File No. 33340

IN THE SUPREME COURT OF CANADA
(On Appeal from the Alberta Court of Appeal)

BETWEEN:

HER MAJESTY THE QUEEN IN RIGHT OF ALBERTA (MINISTER OF ABORIGINAL AFFAIRS AND NORTHERN DEVELOPMENT) and THE REGISTRAR, MÉTIS SETTLEMENTS LAND REGISTRY

APPELLANTS
(Respondents)

AND:

BARBARA CUNNINGHAM, JOHN KENNETH CUNNINGHAM, LAWRENT (LAWRENCE) CUNNINGHAM, RALPH CUNNINGHAM, LYNN NOSKEY, GORDON CUNNINGHAM, ROGER CUNNINGHAM AND RAY STUART

RESPONDENTS
(Appellants)

AND:

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(pursuant to *Rule 42* of the *Rules of the Supreme Court of Canada*)

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PART I - OVERVIEW AND STATEMENT OF FACTS

A. Overview

1. The eight individual Respondents are longstanding members of the Peavine Métis Settlement, who self-identify as Métis, and have lived and actively participated in their Settlement community for decades. These individuals registered under the *Indian Act (Canada)* to access medical benefits that were otherwise unavailable to them, and not to signal any rejection of their cultural identity. The legislative provisions impugned in this case, ss. 75 and 90 of the Alberta *Metis Settlements Act*[1] (the "Impugned Provisions"), operated to automatically terminate their membership in Peavine, and their rights to participate as members of that community, upon becoming registered under the *Indian Act*.

2. This case is about an invidious and irrational stereotype, which suggests that Métis individuals who acquire status under the *Indian Act* are not valuable members of Métis communities, that such individuals pose a threat to Métis cultural preservation and self-governance, and that the connection of such individuals to their longstanding ethnic, cultural, and political communities must be severed by state action.

3. More specifically, this case is about whether the *Canadian Charter of Rights and Freedoms*[2] permits the legislature to terminate or preclude the membership of certain Métis individuals in a Métis community - and by doing so, terminate or preclude individuals' rights to residency, political participation, land allocation, housing, hunting, fishing, and generally to participation in that community - on the mere basis that such individuals have acquired registered Indian status after November 1, 1990, and notwithstanding the wish of the community to keep or restore those individuals as members.

4. The Court of Appeal, reversing the decision of the learned chambers judge (Shelley, J. of the Court of Queen's Bench), unanimously struck down the Impugned Provisions as contrary to s. 15(1) of the *Charter*, and not justified pursuant to s. 1 of the *Charter*. The Court of Appeal's decision was correct, both for the reasons cited by the Court of Appeal, and for other compelling reasons.

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[1] *Metis Settlements Act*, R.S.A 2000, c. M-14 (the "*MSA*")[TAB 22]. Tab references in this factum are to the Respondents' Book of Authorities, except where otherwise indicated.
[2] Appellants' Authorities, TAB 24

5. The Respondents are members of a subset (Métis individuals with Indian status) of a larger disadvantaged group (Alberta Métis). The objects of the *MSA* are aimed at that larger group. The Respondents' claim is not only one of underinclusion, but a specific type of underinclusion claim: that advanced by members of the very disadvantaged group targeted by the objects of the impugned legislation.

6. The s. 15(2) *Charter* analysis articulated by this Court in *R. v. Kapp*[3], which was not a claim by members of a disadvantaged group, requires further development in this particular context. Insufficient focus on the purpose and effects of exclusion could undermine *Charter* values of substantive equality, allow governments to unjustifiably discriminate among members of a disadvantaged group, and create irreconcilable contradictions in this Court's jurisprudence.

7. Section 15(2) should simply not apply to underinclusion claims by disadvantaged groups. Alternatively, s. 15(2) should be restricted to only bar s. 15(1) claims by advantaged groups, and by members of disadvantaged groups falling outside program objects of the subject law, program, or activity.[4] Under either of these approaches, s. 15(2) does not apply to this case.

8. In the further alternative, even if a form of *Kapp* analysis is applied, the Impugned Provisions cannot be shielded under s. 15(2). The Impugned Provisions have no ameliorative purpose. Further, and as the Court of Appeal found, the Impugned Provisions are not rationally connected to the broader ameliorative purposes of the *MSA*. Excluding Métis individuals from Métis communities is antithetical to the objectives of protecting and distinguishing Métis culture, restricting resource allocation to Métis individuals, and furthering Métis self-government.

9. The learned chambers judge correctly found, and Alberta correctly accepts, that the Impugned Provisions draw a distinction based on an analogous ground - Indian status. The Court of Appeal correctly found, for the purposes of s. 15(1), that the Impugned Provisions perpetuated prejudice and disadvantage, and imposed differential treatment on the Respondents based on an illogical stereotype. The Court of Appeal's finding that the Impugned Provisions are not justified under s. 1 of the *Charter* was also correct, given the lack of evidence adduced by Alberta on s. 1, and the obvious irrationality and disproportionality of the Impugned Provisions.

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[3] *R. v. Kapp* [2008] 2 S.C.R. 483 [Appellant's Authorities, TAB 16]
[4] *Lovelace v. Ontario*, 1997 CarswellOnt 1897 (C.A.) ["*Lovelace* (CA)"] [Appellants' Authorities, TAB 2]

10. While the Court of Appeal largely analyzed this case under s. 15, the Respondents' claims under ss. 7 and s. 2(d) of the *Charter* are equally established. The learned chambers judge correctly found (and in the Court of Appeal, Alberta properly conceded) that the Impugned Provisions severely breached the Respondents' s. 7 liberty rights. However, given the Court of Appeal's findings that the Impugned Provisions are not rationally connected or proportional to their alleged objectives, the learned chambers judge clearly erred in finding that breach to be in accordance with the principles of fundamental justice.

11. The learned chambers judge's dismissal of the Respondents' claim under s. 2(d) of the *Charter* was properly criticized by the Court of Appeal. The fundamental freedom of aboriginal individuals to belong to their historic communities undoubtedly exists independent of legislation. The state should properly be held accountable for legislation that clearly and substantially interferes with those rights. While the Court of Appeal found it unnecessary to adjudicate the s. 2(d) claim, that claim is properly grounded in the principles articulated by this Court in *Dunmore*[5], and should be given full effect on this appeal.

12. The Impugned Provisions are repugnant in a free, equal, and multicultural society. They are inconsistent with the pluralities of race, ancestry, culture, and identity that define many Canadians. They have a punishing effect on a wide range of *Charter* rights of aboriginal individuals, and offend a broad spectrum of fundamental *Charter* values, including equality, liberty, autonomy, and multiculturalism. Nor are they justified by the misguided and contradictory cries for cultural and racial purity from institutional voices that do not speak for individual rights and freedoms.

B. Position on the Appellants' Statement of Facts

13. The facts of this case are accurately summarized in the Court of Appeal's reasons.[6]

14. With respect to paragraph 14 of the Appellants' Statement of Facts, while it is correct that the Respondents' names remained on the Peavine settlement members' list until they were removed by the Registrar in approximately March 2001, it is not entirely correct that the Respondents remained members of Peavine until that date. Section 90 of the *MSA* provided that

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[5] *Dunmore v. Ontario (Attorney General)*, [2001] 3 S.C.R. 1016 [TAB 4]
[6] ABCA Reasons, A.R. Vol. I at pgs. 49-51

a settlement member's membership status automatically terminated upon registration under the *Indian Act*.

15. Accordingly, while the Respondents' names remained on the settlement members' list until their removal by the Registrar, their substantive membership rights in Peavine were terminated by s. 90 (the "Terminations") immediately upon their registration as status Indians. The Notices of Termination served by the Peavine Council of the day (the "2001 Council"), and the Registrar's removal of their names from the Settlement membership list, simply confirmed and documented those Terminations.

16. While paragraph 15 of the Appellants' Statement of Facts is largely accurate, the suggestion that the Respondents' registration as Indians was "voluntary" is misleading. While the Respondents obviously were entitled to, applied for and received Indian status, their reasons for doing so were motivated by a need for medical benefits to treat serious physical disabilities suffered by the Respondents and an immediate family member.[7] In this context, it is difficult to characterize a registration under the *Indian Act* as unconstrained by interference, or a free and unrestrained choice.

17. In addition to the loss of the specific rights caused by the Terminations, listed at paragraph 20 of the Appellants' Statement of Facts, the learned chambers judge found that the Terminations resulted in the loss of the Respondents' more general rights "to participate formally in the Métis community with which they have been associated on a long term basis, if not their whole life".[8] Similarly, the Court of Appeal found that the Terminations resulted in the general loss of the Respondents' "right to participate as members of a Métis settlement community".[9]

18. Lastly, and most importantly, the Appellants' Statement of Facts omits any reference to two crucial findings of fact below: first, the learned chambers judge's finding that despite registration under the *Indian Act*, Métis individuals may continue to identify with Métis culture

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[7] Affidavits of the Respondents, ex. at A.R. Vol. II at 3, para 9; 13, para 11; 45, para 8; 3, paras 12-13
[8] ABQB Reasons, A.R. Vol. I at 40-41, para 205
[9] ABCA Reasons, A.R. Vol. I at 49, para 4

and with a specific Métis community; second, the Court of Appeal's finding that each of the individual Respondents identifies as Métis.[10]

PART II - POSITION ON THE APPELLANTS' QUESTIONS

19. The Respondents agree with the Appellants' statement of the questions in issue in this appeal.[11] The Respondents' position is that the Impugned Provisions unjustifiably infringe ss. 2(d), 7, and 15 of the *Charter*. Questions 1, 3, and 5 should be answered in the positive, and questions 2, 4, and 6 should be answered in the negative.

PART III - STATEMENT OF ARGUMENT

A. Introduction: Aboriginal identity, Indian status, and *Charter* interpretation

20. The Appellants' arguments are based on two erroneous assumptions: first, that registered Indian status, on one hand, and Métis identity, on the other, are mutually exclusive personal characteristics; and second, that an individual cannot hold both Métis identity and Indian identity. These assumptions contradict the historical record, the provisions of the *MSA*, the findings of the *Royal Commission on Aboriginal Peoples*, recent jurisprudence, scholarly commentary, and the principles of multicultural interpretation prescribed by s. 27 of the *Charter*.

21. Métis identity is fundamentally grounded in aboriginal ancestry, self-identification, and community acceptance, as recognized by this Court in *R. v. Powley*, by the *Royal Commission on Aboriginal Peoples*, and by the terms of the *MSA*. The ancestry component of Métis identity may be derived from a status or non-status Indian ancestor, a Métis ancestor, or may be non-genetic. On the latter point, the *Royal Commission on Aboriginal Peoples*, and this Court in *Powley*, recognized that ancestral connection may be established, for example, by marriage or adoption.[12]

22. The significance of cultural self-identification is expressly recognized in s. 1(j) of the *MSA*, where "Métis" is defined as "a person of aboriginal ancestry who identifies with Métis history and culture".[13]

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[10] ABQB Reasons, A.R. Vol. I at 38, para 193; ABCA Reasons, A.R. Vol. I at 50, para 7
[11] Appellants' Factum at 7-8, para 25
[12] *R. v. Powley* [2003] 2 S.C.R. 207 at 224, paras 22-23 [TAB 18]; *Royal Commission on Aboriginal Peoples*, Vol. 4 (Indian and Northern Affairs Canada, 1996, online http://www.aincinac.gc.ca/ch/rcap/sg, ch. 5, s. 1.2 [TAB 29]
[13] *MSA*, s. 1(j) [TAB 22]

23. Registered Indian status, however, is fundamentally about genetic heritage, or at least, how degrees of Indian blood quantum have been treated over time by Parliament in the *Indian Act*. While Indian status is connected to race, the ability of an individual to obtain Indian status does not require any cultural self-identification as an Indian or acceptance by an Indian community.

24. Accordingly, it is logically consistent that an individual may have registered Indian status, yet continue to self-identify as Métis, participate as a full-fledged member of a Métis community, and be fully accepted by the Métis community as a member. This is especially so in the context of the Alberta Métis settlements, which as Catherine Bell notes, have a distinct history and contemporary culture of drawing their membership from more than one of the aboriginal groups enumerated in s. 35(2) of the *Constitution Act*.[14]

25. The compatibility of Indian status and Métis identity was explicitly recognized in the past by Alberta's most prominent Métis community association, formed before the passage of the first Alberta Métis settlements legislation. In 1932, L'Association des Métis d'Alberta et les Territoires du Nord-Ouest (later to become the Métis Association of Alberta, or MAA) was formed, largely to promote demands for a statutory land base and other rights for Alberta Métis. That association adopted a constitution specifying that anyone with aboriginal ancestry (including treaty Indians) was eligible for membership. Indeed, one of the "big four" leaders of that association, and the president of its executive council, was Joseph Dion - an enfranchised Indian. As Catherine Bell notes, the original vision of the big four was to reclaim land for a wide spectrum of Métis people who identified with Métis culture and history. As another of the "big four", Malcolm Norris, observed at the time, it was "almost impossible to make any strict and definite line of distinction between the Treaty Indian and the Métis". The efforts of the "big four" and the Association led to the creation of the *Metis Population Betterment Act*, S.A. 1938 (2d), c. 6 ("*MPBA, 1938*").[15] Indeed, until at least 1987, any person of native ancestry could

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[14] Catherine Bell, "Who Are the Metis People in Section 35(2)?" (1991) 29 Alta. L. Rev. 351 at 356 [TAB 24]

[15] Donald G. Wetherill and Irene R.A. Kmet, *Alberta's North: A History, 1890-1950* (Edmonton: Univ. of Alberta Press, 2000) at 321-324 [TAB 31; Catherine E. Bell, *Contemporary Metis Justice: The Settlement Way* (Native Law Centre, Univ. of Saskatchewan, 1999) at 9-14 [TAB 25]

become a member of the MAA so long as a member of the Association was willing to make a sworn statement that the applicant was a Métis.[16]

26. The *MSA* recognizes that Indian status can be fully consistent with both Métis identity and settlement membership, notwithstanding the Impugned Provisions, by permitting Métis individuals with Indian status to retain or acquire settlement membership in prescribed circumstances. Section 75 expressly allows for a status Indian to become a member of a Métis settlement, if that individual was registered as an Indian when less than 18 years old. Sections 75(3.1) and 222(1)(y) authorize the creation of a General Council Policy permitting a status Indian to be approved as a settlement member. Further, the *Transitional Membership Regulation* allowed individuals on a settlement list prior to November 1, 1990, and individuals who were previously treated as members, to become settlement members, even if they had registered as Indians. In addition, the statutory definition of "Metis" found in s. 1(j) of the *MSA* was a departure from the definition utilized in prior legislation, which had excluded status Indians from the scope of the term "Métis".[17]

27. In *Powley*, both this Court and the Ontario Court of Appeal found Indian status compatible with Métis identity. In that case, the claimants' ancestors were Métis individuals who had moved to an Indian reserve, accepted the benefits of treaty, and acquired status as band members. Both the Court of Appeal and this Court accepted that Métis who had taken treaty benefits remained Métis, and found that this history of Indian status did not negate the claimants' Métis identity.[18] Similarly, in the case at bar, the courts below found that Métis individuals may continue to identify with Métis culture and with a specific Métis community, and that each of the Respondents identifies as Métis, notwithstanding registration under the *Indian Act*.[19] Many Canadians are in precisely the same position as the Respondents. In the 1996 federal census, 26,000 status Indians identified themselves as Métis.[20]

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[16] Bell, "Who Are the Metis People in s. 35(2)", *supra* at 378 [TAB 24]
[17] *MSA*, s. 1(j) [TAB 22]; *Transitional Membership Regulation* (Alta. Reg. 337/90), s. 2-8, 11 [Appellants' Authorities, TAB 32]
[18] *Powley*, *supra* at 225-226, para 35 [TAB 18]
[19] ABQB Reasons, A.R. Vol. I at 38, para 193; ABCA Reasons, A.R. Vol. I at 50, para 7
[20] John Giokas and Paul L.A.H. Chartrand, "Who Are the Métis in Section 35? A Review of the Law and Policy Relating to Métis and 'Mixed-Blood' People in Canada", in Paul L.A.H. Chartrand and Harry W. Daniels, eds., *Who*

28. Some political organizations, such as the Métis National Council, have adopted narrow, supposedly racially based membership criteria, which exclude Métis registered as status Indians. However, as Catherine Bell points out, such narrow definitions contradict contemporary and traditional understandings of the term "Métis". Other political organizations, like the Congress of Aboriginal Peoples, impose no such restrictions on the definition of "Métis".[21]

29. Given the history of the *Indian Act*, and the historical, legislative, jurisprudential and scholarly context, it is incongruous for Métis identity to be defined in negative terms, as an identity ascribed to aboriginal persons without Indian status. It is equally incongruous to assume that Métis individuals who obtain Indian status necessarily adopt an "Indian" identity, given the economic incentives for Métis individuals to obtain Indian status, even where such individuals have little or no connection to their Indian roots or heritage.[22]

30. The assumption that a Métis individual, by obtaining Indian status under federal legislation to access a social benefits program, both acquires an Indian identity and somehow extinguishes his or her Métis identity, is not supported by fact or logic. Even if a Métis individual somehow "self-identified" as Indian by obtaining Indian status, there is no link between such identification and the repudiation of that individual's Métis identity.

31. Section 27 of the *Charter* directs that *Charter* provisions shall be interpreted in a manner consistent with the multicultural heritage of Canadians. In the context of this case, s. 27 mandates that recognition be accorded to the pluralities of race, ancestry, culture, and identity that define many Canadians, and to the reality that in a multicultural society, individuals may hold multiple and overlapping identities. Indeed, in *Kapp*, Bastarache, J. expressly recognized that Canadians can have multiple identities.[23]

32. As Bell and Leonard suggest, on the reasoning in *Powley*, it is perfectly logical for Indian status and Métis identity to co-exist, in a way analogous to that of dual citizenship. Canadian society allows for individuals to, for example, hold Canadian citizenship, identify primarily as

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Are Canada's Aboriginal Peoples? Recognition, Definition, and Jurisdiction (Saskatoon: Purich Publishing, 2002) at 109 [Respondents' Authorities, TAB 26]

[21] Bell, "Who Are the Metis People in Section 35(2), *supra* at 378 [TAB 24]; Giokas and Chartrand, *supra* at 106 [TAB 26]

[22] Giokas and Chartrand, *supra* at 106 [TAB 26]

[23] *Kapp*, *supra* at para 99 [TAB 7]

Canadian, to live in Canada, and to participate fully as Canadian citizens, while also holding citizenship in their country of origin, or their ancestors' country of origin. The fact that a Canadian citizen may also hold the legal status of citizenship in another country does not make that person any less Canadian, even if such legal status does amount to an incident of that person's identity.[24]

33. In the present case, the majority of the Respondents are children of a mother of Indian heritage (Nora Cunningham), and a father of Métis heritage, Peter Cunningham. Even if it was assumed, contrary to the evidence, that the Respondents' attainment of Indian status reflects a recognition of Indian identity (inherited from their mother's genetic ancestry), it would be illogical, particularly in a multicultural society, to assume that the Respondents ceased to recognize or value their Métis identity flowing from their father's ancestry, their own cultural self-identification, and their longstanding acceptance by the Peavine community.

B. Section 15 - threshold inquiry

34. At the outset of the s. 15 analysis, the claimants must establish a distinction based on an enumerated or analogous ground. The learned chambers judge was correct in finding that the Impugned Provisions distinguish between Métis individuals on the basis of Indian status, and in finding Indian status to be an analogous ground. The Court of Appeal upheld those findings.

35. The Appellants rightly do not dispute these conclusions. Once a ground is found to be analogous, it is permanently enrolled as analogous for other cases, and need not be established again in subsequent cases.[25] This Court has found that distinctions based on Indian status or band membership fall within the enumerated or analogous grounds.[26]

C. Section 15(2)

36. In *Kapp*, this Court held that s. 15(2) will only apply where the Crown can demonstrate: (1) the program has an ameliorative or remedial purpose; and (2) the program targets a

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[24] Catherine Bell and Clayton Leonard, "A New Era in Metis Constitutional Rights: The Importance of *Powley* and *Blais*" (2004) 41 Alta. L. Rev. 1049 at 1076 [TAB 23]

[25] *Lavoie v. Canada* [2002] 1 S.C.R. 769 at 780, para 2 (per McLachlin, C.J. and L'Hereux-Dube, J) and 804, para 41 (per Bastarache, J.) [TAB 8]

[26] *Kapp*, *supra* at para 56 [Appellants' Authorities, TAB 16]; *Ermineskin Indian Band v. Canada* [2009] 1 S.C.R. 222 at para 189 [Appellants' Authorities, TAB 9]

disadvantaged group identified by the enumerated or analogous grounds. While allowing for some analysis of the plausible or predictable effects of the program, the overall focus is on the legislative purpose. The burden of proof is on the Crown.[27]

i. Substantive equality and underinclusion - the difficulties with *Kapp*

37. Much commentary since *Kapp* has focused on how s. 15(2) should be applied in the context of underinclusion claims by disadvantaged groups.[28]

38. The purpose of s. 15(2) is to further substantive equality by preserving the ability of governments to implement programs aimed at helping disadvantaged groups improve their circumstances. To do so, governments must have the freedom to implement such programs without fear of s. 15(1) challenge by advantaged groups.[29]

39. In the context of challenges by advantaged groups to ameliorative programs, substantive equality may be facilitated by according governments flexibility to adopt innovative programs. In that context, there is no risk of government action offending the purpose of s. 15(1), which is to prevent discriminatory distinctions imposing adverse impact on members of groups identified by enumerated or analogous grounds. However, similar considerations do not apply to underinclusion claims by disadvantaged groups, especially those made by disadvantaged groups falling within the objects of the ameliorative program. It would incongruous to assume, for example, that substantive equality could ever be furthered by excluding women, homosexuals, or visible minorities from a program providing benefits to persons with disabilities.

40. The courts have consistently recognized that legislation excluding disadvantaged groups from ameliorative programs on the basis of enumerated or analogous grounds runs a significant risk of offending s. 15(1). As the Ontario Court of Appeal held in *Lovelace*:

> A s. 15(2) program that excludes from its reach disadvantaged individuals or groups that the program was designed to benefit likely infringes s. 15(1). The government would then have to justify the exclusion under s. 15(1). In the context of human rights legislation, the decision of this court in *Roberts*, *supra* and the recent decision of the

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[27] *Kapp*, *supra* [Appellants' Authorities, TAB 16]

[28] Ex. Michael J. Morris and Joseph K. Cheng, "*Lovelace* and *Law* Revisited: The Substantive Equality Promise of *Kapp*", (2009), 47 S.C.L.R. (2d) 281 at 311-312 [TAB 27]; Jonnette Watson-Hamilton and Jennifer Koshan, "Courting Confusion? Three Alberta Cases on Equality Post-*Kapp*" (2010), 47:4 Alta. L. Rev. 927 at 948 [TAB 30]

[29] *Kapp*, *supra* at para 16 [Appellants' Authorities, TAB 16]

> Supreme Court of Canada in *Gibbs v. Battlefords & District Co-operative Ltd.* (1996), 140 D.L.R. (4th) 1 are examples of benefit programs found to be discriminatory because they excluded or differentiated between individuals with the same disadvantage at which the program was aimed....In each of these two cases the purpose of the program was to provide a benefit to a specific disadvantaged group, but the program actually treated more harshly some members of that group.[30]

41. As Watson-Hamilton and Koshan point out, in the context of underinclusion claims by disadvantaged groups, substantive equality demands a close analysis of two elements: 1) the purpose for excluding the claimants from the targeted program, and 2) the effects of that exclusion. The authors note the tension between these concerns and the applicable approach to claims by advantaged groups, set down in *Kapp*:

> Under the *Kapp* approach, the principal difference between ss. 15(1) and 15(2) is whether the Court evaluates effects. However, when the challenge is one of underinclusiveness, as in *Cunningham*, the real issue is the basis of the exclusion of the claimants from the ameliorative program and the effects of that exclusion, rather than the overall ameliorative purpose of the program. When underinclusion is the real issue the court focuses on purpose rather than effects. This results in the risk that the purpose of the ameliorative law or program, and the purpose of the claimants' exclusion from that law or program will become confused or conflated. For example, when underinclusion is the issue as in *Cunningham*, the relevant purpose is not, for example, the purpose for including Métis within the *MSA*; the relevant purpose must be the purpose of excluding the claimants from the *MSA*. Further, it is not enough to look only to the *purpose* of the denial of the benefits of the targeted program. To achieve substantive equality, the court must also look to the *effects* of the exclusion under s. 15(1), as the Court of Appeal actually did in *Cunningham*. Claims of underinclusion must receive the full s. 15(1) analysis in order to ensure that "governments...are not permitted to protect discriminatory programs on colourable pretexts".[31]

42. The importance of considering the effects of underinclusion for the purposes of s. 15(2) was highlighted in the pre-*Kapp* case of *Harrison v. British Columbia* (per Hinkson and McFarlane JJ.A and McLachlin, J.A., as she then was). In *Harrison*, the Court of Appeal held s. 15(2) inapplicable to a situation where underinclusion had "the effect of excluding the most severely disadvantaged members of the group supposedly protected while contributing nothing to the achievement of the goal of the program".[32]

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[30] *Lovelace* (CA), *supra* at para 67 [Appellants' Authorities, TAB 2]
[31] Watson-Hamilton and Koshan, *supra* at 948-949 [TAB 30]
[32] *Harrison v. University of British Columbia*, 1988 CarswellBC 1 (C.A.) at para 60 [TAB 6]

ii. Substantive equality, underinclusion, and s. 15(2): three options

43. There are three possible solutions to resolving the difficulties with *Kapp* in the context of underinclusion claims by disadvantaged groups. First, this Court could simply hold s. 15(2) inapplicable, except as an interpretive aid.

44. Second, this Court could adopt an approach akin to that used by the Ontario Court of Appeal in *Lovelace*, which held s. 15(2) applicable only where the object of a program is to ameliorate the conditions of a disadvantaged group, and where no member of the targeted group has been denied the benefits of the program.[33]

45. A similar approach was applied by the British Columbia Court of Appeal in *Harrison*, where the Court held that a program falls within the terms of s. 15(2) only if the legislative purpose was to assist a disadvantaged group and the need to exclude others from the benefits conferred by the legislation was properly considered.[34] In the case of underinclusion claims advanced by members of a disadvantaged group falling within the objects of an ameliorative program, such a "proper consideration" certainly requires compliance with s. 15(1).

46. Third, this Court could apply the analysis in *Kapp*, focusing that analysis on the reasons for exclusion, and the effects of exclusion, in the context of underinclusion claims. The *Kapp* Court held that the test for s. 15(2) must be applied through an assessment of the *specific distinction* impugned by the applicant under s. 15(1). This Court characterized the appropriate inquiry as follows:

> ...where a law, program or activity creates a distinction based on an enumerated or analogous ground, was the government's goal in creating that distinction to improve the conditions of a group that is disadvantaged?[35] (emphasis added)

47. If the impugned distinction arises from the very existence of the legislative scheme or program, as in *Kapp*, then the analysis rightly focuses on the legislation or program as a whole. However, if the impugned distinction arises from specific provisions of that legislation or program (as in this case) the analysis must focus on whether those specific provisions have an ameliorative purpose.

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[33] *Lovelace* (CA), *supra* at para 72 [Appellants' Authorities, TAB 2]
[34] *Harrison*, *supra* at para 60 [TAB 6]
[35] *Kapp*, *supra* at para 48 [Appellants' Authorities, TAB 16]

48. In the context of underinclusion claims, this requires analysis of the purpose for which the claimants are denied the benefit of the scheme. If the exclusion has no ameliorative purpose, then s. 15(2) is not triggered. This approach is consistent with comparable principles in the human rights context, which require underinclusive distinctions to be rationally connected to the purpose of the ameliorative program.[36]

49. *Kapp* held that where ameliorative and non-ameliorative provisions coexist in a single legislative scheme (as in this case), a necessity test must be applied:

> Consider that an ameliorative program may coexist with or interact with a larger legislative scheme. If only the program has an ameliorative purpose, does s. 15(2) extend to protect the wider legislative scheme? We offer as a tentative guide that s. 15(2) precludes from s. 15(1) review distinctions made on enumerated or analogous grounds that serve and are necessary to the ameliorative purpose.[37] (emphasis added)

50. This principle also logically applies in the converse situation -- where a wider legislative scheme is motivated by an ameliorative purpose, but contains non-ameliorative distinctions based on enumerated or analogous grounds (as in this case). To bring those distinctions within s. 15(2), *Kapp* requires the government to prove that the distinctions "serve and are necessary" to the ameliorative purpose of the wider legislative scheme.

51. In most (if not all) cases it would be impossible to determine whether this necessity threshold is established without analyzing the effects of the impugned distinctions. *Kapp* strongly suggests that a law with no "plausible or predictable ameliorative effect" cannot be found to have an ameliorative purpose. Accordingly, *Kapp* appears to allow for at least some effects-based analysis where underinclusion claims are advanced by disadvantaged groups.

52. Alberta suggests that *Kapp* does not require the government to demonstrate that an impugned distinction has an ameliorative purpose, and further suggests that in circumstances where the government relies on the overall ameliorative purpose of a statute, there is no need to prove that the impugned distinction is a rational means of achieving that purpose.[38] These suggestions offend the standard set in *Kapp.*

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[36] *Roberts v. Ontario*, 1994 CarswellOnt 2209 (C.A.) at para 60 [TAB 19]
[37] *Kapp, supra* at para 52 [Appellants' Authorities, TAB 16]
[38] Appellants' Factum at 14, para 44

53. The most straightforward way for this Court to resolve the difficulties of applying *Kapp* to underinclusion claims by disadvantaged groups would be to find s. 15(2) inapplicable to such claims. However, regardless of which of these three approaches applies, s. 15(2) does not operate to foreclose the Respondents' s. 15(1) claim.

iii. First option - application to this case

54. If the first option identified above is adopted, s. 15(2) does not apply. As Alberta concedes, the Respondents are members of a disadvantaged group.[39]

iv. Second option - application to this case

55. If the approached used by the Court of Appeal in *Lovelace* applies to this case, the only question to be determined, for s. 15(2) purposes, is whether the Respondents are members of the disadvantaged group targeted by the *MSA*. If they are members of that group, s. 15(2) does not apply.

56. Alberta argues that the disadvantaged group targeted by the *MSA* is not all Métis in Alberta, but a narrow group, comprised only of those Métis who happen to meet the present membership criteria of the *MSA*.[40]

57. This argument is inconsistent with the history and provisions of the *MSA* and associated legislation, all of which suggest the *MSA* is directed to all Métis in Alberta. In 1985, a resolution made in anticipation of the *MSA* and its associated legislation, the *Resolution Concerning an Amendment to the Alberta Act*, described the intent of the Alberta legislature as follows: "to better the general welfare of the Métis population of Alberta"[41]. The recitals to Resolution 18, *The Resolution to Authorize an Amendment to the Constitution of Canada* (incorporated in the Alberta-Métis Settlements Accord) states the objective as "self-determination for Alberta's Métis people". The only restriction on membership in the original *MSA* was that a person must be "Métis".[42] The *Transitional Membership Regulation* provided membership to any Métis individual who was "treated" as a settlement member before 1990. The recitals to the *MSA* itself speak only of "the Métis", not to any particular subgroup of Métis. The *MSA* defines "Metis"

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[39] Appellants' Factum at 22, para 70
[40] Appellants' Factum at 12, para 40
[41] *A Resolution Concerning an Amendment to the Alberta Act*, June 3, 1985 [Appellants' Authorities, TAB 35]
[42] Bill 64, *Metis Settlements Act*, 1988, s. 77, A.R. Vol. III at 102

simply as "a person of aboriginal ancestry who identifies with Metis history and culture". Within this definition, considerable flexibility is provided for settlement membership to be defined by General Council policies and settlement bylaws.[43]

58. Alberta's suggestion that the *MSA*'s objects extend only to the group of Métis entitled to settlement membership at any particular time constrains the legislative objects, and would allow Alberta to arbitrarily assert shifting purposes through minor amendments to the legislation. Constructing the target group in this way, for example, would allow Alberta to enact provisions in the *MSA* denying settlement membership to women, persons with disabilities, and homosexuals, and then to assert that the group targeted by the *MSA* extends only to male, able-bodied, heterosexual Métis persons.

59. A correct construction of an ameliorative program's purpose focuses on the circumstances of the target group.[44] The focus of the inquiry must be on the need being redressed. In the present case, the legislation addresses a myriad of basic needs that are at the heart of human dignity -- shelter, sustenance, residency, community belonging, cultural and spiritual participation, familial connection, political discourse, and personal identity. A broad range of Alberta Métis, and particularly those with a longstanding connection to a particular settlement community, and who have lived in that Métis settlement for their entire lives, have these needs addressed by the membership rights accorded through the *MSA*. This is so regardless of whether such individuals hold Indian status.

60. Alberta's argument appears to be premised on the assumption that the needs redressed through the *MSA* are comparable to the needs redressed by mere registration under the *Indian Act*. However, as both Courts below recognized, settlement membership addresses more fundamental needs, in a more comprehensive way. The rights and entitlements provided through settlement membership are entirely different from a financial subsidy for medical services. As the learned chambers judge recognized through a simple illustration, Métis with Indian status

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[43] *MSA*, ss. 1(j), 74, 75(2), 90, 222(1)(y) and 222(1)(z) [TAB 22]; *Transitional Membership Regulation* (Alta. Reg. 337/90), s. 11 [Appellants' Authorities, TAB 32]

[44] *Lovelace* (CA) at para 78 [Appellants' Authorities, TAB 2]; *Battlefords and District Co-operative Ltd. v. Gibbs*, [1996] 3 S.C.R. 566 at para 50 [TAB 1]

who lose their settlement membership do not necessarily acquire any corresponding right of residence under the *Indian Act*.[45]

61. The provisions of the *MSA* and the *Transitional Membership Regulation* also rebut Alberta's assertion since they expressly provide rights and entitlements to at least three groups of Métis with Indian status: individuals who attained Indian status before November 1, 1990; individuals who attained Indian status before the age of 18; and any individuals with Indian status who might be permitted membership under a General Council Policy.[46]

62. The history and provisions of the *MSA*, the circumstances of Métis individuals, the needs addressed by the *MSA*, and the applicable principles of interpretation establish that the disadvantaged group targeted by the *MSA* includes all individuals comprising the Métis population of Alberta - that is, persons of aboriginal ancestry who identify with Métis history and culture - including those with Indian status.[47]

63. The Respondents all fit this definition. All self-identify as Métis, and have aboriginal ancestry. Indeed, the Respondents all have specific Métis ancestry, most flowing from their father, Peter Cunningham. Most of the Respondents have lived in the Peavine community for their entire lives. Their parents lived at Peavine, and their immediate and extended families live at Peavine. In some cases, the Respondents have served as community leaders (chairpersons and councilors of the settlement).[48] The Respondents are clearly members of the disadvantaged group targeted by the *MSA*, who have been denied its benefits. On the approach to s. 15(2) articulated in *Lovelace* (CA), s. 15(2) simply does not apply, and a full s. 15(1) analysis is required.

v. Third option - application

64. The first step of the *Kapp* test requires an examination of whether the distinction drawn by the Impugned Provisions has an ameliorative or remedial purpose. This requires a focus on whether the purpose behind the Impugned Provisions was to improve the conditions of a disadvantaged group.

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[45] ABQB Reasons, A.R. Vol. I at 38, para 193
[46] *MSA*, ss. 75(3.1), 90, 222(1)(y) and 222(1)(z) [TAB 22]; *Transitional Membership Regulation*, s. 11 [Appellants' Authorities, TAB 32]
[47] *MSA*, s. 1(j) [TAB 22]
[48] Affidavits of the Appellants, A.R. Vol. II at 1-3, 20-22, 30-32, 43-45, 52-54, 58-60, 67-69

65. Given that the purpose of s. 15(2) is to protect *bona fide* government efforts to ameliorate disadvantage, the government should at least be required to prove that the impugned distinction is plausibly the result of such efforts. *Kapp* requires proof that "the declared purpose is genuine" and that the "sincere purpose is to promote equality".[49] Governments should therefore be required to prove that ameliorative objectives were the actual motivation for the impugned provisions, similar to the approach at the first stage of the *Oakes* test.[50]

66. Alberta argues that the purposes of the impugned provisions are Métis self-governance, the preservation and enhancement of Métis identity, and preventing the dilution of settlement benefits. The first two of these purported objectives are undoubtedly ameliorative. However, it is not self-evident that those were ever the purposes of the Impugned Provisions. Further, as the Court of Appeal found, there is simply no evidence that the Impugned Provisions were enacted with such goals in mind.[51]

67. The third objective can hardly be construed as ameliorative: in essence, Alberta argues that reducing the financial strain on the Alberta government (which provides a large portion of settlement funding) is somehow ameliorative. It is not. Further, as the Court of Appeal noted, there is no evidence that this purported concern is a reality.[52] Nor has Alberta adduced any evidence whatsoever to show that the Impugned Provisions were enacted with financial considerations in mind. In short, Alberta has not proved what the purpose of the Impugned Provisions is at all, let alone that those provisions have any ameliorative purpose.

68. Alberta argues that a few factors connect the Impugned Provisions and the broader ameliorative purposes of the *MSA*. As noted above, in these circumstances *Kapp* requires the government prove the distinctions drawn "serve and are necessary to the ameliorative purpose" of the broader legislation.[53] At the very least, the impugned distinction must be rationally connected to those purposes. In assessing necessity and rationality, it is important to analyze whether the means chosen (i.e. the impugned distinction) would rationally contribute to the ameliorative goals, and whether there exists a correlation between the impugned law and the

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[49] *Kapp, supra* at paras 46-47 [Appellants' Authorities, TAB 16]
[50] *R. v. Big M. Drug Mart*, [1985] 1 S.C.R. 295 at 353 [TAB 12]
[51] ABCA Reasons, A.R. Vol. I at 65, paras 63-64
[52] ABCA Reasons, A.R. Vol. I at 64, para 62
[53] *Kapp, supra* at para 52 [Appellants' Authorities, TAB 16]

disadvantage suffered by the target group.[54] In this case, the means chosen involve the ex-communication of Métis individuals from Métis communities. In utilizing these means, Alberta's erroneous assumption seems to be that Métis individuals who register under the *Indian Act* automatically acquire Indian identities, disavow their Métis identity, and are no longer subject to the disadvantage suffered by other Métis.

69. Alberta argues that other provisions of the *MSA*, granting the General Council power to nullify the Impugned Provisions, connect the Impugned Provisions to ameliorative objectives (presumably, objectives related to self-governance).[55] However, Alberta's focus is misdirected. Under *Kapp*, the focus must remain on the impugned distinction. While s. 15(2) protects distinctions that "serve and are necessary" to ameliorative purposes, it is not necessary or rational for the legislature to automatically exclude any Métis from settlement membership in order for the General Council (or the settlements) to control their own membership policy. Section 222 (1)(z) gives the General Council the power to pass membership policy generally, subject to *Charter* values and limits.[56]

70. Indeed, the Impugned Provisions actually inhibit the settlements from exercising self-governance over their own membership. In the case at bar, for example, even though the Peavine settlement council made significant efforts to reinstate the Respondents to membership, they were prevented from doing so by the Impugned Provisions.[57]

71. Alberta then argues that the *MSA* was the result of cooperation and consultation with the Métis leadership of the time, and suggests that the membership provisions were a result of that process. The underlying suggestion appears to be that the Impugned Provisions were enacted at the request of or in consultation with certain members of the Métis leadership, and that this step automatically makes them ameliorative.

72. There are two flaws in this argument. First, there is absolutely no evidence that the Impugned Provisions were in fact enacted at the request of the Métis leadership, nor as a result of consultation. The Crown points to the transitional provisions comprising the *Alberta-Métis*

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[54] *Kapp, supra* at para 48 [Appellants' Authorities, TAB 16]
[55] Appellants' Factum at 14, para 45
[56] *MSA*, s. 222(1)(z) [TAB 22]
[57] See facts outlined in the Appellants' Statement of Facts: Appellants' Factum at 6, para 19

Settlements Accord to suggest all membership provisions were the product of cooperation and consultation. However, examination of those provisions is equally consistent with the membership provisions having been imposed by the Minister unilaterally. While s. 77 of Bill 64, for example, provided the Minister with a broad power to enact membership provisions, and s. 96 (1) required the Minister make such provisions at the request of the General Council, s. 96 (2) allowed the Minister to make such provisions without a request in certain circumstances.[58]

73. More importantly, even if the Impugned Provisions were enacted at the request of the Métis leadership of the time, there is no evidence that such request was motivated by a desire for self-governance, or by any ameliorative purpose at all. Indeed, such a request could have been made on the basis of stereotypes accepted by certain Métis leaders of the time. Alternatively, such a request could have been motivated by perceived political advantage for certain members of the leadership group, just as the expulsion of the Respondents from Peavine was precipitated by political advantage for members of the 2001 Council. However, the *Constitution Act* does not allow aboriginal politicians to violate the *Charter* rights of their own members for any reason, let alone for political advantage, unless such violations can be justified under s. 1.[59]

74. Alberta then argues that the legislation reveals a concern that Métis identity could be compromised in the event settlement members were to acquire Indian status. But it is difficult to see how the legislation can reveal such a concern in circumstances where the legislation itself allows many Métis individuals to hold Indian status without losing settlement membership.

75. Alberta notes, at paras 56-57 of the Appellants' factum, that First Nations, Inuit and Métis are distinct aboriginal groups, and then suggests that use of the terms "Indian, Inuit, and Métis" in s. 35(2) of the *Constitution Act* means that a person must choose between three watertight compartments of cultural and racial purity. The further implication appears to be that if individuals are permitted to belong to more than one of these groups, the distinctiveness of those groups cannot be achieved. While First Nations, Inuit and Métis cultures are each distinctive, Alberta does not show how allowing an individual to associate with more than one of these cultures would in any way undermine that distinctiveness. Section 27 of the *Charter* requires an interpretation consistent with multicultural values. The suggestion that an individual

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[58] Bill 64, *Metis Settlements* Act, 1988, ss. 77 and 96 [A.R. Vol. III at 102, 107]
[59] *Kapp*, *supra* at para 99 (per Bastarache, J.) [TAB 7]

cannot belong to more than one of the groups enumerated in s. 35 fundamentally contradicts those values. Further, as Brian Slattery and Catherine Bell have observed, nothing in s. 35(2) suggests the categories of "Indian, Inuit, and Métis" are mutually exclusive.[60]

76. Alberta then suggests that the Impugned Provisions reflect current Métis standards for community acceptance, and references *Powley* in support of this argument. However, this contention is not supported by any evidence. For example, there is no evidence to suggest that in the 52 years of Alberta Métis settlements legislation pre-dating the *MSA*, any settlement ever sought to terminate the settlement membership of an individual because that person obtained Indian status. Further, the creation of the *Transitional Membership Regulation* suggests that Métis settlement members with Indian status were sufficiently prevalent within the settlements prior to the enactment of the *MSA* that a grandfathering provision was thought to be necessary.

77. The concept of community acceptance in *Powley* does not mean that community acceptance is denied to individuals simply because some members of the community believe those individuals should not be members. Under *Powley*, community acceptance is about past and ongoing participation in a shared culture. And there is absolutely no evidence whatsoever that the fact of the Respondents' *Indian Act* registration did anything to detract from their past and ongoing participation in Métis culture, or that *Indian Act* registration in the abstract would detract from an individual's participation in Métis culture.[61]

78. Alberta also suggests that Métis individuals who acquired dual status prior to November 1, 1990 are somehow more Métis than those who registered after that date, apparently because individuals who registered before that date might have acquired Indian status on an involuntary basis or without recognizing the consequences of obtaining that status. However, Alberta does not explain why individuals acquiring Indian status after that date would have had any more reason to recognize the consequences of obtaining that status.

79. As explained earlier, associations of Métis settlers organized prior to passage of the *MPBA,* 1938, viewed Métis identity in fairly wide terms, inclusive of Métis individuals holding

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[60] Bell, "A New Era...", *supra* at para 51 [TAB 23]
[61] *Powley*, *supra* at para 33 [Appellants' Authorities, TAB 19]

treaty Indian status.[62] However, during the Ewing Commission proceedings in 1936 (preceding enactment of the *MPBA,* 1938), these Métis understandings of community membership were largely ignored. Instead, the Commission imposed a narrow definition of "Métis", driven by social welfare purposes, and therefore exclusive of status Indians -- who were perceived at the time to have adequate social welfare benefits.[63] This statutory definition, the relevant terms of which largely survived until passage of the *MSA*, fundamentally contradicted the indigenous Métis view of membership. This incongruity gave rise, over the 52 years between 1938 and passage of the *MSA*, to a practice whereby Indian prohibitions in Alberta's Métis settlement legislation were effectively ignored, and many status Indians were treated as settlement members.[64] The *Transitional Membership Regulation* was designed to affirm this historical practice, by allowing any Métis person who had been previously treated as a settlement member to become or remain listed as a settlement member under the new regime.[65] Given the traditional understandings of membership held by the Métis community, and the history of non-application of statutory Indian prohibitions by Alberta, it is not surprising that none of the Respondents believed their settlement membership would be removed as a result of obtaining Indian status.[66]

80. In short, the distinction drawn by the Impugned Provisions does not meet the threshold, set forth in *Kapp*, of requiring a non-ameliorative distinction that "serves and is necessary" to the ameliorative purposes of a broader legislative scheme. Indeed, as found by the Court of Appeal, the distinction drawn by the Impugned Provisions does not even meet the lower standard of rational connection with those ameliorative purposes.

D. Section 15(1)

81. In *Kapp,* this court reiterated the two-stage test for s. 15(1) set forth in *Andrews*, which requires analysis of two things: (1) whether the law creates a distinction based on an enumerated or analogous ground, and (2) whether the distinction creates a disadvantage by perpetuating disadvantage and stereotyping. The *Kapp* Court reiterated that the four contextual factors

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[62] Wetherill and Kmet, *supra* at 324 [TAB 31]
[63] Bell, *Contemporary Metis Justice*, *supra* at 13 [TAB 25]
[64] Affidavit of Dennis Cunningham, A.R. Vol. II at 109, para 6
[65] *Transitional Membership Regulation*, ss. 4-11 [Appellants' Authorities, TAB 32]
[66] See, for example, Affidavit of Barbara Cunningham, A.R. Vol. II at 13, para 11. All of the Respondents gave similar evidence.

enumerated in *Law v. Canada*[67] - pre-existing disadvantage, correspondence between the differential treatment and the claimant group's reality, ameliorative purpose or effect, and nature of the interest affected - are not a legal test in and of themselves, but a way of informing the second stage of the *Andrews* test, by helping to identify impact amounting to discrimination. This factum has already addressed the first stage of the *Andrews* test. The following discussion focuses on the second stage.

i. Stereotyping and forced choice

82. A law restricting rights of membership in aboriginal communities on the basis of enumerated or analogous grounds enforces stereotyping when that law unjustifiably sends a message that the rights-claimants are less interested in maintaining meaningful participation in their community, or in preserving their cultural identity.[68]

83. In such cases, the legislative imposition of a forced choice between membership rights and personal characteristics is a key sign of stereotyping. In *Corbiere*, McLachlin and Bastarache, J.J. held:

> The effect of the legislation is to force band members to choose between living on the reserve and exercising their political rights, or living off-reserve and renouncing the exercise of their political rights. The political rights in question are related to the race of the individuals affected, and to their cultural identity. As mentioned earlier, the differential treatment resulting from the legislation is discriminatory because it implies that off-reserve band members are lesser members of their band or persons who have chosen to be assimilated by the mainstream society.[69]

84. This Court has repeatedly rejected reasoning that suggests legislation is not discriminatory because individuals could have made a different response to a forced choice. As McLachlin, C.J. held in *Lavoie*:

> Third, the fact that a person could avoid discrimination by modifying his or her behaviour does not negate the discriminatory effect. If it were otherwise, an employer who denied women employment in his factory on the ground that he did not wish to establish female changing facilities could contend that the real cause of the discriminatory effect is the woman's "choice" not to use men's changing facilities. The very act of forcing some people to make such a choice violates human dignity, and is inherently discriminatory. The law of discrimination thus far has not required applicants

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[67] *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497 (not reproduced)
[68] *Corbiere v. Canada*, [1999] 2 S.C.R. 203 at 223, para 18 [TAB 3]
[69] *Corbiere*, *supra* at para 19 [TAB 3]

> to demonstrate that they could have avoided the discriminatory effect in order to establish a denial of equality under s. 15(1). The Court in Andrews was not deterred by such considerations....[70]

85. The most notorious example of such a discriminatory forced choice is the former s. 12(1)(b) of the *Indian Act*, which effectively forced Indian women into a choice between refraining from marrying a non-Indian and maintaining their status, or marrying an Indian, and losing their status.

86. The fact that a rights-claimant has made a "voluntary" decision to acquire characteristics that through the operation of forced choice result in differential legislative treatment does not mitigate a finding of discrimination for the purpose of the second stage of the *Andrews* test. As the *Corbiere* Court held, "even if all band members living off-reserve had voluntarily chosen this way of life...they would still have the same cause of action".[71]

87. The Impugned Provisions impose a forced choice between race (or at least, genetic heritage) and cultural identity. Individuals are put in a position of "choosing" to forego Indian status and maintaining their Métis membership rights, or "choosing" to acquire Indian status and losing those membership rights. This is exactly the sort of discriminatory choice that was imposed by s. 12(1)(b) of the *Indian Act*, and by the voting restrictions struck down in *Corbiere*. This forced choice delivers exactly the same message as the measures considered in *Corbiere*: that settlement members with Indian status are lesser members of the settlement community, and that they are persons who have chosen to relinquish their Métis identity. The *Andrews* test was designed to prohibit exactly this sort of stereotyping.

88. Alberta attempts to distinguish this case from *Corbiere,* arguing that a "choice" to live off-reserve is not comparable to a "choice" to obtain registration under the *Indian Act*. The supposed basis for this argument is that s. 35 recognizes Indians as distinctly different peoples from the Métis. Alberta argues that the "choice" to obtain registration under the *Indian Act* is far more problematic for individual identity than the "choice" to live off-reserve. But Alberta does not explain why that is the case, in circumstances where the categories enumerated in s. 35 are

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[70] *Lavoie, supra* at para 5 [TAB 8]
[71] *Corbiere, supra* at para 19 [TAB 3]

not mutually exclusive,[72] where many Métis with Indian status are permitted to become and remain settlement members, and where the motivation for acquiring Indian status has nothing to do with either the acquisition of Indian identity or disavowal of Métis identity, but is instead motivated by a need to obtain treatment for serious illness and disability, such as rheumatoid arthritis, diabetes, seizures, physical deformities, and risk of strokes.[73]

ii. Pre-existing disadvantage

89. Alberta acknowledges that the Respondents are subject to pre-existing disadvantage.[74] This concession is consistent with this Court's prior highlighting of the importance of recognizing all aboriginal groups as historically disadvantaged.

90. While assessment of pre-existing disadvantage must not descend into a race-to-the-bottom assessment of relative disadvantage, it is important to note that Métis individuals seeking to obtain Indian status often suffer from other pre-existing disadvantages not suffered by Métis individuals generally, or Métis individuals entitled to obtain Indian status who have not done so. For example, Métis individuals who seek to obtain Indian status often do so for reasons of physical disability or advanced age, both of which require access to medical funding provided under the *Indian Act*. Their situation is also more likely to be associated with pre-existing disadvantage visited on their families - for example, many, like the Respondents in this case, are the descendants of women disenfranchised from Indian status on discriminatory grounds. The Court of Appeal correctly recognized, following this Court's analysis in *Lovelace* and *Corbiere*, the unique vulnerability of Métis individuals who seek to obtain or actually acquire Indian status to being stereotyped as "less Métis"-- a vulnerability not experienced by individuals who are not entitled to Indian status, or who are so entitled, but have not registered under the *Indian Act*.[75] In this case, pre-existing disadvantage is a strong indicator that the second stage of the *Andrews* test is met.

iii. Correspondence between treatment and needs of the claimant group

91. Alberta argues that the Impugned Provisions reflect the different situation of the claimants vis-à-vis others on the settlements who are unable or do not choose to acquire Indian

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[72] Bell, "A New Era...", *supra* at 1076-1077 [TAB 23]
[73] Affidavits of the Respondents, A.R. Vol. II at 3, para 9, 13, para 9, 45, para 8, 54, para 12
[74] Appellants' Factum at 22, para 70
[75] ABCA Reasons, A.R. Vol. I at 60, para 43

status.[76] Alberta suggests that since the Respondents have received health benefits by registering under the *Indian Act*, they have no further need for settlement membership. The reasoning here appears to be that since the Respondents have Indian status, they have no need for the political, residential, cultural, associational, spiritual, and identity rights that are either fully eliminated or severely circumscribed by the Impugned Provisions. This sort of reasoning is premised on the invidious stereotype that Métis individuals with Indian status are somehow "less Métis". It falsely suggests that Métis individuals who obtain Indian status not only have no need to belong to a Métis community, but even worse, are actually harmful to that community.

92. The effect of the Impugned Provisions closely parallels the effect of the measures considered in *Corbiere*. Presumably, the off-reserve claimants in *Corbiere* obtained certain benefits as a result of their choice to acquire off-reserve residency (for example, voting and other rights associated with being the citizen of a city). However, the *Corbiere* Court recognized that despite the benefits acquired through off-reserve status, the claimants had an important and continuing interest in maintaining political rights in their home communities, and that voting restrictions failed to correspond to these needs and interests.[77] Indeed, the lack of correspondence in the present case is far more attenuated than in *Corbiere*, since the measures in that case restricted voting rights only.

93. Even if some Métis individuals who obtained Indian status disavowed their Métis communities, the Impugned Provisions are clearly overbroad, in that they deny settlement membership to all settlement members who obtain Indian status. As this Court has consistently recognized, overbroad provisions of this sort, which prejudge an individual's situation and needs based on presumed group characteristics, without an individualized assessment, are a hallmark of stereotyping.[78] In more concrete terms, this reasoning fails to recognize that there is no evidence that <u>any</u> of the rights and benefits associated with settlement membership (including, for example, residency or voting rights in an aboriginal community) are provided by mere registration under the *Indian Act*, and fails to recognize that Métis individuals with Indian status have just as strong of a need for access to those rights and benefits as do other Métis individuals.

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[76] Appellants' Factum at 22, para 71
[77] *Corbiere, supra* at para 19 [TAB 3]
[78] *Nova Scotia (Workers' Compensation Board) v. Martin*, [2003] 2 S.C.R. 504 at 517, para 5, and 567-568, paras 99-100 [TAB 10]

The complete lack of correspondence between the Impugned Provisions and the Respondents' needs is another strong indicator of discrimination.

iv. Ameliorative purpose or effect

94. The Impugned Provisions have no necessary or rational connection to any ameliorative purpose. The evidence clearly establishes that the Respondents are longstanding, valuable, and committed members of the Peavine community, with close family, political, and cultural ties to that community. There is no basis to suggest that removing such individuals from Métis settlement communities has any ameliorative effect whatsoever. Instead, the clear effect of the Impugned Provisions is to undermine the ameliorative objectives of the *MSA*, particularly those relating to the preservation of the heritage, cultural distinctiveness, and cohesion of Métis settlement communities.

v. Nature of the interest affected

95. As both the learned trial judge and the Court of Appeal recognized, it is patently obvious that the individual interests affected by the Impugned Provisions are extremely important.[79]

96. In summary, all of the indicia listed in *Law*, analyzed in the context of this case, point strongly toward a finding of discrimination. The egregious stereotyping imposed by the Impugned Provisions undoubtedly offends s. 15(1).

E. Section 2(d)

97. The basic approach to a s. 2(d) claim has two stages. First, there must be a determination of whether the activity for which the claimants seek protection falls within the range of activities protected by s. 2(d) of the *Charter*. Second, there must be a determination of whether the impugned legislation has, either in purpose or effect, interfered with these activities.[80]

98. Where a claim is based on underinclusion in a legislative scheme, the second stage of the approach involves three further inquires: (1) whether the legislative scheme is designed to safeguard the exercise of the fundamental freedom to associate; (2) whether the claimants are substantially incapable of exercising the freedom to associate without the protection of the

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[79] ABQB Reasons, A.R. Vol. I at 40-41, para 205-206; ABCA Reasons, A.R. Vol. I at 59, para 38
[80] *Dunmore*, *supra* at para 13 [TAB 4]

legislative scheme; and (3) whether the exclusion of the claimants from the legislative scheme substantially reinforces the inherent difficulty in exercising the freedom to associate.[81]

99. Both the learned chambers judge and the Court of Appeal appear to have accepted that the activity for which the Respondents seek protection, being the ability to fully belong to and participate in a Métis community, falls within the ambit of s. 2(d) protection.[82] This was a correct finding.[83]

i. Settlement membership as a fundamental freedom

100. The learned chambers judge erred in finding the right to Peavine membership was not a fundamental freedom. The Court of Appeal was correct to emphasize the learned chambers judge's tautological reasoning on this point.[84] The learned chambers judge failed to apply the factors identified in *Dunmore* as indicia of whether protected activity engages a fundamental freedom. Those factors are: (1) whether the activity for which the claimants seek protection antecede, at least notionally, the enactment of the protective legislation; and (2) whether the activity lies at the core of freedom of association.[85]

101. The activity for which the Respondents seek protection, the right to belong to and participate in a Métis settlement community, undoubtedly anteceded the *MSA*. In fact, such rights anteceded the very establishment of the Alberta legislature. In *Powley*, this Court, relying on the *Royal Commission on Aboriginal Peoples*, noted that Métis communities evolved and flourished prior to the entrenchment of European control, when the influence of European settlers and political institutions became pre-eminent.[86] In *Powley*, this Court held that one factor defining a Métis community is residency of persons in a geographical area.[87]Accordingly, given that these geographical communities existed long before the *MSA*, and given that non-statutory settlement community organizations had developed membership criteria, inclusive of Métis registered as

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[81] *Dunmore*, supra at paras 36-48 [Respondents' Authorities, TAB 4]
[82] ABQB Reasons, A.R. Vol. I at 15-16, paras 62-64 and 96; ABCA Reasons, A.R. Vol. I at 63, para 55-57
[83] *P.I.P.S.C. v. Northwest Territories (Commissioner)*, [1990] 2 S.C.R. 367 at 402-403 [TAB 11]
[84] ABCA Reasons, A.R. Vol. I at 63, paras 55-56
[85] *Dunmore, supra* at paras 36-38 [TAB 4]
[86] *Powley, supra* at 215, para 10 [TAB 18]
[87] *Powley, supra* at 216, para 12 [TAB 18]

status Indians, long before enactment of the *MSA* and its predecessor legislation[88], membership in a Métis settlement is more than a mere statutory benefit.

102. Further, as identified in *P.I.P.S.C.*, the right sought to be protected, being the right to belong to an association, lies at the core of the *Charter*'s protection of freedom of association. The learned chambers judge seems to have recognized this,[89] although she failed to correctly apply this finding in assessing whether the *MSA* was designed to safeguard this freedom.

103. Alberta argues that settlement membership cannot be a fundamental freedom because predecessor legislation to the *MSA* excluded persons registered under the *Indian Act*. This argument has two flaws. First, such prohibitions were never historically enforced. Second, the fact that a certain form of association or membership was outlawed in the past does not mean that membership in such an association is not a fundamental freedom. Indeed, despite longstanding and severe historical statutory restrictions on collective bargaining associations, *Dunmore* found membership in such associations to be a fundamental freedom.

ii. Substantial incapability of exercising the freedom to associate

104. *Dunmore* identified three factors as being relevant to the "substantial incapability" inquiry: (1) whether the legislative scheme facilitates association in the face of pre-existing barriers to such association; (2) whether the legislative scheme regulates, structures, and channels the activity sought to be protected; and (3) whether the claimants are politically impotent and have a lack of resources.[90]

105. Each of these factors is present in this case. First, the *MSA* and associated legislation is designed to overcome substantial barriers to association posed by the lack of a land and fiscal resources experience by the Métis in the period prior to the enactment of Alberta Métis legislation. To this end, the *MSA* and its associated legislation assists settlement members in overcoming these barriers, by providing resources such as rights to patented land, a framework

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[88] For an overview of the development of Alberta Metis communities, see C. Bell, *Contemporary Metis Justice, supra* at 7-10, 115 [TAB 25]. As noted earlier in this factum, the predecessor organization to the MAA, organized by the settlement communities to advance self-governance initiatives, adopted a constitution (in 1932) allowing treaty Indians to become members. See Wetherill and Kmet, *supra* at 321-322 [TAB 31].

[89] ABCA Reasons, A.R. Vol. I at 22, para 96

[90] *Dunmore*, *supra* at para 41 [TAB 4]

for funding arrangements, and surface rights.[91] Indeed, the Metis Settlements Accord expressly recognized the importance of a land base for preserving and maintaining Métis culture.[92] Access to that land is therefore fundamental to preserving and participating in Métis culture.

106. Second, the *MSA* regulates, structures, and channels the associational activities of Métis communities, including the comprehensive structuring of political association on the settlements.[93] Third, the claimants are clearly analogous to the *Dunmore* claimants, in that they have few resources to facilitate the exercise of their association rights without state assistance. They are largely engaged in low-paying occupations or unemployed, have few resources for legal representation, and in many cases, suffer from physical disabilities. As the learned chambers judge recognized, they are vulnerable to and have been politically targeted for reprisals by former settlement councils.[94] The Métis were recognized in the *Royal Commission on Aboriginal Peoples* as suffering from low income and education levels, and being vulnerable to cultural assimilation.[95]

iii. Substantial reinforcement of interference with fundamental freedoms

107. In *Dunmore*, this Court noted that by channeling associational activity into a protective scheme, then excluding members of an association from that scheme, the legislature reinforces pre-existing barriers to the exercise of fundamental freedoms.[96]

108. The *MSA* substantially channels the exercise of Métis community association into a statutory framework, and effectively subsumes a significant portion of the associational component of Métis life. Absent the *MSA*, the Respondents would have retained their historical rights to associate with other members of the Métis community. But by channeling these rights, the *MSA* has a "chilling effect" on non-statutory Métis associational activity. This substantially

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[91] *MSA*, Parts 4 and 6 [TAB 22]; *Metis Settlements Land Protection Act*, R.S.A. 2000, c. M-16 [Appellants' Authorities, TAB 31]
[92] Metis Settlements Accord, "Motion for a Resolution to Authorize and Amendment to the Constitution of Canada" A.R. Vol. III at 52; also see the recital at section 0.1 of the *MSA* [TAB 22]
[93] *MSA*, Parts 1 and 2 [TAB 22]
[94] ABQB Reasons for Judgment, A.R. Vol.I at 27, para 131
[95] *Royal Commission*, *supra*, s. 1.6 [TAB 29]
[96] *Dunmore*, *supra* at para 44 [TAB 4]

reinforces pre-existing difficulties in exercising the freedom to associate.[97] As a result, the Impugned Provisions have infringed the Respondents' freedom of association.

F. Section 7

109. The learned chambers judge correctly found that the Impugned Provisions deprive the Respondents of their right to liberty.[98] However, she erred in failing to find such deprivation contrary to two principles of fundamental justice: the principle that laws shall not be arbitrary, and the principle that laws shall not be grossly disproportional.

i. Infringement of the Respondents' rights to liberty and security of the person

110. In the proceedings before the Court of Appeal, Alberta essentially conceded that the Impugned Provisions engage the Respondents' s. 7 rights.[99] Alberta now seeks, rather weakly, to resile from that concession.

111. In determining that the right to choose the place of one's residence falls within s. 7, the learned trial judge relied on this Court's reasons in *Godbout*.[100] Alberta provides no cogent basis for its argument that the reasons of Laforest, L'Hereux-Dube, and McLachlin, JJ. (as she then was) in that case should not be followed.

112. Indeed, the reasons for finding s. 7 engaged in this case are much stronger than the facts in *Godbout*. Here, the loss of settlement membership results in the loss of the right to choose to remain in one's lifelong home, the loss of the ability to choose to exercise important aboriginal rights in one's ancestral homeland (such as hunting and fishing rights), and the right to associate with others of the same discrete culture. As the Court of Appeal held, "even if the provisions were applied uniformly and consistently, the consequences are drastic as they go to the heart of the issues of identity, community, and autonomy".[101]

113. In the circumstances of this case, the Impugned Provisions not only restricted the Respondents' rights to make fundamental choices, but their impact plausibly rose to the level of

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[97] *Dunmore*, *supra* at paras 43-44 [TAB 4]
[98] ABQB Reasons, A.R. Vol. I at 22, para 112, to 26 para 122
[99] ABCA Reasons, A.R. Vol. I at 63, para 58
[100] *Godbout v. Longueuil (City)*, [1997] 3 S.C.R. 844 at paras 58-73 [TAB 5]
[101] ABCA Reasons, A.R. Vol. I at 66, para 67

inflicting psychological and physical harm. As a consequence, not only are the Respondents' s. 7 rights to liberty engaged, but so are their s. 7 rights to security of the person.

ii. Principles of fundamental justice - arbitrariness

114. An arbitrary law bears no relation to, or is inconsistent with, the objective that lies behind it.[102] The correct approach to arbitrariness requires a three stage assessment. First, there must be a characterization of the state interest behind the legislation. Second, there must be an examination of the interference with rights caused by the impugned measures. This examination has been variously stated as requiring a focus on the "interference", the "limit", the "deprivation of the right", the "particular limit" or the "statutory provision".[103] No authority suggests that this examination should focus on the history of the legislation generally, or on non-impugned provisions, to the exclusion of an assessment of the measures specifically impugned, and of the specific interference with rights caused by those measures.

115. Third, there must be an assessment of whether there is a "real connection on the facts" between the infringement and the legislative goal. If there is no connection, or merely a theoretical connection, the law is arbitrary. The more serious the impingement on rights, the more clear must be the connection.[104] The Court of Appeal clearly held that the Impugned Provisions are not rationally connected to their purported underlying objectives.[105] While the Court of Appeal made this finding in the context of its s. 1 analysis, this finding, and the Court of Appeal's analysis, is also sufficient to establish arbitrariness for the purpose of s. 7.

116. The Impugned Provisions severely circumscribe the Respondents' liberty rights, as noted by the learned chambers judge.[106] In these circumstances, a very clear, factual connection between the goals of Métis self-government or cultural preservation and such interference would be required for the Impugned Provisions not to be found arbitrary.[107]

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[102] *Rodriguez v. British Columbia*, [1993] 3 S.C.R. 519 at 594(f) [TAB 20]; *Chaoulli v. Quebec*, [2005] 1 S.C.R. 791 at 852, para 130 and 894, para 232 [TAB 2]
[103] *Chaoulli, supra* at 852, para 131, 853-854, paras 134-137, 894, para 232 and 894, para 236 [TAB 2]; *Rodriguez, supra* at 594(f) [TAB 20]
[104] *Chaoulli, supra* at 852, para 131 [TAB 2]
[105] ABCA Reasons, A.R. Vol. I at 66, para 70
[106] ABQB Reasons, A.B. Vol. I at 26, para 122
[107] *Chaoulli, supra* at 852, para 131 [TAB 2]

117. No such connection exists. The *MSA* requires that before becoming a Métis settlement member, an individual must prove to the satisfaction of the community that she or he has aboriginal ancestry, identifies with Métis history and culture, has suitable living accommodation in the settlement area, is committed to living in the settlement area and preserving a peaceful community, and agrees to comply with settlement bylaws and General Council policies.[108]

118. Any suggestion that Métis self-government or cultural preservation is enhanced by terminating the rights of individuals of proven Métis identity to choose to live in their communities defies logic. This is particularly so since the statutory criterion (Indian status) used to deprive individuals of settlement residency rights is derived from the same personal characteristic (aboriginal ancestry) ultimately necessary to acquire those rights in the first place. As a New Brunswick member of the Native Council of Canada has stated, "all Métis are aboriginal people. All have Indian ancestry".[109] Interference with these individuals' rights undermines Métis self-government, by removing individuals from those communities who have already been accepted by those communities as Métis.

119. Further, since the Impugned Provisions are mandatory, they deny Métis settlement councils the ability to choose to accept (or keep) such individuals as members of their communities. This undermining of self-government interests is underscored, in this case, by the fact that the Peavine Council voted to restore the Respondents to membership, but was unable to effect the resolutions because of the Impugned Provisions[110].

120. Alberta infers, without stating it, that the Impugned Provisions serve to identify individuals who have "self-identified as Indians"; that by obtaining Indian status, Métis individuals disavow their Métis ancestry, their identification with Métis history and culture, and their commitment to the Métis community; and that terminating the settlement membership of such individuals furthers the objective of enabling Métis self-government, by removing them from Métis communities. At most, this poses a merely theoretical connection between the

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[108] *MSA*, s.74, 76, and 78 [TAB 22]
[109] Bell, "Who Are the Metis People in s. 35(2)", *supra* at 356 [TAB 24]
[110] Affidavit of Dennis Cunningham, A.R. Vol. II at 112 para 20 and Vol. III at 22-38

infringement of the Respondents' rights and the objective of enabling Métis self-government. Such a connection is insufficient for a law not to be arbitrary.[111]

121. Further, this inference contradicts the overwhelming weight of the evidence. There was no evidence below to support a finding that Métis who obtain Indian status do so because they self-identify as Indians, or that by registering under the *Indian Act*, Métis individuals disavow their Métis identity. To the contrary, the overwhelming evidence was that such individuals obtain Indian status for the purpose of acquiring health care benefits. Any suggestion, for example, that a person such as the Respondent Lawrence Cunningham (who is a former Chairman of the Peavine community and spent more than a decade as the Vice-President of the Federation of Métis Settlements, the forerunner to the General Council)[112] does not self-identify as Métis, or that terminating Mr. Cunningham's membership somehow enables Métis self-government or cultural preservation, is palpably unreasonable.

122. Such an inference also contradicts findings of fact made by the learned chambers judge:

> Metis registered as Indians under the *Indian Act*, who lose their right to Metis settlement membership under ss. 75(1) and 90(1) of the *M.S.A.*, may lose their right to reside on or to occupy patented lands without necessarily acquiring any corresponding right of residence under the *Indian* Act. Despite their registration under the *Indian Act*, they may continue to identify with Metis history and culture and with a specific Metis community"[113]. (emphasis added)

123. The suggestion that the Impugned Provisions are connected to the goal of Métis self-governance is completely at odds with the Court of Appeal's findings of irrationality.[114] Since no factual connection can be found between the interference with the Respondents' rights to liberty and security of the person and the objective of Métis self-government, the Impugned Provisions are arbitrary.

iii. Disproportionality

124. A disproportional law uses means, and causes deprivations of *Charter* rights that are grossly disproportional to the desired state objective.[115] The Court of Appeal clearly found the

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[111] *Chaoulli, supra* at para 852, para 131, and 854, para 138 [TAB 2]
[112] Affidavit of Lawrent (Lawrence) Bernard Cunningham, A.R. Vol. II, at 32, para 9
[113] ABQB Reasons, A.R. Vol. I at 38, para 193
[114] ABCA Reasons, A.R. Vol. I at 66, para 70
[115] *R. v. Malmo-Levine*, [2003] 3 S.C.R. 571 at 644, paras 141-144 [TAB 16]

Impugned Provisions to be disproportional to their purported objectives, and implied a finding of gross disproportionality. The Court characterized the Impugned Provisions as going "well beyond" what is necessary to achieve the purported objectives.[116] Again, the findings and analysis of the Court of Appeal, while made in the context of s. 1, are sufficient to show the Impugned Provisions contrary to the principles of fundamental justice.

125. Disproportionality doctrine requires a court to determine: (1) whether the law pursues a legitimate state interest; and if it does, (2) whether the legislative measures are so extreme that they are disproportionate to the state interest.[117] At the first stage of this test, the learned chambers judge identified the state interest behind the *MSA* as to secure a land base, and to provide a measure of self-autonomy for Alberta Metis.[118] This was not unreasonable. However, the learned chambers judge completely failed to apply the second stage of the test.

126. When the second stage of the test is correctly applied, it is clear that the Impugned Provisions are disproportional. Disproportionality of the Impugned Provisions is a result of two factors: (1) overbreadth, and (2) the severity of the deprivation of rights. Disproportionality can be a direct consequence of overbreadth.[119] Overbreadth analysis is not just a tool of criminal law. In *Godbout*, for example, Laforest J. used overbreadth analysis to find a residency requirement for municipal workers contrary to the principles of fundamental justice.[120]

127. The form of overbreadth relevant to the present case involves the range of persons to whom the Impugned Provisions apply. Where a law limits the rights of a broader group of persons more than is necessary to accomplish the legislative objective, that law is overbroad.[121] The Impugned Provisions terminate the membership of all adult Metis persons who "voluntarily" register under the *Indian Act*. However, the learned chambers judge found as a fact that some Métis persons who obtain Indian status, and whose membership is terminated by the Impugned

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[116] ABCA Reasons, A.R. Vol. I at 65, para 66
[117] *Malmo-Levine*, *supra* at para 143 [TAB 16]
[118] ABQB Reasons, A.R. Vol. I at 27, paras 128-130
[119] *R. v. Heywood*, [1994] 3 S.C.R. 761 at 792(i) - 793(a)[TAB 15]; see also *R. v. Demers*, [2004] 2 S.C.R. 489 at paras 37-39 [TAB 14]; *R. v. Clay*, [2003] 3 S.C.R. 735 at 72, paras 38-40 [TAB 13]
[120] *Godbout*, *supra* at para 87 [TAB 5]
[121] *Heywood*, *supra* at 792(i) - 792(c) [TAB 15]; *Demers*, *supra* at 514, paras 41-43 [TAB 14]; *Godbout*, *supra* at para 87 [TAB 5]

Provisions, continue to self-identify as Métis.[122] All of the Respondents fall into this group. Termination of these individuals' membership is unnecessary in order to remove individuals who cease to self-identify as Métis from settlement communities, or to further the objective of Métis self-autonomy. In fact, ss. 85 and 87 of the *MSA* appear sufficient to accomplish this purpose.[123]

128. The Respondents have a demonstrable and substantial connection to the settlement community. Their ancestors lived in the community, and their immediate and extended families live in the community. The learned chambers judge and the Court of Appeal both found the Respondents' rights to choose to live in that same community were severely circumscribed by the operation of the Impugned Provisions, in conjunction with ss. 91, 92, 93, and 95 of the *MSA*.[124] As a result, the Respondents were subjected to the political whims of a settlement council, or forced to reside with an immediate family member who had settlement membership in order to keep living in the community that had been their only home. They were thereby subjected to a loss of independence, the uncertainty of losing their residence, and the loss of their rights to political, cultural, spiritual, and familial connections with the community. The Impugned Provisions directly engaged the core of personal autonomy protected by s. 7 of the *Charter*. Such a severe, wholly unnecessary, and grossly disproportional limitation on *Charter* rights was manifestly contrary to the principles of fundamental justice.

G. Section 1

i. Alberta has not met its burden of proof

129. Alberta bears the burden of proving the constituent elements of the *Oakes* test, on a preponderance of probability. This standard is exacting. Alberta has effectively provided no evidence to support any stage of its s. 1 justification, let alone the type of "cogent and persuasive" evidence demanded by *Oakes*.[125] This is not the sort of hypothetical case where one or more parts of the s. 1 analysis are self-evident. In sum, Alberta simply cannot meet its burden.

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[122] ABQB Reasons, A.R. Vol. I at 38, para 193
[123] *MSA*, ss. 85 and 87 [TAB 22]
[124] *MSA*, ss. 91, 92, 93, and 95 [TAB 22]
[125] *R. v. Oakes*, [1986] 1 S.C.R. 103 at 138(c) - 138(g) [TAB 17]

ii. Pressing and substantial objective

130. At the first stage of the *Oakes* test, there must be proof that the objective identified by the Crown was the actual motivation for the impugned provisions.[126] However, there was no evidence below to establish the actual motivation behind the Impugned Provisions. While the Ewing Report, the MacEwan Report, the Accord, and previous Metis-related legislation are all in evidence, those materials provide no clue as to why the Impugned Provisions were included in the *MSA*. However, Alberta asserts, presumably based on the preamble to the *MSA* as a whole, that the purpose of the Impugned Provisions is to further self-governance and preserve Métis culture and identity.

131. As noted by the Court of Appeal[127], in *Vriend v. Alberta*, the Crown failed to prove the legislative objective of the impugned measures, the objective could not be discerned from the legislation as a whole, and the effect of the impugned measures contradicted the purpose of the legislation as a whole. In such circumstances, the s. 1 justification failed at the "pressing and substantial objective" stage.[128] The present case closely parallels *Vriend* on this point. The specific objective of the Impugned Provisions is not discernible from the *MSA* as a whole. Alberta suggests the overall purposes of the legislation are the preservation and enhancement of Métis culture and identity, and to enable the Métis to attain self-governance. However, the effect of the Impugned Provisions is to excommunicate Métis individuals from their communities. These effects clearly undermine the purported purposes of the *MSA*. Accordingly, the s. 1 justification must fail at the outset.[129]

iii. Rational connection

132. Applying the *Oakes* test is not a simple matter of mechanics. Section 1 must be applied in accordance with the underlying values of the *Charter*, including respect for cultural and group identity, and in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.[130] In a multicultural society, individuals often bear separate racial and cultural identities, or even, as Bastarache, J. noted in *Kapp*, multiple identities generally.

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[126] *R. v. Big M. Drug Mart*, [1985] 1 S.C.R. 295 at 366 [TAB 12]
[127] ABCA Reasons, A.R. Vol. I at 65, para 63
[128] *Vriend v. Alberta*, [1998] 1 S.C.R. 493 at paras 114-116 [TAB 21]
[129] *Vriend, supra* at para 116 [TAB 21]
[130] *M v. H*, [1999] 2 S.C.R. 3 at para 77 [TAB 9]; *Charter*, s. 27 [Appellants' Authorities, TAB 24]; *Oakes, supra* at 136(a) - 136(f) [TAB 17]

Arguments that equate racial characteristics with cultural identity cannot be accepted as logical in a society that seeks to uphold *Charter* values.[131]

133. In the present case, any attempt at meeting the rational connection requirement falls into this sort of illogic. Such an argument rests on the erroneous assumption that Métis persons who gain Indian status disavow their Métis cultural identity, and no longer identify as Métis, or are somehow less connected to Métis culture. This assumption patently contradicts the evidence and defies *Charter* values. Furthermore, any allusion to a rational connection between the Impugned Provisions and a purported goal of distinguishing Métis culture from Indian/First Nation culture rests on the erroneous assumption that cultural distinctiveness is preserved by removing Métis persons with Indian status from the community, even though they identify with Métis history and culture, and fully participate in and support that culture.

134. Lastly, as explained earlier, the Impugned Provisions actually impair the ability of Métis settlements to control their own membership by prohibiting them from retaining valued members of the community, or accepting new members who identify with Metis history and culture. Alberta asserts that the Impugned Provisions operate to allow considerable scope for the settlements to develop policies respecting dual status. Here again, Alberta simply ignores the fact that it is not the Impugned Provisions which allow for the development of membership policy, but rather other provisions in the *MSA*, like s. 222(1)(z), which stand apart and are severable from the Impugned Provisions.

iv. Minimal impairment

135. The minimal impairment branch of the *Oakes* test requires that the impugned legislation limit *Charter* rights "as little as reasonably possible". In the present case, even a brief examination of the possible alternatives available to the Crown shows the Impugned Provisions are not minimally impairing.[132]

136. As noted in the Appellants' Statement of Facts, the Impugned Provisions remove: the right to reside on the Métis settlement; the right to vote in Settlement Council elections or to serve on Council; the right to land allocation; fishing rights, and other rights accorded by the

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[131] *Kapp*, *supra* (S.C.C.) at para 99 [TAB 7]
[132] *Martin*, *supra* at 575, para 112 [TAB 10]

MSA and various settlement resolutions and bylaws. If the concern is to ensure that all benefits of settlement membership are accorded only to those who identify with Métis culture, legislation could easily be tailored so that individuals who attain Indian status could retain settlement membership upon proving their continuing cultural identity as Métis -- for example, by having Métis elders attest to their ongoing cultural identification and participation in shared Métis culture, or by providing a statutory declaration as to their cultural identity.[133]

137. An extensive range of less intrusive measures can also be conceived to meet the objective of distinguishing Métis culture from Indian/First Nation culture. A requirement of affirming Métis identity would address concerns about influence over settlement culture being exercised by persons who do not identify as Métis. If, as Archie Collins suggests, the concern is that individuals with Indian status will take over control of the settlements, a two-tiered council system, reserved seats for Métis persons without Indian status, or double-majority voting (all options alluded to in *Corbiere*)[134] could be used. Membership restrictions could be tailored to exclude only those individuals who, in addition to attaining Indian status, have actually become members of an Indian band, or who have taken up residence on Indian reserves. Or Alberta could simply direct a larger proportion of its funding directly to Métis cultural initiatives. All of these options would involve less impairment of *Charter* rights than the Impugned Provisions.

138. Similarly, numerous less-intrusive options were open to Alberta to provide Métis settlements with control over their own membership, and to further Métis self government. Since the Impugned Provisions actually impair settlement control over membership, one of these options would have been to repeal the Impugned Provisions. Another option would have been to delegate the general membership control power in s. 222 (1)(z) of the *MSA* to the settlements, as opposed to the General Council.

139. While the Respondents can identify many less-intrusive alternatives to the Impugned Provisions, the crucial point is that Alberta has simply not discharged its onus of proving minimal impairment. Alberta has adduced no evidence to show what alternate measures for implementing its purported objectives were available to legislators. There is no evidence

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[133] Similar procedures are already incorporated into the *MSA* with respect to proving Metis identity in the context of first-instance applications for settlement membership: *MSA*, s. 76 [TAB 22]

[134] *Corbiere*, *supra* at para 21 and at 273, para 95 [TAB 3]

showing whether the less-intrusive options mentioned above, or others, were considered, or if they were, why they were rejected. As Dickson, C.J. held in *Oakes*, this is precisely the type of evidence a proper s. 1 justification requires.[135] Yet such evidence is conspicuously absent.

140. The Crown's sole argument on minimal impairment consists of a vague reference to the "likely consequences of removing from the settlements the power to exclude those who register as Indians".[136] This is a difficult reference to understand, since the settlements have never passed any policy attempting to exclude those who register as Indians. That exclusion operated by virtue of the Impugned Provisions, which were imposed by the legislature.

v. Proportionality

141. At the final stage of the *Oakes* test, the Crown must prove two forms of proportionality: 1) proportionality between the deleterious effects of the Impugned Provisions and the stated objectives; and 2) proportionality between the deleterious and salutary effects of the Impugned Provisions.[137] As found by both the learned chambers judge and the Court of Appeal, the damaging effects of expelling Métis persons from their lifelong communities are broad-ranging and severe, extending to almost every important aspect of these individuals' lives.

142. The Crown's purported objectives (in particular, furthering self-governance and Métis cultural distinctiveness) are laudable. However, where, as here, the Impugned Provisions actually undermine the purported legislative objectives, and where the Crown has failed to demonstrate that the Impugned Provisions have any salutary effect on the purported legislative objectives, it cannot be said that the deleterious effects are outweighed by the legislative objectives, nor by the salutary effects of the measures.[138] In such circumstances, the Crown cannot justify the Impugned Provisions.

H. Remedy

143. Alberta requests that if the appeal on the substantive *Charter* issues is dismissed, then the remedy granted by the Court of Appeal (severance of the entirety of ss. 75 and 90 of the *MSA*) should be narrowed, so that only ss. 75(2)(a) and s. 90(1)(a) are found to infringe the *Charter*.

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[135] *Oakes*, *supra* at 138(f) [Respondents' Authorities, TAB 17]
[136] Appellants' Factum at 34, para 124
[137] *M. v. H.*, *supra* at para 82-83, para 133 [TAB 9]
[138] *M. v. H.*, *supra* at 82-83, para 133 [TAB 9]; *Vriend*, *supra* at para 128 [TAB 21]

There is no reason to limit the relief granted by the Court of Appeal. Alberta provides no argument to show how any provisions discriminating against Métis individuals registered under the *Indian Act* for membership purposes are any less discriminatory than ss. 75(2)(a) and s. 90(1)(a). However, as the Respondents are not registered as Inuk, they take no position on Alberta' request to limit the severance of s. 90 to s. 90(1)(a).

PART IV - SUBMISSIONS CONCERNING COSTS

144. The Reinstated Members request that costs of this application be awarded in their favour, payable by Alberta, on a solicitor and own client basis, in any event of the cause. Such an order is justified since the Respondents were denied basic constitutionally guaranteed rights over a period of 7 years, there were no legitimate reasons for denying those rights, and the complex issues raised with respect to *Charter* interpretation are important to all Canadians. As Kent Roach points out, it is desirable to encourage individuals to bring well-grounded *Charter* claims, and for such individuals to receive full compensation for costs incurred in doing so.[139]

PART V - ORDERS SOUGHT

145. The Respondents request an Order dismissing this appeal in its entirety. The Respondents further request an Order awarding costs in their favour, payable by the Appellants. In the alternative, the Respondents request leave to make written submissions regarding costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 14TH DAY OF SEPTEMBER, 2010.

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Per:

Dougald E. Brown Agent for

Kevin S. Feth, Q.C.
Jeremy L. Taylor
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NELLIGAN O'BRIEN PAYNE LLP
Per: Dougald Brown

[139] Kent Roach, *Constitutional Remedies in Canada*, looseleaf (Aurora: Canada Law Book, updated to 2009) at 11-78 - 11-81 [TAB 28]

PART VI - TABLE OF AUTHORITIES

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1.	*Battlefords and District Co-operative Ltd. v. Gibbs*, [1996] 3 S.C.R. 566	43
2.	*Chaoulli v. Quebec*, [2005] 1 S.C.R. 791	114, 115, 116, 120
3.	*Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203	82, 83, 86, 92, 137
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11.	*P.I.P.S.C. v. Northwest Territories (Commissioner)*, [1990] 2 S.C.R. 367	82

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13.	*R. v. Clay*, [2003] 3 S.C.R. 735	126
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15.	*R. v. Heywood*, [1994] 3 S.C.R. 761	126, 127
16.	*R. v. Malmo-Levine*, [2003] 3 S.C.R. 571	124, 125
17.	*R. v. Oakes*, [1986] 1 S.C.R. 103	129, 139
18.	*R. v. Powley*, [2003] 2 S.C.R. 207	20, 21, 27, 77, 101
19.	*Roberts v. Ontario*, 1994 CarswellOnt 2209 (C.A.)	48
20.	*Rodriguez v. British Columbia*, [1993] 3 S.C.R. 519	114
21.	*Vriend v. Alberta*, [1998] 1 S.C.R. 493	131, 142

B. LEGISLATION

22.	*Metis Settlements Act*, R.S.A. 2000, c. M-14	1, 22, 26, 42, 61, 62, 69, 105, 106, 117, 127, 128, 134

C. SECONDARY SOURCES

23.	Bell, Catherine E. and Clayton Leonard, "A New Era in Metis Constitutional Rights: The Importance of *Powley* and *Blais*", (2004) 41 Alta L. Rev. 1049	32, 75, 88
24.	Bell, Catherine E. "Who Are the Metis People in Section 35(2)?" (1991) 29 Alta. L. Rev. 351	24, 25, 28
25.	Bell, Catherine E. *Contemporary Metis Justice: The Settlement Way* (Native Law Centre, Univ. of Saskatchewan, 1999)	79, 101
26.	Giokas, John and Paul L.A.H. Chartrand, "Who Are the Métis in Section 35? A Review of the Law and Policy Relating to Métis and 'Mixed-Blood' People in Canada", in Paul L.A.H. Chartrand and Harry W. Daniels, eds., *Who Are Canada's Aboriginal Peoples? Recognition, Definition, and Jurisdiction* (Saskatoon: Purich Publishing, 2002)	27, 28, 29
27.	Morris, Michael H. and Joseph K. Cheng, "*Lovelace* and *Law* Revisited: The Substantive Equality Promise of *Kapp*" (2009), 47 S.C.L.R. (2d) 281	27
29.	Roach, Kent. *Constitutional Remedies in Canada* (looseleaf) (The Cartwright Group Ltd., 2009)	144
30.	*Royal Commission on Aboriginal Peoples*, Vol. 4 (Indian and Northern Affairs Canada, 1996, online http://www.aincinac.gc.ca/ch/rcap/sg	20, 21, 106
31.	Watson-Hamilton, Jonnette and Jennifer Koshan, "Courting Confusion? Three Recent Alberta Cases on Equality Rights Post-*Kapp*", (2010) 47:4 Alta. L. Rev. 927	27, 41
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PART VII - STATUTES AND REGULATIONS

A. *Metis Settlements Act*, R.S.A. 2000, c. M-14, ss. 75 and 90

Automatic termination

90(1) Unless a General Council Policy provides otherwise, a settlement member terminates membership in a settlement if

(a) the person voluntarily becomes registered as an Indian under the *Indian Act* (Canada), or

(b) the person becomes registered as an Inuk for the purpose of a land claims agreement.

(2) On receipt from the settlement council of notice of a termination of membership under subsection (1), and after any verification of the facts that is considered necessary, the Minister must remove the name of the person concerned from the Settlement Members List.

RSA 2000 cM-14 s90;2004 c25 s21

Indians and Inuit

75(1) An Indian registered under the *Indian Act* (Canada) or a person who is registered as an Inuk for the purposes of a land claims settlement is not eligible to apply for membership or to be recorded as a settlement member unless subsection (2) or (3.1) applies.

(2) An Indian registered under the *Indian Act* (Canada) or a person who is registered as an Inuk for the purposes of a land claims settlement may be approved as a settlement member if

(a) the person was registered as an Indian or an Inuk when less than 18 years old,

(b) the person lived a substantial part of his or her childhood in the settlement area,

(c) one or both parents of the person are, or at their death were, members of the settlement, and

(d) the person has been approved for membership by a settlement bylaw specifically authorizing the admission of that individual as a member of the settlement.

(3) If a person who is registered as an Indian under the *Indian Act* (Canada) is able to apply to have his or her name removed from registration, subsection (2) ceases to be available as a way to apply for or to become a settlement member.

(3.1) In addition to the circumstances under subsection (2), an Indian registered under the *Indian Act* (Canada) or a person who is registered as an Inuk for the purposes of a land claims settlement may be approved as a settlement member if he or she meets the conditions for membership set out in a General Council Policy.

(4) A right to reside on patented land acquired under this or another enactment, a General Council Policy or a bylaw is not affected by a decision to refuse an application for membership when the decision is based on this section.

RSA 2000 cM-14 s75; 2004 c25 s20