

**IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL OF ALBERTA)**

BETWEEN:

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

Appellants
(Respondents)

- and -

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(LAWRENCE) CUNNINGHAM, RALPH CUNNINGHAM, LYNN NOSKEY, GORDON
CUNNINGHAM, ROGER CUNNINGHAM and RAY STUART**

Respondents
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- and -

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OVERVIEW

1. The Attorney General of Ontario intervenes exclusively on the s. 15 issue, specifically regarding the proper s. 15(2) analysis where some members of a disadvantaged group challenge their exclusion from an ameliorative program benefiting other members of that disadvantaged group (here Métis individuals, who are also status Indians, challenge their exclusion from Alberta's *Métis Settlements Act* because of their Indian status).

2. This Court's decision in *Kapp* marked a new beginning with respect to the framework for determining whether ameliorative programs comply with the equality guarantee of the *Charter*. Ameliorative programs are critical to achieving substantive equality in Canada. In the Aboriginal context, they are also important to fostering improved relationships with Aboriginal communities. *Kapp* expressed support for government attempts to further substantive equality through such programs and encouraged governments to initiate ameliorative programs in order to counteract historic disadvantage.

3. While *Kapp* did not involve a challenge by another disadvantaged group, it expressly stated that future cases would shape the new s. 15(2) analysis. There are two potential types of challenges by disadvantaged groups. Where a challenge is by a different disadvantaged group than the ameliorative program is designed to benefit, as was the case in *Lovelace* (where the Casino Rama project was exclusively for First Nations and not for Métis or non-status Indians), the *Kapp* analysis – requiring the government to demonstrate that the program has an ameliorative purpose and targets a disadvantaged group identified on s. 15 grounds – applies and the program is protected under s. 15(2).

4. Where, however, some members of a disadvantaged group challenge their exclusion from an ameliorative program benefiting other members of that disadvantaged group – as is the case in this appeal – the court should consider whether there is a rational connection between the eligibility criteria and the program's purpose and design. The following two questions are relevant to this assessment:

(a) Who was the program designed to benefit? ; and

(b) What is the nature of the program?

5. Ontario submits that the Alberta Court of Appeal set out an incorrect framework for the s. 15(2) analysis in this context. The proper s. 15(2) framework to analyze an equality challenge by members of a group who are excluded from an ameliorative program benefiting other members of the group should instead flow from this Court's decision in *Kapp*, with further development drawing from the Ontario Court of Appeal's considerations of s. 15(2) in *Roberts* and *Lovelace*. This s. 15(2) framework is a deferential one – a fact that the Court of Appeal did not properly appreciate.

6. Where the membership in a disadvantaged group is contested, the question is whether the government has a reasonable basis for their identification of the group. A reasonable basis may be established through consultation with the disadvantaged group or through the use of other sources of information which may also be available and appropriate.

PART I – FACTS

7. The Attorney General of Ontario takes no position on the facts, nor does Ontario have a Métis settlements program similar to the Alberta program at issue.

8. Ontario does provide, however, a wide range of ameliorative programs that attempt to foster substantive equality for disadvantaged groups in the province. These include culturally-based schools, health initiatives and social benefits programs. In the Aboriginal context, ameliorative programs include the First Nation Gaming Revenue Sharing and Financial Agreement, and a program designed to help Aboriginal communities engage in meaningful consultation (the New Relationship Fund).

For details on the Gaming Revenue Sharing and Financial Agreement see:
www.aboriginalaffairs.gov.on.ca/english/news/2008/feb7nr_08.asp

For details on the New Relationship Fund (NRF) see: www.aboriginalaffairs.gov.on.ca/english/policy/nrf/nrf.asp

9. As a result, the issue of group identification and government's ability to rely on group-defined membership criteria if it wishes is of considerable importance to Ontario. Group membership may be complex, and is contested in a wide variety of contexts – from disability to religion to culture – and therefore is an issue in government design of many ameliorative programs. In the Aboriginal context, the issue of Métis group membership arises, for example, with respect to the administration of the NRF, in *Powley* implementation, and in ongoing discussions concerning resource benefits sharing (RBS) in the province.

***R. v. Powley*, 2003 SCC 43, [2003] 2 S.C.R. 207**

On NRF Métis community eligibility criteria see www.aboriginalaffairs.gov.on.ca/english/policy/nrf/pdf/nrf_core_consultation_capacity_application_mmetis.pdf

On RBS discussions see www.fin.gov.on.ca/en/budget/ontariobudgets/2010/sectors/aboriginal.html (under heading Resource Benefits Sharing)

PART II – QUESTIONS IN ISSUE

10. The Chief Justice stated the following constitutional questions on April 28, 2010:

Do ss. 75 and/or 90 of the *Métis Settlements Act*, R.S.A. 2000, c. M-14, infringe s. 2(d) of the *Canadian Charter of Rights and Freedoms*?

If so, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under s. 1 of the *Canadian Charter of Rights and Freedoms*?

Do ss. 75 and/or 90 of the *Settlements Act*, R.S.A. 2000, c. M-14, infringe s. 7 of the *Canadian Charter of Rights and Freedoms*?

If so, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under s. 1 of the *Canadian Charter of Rights and Freedoms*?

Do ss. 75 and/or 90 of the *Métis Settlements Act*, R.S.A. 2000, c. M-14, infringe s. 15 of the *Canadian Charter of Rights and Freedoms*?

If so, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under s. 1 of the *Canadian Charter of Rights and Freedoms*?

11. These sections of Alberta's *Métis Settlements Act* state:

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.

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.

PART III – ARGUMENT

12. The Attorney General of Ontario intervenes exclusively on the s. 15 issue, specifically regarding the proper s. 15(2) analysis where some members of a disadvantaged group challenge their exclusion from an ameliorative program benefiting other members of that disadvantaged group.

(a) *Kapp*: a new beginning for s. 15(2)

13. This Court’s decision in *Kapp* marked a new beginning for s. 15(2) of the *Charter*. It recognized the unique role s. 15(2) plays in “promot[ing] the vision of substantive equality that underlies s. 15 as a whole” and stressed that “through s. 15(2), the *Charter* preserves the right of government to implement programs [that combat discrimination], without fear of challenge under s. 15(1).”

***R. v. Kapp*, 2008 SCC 41, [2008] 2 S.C.R. 483 at para. 16**

14. In this way, *Kapp* signalled to governments the importance of ameliorative programs and expressed support for government attempts to further substantive equality through such programs. This approach encourages governments to experiment with ameliorative programs in order to counteract historic disadvantage:

...the government should be given some leeway to adopt innovative programs, even though some may ultimately prove to be unsuccessful. The government may learn from such failures and revise equality-enhancing programs to make them more effective.

***Kapp*, *supra*, at para. 47**

15. While *Kapp* did not involve a challenge by another disadvantaged group, it expressly stated that future cases would further shape the new s. 15(2) analysis:

...we are mindful that future cases may demand some adjustment to the framework in order to meet the litigants’ particular circumstances. However, at this early stage in the development of the law surrounding s. 15(2), the test we have described provides a basic starting point – one that is adequate for

determining the issues before us on this appeal, but leaves open the possibility for future refinement.

***Kapp, supra*, at para. 41**

(b) Developing the *Kapp* framework

16. There are three broad classes of potential s. 15(2) challenges:

- The first, which was at issue in *Kapp*, is a challenge by an advantaged group to an ameliorative program.
- The second, which was at issue in *Lovelace*, is a challenge by a disadvantaged group other than the group the ameliorative program was designed to benefit.
- The third, at issue in this appeal, is a challenge by some members of a disadvantaged group to their exclusion from an ameliorative program benefiting other members of that disadvantaged group.

(i) Challenge by an advantaged group

17. *Kapp* established that the following test governs the application of s. 15(2) where an equality challenge to an ameliorative program is brought by an advantaged group:

A program does not violate the s. 15 equality guarantee if the government can demonstrate that: (1) the program has an ameliorative or remedial purpose; and (2) the program targets a disadvantaged group identified by the enumerated or analogous grounds.

***Kapp, supra*, at para. 41**

(ii) Challenge by another disadvantaged group

18. The second category involves equality challenges from a different disadvantaged group than the one that is the subject of the program. The Attorney General of Ontario submits that the test set out in *Kapp* fully governs this type of claim. Governments require leeway to establish ameliorative programs without having to proceed in lock-step with programs for all disadvantaged groups at once. As Colleen Sheppard stated in a 1993 equality report prepared for the Ontario Law Reform Commission:

Nor should it violate the equality guarantees for the government to make certain choices in the kinds of initiatives or programs it wants to implement. It should be open to governments, for example, to decide to develop an urban housing project for single parents or a special education program for children with physical disabilities. The equality guarantees should not be reduced to a requirement that all problems be solved or addressed at the same time and allocated the same amount of resources.

Colleen Sheppard, “Litigating the Relationship between Equity and Equality”, study paper for the Ontario Law Reform Commission (1993) at p. 61

***Lovelace v. Ontario* (1997), 33 O.R. (3d) 735 (C.A.) at p. 755 (citing the above quote); aff’d, under a s. 15(1) analysis, 2000 SCC 37, [2000] 1 S.C.R. 950**

19. *Lovelace* provides an example of such a claim, in that the Casino Rama project was designed exclusively for First Nations and not for Métis or non-status Indians. The Ontario Court of Appeal held that this program met the s. 15(2) test and applied a s. 15(2) analysis similar to the analysis developed in *Kapp*:

We take a different view of the constitutionality of a s. 15(2) program when a claim of underinclusiveness is made by a disadvantaged group outside the object of the program. In our view such a claim cannot be maintained. Section 15(2) affirms that the government may target and attempt to remedy specific disadvantage. Governments should, therefore, be able to rely on s. 15(2) to provide benefits to a specific disadvantaged group and should not have to justify excluding other disadvantaged groups even if those other groups suffer similar disadvantage. To hold that an affirmative government program violates s. 15 because it excludes disadvantaged groups or individuals that were never the object of the program would undermine the effectiveness of s. 15(2) and the ability of governments to redress disadvantage. [emphasis added]

***Lovelace, supra*, (O.C.A.) at pp. 756-57**

20. In this appeal, for example, Alberta’s *Métis Settlements Act (MSA)* specifically benefits Métis peoples, not First Nation peoples. The exclusion of status Indians who are not Métis is therefore consistent with the purpose and design of the program and does not violate s. 15 under the s. 15(2) *Kapp* test.

(iii) Challenge by an excluded subset of a disadvantaged group

21. Where some members of a disadvantaged group challenge their exclusion from an ameliorative program benefiting other members of that disadvantaged group, however, a more

developed s. 15(2) analysis may be required. The Attorney General of Ontario's submissions address the framework for the s. 15(2) test in this context, as the issue in this appeal is whether the exclusion under the MSA of Métis who are also status Indians comes within s. 15(2).

22. Ontario submits that the Alberta Court of Appeal set out an incorrect framework for the s. 15(2) analysis in this third context. The proper s. 15(2) framework to analyze an equality challenge by members of a group who are excluded from an ameliorative program benefiting other members of the group should instead consider whether there is a rational connection between the eligibility criteria and the program's purpose and design. The following two questions are relevant to this assessment:

- (a) Who was the program designed to benefit? ; and
- (b) What is the nature of the program?

23. This proposed test flows from this Court's decision in *Kapp*, with further development drawing from the Ontario Court of Appeal's considerations of s. 15(2) in *Lovelace* and *Roberts*, as discussed in detail below.

Kapp, supra

***Lovelace, supra*, (O.C.A.)**

***Ontario Human Rights Commission v. Ontario* (1994), 19 O.R. (3d) 387 (C.A.) ("*Roberts*")**

24. The Attorney General of Ontario disagrees with the approach set out by the Alberta Court of Appeal for two reasons. First, the general s. 15(1) test is not well suited to assessing whether ameliorative programs comply with the *Charter* equality guarantee. Ameliorative programs further substantive equality in Canada by giving benefits or advantages to a disadvantaged group. They are intended to level a historically uneven field. They therefore occupy a unique position with respect to equality and require their own analytical framework. Such an approach reads s. 15(1) and s. 15(2) together in a harmonious fashion.

Through s. 15(2), the Charter preserves the right of governments to implement [ameliorative] programs, without fear of challenge under s. 15(1). This is made apparent by the existence of s. 15(2).

***Kapp, supra*, at para. 16 (see also para. 37)**

25. The Court of Appeal's reliance on s. 15(1) in the context of this case is not consistent with this Court's affirmation in *Kapp* of the important role s. 15(2) plays in fostering substantive equality in Canada:

Section 15(2) is more than a hortatory admonition. It tells us, in simple clear language, that s. 15(1) cannot be read in a way that finds an ameliorative program aimed at combatting disadvantage to be discriminatory and in breach of s. 15.

***Kapp, supra*, at para. 38**

26. Second, the Court of Appeal erred in interpreting *Kapp*'s s. 15(2) test to require the government to establish that "the impugned provisions ... rationally advance their purported ameliorative purpose." The identification of the group to be benefited in an ameliorative program will never in and of itself advance a program's ameliorative purpose. The very purpose of eligibility criteria is to play a "gatekeeper" role, determining who qualifies for a program. As a result, by definition they will always exclude some people from the program to which they are attached. The central question for this analysis thus cannot be whether eligibility criteria themselves advance a program's ameliorative purpose.

Alberta Court of Appeal below, Appellants' Record, v. I, p. 55 (para. 21)

(c) Ontario's proposed rational connection test

27. Instead, the Attorney General of Ontario proposes a different approach for the type of s. 15(2) case at issue in this appeal. In Ontario's view, the critical question in this context is whether there is a rational connection between the eligibility criteria and the purpose and design of the ameliorative program for which they are determining eligibility.

28. To answer this question, two underlying issues must be examined:

- (a) Who does the program benefit? ; and
- (b) What is the nature of the program? (in terms of program design and type of benefits)

29. Sometimes assessing these underlying issues will be relatively straightforward. In other contexts, such as the case at bar, they may require consideration of complex factors such as

contested group identity and the relationship of the benefits at issue to that identity. These considerations are discussed in detail below.

30. The Ontario Court of Appeal developed a similar rational connection test for ameliorative programs in *Roberts*, a *Human Rights Code* case that examined the nature of the connection between the exclusion at issue (based on age) and the purpose of the ameliorative program and benefit at issue (access to assistive devices for the visually impaired). The Court concluded that if there is a rational connection between the eligibility criteria and the purpose and design of the program, it is protected as an ameliorative program:

Once it can be shown that an individual whom a special program is designed to assist is being discriminated against and that there is no rational connection between the prohibited ground of discrimination and the program, the provider of the program must remove the discrimination. [emphasis added]

***Roberts, supra*, at p. 407, per Weiler J.A., lead majority reasons (Houlden J.A. concurring) (holding that “the age restriction is completely unrelated to the purpose of the program.”)**

31. This suggested approach is consistent with the tentative guide this Court offered, in *Kapp*, that “s.15(2) precludes from s.15(1) review distinctions on enumerated or analogous grounds that serve and are necessary to the ameliorative purpose”.

***Kapp, supra*, at para. 52**

32. Further, it establishes a threshold for review that encourages governments to establish ameliorative programs. As the Ontario Court of Appeal noted in *Lovelace*:

Policy considerations also support limited judicial review of s. 15(2) programs. Governments have no constitutional obligation to remedy all conditions of disadvantage in our society. If government affirmative action programs can be too readily challenged because, for example, they do not go far enough in remedying disadvantage, governments will be discouraged from initiating such programs.

***Lovelace, supra*, (O.C.A.) at p. 755**

33. These policy considerations affirm that the rational connection test does not require perfect accord between the group defined to benefit from the program and the program’s purpose. The Ontario Court of Appeal accepted in *Lovelace* that some “leakage” is inevitable in defining eligibility criteria and governments should be granted a measure of deference in determining

these criteria:

Although the project does target Band members living on reserves, admittedly there is some ‘leakage’. The project may not exclusively benefit those on reserves and may not even exclusively benefit the Bands. Many status Indians live off their reserves, and Ontario has not insisted that the revenue from Casino Rama be spent only on the reserves; some Bands do not yet have reserves; and Ontario is willing to consider including in the project a few communities that have not yet achieved Band status. The applicants rely on this leakage in submitting that the true object of the project is wider than Ontario and the Chiefs of Ontario claim, and the motion judge accepted this submission in finding discrimination. In our view, this leakage does not undermine the overall objects of the project.

Lovelace, supra, (O.C.A.) at p. 761

(i) Who does the program benefit?

34. Turning to the first underlying issue concerning who an ameliorative program benefits, the starting point will always be the legislation, regulations or program documents that set out the eligibility criteria.

35. A further question may arise, however, depending on the nature of the group at issue. In some contexts, this assessment is relatively straightforward as membership in the group is clear. For example, in *Larromana*, the Divisional Court found a reasonable basis for Disability Support Program provisions that defined disability more narrowly than under the *Human Rights Code* as they address a specific subset of disabled people with a more serious degree of impairment:

The broad definition of disability in the Code is designed to protect a broad range of individuals from discriminatory treatment based on any degree of actual or perceived disability. The much narrower definition of disability in the ODSPA is designed to provide a financial benefit to a smaller disadvantaged group, those with more serious degrees of impairment. That benefit meets the requirements of s. 14(1) of the *Code* [the equivalent to s. 15(2) of the *Charter*] which provides, *inter alia*, that rights to be free from discrimination guaranteed under the *Code* are not infringed by a special program designed to relieve hardship or disadvantage. Even a program that falls within s. 14(1) is not permitted to discriminate on grounds not relevant to furthering the purpose of that program: *Ontario Human Rights Commission and Roberts v. Ontario* (1994), 19 O.R. (3d) 387 (C.A.) [emphasis added]

Larromana v. Ontario (Director, Disability Adjudication Unit), 2010 ONSC 1243 (Div. Ct.) at para. 6

36. In other circumstances, such as where a program is focused on a cultural group, the boundaries of the group who benefit from the program may be harder to define. These boundaries are often contested in a modern multicultural society where the factors that contribute to cultural identity are dynamic. Although this vitality is an integral aspect of cultural expression, it poses a significant practical challenge. On what basis will courts assess criteria governments develop to determine eligibility?

On matters of identification and accountability, the Bands stand on a different footing from the applicant groups. Band members are easily identifiable because they are registered under Band lists. In contrast, no consensus exists on an appropriate definition of Métis or non-status Indians, making their identification extremely difficult.

Lovelace, supra, (O.C.A.) at p. 762

37. Ontario's submits that governments need only establish a reasonable basis for their identification of the group, as otherwise governments cannot draft the very ameliorative programs s. 15(2) encourages them to develop in order to further substantive equality in Canada. Such a reasonable basis standard has been applied with respect to the selection of age restrictions by government for various programs and legislative provisions.

Mckinney v. University of Guelph, [1990] 3 S.C.R. 229

A.C. v. Manitoba (Director of Child and Family Services), 2009 SCC 30, [2009] 2 S.C.R. 181 at para. 145: "Age, in this context, is a reasonable proxy for independence.", *per* McLachlin C.J. and Rothstein J., concurring

38. The case at bar illustrates this difficulty. The Métis groups and individuals involved in this appeal are divided as to whether Métis members who register as status Indians should continue to be accepted within their community. The majority of Métis groups define membership to exclude status Indians, but others object to such a requirement.

39. This Court in *Powley* discussed the challenges of providing a definition of Métis individuals, and concluded that group acceptance plays an important role in defining Métis under s. 35 of the *Constitution Act, 1982*:

We emphasize that we have not been asked, and we do not purport, to set down a comprehensive definition of who is Métis for the purpose of asserting a claim under s. 35. We therefore limit ourselves to indicating the important components

of a future definition, while affirming that the creation of appropriate membership tests before disputes arise is an urgent priority. ... In particular, we would look to three broad factors as indicia of Métis identity for the purpose of claiming Métis rights under s. 35: self-identification, ancestral connection, and community acceptance.

...

Third, the claimant must demonstrate that he or she is accepted by the modern community whose continuity with the historic community provides the legal foundation for the right being claimed. Membership in a Métis political organization may be relevant to the question of community acceptance, but it is not sufficient in the absence of a contextual understanding of the membership requirements of the organization and its role in the Métis community. The core of community acceptance is past and ongoing participation in a shared culture, in the customs and traditions that constitute a Métis community's identity and distinguish it from other groups. This is what the community membership criterion is all about.

***Powley, supra*, at paras. 30-33**

40. Given the uncertainty that may exist with respect to defining groups in Canada, Ontario submits that governments need only establish a reasonable basis for their identification of the group. One possible way to establish a reasonable basis is through consultation with the disadvantaged group and subsequent reliance on the group's own definition of membership in formulating eligibility criteria. In the case at bar, it is therefore relevant that Alberta consulted with Métis groups in designing the *MSA*. In other contexts, other sources of information may be available and appropriate (i.e. relying on the federal *Indian Act* to identify status Indians). In all cases, government decisions to heed a disadvantaged group's formulation of its identity should be granted significant deference.

41. Of course, the Attorney General of Ontario recognizes that groups do not speak with a unitary voice. In the case at bar, certain Métis individuals and groups have objected to the Métis National Council's assertion that Indian status is a make-or-break indicator of non-Métis identification. Following the *Kapp* framework, the government's choices in defining a group – while recognizing that such disputes exist – should be considered in a manner that supports government development of ameliorative programs.

42. Such a process is in line with Justice Wilson’s exhortation, in *Edwards Books*, that laws must “preserve rather than fracture the integrity of the group” they are attempting to assist. Ontario submits that eligibility criteria that reflect consultation with the group as to the manner in which it would demarcate its identity – and provide an opportunity for such demarcations to change over time – preserve the integrity of the group in its complex modern iteration. As a result, they should be granted considerable deference.

***R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713 at p. 811 (dissenting)**

(ii) What is the nature of the program?

43. The second question relevant to assessing rational connection in this context is the nature of the ameliorative program at issue, specifically considering program design elements, the types of benefits at issue, the overall significance or magnitude of the program, and avoidance of overlap with other ameliorative programs.

44. For example, in the Aboriginal context, a contextual assessment of the connection between ameliorative program eligibility criteria and the purpose of the program or benefit at issue would take account of the fact that the government program’s requirements for inclusion may be more stringent when the ameliorative program at issue deals with limited resources, such as land, or is of significant financial magnitude. This is particularly the case where the resource is also intimately linked to group identification (i.e. determining who resides on a Métis settlement is more important to group identity than determining who is eligible to participate in a Métis after-school program).

***Lovelace, supra*, (O.C.A.) at p. 763** (“We recognize that, despite these problems of identification and accountability, Ontario has funded many programs for the Métis and non-status Indians. But none is of the magnitude or raises the concerns of the Casino Rama project. In targeting the beneficiaries of this project Ontario can legitimately insist on stringent requirements of identification and accountability.”)

45. In contrast, the government program’s requirements for inclusion may be less stringent with respect to culturally-based programs that are not focused on group identification, but instead on individual identification, since often space in these programs will not be limited.

46. The issue of a land base in the case at bar illustrates these distinctions. Most, but not all, status Indians are entitled to occupy reserve lands. The exceptions are status Indians who are not members of a band (as is the case with many of the respondents) or who are members of a band without a land base. Nevertheless, where a province acts to provide a land base to Métis people – as Alberta has done here – the fact that status Indians already have access to a land base is a relevant consideration to whether a rational connection exists between the eligibility criteria and the program’s ameliorative purpose:

[I]t should still be considered consistent with equality to develop special programs or treat groups differently to accommodate their specific needs and differences. It is not discriminatory to exclude those who do not have the same needs as those for whom the program is designed.

Sheppard, *supra*, at p. 61

47. In addition, the *MSA* provides a wide range of benefits besides the right to hold title. It also provides the right to receive payments associated with holding Métis title to land, the right to obtain housing on the settlement while paying only a portion of the construction costs, and the ability to qualify for settlement programs such as job training.

Appellants’ Record, v. II, p. 74 : Affidavit of Archie Collins, at para. 8

48. Ontario therefore submits that the nature of the *MSA* program at issue concerns the distribution of limited resources (land), that are critical to group identity (who is entitled to live on the Métis settlements) and also involves monetary and social services benefits of a significant magnitude. All of these factors suggest that the government’s requirements for inclusion may be more stringent in this context.

49. In addition, governments should be given leeway to tailor ameliorative program eligibility to avoid program overlap. All individuals are members of multiple groups – based on anything from citizenship to gender to age to religion. The receipt of government benefits, however, inevitably requires some line-drawing with respect to the benefits that arise from individuals identifying with and participating in multiple groups.

50. To the extent an individual's membership in multiple groups entitles him or her to overlapping benefits, the government should be able to structure exclusions that promote the fair allocation of limited government resources to ensure amelioration of disadvantage more broadly. Such exclusions should be considered rationally connected to an ameliorative program's purpose in that the purpose of any ameliorative program is to remedy disadvantage, rather than to provide an additional source of entitlement to benefits that have already been proffered.

51. The analogy of dual citizenship has been raised by the respondents. However, dual citizens may be required to elect between laws and programs offered by the two states to which they simultaneously belong (most notably for taxation purposes, but sometimes concerning critical life decisions such as military service). In other words, dual citizenship brings benefits – flowing from the wider range of life choices available by virtue of holding citizenship in two states – but also burdens, requiring decisions that non-dual citizens are not required (or entitled) to make. Further, some states design benefit programs to restrict eligibility if a dual citizen receives a similar benefit from their other home state.

Dual citizenship may carry with it certain benefits, but it may also bring unexpected difficulties: legal proceedings, taxation and financial responsibilities, military service, denial of emigration, even imprisonment for failure to comply with obligations in one of your countries of citizenship.

www.cic.gc.ca/english/resources/publications/dual-citizenship.asp

Respondents' Factum, para. 32

(d) Conclusion

52. Ameliorative programs are critical to achieving substantive equality in Canada. In *Kapp*, this Court established a new framework for assessing the constitutionality of ameliorative programs under s. 15(2) of the *Charter*, without fear of challenge under s. 15(1).

53. In the Aboriginal context, it is particularly important for governments to have flexibility to create distinct ameliorative programs for First Nations, Métis and non-status Indians. With the constitutional entrenchment of Aboriginal and treaty rights under s. 35 of the *Constitution Act, 1982* and the coming into force of s. 15 of the *Charter* in 1985, the importance of ameliorative

programs for Aboriginal peoples was reinforced, particularly as a tool to foster Crown-Aboriginal relationships. While these communities are joined together as Aboriginal peoples, they have experienced different historical paths, are organized and governed in very different ways, and have different current needs.

54. The *Kapp* approach should now be developed to assess challenges made by some members of a disadvantaged group to their exclusion from an ameliorative program benefiting other members of that disadvantaged group. The Attorney General of Ontario submits that the critical question in this context is whether an ameliorative program's eligibility criteria (and resulting exclusions) are rationally connected to the purpose and design of the program.

PART IV – COSTS

55. As an intervener, the Attorney General of Ontario does not seek costs, nor should costs be ordered against Ontario.

PART V – RELIEF REQUESTED

56. The Attorney General of Ontario takes no position with respect to relief requested by the parties.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

October 22, 2010

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PART VI – TABLE OF AUTHORITIES

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Literature	
Colleen Sheppard, “Litigating the Relationship between Equity and Equality”, study paper for the Ontario Law Reform Commission (1993)	18, 47