Court File No. 33340

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

B E T W E E N:

HER MAJESTY THE QUEEN IN RIGHT OF ALBERTA
(MINISTER OF ABORIGINAL AFFAIRS AND NORTHERN DEVELOPMENT)

Appellants
(Respondents)

- and –

REGISTRAR, MÉTIS SETTLEMENT LAND REGISTRY

Appellants
(Respondents)

- and –

BARBARA CUNNINGHAM

Respondent
(Appellants)

- and –

JOHN KENNETH CUNNINGHAM. LAWRENT (LAURENCE) CUNNINGHAM, RALPH CUNNINGHAM, LYNN NOSKEY, GORDON CUNNINGHAM, ROGER CUNNINGHAM and RAY STUART

Respodents
(Appellants)

- and –

ATTORNEY GENERAL OF ONTARIO, ATTORNEY GENERAL OF QUEBEC, ATTORNEY GENERAL OF SASKATCHEWAN, MÉTIS NATIONAL COUNCIL, MÉTIS NATION OF ALBERTA, MÉTIS SETTLEMENTS GENERAL COUNCIL, EAST PRAIRIE MÉTIS SETTLMENT, ELIZABETH MÉTIS SETTLEMENT, GIFT LAKE MÉTIS SETTLEMENT, NATIVE WOMEN'S ASSOCIATION OF CANADA, ABORIGINAL LEGAL SERVICES OF TORONTO, WOMEN'S LEGAL EDUCATION AND ACTION FUND (LEAF) and CANADIAN ASSOCIATION FOR COMMUNITY LIVING

Interveners

REVISED FACTUM OF THE INTERVENER ELIZABETH METIS SETTLEMENT

OWEN LAW
1660, 10020 – 101 A Avenue
Edmonton, AB. T5J 3G2

Thomas R. Owen
Tel: 780-408-7862
Fax: 780-423-3462
Counsel for the Intervener
Elizabeth Métis Settlement

BURKE-ROBERTSON
70 Gloucester Street
Ottawa, ON. K2P 0A2

Robert E. Houston, Q.C.
Tel: 613-236-9665
Fax: 613-235-4430
Ottawa Agents

ATTORNEY GENERAL OF ALBERTA
4th Floor, 9833 – 109 Street
Edmonton, AB. T5K 2E8

Robert J. Normey & David Kamal
Tel: 780-422-9532
Counsel for the Appellants

GOWLINGS
2600 – 160 Elgin Street
Ottawa, ON. K1P 1C3

Henry S. Brown, Q.C.
Tel: 613-232-1781
Ottawa Agents

FIELD, LLP
2000, 10235 – 101 Street
Edmonton, AB. T5J 3G1

Kegin Feth, Q.C. and Jeremy Taylor
Tel: 780-422-9532
Counsel for the Respondents

NELLIGAN, O'BRIEN
1500, 50 O'Connor Street
Ottawa, ON. K1P 6L2

Dougald E. Brown
Tel: 613-231-8210
Ottawa Agents

CAVANAGH, WILLIAMS
401, 1111 Prince of Wales Dr.
Ottawa, ON. K2C 3T2

Colin Baxter, Ottawa Agent for the Intervener,
Métis Settlements General Council

LANG, MICHENER
3000 – 50 O'Connor Street
Ottawa, ON.

Marie France Major
Ottawa Agents for Intervener East Prairie Metis Settelement

NOEL & ASSOCS.
111 rue Champlain
Gatineau, Quebec

Pierre Landry
Agents for the Intervener, AG Quebec

GOWLINGS
2600 – 160 Elgin Street
Ottawa, ON.

Henry S. Brown, Q.C.
Ottawa Agents for the Interveners, AG Sask.
Metis Nation of Alberta and Metis National Council

BURKE-ROBERTSON
70 Gloucester Street
Ottawa, ON.

Robert E. Houston, Q.C.
Ottawa Agents for the Intervener, AG Ontario

South-Ottawa Community Legal Services
406 – 1355 Bank Street
Ottawa, ON. K1H 8K7

Chantal Tie
Ottawa Agents fro Aboriginal Legal Services Toronto

BORDEN, LADNER
1000 Queen Street, Suite 1100
Ottawa, ON. K1P 1J9

Nadia Effendi
Ottawa Agents for W.L.E.A.F.

COMMUNITY LEGAL SERVICES –OTTAWA CARLETON
422 – 1 Nicholas Street
Ottawa, ON. K1N 7B7

Michael Bossin
Ottawa Agents for Can. Assoc,. for Community Living

NELLIGANS
1500 – 50 O'Connor Street
Ottawa, ON.

Dougald Brown
Ottawa Agents for the Gift Lake Metis Settlement

MACLAREN, CORLETT
50 O'Connor Street, Suite 1625
Ottawa, ON.

Michael A. Chambers
Ottawa Agents for Native Women's Assoc. of Can.

INDEX

PART I – STATEMENT OF FACTS

1. Elizabeth relies on the facts as set out in Alberta's Factum and would add the following facts:

2. Elizabeth Metis Settlement ("Elizabeth") is a Metis settlement created and governed by the *Metis Settlements Act* R.S.A. 2000, c. M-14 (the "*MSA*")[1].

3. In the event that ss. 75 and 90 of the *MSA* are found by this court to be of no force and effect, Elizabeth will directly suffer the harm resulting from that decision.

4. Members of Elizabeth receive a number of benefits, including the right to hold interests in Settlement lands, the right to receive surface revenues, subsidized housing, and such Settlement programs as job training. However, these benefits are from limited Provincial funds, oil and gas revenues, and spin-off employment, and are not enough to sustain a decent standard of living for the existing members of Elizabeth.[2]

5. Provincial benefits provided to the Metis are determined on a per-settlement basis and not on a per-capita basis. Therefore, the larger the membership, the less the per-capita benefit to the membership. As a result, the individual settlement members would be detrimentally affected by an increase in membership of the settlement.

6. The benefits of membership are intended to be reserved for those Metis who are unable to obtain federal benefits from registration as Indians.[3]

7. The Respondents do not self-identify as Indians. They believe that they are regarded by other members of Peavine as being equally Metis and that their registration as Indians does not affect this perception[4].

8. General Council did not pass any policy allowing settlement members who took registration as Indians to remain as settlement members.

PART II – QUESTIONS IN ISSUE

9. The questions in issue in this Appeal are set out at paragraph 25 of the Appellant's Factum.

---

[1] Appellant's Book of Authorities, Tab 37
[2] Reasons for Judgment of chambers judge, para. 199, Appellant's Record ("A.R.") Vol I at 39
[3] *Ibid.*
[4] Reasons for Judgment, para. 7. A.R. Vol I at 50

PART III – STATEMENT OF ARGUMENT

10. Elizabeth adopts the arguments submitted by the Intervener Metis Settlements General Council ("MSGC") and would add the following to their submissions.

Section 15(1)

Registration not an Analogous Ground

11. The Court of Appeal concluded that the basis of registration under the *Indian Act*, R.S.C. 1985, c. I-5 (the "*Indian Act*") is not an enumerated ground. We concur with this finding.

12. However, the Court of Appeal accepted, without analysis, the finding of the chambers judge that registration under the *Indian Act* constitutes an analogous ground[5]. We submit that this was an error. Elizabeth was unable to present argument on this point in the lower courts as we were restricted by Court Order to make representations only in respect of s.25. Had we been free to do so, Elizabeth would have argued in the lower courts that this finding is incorrect.

13. L'Heureux-Dubé J. states, at paragraph 61 of her reasons, with which the rest of the Court agreed, in Corbiere v. Canada (Minister of Indian and Northern Affairs), [1999] 2 S.C.R. 203 ("Corbiere")[6], that the Court can and should have regard to the specific segment of society in question when determining whether the ground of differential treatment is analogous. She concludes that for certain segments of society, a characteristic, such as residence in that case, may be analogous, while for others, it may not be.

14. Although the Majority disagreed with a potential interpretation of the minority decision, they did not contradict this point. They clarified that they could only agree with the minority decision if it meant that a ground, once found to be analogous, was always analogous. That ground may exist only for a certain demographic, but for that demographic, it must always constitute a prohibited basis for discrimination. The only way the Majority could not agree with the minority decision was if it meant that the analogous ground would vary depending on

[5] Reasons for Judgment at paras. 32, 34, A.R. Vol I at 58
[6] A.B.A. Vol. I, Tab 6

the government action in issue[7]. The ground must not vary depending on whether the impugned action is discriminatory.

15. Our submission in this regard accord with the decision of L'Heureux-Dubé J. without contradicting the Majority. Her finding was very specific on this point. The ground which was found to be analogous was not residence generally. It was only the residence of band members and it was only the off-reserve nature of that residence. The ground of discrimination was delineated by the particular nature and circumstances of the particular claimant group and the Majority concurred with this finding.

16. What we submit is that the alleged ground of discrimination in this case be restricted in scope with reference to the specific claimant group. It is not necessary, and in fact it clouds the issue, to consider the ground of discrimination in too broad terms. We submit that the ground should not be defined as all instances of registration under the *Indian Act* for all those who qualify for registration.

17. In the instant case, the claimant group is defined as "Métis who have registered as Indians under the *Indian Act* (since the *MSA* came into effect), but who otherwise meet the criteria for settlement membership"[8] and Elizabeth concurs with that definition. Inherent in this definition is the understanding that in order to be considered Metis, and to meet the criteria for settlement membership, one must self-identify as Metis.

18. We therefore submit that the alleged ground of discrimination in this case is registration under the *Indian Act* by those who both qualify for registration and self-identify as Metis.

19. The Court of Appeal accepts the finding by Shelley J. that registration is an analogous ground. They do not provide any analysis on this point as it was not debated by any of the parties. We submit that they erred in this regard.

20. The reason given by Shelley J. at paragraph 168 for her finding that registration under the *Indian Act* is an analogous ground is that "For those of aboriginal origin, the choice of whether to register under the *Indian Act*, if it is available to them, is an important one to their

---

[7] *Ibid.*, at paras. 7-10
[8] Reasons for Judgment of chambers judge at para. 157, A.R. Vol. I at 32

identity and personhood." We submit that while this may be the case for other aboriginal people, it is, by their own admission, not the case for the claimant group.

21. The evidence before this Honourable Court, and the evidence which was before both lower courts exclusively supports the reverse finding, that the decision to register was one motivated by financial and health concerns. There has been no evidence throughout this case to the effect that, for those who self-identify as Metis, the decision to register as Indian is an important one to their identity and personhood. Therefore we submit that this finding is not supportable and should not be accepted by this Court.

22. In the alternative, if this Court finds that the differential treatment in this case is based on an analogous ground, Elizabeth submits that the differential treatment does not constitute discrimination in any event.

Differential Treatment not Discriminatory

Pre-existing Disadvantage, Stereotyping, Prejudice or Vulnerability

23. The Court of Appeal correctly states at paragraph 41 that, "pre-existing disadvantage only weighs in favour of a discrimination finding where claimants are able to establish that they suffer a unique pre-existing disadvantage; if they are unable to do so, this factor is treated as neutral in the overall analysis."

24. There is no unique, pre-existing disadvantage to registered Indian Metis in contrast to the comparator group[9]. The Court of Appeal finds that the claimants suffer such a disadvantage because of the effect of ss.75 and 90 of the *MSA*[10]. They find that the claimant group suffers the disadvantage of being removed from settlement membership. We submit that this is confusing the issue. The fact that the impugned legislation itself creates a disadvantage is not evidence of a pre-existing disadvantage, stereotyping, prejudice or vulnerability.

25. The Court of Appeal draws a comparison between the decision of the claimants in Corbiere to live off-reserve and the decision of the claimants in this case to register as Indians. The basis

[9] *Ibid.*, at para. 180
[10] Reasons for Judgment at paras. 41,42, A.R. Vol. I at 60

of the comparison is that the disadvantage in this case resulted from the perception by other Metis that those Metis who registered as Indians were less Metis[11].

26. Again, the position and the evidence of the Respondents contradict this comparison. It has been the argument of the Respondents throughout this case that they should not be excluded from settlement membership because their Indian status does not affect their identity as Metis. They state they are equally regarded as Metis by the community, regardless of their registration as Indians[12]. Therefore, it does not lie in their mouths to argue that their registration has caused them to be regarded as less Metis.

27. Furthermore, a person's residency is easily identified and evident. A person's status as an Indian is personal information which is not obvious.

28. Given that it is impossible to identify those who are registered as Indians, it is also impossible for them to have suffered historic disadvantage based on perception. Again, the Court of Appeal relies on the effect of the *MSA* to find disadvantage in this regard. There is no evidence that this perception is pre-existing.

29. The Respondents argue at paragraph 90 of their factum that they are disadvantaged because of the health concerns which caused them to seek registration and the resulting health benefits. They provide no evidence that all Metis who register under the Indian Act do so because of health concerns. Nor do they demonstrate that this disadvantage is unique, that other Metis do not have the same health concerns. Even if the evidence did support such assertions, it is not the legislation itself which draws this distinction. Healthy Metis who qualify for registration are equally able to register and would be equally barred from settlement membership. For all these reasons, this factor cannot be relied on in finding that the claimant group is historically disadvantaged in a way unique from the comparator group.

30. As no other unique, historic disadvantage has been alleged, Elizabeth submits that this factor is neutral in the discrimination analysis.

Basis of Impugned Provisions Relative to Claimants' Actual Circumstances

---

[11] Reasons for Judgment, para. 43, A.R. Vol. I at 60
[12] *Ibid.*, para. 7 at 50

31. The Court of Appeal states at paragraph 44:

> The chambers judge erred by concluding, on the sole basis that registering as Indians was voluntary, that the impugned provisions were not discriminatory, despite the severe effect on the appellants' interests. The choice element is irrelevant to the analysis and the severe effect of the impugned provisions on the appellants supports a discrimination finding.

32. This constitutes a mischaracterization of the conclusions of Shelley J. She does not conclude that the choice to acquire an analogous ground is inconsistent with a finding of discrimination. In fact, she finds that "It should not and does not matter for purposes of this step in the analysis that the Applicants and those who are similarly situated voluntarily chose, as adults, to register under the *Indian Act*."[13]

33. She concludes that the choice to register under the *Indian Act* is a decision related to cultural identity, saying, "The individual Applicants voluntarily registered as Indians under the *Indian Act*, when they were adults, in order to obtain benefits available to Indians under that legislation. In doing so, in my view, they self-identified as Indians."[14] This conclusion is necessary in order to support her finding that registration constitutes an analogous ground. Without this conclusion, registration must be regarded as a pragmatic decision made for the purpose of financial benefit, in which case it could not be considered an analogous ground.

34. Given the finding that registration is relevant to whether one culturally identifies as Indian, the choice to register must be regarded as relevant to whether one culturally identifies as Metis and therefore relevant to whether one qualifies for membership in a Metis Settlement.

35. The Respondents argue that s.27 of the *Charter* dictates that no law should be permitted which prevents them from belonging to all the Aboriginal groups for which they may qualify for membership. Such an application of s.27 would enable an individual to belong to multiple Indian Bands and to multiple Metis Settlements, yet that has never been found to be the necessary outcome of s.27. Furthermore, s.27 was never raised in the courts below and was not referred to in the "Constitutional Questions" stated by the Chief Justice of Canada. Therefore it constitutes a new issue and any arguments which rely on that section should be disregarded by this Honourable Court.

---

[13] Reasons for Judgment of chambers judge, para. 170, A.R. Vol. I at 34
[14] *Ibid.*, para. 203, A.R. Vol. I at 40

Community Acceptance

36. In R. v. Powley, [2003] 2 S.C.R. 207("Powley"), The Supreme Court of Canada "looked to three factors as indicia of Métis identity for the purpose of determining Métis rights under s. 35: self-identification, ancestral connection, and community acceptance"[15].

37. "Subsections 75(1) and 90(1) of the *MSA* cannot be considered in isolation, however. Subsection 75(3.1) and the opening words ("Unless a General Council Policy provides otherwise...") of s. 90 of the *MSA* allow the General Council to adopt policy which eliminates the differential treatment in issue. These provisions represent an initiative towards Métis self-autonomy and self-determination. They serve as recognition that Métis identity is in part defined by community acceptance."[16]

38. "Mr. Collins deposed in a separate affidavit, sworn on February 27, 2007, that he was present at an General Council meeting on September 9, 2004 where a draft "Eligibility & Termination Policy for Registered Indians and Inuk" was presented and discussed. This policy would have allowed settlement councils the discretion to pass bylaws authorizing applications for membership by Indians registered under the *Indian Act* and limiting the application of s. 90 of the *MSA* to terminate membership in a settlement for members who are or become registered as Indians under the *Indian Act*. Mr. Collins indicated that neither Peavine nor any other settlement has made a motion to approve the membership policy or any other membership policy since that meeting"[17]

39. The fact that General Council has not passed a policy limiting the application of s. 90 is evidence that there is no community acceptance of that Registered Indians are also Metis.

Ameliorative Purpose

40. The Court of Appeal dismisses the arguments respecting the ameliorative purpose of the *MSA* and specifically ss.75 and 90 thereof on the basis that they have not been invoked by Metis Settlements except for political purposes. We submit that the actions of settlement councils in applying a given legislative provision are not relevant to a determination of the constitutionality of that provision.

---

[15] Reasons for Judgment of chambers judge, para. 187, A.R. Vol. I at 37
[16] *Ibid.*, para 195, A.R. Vol I at 39
[17] *Ibid.*, para 201 A.R. Vol. I at 40

41. It is submitted that the ameliorative purpose of the *MSA* is to benefit the Metis people of Alberta, as an Aboriginal People distinct from Indians and Inuit. The impugned provisions serve this purpose by distinguishing Metis people from other Aboriginal peoples and defining which people the *MSA* is intended to benefit.

42. The Respondents argue at paragraph 70 of their Factum that the Impugned provisions do not serve the ameliorative purpose of self-government because they do not give the individual settlements the authority to determine whether registered Indians may be granted membership. The *MSA* gives this authority to MSGC. Elizabeth submits that this is consistent with the centralized form of self-government set out in the *MSA*. MSGC holds title to Metis lands throughout the province and has policy-making authority over many matters respecting the governance of settlements. There has been no suggestion that the settlements should have absolute independence as discrete entities. The scheme of the *MSA* is one of centralized authority in which the MSGC represents the interests of the settlements collectively. The impugned provisions are consistent with this scheme.

PART IV – SUBMISSIONS REGARDING COSTS

43. Elizabeth does not seek any Order regarding costs.

PART V – ORDER SOUGHT

44. Elizabeth asks that Alberta's appeal be allowed and that the Order of the Court of Appeal be set aside.

All of which is respectfully submitted this 8 day of December, 2010.

Thomas R. Owen
Owen Law
Counsel for the Intervener Elizabeth Metis Settlement

By their agents
BURKE-ROBERTSON LLP
Per: Robert Houston Q.C.

PART VI – LIST OF AUTHORITIES

Case	Paragraph
Alberta (Minister of Justice) v. Metis Settlements Appeal Tribunal, 367 A.R. 34 (ABCA).	9
Corbiere v. Canada (Minister of Indian and Northern Affairs) [1999] 2 S.C.R. 203.	13, 14, 21
R. v. Kapp, [2008] 2 S.C.R. 483.	37, 41, 46,

Recital to and sections 75 and 90 of the *Metis Settlements Act* R.S.A. 2000, c. M-14

Schedule to and Sections 15, 25 and 35(2) of *The Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11

Constitution of Alberta Amendment Act, 1990, R.S.A. 2000, c. C-24

Alberta Act I, 1905, 4-5 Edw. VII, c. 3 (Can.)

PART VII – STATUTORY OR OTHER PROVISIONS

Metis Settlements Act R.S.A. 2000, c. M-14

Alberta (Minister of Justice) v. **Métis Settlements Appeal Tribunal**

Minister of Justice and Attorney General of **Alberta** (Appellant / Intervener) and **Hazel Vicklund** (Not Party to **Appeal** / Appellant) and Peavine **Métis** Settlement (Not Party to **Appeal** / Respondent) and Judy Willier (Not Party to **Appeal** / Affected Party) and **Métis Settlements Appeal Tribunal** (Respondent / Respondent) and Elizabeth **Metis** Settlement (Applicant)

Alberta Court of Appeal

Fraser C.J.A., Costigan, Ritter JJ.A.

Heard: March 17, 2005
Oral reasons: March 17, 2005
Written reasons: April 6, 2005
Docket: Edmonton Appeal 0403-0352-AC

Counsel: M.A. Unsworth for Appellant / Minister of Justice and Attorney General of Alberta

R.S. Maurice for Respondent / Métis Settlements Appeal Tribunal

T.R. Owen for Applicant, Elizabeth Metis Settlement

Subject: Public; Civil Practice and Procedure; Constitutional

Aboriginal law --- Practice and procedure — Parties — Intervenors

Appeal Tribunal found that s. 75(2)(a) of Métis Settlements Act was of no force or effect because it violated s. 15 of Canadian Charter of Rights and Freedoms — Effect was to expand categories of Indians eligible for membership in settlement — Alberta was granted leave to appeal on questions related to ss. 1 and 15 of Charter — Chambers justice declined to add Elizabeth Métis Settlement as party — Elizabeth Métis Settlement then applied for intervenor status — Application granted — Settlement had special interest as it was directly affected by tribunal's decision — Settlement was also permitted to raise possible application of s. 25 of Charter — Case was exception to rule refusing intervenors to expand issues on appeal — Application of ss. 1 and 15 were arguably inextricably linked to s. 25.

Cases considered by *Fraser C.J.A.*:

Athabasca Tribal Council v. Alberta (Minister of Environmental Protection) (1998), 1998 CarswellAlta 980, 67 Alta. L.R. (3d) 232, 26 C.P.C. (4th) 98, [1999] 6 W.W.R. 20, (sub nom. *Ahyasou v. Alberta (Minister of Environmental Protection)*) 235 A.R. 387, 13 Admin. L.R. (3d) 254, 1998 ABQB 875 (Alta. Q.B.) — referred to

Deloitte & Touche LLP v. Ontario (Securities Commission) (2003), 2003 SCC 61, 2003 CarswellOnt 4121, 2003 CarswellOnt 4122, 37 B.L.R. (3d) 161, 232 D.L.R. (4th) 1, 310 N.R. 376, 13 Admin. L.R. (4th) 1, [2003] 2 S.C.R. 713, 179 O.A.C. 1 (S.C.C.) — considered

Elizabeth Metis Settlement v. Metis Settlements Appeal Tribunal (2004), 2004 ABCA 418, 2004 CarswellAlta 1748 (Alta. C.A.) — referred to

Indian Residential Schools, Re (2000), 2000 ABCA 217, 2000 CarswellAlta 780, 2 C.P.C. (5th) 243 (Alta. C.A.) — referred to

R. v. Morgentaler (1993), [1993] 1 S.C.R. 462, 1993 CarswellNS 429, 1993 CarswellNS 429F (S.C.C.) —

referred to

Charter?

(2) Did the Tribunal fail to properly consider and apply s. 15(2) of the *Charter*?

(3) Did the Tribunal err in its application of s. 1 of the *Charter*?

3 The chambers justice also declined to add the Elizabeth Metis Settlement (Settlement) as a party to the subject action but left open the possibility of the Settlement's applying to a panel of this Court for intervener status. Hence, the Settlement now seeks to be added as an intervener on this appeal.

4 Intervener status may be granted when the proposed intervener will be specially affected by the decision facing the Court or has some special expertise or insight to bring to bear on the issues facing the Court: *R. v. Morgentaler*, [1993] 1 S.C.R. 462 (S.C.C.) at para. 1; *Indian Residential Schools, Re* (2000), 2 C.P.C. (5th) 243, 2000 ABCA 217 (Alta. C.A.) at para. 10, citing *Athabasca Tribal Council v. Alberta (Minister of Environmental Protection)* (1998), 235 A.R. 387, 1998 ABQB 875 (Alta. Q.B.) at para. 4. Intervener status may also be granted where the proposed intervener's interest in the proceedings may not be fully protected by the parties: *United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)* (2002), 312 A.R. 351, 2002 ABCA 243 (Alta. C.A.).

5 However, it is inappropriate for an intervener to extend legal argument well beyond what the courts below and the parties have advanced: *Deloitte & Touche LLP v. Ontario (Securities Commission)* (2003), 232 D.L.R. (4th) 1, [2003] S.C.J. No. 62 (S.C.C.) at para. 31 (per Iacobucci J. for the Court).

6 The Settlement asserts that it has a special interest in the appeal and will be directly affected by it because the Tribunal's decision changes the criteria the Settlement is required to use when admitting members. The Settlement wishes to argue on appeal that the Tribunal erred by failing to consider or apply s. 25 of the *Charter*. The Settlement asserts that it should be permitted to make this argument since it will not be made by the other parties to the appeal and the decision of this Court may bind the Settlement.

7 While Alberta does not object to the Settlement being added as an intervener, Alberta argues that the issues on appeal should not be expanded so as to include the potential applicability of s. 25 of the *Charter*. Alberta argues that it has only been granted leave to appeal on specific questions of law and the Settlement is seeking to expand the issues on appeal by raising s. 25.

8 While an intervener is not generally permitted to expand the issues on appeal, this situation is unique. This is not a case where an intervener seeks to argue a section of the *Charter* unrelated and unlinked to a section already in dispute. Section 15 of the *Charter*, which is the foundational basis for Ms. Willier's claim here, is arguably, in this context, inextricably linked to s. 25, and indeed possibly to both s. 28 and s. 35. Thus, in deciding whether the Tribunal erred in concluding that s. 75(2)(a) of the *Metis Settlements Act* infringed s. 15, it is difficult to understand how a Court could answer that question without considering any relevant sections of the *Charter* or the *Constitution Act*, 1982 bearing on the proper interpretation of s. 15 in this context. Therefore, we do not accept that this Court can, and should, deal with the proper interpretation of s. 15 in the context of this case in a statutory vacuum without reference to any other possibly relevant sections of the *Charter*, other than s. 15(2) or s. 1.

9 Accordingly, we have concluded that not only is it appropriate to grant intervener status to the Settlement, but the Settlement should also be entitled to raise the possible application of s. 25 of the *Charter*. The Settlement has confirmed that it will not be leading any additional evidence beyond that adduced to date. Alberta has advised that it may wish to call additional evidence depending on the arguments made by the Settlement, and presumably Ms. Willier. We leave this issue of fresh evidence by Alberta for consideration by the appeal panel hearing this appeal.

10 There remains the issue of Ms. Willier's representation. She is the only one whose substantive rights are directly affected by the Tribunal's decision and the only one arguing for a robust interpretation of s. 15. But she is unrepresented. Both Alberta and the Settlement oppose Ms. Willier's interests, albeit for different reasons. Since the

Tribunal is effectively precluded from arguing the merits of its own decision, that leaves no one to take a position opposite to Alberta's and the Settlement's. This being so, and given the significant public interest dimension to this issue, we consider this an appropriate case in which to appoint an *amicus curiae* to represent Ms. Willier's interests

SCHEDULE TO THE CONSTITUTION ACT, 1982

MODERNIZATION OF THE CONSTITUTION

Item	Column I Act Affected	Column II Amendment	Column III New Name
1.	British North America Act, 1867, 30-31 Vict., c. 3 (U.K.)	(1) Section 1 is repealed and the following substituted therefor: "1. This Act may be cited as the *Constitution Act, 1867*." (2) Section 20 is repealed. (3) Class 1 of section 91 is repealed. (4) Class 1 of section 92 is repealed.	Constitution Act, 1867
2.	An Act to amend and continue the Act 32-33 Victoria chapter 3; and to establish and provide for the Government of the Province of Manitoba, 1870, 33 Vict., c. 3 (Can.)	(1) The long title is repealed and the following substituted therefor: "*Manitoba Act, 1870*." (2) Section 20 is repealed.	Manitoba Act, 1870
3.	Order of Her Majesty in Council admitting Rupert's Land and the North-Western Territory into the union, dated the 23rd day of		Rupert's Land and North-Western Territory Order

	June, 1870		
11.	Canadian Speaker (Appointment of Deputy) Act, 1895, 2nd Sess., 59 Vict., c. 3 (U.K.)	The Act is repealed.	
12.	The Alberta Act, 1905, 4-5 Edw. VII, c. 3 (Can.)		Alberta Act
13.	The Saskatchewan Act, 1905, 4-5 Edw. VII, c. 42 (Can.)		Saskatchewan Act
14.	British North America Act, 1907, 7 Edw. VII, c. 11 (U.K.)	Section 2 is repealed and the following substituted therefor: "2. This Act may be cited as the *Constitution Act, 1907*."	Constitution Act, 1907
15.	British North America Act, 1915, 5-6 Geo. V, c. 45 (U.K.)	Section 3 is repealed and the following substituted therefor: "3. This Act may be cited as the *Constitution Act, 1915*."	Constitution Act, 1915
16.	British North America Act, 1930, 20-21, Geo. V, c. 26 (U.K.)	Section 3 is repealed and the following substituted therefor: "3. This Act may be cited as the *Constitution Act, 1930*."	Constitution Act, 1930
17.	Statute of Westminster, 1931, 22 Geo. V, c. 4 (U.K.)	In so far as they apply to Canada, (*a*) section 4 is repealed; and (*b*) subsection 7(1) is	Statute of Westminster, 1931

repealed.