SCC 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- APPELLANTS

REGISTRAR, MÉTIS SETTLEMENTS LAND REGISTRY

-and- APPELLANTS
(Respondents)

BARBARA CUNNINGHAM

-and- RESPONDENTS
(Appellants)

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

-and- RESPONDENTS
(Appellants)

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

INTERVENERS

FACTUM OF THE INTERVENER, THE ATTORNEY GENERAL FOR SASKATCHEWAN

ATTORNEY GENERAL FOR SASKATCHEWAN
8th Floor, 1874 Scarth Street
REGINA SK S4P 3V7
Counsel: P. Mitch McAdam and James Fyfe
Telephone: (306) 787-7846 / (306)787-7886
Facsimile: (306) 787-9111
Counsel for the Respondent,
Attorney General for Saskatchewan

GOWLING LAFLEUR HENDERSON LLP
2600 - 160 Elgin Street
OTTAWA ON K1P 1C3
Agent: Henry Brown, Q.C.
Telephone: (613) 233-1781
Facsimile: (613) 563-9869
Ottawa Agent for the Intervener,
Attorney General for Saskatchewan

TABLE OF CONTENTS

PART I

OVERVIEW OF POSITION AND STATEMENT OF FACTS

1. The Attorney General for Saskatchewan has intervened in these proceedings in support of the position of the Attorney General for Alberta that the exclusion of status Indians from the benefits of the *Métis Settlements Act* does not infringe section 15 of the *Canadian Charter of Rights and Freedoms*. The Attorney General accepts the Statement of Facts set out at paragraphs 13 to 24 of the Appellant's Factum and also draws the Court's attention to the historical background concerning the *Métis Settlements Act* set out at paras. 5 to 28 of the decision of the Chambers Judge.

> *Métis Settlements Act*, R.S.A. 2000, c. M-14, *Canadian Charter of Rights and Freedoms*, being Part I of the *Constitution Act, 1982* R.S.C. 1985, Appendix II, No. 44.

PART II

STATEMENT OF ISSUES

2. On April 28, 2010, the Chief Justice set Constitutional Questions for the appeal dealing with sections 2(d), 7 and 15 of the *Charter*. The Attorney General participates in this appeal by right pursuant to Rule 61(4) of the *Rules of the Supreme Court of Canada* and a Notice of Intervention filed on June 3, 2010.

3. The Attorney General intends to address only two of the issues raised by the appeal. They are:

a. Whether the exclusion of status Indians from the purview of the *Métis Settlements Act* is immune from review under section 15 of the *Charter* as a result of the principle that section 15 cannot render unconstitutional distinctions that are expressly permitted by the Constitution? and

b. If the exclusion of status Indians is subject to scrutiny under section 15, whether the *Métis Settlements Act* qualifies as a law, program or activity that has as its objective the amelioration of conditions of a disadvantaged group within the meaning of section 15(2) and therefore is not precluded by section 15(1)?

4. It is the Attorney General's position that Alberta's decision to exclude status Indians from an entitlement to be registered as members of a Métis Settlement simply reflects the fact that "Indians" fall within the exclusive legislative jurisdiction of Parliament under section 91(24) of the *Constitution Act, 1867* and that this exclusion is therefore immune from review under section 15 of the *Charter*.

Constitution Act, 1867, R.S.C. 1985, Appendix II, No. 5.

5. In the alternative, if the Court determines that the exclusion of status Indians from the purview of the *Métis Settlements Act* can be reviewed under section 15 of the *Charter*, it is the Attorney General's position that the *Act* falls squarely within section 15(2) as a law with the objective of ameliorating the conditions of disadvantaged Métis in northern Alberta by providing them with a land base and self-government. The exclusion of status Indians from this regime is rationally related to achieving this objective. The Alberta Court of Appeal applied the wrong test in reaching the contrary conclusion and, in doing so, failed to apply the directions of this Court in *R. v. Kapp*.

R. v. Kapp [2008] 2 S.C.R. 483.

PART III

ARGUMENT

A. Saskatchewan's Interests

6. The Province of Saskatchewan has not enacted Métis self-government legislation similar to the *Métis Settlements Act*. The Province has, however, enacted *The Métis Act* which recognizes the contributions of the Métis people to the development and prosperity of Canada and which commits the Government of Saskatchewan to work together with the Métis Nation-Saskatchewan through a bilateral process to address important issues concerning land, harvesting and governance. The Province is about to embark upon negotiations with the Métis Nation – Saskatchewan about harvesting rights. The outcome of this appeal will have a direct impact on those negotiations. The Métis Nation – Saskatchewan has adopted a definition of Métis which requires its citizens to be "distinct from other Aboriginal peoples" and which excludes status Indians. It will be much more difficult for the Province and the Métis Nation-Saskatchewan to reach any agreement with respect to this issue if status Indians will be entitled to benefit. Indians in Saskatchewan have already had their land claims settled through the Numbered Treaties and they have recognized hunting, fishing and trapping rights; reserve lands and self-government under the *Indian Act*. Given the collective nature of these interests, allowing individual status Indians to also claim the benefits of settlements with the Métis is constitutionally unnecessary and amounts to the off-loading of federal responsibilities onto the provinces.

> *The Métis Act*, S.S. 2001, c. M-14.01; *Indian Act*, R.S.C. 1985, c. I-5.

7. As well, historically the Province has had economic development programs and social programs that are available only to Métis. For example, the Province currently provides funding to the Clarence Campeau Development Fund. The purpose of this Fund is to facilitate Métis

economic development by providing equity for Métis businesses and assistance with the development of management skills for Métis business owners and entrepreneurs. First Nations people are not eligible to apply for assistance from this Fund. They can, however, apply for funding under a similar program, the First Nations Trust. The decision of this Court will determine whether the Province can, as a matter of constitutional law, establish separate programs and policies for First Nations and Métis in the future or whether the benefits of these programs must always be available to both.

B. Historical Background

8. The *Métis Settlements Act* has its genesis in the *Métis Population Betterment Act* which was enacted by the Alberta Legislature in 1938. The Act resulted from the work of the Ewing Commission which investigated the plight of Alberta's Métis in the mid-1930's and recommended the establishment of the Métis farm colonies as a means to address poverty and other social issues facing the Métis at the time. The Commission specifically rejected "a scheme which would give to the half-breeds the status of the Indians and thereby make him a ward of the Government." The *Métis Population Betterment Act* specifically provided that Indians were not eligible for membership in the settlements. They were, quite simply, the responsibility of the federal government, not the Province. This exclusion has been retained in the legislation to the present day.

> *The Métis Population Betterment Act*, S.A. 1938 (2nd session), c. 6 s. 2(a); *The Métis Population Betterment Act, 1940*, S.A. 1940, c. 6; *The Métis Population Betterment Act*, R.S.A. 1942, c. 329; *The Métis Betterment Act*, R.S.A. 1955, c. 202 and *The Métis Betterment Act*, R.S.A. 1970, c. 233, see also *Report of the Royal Commission Appointed to Investigate the Conditions of the Half-Breed Population of Alberta*, 1936 which is Exhibit A to the Affidavit of Dennis Cunningham, Appellant's Record, Vol. II, at p. 125.

9. The current Métis settlements legislation flowed out of an Agreement known as the Alberta-Métis Settlements Accord entered into between Alberta and the Federation of Métis Settlement Associations in 1989. The goals of the Accord were to secure a land base for future generations of Métis, to provide local autonomy over their own affairs and to provide opportunities for the Métis to achieve economic self sufficiency. The Accord resulted in a package of legislation being adopted by Alberta including the *Constitution of Alberta Amendment Act* which entrenched the Métis Settlements' right to their lands in Alberta's Constitution.

> *Métis Settlements Accord Implementation Act*, R.S.A. 2000, c. M-15, *Métis Settlement Land Protection Act*, R.S.A. 2000, c. M-16; and *Constitution of Alberta Amendment Act, 1990*, R.S.A. 2000, c. C-24.

10. In order to address the issues raised in this case properly, it is submitted that it is necessary for the Court to understand three contextual factors. First, that while a comprehensive and universally accepted definition of "Métis" does not exist, the Métis have always been considered to be a separate and distinct people from Indians. Second, that the constitutional place for the Métis within our country - ie, whether the Métis are "Indians" for the purposes of section 91(24) of the *Constitution Act, 1867* – has not been resolved by this Court. Only the Government of Alberta has enacted comprehensive Métis legislation. Third, the federal *Indian Act* during much of its existence has expressly denied Métis the right to be registered as Indians.

11. "Who are the Métis?" is a vexing question which has attracted much academic discussion and debate. Some authors suggest that in order to be Métis, an individual simply has to trace his or her ancestry to someone who was Métis as demonstrated by the receipt of Métis lands or scrip. Others suggest that it is primarily a matter of cultural affiliation. It is nevertheless clear that however Métis are defined, the Métis emerged in the late 18th or early 19th centuries through a

process of ethnogenesis as a distinct people who were and continue to be separate from both their First Nations and their European ancestors.

> See generally, Catherine Bell "*Who are the Métis People in Section 35(2)?*" (1991) 29 Alta. Law Rev. 351; Larry N. Chartrand "*The Definition of Métis Peoples in Section 35(2) of the Constitution Act, 1982*" (2004) 67 Sask. Law Rev. 209 and John Giokas and Paul L.A.H. Chartrand, "Who Are the Métis? A Review of the Law and Policy" in Paul L.A.H. Chartrand, ed., *Who Are Canada's Aboriginal Peoples?* (Saskatoon: Purich Publishing Ltd., 2002).

12. In *R. v. Powley*, this Court discussed Métis Aboriginal rights protected by section 35(1) of the *Constitution Act, 1982* for the first time and posited the following general definition of Métis:

> The term Métis in section 35 does not encompass all individuals with mixed Indian and European heritage; rather, it refers to distinctive peoples who in addition to their mixed ancestory, developed their own customs, way of life, and recognizable group identity separate from their Indian or Inuit and European forebears. [Emphasis added.]
>
> *R. v. Powley* [2003] 2 S.C.R. 207, at para. 10; *Constitution Act, 1982*, R.S.C. 1985, Appendix II, No. 44.

13. Historically, Indians and Métis have been considered to be separate categories of people for legal purposes. While the dividing line between the categories is not a bright line and it has always been recognized that some individuals can move back and forth between the categories, the historical fact is and remains that Indians and Métis are separate peoples and individuals have not been permitted to claim benefits as both Indians and Métis at the same time. The legal distinction between Indians and Métis, and the dilemma that sometimes arise from it, is demonstrated by the following passage from the report of M.G. Dickieson, who was responsible for making annuity payments to Treaty 4 Indians in 1876 and which is contained in the Annual Report of the Department of the Interior for the year ended June 30, 1876:

> The question as to who is or who is not an Indian is a difficult one to decide, many whose forefathers were Whites, follow the customs and habits of the Indians and have always been recognized as such.
>
> The Chiefs, Côte, George Gordon and others, and likewise a large proportion of their Bands, belonging to this class. A second class have little to distinguish them from the former, but have not altogether followed the ways of the Indians. A third class again have followed the ways of the Whites more than those of the Indians, while others have followed the habits of the Whites and have never been recognized, or accounted themselves as anything but Half-breeds.
>
> The distinction between the first and fourth of these classes into which I have for convenience divided the Half-breeds is marked enough, but the difference between the first and second, the second and third, and third and fourth is very slight, and not obvious.
>
> The question then arises—where shall the line be drawn to decide who is or who is not an Indian? The Indian Act of last session, which defines that an "Indian shall be any male person of Indian blood reputed to belong to any particular Band" or "any child of such person," does not cover the ground, for under the strict interpretation of the law, as I understand it, many who are of pure Indian blood would be excluded as they have never belonged to "any particular Band," and a few of these have followed to a considerable extent the customs of the Whites. When the payments were made in 1875, some Half-breeds, who though residing among, had never followed the habits of the Indians, were admitted. This was sanctioned by the Act 31 vic. cap. 42, clause 15, which provided that "all persons residing among these Indians, of whom their parents, from either side, were descended from Indians or reputed Indians belonging to the nation, tribe or particular people of Indians intrusted in real estate or their descendants, should be accounted as Indians." I could not refuse these their annuities since they now belonged to a Band, and accordingly paid them.
>
> You will understand the difficulty of the position I was placed in, when I had to refuse to pay the brothers, sisters, and in some instances the parents of these persons.
>
> Annual Report of the Department of the Interior for the Year Ended 30th June, 1876 in *Sessional Papers*, 1877, No. 11, at p. xxxiv.

14. It is submitted that the Court can take judicial notice of this report because it is a public document of an historical nature.

R. v. Sioui [1990] 1 S.C.R. 1025 at p. 1050.

had received or been allotted "half-breed lands" or money scrip and their descendants. After the amendments to the *Act* in 1951, attempts were made to purge Métis from Band lists.

> *The Indian Act, 1876* S.C. 1876, c. 18, s. 3(3)(e); *An Act to amend "The Indian Act, 1876"*, S.C. 1879, c. 34, s. 1; *The Indian Act, 1880*, S.C. 1880, c. 28, s. 14; *An Act to further amend "The Indian Act, 1880"*, S.C. 1884, c. 27, s. 4; *The Indian Act*, R.S.C. 1886, c. 43, s. 13; *An Act to further amend "The Indian Act"*, S.C. 1888, c. 22, s. 1; *Indian Act*, R.S.C. 1906 c. 81, s. 16; *An Act to Amend the Indian Act*, S.C. 1914, c. 35, ss. 3 and 4; *Indian Act*, R.S.C. 1927, c. 98, s. 16; *The Indian Act*, S.C. 1951, c. 29, ss. 12(1)(a)(i) and (ii); *Indian Act*, R.S.C. 1970, c. I-6, ss. 12(1)(a)(i) and (ii).
>
> See, for example, *Re: Poitras* (1956) 20 W.W.R. 545 (Sask. Dist. Ct.) and *Re: Samson Indian Band* (1957) 21 W.W.R. 455 (Alta. Dist. Ct.).

18. The express exclusion of Métis scrip recipients and their descendents remained in the *Indian Act* until 1985. The fact that one's ancestor took scrip is no longer an absolute bar to registration as an Indian, but still may be a relevant consideration.

> See, for example, *Canada (Registrar of Indian Register) v. Sinclair* [2001] 4 C.N.L.R. 11 (F.C. – T.D.), appeal allowed [2004] 2 C.N.L.R. 19 (F.C.A.); leave to appeal refused [2004] 1 S.C.R. xiv.

C. Immunity from Charter Review

19. The specific question that arises in this appeal is whether it is permissible for Alberta to exclude status Indians from the purview of its Métis self-government legislation. In order to resolve this question, it is necessary for the Court to assume that the *Métis Settlements Act* is within the legislative jurisdiction of Alberta and that the *Act* as a whole does not infringe upon section 15 of the *Charter*. The validity of either of these assumptions may be questioned.

20. To begin with, this Court has never been asked to resolve the debate concerning whether Métis are "Indians" for the purposes of section 91(24) of the *Constitution Act, 1867*. The

academic commentary on this point is divided and lower court judgments are inconclusive. Of course, if Métis are "Indians" for the purposes of section 91(24), then only Parliament can enact Métis self-government legislation and the *Métis Settlements Act* is wholly *ultra vires*.

> Clem Chartier "Indian: Analysis of the Term" (1978) 43 Sask. Law Rev. 37; Bryan Schwartz, *First Principles: Constitutional Reform with Respect to the Aboriginal Peoples of Canada 1982-1984* (Kingston: Institute of Intergovernmental Relations, 1985) at pp. 183-228.

21. However, even if this Court were to conclude that Métis are not section 91(24) Indians and therefore do not fall within the exclusive jurisdiction of the federal government, it does not necessarily follow that the provinces would have jurisdiction to enact Métis self-government legislation. The provinces do not have an express grant of legislative jurisdiction over the Métis and any provincial Métis self-government legislation would necessarily exclude others on the basis of race or ethnic origin and could run afoul of section 15 of the *Charter*.

22. The Attorney General will nevertheless assume for the purposes of this appeal that the *Métis Settlements Act* is *intra vires* and that the Act, as a whole, does not offend the equality guarantees set out in sections 15 of the *Charter*.

23. Once it is assumed that Alberta can enact Métis self-government legislation, then it is the Attorney General's position that Alberta's decision to exclude status Indians from the purview of the legislation simply reflects the fact that Parliament has legislative jurisdiction over Indians and Indian self-government under section 91(24) of the *Constitution Act, 1867* and that the exclusion is accordingly immune from review under section 15 of the *Charter*.

24. The Attorney General's position is based upon the principle that section 15 of the *Charter* cannot render unconstitutional distinctions which are expressly permitted by the *Constitution Act, 1867*.

25. The Attorney General acknowledges that this argument is not being relied upon by the Attorney General for Alberta and was not raised in the courts below. Nevertheless, it is submitted that it is proper for the Attorney General, as an intervener, to raise this argument because it is a purely legal argument directly related to one of the key issues in the case, it does not require the proof of any additional facts and it should not take the Respondents by surprise or otherwise prejudice them.

> *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)* 2005 SCC 69, at paras. 40 and 41.

26. This principle was initially expressed by Estey J. in *Reference re Bill 30*. The issue in that case concerned Ontario's decision to extend funding to Roman Catholic high schools and whether this decision violated the equality rights of other religious groups in the province. This Court held that the decision to extend funding to Roman Catholic high schools was constitutionally permitted by section 93 of the *Constitution Act, 1867*, which was part of the original Confederation bargain, and, therefore, could not be annulled by section 15 of the *Charter*. During the course of his judgment, Estey J. described the role of the *Charter* as follows:

> The role of the *Charter* is not envisaged in our jurisprudence as providing for the automatic repeal of any provisions of the Constitution of Canada which includes all of the documents enumerated in s. 52 of the *Constitution Act, 1982*. Action taken under the *Constitution Act, 1867* is of course subject to *Charter* review. That is a far different thing from saying that a specific power to legislate as existing prior to April, 1982, has been entirely removed by the simple advent of the *Charter*. It is one thing to legislate; it is quite another thing to say that an entire power to legislate has been removed from the Constitution by the introduction of this judicial power of supervision. The power to establish or add to a system of Roman Catholic separate schools found in s. 93(3) expressly contemplates that the

> province may legislate with respect to a religiously-based school system funded from the public treasury. Although the *Charter* is intended to constrain the exercise of legislative power conferred under the *Constitution Act, 1867* where the delineated rights of individual members of the community are adversely affected, it cannot be interpreted as rendering unconstitutional distinctions that are expressly permitted by the *Constitution Act, 1867*. [Emphasis added.]
>
> *Reference re Bill 30, An Act to Amend the Education Act (Ont.)* [1987] 1 S.C.R. 1148, at pp. 1206-1207; see also, at p. 1198 per Wilson J.; *Chiarelli v. Canada (Minister of Employment and Immigration)* [1992] 1 S.C.R. 711, at p. 736; *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly* [1993] 1 S.C.R. 319, at pp. 373 and 390; *Adler v. Ontario* [1996] 3 S.C.R. 609, at paras. 38 and 47; *Gosselin (Tutor of) v. Quebec (Attorney General)* [2005] 1 S.C.R. 238, at paras. 21 to 27; and *Charkaoui v. Canada (Citizenship and Immigration)* [2007] 1 S.C.R. 350, at para 129.

27. At para. 79 of his judgment, Estey J. drew an analogy between section 93 and section 91(24). Estey J. was clearly of the view that any federal legislation enacted under the auspices of section 91(24) could not be attacked under section 15 of the *Charter* even though that legislation was necessarily aimed at a specific racial group, namely, Indians. It must be acknowledged that this type of race-based legislation does not fit well with the egalitarian concepts embodied in section 15 of the *Charter*. However, as is clear from Estey J.'s comments in *Reference re Bill 30*, section 15 cannot be interpreted in a way that would be tantamount to repealing section 91(24).

> See also: P.W. Hogg "The Canadian Bill of Rights – "Equality Before The Law" – *A.G. Can. v. Lavell*" (1974) 52 Can. Bar Rev. 263.

28. It is submitted that the same principle should apply to the provincial legislation in issue in this case. First, the exclusion of status Indians from the *Métis Settlements Act* simply recognizes that Indians and Indian self-government are matters falling within exclusive federal jurisdiction under section 91(24). The recognition of this constitutional reality should not be seen as offending the equality guarantees set out in section 15 of the *Charter*. Any decision that it is

unconstitutional for Alberta to exclude status Indians from its Métis self-government legislation ignores the dividing line that must exist between Indians and Métis if one group is to be within federal jurisdiction and the other is to be within provincial jurisdiction.

29. Clearly, it would be unconstitutional for Alberta to enact Indian self-government legislation. Section 15 cannot be relied upon to expand provincial legislative powers into a realm that is otherwise within exclusive federal jurisdiction. However, this is the effect of the Alberta Court of Appeal's decision. The Court of Appeal has done by judicial intervention what the Alberta Legislature could not do either directly or indirectly. This is not to suggest that Alberta's legislation could not embrace Métis people who are also considered to be Indians, if the Legislature chose to include them. Given the imprecise boundary between Indians and Métis, the Court should provide deference to both Parliament and provincial legislatures to define the scope of their self-government legislation.

30. Second, a necessary corollary to the exclusive federal jurisdiction over Indians under section 91(24) must be a province's authority to exclude Indians from the ambit of provincial legislation in appropriate cases. In many situations, this exclusion will arise by operation of law through the application of either the doctrine of inter-jurisdictional immunity or the doctrine of paramountcy. However, it is submitted that provinces also have the constitutional power to expressly exclude Indians from the operation of certain provincial laws such as the provincial Métis self-government legislation at issue in this case.

31. In *Kitkatla Band*, this Court recognized that provincial legislation dealing with heritage property could make specific provision for Aboriginal artifacts without running afoul of section

91(24). The mere mention of the word "Indian" in provincial law does not render the law *ultra vires*. LeBel J. described the impugned legislation in that case as being tailored, whether by design or by operation of constitutional law, to not affect the established rights of Aboriginal peoples. Just as British Columbia can tailor its heritage property legislation to respect Aboriginal rights, it is submitted that Alberta can tailor its Métis self-government legislation to respect federal jurisdiction over Indians.

> *Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture)* [2002] 2 S.C.R. 146 at paras. 66 and 71.

32. While the Attorney General fully acknowledges that this power could not be utilized to exclude Indians from the benefits of provincial laws of general application such as those providing universal social programs , at least where no comparable federal programs exist, the situation in this case is quite different. The *Métis Settlements Act* is provincial legislation which deals with the Métis *qua* Métis. The benefits of this legislation are not available to everyone in the Province. Alberta is entitled to exclude status Indians on the same basis as it is entitled to exclude the members of any other racial or ethnic group. In fact, status Indians are better positioned than others who do not meet the eligibility requirements of the *Act* because status Indians can take advantage of the benefits of Indian self-government under the *Indian Act* regime.

33. Third, if it is assumed that the Province has an implied power under section 92 of the *Constitution Act, 1867* to enact Métis self-government legislation, then this power must stand on the same footing as Parliament's power to enact Indian self-government legislation under section 91(24) and must be immune from review under section 15 of the *Charter*. An analogy can be drawn to the finding of the majority of this Court in *Adler* that an implied power to legislate with respect to public schools is protected by section 93 and is insulated from *Charter* review. In fact,

the case here stands on a stronger footing because the Province's implied power is specific to Métis, as opposed to being a plenary power,

Adler, supra, at paras. 41-47.

34. Furthermore, any provincial power to enact Métis self-government legislation must necessarily include the power to exclude people who are not Métis. This means that the power includes the ability to define "who is Métis" for the purposes of the legislation. This ability is essential to any meaningful exercise of the power. It goes to the very core of the power. It is therefore submitted that a decision to strike down provisions of the legislation because the definition of Métis is underinclusive by omitting status Indians would strike at the core of the power and be tantamount to eliminating the power. Once it is assumed that the Constitution permits Alberta to legislate in this area and to define Métis in race-specific terms, it cannot be a violation of section 15 for Alberta to do so, even if some people who consider themselves to be Métis are excluded.

35. For all of the foregoing reasons, the Attorney General submits that the exclusion of status Indians from the purview of the *Métis Settlements Act* is immune from review under section 15 of the *Charter* because the exclusion reflects the fact that Indians are under federal jurisdiction and, as we must assume for the purposes of this case, Métis are not. Therefore, the distinction is authorized by section 91(24) of the *Constitution Act, 1867* and the constitutional implications that arise therefrom.

D. Section 15(2)

36. The Attorney General also submits that the impugned provisions are not subject to review under section 15(1) of the *Charter* because they form part of ameliorative legislation falling within

the meaning of section 15(2) of the *Charter*. The Alberta Court of Appeal made a number of errors in its section 15(2) analysis and its decision should be overturned on that basis.

1. Deference and Section 15(2)

37. In *R. v. Kapp*, Chief Justice McLachlin and Justice Abella outlined for the Court a test for section 15(2) that "permits significant deference" to the legislature. They determined that courts should focus their inquiry on the purpose rather than the effect of the impugned law, program or activity. The Justices found that the text of section 15(2) - in particular the words "has as its object" - supports such an approach. They accepted that such an approach will prevent courts from "unduly interfering in ameliorative programs", and that governments "should be given some leeway to adopt innovative programs, even though some may ultimately prove to be unsuccessful."

Kapp, supra, at paras. 44, 47, 49 & 77.

38. Chief Justice McLachlin and Justice Abella stated that in examining legislative purpose, courts "may find it necessary" to consider whether the means chosen by the legislature are rationally related to the ameliorative purpose, "in the sense that it appears at least plausible that the program may indeed advance the stated goal of combatting disadvantage." The Justices were conscious that analysing the means chosen by the legislature can easily turn into assessing the effect of the program. In order to preserve an intent-based analysis, the Justices framed the question as follows: "Was it rational for the state to conclude that the means chosen to reach its ameliorative goal would contribute to that purpose?"

Kapp, supra, at para. 48.

39. The Attorney General submits that in the present matter the Alberta Court of Appeal failed to follow this Court's deferential approach to section 15(2) outlined in *Kapp*.

2. Purpose and Effect

40. The Court of Appeal ignored this Court's direction in *Kapp* that the section 15(2) analysis should focus on legislative purpose rather than effect. While Chief Justice McLachlin and Justice Abella left open the possibility that the section 15(2) test could be refined in future cases, the Alberta Court of Appeal undertook a complete reversal on this question. The Attorney General submits that such a reversal was not warranted and ultimately led that Court into error.

41. The Court of Appeal rejected the Chamber Judge's finding that the impugned provisions support the *Métis Settlements Act's* ameliorative purpose of providing for Métis self-governance. The Court found that the effect of the provisions was to enable Métis councils "to pick and choose among various status Indians who have taken that status after November 1, 1990." This conclusion was repeated in the Court's assessment of ameliorative purpose in its section 15(1) analysis:

> I have already stated that I can perceive little that is ameliorating in the purpose or effect of the impugned provisions. Historically, they have only served to permit a seemingly vindictive council to arbitrarily prevent the appellants from continuing as members of Peavine.
>
> *Cunningham v. Alberta*, 2009 ABCA 239 at paras. 29 & 37.

42. The Attorney General submits that this is precisely the type of *ex post facto* second-guessing that this Court in *Kapp* was attempting to avoid by preferring a purpose-based analysis for section 15(2). The impugned provisions draw limits on Métis membership but those limits are expressly subject to being overriden by General Council Policy. Deference to Métis self-

governance on the question of membership is integrated within those provisions. As the Chambers Judge found:

> The ability of settlements to determine their own criteria for membership is further evidenced by ss.222(1)(y) of the *M.S.A.*, which enables the General Council to pass policies respecting membership eligibility for purposes of ss. 75(3.1) and 90(1). It is not unreasonable to assume that the General Council was given these powers, which are consistent with the advancement of self-governance, to allow Métis settlement communities to determine their own membership.
>
> *Cunningham v. Alberta*, [2007] A.J. No. 913 at para. 97 (A.B.Q.B.).

43. The General Council has three options under the impugned provisions: develop a policy allowing status Indians to be Settlement members, which they have not done; decline to develop a policy and live with the restrictions in sections 75 and 90; or a third option, applicable here, in which General Council has not developed a policy, but Settlement Councils have allowed members to retain membership after having registered as status Indians. This third option is possible because there is nothing in subsection 90(2) that requires a Settlement Council to notify the Minister of a termination of membership. Each option is an expression of Métis self-governance over membership.

44. By focusing on effects, the Court of Appeal confused the grant of self-governance with the former Peavine Council's arbitrary exercise of self-governance. That arbitrariness arose out of an improper exercise of power - not the conferral of that power - and has no bearing on the question of whether the impugned provisions are rationally related to the ameliorative purpose of providing for Métis self-government. As the Chambers Judge correctly found:

> On the facts of this case, there does appear to have been political targeting of the individual Applicants. However, that is not due to arbitrariness in the legislation, but rather in selective application by the Former Peavine Council.
>
> *Cunningham v. Alberta, supra*, at para. 131.

45. By way of analogy, the *Indian Act* allows Indian Bands to determine their membership and to regulate membership rights, including those related to voting and reserve residence. On judicial review, the exercise of those self-governance powers has been found on occasion to have been improperly exercised or exercised in contravention of the *Charter*. Nowhere is it suggested that the improper or even unconstitutional exercise of Band powers place a blemish on the *Indian Act*, by which those self-governance powers are conferred.

> *Scrimbitt v. Sakimay Indian Band Council*, [2000] 1 C.N.L.R. 205 (Fed. T.D.); *Six Nations of the Grand River Band v. Henderson*, [1997] 1 C.N.L.R. 202 (Ont. Gen. Div.).

46. The Respondents argue that the British Columbia Court of Appeal's decision in *Harrison v. British Columbia* supports their position that both purpose and effect should be considered under section 15(2) for claims of underinclusion.

> Respondents' Factum, at para. 42; *Harrison v. British Columbia*, [1988] 2 W.W.R. 688 (B.C.C.A.). [Respondents' Book of Authorities, at Tab 6, p. 158].

47. *Harrison* does not assist the Respondents. In that case the Court determined that section 15(2) applies "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." [Emphasis added.] The Court's requirement that legislation be "properly considered" is arguably consistent with the rational connection test outlined in *Kapp*. In any event, nowhere does the Court state that effects must be considered in cases of alleged underinclusion.

> *Harrison v. British Columbia, supra*, at para. 60.

48. The Court in *Harrison* found that the impugned provision in that case did not fall within section 15(2) because there was nothing to suggest that the target group was disadvantaged or that there was any valid reason for excluding persons in the claimant group. That is not the case in the

present matter, where the ameliorative program is unquestionably targeted towards a disadvantaged group, and the exclusion at issue reflects the distinct constitutional, legislative and cultural identity of status Indians.

49. The Ontario Court of Appeal's decision in *Lovelace v. Ontario* is instructive. That case involved Métis groups claiming that a provincial program was impermissibly underinclusive because it restricted participation to *Indian Act* Bands. The Court found that the impugned program fell within the meaning of section 15(2), and foreshadowed this Court's section 15(2) analysis in *Kapp* by explicitly rejecting an effects-based analysis.

> *Lovelace v. Ontario* [1997] O.J. No. 2313 at para. 62 (Ont. C.A.); aff'd on other grounds [2000] 1 S.C.R. 950; see also: *Cooper v. Ontario (Attorney General)* (2009), 99 O.R. (3d) 25 at paras. 15 & 16 (Ont. Supr Ct.) (no effects considered under s.15(2) in underinclusion claim).

3. Importing Pressing and Substantial Objective

50. The Court of Appeal appears to have accepted that one of the purposes of the impugned provisions was to prevent a dilution of limited resources to settlement members. However, the Court found that the provisions did not advance that purpose because there was no evidence of any attempt by status Indians to gain membership, or of any such problem occurring historically.

> *Cunningham v. Alberta*, *supra*, at paras. 25 & 26.

51. The Court of Appeal again exacted too high a standard under section 15(2). It required Alberta to establish that the distinction address some immediate or historical problem or mischief. In effect, the Court imported a "pressing and substantial concern" test into the section 15(2) analysis. The danger with this approach is that it tends to turn the section 15(2) analysis, which

already has incorporated the requirement of a rational connection, into a proxy for section 1 justification.

52. The only aspect of the section 15(2) test outlined in *Kapp* that has any resemblance to the notion of a pressing and substantial concern, is the requirement that the impugned law or program target an historically disadvantaged group. Addressing historical disadvantage, it might be said, is a pressing and substantial concern. However, there is no issue in the present matter that the Métis targeted by the *Métis Settlements Act* are historically disadvantaged. To the extent that a pressing and substantial concern might be relevant to the section 15(2) analysis, it has been satisfied in this case.

53. The Attorney General submits that there should have been no need for Alberta to adduce evidence of an existing or historical problem with status Indians attempting to gain membership in Métis settlements. If one of the purposes behind the impugned distinction is to prevent a dilution of limited resources for Métis communities, then membership restrictions - particularly with respect to persons belonging to other Aboriginal groups who are beneficiaries of separate benefit schemes - rationally address that concern.

4. Rational Connection

54. The Attorney General submits that any ameliorative law, program or activity targeted toward a specific group will necessarily either directly or indirectly exclude other groups. Where governments take measures to ameliorate the conditions of a specific Aboriginal group, other Aboriginal groups will necessarily be excluded. In *Kapp*, for example, the impugned commercial fishing licence was targeted only to certain Indian Bands and thereby implicitly excluded non-

Aboriginals as well as other Indian Bands and other Aboriginal persons and groups including those of Métis heritage. In *Lovelace v. Ontario*, the program at issue was directed at *Indian Act* Bands, implicitly excluding all other Aboriginal groups, including Métis groups, falling outside of the *Indian Act's* purview.

> *R. v. Kapp*, [2003] B.C. J. No. 1772 at paras. 112, 118, 119, 125, 175 & 176 (B.C. Prov. Ct.); *Lovelace v. Ontario, supra.*

55. The present matter differs from *Kapp* and *Lovelace* in that it involves an explicit exclusion of certain Aboriginal groups (status Indians and Inuk with land claims settlements). However, the mere fact that an exclusion is explicit does not warrant the application of stricter scrutiny under section 15(2) than was applied to the implicit exclusions involved in *Kapp* and *Lovelace*.

56. In *Kapp*, this Court did not question whether the distinction itself was rational or had an ameliorative purpose. Rather, the Court undertook that analysis with respect to the Aboriginal Fishing Strategy and Pilot Sales Program.

57. A comparison to the facts of *Lovelace* is particularly helpful. Just as the scope of the program in *Lovelace* was defined by reference to a distinction in the *Indian Act* (between *Indian Act* Bands and other Aboriginal groups), the scope of the *Métis Settlements Act* is defined, at least in part, by reference to the *Indian Act* distinction between registered Indians ("status Indians") and other Aboriginal people. The program in *Lovelace* incorporated an *Indian Act* distinction to determine "who's in", while the *Métis Settlements Act* relies on an *Indian Act* distinction to determine "who's out". In both cases, the distinction at issue is rational in that it assists in identifying the Aboriginal group to whom the amelioration is directed.

58. The Ontario Court of Appeal in *Lovelace* considered differences in the circumstances between the target group, *Indian Act* Bands, and the excluded Aboriginal groups. For example, the Court found that it was "entirely legitimate" for Ontario to provide a benefit to *Indian Act* Bands and their members on reserve because of inferior provincial services provided on reserves - in comparison to Aboriginal people living off-reserve - ultimately due to exclusive federal jurisdiction under section 91(24). The Attorney General submits that, conversely, in the context ameliorating the circumstances of Métis, it was legitimate for Alberta to exclude status Indians from the scope of the *Métis Settlements Act* because status Indians are already beneficiaries of targeted benefits under the *Indian Act* and are subject to exclusive federal jurisdiction under section 91(24).

Lovelace, *supra*, at para. 81.

59. The constitutional and legislative context of section 91(24) of the *Constitution Act, 1982*, and the *Indian Act* provides a rational foundation for excluding status Indians from the purview of the *Métis Settlements Act*. The constitutional distinctiveness of Indians was recognized by Chief Justice Brenner in *R. v. Kapp*:

> The distinctiveness of Indians and Inuit people has, since Confederation, been reflected in s.91(24) of the *Constitution Act 1867*, which grants exclusive legislative authority to Parliament to enact laws relating to Indians and lands reserved to Indians. While for the purposes of this case I do not have to decide whether the P.S.P. was made pursuant to the s.91(24) power as opposed to the 91(12) power, the constitutionally recognized distinction between Indians and non-Indians can form part of the context for the court's analysis. [Emphasis added.]

R. v. Kapp [2004] B.C.J. No. 1440 at para. 49 (B.C.S.C.).

60. Legislatively, status Indians have generally been eligible for federal benefits provided under the *Indian Act* dealing with lands, resources and self-governance. Status Indians have been defined in various ways under the *Indian Act*, but at no time has the definition included Métis

people. As discussed above, Métis were explicitly excluded from the scope of the *Indian Act* for the greater part of that Act's existence.

61. Not surprisingly, Indian status now imparts a distinct cultural identity. As Ross J. of the British Columbia Supreme Court stated in *McIvor v. Canada*:

> In my view, status under the *Indian Act* is a concept that is closely akin to the concepts of nationality and citizenship. ...
>
> [T]he Defendant's approach would treat status as an Indian as if it were simply a statutory definition pertaining to eligibility to some program or benefit. However, having created and imposed this identity upon First Nations peoples, with the result that it has become a central aspect of identity, the government cannot now treat it in that way, ignoring the true essence or significance of the concept.
>
> *McIvor v. Canada* [2007] B.C.J. No. 1259 at paras. 192, 193 (B.C.S.C.).

62. While the Respondents are status Indians who do not necessarily share this cultural identity, they are entitled to benefits of status which go beyond health care benefits and include province-wide hunting rights and the ability to purchase goods tax free on reserves. It was rational for Alberta to exclude status Indians from the *Métis Settlements Act*'s purview as an Aboriginal group distinct from Métis. A deferential approach to section 15(2) should not require ameliorative laws or programs to effect an exact correspondence for all persons within and without the targeted group, particularly in the complex area of Aboriginal identity.

PART IV

COSTS

63. The Attorney General does not seek costs and submits that he should not be liable for the costs of either of the parties or any of the other interveners.

PART V

DISPOSITION OF THE LEGAL ISSUES

64. The Attorney General does not seek permission to present oral argument at the hearing of the appeal. The Attorney General has made submissions with respect to only the fifth and sixth Constitutional Questions and submits that they should be answered as follows:

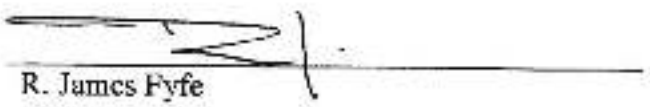
5. No, sections 75 and/or 90 of the *Métis Settlements Act* do not infringe section 15 of the *Charter*.

6. Given the answer to Question 5, it is unnecessary to answer this Question.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

DATED at Regina, Saskatchewan this 29th day of October, 2010

F. Mitch McAdam



R. James Fyfe

PART VI

TABLE OF AUTHORITIES

Statutes	**Paragraph Number**
Constitution of Alberta Amendment Act, 1990, R.S.A. 2000, c. C-24.	9
The Indian Act, 1876 S.C. 1876, c. 18, s. 3(3)(e)	17
The Indian Act, 1880, S.C. 1880, c. 28, s. 14	17
An Act to further amend "The Indian Act, 1880", S.C. 1884, c. 27, s. 4	17
The Indian Act, R.S.C. 1886, c. 43, s. 13	17
An Act to further amend "The Indian Act", S.C. 1888, c. 22, s. 1	17
Indian Act, R.S.C. 1906 c. 81, s. 16	17
An Act to Amend the Indian Act, S.C. 1914, c. 35, ss. 3 and 4*Indian Act*, R.S.C. 1927, c. 98, s. 16	17
The Indian Act, S.C. 1951, c. 29, ss. 12(1)(a)(i) and (ii)	17
Indian Act, R.S.C. 1970, c. I-6, ss. 12(1)(a)(i) and (ii).	17
Indian Act, R.S.C. 1985, c. I-5.	6, 10, 17, 18, 32, 45, 49, 57, 58, 59, 60, 61
The Métis Act, S.S. 2001, c. M-14.01	6
The Métis Betterment Act, R.S.A. 1955, c. 202	8
The Métis Betterment Act, R.S.A. 1970, c. 233	8
The Métis Population Betterment Act, S.A. 1938 (2nd session), c. 6 s. 2(a)	8
The Métis Population Betterment Act, 1940, S.A. 1940, c. 6	8
The Métis Population Betterment Act, R.S.A. 1942, c. 329	8
Métis Settlements Accord Implementation Act, R.S.A. 2000, c. M-15	9
Métis Settlements Act, R.S.A. 2000, c. M-14.	1, 3, 5, 6, 8, 19, 20, 22, 28, 32, 35, 41, 43, 52, 57, 58, 59, 62, 64
Métis Settlement Land Protection Act, R.S.A. 2000, c. M-16	9

Other	**Paragraph Number**
Annual Report of the Department of the Interior for the Year Ended 30th June, 1876 in *Sessional Papers*, 1877, No. 11.	13
Catherine Bell "*Who are the Métis People in Section 35(2)?*" (1991) 29 Alta. Law Rev. 351.	11
Clem Chartier "Indian: Analysis of the Term" (1978) 43 Sask. Law Rev. 37.	20
Larry N. Chartrand "*The Definition of Métis Peoples in Section 35(2) of the Constitution Act, 1982*" (2004) 67 Sask. Law Rev. 209	11
John Giokas and Paul L.A.H. Chartrand, "Who Are the Métis? A Review of the Law and Policy" in Paul L.A.H. Chartrand, ed., *Who Are Canada's Aboriginal Peoples?* (Saskatoon: Purich Publishing Ltd., 2002).	11
P.W. Hogg "The Canadian Bill of Rights – "Equality Before The Law" – *A.G. Can. v. Lavell*" (1974) 52 Can. Bar Rev. 263.	27
Report of the Royal Commission Appointed to Investigate the Conditions of the Half-Breed Population of Alberta, 1936.	8
Bryan Schwartz, *First Principles: Constitutional Reform with Respect to the Aboriginal Peoples of Canada 1982-1984* (Kingston: Institute of Intergovernmental Relations, 1985).	20