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)**

- and -

**REGISTRAR, METIS SETTLEMENTS LAND REGISTRY**

Appellants

- and -

**BARBARA CUNNINGHAM**

- and -

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

Respondents

- and -

**ATTORNEY GENERAL OF QUEBEC, ATTORNEY GENERAL OF SASKATCHEWAN, ATTORNEY GENERAL OF ONTARIO, CANADIAN ASSOCIATION FOR COMMUNITY LIVING, ELIZABETH METIS SETTLEMENT, WOMEN'S LEGALEDUCATION AND ACTION FUND, EAST PRAIRIE METIS SETTLEMENT, GIFT LAKE METIS SETTLEMENT, NATIVE WOMEN'S ASSOCIATION OF CANADA, METIS NATION OF ALBERTA, METIS NATIONAL COUNCIL and METIS SETTLEMENTS GENERAL COUNCIL**

Interveners

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# FACTUM OF THE INTERVENER ABORIGINAL LEGAL SERVICES OF TORONTO INC.

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## PART I – OVERVIEW

1. Aboriginal Legal Services of Toronto is a non-profit organization that was incorporated to assist Aboriginal people gain access to, and control over, justice related issues that affect them.

2. The clients of ALST have a real interest in the way in which government programs construct Aboriginal identity. Many of our clients have become displaced from their traditional homes as a result of government programs and practices as well as general societal discrimination towards them. As our clients seek to reassert their Aboriginal rights, whether as Indian, Métis or Inuit people, they often must struggle with attitudes that view them as not truly Aboriginal. These perceptions are even more pernicious when they are supported by government legislation as they were in *Attorney General of Canada v. Lavell,*[1] and *Corbiere v. Canada (Minister of Indian and Northern Affairs)*[2]. The case at bar is both an extension of those cases and also the first case that will allow this Honourable Court to scrutinize government attempts to define Métis identity.

3. The argument advanced by the Appellants that if a government program has any ameliorative elements then courts should be deferential to the legislation misreads the decision of this Honourable Court in *R. v. Kapp.*[3] Allowing such judicial deference to be exercised under the "ameliorative provision" guise, that it benefits Métis members who are not registered as status Indians, brings back the now discredited "similarly situated test"[4] under a new name. Section 15(2) of the *Canadian Charter of Rights and Freedoms* should not bar claims of discrimination by precisely the individuals who the legislation in question was meant to benefit. Indeed, rather than approach such claims of rights deferentially, courts should review these provisions with greater scrutiny.

4. Section 15(2) should however immunize properly constituted government programs from claims of discrimination from members of other disadvantaged groups who are

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[1] *Attorney General of Canada v. Lavell* [1973] S.C.R. 1349 ("*Lavell*") [TAB 1].
[2] *Corbiere v. Canada (Minister of Indian and Northern Affairs)* [1999] 2 S.C.R. 203 [Respondent's Authorities TAB 3] ("*Corbiere*").
[3] *R. v. Kapp* [2008] 2 S.C.R. 483 [Appellant's Authorities TAB 16] ("*Kapp*").
[4] *Andrews v. Law Society of B.C,* [1989]1 S.C.R. 143 at 166 – 168 [Appellant's Authorities TAB 1].

legitimately not included in the program. Allowing claims from members of other disadvantaged groups to trump the provisions if s. 15(2) will, in the end, have a chilling impact on the development of such programs altogether.

5. ALST adopts the position of the Respondent on the facts of the case.

## PART II – STATEMENT OF POSITION

6. ALST submits that questions 1, 3 and 5 of the stated constitutional questions should be answered in the affirmative and questions 2, 4, and 6 in the negative.

## PART III – STATEMENT OF ARGUMENT

### (a) The Construction of Métis Identity in the Métis Settlement Act (MSA) is Discriminatory:

7. For Aboriginal people, identity is rooted in the land and is tied to place. This is as true for Métis people as it is for Indians and Inuit. The *Report of the Royal Commission on Aboriginal Peoples* found:

> Aboriginal people have told us of their special relationship to the land and its resources. This relationship, they say, is both spiritual and material, not only one of livelihood, but of community and indeed of continuity of their cultures and societies.[5]

8. The Appellants in their factum at paragraph 48 cite approvingly from the MacEwan Joint Métis-Government Committee to Review the Métis Betterment Act and Regulations which set out as a basic principle that:

> Because the culture and lifestyle of the Métis settlements is inextricably linked to the land, a Métis settlement land base is the cornerstone on which to build and maintain the social, cultural and economic strength of the Métis settlers.

9. The Appellants state at paragraph 8 of their factum that: "This is not a case about whether, in a sociological sense, one can be both Métis and Indian." However the

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[5] Canada, *Report of the Royal Commission on Aboriginal Peoples*: *Restructuring the Relationship*, vol. 2 (Ottawa: Supply and Services Canada (1996) at 448 [TAB 12]. See also: *Indigenous Peoples - Lands, Territories and Natural Resources*, UN PFIIOR, 6th Sess., Background 1 (2007) at 1 [TAB 16]. *State of the Worlds Indigenous Peoples*, UN PFIIOR, 2009, UN Doc. ST/ESA/328 at 53 -54, and 84 [TAB 17].

expulsion of the Respondents from their home community because they have acquired Indian status deprives them of a vital aspect of who they are as Métis people.

10. The *Constitution Act*[6] at section 35(1) recognizes that the Aboriginal peoples of Canada have specific rights. For greater specificity, in s. 35(2) the Aboriginal peoples of Canada are defined as "the Indian, Inuit and Métis people of Canada." While the Métis are a distinct and unique nation,[7] there have always been interactions and close relations between Métis and Indian and Inuit people. In *R. v. Powley*, this Court found: "The Métis of Canada share the common experience of having forged a new culture and a distinctive group identity from their Indian or Inuit and European roots."[8]

11. While distinct from each other, Indian, Inuit and Métis people have long had close interactions with each other.[9] All Métis people have Indian or Inuit ancestry. Given the challenges faced by Aboriginal people in light of government policies of assimilation and marginalization, Métis and Indian peoples often lived together or in close proximity to each other.[10]

12. The reference in the *Constitution Act*[11] to Indian people includes both persons who have Indian status as recognized by the federal government and persons that do not have such status. Indian status is a government construct – it is not a term that Aboriginal people understood prior to the 1850s when the federal government developed the concept.[12]

13. This is not a case of determining whether someone is entitled to become recognized as a member of a Métis settlement, rather it is about the expulsion of individuals who have been recognized as members of these settlements.

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[6] *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.
[7] Canada, *Report of the Royal Commission on Aboriginal Peoples: Looking Forward, Looking Back*, vol. 1 (Ottawa: Supply and Services Canada, 1996) at 151("RCAP: *Looking Forward, Looking Back*"), [TAB 10]. See also: *Report of the Royal Commission on Aboriginal Peoples Perspectives and Realities*, vol. 4 (Ottawa: Supply and Services Canada, 1996) at 202 [TAB 13].
[8] *R. v. Powley*, [2003] 2 S.C.R. 207 at para. 11 [Respondent's Authorities TAB 18].
[9] RCAP, *supra* note 7 at 220 and 226 [TAB 14].
[10] *Powley, supra* note 8 at para. 25 [Respondent's Authorities TAB 18].
[11] *Constitution Act, supra* note 6.
[12] RCAP: *Looking Forward, Looking Back, supra* note 7 at 145 [TAB 11].

14. The Appellants in their factum repeatedly refer to the fact that the Respondents "voluntarily" acquired Indian status. The use of this term mirrors the language of the majority of the Supreme Court of Canada in *Lavell* when they spoke of the women in that case electing to marry non-Indians.[13]

15. In *Lavell*, this Court upheld the stripping away of Indian status from Indian women who married non-status men while status Indian men who married non-status women not only retained their Indian status but also conferred status on their wives.[14] This decision was roundly criticized and has since been recognized by this Court as wrong in law and as perpetuating a discriminatory regime.[15]

16. The fundamental question in this case is what is so significant about the acquisition of Indian status by a person who is a member of a Métis settlement such that it requires her expulsion from the settlement. Denying someone the ability to retain membership in their community as a result of making a choice that they are entitled to make must be justified on a basis other than simply that the legislation proscribes consequences for the making of that choice. The answer to this question cannot be tautological.

17. At paragraph 55 of their factum the Appellants state that:

> The exclusion of those who have acquired Indian status will have unfortunate consequences but it is clear that this is a result of a conscious choice to obtain benefits under an alternative regime, the federal Indian Act and related law and policy, made in the context of the clear language of s. 90.

This is not a justification for why the MSA expels people from the communities where they have lived all their lives; it simply restates the provisions of the impugned legislation.

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[13] *Lavell*, *supra* note 1 at p. 1353 [TAB 1]
[14] *Ibid.* at p. 1373 [TAB 1].
[15] See *Corbiere*, *supra* note 2 at 87 [Respondent's Authorities TAB 3].

18. At paragraph 54 of their factum, the Appellants seek to justify the legislation by raising a floodgates argument. There, the Appellants argue that if the impugned provisions of the MSA are struck down then people who were previously denied membership due to their Indian status will then qualify for membership, thereby diluting the benefits available for current members of the settlement.

19. This argument fails on two grounds. First, the Appellant's fail to distinguish the position of the Respondents from those persons who are not and have not ever been, members of Métis settlements. Allowing individuals who are members of Métis settlements to remain members after acquiring Indian status will not impact the benefits available to the collective as they are already included within the membership.

20. Second, the argument fails as such amendments would not create an automatic entitlement to membership for all persons with Indian status as the remaining membership provisions of the *Act* preclude this from occurring.[16]

**(b) The Interpretation of Kapp in the context of this case:**

**(i) The attempted resurrection of the similarly situated test**

21. The Appellants seek to immunize the contested provisions of the MSA from detailed scrutiny by relying on the provisions of s. 15(2) and the decision of this Honourable Court in *Kapp*. In so doing the Appellants are seeking to reinvigorate the now discredited similarly situated test.[17]

22. The similarly situated test was described in *Andrews* as:

> ... a restatement of the Aristotelian principle of formal equality -- that "things that are alike should be treated alike, while things that are unalike should be treated unalike in proportion to their unalikeness...[18]

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[16] See *Metis Settlements Act*, R.S.A. 2000, c. M-14, ss. 74 - 76, 78.
[17] See the Appellant's Factum at para. 41 – 45.
[18] *Andrews*, *supra* note 4 at para. 27 [Appellant's Authorities TAB 1].

23. The problem with the test, as enunciated by Justice McIntyre in *Andrews* was that:

> The test as stated, however, is seriously deficient in that it excludes any consideration of the nature of the law. If it were to be applied literally, it could be used to justify the Nuremberg laws of Adolf Hitler. Similar treatment was contemplated for all Jews. The similarly situated test would have justified the formalistic separate but equal doctrine of *Plessy v. Ferguson.*[19]

24. In *Kapp* this Court found that:

> 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.[20]

25. In the instant case the Appellants assert that since the purpose of the MSA is to benefit Métis people, a clearly disadvantaged group, s. 15(2) protects the provisions of the *Act* from challenge by members of other disadvantaged groups. The problem with this argument in the context of the facts of this case is that the Respondents were themselves members of the particular disadvantaged group until the impugned provisions of the *Act* disenfranchised them.

26. The Appellants' argument resurrects the similarly situated test. In this case they are saying the MSA is an ameliorative program designed to benefit Métis people. They then identify the class of Métis people who are to benefit by the MSA as those individuals who met the criteria for membership in a Métis settlement and who did not acquire Indian status after 1990. Since the Respondents are Métis people under the provisions of the MSA who acquired Indian status after 1990, they are not the Métis people the *Act* is meant to benefit.

27. If this argument were accepted by this Court then the MSA would be immunized against any scrutiny no matter how egregious and discriminatory the membership provisions of the *Act*. If, for example to echo *Lavell*, the MSA stated that a Métis woman who marries a non-Métis man loses her membership in the Métis settlement that would

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[19] *Andrews, supra* note 4 at para. 28 [Appellant's Authorities TAB 1]. See also *Kapp, supra* note 3 at para. 15 [Appellant's Authorities TAB 16].

[20] *Kapp, supra* note 3 at para. 41 [Appellant's Authorities TAB 16].

be justified since such a Métis woman was now different from the Métis people the *Act* intended to benefit.

28. *Kapp* should not be read to protect from challenge a provision that targets precisely the individuals who the legislation in question was meant to benefit.

29. The Ontario Court of Appeal in *Ontario (Human Rights Commission) v. Ontario* [hereinafter *Roberts*][21] addresses this specific issue. While a pre-*Kapp* decision that focuses on the provisions of the *Ontario Human Rights Act*, the case was cited with approval by this Court in *Lovelace*[22] and, it is submitted, captures the proper application of the ameliorative provisions principle.

30. In *Roberts* the Ontario government operated the Assistive Devices Program (ADP). One aspect of that program provided assistive devices for blind people under the age of 30.[23] Mr. Roberts met all the criteria for the program other than the fact he was over 30, thus, he was denied access to the program.[24] The Court of Appeal stated: "We are concerned in this case with a discriminatory refusal of assistance to a person with the specific disability that special program was designed to assist."[25]

31. In language that is directly relevant to this case, the Court of Appeal concluded:

> In the context of this case, to say that s.14(1) exempts the *age discrimination* in the vision aids category of the ADP program from review, is to interpret the section so as to permit substantive equality to be undermined, when substantive equality is one of the section's very purposes. Fairness, and the recognition of substantive equality, require that discrimination, in the provision of a service to a person who is a member of a disadvantaged group for whom a special program is designed, not be tolerated and be subject to review. This interpretation does not second-guess the Legislature. Rather, it fulfils one of the purposes of the Legislature and is consistent with the overall purpose of the Code.[26]

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[21] *Ontario (Human Rights Commission) v. Ontario,* [1994] O.J. No. 1732 ("*Roberts*") [TAB 3].
[22] *Lovelace v. Ontario,* [2000] 1 S.C.R. 950 at para. 100 [Appellant's Authorities TAB 11].
[23] *Roberts, supra* note 21 at para. 5.
[24] *Ibid.* at para. 2.
[25] *Ibid.* at para. 42.
[26] *Ibid.* at para. 47.

32. The Appellants submit that the provisions of the MSA that disentitle the Respondents to membership in the settlements should be treated with deference by the court because the provision arose following consultation with organizations representing the Métis community.[27] While consultation with representatives of Aboriginal organizations is important in terms of respecting the rights of Aboriginal peoples, it should not lead to any particular deferential approach by the courts when objections are raised that membership criteria are discriminatory.

33. It must be kept in mind that in *Lavell*, the position of the Attorney General of Canada advocating for the continued discriminatory treatment of Aboriginal women under the *Indian Act* was supported by: The Indian Association of Alberta; The Union of British Columbia Indian Chiefs; The Manitoba Indian Brotherhood; The Union of New Brunswick Indians; The Indian Brotherhood of the Northwest Territories; The Union of Nova Scotia Indians; The Union of Ontario Indians; The Federation of Saskatchewan Indians; The Indian Association of Quebec; The Yukon Native Brotherhood; the Six Nations Band of Indians; and The National Indian Brotherhood (now known as the Assembly of First Nations).[28]

34. Rather than being deferential towards scrutinizing programs that appear to discriminate against the very people the programs are designed to benefit, it is our respectful submission that such situations cry out for heightened scrutiny.[29] Where a program allocates benefits there is often pressure to limit the individuals who are eligible for those benefits. On some occasions that pressure comes from members of the group itself. One of the rationales for why the First Nations leadership was opposed to the legitimate claims of discrimination advanced in *Lavell*, was a concern about allocation of scarce resources.[30] When these concerns arise, as they often do when governments enact

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[27] See the Appellant's Factum at paras. 5, 12, 37, 46, 47, 49-50, and 120.
[28] *Lavell, supra* note 1 at p. 1391-2.
[29] *Cunningham v. Alberta (Minister of Aboriginal Affairs and Northern Development)*, [2009] A.J. No. 678 at para. 49 [TAB 2].
[30] First Nations Leadership also felt that it was strategically beneficial to oppose rights for women in order to negotiate further agreements with the federal government. Women's rights were held hostage to broader concerns. See John Borrows, "Contemporary Traditional Equality: The Effect of the Charter on First Nations Politics" (1994) 43 UNBLJ 19 p. 26-7 [TAB 4]. Andrea Catapano, "Contesting Patriarchy: Granddaughters Fight Back" <http://www.forumonpublicpolicy.com/archive07/catapano.pdf> at p. 11-14 [TAB 5].

benefits programs, the most vulnerable among the members of the group are most likely to be left out of the program. It is these individuals who most need the protection of the courts as they are least likely to receive it elsewhere.

35. This position is not meant to suggest that Aboriginal organizations are any more likely to discriminate against their members than others. Rather it recognizes that when the issue becomes the allocation of resources, those in power, in any context, will find it easier to disenfranchise those seen as 'others.'[31] The Royal Commission on Aboriginal Peoples recognized this concern in their report – Bridging the Cultural Divide, "...there is no reason to think that Aboriginal governments will be any less disposed than non-Aboriginal governments to abuse their powers."[32]

**(ii) Section 15(2) and other disadvantaged groups**

36. It has been suggested that s. 15(2) should not prevent the application of s. 15(1) where the legislation in question is challenged by a member of any disadvantaged group.[33]

37. If this approach had been used in *Kapp*, had the Appellants shown that in addition to being excluded from the program on the basis of race[34] they were also members of a disadvantaged group,[35] then a program developed to focus on the specific needs of Aboriginal fishers could have been declared unconstitutional because it did not address the needs of disadvantaged non-Aboriginal fishers.

38. ALST respectfully submits that this is an unjustified limiting of the principle in *Kapp*. Preventing governments from using s. 15(2) to support carefully developed programs designed to benefit particular disadvantaged groups because other disadvantaged groups

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[31] Michael Peirce, "A Progressive Interpretation of Subsection 15(2) of the Charter" (1993) 57 Sask. L. Rev. 263 at p. 31 [TAB 9].

[32] Canada, *Report of the Royal Commission on Aboriginal Peoples*: *Bridging the Cultural Divide – A Report on Aboriginal People and Criminal Justice in Canada* (Ottawa: Supply and Services Canada, 1996) at 261 [TAB 15].

[33] James Fyfe, "Dignity as Theory: Competing Conceptions of Human Dignity at the Supreme Court of Canada" (2007) 70 Sask. L. Rev. 1 at p. 17 (HeinOnline) [TAB 6]. See also: Donna Greschner, "Does *Law* Advance the Cause of Equality" (2001-2002) 27 Queen's L.J. 299 at p. 311 (HeinOnline) [TAB 7].

[34] *Kapp*, *supra* note 3 at para. 29 [Appellant's Authorities TAB 16].

[35] The Court did not comment in *Kapp* on whether the Appellants were members of a disadvantaged group.

are left out of the process, will restrict *Kapp* unduly and prevent governments from responding to the needs of particular disadvantaged groups in a unique and innovative fashion.[36] This approach is in keeping with the idea that s. 15 should not force governments to extend benefits too broadly as this might cause governments to rethink developing benefits programs at all.

## PART IV – POSITION ON COSTS

39. ALST seeks no costs and respectfully requests that no costs be ordered against it.

## PART V – INTERVENER'S POSITION

40. It is respectfully submits that the appeal should be dismissed. ALST respectfully requests that it be granted 15 minutes to make oral argument at the hearing of the appeal.

**DATED AT TORONTO THIS 3rd DAY OF NOVEMBER 2010.**

Jonathan Rudin
Counsel for the Intervener ALST

Mandy Wesley
Counsel for the Intervener ALST

[36] *Kapp*, *supra* at para. 47 [Appellant's Authorities TAB 16].

## PART VI - TABLE OF AUTHORITIES

| Jurisprudence | Paragraph Reference in Factum |
|---|---|
| *Andrews v. Law Society of British Columbia* [1989] 1 S.C.R. 143 | 3, 22, 23 |
| *Attorney General of Canada v. Lavell* [1973] S.C.R. 1349 | 2, 14, 15, 27, 33, 34 |
| *Corbiere v. Canada (Minister of Indian and Northern Affairs)* [1999] 2 S.C.R. 203 | 2, 15 |
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| *R. v. Powley* [2003] 2 S.C.R. 207 | 10, 11 |

| Secondary Sources | Paragraph Reference in Factum |
|---|---|
| Borrows, John. "Contemporary Traditional Equality: The Effect of the Charter on First Nations Politics" (1994) 43 UNBLJ 19 | 34 |
| Catapano, Andrea. "Contesting Patriarchy: Granddaughters Fight Back" (undated), online: The Forum on Public Policy <http://www.forumonpublicpolicy.com/archive07/catapano.pdf> | 34 |
| Fyfe, James. "Dignity as Theory: Competing Conceptions of Human Dignity at the Supreme Court of Canada" (2007) 70 Sask. L. Rev. 1 | 30 |
| Greschner, Donna. "Does *Law* Advance the Cause of Equality" (2001- 2002) 27 Queen's L.J. 299 at p. 311 | 30 |
| Peirce, Michael. "A Progressive Interpretation of Subsection 15(2) of the Charter" (1993) 57 Sask. L. Rev. 263 | 35 |

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| *Report of the Royal Commission on Aboriginal Peoples* (1996) Vol. 1 Looking Forward, Looking Back, Part One: The Relationship in Historical Perspective, Chap. 5 | 10 |
| *Report of the Royal Commission on Aboriginal Peoples* (1996) Vol. 1 Looking Forward, Looking Back, Part One: The Relationship in Historical Perspective, Chap. 6 | 12 |
| *Report of the Royal Commission on Aboriginal Peoples* (1996), Vol. 2: Restructuring the Relationship, Part Two: Lands and Resources, Chap. 4 | 7 |
| *Report of the Royal Commission on Aboriginal Peoples* (1996), Vol. 4 Perspectives and Realities, Chap. 5 | 10, 11 |
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| United Nations. *Indigenous Peoples - Lands, Territories and Natural Resources*, UN PFIIOR, 6th Sess., Background 1 (2007) | 7 |
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## PART VII: STATUTES AND REGULATIONS

**_Charter of Rights and Freedoms_, Part I of the _Constitution Act_, 1982, being Schedule B to the _Canada Act 1982_ (U.K.), 1982, c. 11, ss. 15(2) and 35(1) and (2).**

***Equality Rights***

Equality before and under law and equal protection and benefit of law

**15.** (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

***Affirmative action programs***

15. (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

***Rights of the Aboriginal Peoples of Canada***

35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
Definition of "aboriginal peoples of Canada"

(2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada.

***Droits à l'égalité***

Égalité devant la loi, égalité de bénéfice et protection égale de la loi

**15.** (1) La loi ne fait acception de personne et s'applique également à tous, et tous ont droit à la même protection et au même bénéfice de la loi, indépendamment de toute discrimination, notamment des discriminations fondées sur la race, l'origine nationale ou ethnique, la couleur, la religion, le sexe, l'âge ou les déficiences mentales ou physiques.

***Programmes de promotion sociale***

(2) Le paragraphe (1) n'a pas pour effet d'interdire les lois, programmes ou activités destinés à améliorer la situation d'individus ou de groupes défavorisés, notamment du fait de leur race, de leur origine nationale ou ethnique, de leur couleur, de leur religion, de leur sexe, de leur âge ou de leurs déficiences mentales ou physiques.

***Droits Des Peuples Autochtones Du Canada***

35 (1) Les droits existants — ancestraux ou issus de traités — des peuples autochtones du Canada sont reconnus et confirmés.

*(2) Dans la présente loi, « peuples autochtones du Canada » s'entend notamment des Indiens, des Inuit et des Métis du Canada.*

## *Métis Settlements Act*, R.S.A 2000, c. M-14, ss. 74 -78 and 90

**Application criteria**

**74(1)** A person may apply to a settlement council for membership in a settlement only if

(a) the applicant is a Métis and at least 18 years old, and

(b) the applicant

(i) has previously been a settlement member or a member of a settlement association under the former Act, or

(ii) has lived in Alberta for the 5 years immediately preceding the date of application.

**(2)** The settlement council may waive the residency requirement referred to in subsection (1)(b)(ii) if a parent of the applicant was or is a settlement member or a member of a settlement association under the former Act.

**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.

**Proving Métis identity**

**76** Every application for membership in a settlement must be sent to the settlement office and must be accompanied by

(a) a statutory declaration that

(i) the applicant has Canadian aboriginal ancestry, describing the facts on which the declaration is based, and

(ii) the applicant identifies with Métis history and culture;

(b) one or more of the following:

(i) gencalogical records as evidence that the applicant has aboriginal ancestry;

(ii) a statutory declaration of at least 2 Métis who are recognized as Métis elders that the applicant has aboriginal ancestry, describing the facts on which the declaration is made;

(iii) such other evidence satisfactory to the settlement council that the applicant has aboriginal ancestry;

(c) an address to which notices and decisions can be sent to the applicant.

**Membership decisions**

**78(1)** An application for membership in a settlement can be approved only if the settlement council is satisfied that the applicant

(a) is a person of Canadian aboriginal ancestry who identifies with Métis history and culture,

(b) has or will have suitable living accommodation in the settlement area, and

(c) is committed to living in the settlement area and preserving a peaceful community.

**(2)** No application for membership in a settlement can be approved if the applicant

(a) is a member of another settlement,

(b) is in debt to the settlement or any other settlement, unless

(i) satisfactory written arrangements have been made to pay the debt, and

(ii) the applicant is not in arrears in payments,

(c) is ineligible under section 75, or

(d) does not agree to preserve a peaceful community and to comply with this Act, the bylaws and General Council Policies.

**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.

**Her Majesty the Queen and Registrar, Métis Settlements Land Registry**
Appellants

and

**Barbara Cunningham et al.**
Respondents

**Court File No. 33340**

**Supreme Court of Canada**
**On Appeal from the**
**Court of Appeal of Alberta**

# FACTUM OF THE INTERVENER ABORIGINAL LEGAL SERVICES OF TORONTO


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