SCC File N0. 33340

IN THE SUPREME COURT OF CANADA

(ON APPEAL FROM THE COURT OF APPEAL OF ALBERTA)

BETWEEN:

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

APPELLANTS
(Respondents)

- and -

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

RESPONDENTS
(Appellants)

- and -

ATTORNEY GENERAL OF QUÉBEC, ATTORNEY GENERAL OF SASKATCHEWAN, ATTORNEY GENERAL OF ONTARIO, MÉTIS NATIONAL COUNCIL, MÉTIS NATION OF ALBERTA, MÉTIS SETTLEMENTS GENERAL COUNCIL, EAST PRAIRIE MÉTIS SETTLEMENT, 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

Factum of the Intervener
Métis Nation of Alberta

Jean Teillet
Pape Salter Teillet
Barristers & Solicitors
460-220 Cambie Street
Vancouver, BC, V6B 2M9
Telephone: 604 681-3002
Fax: 604 681-3050
Email: jteillet@pstlaw.ca
Counsel for the Intervener
Métis Nation of Alberta

Ed Van Bemmel
Gowling Lafleur Henderson LLP
Barristers & Solicitors
160 Elgin Street, 26th Floor
Ottawa, Ontario, K1P 1C3
Telephone: 613 786-0212
Fax: 613 788-3500
Email: ed.vanbemmel@gowlings.com
Ottawa Agent for the Intervener
Métis Nation of Alberta

TO:

Robert J. Normey & David Kamal
Attorney General of Alberta
4th Floor, Bowker Building
9833 – 109th Street
Edmonton, Alberta T5K 3E8
Tel: 780 422-9532
Fax: 780 425-0307
Email: Robert.normey@gov.ab.ca
Counsel for the Appellants

Henry S. Brown, Q.C.
Gowling LaFleur Henderson LLP
2600-160 Elgin Street
Ottawa, Ontario, K1P 1C3
Tel: 613 233-1781
Fax: 613 788-3433
Ottawa Agent for the Appellants

Mr. Kevin Feth, Q.C. & Jeremy L. Taylor
Field LLP
Suite 2000
10235 – 101 Street
Edmonton, Alberta, T5J 3G1
Tel: 780 423-7626
Fax: 780 424-7116
k.feth@fieldlaw.com
Counsel for the Respondents

Dougald E. Brown
Nelligan O'Brien Payne LLP
Suite 15600
50 O'Connor Street
Ottawa, Ontario, K1P 6L2
Tel: 613 231-8210
Fax: 613 788-3661
Email: dougald.brown@nelligan.ca
Ottawa Agent for the Respondents

Ms. Isabelle Harnois
Attorney General of Québec
1200 Route de l'Église, 2nd Floor
Ste-Foy, Québec, G1V 4M1
Tel: 418 643-1477
Fax: 418 646-1696
Email: isabelle.harnois@justice.gouv.qc.ca
Counsel for the Intervener
Attorney General of Québec

Pierre Landry
Noël and Associés
111 Champlain Street
Gatineau, Québec, J8X 3R1
Tel: 819 771-7393
Fax: 819 771-5397
Email: p. landry@noelassocies.com
Agent for the Intervener
Attorney General of Québec

Attorney General of Saskatchewan
8th Floor, 1874 Scarth Street
Regina, Saskatchewan, S4P 3V7
Tel: 306 787-5603
Fax: 306 787-9111
Email:
Counsel for the Intervener
Attorney General of Saskatchewan

Brian A. Crane, Q.C.
Gowling Lafleur Henderson LLP
Suite 2600-160 Elgin Street
Ottawa, Ontario, K1P 1C3
Tel: 613 233-1781
Fax: 613 563-9869
Email: brian.crane@gowlings.com
Agents for the Intervener
Attorney General of Saskatchewan

Janet E. Minor & Mark Crow
Attorney General of Ontario
720 Bay Street, 4th Floor
Toronto, Ontario, M5G 2K1
Tel: 416 326-4137/4470
Fax: 416 326-4015
Email: janet.minor@ontario.ca
Mark.crow@ontario.ca

Robert E. Houston. Q.C.
Burke-Robertson
70 Gloucester Street
Ottawa, Ontario, K2P 0A2
Tel: 613 566-2058
Fax: 613 235-4430
Email: rhouston@burkerobertson.com

Counsel for the Intervener,
Attorney General of Ontario

Richard Hajduk
Hajduk Gibbs LLP
202 Platinum Place
10120-118 St. NW
Edmonton, Alberta, T5K 1Y4
Tel: 780 428-4258
Email: r.hajduk@hajdukandgibbs.com
Counsel for the Intervener
East Prairie Métis Settlement

Thomas R. Owen
Owen Law
1660 Phipps-McKinnon Building
10020 101A Avenue
Edmonton, Alberta, T5J 3G2
Tel: 780-408-7862
Fax: 780 423-3462
Email:
Counsel for the Intervener
Elizabeth Métis Settlement

Garry Appelt
Witten LLP
2500-10303 Jasper Ave.
Edmonton, Alberta, T5J 3N6
Tel: 780 428-0501
Fax: 780 429-2559
Email:
Counsel for the Intervener
Métis Settlements General Council

Jonathan Rudin
Aboriginal Legal Services of Toronto Inc
803-415 Yonge Street
Toronto, Ontario, M5B 2E7
Tel: 416 408-4041
Fax: 416 408-4268
Email:
Counsel for the Intervener
Aboriginal Legal Services of Toronto Inc.

Joanna Birenbaum
Women's Legal Education and Action Fund
703-60 St. Clair Ave. East
Toronto, Ontario, M4T 1N5
Tel: 416 595-7170 ext 223
Fax: 416 595-7191
Email: j.birenbaum@leaf.ca

Ottawa Agents for the Intervener,
Attorney General of Ontario

Marie-France Major
Language Michner LLP
300-50 O'Connor Street
Ottawa, Ontario, K1P 6L2
Tel: 613 232-7171
Fax: 613 232-3191
Email: nmajor@langmichner.ca
Agent for the Intervener
East Prairie Métis Settlement

Robert E. Houston Q.C.
Burke-Robertson LLP
70 Gloucester Street
Ottawa, Ontario, K1P 0A2

Tel: 613 566-2058
Fax: 613 235-4430
Email: rhouston@burkerobertson.com
Agent for the Intervener
Elizabeth Métis Settlement

Colin Baxter
Cavanagh Williams Conway Baxter LLP
401-1111 Prince of Wales Drive
Ottawa, Ontario, K2C 3T2
Tel: 613 569-8558
Fax: 613 569-8668
Email: cbaxter@cwcb-law.com
Agent for the Intervener
Métis Settlements General Council

Chantal Tie
South Ottawa Community Legal Services
406-1355 Bank Street
Ottawa, Ontario, K1H 8K7
Tel: 613 733-0140
Fax: 613 733-0401
Email:
Counsel for the Intervener
Aboriginal Legal Services of Toronto Inc.

Nadia Effendi
Borden Ladner Gervais LLP
1100-100 Queen Street
Ottawa, Ontario, K1P 1I9
Tel: 613 237-5160
Fax: 613 230-8842
Email:

Counsel for the Intervener
Women's Legal Education and Action Fund

Laurie Letheren
ARCH Disability Law Centre
110-425 Bloor Street East
Toronto, Ontario, M4W 3R5
Tel: 416 482-8255
Fax: 416 482-2981
Email: letherel@lao.on.ca
Counsel for the Intervener
Canadian Association for Community Living

Sandeep Dhir
Field LLP
#2000, 10235 – 101 Street
Edmonton, Alberta, T5J 3G1
Tel: 780 423-3003
Fax: 780 424-5657
Email: sdir@fieldlaw.com
Counsel for the Intervener
Gift Lake Métis Settlement

Mary Eberts
Law Office of Mary Eberts
P.O. Box 19047, Station Walmer
Toronto, Ontario, M5S 1X1
Tel: 416 966-0404
Fax: 416 966-2999
Email: maryeberts@bellnet.ca
Counsel for the Intervener
Native Women's Association of Canada

Jason Madden
JTM Law
28 Hawthorn Avenue
Toronto, Ontario, M4W 2Z2
Tel: 416 945-7958
Fax: 416 981-3162
Email: Jason@jtmlaw.ca
Counsel for the Intervener
Métis National Council

Agent for the Intervener
Women's Legal Education and Action Fund

Michael Bossin
Community Legal Services – Ottawa Carleton
422-1 Nicholas Street
Ottawa, Ontario, K1N 7B7
Tel: 613 241-7008
Fax: 613 241-8680
Email:
Agent for the Intervener
Canadian Association for Community Living

Dougald E. Brown
Nelligan O'Brien Payne LLP
1500-50 O'Connor Street
Ottawa, Ontario, K1P 6L2
Tel: 613 231-8210
Fax: 613 788-3661
Email: dougald.brown@nelligan.ca
Agent for the Intervener
Gift Lake Métis Settlement

Michael Chambers
Maclaren Corlett
1625-50 O'Connor Street
Ottawa, Ontario, K1P 6L2
Tel: 613 233-1146
Fax: 613 233-7190
Email: mchambers@macorlaw.com
Agent for the Intervener
Native Women's Association of Canada

Brian Crane, Q.C.
Gowling Lafleur Henderson LLP
2600-160 Elgin Street
Ottawa, Ontario, K1P 1C3
Tel: 613 233-1781
Fax: 613 788-3433
Email: brian.crane@gowlings.com
Agent for the Intervener
Métis National Council

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Overview

1. This case is not about identity and the Métis Nation of Alberta submits that it should not be determined on that basis. It is not about what it means to be "Métis" for the purposes of the *MSA* or what it means to be "Indian" for the purposes of the *Indian Act.* This case is not about whether an individual who registers under the *Indian Act* is "more Métis" or "less Métis" than an individual who does not so register.[1] This is not a case about the inequities suffered by women under the *Indian Act*. Finally, this case is not about whether the Métis, as one of the "aboriginal peoples of Canada," have the right to determine their own membership, or make that determination in a partnered initiative with government. The right of an aboriginal people to self-determination is firmly established in international law.[2]

2. The Métis Nation of Alberta submits that the central issue in this case is whether aboriginal peoples and/or government can create legislated or negotiated schemes, such as treaties, the *Indian Act* or the *MSA,* that include a policy that prohibits multiple concurrent enrolments in such schemes (the 'one enrolment' policy). This is the policy that is articulated in ss. 75 and 90 of the *MSA.* The question before this court is whether this 'one enrolment' policy infringes ss. 2(d), 7 or 15 of the *Charter.*

3. Two facts are pertinent in determining whether this 'one enrolment' policy violates the *Charter*. First, many aboriginal people in Canada have multiple identity options and therefore have the option to register under two or more schemes.[3] Second, there has always been an inequality as between the schemes available to different aboriginal groups.[4] The case at bar illustrates the inequities as between the schemes available to First Nations *vis a vis* Métis.[5] However, the inequities also exist as between different First Nations.[6] It is quite

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[1] This Intervener suggests that this court should be wary of making any determinations with respect to the *Indian Act* in the absence of any First Nations and the federal government.
[2] UN General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples, s. 3: resolution / adopted by the General Assembly*, 2 October 2007, A/RES/61/295, http://www.unhcr.org/refworld/docid/471355a82.html
[3] The Respondents in the case at bar are an example. But see also *Canada (Registrar of Indian Register) v. Sinclair,* 2001 FCT 319 (CanLII) at para. 5*;* rev'd on other grounds at 2003 FCA 265, [2004] 3 F.C.R. 236.
[4] Note the difference between what was offered in scrip (individual, alienable land allotments or money) and historic treaty (collective, inalienable land, money and other benefits)
[5] The Respondents, as registered "Indians" under the *Indian Act*, have access to health benefits not available to Métis. They can also exercise trapping, hunting and fishing rights as "Indians" under the *Natural Resources Transfer Agreements,* which are not available to Métis.
[6] For example one First Nation may make have access to oil or gas money and make individual distributions to its members, whereas another First Nation with no resource revenue will have no ability to make such benefits available to its members.

likely that there will never be perfect equality across the board, and given that likelihood, individuals with multiple identity options will always have the option of choosing to enroll in the scheme that provides the benefits package they most want or require.

4. The Province of Alberta and the Métis in Alberta have worked together since the early 1930s to establish a scheme that establishes benefits for Alberta Métis. One of their notable accomplishments is the Métis settlements and its implementing legislation – the *Métis Settlements Act (MSA)*. The *MSA* provides a range of benefits including a land base and self-governance. It includes a similar 'one enrolment' policy to the ones that are included in historic treaties, scrip, the *Indian Act,* and modern land claim and self-government agreements. The Métis Nation of Alberta's registry also includes a 'one enrolment' policy and denies registration to Métis who are also registered under the *Indian Act.* It is submitted that if ss. 75 and 90 of the *MSA* infringe ss. 2(d), 7 or 15 of the *Charter*, then all such schemes will be similarly vulnerable.

5. The courts below noted that there was an alternative remedy available to the Respondents.[7] It is submitted that there was also an alternative forum and that the initial complaint should have gone to the Métis Settlements Appeal Tribunal (MSAT), which has jurisdiction to deal with membership issues. In light of this, it is submitted that the Court of Appeal erred in providing the Respondents with a *Charter* remedy.

6. There is no question that what happened to these Respondents was wrong. Their membership was removed because they were selectively and maliciously targeted for political purposes. The courts below recognized that the actions of the Former Peavine Council were the mischief in this case.[8] It is submitted that the Court of Appeal erred in

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[7] Reasons for Judgment of the Court of Queen's Bench ("QB Judgment"), Appellant's Record ("AR"), Vol. 1, pps. 12-13, paras. 48-49, "In my view … judicial review of that action should have been sought or an appeal of Nash J.'s decision should have been taken … In now seeking a declaration … and in asking for an order in the nature of mandamus … the Applicants in effect are asking for judicial review ..."; Reasons for Judgment of the Court of Appeal ("CA Judgment,") AR, Vol. 1, p. 62, para. 53, "It may be that the appellants' underlying problem could have been dealt with by reliance on traditional judicial proceedings, such as judicial review or an action grounded on the tort of abuse of public office". See s. 88(2) *MSA*.

[8] QB Judgment, AR, Vol. 1, p. 7, para. 29 and p. 42, para. 10; CA Judgment, AR, Vol. 1, p. 66, para. 67, "On the only occasion a council did act, it did so for improper purposes."

providing a *Charter* remedy because the *Charter* does not apply to the **actions** of the Peavine Council, which is not a "government" within the meaning of s. 32 of the *Charter.*[9]

7. If we are wrong and this court finds that ss. 75 and 90 do unjustifiably infringe the Respondents *Charter* rights, the Métis Nation of Alberta submits that the Court of Appeal granted the wrong remedy and erred in striking out ss. 75 and 90. It is submitted that any findings with respect to s. 75 are premature, as the Registrar did not refuse to register the Respondents pursuant to s. 75 and made no decision in that regard. The appropriate remedy is a declaration. The resolution of these issues is sensitive and complex and it should be left to the Métis Settlements and the Alberta government to find an appropriate means of achieving their objectives with the guidance of this court's declaration.

Part I – Facts

8. The Métis Nation of Alberta accepts the facts as set out by Shelley J. at the Court of Queen's Bench and adds the following facts.

9. There are approximately 85,500 people who self-identify as Métis in Alberta. The Métis Nation of Alberta (MNA) currently has approximately 42,000 of those Alberta Métis in its registry, which includes approximately 50% of Métis Settlement members. The MNA's membership is determined pursuant to a 'one enrolment' policy; one that like the *MSA*, excludes individuals who are registered as "Indians" under the *Indian Act.*

10. The Métis Nation of Alberta, its leaders and its predecessor organizations (*L'Association des Métis d'Alberta et des Territories du Nord Quest* and the Métis Association of Alberta) have a long history with the Métis Settlements. In 1935, in response to submissions and resolutions from *L'Association des Métis d'Alberta*, the Alberta government appointed the Ewing Commission. One result of the Ewing Commission's recommendations was the *Métis Population Betterment Act of 1938* and the decision to set aside land for the Métis. A committee composed of leaders of *L'Association des Métis d'Alberta* and representatives of

[9] *McKinney v. University of Guelph,* [1990] 3 S.C.R. 229 at pps. 41-55; Section 32(1)(a) and (b) of the *Charter* is as follows: "This *Charter* applies to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and to the legislature and government of each province in respect of all matters within the authority of the legislature of each province."

the Alberta government identified lands for Métis settlements (then known as colonies). Peavine (originally called Big Prairie) was one of the original twelve colonies.

11. The Respondents memberships were terminated for political reasons.[10]

12. The Peavine Council asked the Registrar to reinstate the Respondents to membership. The Registrar replied that he did not have the authority to do so and advised that the Respondents could re-apply for membership under the provisions of the *MSA*. They did not do so as "they felt they should not have to."[11]

13. The Métis Nation of Alberta disagrees with the statement of East Prairie Métis Settlement, in paragraph 2 of its factum. All of the Métis Settlements were not formed "as a result of the settlement of long-standing litigation between the Government of Alberta and the Métis Peoples of Alberta." The Settlements (originally known as colonies) were established in the 1930s as a result of the *Métis Population Betterment Act*, S.A. 1938 (2d), c. 6.

14. The Métis Nation of Alberta also disagrees with East Prairie Métis Settlement where it states at paragraph 5 of its factum that "the origins and history of the Métis People of Alberta are related to, and founded upon, the fact that children were born of Indian women who lost their Indian Status as a result of marrying non-Indian men, and which children were disqualified from Indian Status." This is factually incorrect. The Métis people of Alberta arose, as a distinct aboriginal people, long before there was an *Indian Act* or any treaties in Alberta. The Métis are not simply Indians who lost their Indian Status. While there are some who now identify as Métis who lost their *Indian Act* status (or their parents and/or grandparents lost status), this is not true of all or even the majority of Métis in Alberta.

Part II – Questions in Issue

15. There are four questions before this court:

a) Was there an adequate alternative remedy and forum?

b) Does the *Charter* apply to the actions of the Former Peavine Council?

c) Do ss. 75 and/or 90 of the *MSA* unjustifiably infringe ss. 2(d), 7 or 15 of the *Charter*?

[10] AR, Vol. 3, p. 127-8, Affidavit of Sherry Cunningham, paras. 4, 7 and 8.
[11] QB Judgment, AR, Vol. 1, p. 8, para. 35 and p. 50, para. 8.

d) What is the appropriate remedy?

Part III – Argument & Law

a) There was an Adequate Alternative Remedy and Forum

16. The MSAT, established by Part 7 of the *MSA,* has jurisdiction to hear disputes with respect to the removal of membership. The policies of the Métis Settlements General Council (MSGC) have the force of law and are binding on settlement members.[12] The MSAT is empowered to decide questions of law.[13]

17. The general principle is that complaints should proceed through available statutory appeal procedures at first instance.

> The basic characteristic, however, of judicial review providing an exceptional or extraordinary remedy must necessarily be maintained. It can only be maintained when no other effective recourse is open to a litigant. Absent any statutory bar to jurisdiction . . . the relief which a court may grant by way of judicial review remains essentially discretionary. On such an application, **a court must view all the circumstances of the case and decide if any other recourse or remedy is available. Such a recourse is . . . usually by way of an appeal … the practice is to decline jurisdiction where there is a right of appeal, except under special circumstances.**[14] [emphasis added]

18. It is submitted that the Respondents were required to take their case to MSAT prior to filing this case in the courts. There are no special circumstances. In light of this, it is submitted that the courts below erred in hearing the matter and providing a *Charter* remedy.

b) The Charter does not Apply to the Actions of the Peavine Council

19. The evidence shows that the membership removal of the Respondents was part of a strategy to keep the members of one family from voting in Settlement elections. In other words the Respondents were targeted for political reasons.[15] The courts below noted the improper

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[12] *MSA,* s. 227(1)

[13] *Paul v. British Columbia (Forest Appeals Commission),* 2003 SCC 55, [2003] 2 S.C.R. 585, para. 39 "The essential question is whether the empowering legislation implicitly or explicitly grants to the tribunal the jurisdiction to interpret or decide any question of law. If it does, the tribunal will be presumed to have the concomitant jurisdiction to interpret or decide that question in light of s. 35 or any other relevant constitutional provision." For MSAT jurisdiction with respect to determine law see: *MSA,* ss. 189(1)(g.1), 190(1)(i) and 190(1)(m.1).

[14] *Turnbull v. Canadian Institute of Actuaries,* 1995 CanLII 6265 (M.C.A.), pps. 7-8 and 14

[15] AR, Vol. III, p. 128, Affidavit of Sherry Cunningham, paras. 7-8; and see Exhibit "B" attached to that Affidavit, Memorandum from Deputy Minister to Associate Minister of Aboriginal Affairs, AR, Vol. III, p. 131-132, "As you know, there is a long-standing struggle for control in Peavine between the Cunningham and the Gauchier/Noskey families. One cannot but infer that Mr. Gauchier's request is politically motivated…"

implementation of the *MSA* by the Former Peavine Council.[16] Unfortunately, the Court of Appeal then proceeded on the basis that the legislation, not the improper implementation, infringed the *Charter*. This was an error. It is submitted that the Court of Appeal should have asked whether the malicious actions of the Former Peavine Council infringed the *Charter*.[17]

20. This court has distinguished between legislation that infringes a *Charter* right and the application of that legislation. When it is alleged that an action by an entity and not the legislation that regulates them, violates the *Charter,* it must be established that the entity, in performing that particular action, is part of "government" within the meaning of s. 32 of the *Charter*.[18]

21. It is submitted that the Peavine Council is a government, but is not "government" within the limited definition in s. 32 of the *Charter.* The fact that it is a creature of statute is not sufficient to make its actions subject to the *Charter.* While the Peavine Council may be subsidized by public funds, it is not a public entity because its responsibility extends only to its members. The settlements are subjected to limitations on what they can do because of their dependence on government funds and because they must work in cooperation with the provincial government. It by no means follows, however, that the settlements are organs of government. The decisions of the Peavine Council are not government decisions.

22. The basis of the exercise of supervisory jurisdiction by the courts is not that Peavine Council is government, but that it is a decision maker. Therefore, the *Charter* does not apply to the actions of Peavine Council and the Court of Appeal erred in holding that it did apply.

c) Did ss. 75 and/or 90 of the *MSA* unjustifiably infringe ss. 2(d), 7 or 15 of the *Charter*?

23. The MNA submits that ss. 75 and/or 90 of the *MSA* do not unjustifiably infringe the *Charter.*

24. The Métis Settlements were always intended to be a benefit for Métis – not for Indians. The MNA takes the position that it is not unconstitutional for the Alberta government to enter

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[16] QB Judgment, AR, Vol. 1, p. 7, para. 29 and p. 42, para. 10; CA Judgment, AR, Vol. 1, p. 66, para. 67, "On the only occasion a council did act, it did so for improper purposes."
[17] *Nelles v. Ontari*o, [1989] 2 S.C.R. 170, p. 27 in which malice is defined in broad terms as including an improper purpose, such as gaining a private collateral advantage.
[18] *Mckinney v. University of Guelph, supra* at pps. 41-55.

into a partnered initiative that creates Métis-only benefits or to enact legislation that excludes registered Indians from benefits intended for the Métis. The exclusion of registered Indians in the Alberta Métis settlements scheme is not a new, arbitrary or *ad hoc* policy choice.[19] The *MSA* is a clear statement of Alberta's legislative intention that the benefits are for the Métis only; *MSA* benefits are not intended to be for registered Indians.

25. The idea that government in partnered initiatives, negotiated agreements, legislation and treaties can provide benefits for one of the aboriginal peoples of Canada and exclude others from the benefits has been part of aboriginal policy in Canada since at least 1850 when Robinson denied the Métis participation in the Robinson Huron Treaty claiming that he had instructions to enter into treaty only with Indians.[20] This same policy led the federal government to implement two different schemes to deal with the aboriginal title claims of Indians and Métis – treaty and scrip.[21] The historical facts show that aboriginal applicants had a choice between taking treaty or scrip. They were even permitted to change their minds and switch regimes.[22] The 'one enrolment' policy remains a feature of modern land claim and self-government agreements.[23]

26. The *Indian Act* is another scheme that is based on the 'one enrolment' policy. The Act was designed primarily for "Indians". This is not to say that no "non-Indians" are registered under the Act.[24] It is to say that the intention of the legislature has always been to articulate its authority for, register, and provide benefits for one group – Indians.

27. Indians and Métis have, since at least 1886 been distinguished in the *Indian Act*. Since 1927, the Act has denied registration to "half-breeds" who were beneficiaries under the *Manitoba Act*. In 1951, the Act extended that exclusion to "half-breeds" who were beneficiaries of scrip under the *Dominion Lands Act*. This exclusion continues today. The current *Indian Act* states in s. 6(1)(a) that, "a person is entitled to be registered if that person was registered or

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[19] Appellants Authorities, Tab 28, *Métis Population Betterment Act,* S.A., 1938 (2d) c. 6, s. 2(a); Appellants Authorities, Tab 27, *Métis Betterment Act,* R.S.A. 1955, c. 202, s. 2(a)
[20] *R. v. Powley,* 2001 CanLII 24181 (ON C.A.), paras. 21-22.
[21] AR, Vol. 2, p. 118, Ewing Commission Report.
[22] *Papaschase Indian Band (Descendants of) v. Canada (Attorney General),* 2004, ABQB 655, para. 23. Note that the *Indian Act* is the only regime that does not permit individuals to remove themselves from registration, Appellants Book of Authorities, Tab 23 *Indian Act,* R.S.C. 1985, c. I-5, s. 5(3). See *Tlicho Agreement*, s. 3.4.2(a).
[23] See *Tlicho Agreement*, Chapter. 3, s. 3.1.2 and s. 3.4.3(c).
[24] Clearly there are non-aboriginal women who married "Indians" prior to 1985 and remain registered under the *Indian Act*. Clearly there are also some Métis who are registered under the Act.

entitled to be registered immediately prior to April 17, 1985." Prior to 1985, Métis were excluded by s. 12(1)(a)(i) and (ii) which denied registration to "a person who has received or has been allotted half-breed lands or money scrip" or is a descendant of such a person. The *Indian Act* Registrar has the authority to remove Métis from registration if they are descendents of those who registered under another scheme (took scrip).

28. The scheme in the *MSA* is strikingly similar. It denies registration to those who are registered under another scheme – the *Indian Act.* The *MSA* Registrar has the authority to remove members if they registered after the cutoff date under another scheme – the *Indian Act.*

29. It is submitted that while 'one enrolment' policies may establish distinctions between various aboriginal groups, they do not produce discrimination. It is further submitted that the case at bar is a situation where substantive equality requires that a distinction be made. If we are wrong in this submission and this court does find that the distinction is discrimination, then it is submitted that it is justified under s. 1. This court has previously upheld the creation of programs with exclusion provisions.[25]

30. This Intervener submits that this case does not rise or fall on the issue of identity. The constitutional questions should be determined on one question only - whether a partnered initiative that resulted in legislation expressly intended to benefit Métis can exclude those who are registered as "Indians" under the *Indian Act.* It is respectfully submitted that this court should reject any impulse to wade into the battle of identities or the "relative disadvantage approach." All parties acknowledge the disadvantages suffered by Métis whether or not they are registered as "Indians" within the meaning of the *Indian Act*. As this court has noted previously it is unseemly to pit one disadvantaged group against another.[26]

31. It is submitted that in the face of such a clear legislative intention, this court should not substantially change the legislation or adopt means clearly rejected in the legislation. As

[25] *Lovelace v. Ontario*, 2000 SCC 37, para. 90.
[26] *Lovelace v. Ontario*, *supra,* para. 59.

Professor Roach has noted, "courts should focus on respect for the role of the legislature and not rely on fictional attributions of legislative intent."[27]

d) What is the Appropriate Remedy?

32. As noted above, this Intervener submits that there is no unjustifiable infringement of the Respondents' *Charter* rights. However, if we are wrong in this, we submit that the infringement was the implementation of s. 90 for improper purposes. In cases where the *Charter* is infringed by the improper implementation of legislation by government, the appropriate remedy is under s. 24(1) of the *Charter*.[28] Therefore, the Court of Appeal erred in severing ss. 75 and 90, which are s. 52(1) remedies.

33. As noted above, the Registrar was asked by the Present Peavine Council to reinstate the Respondents.[29] The Court of Appeal stated that the Registrar replied that he was unable to do so "under s. 75 of the *MSA,* which does not allow Métis with Indian status to obtain settlement membership".[30] The actual letter from the Registrar does not say that. It says as follows:

> With respect to your request of the Registrar of the MSLR to restore the memberships of the individuals you identified, we are not able to comply with this request at this time. The advice we have received in this matter suggests that **the legislation does not give the Registrar the authority or jurisdiction to restore terminated Settlement memberships**. However, the advice also indicates that if the individuals believe they are entitled to Settlement membership, they can apply for membership pursuant to the *Métis Settlement Act*. [emphasis added][31]

34. The Registrar's response is only with respect to the fact that the legislation does not provide him with the authority or jurisdiction to restore terminated memberships. In fact the Registrar never claimed that his inability to reinstate was pursuant to s. 75. The facts also show that the Respondents never applied for or were denied registration pursuant to s. 75.

35. The Respondents did express a fear that future Peavine Councils might remove them.[32] The Court of Appeal used this to justify severing ss. 75 and 90 and agreed with the Respondents that "so long as the impugned provisions remain in force, the potential exists that another

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[27] Kent Roach, *Constitutional Remedies in Canada,* p. 14-53.
[28] *Eldridge v. British Columbia (Attorney General)* 1997 CanLII 327 (S.C.C.), para. 20.
[29] AR, Vol. III, p. 36, letter of April 18, 2005 from S. Dhir to R. Raitz, Interim Métis Settlements Registrar.
[30] CA Judgment, AR, Vol. I, p. 50, para. 8; and see QB Judgment, AR, Vol. I, p. 4, para. 3.
[31] AR. Vol. III, p. 38, letter of November 17, 2005 from R. Raitz to S. Dhir.
[32] AR, Vol. II, p. 4, para. 16, Affidavit of Ralph David Cunningham.

council will do to the appellants, or to others, as the Former Peavine Council did."[33] While this logic might apply to the removal provisions in s. 90(1)(a), it is not applicable to the registration provisions in s. 75.

36. Further, the courts have relied on declaratory relief under s. 24(1) of the *Charter* in the belief (largely substantiated by experience) that there will be "prompt and good faith compliance with the letter and spirit of their declarations."[34] There is no reason for the courts to assume that future Settlement Councils would not act appropriately in light of a declaration pursuant to s. 24(1) of the *Charter* that prohibited removing membership for improper purposes under s. 90(1)(a) of the *MSA*. In the result, the MNA submits that s. 75 is not engaged in this case and the Court of Appeal erred in severing it.

37. If the *Charter* rights of the Respondents have been infringed it is submitted that a declaration, is the appropriate remedy. Severing ss. 75 and 90 is a substantial intrusion into the legislative domain. The Court of Appeal erred in severing the provisions, thereby dictating how rectification is to be accomplished. There are myriad options available to the government to rectify any unconstitutionality in the current system.

Part IV – Costs

38. This Intervener does not seek costs and asks that costs not be ordered against it.

Part V – Relief Requested

39. The MNA asks that the appeal be allowed and the order of the Court of Appeal be set aside.

40. The MNA asks that this court grant it time to make oral representations at the hearing of this appeal.

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

Jean Teillet

[33] CA Judgment, Vol. 1, p. 62, para. 53 and p. 66, para. 69.
[34] Kent Roach, *Constitution Remedies in Canada*, p. 12-2.

Part VI – Table of Authorities

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