

**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)**

Appellants  
(Respondents)

- and -

**REGISTRAR, MÉTIS SETTLEMENTS LAND REGISTRY**

Appellants  
(Respondents)

- and -

**BARBARA CUNNINGHAM**

Respondents  
(Appellants)

- and -

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

Respondents  
(Appellants)

- and -

**PEAVINE MÉTIS SETTLEMENT**

Respondents  
(Appellants)

- and -

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## PART I – STATEMENT OF FACTS

### A. Nature of the Appeal

1. Métis Settlements General Council (“MSGC”) submits that the Alberta Court of Appeal erred in its analysis of ss. 15 of the *Charter of Rights and Freedoms* (“Charter”). The validity of ss. 75 and 90 of the *Métis Settlements Act* (the “Challenged Provisions”) should be upheld.

### B. Background to the Enactment of the *Métis Settlements Act*

2. In Alberta, Métis leaders have a long history of negotiating directly with the Government of Alberta to secure land rights, local autonomy and other benefits for Métis people.<sup>1</sup> The need for these negotiations arose from the historical displacement of Métis people from Indian Reserves and areas opened up to European settlement, which resulted in extreme poverty for many Alberta Métis. The Ewing Commission prepared the first formal study of these issues in 1934.<sup>2</sup> For the purposes of its report, the Ewing Commission recognized the historical and then-current distinctions between Indians and Métis, the latter being described as a person of “mixed blood, white and Indian, who lives the life of the ordinary Indian and includes a non-Treaty Indian.”<sup>3</sup>

3. Flowing from the Ewing Report and further conferences and negotiations with Métis leadership, Alberta passed the first legislation dealing strictly with Métis people in 1938 – *An Act Respecting the Métis Population of the Province, SA 1938* (the “*Métis Betterment Act*”). The *Métis Betterment Act* specifically excluded Indians and non-treaty Indians as defined in the *Indian Act, 1927*, from its statutory regime.<sup>4</sup> Significantly, the *Métis Betterment Act* led to the establishment of: 12 Métis associations whose “aims and objects...[were] to co-operate with the Minister in preparing and formulating schemes for the betterment of the members of such

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<sup>1</sup> For an overview of the history of Métis Settlements in Alberta see Fred V. Martin, “Alberta’s Métis Settlements: A Brief History” in Richard Connors & John M. Law, eds., *Forging Alberta’s Constitutional Framework* (Edmonton: The University of Alberta Press, 2005) 345 [Martin, “Alberta’s Métis Settlements”].

<sup>2</sup> Affidavit of Dennis Cunningham, A.E. Vol. II, Exhibit A at 114-134 [Ewing Report].

<sup>3</sup> *Ibid.* at 120.

<sup>4</sup> See *An Act Respecting the Metis Population of the Province, S.A. 1938* (2nd Sess.), c.6, s. 2(a).



association, and for their settlement on lands set aside for that purpose by the Province”<sup>5</sup>; 12 Métis colonies; and exclusive Métis hunting and trapping rights within the colonies.<sup>6</sup>

4. In the 1970’s the Alberta Federation of Métis Settlements (the “Federation”) commenced litigation against the Province of Alberta claiming breaches of trust arising from the *Métis Betterment Act* and claiming an interest in subsurface resources (the “Resource Litigation”).<sup>7</sup> In order to address growing problems under the *Métis Betterment Act* and to resolve the Resource Litigation, the Alberta Government and the Federation engaged in a series of negotiations<sup>8</sup> to provide constitutional protection to the Métis settlement lands and to promote and enhance local self-government for the Métis settlers. Part of the negotiation process was the establishment of the MacEwan Joint Métis-Government Committee to Review the *Métis Betterment Act* and Regulations. This committee identified two major issues that the authors considered fundamental to their proposal for changing the *Métis Betterment Act* legislation: 1) a reflection of the reality that the Settlements were moving toward local self-government; and 2) security of the land, which had always been of paramount importance to Métis people.<sup>9</sup>

5. On June 3, 1985, the Legislative Assembly of Alberta passed Resolution 18<sup>10</sup>, which provides:

- (a) Alberta’s commitment to protecting the settlement lands; and
- (b) Recognition that it was the responsibility of the Métis to define and propose criteria for membership in settlement associations.

6. Ultimately, the conferences and negotiations between Alberta and the Federation culminated in the *Alberta-Métis Settlements Accord* (the “Accord”), which was signed on July 1, 1989.<sup>11</sup> The Accord included draft bills, the language of which had been negotiated as part of the settlement of the Resource Lawsuits and ratified by a Settlement-wide referendum. The draft

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<sup>5</sup> *Ibid.*, s. 4(3).

<sup>6</sup> *Ibid.*, s. 7.

<sup>7</sup> Martin, “Alberta’s Métis Settlements”, *supra* note 1 at 366.

<sup>8</sup> ABQB Reasons, A.R. Vol. 1 at 5, para. 14.

<sup>9</sup> *Ibid.* at 143-44.

<sup>10</sup> See The Honourable Peter Lougheed, Premier, *A Resolution Concerning an Amendment to the Alberta Act* (June 3, 1985).

<sup>11</sup> Cross Examination of Dennis Cunningham, A.R. Vol. III, Exhibit D-1 at 50-113.

bills were eventually enacted as the *Métis Settlements Act* (the “MSA”)<sup>12</sup>, the *Métis Settlements Accord Implementation Act*<sup>13</sup>, the *Métis Settlements Land Protection Act*<sup>14</sup>, and the *Constitution of Alberta Amendment Act, 1990* (the “*Constitution of Alberta*”)<sup>15</sup> (collectively, the “Accord Legislation”).

7. When the *MSA* was passed, MSGC was created and took over governmental functions from the Federation.<sup>16</sup> Under the *MSA*, MSGC acts as the collective government for the eight Métis Settlements. It is comprised of five elected councillors from each Settlement plus four elected Executive members. MSGC holds the letters patent for the land of each of the eight Settlements and has legislative powers prescribed by the *MSA* to pass General Council Policies (“GC Policies”) enforceable within the Métis Settlements. Included in these legislative powers is the power to pass GC Policies regarding settlement membership, generally, and to address ss. 75 and 90 of the *MSA*, specifically.<sup>17</sup>

8. Another key element of the Accord Legislation is that the letters patent and the composition of MSGC are protected from revocation or alteration by Alberta through an amendment to the *Constitution of Alberta*.

9. The parties’ intention when entering into the Accord and in protecting the Settlement Lands within the *Constitution of Alberta* was to set aside land for the exclusive use and benefit of Métis people, to promote Métis self-government and the preservation of the Métis culture.<sup>18</sup>

### C. Individual Respondents

10. The evidence of the Respondents is that they registered as Indians under the *Indian Act* so they could receive health care benefits provided to Status Indians.<sup>19</sup>

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<sup>12</sup> *Métis Settlements Act*, R.S.A. 2000, c. M-14 [*MSA*].

<sup>13</sup> *Métis Settlements Implementation Act*, R.S.A. 2000, c. M-15.

<sup>14</sup> *Métis Settlements Land Protection Act*, R.S.A. 2000, c. M-16.

<sup>15</sup> *Constitution of Alberta Amendment Act, 1990*, R.S.A. 2000, c. C-24.

<sup>16</sup> *MSA*, *supra* note 12 at part 8.

<sup>17</sup> *Ibid.*, ss. 222 (y) and (z).

<sup>18</sup> See, for example, s. 0.1 of the *MSA*, *supra* note 12.

<sup>19</sup> Affidavit of Ralph David Cunningham, A.R. Vol. II at 1, para. 9; Affidavit of Barbara Joyce Cunningham, A.R. Vol. II at 11, para. 9; Affidavit of John Cunningham, A.R. Vol. II at 20, para. 11; Affidavit of Lawrent Cunningham, A.R. Vol. II at 30, para.8; Affidavit of Gordon Cunningham, A.R. Vol. II at 43, para. 8; Affidavit of

## PART II – QUESTIONS IN ISSUE

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

## PART III – ARGUMENT

### A. Errors by the Alberta Court of Appeal

#### i. Section 15 (1) of the Charter: Enumerated or Analogous Ground

12. MSGC respectfully submits that the Court of Appeal erred in finding that registration under the *Indian Act* constitutes an analogous ground. Contrary to the submissions of the Respondent<sup>20</sup>, MSGC submits that this Honourable Court has not determined that registration under the *Indian Act*, in and of itself, is an enumerated or analogous ground under s. 15 of the *Charter*.

13. In accordance with *Corbiere v. Canada (Minister of Indian and Northern Affairs)*<sup>21</sup>, analogous grounds have the following in common: “they often serve as the basis for stereotypical decisions made not on the basis of merit but on the basis of a personal characteristic that is changeable only at unacceptable cost to personal identity”<sup>22</sup> (emphasis added).

14. The evidence in this case is that the Respondents did not choose to register as Indians for reasons of “personal identity” or other reasons akin to personal dignity. Rather, they did so to access financial benefits available to persons registered as Indians under the *Indian Act*. In effect, the Respondents selected the benefits available under one legislative scheme, and in doing so made themselves ineligible to participate in a separate legislative scheme.

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Lynn Noskey, A.R. Vol. II at 52, para. 12; Affidavit of Roger Cunningham, A.R. Vol. II at 58, para. 9; Affidavit of Ray Stuart, A.R. Vol. II at 67, para. 8.

<sup>20</sup> Respondent's Factum at paras. 34-35.

<sup>21</sup> *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203 [*Corbiere*].

<sup>22</sup> *Ibid.* at para. 13.

ii. *Section 15 (1) of the Charter: Whether the Challenged Provisions are Discriminatory*

15. In the alternative, if registration under the *Indian Act* is an analogous ground, this must speak to the fundamental importance of the Respondents' decision to register. If the choice to register under the *Indian Act* is fundamental to personhood and identity warranting protection under s. 15, it follows that registration is a legitimate or rational indication that the Respondents self-identify as Indians.

16. Simply put, MSGC respectfully submits that it is internally inconsistent for the Respondents to argue that their *Indian Act* status is an analogous ground under s. 15 because it is akin to a closely held personal and immutable characteristic, but that registration should be irrelevant to whether or not one is eligible for Métis settlement membership.

17. Further, MSGC respectfully submits that the Court of Appeal erred by misapplying this Honourable Court's ruling in *Corbiere* regarding "choice" in finding that the Challenged Provisions offended s. 15(1). It is respectfully submitted that *Corbiere* does not support the general proposition that the choice to acquire an analogous ground is irrelevant to the discrimination analysis. Rather, as was articulated in *Corbiere*, once a "distinction on an enumerated or analogous ground is established, the contextual and fact-specific inquiry proceeds to whether the distinction amounts to discrimination in the context of the particular case."<sup>23</sup> In this case, one of the primary contextual factors is the Respondents' choice of one legislative regime over another. There is no evidence before the Court that the Respondents' choice to access benefits was "profound" or fundamentally related to a closely held personal characteristic.

18. Accordingly, MSGC submits that the choice of the Respondents to actively seek out the benefits available to them by virtue of registration under the *Indian Act* and to thereby forego benefits under the *MSA* is highly relevant to the discrimination analysis. In particular, the issue squarely under appeal is membership criteria for a Métis community under a legislative scheme of self-governance and land ownership. The ability for the Métis settlements to distinguish between themselves and persons who choose registration under the *Indian Act* corresponds directly with the intention of the Accord Legislation to protect Métis lands for Métis people. In

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<sup>23</sup> *Ibid.* at para. 11.

this way, distinguishing between adults who have chosen to register as Indians from those who have not so chosen is rational and not discriminatory under s. 15 of the *Charter*.

19. The linked issues of choice and self-identification explain why exceptions exist to allow membership for persons who were registered as Indians prior to turning 18 or those who were registered prior to the enactment of the *MSA*; namely in those cases registration is not clearly representative of self-identification as an Indian.

20. Finally, the Respondents improperly characterize themselves as suffering more disadvantage than Settlement members who are not able to register as Indians. The fact is that registration under the *Indian Act* affords the Respondents a number of benefits that Métis are not able to access. It is precisely because Métis in Alberta are totally excluded from the rights and entitlements afforded to Indians by the Federal government that the provincial regime was created for Métis<sup>24</sup> and it is inherently rational to exclude Indians from the Métis-ameliorative regime.

#### **PART IV – COSTS**

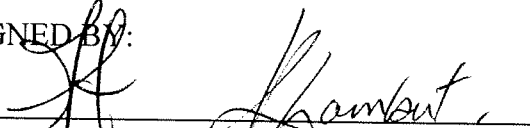
21. The Applicant makes no submissions at this time in respect of an Order concerning costs.

#### **PART V – ORDER SOUGHT**

22. MSGC asks that Alberta's Appeal be allowed and the Order of the Alberta Court of Appeal be set aside.

Dated at Edmonton, Alberta this 13<sup>th</sup> day of December, 2010.

SIGNED BY:

  
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<sup>24</sup> Martin, "Alberta's Métis Settlements", *supra* note 1 at 353-56.

## PART VI – TABLE OF AUTHORITIES

### A. JURISPRUDENCE

1. *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 3 13, 17

### B. LEGISLATION

2. *Alberta-Métis Settlements Accord*, (July 1, 1989) 6, 9
3. *An Act Respecting the Métis Population of the Province*, S.A. 1938 (2nd Sess.), c.6 3, 4
4. *Canadian 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 1, 11, 12, 15
5. *Constitution of Alberta Amendment Act, 1990*, R.S.A. 2000, c. C-24 6, 8, 9
6. *Indian Act*, R.S.C. 1985, c. I-5, s. 6 10, 12, 15
7. *Métis Settlements Accord Implementation Act*, R.S.A. 2000, c. M-15 6
8. *Métis Settlements Act*, R.S.A. 2000, c. M-14 1, 6, 7, 9, 18
9. *Métis Settlements Land Protection Act*, R.S.A. 2000, c. M-16 6

### C. SECONDARY SOURCES

10. The Honourable Peter Lougheed, Premier, *A Resolution Concerning an Amendment to the Alberta Act* (June 3, 1985) 5
11. Fred V. Martin, “Alberta’s Métis Settlements: A Brief History” in Richard Connors & John M. Law, eds., *Forging Alberta’s Constitutional Framework* (Edmonton: The University of Alberta Press, 2005) 345 2, 4, 20

## PART VII – STATUTES AND REGULATIONS

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

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

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BETWEEN:

HER MAJESTY THE QUEEN IN RIGHT OF  
ALBERTA et al.

Appellants  
(Respondents)

- and -

BARBARA CUNNINGHAM

Respondents  
(Appellants)

- and -

JOHN KENNETH CUNNINGHAM et al

Respondents  
(Appellants)

- and -

PEAVINE MÉTIS SETTLEMENT

Respondent  
(Appellant)

- and -

MÉTIS SETTLEMENTS GENERAL COUNCIL et  
al

Interveners

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**REVISED AMENDED FACTUM OF THE  
INTERVENER, METIS SETTLEMENTS  
GENERAL COUNCIL**

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