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Another Take on Equality Rights by the Court of Appeal

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Cases Considered:

Cunningham v. Alberta (Aboriginal Affairs and Northern Development), 2009 ABCA 239

In my recent post on *Morrow v. Zhang*, 2009 ABCA 215, Some Questions about the Decision to Reinstate the Cap on Damages for Soft Tissue Injuries, I noted that this case was the first opportunity for the Court of Appeal to apply section 15 of the *Charter* (the equality rights provision) since the Supreme Court of Canada's landmark decision in *R. v. Kapp*, 2008 SCC 41. Only a couple of weeks later, a differently constituted Court of Appeal panel decided another section 15 case, and the analysis and outcome of the two cases are quite different. While I have a few quibbles with the Court's decision in *Cunningham v. Alberta (Aboriginal Affairs and Northern Development)*, I believe it is a much better example of how section 15 of the *Charter* should be applied than is *Morrow v. Zhang*.

I also wrote a post, "Evidence of amelioration: What does Kapp require of governments under s.15(2) of the Charter? What will courts permit?" on an earlier decision in *Cunningham* which dealt with a government application to introduce new evidence on appeal (*Cunningham v. Alberta (Aboriginal Affairs and Northern Development)*, 2009 ABCA 53). As noted there, the case deals with a claim by a number of individuals who were removed from the membership list of the Peavine Métis Settlement in 2001 by the Registrar of Métis Settlements as requested by a former Peavine Council. Under section 90 of the *Métis Settlements Act*, R.S.A. 2000, c. M-14 (*MSA*), a Métis settlement member who voluntarily registered as an "Indian" under the *Indian Act*, R.S.C. 1985, c. I-5 after November 1, 1990 must be removed from the Métis settlement membership list by the Registrar when requested by the settlement council. The Registrar refused to reinstate these individuals on an application by a subsequently elected Peavine Council because section 75 of the *MSA* prohibits an adult Métis person who holds Indian status from obtaining membership in a Métis settlement. The individuals in question initiated a *Charter* action for a declaration that the relevant sections of the *MSA* violated their rights under sections 2(d), 7 and 15 of the *Charter*, and for an order requiring the Registrar to reinstate them to the Peavine membership list.

At trial, the applicants' claims based on freedom of association (section 2(d) of the *Charter*) and liberty (section 7 of the *Charter*) were rejected by Madam Justice D.L. Shelley of the Alberta Court of Queen's Bench (*Peavine Métis Settlement v. Alberta (Minister of Aboriginal Affairs and Northern*, 2007 ABQB 517). More relevant to this post, she also found that there was no violation of equality rights under section 15 of the *Charter*, applying the test from *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497 which governed at that time. Justice Shelley found that as compared to Métis individuals who had not registered as Indians under the *Indian Act* and who met the other criteria for settlement membership, the

applicants were differentially treated because they lost the benefits of settlement membership. Such benefits included the ability to participate in the Métis community, the right to vote in Peavine Council elections, and the right to reside on or occupy Métis land. This differential treatment was said to be based on the analogous ground of registration as an Indian under the *Indian Act*, a ground "that is closely akin to the concepts of nationality and citizenship" (at para. 167, citing *McIvor v. Canada (Registrar, Indian and Northern Affairs)*, 2007 BCSC 827). Thus Justice Shelley found that the first two steps of the *Law* test had been met.

However, she went on to find that this differential treatment on a protected ground did not pass the third stage of the *Law* test, which required a finding of discrimination based on a violation of the essential human dignity of the claimants. Applying the first contextual factor from *Law*, Justice Shelley found that the claimants were not subject to "any stereotyping or unique disadvantage" as compared to the comparator group, "other than exclusion from the benefits offered by settlement membership" (at para. 180). Under the third contextual factor from *Law*, Justice Shelley characterized the *MSA* as ameliorative:

> the *MSA* represents a partnered initiative between the Government of Alberta and Alberta Métis … which was intended to allow the Métis "to secure a land base for future generations, to gain local autonomy in their own affairs, and to achieve economic self-sufficiency" (at para. 183, citing The Alberta-Métis Settlements Accord of 1989).

In terms of the second contextual factor from *Law*, whether there is a correspondence between the ground on which the claim is based and the actual needs, capacities, and circumstances of the claimants, Justice Shelley held (at para. 204) that "the ameliorative purpose or effect of the legislation is supported rather than undermined by the impugned provisions" in light of the fact that the *MSA* permitted Métis Councils to adopt policies overriding the loss of Métis status upon registration as an Indian. Lastly, she focused on the fact that the applicants had voluntarily chosen to register as Indians in order to obtain some of the benefits available under the *Indian Act*. This was seen to be relevant to the fourth contextual factor from *Law*. While "the loss of their right to formally participate in the Métis community with which they have been associated on a long- term basis, if not for their whole life, is undoubtedly a severe consequence suffered by the individual Applicants", … "by registering as Indians under the Indian Act, they have chosen to acquire other rights and benefits" (at para. 205). Overall, the application of the *Law* test was seen to mandate the finding that the *MSA* "[does] not affect the human dignity of the individual Applicants and, therefore, [is] not discriminatory" (at para. 206).

The claimants appealed this decision to the Alberta Court of Appeal, where the government applied to introduce new evidence to support the ameliorative purpose of the relevant legislation in light of the *Kapp* decision. *Kapp* had come down after the trial judgment, and gave new and independent weight to section 15(2) of the *Charter*, the affirmative action provision. Justice Jack Watson of the Alberta Court of Appeal held that the appeal panel should decide whether the Crown was permitted to introduce new evidence and raise new arguments based on that evidence, and to decide if any harm or unfairness would result from the admission of new evidence (*Cunningham v. Alberta (Aboriginal Affairs and Northern Development)*, 2009 ABCA 53).

As it turns out, the question of new evidence was not determinative on appeal, as the claimants did not in the end object to the consideration of the evidence put forward by the government (at para. 18). What was more important was the proper application of section 15 of the *Charter* in light of all the evidence.

Justice Keith Ritter (with Justices Peter Costigan and Elizabeth McFadyen concurring), began the section 15 analysis by referencing the *Kapp* decision. He interpreted the case to mean that "if the state can meet the requirements of s.15(2), then a s.15(1) claim will fail" (at para. 19, citing *Kapp* at paras. 37-39). Accordingly, the Court said that it would consider section 15(2) before section 15(1) (at para. 17).

This is not quite right. The Supreme Court held in *Kapp* that section 15 analysis should begin with a consideration of whether there has been differential treatment based on a protected ground, the first step towards proving a claim under section 15(1). If that step is met, then a court should turn its focus to section 15(2), where the burden shifts to the government to prove that the impugned law or government program has an ameliorative purpose that targets a disadvantaged group. If the government can meet its burden under section 15(2), the section 15(1) claim will fail. If not, the burden returns to the claimant(s) to prove that there has been discrimination contrary to section 15(1) (see *Kapp* at paras. 40-41).

While it may seem overly formalistic to insist that courts sequentially follow the Supreme Court's stages of analysis from *Kapp*, the Court of Appeal's failure to proceed through these steps in the right order causes confusion in *Cunningham*. At para. 20, under its section 15(2) analysis, the Court finds as follows:

> The chambers judge identified the appellants as being denied the benefits of settlement membership on the basis of their registration as Indians under the *Indian Act*, and correctly found that to be a personal characteristic analogous to an enumerated ground…. Because the impugned provisions target the appellants, and those similarly situated, the second part of the s. 15(2) test is met.

In spite of its earlier statement that it would consider section 15(2) first, the Court effectively looks at the first step of section 15(1) in this passage, and supports the trial judge's decision that there was differential treatment (the denial of the benefit of settlement membership) on the basis of a protected ground (Indian status). This is actually a positive thing, as it is difficult to see how the section 15(2) analysis could proceed without an initial determination of the nature of the discrimination being claimed under section 15(1). However, to go on to say that because there is differential treatment on a protected ground, the law targets a disadvantaged group for the purposes of section 15(2) is surely incorrect. The whole gist of section 15(2) is to protect programs that are targeted at disadvantaged groups other than the claimants. In *Kapp*, for example, at issue was a fishing program that gave west coast Aboriginal fishers a one day lead over fishers who were not included in the program. The excluded fishers claimed discrimination, and the Supreme Court held that even though there was differential treatment against this group based on a protected ground, the program was designed to ameliorate the disadvantage of another group (i.e. the Aboriginal fishers) and could not therefore be seen as discriminatory. In *Cunningham*, in addressing whether the law targeted a disadvantaged group, the Court should first have looked at who the impugned provisions were designed to benefit, not who was being disadvantaged by the exclusion from those benefits. This is not to say that if a disadvantaged group is wrongly excluded from an ameliorative program they will be unable to successfully mount a discrimination claim. It may be that the targeted group was too narrowly framed by the government when it designed its law or program. This was a key issue left open by *Kapp*, and the Court of Appeal does go on to consider that question in *Cunningham*. But the starting point for section 15(2) should be the determination of which disadvantaged group(s) the law or program was intended to ameliorate (and for what reasons), not who it excludes.

(As an aside, two members of the Supreme Court of Canada make a similar error in *A.C. v. Manitoba, (Director of Child and Family Services)*, 2009 SCC 30, released the same day as *Cunningham*. In that case, Chief Justice Beverley McLachlin and Justice Marshall Rothstein find that legislation which limits decisions that minors can make about their medical treatment is ameliorative, and therefore not discriminatory (at para. 152). This finding is said to be based on the law's protection of minors as a vulnerable group, but this is the very group to which the claimant A.C. belonged. If ameliorative purpose can be used this way, it means that laws cannot be seen as discriminatory if they are seen to be imposed for the claimant group's own good. This extends the notion of ameliorative purpose even further than it was taken in *Kapp*, and deserves a fuller consideration than the three paragraphs that McLachlin, C.J. and Rothstein, J. gave it.)

In *Cunningham*, the Court of Appeal quickly recovers from its misstep under section 15(2) by considering whether the challenged law rationally advances its intended ameliorative purpose. At this point the Court shifts to an assessment of the *MSA*'s overall ameliorative purpose, which it finds to be "the enhancement and preservation of Métis culture and identity", as well as to "enable a degree of self-governance" and "to preserve a Métis land base" (at para. 24). The problem for the government was that the exclusion of the claimants (and others in their situation) detracted from rather than advanced this purpose. Their exclusion is seen by the Court to be arbitrary rather than rationally connected to the purpose of the *MSA*, as they "potentially [exclude] Métis settlement members like the appellants, who, for a long time, have identified with and lived the Métis culture" (at para. 28).

Importantly, the Court does not accept the government's argument that because the overall purpose of the *MSA* was ameliorative, this should bar the section 15 claim. The Court draws an analogy to the case of *Vriend v. Alberta*, [1998] 1 S.C.R. 493, where the exclusion of sexual orientation as a protected ground under Alberta's human rights legislation was found to be discriminatory. Surely, the Court suggests, we would not say that *Vriend* is now bad law in light of *Kapp* simply because a government could prove that human rights legislation has an overall ameliorative purpose (at para. 23). We would still find the exclusion of a particular group that required human rights protection – i.e. of another disadvantaged group – to be discriminatory. This is the same analogy that my colleague Jonnette Watson Hamilton uses in a case comment she is writing on *Kapp*, where she raises *Vriend* as a cautionary tale of how *Kapp* might be misinterpreted. In order to avoid overturning years of section 15 case law dealing with the discriminatory exclusion of particular groups from benefit conferring legislation, *Kapp* must leave space to find that this sort of exclusion cannot be justified under section 15(2). I think the Court of Appeal got this aspect of its judgment right.

So far I have not made any comparisons between *Cunningham* and *Morrow v. Zhang*, which I promised I would do in the introduction to this post. That is because section 15(2) was not raised by the government as a bar to the section 15(1) claim of soft tissue injury victims in *Morrow v. Zhang*. It is in respect of the Court of Appeal's section 15(1) reasons that *Cunningham* and *Morrow v. Zhang* provide such an interesting contrast.

In my post on *Morrow v. Zhang*, I suggest that while it seemed to acknowledge the import of *Kapp* and its impact on *Law*, the Court of Appeal went on to apply the *Law* test. In her post on *Morrow v. Zhang*, "More Questions about the Decision to Reinstate the Cap on Damages for Soft Tissue Injuries," Jonnette Watson Hamilton argues that the Court of Appeal applies more of a "*Law*-lite" approach by applying *Law*'s four contextual factors without an overarching focus on human dignity. She also argues that although it added "perpetuation of stereotype" as a new factor, the Court did not take the stereotyping of soft tissue injury victims seriously.

In *Cunningham*, the Court begins its section 15(1) analysis by noting that the only issue of contention (having disposed of the section 15(2) argument) was whether the differential treatment on a protected ground was discriminatory (at para. 34). The Court describes how the question of discrimination would have been analyzed under *Law*, with its focus on human dignity assessed via four contextual factors. It then states that *Kapp* "clarified" *Law*, and that "a proper analysis of whether differential treatment is discriminatory involves determining whether the distinction drawn creates a disadvantage by perpetuating prejudice or stereotyping" (at para. 34, citing *Kapp* at para. 24). In other words, "[d]iscrimination can be found through two avenues: decisions or laws that perpetuate the prejudice or disadvantage of a claimant, and decisions or laws that are based on inaccurate stereotypes" (at para. 35, citing *Kapp* at para. 18).

This approach was confirmed in *Ermineskin Indian Band and Nation v. Canada*, 2009 SCC 9. In our post on *Ermineskin*, "The End of Law: A New Framework for Analyzing Section 15(1) Charter Challenges," Professor Watson Hamilton and I argue this is too narrow a test of discrimination, and that a broader range of harms – including vulnerability, powerlessness, oppression, stigmatization, marginalization, and devaluation – should be recognized (as they were, somewhat ironically, in the much criticized *Law* case). However, the Court in *Cunningham* does articulate the test properly according to the Supreme Court's recent pronouncements on section 15.

The Court then turns to the application of the test. Looking first at the perpetuation of prejudice or disadvantage, the Court notes that three of the contextual factors from *Law* continue to be relevant to this analysis: the nature and scope of the interest affected (*Law*'s factor 4), whether the appellants suffered pre-existing disadvantage, stereotyping, prejudice, or vulnerability (*Law*'s factor 1) and whether the law has an ameliorative purpose or effect (*Law*'s factor 3) (at paras. 36-37, citing *Kapp* at para. 23). Having already dealt with ameliorative purpose under section 15(2), the Court focuses on the other two factors.

In terms of the nature and scope of the interest affected, the Court agrees with the trial judge's holding that the deprivation of settlement membership has severe consequences for the claimants and others. However, the Court disagrees with her finding that because the claimants chose to become registered as Indians, this somehow mitigated the seriousness of the consequences (at para. 39).

This is an important finding. Choice was used to the detriment of many equality rights claimants under *Law* (see for example *Nova Scotia (Attorney General) v. Walsh*, 2002 SCC 83 and *Gosselin v. Quebec (Attorney General)*, 2002 SCC 84) and may rely on certain preconceptions about individual autonomy that do not comport with reality (see Diana Majury, "Women are Themselves to Blame: Choice as a Justification for Unequal Treatment" in Margaret Denike, Fay Faraday & Kate Stephenson, eds., *Making Equality Rights Real: Securing Substantive Equality Under the Charter* (Toronto: Irwin Law, 2006) at 209). Particularly in the context of Aboriginal equality rights claimants, decisions about, for example, whether to reside on or off reserve or whether to acquire Indian status are made in the context of a complex history of colonialism and discrimination against women that cannot be easily equated to a simple matter of "choice" (see *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203 at paras. 62 and 84).

It is difficult to say that the Court's dismissal of choice-based reasoning in *Cunningham* is a direct result of its application of a revised test for discrimination. But it may be that the retreat from human dignity as the focus of section 15(1) does play a role in minimizing the role of

choice in the discrimination analysis (see Majury, *supra* at 219-220). *Law*'s statement of the purpose of section 15(1) did include references to "human dignity *and freedom*" (at paras. 48, 51 (emphasis added)) and also the notion that the equality guarantee in section 15(1) "is concerned with the realization of personal autonomy and self-determination" (at para. 53). Personal autonomy and self-determination are not the same as "choice," but those who understand freedom as negative liberty do tend to conflate these ideas.

Moving on to the consideration of pre-existing disadvantage, stereotyping, prejudice, or vulnerability, the Court notes that proof of a "unique pre-existing disadvantage" is required to support a finding of discrimination; an absence of relative disadvantage will be seen as neutral (at para. 41, citing *Nova Scotia (Workers' Compensation Board) v. Martin*, 2003 SCC 54 at paras. 86-88). The Court finds that the claimants' loss of settlement benefits, including the entitlement to participate in settlement governance, meets this test (at para. 41, relying upon *Lovelace v. Ontario*, 2000 SCC 37 at para. 70). While it seems the Court is correct about the claimants' disadvantage being unique relative to other Métis persons, this flows from the impugned provisions themselves, and so it is more difficult to see this particular disadvantage as being "pre-existing". However, I think there was other evidence upon which a finding of unique pre-existing disadvantage could have been made. The Court refers earlier to the affidavit of one of the claimants, Ralph David Cunningham, whose mother "lost her Indian status by marrying his Métis father, but subsequently regained it in 1985", entitling Ralph to regain status as well (at para. 5). This story, said to be "typical" of the claimants, points to a common history faced by the descendents of women who lost their Indian status when they "married out". It supports a finding of unique pre-existing disadvantage, as only persons in this category would have faced the myriad complexities associated with deciding whether to seek reinstatement as Indians (of which the consequences of the *MSA* are only one aspect).

This point is not critical in any event, as discrimination can be evidenced by proof of pre-existing disadvantage, stereotyping, or prejudice (and the perpetuation of one of these harms – see *Kapp* at paras. 18 and 24). In addition to disadvantage, the Court finds that there was stereotyping at play in the case, based on the fact that the claimants "share the undesirable trait of being status Indians and are consequently seen by some as being "less Métis"" (at para. 43). The *MSA* is seen to perpetuate this stereotype "by terminating the appellants' settlement memberships [and thus] encouraging a wrongful presumption that because the appellants registered as Indians, they are not interested in participating in their community and identifying as Métis" (at para. 43). The Court also links stereotyping to Law's 2nd contextual factor, whether the impugned law corresponds to the actual needs, capacities and circumstances of the claimant. If the law is based on stereotypical assumptions about the claimants' needs rather than on their actual situation, this will support a finding of discrimination (at para. 46). Here, the Court finds that "the impugned provisions fail to account for the appellants' needs and circumstances in terms of belonging to a settlement and self-identifying as Métis" (at para. 48). This is so even though the claimants "chose" to register as Indians and thus became eligible for certain benefits under the *Indian Act* that were not available to them under the *MSA* (e.g. health benefits).

Cunningham provides a nice contrast with *Morrow v. Zhang* in its treatment of stereotyping. As noted in our ABlawg posts on *Morrow v. Zhang*, the Court of Appeal found that the cap on general damages for soft tissue injury victims did not perpetuate the stereotype that such victims are less worthy and deserving of compensation because they were eligible for other benefits under the package of insurance forms of which the cap was a part. The Court failed to grapple with the implications of a particular category of accident victims being singled out for this sort of treatment (see Jonnette Watson Hamilton's post on *Morrow v. Zhang* at p. 3 and my post at p. 4).

In contrast, the fact that the claimants in *Cunningham* were eligible for benefits under the *Indian Act* did not detract from the findings of stereotyping and disadvantage, and the singling out of Métis persons with Indian status was seen as stereotypical.

There are a couple of places in *Cunningham* where, like in *Morrow v. Zhang*, the Court returns to the language of human dignity and other aspects of the *Law* test. For example, at para. 50 the Court states that "the underlying question [of discrimination] always relates to the claimant's human dignity", and at para. 52 it reverts to the idea of a three step test for section 15(1) (following *Law*). However, the question of two steps or three steps is not significant (as opposed to the content of those steps), and the Court does not use human dignity in the problematic ways identified in *Kapp*. Overall, the Court's analysis in *Cunningham* does seem to be in keeping with the overall purpose of section 15 equality rights, which is "the promotion of a society in which all are secure in the knowledge that they are recognized at law as human beings equally deserving of concern, respect and consideration" (*Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143 at para. 34).

On reflection, it may be that it is not so much a question of what test was applied by the Court in *Morrow v. Zhang* versus *Cunningham*. In both cases the Court looks at the contextual factors from *Law*, albeit in different ways. And I still have concerns with the focus on stereotyping, prejudice and disadvantage as the sole markers of discrimination. However, given that both cases could have been resolved on the basis of stereotyping, what seems most significant in the end is the Court's ability to actually see the stereotyping at play in each case. Justices Ritter, Costigan and McFadyen could see such stereotyping in *Cunningham* (although Justice Shelley could not), while Justices Rowbotham, O'Brien and McFadyen could not see such stereotyping in *Morrow v. Zhang* (although Justice Wittman could). This may ultimately have more to do with the nature of the inequalities at issue in each case, or the individual judges' ability to truly understand those inequalities, rather than the test the Court applied.

After finding a violation of section 15 in *Cunningham*, the Court declined to consider the alleged violations of section 2(d) and 7 of the *Charter*. Further, it held that the government could not justify the equality rights breach under section 1 of the *Charter*. I will not undertake a full review of the Court's section 1 reasons here, but suffice it to say that in spite of being permitted to introduce fresh evidence on appeal, the government still failed to prove that the purported objectives of the *MSA* were the specific objectives it had when it passed the legislation (at paras. 62-64). Further, the Court held that the objectives, even if pressing and substantial, were not achieved via rational or minimally impairing means (at paras. 66-70). Lastly, section 25 of the *Charter*, which was raised by an intervener, was found to be inapplicable given the lack of an evidentiary basis for analyzing this section (which provides that *Charter* rights and freedoms "shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada"). This is unfortunate, as the case does raise important questions about the interaction between Métis rights of control over membership provided under the *MSA*, and individual membership rights. In the end, the impugned sections of the *MSA* were declared unconstitutional and severed from the *MSA*, and the Registrar was directed to restore the claimants' names to the Peavine Métis Settlement's membership list (at para. 84).