March 8th, 2009

Evidence of amelioration: What does Kapp require of governments under s.15(2) of the Charter? What will courts permit?

By Jennifer Koshan

Cases Considered:

Cunningham v. Alberta (Aboriginal Affairs and Northern Development), 2009 ABCA 53.

Jonnette Watson Hamilton and I recently commented on the implications of the Supreme Court of Canada's decision in *R. v. Kapp*, 2008 SCC 41 for the proper approach to equality rights under s.15(1) of the *Charter* (see The End of *Law*: A New Framework for Analyzing Section 15(1) *Charter* Challenges). We also noted that *Kapp* was more clear in terms of the approach to be taken under s.15(2) of the *Charter*, giving that section "independent status to protect ameliorative laws, programs and activities." A recent Alberta case deals with a potential new battleground under s.15(2): government attempts to introduce new evidence to establish the ameliorative purpose of their laws on appeal. If a government is successful in this respect, and the court accepts the ameliorative purpose of the law or program in question, this will effectively serve to bar a claim under s.15(1).

Only a few years ago in *Lovelace v. Ontario*, 2000 SCC 37, the Supreme Court held that s.15(2) should be used as an interpretive aid in relation to s.15(1). Following the earlier case of *Law v. Canada (Minister of Employment and Immigration)* [1999] 1 S.C.R. 497, claims of discrimination under s.15(1) of the *Charter* would be assessed contextually with a focus on the claimant's human dignity. Part of the context would include consideration of whether the challenged law or program was put in place for or targeted at the amelioration of disadvantage of another group. If so, that factor tended to weigh against a finding of discrimination. The Court rejected the approach of the Ontario Court of Appeal in *Lovelace*, which held that s.15(2) could act as a shield to a claim of discrimination where the challenged law or program was ameliorative. According to Justice Frank Iacobucci, writing for the Supreme Court in *Lovelace*:

> In summary, at this stage of the jurisprudence, I see s. 15(2) as confirmatory of s. 15(1) and, in that respect, claimants arguing equality claims in the future should first be directed to s. 15(1) since that subsection can embrace ameliorative programs of the kind that are contemplated by s. 15(2). By doing that one can ensure that the program is subject to the full scrutiny of the discrimination analysis, as well as the possibility of a s. 1 review. However, as already stated, we

> may well wish to reconsider this matter at a future time in the context of another case (at para. 108).

The future arrived in *Kapp*, where the Supreme Court decided that it was time to reconsider its approach to s.15(2). At a general level, the Court had this to say about the relationship between s.15(1) and s.15(2):

> Sections 15(1) and 15(2) work together to promote the vision of substantive equality that underlies s. 15 as a whole. Section 15(1) is aimed at preventing discriminatory distinctions that impact adversely on members of groups identified by the grounds enumerated in s. 15 and analogous grounds. This is one way of combatting discrimination. However, governments may also wish to combat discrimination by developing programs aimed at helping disadvantaged groups improve their situation. Through s. 15(2), the *Charter* preserves the right of governments to implement such programs, without fear of challenge under s. 15(1) (at para. 16 per Chief Justice Beverly McLachlin and Justice Rosalie Abella for the majority).

So far this does not sound much different from *Lovelace*. The Court went on, however, to adopt what it saw as a third approach to s.15(2). Rather than using the interpretive aid approach from *Lovelace*, or the exception / exemption approach it rejected in that case, the Court applied what might be called the "independent force" approach. Under that approach,

> once the s. 15 claimant has shown a distinction made on an enumerated or analogous ground, it is open to the government to show that the impugned law, program or activity is ameliorative and, thus, constitutional. This approach has the advantage of avoiding the symbolic problem of finding a program discriminatory before "saving" it as ameliorative, while also giving independent force to a provision that has been written as distinct and separate from s. 15(1). Should the government fail to demonstrate that its program falls under s. 15(2), the program must then receive full scrutiny under s. 15(1) to determine whether its impact is discriminatory (at para. 40).

Put another way,

> 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 (at para. 41).

This new test necessitated some elaboration by the Court. First, it held that the focus should be on the ameliorative purpose rather than effects of the law or program in question. At the same time, courts should ensure that the alleged ameliorative purpose is genuine and, invoking language normally used in division of powers cases, not "colourable" (at para. 54). Further, the

Court noted that "in examining purpose, courts may … find it necessary to consider not only statements made by the drafters of the program but also whether the legislature chose means rationally related to that ameliorative purpose, in the sense that it appears at least plausible that the program may indeed advance the stated goal of combatting disadvantage" (at para. 48). However, the program's purpose need not be its exclusive objective. Second, "amelioration" was defined as precluding from s.15(2) protection laws that restrict or punish behaviour. To meet the definition, the court again suggested that there would need to be some evidence of a law's "plausible or predictable ameliorative effect" in order not to "render suspect the state's ameliorative purpose" (at para. 54). Third, "disadvantage" was taken to mean "vulnerability, prejudice and negative social characterization… of a specific and identifiable disadvantaged group" as opposed to a group that receives benefits under "broad societal legislation." However, "not all members of the group need to be disadvantaged, as long as the group as a whole has experienced discrimination" (at para. 55).

How did all of this play out in the case under consideration in this post?

Cunningham concerns a claim by a number of individuals who in 2001 were removed from the membership list of the Peavine Métis Settlement by the Registrar of Métis Settlements at the direction of the Former Peavine Council. Section 90 of the *Métis Settlements Act*, R.S.A. 2000, c. M-14 ("*MSA*"), provides that 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 on request by the settlement council. A subsequently elected Peavine Council sought to have these individuals reinstated, but the Registrar refused to do so on the basis that s. 75 of the *MSA* prohibits an adult Métis person who holds Indian status from obtaining membership in a Métis settlement. The individuals concerned then initiated a *Charter* claim seeking a declaration that that the relevant sections of the *MSA* violated their rights under sections 2(d), 7 and 15(1) of the *Charter*, and an order requiring the Registrar to reinstate them to the Peavine membership list (see *Peavine Métis Settlement v. Alberta (Minister of Aboriginal Affairs and Northern*, 2007 ABQB 517 at paras. 1 to 4 ("*Peavine Métis Settlement*")).

The practical consequence of being removed from the Peavine membership list was that the *Charter* applicants "lost their formal ability to participate in their Métis community and [were] disqualified from voting in elections of the Peavine Council" (*Peavine Métis Settlement* at para. 34). A further effect is that former members lost their right to reside on or occupy Métis land unless they are part of the immediate family of a settlement member, a teacher or health care worker, or an employee of the settlement.

At trial, Madam Justice D.L. Shelley of the Alberta Court of Queen's Bench rejected the applicants' claims that their freedom of association had been infringed contrary to s. 2(d) of the *Charter*, and that their right to liberty had been deprived contrary to the principles of fundamental justice under s. 7 of the *Charter*. Further, she found that there was no violation of equality rights under s. 15(1) of the *Charter*, applying the governing test at that time from *Law v. Canada*. As compared to Métis who had not registered as Indians under the *Indian Act* and who

met the other criteria for settlement membership, the applicants were differentially treated in that they lost the benefits of settlement membership. This was found to be differential treatment 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). However, this differential treatment on a protected ground was not found to be discriminatory, as it did not violate the essential human dignity of the applicants. Because the applicants had voluntarily chosen to register as Indians, and did so to obtain some of the benefits that were available under the *Indian Act*, their loss of benefits as Métis was not found to violate their human dignity. Key to Justice Shelley's decision on s.15(1) was her characterization of the legislation in question as ameliorative:

> the *MSA* represents a partnered initiative between the Government of Alberta and Alberta Métis designed, as stated in the recital to the Act, to recognize that the "Métis should continue to have a land base to provide for the preservation and enhancement of Métis culture and identity and to enable the Métis to attain self-governance under the laws of Alberta." The Act recognizes that the Government of Alberta and the Alberta Federation of Métis Settlement Associations entered into The Alberta-Métis Settlements Accord on July 1, 1989, 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).

The *Charter* applicants appealed this decision to the Alberta Court of Appeal. On appeal, the Alberta government applied to introduce new evidence to support the ameliorative purpose of the relevant legislation in light of the *Kapp* decision. More specifically, the Crown sought to introduce: (1) an affidavit summarizing the legal structure of rights and privileges under the *Métis Settlement Act*, the *Métis Settlements Accord Implementation Act*, and the *Peavine Métis Settlement Budget By-law* #118/07 2007/2008; (2) information from a web-site as to the benefits available to settlement members and registered Indians; (3) assertions of fact as to the purposes of the *Métis Settlement Act* and an assertion that the "membership provisions [of the Act] are the result of extensive consultation and agreement between the Government of Alberta and the Métis people" (see *Cunningham v. Alberta (Aboriginal Affairs and Northern Development)*, 2009 ABCA 53 at para. 3).

Cunningham et al ("the appellants") raised a number of concerns regarding the timing of the Crown's application. More substantively, the appellants argued that the evidence should not be introduced because:

> (1) the material existed before the hearing below; (2) the topic of an "independent force" to s. 15(2) of the *Charter* could have been fully litigated at the hearing below; (3) the topic of ameliorative purpose was in issue below regardless of any enhancement of its relevance arising under *Kapp*; (4) the specific legislation under attack is not supportable by reference to any ameliorative purpose that the overall statutory structure may be said to have arising from the proposed new

> evidence; and (5) the evidence would not be expected to have affected the outcome below (at para. 7).

Justice Jack Watson of the Alberta Court of Appeal held that it was up to the appeal panel to decide whether to permit the Crown to introduce new evidence and to raise new arguments based on that evidence. It was also up to the appeal panel to decide if any harm or unfairness would result from the admission of new evidence. However, Justice Watson permitted the Crown to include the proposed evidence with its materials on the appeal, noting that "the material is not bulky" (at para. 9). The Crown was ordered to file a supplementary memorandum of its argument on the new material, and the appellants were permitted to file a reply memorandum to address the Crown's argument and new evidence motion.

It will be interesting to see how the appeal panel decides to treat this proposed evidence. As noted, the ameliorative purpose of the challenged law or program has been an important factor to the determination of discrimination since *Law*. The Alberta government did lead evidence of the ameliorative purpose of the *MSA* and related legislation at trial. However, the government's apparent reaction to *Kapp* was an attempt to buttress the evidentiary foundation for establishing the ameliorative purpose of the laws, the plausibility of their ameliorative effects, and the disadvantage of the targeted group. This strategy supports the doctrinal significance of the *Kapp* case for s. 15(2) of the *Charter*. If only the government can prove the ameliorative purpose of the law for a disadvantaged group, the appellants will not have a viable s. 15(1) argument (or so the government will argue). As noted by Rob Moyse (LLB expected 2010) at a roundtable our faculty held on *Kapp* shortly after its release, a contextual factor has thus been elevated to a bar to a finding of discrimination. That this should be so even where the persons excluded from the ameliorative law are themselves disadvantaged is an issue that *Kapp* left open. The question of how to deal with ameliorative legislation that is discriminatorily underinclusive under s. 15(2) is currently being addressed in another case involving Aboriginal claimants, *Micmac Nation of Gespeg v. Canada*, 2007 FC 1036 (CanLII), currently before the Federal Court of Appeal.

The Appellants will likely also be making new arguments on appeal, namely that the *Law* test and its focus on human dignity are no longer the governing approach to discrimination under s. 15(1) of the *Charter*. Provided the Appellants can get to the discrimination part of the s. 15(1) test, that is.