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Interpreting Section 15(2) of the Charter: LEAF's Intervention in Alberta (Minister of Aboriginal Affairs and Northern Development) v. Cunningham

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Cases Considered:
Her Majesty the Queen in Right of Alberta (Minister of Aboriginal Affairs and Northern Development), et al. v. Barbara Cunningham, et al. (Alberta) (Civil) (By Leave) Case number 33340, on appeal from *Cunningham v. Alberta (Aboriginal Affairs and Northern Development)*, 2009 ABCA 239

The Supreme Court of Canada is scheduled to hear the appeal of the Alberta government in *Alberta (Minister of Aboriginal Affairs and Northern Development) v. Cunningham* on Thursday, December 16, 2010. *Cunningham* will be the first case in which the Supreme Court considers the application of section 15(2) of the *Charter* since that Court gave independent meaning to section 15(2) in *R. v. Kapp*, 2008 SCC 41 and the first case in which the Court must consider the possible application of section 15(2) when the challenge is on the basis of under-inclusiveness. This comment is based on my experience serving on the Women's Legal Education and Action Fund (LEAF) case subcommittee in *Cunningham,* the factum filed by LEAF, and, to a much lesser extent and only to offer a contrast, the facta of the Appellants and the Attorney General of Ontario.

The facts of the *Cunningham* case have been summarized by my colleague, Jennifer Koshan, in her post on the Alberta Court of Appeal decision in *Cunningham*, Another Take on Equality Rights by the Court of Appeal.

The *Cunningham* appeal has attracted a large number of interveners. The Attorneys General of Ontario, Quebec and Saskatchewan intervened as of right, and leave to intervene was granted to the Métis Settlements of East Prairie, Elizabeth and Gift Lake, the Métis Settlements General Council, the Métis National Council, the Métis Nation of Alberta, the Native Women's Association of Canada, Aboriginal Legal Services of Toronto Inc., the Canadian Association for Community Living, and LEAF. The facta of the last nine interveners listed are limited to 10 pages in length. Of those nine interveners, each of LEAF, the Native Women's Association of Canada, the Métis Nation of Alberta and the Métis Settlements General Council were granted permission to present oral arguments not exceeding 10 minutes at the hearing of the appeal, with the others being restricted to 5 minute oral arguments. (For a recent critical comment on limits on written and oral arguments such as these, see Sanda Rodgers, "Getting Heard: Leave to Appeal, Interveners and Procedural Barriers to Social Justice in the Supreme Court of Canada", in Sanda Rodgers and Sheila McIntyre, eds., *The Supreme Court of Canada and Social Justice: Commitment, Retrenchment or Retreat* (LexisNexis, 2010) 1.)

Although there are a number of issues in *Cunningham* – including the infringement of sections 2(d) and 7 of the *Charter* -- LEAF's intervention before the Supreme Court is limited to the interpretation of section 15 of the *Charter*:

> 15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
>
> (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

In *R. v. Kapp,* the Supreme Court held that ameliorative laws, programs and activities are shielded from scrutiny under section 15(1) of the *Charter* if the government proves: (1) the scheme has an ameliorative or remedial purpose; and (2) the scheme targets a disadvantaged group identified by the enumerated or analogous grounds (*Kapp* at para. 41). However, *Kapp* involved a classic claim of "reverse discrimination" that challenged the very existence of a program which ensured a 24-hour reserved fishery for three Aboriginal bands.

LEAF's position is that there are two threshold issues that must be addressed before *Kapp*'s section 15(2) test can be applied. The first is the issue of whether the targeted law, program or activity is ameliorative within the meaning of section 15(2). Many of the interveners address this crucial issue in the context of the facts in *Cunningham*, i.e., the question of whether general legislation that addresses the historic status of Métis peoples, not as a disadvantaged group, but as Aboriginal peoples can be ameliorative within the meaning of section 15(2). LEAF is not making submissions on this important first threshold issue, given the limited number of pages and minutes they have to present their arguments.

The second threshold issue looks at the nature of the challenge. In its factum, LEAF argues that the test set out in *Kapp* is not appropriate for all types of challenges to ameliorative programs. LEAF contends that the Supreme Court based its section 15(2) analysis in *Kapp* on the principle that a deferential approach to the ameliorative program in that case advanced the goal of substantive equality. Deference is reflected in the Court's focus on the government's purposes. *Kapp* held that, as long as the purpose is genuine (at para. 46), measured by whether the "means [are] rationally related to that ameliorative purpose" (at para 48), then the effects of the ameliorative scheme need not be scrutinized. That is the <u>critical difference</u> between section 15(2) and section 15(1). In contrast to the deferential focus on the government's <u>purpose</u> under section 15(2), an evaluation of the challenged law's <u>effects</u> is required under section 15(1).

LEAF's argument is that section 15(2) — assuming the *Métis Settlements Act*, R.S.A. 2000, c. M-14 is ameliorative for the sake of argument — is not applicable in cases such as *Cunningham* where the claim is one of under-inclusiveness. In *Cunningham*, the claimants were not challenging the existence of the *Métis Settlements Act*, or the fact that Act targeted Métis. Instead, the claimants challenged only the restrictive definition of who is a Métis under that Act, a definition that excluded those who became status Indians after November 1, 1990, the date the *Métis Settlements Act* came into effect. LEAF's main point is that when the government's legislative scheme, program or activity is challenged solely on the basis that it is under-inclusive in its targeting, the definition of the target group is not immune from scrutiny under section 15(1)

and that scrutiny requires careful assessment of effects. In delineating the disadvantaged group targeted by the ameliorative law, program or activity, regard must be had to the effects of the government's delineation in order to achieve substantive equality.

Without regard to the effects of the law challenged in *Cunningham*, the intersection of discrimination on the basis of sex and Indian status might not be seen and cannot be appreciated. The *Indian Act*, R.S.C. 1985, c. I-5, as amended, has a long history of sex discrimination embedded in its status provisions, whereby Indian women who "married out" lost their status: see *McIvor v. Canada (Registrar of Indian and Northern Affairs),* 2009 BCCA 153, leave to appeal to the Supreme Court of Canada denied, [2009] S.C.C.A. No. 234. Bill C-31 partially remedied that discrimination, but many of the people eligible for status under Bill C-31 were not registered by November 1, 1990. As a result, they were not "grandfathered" in under the *Métis Settlements Act.* And because *McIvor* found that Bill C-31 was itself discriminatory on the ground of sex, there will be yet more people, newly eligible for Indian status, who will also not be "grandfathered" in. (Bill C-3, the *Gender Equity in Indian Registration Act*, is the government's answer to the discrimination identified in *McIvor*, but critics say that it too is discriminatory because it does not ensure that women and their descendants will be treated the same as men and their descendants for the purposes of determining Indian status.) If attention is only paid to the government's purpose in enacting the *Métis Settlements Act*, then the discriminatory effects of the delineation of who is and who is not Métis under the *Métis Settlements Act* would be missed.

Without regard to the effects of the law challenged in *Cunningham*, it is also easier to say that some Métis "chose" to acquire Indian status after Bill C-31 came into effect, as the trial judge did in this case: *Peavine Métis Settlement v. Alberta (Minister of Aboriginal Affairs and Northern*, 2007 ABQB 517. An approach that avoids examining the effects of an ameliorative law, program or activity can also fail to appreciate constraints on choice. Choice, liberty and autonomy are not meaningful in situations of inequality: see Diana Majury, "Women are Themselves to Blame", in Fay Faraday, Margaret Denike and M. Kate Stephenson, eds., *Making Equality Rights Real: Securing Substantive Equality under the Charter* (Toronto: Irwin Law, 2006) 219.

In its factum, the appellant, the government of Alberta, abandoned its claim that if the ameliorative scheme as a whole meets the *Kapp* section 15(2) test — if the government proves (1) the scheme has an ameliorative or remedial purpose; and (2) the scheme targets a disadvantaged group identified by the enumerated or analogous grounds — then the challenged provisions do not violate section 15. Instead, the government now argues that in addition to meeting the two-part section 15(2) test set out in *Kapp*, the government must also prove a connection between the challenged provisions and the ameliorative scheme as a whole such that the challenged provisions "are supportive of or rationally connected to the ameliorative scheme" (at para. 28). However, as those familiar with the *Oakes* test for section 1 of the *Charter* know, to require only a rational connection between the exclusion of the claimants and the ameliorative purpose of the legislation, program or activity is to set the bar too low. All delineations of the targeted disadvantaged group will to some extent be rationally connected to the ameliorative purpose. If the purpose is, for example, as expressed in the preamble to the *Métis Settlements Act,* to recognize "the Metis should continue to have a land base to provide for the preservation and enhancement of Metis culture and identity and to enable the Metis to attain self-governance under the laws of Alberta," then the definition of Métis is rationally connected to that purpose. Whether the claimants are part of the disadvantaged group targeted by the legislation, program or activity or whether they are part of a different disadvantaged group requires assessment of the

effects of the lines drawn by the government to exclude the claimants. The lines drawn should not be drawn in such a way that the consequences are discriminatory on the ground of the targeting or any other enumerated or analogous ground.

Like LEAF, the Attorney General of Ontario has intervened exclusively on the section 15 issue and, specifically, on the proper interpretation of section 15(2) when the challenge to their exclusion from an ameliorative law, program or activity that benefits some members of a disadvantaged group is brought by other members of that disadvantaged group. The Attorney General of Ontario argues there are two types of challenges not contemplated by *Kapp*, which did not involve a challenge by a disadvantaged group. One is a challenge brought by a different disadvantaged group than the one the ameliorative law, program or activity was designed to benefit — what some term a "competing claim." For such challenges, the Attorney General for Ontario argues, the deferential *Kapp* test for the application of section 15(2) should apply.

The second type – the type seen in *Cunningham* – is said to be a challenge to their exclusion that is brought by some members of the disadvantaged group that benefits from the ameliorative law, program or activity. In those instances, the Attorney General for Ontario argues (at paras. 4 and 22 of its Factum) that the court should consider whether there is a rational connection between the eligibility criteria and the ameliorative program's purpose and design. Consideration of who the program was designed to benefit and the nature of the program are relevant, it is claimed, in this new section 15(2) analysis.

There are at least two big problems with these arguments. First, the issue of whether the challenge is being brought by a disadvantaged group that is different from the targeted disadvantaged group or whether it is being brought by some members of the targeted disadvantaged group is usually the heart of the case. Were the non-status Indians and the Métis who challenged the Casino Rama project in *Lovelace v. Ontario*, 2000 SCC 37, [2000] 1 S.C.R. 950 members of the disadvantaged group targeted by the project or were they part of a different group?

Second, in setting out its proposed test for challenges by members of the same disadvantaged group, the Attorney General of Ontario changes the deferential section 15(2) *Kapp* test by refocusing the inquiry on the eligibility criteria and their relationship to the ameliorative law, program or activity's purpose and design. The proper question, argues the Attorney General for Ontario, is whether those eligibility criteria and the scheme's purpose and design are "rationally connected." The rational connection test in *Kapp* (at para. 48) was "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." The new rational connection test proposed by the Attorney General for Ontario is almost as deferential to the government because it can be satisfied if the government establishes "a reasonable basis for their identification of the group" (Factum of the Attorney General for Ontario, para. 37).

How does the Attorney General for Ontario justify so much deference and so much focus on the government's purposes? A test that is easy to meet is required because "otherwise governments cannot draft the very ameliorative programs s. 15(2) encourages them to draft in order to further substantive equality in Canada" (Factum of the Attorney General for Ontario, para. 37). The message appears to be that even if the eligibility criteria are discriminatory in their effects, any ameliorative program is better than none.

There is no doubt that targeted ameliorative laws, programs and activities need to be selective. However, they cannot be discriminatory. If the decision as to whether the delineation of who is to benefit from those targeted schemes is scrutinized under section 15(2) with a focus on the government's purpose, then formal equality is the likely result. It is only when the effects of exclusion are scrutinized under section 15(1) analysis that an assessment can be made as to whether or not the goal of substantive equality is met.

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