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Leave to appeal granted by the SCC in Métis Status Case

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Cases Considered:

Cunningham v. Alberta (Aboriginal Affairs and Northern Development), 2009 ABCA 239, leave to appeal granted March 11, 2010

On March 11, 2010, the Supreme Court of Canada (Justices McLachlin, Abella and Rothstein) granted leave to appeal to the Alberta government in *Her Majesty the Queen in Right of Alberta (Minister of Aboriginal Affairs and Northern Development) and the Registrar et al. v. Barbara Cunningham et al.* Dealing with the relationship between Métis and Indian status under the *Métis Settlements Act*, the case may take on even greater significance in light of Bill C-3, the *Gender Equity in Indian Registration Act*, introduced in the House of Commons on March 12, 2010.

The Supreme Court's summary of the *Cunningham* case is as follows:

> *Charter of Rights and Freedoms*, s. 15 – Constitutional law – Right to equality – Aboriginal law – Métis – Respondents' membership in the Peavine Métis Settlement terminated pursuant to s. 90 of the *Métis Settlements Act*, R.S.A. 2000, c. M-14 after they voluntarily registered as Indians under the *Indian Act*, R.S.C. 1985, c. I-5 – Section 75 of the MSA prohibits individuals with Indian status from obtaining Métis settlement membership – Whether the Court of Appeal applied the correct interpretation and application of *R. v. Kapp* with respect to s.15(2) *Charter* analysis, particularly, on the relationship between the ameliorative purpose of a given scheme and impugned provisions –Whether this appeal addresses issues fundamental to the role of a government wishing to establish an ameliorative program designed to assist a vulnerable or disadvantaged social group – Whether this appeal addresses issues fundamental to the preservation of Métis culture, which is recognized as a distinct aboriginal culture under s.35 of the *Constitution Act, 1982* – Whether this appeal raises issues regarding the right of self-determination and self-definition of all identifiable cultures and minorities within Canada –Whether this appeal addresses issues relevant to persons with Indian status and federal legislation – Whether this appeal raises issues pertaining to the correct approach with respect to s.15(1) *Charter* analysis.

At the Court of Appeal, the focus was on section 15 of the *Charter*, and in particular the application of the new approach to ameliorative laws and programs under section 15(2) set out by the Supreme Court in *R. v. Kapp*, 2008 SCC 41, [2008] 2 S.C.R. 483 (see my post on the Court of Appeal decision in *Cunningham* here). Section 15 is sure to be a focus at the Supreme Court as well, as the case concerns a factual context not considered in *Kapp* – that of an under-inclusive law and an internal conflict within a community. The Supreme Court's summary suggests that it may also hear arguments under section 35 of the *Constitution Act, 1982* in relation to the protection of Métis culture and self-determination. Not mentioned in the Court's summary is section 25 of the *Charter*, which was raised by an intervener, the Elizabeth Métis Settlement, at the Court of Appeal. Section 25 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". The Court of Appeal did not consider section 25, finding that it lacked an evidentiary basis for analyzing this section of the *Charter*. This may also undermine the consideration of section 25 by the Supreme Court. The Supreme Court has not yet rendered a majority opinion on the proper interpretation of section 25 (although see the concurring judgment of Bastarache, J. in *Kapp* for one possible approach to section 25).

The *Cunningham* case was the subject of the recent Kawaskimhon Aboriginal moot that took place in Ottawa over the first weekend in March. The team from the University of Calgary represented the Cunninghams. U of C third year student Orlagh O'Kelly reports that the teams at her table reached consensus at the moot, aiming to balance the need for self-government and community harmony with individual rights. It was agreed that section 75 of the *Métis Settlements Act*, which prohibits individuals with Indian status from obtaining Métis settlement membership, should be repealed. This is where Bill C-3 is relevant, as it will amend the *Indian Act* by providing Indian status to another generation of persons whose female ancestors "married out" (i.e. married non-Aboriginal men) following the direction of the B.C. Court of Appeal in *McIvor v. Canada (Registrar of Indian and Northern Affairs)*, 2009 BCCA 153. The Globe and Mail reported last week that this amendment might add up to 45,000 people to the Indian Register.

At the Kawaskimhon moot, section 78 of the *Métis Settlements Act* was thought to provide sufficiently clear criteria for establishing membership in Métis settlements regardless of the Indian status of the applicant (although it was also decided that there should be more emphasis on community based decision making in section 78). Section 78 currently provides that an applicant for membership in a Métis settlement must satisfy the settlement council that he or she:

> (a) is a person of Canadian aboriginal ancestry who identifies with Métis history and culture,
> (b) has or will have suitable living accommodation in the settlement area, and
> (c) is committed to living in the settlement area and preserving a peaceful community.

The teams also agreed to amend section 90 of the Act (which provides for loss of Métis status in particular circumstances, including registration as an Indian), such that only if a member of a Métis settlement defaulted on one of the grounds on which they were granted membership could they be excluded. Decisions on exclusion would also be community based, and would include a

healing circle, with the decision to be based upon the Métis or indigenous law within the community.

This is not doing justice to the full tenor of discussions at the moot, but it is interesting that, following a process of consensus building between parties and interveners with diverse interests, the students were able to agree on this outcome. Applications to intervene in the Supreme Court's leave to appeal hearing in *Cunningham* by the East Prairie Métis Settlement, the Métis Settlements General Council, and the Elizabeth Métis Settlement were dismissed, but without prejudice to the right of these groups to apply for leave to intervene in the appeal itself. It is to be hoped that the Supreme Court will hear from a full range of interveners in *Cunningham* so that a full range of perspectives on the issues raised in this case can be heard.