August 15, 2011

Greater Rights for Métis Settlements in Alberta?

By Will Randall

Case Considered:

Alberta (Aboriginal Affairs and Northern Development) v Cunningham, 2011 SCC 37

Editor's note: For pre-SCC ABlawg posts on this case see: Jonnette Watson Hamilton, Interpreting Section 15(2) of the Charter: LEAF's Intervention in Alberta (Minister of Aboriginal Affairs and Northern Development) v. Cunningham, and Jennifer Koshan, Another Take on Equality Rights by the Court of Appeal, and Evidence of amelioration: What does Kapp require of governments under s.15(2) of the Charter? What will courts permit?

Introduction

On July 21, 2011, the Supreme Court of Canada issued its decision in *Alberta (Aboriginal Affairs and Northern Development) v Cunningham* on appeal from the Alberta Court of Appeal. The Court found the *Métis Settlements Act*, *RSA* 2000, c M-14 to be an ameliorative program, and upheld limits on who may become a member in a Métis Settlement. The Court also re-affirmed the central role of Métis people in defining who is Métis and to determine who may benefit from the *Métis Settlements Act*. This comment is about the Court's statements on Métis history and policy, and what effect it may have on the rights of Métis Settlements.

The *Métis Settlements Act* precludes Status Indians from being members of Métis Settlements in Alberta in all but rare cases. Some members of Peavine Métis Settlement registered for Status under the *Indian Act*, and the Registrar of Métis Settlements, an Alberta government body, struck those members from Peavine's membership list. The claimants sued for a declaration that section 75 of the *Métis Settlements Act* prohibiting them, as Métis Settlement members, from registering as Status Indians violated section 15 of the *Charter*.

Just prior to the drafting process of the *Métis Settlements Act*, Parliament passed Bill C-31, which re-instated Indian status on Indian women who married non-Status Indian men. Bill C-31 expanded that status to their children, including the claimants who lived on Peavine Métis Settlement (para 24).

The equality question before the Court was whether the distinction in section 75 of the *Métis Settlements Act* between Status Indians and Métis violated the *Charter*'s equality provisions, and, if so, did such a distinction survive as an ameliorative program. The Court found that the action of the Registrar of Métis Settlements was consistent with the *Charter*'s equality qualification under section 15, since the *Métis Settlements Act* was an ameliorative program protected by section 15(2) of the *Charter*.

Historical Framework

The Métis are the descendents of the unions of European men, who came to North America as explorers and traders, and Indian women. The Métis developed a culture distinct from both their Indian and European ancestors.

From the Royal Proclamation of 1763, RSC 1985, App. II, No 1, the Crown made treaties with Indians, which included the establishment of a land base and certain hunting and trading rights (para 6). The Crown made no provision for the Métis (para 6). The Métis did not enjoy the cultural protections and economic benefits available to Indians that came with a land base, and the Métis faced discrimination elsewhere (para 7). Poverty was endemic in the Métis community.

Alberta established the Ewing Commission in 1934 to inquire into the, "problems of the health, education, relief and general welfare of the half-breed population" (para 8). The Ewing Commission defined the Métis as, "a person of mixed blood, white and Indian, who lives the life of an ordinary Indian and includes a non-treaty Indian" but not those who have settled as farmers or do not need public assistance (para 9).

The Alberta Legislature enacted the *Métis Population Betterment Act* in 1938 (SA 1938 (2d)) as a result of the Ewing Commission's findings, leading to an initial land base for the Métis in Alberta (para 10). That Act specifically excluded either an Indian or a non-treaty Indian (as defined by the *Indian Act* at that time, c 98, RSC 1927) from benefitting under the *Métis Population Betterment Act* (para 11).

Section 35 of the *Constitution Act, 1982* enshrined existing Aboriginal and treaty rights and constitutionally recognized the Métis (para 13). The provincial government and Métis communities gathered to define Métis rights and communities in light of the *Constitution Act, 1982* (para 14). The committee's report, named after the chair Grant MacEwan, defined a Métis more broadly than the Ewing Commission as, "an individual of aboriginal ancestry who identifies with Métis history and culture" (para 15). The MacEwan Report recommended self-government and the creation of land base for Métis people in Alberta. The Alberta Legislature put these into law *via* the *Métis Settlements Act*, the *Constitutional of Alberta Amendment Act, 1990*, RSA 2000, c C-24, and two other pieces of legislation (para 19). This led to the creation of the eight Métis Settlements in Alberta that exist today.

***Kapp* Analysis**

The Court analysed the ameliorative nature of the *Métis Settlements Act* using the framework of *R v Kapp,* 2008 SCC 41, [2008] 2 SCR 483; I will divide the discussion along the *Kapp* analysis.

The first step in *Kapp* is determining whether the distinction is on an enumerated or analogous ground. The Court accepted the trial judge's conclusion that registration as a Status Indian is an analogous ground for discrimination, and the Crown in Right of Alberta did not challenge the trial judge's decision (para 58).

The second step in the *Kapp* analysis is whether or not the program will improve the situation of a group in need. Here, the Court looked to the historical framework to find that the Alberta Legislature intended the *Métis Settlements Act* to assist an Aboriginal group who had no land base and suffered from widespread poverty and social exclusion (paras 60-71). Using the

wording of the *Métis Settlements Act* and the *Constitution of Alberta Amendment Act, 1990*, the Court found that the legislative intent was to protect and strengthen Métis culture through the creation of Métis Settlements. The Court found that:

> …the preamble, wording, legislative history, and social context of the MSA combine to support the conclusion that the MSA is not a general benefit program, but a unique scheme that seeks to establish a Métis land base to preserve and enhance Métis identity, culture and self-government, as distinct from Indian identity, culture and modes of governance. In seeking this objective, it reflects the constitutional scheme, which endorses Indians, Métis and Inuit as distinct Aboriginal groups with distinct identities, cultures and rights. (para 69).

The Court held that the *Métis Settlements Act* is an ameliorative program, in which, "the object of the program is not the direct conferral of benefits onto individuals with a particular group, but the strengthening of the identity of the Métis as a group…" (para 60).

The final step in the *Kapp* analysis was whether or not the *Métis Settlements Act* advanced an object of the ameliorative program. The Court wrote that:

> the line drawn by the MSA between Métis and Métis who are also status Indians with respect to membership, serves and advances the object of the program. It is supported by historic distinctions between Métis and Indian culture; by the fact that, without the distinction, achieving the object of the program would be more difficult; and by the role of the Métis settlement in defining its membership. (para 73)

The Court found that the historic uniqueness of the Métis was a rational reason to exclude Status Indians from membership in a Métis Settlement to preserve Métis culture and society (para 75). The Court held that, "extending [Métis Settlement] membership to significant number of people with Indian status may undercut the goals of preserving and enhancing the distinctive Métis culture, identity and self-governance into the future" (para 77).

The Court also noted that the different social, health, and tax benefits offered to Status Indians versus Métis, could dilute the will of Métis Settlement members to fight for similar benefits if there were many members who enjoyed both Métis and Indian Status (para 78).

The Court concluded its decision with the recognition that the Métis were instrumental in drafting the *Métis Settlements Act* (para 82). Although the court recognized that multiple identities among Aboriginal people are common, it found lines must be drawn to determine who will benefit from which rights (para 86). In light of the Court's decision in 2006 in *R v Powley*, [2003] 2 SCR 207, 2003 SCC 43, which defined Aboriginal rights for the Métis under section 35 of the *Constitution Act, 1982*, the Métis are to take a central role in drawing lines for membership (para 81). The Court specifically stated that this case is not about Aboriginal rights for Métis people under section 35, and this clear statement from the Court may limit the case's broad applicability (para 81).

Analysis

The Court reaffirmed the importance of Métis participation with government in creating programs that benefit Métis people in Canada under the *Powley* test for Métis' section 35 rights (paras 80-81). Although the Court has not insulated the selection for who is and is not Métis from judicial scrutiny, the Court has affirmed that the Métis have a central role in making these decisions (para 79). This favours the autonomy of the Métis. Governments will be keener to rely on the Métis' self-definition when creating programs to benefit Métis.

Despite the statement from the Court that this case is not about section 35 rights, the court may have opened the door to expanded Métis rights (para 81). An ameliorative program creating a land base, such as the Métis Settlements, is less effective if that land base does not allow the residents to practise a traditional lifestyle. The favourable language from the Court regarding the ameliorative purpose of the Métis Settlements supports greater interactions between Métis Settlements and government to ensure that the ameliorative purpose of the program is not lost because of development.

Several Métis Settlements and their surrounding areas are at the centre of future heavy oil extraction, but the duty to consult with and accommodate Métis Settlements is in flux. For the Province of Alberta to have established a land base as an ameliorative program to protect the Métis, but then for the Province of Alberta to fail to protect the lands surrounding the Métis Settlements would erode the purposes of the *Métis Settlements Act* (see generally paras 60-71). Courts may extrapolate this case to favour a broader consultation process between Métis Settlements and governments than what exists today. The Court's discussion of the "distinctive Métis culture, identity and self-governance" may persuade Courts that the Crown owes a greater duty to consult and accommodate the concerns of Métis Settlements regarding development. *

Will S. Randall II, B.Sc. (Georgia Tech), J.D. (Case Western Reserve), LL.M. (Calgary), of the Texas Bar, is completing articling for call to the Alberta Bar in October. He practises primarily in regulatory and aboriginal law in Edmonton. The views expressed are his own.