

Case Law Update: Alberta (Aboriginal Affairs and Northern Development) v Cunningham

September 21, 2011

By Mark Edelstein

2011 SCC 37 (Released July 21, 2011)

Constitutional Law *Canadian Charter of Rights and Freedoms* Discrimination

The Respondents, Métis who also identify as status Indians, brought an application alleging that provisions of Alberta's *Métis Settlements Act* ("MSA") that prohibit status Indians from being members of a Métis settlement violated ss. 15, 2(d) and 7 of the *Canadian Charter of Rights and Freedoms* ("**Charter**"). The Chambers Judge dismissed the application.

The Alberta Court of Appeal concluded that the provisions breached s. 15 of the *Charter*. The Supreme Court overturned the Court of Appeal's decision. Most of its analysis focused on the application of s. 15(2) of the *Charter* to the MSA.

The court emphasized that s. 15(2) permits governments to improve the situation of members of disadvantaged groups by permitting the establishment of ameliorative programs aimed at a particular group. These programs necessarily confer benefits on certain groups and not others. Section 15(2) permits governments to "set priorities" and does not oblige governments to assist all disadvantaged groups at the same time. To be protected by s. 15(2) the distinction does not need to be essential to realizing the object of the ameliorative program. An impugned distinction simply must advance, in a general sense, the object of the program.

The court concluded that s. 15(2) protected the MSA provisions. The provisions constituted a program designed to establish a Métis land base in order to enhance and preserve the identity of Métis. In light of the relevant historical and constitutional recognition of Métis, the court found that this program should be considered to be an ameliorative program.

The court also concluded that the distinction drawn between Métis and Métis who are status Indians served and advanced the objects of the program. The court held that in order for the program to be caught by s. 15(2) the government simply had to show that it was rational to conclude that the distinction contributed to the ameliorative purpose. Following a consideration of the Métis history and the constitutional context the court concluded this test was met.

The court also held that eliminating the distinction would risk undermining the program. It noted that its conclusions were strengthened by the fact the distinction at issue was the product of consultation with the Métis community. The court acknowledged that individuals may assert multiple identities but it held that s. 15(2) permits a line to be drawn between groups in order to fulfill a valid ameliorative purpose.

The court rejected the s. 2(d) claim on evidentiary grounds. In addition, the court concluded that even if "place of residence" is a protected interest covered by s. 7 the Respondents had failed to demonstrate a breach of this section.



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