Case Name:

Peavine Métis Settlement v. Alberta (Minister of Aboriginal Affairs and Northern Development)

Between
Peavine Métis Settlement, Barbara Cunningham, John Kenneth Cunningham, Lawrent (Lawrence) Cunningham, Ralph Cunningham, Lynn Noskey, Gordon Cunningham, Roger Cunningham and Ray Stuart, Applicants, and
Her Majesty the Queen in Right of Alberta (The Minister of Aboriginal Affairs and Northern Development) and the Registrar, Métis Settlements Land Registry, Respondents, and
Elizabeth Métis Settlement, Intervener

[2007] A.J. No. 913

2007 ABQB 517

[2008] 1 W.W.R. 507

81 Alta. L.R. (4th) 28

[2007] 4 C.N.L.R. 179

160 C.R.R. (2d) 185

424 A.R. 271

160 A.C.W.S. (3d) 924

2007 CarswellAlta 1103

Docket: 0603 14676

Registry: Edmonton

Alberta Court of Queen's Bench

Judicial District of Edmonton

D.L. Shelley J.

Heard: April 26, 2007.
Judgment: August 13, 2007.
Released: August 14, 2007.

(212 paras.)

Aboriginal law -- Aboriginal rights -- Status Indian -- Application by former members of Metis Settlement for declaration that ss. 75 and 90(1)(a) of Metis Settlement Act were unconstitutional -- Applicants removed from membership pursuant to s. 90 after they voluntarily registered as Indians under Indian Act at age 18 -- Application dismissed -- Sections did not breach ss. 15(1), 2(d) or 7 of Charter -- Claim for under-inclusion was grounded in fundamental freedom of association -- Legislation not grossly disproportionate to state interest in securing land base for Metis -- Differential treatment not discriminatory as impugned provisions did not affect human dignity of applicants -- Canadian Charter of Rights and Freedoms, 1982, ss. 2(d), 7, 15(1).

Constitutional law -- Canadian Charter of Rights and Freedoms -- Equality rights -- Grounds of discrimination -- Analogous -- Fundamental freedoms -- Freedom of association -- Legal rights -- Life, liberty and security of person -- Principles of fundamental justice -- Application by former members of Metis Settlement for declaration that ss. 75 and 90(1)(a) of Metis Settlement Act were unconstitutional -- Applicants removed from membership pursuant to s. 90 after they voluntarily registered as Indians under Indian Act at age 18 -- Application dismissed -- Sections did not breach ss. 15(1), 2(d) or 7 of Charter -- Claim for under-inclusion was grounded in fundamental freedom of association -- Legislation not grossly disproportionate to state interest in securing land base for Metis -- Differential treatment not discriminatory as impugned provisions did not affect human dignity of applicants -- Canadian Charter of Rights and Freedoms, 1982, ss. 2(d), 7, 15(1).

Application by former members of Metis Settlement for declaration that ss. 75 and 90(1)(a) of Metis Settlement Act were unconstitutional -- Applicants removed from membership pursuant to s. 90 after they voluntarily registered as Indians under Indian Act at age 18 -- Registrar refused to reinstate applicants as s. 75 prohibited adult Metis person with Indian status from obtaining membership in Metis settlement -- HELD: Application dismissed -- No breach of applicants' s. 2(d) right under Charter established -- Applicants' claim for under-inclusion was grounded in access to particular statutory regime rather than fundamental freedom -- Freedom of association did not include right to belong to particular type of association created by statute and which defined specific criteria for membership -- State had not restricted applicants' freedom of association by creating a statutory regime which did not apply to applicants -- Even if claim for under-inclusion was grounded in fundamental freedom of association, there was no interference with protected s. 2(d) activity -- Applicants had not demonstrated that membership provisions of Act substantially

interfered with their freedom of association -- Sections did not offend s. 7 of Charter -- Act and associated legislation intended to secure land base and to provide measure of self-autonomy for Alberta Metis which was legitimate state interest -- Requiring aboriginal adults who might otherwise meet definition of both Indian and Metis to choose which legislative scheme they wished to fall under was not requirement that was grossly disproportionate to interest of Alberta in securing a land base for Metis -- Sections drew distinction between applicants and those Metis who had not registered as Indians -- Distinction resulted in differential treatment of applicants based on personal characteristics based in part on registration under Indian Act, an analogous ground -- Differential treatment not discriminatory as impugned provisions did not affect human dignity of applicants.

Statutes, Regulations and Rules Cited:

Canadian Charter of Rights and Freedoms, 1982, s. 2(d), s. 7, s. 15(1), a. 25

Metis Settlements Act, R.S.A. 2000, c. M-14, s. 75, s. 90

Counsel:

Sandeep K. Dhir and Thomas K. O'Reilly, Field LLP, for the Applicants.

David N. Kamal, Alberta Justice, for the Respondents.

Thomas Owen, Owen Law, for the Intervener.

Reasons for Judgment

D.L. SHELLEY J.:--

I. Nature of the Application

1 The individual Applicants were long time registered members of the Peavine Métis Settlement (Peavine) until removed from its membership list by the Registrar, Métis Settlements Land Registry (Registrar) in about March 2001 pursuant to directions of the Peavine Council of the day (Former Peavine Council).

2 Their removal from the membership list was undertaken pursuant to s. 90 of the *Métis Settlements Act*, R.S.A. 2000, c. M-14, as amended (*M.S.A.*). This section provides that a Métis settlement member who voluntarily registers as an "Indian" under the *Indian Act*, R.S.C. 1985, c. I-5, as amended is to be removed from the Métis settlement membership list on request by the settlement council that the Registrar do so.

3 The Peavine Council which was elected in 2004 (Current Peavine Council) asked the Registrar to reinstate the individual Applicants to the Peavine membership list. The Registrar declined to do so as s. 75 of the *M.S.A.* prohibits an adult Métis person with Indian status from obtaining membership in a Métis settlement.

4 The Applicants contend that ss. 75 and 90(1)(a) of the *M.S.A.* contravene ss. 2(d), 7 or 15(1) of the *Canadian Charter of Rights and Freedoms* and cannot be saved by s. 1. They seek a declaration to that effect. In the alternative, they seek an order declaring that application of those provisions to the individual Applicants offends the *Charter*. In addition, they ask for an order declaring that the Registrar has the power to reinstate the individual Applicants to the Peavine membership list at the request of Peavine and an order in the nature of *mandamus* directing that the Registrar do so as requested by the Current Peavine Council.

II. Background

5 In 1934, the Alberta Legislature established the "Royal Commission Appointed to Investigate the Conditions of the Half-Breed Population of Alberta" (Ewing Commission). The mandate of the Ewing Commission was to inquire into "the problems of health, education, relief and general welfare of the half-breed population" and to make recommendations based on its investigation.

6 The Ewing Commission Report defined the terms "Métis" or "half-breed" for its own purposes as "a person of mixed blood, white and Indian, who lives the life of the ordinary Indian, and includes a non-treaty Indian," but excluding persons of mixed blood (Indian and white) who had settled down as farmers and who did not need or desire public assistance.

7 The *Métis Population Betterment Act*, S.A. 1938 (2d), c. 6, was enacted as a result of the findings and recommendations of the Ewing Commission. The term "Métis" was defined in s. 2(a) of the Act as meaning:

> ... a person of mixed white and Indian blood but does not include either an Indian or a non-treaty Indian as defined in the *Indian Act*, being Chapter 98 of the Revised Statutes of Canada, 1927.

8 The renamed *Métis Betterment Act*, R.S.A. 1955, c. 202, continued to exclude from the definition of "Métis" anyone registered as an Indian under the *Indian Act* but expanded the exclusion to encompass anyone who had the ability to be registered as an Indian under the *Indian Act*.

9 On March 31, 1982, the Government of Alberta created a joint Metis-Government Committee to review the *Métis Betterment Act* and regulations. The Committee, chaired by the late Grant MacEwan and comprised of an equal number of members from government and the Métis community, prepared a report, dated July 12, 1984, setting out its findings and recommendations (MacEwan Report).

10 The MacEwan Report defined a "Métis" simply as "an individual of aboriginal ancestry who identifies with Métis history and culture."

11 The *Constitution Act, 1982* came into force on April 17, 1982, entrenching existing aboriginal rights in the Canadian constitution and recognizing the Métis as one of Canada's aboriginal peoples.

12 On June 3, 1985, the Alberta legislature passed Resolution 18, authorizing an amendment to the *Alberta Act* to secure a land base and self-government for the Métis in Alberta.

13 *An Act to Amend the Indian Act*, S.C. 1985, c. 27 (Bill C-31), passed by the federal government in 1985, reinstated the right to Indian status to many Métis settlement members who previously had been denied that status, including the individual Applicants.

14 On July 1, 1989, the Alberta Federation of Métis Settlement Associations (Federation) and the Province of Alberta entered into the Alberta-Métis Settlements Accord (Accord) to resolve ongoing litigation between the parties relating to resource monies and 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."

15 All eight Métis settlements in the province held referenda approving the Accord.

16 Pursuant to the Accord, the Province granted the Métis Settlements General Council (General Council) fee simple title to the lands of the eight Métis settlements by Letters Patent in 1990. It also passed a suite of legislation, including the *Constitution of Alberta Amendment Act*, 1990, R.S.A. 2000, c. C-24, the *Métis Settlements Accord Implementation Act*, R.S.A. 2000, c. M-15, the *Métis Settlements Land Protection Act*, R.S.A. 2000, c. M-16 and the *M.S.A.*

17 The *M.S.A.* came into force on November 1, 1990. As set out in s. 0.1(a) of the *M.S.A.*, the Act was passed:

> (a) recognizing the desire expressed in the *Constitution of Alberta Amendment Act*, 1990 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.

18 Peavine and the Intervenor, the Elizabeth Métis Settlement (Elizabeth), are two of the eight Métis settlements established in 1990 as statutory corporations under the *M.S.A.*

19 Following passage of the Accord, Métis settlement members were advised by government representatives and the Métis settlements that, if they had the right to register as Indians, they should do so prior to November 1, 1990.

20 The *Transitional Membership Regulation*, Alta. Reg. 336/90 under the *M.S.A.*, provided for grandfathering of those listed on an official settlement membership list at the date the *M.S.A.* came

into effect. The Regulation stated that they could maintain their membership in the settlement even if they had or were eligible to register as Indians under the *Indian Act*.

21 The *M.S.A.* has been the governing legislation of all eight Métis settlements in Alberta since then and regulates their local government structure.

22 Each Métis settlement has a settlement council composed of five councilors elected for a three-year term pursuant to ss. 8(1) and 12 of the *M.S.A.* and the *Local Authorities Election Act*, R.S.A. 2000, c. L-21. The councils have the authority to make bylaws in a manner similar to municipalities in the province. They are also granted governing authority with reference to the administration of membership in the settlement and land allocation to members within the settlement area: *M.S.A.*, Parts 2 to 6.

23 The General Council, established as a corporation in 1990 under the *M.S.A.*, is comprised of the elected councillors of all eight Métis settlements and officers of the General Council. The General Council governs the eight settlements by passing policies.

24 The General Council can make decisions by special resolution or by ordinary resolution. Any change by the General Council to the policy dealing with criteria for membership at a settlement must be effected by special resolution requiring the approval of at least six of the eight settlement councils. Any General Council policy may be rescinded with the same majority.

25 A Memorandum of Agreement was entered into on May 2, 1996, between the Registrar and the federal Department of Indian Affairs and Northern Development (DIAND), whereby DIAND agreed to provide confirmation to the Registrar "whether or not specific individuals are listed in the DIAND Indian Register and, if an individual is listed, the creation date of the listing, which is personal information under the control of DIAND, to the [Registrar] for the purpose of administering or enforcing the [*M.S.A.*]."

26 On September 11, 1996, the Provincial Minister responsible for the administration of the *M.S.A.* delegated to the Registrar the authority to perform the duties conferred on the Minister under ss. 90(2) and 98(a) of the *M.S.A.* to verify an individual's registration as an Indian or Inuit or to remove names from or to receive information on the membership lists for the settlements.

27 The Report of the Royal Commission on Aboriginal Peoples, dated October 1996, recognized that "Métis identity" is not merely a question of genetics. It stated that, while a Métis person has both aboriginal and non-aboriginal ancestry, these ancestral links may be non-genetic, through marriage, adoption and other family links short of blood connections. It also recognized that cultural factors are a significant component of Métis identity. Métis people associate themselves with a culture that is distinctly Métis, and it is primarily this culture which sets them apart from other aboriginal peoples.

28 The *M.S.A.* was amended in May 2004 by the *Métis Settlements Amendment Act*, S.A. 2004, c.

25. The amendment added a recital referencing Resolution 18, the Accord and the *Constitution of Alberta Amendment Act*. It also added s. 222(1)(y), which allows the General Council to pass policies essentially overriding ss. 75 and 90. No such policies have been passed. The requirement for annual settlement council elections was also changed, to require elections only every three years.

29 In August 1999, the Former Peavine Council gave notice to the Registrar that twenty-three individuals (all members of the Cunningham family, including the individual Applicants) had terminated their membership pursuant to s. 90(1) of the *M.S.A.* by registering as Indians under the *Indian Act* after November 1, 1990. It was seeking to have the Registrar remove them from the membership list for the settlement. The list provided to the Registrar was selective, in that all were members of the Cunningham family and the list did not include sixteen other members who had registered as Indians after November 1, 1990.

30 On September 21, 1999, the Registrar wrote to the Former Peavine Council and advised that DIAND was not prepared to release information under the Memorandum of Agreement and therefore he could not verify the status of these individuals. Pursuant to s. 90(2) of the *M.S.A.*, he could not remove them from the membership list without confirmation of their status.

31 On June 23, 1999, the Former Peavine Council wrote to the Provincial Minister of Aboriginal Affairs, asking that she exercise her discretion to investigate whether twenty-one individuals had registered as Indians under the *Indian Act*. On October 21, 1999, the Associate Minister for Aboriginal Affairs wrote to the Former Peavine Council indicating that she was unwilling to deal with the issue without further study.

32 The Former Peavine Council commenced an action in November 2000 against the Alberta government. It sought an order in the nature of *mandamus* directing the Registrar to remove the twenty-three individuals from the Peavine membership list pursuant to s. 90 of the *M.S.A.*

33 The application was granted on March 2, 2001 by Nash J., who issued an order directing the Registrar to obtain DIAND registration information to "facilitate the efficient rectification of a matter which has been improperly stalled for too long," and to update the settlement membership list by March 23, 2001: ***Alberta (Minister of International and Intergovernmental Relations) v. Peavine Métis Settlement***, [2001] 3 C.N.L.R. 1, 2001 ABQB 165. The Registrar obtained the necessary information from DIAND, determined that the individual Applicants had received Indian status after November 1, 1990 and removed them from the settlement membership list on May 9, 2001.

34 All of the individual Applicants had taken advantage of certain healthcare reimbursements available to aboriginal persons with registered Indian status. They were all long-time and, in some cases, lifetime members of Peavine until their removal from the membership list. They continue to reside at Peavine, but they argue that, as a result of their removal, they have lost their formal ability to participate in their Métis community and have been disqualified from voting in elections of the

Peavine Council.

35 By letter dated April 18, 2005, the Current Peavine Council asked the Registrar to reinstate the individual Applicants to membership. In a letter dated November 17, 2005, the Registrar indicated that he did not have the authority to do so. He advised that they could re-apply for membership under the provisions of the *M.S.A.* They did not do so.

36 On November 22, 1996, Peavine and the individual Applicants filed the Originating Notice in this proceeding.

37 On January 19, 2007, Ross J. granted Elizabeth leave to intervene in this matter to the following extent:

> Elizabeth may file affidavits, participate in cross-examinations, and otherwise join issue fully with respect to the *Charter* relief sought by the Applicants, but shall confine its submissions to the effect of s. 25 of the *Charter* ...

III. Issues

38 The issues on this application are whether:

1. the present application is an impermissible attempt to appeal the order of Nash J.;
2. the individual Applicants have standing to bring this application;
3. the words or effect of ss. 75 or 90 of the *M.S.A.* offend s. 2(d) of the *Charter*;
4. the words or effect of ss. 75 or 90 of the *M.S.A.* offend s. 7 of the *Charter*;
5. the words or effect of ss. 75 or 90 of the *M.S.A.* offend s. 15(1) of the *Charter*, in light of s. 25 of the *Charter*;
6. if either or both of these provisions offend the *Charter*, the infringement is a reasonable limit prescribed by law as demonstrably justified in a free and democratic society under s. 1 of the *Charter*; and
7. the Registrar is entitled or obliged to restore an individual to a settlement's membership list when requested to do so by the settlement council, after the individual was removed from the list following a request made by the former council of the settlement, if that original request was made in bad faith.

IV. The Law

39 The pertinent provisions of the *M.S.A.* and *Charter* read:

> *M.S.A.*

1(j) "Metis" means a person of aboriginal ancestry who identifies with Metis history and culture;

75(1) An Indian registered under the *Indian Act* (Canada) or a person who is registered as an Inuk for the purposes of a land claims settlement is not eligible to apply for membership or to be recorded as a settlement member unless subsection (2) or (3.1) applies.

(2) An Indian registered under the *Indian Act* (Canada) or a person who is registered as an Inuk for the purposes of a land claims settlement may be approved as a settlement member if

(a) the person was registered as an Indian or an Inuk when less than 18 years old,
(b) the person lived a substantial part of his or her childhood in the settlement area,

(c) one or both parents of the person are, or at their death were, members of the settlement, and

(d) the person has been approved for membership by a settlement bylaw specifically authorizing the admission of that individual as a member of the settlement.

(3) If a person who is registered as an Indian under the *Indian Act* (Canada) is able to apply to have his or her name removed from registration, subsection (2) ceases to be available as a way to apply for or to become a settlement member.
(3.1) In addition to the circumstances under subsection (2), an Indian registered under the *Indian Act* (Canada) or a person who is registered as an Inuk for the purposes of a land claims settlement may be approved as a settlement member if he or she meets the conditions for membership set out in a General Council Policy.
(4) A right to reside on patented land acquired under this or another enactment, a General Council Policy or a bylaw is not affected by a decision to refuse an application for membership when the decision is based on this section.

90(1) Unless a General Council Policy provides otherwise, a settlement member

terminates membership in a settlement if

(a) the person voluntarily becomes registered as an Indian under the *Indian Act* (Canada), or
(b) the person becomes registered as an Inuk for the purpose of a land claims agreement.

(2) On receipt from the settlement council of notice of a termination of membership under subsection (1), and after any verification of the facts that is considered necessary, the Minister must remove the name of the person concerned from the Settlement Members List.

222(1) The General Council, after consultation with the Minister, may make, amend or repeal General Council Policies

(y) respecting eligibility for membership in settlements for the purpose of section 75(3.1) and respecting termination of membership for the purpose of section 90(1);
(z) respecting membership in settlements generally.

Charter

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.
2. Everyone has the following fundamental freedoms:

...

(d) freedom of association.

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.
15. 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 in race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

25. The guarantee in this *Charter* of certain 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, including

(a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and
(b) any rights or freedoms that now exist by way of land claims agreements or may be so acquired.

V. Analysis

1. Is this an impermissible appeal of Nash J.'s order?

40 The Respondents argue that the constitutional issues now being raised are not properly before the Court and are a "backdoor" attempt to attack the decision of Nash J., which directed that the Registrar obtain DIAND registration information and update the settlement membership list by March 23, 2001. They submit that a bare demand by Peavine Council to the Registrar that he reinstate the individual Applicants does not trigger any duty on the part of the Registrar. They say that if the Registrar was to reinstate the individual Applicants to the settlement membership list, he would be in violation of the Nash J. order. They suggest that as the order was entered and perfected, this Court is *functus officio* and cannot set aside or alter that order.

41 The Respondents also contend that the Nash J. order, which was never appealed, is protected by the *de facto* doctrine. They maintain that, even if ss. 75 and 90 of the *M.S.A.* are struck down as offending the *Charter*, the Nash J. order will not be nullified.

42 The Respondents argue that the present application constitutes an abuse of process and an impermissible collateral attack on the order of Nash J. They assert that the issue of whether the Registrar has discretion regarding the updating of the settlement list was litigated and issue estoppel now applies.

43 The Respondents point out that the Peavine Council is an unchanging legal entity despite changes in its composition and, given it was a party to the application heard and decided by Nash J., it cannot bring the present constitutional challenge to undermine the effects of that order or otherwise impugn the validity of that order.

44 The Applicants counter that this application is not an attack on the Nash J. order but rather is a

constitutional challenge of ss. 75 and 90 of the *M.S.A.* The issue relating to discretion of the Registrar is framed as alternate relief if *Charter* relief is not granted.

45 With the exception of the individual Applicants, the same parties were before Nash J. in 2001 as at present. Peavine at that time sought an order in the nature of *mandamus* directing the Minister of International and Governmental Relations and the Registrar to prepare an updated membership list for Peavine for purposes of its next municipal election and for administration of Settlement programs. At that time, Peavine argued that there were individuals who had terminated their membership in the Settlement by voluntarily becoming registered as Indians under the *Indian Act* after November 1, 1990; and that their names should therefore be removed from the Settlement's membership list in accordance with s. 97(3) of the *M.S.A.* Nash J. agreed. She held that the Minister and the Minister's delegate had a mandatory duty under ss. 90(2), 96(3) and 97(3) of the Act to keep the membership list up to date and to remove a name when that individual's membership was lost pursuant to the *M.S.A.*

46 In my view, as the constitutional issues raised in the present application were not before Nash J., this application cannot be considered an impermissible collateral attack on her order nor an abuse of process to the extent that it deals with those issues, which are not *res judicata*.

47 The individual Applicants in the present case do not dispute that they were registered as Indians under the *Indian Act* after November 1, 1990, although a number of them applied before that date. The Applicants do not point to any statutory right or power given to the Minister or the Registrar to reinstate them to the membership list at the request of Peavine. They argue that if Peavine has the power to direct that the Registrar remove a member under s. 90, Peavine must have the power to direct that the Registrar reinstate a member who was improperly removed under s. 90 and that the Registrar has the power and duty to comply if such a request is received. In referring to improper removal under s. 90, the Applicants appear to mean that the actions of the Former Peavine Council were taken in bad faith at the time, not that removal of the individual Applicants from the membership list was in breach of the *Charter*.

48 In my view, if the Applicants took issue with the request made by the Former Peavine Council, which was the foundation for Nash J.'s decision and the Registrar's action in removing the individual Applicants from the Peavine membership list, judicial review of that action should have been sought or an appeal of Nash J.'s decision should have been taken. The Applicants are now well out of time for doing so and therefore are precluded from arguing that the request of the Former Peavine Council was made in bad faith.

49 The Applicants say that on April 12, 2005, Peavine resolved that the Registrar should reinstate the individual Applicants to membership in the settlement. They complain that, although Peavine directed that the Registrar do so, the Registrar, by letter dated November 17, 2005, declined to act as he was of the view that he did not have the authority to reinstate the Applicants to membership in the settlement. In now seeking a declaration that the Registrar has the power to reinstate the

individual Applicants to the settlement membership list and asking for an order in the nature of *mandamus* to require that the Registrar do so, the Applicants in effect are asking for judicial review of the Registrar's November 17, 2005 decision, although their application is not framed in that manner. This is a different issue than faced by Nash J. As a result, issue estoppel and *res judicata* do not apply.

2. Do the Applicants have standing to bring this challenge?

50 Standing to bring a *Charter* challenge may be gained as of right or in the public interest. Those who allege infringement of their individual rights, such as those under ss. 2(d), 7 and 15 of the *Charter*, acquire standing as of right: ***Kasko Estate v. Lethbridge Regional Hospital*** (2006), 393 A.R. 28, 2006 ABQB 280.

51 The individual Applicants lost their membership in Peavine as a result of the operation of ss. 75 and 90 of the *M.S.A.* They were not parties to the application before Nash J. In my view, they are directly affected by the operation of ss. 75 and 90 of the Act and thereby are entitled as of right to bring a *Charter* challenge in regard to those sections.

52 The Respondents note that Peavine, which is an Applicant in the present matter, was one of the parties that sought the Nash J. order. They contend that Peavine is a statutory corporation, which is a separate and distinct legal entity from its shareholders, and that the Peavine Council is a continuing body despite changes in its composition. They take the position that, since Peavine is the same party that obtained and benefited from the Nash J. order, it cannot adopt the opposite position to benefit from a reversal of that order and cannot bring a constitutional challenge to undermine the effect of that order.

53 Artificial persons such as corporations may not claim the benefit of individual rights: ***Irwin Toy Ltd. v. Quebec (Attorney General)***, [1989] 1 S.C.R. 927 at 1004; ***Canada (Attorney General) v. Hislop***, (2007) 358 N.R. 197, 2007 SCC 10. However, a corporation may be granted standing when it is challenging the constitutional validity of a law under which it is being prosecuted or sued by the state: ***Big M*** [1985] 1 S.C.R. 295 at 312-315; and ***Canadian Egg Marketing Agency v. Richardson***, [1998] 3 S.C.R. 157 at paras. 35-44.

54 A third party such as a corporation, in this case a Métis settlement, even if not directly prejudiced, may bring a constitutional challenge to impugned federal or provincial legislation if it is in the public interest to allow it to do so and the following three-part test is met (Peter W. Hogg, *Constitutional Law of Canada*, looseleaf (Toronto: Carswell, 1997) para. 37.2(d); ***Thorson v. Canada (Attorney General)*** (1974), [1975] 1 S.C.R. 138; ***Nova Scotia (Board of Censors) v. McNeil*** (1975), [1976] 2 S.C.R. 265; ***Canada (Minister of Justice) v. Borowski***, [1981] 2 S.C.R. 575; and ***Finlay v. Canada (Minister of Finance)***, [1986] 2 S.C.R. 607):

1. the plaintiff raises a serious legal issue;
2. the plaintiff has a genuine interest in the resolution of the issue; and
3. there is no other reasonable and effective manner in which the issue may be brought before the Court.

55 In ***Canadian Council of Churches v. Canada (Minister of Employment and Immigration)***, [1992] 1 S.C.R. 236 at paras. 35 and 36, Cory J. commented that a balance must be struck between ensuring access to the courts and preserving judicial resources. As the purpose of granting public interest standing is to prevent immunization of legislation from challenge, if the legislation is or will likely be subject to attack by a private litigant, public interest standing need not be granted. The decision whether to grant public interest standing is discretionary but the applicable principles are to be interpreted in a liberal and generous fashion in exercising that discretion.

56 In the present case, the first two requirements for public interest standing are satisfied. A serious legal issue is raised and Peavine has a genuine interest in ensuring that individuals have not been deprived of entitlement to membership by way of legislation that potentially offends the *Charter*. Peavine has failed to satisfy the third requirement, however, as the individual Applicants themselves are raising the *Charter* issues. Accordingly, the *M.S.A.* is not immunized from *Charter* challenge.

57 If *Charter* relief is not granted, the issue arises as to whether the Minister and his delegate have the power or are required to reinstate an individual's membership if there was bad faith displayed by the Former Peavine Council in being selective in asking that the Registrar confirm the status of only the Applicants as registered Indians. The Respondents do not appear to dispute the right of the individual Applicants to seek a declaration and *mandamus* on this basis, even though they were not a party to the request for reinstatement made of the Registrar.

58 The Respondents contend that Peavine is precluded from seeking this relief as it is asking, in essence, that an action which it demanded be taken be reversed on the basis of bad faith exercised by the Former Peavine Council. In my view, that is not an argument which goes to standing so much as it does to the equities of the situation, which is of relevance given that a declaration and *mandamus* are discretionary equitable remedies. The Respondents did not advance any other arguments addressing the issue of the Applicants' standing to seek these remedies. Accordingly, I will proceed to consider the merits of the request if *Charter* relief is not granted.

3. Do the words or effect of ss. 75 or 90 of the *M.S.A.* offend s. 2(d) of the *Charter*?

59 The individual Applicants submit that their right to belong to Peavine is a fundamental freedom and that, given the social, economic and statutory context, ss. 75 and 90 of the *M.S.A.* substantially interfere with their s. 2(d) *Charter* right to belong to a settlement community. In

contrast, the Crown takes the position that, while s. 2(d) protects fundamental freedoms, such protection does not extend to statutory rights or benefits such as those provided to settlement members pursuant to the *M.S.A.* The Crown points to the legislative scheme of the *M.S.A.* in support of its position, noting that Peavine is a statutory corporation for which membership criteria are defined by statute and that certain statutory benefits flow from that definition of membership.

60 Both the Applicants and the Respondents rely on the Supreme Court of Canada's decision in ***Dunmore v. Ontario (Attorney General)***, [2001] 3 S.C.R. 1016, as the definitive approach to s. 2(d) analysis. Although ***Dunmore*** was decided in the context of labour relations, it remains good authority in determining whether a fundamental freedom has been infringed under s. 2.

61 According to ***Dunmore*** at para. 13, in order to establish a violation of s. 2(d), the Applicants must demonstrate that:

> (a) the activities for which the Applicants seek protection fall within the range of activities protected by s. 2(d); and
> (b) the impugned legislation has, either in purpose or effect, interfered with those activities.

62 The activity for which the Applicants seek protection is the right to fully belong to and participate in Peavine, a Métis community and corporation established under the *M.S.A.* The Applicants argue that the impugned provisions constitute government restriction on membership in an association, which engages the protection of s. 2(d). The Crown submits that, even if settlement membership does fall under the protection of s. 2(d), the impugned provisions do not infringe the *Charter* because they do not preclude the individual applicants from becoming settlement members. The Crown further argues that, as the individual Applicants have not re-applied for settlement membership, it cannot be said that they have even attempted to exercise or assert any associational rights under the legislation.

63 Freedom of association under s. 2(d) includes the freedom to establish, belong to and maintain an association. Any governmental restriction on the formation of or membership in associations would fall afoul of this aspect of s. 2(d): ***P.I.P.S. v. Northwest Territories (Commissioner)***, [1990] 2 S.C.R. 367 at para. 36 (*per* Sopinka J.).

64 It is accepted that, at a minimum, freedom of association includes the right of an individual to belong to an association. However, in this case, the association in issue is one created by statute which defines membership criteria. The essential questions are: (a) whether the Applicants' freedom of association extends to an association that is fundamentally a creature of statute, and (b) whether legislating membership criteria that exclude the individual Applicants by virtue of their status as registered Indians violates s. 2(d) of the *Charter*.

65 Bastarache J., writing for the majority in ***Dunmore***, held at para. 16 that the purpose of s. 2(d) commands a single inquiry: whether the state has precluded activity *because* of its associational

nature, thereby discouraging the collective pursuit of common goals. At para. 18, he explained that:

> In sum, a purposive approach to s. 2(d) demands that we "distinguish between the associational aspect of the activity and the activity itself", a process mandated by this Court in the ***Alberta Reference*** [1987] 1 S.C.R. 313 (see ***Egg Marketing***, *supra*, per Iacobucci and Bastarache JJ., at para. 111). Such an approach begins with the existing framework established in that case, which enables a claimant to show that a group activity is permitted for individuals in order to establish that its regulation targets the association *per se* (see ***Alberta Reference***, *supra*, per Dickson C.J., at p. 367). Where this burden cannot be met, however, it may still be open to a claimant to show, by direct evidence or inference, that the legislature has targeted associational conduct because of its concerted or associational nature. [Emphasis added.]

66 Bastarache J. recognized that the collective is "qualitatively" distinct from the individual; individuals associate not because there is strength in numbers, but because communities can embody objectives that individuals cannot: ***Dunmore*** at para. 17. Although certain collective activities must be recognized if the freedom to form and maintain an association is to have any meaning, this is not to say that all such activities are protected by s. 2(d), nor that all collectivities are worthy of constitutional protection: ***Dunmore*** at para. 17.

67 The scope of state responsibility in respect of freedom of association is generally characterized as "negative" in nature, meaning that the state need only refrain from interfering, either in purpose or effect, with protected associational activity: ***Dunmore*** at para. 19. Although the *Charter* does not generally oblige the state to take affirmative action to safeguard or facilitate the exercise of fundamental freedoms, Bastarache J. recognized in ***Dunmore*** at para. 20 that, in certain exceptional circumstances, namely in the area of labour relations, the *Charter* may impose positive duties on the state.

68 In this case, the Applicants challenge ss. 75 and 90 of the *M.S.A.* on the grounds that the impugned provisions are under-inclusive and that the Crown has a positive obligation to extend settlement membership to the individual Applicants, regardless of their status as registered Indians.

69 It is important to note at this stage of the inquiry that the determination of "under-inclusion" for the purpose of s. 2(d) analysis is conceptually distinct from that involved under s. 15(1). The burden imposed by s. 2(d) differs from that imposed by s. 15(1): the former focuses on the effects of under-inclusion on the ability to exercise a fundamental freedom, while the latter focuses on the effects of under-inclusion on human dignity: ***Dunmore*** at para. 28.

70 Bastarache J. noted at para. 22 of ***Dunmore*** that the total exclusion of a group from a protective regime could engage not only 15(1) of the *Charter*, but also s. 2(d), if the exclusion amounts to an affirmative interference with the effective exercise of a protected freedom. Claims for inclusion under s. 2(d) are rare and are constrained by s. 32 of the *Charter*, which requires a

minimum of state action before the *Charter* can be invoked: ***Dunmore***, at paras. 28 and 30.

71 Bastarache J., at paras. 24 to 26 and 31 to 33 of ***Dunmore***, identified three factors to limit challenges to s. 2(d) on the grounds of under-inclusion:

> (a) Claims of under-inclusion should be grounded in fundamental *Charter* freedoms rather than in access to a particular statutory regime;
> (b) The claimant must meet an evidentiary burden of demonstrating that exclusion from a statutory regime permits a *substantial interference* with the exercise of protected s. 2(d) activity, or that the purpose of the exclusion was to infringe such activity. This must be proven before a positive obligation arises under the *Charter*. It is not required that the exercise of a fundamental freedom be impossible, but it is required that the claimant seek more than a particular channel for exercising his or her fundamental freedoms ; and
> (c) The state must be accountable for any inability to exercise the fundamental freedom: under-inclusive state action falls into suspicion not simply to the extent that it discriminates against an unprotected class, but to the extent it substantially orchestrates, encourages or sustains the violation of fundamental freedoms.

72 In ***Baier v. Alberta***, [2007] S.C.J. No. 31, 2007 SCC 331, Rothstein J. confirmed at para. 30 that, once an applicant claims a positive entitlement to government action, all three ***Dunmore*** factors must be satisfied in order to establish an infringement of s. 2.

(a) Is the Claim for Under-Inclusion Grounded in Freedom of Association rather than Access to a Particular Statutory Regime?

73 The Applicants submit that the statutory framework established by the *M.S.A.* regulates, structures, and channels virtually all of the associational activities of the settlement community, including decisions on almost all matters of local governance and leadership. They argue that, by virtue of the *M.S.A.*, membership in a Métis settlement community has become virtually synonymous with settlement membership and that the right of Métis members to organize through the provisions of the *M.S.A.* "lies at the core of the *Charter's* protection of freedom of association," as *per* ***Dunmore***. As such, the termination of the Individual Applicants' settlement membership has infringed on their right to organize collectively with the remaining members of Peavine towards pursuing the objectives of the *M.S.A.*

74 However, the Respondent Crown points to the same statutory framework in support of its position that the Applicants' claim for under-inclusion is governed by their desire to reap the benefits of settlement membership as determined by the legislative regime.

75 A distinction must be drawn between requiring the state to enact legislation that safeguards the exercise of a fundamental freedom, as opposed to legislation that simply allows access to benefits under a particular statutory regime. The essential nature of the right claimed is rooted in this distinction.

76 In order to determine whether the Applicants' claim for under-inclusion is grounded in a fundamental freedom rather than access to a particular statutory regime, one must keep in mind the purposive approach advocated by Bastarache J. in ***Dunmore***. In this case, taking a purposive approach leads me to consider the following issue: whether the Crown has excluded registered Indians from membership in a settlement community *because* of its concerted or associational nature, thereby discouraging the collective pursuit of common goals.

77 Part 3 of the *M.S.A.* sets out a comprehensive legislative scheme to determine membership in a Métis settlement community. The scheme sets out an application process and provides a list of criteria that must be met in order to apply for settlement membership, including proving Métis identity. In addition to setting out application criteria in s. 74 of the *M.S.A.*, s. 75 further provides that a registered Indian is not eligible to become a settlement member unless further criteria are met. The legislation also allows the General Council to adopt a policy which would negate the exclusion from membership of registered Indians. In the absence of such a policy, s. 90 has the effect of automatically terminating membership on a person's voluntary registration as an Indian under the *Indian Act*.

78 The effect of membership termination is that the former member loses all rights gained by his or her former membership to reside on or occupy patented land: *M.S.A.*, s. 91. However, the former member may nevertheless be able to continue residing on the patented land if he or she is part of the immediate family of a settlement member, a teacher or health care worker, an employee of the settlement, or otherwise is permitted to reside on patented land under legislation, a General Council Policy or a settlement bylaw: *M.S.A.*, s. 92.

79 Other rights associated with settlement membership include: the right to vote in a general election or by-election (*M.S.A.*, s. 14); the right to run as a councilor (*M.S.A.*, s. 15); the right to vote on a resolution at a general or special meeting (*M.S.A.*, s. 47); the right to vote on bylaws (*M.S.A.*, s. 55); and the right to petition the settlement council (*M.S.A.*, s. 57).

80 The Supreme Court of Canada has held that as long as the legislature's decision is consistent with other provisions of the *Charter*, it must be open to the government to determine which associations are entitled to special support or protection: ***Delisle v. Canada (Attorney General)***, [1999] 2 S.C.R. 989 at para. 29. Freedom of association does not include the right to establish a particular type of association defined in a particular statute: ***Delisle*** at para. 33. Similarly, freedom of association does not include the right to belong to a particular type of association created by statute and which defines specific criteria for membership.

81 In this case, the purpose of the exclusion of registered Indians from the statutory regime is

simply not to grant them any status under the *M.S.A.* to claim membership benefits from a Métis settlement. This purpose is supported by the recital to the *M.S.A.*, which recognizes that the Métis should 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 right to Métis settlement membership is, in essence, a right to reside on the settlement land.

82 The *M.S.A.* does not restrict the Applicants' ability to associate with other Métis people or to form associations or organizations outside of the statutory regime which is dedicated to the preservation of Métis culture and identity or to the attainment of Métis self-government. In this case, the Individual Applicants were eligible to register for Indian status and, by electing to do so, they effectively removed themselves from the statutory regime established by the M.S.A. Similar to the finding in ***Delisle*** at para. 25, the state has not restricted the Applicants' freedom of association by creating a statutory regime which does not apply to them.

83 The analysis here is similar to that undertaken by the Supreme Court of Canada in ***Haig v. Canada***, [1993] 2 S.C.R. 995, and more recently in ***Baier***. Although those cases considered freedom of expression under s. 2(b) of the *Charter*, the reasoning is applicable to the determination of whether a fundamental freedom has been infringed due to under-inclusion under a statute.

84 In ***Haig***, L'Heureux-Dubé J. noted at para. 79 that positive governmental action might be required in order to make a fundamental freedom meaningful. Mr. Haig had moved from Ontario to Quebec and was unable to vote in either the federal or Quebec referendum because of different residency requirements under the two different legislative regimes. He then challenged the federal legislation for violating his freedom of expression. In holding that it did not violate s. 2(b) of the *Charter*, L'Heureux-Dubé J. noted at para. 83:

> A referendum is a creation of legislation. Independent of the legislation giving genesis to a referendum, there is no right of participation. The right to vote in a referendum is a right accorded by statute, and the statute governs the terms and conditions of participation. The court is being asked to find that this statutorily created platform for expression has taken on constitutional status. In my view, though a referendum is undoubtedly a platform for expression, s. 2(b) of the *Charter* does not impose upon a government, whether provincial or federal, any positive obligation to consult its citizens through the particular mechanism of a referendum. Nor does it confer upon all citizens the right to express their opinions in a referendum. A government is under no constitutional obligation to extend this platform of expression to *anyone*, let alone to everyone. A referendum as a platform of expression is, in my view, a matter of legislative policy and not of constitutional law.

85 In ***Baier***, the question before the Court was whether legislation limiting the ability of school employees to run for election and to serve as school trustees was constitutional. Rothstein J., writing

for the majority, applied the ***Dunmore*** analysis in finding that the appellants' claim for under-inclusion was grounded in access to a particular statutory regime of school trusteeship and not in a fundamental freedom. Furthermore, the appellants did not establish that the exclusion had resulted in substantial interference with their freedom of expression. They merely sought a particular channel of expression: ***Baier*** at para. 54.

86 In a very recent decision of the Supreme Court of Canada, ***Health Services & Support Facilities Subsector Bargaining Assn. v. British Columbia***, [2007] S.C.J. No. 27, 2007 SCC 27, McLachlin C.J.C. and LeBel J., writing on behalf of the majority, held that s. 2(d) of the *Charter* protects the capacity of members of labour unions to engage, in association, in collective bargaining on fundamental workplace issues. While this decision overturned previous authority from the Supreme Court of Canada which held that collective bargaining was not protected under s. 2(d), McLachlin C.J.C. and LeBel J. noted at para. 19 that this newly extended protection does not cover all aspects of collective bargaining, nor does it ensure a particular outcome in a labour dispute, or guarantee access to any particular statutory regime.

87 Put another way, the Court held that the "procedure" known as collective bargaining can be constitutionally protected without mandating that such protection also extend to the fruits of that bargaining process: ***Health Services*** at para. 29. As it is the process which is protected, no particular substantive or economic outcome is guaranteed: ***Health Services*** at para. 91. Furthermore, the right is to a general process of collective bargaining, not to a particular model of labour relations, nor to a specific bargaining method: ***Health Services*** at para. 91.

88 In the present case, the ability of a settlement member to exercise the privileges of membership, including the right to reside on settlement land, does not exist independently outside of the legislative regime established by the *M.S.A.* The right of residency, which is intrinsically tied to the ability to hold settlement membership, is properly characterized as a statutory benefit, not as a fundamental freedom. Membership is defined by statute; the benefits of such membership are granted by virtue of legislation. In the case at bar, the Applicants' claim is grounded in the assertion of a right to access a particular statutory regime; namely, the right to reside on patented land through inclusion in the legislatively defined membership scheme. This distinguishes the situation from the labour relations context as the Supreme Court of Canada has noted that the right to bargain collectively was not created by legislation, but is merely protected by legislation: ***Health Services*** at para. 25.

89 In conclusion, I find that the Applicants in the present case are seeking to participate in a particular channel or model of association, which will grant them access to a particular statutory regime. As such, it cannot be said that the Applicants' claim of under-inclusion is grounded in the fundamental freedom of association. The Applicants have failed to meet the first of the ***Dunmore*** factors.

(b) Has There Been a Substantial Interference With Protected

s. 2(d) Activity?

90 If I am incorrect in characterizing the Applicants' claim for under-inclusion as being grounded in the desire to access a particular statutory regime, I must consider the remaining ***Dunmore*** factors.

91 The Applicants suggest that, like the claimants in ***Dunmore***, they too come from an historically destitute group, they have few material resources, no statutory resources and are vulnerable to reprisals by a future settlement council. They maintain that they are politically impotent in attempting to pursue the objectives of the *M.S.A.* without the benefit of membership in the larger Métis community and that they do not have the ability to set up any alternate community organization.

92 In response, the Crown takes the position that the circumstances in ***Dunmore*** are unique to the labour relations context and therefore distinguishable from the present case.

93 Even if a legislative regime aims to safeguard a fundamental freedom, it does not follow that exclusion from that regime will automatically give rise to a *Charter* violation; a group that proves capable of associating despite its exclusion from a protective regime will be unable to meet the evidentiary burden required of a *Charter* claim: ***Dunmore*** at para. 39. In such a case, inclusion in a statutory regime cannot be said to safeguard, but rather enhances the exercise of a fundamental freedom: ***Dunmore*** at para. 39. There must be evidence that the freedom would be next to impossible to exercise without positively recognizing a right to access a statutory regime: ***Health Services*** at para. 34.

94 The analysis here turns on the determination of whether, by excluding registered Indians from settlement membership, there has been substantial interference with the Applicants' freedom of association.

95 The Supreme Court of Canada in ***Health Services*** at para. 93 recently expanded on the substantial inference branch of the ***Dunmore*** test, *albeit* in the context of collective bargaining. The court indicated that two inquiries must be made. The first is into the nature of the affected right. The second is into the manner in which the measure impacts that right. As indicated by the Court at para. 129 of ***Health Services***, "Even where a matter is of central importance to the associational right, if the change has been made through a process of good faith consultation it is unlikely to have adversely affected the employees' right to collective bargaining."

96 In the present case, the Applicants have not met the evidentiary burden of demonstrating that the membership provisions of the *M.S.A.*, which exclude them from membership in Peavine, substantially interfere with their freedom of association. Although the ability to belong to a group may be considered central to freedom of association, the Applicants have not established that it is

"next to impossible" for them to have the capacity to pursue common goals.

97 Moreover, the second stage of the inquiry into substantial interference requires the Court to look at the circumstances by which registered Indians were excluded from the membership scheme set out in the *M.S.A.* I accept that the membership provisions resulted from extensive consultations between the Crown and representatives from the Alberta Federation of Metis Settlement Associations; indeed, this is reflected in the recital to the *M.S.A.* The ability of settlements to determine their own criteria for membership is further evidenced by ss. 222(1)(y) of the *M.S.A.*, which enables the General Council to pass policies respecting membership eligibility for purposes of ss. 75(3.1) and 90(1). It is not unreasonable to assume that the General Council was given these powers, which are consistent with the advancement of self-governance, to allow Métis settlement communities to determine their own membership.

98 In conclusion, I find that the Applicants have not demonstrated that the impugned provisions constitute a substantial interference with their freedom of association.

(c) **Is the State Accountable for the Claimants' Inability to Exercise their Fundamental Freedom?**

99 The Applicants submit that the conditions facing them, which place them in a vulnerable position similar to that of the agricultural workers in ***Dunmore***, are reinforced by their exclusion from the protection of the *M.S.A.* They argue that by enacting the *M.S.A.*, the Crown must be presumed to have recognized that a protective regime was essential to the exercise of freedom of association on the Métis settlements, given the historical conditions of the Métis people. The Applicants maintain that, in excluding them from the protective regime, the Crown has provided the means by which coercive state force may be used to expel them from the settlement community.

100 The interference at issue must be linked to the state, not private action: ***Dunmore*** at para. 43. Although heavily relied on by the Applicants, ***Dunmore*** is distinguishable on this point. It is important to note that, in the context of labour relations, s. 2(d) protects employees' freedom to organize without fear of penalty or reprisal from their employers and that without state protection, the freedom to organize could otherwise subject employees to complaints of unfair labour practices, as well as adverse legal and economic consequences: ***Dunmore*** at paras. 21-22. Their exclusion from the regime would not simply permit private interference with their fundamental freedoms, but would function to substantially reinforce such interferences: ***Dunmore*** at para. 35. In this exceptional context, the effective exercise of freedom of association would require positive legislative action to protect an historically vulnerable group that would otherwise be subject to the whims and fancies of a more powerful group.

101 Unlike the situation in ***Dunmore***, in the present case, the *M.S.A.* is designed to provide a limited statutory entitlement to certain classes of citizens, namely Métis people. In ***Dunmore***, the

Ontario *Labour Relations Act* was designed to safeguard a fundamental freedom, namely the freedom to organize. Without the protective regime, the agricultural workers would have been incapable of exercising their freedom to organize. The Applicants in the present case have not established that their exclusion from the *M.S.A.*'s legislative regime reinforces private interference with their fundamental freedoms, or otherwise subjects them to negative legal and economic consequences.

102 In conclusion, I find that the Applicants have failed to establish that ss. 75 and 90 of the *M.S.A.* infringe their freedom of association under s. 2(d) of the *Charter*.

4. Do the words or effect of ss. 75 or 90 of the *M.S.A.* offend s. 7 of the *Charter*, in light of s. 25 of the *Charter?*

(a) Arguments of the Parties on s. 7

103 In order to succeed on this ground, the Applicants must establish that the impugned legislation deprives them of their life, liberty or security of the person and that such deprivation does not accord with the principles of fundamental justice: ***Blencoe v. British Columbia (Human Rights Commission)***, [2000] 2 S.C.R. 307 at para. 47.

104 As noted by the Applicants, the right to liberty encompasses the right to make decisions of fundamental personal importance, decisions that "by their very nature ... implicate basic choices going to the core of what it means to enjoy individual dignity and independence:" ***Godbout v. Longueuil (City)***, [1997] 3 S.C.R. 844 at paras. 65-66; ***R. v. Malmo-Levine***, [2003] 3 S.C.R. 571 at para. 85; ***Blencoe*** at paras. 49-54.

105 The Applicants contend that an aspect of the right to liberty is the right to choose where to establish your home, as that is a private decision going to the core of personal autonomy and may reflect personal values, such as the historical significance or cultural make-up of a location and physical proximity to close family and friends: ***Godbout*** at para. 67.

106 The Applicants maintain that what they term the "Indian prohibition" of the *M.S.A.*, combined with ss. 91(1)(a), 92, 93 and 95, have the potential to compromise their right to reside at Peavine and that it is only as a result of living with a member of their immediate family or through the benevolence of the Current Peavine Council that they are able to continue to reside on the Settlement.

107 The Applicants further submit that the right to belong to an Aboriginal community with which they identify strikes at the heart of the guarantee to autonomy of the individual Applicants: ***Godbout*** at para. 68.

108 The Applicants also argue that the "Indian prohibition" runs counter to the purpose of the *M.S.A.* to facilitate the Métis continuing to have a land base to provide for the preservation of their culture and identity and to enable them to have self-governance. They submit that the impugned provisions are arbitrary and detract from a Settlement's ability to determine who may be a member of the community.

109 The Respondents argue that it is not clear from ***Godbout*** that s. 7 includes the right to decide where to establish a residence.

110 The Respondents note that the Applicants rely on the principle of fundamental justice that "laws shall not be arbitrary," but suggest that the definition of arbitrariness found in ***Malmo-Levine*** is to be preferred over the discussion in ***Chaoulli v. Quebec (Attorney General)***, [2005] 1 S.C.R. 791, as the Supreme Court of Canada was evenly divided on the issue in the latter case. In ***Malmo-Levine***, the court applied a two-part test in assessing whether a law was arbitrary: (1) Does the law pursue a legitimate state interest; and (2) Is the law grossly disproportionate to the state interest?

111 The Respondents submit that the Applicants' argument with respect to arbitrariness is fundamentally flawed as it was the actions of the Former Peavine Council and not the legislation which were arbitrary.

(b) Analysis

112 The Supreme Court of Canada, in ***New Brunswick (Minister of Health and Community Services) v. G.(J.)***, [1999] 3 S.C.R. 46 at paras. 58 and 65, and ***Blencoe*** at para. 45, confirmed that s. 7 of the *Charter* is not confined to the penal context. It can extend beyond the criminal sphere where there is "state action which directly engages the justice system and its administration:" ***G.(J.)*** at para. 66; ***Blencoe*** at para. 46.

113 In ***Chaoulli***, the majority of the court accepted that s. 7 can apply outside of the context of the administration of justice, but suggested that, the more distant a challenged action is from the adjudicative context, the more difficult it will be for the claimant to make the essential link to s. 7.

114 The first question to be addressed is whether the interest in respect of which the Applicants assert their claim falls within the ambit of s. 7: ***Blencoe*** at para. 47. Has there been a deprivation of the Applicants' right to "life, liberty and security of the person?" As indicated by the court in ***Blencoe***, these are separate interests. The liberty interest is engaged where state prohibitions affect important and fundamental life choices: ***Blencoe*** at para. 49.

115 In ***R. v. Morgentaler***, [1988] 1 S.C.R. 30 at 166, Wilson J. expressed the view that the right to liberty protected by the *Charter* is inextricably tied to the concept of human dignity. The essential

premise of the *Charter* is that the state will respect choices made by individuals. "Individuals are afforded the right to choose their own religion and their own philosophy of life, the right to choose with whom they will associate and how they will express themselves, the right to choose where they will live and what occupation they will pursue (emphasis added)." According to Wilson J., the right to liberty, properly construed, grants the individual a degree of autonomy in making decisions of fundamental personal importance.

116 LaForest J., writing for L'Heureux-Dubé J. and McLachlin J. (as she then was) in ***Godbout v. Longueuil (City)***, [1997] 3 S.C.R. 844 at para. 66, also supported a broad scope for the s. 7 right to liberty, finding that it protects an individual's right to choose where to establish their home. He found support for his view in the fact that this right is afforded explicit protection in Article 12(1) of the *International Covenant on Civil and Political Rights*, Can. T.S. 1976 No. 47 to which Canada became a party in 1976. It provides that: "Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence."

117 The remaining six members of the bench in ***Godbout*** decided the case on a different basis and chose not to comment on whether s. 7 extends to an individual's right to choose where to establish their home.

118 In ***Scrimbitt v. Sakimay Indian Band Council***, [1999] F.C.J. No. 1606, MacKay J. of the Federal Court Trial Division referred to ***Godbout***, but suggested at para. 59 that there was no jurisprudence at the time which clearly accepted that the liberty interest protected by s. 7 extends beyond protection from physical restriction of an individual's liberty. In the end result, he was not persuaded that the claimant's s. 7 rights had been infringed by the Band Council's denial of her right to vote on the basis that she was a "Bill C-31 Band member," although he concluded that there had been a breach of s. 15 of the *Charter* in the circumstances of that case.

119 On the other hand, MacKenzie J., in ***Vaugeois v. Red Deer (City)*** (1999), 169 D.L.R. (4th) 744 (Alta. Q.B.), held that a municipal bylaw violated s. 7 by imposing a residency requirement for purposes of acquiring a licence to operate a business.

120 In ***Thurber v. Thurber*** (2002), 322 A.R. 242, 2002 ABQB 727, the applicant sought a declaration that the one year residency requirement in s. 3(1) of the *Divorce Act* offended s. 7 of the *Charter*. While McMahon J. of this Court acknowledged (at para. 21) that Mr. Justice LaForest's minority opinion in ***Godbout*** had been adopted in ***Re Vaugeois***, he was of the view that it was not appropriate to extend the protection of s. 7 on the facts before him. He noted that there was nothing preventing the Applicant from moving to another province and concluded that the impugned law did not constrain her ability to reside where she chose, except in a peripheral way.

121 Unfortunately, the issue of whether the liberty right under s. 7 extends to residency has not been revisited by the Supreme Court of Canada since ***Godbout***. Nevertheless, I agree with LaForest J. that residency is a fundamental life choice which goes to personal autonomy. There are a variety of intensely personal considerations that may inform an individual's decision where to live,

including the social and economic circumstances of that individual and their aspirations, concerns, values and priorities. As suggested by LaForest J. at paras. 67 and 68 of ***Godbout***, these considerations represent "what each individual values in ordering his or her private affairs," and "highlight the inherently private character of deciding where to maintain one's home," a choice which may have a "determinative effect" on the quality of a person's life.

122 In the present case, I find that ss. 75(1) and s. 90(1) have the effect of impinging on the right of the individual Applicants to choose to live on the Peavine Métis Settlement. While that right has not been totally eliminated in terms of all of the individual Applicants, it has been severely circumscribed. As noted in the affidavits filed by a number of the individual Applicants, they have been able to continue to reside at Peavine only because they are immediate family of a settlement member. Two of the individual Applicants apparently remain as residents due to the benevolence of the Current Peavine Council.

123 The state's deprivation of an individual's right to life, liberty or security of the person does not violate the *Charter* unless it contravenes the "principles of fundamental justice." In ***Re B.C. Motor Vehicle Act***, [1985] 2 S.C.R. 486 at 512, the Supreme Court of Canada held that the principles of fundamental justice to which s. 7 refers include the basic tenets of our legal system.

124 In ***Chaoulli*** at para. 129, Deschamps J., who delivered the English version of the court's reasons, stated at para. 129 that: "It is a well-recognized principle of fundamental justice that laws should not be arbitrary: see, e.g., ***Malmo-Levine***, at para. 135; ***Rodriguez***, [1993] 3 S.C.R. 519 at p. 594. The state is not entitled to arbitrarily limit its citizens' rights to life, liberty and security of the person." At para. 130, she defined an arbitrary law as one which "bears no relation to, or is inconsistent with, the objective that lies behind [it]," thereby necessitating the consideration of the state interest and societal concerns meant to be reflected in the impugned provision(s). The claimant is the one who has the onus of showing lack of connection.

125 In ***Malmo-Levine***, Gonthier and Binnie JJ., for the majority, applied a two-stage test in determining arbitrariness: (1) Does the law pursue a legitimate state interest?; (2) Is the law grossly disproportionate to the state interest? They indicated that the balancing of individual and societal interests within s. 7 is relevant only when elucidating a particular principle of fundamental justice.

126 In the present case, the individual Applicants contend that the impugned provisions bear no relation to or are inconsistent with the objective of those provisions. They complain that they have been the subject of political targeting; i.e., arbitrary enforcement of ss. 75(1) and 90(1), pointing out that other individuals who have registered as Indians under the *Indian Act* since November 1, 1990 have retained their membership in Peavine and other Métis settlements and that no other Métis settlement has taken action to have the Registrar remove such individuals from their respective membership lists.

127 Section 35(2) of the *Charter* distinguishes between Indian, Métis and Inuit peoples of Canada, although all are considered to be aboriginal peoples. Section 18(1) of the *Indian Act*

provides that reserves are held by Her Majesty for the use and benefit of the respective bands for which they were set apart. Bands are made up of persons who were entered on the band list for that band immediately prior to April 17, 1985 or who have since registered as Indians under the *Indian Act* and meet certain other criteria.

128 In my view, the *M.S.A.* and associated legislation are intended to secure a similar land base and to provide for a measure of self-autonomy for Alberta Métis. The recital to the *M.S.A.* provides that the Act was passed recognizing that the Crown in right of Alberta had granted land to the General Council by letters patent and that the Métis should have a land base to provide for the preservation and enhancement of their culture and identity and to enable the Métis to attain self-governance under the laws of Alberta. This is a legitimate state interest.

129 Clearly, the *M.S.A.* and associated legislation was intended to benefit Alberta Métis, who are defined in the Act as persons of aboriginal ancestry who identify with Métis history and culture. While the term Métis as defined in the *M.S.A.* does not exclude Indians, individuals who register as Indians under the *Indian Act* after November 1, 1990 are excluded from membership in Métis settlements by virtue of ss. 75(1) and 90(1) of the *M.S.A.*, unless the General Council adopts a policy which provides otherwise.

130 Requiring aboriginal adults who might otherwise meet the definition of both Indian and Métis to choose which legislative scheme they wish to fall under -- the *Indian Act* or the *M.S.A.* -- is not a requirement which is grossly disproportionate to the interest of Alberta in securing a land base for the Métis. While the Alberta government has enacted legislation excluding aboriginals who have self-identified as Indians from membership in Métis settlements, it has done so after negotiation with the Métis in this province and has allowed the General Council to adopt policy which would negate this exclusion, thereby furthering its objective of enabling Métis self-government. The General Council has chosen not to pursue this option.

131 On the facts of this case, there does appear to have been political targeting of the individual Applicants. However, that is not due to arbitrariness in the legislation, but rather its selective application by the Former Peavine Council.

132 I conclude that the impugned provisions of the *M.S.A.* do not infringe s. 7 of the *Charter*.

5. Do the words or effect of ss. 75 or 90 of the *M.S.A.* offend s. 15(1) of the *Charter*, in light of s. 25 of the *Charter*?

(a) Arguments of the Parties on s. 15

133 The Applicants cite the test set out in ***Law v. Canada (Minister of Employment and***

Immigration), [1999] 1 S.C.R. 497, as summarized in ***Canada (Attorney General) v. Hislop***, (2007) 358 N.R. 197, 2007 S.C.C. 10 at para. 36, as the appropriate test to be applied when s. 15 claims are advanced. There must be: (1) differential treatment on the basis of a personal characteristic; (2) an enumerated or analogous ground; and (3) discriminatory purpose or effect. In ***Lovelace v. Ontario***, [2000] 1 S.C.R. 950 at para. 54, the court emphasized that the main purpose of s. 15 is to protect against "the violation of essential human dignity."

134 The Applicants contend that, although the *Métis Population Betterment Act* and successor legislation prohibited individuals who had or were eligible to have *Indian Act* status from membership in Métis settlements, these provisions were not enforced by either the Métis settlements or the Alberta government.

135 They note there are a number of individuals who reside at and are members of Peavine who obtained Indian status after November 1, 1990. With the exception of the individual Applicants, they have not faced removal from the membership list.

136 The Applicants point out that no Métis settlement other than Peavine has removed any member against their will for having, or being eligible to have, Indian status.

137 The Applicants suggest that the appropriate comparator group is comprised of Métis settlement members without Indian status. They submit that the comparator analysis is not effected by the *Transitional Membership Regulation*, which allowed Métis with Indian status to avoid the effect of s. 90 of the *M.S.A.* if they were listed on an official settlement membership list at the date the *M.S.A.* came into effect. They also contend it is irrelevant that the difference in status between the suggested comparator group and the individual Applicants arose from the voluntary action of the individual Applicants in obtaining recognition of their Indian status: ***Corbiere v. Canada (Minister of Indian and Northern Affairs)***, [1999] 2 S.C.R. 203 at para. 19.

138 In terms of the first part of the three-part ***Law*** test, the Applicants submit that the impugned provisions of the *M.S.A.* clearly deny equal benefit of the availability of Métis settlement membership to Métis with Indian status and those without. They contend that the basis of differential treatment is the enumerated ground of "race and national or ethnic origin." They point out that both the individual Applicants and the comparator group are disadvantaged. They suggest that their exclusion does not correspond to the greater need or different circumstances experienced by the comparator group, as evidenced by the fact that Alberta Métis have never enforced an "Indian prohibition" rule. They allege that interest in membership in a Métis settlement is an important interest and fundamental to the rights and dignity of a Métis person.

139 The position taken by the Respondents is that the *M.S.A.* attempts to alleviate the conditions of Métis communities in Alberta as compared to Indian communities. It strikes a balance between Métis and Indian rights. They argue that as the *Indian Act* represents legislative recognition of the dignity of status Indians, it cannot be said that the denial of settlement membership to status Indians constitutes an infringement of their human dignity.

140 The Respondents note that the individual Applicants became registered Indians precisely so that they could distinguish themselves from non-Indian Métis settlement members in order to gain recognition and benefits under the *Indian Act* that are not available under the *M.S.A.* Therefore, it is disingenuous to suggest that the comparator group should be Métis settlement members without Indian status.

(b) Arguments of the Parties on s. 25

141 Elizabeth contends that s. 25 must be considered in interpreting the guarantee of equality in s. 15 of the *Charter* in this case. It suggests that the proper approach when applying s. 25 is the one outlined by Low J.A. in ***R. v. Kapp*** (2006), 271 D.L.R. (4th) 70, 2006 BCCA 277, app'n for leave to appeal to S.C.C. filed [2006] S.C.C.A. No. 331; that is, the Applicants must satisfy the first part of the three-part test in ***Law*** before consideration is given to whether a conflict exists between their *Charter* rights and the rights of aboriginal people in general. They submit that s. 25 should be addressed before the s. 1 analysis is undertaken.

142 The Intervenor argues that the following three criteria, referred to in ***Kapp***, must be satisfied before s. 25 is applied:

(a) Is the right or freedom a treaty right, aboriginal right or other right or freedom pertaining to the aboriginal peoples of Canada?
(b) If the right or freedom is an "other right or freedom pertaining to the aboriginal peoples of Canada", does it relate to a significant aspect of aboriginal life, culture or heritage, and does it relate to aboriginal peoples as aboriginal peoples?
(c) Would the remedy sought by way of the *Charter* challenge result in the abrogation of or derogation from the aboriginal right or freedom?

143 The Intervenor asserts that the right given to the Métis to exclude Indians from membership in Métis settlements pursuant to ss. 75 and 90 of the *M.S.A.* falls within the category of "other rights and freedoms pertaining to the aboriginal peoples of Canada." It argues that the *Alberta Act* entrenched a land base and self-government for the Métis, which are collectively held and controlled by the members of the settlements, not the provincial legislature. It maintains that the right to determine who is eligible to become and remain a member of a Métis settlement is a significant aspect of Métis life, culture and heritage and that the right to exclude Indians protects against assimilation. The Intervenor argues that elimination of ss. 75 and 90 of the *M.S.A.* would derogate from the right to determine membership on settlements.

144 In reply, the Applicants contend that s. 25 was not meant to apply where the competing claimants are both aboriginal, citing ***Kapp*** at paras. 127, 137, 149 and 150; and ***Corbiere*** in support of this assertion. They submit that the Intervenor's assertion that the impugned provisions guard

against assimilation is not supported by evidence to that effect. As a final point, the Applicants suggest that the s. 25 analysis should take part at the third part of the ***Law*** test in a fashion analogous to a s. 1 analysis.

145 The Respondents maintain that s. 25 is not relevant to a determination of the central question in this application -- whether the Registrar has the discretion to add or remove individuals from a Métis settlement list. Further, they suggest that the legislation under challenge does not create any rights capable of engaging s. 25 as it does not constitute "other rights or freedoms." They contend that the purpose of the legislation was not to create rights, but rather was to produce certain pragmatic results.

(c) Analysis

146 I agree with the Applicants that the comparative approach detailed in ***Law*** must be applied in determining whether there has been a breach of s. 15. The individual Applicants must first establish that the impugned provisions draw a distinction between them and others on the basis of one or more personal characteristics. Identifying an appropriate comparator group is essential in identifying differential treatment and the grounds of the distinction.

147 Ordinarily, it is the claimant who chooses the group with which he or she wishes to be compared for purposes of this analysis. However, if their characterization of the comparator group is insufficient, the court may refine the suggested comparison within the scope of the grounds pleaded: ***Law*** at para. 58.

148 According to Iacobucci J. in ***Law*** at para. 57, a variety of factors must be considered in locating the appropriate comparator, including the purpose and effect of the legislation and contextual factors such as biological, historical, and sociological similarities or dissimilarities.

149 The individual Applicants suggest that "Métis settlement members without Indian status" is the appropriate comparator group.

150 Clearly, the purpose and effect of ss. 75 and 90 of the *M.S.A.* are to deny settlement membership to Métis who register as Indians under the *Indian Act*, unless General Council Policy provides otherwise. The effect of the *Transitional Membership Regulation* was to safeguard the membership of Métis who registered under the *Indian Act* before the *M.S.A.* came into effect. Arguably, s. 75(3.1) and the opening words of s. 90 are intended as a reflection of local Métis autonomy.

151 The term "Métis" is defined in s. 1(j) of the *M.S.A.* as meaning "a person of aboriginal ancestry who identifies with Métis history and culture." This definition, in and of itself, does not exclude Indians.

152 The Applicants claim that there are members of a number of Métis settlements, including Peavine, who are eligible to register as Indians under the *Indian Act* but who have not done so or who did so before November 1, 1990. Section 2(1) of the *Indian Act* defines "Indian" as meaning a person registered as an Indian or entitled to be registered as an Indian under that Act, but not including Inuit. This definition, in and of itself, does not exclude Métis. As the definition includes individuals who are eligible to register as Indians under the Act but have not done so, it is preferable to avoid defining the comparator group by its lack of "Indian status," as confusion may arise as to whether that phrase encompasses those who fall within the definition of Indian under the *Indian Act* or only those who have registered under the Act. Rather, the comparator group should be defined, in part, as Métis who have not registered as Indians under the *Indian Act*.

153 The Applicants suggest that for purposes of defining the comparator group, it is irrelevant that the *Transitional Membership Regulation* grandfathered Métis who registered as Indians under the *Indian Act* prior to the *M.S.A.* coming into effect. In ***Nova Scotia (Workers' Compensation Board) v. Martin; Nova Scotia (Workers' Compensation Board) v. Laseur***, [2003] 2 S.C.R. 504, Gonthier J. considered whether workers who had been grandfathered under the legislation under consideration in that case, and who were thereby protected from the differential treatment complained of, would constitute an appropriate comparator group. Assuming without deciding that they would, he commented (at para. 73) that this would not advance the appellants' argument as the distinction between those workers and the appellants would be the date of their injury and the status of their case before the Board, not the nature of their disability. The date of an injury is not an enumerated or analogous ground. Accordingly, the second branch of the test in ***Law*** would not be met. Given this comment by Gonthier J., I conclude that the comparator group in the present case should not include Métis who registered as Indians prior to the *M.S.A.* coming into effect.

154 Métis who were registered as Indians under the *Indian Act* when they were less than 18 years of age are not automatically excluded from settlement membership. As this group was not specifically addressed by the parties, I consider it best not to include them as part of the comparator group or as a separate comparator group, although the legislation's distinguishing of this group is relevant in terms of other aspects of the s. 15 analysis.

155 The Applicants point out that there are individuals who continue to be members of Peavine who obtained Indian status after November 1, 1990, but who have not faced removal from the membership list. In my view, this group should not be used as a comparator as the difference in treatment between that group and the individual Applicants does not arise as a result of the legislation but rather as a result of the selective application of the legislation by the Former Peavine Council.

156 As loss of settlement membership is the end result of the alleged differential treatment in the present case, settlement membership in my view is not an appropriate descriptor of the comparison group. Accordingly, the comparator can best be defined as Métis who have not registered as Indians under the *Indian Act* and who meet the other criteria for settlement membership in the *M.S.A.* and

the *Transitional Membership Regulation*.

157 In my view, ss. 75(1) and 90(1) of the *M.S.A.* draw a distinction between the individual Applicants, Métis who have registered as Indians under the *Indian Act* (since the *M.S.A.* came into effect), but who otherwise meet the criteria for settlement membership, and the comparator group. This distinction is based on a personal characteristic of the individual Applicants, their registration under the *Indian Act*. These sections have resulted in the differential treatment of the individual Applicants and those who are similarly situated, in that they have been denied the benefits of settlement membership, including voting and formal participation in the community.

158 The issue remains whether this differential treatment is based on an enumerated or analogous ground. The individual Applicants assert that they have been discriminated against on the basis of their race or national or ethnic origin.

159 Registration under the *Indian Act*, or being a "status Indian," was seen by Muldoon J. as falling within the enumerated grounds in ***Bear v. Canada (Attorney General)*** (2001), 212 F.T.R. 208, app'n for leave to appeal to S.C.C. dismissed [2003] S.C.C.A. No. 115. The applicant in that case argued that certain sections of the Canada Pension Plan, which precluded status Indians who were working on reserves from contributing to the Plan between certain years, were discriminatory. Muldoon J. held that the applicant had no *Charter* entitlement to any remedy before 1985, when s. 15 came into effect, as to allow a remedy would amount to a retroactive application of the *Charter*. Nevertheless, he went on to apply s. 15 to the facts of that case, concluding that the applicant had clearly established differential treatment on the basis of race.

160 Muldoon J. reached this conclusion without defining a comparator group. He was not persuaded by the respondent's argument that the differential treatment of the applicant was based on *situs* instead of personal immutable characteristics. At para. 28, he commented:

> Tax exemptions for status Indians residing and working on reserves is an integral part of the applicant's identity, which cannot be separated from her. The very notion of "Status Indian" tells the story in deep distinction from all other Canadians. Moreover, the applicant's distinct legal identity is primarily attributable to over 100 years of government policy for aboriginal peoples. The obvious importance of such policy in defining aboriginal peoples in Canada should preclude the government of Canada from arguing that its legal treatment of aboriginal peoples is distinct from personal identity. The differential treatment in this case is premised on the applicant's identity as a status Indian.

161 Given that the comparator group in the present case encompasses Métis who are eligible to register under the Act but who have not done so, it appears to me that the distinction made in the *M.S.A.* is not based solely on race or national or ethnic origin, but is also based on registration under the *Indian Act, albeit* there was some grandfathering to exempt those who registered prior to November 1, 1990 from the restrictive provisions of the legislation.

162 Registration as an Indian under the *Indian Act* is not an enumerated ground. Accordingly, consideration must be given to whether this is an analogous ground of distinction. McLachlin and Bastarache JJ., for the majority in ***Corbiere v. Canada (Minister of Indian and Northern Affairs)***, [1999] 2 S.C.R. 203, indicated at para. 13 that analogous grounds are those which, like the enumerated grounds, are based on characteristics which are immutable, like race, or constructively immutable in that the government has no legitimate interest in expecting a person to change that characteristic in order to receive equal treatment under the law, like religion.

163 The majority disagreed with the suggestion of contextual dependency of the enumerated and analogous grounds made by L'Heureux-Dubé J., for the minority, in ***Corbiere***. As stated by McLachlin and Bastarache JJ. at para. 7:

> The enumerated grounds function as legislative markers of suspect grounds associated with stereotypical, discriminatory decision making. They are a legal expression of a general characteristic, not a contextual, fact-based conclusion about whether discrimination exists in a particular case. As such, the enumerated grounds must be distinguished from a finding that discrimination exists in a particular case. Since the enumerated grounds are only indicators of suspect grounds of distinction, it follows that decisions on these grounds are not always discriminatory; if this were otherwise, it would be unnecessary to proceed to the separate examination of discrimination at the third stage of our analysis discussed in ***Law***, supra, per Iacobucci J.

164 The majority confirmed that the same applies to analogous grounds. They do not change from case to case, depending on the circumstances. Rather, they stand as constant markers of suspect decision making or potential discrimination. It is not the ground which varies, but the decision as to whether a distinction based on that ground goes to human dignity.

165 L'Heureux-Dubé J. found at para. 62 that several factors led in that case to the conclusion that recognizing off-reserve band member status as an analogous ground would accord with the purposes of s. 15(1). She concluded that the choice of whether to live on- or off-reserve was an important one to the identity and personhood of band members. It involved choosing whether to live with other members of the band to which they belonged, or apart from them. It related to a community and land that had particular social and cultural significance to many or most band members. Also, because of the lack of opportunities and housing on many reserves, and the fact that the *Indian Act*'s rules formerly removed band membership from various categories of band members, residence off the reserve had often been forced on them, or constituted a choice made reluctantly or at high personal cost.

166 The majority agreed with the conclusion reached by L'Heureux-Dubé J. that "Aboriginality-residence," as it pertains to whether an Aboriginal band member lives on-reserve or off, is an analogous ground as the distinction goes to a personal characteristic essential to a band

member's personal identity. This personal characteristic was said to be constructively immutable given that off-reserve Aboriginal band members can change their status to on-reserve band members only at great cost, if at all.

167 In ***McIvor v. Canada (Registrar, Indian and Northern Affairs)***, [2007] B.C.J. No. 1259, 2007 BCSC 827, Ross J. concluded at paras. 192 and 193 that status under the *Indian Act* is a concept that is closely akin to the concepts of nationality and citizenship, and is an aspect of cultural identity, not merely a statutory definition relating to eligibility for some program or benefit. While the government created and imposed this identity on First Nations peoples, it has become a central aspect of identity.

168 I agree. In my view, registration as an Indian under the *Indian Act* is an analogous ground. As in Aboriginality-residence, recognizing registration as an Indian under the *Indian Act* as an analogous ground would accord with the purposes of s. 15(1). For those of aboriginal origin, the choice of whether to register under the *Indian Act*, if it is available to them, is an important one to their identity and personhood.

169 As in ***Corbiere***, because of the criteria necessary for registering as an Indian under previous versions of the *Indian Act*, registration under the Act was withheld from many. Those who were not registered at times have not been given equal consideration or respect by the government or by others in Canadian or aboriginal society. Decision makers have not always considered the perspectives and needs of aboriginal people who have not registered as Indians under the *Indian Act*. Conversely, those who have registered as Indians under the *Indian Act* have also suffered disadvantage, stereotyping, and prejudice.

170 It should not and does not matter for purposes of this step in the analysis that the Applicants and those who are similarly situated voluntarily chose, as adults, to register under the *Indian Act*. They are still denied membership and full participation in the settlements with which they identify and have long been associated.

171 Having concluded that there has been differential treatment of the individual Applicants based on personal characteristics which are enumerated and analogous to those enumerated in s. 15 of the *Charter*, consideration must now be given to whether this differential treatment is discriminatory.

172 In ***Corbiere***, McLachlin and Bastarache JJ. concluded that the differential treatment resulting from the legislation was discriminatory because it implied that off-reserve band members were lesser members of their bands or persons who had chosen to be assimilated by the mainstream society.

173 McLachlin and Bastarache JJ. commented in ***Corbiere*** at para. 19 that, even if all band members living off-reserve had voluntarily chosen that way of life and were not subject to discrimination in the broader Canadian society, they would still have the same cause of action. They

would still suffer a detriment by being denied full participation in the affairs of the bands to which they would continue to belong while the band councils were able to affect their interests, in particular by making decisions with respect to the surrender of lands, the allocation of land to band members, the raising of funds and making of expenditures for the benefit of all band members. The effect of the legislation was to force band members to choose between living on the reserve and exercising their political rights, or living off-reserve and renouncing the exercise of their political rights. The political rights in question were related to the race and cultural identity of the affected individuals.

174 In ***Lovelace***, some members of the appellant groups had registered or were entitled to register as Indians under the *Indian Act*, but as communities the groups were without status as they had not registered as bands. The Province of Ontario proposed to limit distribution of proceeds from a reserve-based casino to Ontario First Nations communities registered as bands under the *Indian Act*. The comparison made in ***Lovelace*** was between band and non-band aboriginal communities.

175 One group of appellants argued that they were excluded on the basis of race or ethnicity. Another group submitted that non-registration under the *Indian Act* was tied to their long- standing cultural, community and personal identity as a group of individuals "constituting a discrete and insular minority within the larger aboriginal population," and that "their exclusion from the *Indian Act* was constructively immutable given the onerous nature of current federal policies relating to individual and band registration under the *Indian Act*: ***Lovelace*** at para. 66.

176 Iacobucci J., who delivered the judgment of the court, determined that it was not necessary to decide whether the differential treatment was based on an enumerated or analogous ground. He concluded at the third stage of the inquiry that, even if these grounds were present, there was no discrimination in the circumstances of that case.

177 At para. 68, he set out the four contextual factors which inform the third stage of the discrimination analysis: (i) pre-existing disadvantage, stereotyping, prejudice, or vulnerability; (ii) the correspondence, or lack thereof, between the ground(s) on which the claim is based and the actual need, capacity, or circumstances of the claimant or others; (iii) the ameliorative purpose or effects of the impugned law, program or activity upon a more disadvantaged person or group in society; and (iv) the nature and scope of the interest affected by the impugned government activity.

178 According to Iacobucci J. in ***Law*** at para. 60, these contextual factors must be construed from the perspective of the claimant, with the focus of the inquiry being both subjective and objective. The Court must consider the point of view of the reasonable person, dispassionate and fully apprised of the circumstances, possessed of similar attributes to, and under similar circumstances as, the claimant.

179 As noted in ***Lovelace*** as para. 69, the first of these four contextual factors does not require that the Applicants establish that they are more disadvantaged than the comparator group, given that all aboriginal peoples have been affected by a legacy of stereotyping and prejudice: ***Corbiere*** at

para. 66. The claimants in ***Lovelace*** (at para. 70), did, however, establish a unique set of disadvantages, including: "(i) a vulnerability to cultural assimilation, (ii) a compromised ability to protect their relationship with traditional homelands; (iii) a lack of access to culturally-specific health, educational, and social service programs, and (iv) a chronic pattern of being ignored by both federal and provincial governments."

180 The Applicants here have not pointed to any stereotyping or unique disadvantage which they share in contrast to the comparator group, other than exclusion from the benefits offered by settlement membership.

181 In ***Lovelace***, Iacobucci J. concluded that there was a correspondence between the ground on which the claim was based and the actual need, capacity, or circumstances of the claimants. The First Nations Fund represented the proceeds of a partnered initiative designed to support the development of a government-to-government relationship between First Nations bands and the provincial government and to ameliorate the social, cultural and economic conditions of band communities. Iacobucci J. recognized that the claimants shared the same needs, but found that the claimant aboriginal communities had very different relations with respect to the land, government, and gaming from those anticipated by the casino program. He stressed that the casino project was not only a targeted ameliorative program; it had developed on a partnered basis with representatives of First Nations bands. As a result, the casino arrangement was distinguished from a universal or comprehensive benefits program.

182 The Respondents in the present case point out that differential treatment will not amount to discrimination if it does not violate the human dignity or freedom of a person or group, particularly where the differential treatment is meant to ameliorate the position of the disadvantaged in society: ***Chippewas of Nawash First Nation v. Canada (Minister of Fisheries and Oceans)*** (2002), 298 N.R. 305, 2002 FCA 485 at para. 53 (C.A.). They argue that exclusion from a targeted or partnership program which is intended to be ameliorative is less likely to be associated with stereotyping or stigmatization: ***Lovelace*** at para. 86.

183 Like the First Nations Fund in ***Lovelace,*** the *M.S.A.* 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."

184 As noted by Catherine E. Bell in her discussion of the history of the *M.S.A.* in *Alberta's Métis Settlements Legislation: An Overview of Ownership and Management of Settlement Lands* (Regina: Canadian Plains Research Centre, University of Regina, 1994) at p. 9:

> In order to free themselves from economic and political dependency, the Métis sought control, through litigation and negotiation, of settlement resource revenues, powers of government analogous to those exercised by municipalities, and protection for traditional economic pursuits such as hunting, fishing, trapping and gathering. In published position papers and the natural resources litigation, the Federation asserted the right as an aboriginal people to determine their own membership. It was believed that self-determination was integral to their continued existence as a people.

185 The *M.S.A.* was intended to support at least a measure of Métis self-autonomy and was designed to have an ameliorative effect in redressing historical disadvantage and contributing to enhancement of the dignity and recognition of Métis in Alberta.

186 In ***R. v. Powley***, [2003] 2 S.C.R. 207, 2003 SCC 43, the trial judge found that the Respondents were members of a Métis community near Sault Ste. Marie, Ontario and that under s. 35(1) of the *Constitution Act, 1982*, they had an aboriginal right to hunt for food which had unjustifiably been infringed by Ontario's hunting legislation. Their acquittals were upheld by the Superior Court of Justice, the Court of Appeal, and the Supreme Court of Canada, the latter court commenting at para. 29:

> While determining membership in the Métis community might not be as simple as verifying membership in, for example, an Indian band, this does not detract from the status of Métis people as full-fledged rights-bearers. As Métis communities continue to organize themselves more formally and to assert their constitutional rights, it is imperative that membership requirements become more standardized so that legitimate rights-holders can be identified. In the meantime, courts faced with Métis claims will have to ascertain Métis identity on a case-by-case basis. The inquiry must take into account both the value of community self-definition, and the need for the process of identification to be objectively verifiable. In addition, the criteria for Métis identity under s. 35 must reflect the purpose of this constitutional guarantee: to recognize and affirm the rights of the Métis held by virtue of their direct relationship to this country's original inhabitants and by virtue of the continuity between their customs and traditions and those of their Métis predecessors. This is not an insurmountable task.

187 The Supreme Court of Canada in ***Powley*** looked to three factors as indicia of Métis identity for the purpose of determining Métis rights under s. 35: self-identification, ancestral connection, and community acceptance. At para. 34, the court emphasized the importance of verifying membership in a Métis community:

> It is important to remember that, no matter how a contemporary community

> defines membership, only those members with a demonstrable ancestral connection to the historic community can claim a s. 35 right. Verifying membership is crucial, since individuals are only entitled to exercise Métis aboriginal rights by virtue of their ancestral connection to and current membership in a Métis community.

188 The Court commented that the decision by a Métis person's ancestors to take treaty benefits did not necessarily extinguish that person's claim to Métis rights, unless perhaps there was a collective adhesion by the Métis community to the treaty.

189 Of course, this does not answer whether it is discriminatory for an individual's membership in a Métis settlement to be terminated if that individual voluntarily registers as an Indian under the *Indian Act* and accept the benefits which such registration entails.

190 The *M.S.A.* does not include the concept of registration as a Métis. However, it addresses the criteria required for membership in a Métis settlement. Métis registered as Indians under the *Indian Act* after the *M.S.A.* came into effect are excluded pursuant to ss. 75(1) and 90(1) of the *M.S.A.* from the benefits or at least certain of the benefits entailed in settlement membership, including voting.

191 According to s. 91(1), when membership is terminated, the member loses any rights gained by his or her former membership to reside on or to occupy patented lands but does not lose any right to reside on patented land acquired under the Act, a General Council Policy or a settlement bylaw. A person who is not a settlement member is only permitted to reside on patented land if the criteria set out in s. 92 are met.

192 Métis registered as Indians under the *Indian Act* have access to certain of the rights and benefits offered under the *Indian Act*, including access to various federal health and education programs, which are not available to Métis who have not registered under the *Indian Act*. After the amendments to the *Indian Act* made in 1985, the issue of Indian status was separated from the issue of band membership and control over band membership was given to Indian bands.

193 Métis registered as Indians under the *Indian Act*, who lose their right to Métis settlement membership under ss. 75(1) and 90(1) of the *M.S.A.*, may lose their right to reside on or to occupy patented lands without necessarily acquiring any corresponding right of residence under the *Indian Act*. Despite their registration under the *Indian Act*, they may continue to identify with Métis history and culture and with a specific Métis community. If they meet the criteria under s. 92 of the *M.S.A.* for permission to continue to reside on patented land, as it appears the individual Applicants currently do, they will have no say in settlement governance as they have been denied the right to vote. However, they will have acquired certain rights and benefits under the *Indian Act*.

194 While it is apparent that the two legislative schemes are not co-extensive, the differences in these Acts arise from the different relations which the Indians and Métis peoples have had with different levels of government and with the land. Each has pursued different self-government

initiatives which reflect their respective distinctness as unique aboriginal communities. The Métis, represented by the Alberta Federation of Métis Settlement Associations, entered into the Accord with the Government of Alberta, which led to enactment of the *M.S.A.*, including ss. 75(1) and 90(1).

195 Subsections 75(1) and 90(1) of the *M.S.A.* cannot be considered in isolation, however. Subsection 75(3.1) and the opening words ("Unless a General Council Policy provides otherwise ...") of s. 90 of the *M.S.A.* allow the General Council to adopt policy which eliminates the differential treatment in issue. These provisions represent an initiative towards Métis self-autonomy and self-determination. They serve as recognition that Métis identity is in part defined by community acceptance.

196 The Applicants argue that, while the evidence is that the majority of Métis members of the eight Alberta settlements agreed to the Accord, including the impugned provisions, they chose to ignore the effect of the "Indian prohibition" by including the *Membership Transitional Regulation*. The Applicants note that the "Indian prohibition" has, in fact, not been historically applied.

197 However, the Applicant Dennis Cunningham, in his affidavit of January 24, 2007, deposed that:

> During the negotiations of the Accord, it was recognized by the various parties that a number of individuals who were members of Métis Settlements were also registered, or were entitled to be registered as Indians. As a consequence, it was agreed that any Metis Settlement member who registered as an Indian prior to November 1, 1990 would be entitled to maintain membership at a Métis Settlement.

198 This suggest that the parties to the Accord clearly understood what the effect of ss. 75(1) and 90(1) would be and agreed that only those who registered as Indians after November 1, 1990 would be subject to the effect of those provisions.

199 In his affidavit in support of the application by Elizabeth for intervenor status, Archie Collins, Chair of the Council for that Settlement, deposed that members of the Settlement receive a number of benefits, including the right to hold Métis title on a parcel of land within the Settlement, the right to receive payments associated with holding that title, the right to obtain housing on the Settlement while paying only a portion of the construction costs, and the ability to qualify for Settlement programs, such as job training. He advised that these benefits are provided from limited provincial funds, oil and gas revenues, and spin-off employment, and are not enough to sustain a decent standard of living for all existing members of the Settlement. He noted that unemployment is high and housing opportunities are limited. In addition, because they do not have Treaty status, members of the Settlement are not entitled to federal benefits available to registered Indians. He expressed concern that adding more members to the Settlement membership list would further dilute the benefits available to existing members.

200 Similar arguments were raised in ***Six Nations of the Grand River Band v. Henderson***, [1997] 1 C.N.L.R. 202 (Ont. Ct. Just. (Gen. Div.)), *albeit* in the context of justifying a discriminatory bylaw under s. 1 of the *Charter*. The respondent in that case, a non-band member spouse of a Six Nations Band member, moved with her spouse to the Six Nations Reserve, but was prosecuted under a bylaw which prohibited non-band member spouses of Six Nations Band members from residing on the reserve. On appeal of the trial judge's ruling, the court concluded that the bylaw discriminated on the basis of marriage, but that it was a "reasonable limit" that could be "demonstrably justified in a free and democratic society" pursuant to s. 1 of the *Charter*. Kent J. determined from a review of the legislative and legal history that the importance of maintaining Indian lands for Indians has been recognized in this country for over 200 years, but expressed the hope that, although the bylaw was legally valid, an amendment might be considered in order to address hardship situations such as the respondent's.

201 Mr. Collins deposed in a separate affidavit, sworn on February 27, 2007, that he was present at an General Council meeting on September 9, 2004 where a draft "Eligibility & Termination Policy for Registered Indians and Inuk" was presented and discussed. This policy would have allowed settlement councils the discretion to pass bylaws authorizing applications for membership by Indians registered under the *Indian Act* and limiting the application of s. 90 of the *M.S.A.* to terminate membership in a settlement for members who are or become registered as Indians under the *Indian Act*. Mr. Collins indicated that neither Peavine nor any other settlement has made a motion to approve the membership policy or any other membership policy since that meeting.

202 According to the Supreme Court of Canada in ***Powley***, not only community acceptance but also self-identification is a factor in Métis identity, at least for purposes of s. 35 of the *Constitution Act, 1982.*

203 The individual Applicants voluntarily registered as Indians under the *Indian Act*, when they were adults, in order to obtain benefits available to Indians under that legislation. In doing so, in my view, they self-identified as Indians. Membership in a Métis settlement is restricted to Métis who are at least 18 years old. Special provision is made in the *M.S.A.* for persons who were registered as Indians when they were less than 18 years old to be approved for settlement membership if they are unable to de-register as Indians (s. 75(2)(a) and 75(3)) and meet certain other criteria. This supports the view that what the Applicants refer to as the "Indian prohibition" is directed only at those who voluntarily register as adults and thereby self-identify as Indians.

204 In my view, there is a correspondence between the ground on which the present claim is based and the actual need, capacity, or circumstances of the individual Applicants and of the comparator group. The ameliorative purpose or effect of the legislation is supported rather than undermined by the impugned provisions given the legislated entitlement of the General Council to adopt policy respecting eligibility for membership in settlements for the purpose of s. 75(3.1) and termination of membership for the purpose of s. 90(1).

205 The last of the contextual factors specifically mentioned by Iacobucci J. in ***Lovelace*** is the nature and scope of the interest affected by the legislation. As noted by L'Heureux-Dubé J. in ***Egan*** [1995] 2 S.C.R. 513 at para. 63, "[i]f all other things are equal, the more severe and localized the ... consequences on the affected group, the more likely that the distinction responsible for these consequences is discriminatory within the meaning of s. 15 of the Charter." The loss of their right to formally participate in the Métis community with which they have been associated on a long-term basis, if not for their whole life, is undoubtedly a severe consequence suffered by the individual Applicants. However, by registering as Indians under the *Indian Act*, they have chosen to acquire other rights and benefits.

206 I conclude that ss. 75(1) and 90(1) of the *M.S.A.* do not affect the human dignity of the individual Applicants and, therefore, are not discriminatory. As a result of this conclusion, I need not attempt to resolve whether s. 25 of the *Charter* is a threshold issue which may render a s. 15 analysis unnecessary, as suggested by Kirkpatrick J.A. in ***R. v. Kapp*** (2006), 271 D.L.R. (4th) 70, 2006 BCCA 277, leave to appeal to the S.C.C. granted [2006] S.C.C.A. No. 331, or whether it simply means that where there is a conflict between the claimant's *Charter* rights and the rights of aboriginal peoples, the latter should not be affected, a position favoured by Low J.A. in the same case. Nor is there a need for me to comment on whether s. 25 is applicable when there is a dispute between two aboriginal groups.

6. Is the infringement a reasonable limit prescribed by law as demonstrably justified in a free and democratic society under s. 1 of the *Charter*?

207 The Respondents submit that, even if ss. 75 and 90(1)(a) of the *M.S.A.* contravene one or more sections of the *Charter*, any infringement would meet the test under s. 1 of the *Charter*, as established in ***R. v. Oakes*** (1983), 145 D.L.R. (3d) 123; ***RJR-MacDonald v. Canada***, [1994] 1 S.C.R. 311; and ***Irwin Toy Ltd. v. Quebec (Attorney General)*** (*supra*). However, given the conclusions I have reached above, it is not necessary for me to deal with the arguments of the parties concerning s. 1.

7. Is the Registrar entitled or obliged to restore an individual to a settlement's membership list when requested to do so by the settlement council, after the individual was removed from the list following a request made by the former council of the settlement, if that original request was made in bad faith?

208 Madam Justice Nash, in her decision in this matter of March 2, 2001, referred to the following test to be met for mandamus to issue, as set out by the Federal Court of Appeal in ***Apotex Inc. v. Canada (Attorney General)*** (1993), 18 Admin. L.R. (2d) 122, aff'd [1994] 3 S.C.R. 1100:

1. There must be a public duty to act.

2. The duty must be one that is owed to the Applicants.
3. There must be a clear right to performance of the duty in that all conditions precedent have been satisfied.
4. In exercising his discretion, the Registrar must have acted in a manner that was unfair and oppressive in considering irrelevant matters or failing to consider relevant matters
5. There must be no adequate alternative remedy available to the Applicants.
6. The Order sought will be of some practical value and effect.

209 As stated above, the Applicants have not pointed to any power or statutory or common duty of the Registrar to reinstate individuals onto a settlement's membership list absent evidence that an error was made in removing them in the first place. The Applicants are precluded from arguing that the original decision to strike them from the list was based on a request that was made in bad faith as they chose not to challenge that decision.

210 In any event, even if the Applicants could have argued bad faith on the part of the Former Peavine Council, I am not convinced that bad faith would have affected the original decision of the Registrar to strike the individual Applicants from the settlement's membership list. As determined by Nash J., the Registrar was acting under a mandatory duty at that time, not a discretionary one. The Applicants do not contend that he was acting in bad faith. While the Former Peavine Council may have selectively targeted the individual Applicants for removal, that does not mean that they should not have been removed from the membership list.

VI. Conclusion

211 For the reasons set out above, and in light of my conclusion that the loss of the individual Applicants' membership status did not result from an infringement of their rights under ss. 2(d), 7, or 15(1) of the *Charter*, the application is dismissed.

212 If the parties wish to speak to the matter of costs, they should make arrangements to appear before me for such purpose.

D.L. SHELLEY J.

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