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LEAF CASE - INFORMATION RELEASE

***LEAF* Concerned About Implications of SCC Interpretation of *Charter* s.15(2)**
***Cunningham v. Alberta* (SCC Judgment Released July 21, 2011)**

July 25, 2011, Toronto - The Supreme Court of Canada released its decision on July 21, 2011 in the case of *Cunningham v. Alberta*. LEAF intervened in the appeal to address the interpretation of s.15(2) of the *Charter* which protects ameliorative (affirmative action) programs and to address the gendered context of the case, which involves the legacy of sex discrimination under the *Indian Act* status provisions. Although LEAF took no position on the ultimate disposition of the case, it argued that the case should be decided on the basis of s. 15(1), not 15(2) of the *Charter*. The SCC declined to follow LEAF's arguments, and sided with the Alberta government based on s. 15(2).

LEAF contended that deference to government under s. 15(2) should be reserved for instances where the objection is to the existence of an ameliorative program.

"LEAF argued that the purpose of *Charter* s.15(2) is limited. It is to protect ameliorative programs from U.S.-style claims of "reverse discrimination", in which targeted programs to increase the socio-economic inclusion of marginalized groups are attacked for allegedly discriminating against members of privileged groups", says LEAF Legal Director and co-counsel Joanna Birenbaum. "LEAF argued that the protective purpose of s.15(2) is simply not engaged when the equality claim is that the government's delineation of the group targeted is underinclusive and discriminatory. Where, as in *Cunningham*, the claim is that the excluded group ought to have been included within the ameliorative scheme, LEAF argued there should be no application of the s. 15(2) deference. Instead a full s. 15 (1) analysis, without deference to government, should be employed. The SCC disagreed."

"Yesterday's decision represents a significant development in equality law with very troubling implications" explains Dianne Pothier, LEAF counsel in *Cunningham* and Professor at the Shulich School of Law at Dalhousie University. "The Court held that s.15(2) can be relied on by governments to protect discriminatory ameliorative schemes, provided the deferential s.15(2) test is met. Exclusionary effects are not seriously scrutinized if the government has a genuine ameliorative purpose. As a consequence, governments seem to be given considerable latitude to design special programs without being vulnerable to challenges that they excluded groups who ought to have been included, even if those who are excluded are the most vulnerable. LEAF is deeply concerned by the consequences of this ruling."

The *Cunningham* case involves a challenge to the Alberta *Metis Settlement Act* (the "*MSA*"). The *MSA* was enacted to preserve a land base for the Métis in Alberta, to enable Métis self-governance, and to enhance and preserve Métis culture and identity. The Court held that the *MSA* is ameliorative legislation for the purpose of *Charter* s.15(2).

The claimants challenged two provisions of the *MSA* which exclude those who "voluntarily" registered for Indian status under the *Indian Act*, after November 1, 1990. Under the impugned provisions, those status Indians are excluded from membership in a Métis settlement. However, Métis Settlement members

who held Indian status on or before November 1, 1990 (the date on which the *Metis Settlement Act* came into force) are not excluded from membership.

The Cunningham family claimants, all long-standing (and some even founding) members of the Peavine Métis Settlement, obtained status under the *Indian Act* in the early 1990s in order to access health benefits unavailable to Métis. As a result, they were removed from the Métis Settlement Membership list. Most of the claimants became entitled to Indian status following the partial removal of sex discrimination in the *Indian Act* status provisions under Bill C-31 in 1985.

The Cunninghams argued that the *MSA* discriminated against them on the basis of their *Indian Act* status.

The Court held that s.15(2) offered a "complete answer" to the claim and, therefore, that the Cunninghams' s.15(1) discrimination claim need not be heard. The claim was dismissed.

"The Court rightly confirmed the significance of the distinct status, identity and culture of Métis" says Pothier, "however, the judgment does not fully engage the complexities and nuances of this identity, nor the colonial legacy of governments determining Aboriginal identity."

In addition, the Court did not confront the gendered nature of who is "in" and who is "out". "In this case," explains Birenbaum, "the claimants all suffer the ongoing effects of sex discrimination under the *Indian Act.* The claimants are only in the position of obtaining *Indian Act* status after November 1, 1990 because of this history of sex discrimination. This is true also for Métis Settlement members who may be entitled to (re)gain their *Indian Act* status as a result of 2010 amendments to the *Indian Act* to further redress residual discrimination."

The Court held that the refinement of its approach to s.15(2) will develop on a case by case basis.

LEAF hopes that s.15(2) will be developed and narrowed in future cases to ensure that the claims of those most disadvantaged are heard, consistent with the purpose of the constitutional equality guarantee.

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