Court File No. A-593-07

FEDERAL COURT OF APPEAL

BETWEEN:

LINDA JEAN, CHIEF OF THE MICMAC NATION OF GESPEG, IN HER OWN NAME AND ON BEHALF OF ALL OTHER MEMBERS OF HER BAND, AND THE CONSEIL DE LA NATION MICMAC DE GESPEG

Appellants

- and -

MINISTER OF INDIAN AND NORTHERN AFFAIRS CANADA and ATTORNEY GENERAL OF CANADA

Respondents

- and -

WOMEN'S LEGAL EDUCATION AND ACTION FUND

Intervener

FACTUM OF THE INTERVENER, WOMEN'S LEGAL EDUCATION AND ACTION FUND

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Part I - STATEMENT OF FACTS

1. LEAF, as an intervener, takes no position on the specific facts of this case.

Part II - POINTS IN ISSUE

2. This appeal is the first appellate case to involve s.15(2) of the *Charter* following the release of the decision of the Supreme Court of Canada in *R. v. Kapp*. Unlike *R. v. Kapp,* which was a "reverse discrimination" challenge to an affirmative action program, this claim is made by an Aboriginal nation that the impugned governmental program is underinclusive. LEAF's intervention in this appeal is directed toward the significance of the underinclusion aspect of the claim to the s.15 *Charter* analysis.

3. In the event that this Honourable Court concludes that the respondent Crown is entitled to raise s. 15(2) of the *Charter* at this stage of the proceedings, and in the event that the Court is satisfied that the evidence establishes an ameliorative program capable of falling within the ambit of s. 15(2), LEAF's submissions are directed toward the proper interpretation of s. 15(2), in conjunction with s. 15(1), of the *Charter*. Even if the challenged program could otherwise engage s. 15(2), LEAF's submission is that a claim of underinclusion does not properly invoke s. 15(2), but only s. 15(1). LEAF's submissions thus address the proper application of s. 15(1) in this case, and the interrelationship between ss. 15(1) and 15(2) of the *Charter*.

4. Specifically, LEAF contends that where a challenge to a targeted government program is based on its being underinclusive:

(a) the precise identification of the target group is neither immune from s. 15 *Charter* scrutiny, nor subject to judicial deference; and

(b) the comparator group analysis must be consistent with the nature of the claim as being one of underinclusion.

5. LEAF further submits that "human dignity" is not an independent legal test in the s. 15(1) discrimination analysis, but a "philosophical enhancement", and as such, it cannot be used in a way that undermines substantive equality.

Part III – ARGUMENT

(a) The precise identification of the target group is neither immune from s. 15 *Charter* scrutiny, nor subject to judicial deference

6. In *R. v. Kapp*, the Supreme Court modified the constitutional treatment of ameliorative or affirmative action programs previously adopted by it. Specifically, the Court formulated a s. 15(2) test which protects ameliorative programs from s. 15(1) *Charter* scrutiny if the government can demonstrate that:

(1) the program has an ameliorative or remedial purpose; and

(2) the program targets a disadvantaged group identified by the enumerated or analogous grounds.

R. v. Kapp, 2008 SCC 41 at para. 41

7. Unlike the case at bar, *R. v. Kapp* did not involve a claim that an ameliorative program was underinclusive. The Supreme Court of Canada in *R. v. Kapp* was very clear that:

a. the above test was intended to provide "a basic starting point", "adequate for determining the issues" before the Court on the specific facts of the appeal in *R. v. Kapp*;

b. it was "in the early stage in the development of the law surrounding s. 15(2)";

c. "future cases may demand some adjustment to the framework in order to meet the litigants' particular circumstances"; and

d. "future refinement" of the approach may be necessary;

R. v. Kapp, *supra* at para.41

8 In *R. v. Kapp*, a group of largely non-Aboriginal fishers challenged a 24 hour communal fishing license intended to benefit three Aboriginal bands. The government's decision to target a disadvantaged group was being challenged by a group who were, by comparison, relatively advantaged. In *R. v. Kapp*, the Supreme Court did not:

a consider s. 15(2) of the *Charter* in the case of a disadvantaged group alleging that a remedial program is discriminatorily underinclusive; or

b. address the identification of the comparator groups where an affirmative action program is challenged as underinclusive.

9. Accordingly, the Supreme Court was silent on the application and interpretation of its modified test to a case involving a claim by a disadvantaged group that its exclusion from a remedial program is discriminatory. This issue was left to be determined in future cases.

10. The Micmac of Gespeg in this appeal are challenging the Indian and Northern Affairs Canada ("INAC") Elementary/Secondary Education Program ("the Program") on the basis that it is underinclusive in a way that violates section 15 of the *Charter*. They argue that the Program makes a discriminatory distinction between students who live on reserve or Crown land and student members of landless bands. Unlike *R. v. Kapp*, this appeal involves a challenge to an ameliorative program by members of a disadvantaged group. One of the fundamental concerns which led to the inclusion of s.15(2) in the *Charter* and which formed the factual matrix in *R. v. Kapp* - that affirmative action programs be protected from challenge by privileged groups – is therefore not at play in this case.

R. v. Kapp, *supra* at para. 47

11. Relying on *R. v. Kapp*, the Crown takes the position in this appeal that: the Program is ameliorative and targets a disadvantaged group; the Court has no obligation to engage in a s. 15(1) inquiry; and the appeal should thus be dismissed. In its factum, however, the Crown does not acknowledge that this is an underinclusiveness claim by a disadvantaged group and thus does not consider the principled distinction between this case and *R. v. Kapp*.

12. The Supreme Court of Canada in *R. v. Kapp* reaffirmed the centrality of substantive equality to the analysis and resolution of equality rights claims. The Court grounded its s. 15(2) analysis in *R. v. Kapp* on the principle that a deferential approach to the ameliorative program in that case advanced the goal of substantive equality. This foundational principle does not apply to challenges of underinclusion. A deferential approach in cases involving a challenge by a disadvantaged claimant to an underinclusive remedial program is not consistent with "s.15's purpose of furthering substantive equality".

R. v. Kapp, *supra* at para.16

13. To warrant the protection of s. 15(2), an ameliorative program does not need to address all forms of disadvantage at once. It can be selective. But it does not follow that all types of selection or targeting are protected by s. 15(2). Constitutional protection for specific types of

programs does not immunize them from *Charter* scrutiny in respect of how they are implemented and the effects so produced.

Adler v. Ontario, [1996] 3 S.C.R 609 at para. 49

14. If the fact of targeting were sufficient to immunize the method and/or scope of targeting from s. 15 *Charter* scrutiny, absurd results could follow. For example, it could immunize from challenge a skills upgrading program for Aboriginal persons that, to make it affordable, included only those who have two Aboriginal parents. Such a blatantly discriminatory scenario based on blood quantum cannot merit protection under s. 15(2), and needs to be subjected to s. 15(1) scrutiny. *Martin v. Nova Scotia* establishes that exclusion within a category (in that case those with chronic pain as a subset of disability) can amount to discrimination on that ground (disability in *Martin*). Similarly, the arbitrary exclusion of those without two Aboriginal parents from an Aboriginal skills upgrading program would constitute discrimination on the basis of Aboriginality that would obviously breach s. 15(1) and could not be protected by s. 15(2).

Martin v. Nova Scotia, [2003] 2 S.C.R. 504

15. Where the method and/or scope of selection is challenged as underinclusive, neither the principle of affirmative action nor the fact of targeting is being questioned. Rather the challenge is coming from those claiming to properly fall within the targeted group. Such a challenge does not engage the protective purpose of s. 15(2). Instead it demands an assessment of whether the exclusion of the group violates the purpose of section 15 (promotion of substantive equality) and requires full s. 15(1) scrutiny. Although not a s. 15(2) case, *Martin v. Nova Scotia* stands for the proposition that a targeted program (workers' compensation) can be successfully challenged for underinclusiveness (almost total exclusion of chronic pain). Similarly, this Honourable Court's decision in *Misquadis v. Canada (Attorney General)* is an example of a successful challenge to an underinclusive targeted program (exclusion of off-reserve communities from local community control over the delivery of human resources programming).

Martin v. Nova Scotia, *ibid*; *Misquadis v. Canada (Attorney General)*, 2003 FCA 473

16. While an ameliorative program can properly target disadvantage associated with a particular ground, it cannot do so in a way that is discriminatory either on the ground of the

targeting (see the example at para.14 *supra*) or on any other enumerated or analogous ground. For example, an Aboriginal skills upgrading program would be vulnerable to a s. 15(1) challenge in the following circumstances:

(a) the program is delivered in premises that are wheelchair inaccessible, thus constituting disability discrimination;

(b) the program is delivered at dates or times that made general attendance inconsistent with the tenets of certain religious faiths, thus constituting religious discrimination;

(c) the program is delivered without childcare arrangements and at times where affordable childcare is difficult to obtain, thus making attendance difficult for single parents (likely predominantly mothers), thus constituting discrimination on the grounds of family status and sex.

17. In none of these circumstances would the protective purpose of s. 15(2) be engaged. Section 15(2) would protect the targeting of Aboriginal persons, but not the discriminatory exclusion of those properly within the target group of Aboriginal persons. Any possible argument that such circumstances are not ultimately discriminatory would depend on a complete s. 15(1) analysis.

18. In the exercise of its s. 91(24) jurisdiction, the federal government is inevitably targeting Aboriginal persons. If a discriminatory failure to fully exercise its s. 91(24) jurisdiction were immune from *Charter* scrutiny by virtue of s. 15(2), that would effectively make s. 91(24) a s. 15 "no go" zone. Such a "no go" zone cannot possibly be the effect of s. 15(2) and would be totally inconsistent with the Supreme Court of Canada's decision in *Corbière v. Canada* and this Honourable Court's decision in *Misquadis v. Canada (Attorney General)*.

> *Corbière v. Canada*, [1999] 2 S.C.R. 203; *Misquadis v. Canada (Attorney General)*, *supra*.

19. In *R. v. Kapp* the Supreme Court of Canada adopted the following approach to the interrelationship between s. 15(1) and s. 15(2) of the *Charter*.

> As discussed at the outset of this analysis, s. 15(1) and s. 15(2) should be read as working together to promote substantive equality. The focus of s. 15(1) is on *preventing*

> governments from making distinctions based on enumerated or analogous grounds that have the effect of perpetuating disadvantage or prejudice or imposing disadvantage on the basis of stereotyping. The focus of s. 15(2) is on *enabling* governments to pro-actively combat discrimination. Read thus, the two sections are confirmatory of each other.
>
> *R. v. Kapp*, *supra* at para. 37 [emphasis in original]

20. The purpose of enabling governments to proactively combat discrimination under s. 15(2) cannot be used to shield a manner of tackling discrimination that is itself otherwise discriminatory in the method and/or scope of its targeting. Where the very fact of having a targeted ameliorative program is not challenged, the enabling feature of the s. 15(2) analysis is spent, and the prevention analysis of s. 15(1) is engaged.

21. In *R. v. Kapp* the challenge was to the fact of targeting by those who claimed that anything other than identical treatment for all was discriminatory. The Supreme Court of Canada rejected such a formal equality analysis.

22. Outside of the context of s.15(2) of the *Charter*, it is well-established law that legislation that confers a benefit cannot exclude beneficiaries on discriminatory grounds. In *Law v. Canada* the Court held that "[u]nderinclusive ameliorative legislation that excludes from its scope the members of a historically disadvantaged group will rarely escape the charge of discrimination". In *Eldridge v. British Columbia* the Court noted that "this Court has repeatedly held that once the state does provide a benefit, it is obligated to do so in a non-discriminatory manner". It is not possible to reconcile this jurisprudence with a blanket protection of discriminatorily underinclusive affirmative action programs.

> *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497 [*Law*] at para.72; *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624 at para. 73 See also *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143 [*Andrews*]; *Miron v. Trudel* [1995] 2 S.C.R. 418; *Vriend v. Alberta*, [1998] 1 S.C.R. 493; *M. v. H.*, [1999] 2 S.C.R. 3

23. The consequence of an approach that protects all ameliorative programs from s.15(1) *Charter* scrutiny would be a two-tiered hierarchy of equality rights that would accord second-class status to members of disadvantaged groups who are excluded from these programs. The

particularly vulnerable and marginalized members of disadvantaged groups - those who experience multiple and intersecting grounds of discrimination, including on the basis of sex, race, Aboriginality, disability, poverty, marital status and sexual orientation – would be most likely to suffer from such exclusion and diminished constitutional recognition.

b. The comparator group analysis must be consistent with the nature of the challenge as being one of underinclusion

24. In *R. v. Kapp*, the Supreme Court of Canada warned against the use of comparators in a way that undermines substantive equality by invoking formal equality notions of treating likes alike.

> *R. v. Kapp*, *supra* at para. 22[1]
> See also Sheila McIntyre, "Answering the Siren Call of Abstract Formalism with Subjects and Verbs of Domination", in Fay Faraday, Margaret Denike, Kate Stephenson eds., *Making Equality Rights Real: Securing Substantive Equality under the Charter* (Toronto: Irwin Law, 2006) 99 [*"Making Equality Rights Real"*]

25. The trial judge in this case fell into this problem when he made the following comments respecting comparators:

> I note that students, members or not, who do not live on a reserve or Crown lands are treated the same way as non-Indian students enrolled in a provincial school.
>
> *Linda Jean et al.* v. *Attorney General of Canada*, 2007 FC 1036 at para. 11 ["Trial Decision"]

26. This analysis improperly invokes the similarly situated analysis rejected in *Andrews v. Law Society of British Columbia*. Moreover, such comparisons with the general population are

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[1] Citing Sophia Reibetanz Moreau, "Equality Rights and the Relevance of Comparator Groups" (2006), 5 *J.L. & Equality* 81; Daphne Gilbert and Diana Majury, "Critical Comparisons: The Supreme Court of Canada Dooms Section 15" (2006), 24 *Windsor Y.B. Access Just.* 111; Beverley Baines, "Equality, Comparison, Discrimination, Status", in Fay Faraday, Margaret Denike and M. Kate Stephenson, eds., *Making Equality Rights Real: Securing Substantive Equality under the Charter* (2006), 73; Dianne Pothier, "Equality as a Comparative Concept: Mirror, Mirror, on the Wall, What's the Fairest of Them All?", in Sheila McIntyre and Sanda Rodgers, eds., *Diminishing Returns: Inequality and the Canadian Charter of Rights and Freedoms* (2006), 135. See also Dianne Pothier, "Connecting Grounds of Discrimination to Real People's Real Experiences" (2001), 13 *C.J.W.L.* 37; Bruce Ryder, Cidalia C. Faria and Emily Lawrence, "What's *Law* Good For? An Empirical Overview of Charter Equality Rights Decisions" (2004), 24 *S.C.L.R.* (2d) 103; Mayo Moran, "Protesting Too Much: Rational Basis Review Under Canada's Equality Guarantee", in Sheila McIntyre and Sanda Rodgers, eds., *Diminishing Returns: Inequality and the Canadian Charter of Rights and Freedoms* (2006), 71; Sheila McIntyre, "Deference and Dominance: Equality Without Substance", in Sheila McIntyre and Sanda Rodgers , eds., *Diminishing Returns: Inequality and the Canadian Charter of Rights and Freedoms* (2006), 95.

inconsistent with the nature of the claim as being one of underinclusion. The Supreme Court of Canada in *Hodge* emphasized that the identification of comparators is pertinent throughout a s. 15 analysis, and must be congruent with the analysis at each stage.

> *Andrews v. Law Society of British Columbia*, *supra* at paras.28-30, 34; *Hodge v. Canada*, [2004] 3 S.C.R. 357

27. Where the challenge is based on underinclusion, a comparator analysis that incorporates the general populace outside the challenged program is inappropriate because it is disconnected from the issue of the method and/or scope of targeting. In the context of an underinclusiveness challenge to a remedial program, a substantive equality analysis demands that the Court compare the excluded claimant group not with the general public, who are outside the target of the program, but with the members of the disadvantaged group who are targeted by the law, program or policy. Where the claim is that a limited program is underinclusive, the issue is not the differential treatment of an advantaged group compared to a disadvantaged group. Rather the challenge is to the differential treatment within the disadvantaged group that is being targeted, such that the proper comparison is within the disadvantaged group.

28. In the present case, the trial judge's reliance on the similarity of treatment of the claimants and non-Aboriginal attendees of provincial schools effectively erases the claimants' Aboriginal identity. A comparison relying on such formal equality with the general non-Aboriginal populace outside the program precludes a consideration of substantive equality. Assessment of the substantive equality issue requires a comparison between students resident on Aboriginal reserve or Crown lands (those included in the program) versus student members of landless bands (those excluded from the program). That is the differential treatment that needs to be evaluated under s. 15(1). The question is whether it is discriminatory to exclude this group of *Aboriginal people* from a program aimed at ameliorating the disadvantage of *Aboriginal people*.

c. Human dignity is not an independent legal test and must not undermine Substantive Equality

29. In *R v. Kapp,* the Supreme Court provided clarity and direction with respect to the discrimination analysis under s. 15(1), and in particular with respect to the role of human dignity.

30. In *Law*, the Supreme Court held that the purpose of s.15(1) is to:

> "...prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice, and to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally capable and equally deserving of concern, respect and consideration".
>
> *Law v. Canada, supra* at para. 51

31. In the decade following *Law*, courts have required claimants to establish "injury to dignity" in order to succeed in equality rights challenges.

> Fiona Sampson, "The *Law* Test for Discrimination and Gendered Disability", in *Making Equality Rights Real, supra* at 245

32. This focus on human dignity has been much critiqued. In particular, Courts have been criticized for focusing on the personal feelings of the claimants, thus diverting attention away from analysis of the "larger social, political and legal context" (*R. v. Turpin*). Such diversion results in a departure from the substantive equality analysis of *Andrews* and imposes an additional legal hurdle which equality rights claimants must overcome. In *R. v. Kapp*, the Supreme Court acknowledged the difficulties in the application of the "human dignity" analysis and clarified that dignity was not intended to be an additional burden on equality claimants:

> At the same time, several difficulties have arisen from the attempt in *Law* to employ human dignity as a *legal test*. There can be no doubt that human dignity is an essential value underlying the s.15 equality guarantee...
>
> But as critics have pointed out, human dignity as an abstract and subjective notion that, even with the guidance of the four contextual factors, cannot only become confusing and difficult to apply; it has also become an *additional* burden on equality claimants, rather than the philosophical enhancement it was intended to be. Criticism has also accrued for the way *Law* has allowed the formalism of some of the Court's post-*Andrews* jurisprudence to resurface in the form of an artificial comparator analysis focussed on treating likes alike.

> ... *Law* does not impose a new and distinctive test for discrimination, but affirms the approach to substantive equality under s.15 set out in *Andrews* and developed in numerous subsequent decisions...
>
> *R. v. Kapp*, *supra* at paras. 21, 22[2], 24; *R. v. Turpin,* [1989] 1 S.C.R. 1296 at para. 45 and quoted recently by the Supreme Court of Canada in *Ermineskin Indian Band and Nation v. Canada*, 2009 SCC 9, para. 193

33. In its recent decision in *Ermineskin Indian Band and Nation v. Canada*, released on February 13, 2009, the Supreme Court of Canada does not refer to or rely on *Law* or human dignity in its s. 15(1) analysis. Instead, in accordance with its direction in *R. v. Kapp*, the Court references the approach to s.15 articulated in *Andrews* and *Turpin*.

> *Ermineskin Indian Band and Nation v. Canada*, *supra* at paras. 185-202

34. The purpose of s. 15(1) as defined in *Andrews* and subsequent cases, is to "remedy or prevent discrimination against groups subject to stereotyping, historical disadvantage and political and social prejudice in Canadian society" (*Swain,*) and "also to ameliorate the position of groups within Canadian society who have suffered disadvantage by exclusion from mainstream society..." (*Eaton*). The *Andrews* substantive equality approach considers the *effect* of the distinction on the claimant within the context of the claimant's experience of inequality; it determines "...whether the impact of the impugned legislation is to disadvantage the group or individual in a manner which perpetuates the injustice which s.15(1) is aimed at preventing" (*Miron v. Trudel*).

> *R. .v Swain,* [1991] 1 S.C.R. 933 at para.81; *Eaton v. Brant County Board of Education*, [1997] 1 S.C.R. 241 at para.66; M*iron v. Trudel*, *supra* at para.140; *Ermineskin Indian Band and Nation v. Canada*, *supra*, at para.188

35. The focus of the discrimination analysis, therefore, is not whether individual claimants have suffered hurt feelings or whether there is evidence that the dignity of individuals within the class of claimants has been harmed, but whether, viewed contextually, the distinction at issue

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[2] Citing, among others, Donna Greschner, "Does *Law* Advance the Cause of Equality?" (2001), 27 *Queen's L.J.*299; Daphne Gilbert and Diana Majury, "Critical Comparisons: The Supreme Court of Canada Dooms Section 15" (2006), 24 *Windsor Y.B. Access Just.* 111; Daphne Gilbert, "Time to Regroup: Rethinking Section 15 of the Charter" (2003), 48 *McGill L.J.* 627; R. James Fyfe, "Dignity as Theory: Competing Conceptions of Human Dignity at the Supreme Court of Canada" (2007), 70 *Sask. L. Rev* 1.

creates, furthers or exacerbates the oppression, exclusion, marginalization, prejudice or disadvantage suffered by the claimant group. Any reference to human dignity as a "philosophical enhancement" within the discrimination analysis must be consistent with the goals and concerns of substantive equality.

> *R. v. Kapp, supra* at para.24; *Ermineskin Indian Band and Nation v. Canada, supra* at paras. 188, 193, 201; *Andrews, supra* at paras. 37, 43, 46; *R. v. Turpin, supra* at paras. 45-47; *R. v. Swain, supra* at para. 81; *Eaton v. Brant County Board of Education, supra* at para. 66

36. In dismissing the Appellants' claim, the trial judge asserts, without elaboration, that the Appellants' exclusion from the Program does not demean their dignity. Similarly, and without reference to paragraphs 22-24 of *R. v. Kapp*, the Crown in its factum asserts that the Program is not discriminatory because the Appellants have not established a violation of their dignity. This is not the correct inquiry. "Harm to dignity" is not an independent legal test. The question before this Court is not: "has the claimant established a violation of human dignity?" but "has the claimant established discrimination through a violation of substantive equality?".

> Trial Decision, *supra* at para.9

37. *Law* set out four contextual factors to guide the determination of whether a particular distinction is discriminatory. In *R. v. Kapp,* the Court noted the concern expressed by critics with respect to a mechanistic application of these four contextual factors and confirmed that the "factors cited in *Law* should not be read literally as if they were legislative dispositions", but as a way of focussing on the central substantive equality concerns of s.15 as articulated in *Andrews*. In *Ermineskin*, the Supreme Court did not rely on the *Law* contextual factors at all and instead referred to the two part test established in *Andrews*.

> *R v. Kapp, supra* at paras. 22 and 24; *Ermineskin Indian Band and Nation v. Canada, supra* at paras. 188 and 201

38. In *R. v. Kapp,* the Court further confirmed that the analysis of whether a distinction is discriminatory in any particular case should focus on the "factors that identify impact amounting to discrimination".

> *R v. Kapp, supra* at para. 23

39. The Court has used a variety of indicia to describe substantive discrimination, including:

> "Devalued", "stigmatization", "political and social prejudice", "stereotyping", "lacking political power", "exclusion", "exclusion from the mainstream", "marginalized", "social, political and legal disadvantage", "vulnerability", "oppression" and "powerlessness"

Andrews, supra at paras. 35, 43, *Turpin, supra* at para. 47; *Swain, supra* at paras. 80, 85; *Eaton, supra* at para.66; *Eldridge, supra* at paras. 54, 56; *M. v. H., supra* at para. 65; *Law, supra* at paras. 29, 34, 39, 42, 43, 44, 46, 47, 53, 63 and 64

40. The Court's reaffirmation in *R. v. Kapp* of its commitment to the vision of substantive equality as articulated in *Andrews* engages a substantive discrimination analysis that avoids rigid categories and focuses holistically on social context, exclusion, oppression, prejudice and the effects of discriminatory practices. The discrimination analysis cannot be framed so as to define the claimants' circumstances out of existence. As noted by the Supreme Court in *Turpin*:

> If the larger context is not examined, the s.15 analysis may become a mechanical and sterile categorization process conducted entirely within the four corners of the impugned legislation. A determination as to whether or not discrimination is taking place, if based exclusively on an analysis of the law under challenge, is likely, in my view, to result in the same kind of circularity which characterized the similarly treated test clearly rejected by this Court in *Andrews*.

R. v. Turpin, *supra* at para. 46; Daphne Gilbert and Diana Majury, "Critical Comparisons: The Supreme Court of Canada Dooms Section 15" (2006), 24 *Windsor Y.B. Access Just.* 111; Dianne Pothier, "Equality as a Comparative Concept: Mirror, Mirror, on the Wall, What's the Fairest of Them All?" in Sheila McIntyre and Sanda Rodgers, eds., *Diminishing Returns: Inequality and the Canadian Charter of Rights and Freedoms* (2006), 135

41. In the case at bar, the trial judge accepted that "landless bands suffer real disadvantages considering the position that the group and its members occupy in the social, political and legal contexts of our society" and that the characteristic is "immutable or difficult to change", particularly given that in the case of the Micmac of Gespeg, "the Crown does not seem disposed...to create a reserve...even though INAC's relationship with the Micmacs of Gespeg can be traced back to 1880".

Trial Decision, *supra* at para.9

42. The analysis of whether the impugned distinction is discriminatory in this appeal, therefore, requires an examination of whether the exclusion of the Appellants from the Program on the basis of their landlessness perpetuates the existing disadvantage acknowledged by the trial judge, or subjects them to further disadvantage, political or social prejudice, marginalization, exclusion or stereotyping. More particularly, the systemic and contextual substantive discrimination analysis demanded by *Andrews* would consider the following questions:

a. What is the effect of the exclusion on the Appellants as a landless band?

b. Does the Program take into account the particular circumstances of landless bands and their needs in relation to educational services?

c. Is this a discriminatory failure by the Crown to fully exercise its jurisdiction under s. 91(24)?

d. Is the exclusion a perpetuation of the power imbalance between the Crown and the claimant Aboriginal nation?

e. Is, or in what way is, the exclusion related to the historic, social, economic and other context of the Appellants?

43. All of the above questions address the central issue to be determined in this case, which is whether the impugned distinction furthers or exacerbates the oppression, exclusion, marginalization, prejudice or disadvantage of the Micmac of Gespeg, viewed within the context of the existing disadvantage, marginalization and exclusion suffered by them in comparison to bands living on reserve or Crown lands.

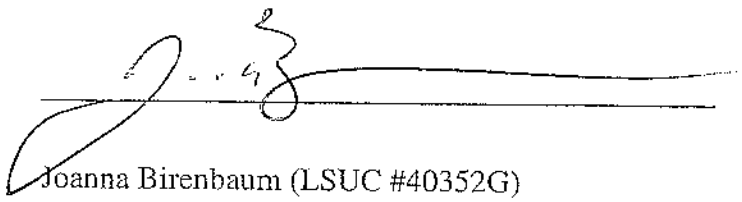
ORDER SOUGHT

44. LEAF takes no position in the ultimate disposition of this appeal.

45. LEAF seeks no costs and requests an Order that no costs be awarded against it.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED at Toronto, this 20th day of February, 2009.



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LIST OF AUTHORITIES

Secondary Sources