Court File No. A-630-02
(T-1274-99)

FEDERAL COURT OF APPEAL

B E T W E E N:

THE ATTORNEY GENERAL OF CANADA

Appellant (Respondent)

- and -

ROGER MISQUADIS, PETER OGDEN, MONA PERRY, DOROTHY PHIPPS-WALKER and CHIEF BOB CRAWFORD, on his own behalf and on behalf of the ARDOCH ALGONQUIN FIRST NATION, and DARWIN LEWIS and THE ABORIGINAL COUNCIL OF WINNIPEG INC.

Respondents (Applicants)

- and -

CONGRESS OF ABORIGINAL PEOPLES

Intervener

MEMORANDUM OF FACT & LAW OF THE INTERVENER
Congress of Aboriginal Peoples

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Part I – Overview

1. The narrow question in this appeal is whether a Government of Canada program is underinclusive and discriminatory because it includes reserve-based First Nations, Inuit and Métis peoples, but excludes urban and off-reserve Aboriginal peoples. The appeal also raises deeper and more fundamental questions concerning Aboriginal identity, dignity, and community membership.

2. In the appeal, the Attorney General of Canada ("Canada") seeks to overturn the order of Mr. Justice Lemieux declaring that the Aboriginal Human Resources Development Strategy (the "Strategy") of Human Resources Development Canada ("HRDC") violates s. 15 of the *Charter* and is not saved by s. 1.

3. The Strategy is a $1.6 billion, 5 year (1999-2004) labour market initiative implemented through funding agreements known as Aboriginal Human Resource Development Agreements ("the Agreements"). HRDC enters into framework Agreements with certain national Aboriginal groups – the Assembly of First Nations, Métis National Council and Inuit Tapiriit Kanatami (formerly Inuit Tapirisat of Canada) – primarily targeting some of these groups' communities. HRDC gives these groups local community control over the planning, design and delivery of employment training programs for their community-members, in order to enhance their skills and employability, and once employed, to retain their jobs.

4. HRDC refuses to enter Agreements with the Respondents' communities, which are urban off-reserve Aboriginal communities and rural First Nations communities without a reserve. Instead, HRDC established an Urban Component under the Strategy. The Urban Component tries to provide urban and off-reserve Aboriginal peoples with access to services, but does not give their communities local community control over labour market programs – the very benefit provided to reserve-based Aboriginal communities. Lemieux J. found that this is unjustifiable discrimination contrary to s. 15(1) of the *Charter*, and ordered HRDC to provide local community control over labour training programs to the Respondents' communities.

5. The intervener, the Congress of Aboriginal Peoples ("CAP"), submits that Lemieux J.'s ruling was correct and should be affirmed. CAP further submits that this remedy should be extended nationally to similarly situated urban and off-reserve Aboriginal peoples across Canada.

Part II – Statement of Facts

(a) Background Facts

6. CAP adopts Lemieux J.'s detailed description of the background facts in his reasons for judgment (Reasons, paras. 1-65). CAP also agrees with the Respondents' statements of facts.

(b) CAP

7. In his reasons for judgment, Lemieux J. described CAP as a "national organization speaking for Aboriginal people not covered by the *Indian Act*, for Indians who have regained their status, and for the Aboriginal population not residing on reserves" (Reasons, para. 37).

8. Canada similarly accepts that CAP is a "widely accepted national political organization" representing "Aboriginal people wherever they live". Canada's witness, David Hallman, Director of Programs, Aboriginal Relations Office of the Human Resources Investment Branch of HRDC, described CAP as follows:

> NWAC [Native Women's Association of Canada] and CAP are widely accepted national political organizations representing, respectively, Aboriginal women and Aboriginal people wherever they live, regardless of status under the *Indian Act*, membership in an Indian band or self-identification as Metis. Affidavit of David Hallman sworn January 6, 2000, para. 18: *Appeal Book*, vol. 6, p. 1711 (emphasis added)

9. CAP's mandate is to represent the collective and individual interests of its Métis and off-reserve Indian constituencies. CAP's membership is comprised of provincial and territorial affiliates, including the Labrador Métis Association, the Federation of Newfoundland Indians, the Native Council of Prince Edward Island, the Native Council of Nova Scotia, the New Brunswick Aboriginal People's Council, the Native Alliance of Quebec, the Aboriginal Council of Saskatchewan, the Indian Council of First Nations of Manitoba, the Ontario Métis Aboriginal Association, the United Native Nations (British Columbia), and the Métis Nation Northwest Territories.

(c) CAP's limited role under the Strategy

10. HRDC gives CAP a limited role in delivering labour market training programs to urban Aboriginal people under the Strategy, just as it did under the Strategy's predecessor program, the "New Relationship". This limited role is profoundly troubling to CAP, given that, as the *Report of*

the Royal Commission on Aboriginal Peoples ("*RCAP*") found, almost half of Canada's Aboriginal population live in urban communities. As the *RCAP* stated:

> Many Canadians think of Aboriginal people as living on reserves or at least in rural areas. This perception is deeply rooted and persistently reinforced. Yet almost half of Aboriginal people in Canada live in cities and towns. (*RCAP*, vol. 4, p. 519)(emphasis added)

11. Under the Strategy, HRDC provides CAP with $2.2 million per annum over 5 years (for a total of $11 million), out of the total $1.6 Billion available for Aboriginal labour market programming (*Appeal Book*, vol. 6, pp. 1799-1817, HRDC's Contribution Agreement with CAP). CAP's $11 million represents approximately 0.6875% of the Strategy's total budget.

12. Canada has taken the position that CAP's small funding under the Strategy is a ground for finding that the Strategy is not discriminatory. Lemieux J. noted how Canada pointed to CAP's funding under the New Relationship, the Strategy's predecessor program, to establish this:

> Under this initiative, HRDC initially allocated $21,000,000 in funding over three years of the New Relationship to three specific Aboriginal organizations in order to better address the labour market development needs of urban Aboriginal people. The three organizations receiving funds were the National Association of Friendship Centres ("NAFC"), the Native Women's Association of Canada ("NWAC") and the Congress of Aboriginal Peoples ("CAP").
>
> NAFC represents the interests of seven provincial/territorial associations with 112 Friendship Centres. NWAC is a political organization representing the interests of Aboriginal women; and CAP is a national organization speaking for Aboriginal people not covered by the Indian Act, for Indians who have regained their status, and for the Aboriginal population not residing on-reserves. As a result of the agreements, HRDC maintains the urban Aboriginal people, including those residing in GTA and/or Niagara Peninsula and Winnipeg, were able to apply for funding to support employment and training activities in urban areas. (Reasons, paras. 36-37)(emphasis added)

13. Lemieux J. also noted how Canada defended the Strategy by claiming that it had been adopted following "extensive consultation" with CAP and other Aboriginal stakeholders:

> HRDC claims AHRDS [i.e. the Strategy] was implemented following an extensive consultation process carried out with Aboriginal stakeholders including AFN [Assembly of First Nations], MNC [Metis National Council], ITC as well as CAP, NWAC and organizations and individuals purporting to represent urban and off-reserve Aboriginal people. (Reasons, para. 42)(emphasis added)

14. Before this Court, Canada continues to defend the Strategy by pointing to CAP's small funding. In its Memorandum, Canada asserts:

> HRDC did not fail to recognize any of the Claimants and their communities. On the contrary, HRDC recognized and accommodated urban and off-reserve Aboriginal people by signing National Accords with CAP and NWAC and by developing the

> Urban/ Off-Reserve Component of the Strategy. (Canada's Memorandum, para. 96)(emphasis added)
>
> See also Canada's Memorandum, paras. 20, 37, 55, 63, 68

15. CAP disagrees with Canada's position. CAP's small funding and limited role under the Strategy are not grounds for finding that the Strategy is not discriminatory. The Strategy is not equitable because it fails to provide local community control to the Respondents and their communities, as well as to other urban and off-reserve Aboriginal communities across Canada. It is discriminatory, contrary to the guarantee in s. 15(1) of the *Charter*, and cannot be justified under s. 1.

Part III – Points In Issue

16. CAP agrees with and adopts the Respondents' statements of the points in issue.

Part IV – Submissions

A. The Standard of Review of Lemieux J.'s Findings of Fact and the Application of the Legal Standard to the Facts is "Palpable and Overriding Error", Not "Correctness"

(a) Canada asserts that the standard of review is correctness

17. Canada asserts that "[t]he standard of review applicable to the Application Judge's decision is correctness" (Canada, para. 44). Canada claims:

> The Application Judge erred in law in his application of the sections 15(1) and 1 tests, and in his assessment of the evidence before him. The latter errors are questions of mixed fact and law so inextricably linked to the s. 15(1) and s. 1 errors of law that they, too, are subject to the same, less deferential standard of review – correctness. (Canada's Memorandum, para. 44)

18. Canada seeks to review the decision as a whole on a correctness standard by lumping together Lemieux J.'s factual findings with his application of s. 15(1) of the *Charter* to those facts. This improperly conflates questions of fact with questions of mixed fact and law. Canada's approach tellingly reveals the Achilles' heel of its appeal. It needs to overturn Lemieux J.'s factual findings; otherwise its appeal cannot succeed.

19. Canada's statement of the standard of review contains three errors: first, "the assessment of the evidence" involves a question of fact, not a question of mixed fact and law; second, a question of fact is reviewable on the standard of palpable and overriding error, not correctness; and third, a question of mixed fact and law is also generally reviewable on the standard of palpable and overriding error, not correctness. Each of Canada's errors is addressed in turn.

(b) Errors in Canada's assertion

1. An "assessment of the evidence" involves a question of fact, not mixed law and fact

20. First, Canada asserts that Lemieux J.'s "assessment of the evidence before him" involves "errors of mixed fact and law". That is not correct. A trial judge's assessment of the evidence involves a question of fact. By contrast, a question of mixed fact and law involves the application of a legal standard to a set of facts, once the trial judge has found those facts. This elementary difference was recently highlighted by the Supreme Court of Canada in *Housen v. Nikolaisen,* 2002 SCC 33:

> [I]t is important to distinguish questions of mixed fact and law from factual findings (whether direct findings or inferences). Questions of mixed fact and law involve applying a legal standard to a set of facts: *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748, at para. 35. On the other hand, factual findings or inferences require making a conclusion of fact based on a set of facts. (para. 26, *per* Iacobucci and Major JJ.)

21. Thus, Lemieux J.'s assessment of the evidence before him involved findings of fact. Subsequently, the application of the legal standard in s. 15(1) of the *Charter* to those facts involved questions of mixed fact and law.

22. A court must consider precisely the nature of the question under review, rather than lumping them all together as Canada proposes, because different standards of review can – and often do – apply to the various issues raised on a single appeal (*Housen*, para. 7; *Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers,* [2002] 4 F.C. 3 at para. 77 (C.A.), *per* Evans J.A.).

2. Findings of fact are reviewable on the standard of "palpable and overriding error", not "correctness"

23. Second, Canada asserts that a trial judge's assessment of the evidence before him is reviewable on the standard of correctness. That is not correct. As the Supreme Court confirmed in *Housen*, findings of fact and inferences of fact are owed deference, and are reviewable on the standard of "palpable and overriding error", not correctness:

> The essential point is that making a factual conclusion, of any kind, is inextricably linked with assigning weight to evidence, and thus attracts a deferential standard of review. (para. 24) […] It is our view that the trial judge enjoys numerous advantages over appellate judges which bear on *all* conclusions of fact, and, even in the absence of these advantages, these are other compelling policy reasons supporting a deferential approach to inferences of fact. We conclude, therefore, by emphasizing that there is one, and only one, standard of review applicable to all

> factual conclusions made by the trial judge – that of palpable and overriding error. (para. 25, *per* Iacobucci and Major JJ.)(italics in original)(emphasis added)

24. The Supreme Court stressed that the standard of "palpable and overriding error" sets a very high threshold: a palpable error is one that is "plainly seen" (*Housen*, paras. 5-6). The Court also stated that "it is wrong for an appellate court to set aside a trial judgment where the only point at issue is the interpretation of the evidence as a whole" (*Housen*, para. 20). The Court said that while "it is open to an appellate court to find that an inference of fact made by the trial judge is clearly wrong, we would add caution that where evidence exists to support this inference, an appellate court will be hard pressed to find a palpable and overriding error" (*Housen*, para. 22).

3. Questions of mixed fact and law are owed deference

25. Third, Canada asserts that questions of mixed fact and law are also reviewable on a standard of correctness. That is not correct. As also confirmed in *Housen*, questions of mixed fact and law are reviewable on the standard of palpable and overriding error – the same standard applied to findings of fact – unless it is "clear" that the trial judge made some extricable error in legal principle with respect to the characterization of the legal standard or in its application:

> [W]here the error does not amount to an error of law, a higher standard is mandated. Where the trier of fact has considered all the evidence that the law requires him or her to consider and still comes to the wrong conclusion, then this amounts to an error of mixed law and fact and is subject to a more stringent standard of review. (para. 28) […]
>
> In our view, it is settled law that the determination of whether or not the standard of care was met by the defendant involves the application of a legal standard to a set of facts, a question of mixed fact and law. This question is subject to the standard of palpable and overriding error unless it is clear that the trial judge made some extricable error in principle with respect to the characterization of the standard or its application, in which case the error may amount to an error of law. (para. 37, *per* Iacobucci and Major JJ.)(emphasis added)

26. Canada does not assert that Lemieux J. got the standard for s. 15(1) of the *Charter* wrong, which everyone agrees is the Supreme Court's ruling in *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497, and which Lemieux J. applied in this case. Canada's real quarrel is with Lemieux J.'s application of the *Law* test to the facts of this case – a question of mixed fact and law. This question is therefore owed deference unless Canada shows that it is "clear" that Lemieux J. "made some extricable error in principle with respect to the characterization of the standard or its application".

(c) Deference is owed even though this was an application for judicial review involving a written record

27. Deference is owed to a court of first instance even if the record below was largely or entirely written and without live testimony raising issues of credibility. Various appellate courts have confirmed this, including this Honourable Court, the Ontario Court of Appeal, and most recently, the Supreme Court of Canada.

28. A leading authority is the Ontario Court of Appeal's ruling in *Gottardo Properties (Dome) v. Toronto (City)* (1998), 162 D.L.R. (4th) 574, where Laskin J.A. for the Court stated that "deference is still called for on an appeal from an entirely written record". Laskin J.A. explained the policies supporting this rule as follows:

> […] the record before the motion judge was entirely documentary. No oral evidence was adduced. The absence of oral evidence does not however negate the desirability of a deferential standard of review. Deference is desirable for several reasons: to limit the number and length of appeals, to promote the autonomy and integrity of the trial or motion court proceedings on which substantial resources have been expended, to preserve the confidence of litigants in those proceedings, to recognize the competence of the trial judge or motion judge and to reduce needless duplication of judicial effort with no corresponding improvement in the quality of justice. […] These reasons for deference apply even if no issue of credibility arises. Issues of credibility raise an added concern about the ability of appellate court review to improve the quality of justice, because an appeal court does not have the trial judge's advantage of seeing and hearing the witnesses. Therefore, a deferential standard of review may be applied more strictly to findings of credibility or other findings that depend on the trial judge's or motion judge's advantage in seeing and hearing the witnesses. But deference is still called for on an appeal from an entirely written record. (para. 48)(emphasis added)

29. Laskin J.A.'s ruling was recently cited approvingly by this Court in *Glaxo Group Ltd. v. Canada (Minister of National Health and Welfare* (2001), 11 C.P.R. (4th) 417 at para. 28 (Fed. C.A.), where Richard C.J. for the Court similarly applied a deferential standard of review on an appeal from an application for judicial review based on an entirely written record.

30. Laskin J.A.'s decision was also cited approvingly in the Supreme Court's majority decision in *Housen* (para. 12), which noted that deference is owed to a trial court's findings of fact even where those findings are not based on determinations of credibility (*Housen*, paras. 12-25), and which rejected the dissenting justices' view that "the principal rationale for showing deference to findings of fact is the opportunity to observe witnesses first hand (*Housen*, para. 25, emphasis in original). The majority in *Housen* found that appellate deference is owed generally to a trial court's findings of fact, whether or not credibility issues are raised, for the following reasons: (1) to limit the number, length and cost of appeals; (2) to promote the autonomy and integrity of trial

proceedings; and (3) to recognize the expertise of the trial judge and his or her advantageous position.

31. These reasons for deference are well-illustrated by Lemieux J.'s ruling in this case. Lemieux J. was involved with this case for over 3½ years. During that time he heard interlocutory motions, presided over two 3-day hearings, and reserved his judgment for almost a year to review and consider a 15-volume application record, consisting of almost 5,000 pages of evidence. His reasons are entitled to deference.

(d) Canada seeks to relitigate its entire case *de novo*

32. As noted above, Canada begins its challenge to Lemieux J.'s decision by attacking many of his factual findings, which it claims were "perverse and capricious" and "made without regard for the evidence before the Court" (Canada's Memorandum, para. 46). Canada asserts as follows:

> The decision of the Application Judge is premised upon inaccurate and unsupported factual determinations about the common attributes of the Claimants and their treatment under the Strategy, the purpose and benefits provided by the Strategy, the conduct of HRDC officials, and the circumstances governing the delivery of human resource programs to urban and off-reserve Aboriginal people in Ontario and Manitoba. (Canada's Memorandum, para. 45)

33. Canada is attempting to relitigate this entire case *de novo*, including many factual determinations made by Lemieux J. These findings are all owed deference and must be respected unless some "palpable and overriding" error is "plainly seen". It must be remembered that where evidence exists to support the factual findings or inferences, "an appellate court will be hard pressed to find palpable and overriding error" (above, para. 24).

34. In support of its submission that correctness is the standard of review of Lemieux J.'s assessment of the evidence before him, Canada cites the reasons of McLachlin J. (as she then was) in *RJR MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199 at para. 141, which considered whether limitations on tobacco advertising infringing the freedom of expression guarantee were demonstrably justifiable in a free and democratic society under s. 1 of the *Charter*. McLachlin J. noted that in the context of s. 1 of the *Charter*, more deference may be owed to findings based on evidence of a purely factual nature, whereas less deference may be owed to findings based on social science and policy evidence. She said this:

> [I]n the context of the s. 1 analysis, more deference may be required to findings based on evidence of a purely factual nature whereas a lesser degree of deference may be required where the trial judge has considerable social science and other policy oriented evidence. As a general matter, appellate courts are not as

> constrained by the trial judge's findings in the context of the s. 1 analysis as they are in the course of non-constitutional litigation, since the impact of the infringement on constitutional rights must often be assessed by reference to a broad review of social, economic and political factors in addition to scientific facts. (para. 334)(emphasis added)

35. This decision does not assist Canada but rather supports the contrary position that deference is owed in this case. The factual determinations Canada challenges are not matters of social science or other policy-oriented evidence, nor do they relate to the "impact of the infringement on constitutional rights". Rather, they are purely factual determinations involving, as Canada puts it, "the common attributes of the Claimants and their treatment under the Strategy, the purpose and benefits provided by the Strategy, the conduct of HRDC officials, and the circumstances governing the delivery of human resource programs to urban and off-reserve Aboriginal people in Ontario and Manitoba" (Canada's Memorandum, para. 45).

36. In any event, Lemieux J. was alive to the factual issues involved and properly weighed and considered the parties' competing positions. Before beginning his analysis of the *Charter* issues, Lemieux J. summarized in detail the parties' evidence on the benefit provided by the Strategy (Reasons, paras. 58-65), including Canada's claim that local community control is not a benefit under the Strategy:

> Underlying these [*Charter*] issues is a fundamental difference in approach between the applicants and HRDC as to what the benefit generated by AHRDS is. HRDC is of the view the benefit of the AHRDS is access to programming with local community control, stated as merely a goal of AHRDS but not a benefit.
>
> Canada takes on the "local community control" issue directly. It acknowledges that one of its stated objectives in establishing AHRDS was to transfer responsibility for the design and delivery of labour market programs directly to Aboriginal organizations themselves. Canada states the AHRDS was intended to be flexible to ensure Aboriginal organizations would have the authority to make decisions to meet the needs of their communities while being accountable for clear performance results. (Reasons, paras. 58-59)(emphasis added)

37. He then went on to detail the Respondents' position on the benefit provided by the Strategy:

> The applicants counter by stating AHRDS is a comprehensive program providing a number of key benefits and local community control is foremost amongst them, since this benefit provides community control over program design, program delivery, program administration and funding allocation in an era when HRDC is no longer involved in those functions, having transferred them through AHRDAs. The applicants say the benefit of local community control allows communities the flexibility to design and implement labour market strategies tailored to meet their respective labour market needs. Moreover, AHRDS yields to Aboriginal individuals a locally controlled representative community organization accountable to them and having the required knowledge of the community. (Reasons, para. 63)(emphasis added)

38. Canada may not like Lemieux J.'s factual finding that local community control is a benefit provided by the Strategy, but it cannot fairly say that this finding was "perverse and capricious" or "made without regard to the evidence before the Court".

B. Lemieux J. Correctly Found That The Strategy Violates Section 15(1) of the *Charter*

(a) Section 15(1)

39. Section 15(1) of the *Charter* provides as follows:

> 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 on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

(b) The purpose of the equality guarantee

40. 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 (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497 at para. 51, *per* Iacobucci J. for the Court).

41. The purpose of s. 15(1) encompasses both preventing discrimination and ameliorating the conditions of disadvantaged persons (*Lovelace v. Ontario*, [2000] 1 S.C.R. 950 at para. 60, *per* Iacobucci J.). Section 15(1) was designed to advance the purpose of "remedying or preventing discrimination against groups suffering social, political or legal disadvantage in our society" (*R. v. Turpin*, [1989] 1 S.C.R. 1296 at p. 1333, *per* Wilson J.)(emphasis added). The Supreme Court has stressed that "[t]hin and impoverished vision[s] of s. 15(1) are to be avoided" (*Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624 at para. 73, *per* La Forest J.).

(c) The 3-stage approach under s. 15(1)

42. Section 15(1) involves the following three broad inquiries (*Law*, para. 88):

> Does the impugned law (a) draw a formal distinction between the claimant and others on the basis of one or more personal characteristics, or (b) fail to take into account the claimant's already disadvantaged position within Canadian society resulting in substantively differential treatment between the claimant and others on the basis of one or more personal characteristics?

> Is the claimant subject to differential treatment based on one or more enumerated and analogous grounds?
>
> Does the differential treatment discriminate, by imposing a burden upon or withholding a benefit from the claimant in a manner which reflects the stereotypical application of presumed group or personal characteristics, or which otherwise has the effect of perpetuating or promoting the view that the individual is less capable or worthy of recognition or value as a human being or as a member of Canadian society, equally deserving of concern, respect and consideration?

Stage 1: Lemieux J. Correctly Found That The Strategy Imposes Differential Treatment On The Respondents And First Nation Members Living On-Reserve

43. The first stage of the s. 15(1) inquiry requires the court to determine whether the impugned law or program: (a) draws a formal distinction between the claimants and others on the basis of one or more personal characteristics; or (b) fails to take into account the claimants' already disadvantaged position within Canadian society resulting in substantively different treatment between the claimants and others on the basis of one or more personal characteristics.

44. This stage of the inquiry recognizes that the equality guarantee in s. 15(1) of the *Charter* is a comparative concept. As explained by Iacobucci J. in *Law*:

> The object of a s. 15(1) analysis is not to determine equality in the abstract; it is to determine whether the impugned legislation creates differential treatment between the claimant and others on the basis of enumerated or analogous grounds, which results in discrimination. (para. 57)

45. Accordingly, it is first necessary to determine the relevant comparator group, in order to then determine whether the claimants are subject to differential treatment.

(a) Lemieux J. correctly identified the appropriate comparator group: First Nation Band communities

1. Lemieux J.'s reasons

46. Lemieux J. correctly identified the claimants as "First Nation members of urban Aboriginal communities living off-reserve in Winnipeg, Toronto and in the Niagara Peninsula and First Nation members who have no reserve and live in Aboriginal communities in the Ottawa Valley" (Reasons, para 106).

47. He then adopted the comparator identified by the Winnipeg applicants:

> I accept the comparator group proposed by counsel for the Winnipeg applicants. The applicants are to be compared with First Nations members living on-reserve for the purpose of determining whether they and the communities they live in are treated differently by the impugned government programs, the AHRDS. In this context, the comparison may also be said to be between First Nation band

> communities and First Nation urban and rural non-band communities (which was the comparison in *Lovelace*, *supra*, para. 64). (Reasons, para. 108)(emphasis added)

2. The claimants have a *prima facie* right to choose the comparator

48. Lemieux J.'s adoption of the comparator group identified by the Winnipeg applicants correctly recognized that *Charter* claimants have the *prima facie* right to identify the group with whom they are to be compared under s. 15(1). The has been accepted by the Supreme Court (*Law*, paras. 56-58 and 88(6); *Lovelace*, para. 62). The determination is conducted from the perspective of the claimant (*Law*, para. 59).

49. Nevertheless, in limited circumstances a court can refine the comparator chosen by the claimants. This was explained by Iacobucci J. in *Law* as follows:

> [T]he claimant's characterization of the comparison may not always be sufficient. It may be that the differential treatment is not between the groups identified by the claimants, but rather between other groups. Clearly, a court cannot, *ex proprio motu*, evaluate a ground of discrimination not pleaded by the parties and in relation to which no evidence has been adduced: see *Symes*, *supra*, at p. 762. (para. 58)(emphasis added)

50. The Court also noted that "[l]ocating the relevant comparison group requires an examination of the subject-matter of the legislation and its effects, as well as a full appreciation of context" (*Law*, para. 88(6)). See also *Lovelace*, para. 62.

3. Canada asserts that there is no comparator because the claimants are not "groups" but rather are just "diverse Aboriginal individuals"

51. Canada does not assert that the claimants should not have been allowed to choose the comparator group, nor does it seek to "tweak" or refine this comparator group. Canada's attack is more fundamental. It asserts that the claimants lack legally relevant common features and hence are not even groups at all, but rather are just a "very diverse group of Aboriginal individuals". This is what Canada says:

> The Application Judge had before him a very diverse group of Aboriginal individuals. Two individuals have status under the *Indian Act*, three do not. Some live in large urban areas (Toronto and Winnipeg), a mixed urban and rural area (Niagara Peninsula), and a rural off-reserve area (the Ardoch Algonquin). One of the Claimants is a corporation purporting to speak for the Winnipeg Aboriginal community on all matters, including Aboriginal employment issues. (Canada's Memorandum, para. 54)

52. Canada falls just short of denying that the claimants are members of communities, though this is the clear import of its position.

4. CAP's response to Canada's assertion

(i) Lemieux J. correctly found that "the existence and functioning of urban and rural Aboriginal communities is beyond doubt"

53. Canada's position should be rejected. In applying the first stage of the s. 15(1) analysis, Lemieux J. expressly found as a fact that the Respondents are members of urban and rural Aboriginal communities, and pointed directly to the evidence before the Court on this issue. As he found:

> The existence and functioning of urban and rural Aboriginal communities is also beyond doubt. I need only refer to affidavits of Mary Richard and Wayne Helagson dealing with the Winnipeg Aboriginal community. The Toronto Aboriginal community was described in the affidavit of Joseph Hester and those in the Niagara Peninsula by Vince Hill. Chief Crawford deposed to the functioning of Ardoch. (Reasons, para. 110)(emphasis added)

54. Lemieux J.'s factual finding was amply supported by the evidence before him. Canada has not indicated what evidence Lemieux J. ignored, or why this finding is "perverse and capricious". Instead, Canada relies on only the bald assertion that the claimants do not "share any common features in respect of their treatment under the Strategy program that can appropriately be compared for the purposes of the s. 15(1) analysis" (Canada's Memorandum, para. 57).

(ii) *RCAP* confirmed the existence of urban Aboriginal communities

55. Lemieux J.'s finding that these specific urban and rural Aboriginal communities exist is consistent with the *RCAP*, which concluded that "[m]aintaining cultural identity often requires creating an Aboriginal community in the city" (*RCAP*, vol. 4, p. 531). Indeed, *RCAP* devotes an entire chapter to "Urban Perspectives" detailing the plight of Canada's urban Aboriginal peoples, who it noted make up almost half of this country's Aboriginal population (*RCAP*, vol. 4, chapter 7, "Urban Perspectives", pp. 519-621).

(iii) The Supreme Court has also recognized that off-reserve band members form a discrete and insular minority

56. The Supreme Court of Canada has similarly recognized that off-reserve and non-status Aboriginal peoples are distinct "groups" with *Charter* rights under s. 15(1), even though they may be very diverse. The Court has noted that these groups have faced a long history of discrimination from others in Canadian society. In *Corbière v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203, L'Heureux-Dubé J. drew on the findings of the *RCAP* and found that band

members living off-reserve form a vulnerable "discrete and insular minority" who have been targeted by discrimination. She stated as follows:

> [B]and members living off-reserve form part of a "discrete and insular minority", defined by both race and residence, which is vulnerable and has at times 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 living off reserves, particularly their Aboriginal identity and their desire for connection to their heritage and cultural roots. As noted by the Royal Commission on Aboriginal Peoples,
>
> > Before the Commission began its work, however, little attention had been given to identifying and meeting the needs, interests and aspirations of urban Aboriginal people. Little thought had been given to improving their circumstances, even though their lives were often desperate, and relations between Aboriginal people and the remainder of the urban population were fragile, if not hostile.
> >
> > The information and policy vacuum can be traced at least in part to long-standing ideas in non-Aboriginal culture about where Aboriginal people 'belong'. [*Report of the Royal Commission on Aboriginal Peoples* (1996), vol. 4, *Perspectives and Realities*, at p. 519.] (para. 71)

57. L'Heureux-Dubé J. also noted that stereotypes persist concerning where Aboriginal peoples "belong" – on reserves – which pose barriers to their ability to form urban communities. She stated as follows:

> Similarly, there exist general stereotypes in society relating to off-reserve band members. People have often been only seen as "truly Aboriginal" if they live on reserves. The Royal Commission wrote:
>
> > MANY CANADIANS THINK of Aboriginal people as living on reserves or at least in rural areas. This perception is deeply rooted and persistently reinforced....
> >
> > There is a history in Canada of putting Aboriginal people 'in their place' on reserves and in rural communities. Aboriginal cultures and mores have been perceived as incompatible with the demands of industrialized urban society. This leads all too easily to the assumption that Aboriginal people living in urban areas must deny their culture and heritage in order to succeed – that they must assimilate into this other world. The corollary is that once Aboriginal people migrate to urban areas, their identity as Aboriginal people becomes irrelevant. [*Perspectives and Realities*, *supra*, at p. 519] (para. 71)

58. Similarly, in *Lovelace* the Supreme Court confirmed that off-reserve and non-status Aboriginal peoples are vulnerable, disadvantaged and subject to stereotypes. Iacobucci J. for the Court cited approvingly the following findings from the *RCAP* (vol. 3, *Gathering Strength*, pp. 204, 225), confirming the disadvantaged position of non-status and urban Aboriginal peoples:

> In addition to the gap in health and social outcomes that separates Aboriginal and non-Aboriginal people, a number of speakers pointed to inequalities between groups

> of Aboriginal people. Registered (or status) Indians living on-reserve (sometimes also those living off-reserve) and Inuit living in the Northwest Territories have access to federal health and social programs that are unavailable to others. Since federal programs and services, with all their faults, typically are the only ones adapted to Aboriginal needs, they have long been a source of envy to non-status and urban Indians, to Inuit outside their northern communities, and to Métis people. […]
>
> Equity, as we use the term, also means equity among Aboriginal peoples. The arbitrary regulations and distinctions that have created unequal health and social service provision depending on a person's status as Indian, Métis or Inuit (and among First Nations, depending on residence on- or off-reserve) must be replaced with rules of access that give an equal chance for physical and social health to all Aboriginal peoples. (para. 70)(emphasis added)

59. Significantly, and contrary to Canada's position in this case, the Court in *Lovelace* found that several diverse non-status and off-reserve Aboriginal groups were entitled to claim the protection of s. 15(1) of the *Charter* for their communities. The Court described the diverse Charter claimants before the Court and then found as follows:

> Although the two appellant groups are primarily distinguished as being either First Nations or Métis, each of the seven appellant groups has its own unique history, culture, political goals, and relations with government. Indeed, this is a case which immediately invokes a deep appreciation for the diversity of Canada's aboriginal population. (para. 10)(emphasis added)

60. There was no suggestion in *Lovelace* that these diverse groups were disentitled to the protection of s. 15(1) of the *Charter* merely because of their diversity, as Canada asserts in this case. Canada seeks to deprecate the Respondents' communities *qua* communities and perpetuates the stereotype that Aboriginal peoples belong on reserves, since they cannot form diverse yet recognizable urban communities.

61. CAP submits that the Respondents' communities are indeed diverse, but what binds them together in this case is their exclusion from the Strategy on a discriminatory basis.

(b) Lemieux J. correctly found that the claimants have experienced differential treatment

62. Once the claimant and comparator groups have been established, the court must then determine whether the impugned law or program imposes differential treatment on the claimant and others, in purpose or effect (*Law*, para. 88(2)(A)). Section 15(1) scrutiny is not limited to distinctions set out in legislation, but extends to review ameliorative programs (*Lovelace*, para. 56).

1. Lemieux J.'s reasons

63. Lemieux J. concluded that the claimants have indeed experienced differential treatment, as they and their communities are excluded from participating in the Strategy on the same basis as

reserve-based Aboriginal communities, that is, by having local community control over labour market training programs. Lemieux J. found as follows:

> The benefit denied or unequal treatment imposed claimed by the applicants is the inability under the ARDHS for the communities they live in to do what First Nation members living on-reserve communities can do for their members, both on and off-reserve: decide how best to devise and implement training programs, decide which type of program is needed to serve Aboriginal peoples in their communities, allocate finding [*sic*] for this purpose and ensure service providers function appropriately in a context of accountability. (Reasons, para. 112)

64. Later in his reasons, Lemieux J. confirmed that the Strategy draws a distinction by giving reserve-based communities local community control, and by failing to give the claimants such control. He also found this distinction is not overcome by the Urban Component of the Strategy, as this also fails to provide local community control. Lemieux J. ruled as follows:

> ARDHS draws a distinction between the applicants' communities and those of the comparator group. First Nation band communities enjoy the benefits of local community control while the applicants' communities do not. The distinction is not overcome by the urban component of ARDHS whose purpose is different: to ensure access in urban and rural communities to supplement the primary responsibility of ARDHA holders (First Nation bands) to serve their members in those communities. As counsel for Canada argued this is not a case where the applicants allege they were denied funding when they applied for it. The applicants have met the first stage. (Reasons, para. 116)

2. Lemieux J.'s finding of differential treatment was correct

65. Lemieux J.'s finding of differential treatment was correct. Exclusion of one Aboriginal group from a program provided to another Aboriginal group is sufficient to establish differential treatment.

66. Thus, in *Corbière* the Supreme Court found differential treatment on the basis that s. 77(1) of the *Indian Act* drew "a distinction between band-members who live on-reserve and those who live off-reserve, by excluding the latter from the definition of 'elector' within the band. This constitutes differential treatment" (para. 57). Similarly, in *Lovelace* the Court found differential treatment because the Province of Ontario excluded the Aboriginal claimants in that case from a share in a First Nations Fund derived from casino proceeds and from any related negotiation process (para. 66).

67. Similarly, here, as Lemieux J. found, the claimants were excluded from entering Agreements under the Strategy because they were not reserve-based First Nations band communities. This established differential treatment.

3. Canada asserts that local community control is not a benefit of the Strategy

68. Canada asserts that the Respondents are not treated differently under the Strategy because "[t]he benefit provided by the Strategy is individual access to Aboriginal-specific human resource programming" (Canada's Memorandum, para. 60). Its claims that Lemieux J. erred in finding that the benefit of the Strategy is "local community control" (Canada's Memorandum, para. 61), and that this was an error of mixed fact and law (Canada's Memorandum, para. 62).

4. CAP's response to Canada's assertion

(i) Lemieux J.'s finding as to the benefit provided under the Strategy is a question of fact, not mixed fact and law

69. As noted above, an assessment of the benefit provided under the Strategy is not a finding of mixed fact and law, but rather a finding of fact. It does not involve an application of any legal standard to a set of facts. Rather, it involves an assessment of the nature of the Strategy and the benefits it provides, based on the evidence adduced. Such a factual finding is reviewable on the standard of palpable and overriding error.

(ii) There was ample evidence in the record to support Lemieux J.'s finding

70. As noted above (para. 24), a court will be hard-pressed to find palpable and overriding error where evidence exists to support the finding. In this case, as set out in the Respondents' Memoranda of Law, Lemieux J.'s finding was amply supported by the record. In 1995, HRDC itself acknowledged that "[t]he Aboriginal population in Canada is not homogeneous. […] The diversity of Aboriginal communities means that delivery should be community-based, through a wide-variety of Aboriginal jurisdictions, development institutions and related authorities" (*Appeal Book*, vol. 3, pp. 691, 694)(emphasis added). In 1998, HRDC's "Information Handbook" for the Strategy stated, under the heading "Lessons Learned", that "local control over the delivery mechanism is regarded as the most important element" of the regional bilateral agreements HRDC entered into with Aboriginal communities (*Appeal Book*, vol. 13, p. 3964)(emphasis added). This continues to be HRDC's position: HRDC's website describes the benefit provided by the Strategy in these terms:

> The Aboriginal Human Resources Development Strategy is a five-year, $1.6 billion initiative which came into effect in April 1999. The Strategy allows Aboriginal organizations across the country to design and implement labour market programs and services for Aboriginal people in their communities. Aboriginal organizations are able to deliver not only labour market programs, but programs for youth, persons with disabilities and child care for First Nations and Inuit as well.

> There are numerous features of the Strategy. Each feature focuses on expanding the employment opportunities of Aboriginal people across Canada. HRDC recognizes the uniqueness of Aborginal groups in various communities; thus, the Strategy is flexible to ensure that Aboriginal organizations have the authority to make decisions that will meet the needs of their communities, while being accountable for clear performance results.
>
> (http://www.hrdc-drhc.gc.ca/dept/guide/aboriginal.shtml))(emphasis added)

71. Canada acknowledges that 633 Indian band communities are served by 52 AHRDA-holders (Canada's Memorandum, para. 64). Why would Canada enter into all these agreements with all these communities across Canada if it did not believe that local community control is beneficial?

(iii) The value of local community control over Aboriginal programming was recognized by *RCAP*

72. Canada's refusal to acknowledge that local community control is a benefit for Aboriginal service delivery under the Strategy is also refuted by the *RCAP*. The *RCAP* emphasized the need for and benefit of local community control of Aboriginal programming, particularly in urban Aboriginal communities. *RCAP* found as follows:

> Many urban services designed for the general population are not culturally relevant to Aboriginal people. […] Aboriginal people need and should have culturally appropriate services, designed by Aboriginal people, that promote healing through a holistic approach to individuals and communities. (*RCAP*, vol. 4, p. 554)(emphasis added)
>
> Programs developed by mainstream service agencies do little to protect and enhance Aboriginal cultural identity because they are not designed to do so. […] Their cultural unsuitability flows from the lack of direct Aboriginal involvement in their design, development and delivery. Aboriginal people and organizations are sharply under-utilized in all phases of programming, including monitoring and evaluation. (*RCAP*, vol. 4, p. 554)(emphasis added)
>
> Some mainstream agencies and municipal governments have begun to realize that they cannot adequately meet the needs of urban Aboriginal people and are turning more frequently to Aboriginal agencies to provide services. But Aboriginal organizations and service agencies are severely underfunded, often operating on an ad hoc or short-term project-funding basis. Unstable and fragmented funding arrangements make it impossible to plan and deliver quality services at an adequate level, and programs are often understaffed and overly dependent on unpaid and untrained volunteers. Burn-out of staff and volunteers is a constant problem as well. Administrators spend much of their time and energy seeking funding instead of delivering services. (*RCAP*, vol. 4, pp. 554-55).
>
> Government funding for urban Aboriginal services has not kept pace with the growth of the urban Aboriginal population. Although 45 per cent of all Aboriginal people now live in urban areas, funding does not reflect this reality. Federal funding for programs such as the Aboriginal health program apply only to First Nations people living on reserves and Inuit living in their home communities. Aboriginal people living in urban areas are generally ineligible for these programs (*RCAP*, vol. 4, at p. 555)

> It is obvious that the current delivery system is seriously deficient in meeting the needs of urban Aboriginal people. They are being served by a system that is essentially foreign to them. Clearly, it must change. (*RCAP*, vol. 4, at p. 555)(emphasis added)

73. The *RCAP* also found that "Aboriginal services institutions should be seen as fundamental to service delivery, not as discretionary initiatives. In addition to providing greatly needed services, they are important vehicles for supporting Aboriginal identity" (*RCAP*, vol. 4, p. 555)(emphasis added). It noted that "Aboriginal services institutions should be seen as long-term responses to the needs of urban Aboriginal people" and must be "accountable to the Aboriginal community" (*RCAP*, vol. 4, p. 557)(emphasis added). The *RCAP* also recommended that urban Aboriginal communities themselves should be responsible for determining service delivery for their communities:

> Service delivery options vary with the size of the client base and local cultural and political conditions. Aboriginal people, their leaders and service providers will ultimately determine the most appropriate systems of urban service delivery. Three fundamental objectives should, however, inform these decisions: first, urban-based strategies and delivery methods must ultimately be broad-based and inclusive; second, retaining and enhancing Aboriginal identity and culture should be cornerstones of urban service delivery; and third, the manner of service delivery must reflect the size of the client base. (*RCAP*, vol. 4, p. 560)(emphasis added)(emphasis added)

Stage 2: Lemieux J. Correctly Found That The Strategy's Differential Treatment Of The Claimants Is Based On The Established Analogous Ground Of Off-Reserve Status

74. The second stage of the s. 15(1) inquiry asks whether the differential treatment identified in the first stage is based on an enumerated or analogous ground.

1. Lemieux J.'s reasons

75. Lemieux J. found that the Strategy's differential treatment of the claimants and their communities is based on the analogous ground of off-reserve residency. He found as follows:

> Off-reserve residency has already been accepted as an analogous ground in *Corbière*. The only issue is whether the distinction was based on that analogous ground. I find that it did. HRDC's decision not to enter into an ARDHA, encompassing the element of local community control, with the organizations mandated by the applicants was based on where they lived, *i.e.* Aboriginality-residence. (Reasons, para. 120)

2. Off-reserve residency is an established analogous ground

76. As Lemieux J. correctly noted, the Supreme Court of Canada in *Corbière* accepted off-reserve residency as an analogous ground under s. 15(1) of the *Charter*. As McLachlin J. (as she then was) and Bastarache J. stated for the majority in *Corbière*:

> L'Heureux-Dubé J. ultimately concludes that "Aboriginality-residence" as it pertains to whether an Aboriginal band member lives on or off the reserve is an analogous ground. We agree. L'Heureux-Dubé J.'s discussion makes clear that the distinction goes to a personal characteristic essential to a band member's personal identity, which is no less constructively immutable than religion or citizenship. Off-reserve Aboriginal band members can change their status to on-reserve band members only at great cost, if at all. (para. 14)(emphasis added)

3. Canada asserts that "off-reserve" residency is not in issue

77. Canada asserts that Lemiuex J. broadened *Corbière* to apply to ordinary residence, and not simply to "off-reserve" residency (Canada's Memorandum, paras. 72-75). Canada relies on this Court's ruling in *Chippewas of Nawash First Nation v. Canada (Minister of Fisheries and Oceans)*, 2002 FCA 485, [2002] F.C.J. No. 1739.

4. CAP's response to Canada's assertion

78. The *Chippewas* case does not conflict with Lemieux J.'s ruling in this case. The *Chippewas* case was concerned with ordinary residence, not off-reserve residency, the issue in this case.

79. In *Chippewas*, this Court was asked to determine whether the exclusion of the Chippewas of Nawash First Nation (the "Nawash") from a federal program known as the Aboriginal Fisheries Strategy (the "AFS") violated s. 15(1) of the *Charter*. In particular, while the goal of the AFS was to enhance opportunities in Canadian fisheries for Aboriginal people, it denied funding to Aboriginal groups that pursued inland fishing within provincial boundaries. The Nawash, whose traditional fishing grounds encompassed a number of offshore islands in Georgian Bay, challenged the program on the grounds that it drew a distinction between Aboriginal people whose reserves and bands are on the coasts, and those whose reserves and bands are in other parts of Canada; in other words, on the basis of ordinary residency, rather than on the basis of "off-reserve" residency. The judge at first instance dismissed this argument on the ground that *Corbière* only recognized off-reserve status and not ordinary residence as an analogous ground. This Court affirmed that conclusion, holding as follows:

> The majority judgment in *Corbière*, written by McLachlin J. and Bastarache J., limited the analogous ground of Aboriginality-residence to off-reserve status. The issue in *Corbière* was a narrow one: whether a statutory provision which excluded off-reserve members of an Indian band from voting in band elections violates section 15(1) of the Charter. The majority agreed with L'Heureux-Dubé J.'s conclusion, in her concurring reasons, that Aboriginality-residence is an analogous ground, but warned that this conclusion should not be interpreted to mean that "ordinary residence" is an analogous ground. (para. 38)(emphasis added)

80. This finding plainly does not conflict with Lemieux J.'s ruling. Here, the claimants do not claim that they are discriminated against based on "ordinary residence". They claim that they are discriminated against because they are "off-reserve" Aboriginal communities. This is the analogous ground identified in *Corbière* and accepted by this Court in the *Chippewas* case.

Stage 3: Lemieux J. Correctly Found That The Strategy Is Substantively Discriminatory

81. The third stage of the s. 15(1) inquiry requires the court to consider whether the differential treatment identified above is substantively discriminatory. This stage is concerned with substantive equality, not formal equality (*Gosselin v. Quebec (Attorney General)*, 2002 SCC 84 at para. 22). The emphasis is on human dignity. In *Law*, Iacobucci J. elaborated on the meaning and importance of respecting human dignity, particularly within the framework of equality rights:

> Human dignity means that an individual or group feels self-respect and self-worth. It is concerned with physical and psychological integrity and empowerment. Human dignity is harmed by unfair treatment premised upon personal traits or circumstances which do not relate to individual needs, capacities or merits. It is enhanced by laws which are sensitive to the needs, capacities, and merits of different individuals, taking into account the context underlying their differences. Human dignity is harmed when individuals and groups are marginalized, ignored, or devalued, and is enhanced when laws recognize the full place of all individuals and groups within Canadian society. Human dignity within the meaning of the equality guarantee does not relate to the status or position of an individual in society *per se*, but rather concerns the manner in which a person legitimately feels when confronted with a particular law. Does the law treat him or her unfairly, taking into account all of the circumstances regarding the individuals affected and excluded by the law? (para. 53)(emphasis added)

82. The assessment of whether a law has the effect of demeaning a claimant's dignity should be undertaken from a subjective-objective perspective. The relevant point of view is not solely that of a "reasonable person", but that of a "reasonable person, dispassionate and fully apprised of the circumstances, possessed of similar attributes to, and under similar circumstances as, the group of which the rights claimant is a member" (*Law*, paras. 60-1). This requires a court to consider the individual's or groups traits, history, and circumstances, in order to evaluate whether a reasonable person, in circumstances similar to the claimant, would find that the impugned law or program differentiates in a manner that demeans his or her dignity (*Law*, para. 61).

83. This Court is required to examine both the purpose and effect of the program in question. While a law with a discriminatory purpose cannot survive s. 15(1) scrutiny, a discriminatory purpose is not required: it is enough for the claimant to demonstrate a discriminatory effect. As the Supreme Court stated in *Law*:

> [A]ny demonstration by a claimant that a legislative provision or other state action has the effect of perpetuating or promoting the view that the individual is less capable, less worthy of recognition or value as a human being or as a member of Canadian society […] will suffice to establish an infringement of s. 15(1). (para. 64)(emphasis added)

84. In *Law*, Iacobucci J. identified four contextual factors relevant in assessing whether a government program demeans a claimant's dignity in purpose or effect: (i) pre-existing disadvantage, stereotyping or vulnerability; (ii) the correspondence between the grounds and the claimant's actual needs, capacities or circumstances; (iii) the ameliorative purpose or effects on more disadvantaged individuals or groups in society; and (iv) the nature of the interest affected (para. 88(9)).

85. Lemieux J. correctly considered each of these contextual factors.

(a) The pre-existing disadvantage, stereotyping and vulnerability of the claimants

86. The Supreme Court has stated that a claimant's pre-existing disadvantage, stereotyping, prejudice or vulnerability is "probably the most compelling factor favouring a conclusion that differential treatment imposed by legislation is truly discriminatory" (*Law*, para. 63). As explained by Iacobucci J. in *Law*:

> These factors are relevant because, to the extent that the claimant is already subject to unfair circumstances or treatment in society by virtue of personal characteristics or circumstances, persons like him or her have often not been given equal concern, respect, and consideration. It is logical to conclude that, in most cases, further differential treatment will contribute to the perpetuation or promotion of their unfair social characterization, and will have a more severe impact upon them, since they are already vulnerable. (para. 63)

87. The Supreme Court has recognized that all Aboriginal peoples experience stereotyping, disadvantages and vulnerability. In *Lovelace*, Iacobucci J. for the Court endorsed the Court's earlier conclusion in *Corbière* that "all aboriginal peoples have been affected by the legacy of stereotyping against Aboriginal peoples". He noted that "Aboriginal peoples experience high rates of unemployment and poverty and face serious disadvantages in the areas of education, health and housing" (para. 69)(emphasis added). Both *Corbière* and *Lovelace* also recognized in particular the unique vulnerabilities, disadvantages and stereotypes suffered by members of off-reserve Aboriginal communities (see above, paras. 56-58).

88. The *RCAP* drew a moving, detailed portrait of the pervasive poverty and pre-existing disadvantage of urban Aboriginal communities across Canada:

> Aboriginal people in urban areas are also economically disadvantaged relative to their non-Aboriginal neighbours. Although labour force participation rates for urban Aboriginal residents approach those of other Canadians, their unemployment rate is two and a half times greater. Those working for 40 or more weeks a year had average incomes more than 36 per cent lower than non-Aboriginals in the same circumstances. Average annual income from all sources for Aboriginal people in urban areas lagged 33 per cent behind that of non-Aboriginal residents. (*RCAP*, vol. 4, at p. 521)(emphasis added)
>
> The incidence of poverty is high. In Winnipeg, Regina and Saskatoon, the 1991 census found that more than 60 per cent of Aboriginal households were below the low income cut-off—the poverty line defined by Statistics Canada. For single-parent households headed by women, the situation was disastrous—between 80 and 90 per cent were below the line. Moreover, the situation was almost as bad in nearly every major city in Canada. (*RCAP*, vol. 4, at p. 521)

89. *RCAP* found that the challenges facing urban Aboriginal peoples went beyond economic issues. RCAP concluded that the identity and survival of Aboriginal peoples are threatened in urban areas because of lack of funding to organize themselves as cohesive communities:

> [T]o cope in the urban milieu, support for enhancing and maintaining their culture is essential. Whenever that support is missing, the urban experience is profoundly unhappy for Aboriginal people (*RCAP*, vol. 4, at p. 520)
>
> Constant interaction with non-Aboriginal society in the urban environment presents particular challenges to cultural identity. Aboriginal people want to achieve an adequate standard of living and participate in the general life of the dominant society, while at the same time honouring and protecting their own heritage, institutions, values and world view. Sustaining a positive cultural identity is particularly important for Aboriginal people in urban areas because of the negative impact of their often troubled contacts with the institutions of the dominant society. Maintaining identity is more difficult because many of the sources of traditional Aboriginal culture, including contact with the land, elders, Aboriginal languages and spiritual ceremonies, are not easily accessible. (*RCAP*, vol. 4, at p. 522)
>
> Since a large percentage of Aboriginal people today live in urban settings, the extent to which they are able to sustain a positive cultural identity will significantly affect the survival of Aboriginal peoples as distinct peoples. (*RCAP*, vol. 4, at p. 522)
>
> Maintaining cultural identity often requires creating an Aboriginal community in the city. Following three decades of urbanization, development of a strong community still remains largely incomplete. Many urban Aboriginal people are impoverished and unorganized. No coherent or co-ordinated policies are in place, despite the fact that they make up almost half of Canada's Aboriginal population. They have been largely excluded from discussions about self-government and institutional development. Aboriginal people in urban areas have little collective visibility or power. It is clear that they urgently require resources and assistance to support existing organizations and create new institutions to enhance their cultural identity. (*RCAP*, vol. 4, at p. 531)

90. Against this background, there can be no doubt that Lemieux J. correctly concluded that the claimants experienced pre-existing disadvantage, stereotyping and vulnerability. As Lemieux J. concluded:

> The distinction drawn in the AHRDS, as it has been applied in the applicants' communities, is a distinction similar to that found in *Corbière* and *Lovelace*, *supra*. HRDC's decision not to enter into an AHRDA with representative organizations mandated by the applicants' communities perpetuates the historic disadvantage and continues the stereotype of the applicants being less worthy and less organized. It is difficult to understand HRDC's reasoning since these communities were considered by it to be worthy under Pathways. (Reasons, para. 129)

91. Canada asserts that the Strategy does not perpetuate the disadvantages of urban Aboriginal peoples. It claims that "[q]uite the contrary, the Strategy, by seeking to serve the needs of all Aboriginal people, wherever they live, recognizes the existence and importance of off-reserve and urban Aboriginal people as members of Canada's Aboriginal population" (Canada's Memorandum, para. 84).

92. Canada's assertion is without merit. As Lemieux J. found, the Strategy perpetuates the historic disadvantages facing urban Aboriginal peoples by placing control of programming in the hands of organizations having little or no connection to their urban communities.

93. The current structure of the Strategy forces a member of an urban Aboriginal community to either: (a) approach a band with whom he or she is formally registered for the purposes of the *Indian Act*, but with whom he or she may have no community connection whatsoever – thus depreciating his or her identity and community membership as an urban Aboriginal person in exchange for funding; or (b) to apply to the Urban Component, which does not accord local community control to the urban Aboriginal person's community, nor allow that person's community to design suitable programs that are sensitive to that person's needs and circumstances. In either case, the Strategy stifles rather than fosters the person's identity and the development of urban Aboriginal communities, and perpetuates the stereotype that these Aboriginal communities are not "real" communities at all.

94. As noted above, historical disadvantage is "the most compelling" indicator of discrimination (above, para. 86), and favours a finding of discrimination in this case.

(b) The correspondence between the grounds and the claimants' actual needs, capacities or circumstances

95. The second contextual factor is the correspondence, or lack thereof, between the grounds on which the claim is based and the actual needs, capacities or circumstances of the claimant or others with similar traits (*Law*, para. 88). It will be easier to establish discrimination to the extent that the impugned law or program fails to take into account a claimant's actual situation (*Law*, para. 70).

96. In considering this factor, Lemieux J. concluded that Canada had failed to demonstrate that the needs, capacities and circumstances of the applicants and their communities are different from those of First Nations reserve-based communities. Lemieux J. correctly found that "the benefits of local community control do not differ whether a First Nation person lives on the reserve or not" (Reasons, para. 132).

97. Canada challenges this finding by asserting that "[a]ll Aboriginal people receive the same benefit under the Strategy program, which is access to Aboriginal-specific employment training funds and services" (Canada's Memorandum, para. 86). Again, this ignores the beneficial nature of local community control. Lemieux J. recognized this benefit, and found it was given to reserve-based Aboriginal communities but withheld from the claimants. This factor also weighs in favour of a finding of discrimination.

(c) The Strategy is an underinclusive ameliorative program

98. The third contextual factor is whether the impugned law has an ameliorative purpose or effect upon a more disadvantaged person or group in society. The Supreme Court has said that "[u]nderinclusive ameliorative legislation that excludes from its scope the members of a historically disadvantaged group will rarely escape the charge of discrimination" (*Law*, para. 72).

99. Ordinarily, the question to be asked at this stage of the s. 15(1) analysis is whether the group excluded from the scope of the ameliorative law is in a more advantaged position than the person included within the scope of the law. In this case, however, the Court is faced with groups that are equally disadvantaged. Consequently, the Court must not engage in a "simplistic measuring or balancing of relative disadvantage" (*Lovelace*, para. 85). Rather, the inquiry should focus on the nature of the program in order to determine whether it is a targeted, as opposed to a more comprehensive, ameliorative program (*Lovelace*, para. 85).

100. In *Lovelace*, the Supreme Court explained that "exclusion from a targeted or partnership program is less likely to be associated with stereotyping of stigmatization or conveying the message that the excluded group is less worthy of recognition and participation in the larger society" (*Lovelace*, para. 86). In *Lovelace* itself, the Court considered whether Ontario's decision to give reserve-based casino proceeds to only First Nation communities registered as Bands under the *Indian Act* violated s. 15(1) of the *Charter*. The Court found no violation, on the ground that the claimants, who were off-reserve, non-status Aboriginal peoples, had failed to demonstrate

substantive discrimination. The Court emphasized that the program was developed on a partnered basis between Ontario and the Bands, which, together with the high degree of correspondence between the program and the actual needs, circumstances, and capacities of the Bands, distinguished it from a universal or generally comprehensive benefits program (*Lovelace*, para. 82).

101. Canada seeks to rely on the result in *Lovelace* by asserting that the Strategy is a targeted partnership program. It claims that "[e]xclusion from a targeted or partnership program, such as the Strategy, is less likely to be associated with stereotyping or stigmatization or conveying the message that the excluded group is less worthy of recognition and participation in the larger society" (Canada's Memorandum, para. 93)(emphasis added).

102. Lemieux J. rejected this submission, and this Court should as well. As Lemieux J. found:

> AHRDS is not a targeted program in the sense used in *Lovelace*, *supra*, where the program was tailored to ameliorate a specific group rather than the disadvantage potentially experienced by any member of society. AHRDS targets all Aboriginal people and seeks to ameliorate all. (Reasons, para. 136)

103. Canada's submission that this is a "targeted partnership program" is inconsistent with its earlier submission that all Aboriginal peoples have equal access to programming under the Strategy, which Canada asserted vigorously in claiming that "access" rather than "local community control" is the benefit of the Strategy (see above, para. 68). Plainly, unlike the program at issue in *Lovelace*, this is a program intended to benefit all Aboriginal peoples; it is not a targeted partnership program intended to benefit a select few. It is an underinclusive ameliorative program that excludes from its scope members of a historically disadvantaged group – urban and off-reserve Aboriginal peoples – and is therefore the sort of program that the Supreme Court has said will "rarely escape the charge of discrimination".

104. Canada again fails to see the benefit provided under the Strategy. It claims that "the program is designed for a disadvantaged group in society and provides a benefit in an area in which they are disadvantaged – employment training and human resource development" (Canada's Memorandum, para. 93)(emphasis added). Canada believes exclusion is not a problem since urban Aboriginal peoples technically have access to money. But this misses the point of local community control.

(d) The fundamental interests affected have constitutional and societal significance

105. The fourth contextual factor is the nature of the interest affected by the impugned law or program. The discriminatory calibre of differential treatment cannot be fully appreciated without

evaluating not only the economic but also the constitutional and societal significance attributed to the interest or interests adversely affected by the program in question. It is also relevant to consider whether the distinction restricts access to a fundamental social institution or affects a basic aspect of full membership in Canadian society, or constitutes a complete non-recognition of a particular group (*Law*, para. 74).

106. Lemieux J. correctly considered this factor and concluded as follows:

> What HRDC failed to recognize are the applicants' urban and rural First Nation communities, that they function as a community in which First Nation members participate, have traditional forms of governance which tasks organizations to carry out programs they consider necessary to address the needs of the members of that community. HRDC does not acknowledge a Roger Misquadis, a Mona Perry, a Perry Ogden, with others, has built an Aboriginal community in the places they live in. (Reasons, para. 141)

107. Canada asserts that the Strategy does not ignore urban Aboriginal communities, citing the Strategy's Urban Component, and by noting that it has entered into funding agreements with CAP and Native Women's Association of Canada (Canada's Memorandum, para. 96).

108. Canada's submission takes too narrow a view of the *Charter*'s equality guarantee. Canada focuses on whether a particular individual gets access to funding, a purely economic interest. But the *Charter* also extends to interests with "constitutional and societal significance" (*Law*, para. 74, citing *Egan v. Canada*, [1995] 2 S.C.R. 513 at paras. 63-4). Such broader interests are affected in this case, both for individuals and for communities.

109. The individual interests include the ability of off-reserve Aboriginal people to seek and maintain employment and, in turn, to participate in society. This engages their dignity in profound ways. Employment involves far more than merely receiving a salary; it is constitutive of our identity. In *Reference Re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313, Dickson C.J. said that

> Work is one of the most fundamental aspects in a person's life, providing the individual with a means of financial support and, as importantly, a contributory role in society. A person's employment is an essential component of his or her sense of identity, self-worth and emotional well-being. (p. 368)(emphasis added)(dissenting in the result)

These comments were echoed by La Forest J. in *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229, who said that "work cannot be considered solely from a pure economic standpoint. In a work-oriented society, work is inextricably tied to the individual's self-identity and self-worth" (p. 299)(emphasis added).

See also *Dunmore v. Ontario (Attorney General)*, [2001] 3 S.C.R. 1016 at para. 167, *per* L'Heureux-Dubé J. ("...employment is a fundamental aspect of an individual's life and an essential component of identity, personal dignity, self-worth and emotional well-being..."); *McKinley v. B.C. Tel*, [2001] 2 S.C.R. 161 at paras. 53-54, *per* McLachlin C.J. ("...the sense of identity and self-worth individuals frequently derive from their employment..." and "...the integral nature of work to the lives and identities of individuals in our society..."); and *Wallace v. United Grain Growers Ltd*., [1997] 3 S.C.R. 701 at para. 94, *per* Iacobucci J. ("...for most people, work is one of the defining features of their lives").

110. Fundamental community interests are also engaged. Local community control of employment programming is essential to preserve and enhance urban Aboriginal communities and to maintain Aboriginal identity. This is not just a question of money; it is a question of community survival. The Strategy is discriminatory.

C. The Strategy Cannot Be Justified Under Section 1 of the *Charter*

111. CAP agrees with and adopts the submissions of the Respondents that the Strategy cannot be justified under s. 1 of the *Charter*. CAP also agrees with the findings of Lemieux J., particularly his finding that Canada did not discharge its burden of showing that the Strategy minimally impaired the claimants' equality rights. As Lemieux J. noted, "Canada led no evidence of any study or arrangements considered short of shutting out the applicants' communities from participation, on an equal basis, in decision-making about labour market programming" (Reasons, para. 152)(emphasis added).

D. The Remedy Granted Should Be Upheld and Extended Nationally

112. With respect to remedy, Lemieux J. granted the following relief:

> HRDC is to eliminate the discrimination by providing community control over labour training programs to the applicants' communities. These communities can then, through representative organizations accountable and responsible to the community members, design, implement and fund training programs which will meet the needs of the Aboriginal community where the applicants reside. (Reasons, para. 158)

113. Lemieux J. limited his finding of the discrimination and the remedy he granted to the Respondents and their communities. As Lemieux J. stated:

> The discrimination which is to be remedied is specific to the applicants and their communities. I have no evidence of any other discriminatory implementation of AHRDS [the Strategy] by HRDC. The discrimination I have found consists of

> AHRDS's exclusion when it embraces the applicants' communities. (Reasons, para. 156)

114. Canada alleges that the Court's remedy is "impossible to comply with" (Memorandum, para. 104). Canada has not applied for a stay of the remedy, and is silent about what effort, if any, it has made to comply with the Court's decision. In fact, it has done nothing.

115. CAP agrees with the remedy granted by Lemieux J., but submits that it should be extended nationally, just as the Supreme Court extended nationally the local remedy given to the Batchewana band in *Corbière*.

116. Many other urban Aboriginal communities have been excluded from the Strategy in the same way as the Respondents. The evidence of their exclusion is simply that they are not included under the Strategy, which by Canada's admission is limited to the 633 Indian band communities with whom Canada has negotiated 52 Agreements under the Strategy (Canada's Memorandum, para. 64). All other Aboriginal communities across Canada are excluded. CAP therefore submits that Lemieux J.'s local remedy can and should be extended on a national basis.

117. It is entirely appropriate on appeal to extend a remedy granted to specific Aboriginal communities who happen to be before the Court, to other, similarly-situated Aboriginal communities who are not before the Court. The Supreme Court did just that in *Corbière*, where it extended the lower courts' finding that the exclusion of off-reserve Aboriginal peoples from voting in band elections was discriminatory, to members of other bands who were not before the Court. The Supreme Court found that this was appropriate, given that there was nothing to distinguish the situation of other Aboriginal peoples across Canada, and because the Attorney General had been given notice of the constitutional question before the Court raising the general constitutionality of the relevant legislation. The Court extended the remedy granted at trial by Strayer J. (as he then was), who, as the Supreme Court noted, had "confined his declaration to the Batchewana Band because the pleadings and evidence related only to that band" (*Corbière*, para. 107).

118. Here, Canada has similarly been on notice since the beginning that the Strategy was challenged generally, and not simply as it applied to the claimants' communities. The claimants' Notice of Application for Judicial Review had sought the following general relief, which was not limited to the particular communities before the Court:

> A declaration that the AHRDS violates the right of urban First Nations people and the members of First Nation communities which are not registered as "bands" under the Indian Act, to equality with members of Indian Act bands and the Inuit and

> Metis, contrary to section 15(1) of the Charter of Rights and Freedoms. (Notice of Application for Judicial Review: *Appeal Book*, vol. 1, p. 69)

119. The alternative to providing a national remedy is to require disadvantaged community by disadvantaged community to reconstruct and plead this case before the courts. These communities do not have resources for this; and it would encourage Canada to perpetuate the discrimination in the design of any successor program. This 'let them litigate' strategy is discriminatory and should be discouraged. It is for this reason that in other collective rights cases the courts have expressly disapproved a 'let them litigate' prescription.

> We do not agree with the submission that no structural changes should be made in separate school boards and that the enforcement of the minority's right to French language education should be left to the courts on applications alleging infringement of Charter rights under s. 24(1) [...] Minority linguistic rights should be established by general legislation assuring equal and just treatment to all rather than by litigation. (*Reference Re Education Act of Ontario and Minority Language Education Rights* (1984), 47 O.R. (2d) 1 at p. 57, *per curiam* (C.A.))

120. Each and every urban Aboriginal community across Canada should not have to litigate its exclusion on a community by community basis. Each and every one of these communities has been excluded from the Strategy on the same basis. The Court's remedy should therefore be extended to them as well.

Part V – Order Sought

121. CAP asks that this appeal be dismissed and that the remedy formulated by the lower court be extended nationally to similarly-excluded urban Aboriginal and off-reserve rural communities across Canada.

July 11th, 2003 ALL OF WHICH IS RESPECTFULLY SUBMITTED,

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Mahmud Jamal

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