Court File No.: 26165

IN THE SUPREME COURT OF CANADA
(Appeal from the Ontario Court of Appeal)

BETWEEN:

ROBERT LOVELACE, on his own behalf and on behalf of the Ardoch Algonquin First Nation and Allies, the ARDOCH ALGONQUIN FIRST NATION AND ALLIES, and CHIEF KRIS NAHRGANG, on behalf of the Kawartha Nishnawbe First Nation, the KAWARTHA NISHNAWBE FIRST NATION, CHIEF ROY MEANISS on his own behalf and on behalf of the Beaverhouse First Nation, and the BEAVERHOUSE FIRST NATION, CHIEF THERON MCCRADY on his own behalf and on behalf of the Poplar Point Ojibway First nation, the POPLAR POINT OJIBWAY FIRST NATION, and the BONNECHERE METIS ASSOCIATION & BE-WAB-BON METIS AND NON-STATUS INDIAN ASSOCIATION and ONTARIO METIS ABORIGINAL ASSOCIATION

APPELLANTS
(Applicants)

AND

HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO and THE CHIEFS OF ONTARIO

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PART I

STATEMENT OF FACTS

1. The Intervenor, The Congress of Aboriginal Peoples (formerly the Native Council of Canada), was incorporated in 1972 and is the recognized national representative organization of Aboriginal people who do not reside on reserves and is composed of 14 provincial and territorial off-reserve Aboriginal organizations.

2. The Congress of Aboriginal Peoples adopts that Statement of Facts in the Factums of the Appellants, Lovelace, et. al. and the Appellants, Be-Wa-Bon.

PART II

CONSTITUTIONAL QUESTIONS AND ISSUES ON APPEAL

3. The following three constitutional questions were set by this Honourable Court:

A. Does the exclusion of the Appellant Aboriginal groups from the First Nations Fund, and from the negotiations on the establishment and operation of the Fund, set up pursuant to s. 15(1) of the *Ontario Casino Corporation Act*, 1993 S.O. c. 25, on the grounds that they are not Aboriginal groups registered as *Indian Act* Bands under the *Indian Act*, R.S.C. 1985, c. I-5, violate s. 15 of the *Canadian Charter of Rights and Freedoms*?

B. If the answer to question No. 1 is yes, is the violation demonstrably justified under s. 1 of the *Canadian Charter of Rights and Freedoms?*

C. Is the exclusion of the Appellant Aboriginal groups from the First Nations Fund of the Casino Rama Project, and from the negotiations on the establishment and operation of the Fund on the grounds that they are not Aboriginal groups registered as *Indian Act* Bands under the *Indian Act*, R.S.C. 1985, c. I-5, *ultra vires* the power of the province under the *Constitution Act, 1867*?

PART III

ARGUMENT

The Congress' Perspective

4. The approach of the Province of Ontario to limit access to the First Nations Fund to only registered Indian Bands under the *Indian Act* ignores the desperate plight of non- registered Aboriginal people and Metis people who live off-reserves.

5. Both levels of government deny responsibility for off-reserve Aboriginal people.

6. What the province has done in restricting access to the First Nations Fund to Indian Bands is to adopt the very narrow classification that the federal government has taken pursuant to its responsibility under section 91 (24) of the *Constitution Act, 1867*.

7. While the Federal Government may think it has constitutional warrant for its narrow classifications of Aboriginal people under section 91 (24), Ontario clearly has none.

8. If the province of Ontario is permitted to adopt this policy, it will serve as a license for other provinces to do the same and empty the content of the guarantees of equality for Aboriginal people who are not status and Metis. These Aboriginal people seek by parity of treatment to escape their growing marginalization as an urban underclass in Canadian cities and rural off-reserve settings.

9. This case raises the issue as to whether Ontario can perpetuate the status and non-status divide in Canadian law and practice and one must question why they would do it.

Ontario's Interest

10. Throughout the 1980's, Indian Bands expanded large-scale profitable Indian gaming activities on their reserves. They were charged and resulting convictions were upheld by this court.

R v Pamajewon, [1996] SCR 821.

11. At this time, Ontario enacted the *Ontario Casino Corporation Act*. Section 1 (b) of this Act sets out the purpose of the Act, which provides *inter alia*, "to generate revenues for the province"

Ontario Casino Corporations Act 1993, SO 1193, s.l(b)

12. Contemporaneously, Ontario commenced negotiations with the Chiefs to license a casino ostensibly for them. Subsequently, Ontario announced that it would keep 20% of the revenues for itself.

13. The revenues are anticipated to be large: $100 million per year for 10 years. This Justice Cosgrove found equaled the "total sums presently expended by the government of Ontario, for all programs for all Aboriginals every year".

Reasons of Cosgrove, J paragraph 30.

14. Justice Cosgrove also found no evidence that Ontario considered "alternatives to the design of the program excluding Non-Status Aboriginals."

Reasons of Cosgrove, J paragraph 24.

15. Considering the ongoing systemic discrimination of off-reserve Aboriginal people and the amount of money at play, Ontario knew or ought to have known that its approach would pit Aboriginal group against Aboriginal group.

16. In short, the chiefs had profitable enterprise but a legal problem. Ontario had the legal solution apparently for sale. The negotiations for the bargain, which was later cloaked as an affirmative action measure, cut out the most disadvantaged, and weakest, Aboriginal people. Predictably this has set up the contest in this case, with one disadvantaged Aboriginal minority vying against another.

The- Problem of Minority Factionalism

17. In *The Federalist Papers,* #10, James Madison epitomized a "well-constructed Union" by "its tendency to break and control the violence of faction."

18. By "faction," Madison understood "citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse of passion or of interest, adverse

to the rights of other citizens, or to the permanent and aggregate interests of the community."

19. "The causes of faction could never be removed," Madison wrote; by "self-love" they were "sown into the nature of man." A well-constructed State had therefore to control the effects of faction, in the realization that "[t]he regulation of these various and interfering interests forms the principal task of modern legislation..."

20. Madison was addressing 18th century problems of "pure democracy" in "a society consisting of a small number of citizens." In small societies common passion is almost always felt. Small societies create opportunity for [m]en of factious tempers ... [to] first obtain the suffrages, and then betray the people." In small societies these "cabals of a few" lead in almost every case "to sacrifice the weaker party or an obnoxious individual." In the result, "such democracies have ever been spectacles of turbulence and contention; have ever been found incompatible with personal security or the rights of property; and have in general been as short in their lives as they have been violent in their deaths."

The Federalist Papers, (ed. I. Kramnick, Penguin, 1987), #10, p. 122-26

21. Madison' s response to the problem of democracy in his time was the formation of a large, federal republic. Madison did not consider equality or affirmative action problems -- the situation where government directs its largess to small communities of disadvantaged groups.

22. Within the "small societies" of disadvantaged persons targeted by affirmative action programs the problem of "minority faction" reappears with a vengeance. Certain factions within minority communities are more articulate, fortuitously funded, better organized, stronger, with resultant better capacity to persuade its members, and especially with greater power to trumpet its voice in the corridors of government power. Weaker groups within the minority are correspondingly disempowered.

23. It is submitted that sec. 15(1) and (2) must be interpreted as preventing, in the targeting of governmental largess at minority communities, the formation of unholy alliances between minority factions within disadvantaged groups and governments seeking the approval of minority communities.

Minority Factionalism and the Power to Self Define

24. The problem of minority factionalism -- of minorities within minorities -- becomes particularly salient where cultural groups enjoy semi-autonomous power to define their membership, including power to include objecting members and exclude dissenters.

25. Where a minority group enjoys or seeks government derived powers or benefits, the danger arises that a faction within the group will use its power to self define to appropriate the benefits for a narrowly defined minority within the minority community, and oppressively exclude others.

For examples of such conflict see *Native Women's Assn. v. Canada* (1992), 10 C.R.R. (2d) 269 (Fed. Ca) rev'd for want of an adequate evidentiary foundation: [1994] 3 S.C.R. 627 and *Prairie*

Treaty Nations Alliance v. Mulroney, Ont. H.C.J. March 29,1985 (reproduced in *Constitutional Law of Canada*, 2nd 1985, II, p. 1592)

26. It is submitted that where government devolves powers or benefits on self-defining cultural groups, government is obligated to require that the group use its power to distribute the benefits to its members responsibly.

W. Kymlicka, *Finding Our Way: Rethinking Ethnocultural Relations in Canada* (Oxford U.P., 1998), p. 62-4: "To understand the relationship between group rights and individual rights we need to distinguish two kind of rights that a group might claim. The first involves the right of a group against its own members; the second involves the right of a group against the larger society." Kymlicka then warns against "the possibility that individuals or sub-groups within Indian communities could be oppressed in the name of group solidarity or cultural purity."

Section 15 of the Charter

27. When government designs affirmative action programs under s. 15(2) of the Charter government's responsibility to protect disempowered groups *within* larger minority communities against abusive minority factionalism comes into relevance. It is submitted that this Court's s. 15(1) jurisprudence, applied with sensitivity to the problem of minorities within minorities, should shape the nature of government's responsibility.

28. This Court's analysis of programs under s. 15(1) involves a three part inquiry: i) does the impugned action or law draw a formal distinction between the claimant and others on the basis of one or more personal characteristics; ii) does it subject the claimant to differential treatment based on one or more of the enumerated or analogous grounds; and iii) does it discriminate in a substantive sense bringing into play the purpose of s. 15(1) in remedying such ills as prejudice,

stereotyping and historical disadvantage?

Law v. Canada, [1999] 1 S.C.R. 497 at 529, 539.

29. As applied to the question of government's creation of affirmative action programs under s. 15(2) it is submitted that the *Law* test requires an analysis of whether government has drawn an unwarranted distinction between groups in the minority community which is discriminatory.

30. The problem of minority factions should be considered initially within the first part of the *Law* test. The analysis should question whether a formal distinction has been drawn between "haves" and "have nots" *within* the minority group. The comparator groups should not be between the minority community and the larger society.

31. If government has drawn a formal distinction between "haves" and "have nots" *within* the minority group, the reviewing Court should go on to consider whether the distinction is discriminatory under the third part of the *Law* test. Relevant to this inquiry in the context of affirmative action programs is whether Government has discharged its responsibility to prevent oppression of "have nots" by the "haves" within the minority community.

32. In determining whether Government has discharged its responsibility to prevent oppression of "have nots" within the minority the Court may consider evidence of disproportionate power between groups within the minority community.

33. The Court may also consider evidence of an undue alliance between "have" factions within the minority community and government. Indicators of an undue alliance would include privileged access to government, privileged funding, government participation in structuring the "have" faction, government participation in facilitating membership in the "have" faction, government participation in the organizational capacity of the "have" faction, and related matters.

34. Following on consideration of these factors the Court should determine whether the exclusion of one or more minority communities within the minority group is irrational in a substantive sense. Relevant to this consideration would be whether the exclusion exacerbates already existing inequalities within the group.

35. The onus on Government to demonstrate that the exclusion of the disempowered groups in the minority community is rational should not be unduly onerous. The Court should recognize that government may validly exclude certain groups within the minority community from receiving program benefits if there is any rationally articulated reason for doing so.

36. In demonstrating that it has a rational reason for excluding minorities within the minority community from program benefits government should be required to establish that it made at least minimal efforts to understand and address the problem of minority factionalism within the targeted minority community. Government could demonstrate this in any variety of ways: by

showing that it consulted with representative groups within

the minority community, by procedurally fair statutory or administrative findings, by program design, by including responsive machinery within the program, or otherwise.

> *Ontario Human Rights Guidelines on Special Programs*, (Aug., 1990), p. 6
> Canada, *A Matter of Fairness: Report of the Special Committee on the Employment Equity Act* (May, 1992), pp. 15-17

37. That government should be held to at least a weak standard of justifying its objectives takes on all the more importance in the context of government's dealings with aboriginal peoples. Whether in the context of the fiduciary duty developed in *Guerin v. The Queen*, [1984] 2 S.C.R. 333 and its progeny, or in the context of existing aboriginal rights within s. 35(1) of the *Constitution Act, 1982* considered in *R. v. Sparrow*, [1990] 1 S.C.R. 1075 and *Delgamuukw v. British Columbia*, [1997] 3 S.C.R.1010 justification is the essential obligation imposed on the Crown. Throughout all these contexts, this Court holds the Crown to a high standard of honourable dealing with the aboriginal peoples of Canada. As stated in *Sparrow*, in the context of existing aboriginal rights within s. 35(1), at p. 1110:

> The way in which a legislative objective is to be obtained must uphold the honour of the Crown and must be in keeping with the unique contemporary relationship, grounded in history and policy between the Crown and aboriginal peoples.

38. In the context of affirmative action programs directed at aboriginal peoples, a reviewing Court can insure that a high standard of honourable dealing is achieved only if the Crown's actions are transparent, justifiable and justified.

Positions of the Court of Appeal, Canada and Ontario

39. The Court of Appeal stated: "Governments should ... be able to rely on s. 15 to provide benefits to a specific disadvantaged group and should not have to justify excluding other disadvantaged groups even if those groups suffer similar disadvantage."

40. Canada and Ontario rely on the Court of Appeal. They say that court review under s. 15(2) is limited to: (1) an identification that the target group intended to be benefitted by a program; and (2) an assessment that a complainant of underinclusion is not within the targeted group. (Canada, paras. 10, 40; Ontario, para. 57).

41. Canada and Ontario would bring within s. 15(2) only laws, programs or activities that have as their primary objective the amelioration of conditions of disadvantage experienced by the targeted group. (Canada, para. 42 ff).

42. The danger of these approaches is that government may construct a program objective that cloaks its intentions to benefit its friends in the minority communities and exclude others for no reason other than its own political advantage or favoritism. The reason why s. 15(1) was cast broadly in its present form was to guard against these clear problems of self-serving, or unjustifiable classification.

> M. Drumbl & J. Craig, "Substantive Equality and Constitutionally Problematic Affirmative Action," (1997), 4(1) Rev. of Con. Studies 83, 116

Tarnopolsky, "The Equality Rights" in Tarnopolsky and Beaudoin (eds.), *The Canadian Charter of Rights and Freedoms* (Carswell, 1982), p. 395 at. p. 421

Bliss v. A. G. Canada (1978), 92 D.L.R. (3d) 417

43. An approach to s. 15(2) that restricts judicial review of Government's objective allows Government easy access to frustrate the limits on arbitrary classification that is a central purpose of s. 15(1). Additionally, restrictive review of Government's objective gives government easy access to construct perverse programs behind a seemingly benign facade.

44. Para. 21 & 22, *supra*. would eliminate this danger by imposing the most minimal standard of justification for programs claimed to be supported by s. 15(2) -- the standard of rationality. Moreover, the suggested requirement of rationality extends only to a consideration of why one minority group within the minority community was privileged over others. It is extravagant for Government to suggest that this anaemic standard of justification would discourage Government from carrying out the "difficult choices of governance" involved in helping the disadvantaged (Canada, para. 6), or "drastically limit the sort of affirmative action programs that could be developed" (Ontario, para 103). All that would be required is that Government justify in some minimal way or by some minimal means, that its decision to exclude a minority within the minority is for a rational purpose and not arbitrary in the sense of cloaking an intention to benefit its friends or gain political advantage, free of constitutional review under s. 15.

45. Openness and justification are the great enemies of arbitrary action in the modern administrative state.

> Where a society is marked by a culture of justification, an exercise of public power is only appropriate where it can be justified to citizens in terms of *rationality and fairness.* Arbitrary decisions and rules are seen as illegitimate. Rule by fiat is unaccepted. But these standards do not just stand as abstract rules. Indeed, most importantly, the ability to call for such a justification as a precondition to the legitimate exercise of public power is regarded by citizens as their *right*, a right which only illegitimate institutions and laws venture to infringe. The prevalence of such a cultural expectation is, in my view, the definitive marker of a mature Rule of Law. I suggest that Canada, in particular, has developed a functional culture of justification, especially since the introduction of the *Charter of Rights and Freedoms* in 1982.
>
> Justice Beverley McLachlin, 'The Roles of Administrative Tribunals and Courts in Maintaining the Rule of Law" (1999), 12 C.J.A.L.P. 171

Application to This Case

46. Justice Cosgrove found as a fact that:

> [para 8] I am satisfied further that the four-part rationale now argued by the respondents is an inadequate basis to justify the exclusion of the applicants from the casino project because the evidence in support of the rationale is either invalid or the conclusions urged flowing from the evidence are flawed.
>
> [para 9] 1. Identity. I agree with the applicants that the issue of non-status identity is not as complex as alleged by the respondents. In a related proceeding, I have required the parties to negotiate a formula (with the Government of Canada as an invited participant) to reach a conclusion on this issue. (Perry et al v. The Queen, [1996] 2 C.N.L.R., 167 at 176)
>
> [para10] 2. Accountability. I agree with the applicants that this issue has been satisfactorily resolved between Ontario and non-status Aboriginal groups in other programs (such as the program designs between Ontario and the applicant Be-Wab-Bon Metis and Non-Status Indian Association) which are a ready precedent for the casino project. I agree further that any requirement for additional reasons of accountability could and should be the subject of discussions between the parties.
>
> [para11] 3. Reserves. The evidence shows that not all Indian Act bands have reserves. While the host band for the Casino Rama was able to use reserve lands, the relevance to the issue of the sharing of revenues is marginal.
>
> [paral2] 4. Project Development. While the early involvement in the Casino project of the Indian Act bands is commendable, in a jural context, it is irrelevant to the issue of exclusion justification.
>
> [paral3] I am satisfied, moreover, that the applicants have met the burden of proof in establishing that the non-status Indians and Metis are a disadvantaged group vis-a-vis the rest of society and members of bands under the Indian Act. I have indicated that I agree that the statistical evidence provided by the Chiefs of Ontario does not, on careful analysis, provide

> contrary proof. On this issue, I was particularly impressed with the information contained in the Supplementary Application Record affidavits of the original applicants herein, Robert Lovelace, Kris Nahrgang, Roy Meaniss and Richard Zohr which speaks to discrimination against non-status Aboriginals, both in a quantitative and qualitative sense ... [paral5] The argument by Ontario that distinctions (different level of treatment by Ontario of status and non-status Aboriginals) between Aboriginal peoples are not distinctions between the privileged and the disadvantaged but are simply distinctions between different groups of disadvantaged people I find to be specious.

47. The Court of Appeal rejected Justice Cosgrove's findings because "it was an error to treat this case and *Perry* as a package and from the beginning this case was considered on an improper basis." Also, "[t]his fundamental error of the motion judge seems to have influenced his findings on other aspects of the case. Most notably, it is manifested in a suspicious attitude toward the government that caused him to misapprehend some of the evidence before him." The Court of Appeal continued:

> The record also does not support the motion judge's conclusion that the decision to exclude non-status Indians and Metis from the Casino Rama project was "starkly arbitrary" or his conclusion that the rationale for excluding non-status Indians and Metis from the project was recently constructed in response to the application.
>
> With respect to the first conclusion, the Casino Rama project was a pilot project that was, from the outset in 1993, initiated, designed and negotiated with First Nations under the Indian Act, as detailed in the affidavit of John Rabeau. There may have been difficulties with the precise meaning of "First Nations under the Indian Act", "bands under the Indian Act" and "reserve based communities", but there is no doubt that the purpose of the project was to provide a fund for the socio-economic development of the aboriginal communities represented by the Chiefs of Ontario. None of the applicants raised any objection to the project from 1993 to 1995 and, before the Perry case, none of the applicants asserted an interest in the profits of the project or made any kind of request to participate in the Chiefs of Ontario's initiative.
>
> With respect to the second conclusion, Ontario was clearly motivated by the self-government commitment contained in the statement of political relationship executed by Ontario and the band representatives in 1991. The government's motivation was reflected in the request for proposals document put together to solicit bids for a commercial casino operator, which was issued over a year before the application in this case. Both conclusions of the motion judge demonstrate that he misapprehended the evidence.
>
> These errors of the motion judge were all findings that he used to reach his ultimate decision on the application and raise serious questions about the validity of his final determination.

48. Importantly, the Court of Appeal did not make independent findings of fact that the

government's reason for excluding the Appellants was rational. Rather, the Court of Appeal concluded (erroneously in law, it is submitted) that:

> the main object of the Casino Rama project is to ameliorate the social and economic conditions of bands. The exclusion of the applicants is not discriminatory because the applicants are not among the groups the project was designed to benefit. The project is therefore authorized by s. 15(2) of the Charter, and does not infringe s. 15(1) of the Charter.

49. The Appellants Metis and non-status aboriginal communities were excluded from the discussions and negotiations about the Casino Rama project and the establishment of the fund for economic community development.

50. There is no other evidence in the record that Ontario took steps to understand or address the problem of minority factionalism within the larger aboriginal community which it targeted. Nor has Ontario satisfied any of the reviewing Courts, properly instructing themselves in law, that it had a rational reason for excluding the Metis and non-status aboriginal groups from program benefits.

51. That Government should have negotiated extensively with one faction in the aboriginal community -- particularly a faction that was profiting from illegal on-reserve gaming -- with a view to concluding an agreement to split gambling revenues with that group exacerbates the problems of minority factionalism which is the theme of this factum. The facts open the door to the core problems of undue alliances between government and "have" factions within the minority community, self serving justifications, political motivation and favoritism.

52. For these reasons, it is submitted that Ontario's Casino Rama project cannot be supported under s. 15(2).

Sections 15(1) and 1 of the Charter

53. Intervenor, Congress of Aboriginal Peoples, adopts the submissions of Appellants, Be-Wab-Bon at paras. 38 - 68 and 89 -111 that the exclusion of Metis and Non-Status Indians from sharing in the Casino Rama program violates s. 15(1) and cannot be saved by s. 1.

PART IV

ORDER REQUESTED

54. Intervenor, the Congress of Aboriginal Peoples, requests that the appeal be allowed, and the order of Justice Cosgrove be restored.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED at Ottawa, Ontario this 2nd day of December, 1999.

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Marc J.A. LeClair

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Joseph Eliot Magnet

Counsel for the Intervenor

PART V

TABLE OF AUTHORITIES