lovelace *v*. ontario

Robert Lovelace, on his own behalf and on behalf of
the Ardoch Algonquin First Nation and Allies,
the Ardoch Algonquin First Nation and Allies,
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, 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 Métis Association *Appellants*

and

Be-Wab-Bon Métis and Non-Status Indian Association and
the Ontario Métis Aboriginal Association *Appellants*

v.

Her Majesty The Queen in right of Ontario
and the Chiefs of Ontario *Respondents*

and

The Attorney General of Canada,
the Attorney General of Quebec,
the Attorney General for Saskatchewan,
the Council of Canadians with Disabilities,
the Mnjikaning First Nation,
the Charter Committee on Poverty Issues,
the Congress of Aboriginal Peoples,
the Native Women's Association of Canada and
the Métis National Council of Women *Interveners*

Indexed as: Lovelace *v*. Ontario

Neutral citation: 2000 SCC 37.

File No.: 26165.

1999: December 7; 2000: July 20.

Present: L'Heureux-Dubé, Gonthier, McLachlin, Iacobucci, Major, Bastarache and Arbour JJ.

on appeal from the court of appeal for ontario

Constitutional law -- Charter of Rights -- Equality rights -- Indians -- Proceeds of province's first reserve-based commercial casino to be distributed only to Ontario First Nations communities registered as bands under Indian Act -- Whether province's decision to exclude non-band aboriginal communities from casino proceeds and from participating in the negotiations infringing s. 15(1) of Canadian Charter of Rights and Freedoms.

Constitutional law – Charter of Rights – Equality rights – Relationship between ss. 15(1) and 15(2) of Canadian Charter of Rights and Freedoms.

Constitutional law -- Division of powers -- Indians -- Proceeds of province's first reserve-based commercial casino to be distributed only to Ontario First Nations communities registered as bands under Indian Act -- Whether province's decision to exclude non-band aboriginal communities ultra vires -- Whether province exercising its spending power -- Constitution Act, 1867, s. 91(24).

In the early 1990's First Nations bands approached the Ontario government for the right to control reserve-based gaming activities. The profits from these activities were to be used to strengthen band economic, cultural, and social development. As a result, Ontario and representatives from Ontario's First Nations entered into a process of negotiations with the goal of partnering in the development of the province's first reserve-based commercial casino. In 1996, the appellants were informed by the province that the casino's proceeds ("First Nations Fund") were to be distributed only to Ontario First Nations communities registered as bands under the *Indian Act*. At the individual level, all of the appellate groups have members who have, or are entitled to, registration as individual "Indians" pursuant to the *Indian Act*; however, as communities, the appellant groups are non-status since they are not registered as *Indian Act* "bands", and do not have reserve lands. At motions court, the appellants successfully sought a declaration that Ontario's refusal to include them in the casino project was unconstitutional and that they should be allowed to participate in the distribution negotiations. The judge held that (1) the exclusion of the appellants from the First Nations Fund violated their equality rights under s. 15(1) of the *Canadian Charter of Rights and Freedoms* and was not justified under s. 1; (2) s. 15(2) of the *Charter* could not be invoked as a defence to the s. 15(1) violation; and (3) Ontario's actions were *ultra vires* because of s. 91(24) of the *Constitution Act, 1867*. The Court of Appeal set aside the decision, finding that the motions judge had misapprehended the facts and made errors in law. On the basis that the main object of the casino project was to ameliorate the social and economic conditions of bands, the court held that the casino project was authorized by s. 15(2) of the *Charter* and could not therefore constitute discrimination under s. 15(1). The Court of Appeal held also that the province did not act *ultra vires* the *Constitution Act, 1867* as the province simply exercised its spending power.

Held: The appeal should be dismissed.

This appeal should be decided on the basis of s. 15(1) of the *Charter*. Although the Court of Appeal's decision was based on the application of s. 15(2), it was rendered without the benefit of this Court's decision in *Law*. *Law* requires that the determination of a discrimination claim be grounded in three broad inquiries: (1) whether the law, program or activity imposes differential treatment between the claimant and others; (2) whether this differential treatment is based on one or more enumerated or analogous grounds; and (3) whether the impugned law, program or activity has a purpose or effect that is substantively discriminatory. Each of these inquiries proceeds on the basis of a comparative analysis which takes into consideration the surrounding context of the claim and the claimant.

Section 15(1) is to be interpreted in a purposive and contextual manner. The main focus of the inquiry is to establish whether a conflict exists between the purpose or effect of an impugned law and the purpose of s. 15(1), which is to protect against the violation of essential human dignity. The contextual analysis is a directed inquiry; it is focused through the application of contextual factors which have been identified as being particularly sensitive to the potential existence of substantive discrimination. Further, the determination of the appropriate comparator and the evaluation of the context must be examined from the reasonable perspective of the claimant. The question to be asked is whether, taking the perspective of a "reasonable person, in circumstances similar to those of the claimant, who takes into account the contextual factors relevant to the claim", the law has the effect of demeaning a claimant's human dignity. The s. 15(1) scrutiny, which applies to comprehensive benefit schemes as well as targeted ameliorative programs, is not limited to distinctions set out only in legislation. The activities relating to the First Nations Fund undertaken by the provincial government are open to *Charter* scrutiny as actions taken under the statutory authority of s. 15(1) of the *Ontario Casino Corporation Act, 1993*.

The s. 15(1) inquiry must proceed in this case on the basis of comparing band and non-band aboriginal communities. It is clear that the appellants have been subjected to differential treatment since the province confirmed that they were excluded from a share in the First Nations Fund and any related negotiation process. However, it is not necessary to decide whether the differential treatment was based on an enumerated or analogous ground in view of the finding at the third stage of the inquiry that even if these grounds are present there is no discrimination in the circumstances of this case.

Four contextual factors provide the basis for organizing the third stage of the discrimination analysis: (i) pre-existing disadvantage, stereotyping, prejudice, or vulnerability; (ii) the correspondence, or lack thereof, between the ground(s) on which the claim is based and the actual need, capacity, or circumstances of the claimant or others; (iii) the ameliorative purpose or effects of the impugned law, program or activity upon a more disadvantaged person or group in society; and (iv) the nature and scope of the interest affected by the impugned government activity. The relative disadvantage of the claimant, as assessed in relation to the comparator group, does not stand alone as constituting a fifth contextual factor. The broad and fully contextual s. 15(1) analysis transcends the superficiality of a simple balancing of relative disadvantage. The inappropriateness of a relative disadvantage approach is highlighted by the unique circumstances of this case, where the disadvantages suffered both by the claimants and the comparator group must be acknowledged.

An analysis of the four contextual factors leads to the conclusion that the First Nations Fund does not conflict with the purpose of s. 15(1) and does not engage the remedial function of the equality right. While, the appellants have established pre-existing disadvantage, stereotyping, and vulnerability, they have failed to establish that the First Nations Fund functioned by device of stereotype. Instead, the distinction corresponded to the actual situation of individuals it affects, and the exclusion did not undermine the ameliorative purpose of the

targeted program. Second, while the appellants' needs correspond to the needs addressed by the casino program, for both the appellant and respondent aboriginal communities face these same social problems, the correspondence consideration requires more than establishing a common need. A consideration of the correspondence between the actual needs, capacities, and circumstances on the one hand, and the program on the other, indicates that the appellant aboriginal communities have very different relations with respect to land, government, and gaming from those anticipated by the casino program. Third, the focus of the ameliorative purpose analysis is not the fact that the appellant and respondent groups are equally disadvantaged, but that the program was targeted at ameliorating the conditions of a specific disadvantaged group rather than at disadvantage potentially experienced by any member of society. Although the targeted ameliorative program is alleged to be underinclusive, one must recognize that exclusion from a targeted or partnership program 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. Here, the ameliorative purpose of the overall casino project and the related First Nations Fund has clearly been established. The First Nations Fund will provide bands with resources in order to ameliorate specifically social, health, cultural, education, and economic disadvantages, thereby increasing the fiscal autonomy of the bands and supporting the bands in achieving self-government and self-reliance. The First Nations Fund has a purpose that is consistent with s. 15(1) of the *Charter* and the exclusion of the appellants does not undermine this purpose since it is not associated with a misconception as to their actual needs, capacities and circumstances. Lastly, with respect to the nature of the interest affected, the targeted arrangement and circumstances surrounding the First Nations Fund do not result in any lack of recognition of the appellants as self-governing communities. To the extent that there is any such effect in this respect, it is remote.

Therefore, the appellants have failed to demonstrate that, viewed from the perspective of the reasonable individual, in circumstances similar to those of the appellants, the exclusion from the First Nations Fund has the effect of demeaning the appellants' human dignity. This conclusion was reached despite a recognition that the appellant and respondent aboriginal communities have overlapping and largely shared histories of discrimination, poverty, and systemic disadvantage that cry out for improvement. The contextual analysis reveals an almost precise correspondence between the casino project and the needs and circumstances of the First Nations bands. The casino project was undertaken by Ontario in order to further develop a partnership or a "government-to-government" relationship with Ontario's First Nation band communities. It is a project that is aimed at supporting the journey of these aboriginal groups towards empowerment, dignity, and self-reliance. While it is not designed to meet similar needs in the appellant aboriginal communities, its failure to do so does not amount to discrimination under s. 15.

At this stage of the s. 15 jurisprudence, s. 15(2) of the *Charter* should be understood as confirmatory of s. 15(1). In that respect, claimants arguing equality claims in the future should first be directed to s. 15(1) since that subsection can embrace ameliorative programs of the kind that are contemplated by s. 15(2). By doing that one can ensure that the program is subject to the full scrutiny of the discrimination analysis, as well as the possibility of a s. 1 review. However, in view of emerging equality jurisprudence the possibility is not foreclosed that s. 15(2) may be independently applicable to a case in the future.

Finally, the province did not act *ultra vires* in partnering the casino initiative with *Indian Act* registered aboriginal communities. The exclusion of non-registered aboriginal communities did not act to define or impair the "Indianness" of the appellants since the province simply exercised its constitutional spending power in making the casino arrangements. There is nothing in the casino program affecting the core of the s. 91(24) federal jurisdiction.

Consequently, this casino program cannot have the effect of violating the rights affirmed by s. 35(1) of the *Constitution Act, 1982* and does not approach the core of aboriginality.

Cases Cited

Applied: *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497; **referred to:** *R. v. Van der Peet*, [1996] 2 S.C.R. 507; *R. v. Powley*, [1999] 1 C.N.L.R 153, varied (2000), 47 O.R. (3d) 30; leave to appeal granted, [2000] O.J. No. 1063 (QL); *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203; *R. v. Pamajewon*, [1996] 2 S.C.R. 821; *R. v. Perry*, [1996] 2 C.N.L.R. 167; rev'd (1997), 148 D.L.R. (4th) 96, leave to appeal dismissed, [1997] 3 S.C.R. xii; *Ontario Human Rights Commission v. Ontario* (1994), 19 O.R. (3d) 387; *R. v. Willocks* (1995), 22 O.R. (3d) 552; *Battlefords and District Co-operative Ltd. v. Gibbs*, [1996] 3 S.C.R. 566; *M. v. H*, [1999] 2 S.C.R. 3; *Winko v. British Columbia (Forensic Psychiatric Institute)*, [1999] 2 S.C.R. 625; *Egan v. Canada*, [1995] 2 S.C.R. 513; *Douglas/Kwantlen Faculty Assn. v. Douglas College*, [1990] 3 S.C.R. 570; *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229; *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624; *Eaton v. Brant County Board of Education*, [1997] 1 S.C.R. 241; *Brooks v. Canada Safeway Ltd.*, [1989] 1 S.C.R. 1219; *Vriend v. Alberta*, [1998] 1 S.C.R. 493; *Granovsky v. Canada (Minister of Employment and Immigration)*, [2000] 1 S.C.R. 703, 2000 SCC 28; *Collins v. Canada*, [2000] 2 F.C. 3; *Benner v. Canada (Secretary of State)*, [1997] 1 S.C.R. 358; *Miron v. Trudel*, [1995] 2 S.C.R. 418; *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143; *R. v. Swain*, [1991] 1 S.C.R. 933; *Weatherall v. Canada (Attorney General)*, [1993] 2 S.C.R. 872; *Harrison v. University of British Columbia*, [1990] 3 S.C.R. 451; *Manitoba Rice Farmers Association v. Human Rights Commission (Manitoba)* (1987), 50 Man. R. (2d) 92; *Silano v. The Queen in Right of British Columbia* (1987), 42 D.L.R. (4th) 407; *Re MacVicar and Superintendent of*

Family and Children Services (1986), 34 D.L.R. (4th) 488; *Canadian Egg Marketing Agency v. Richardson*, [1998] 3 S.C.R.157; *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, ss. 1, 15.

Constitution Act, 1867, s. 91(24).

Constitution Act, 1982, s. 35(1).

Criminal Code, R.S.C., 1985, c. C-46, s. 207 [rep. & sub. c. 52 (1st Supp.), s. 3; am. 1999, c. 5, s. 6].

Indian Act, R.S.C., 1985, c. I-5, ss. 2(1) "band", "Indian", "reserve" [rep. & sub. c. 17, (4th Supp.), s. 1], 6 [rep. & sub. c. 32 (1st Supp.), s. 4; am. c. 43 (4th Supp.), s. 1], 17 [rep. & sub. c. 32 (1st Supp.), s. 7], 74(1).

Ontario Casino Corporation Act, 1993, S.O. 1993, c. 25, ss. 1, 15 [am. 1996, c. 26, s. 5].

Authors Cited

Agocs, Carol, and Monica Boyd, "The Canadian Ethnic Mosaic Recast for the 1990s". In James Curtis, Edward Grabb and Neil Guppy, eds., *Social Inequality in Canada: Patterns, Problems, Policies*, 2nd ed. Scarborough, Ont.: Prentice Hall Canada, 1993, 330.

Canada. Royal Commmission on Aboriginal Peoples. *Report of the Royal Commission on Aboriginal Peoples*, vols. 1 (*Looking Forward, Looking Back*), 2 (*Restructuring the Relationship*) and 3 (*Gathering Strength*). Ottawa: The Commission, 1996.

Drumbl, Mark A., and John D. R. Craig. "Affirmative Action in Question: A Coherent Theory for Section 15(2)" (1997), 4 *Rev. Const. Studies* 80.

Iacobucci, Edward M. "Antidiscrimination and Affirmative Action Policies: Economic Efficiency and the Constitution" (1998), 36 *Osgoode Hall L.J.* 293.

Orton, Horton. "Section 15, Benefit Programs and Other Benefits at Law: The Interpretation of Section 15 of the Charter since Andrews" (1990), 19 *Man. L.J.* 288.

Ontario. Law Reform Commission. *Litigating the Relationship Between Equity and Equality*. Study paper prepared by Colleen Sheppard. Toronto: The Commission, 1993.

Tarnopolsky, Walter S. "The Equality Rights in the *Canadian Charter of Rights and Freedoms*" (1983), 61 *Can. Bar Rev.* 242.

United Nations. Committee on Economic, Social and Cultural Rights. *Concluding Observations of the Committee on Economic, Social and Cultural Rights* (Canada), E/C. 12/1/Add. 31, 4 Dec. 1998.

APPEAL from a judgment of the Ontario Court of Appeal (1997), 33 O.R. (3d) 735, 100 O.A.C. 344, 44 C.R.R. (2d) 285, 148 D.L.R. (4th) 126, [1998] 2 C.N.L.R. 36, [1997] O.J. No. 2313 (QL), allowing an appeal from a decision of the Ontario Court (General Division) (1996), 38 C.R.R. (2d) 297, [1997] 1 C.N.L.R. 66, [1996] O.J. No. 5063 (QL), [1996] O.J. No. 3176 (QL), declaring that the exclusion of the appellants from the First Nations Fund violated s. 15(1) of the *Canadian Charter of Rights and Freedoms*. Appeal dismissed.

Christopher M. Reid, for the appellants Robert Lovelace et al.

Robert MacRae and *Michael S. O'Neill*, for the appellants Be-Wab-Bon Métis and Non-Status Indian Association and the Ontario Métis Aboriginal Association.

Lori R. Sterling and *Sarah Kraicer*, for the respondent Her Majesty the Queen in right of Ontario.

Michael W. Sherry, for the respondent the Chiefs of Ontario.

Urszula Kaczmarczyk and *Michael H. Morris*, for the intervener the Attorney General of Canada.

Isabelle Harnois and *Pierre-Christian Labeau* for the intervener the Attorney General of Quebec.

Kurt Sandstrom and *Marilyn Poitras*, for the intervener the Attorney General for Saskatchewan.

M. Philip Tunley and *Jane A. Langford*, for the intervener the Mnjikaning First Nation.

Marc J. A. LeClair and *Joseph E. Magnet*, for the intervener the Congress of Aboriginal Peoples.

Mary Eberts and *Lucy McSweeney*, for the intervener the Native Women's Association of Canada.

Written submissions only by *David Baker*, for the intervener the Council of Canadians with Disabilities.

Written submissions only by *Cynthia Petersen*, for the intervener the Charter Committee on Poverty Issues.

Written submissions only by *Kathleen A. Lahey*, for the intervener the Métis National Council of Women.

Solicitor for the appellants Robert Lovelace et al.: Christopher M. Reid, Toronto.

Solicitors for the appellants Be-Wab-Bon Métis and Non-Status Indian Association and the Ontario Métis Aboriginal Association: Sarlo O'Neil, Sault Ste. Marie.

Solicitor for the respondent Her Majesty the Queen in right of Ontario: The Attorney General of Ontario, Toronto.

Solicitor for the respondent the Chiefs of Ontario: Michael W. Sherry, Toronto.

Solicitor for the intervener the Attorney General of Canada: The Deputy Attorney General of Canada.

Solicitor for the intervener the Attorney General of Quebec: The Department of Justice, Sainte-Foy.

Solicitor for the intervener the Attorney General for Saskatchewan: The Deputy Attorney General of Saskatchewan, Regina.

Solicitors for the intervener the Mnjikaning First Nation: McCarthy Tétrault, Toronto.

Solicitor for the intervener the Congress of Aboriginal Peoples: Marc J.A. LeClair, Ottawa.

Solicitors for the intervener the Native Women's Association of Canada: Eberts Symes Street & Corbett, Toronto.

Solicitors for the intervener the Charter Committee on Poverty Issues: Sack Goldblatt Mitchell, Toronto.

Solicitor for the intervener the Métis National Council of Women: Kathleen A. Lahey, Kingston.

CITATION

Before publication in the S.C.R., this judgment should be cited using the neutral citation: *Lovelace v. Ontario*, 2000 SCC 37. Once the judgment is published in the S.C.R., the neutral citation should be used as a parallel citation: *Lovelace v. Ontario*, [2000] x S.C.R. xxx, 2000 SCC 37.

IACOBUCCI J. –

I. Introduction

1 In 1993, the Province of Ontario and representatives from Ontario's First Nations entered into a process of negotiations with the goal of partnering in the development of the province's first reserve-based commercial casino, which was to become Casino Rama. Profits from the casino were to be shared among Ontario's First Nations. Ultimately, the reserve site of the Chippewas of Mnjikaning First Nation (formerly known as Rama First Nation) was selected and a development and operations agreement was reached between Ontario, Carnival Hotels and Casinos Canada Ltd. (Ontario's operations agent), and Mnjikaning First Nation. Subsequently, Casino Rama opened its doors to the public in the summer of 1996. Meanwhile, the province and representatives of the Chiefs of Ontario had begun a process of negotiating the terms for distributing the casino's proceeds ("First Nations Fund") to the First Nations communities. In the spring of 1996, the province informed the appellant aboriginal communities that the First Nations Fund was to be distributed only to Ontario First Nations communities registered as bands under the *Indian Act*, R.S.C., 1985, c. I-5.

2 The following is a brief summary of what this appeal decides and what it does not decide.

3 In basic terms, this appeal requires a determination of the constitutionality of the exclusion of non-band aboriginal communities from sharing in the proceeds, and from negotiating the distribution terms for the First Nations Fund. Specifically, the question is whether the First Nations Fund's underinclusiveness violates the appellants' equality rights as guaranteed by s. 15 of the *Canadian Charter of Rights and Freedoms*. We must also determine whether the province's decision to exclude the appellants on the basis that they are not bands under the *Indian Act* was *ultra vires* its jurisdiction under the *Constitution Act, 1867*.

4 At the outset, I wish to note that this appeal has raised collateral issues which are of great importance; among them are the constitutionality of the *Indian Act* and the scope of the federal jurisdiction with respect to Métis and non-registered First Nation peoples pursuant to s. 91(24) of the *Constitution Act, 1867*. Although the substantive equality analysis obliges the Court to consider the circumstances of these appellant aboriginal communities, including the social realities relating to their exclusion from, or non-participation in, the *Indian Act* regime, these important collateral issues are not properly raised in this appeal and, therefore, cannot be decided herein. Similarly, it is neither necessary nor appropriate for this Court to decide or comment upon the responsibilities of provincial governments with respect to these matters.

5 This appeal also raises the question of the proper interpretation of s. 15(2) of the *Charter*. Indeed, the decision of the Ontario Court of Appeal below was based on the application of s. 15(2). However, the Court of Appeal's interpretation of s. 15(2) was decided without the benefit of this Court's decision in *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497, which synthesized a number of approaches in the equality jurisprudence of the Court and provided a set of guidelines for the analysis of a discrimination claim under the *Charter*. After a brief review of the *Law* analytical framework and a consideration of s. 15(2), I conclude that this appeal is properly decided on the basis of the existing s. 15(1) substantive equality framework.

6 With respect to s. 15(1), in my view the exclusion of the non-band aboriginal communities from the First Nations Fund does not violate s. 15 of the *Charter*. I reach this conclusion despite a recognition that, regrettably, the appellant and respondent aboriginal communities have overlapping and largely shared histories of discrimination, poverty, and systemic disadvantage that cry out for improvement.

7 In my opinion, a contextual analysis reveals an almost precise correspondence between the casino project and the needs and circumstances of the First Nations bands. The casino project was undertaken by the province of Ontario in order to further develop a partnership or a "government-to-government" relationship with Ontario's First Nations band communities. It is a project that is aimed at supporting the journey of these aboriginal groups towards empowerment, dignity, and self-reliance. It is not, however, designed to meet similar needs in the appellant aboriginal communities, but its failure to do so does not amount to discrimination under s. l5.

8 Finally, I conclude that the province did not act *ultra vires* in partnering the casino initiative with *Indian Act* registered aboriginal communities. The exclusion of non-registered aboriginal communities did not act to define or impair the "Indianness" of the appellants since the province simply exercised its constitutional spending power in making the casino arrangements.

II. Factual and contextual background

A. *Introduction*

9 There is no dispute as to the appellants' aboriginality or their self-identification as either Métis or First Nations. None of the appellants has claimed an aboriginal right to the First Nations Fund or access to the negotiation process pursuant to s. 35(1) of the *Constitution Act, 1982*. The seven appellant groups are divided into two groups: (i) the Lovelace non-band First Nations appellants and (ii) the Be-Wab-Bon Métis appellants. The Lovelace appellants comprise five non-band First Nations communities: the Ardoch Algonquin First Nation and

Allies ("Ardoch First Nation"), the Kawartha Nishnawbe First Nation ("Kawartha"), the Beaverhouse First Nation, the Poplar Point Ojibway First Nation ("Poplar Point"), and the Bonnechere Métis Association. The two Be-Wab-Bon Métis appellants are: the Ontario Métis Aboriginal Association ("OMAA"), and the Be-Wab-Bon Métis and Non-Status Indian Association ("Be-Wab-Bon"). Essentially, this appellant sub-group identifies itself as rural Métis peoples even though their membership includes non-status or off-reserve First Nations members.

10 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 (see *R. v. Van der Peet*, [1996] 2 S.C.R. 507, at para. 67). Given this complexity, it is neither possible nor desirable to draw bright lines between or among any of the aboriginal communities involved in these proceedings, especially given the limits of the litigation record in the appeal. With those qualifications in mind, the following represents my attempt to describe the appellants and respondents for purposes of deciding the issues arising in this appeal.

B. *Appellants*

11 All of the appellants, except for the OMAA, identify as communities. Although Be-Wab-Bon and the Bonnechere Métis Association have formally incorporated as non-profit service organizations, they reported doing so in order to create an "organizational voice for [the] community" and to access project funding. The "OMAA" is a non-profit organization, incorporated in order to represent the interests of off-reserve aboriginal peoples in issues relating to land, resources, social services, housing, education, economic development, and efforts focused at achieving recognition of inherent aboriginal rights. While seeking a right to participate in the negotiations relating to the distribution of the First Nations Fund, the OMAA does not seek to share in the distributed revenue.

12 The Lovelace appellants may be described as communities with traditional First Nations forms of government. Respectively, they identify ancestral roots in the Mississauga (Kawartha), Algonquin (Bonnechere Métis Association and Ardoch First Nation), and Ojibway (Poplar Point and Beaverhouse) Nations. Their ancestral, community, political and social structures are family- or clan-based, where families have been linked together by shared use of lands and common social interests. They have established councils of heads of families and a chief or spokesperson is elected by the community. The Bonnechere Métis Association's corporate structure has integrated a key feature of traditional Algonquin government with the formal institution of the Elder's Circle as the organization's most powerful decision-maker.

13 The two Be-Wab-Bon appellants did not advance a common definition of "Métis", and, in this respect, I note that this issue remains politically and legally contentious (see *R. v. Powley*, [1999] 1 C.N.L.R 153 (Ont. Ct. (Prov. Div.)); varied (2000), 47 O.R. (3d) 30 (Sup. Ct.); leave to appeal granted, [2000] O.J. No. 1063 (C.A.) (QL), April 3, 2000). Full membership in the Be-Wab-Bon Métis community requires that an individual establish an aboriginal ancestor within four generations. Alternatively, Michael McGuire, the president of the OMAA put forward a definition of Métis which includes those individuals who: (i) identify as a Métis, (ii) are recognized and accepted by the community, and (iii) are of aboriginal descent.

14 With the exception of the Beaverhouse First Nation, the appellants have expressed a profound ambivalence, and sometimes open aversion, towards the *Indian Act* regime. Beaverhouse First Nation has been seeking registered band and reserve status for quite some time and became a party to this litigation given their uncertainty about whether they, as a non-band, would benefit from the First Nations Fund. The reasons for the appellants' non-registration under the *Indian Act* are historically long-standing, community-specific, and complex (see *Report of the Royal Commission on Aboriginal Peoples*, vol. 1, *Looking Forward, Looking Back* (1996), at pp. 303-14). At this point in history, the Métis and four of the non-band First Nations appellants have, each in their own way, initiated a number of political efforts

directed at achieving provincial and federal government recognition as special non-registered aboriginal communities outside of the *Indian Act*'s statutory framework.

15 Even if the appellants were to seek band membership there is very little assurance of success. An application may be made for band registration pursuant to s. 17 of the *Indian Act*, however, no bands have been registered since 1985 and the related federal policies and procedures are onerous. Specifically, an applicant First Nation community must be comprised entirely of registered Indians, and, since the federal government will not provide any "new" funding, the applicant community must persuade a recognized band to share its funding and land base. Counsel for the Lovelace appellants summarized this position as follows:

> ... even if the appellant communities could somehow qualify for band status, they would then be forced to abandon their traditional forms of government, which have played a vital role in their survival as distinct communities, and replace them with *Indian Act* band councils. It is the view of the appellants that the *Indian Act* system of local governance promotes corruption and divisions between community members, and fails to recognize the key role of Elders in community governance. The traditional forms of government, on the other hand, promote harmony, tolerance, respect and accountable, democratic local government. It is questionable whether the appellant communities could bring themselves to adopt the *Indian Act* system, even if it were an option for them.

16 In this case, it is particularly important to note the *Indian Act* distinction between individual and community registration, since the province excluded the appellants on the basis of community or "band" status. At the individual level, all of the appellant groups have members who have, or are entitled to, registration as individual "Indians" pursuant to the *Indian Act*. An aboriginal person would be considered non-status if that individual either chose not to register or could not register in compliance with the statutory requirements set out in s. 6 of the *Indian Act*. As communities, the appellant groups are non-status since they are not registered as *Indian Act* "bands", and do not have reserve lands. Section 2 of the *Indian Act* defines "band" as a body of Indians "for whose use and benefit in common" reserved lands or moneys have been set apart by the Crown. Generally, there is a direct relationship between individual registration as an "Indian" and band membership, and most bands are almost exclusively made up of *Indian Act* registered Indians. However, as is the case with these appellant groups, it

is possible that individually registered Indians, or groups thereof, have not become members of bands.

17 The relationship of the six appellant communities to the land is unique and culturally-specific. As an isolated, remote, village-based and wholly aboriginal community, Beaverhouse First Nation most closely resembles typical conceptions about what constitutes a reserve-based aboriginal community. In contrast, the communities of the other five appellants are much less village- or centre-specific, with community members dispersed throughout respective rural regions identified as their traditional homelands. Some of the appellants emphasized that the dispersed nature of their community base reflects their adherence to traditional ways, even though the lack of a federally registered land base means "a constant struggle to maintain a connected, united community".

C. *Respondents*

18 The respondent Chiefs of Ontario is an incorporated non-profit organization which coordinates and represents the interests of 133 Ontario First Nations registered as bands under the *Indian Act*. The Ontario Regional Chief leads the organization and sits as an *ex officio* member of the executive of the Assembly of First Nations, a major national status Indian organization. The Chiefs of Ontario also represents a small number of aboriginal communities without band or reserve registration. Twelve of these are communities registered as bands, however they are in the process of obtaining a reserve, and seven other communities are attempting to secure a reserve base along with band registration.

19 Most bands hold reserve lands, and the *Indian Act* provides a federally-based legal regime for the identification, management, and accountability of First Nations bands. The *Indian Act* provides for the establishment and maintenance of membership lists, and the management of moneys and reserve lands for the use and benefit of Indians and bands. Each band has a representative political structure, where the chiefs and councils are chosen following the band's custom, or, if an order in council has been made under s. 74(1) of the *Indian Act*, by the

procedures set out in the Act (see *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203, at para. 26).

20 As noted above, the bulk of the Chiefs of Ontario membership is made up of bands with reserves, however, generally only half of band members live on the reserve. Nonetheless, it is clear that off-reserve band members maintain cultural and political interests in, and connections to, their band and reserve such that one can view bands as characteristically land- or reserve-based with communities that extend beyond the boundaries of the reserve (see *Corbiere*, *supra*, at paras. 80-81).

21 With these brief descriptions of the parties, I now wish to deal briefly with the matter of gaming relations involving aboriginals and the province of Ontario.

D. *Gaming and the Relationship of the Province to Ontario's First Nations Bands*

22 For Ontario's First Nations bands, a nexus has emerged between gaming and self-government efforts, and has involved the development of corresponding relations with the province. The province's jurisdiction for gaming activities arises by virtue of s. 207 of the *Criminal Code*, R.S.C., 1985, c. C-46, which permits gambling activities which are provincially licensed, managed, and strictly regulated. In turn, most provincial licensing authority for charitable gaming was delegated to municipalities by order in council. Before the early 1990's, most Ontario gaming was limited to licensed charitable gaming. Many bands were involved in this form of gaming; however, since reserves are not subject to municipal jurisdiction these communities received their licenses directly from the province.

23 In 1992, the province announced its intention to go beyond charitable gaming activities and enter the field of commercial casino gaming. Windsor, Ontario, was chosen as a pilot project in 1992, and the province created the Ontario Casino Corporation in order to manage casino gaming in accordance with the newly enacted *Ontario Casino Corporation Act, 1993*, S.O. 1993, c. 25.

24 First Nations bands had identified gaming initiatives as a vehicle for providing an economic base for self-government activities. Consequently, between 1991 and 1993, First Nations bands approached the provincial government for the right to control reserve-based gaming activities, asserting an inherent aboriginal right to operate gaming activities without having to acquire a provincial licence. The profits from these activities were to be used to strengthen band economic, cultural, and social development. In particular, the Shawanaga First Nation strongly asserted that an aboriginal right to self-government included the right to self-regulate gaming activities (see *R. v. Pamajewon*, [1996] 2 S.C.R. 821).

25 All of this was occurring during the Charlottetown Accord constitutional debates. However, the failure of the Accord meant the demise of a number of provisions supporting aboriginal self-government which had been a part of the Accord package. Consequently, Ontario's First Nations bands sought alternative routes to self-government. One such effort took shape with the negotiation and signing of the Statement of Political Relationship ("SPR"), signed in August 1991 by Ontario, and the Chiefs of Ontario. This agreement provided the basis of establishing "government-to-government" relations between the province and bands, and committed these parties to negotiate the exercise and the implementation of First Nations jurisdiction and self-reliance.

26 In 1991 and 1992, preliminary meetings were held with different First Nations bands to discuss the various ways in which gaming and other economic development issues could be addressed. In this process, Ontario was motivated to consider a reserve-based commercial casino in order to further its commitment to the SPR, as well as to establish more accountable gaming practices on the reserves. Meetings continued between Ontario and the bands and, in 1993, this process resulted in the mutually agreed upon site selection criteria and the striking of an independent First Nations panel to review site proposals.

27 In 1994, the membership of the site selection panel was finalized and submissions were invited. By December 1994, the panel announced the selection of the Chippewas of Rama (Mnjikaning) site, and on May 1, 1995, the Ontario Casino Corporation and the Mnjikaning

First Nation issued a request for proposals for the operation and construction of the casino. On October 11, 1995, Carnival Hotels and Casinos ("Carnival") was announced as the company that would act as the province's agent in developing and operating the casino. A development and operating agreement was signed between Mnjikaning, the province, and Carnival on March 18, 1996. Also, in March, 1996, the Ontario Native Affairs Secretariat ("ONAS") began negotiations for the administration of the First Nations Fund with the bands. To that end, the respondent Chiefs of Ontario selected a committee in order to represent the bands at the negotiating table. On June 29, 1996, the official opening of the casino was announced for July 31, 1996.

E. *Gaming and the Province's Relationship with Métis and Non-Band First Nations*

28 At various times, the Métis appellants have also undertaken self-government and constitutional discussions with the federal and provincial governments. Following the enactment of the *Constitution Act, 1982*, there was discussion of Métis enumeration and registration at the First Ministers' constitutional conferences held between 1984 and 1987. Later on, the OMAA participated with the Métis National Council in the Charlottetown constitutional negotiations. On October 7, 1992, an agreement, the "Métis Nation Accord", was reached among the Métis National Council, the federal government, and the provinces of Ontario, Manitoba, Saskatchewan, Alberta, and British Columbia. This agreement was attached to the Charlottetown Accord, and failed along with the Accord as the Métis Nation Accord was subject to the same process of ratification. The Métis Nation Accord would have committed the governments to negotiate: self-government agreements; lands and resources; the transfer of the portion of aboriginal programs and services available to Métis; as well as cost sharing agreements relating to Métis institutions, programs, and services.

29 During the same period, the province of Ontario, the federal government and the OMAA became parties to an agreement in 1991, which was designed to promote self-reliance and economic development for Ontario Métis. That agreement, encompassing funding for a

number of projects, lasted for three years and was not renewed. Subsequently, in March, 1995, the province of Ontario adopted a number of guidelines for its relationship with Ontario's Métis organizations. These guidelines set out the following bases for provincial/Métis relations: non-interference with Métis organizations and their political processes; allowing Métis people to organize themselves for various purposes as they saw fit; and that government scrutiny and accountability requirements would be limited to specific program or projects.

30 In 1992, the OMAA developed a Métis Gaming Commission with members elected from the OMAA member communities. This initiative was intended to dovetail with the economic development agreement, and was designed to promote gaming activities as a source of revenue for self-reliance initiatives. To that end, a representative of the OMAA met with the Director of the ONAS in February, 1994, in order to advance their gaming agenda. Up to this point, as was the case with First Nations bands, the gaming activities of non-band aboriginal communities were limited to licensed charitable gaming. However, having been made aware of the development of the First Nations reserve casino project, the OMAA specifically requested their own commercial casino licence. In response, the ONAS advised the OMAA that, since commercial gaming was only in a pilot phase, the province was not in a position to negotiate further casino projects. However, the province indicated that they were open to other gaming negotiations with non-status aboriginals and Métis.

31 The Lovelace appellant communities have also undertaken self-government initiatives, each in its own way and in different circumstances. For example, independent of each other, Kawartha and the Bonnechere Métis Association submitted proposals to the provincial and federal governments for the negotiation of recognition as non-*Indian Act* First Nations. Sometimes these recognition efforts have arisen in connection to emerging issues affecting the community or its land base (e.g., the development of a dam, cottage construction, or a resource industry expansion in traditional territories). There was, however, no evidence that these communities had coordinated a gaming program, either individually or collectively, in order to support self-reliance initiatives.

32 In March 1996, counsel for the Lovelace appellants contacted provincial representatives, requesting participation in the negotiations surrounding, and a share in, the First Nations Fund. They asserted that, as they considered themselves to be "First Nations" communities, and since the request for proposals had identified "First Nations" as the beneficiaries of the First Nations Fund, they were legitimate participants in the project. On May 2, 1996, Ontario advised these groups that it considered the term "First Nation" to be synonymous with "band" as defined under the *Indian Act*, and that the First Nations Fund was never intended for non-band aboriginal communities. On May 10, 1996, the Lovelace appellants commenced a proceeding seeking a declaration that Ontario's refusal to include them in the Casino Rama project was unconstitutional and that they should be allowed to participate in the distribution negotiations. On June 27, 1996, the Be-Wab-Bon appellants sought substantially similar relief and the two actions were joined on June 28, 1996.

III. Relevant Constitutional and Statutory Provisions

33 *Canadian Charter of Rights and Freedoms*

> **15.** (1) 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.
>
> (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Indian Act, R.S.C., 1985, c. I-5

> **2.(1)** In this Act,
>
> "band" means a body of Indians
>
> (*a*) for whose use and benefit in common, lands, the legal title to which is vested in Her Majesty, have been set apart before, on or after September 4, 1951,
>
> (*b*) for whose use and benefit in common, moneys are held by Her Majesty, or

(*c*) declared by the Governor in Council to be a band for the purposes of this Act;

...

"Indian" means a person who pursuant to this Act is registered as an Indian or is entitled to be registered as an Indian;

...

"reserve"

(a) means a tract of land, the legal title to which is vested in Her Majesty, that has been set apart by Her Majesty for the use and benefit of a band, and

(b) except in subsection 18(2), sections 20 to 25, 28, 36 to 38, 42, 44, 46, 48 to 51, 58 and 60 and the regulations made under any of those provisions, includes designated lands;"

Ontario Casino Corporations Act, 1993, S.O. 1993, c. 25

1. The purposes of this Act are
(a) to enhance the economic development of certain regions of the province;

(b) to generate revenues for the province; and

(c) to ensure that any measures taken in accordance with these principles are undertaken for the public good and in the best interests of the public.

15. (1) The Corporation shall make payments out of the revenue that it receives from its activities under this Act in accordance with the following priorities:

1. Payment of winnings to players.

2. Payments that the regulations made under this Act require the Corporation to make to the Consolidated Revenue Fund.

3. Payment of the operating expenses of the Corporation.

...

5. Payment required to be made under any agreement entered into by the Corporation with the consent of the Minister of Finance for the distribution of money received from Casino Rama.

IV. Judicial History

A. *Ontario Court* (*General Division*) (1996), 38 C.R.R. (2d) 297

34 In an oral decision supplemented by written reasons, Cosgrove J. held that the exclusion of the appellants from the First Nations Fund violated s. 15(1) of the *Charter*, and was not justified under s. 1. He also found that s. 15(2) could not be invoked as a defence to the s. 15(1) violation. Furthermore, he declared that the province had acted *ultra vires* s. 91(24) of the *Constitution Act, 1867*. Consequently, Cosgrove J. ordered that the six appellant communities had a right to participate fully in the revenues and negotiations relating to the First Nations Fund. In addition, he ordered that the OMAA, which was not seeking a right to share in the First Nations Fund, was entitled to participate in negotiating the terms for distributing the First Nations Fund.

35 Cosgrove J. found that the appellants were disadvantaged in relation to status aboriginal communities, and further, the exclusion of non-status aboriginals was *prima facie* discriminatory on the basis of a racial or ethnic distinction. He emphasized that this particular exclusion was reflective of a pattern of discrimination on the part of the province against the appellants. In this regard, he stated that the provincial government's rationale for excluding the appellants was "starkly arbitrary" and "recently constructed in response to the [appellants'] application" (p. 304). The government's rationale for limiting the distribution of the First Nations Fund to registered bands was set out as follows:

> 1. First Nations [bands] are a clearly identified group under the *Indian Act*. Extension beyond this group raises complex questions about who is aboriginal or Metis. These questions have been the subject of extensive debate and have yet to be satisfactorily resolved.
>
> 2. First Nations bands are recognized as governments with an attendant accountability to their members [under the *Indian Act]*. The *Indian Act* provides for the establishment and maintenance of membership lists, the management of moneys for the use and benefit of Indians and bands, the election of Chiefs and councillors, the management and use of reserve lands and the power of band councils to make by-laws.

> 3. Virtually all First Nations bands have reserves. As a result of the constitutional division of powers, some residents of reserves do not have [access to] the same level of programs and services received by the rest of Ontarians.
>
> 4. The First Nations bands have from a very early stage indicated an interest in the casino business and have been involved throughout the process. ...

36 Cosgrove J. rejected each of these four propositions. On the first issue of identity, Cosgrove J. found that this question was not as complex as alleged by the respondents since he had dealt with this identification issue in his recent decision in *R. v. Perry*, [1996] 2 C.N.L.R. 167 (Ont. Ct. (Gen. Div.)), rev'd, (1997), 148 D.L.R. (4th) 96 (Ont. C.A.) (*sub nom. Ardoch Algonquin First Nation v. Ontario*); leave to appeal dismissed, [1997] 3 S.C.R. xii. He went on to find that there was no basis for deciding that the appellant groups could not meet the provincial accountability requirements. Noting that not all registered bands had reserves, he found that this rationale could not stand as a legitimate basis for excluding the non-reserve based appellants. Finally, he held that the early involvement of the bands in the casino was irrelevant to the s. 15 determination.

37 In order to address the s. 15(2) defence raised by the respondents, Cosgrove J. accepted the approach taken in *Ontario Human Rights Commission v. Ontario* (1994), 19 O.R. (3d) 387 (C.A.) (hereinafter "*Roberts*"). That decision focused on the interpretation of s. 14(1) of the *Human Rights Code*, R.S.O. 1990, c. H.19, which provides:

> A right under Part I is not infringed by the implementation of a special program designed to relieve hardship or economic disadvantage or to assist disadvantaged persons or groups to achieve or attempt to achieve equal opportunity or that is likely to contribute to the elimination of the infringement of rights under Part I.

For the majority in *Roberts*, Weiler J.A. held that s. 14(1) of the Code was to be interpreted as having a dual purpose: (i) the exemption of affirmative action programs from review, and (ii) the promotion of substantive equality (at p. 407). Consequently, s. 14(1) can exempt a program from review if the challenge emerges from a member of a class of historically advantaged persons not intended to benefit from the program. On the other hand, s. 14(1)

cannot immunize a program where (i) an individual suffering from precisely the disadvantage that the program was designed to ameliorate is excluded from the program, and (ii) no rational connection exists between the enumerated ground of discrimination and the purpose of the program (*Roberts, supra*).

38 Cosgrove J. also entertained an alternative interpretation of s. 15(2) of the *Charter* as put forward in *R. v. Willocks* (1995), 22 O.R. (3d) 552 (Gen. Div.). In that case, Watt J. focused the s. 15(2) analysis on whether the distinction created "gross unfairness", and stated (at p. 571):

> In any program which is designed to ameliorate the conditions of a disadvantaged group, others will be "disadvantaged" as a result of their non-eligibility for participation. Section 15(2) acknowledges as much. What must be avoided is gross unfairness to others. The *Charter* does *not* ask, in my respectful view, that an affirmative action program within its s. 15(2), address at once all individuals or groups who suffer similar disadvantage. There must be some room left to establish and give effect to priorities amongst disadvantaged groups, provided there is no gross unfairness. [Emphasis in original.]

39 From either perspective, Cosgrove J. found that s. 15(2) could not be invoked to defend the province's discriminatory treatment of the appellants. In language reflective of the *Roberts* approach, he held that the exclusion of the appellants was "blatantly arbitrary and devoid of any reasoned or rational process of priorization" (p. 306). He also applied the language set out in *Willocks*, holding that the exclusion was "grossly unfair" since "those of the First Nations or aboriginals who are most in need have been excluded from the project specially designed to assist their economic development" (p. 306).

B. *Ontario Court of Appeal* (1997), 33 O.R. (3d) 735

40 The Court of Appeal held that Cosgrove J. had misapprehended the facts and made errors in law. Primarily, the Court of Appeal found that Cosgrove J. had made a fundamental error in improperly applying evidentiary and legal aspects from the *Perry* decision. In effect, Cosgrove J. had inappropriately treated this case as being "packaged" with *Perry*, ignoring the many

factual and legal distinctions between the two cases with the most important distinction being that this case did not raise a claim to an aboriginal right pursuant to s. 35(1) of the *Constitution Act, 1982*. This fundamental error had led Cosgrove J. to further substantive errors in the determination of the case.

41 Having set the trial judge's decision aside, the Court of Appeal moved on to its consideration of the principles applicable to the appeal. In that respect, it concluded that the appeal was to be decided on the basis of interpreting s. 15(2) of the *Charter*, since the main object of the casino project was to ameliorate the social and economic conditions of First Nations bands.

42 Although the Court of Appeal quickly determined, given an examination of the legislative history of s. 15(2), that the provision was included in the *Charter* in order to "recognize the legitimacy of special government programs to help the disadvantaged" (p. 752), the legislative history provided little guidance on the proper interaction between ss. 15(1) and 15(2). Consequently, the Court of Appeal turned to the equality jurisprudence for direction, and found that the starting place for this analysis was the recognition that s. 15(2) enhanced and explained the substantive, rather than formalistic, approach to equality in s. 15. The Court of Appeal stated (at pp. 752-53):

> We view s. 15(2) of the *Charter* as furthering the guarantee of equality in s. 15(1), not as providing an exception to it. This view is grounded in our concept of equality and in the Supreme Court of Canada's equality jurisprudence. Beginning with *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, ... and *R. v. Turpin*, [1989] 1 S.C.R. 1296, ... the Supreme Court of Canada has consistently stated that the purpose of the equality guarantee in s. 15(1) is to remedy historical disadvantage, that identical treatment can perpetuate disadvantage and that equality may sometimes require different treatment. Section 15(2) enhances this concept of equality by recognizing that achieving equality may require positive action by government to improve the conditions of historically and socially disadvantaged individuals and groups in Canadian society. We therefore read ss. 15(1) and 15(2) of the *Charter* together to embrace this one consistent concept of equality.

43 Understood this way, s. 15(2) must be considered with s. 15(1) in determining "*whether* a claim of discrimination has been established" (p. 754) (emphasis in original). In addition, the Court of Appeal determined that, while s. 15(2) did not immunize special programs from constitutional review, the judicial review of these programs was limited in order to support

governments in undertaking such remedial initiatives. Therefore, to invoke s. 15(2) a court need only be satisfied that the target of the program was a disadvantaged group, and the purpose of the program was to ameliorate these conditions. In support of this interpretation, the Court of Appeal noted that s. 15(2) contained no language calling for the assessment of the effectiveness of the program. Neither was there any basis for demanding a rational relationship between the cause of the disadvantage and the program design. If, according to this standard of review, the program infringes the equality interest, these issues are considered under s. 1 of the *Charter*.

44 After commenting that the language and history of s. 15(2) "seem to militate against ... challenges to s.15(2) programs by members of socially advantaged or privileged groups" (p. 755), the Court of Appeal proceeded to focus on situations, such as this appeal, where the claimants are disadvantaged, and the alleged breach of s. 15(1) flows from the program's underinclusiveness. This analysis, they found, was to be focused on distinguishing between those claiming discrimination as members of a disadvantaged group who fell within the scope of the targeted special program, and challenges by disadvantaged groups who fell outside the object of the program. Since s. 15(2) affirms government initiatives directed at redressing disadvantage, these programs should be shielded to the extent that they address a specific disadvantage. In short, in underinclusive situations, one can find discrimination only if a distinction is made resulting in the denial of a benefit to a member of the group targeted by the program. As a result, the key to the s. 15(2) analysis is properly characterizing the object or the purpose of the program in order to determine whether the claimants are within a group targeted by that program's objects.

45 The Court of Appeal accepted the broad approach to determining a program's purpose as articulated by Sopinka J., for the majority, in *Battlefords and District Co-operative Ltd. v. Gibbs*, [1996] 3 S.C.R. 566. Rejecting a narrow or formalistic approach, Sopinka J. asserted that in order to establish the "true character or underlying rationale" a full review of the evidence was required (*Gibbs*, *supra*, at para. 38).

46 Before applying its interpretation of the s. 15(2) analysis, the Court of Appeal paused to consider the relevance of alleged differences in levels of disadvantage suffered by the claimant and respondent aboriginal communities. First, it found that it had been indisputably established that all aboriginal peoples in Canada are disadvantaged in terms of life expectancy, child welfare, educational attainment, employment, and living conditions. Secondly, the court found that the record had not established that the claimants were relatively more disadvantaged than the respondent aboriginal communities. Nonetheless, it held that this question was irrelevant to the s. 15(2) analysis, which is to be focused on establishing the true purpose of the program and whether the excluded group was within the group specifically targeted for that purpose. In this regard, the court stated (at p. 760):

> Moreover, we do not think that pitting one aboriginal group against another in a perverse competition over which is more needy accords with the purpose and spirit of s. 15 of the *Charter*. Both the applicants and the bands are demonstrably disadvantaged. We do not have to determine the question of relative disadvantage to decide this appeal. The issue is not whether the bands are more or less disadvantaged than the applicants but whether benefitting only the bands reflects the true purpose of the project and is consistent with the goals of s. 15(2).

47 An examination of the record and its account of the distinct circumstances of the bands assisted the court in purposively determining that the casino project's true purpose was to benefit specifically the First Nations bands. The first distinct circumstance that was considered was the relation of the bands to reserves, given that the project was reserve-based. Even though there were a number of bands without reserve communities, the Court of Appeal held that this "leakage" did not undermine the overall objects of the project, nor appreciably strengthen the applicants' position.

48 Beyond the reserve-based distinctions between the claimant and respondent aboriginal communities, the Court of Appeal found that other important differences existed and were specifically relevant to the casino project. In short, the bands stood on a different footing from the applicant groups inasmuch as: (i) the *Indian Act* regime created a level of political and financial accountability for the bands which was in keeping with the province's need to regulate

commercial gambling strictly, (ii) the application of the registration and membership list provisions of the *Indian Act* made band communities easily identifiable in contrast to the uncertainty surrounding the enumeration of Métis or non-status Indians, and (iii) the bands had experience in gaming and had established an early interest in casino gaming.

49 Given the province's clear ameliorative purpose, and the relation between this purpose and the distinct circumstances of the First Nations bands, the Court of Appeal held that the casino project was authorized by s. 15(2) and could not constitute discrimination under s. 15(1) of the *Charter*. Finally, the Court of Appeal held that the province did not act *ultra vires* the *Constitution Act, 1867*. Although reserves and bands fall under federal jurisdiction, the province simply exercised its spending power, and did not act in any way to encroach upon the federal power.

V. Issues

50 By order of Lamer C.J. dated November 25, 1998, the following constitutional questions were stated for this Court's consideration:

1. 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. 1993 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*?

2. 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*?

3. 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*?

VI. Analysis

A. *Introduction*

51 At the centre of this appeal is the appellants' claim that their exclusion from the First Nations Fund represents a contravention of the equality right guaranteed by s. 15(1) of the *Charter*. The courts below, however, made their respective decisions without the benefit of this Court's decision in *Law*, *supra*, which synthesized the s. 15(1) jurisprudence of the Court. Consequently, I will begin the analysis with a brief review of that decision before going on to discuss the application of the s. 15(1) substantive equality analysis to this appeal.

52 In addition, since the courts below based their decisions on the application of s. 15(2) as opposed to s. 15(1) and the interpretation of s. 15(2) was fully argued before this Court, the next section of the analysis is devoted to a discussion of s. 15(2) and its relationship with s. 15(1). The final section of the analysis deals with the question of whether the province of Ontario acted *ultra vires* its jurisdiction under the *Constitution Act, 1867*.

B. *The Synthesis in Equality Jurisprudence*

53 In the recent decision of *Law*, *supra*, this Court reviewed its equality jurisprudence and provided a summary of the basic principles relating to the purpose of s. 15(1) and the proper approach to equality analysis generally. This review revealed considerable continuity in this Court's understanding of the purpose of s. 15(1), and provided the basis for setting forth a synthesis of the various formulations of the s. 15 analysis. The synthesized approach requires that the determination of a discrimination claim be grounded in three broad inquiries (*Law*, *supra*, at para. 39). First, we must examine whether the law, program or activity imposes

differential treatment between the claimant and others. Secondly, we must establish whether this differential treatment is based on one or more enumerated or analogous grounds. And finally, we must ask whether the impugned law, program or activity has a purpose or effect that is substantively discriminatory.

54 This three-staged inquiry is not to be undertaken according to a fixed formula or a rigid test. Rather, s. 15(1) is to be interpreted in a purposive and contextual manner in order to permit the realization of the provision's strong remedial purpose, and to avoid the pitfalls of a formalistic or mechanical approach (*Law*, *supra*, at para. 88) (p. 548); *M. v. H*, [1999] 2 S.C.R. 3, *per* Cory J. at para. 47). The main focus of the inquiry is to establish whether a conflict exists between the purpose or effect of an impugned law and the purpose of s. 15(1). The central purpose of the guarantee in s. 15(1) is to protect against the violation of essential human dignity (*Law*, *supra*, at para. 51; *Winko v. British Columbia (Forensic Psychiatric Institute)*, [1999] 2 S.C.R. 625, *per* McLachlin J. (as she then was), at para. 75). The concept of human dignity was described in the following terms (*Law*, *supra*, at para. 53):

> For the purpose of analysis under s. 15(1) of the *Charter*, however, the jurisprudence of this Court reflects a specific, albeit non-exhaustive, definition. As noted by Lamer C.J. in Rodriguez v. British Columbia (*Attorney General*),[1993] 3 S.C.R. 519, at p. 554, the equality guarantee in s. 15(1) is concerned with the realization of personal autonomy and self-determination. 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?

55 In appreciation of the depth and complexity of the human dignity interest, the discrimination inquiry demands a full contextual analysis. However, this contextual analysis is a directed inquiry; it is focused through the application of contextual factors which have been identified

as being particularly sensitive to the potential existence of substantive discrimination. This contextual analysis proceeds on the basis of "a comparative analysis which takes into consideration the surrounding context of the claim and the claimant" (*Law*, *supra*, at para. 55). Further, the determination of the appropriate comparator and the evaluation of the context must be examined from the reasonable perspective of the claimant. The question to be asked is whether, taking the perspective of a "reasonable person in circumstances similar to those of the claimant who takes into account the contextual factors relevant to the claim"(*Law*, *supra*, at para. 88 (p. 550)), the law has the effect of demeaning a claimant's human dignity; (*Egan v. Canada*, [1995] 2 S.C.R. 513, *per* L'Heureux-Dubé J. at para. 56).

56 At this point, I must pause to mention that the s. 15(1) scrutiny is not limited to distinctions set out only in legislation. Given the remedial purpose of s. 15, we must have a broad understanding of how "law" in s. 15(1) is defined (*Douglas/Kwantlen Faculty Assn. v. Douglas College*, [1990] 3 S.C.R. 570, at p. 585). The necessity for a broader definition becomes manifest in cases such as this appeal, since it is clear that s. 15(1) must be available to review ameliorative programs. LaForest J. recognized precisely this in *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229, at p. 277, where he determined that:

> One need simply examine s. 15(2) which provides that s. 15(1) "does not preclude <u>any law, program or activity</u> that has as its object the amelioration of conditions of disadvantaged individuals or groups...". There would be no need to refer to programs and activities if s. 15(1) were confined to legislative activity. [Emphasis added.]

Consequently, the activities relating to the First Nations Fund undertaken by the provincial government are open to *Charter* scrutiny as "action[s] taken under [the] statutory authority" of s. 15(1) of the *Ontario Casino Corporation Act, 1993*, (*Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624, at para. 21; *Law*, *supra*, at para. 23).

57 As noted above, the purposive s. 15(1) inquiry requires a claimant to advert to factors which contextually establish a breach of the human dignity interest. In *Law*, the Court set out four such contextual factors, with the understanding that others might emerge depending on the

circumstances of a particular appeal. Each of these factors will be considered below in the discrimination analysis.

58 I also wish to emphasize that the relative disadvantage of the claimant, as assessed in relation to the comparator group, does not stand alone as constituting a fifth contextual factor in *Law*. Admittedly, in *Law*, there are a number of observations about what result might be expected in relation to various constellations of relative disadvantage. However, these were observations and nothing more; they were presented in order to convey a full appreciation of the flexibility of the substantive equality analysis. The broad and fully contextual s. 15(1) analysis transcends the superficiality of a simple balancing of relative disadvantage. This was stated as follows in *Law*, *supra*, at para. 68:

> ... in referring to groups which, historically, have been more or less disadvantaged, I do not wish to imply the existence of a strict dichotomy of advantaged and disadvantaged groups, within which each claimant must be classified. I mean to identify simply the social reality that a member of a group which historically has been more disadvantaged in Canadian society is less likely to have difficulty in demonstrating discrimination. Since *Andrews*, it has been recognized in the jurisprudence of this Court that an important, though not exclusive, purpose of s. 15(1) is the protection of individuals and groups who are vulnerable, disadvantaged, or members of "discrete and insular minorities". The effects of a law as they relate to this purpose should always be a central consideration in the contextual s. 15(1) analysis. [Emphasis added.]

59 I, therefore, support the Court of Appeal's rejection, albeit within its s. 15(2) interpretation, of a relative disadvantage approach. The inappropriateness of such an approach is highlighted by the unique circumstances of this appeal, where we must respectfully acknowledge the disadvantages suffered both by the claimants and the comparator group. Moreover, the remedial and holistic nature of the s. 15(1) inquiry obliges this Court to proceed to the directed contextual analysis from the standpoint of acknowledging severe and profoundly patterned historical disadvantages (see *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203, *per* L'Heureux-Dubé J. at para. 54). In short, beyond the unseemly nature of the relative disadvantage approach, i.e., "pitting one disadvantaged group

against another", its narrow focus is inconsistent with the fullness of the substantive equality analysis.

60 The application of the substantive equality analysis cannot be reduced to simple analytical formulae. For, while it is often true that distinctions may produce discrimination, there are many other situations where substantive equality requires that distinctions be made in order to take into account the actual circumstances of individuals as they are located in varying social, political, and economic situations. This is why this Court has long recognized that the purpose of s. 15(1) encompasses both the prevention of discrimination and the amelioration of the conditions of disadvantaged persons (see *Eaton v. Brant County Board of Education*, [1997] 1 S.C.R. 241 at para. 66, *per* Sopinka J.). Accordingly, there has been an equally longstanding recognition that an underinclusive ameliorative law, program or activity may violate the constitutional equality interest (*Brooks v. Canada Safeway Ltd.*, [1989] 1 S.C.R. 1219, at p. 1240, *per* Dickson C.J.). However, until recently, this Court's consideration of underinclusiveness has been limited to the review of universal or generally comprehensive benefit schemes (see *Eldridge, supra*; *Vriend v. Alberta*, [1998] 1 S.C.R. 493).

61 This appeal, then, represents an opportunity for this Court to confirm that the s. 15(1) scrutiny applies just as powerfully to targeted ameliorative programs. Two recent post-*Law* decisions have already indicated as much (*Granovsky v. Canada (Minister of Employment and Immigration)*, [2000] 1 S.C.R. 703, 2000 SCC 28; *Collins v. Canada*, [2000] 2 F.C. 3 (T. D.). I now proceed to discuss the application of the s. 15(1) substantive discrimination analysis.

C. *The Application of Section 15(1)*

1. Comparator Group

62 As stated above, there are three basic stages to establishing a breach of s. 15. Briefly, the Court must find (i) differential treatment, (ii) on the basis of an enumerated or analogous

ground, (iii) which conflicts with the purpose of s. 15(1) and, thus, amounts to substantive discrimination. Each of these inquiries proceeds on the basis of a comparison with another relevant group or groups, and locating the relevant comparison groups requires an examination of the subject-matter of the law, program or activity and its effects, as well as a full appreciation of the context. Generally, the claimant chooses the relevant comparator, however, a court may, within the scope of the ground or grounds pleaded, refine the comparison presented by the claimant (*Law*, *supra*, at para. 57).

63 In this case, each of the two appellant groups has premised their submissions on the selection of the applicable comparator group upon a recognition that the distinction creates differential treatment for categories of aboriginal peoples. The Lovelace appellants submit that the only appropriate comparison is between aboriginal communities registered as bands and rural non-registered aboriginal communities. The Be-Wab-Bon appellants submit, however, that since the majority of non-registered aboriginal communities are made up of non-status Indians and Métis, the appropriate comparison is between status Indians and non-status Indians and Métis.

64 Undoubtedly, the existence of complicated relationships between individual and community aboriginal status must be recognized in the context of this appeal, especially since there are significant differences in this regard between Métis and First Nations peoples. However, the two appellant groups recognize that both the distinction made and the benefit conferred by the First Nations Fund, are fundamentally directed to aboriginal communities rather than individual aboriginals. Furthermore, I see no basis for limiting the comparison of band communities with rural non-band aboriginal communities. As outlined in the factual and contextual section of these reasons, there is a great degree of diversity in the living circumstances of the appellant groups which cannot be properly reflected by this single descriptor. Accordingly, having considered the submissions of the parties, and finding that the whole context of the circumstances warrants a refinement in the identification of the comparator group, I find that

the s.15(1) inquiry must proceed on the basis of comparing band and non-band aboriginal communities.

2. Differential Treatment and Grounds

65 Having decided the relevant comparator group, we must now deal with the first and second stages of the discrimination inquiry. Firstly, we must examine whether the appellants were subject to differential treatment, and secondly, whether this differential treatment was on the basis of an enumerated or analogous ground under s. 15(1).

66 Clearly, the appellants have been subjected to differential treatment since the province of Ontario confirmed, on May 2, 1996, that the appellants were excluded from a share in the First Nations Fund and any related negotiation process. Moving, then, to a consideration of the basis of this distinction, the Be-Wab-Bon appellants submit that they were excluded on the basis of race or ethnicity. On the other hand, the Lovelace appellants submit that non-registration under the *Indian Act* is inextricably tied to a longstanding cultural, community and personal identity of a group of individuals constituting a discrete and insular minority within the larger aboriginal population. Further, they argue that their exclusion from the *Indian Act* is constructively immutable given the onerous nature of current federal policies relating to individual and band registration under the *Indian Act*.

67 Although there may be sound reasons for accepting either the Lovelace or Be-Wab-Bon submissions on the question of enumerated or analogous grounds, and as coming within previous jurisprudence of the Court such as outlined in *Corbiere*, *supra*; *Benner v. Canada (Secretary of State)*, [1997] 1 S.C.R. 358, at para. 62; *Egan*, *supra*; and *Miron v. Trudel*, [1995] 2 S.C.R. 418, I find that it is not necessary to decide this in view of my finding that even if these grounds are present there is no discrimination in these circumstances. To that third stage of the analysis I now turn.

3. Contextual Analysis of Discrimination

68 As mentioned above there are four contextual factors which provide the basis for organizing the third stage of the discrimination analysis, they are: (i) pre-existing disadvantage, stereotyping, prejudice, or vulnerability, (ii) the correspondence, or lack thereof, between the ground(s) on which the claim is based and the actual need, capacity, or circumstances of the claimant or others, (iii) the ameliorative purpose or effects of the impugned law, program or activity upon a more disadvantaged person or group in society, and (iv) the nature and scope of the interest affected by the impugned government activity. As the following discussion of those contextual factors will reveal, I conclude that no discrimination exists through the operation of the casino program.

(a) *Pre-Existing Disadvantage, Stereotyping, Prejudice* or *Vulnerability*

69 As I have already pointed out, this enquiry does not direct the appellants and respondents to a "race to the bottom", i.e., the claimants are not required to establish that they are more disadvantaged than the comparator group. However, it is important to acknowledge that all aboriginal peoples have been affected "by the legacy of stereotyping and prejudice against Aboriginal peoples" (*Corbiere*, *supra*, at para. 66). Aboriginal peoples experience high rates of unemployment and poverty, and face serious disadvantages in the areas of education, health, and housing (*Report of the Royal Commission on Aboriginal Peoples*, vol. 3, *Gathering Strength* (1996), at pp. 108-114, 166-75, 366-69, 438-44; see also U.N. Committee on Economic, Social and Cultural Rights, *Concluding Observations of the Committee on Economic, Social and Cultural Rights* (Canada), E/C. 12/1/Add. 31, 4 Dec. 1998, at paras. 17 and 43; and Carol Agocs and Monica Boyd, "The Canadian Ethnic Mosaic Recast for the 1990s" in *Social Inequality in Canada: Patterns, Problems, Policies,* (2nd ed.1993), 330, at pp. 333-36).

70 Apart from this background, the two appellant groups face a unique set of disadvantages. Although the two appellant groups emphasize their respective cultural and historical distinctness as Métis and First Nations peoples, both appellant groups submit that these particular

disadvantages can be traced to their non-participation in, or exclusion from, the *Indian Act*. These disadvantages include: (i) a vulnerability to cultural assimilation, (ii) a compromised ability to protect their relationship with traditional homelands; (iii) a lack of access to culturally-specific health, educational, and social service programs, and (iv) a chronic pattern of being ignored by both federal and provincial governments. These submissions were clearly supported in the findings of the *Royal Commission on Aboriginal Peoples*, (vol. 3, *Gathering Strength* (1996), at p. 204):

> 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. ...

and (at p. 225):

> 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. ...

71 Furthermore, the appellants have emphasized that these disadvantages have been exacerbated by continuing unfair treatment perpetuated by the stereotype that they are "less aboriginal", with the result that they are generally treated as being less worthy of recognition, and viewed as being disorganized and less accountable than other aboriginal peoples. In *Law*, *supra*, this Court affirmed that the existence of substantive discrimination was highly correlated with the existence of a stigmatizing stereotype. In essence, a stereotype is a "misconception whereby a person or, more often, a group is unfairly portrayed as possessing undesirable traits, or traits which the group, or at least some of its members, do not possess" (*Law*, *supra*, at para. 64).

72 In *Corbiere*, *supra*, this Court recognized the vulnerability of off-reserve First Nations band members to unfair treatment on the basis of that group being stereotyped as "less Aboriginal"

than band members living on a reserve (*per* McLachlin and Bastarache JJ. at para. 18, and *per* L'Heureux-Dubé J., at paras. 71 and 92). While the appellants are situated differently from the *Corbiere* claimants, I accept that the appellants in this appeal are vulnerable to stereotyping in a similar and a somewhat related fashion.

73 The appellants have most certainly established pre-existing disadvantage, stereotyping, and vulnerability, and the Be-Wab-Bon appellants legitimately emphasized that "[f]urther inequities should not be layered upon these widely acknowledged unfair historical exclusions". However, leaving aside as I must, the arguments advanced relating to the potentially discriminatory or arbitrary nature of the exclusionary provisions of the *Indian Act*, the appellants have failed to establish that the First Nations Fund functioned by device of stereotype (*Law*, *supra*, at para. 102). Instead, as will be discussed below, this distinction corresponded to the actual situation of individuals it affects, and the exclusion did not undermine the ameliorative purpose of the targeted program. In short, the First Nations Fund does not conflict with the purpose of s. 15(1) and does not engage the remedial function of the equality right.

(b) *Correspondence to the Needs, Capacities and Circumstances*

74 As discussed above, the province and the First Nations bands agreed that the First Nations Fund revenues were to be directed to community development, health, education, economic development, and cultural development. However, in the context of the overall project, they had agreed to much more, and in order to understand fully the nature of this program and whether it corresponds with the actual circumstances of the appellants, there must be a recognition of how the First Nations Fund is embedded in the overall casino project. Specifically, it is critical to recognize that the province did not merely and unilaterally allocate this First Nations Fund from their general consolidated revenue pool. Rather, the First Nations Fund represents the proceeds of a partnered initiative designed to address several issues at once, namely: (i) to reconcile the differing positions of the province and First Nations bands with respect to the need to regulate reserve-based gambling activities, (ii) to support the

development of a government-to-government relationship between First Nations bands and the provincial government, as a concretization of the SPR, and (iii) to ameliorate the social, cultural and economic conditions of band communities.

75 The appellants have submitted that they have precisely the same need to ameliorate poor social, cultural and economic conditions in their communities. They also see the First Nations Fund as creating opportunities for advancing their self-government and recognition aspirations. Aside from any need to resolve the on-reserve gambling question, I accept that the needs of the appellants correspond to the needs addressed by the casino program, for both the appellant and respondent aboriginal communities face these same social problems. However, the correspondence consideration requires more than establishing a common need. If only a common need were the norm, governments would be placed in the untenable position of having to rank populations without paying any attention to the unique circumstances and capabilities of potential program beneficiaries. I turn, therefore, to a consideration of the correspondence between the actual needs, capacities, and circumstances on the one hand, and the program on the other. In so doing, it becomes evident that the appellant aboriginal communities have very different relations with respect to the land, government, and gaming from those anticipated by the casino program.

76 As highlighted in the factual and contextual section of these reasons, the casino was designed to be located on a reserve, and the respondents stressed the appropriateness of such a location since First Nations bands have encountered limited economic development opportunities as a result of certain *Indian Act* provisions which place constraints on the use of this land. Although the appellants are not subject to any statutory strictures on land use, they simply do not have the land-base anticipated by the casino program. Given the interaction of a number of historical factors, some relating to cultural traditions, and some directly relating to their exclusion from the *Indian Act* regime, these aboriginal communities are of a dispersed nature and do not hold title to a land-base identifiable as an aboriginal community centre.

77 There is no evidence of the Lovelace appellants' involvement in gaming activities, and, thus, no correspondence between the program's focus on resolving outstanding gambling issues with these aboriginal communities. The Be-Wab-Bon appellants, however, had undertaken their own gambling negotiations with provincial representatives. Internally, they established their own gaming commission and were talking to the government about t.v. bingo initiatives and the development of their own casino. These negotiations, however, were undertaken specifically on behalf of the Métis associations and there was no ongoing dispute regarding illegal gaming activities to be resolved.

78 With the exception of the Beaverhouse First Nation (which is seeking band status in affiliation with the Chiefs of Ontario), each of the appellant groups has been struggling to achieve government recognition as self-governing aboriginal communities. Importantly, they are seeking to achieve these goals outside of the *Indian Act* statutory framework. In short, they seek to be specifically recognized as Métis peoples and as First Nations, each with their own distinct traditions, history and culture. The First Nations bands, however, are clearly on a different path to self-government and the casino project is a single stepping stone on that path.

79 Although First Nations bands recognize certain difficulties with the *Indian Act*, they acknowledge that its impact has been woven into their history and identity. While I acknowledge that, albeit in a converse manner, *Indian Act* exclusion has impacted the appellant aboriginal communities with equally powerful social force, each of the respondent and appellant aboriginal communities has undertaken self-government initiatives reflecting their own particular relation to this regime.

80 To that end, the Lovelace appellants have made individual assertions and proposals on their right to self-government to the provincial government. Separately, the Métis appellants have pursued negotiations with the provincial government, and the province has responded by setting out specific guidelines in support of this relationship. In contrast, the First Nations bands pursued an agreement with the province which ultimately took the shape of the SPR, and which became a central basis for the casino development.

81 Thus, each aboriginal community has undertaken distinct self-government initiatives which reflect their respective distinctness as unique aboriginal communities. Chief Gordon Peters, a representative of the Chiefs of Ontario, offered the following comments about the need to respect these separate initiatives:

> In general, the rights and interests of the First Nations represented by COO are qualitatively different from the rights and interests of other Aboriginal groups; for example, the Inuit and the Métis. These other Aboriginal groups clearly have rights of various kinds, some of which are protected by subsec. 35(1) of the Canadian *Constitution Act, 1982*. But these rights are not coincident or exactly the same as the rights of First Nations, i.e. the kind of communities represented by COO. The nature and extent of rights and jurisdictions enjoyed by different Aboriginal groups always depend on the particular circumstances.
>
> In the usual course, COO and its First nation constituency pursue their unique rights and issues on an independent basis. Activities are undertaken without any form of contact with other Aboriginal groups (Inuit and Metis). I believe the same holds true for the regular operations and activities of these other Aboriginal groups. Thus, COO and its First Nation constituency are not consulted by these other Aboriginal groups on a regular basis. This mode of doing business is a reflection of the fact that different rights, obligations, jurisdictions and issues are at stake. [Emphasis added.]

82 I must stress that the casino project is not only a targeted ameliorative program, it is a program that has developed on a partnered basis, with representatives of First Nations bands having had significant decision-making input at every step of the project's development. I emphasize the partnership because the casino arrangement must be distinguished from a universal or generally comprehensive benefits program. Given the input from the bands communities, it is not surprising that there is a very high degree of correspondence between the program and the actual needs, circumstances, and capacities of the bands. And yet, the appellants submit that the program does not precisely correspond to the actual circumstances of the bands, since (i) there are a number of Chiefs of Ontario members who do not have reserve lands or registered band status, and (ii) generally, significant numbers of band members do not live on-reserve.

83 While I would agree that, where the claimant group is disadvantaged the correspondence requirement is more exacting (*Law*, *supra*, at para. 106), I do not find that either of the above submissions put forward by the appellants serves to diminish the degree of required correspondence. Firstly, I do not view the so-called "near-band" membership of the

respondent Chiefs of Ontario, as "leakage" or reflecting a lack of correspondence. The record has established that these communities are seeking recognition and self-government in concert with the band communities. Indeed, according to current government policy, if they are to succeed in attaining registration they must do so on the basis of establishing very close relationships and alliances with existing bands. Secondly, as this Court recognized in *Corbiere, supra,* it is not reasonable to view the scope and breadth of a band community as being limited simply to those members living on-reserve. While there are most certainly compelling local interests on the reserve, off-reserve band members maintain meaningful participation in band affairs (*Corbiere, supra, per* McLachlin and Bastarache JJ., at para. 18).

(c) *Ameliorative Purpose*

84 In setting out the relevance of this contextual factor in *Law, supra,* reference was made to a situation where a relatively more advantaged claimant was excluded from a targeted ameliorative program. Specifically, where the ameliorative purpose or effect of such a program accords with the purpose of s. 15(1) of the *Charter*, the exclusion will likely not violate the human dignity of more advantaged individuals where the exclusion of these more advantaged individuals largely corresponds to the greater need or the different circumstances experienced by the disadvantaged group being targeted by the legislation (*Law, supra,* at para. 72). In *Law*, the Court also affirmed that ameliorative legislation designed to benefit the population in general, yet which excludes historically disadvantaged claimants, will "rarely escape the charge of discrimination" (*Law, supra* at para. 26; *Vriend, supra,* at paras. 94-104). Specifically, in *Vriend, supra,* the Court considered the approach to underinclusivity as it arises in more comprehensive schemes as compared to underinclusive targeted programs. Cory J. stated, at para. 96:

> The comprehensive nature of the Act [human rights legislation] must be taken into account in considering the effect of excluding one ground from its protection. It is not as if the Legislature had merely chosen to deal with one type of discrimination. In such a case it might be permissible to target only that specific type of discrimination and not another. This is, I believe, the type of case to which L'Heureux-Dubé J. was

> referring in the comments she made in *obiter* in her dissenting reasons in *McKinney* (at p. 436): "in my view, if the provinces chose to enact human rights legislation which only prohibited discrimination on the basis of sex, and not age, this legislation could not be held to violate the *Charter*". ... Those comments contemplated a type of legislation different from that at issue in this case, namely, legislation which seeks to address one specific problem or type of discrimination. The case at bar presents a very different situation. It is concerned with legislation that purports to provide comprehensive protection from discrimination for all individuals in Alberta. The selective exclusion of one group from that comprehensive protection therefore has a very different effect. [Emphasis added.]

85 This appeal raises yet another situation where both the claimant and the targeted group are equally disadvantaged, and although this scenario was not adverted to in *Law*, I think it is appropriate to extend the ameliorative purpose analysis to situations where disadvantage, stereotyping, prejudice or vulnerability describes the excluded group or individual. Taking such an approach ensures that the analysis remains focused on whether the exclusion conflicts with the purpose of s. 15(1), and directs us away from reducing the equality analysis to a simplistic measuring or balancing of relative disadvantage. Here, the focus of analysis is not the fact that the appellant and respondent groups are equally disadvantaged, but that the program in question was targeted at ameliorating the conditions of a specific disadvantaged group rather than at disadvantage potentially experienced by any member of society. In other words, we are dealing here with a targeted ameliorative program which is alleged to be underinclusive, rather than a more comprehensive ameliorative program alleged to be underinclusive.

86 Having said this, one must recognize that exclusion from a targeted or partnership program 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.

87 The ameliorative purpose of the overall casino project and the related First Nations Fund has clearly been established. In particular, the First Nations Fund will provide bands with resources in order to ameliorate specifically social, health, cultural, education, and economic disadvantages. It is anticipated that the bands will be able to target the allocation of these monies within these specified areas, thereby increasing the fiscal autonomy of the bands. This aspect of the First Nations Fund is consistent with the related ameliorative purpose of

supporting the bands in achieving self-government and self-reliance. Without a doubt, this program has been designed to redress historical disadvantage and contribute to enhancing the dignity and recognition of bands in Canadian society. Furthermore, both of the above ameliorative objectives can be met while, at the same time, ensuring that on-reserve commercial casino gaming is undertaken in compliance with the strict regulations applicable to the supervision of gaming activities. The First Nations Fund has, therefore, a purpose that is consistent with s. 15(1) of the *Charter* and the exclusion of the appellants does not undermine this purpose since it is not associated with a misconception as to their actual needs, capacities and circumstances.

(d) *Nature of the Interest Affected*

88 In *Egan*, *supra*, L'Heureux-Dubé J. explained that the essence of differential treatment cannot be fully appreciated without evaluating the economic, constitutional and societal significance of the interest adversely affected by the program in question (*Law*, *supra*, at para. 74). She stated, at paras. 63-64:

> If all other things are equal, the more severe and localized the economic consequences on the affected group, the more likely that the distinction responsible for these consequences is discriminatory within the meaning of s. 15 of the *Charter*.
>
> Although a search for economic prejudice may be a convenient means to begin a s. 15 inquiry, a conscientious inquiry must not stop here. The discriminatory calibre of a particular distinction cannot be fully appreciated without also evaluating the constitutional and societal significance of the interest(s) adversely affected. Other important considerations involve determining whether the distinction somehow restricts access to a fundamental social institution, or affects a basic aspect of full membership in Canadian society (e.g. voting, mobility). Finally, does the distinction constitute a complete non-recognition of a particular group? It stands to reason that a group's interests will be more adversely affected in cases involving complete exclusion or non-recognition than in cases where the legislative distinction <u>does</u> recognize or accommodate the group, but does so in a manner that is simply more restrictive than some would like. [Emphasis in original.]

89 The claimants have stated that the exclusion from the First Nations Fund results in severe and localized economic and social consequences. They have also indicated that the conferral of

this benefit relates to a more constitutionally related interest in building self-reliant and recognized self-governing communities. We see, therefore, that the severe and localized economic interest is interwoven with a compelling interest in a fundamental social institution, namely recognition as self-governing aboriginal communities. However, I fail to see how the targeted arrangement and circumstances surrounding the First Nations Fund, including the special characteristics of First Nations bands as described above, results in any lack of recognition of the appellants as self-governing communities. To the extent that there is any such effect in this respect, I find it remote.

(e) *Conclusion on Discrimination*

90 Thus, applying the contextual factors discussed above, I find that the appellants have failed to demonstrate that, viewed from the perspective of the reasonable individual, in circumstances similar to those of the appellants, the exclusion from the First Nations Fund has the effect of demeaning the appellants' human dignity. There are important differences among First Nations bands, Métis communities and non-band First Nations, and as stated by L'Heureux-Dubé in *Corbiere*, *supra*, at para. 94, "[t]aking into account, recognizing, and affirming differences between groups in a manner that respects and values their dignity and difference are not only legitimate, but necessary considerations in ensuring that substantive equality is present in Canadian society." Again, I acknowledge that the appellant aboriginal communities have experienced layer upon layer of exclusion and discrimination.

91 It is not surprising that the applicability of s. 15(2) to targeted programs was raised as a question in this appeal. The respondents submit that s. 15(2) provides an alternative approach to dealing with the discrimination analysis and, in this case, acts to protect ameliorative programs by restricting the s. 15 review to a consideration of whether the claimants fell outside the ameliorative object of the program. The respondents are concerned that the *Charter* must be interpreted as providing a way to support the government's ability to create programs with embedded distinctions which support the amelioration of the precise circumstances of targeted

groups. On the other hand, the appellants submit that, if s. 15(2) was applicable to this case, that analysis should be focused on whether there is a correspondence between the program and the needs addressed. They submit that simply drawing a line around a group of intended beneficiaries may improperly immunize discriminatory government action.

92 We have seen, however, that both of these concerns are fully addressed by the s. 15(1) contextual analysis outlined above. Specifically, my consideration of the correspondence factor has addressed the appellants' worry by requiring an examination of the relationship between the differential treatment and the specific needs, capacities and circumstances of the claimants and the bands. The respondents' concerns have also been addressed by the in-depth consideration of the ameliorative purpose, where it was determined that this program had a purpose consistent with s. 15(1) which was not undermined by targeting the different circumstances experienced by the First Nations bands. But all this brings me to an examination of the relationship between ss. 15(1) and 15(2) of the *Charter*.

D. *The Interrelationship Between Sections 15(1) and 15(2)*

1. Background

93 The Court of Appeal decided the case on the basis of s. 15(2) and much of the argument the Court heard was based on that subsection. In that light, I believe it is important to comment on the relationship between ss. 15(1) and 15(2). This Court has not defined the scope or content of s. 15(2) of the *Charter*, at least not as a substantive or independently applicable subsection of s. 15. However, s. 15(2) has played an important role in the evolution of s. 15 jurisprudence. In particular, s. 15(2) provides a basis for the firm recognition that the equality right is to be understood in substantive rather than formalistic terms (see *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, at pp. 163 and 169; *R. v. Swain*, [1991] 1 S.C.R. 933, at pp. 991-92; *Weatherall v. Canada (Attorney General)*,[1993] 2 S.C.R. 872, at p. 877; *Eaton*, *supra*, at paras. 66-67; and *Law*, *supra*, at paras. 3 and 46). Having

accepted the substantive approach, the Court has interpreted s. 15(1) not only to prevent discrimination but also to play a role in promoting the amelioration of the conditions of disadvantaged persons.

94 In developing this substantive approach to the equality interest, the Court has on occasion adverted to the language of s. 15(2). Indeed, in this Court's very first consideration of s. 15(1) in *Andrews*, *supra*, McIntyre J. used s. 15(2) as an interpretive aid for understanding s. 15(1). He stated, at p. 171:

> It is clear that the purpose of s. 15 is to ensure equality in the formulation and application of the law. The promotion of equality entails the promotion of a society in which all are secure in the knowledge that they are recognized at law as human beings equally deserving of concern, respect and consideration. It has a large remedial component. ...
>
> It must be recognized, however, as well that the promotion of equality under s. 15 has a much more specific goal than the mere elimination of distinctions. If the *Charter* was intended to eliminate all distinctions, then there would be no place for sections such as 27 (multicultural heritage); 2(*a*)(freedom of conscience and religion); 25 (aboriginal rights and freedoms); and other such provisions designed to safeguard certain distinctions. Moreover, the fact that identical treatment may frequently produce serious inequality is recognized in s. 15(2), which states that the equality rights in s. 15(1) do "not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups... ." [Emphasis added.]

95 A year later, Wilson J., in her dissenting reasons in *Harrison v. University of British Columbia*, [1990] 3 S.C.R. 451, also made reference to the language of s. 15(2) as supporting s. 15(1)'s applicability to protect differential treatment focused on ameliorating the conditions of disadvantaged persons (at pp. 474-75):

> ... at the very least the purpose of this section [15(2)] is to enshrine the notion of the viability, indeed the necessity, of measures designed to redress the drastic effects of discrimination. By its terms s. 15(2) informs us that measures aimed at ameliorating the conditions of those who are disadvantaged because of such personal characteristics as race, sex and age (those in other words who have been the victims of discrimination) are constitutionally permissible. In this way subsection (2) strengthens the notion adopted by this Court in *Andrews*, that what lies at the heart of the equality guarantee is protection from discrimination. [Emphasis added.]

96 These are just two examples of how the language of s. 15(2) has provided interpretive assistance in the development of the discrimination analysis in s. 15(1). However, the

respondents have argued, and the Ontario Court of Appeal has agreed, that s. 15(2) has an independent role to play within s. 15. Although agreeing that s. 15(2) is integral to the meaning of the equality interest in s. 15, the respondents submit that s. 15(2) must play an independent role in situations involving a targeted ameliorative program. In effect, they have urged this Court to accept that s. 15(2) can act to pre-empt or limit the s. 15(1) scrutiny.

97 Consequently, we are confronted with two competing approaches to understanding the application of s. 15(2) and its relationship with s. 15(1). On the one hand, s. 15(2) is regarded as an interpretive aid to s. 15(1); providing conceptual depth and clarity on the substantive nature of equality. On the other hand, s. 15(2) is seen as an exemption or a defence to the applicability of the s. 15(1) discrimination analysis.

98 The tension between these competing perspectives on the interpretation and applicability of s. 15(2) is reflected in a number of inconsistent lower court decisions on the proper approach to s. 15(2). Taking the exemptive approach, Simonsen J. in *Manitoba Rice Farmers Association v. Human Rights Commission (Manitoba)* (1987), 50 Man. R. (2d) 92 (Q.B.), held that an ameliorative program designed for an identifiable disadvantaged group could be saved under s. 15(2) if the government could establish that the program was rationally designed in order to redress the cause of the disadvantage (at pp. 101-2). In other words, the s. 15(2) analysis was not only capable of being independently triggered, but it also imported and displaced the justification analysis from s. 1 of the *Charter*. In *Willocks, supra*, Watt J. also felt that s. 15(2) works to exempt any finding of a s. 15(1) violation. However, Watt J. focused his analysis on considering whether the distinctions tied to the ameliorative program created "gross unfairness" (p. 571).

99 Still another interpretation originates from the decision of the Ontario Court of Appeal in *Roberts, supra*. Although that case dealt with s. 14(1) of the Ontario *Human Rights Code*, that provision was seen to have the same purpose as s.15(2) of the *Charter* and both provisions should, therefore, be interpreted in a congruent manner (at p. 405). Weiler J.A., for the majority, found that s. 14(1) of the Ontario *Human Rights Code* had two purposes:

(i) the exemption of affirmative action programs from review, and (ii) the promotion of substantive equality. However, given the need to promote substantive equality, s. 14(1) could only be invoked as an exemptive clause in situations where a rational connection exists between the prohibited ground of discrimination and the program (see also *Silano v. The Queen in Right of British Columbia* (1987), 42 D.L.R. (4th) 407 (B.C.S.C.)). In contrast to *Manitoba Rice Farmers, supra*, the *Roberts* approach did not demand that the government demonstrate the program's effectiveness.

100 The "rational connection" test outlined in *Roberts, supra*, squarely matches the approach to examining the "correspondence factor" embedded in the s. 15(1) analysis outlined above. I am not at all surprised by this conceptual parallel since the *Roberts* analysis begins with the premise that ameliorative programs are generally to be regarded as consistent with s. 14(1)'s goal of promoting substantive equality. It is precisely this same premise which grounds my approach to understanding the interrelationship between ss. 15(1) and 15(2) and, for the reasons outlined below, I find that s. 15(2) can be understood as confirming the substantive equality approach of s. 15(1). However, in view of emerging equality jurisprudence it is worth emphasizing that I do not foreclose possibility that s. 15(2) may be independently applicable to a case in the future.

101 Colleen Sheppard, in *Litigating the Relationship Between Equity and Equality* (1993), a study paper prepared by Ontario Law Reform Commission, pointed out that interpreting s. 15(2) as an exemption or defence requires the courts to inappropriately frame equity programs as constituting *prima facie* violations of s. 15(1). Such a view is inconsistent with the substantive equality analysis and encourages a negative approach to ameliorative programs. In this regard, she stated at p. 2:

> ... equity programs should be understood as integral to, and consistent with, legal guarantees of equality for historically disadvantaged groups in society, thereby rejecting the view that affirmative action is a source of discrimination. Thus, affirmative action is presented as an expression of equality, rather than an exception to it.

and at p. 20:

> "Any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups", which is the phrase used in section 15(2) of the *Charter*, should be understood as an elucidation of what equality is all about, rather than the threshold question for delineating exceptions to equality. Treating special programs to remedy disadvantages as exceptions to equality, rather than expressions of it, allows judges to uphold such programs while continuing to adhere to a formal understanding of equality.

102 On the other hand, Mark A. Drumbl and John D. R. Craig argue that s. 15(2) should be viewed as a defence to a s. 15(1) violation since s. 15(2), properly construed, is concerned with promoting state action beyond the substantive equality requirement set out in s. 15(1) (i.e., the creation of affirmative action programs) ("Affirmative Action in Question: A Coherent Theory for Section 15(2)" (1997), 4 *Rev. Const. Studies* 80). Specifically, at p. 85, these authors explain:

> ... section 15(1) already gives effect to the principle of substantive equality within the Canadian constitutional framework, section 15(2) must permit some forms of state action which pursue objectives beyond what is commonly understood as substantive equality. Any other conclusion would render section 15(2) redundant. This conclusion is reinforced by the broad wording of section 15(2), since the provision seemingly immunizes from constitutional review any governmental law or program which has the *objective* of improving the circumstances of members of a 'have-not' category, even if the law or program imposes substantial burdens on other persons, including other 'have-nots.' Assuming this to be true, then the scope of section 15(2) could extend considerably beyond the principle of substantive equality. [Emphasis in original.]

103 Accepting this perspective, however, means adopting a limited understanding of what is meant by substantive equality and, more importantly, an approach that would regressively narrow the scope of s. 15(1)'s application. As outlined in the preceding s. 15(1) analysis, the s. 15(1) directed contextual analysis does not proceed on the basis of simplistic comparisons or categorizations of 'haves' and 'have-nots'. The authors' concern that s. 15(2) be made available in order to address the complexity of diversity in a continuum of disadvantage and privilege is adequately addressed in the s. 15(1) analysis which has fully integrated this holistic approach.

104 In this regard, Edward M. Iacobucci stated, in "Antidiscrimination and Affirmative Action Policies: Economic Efficiency and the Constitution" (1998), 36 *Osgoode Hall L.J.* 293, at p. 326:

> The debate is whether section 15(2) *informs* the interpretation of section 15(1), which if true indicates that while section 15(2) is not absolutely necessary to establishing equality rights, it is important in determining the scope of the equality rights set out in section 15(1). Under this view, section 15(2) admittedly does not set out any new rights, but it is not redundant. [Emphasis in original.]

He goes on to say that the preferred view is recognizing s. 15(2) as an interpretive aid to s. 15(1), since taking the exemptive approach means that affirmative action programs are construed as somehow conflicting with the purpose of s. 15(1).

2. The Relationship Between Sections 15(1) and 15(2)

105 The plain meaning of the language in these subsections is consistent with the view that s. 15(2) is confirmatory and supplementary to s. 15(1). In this respect, it is clear that the s. 15(2) phrase "does not preclude" cannot be understood as language of defence or exemption. Rather, this language indicates that the normal reading of s. 15(1) includes the kind of special program under review in this appeal. Indeed, Walter S. Tarnopolsky noted that the drafters of s. 15 added s. 15(2) out of "excessive caution", intending to bolster the substantive equality approach in s. 15(1), since, at the time the *Charter* was being drafted, there was a worry that affirmative action programs would be over-turned on the basis of reverse discrimination ("The Equality Rights in the Canadian Charter of Rights and Freedoms" (1983), 61 *Can. Bar Rev.* 242; *Re MacVicar and Superintendent of Family & Children Services* (1986), 34 D.L.R. (4th) 488 (B.C.S.C.); and Helena Orton, "Section 15, Benefits Programs and Other Benefits at Law: The Interpretation of Section 15 of the Charter since Andrews" (1990), 19 *Man. L.J.* 288, at p. 299). In short, s. 15(2) is referenced to the s. 15(1) subsection and there is no language of exemption; on its face s. 15(2) describes the scope of the s. 15(1) equality right (Iacobucci, *supra*, at p. 328, ftn. 85).

106 I would also note in stating that s. 15(2) acts as an interpretive aid to s. 15(1) that such an interpretation ensures the internal coherence of the *Charter* as a working statute. A similar conclusion was made in relation to the *Charter* mobility right in *Canadian Egg Marketing Agency v. Richardson*, [1998] 3 S.C.R. 157. In that case the Court was asked whether ss. 6(2)(*b*) and 6(3)(*a*) of the *Charter* were to be read together as establishing an internally qualified right, or whether s. 6(2)(*b*) establishes a self-contained right which was only externally qualified by s. 6(3)(*a*). In deciding that these provisions were interpretively interdependent, Iacobucci and Bastarache JJ. commented as follows (at para. 54):

> In our view, using s. 6(3)(*a*) as an independent saving provision is redundant and potentially confusing. This Court has recognized that the mobility right articulated in s. 6(2)(*b*) must be read in light of the discrimination provision contained in s. 6(3)(*a*) or else be manifestly too broad, given the heading '*Mobility Rights*'. Once this interpretive interdependence is recognized, it is more coherent to read the two sections together as defining a single right, rather than one right which is externally 'saved' by another. [...] The discrimination provision should be fully integrated into an understanding of the purpose and scope of the mobility right described in s. 6(2)(*b*). Section 6(3)(*a*) is not a 'saving' provision in the way in which s. 6(3)(*b*), s. 6(4) or s. 1 of the *Charter* are, since none of these sections is essential to defining the purpose of the sections they limit. [Emphasis added.]

107 Finally, Drumbl and Craig, *supra*, conceded that treating s. 15(2) as an exception or defence would render s. 1 of the *Charter* redundant (at p. 122). Such an approach would be inconsistent with the overall structure of the *Charter*, and consequently it is preferable, as was the case in *Canadian Egg Marketing*, *supra*, to recognize the interpretive interdependence of ss. 15(1) and 15(2).

108 In summary, at this stage of the jurisprudence I see s. 15(2) as confirmatory of s. 15(1) and, in that respect, claimants arguing equality claims in the future should first be directed to s. 15(1) since that subsection can embrace ameliorative programs of the kind that are contemplated by s. 15(2). By doing that one can ensure that the program is subject to the full scrutiny of the discrimination analysis, as well as the possibility of a s. 1 review. However, as already stated, we may well wish to reconsider this matter at a future time in the context of another case.

E. *The First Nations Fund Is Intra Vires the Province's Constitutional Jurisdiction*

109 While the appellants agree that s. 91(24) of the *Constitution Act, 1867* does not preclude provincial programs aimed at aboriginal peoples or communities, they submit that the province has strayed into the field of exclusive federal jurisdiction by defining which groups of aboriginal peoples are "First Nations" for the purposes of the casino project. In short, they argue that this approach has undermined the "Indianness" or aboriginality of non-status and Métis aboriginal communities.

110 This Court addressed the s. 91(24) federal jurisdiction in *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, and, at para. 181, Lamer C.J. offered the following description of the core of that jurisdiction as it relates to the integrity of "Indianness":

> ... as I mentioned earlier, s. 91(24) protects a core of federal jurisdiction even from provincial laws of general application, through the operation of the doctrine of interjurisdictional immunity. That core has been described as matters touching on "Indianness" or the "core of Indianness" (*Dick*, *supra*, at pp. 326 and 315; also see *Four B*, *supra*, at p. 1047; and *Francis*, *supra*, at pp. 1028-29). The core of Indianness at the heart of s. 91(24) has been defined in both negative and positive terms. Negatively, it has been held to not include labour relations (*Four B*) and the driving of motor vehicles (*Francis*). The only positive formulation of Indianness was offered in *Dick*. Speaking for the Court, Beetz J. assumed, but did not decide, that a provincial hunting law did not apply *proprio vigore* to the members of an Indian band to hunt and because those activities were "at the centre of what they do and what they are" (at p. 320). But in *Van der Peet*, I described and defined the aboriginal rights that are recognized and affirmed by s. 35(1) in a similar fashion, as protecting the occupation of land and the activities which are integral to the distinctive aboriginal culture of the group claiming the right. It follows that aboriginal rights are part of the core of Indianness at the heart of s. 91(24).

111 In my opinion there is nothing in the casino program affecting the core of the s. 91(24) federal jurisdiction. The Ontario government is simply using the definition of band found in the federal *Indian Act*. The province has done nothing to impair the status or capacity of the appellants as aboriginal peoples. Furthermore, in *Pamajewon*, *supra*, this Court found that gambling, or the regulation of gambling activities, is not an aboriginal right. Consequently, this casino program cannot have the effect of violating the rights affirmed by s. 35(1) of the *Constitution Act, 1982*, and does not approach the core of aboriginality. I agree with the Ontario Court of Appeal, therefore, that the casino program falls within the provincial spending power, and the province did not act in any way to encroach upon federal jurisdiction.

VII. Conclusions and Disposition

112 In the result, I would dismiss the appeal. In addition, I agree with the Ontario Court of Appeal that no costs should be ordered.

113 I would answer the constitutional questions as follows:

Question 1: 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. 1993, 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*?

Answer: No.

Question 2: 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*?

Answer: In view of the answer to Question 1, it is not necessary to answer this question.

Question 3: 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*?

Answer: No.

Appeal dismissed.

Solicitor for the appellants Robert Lovelace et al.: Christopher M. Reid, Toronto.

Solicitors for the appellants Be-Wab-Bon Métis and Non-Status Indian Association and the Ontario Métis Aboriginal Association: Sarlo O'Neil, Sault Ste. Marie.

Solicitor for the respondent Her Majesty the Queen in right of Ontario: The Attorney General of Ontario, Toronto.

Solicitor for the respondent the Chiefs of Ontario: Michael W. Sherry, Toronto.

Solicitor for the intervener the Attorney General of Canada: The Deputy Attorney General of Canada.

Solicitor for the intervener the Attorney General of Quebec: The Department of Justice, Sainte-Foy.

Solicitor for the intervener the Attorney General for Saskatchewan: The Deputy Attorney General of Saskatchewan, Regina.

Solicitors for the intervener the Mnjikaning First Nation: McCarthy Tétrault, Toronto.

Solicitor for the intervener the Congress of Aboriginal Peoples: Marc J.A. LeClair, Ottawa.

Solicitors for the intervener the Native Women's Association of Canada: Eberts Symes Street & Corbett, Toronto.

Solicitors for the intervener the Charter Committee on Poverty Issues: Sack Goldblatt Mitchell, Toronto.

Solicitor for the intervener the Métis National Council of Women: Kathleen A. Lahey, Kingston.