CCPI
Charter Committee on Poverty Issues

Court File No.26165

IN THE SUPREME COURT OF CANADA

(On Appeal from the Court of Appeal for the Province of Ontario)

B E T W E E N :

Robert LOVELACE, on his own behalf and on behalf of the

ARDOCH ALGONQUIN FIRST NATION & ALLIES, and the

ARDOCH ALGONQUIN FIRST NATION & ALLIES, and

CHIEF KRIS NAHRGANG on behalf of KAWARTHA NISHNAWBE FIRST NATION,

and the KAWARTHA NISHNAWBE FIRST NATION,

and CHIEF ROY MEANISS on his own behalf and on behalf of the

BEAVERHOUSE FIRST NATION, and the BEAVERHOUSE FIRST NATION,

and CHIEF THERON McCRADY on his own behalf and on behalf of

the POPLAR POINT OJIBWAY FIRST NATION,

and the POPLAR POINT OJIBWAY FIRST NATION,

and the BONNECHERE METIS ASSOCIATION &

BE-WAB-BON METIS AND NON-STATUS INDIAN ASSOCIATION, and

the ONTARIO METIS ABORIGINAL ASSOCIATION

APPELLANTS

(Applicants)

- and -

HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO and

THE CHIEFS OF ONTARIO

RESPONDENTS

FACTUM OF THE INTERVENER

CHARTER COMMITTEE ON POVERTY ISSUES

SACK GOLDBLATT MITCHELL NELLIGAN POWER

Barristers & Solicitors Barristers & Solicitors

20 Dundas Street West 66 Slater Street

Suite 1130 Suite 1900

Toronto, ON M5G 2G8 Ottawa, ON K1P 5H1

Cynthia Petersen Pamela MacEachern

tel: (416) 979-6440 tel: (613) 231-8276

fax: (416) 591-7333 fax: (613) 238-2098

Solicitors for the Intervener Ottawa Agent

Charter Committee on Poverty Issues

TABLE OF CONTENTS

PART I - THE FACTS

1. This appeal concerns the Ontario government's exclusion of Metis and non-status Aboriginal groups from sharing in the proceeds of the Casino Rama Project (the "Project") and from participating in negotiations regarding the Project. The parties dispute whether the Project is designed to benefit only Indian bands or whether its purpose is to benefit all Aboriginal peoples, including Metis and non-status Aboriginal groups. However, there is no dispute that the proceeds of the Project are intended to be used for cultural and community development, to address the health, housing, education, and other social service needs of Aboriginal peoples. In other words, the parties agree that the Project constitutes a government program designed to ameliorate the socio-economic conditions of a disadvantaged group.

2. Although the parties dispute whether Indian bands or Metis and non-status Aboriginal groups suffer greater socio-economic disadvantage, it is undisputed that all Aboriginal persons in Canada - including on-reserve and off-reserve status Indians, non-status Indians, and Metis - experience significant socio-economic disadvantage in comparison to the non-Aboriginal population (see paragraph 21 of the Factum of the Attorney General of Ontario). Indeed, the Report of the Royal Commission on Aboriginal Peoples ("RCAP") reveals, *inter alia*, that:

- Aboriginal people experience higher unemployment rates than the average Canadian and those who are employed earn considerably less on average than the average Canadian.
- Aboriginal people receive lower transfers than Canadians generally from several income support programs, including employment insurance and the Canada and Quebec Pension Plans.
- Social assistance dependence levels for Aboriginal people are considerably higher than the national average and are increasing over time.
- Approximately 50% of Aboriginal children live in poverty.
- Aboriginal people often face inadequate nutrition, substandard housing and sanitation, unemployment and poverty, discrimination and racism, violence, inappropriate and absent services, and subsequent high rates of physical, social, and emotional illness, injury, disability, and premature death.

RCAP Report, chapter 2, pp.3 and 20, and "Health and Healing", pp.1 and 52

PART II - THE ISSUES

8. The questions stated by this Court include whether the exclusion of the Appellant Aboriginal groups from the Casino Rama Project is *ultra vires* the power of the province under the *Constitution Act, 1867*, whether it violates rights guaranteed by s.15 of the *Charter* and, if so, whether that violation is justified pursuant to s.1 of the *Charter*. The Respondent Attorney-General of Ontario ("AGO") asserts that the Project is subject to limited judicial scrutiny under s.15(1) of the *Charter* because it is an ameliorative program within the meaning of s.15(2). This appeal therefore raises before this Court, for the first time, issues about the relationship between s.15(1) and s.15(2). The intervention of the Charter Committee on Poverty Issues ("CCPI") is restricted to submissions on the appropriate interpretation and application of these subsections of the *Charter*. CCPI takes no position on whether there is a constitutional violation on the specific facts in this case.

PART III - THE ARGUMENT

A. Summary of CCPI's Position

9. CCPI submits that s.15(2) of the *Charter* should be construed, not as an exemption or exclusion from the requirements of s.15(1), but rather as an interpretive aid that clarifies and enhances the nature and purpose of the equality guarantee contained in s.15(1). Section 15 should be read as a whole, with parts that complement rather than contradict each other. Subsections 15(1) and 15(2) are both intended to ensure that substantive rather than merely formal equality is provided by the *Charter*. Underlying both subsections is a recognition that governments must take affirmative steps to remedy the effects of discrimination and ameliorate the conditions of disadvantaged groups, in order for substantive equality to be realized.

10. By proposing an analytical framework that would effectively insulate most ameliorative programs from scrutiny under s.15(1), the AGO and the Court of Appeal treat s.15(2) as an exemptive provision. Both the AGO and the Court of Appeal

assert that a lesser standard of review of ameliorative programs is warranted based on the assumption that governments have no obligation to implement such programs in the first place and consequently require an incentive to do so, in the form of a promise of judicial deference. Central to this appeal, therefore, is the issue of whether the enactment of ameliorative programs is purely optional on the part of governments or whether it is an obligation that flows from constitutional imperatives.

11. CCPI submits that any approach to s.15(2) which presupposes that governments have no positive obligation to redress substantive inequalities is inconsistent with international legal norms. As discussed below, if the AGO's position were adopted by this Court, it would place Canada's domestic *Charter* equality jurisprudence in conflict with our international human rights obligations.

12. CCPI further submits that the AGO's position is contrary to domestic human rights and *Charter* jurisprudence. In particular, it is inimical to the remedial purpose of s.15 of the *Charter*. Although ostensibly designed to encourage the development of ameliorative programs, in reality, the AGO's approach to s.15(2) provides no incentive to governments to implement programs that ameliorate the conditions of disadvantaged individuals or groups. On the contrary, it invites judicial deference and acquiescence to government inaction and/or incremental action in the face of substantive inequalities that cry out for remedial measures.

B. The Equality Rights of Poor People are at Stake

13. If the AGO's approach to s.15(2) were adopted by this Court, this case would have catastrophic results for the equality rights of poor people. The AGO argues for limited judicial scrutiny under s.15(1) of government programs designed to ameliorate the conditions of disadvantaged groups. These include virtually all of the programs on which poor people rely for their well-being and survival, such as those that address social assistance, education, health, housing, and other basic needs. The AGO seeks to insulate these programs from discrimination claims made by disadvantaged as well as advantaged groups. The AGO not only asserts that governments are free to act or not to act in developing ameliorative programs, but also argues that governments should be permitted to discriminate against those who require such programs in ways that would be constitutionally unacceptable in any other type of program.

14. The AGO's approach to s.15(2) would give governments an unfettered right to discriminate against disadvantaged individuals or groups based on enumerated or analogous grounds in programs that have as their object the amelioration of disadvantage. If this approach were adopted, poor people (who frequently rely on ameliorative programs) would regularly be denied the full protection of s.15(1) of the *Charter*. They would effectively be deemed to have waived their constitutional equality rights in exchange for benefitting from government programs. Such an approach to s.15(2) reflects a pernicious and discriminatory attitude toward poor people, which holds that they ought to be grateful for the purported generosity of social assistance programs, rather than claiming entitlement to the benefit of such programs as a fundamental human right.

C. Subsection 15(1) of the Charter Guarantees Substantive Equality

15. It is now well established in this Court's jurisprudence that s.15(1) of the *Charter* guarantees substantive and not merely formal equality.

> *Eldridge v. B.C. (Attorney General)*, [1997] 3 S.C.R. 624 at 671; *Vriend v. Alberta*, [1998] 1 S.C.R. 493 at 542-43; *Law v. Canada* (25 March 1999, SCC doc.25374) at paras.38-41

16. Subsection 15(2) of the *Charter* reinforces the guarantee of substantive equality in s.15(1). As Gwen Brodsky and Shelagh Day have written, s.15(2) "indicates that the amelioration of disadvantage is central to the purpose of section 15, and that it is the conditions of disadvantage, not merely distinctions in the form of law, which the equality guarantee is intended to address."

> Gwen Brodsky and Shelagh Day, *Canadian Charter Equality Rights for Women: One Step Forward or Two Steps Back?* (Canadian Advisory Council on the Status of Women, 1989) at 31

17. Since its earliest rulings on s.15, this Court has consistently rejected a formal equality model, recognizing that identical

treatment of different groups will sometimes produce serious inequality, and that differential treatment will not always result in inequality. In recent cases, this Court's articulation of the meaning of substantive equality has evolved beyond a rejection of the "same treatment" model of equality, toward an acknowledgment that positive measures addressing the specific needs of disadvantaged groups are not only acceptable, but are sometimes *required* under s.15 of the *Charter*.

Andrews v. Law Society of British Columbia, [1989] 1 S.C.R. 143 at 164-69

18. For example, in *Eldridge v. B.C. (A.G.)*, this Court held that, where sign language interpreters are necessary for effective communication in the delivery of medical services, the failure to provide them constitutes a violation of s.15(1) of the *Charter*. In that case, interpreter services had previously been funded by private sources, but the funding had ceased to exist. The provincial government was aware that the private funding had been cut, but took no steps to ensure the continuation of the interpreter services. In response to the applicants' *Charter* claim of discrimination, the government argued that it had no constitutional obligation to ameliorate disadvantage that it had neither created nor exacerbated (namely, disability due to deafness). This Court rejected that argument with the following remarks:

> [T]he respondents and their supporting interveners maintain that section 15(1) does not oblige governments to implement programs to alleviate disadvantages that exist independently of state action. Adverse effects only arise from benefit programs, they aver, when those programs exacerbate the disparities between the group claiming a section 15(1) violation and the general population. They assert, in other words, that governments should be entitled to provide benefits to the general population without ensuring that disadvantaged members of society have the resources to take full advantages of those benefits. / In my view, this position bespeaks a thin and impoverished vision of section 15(1).

Eldridge v. B.C. (A.G.), [1997] 3 S.C.R. 624 at 677-78

19. Similarly, in *Vriend v. Alberta*, this Court ruled that the Alberta legislature had violated s.15(1) of the *Charter* by failing to prohibit discrimination based on sexual orientation in its human rights legislation, thereby denying lesbians and gay men "the very protection they so urgently need because of the existence of discrimination against them in society." The provincial government had argued that it was not constitutionally required to adopt measures to redress discrimination that existed independently of any legislative action (namely, anti-lesbian and anti-gay discrimination in the public and private sectors). This Court rejected that argument, affirming that "substantive equality may be violated by legislative omission."

Vriend v. Alberta, [1998] 1 S.C.R. 493 at 543-44

D. Governments Have a Constitutional Obligation to Take Positive Steps to Remedy Substantive Inequality

20. In both *Eldridge* and *Vriend*, the applicants formulated their *Charter* claim as an argument based on underinclusion. The issue was framed as whether the impugned governmental failure to act or legislative omission resulted in discrimination *within the existing schemes* for the provision of benefits and legislative protections. In both cases, this Court moved beyond the appellants' formulation to a more substantive approach to equality, which mandates positive government action to address disadvantage existing independently of the legislation in question. However, in both cases the necessary benefit/protection could be provided through the existing schemes and this Court concluded that it was not required to determine whether governments have a constitutional obligation under s.15 of the *Charter* to provide health services or legislative human rights protections in the first place.

> B.Porter, "Beyond *Andrews*: Substantive Equality and Positive Obligations after *Eldridge* and *Vriend*" (1998) 9:3 *Constitutional Forum* 71 at 75

21. Although the Appellants in the present case have framed their *Charter* argument as a claim of underinclusion -- they assert that their exclusion from the Casino Rama Project is discriminatory -- the Respondents' position on s.15(2) requires this Court to address the larger issue of whether s.15(1) of the *Charter* imposes positive obligations on governments, not only to extend existing programs that contain discriminatory excluding provisions, but also to develop ameliorative programs where a failure to take any initiative would result in substantive inequalities. The fundamental premise underlying the AGO's and Court of Appeal's approach to s.15(2) of the *Charter* is that governments have no constitutional obligation to

adopt positive measures to remedy the effects of discrimination or ameliorate the conditions of disadvantaged groups. CCPI submits that this premise is erroneous and should be rejected by this Court.

22. The requirement under s.15(1) of the *Charter* to take positive steps to ameliorate conditions of disadvantage arises not only in the context of claims of discriminatory underinclusion by disadvantaged groups, but also in instances where substantive inequalities would otherwise result from a government's failure to take any (or adequate) affirmative steps to address the specific needs of disadvantaged groups. As outlined below, a purposive approach to s.15 of the *Charter*, domestic and international human rights jurisprudence, and s.36 of the *Constitution Act, 1982,* all support an interpretation of s.15 that recognizes governments' affirmative duty to adopt measures to ensure the realization of substantive equality.

(a) The Remedial Purpose of s.15 Gives Rise to Positive Obligations

23. This Court has consistently recognized, since its earliest *Charter* equality decisions, that s.15(1) has a "large remedial component". In *Andrews v. Law Society of B.C.*, this Court ruled that the guarantee of equality in s.15 "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." The AGO's position, which presupposes that governments have no positive obligation to remedy the effects of discrimination or redress the conditions of disadvantaged groups, is inconsistent with the remedial purpose of s.15 of the *Charter*.

Andrews v. Law Society of B.C., [1989] 1 S.C.R. 143 at 171

24. When interpreted in a manner consistent with the remedial purpose of the *Charter*'s equality guarantee, s.15(2) underscores the principle that achieving substantive equality sometimes requires governments to take positive steps to ameliorate the conditions of disadvantaged groups. Justice Wilson recognized this point in *Harrison v. University of B.C.*, where she stated that "the purpose of [s.15(2)] is to enshrine the notion of the viability, indeed the *necessity*, of measures designed to redress the drastic effects of discrimination."

Harrison v. University of B.C., [1990] 3 S.C.R. 451 at 474-75, per Wilson, J.A., dissenting on other points (emphasis added)

(b) Human Rights Jurisprudence Supports the Existence of Positive Obligations

25. As this Court recognized in *Eldridge*, the interpretation of s.15 of the *Charter* has been, and should continue to be, guided by established human rights jurisprudence.

Eldridge v. B.C. (A.G.), [1997] 3 S.C.R. 624 at 671-72

26. Under human rights legislation, it is a settled principle that equality provisions give rise to positive obligations on the part of both governments and the private sector. Moreover, a *de minimus* standard for assessing the extent of these positive obligations has been rejected by this Court and affirmative measures with significant cost consequences have been required to remedy the effects of discrimination.

Central Okanagan School District No. 23 v. Renaud, [1992] 2 S.C.R. 970 at 982; *Canadian National Railway v. Canada (C.H.R.C.)*, [1987] 1 S.C.R. 1114 at 1142; *Quesnel v. London Educational Health Centre*, (1995) 28 C.H.R.R. D/474 (Ont.Bd.Inq.); *Hickling v. Lanark Catholic School Board* (1986), 7 C.H.R.R. D/3546 (B.C.C.H.R.)

27. CCPI submits that s.15(1) of the *Charter* should not be construed more narrowly than the provisions of Canadian human rights statutes and should therefore be interpreted to impose positive obligations on governments to take the necessary measures to remedy substantive inequalities.

(c) International Legal Norms Impose Positive Obligations on Governments

28. This Court has recognized the importance and utility of international human rights instruments in interpreting *Charter* guarantees. As Justice L'Heureux-Dube stated, writing for the majority in *Baker v. Canada*, international law is a "critical influence on the interpretation of the scope of the rights included in the *Charter*." Similarly, she remarked in *R. v. Ewanchuk* that "our *Charter* is the primary vehicle through which international human rights achieve a domestic effect."

Baker v. Canada (9 July 1999, SCC doc.25823) at para.70; *R. v. Ewanchuk* (25 February 1999, SCC doc.26493) at para.73. See also *Slaight Communications v. Davidson*, [1989] 1 S.C.R. 1038 at 1056; *Ref. Re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313 at 348-50; *R. v. Keegstra*, [1990] 3 S.C.R. 697 at 750-55

29. Canada is a signatory to the *International Covenant on Civil and Political Rights* (the "*ICCPR*") and the *International Covenant on Economic, Social and Cultural Rights* (the "*ICESCR*"), both of which impose positive obligations on governments to take measures to ensure the equal enjoyment of social, economic, civil, and political rights.

ICCPR, 19 December 1966, Can.T.S. 1976 No.47, 999 U.N.T.S. 171; *ICESCR*, 16 December 1966, Can. T.S. 1976 No.46, 993 U.N.T.S. 3

30. As a party to the *ICCPR*, Canadian governments have an obligation to take affirmative measures to remedy substantive inequalities. The *ICCPR* establishes that "where not provided for by existing legislative or other measures", governments are obliged to "adopt such legislative or other measures as may be necessary to give effect to the rights" protected by the Covenant, including equality rights.

ICCPR, articles 2 and 26

31. Similarly, by ratifying the *ICESCR*, Canadian governments have agreed as a matter of international law to take steps, applying the "maximum of available resources", to protect social and economic rights included in the *ICESCR*, and to ensure that disadvantaged individuals and groups benefit from the equal enjoyment of such rights without discrimination.

ICESCR, articles 2 and 11

32. The U.N. Committee on Economic, Social and Cultural Rights, which monitors compliance with the *ICESCR*, has confirmed that the obligation to promote progressive realization of Covenant rights requires governments to do more than merely abstain from adopting measures that might have a negative impact on disadvantaged or vulnerable groups. The obligation of state parties to the *ICESCR* is to take positive action, to the maximum of available resources, to reduce systemic and structural inequalities, and to give appropriate preferential treatment to disadvantaged groups, where necessary, in order that they may achieve substantive equality.

U.N. Committee on Economic, Social and Cultural Rights, *General Comment No. 5*, 11th Sess., 38th Mtg., E/C.12/1994/13 (1994) at para.9; U.N. Committee on Economic, Social and Cultural Rights, *Concluding Observations (Canada)*, 10 December 1998, E/C.12 /1/Add.31, at paras.40, 42, 43, 46, 48, 49, 54, and 56

33. International human rights instruments, such as the *ICESCR* and *ICCPR*, constitute an expression of a resolve by state parties to protect vulnerable groups, through legislation and other positive measures, from violations of their fundamental human rights. In international legal jurisprudence, it would be inconceivable to construe the scope of the rights contained in these Covenants in the absence of a recognition of the positive obligations on governments to provide for the needs of disadvantaged groups.

B.Porter, "Beyond *Andrews*: Substantive Equality and Positive Obligations after *Eldridge* and *Vriend*" (1998) 9:3 *Constitutional Forum* 71 at 80

34. CCPI submits that s.15 of the *Charter* should be interpreted in a manner that is consistent with the positive obligations recognized by international legal norms. This Court has already acknowledged the appropriateness of using the content of Canada's international human rights obligations as *indicia* of the scope of *Charter* protections. As the former Chief Justice Dickson stated in *Reference re Public Service Employee Relations Act (Alta.)*, "the *Charter* should generally be presumed to provide protection at least as great as that afforded by similar provisions in international human rights documents which Canada ratified." Section 15 of the *Charter* should therefore be presumed to require governments to take positive steps to remedy substantive socio-economic inequalities and ensure the realization of fundamental human rights.

Reference re Public Service Employee Relations Act (Alta.), [1987] 1 S.C.R. 313 at 349, per Dickson, C.J., affirmed by this Court in *Slaight Communications v. Davidson*, [1989] 1 S.C.R. 1038 at 1056

35. An interpretation of s.15 that recognizes a positive duty to address socio-economic disadvantage is required for compliance with Canada's obligations under international human rights law. As the U.N. Committee on Economic, Social and Cultural Rights stated in its General Comment on the Domestic Application of the *ICESCR*,

> [i]t is generally accepted that domestic law should be interpreted as far as possible in a way which conforms to a State's international legal obligations. Thus, when a domestic decision maker is faced with a choice between an interpretation of domestic law that would place the state in breach of the Covenant and one that would enable the State to comply with the Covenant, international law requires the choice of the latter. Guarantees of equality and non-discrimination should be interpreted, to the greatest extent possible, in ways which facilitate the full protection of economic, social and cultural rights.
>
> U.N. Committee on Economic, Social and Cultural Rights, *General Comment No. 9*, 19th Sess., E/C.12/1998/24 (1998) at para.15

36. If this Court were to accept the fundamental premise underlying the AGO's approach to s.15(2) in this case, the *Charter* right to substantive equality would place no obligation on Canadian governments to address pressing human rights violations, such as those related to the Aboriginal peoples' unequal enjoyment of social and economic rights.

37. In their periodic reviews of Canada's compliance with international human rights Covenants, U.N. Committees have expressed serious concerns about the fact that lower courts in Canada have opted for interpretations of the *Charter* which relieve governments of any domestic legal obligation to meet their obligations under international law. For example, in its1993 evaluation of Canada's compliance with the *ICESCR*, the U.N. Committee on Economic, Social and Cultural Rights examined a number of lower court decisions dismissing social welfare related claims under the *Charter*. The Committee expressed concern about the judiciary's characterization of social and economic rights "as mere 'policy objectives' of governments rather than as fundamental human rights." With a view to ensuring greater compliance with the *ICESCR*, the Committee urged Canadian Courts to "adopt a broad and purposive approach to the interpretation of the *Charter of Rights and Freedoms* ... so as to provide effective remedies to violations of social and economic rights."

> U.N. Committee on Economic, Social and Cultural Rights, *Consideration of Reports: Canada*, 8th Sess., 5th & 6th Mtg., E/C.12/1993/19 (1993) at paras.110 and 119; U.N. Committee on Economic, Social and Cultural Rights, *Concluding Observations (Canada*), E/C.12 /1993/5 (1993) at para.119

38. In its most recent review, the U.N. Committee on Economic, Social and Cultural Rights reiterated its deep concern

> that provincial courts is Canada have routinely opted for an interpretation which excludes protection of the right to an adequate standard of living and other Covenant rights ... despite the fact that the Supreme Court of Canada has stated, as has the Government of Canada before this Committee, that the *Charter* can be interpreted so as to protect these rights.
>
> U.N. Committee on Economic, Social and Cultural Rights, *Concluding Observations (Canada)*, 10 December 1998, E/C.12/1/Add.31 (1998) at paras.14 and 15

39. Similarly, in its most recent review of Canada's compliance with the *ICCPR*, the U.N. Human Rights Committee criticized the lack of effective remedies for human rights violations in Canada. The Committee expressed concerns about gaps between the protections afforded by the *ICCPR* and those available under the Canadian *Charter* and domestic human rights statutes.

> U.N. Human Rights Committee, *Concluding Observations (Canada)*, 7 April 1999, CCPR/C/79/Add.105 (1999) at paras.9 and 10

40. As Justice L'Heureux-Dubé remarked in *R. v. Ewanchuk*, s.15 of the *Charter* (along with s.7) is an especially important vehicle to give domestic effect to international human rights because it embodies the notion of respect of human dignity. Yet, as U.N. Committees have repeatedly noted in their reports, lower courts in Canada have made little effort to achieve consistency between the ambit of s.15 and the nature of governments' positive obligations under international human rights law.

R. v. Ewanchuk (25 February 1999, SCC doc.26493) at para.73

41. The most recent U.N. Committee report on Canada's compliance with the *ICESCR* did, however, include the following favourable comments on the implications of this Court's decisions in recent cases such as *Eldridge* and *Vriend*:

> The Committee notes with satisfaction that the Supreme Court of Canada has not followed the decisions of a number of lower courts and has held that section 15 (equality rights) of the *Canadian Charter of Rights and Freedoms* (the *Charter*) imposes positive obligations on governments to allocate resources and to implement programmes to address social and economic disadvantage, thus providing effective domestic remedies under section 15 of the *Charter* for disadvantaged groups.

U.N. Committee on Economic, Social and Cultural Rights, *Concluding Observations (Canada)*, 10 December 1998, E/C.12/1/Add.31 (1998) at para.4

42. While this Court has been cautious to date about asserting the extent to which s.15 imposes positive obligations on governments in contexts other than those involving claims of "underinclusion", CCPI submits that international legal norms, as well as the direction of this Court's own equality jurisprudence, leads inexorably to the conclusion that it must.

(d) Section 36 of the Constitution Act, 1982 Recognizes a Positive Duty to Remedy Inequalities

43. Under s.36(1) of the *Constitution Act, 1982*, the federal Parliament and the provincial legislatures, together with the federal and provincial governments, are committed to"promoting equal opportunities for the well-being of Canadians; furthering economic development to reduce disparity in opportunities; and providing essential public services of reasonable quality to all Canadians."

Constitution Act, 1982, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11, s.36(1)

44. Section 36 has repeatedly been cited by the government of Canada as proof of Canada's compliance with its international human rights obligations. As recently as October 1997, the commitments in s.36 were represented to the U.N. as being "particularly relevant in regard to Canada's international obligations for the protection of economic, social and cultural rights". In 1988, the Alberta Court of Appeal approved a submission by the government of Canada that the provisions of s.36 contemplate that both orders of government would, within their jurisdictional limits, create programming to ensure the provision of essential public services of reasonable quality to all Canadians, such as health care and social assistance.

Core Document Forming Part of the Reports of State Politics (Canada, October 1997), HRI/CORE/1/Add.91, at para.127; *Winterhaven Stables Ltd. v. Canada (A.G.)* (1988), 53 D.L.R. (4th) 413 (Alta.C.A.) at 433, leave to appeal to SCC denied (1989), 55 D.L.R. (4th) viii

45. CCPI submits that the constitutional obligations outlined in s.36 provide further support for an interpretation of s.15 of the *Charter* that includes the recognition of a positive duty on both orders of government to remedy substantive inequalities in Canadian society.

E. The Duty to Ameliorate the Conditions of Aboriginal Peoples is Particularly Pressing

46. Governments' constitutional duty to take positive steps to ameliorate the conditions of disadvantaged groups is particularly pressing with respect to the impoverishment of Aboriginal peoples.

47. In its most recent evaluation of Canada's implementation of the *ICCPR*, the U.N. Human Rights Committee highlighted the discriminatory effect of poverty on certain disadvantaged groups in Canada, particularly Aboriginal groups. In its *Concluding Observations*, the Committee noted the Canadian government's acknowledgment that the impoverished situation of Aboriginal peoples constitutes "the most pressing human rights issue" in this country. The Committee recommended that "decisive and urgent action be taken towards the full implementation" of the recommendations of the RCAP.

U.N. Human Rights Committee, *Concluding Observations (Canada)*, 7 April 1999, CCPR/C/79/Add.105 (1999), at para.8

48. Similarly, in its recent review of Canada's compliance with the *ICESCR*, the U.N. Committee on Economic, Social and Cultural Rights highlighted the disproportionate impact of social program cuts on disadvantaged groups and condemned the

discriminatory nature of poverty in Canada. In particular, the Committee expressed concern about the "gross disparity between Aboriginal people and the majority of Canadians with respect to the enjoyment of Covenant rights" and condemned "the shortage of adequate housing, the endemic mass unemployment and the high rate of suicide, especially among youth, in the Aboriginal communities." Noting that "[t]here has been little or no progress in the alleviation of social and economic deprivation among Aboriginal people", the Committee implored Canadian governments "to take concrete and urgent steps" to remedy the disadvantaged conditions of Aboriginal communities and to implement the recommendations of the RCAP.

> U.N. Committee on Economic, Social and Cultural Rights, *Concluding Observations (Canada)*, 10 December 1998, E/C.12/1/Add.31 (1998), at paras.17 and 43

49. CCPI submits that this Court ought to affirm, in response to the AGO's position, that s.15 of the *Charter* places serious obligations on governments to address what the Government of Canada has itself acknowledged as the most pressing human rights issue in this country.

F. Ameliorative Programs Should Not be Subject to Lesser Scrutiny Under s.15(1)

50. Based on all of the foregoing, CCPI submits that the fundamental premise underlying the AGO's approach to s.15(2) of the *Charter* - namely, that governments have no constitutional obligation to adopt positive measures to remedy substantive inequalities - is erroneous and should be rejected by this Court.

51. There is therefore no basis for the AGO's assertion and the Ontario Court of Appeal's ruling that ameliorative programs should be subject to lesser scrutiny under s.15(1). The argument that judicial deference to such programs should be exercised in order to encourage their implementation is fundamentally flawed in its failure to recognize that the implementation of such programs is required by constitutional imperative.

52. Moreover, s.15(2) of the *Charter* is not intended to limit judicial scrutiny of ameliorative programs under s.15(1). Rather, it is an interpretive aid that explains and enhances the guarantee of substantive equality in s.15(1). Its purpose is to clarify that government programs aimed at ameliorating the conditions of disadvantaged groups will not be vulnerable under s.15(1) to claims of "reverse discrimination" made by members of advantaged groups who seek to impose a formal model of equality.

53. The history of the enactment of s.15 supports this interpretation of s.15(2). It is uncontroverted that s.15(2) was included in the *Charter* to avert in Canada the debate over the legitimacy of affirmative action programs that has raged in the United States. As Justice McLachlin stated in *R. v. Hess*:

> Subsection 15(2) is potentially far-reaching in its application. Interpreted expansively, as the Attorney General suggests, it threatens to circumvent the purpose of s.1. Under s.15(2) it must only be shown that the "object" of the legislation was amelioration of conditions of a disadvantaged individual or group, and there is no need to demonstrate that the legislation used proportionate means. I prefer the approach to s.15(2) adopted by Huddart L.J.S.C. in *Re MacVicar...*:
>
> > To ensure that the s.15(1) guarantee of equal protection and benefit has real effect, s.15(2) must be construed as limited to its purpose. It was included in the *Charter* to silence the debate that rages elsewhere over the legitimacy of affirmative action .... It was not intended to save from scrutiny all legislation intended to have positive effect.
>
> *R. v . Hess*, [1990] 2 S.C.R. 906 at 945-46, citing *Re MacVicar and Superintendent of Family and Child Services* (1986), 34 D.L.R. (4th) 488 (B.C.S.C.) at 502-3. See also Dianne Pothier, "*Charter* Challenges to Underinclusive Legislation: The Complexities of the Sins of Omission" (1993), 19 *Queens Law Journal* 261 at 289; Gwen Brodsky and Shelagh Day, *Canadian Charter Equality Rights for Women: One Step Forward or Two Steps Back?* (Canadian Advisory Council on the Status of Women, 1989) at 30; Walter Tarnopolsky, "The Equality Rights in the *Canadian Charter of Rights and Freedoms*" (1983) 61 *The Canadian Bar Review* 242 at 257

G. The Appropriate Approach to s.15(2) of the Charter

54a CCPI submits that the appropriate approach to s.15(2) is that which has been adopted by the Ontario Court of Appeal in

its interpretation of s.14(1) of the Ontario *Human Rights Code* (the "*Code*"). Subsection 14(1) is the *Code*'s counterpart to s.15(2) of the *Charter*. In *Ontario (Human Rights Comm.) v. Ontario (Ministry of Health)* (hereinafter "*Roberts*"), the Court of Appeal remarked that s.14(1) of the *Code* and s.15(2) of the *Charter* are "similar in spirit" insofar as they are both "aimed at protecting and promoting substantive equality". The Court also noted that both sections share the common history of having been enacted to protect affirmative action programs from the"reverse discrimination" claims.

> *Ontario (Human Rights Comm.) v. Ontario (Ministry of Health)* (1994), 21 C.H.R.R. D/259 at para.45 (Ont.C.A.)

55a In *Roberts*, a visually impaired 71-year-old man complained that he suffered discrimination on the basis of age because he was refused a visual aid by the provincial Ministry of Health's Assistive Devices Program ("ADP"), which provided devices to physically disabled persons under the age of 25 years. The Ministry argued that the ADP was exempt from challenge because it constituted a "special [affirmative action] program" protected by s.14(1) of the *Code*. The Court of Appeal rejected the Ministry's argument, ruling that the ADP and other affirmative action programs are subject to review under the *Code* when a person from a disadvantaged group makes a complaint of discrimination based on a prohibited ground. As Justice Weiler stated,

> to say that s.14(1) exempts the age discrimination in the [ADP]... from review, is to interpret the section so as to permit substantive equality to be undermined, when substantive equality is one of the section's very purposes.
>
> *Ontario (Human Rights Comm.) v. Ontario (Ministry of Health)* (1994), 21 C.H.R.R. D/259 at paras.29 and 36 (Ont.C.A.)

56a The Court of Appeal in *Roberts* adopted the following statement by Helena Orton on the relationship between ss.15(1) and 15(2) of the *Charter* as the correct approach to s.14(1) of the *Code*:

> This approach to equality recognizes that disadvantaged groups must be the beneficiaries of positive action on the part of government and others. It gives no reason to suggest that such equality-promoting steps are themselves immune from review, the implication of many government defences to challenges to equality promoting programs.... Section 15(2) provides that section 15(1) does not preclude ameliorative programs and as such can be understood as an interpretive guide to section 15(1); *it does not preclude review of ameliorative programs where some aspect is discriminatory*.

CCPI submits that this approach to s.15(2) of the *Charter* should be upheld by this Court.

> *Ontario (Human Rights Comm.) v. Ontario (Ministry of Health)* (1994), 21 C.H.R.R. D/259 at paras.108 (Ont.C.A.), (emphasis added by Houlden, J.A.), citing Helena Orton, "Section 15, Benefits Programs and Other Benefits at Law: The Interpretation of Section 15 of the *Charter* since *Andrews*" (1990) 19 *Manitoba Law Journal* 288 at 299

57a CCPI submits that the proper approach to all *Charter* claims of discrimination is to analyze each claim in accordance with the existing framework developed by this Court in its equality jurisprudence under s.15(1). The position advanced by the AGO and adopted by the Court of Appeal is inappropriate because it would create a different framework for analyzing discrimination claims when they are made in respect of ameliorative programs, namely a framework that insulates most ameliorative programs from judicial review under s.15(1).

H. The AGO's Approach to s.15(2) is Inconsistent with the Guarantee of Substantive Equality

58a By proposing a separate and less rigorous framework for analyzing discrimination claims made in respect of ameliorative programs, both the AGO and the Court of Appeal effectively treat s.15(2) as an exception to the guarantee of substantive equality in s.15(1). According to the position advanced by the AGO and adopted by the Court of Appeal, the starting point for analyzing any s.15 challenge to an ameliorative program is s.15(2), rather than s.15(1). If a program is found to be "authorized" by s.15(2), then it is deemed to comply with s.15 and the analysis never proceeds to an assessment of the impugned provisions of the program under s.15(1). This approach is intended to exempt, and effectively exempts, most ameliorative programs from review under s.15(1).

59a CCPI submits that the AGO's approach is inconsistent with well-established human rights and *Charter* principles on the meaning of substantive equality. In particular, under the proposed s.15(2) test, government programs could be deemed to comply with s.15 on the basis of their ameliorative purposes, notwithstanding their provisions have discriminatory effects on disadvantaged groups based on enumerated or analogous grounds. Contrary to the AGO's submission that a "purpose-based approach is an integral feature of constitutional practice" (paragraph 77 of the AGO's factum), the AGO's focus on the purpose of an impugned program is contrary to settled *Charter* and human rights jurisprudence, which requires courts to consider the discriminatory *effects* of a program or provision, even if the program has a valid objective, in order to determine whether equality rights have been violated. Since its earliest rulings in s.15 cases, this Court has consistently maintained that the primary consideration in any equality analysis must be, not the purpose, but rather the *impact* of an impugned program or law on the individual or group concerned.

> *Andrews v. Law Society of B.C.*, [1989] 1 S.C.R. 143 at 165; *Eldridge v. B.C. (A.G.)*, [1997] 3 S.C.R. 624 at 671; *Law v. Canada*, (25 March 1999, SCC doc.25374) at para.80

60a The AGO asserts that a deferential approach to ameliorative programs under s.15(2) is warranted because governments will be disinclined to develop such programs if they believe that courts are likely to order them to extend the benefits of their programs to a larger pool of recipients. In support of this assertion, the AGO argues that governments operate within fiscal constraints, must reconcile competing claims for limited resources, and cannot feasibly remedy all socio-economic inequalities at once, or adequately respond to the unique needs of different disadvantaged groups within a single program. CCPI submits that it is inappropriate to consider the AGO's plea for judicial deference based on these considerations at the s.15 stage of analysis.

61a By asserting the need to reconcile competing claims for limited government resources as a basis for judicial deference under s.15(2), the AGO is seeking to introduce justificatory factors into the s.15 analysis, which this Court has consistently ruled should not be given consideration, except at the s.1 stage of analysis.

> *Miron v. Trudel*, [1995] 2 S.C.R. 418 at 485 and 491; *Eldridge v. B.C. (A.G.)*, [1997] 3 S.C.R. 624 at 680 and 682

62a The AGO's approach to s.15(2) effectively circumvents s.1 of the *Charter*, which requires evidence on a balance of probabilities that a discriminatory provision in an impugned program constitutes a reasonable and justifiable limit on equality rights. Arguments about the relative disadvantage of different groups and the need to balance competing interests can be made by the government in defence of an underinclusive ameliorative program, but they must satisfy the requirements of s.1 in order for the program to withstand constitutional scrutiny. In other words, the government must demonstrate, *inter alia*, that the exclusion of the claimant group from the benefits of the impugned program constitutes a rational and minimally intrusive means of implementing a pressing and substantial objective.

> *R. v. Oakes*, [1986] 1 S.C.R. 103; *RJR MacDonald v. Canada (A.G.)*, [1995] 3 S.C.R. 199 at 327-335

63a Moreover, arguments about fiscal restraint are not appropriate considerations in determining whether an ameliorative program contains discriminatory provisions that violate s.15 of the *Charter*. Cost factors should only be considered, if at all, in the context of deciding remedial issues in the event that a constitutional violation is found.

> *Schachter v. Canada*, [1992] 2 S.C.R. 679 at 709; *Rosenberg v. Canada (A.G.)* (1998), 38 O.R. (3d) 578 at 587 (C.A.)

64a As Justice Cory stated, on behalf of a unanimous Court in *Vriend*, the deference that may be due to legislative or governmental choices

> will be taken into account in deciding whether a limit is justified under s.1 and again in determining the appropriate remedy for a *Charter* breach.... The notion of judicial deference to legislative choices should not, however, be used to completely immunize certain kinds of legislative decisions from *Charter* scrutiny.

Vriend v. Alberta, [1998] 1 S.C.R. 493 at 530

65a CCPI is not suggesting that the needs of every disadvantaged group must be simultaneously addressed in comprehensive affirmative action programs, nor that every instance of underinclusion in an affirmative action program is necessarily discriminatory and in breach of s.15(1). Substantive equality often requires that disadvantaged groups be treated differently, not only from advantaged groups, but also from other disadvantaged groups, in accordance with their respective unique needs and circumstances. Consequently, many distinctions drawn by provisions in ameliorative programs will not violate the *Charter*'s equality guarantee. Distinctions based on enumerated or analogous grounds should not, however, be subject to a lesser standard of scrutiny under s.15(1) simply because they arise in the context of government programs that have ameliorative purposes.

I. Conclusion

66a Although governments may not have an obligation to include all disadvantaged groups in every ameliorative program, they are required, under s.15 of the *Charter*, to adopt positive measures to address the substantive equality issues of those who are excluded, and to do so in ways that respect the dignity of all who rely on such measures. In the context of this appeal, the government of Ontario has a constitutional obligation to take affirmative measures to address the needs of Metis and non-status Aboriginal groups.

67a The parties' dispute about the relative disadvantage of status and non-status Aboriginal groups obscures the important facts that Aboriginal communities generally are impoverished in Canada and that governments have not fulfilled their duty under s.15(1) of the *Charter* to take adequate steps to remedy this disadvantage. Section 15 requires, at minimum, that the equal enjoyment of rights afforded by international human rights covenants be realized and protected. Thus the social and economic disadvantage of Metis and non-status Aboriginal groups in Canada constitutes a violation of s.15 of the *Charter,* quite apart from their exclusion from the Casino Rama project.

68a CCPI submits that the fundamental equality issue in this case is not the disparities between Indian bands on the one hand, and Metis and non-status Aboriginal groups on the other, but rather the socio-economic disadvantage suffered by all Aboriginal peoples in relation to society at large. It is the latter inequality that places obligations on all levels of government to act. CCPI submits that, in the first case in which this Court is being asked to address the poverty of Aboriginal people within the context of the s.15 *Charter* guarantee, the Court ought to place at the centre of its analysis governments' obligations to redress the social and economic disadvantage of all Aboriginal communities, as this remains one of the most disturbing and irrefutable violations of the right to substantive equality in Canada.

ALL OF WHICH IS RESPECTFULLY SUBMITTED,

Cynthia Petersen

LIST OF AUTHORITIES CITED

Cases **Page Numbers**

Articles

The Complexities of the Sins of Omission" (1993), 19 *Queens Law Journal* 261 15

Bruce Porter, "Beyond *Andrews*: Substantive Equality

and Positive Obligations after *Eldridge* and *Vriend*"

(1998) 9:3 *Constitutional Forum* 71 6, 9

Reports

Report of the Royal Commission on Aboriginal Peoples 1

U.N. Committee on Economic, Social and Cultural Rights,

Consideration of Reports: Canada, 8th Sess., 5th & 6th Mtg., E/C.12/1993/19 (1993) 11

U.N. Committee on Economic, Social and Cultural Rights,

Concluding Observations (Canada), E/C.12/1993/5 (1993) 11

U.N. Committee on Economic, Social and Cultural Rights,

General Comment No. 5, 11th Sess., 38th Mtg., E/C.12/1994/13 (1994) 9

U.N. Committee on Economic, Social and Cultural Rights,

General Comment No. 9, 19th Sess., E/C.12/1998/24 (1998) 10

U.N. Committee on Economic, Social and Cultural Rights,

Concluding Observations (Canada),

10 December 1998, E/C.12/1/Add.31 (1998) 9, 11, 12, 14

U.N. Human Rights Committee, *Concluding Observations (Canada)*,

7 April 1999, CCPR/C/79/Add.105 (1999) 11, 13

Core Document Forming Part of the Reports of State Politics

(Canada, October 1997), HRI/CORE/1/Add.91 13