Ardoch Algonquin First Nation v. Canada (Attorney General), 2002 FCT 1058, [2003] 2 FC 350

Date:	2002-10-11
Docket:	T-1274-99
Parallel citations:	2002 FCT 1058 (CanLII); 98 CRR (2d) 245; [2003] 1 CNLR 67; 223 FTR 161
URL:	http://canlii.ca/t/jjv
Citation:	Ardoch Algonquin First Nation v. Canada (Attorney General), 2002 FCT 1058 (CanLII), [2003] 2 FC 350, <http://canlii.ca/t/jjv> retrieved on 2013-05-26
Noteup:	Search for decisions citing this decision
Reflex Record	Related decisions, legislation cited and decisions cited

T-1274-99

2002 FCT 1058

Roger Misquadis, Peter Ogden, Mona Perry, Dorothy Phipps-Walker and Chief Bob Crawford, on his own behalf and on behalf of the Ardoch Algonquin First Nation, and **Darwin Lewis,** and **the Aboriginal Council of Winnipeg Inc.** (*Applicants*)

v.

The Attorney General of Canada (*Respondent*)

Indexed as: Ardoch Algonquin First Nation v. Canada (Attorney General) (T.D.)

Trial Division, Lemieux J.--Toronto, October 10, 2001; Ottawa, October 11, 2002.

Constitutional Law -- Charter of Rights -- Equality Rights -- Applicants claiming federal program Aboriginal Human resources Development Strategy (AHRDS) violates Charter, s. 15(1) by discriminating against urban, off-reserve Aboriginal individuals -- Principles set out in case law governing Charter, s. 15 claims reviewed, applied -- AHRDS drawing distinction between applicants' communities, those of comparator group (First Nation members living on reserves) -- Distinction based on analogous ground of Aboriginality--residency -- Distinction failing to recognize particular group i.e. First Nation urban and non-reserve rural First Nation communities -- Exclusion violating human dignity in fundamental way -- Substantive discrimination established.

Constitutional Law -- Charter of Rights -- Limitation Clause -- Aboriginal Human Resources Development Strategy (AHRDS) substantively discriminating against First Nation urban and non-reserve rural First Nation communities -- Program pressing, substantial as helping Aboriginal people to get jobs -- But means taken to implement AHRDS neither rationally connected to

objective nor minimally impairing right as little as possible -- Discrimination not justified under Charter, s. 1.

Constitutional Law -- Charter of Rights -- Enforcement -- Substantive discrimination resulting from AHRDS's exclusion of applicants' communities not justified under Charter, s. 1 -- Appropriate remedy to undo exclusion by ordering inclusion -- HRDC ordered to eliminate discrimination by providing community control over labour training programs to applicants' communities.

Native Peoples -- Federal program, Aboriginal Human Resources Development Strategy (AHRDS), labour market initiative implemented through mechanism of funding agreements, discriminating against First Nation urban and non-reserve rural First Nation communities because of decision to enter agreements only with representatives of First Nation members living on reserves -- Breach of Charter, s. 15 not justified under Charter, s. 1 as means taken to implement AHRDS neither rationally connected to objective nor minimally impairing right as little as possible -- Appropriate remedy to undo exclusion of applicants' communities by ordering HRDC to provide community control over labour training programs to applicants' communities.

This was an application for judicial review of a decision by Human Resources Development Canada (HRDC) not to enter into an Aboriginal Human Resources Development Agreement (AHRDA) with representative organizations mandated by the applicants' communities. The challenged pro gram is the Aboriginal Human Resources Development Strategy (AHRDS), a labour market initiative of HRDC implemented through the mechanism of funding agreements (known as AHRDA). According to the applicants, HRDC substantially discriminated against them because of its decision to enter into AHRDAs only with the provincial or regional affiliates of the Assembly of First Nations, with the Métis National Council and the Inuit Tapirisat of Canada. The applicants did not want to deny the benefits of AHRDAs to tho se who currently enjoy them, but simply wanted HRDC to ensure that those benefits are provided to all Aboriginal peoples equally. It was agreed that Aboriginal peoples in Canada suffer a high rate of unemployment and face special problems and barriers in obtaining employment and employment skills. The objective of the AHRDS and its two predecessors was to assist Aboriginal peoples in obtaining employment skills by providing labour market development programs delivered by Aboriginal organizations with responsibility over human resources development and promoting their capacity to exercise that responsibility in a manner which addresses the needs of distinct Aboriginal groups and communities across Canada. The applicants claimed that, instead of negotiating AHRDAs with urban and non-status First Nation peoples through their communities and mandated organizations, HRDC unilaterally imposed the separate program, that is, the urban/off-reserve component, on them, adding that this component does not give urban and non-status First Nation communities any control over training funds. Three issues were raised: (1) whether AHRDS violated subsection 15(1) of the Charter by discriminating against urban and off-reserve Aboriginal individuals; (2) if so, whether that discrimination was justifiable under section 1 of the Charter; (3) if not justifiable, what was the appropriate remedy?

Held, the application should be allowed.

(1) Principles governing claims under section 15 of the Charter are found in three Supreme Court of Canada decisions: *Law v. Canada (Minister of Employment and Immigration)*, *Corbiere v. Canada (Minister of Indian and Northern Affairs)* and *Lovelace v. Ontario*. In *Law*, Iacobucci J. pointed out that the general approach to section 15 must always be purposive and contextual and mandates a three-stage inquiry concerning the impugned law or action: (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. He identified four contextual factors concerning the issue of whether a claimant has made out a case of substantive discrimination. Those factors are: (1) the pre-existing disadvantage; (2) the relationship between grounds and the claimant's characteristics or circumstances; (3) the ameliorative purpose or effects; and (4) the nature of the i nterest affected.

As to the second contextual factor, it is easier to establish discrimination where the impugned legislation or program fails to take into account a claimant's actual situation. The third factor was considered to be important because "the purpose of s. 15(1) of the *Charter* is not only to prevent discrimination by the attribution of stereotypical characteristics to individuals, but also to ameliorate the position of groups within Canadian society who have suffered disadvantage by exclusion from mainstream society". In *Corbiere* , the Supreme Court of Canada followed the framework analysis for section 15 set out in *Law* and struck down, on Charter, section 15 grounds, *Indian Act*, section 77 which required Band members to be "ordinarily resident o n the reserve" in order to vote in Band elections. The Court held that 'Aboriginality-residence' was an analogous ground, but there was a divergence of opinion as to whether this result was achieved by examining the purpose of section 15, or by looking at contextual factors. In *Lovelace*, the Supreme Court reiterated that the central purpose of the guarantee in subsection 15(1) is to protect against the violation of essential human dignity and confirmed the three broad inquiries required for the determination of a discrimination claim. The finding of non-discrimination turned mainly on the contextual factor which relates the grounds of the claim of discrimination to the needs, capacities and circumstances of the band communities.

The applicants were compared with First Nation members living on-reserve for the purpose of determining whether they and the communities they live in are treated differently by the impugned governmental program. The comparison was between First Nation band communities and First Nation urban and rural non-band communities, which was the comparison in *Lovelace*. There was no question that the AHRDS is subject to Charter scrutiny. The first stage of the discrimination inquiry under section 15 of the Charter was whether the program makes a distinction that denies equal benefit, or imposes an unequal burden or treatment between the applicants and those in the comparator group. The applicants claimed that the benefit denied or unequal treatment imposed is the inability under the AHRDS for the communities they live in to do what First Nation members living in on-reserve communities can do for their members, both on and off-reserve. Devolving decision-making for labour market programming to Aboriginal communities was the premise upon which AHRDS and its predecessors were built. AHRDS draws a distinction between the applicants' communities and those of the comparator group. First Nation band communities enjoy the benefits of local community control while the applicants' communities do not. The distinction was not overcome by the urban component of AHRDS, the purpose of which was different. The applicants met the first stage of the discrimination inquiry. They also crossed the second stage which asks whether the distinct ion drawn by AHRDS is based on enumerated grounds under section 15 of the Charter or analogous grounds. A finding of an analogous ground such as Aboriginality-residency has a permanency for application in future cases which does not vary in accordance with the circumstances. Off-reserve residency was accepted as an analogous ground in *Corbiere*. The distinction drawn by AHRDS was based on that analogous ground. HRDC's decision not to enter into an AHRDA encompassing the element of local community control, wit h the organizations mandated by the applicants, was based on where they lived, i.e. Aboriginality-residence. Under the third stage of the inquiry, the question was whether AHRDS has a purpose or effect that is substantive discrimination, which involved a consideration of the four contextual factors outlined in the case law. First, it was made clear in *Lovelace* that band and non-band communities suffer from historical disadvantage and a section 15 inquiry does not direct a "race to the bottom". All Aborigina l people are affected by "the legacy of stereotyping and prejudice". HRDC's decision not to enter into an AHRDA with representative organizations mandated by the applicants' communities perpetuated the historic disadvantage and continued the stereotype of the applicants being less worthy and less organized. The second contextual factor speaks to the relationship between the basis on which the differential treatment occurs and the characteristics of the claimant. There was no reliable evidence that the needs, capacities and circumstances of the applicants and the communities they live in are different from the needs of First Nations reserve-based communities. The applicants did not have to show that they are more disadvantaged than the reserve-based First Nation members. AHRDS is a universal program whose purpose is to provide enhanced employment opportunities for all Aboriginal peoples in Canada and the benefits of local community control do not differ whether a First Nation person lives on the reserve or not. The third contextual factor considers the ameliorative purpose. AHRDS is a general comprehensive program geared to assisting all Aboriginal peoples, wherever they live, in order to enhance their

skills, so they can gain employment in the communities in which they live. It targets all Aboriginal people and seeks to ameliorate all. It is underexclusive in terms of First Nation urban and non-reserve rural First Nation communities whom the applicants represent. They have been differentially treated by HRDC and unjustifiably excluded from the purpose and significant benefit of AHRDS. Finally, consideration was given to the nature of the interest affected. The distinction drawn by the AHRDS constitutes a complete non-recognition of a particular group, i.e. the communities in which the applicants live. Such exclusion violates their human dignity in a fundamental way and by ignoring their community, stereotypes them as less worthy of recognition. Substantive discrimination was established.

(2) The section 1 Charter analysis includes two elements, first whether the program meets a pressing and substantial objective, and second, the proportionality analysis which also has three steps. AHRDS is a program which is pressing and substantial since its purpose is to help Aboriginal people, who suffer high unemployment, to get jobs. However, the means taken to implement the AHRDS was neither rationally connected to the objective nor did it minimally impair the right as little as possible. The applicants' communities were den ied the key to making the program work sucessfully so that it could achieve its goal, that is local decision-making by representative groups mandated by the applicants' communities. The latter were excluded because they had no AHRDAs and this was without j ustification. The issue of critical mass was not relevant to the applicants' communities. Moreover, there was no clear evidence that the applicants' communities are fragmented as to who represents them in labour training matters. Canada led no evidence of any study or arrangements considered other than shutting out the applicants' communities from participation, on an equal basis, in decision-making about labour market programming. The discrimination was not justified under section 1 of the Charter.

(3) The discrimination to be remedied was specific to the applicants and their communities. The appropriate remedy was to undo AHRDS's exclusion of the applicants' communities by ordering inclusion. HRDC was therefore ordered to eliminate the discrimination by p roviding community control over labour training programs to the applicants' communities. These communities could then, through representative organizations responsible to the community members, design, implement and fund training programs which will meet t he needs of the Aboriginal community where the applicants reside. This remedy substantially leaves in place the AHRDS and the AHRDAs which are in operation and preserves the integrity of the program.

statutes and regulations judicially

considered

Canadian Charter of Rights and Freedoms, being Part I of the *Constitution Act, 1982*, Schedule B, *Canada Act 1982*, 1982, c. 11 (U.K.) [R.S.C., 1985, Appendix II, No. 44], ss. 1, 15.

Indian Act, R.S.C., 1985, c. I-5 , s. 77 (as am. by R.S.C., 1985 (1st Supp.), c. 32, s. 14).

cases judicially considered

applied:

Law v. Canada (Minister of Employment and Immigration), 1999 CanLII 675 (SCC), [1999] 1 S.C.R. 497; (1999), 170 D.L.R. (4th) 1; 43 C.C.E.L. (2d) 49; 60 C.R.R. (2d) 1; 236 N.R. 1; *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, 1999 CanLII 687 (SCC), [1999] 2 S.C.R. 203; (1999), 173 D.L.R. (4th) 1; [1999] 3 C.N.L.R. 19; 61 C.R.R. (2d) 189; 239 N.R. 1; *Lovelace v. Ontario*, 2000 SCC 37 (CanLII), [2000] 1 S.C.R. 950; (2000), 188 D.L.R. (4th) 193; [2000] 4 C.N.L.R. 145; 255 N.R. 1; 134 O.A.C. 201; *The Queen v. Oakes*, 1986 CanLII 46 (SCC), [1986] 1 S.C.R. 103; (1986), 26 D.L.R. (4th) 200; 24 C.C.C. (3d) 321; 50 C.R. (3d) 1; 19 C.R.R. 308; 65 N.R. 87; 14 O.A.C. 335.

referred to:

Eaton v. Brant County Board of Education, 1997 CanLII 366 (SCC), [1997] 1 S.C.R. 241; (1997), 142 D.L.R. (4th) 385; 41 C.R.R. (2d) 240; 207 N.R. 171; 97 O.A.C. 161; *Egan v. Canada*, 1995 CanLII 98 (SCC), [1995] 2 S.C.R. 513; *Benner v. Canada (Secretary of State)*, 1997 CanLII 376 (SCC), [1997] 1 S.C.R. 358; (1997), 143 D.L.R. (4th) 577; 42 C.R.R. (2d) 1; 37 Imm. L.R. (2d) 195; 208 N.R. 81; *Miron v. Trudel*, 1995 CanLII 97 (SCC), [1995] 2 S.C.R. 418; (1995), 23 O.R. (3d) 160; 124 D.L.R. (4th) 693; 29 C.R.R. (2d) 189; [1995] I.L.R. 1-3185; 10 M.V.R. (2d) 151; 181 N.R. 253; 81 O.A.C. 253; 13 R.F.L. (4th) 1.

authors cited:

Canada. Royal Commission on Aboriginal Peoples. *Report of the Royal Commission on Aboriginal Peoples*, Vols. 3, 4, Ottawa: Minister of Supply and Services, 1996.

APPLICATION for judicial review of a decision by Human Resources Development Canada not to enter into an Aboriginal Human Resources Development Agreement with representative organizations mandated by the applicants' communities on the ground that it violated Charter, section 15. Application allowed.

appearances:

Christopher M. Reid for applicants Roger Misquadis, Peter Ogden, Mona Perry, Dorothy Phipps-Walker, Chief Bob Crawford and the Ardoch Algonquin First Nation.

Greg Tramley for applicants Darwin Lewis and the Aboriginal Council of Winnipeg Inc.

Michael H. Morris, M. Sean Gaudet and *Lara M. Speirs* for respondent.

solicitors of record:

Christopher M. Reid, Toronto, for applicants Roger Misquadis, Peter Ogden, Mona Perry, Dorothy Phipps-Walker, Chief Bob Crawford and the Ardoch Algonquin First Nation.

McCandless & Associates, Winnipeg, for applicants Darwin Lewis and the Aboriginal Council of Winnipeg Inc.

Deputy Attorney General of Canada for respondent.

The following are the reasons for order rendered in English by

Lemieux j.:

A. INTRODUCTION

[1]The challenged program in this judicial review application is the Aboriginal Human Resources Development Strategy (AHRDS), a labour market initiative of Human Resources Development Canada (HRDC) implemented through the mechanism of funding agreements known as Aboriginal Human Resources Development Agreements (AHRDAs) which HRDC enters into with certain Aboriginal entities to whom are devolved considerable control over the planning, design and delivery of employment training programs for Aboriginal peoples to enhance their skills and employability and, once employed, to retain those jobs.

[2]The central issue in this application is whether HRDC violated section 15 of the *Canadian Charter of Rights and Freedoms* [being Part I of the *Constitution Act, 1982*, Schedule B, *Canada Act 1982*, 1982, c. 11 (U.K.) [R.S.C., 1985, appendix II, No. 44]] (the Charter) by not entering AHRDAs with Aboriginal labour market organizations claimed by the applicants to have been mandated for spearheading labour market programming by and responsible to the Aboriginal communities they live in. The result of not having AHRDAs, the applicants claim, is to treat them differently compared to other Aboriginal individuals and communities who have AHRDAs, that is

reserve-based First Nations and Métis organizations and to deny them and the Aboriginal communities they live in with equal benefits of the AHRDAs: local community control over labour market training initiatives by the local Aboriginal communities the applicants live in to whom the organizations they have mandated for planning, design and delivery are accountable.

[3]The applicants Roger Misquadis and Dorothy Phipps-Walker are both members of Indian bands recognized under the *Indian Act* [R.S.C., 1985, c. I-5] and their names have been registered on the Indian Registry maintained under the *Indian Act*. They have lived all of their lives off-reserve in the Greater Toronto area (GTA) and are members of the Aboriginal community there. Neither have any connection with the band or reserve they are registered with.

[4]Chief Bob Crawford and Mona Perry are members of the Ardoch Algonquin First Nation and Allies (Ardoch). Both are Indians who, despite this fact like 100,000 others similarly situated, are not eligible to be registered as Indians under the *Indian Act*. Bob Crawford is the elected Chief of Ardoch, a First Nation which is an Aboriginal community of 500 persons located near Mattawa in the Ottawa Valley but is not an Indian Band recognized under the *Indian Act* and therefore has no reserve.

[5]Peter Ogden is a Mic-Mac originally from Nova Scotia who now lives in Hamilton with his family. He is not a registered Indian.

[6]Aboriginal Council of Winnipeg Inc. (ACW) was formed in 1990 as a result of an amalgamation of two organizations representing the interests of the members of the Winnipeg Aboriginal community, the largest one of Canada made up of approximately 60,000 to 70,000 residents. The amalgamated associations were the Urban Indian Association, representing non-status (essentially non-registered) First Nation Peoples and also individuals of Métis ancestry. The other organization, the Council of Status and Treaty Indians represented treaty and status First Nation individuals.

[7]According to the applicants, HRDC substantially discriminates against them because of its decision to enter into AHRDAs only with the provincial or regional affiliates of the Assembly of First Nations (AFN), with the Métis National Council (MNC) and the Inuit Tapirisat of Canada (ITC) with whom Canada signed National Framework Agreements in 1996 which is aggravated, they claim, by HRDC's unilateral decisions to implement the urban component of the AHRDS in urban First Nation communities and, in Ontario, to graft on the urban component rural non-status Aboriginal First Nation communities such as Ardoch.

[8]The applicants do not want to deny the benefits of AHRDAs to those who currently enjoy them. They think the AHRDS is a sound strategy letting Aboriginal communities deal with Aboriginal labour market issues. The applicants want HRDC to ensure its benefits are provided to all Aboriginal peoples equally.

[9]The AHRDS had two predecessors. The Pathways to Success Strategy (Pathways), implemented in 1991 for a period of five years, was a new strategy providing for the direct involvement of Aboriginal peoples and organizations in employment training programs. Pathways was replaced by the New Relationship Strategy (the New Relationship), a three-year effort, in effect until March 31, 1999.

[10]Fundamentally, the applicants view Pathways as the program which was the most successful and without discrimination having as its central feature local control of decision-making by and accountability to Aboriginal peoples through representative organizations.

[11]The applicants claim the New Relationship, based as it was on the national accords with the AFN, MNC and ITC, and implemented through Regional Bilateral Agreements (RBAs) was a regressive step because it shifted exclusive control over labour market programming, at least in Winnipeg, Toronto, the Niagara Peninsula and in Ontario rural non-band communities to the reserve-based First Nation communities. HRDC, they assert, excluded them and the communities they live in from benefits of the strategy which they had participated in under Pathways. They say

under the RBAs funding to urban and rural non-reserve Aboriginal First Nation communities declined with the result, for example, individual applications for grants towards the payment of fees to pay for attendance at training courses were denied. More important, they argue, is the loss of control, Pathways purpose, over their ability to fund training programs that best meet the needs of their constituents.

[12]Despite the addition in the AHRDS of the urban component, the applicants submit the AHRDS is no better than the New Relationship, which also had an urban initiative, because of its continued focus on reserve-based First Nations. They think the urban component is nothing more than something cobbled together by HRDC to fill the urban gaps created by the RBAs.

[13]In argument, counsel for the Winnipeg applicants submitted, for purposes of determining discrimination under section 15 of the Charter, reserve-based First Nations are the appropriate comparator group. That is because reserve-based First Nations have AHRDAs, compared to the Winnipeg and Ontario applicants where in the communities they live in, there are no AHRDAs.

[14]Counsel for Ontario applicants suggested a wider comparator group, i.e. members of Aboriginal communities with AHRDAs (First Nation reserve-based as well as the Métis and the Inuit) compared to those who have no AHRDAs namely urban First Nation members and non-status First Nation members in rural communities such as Ardoch whom he represents.

[15]Sections 1 and 15 of the Charter read:

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

. . .

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.

B. FACTS

[16]Both the applicants and Canada agree Aboriginal peoples in Canada suffer a high rate of unemployment and face special problems and barriers in obtaining employment and employment skills. The objective of Pathways, the New Relationship and the AHRDS is to assist Aboriginal peoples in obtaining employment skills by providing labour market development programs developed and delivered by Aboriginal organizations with responsibility over human resources development and promoting their capacity to exercise that responsibility in a manner which addresses the needs of distinct Aboriginal groups and communities across Canada. Simply put, Aboriginal peoples, their communities and their mandated service providers know best in each local area they are in what the labour market calls for and what skills are needed to satisfy the market.

[17]Previous skill training initiatives by Canada failed the Aboriginal people because Aboriginal communities had not been involved in designing and implementing strategies to meet their respective local community's unique labour market needs, whether urban or rural off-reserve.

(a) Pathways

[18]Pathways was based on HRDC's recognition that Aboriginal communities, whether First Nation reserve-based or in an urban setting, Métis or Inuit must be directly involved in managing and allocating funds for training programs within their particular communities.

[19]Pathways was based on the principle of local control of decision-making. The applicants' record at page 362 contains the following extract from HRDC's Pathways background paper:

These problems (high Aboriginal unemployment rates and low skill levels) will worsen unless economic, social and human resource development policies are more effective. In order to be successful, the capacity to develop and control these training and re-employment actions <u>should be in the hands of Aboriginal communities and organizations. Such an approach would ensure that training and employment activities will be well-suited to the needs of Aboriginal people</u>. [Emphasis mine.]

[20]Pathways was structured by the establishment, at the national level, of a national management board, made up of representatives of Aboriginal groups and HRDC officials and, at the local or regional level, by local and regional management boards made up this time exclusively by the representatives of Aboriginal groups residing in the local or regional areas.

[21]The applicants make the following assertions, as to Pathways, which are not challenged by Canada.

(i) <u>In Winnipeg</u>

[22]For Pathways, HRDC intended there be only one management board in Winnipeg which would fund labour development programs and services on a status blind basis to all Aboriginal peoples in that city regardless of whether that person was a registered Indian, a non-registered Indian, a treaty Indian, a Métis or an Inuit.

[23]However, the Assembly of Manitoba Chiefs (AMC) and the Manitoba Métis Federation (MMF) opposed this proposal because they each wanted a separate management board for their constituency.

[24]Ultimately, HRDC acceded and, as a result, the control, management and delivery of Pathways for Aboriginal people living in Winnipeg on the following basis:

· a local management board created by AMC to service only First Nation registered band members;

· a local management board created by MMF to service only Métis people and

· the Winnipeg Area Management Board (WAMB) an organization created by the Aboriginal community in Winnipeg, to service all Aboriginal people on an inclusive basis regardless of status.

(ii) <u>In Ontario</u>

[25]In Ontario, under Pathways, there were several area management boards (AMBs) established including, in terms of the applicants' interests here:

· the Niagara Peninsula [Area Aboriginal] Management Board (NPAAMB) mandated by the Aboriginal communities in the Niagara Peninsula to deliver services to their residents who number 32,000;

· Miziwe Biik Aboriginal Employment and Training (Miziwe Biik) mandated in 1991 by the 70,000 strong Aboriginal community in Greater Toronto Area ("GTA") as an area management board to serve their community;

· Kajita Mikam Area Management Board established and mandated to serve Aboriginal communities in Eastern Ontario. Kajita Mikam included representatives of Indian Act bands, non-status First Nation communities such as Ardoch and Métis in its catchment areas.

(b) The New Relationship

[26]In 1995, HRDC undertook a review of Pathways. At pages 597 and 600 of the applicants' record, the following extract from structural review is found:

The Aboriginal population in Canada is not homogenous. Government policy initiatives based solely on the assumption of such homogeneity are likely to result in unproductive wrangling and ineffectiveness, deflecting energy from much higher priorities. Effective policies must take count of the reality of First Nation Métis, Inuit and urban Aboriginal populations. Policies must be sensitive to the widest regional variation of existing Aboriginal communities, governments, institutions and inter-governmental relationships.

The diversity of Aboriginal communities that deliver services should be community based, through a wide variety of Aboriginal jurisdictions, development institutions and related authorities. The cutting edge of programs must be designed, managed and implemented by Aboriginal people in their communities. [Emphasis mine.]

[27]Pursuant to the National Framework Agreements, HRDC, throughout Canada, entered into 54 RBAs with affiliates of the AFN. HRDC did not enter RBAs with any urban or non-status rural First Nation Aboriginal communities. Canada did, however, create an urban initiative.

(i) In Manitoba

[28]HRDC entered into a province-wide RBA with the AMC which included responsibility for all First Nation urban residents in Manitoba registered under the *Indian Act*. It also entered into a province-wide RBA with the MMF with responsibility to serve all other Aboriginal peoples.

[29]In Winnipeg, as under Pathways, the AMC and the MMF set up local management boards but, unlike Pathways, WAMB [Winnipeg Area Management Board], under the New Relationship, was no longer involved in Aboriginal labour market initiatives because HRDC did not negotiate an RBA with either WAMB or ACW despite their expressed concern that without an RBA there would be no longer an organization in that city to deliver status blind services and because the Aboriginal community in Winnipeg and its people would lose local control over programming with all Aboriginal people not being treated equally.

(ii) In Ontario

[30]The New Relationship had similar results in Ontario. HRDC did not enter into RBAs with any urban or non-status First Nation communities. Control over funding, setting training priorities, designing training programs and approving applicants shifted to reserve-based First Nation bands. In Ontario, many First Nation bands joined together to establish one local area management board to service several Aboriginal on-reserve communities in a defined geographic area.

[31]Roger Misquadis had to apply to the Band on Manitoulin Island he is registered with but with which he says he has no connection having lived in Toronto all his life. Dorothy Phipps-Walker faces the same situation. According to HRDC, she is registered with the Lac Seul Band located on a reserve in Northwestern Ontario. She does not know the Band members, has never lived on the reserve and has never received any services from it.

[32]Kajita Mikam, the local management board in the Ottawa Valley, was reorganized to exclude the Ardoch.

[33]Miziwe Biik and the NPAAMB [Niagara Peninsula Area Aboriginal Management Board] continued to exist under the RBA regime but received funding to serve only unaffiliated Aboriginal individuals defined by HRDC as persons who were not members of Ontario bands or served by Métis organizations. These Ontario bands and Métis organizations are responsible for approximately 80% of the Aboriginal population in Ontario.

(iii) The Urban Aboriginal Employment Initiative under the New Relationship

[34]Counsel for the Ontario applicants reproduced the following two extracts from the *Report of the Royal Commission on Aboriginal Peoples* (RCAP) to show that urban and non-status First Nation communities are extremely poor, marginalized and ignored (RCAP, vol. 3, p. 225; RCAP, vol. 4, p. 531):

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 Nation, 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. . . .

Many urban Aboriginal people are impoverished and unorganized. No coherent or co-ordinated policies to meet their needs are in place. . . . They have been largely excluded from discussions about self-government and institutional development. Aboriginal people in urban areas have little collective visibility or power. It is clear that they urgently require resources and assistance to support existing organizations and create new institutions to enhance their cultural identity.

[35]Canada acknowledges in the course of and subsequent to the negotiations of the RBAs, concerns about perceived gaps in the ability of First Nation RBA-holders to serve all Aboriginal people living in urban and off-reserve areas were raised and in response HRDC implemented under the New Relationship a special program called the Urban Aboriginal Employment Initiative.

[36]Under this initiative, HRDC initially allocated $21,000,000 in funding over three years of the New Relationship to three specific Aboriginal organizations in order to better address the labour market development needs of urban Aboriginal people. The three organizations receiving funds were the National Association of Friendship Centres (NAFC), the Native Women's Association of Canada (NWAC) and the Congress of Aboriginal People (CAP).

[37]NAFC represents the interests of seven provincial/territorial associations with 112 Friendship Centres. NWAC is a political organization representing the interests of Aboriginal women; and CAP is a national organization speaking for Aboriginal people not covered by the *Indian Act*, for Indians who have regained their status, and for the Aboriginal population not residing on-reserves. As a result of the agreements, HRDC maintains the urban Aboriginal people, including those residing in GTA and/or the Niagara Peninsula and Winnipeg, were able to apply for funding to support employment and training activities in urban areas.

(iv) A separate RBA--The Circle

[38]In addition to implementing the Urban Aboriginal Employment Initiative, HRDC entered into a separate RBA with the Aboriginal Labour Force Development Circle (the Circle) in May 1997. The Circle is made up of representatives of six Ontario Aboriginal organizations, including NPAAMB and Miziwe Biik. This RBA contained two funding components. First, a contribution of $5.5 million in fiscal year 1997/98 and the same amount in fiscal year 1998/99 to support Aboriginal labour market development programming for urban Aboriginals in Ontario who are not covered by any other RBA.

[39]Funding, under this component, was limited to skills training and employment assistance to the following:

(a) out of province First Nation individuals;

(b) non-status individuals who did not consider themselves Métis and who were not members of a First Nation or Inuit community;

(c) status Indians who had no connection to a band (registered on the General List); and

(d) Aboriginal employers and institutions who were not aligned to any First Nation, Métis or individual community.

[40]The second component of the Circle RBA consisted of a contribution of approximately $4,000,000 in fiscal year 1997/98 and close to that amount for fiscal year 1998/99 to support Aboriginal labour development programming in the geographic areas served by the six-member organizations of the Circle including the urban communities served by NPAAMB (Niagara Peninsula) and Miziwe Biik (Toronto).

(c) The Aboriginal Human Resources Development Strategy (AHRDS)

[41]The AHRDS is similar in purpose and structure as the New Relationship but seeks to improve, build and expand upon it. It had an urban component. As was the case under the New Relationship, HRDC entered into a direct relationship with the AFN, MNC, and ITC. AHRDAs were then entered into with provincial and sub-regional organizations affiliated with the three national Aboriginal organizations.

[42]HRDC claims AHRDS was implemented following an extensive consultation process carried out with Aboriginal stakeholders including AFN, MNC, ITC as well as CAP, NWAC and organizations and individuals purporting to represent urban and off-reserve Aboriginal people.

[43]For the applicants, the AHRDS is no better than its predecessor, the New Relationship, in its RBA form. Its effects are the same: exclusion from the benefits of the AHRDAs in terms of local control of labour market programming.

[44]In Manitoba, HRDC entered ARHDAs with the two RBA holders it had previously signed with, the AMC and the MMF, transferring to them the responsibility and control of training and employment programs for all their members, whether on or off-reserve. ACW asked HRDC to enter into an AHRDA with it covering Winnipeg but HRDC refused giving no reasons, the applicants say. As under Pathways and the New Relationship the AMC and MMF were to operate in Winnipeg through separate local management boards, each controlled by them. At the hearing of this application, I was told the AMC had dissolved their local management board. In replacement, AMC had implemented a plan under which services would be provided directly by First Nations through 20 sub-agreement holders who were expected to have offices in Winnipeg.

[45]The same scenario played out in Ontario. A RBA holder became a AHRDA holder. Miziwe Biik, NPAAMB and Ardoch Algonquins requested negotiations for inclusion as AHRDA holders but were refused, they say, without being given reasons.

[46]In argument, the focus was on how the separate component, the urban/off-reserve component, was put into place and how it differed from the AHRDAs. Controversy also swirled around the selection of the service provider through the means of a request for proposal (RFP).

[47]In certain centres such as Winnipeg or in a province such as Ontario, HRDC selected the service provider for the urban/off-reserve component by means of the RFP.

[48]In Manitoba, the service provider selected was the Centre for Aboriginal Human Resources Development (CAHRD). The ACW made a RFP submission and supported CAHRD's RFP proposal. ACW had informed Canada prior to the RFP for Winnipeg it felt entitled to enter into an AHRDA with HRDC and had a mandate from the Aboriginal community in Winnipeg to do so.

[49]CAHRD signed an agreement with HRDC which required it to provide human resources development programming including design of training programs and their delivery to all

Aboriginal people in Winnipeg regardless of status. It delivers status blind labour programming services as WAMB previously did under Pathways.

[50]In Ontario, HRDC put out an RFP to provide Aboriginal labour market programming, province wide, to the unaffiliated Aboriginal population residing in Ontario.

[51]The Circle, in which both Miziwe Biik and NPAAMB participated as proposed local delivery mechanisms, made an RFP response but it was not successful. The bid was won by the Ontario Federation of Indian Friendship Centers (OFIFC) coupled with Grand River Employment and Training (OFIFC/GREAT).

[52]However, OFIFC, because of a resolution passed at its general meeting, backed away from serving the GTA because it said it had no mandate to serve that area. HRDC then selected, without an RFP, Miziwe Biik who entered into an agreement with it.

[53]Under the AHRDS, there is no AHRDA with rural non-reserve First Nation communities such as Ardoch. Their members are lumped into the urban component where the holder is, as noted, OFIFC/GREAT who appointed, as its local delivery mechanism, Kajita Mikam to serve, in its area, the Ardoch community.

[54]The applicants are critical of HRDC. They claim, instead of negotiating AHRDAs with urban and non-status First Nation peoples through their communities and mandated organizations, HRDC unilaterally imposed the separate program--the urban/off-reserve component-on them. They say this component does not give urban and non-status First Nation communities any control over training funds. The service provider is not mandated by the Aboriginal community and is not responsible and accountable to that community but to HRDC as any commercial contractor would be accountable.

[55]Canada says HRDC added the urban/off-reserve component to the AHRDS in response to complaints made by certain groups purporting to represent urban and other off-reserve Aboriginal people about perceived problems they encountered in accessing programs administered by RBA holders. Canada states First Nation AHRDA holders are required to provide access to programming to their members or constituents, whether they live on or off-reserve. There is a non-discrimination clause in each AHRDA. Canada says, because of this, the urban/off-reserve component is intended merely to provide an additional source of access to programming for Aboriginal people living off-reserves. The reserve--based AHRDA holder is primarily responsible for serving all of its members regardless of where they live.

[56]HRDC claims the difficulty it faced in selecting an appropriate service provider for Aboriginal people living off-reserve in many urban centres was the large number of organizations purporting to speak on their behalf. Accordingly, in order to select the appropriate representative organization, HRDC asserts it initially contacted Aboriginal stakeholders to see if there was a consensus as to which organization should be selected as the AHRDA-holder for any given city or region. In many cases, a consensus did exist as was the case, for example, in Saskatchewan, Alberta, and in parts of British Columbia. It was only where no consensus existed amongst Aboriginal stakeholders that HRDC resorted to the RFP. The RFP process was used to select service providers in Nova Scotia, New Brunswick, Ontario, the Winnipeg area, and the Greater Vancouver area.

C. THE ISSUES

[57]The parties agree the following issues are raised in this proceeding:

(a) does AHRDS violate subsection 15(1) of the Charter in that it discriminates against urban and off-reserve Aboriginal individuals?

(b) if it does, is that discrimination justifiable under section 1 of the Charter?

(c) if it is not justifiable, what is the appropriate remedy?

[58]Underlying these issues is a fundamental difference in approach between the applicants and HRDC as to what the benefit generated by AHRDS is. HRDC is of the view the benefit of the AHRDS is access to programming with local community control stated as merely a goal of AHRDS but not a benefit.

[59]Canada takes on the "local community control issue" directly. It acknowledges that one of its stated objectives in establishing AHRDS was to transfer responsibility for the design and delivery of labour market programs directly to Aboriginal organizations themselves. Canada states the AHRDS was intended to be flexible to ensure Aboriginal organizations would have the authority to make decisions to meet the needs of their communities while being accountable for clear performance results.

[60]Canada argues the objective of local community control is a relative goal which can only be pursued by accounting for the diverse circumstances governing Canada's Aboriginal population. This is what is written in Canada's memorandum:

The concept of "local community control" was not intended to mean giving each and every individual aboriginal community in Canada control over the design and development of training and development programs. Rather, it was intended to try to bring control of human resources programs and services closer to the community level by involving Aboriginal people (through representative organizations) in the design and delivery of the programs at the levels and to the extent appropriate. <u>The objective was to direct decision-making to the level that maximized the effective and efficient development and delivery of employment training and jobs for all Aboriginal people. The development of employment and training opportunities for Aboriginal people is the primary objective of AHRDS, not the degree of local control or empowerment</u>. [Emphasis mine.]

[61]HRDC expands on this important objective of AHRDS of ensuring the effective and efficient delivery of programs to eligible recipients. It states in order to attain efficiencies and economies of scale, HRDC was required to strike a balance by negotiating AHRDAs with community organizations who could demonstrate they had the infrastructure necessary to deliver programming.

[62]HRDC says it signed AHRDAs with organizations only where a critical mass existed in terms of numbers and the word "local" used in this context simply meant decisions would be made at a level most effective for the development and delivery of skills and/or employment and training opportunities for Aboriginal peoples.

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

[64]Applicants attack HRDC's stated rationale for exclusion: critical mass and lack of consensus after consultation with them. They argue critical mass is not an issue in Winnipeg and Toronto. That may be so in other areas. But, Ardoch has advised HRDC it is willing to join with NPAAMB or link up with other rural non-reserve First Nation communities in the Ottawa Valley.

[65]The applicants challenge HRDC on the degree of consultation it made to determine if a representative organization could be found in urban centres and refer to cross-examination of HRDC officials that such consultation never sought to determine whether there was a consensus in urban communities as to which organization should deliver the urban/off-reserve component.

D. ANALYSIS

(1) The principles

[66]In terms of the applicable principles governing section 15 of the Charter claims, three Supreme Court of Canada decisions were cited by both sides:

(1) *Law v. Canada (Minister of Employment and Immigration)*, 1999 CanLII 675 (SCC), [1999] 1 S.C.R. 497;

(2) *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, 1999 CanLII 687 (SCC), [1999] 2 S.C.R. 203; and

(3) *Lovelace v. Ontario*, 2000 SCC 37 (CanLII), [2000] 1 S.C.R. 950.

[67]The importance of *Law, supra*, lies in its synthesis of all previous Supreme Court of Canada decisions interpreting section 15 of the Charter. Justice Iacobucci, on behalf of the Court, translated his analysis into guidelines for use by courts in determining equality claims under section 15 of the Charter.

[68]*Corbiere, supra*, is significant. In a case brought by off-reserve members of the Batchewana Indian Band, the Supreme Court of Canada struck down, on section 15 Charter grounds, a section of the *Indian Act* which required Band members to be "ordinarily resident on the reserve" in order to vote in Band elections.

[69]*Lovelace, supra*, is of considerable application. That case challenged a program established by the Government of Ontario which distributes the proceeds of that province's first reserve-based commercial casino only to Ontario First Nation communities registered as bands under the *Indian Act* to the exclusion of non-band Aboriginal communities who were the plaintiffs at trial. The plaintiffs included Ardoch Algonquin First Nation and Allies, several other Ontario rural non-reserve First Nation communities, one Métis and non-status Indian association and the Ontario Métis Aboriginal Association. The Supreme Court of Canada decided Ontario's program did not violate section 15 of the Charter as the plaintiffs had not made out a case of substantive discrimination.

(a) The principles in *Law, supra*

[70]Justice Iacobucci in *Law, supra*, first addresses the general approach to section 15: "[o]n its face . . . guarantees the equal treatment of individuals by the state without discrimination" (paragraph 22). The approach must always be purposive and contextual and mandates a three-stage inquiry concerning the impugned law or action. He expresses this three-stage inquiry in the following terms, at paragraph 39:

First, does the impugned law [program] (a) draw a formal distinction between the claimant and others on the basis of one or more personal characteristics, or (b) fail to take into account the claimant's already disadvantaged position within Canadian society resulting in substantively differential treatment between the claimant and others on the basis of one or more personal characteristics? If so, there is differential treatment for the purpose of s. 15(1). Second, was the claimant subject to differential treatment on the basis of one or more of the enumerated and analogous grounds? And third, does the differential treatment discriminate in a substantive sense, bringing into play the purpose of s. 15(1) of the *Charter* in remedying such ills as prejudice, stereotyping, and historical disadvantage?

[71]At paragraph 51 of the *Law* decision, Justice Iacobucci restates previous Supreme Court of Canada decisions on the purpose of section 15:

All of these statements share several key elements. It may be said that the purpose of s. 15(1) is to prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice, and to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally capable and equally deserving of concern, respect and consideration. Legislation which effects differential treatment between individuals or groups will violate this fundamental purpose where those who are subject to differential treatment fall within one or more enumerated or analogous grounds, and where the differential treatment reflects the stereotypical application of presumed group or personal characteristics, or otherwise has the effect of perpetuating or promoting the view that the individual is less capable, or less worthy of recognition or value as a human being or as a member of Canadian society. Alternatively, differential treatment will not likely constitute discrimination within the purpose of s. 15(1) where it does not violate the human dignity or freedom of a person or group in this way, and in particular where the differential treatment also assists in ameliorating the position of the disadvantaged within Canadian society.

[72]Justice Iacobucci, in the next paragraph, stated "in the articulation of the purpose of s. 15(1) . . . a focus is quite properly placed upon the goal of assuring human dignity by the remedying of discriminatory treatment". He then proceeds, in paragraph 53, to analyse what human dignity is and concludes at paragraph 54 stating "[t]he overriding concern with protecting and promoting human dignity in the sense just described infuses all of the elements of the discrimination analysis".

[73]He continued his analysis by stating in order to determine whether the fundamental purpose of subsection 15(1) is brought into play in a particular case, it was essential to engage in a comparative analysis which takes into consideration the surrounding context of the claim and the claimant. In discussing the comparative approach, he concluded at paragraph 56 "[u]ltimately, a court must identify differential treatment as compared to one or more other persons or groups. Locating the appropriate comparator is necessary in identifying differential treatment and the grounds of the distinction. Identifying the appropriate comparator will be relevant when considering many of the contextual factors in the discrimination analysis".

[74]In *Law, supra*, Justice Iacobucci addressed the issue of contextual factors at length. He identified four such factors which may be referred to by a subsection 15(1) claimant "in order to demonstrate that legislation [government action or program] has the effect of demeaning his or her dignity" (paragraph 62) cautioning, however, there are "undoubtedly others, and not all four factors will necessarily be relevant in every case"(*ibid*). Those four factors go to the issue of whether a claimant has made out a case of substantive discrimination.

[75]The four contextual factors referred to were:

(1) pre-existing disadvantage;

(2) the relationship between grounds and the claimant's characteristics or circumstances;

(3) ameliorative purpose or effects; and

(4) nature of the interest affected.

[76]He found that "probably the most compelling factor favouring a conclusion that differential treatment imposed . . . is truly discriminatory will be, where it exists, pre-existing disadvantage, vulnerability, stereotyping or prejudice experienced by the individual or group" (paragraph 63):

These factors are relevant because, to the extent that the claimant is already subject to unfair circumstances or treatment in society by virtue of personal characteristics or circumstances, persons like him or her have often not been given equal concern, respect, and consideration. It is

logical to conclude that, in most cases, further differential treatment will contribute to the perpetuation or promotion of their unfair social characterization.

[77]My understanding of the Supreme Court of Canada's second contextual factor "the relationship between grounds and the claimant's characteristic or circumstances" is how an alleged Charter ground such as age, disability or sex corresponds to the claimant's needs (requirements), capacity (ability) and circumstances. Justice Iacobucci remarked that "legislation which takes into account the actual needs, capacity, or circumstances of the claimant and others with similar traits in a manner that respects their value as human beings and members of Canadian society will be less likely to have a negative effect on human dignity" (paragraph 70). Conversely, where legislation or the program fails to take into account a claimant's actual situation, it will be easier to establish discrimination.

[78]He considered an important contextual factor to be the ameliorative purpose or effects of the impugned legislation or government action upon a more disadvantaged person or group because, quoting from Justice Sopinka in *Eaton v. Brant County Board of Education*, 1997 CanLII 366 (SCC), [1997] 1 S.C.R. 241 [paragraph 66], "the purpose of s. 15(1) of the *Charter* is not only to prevent discrimination by the attribution of stereotypical characteristics to individuals, but also to ameliorate the position of groups within Canadian society who have suffered disadvantage by exclusion from mainstream society". Justice Iacobucci continues (at paragraph 72):

An ameliorative purpose or effect which accords with the purpose of s. 15(1) of the *Charter* 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.

[79]He emphasized this factor to be likely only relevant where the person or group that is excluded from the scope of ameliorative legislation or other State action is more advantaged in a relative sense adding "[u]nderinclusive ameliorative legislation that excludes from its scope the members of a historically disadvantaged group will rarely escape the charge of discrimination" (paragraph 72) (emphasis mine).

[80]The last contextual factor adverted to by Justice Iacobucci is the nature of the interest affected. He quoted from Justice L'Heureux-Dubé in *Egan v. Canada*, 1995 CanLII 98 (SCC), [1995] 2 S.C.R. 513 [paragraph 63]:

If all other things are equal, the more severe and localized the . . . 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*.

[81]He noted Madam Justice L'Heureux-Dubé explained at paragraph 64 (of the *Egan* decision), that the discriminatory calibre of differential treatment cannot be fully appreciated without evaluating not only the economic but also the constitutional and societal significance attributed to the interest or interests adversely affected by the legislation in question. Moreover, it is relevant to consider whether the distinction restricts access to a fundamental social institution, or affects « a basic aspect of full membership in Canadian society » , or « constitute[s] a complete non-recognition of a particular group » ."

[82]At paragraph 75 of his reasons, Justice Iacobucci concludes his analysis of the contextual factors a claimant may refer to in order to establish an infringement of equality rights in a purposive sense:

An infringement of s. 15(1) of the *Charter* exists if it can be demonstrated that, from 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 legislative imposition of differential treatment has the effect of demeaning his or her dignity: . . . Demonstrating the existence of discrimination in this purposive sense will require a claimant to advert to factors capable of

supporting an inference that the purpose of s. 15(1) of the *Charter* has been infringed by the legislation [or government action].

(b) The findings in *Corbiere*

[83]In *Corbiere, supra*, the Supreme Court of Canada was unanimous in the result with the reasons written by McLachlin J. (now Chief Justice of Canada) and Bastarache J. subscribed to by three other Justices and those written by Justice L'Heureux-Dubé subscribed in by three other Justices. Both sets of reasons followed the framework analysis for section 15 outlined in *Law, supra*.

[84]I take from *Corbiere, supra*, the following points in terms of the three-stage analysis:

(1) Section 77 [as am. by R.S.C., 1985 (1st Supp.), c. 32, s. 14] of the *Indian Act*'s exclusion of off-reserve band members from voting privileges on band governance satisfies the first step which is "to determine whether the impugned law makes a distinction that denies equal benefit or imposes an unequal burden" as *per* McLachlin and Bastarache JJ. (paragraph 4). Justice L'Heureux-Dubé characterized the distinction, namely the exclusion of the band members who live off-reserve from the definition of elector within the band under the *Indian Act* as differential treatment;

(2) The Court was satisfied on the second inquiry finding the denial of benefits/unequal burden or differential treatment was made on an analogous ground by looking at the purpose of section 15 and whether the analogous ground was like the enumerated grounds which "often serve as the basis for stereotypical decisions made not on the basis of merit but on the basis of a personal characteristic that is immutable or changeable only at unacceptable costs to personal identity" as *per* McLachlin and Bastarache JJ. (paragraph 13) who also found "'Aboriginality-residence' as it pertains to whether an Aboriginal band member lives on or off the reserve is an analogous ground" (paragraph 14) because the distinction goes to a personal characteristic essential to a band member's personal identity, the situation of off-reserve Aboriginal band members being unique and immutable.

Justice L'Heureux-Dubé found "Aboriginality-residence" to be an analogous ground reaching this conclusion, however, by not only examining the purpose of section 15 but also the contextual factors set out in *Law, supra*. In her perspective, the fact that band members living off-reserve had generally experienced disadvantage and prejudice and formed part of a "discrete and insular minority" defined by race and place of residence was important.

McLachlin and Bastarache JJ. disagreed with her approach stating at paragraph 10 of their joint reasons:

If it is the intention of L'Heureux-Dubé J.'s reasons to affirm contextual dependency of the enumerated and analogous grounds, we must respectfully disagree. If "Aboriginality-residence" is to be an analogous ground. . . then it must always stand as a constant marker of potential legislative discrimination, whether the challenge is to a governmental tax credit, a voting right, or a pension scheme. This established, the analysis moves to the third stage: whether the distinction amounts, in purpose or effect, to discrimination on the facts of the case. [Emphasis mine.]

(3) The third inquiry, a fact-finding and contextual one, is to determine whether the distinction amounts, in purpose or effect, to discrimination. McLachlin and Bastarache JJ. found substantive discrimination existed by reference to three contextual factors referred to in *Law, supra*: pre-existing disadvantage, correspondence and importance of the interests affected. They wrote, at paragraph 17:

The impugned distinction perpetuates the historic disadvantage experienced by off-reserve band members by denying them the right to vote and participate in their band's governance. Off-reserve band members have important interests in band governance which the distinction denies. They are

co-owners of the band's assets. The reserve, whether they live on or off it, is their and their children's land. [Emphasis mine.]

McLachlin and Bastarache JJ. concluded the section 77 disenfranchisement resulted in the denial of substantive equality because its message was clear: "off-reserve band members are not as deserving as those band members who live on reserves". This distinction was made on the arbitrary basis of a personal characteristic (paragraph 18).

[85]Justice L'Heureux-Dubé's opinion that the third inquiry was met was considerably more elaborate. She summarized her conclusions at paragraph 91 of her reasons in the following terms:

In summary, therefore, a contextual view of the people affected and the differential treatment in question leads to the conclusion that this legislative distinction conflicts with the purposes of s. 15 (1). The people affected by this distinction, in general, are vulnerable and disadvantaged. They experience stereotyping and disadvantage as Aboriginal people and band members living away from reserves. They form part of a "discrete and insular minority" defined by race and residence, and it is more likely that further disadvantage will have a discriminatory impact upon them. Second, the distinction in question does not correspond with the characteristics or circumstances of the claimants and on-reserve band members in a manner which "respects and values their dignity and difference": . . . The powers of the band council affect cultural, political, and financial interests and needs that are shared by band members living on and off the reserve. Third, the nature of the interests affected is fundamental. Given the form of representative democracy provided for in the *Indian Act*, failure to give any voice in that process to certain members of the band affects an important attribute of membership, and places a barrier between them and a community which has particular importance to them. . . . Finally, the interest affected is also significant because of the ways in which, in the past, ties between band members and the band or reserve have been involuntarily or reluctantly severed. Those affected or their parents may have left the reserve for many reasons that do not signal a lack of interest in the reserve given the various historical circumstances surrounding reserve communities in Canada such as an often inadequate land base, a serious lack of economic opportunities and housing, and the operation of past Indian status and band membership rules imposed by Parliament.

(c) What *Lovelace, supra*, holds

[86]In *Lovelace, supra,* Justice Iacobucci wrote the reasons on behalf of a unanimous Court. He continued the *Law* analytical framework for section 15 Charter equality cases. He considered "[a]t 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*" (paragraph 51).

[87]He reiterated the central purpose of the guarantee in subsection 15(1) is to protect against the violation of essential human dignity and he confirmed the three broad inquiries required for the determination of a discrimination claim at paragraph 53 of his reasons:

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.

[88]Justice Iacobucci emphasized the discrimination inquiry "demands a full contextual analysis . . . focused through the application of contextual factors which have been identified as being particularly sensitive to the potential existence of substantive discrimination . . . [which] proceeds on the basis of 'a comparative analysis which takes into consideration the surrounding context of the claim and the claimant'" (paragraph 55).

[89]At the same paragraph, he stated:

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. . . .

[90]I take the following principles from *Lovelace, supra*, as particularly relevant to this judicial review application.

[91]First, Justice Iacobucci confirmed a subsection 15(1) scrutiny was not limited to distinctions set out only in legislation. It was clearly available to review ameliorative programs established by government.

[92]Second, he acknowledged the historical disadvantage suffered by both claimant and the comparator group and rejected a relative disadvantage approach. He said a section 15 inquiry "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". To him, it was important to acknowledge "that all Aboriginal peoples have been affected 'by the legacy of stereotyping and prejudice against Aboriginal peoples'. . . . Aboriginal peoples experience high rates of unemployment and poverty, and face serious disadvantages in the areas of education, health, and housing", citing both *Corbiere, supra* and the *Report of the Royal Commission on Aboriginal Peoples* (paragraph 69).

[93]Third, he found the section 15 inquiry "must proceed on the basis of comparing band and non-band aboriginal communities" finding "no basis for limiting the comparison of band communities with rural non-band aboriginal communities" (emphasis mine) because "there is a great degree of diversity in the living circumstances of the appellant groups which cannot be properly reflected by this single descriptor" (paragraph 64).

[94]Fourth, in his analysis of the contextual factors and particularly the contextual factor related to correspondence of the grounds to the needs, capacities and circumstances, Justice Iacobucci emphasized it was important to fully understand the nature of the program.

[95]Fifth, relying on various passages from the *Report of the Royal Commission on Aboriginal Peoples* (RCAP) he found the claimant groups faced a unique set of disadvantages in terms of inequalities existing between groups of Aboriginal people quoting from RCAP, vol. 3, at page 204 [paragraph 70]:

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.

He continued at paragraphs 71 and 72 by writing:

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". . . .

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. . . . 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. [Emphasis mine.]

[96]Justice Iacobucci in his reasons "having decided the relevant comparator group" considered the first and second stages of the discrimination inquiry. He characterized the first stage as an examination "whether the appellants were subject to differential treatment" and found "[c]learly, 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 of the First Nations Fund and any related negotiation process (paragraphs 65 and 66).

[97]He turned the second stage "whether this differential treatment was on the basis of an enumerated or analogous ground under s. 15(1)". He considered the submissions of the Métis appellants that they were excluded on the basis of race or ethnicity. He contrasted this with the submission by the *Lovelace* appellants who submitted "that non-registration under the *Indian Act* is inextricably tied to a long-standing 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" (paragraphs 65-66).

[98]He concluded he did not have to decide the point because of his finding that "even if these grounds are present there is no discrimination in these circumstances" (paragraph 67). He added, however, in the same paragraph, "[a]lthough 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 CanLII 376 (SCC), [1997] 1 S.C.R. 358, at paragraph 62; *Egan, supra*, and *Miron v. Trudel*, 1995 CanLII 97 (SCC), [1995] 2 S.C.R. 418".

[99]Justice Iacobucci then went on in the third stage to consider the four contextual factors set out in *Law, supra*. He found "[t]he 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' » . He concluded, however, the appellants "have failed to establish that the First Nations Fund functioned by device of stereotype. . . . Instead, . . . 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" (paragraph 73).

[100]As I read *Lovelace, supra*, the finding of non-discrimination turned mainly on the contextual factor which relates the grounds of the claim of discrimination to the needs, capacities and circumstances of the band communities. Justice Iacobucci looked at the First Nations Fund in the context of the overall project concluding the province and the First Nation bands had agreed to much more than that the First Nations Fund revenues be directed to community development, etc. He stated [at paragraph 74]:

Specifically, it is critical to recognize that the province did not merely and unilaterally allocate this First Nations Fund from its 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 [Statement of Political Partnership], and (iii) to ameliorate the social, cultural and economic conditions of band communities.

[101]Justice Iacobucci stressed the casino project was not only a targeted ameliorative program but was a program that was developed on a partnered basis. He emphasized this partnership between Ontario and the Ontario bands because, in his view, "the casino arrangement must be distinguished from a universal or generally comprehensive benefits program" (paragraph 82).

[102]He found, in this context, it was not surprising "that there is a very high degree of correspondence between the program and the actual needs, circumstances, and capacities of the bands" (paragraph 82).

[103]Justice Iacobucci then examined the contextual factor of ameliorative purpose and extended it to situations "where disadvantage, stereotyping, prejudice or vulnerability describes the excluded group or individual" and said the focus of the 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" (paragraph 85). He then added [at paragraph 86]:

<u>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</u> excluded group is less worthy of recognition and participation in the larger society. [Emphasis mine.]

[104]He found the ameliorative purpose of the overall casino project and related First Nations Fund had been clearly established and concluded "[t]he 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"(paragraph 87).

[105]He touched upon the nature of the interest affected by the program viewing that "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" [paragraph 89]. He concluded:

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.

(2) <u>Application of the principles to this case</u>

[106]Before embarking on the three-stage analysis mandated by the Supreme Court of Canada, I address, at the very start, who the claimants, First Nation members of urban Aboriginal communities living off-reserve in Winnipeg, Toronto and in the Niagara Peninsula and First Nation members who have no reserve and live in Aboriginal communities in the Ottawa Valley, are to be compared to for purposes of the discrimination analysis.

[107]In *Lovelace, supra*, Justice Iacobucci emphasized that generally, the claimant chooses the relevant comparator group but the Court may, within the scope of the grounds pleaded, refine the comparison proposed.

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

First Nation band communities and First Nation urban and rural non-band communities (which was the comparison in *Lovelace, supra*, paragraph 64).

[109]There can be no question AHRDS is subject to Charter scrutiny. Lovelace, *supra*, makes this point quite emphatically.

[110]The existence and functioning of urban and rural Aboriginal communities is also beyond doubt. I need only refer to affidavits of Mary Richard and Wayne Helgason dealing with the Winnipeg Aboriginal community. The Toronto Aboriginal community was described in the affidavit of Joseph Hester and those in the Niagara Peninsula by Vince Hill. Chief Crawford deposed to the functioning of Ardoch.

[111]The first stage of the discrimination inquiry under section 15 of the Charter asks whether the program makes a distinction that denies equal benefit, imposes an unequal burden or put in other words, imposes unequal treatment between the applicants and those in the comparator group.

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

[113]Devolving decision-making for labour market programming to Aboriginal communities was the premise upon which Pathways, the New Relationship and AHRDS were built and the reason is apparent and is acknowledged by HRDC. Experience has shown that labour market programming to serve Aboriginal peoples will not work unless decisions are made by those on the ground.

[114]I accept the evidence of David Hallman, David McCulloch and Robert Hawson, on behalf of HRDC, AHRDS did not envisage every Aboriginal community would have an AHRDAs. Efficiencies and economies of scale are relevant.

[115]I do not, however, accept their evidence critical mass was an issue relevant to the communities the applicants live in.

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

[117]They have also crossed the second stage which asks whether the distinction drawn by AHRDS is based on enumerated section 15 Charter or analogous grounds.

[118]In *Corbiere, supra*, McLachlin and Bastarache JJ. described both enumerated and analogous grounds stand (at paragraph 8)"as constant markers of suspect decision making or potential discrimination". Aboriginality-residence (off-reserve band member status) "must always stand as a constant marker of potential legislative discrimination, whether the challenge is to a governmental tax credit, a voting right, or a pension scheme" (paragraph 10).

[119]What I take from these observations is that a finding of an analogous ground such as Aboriginality-residency has a permanency for application in future cases which does not vary in accordance with the circumstances. Varying circumstances may affect the determination of whether substantive discrimination has been made out because the markers are "only indicators of

suspect grounds of distinction, it follows that decisions on these grounds are not always discriminatory" (paragraph 7).

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

[121]I now move to the third stage where the question is whether AHRDS has a purpose or effect that is substantive discrimination which involves a consideration of the four contextual factors outlined in the jurisprudence.

[122]*Lovelace, supra*, made it clear band and non-band communities suffer from historical disadvantage and a section 15 inquiry does not direct a "race to the bottom". All Aboriginal people are affected by "the legacy of stereotyping and prejudice".

[123]Both *Corbiere* and *Lovelace, supra*, touched upon the inequalities existing between groups of Aboriginal peoples. It will be recalled *Corbiere* focussed on off-reserve First Nation members living around Sault Ste-Marie and, in *Lovelace*, the claimants included the Ardoch First Nation.

[124]Justice L'Heureux-Dubé, in *Corbiere, supra*, viewed off-reserve band members as "vulnerable and disadvantaged. They experience stereotyping and disadvantage as Aboriginal people and band members living away from reserves. They form part of a `discrete and insular minority' defined by race and residence" [paragraph 91].

[125]In *Lovelace, supra*, Justice Iacobucci, quoting from RCAP addressed the issue of inequality between the claimants and reserve-based First Nation members.

[126]He considered the appellants' argument the disadvantage they faced was "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" [paragraph 71].

[127]He referred to *Corbiere* and said that case "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" [paragraph 72].

[128]Justice Iacobucci concluded at paragraph 72:

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.

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

[130]The second contextual factor speaks to the relationship between the basis on which the differential treatment occurs and the characteristics of the claimant. Some distinctions may correspond to the needs, capacities, or circumstances of a group in a manner that does not affect their human dignity. (*Corbiere, supra*, paragraph 73.)

[131]The no discrimination finding in *Lovelace* was largely based on the Court's finding the targeted program, characterized as an ameliorative program developed on a partnership between

Ontario and the First Nations in Ontario, corresponded to the needs, capacities and circumstances of those First Nations. This targeted program was put into place to address several issues between the Government of Ontario and Ontario First Nations and enumerated by Justice Iacobucci at paragraph 74 of his reasons. He also noted the First Nations Fund from which the claimants were excluded was not drawn from the province's general consolidated revenue pool. He distinguished the casino arrangement from a universal or generally comprehensive program.

[132]I agree with the applicants the AHRDS is completely different than the type of program than the one the Court considered in *Lovelace, supra.* There is no reliable evidence, the needs, capacities and circumstances of the applicants and the communities they live in are different than the needs of First Nations reserve-based communities. The applicants do not have to show they are more disadvantaged than the reserve-based First Nation members. AHRDS is a universal program whose purpose is to provide enhanced employment opportunities for all Aboriginal peoples in Canada and the benefits of local community control do not differ whether a First Nation person lives on the reserve or not. Different treatment between band and non-band communities cannot be justified on the basis the Court did in *Lovelace.*

[133]The third contextual factor considers the ameliorative purpose. It is not disputed AHRDS's purpose is an ameliorative one geared to enhancing, through training programs, the employment opportunities of Aboriginal peoples who are disadvantaged by very high unemployment and special barriers they face in getting jobs.

[134]In *Lovelace, supra,* Justice Iacobucci said the Court was dealing "with a targeted ameliorative program which is alleged to be underinclusive, rather than a more comprehensive ameliorative program alleged to be underinclusive" (paragraph 85). Noting his comment in *Law, supra,* the Court affirmed that "ameliorative legislation designed to benefit the population in general, yet which excludes historically disadvantaged claimants, will `rarely escape the charge of discrimination'" (paragraph 84).

[135]As the Court stressed, it is important to appreciate the nature of the impugned program--AHRDS. It is a general comprehensive program geared to assisting all Aboriginal peoples, wherever they live, in order to enhance their skills, tuned to local labour market demand, so they can gain employment in the communities they live in.

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

[137]I find AHRDS is underexclusive in terms of First Nation urban and non-reserve rural First Nation communities whom the applicants represent.

[138]They have been excluded and unjustifiably differentially treated by HRDC from the purpose and significant benefit of AHRDS, that which HRDC itself recognizes without which the program will fail, local control of programming and funding tailored to each community's different needs in the labour market.

[139]Finally, consideration must be given to the nature of the interest affected.

[140]In *Lovelace, supra,* the Court endorsed what Justice L'Heureux-Dubé said about this factor. Included in the considerations involved in the analysis is whether the distinction constitutes a complete non-recognition of a particular group. In my view, it does in respect of the communities the applicants live in.

[141]What HRDC failed to recognize are the applicants' urban and rural First Nation communities, that they function as a community in which First Nation members participate, have traditional forms of governance which tasks organizations to carry out programs they consider necessary to address the needs of the members of that community. HRDC does not acknowledge a Roger

Misquadis, a Mona Perry, a Peter Ogden, with others, has built an Aboriginal community in the places they live in.

[142]This conclusion is manifest by looking at which organizations HRDC entered AHRDAs with and which communities it did not.

[143]As the applicants' affidavits attest, such exclusion violates their human dignity in a fundamental way and ignoring their community stereotypes them as less worthy of recognition.

[144]I find substantive discrimination has been established. All of the contextual factors converge to establish this conclusion.

(3) Justification--Section 1 of the Charter

[145]The section 1 Charter analysis is derived from *The Queen. v. Oakes*, 1986 CanLII 46 (SCC), [1986] 1 S.C.R. 103, with McLachlin and Bastarache JJ. in *Corbiere, supra*, endorsing the approach taken by Justice Iacobucci in *Egan, supra*. The first element is whether the program meets a pressing and substantial objective and the second element is the proportionality analysis which considers (a) whether the program is rationally connected to the objective; (b) the right is impaired as minimally as possible; and (c) the attainment of the goal is not outweighed by the abridgement of the right.

[146]I agree with counsel for Canada that AHRDS is a program which is pressing and substantial. Its purpose is to help Aboriginal people, who suffer high unemployment, get jobs.

[147]However, I find the means taken to implement the AHRDS is not rationally connected to the objective nor does it minimally impair the right as little as possible.

[148]The goal of the AHRDS is to help Aboriginal people get jobs but what is denied the applicants' communities is the key to making the program work successfully so that its goal can be achieved--local decision-making by representative groups mandated by the applicants' communities. The exclusion is because they have no AHRDAs and this without justification. I have already commented HRDC is entitled to apply efficiency criteria when it decides with whom AHRDAs should be entered with. I have decided the issue of critical mass is not relevant to the applicants' communities.

[149]HRDC raised another justification: fragmentation in the urban Aboriginal communities of Toronto and Winnipeg as to which representative organization is mandated by the community to plan, deliver and find training programs. This justification cannot be argued seriously in the case of the Ardoch.

[150]I find this justification not to have been established in fact. There is no clear evidence the applicants' communities are fragmented as to who represents them in labour training matters, HRDC did not realistically try to find out and it ignored the very organizations which operated successfully under Pathways.

[151]The minimal impairment test requires Canada to lead evidence on what alternative measures it considered when it made its decision to exclude the applicants' communities from AHRDAs. Canada says it had to choose representative organizations and where, no consensus existed, it went to the RFP process.

[152]I have already held I was not satisfied with Canada's evidence on this point. Apart from that, Canada led no evidence of any study or arrangements considered short of shutting out the applicants' communities from participation, on an equal basis, in decision-making about labour market programming.

[153]In these circumstances, I find the discrimination not justified under section 1 of the Charter.

(4) The Remedy

[154]Canada's evidence amply demonstrates the varying conditions and circumstances experienced by Aboriginal peoples and communities across Canada. In terms of the AHRDS, I recognize the need for flexibility on HRDC's part.

[155]On the other hand, the applicants have led a great deal of evidence to demonstrate how their communities were organized and functioned under Pathways and how those communities make decisions on an issue-by-issue basis, such as Aboriginal health matters and labour training issues which permits me to fashion a discrete remedy applicable to the applicants' communities which does not impair the generally satisfactory way the AHRDS has been implemented by HRDC.

[156]The discrimination which is to be remedied is specific to the applicants and their communities. I have no evidence of any other discriminatory implementation of AHRDS by HRDC. The discrimination I have found consists of AHRDS's exclusion when it embraces the applicants' communities.

[157]In the circumstances, the appropriate remedy is to undo the exclusion by ordering inclusion.

[158]I order HRDC to eliminate the discriminatory effect imposed on the applicants and the communities they live in by the manner which AHRDS has been implemented in those communities. HRDC is to eliminate the discrimination by providing community control over labour training programs to the applicants' communities. These communities can then, through representative organizations accountable and responsible to the community members, design, implement and fund training programs which will meet the needs of the Aboriginal community where the applicants reside.

[159]This remedy substantially leaves in place the AHRDS and the AHRDAs which are in operation and preserves the integrity of the program.

[160]I leave it to HRDC in consultation with the representative organizations of the applicants' communities who have been identified in these proceeding how best to fashion inclusion in a way which is respectful of the needs of all Aboriginal peoples in their communities.

[161]For all these reasons, this judicial review application is allowed with costs.

Scope of Databases | Tools | Terms of Use | Privacy | Help | Contact Us | About

by LEXUM for the Federation of Law Societies of Canada