

4-1-2009

A Proposed Transjudicial Approach to s. 15(2) Charter Adjudication

Vanita Goela

Public Prosecution Service of Canada

Follow this and additional works at: <https://digitalcommons.schulichlaw.dal.ca/dlj>



Part of the [Comparative and Foreign Law Commons](#), and the [Constitutional Law Commons](#)

Recommended Citation

Vanita Goela, "A Proposed Transjudicial Approach to s. 15(2) Charter Adjudication" (2009) 32:1 Dal LJ 109.

This Article is brought to you for free and open access by the Journals at Schulich Law Scholars. It has been accepted for inclusion in Dalhousie Law Journal by an authorized editor of Schulich Law Scholars. For more information, please contact hannah.steeves@dal.ca.

Canada and India are both pluralistic democracies with diverse populations. Both countries have drafted constitutional provisions which enshrine equality rights and permit affirmative action.

In India, various disadvantaged groups receive special protection from the Constitution of India, such as the Other Backward Classes (OBC). The Supreme Court of India has held that States and the Central government must identify the "creamy layer" within the OBC category so that reservations target members who are most in need. Otherwise, the OBC category is overinclusive. The creamy layer includes those who are socially and economically advanced and who no longer require the benefits of the reservation system.

Race-based affirmative action may be overinclusive in Canada. For this reason, the author argues that the Supreme Court of Canada should explore the concept of creamy layer in any of its future decisions on s. 15(2) of the Canadian Charter of Rights and Freedoms.

Le Canada et l'Inde sont tous deux des démocraties pluralistes aux populations diverses. Ils ont tous deux adopté des dispositions constitutionnelles où sont enchâssés les droits à l'égalité et qui permettent la « discrimination positive ».

En Inde, la constitution du pays accorde à divers groupes désavantagés une protection spéciale, notamment, par exemple aux « autres castes de bas statut ». La Cour suprême de l'Inde a tranché que les États et le gouvernement central doivent déterminer les personnes qui constituent « l'élite » au sein des castes de bas statut afin de limiter les bénéfices du système de réservations aux membres de la société qui en ont le plus besoin. Sinon, force est de conclure que la définition des autres castes de bas statut est trop inclusive. L'élite comprend les personnes avantagées socialement et économiquement qui n'ont plus besoin des bénéfices du système de réservations.

Selon cette théorie, au Canada, la discrimination positive fondée sur la race serait trop inclusive. C'est pourquoi l'auteure avance que la Cour suprême du Canada devrait examiner le concept d'élite dans toutes ses décisions futures fondées sur le paragraphe 15(2) de la Charte canadienne des droits et libertés.

* Vanita Goela is a lawyer with the Public Prosecution Service of Canada (PPSC). The views expressed in this paper are those of the author and not necessarily those of the PPSC. This paper is a condensed version of her thesis, *Who belongs to the 'creamy layer'? Affirmative action in Canada and India* (LL.M. Thesis, University of Toronto, 2008) [Unpublished]. The author would like to thank Sujit Choudhry for his edifying comments and continuous encouragement throughout his supervision of the thesis. The author would also like to acknowledge the insightful feedback and commentary from James Hendry, General Counsel, Human Rights Law Section, at the Department of Justice Canada, and the anonymous reviewer for Dalhousie Law Journal.

Introduction

- I. *The context in India*
 - II. *The problem of classifying peoples*
 - III. *The context in Canada*
- Conclusion*

Introduction

Canada and India are both pluralistic democracies with diverse populations. Accompanying diversity is the existence of minority or equity groups which have been historically disadvantaged or have faced discrimination. Both common law countries strive towards the elimination of inequality. To move forward on the path to equality, Canada and India drafted constitutional provisions which enshrine equality rights.

In Canada, minorities include groups based on ethnicity and race, national or ethnic origin, colour, religion, disability or sexual orientation.¹ Aboriginal peoples and linguistic minorities occupy a special place as minority groups in Canada, which is acknowledged in the *Canadian Charter of Rights and Freedoms* [*Canadian Charter*] and the *Constitution Act, 1982*.²

The general constitutional provision regarding equality is s. 15 of the *Canadian Charter* and has been in force since 1985. Section 15(2) is Canada's affirmative action provision.

(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.

In India, minority groups are defined based on religion, race, sex and place of birth.³ But they are also described by their caste or tribe. Disadvantaged caste groups and people from tribal areas receive special

1. The enumerated grounds from s. 15(1) of the *Canadian Charter of Rights and Freedoms*.

2. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, ss. 16-23, 35 [*Canadian Charter*].

3. *Constitution of India, 1950*, came into force 26 January 1950 and adopted by the Constituent Assembly on 26 November 1949, art. 15 [*India Const.*].

protection in the *Indian Constitution*.⁴ These people are described as belonging to the Scheduled Castes (SC) and Scheduled Tribes (ST). An additional group of people considered to be historically disadvantaged in India include the Other Backward Classes (OBC).⁵

Articles 14 through 16 of the *Indian Constitution* are the principal provisions of equality and have largely been in force since 1950.⁶ The relevant broad equality provisions in the *Indian Constitution* are found in article 15:

(1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.

...

(4) Nothing in this article or in clause (2) of article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes.⁷

*The Constitution (Ninety-third amendment) Act, 2005*⁸ added subsection 5 to article 15. Article 15(5) prescribes that:

Nothing in this article or in sub-clause (g) of clause (1) of article 19 shall prevent the State from making any special provision, by law, for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes or the Scheduled Tribes in so far as such special provisions relate to their admission to educational institutions including private educational institutions, whether aided or

4. *Ibid.* at arts. 341-42, which relate to the Scheduled Castes and Tribes. These special provisions have allowed for action against discrimination towards these groups and compensatory discrimination in their favour: Vani K. Borooah, Amaresh Dubey & Sriya Iyer, "The Effectiveness of Jobs Reservation: Caste, Religion and Economic Status in India" (2007) 38 *Development and Change* 423 at 423-424.

5. I use the term "backward" as it is used in the Indian context. For the purposes of this paper, the relevant articles which refer to the backward classes are 15, 16 and 340; India has also been considering a women's reservation in Parliament, see: Bhaskar Roy, "Finally, Women Set to Get 33% Quota" *The Times of India* (29 January 2008); for additional articles on the backward classes, see also: Pradipta Chaudhury, "The 'Creamy Layer': Political Economy of Reservations," in Sukhadeo Thorat, Aryama & Prashant Negi, eds., *Reservation and Private Sector: Quest for Equal Opportunity and Growth* (New Delhi: Indian Institute of Dalit Studies, Rawat Publications, 2005) 299 at 300 [Chaudhury].

6. Art. 15(4) was added by the *Constitution (First Amendment) Act, 1951*, s. 2; certain words in art. 16(3) were substituted by the *Constitution (Seventh Amendment) Act, 1956*, s. 29 and Schedule: P.M. Bakshi, *The Constitution of India* (Delhi: Universal Law Publishing, 2005), online: <<http://indiacode.nic.in/coiweb/coifiles/amendment.htm>>.

7. Article 29(2) states that "[n]o citizen should be denied admission into any educational institution maintained by the State or receiving aid out of State funds on grounds only of religion, race, caste, language or any of them."

8. No. 23 of 2005 (20 January 2006).

unaided by the State, other than the minority educational institutions referred to in clause (1) of article 30.⁹

Article 16 relates to employment in the public sector. The relevant provisions are:

(1) There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State.

...

(4) Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State.

Affirmative action in any country is controversial. However, the Indian courts have tried to address the deeper complex question of determining who is truly disadvantaged, even within the groups traditionally labelled as disadvantaged. Reservations are a quota-based form of affirmative action confined to the public sector, which apply to the SC, ST and the OBC.¹⁰ The object of reservations is not merely representation of the disadvantaged in the public service but to elevate the social and educational status of these groups.¹¹ The Supreme Court of India has held that States and the Central government must identify what has been referred to as the “creamy layer” within the OBC category so that reservations target members who are most in need.¹² The creamy layer includes those who are socially and economically advanced and who no longer require the benefits of the reservation system.¹³

The focus of this paper will be on judicial pronouncements on the constitutionality of the reservation and quota system in India by the Supreme Court of India, in comparison to the Supreme Court of Canada’s

9. This subsection was the subject of recent controversy in the *Thakur 2008* case which will be discussed further below: *Ashoka Kumar Thakur v. Union of India and Others* Writ Petition (civil) No. 265 of 2006 with others, Supreme Court of India, online: <<http://judis.nic.in/supremecourt/chejudis.asp>>; *Ashoka Kumar Thakur v. Union of India*, (2008) 6 S.C.C. 1 [*Thakur 2008*].

10. Reservations allot or facilitate access to valued positions or resources, Galanter, *infra* note 18 at 1, 43; reservations are a state policy involving the reservation of seats in legislatures, public employment and educational institutions for the underprivileged and disadvantaged: Arvind Sharma, *Reservation and Affirmative Action: Models of Social Integration in India and the United States* (Thousand Oaks, 2005: Sage Publications) at Glossary [Sharma]; see also Chaudhury, *supra* note 5.

11. Georgette David, “La réservation des emplois aux défavorisés dans l’Inde” (1983) 43 *Revue Juridique et Politique, Indépendance et Coopération* 859.

12. *Indra Sawhney v. Union of India and others*, [1992] Supp. 2 S.C.R. 454 [*Indra Sawhney 1992*]; see also the discussion of *Thakur 2008* below.

13. See discussion of *Indra Sawhney 1992* below.

interpretation of the affirmative action provision in the *Canadian Charter*, with particular attention given to the creamy layer concept.

There are various definitions of the concept of affirmative action: it is a public policy which helps a state attain social justice either through quotas or prioritizing benefits to minorities or discriminated groups¹⁴; it aims to increase opportunities for under-represented groups¹⁵; it can nullify discrimination¹⁶; and it is historical restitution or reparation to offset cumulative deprivation suffered by depressed people in the past.¹⁷ I distinguish between affirmative action initiatives which aim at diversity and those which target socio-economic disadvantage. This is to highlight the fact that diversity policies may focus on representation but not necessarily address disadvantage.

The definition of who is disadvantaged evolves in society. Affirmative action policies which aim at eliminating disadvantage based on who is currently disadvantaged may differ from implementing a policy focussed on groups who have been historically disadvantaged. Also, individuals who may require increased access to opportunities might not obtain them because persons from that group may already be represented or considered to be advantaged. Conversely, all individuals within an under-represented group may not in fact be disadvantaged. Therefore, the goal of an affirmative action policy is important to identify.

It appears from the Indian jurisprudence that reservations or affirmative action measures may be overinclusive when relating to identity. Although Canada does not rely on a quota system in its affirmative action laws, policies or programs, it appears that race-based affirmative action may be overinclusive in Canada as well. For this reason, I argue that the Supreme Court of Canada should explore the concept of creamy layer in any of its future decisions on s. 15(2) and race. In Part I, I examine reservations in the Indian context and the creamy layer jurisprudence. In Part II, I review academic literature on the problem of overinclusive programs based on race. In Part III, I discuss the Supreme Court of Canada's cases on affirmative action and provide arguments in favour of a creamy layer analysis.

14. Maria Clara Dias, "Affirmative Action and Social Justice" (2003-2004) 36 Conn. L. Rev. 871 at 871 [Dias].

15. Laura Dudley Jenkins, *Identity and Identification in India: Defining the Disadvantaged* (London and New York: RoutledgeCurzon, 2003) at 1 [Jenkins, *Identity and Identification*].

16. Kasper Lippert-Rasmussen, "Discrimination and the Aim of Proportional Representation" (2008) 7 Politics, Philosophy & Economics 159 at 160.

17. Anirudh Prasad, *Reservational Justice to Other Backward Classes (OBCs)* (New Delhi: Deep & Deep Publications, 1997) at 143 [Prasad].

I. *The context in India*

India and affirmative action

India has had a long history of affirmative action initiatives and has the “longest standing quota system in the world.”¹⁸ As the most diverse democracy in the world, India has had a reservation policy enshrined in the *Indian Constitution* since its inception in 1950, based on one which existed even prior to independence in 1947.¹⁹ In response to the deep social divisions created by caste, which have led to ghettoization, poverty and stigma, the framers of the *Indian Constitution* and government authorities realized the reservation system in order to found a new balance in Indian society based on substantive equality.²⁰

Who are the OBC?

The OBC are persons who belong to groups which are not SC or ST and who are contained in the OBC list created by the Indian government.²¹ The term is used interchangeably with the phrase “socially and educationally backward classes” (SEBC) and is found in Indian jurisprudence as well as the *Indian Constitution*. The OBC are communities thought to be socially

18. The Maharaja of Kholapur Maharashtra introduced the first Government Order recognizing reservations for backward classes in the State administration in approximately 1902: V. Chandra Sekhar, *Other Backward Classes in India, Recognition & Reservation* (New Delhi: Raj Publications, 2006) [Sekhar]; Surinder S. Jodhka & Katherine Newman, “In the Name of Globalisation: Meritocracy, Productivity and the Hidden Language of Caste” *Economic and Political Weekly* 42:41 (13 October 2007) 4125 at 4125; Anonymous, “India’s Creamy Layer” *The Wilson Quarterly* 31:4 (Autumn 2007) 86; Marc Galanter, *Competing Equalities: Law and the Backward Classes in India* (Delhi: Oxford University Press, 1984) at 1, 7-8, 14-16, 26-40 [Galanter]; Frédéric Bobin, “Inde: bilan mitigé de 90 ans de discrimination positive” *Le Monde* (26 January 2008); Thomas Boston & Usha Nair-Reichert, “Affirmative Action: Perspectives from the United States, India and Brazil” (2003) 27 *Western Journal of Black Studies* 3 at 3, 8 [Boston and Nair-Reichert]; Sukhadeo Thorat & Katherine S. Newman, “Caste and Economic Discrimination: Causes, Consequences and Remedies” *Economic and Political Weekly* 42:41 (13 October 2007) 4121 at 4122; Laura Dudley Jenkins, “Race, Caste and Justice : Social Science Categories and Antidiscrimination Policies in India and the United States” (2003-2004) 36 *Conn. L. Rev.* 747 at 753 [Jenkins, “Race”]; Dipankar Gupta, “Caste and Politics : Identity Over System” (2005) 34 *Ann. Rev. Anthropol.* 409 at 410 [Gupta 2005].

19. Galanter, *ibid.* at 26-40; Jenkins, *Identity and Race*, *supra* note 15 at 2; Sharma, *supra* note 10 at c. 6.

20. Jenkins, *Identity and Race*, *supra* note 15 at 1; Galanter, *ibid.* at 1, 7, 10, 14-16; Gupta explains that *varna* refers to the four orders in society. Each order also had a colour pennant of its own, representing different phases of the sun’s journey around the earth: Dipankar Gupta, “The Politics of ‘Caste is Race’: The Impact of Urbanization” in Rik Pinxten & Ellen Precker, eds., *Racism in Metropolitan Areas* (New York, Oxford: Berghahn Books, 2006) at 57 [Gupta, “Politics”]; see also *Thakur* 2008, *supra* note 9 and *Indra Sawhney* 1992, *supra* note 12.

21. *National Commission for Backward Classes Act, 1993*, No. 27 of 1993, s. 2(a) [NCBC Act].

and educationally backward and can belong to any religion or caste.²² The OBC lists are prepared for the purpose of providing reservations for the backward classes in government employment.²³

The concept of a creamy layer, individuals who are the socially, educationally and sometimes economically advanced members of the OBC, evolved as a judicial response to complaints that some people in the OBC category who were targeted by reservations did not in fact need them.²⁴ It should be emphasized that the creamy layer concept applies only to the OBC category and not to the SC or ST. According to remarks by the Supreme Court of India, the creamy layer concept is not a general principle of equality and it does not apply to the SC and ST.²⁵ In other words, not all alleged violations of equality will require an examination of a creamy layer, unless they involve the OBC. The roots of the current controversy surrounding reservations for OBCs are found in the Mandal Report²⁶ and the resulting influential Supreme Court of India decision in *Indra Sawhney 1992*, which will be discussed below.

22. Jenkins explains that although caste contradicts some tenets of Islam, caste-like stratification persists in India based on distinctions surrounding religious conversion, immigration and hierarchies founded on occupation. Likewise, caste inequalities exist within the Christian communities where Dalits (untouchables) who convert from Hinduism continue to face social and economic disadvantages associated with their caste: Laura Dudley Jenkins, "Becoming Backward: Preferential Policies and Religious Minorities in India" (2001) 39:2 *Commonwealth & Comparative Politics* 32 at 32 [Jenkins, "Backward"].

23. *NCBC Act*, *supra* note 21 at s. 2(c): "lists" means lists prepared by the Government of India from time to time for purposes of making provision for the reservation of appointments or posts in favour of backward classes of citizens which, in the opinion of that Government, are not adequately represented in the services under the Government of India and any local or other authority within the territory of India or under the control of the Government of India.

24. See discussion of Supreme Court of India jurisprudence below; Ashwini Deshpande & Katherine Newman, "Where the Path Leads: The Role of Caste in Post-University Employment Expectations" *Economic and Political Weekly* 42:41 (13 October 2007) 4133 at 4140; Chaudhury, *supra* note 5 at 305, asserts that reservations serve essentially as tools for the absorption of the privileged sections of the lower castes in the ruling classes.

25. *Thakur 2008*, *supra* note 9 at paras. 161, 165; *Indra Sawhney 1992*, *supra* note 12 at para. 86.

26. India, Backward Classes Commission, *Reservations for Backward Classes, Mandal Commission Report of the Backward Classes Commission, 1980*, (Delhi: Akalank Publications, 1991) [Mandal Report]. On 20 December 1978, the Prime Minister of India announced the decision to appoint a Backward Classes Commission, pursuant to art. 340 of the *Indian Constitution*. The terms of reference of the Commission, *inter alia*, were to determine the criteria for defining the socially and educationally backward classes. On 31 December 1980, the Chairman of the Commission, B.P. Mandal, presented the Mandal Report to the Government of India. The Commission concluded that based on the available census data, the population of OBCs was estimated at 52% of the total population of India. This is in addition to the SC/ST population which amounts to 22.5%. The Commission noted that the reservation for SC/ST is in proportion to their population, however, based on a legal obligation to keep reservations under arts. 15(4) and 16(4) of the *Indian Constitution* below 50%, they recommended that the OBC reservation be 27%.

Who gets on the OBC list is controversial and involves examining several factors.²⁷ Within the OBC communities, there exists a creamy layer and the current creamy layer criteria are posted on the National Commission for Backward Classes website.²⁸ These people are excluded from reservations. The creamy layer includes an extensive list of criteria, such as, *inter alia*: children of the President of India, children of judges, lawyers, doctors, engineers, or property owners, and children of persons having a gross annual income above Rs. 2.5 lakhs.²⁹ Although most of these criteria include economic and occupational considerations, they are all directly or indirectly related to social advancement.³⁰

The creamy layer criteria are a reminder that an individual's level of backwardness is not static, but rather dynamic and constantly evolving. Thus, it is necessary to continuously distinguish the truly disadvantaged from the creamy layer.

Supreme Court of India creamy layer jurisprudence

In several cases the Supreme Court of India questioned whether the category of OBCs was overinclusive. These cases show an evolution and judicial acceptance of the creamy layer concept and its place alongside the main principles of an equality analysis. Reference to these cases is made within the context of affirmative action programs which target the disadvantaged and not the ideal of diversity or proportional representation.³¹

The Supreme Court of India cases show an attempt by the judiciary to provide guidelines to the government on how to avoid the problem of overinclusion. In a country where reservations affect millions of people and where poverty and social and educational disadvantage is more common than not, the question of who benefits from higher education or a government job is crucial. Defining beneficiaries is also essential in the

27. In 1993, the OBC list contained 1257 castes. In 2006 the list grew to 2297: Manoj Mitta, "OBC list shot up by 90% since Mandal I" *The Times of India* (25 May 2006). See also, Government of India, National Commission for Backward Classes, "Central List of Other Backward Classes", online: <<http://www.ncbc.nic.in/backward-classes/index.html>>.

28. The National Commission for Backward Classes (NCBC) was created pursuant to the *NCBC Act* as a permanent body in 1993, in response to the Supreme Court of India's directions in the *Indra Sawhney* 1992 decision. Its functions include examining "requests for inclusion of any class of citizens as a backward class in the lists and hear complaints of overinclusion or underinclusion of any backward class in such lists and tender such advice to the Central Government as it deems appropriate". *Indra Sawhney* 1992, *supra* note 12; online <<http://www.ncbc.nic.in/html/aboutus.html>>; <<http://www.ncbc.nic.in/html/creamyayer.html>>; *NCBC Act*, *supra* note 12 at s. 9.

29. Rs. = Rupees; one lakh = 100 000; online: <<http://www.ncbc.nic.in/html/creamyayer.html>>.

30. Justice Reddy provides examples of who is socially advanced in the discussion of *Indra Sawhney* 1992, below, but it involves holding elevated social status and society's perceptions of one's social standing.

31. James Hendry highlights, however, that increasing representation is usually seen as a way to aid the disadvantaged and not as a separate goal: email communication, James Hendry (27 March 2009).

quest for equality, where inequality has existed for so long. It is fairly settled that the SC and ST are entitled to affirmative action programs. But with competing claims for reservations from the OBC for limited seats in employment and higher education, the importance of delineating the category clearly has become a pressing matter. One may implement an affirmative action program targeting the OBC, so long as the creamy layer is excluded from it. The language of the bench in the *Indra Sawhney 1992* case confirms that India's debate on the existence of affirmative action is not whether it should exist, but rather the narrower question of who should benefit from it.

Indra Sawhney v. Union of India (1992)

The 1992 *Indra Sawhney* decision is the authoritative decision on reservations for the OBC, up until the recent decision in *Thakur 2008*. It has also been noted for the beginnings of "creamy layerization."³² *Indra Sawhney 1992* was decided by a nine-judge bench and dealt with the issue of employment with the public service and art. 16. The petitioners' arguments were based on an Office Memorandum, dated 13 August 1990, and issued by the Central government, which was prepared subsequent to the findings in the Mandal Report. The Memorandum granted reservations in civil posts and government service to the OBC in the amount of 27%.³³ The petitioners argued that the Memorandum was unconstitutional, as the reservation for OBCs was not valid and contrary to the principles of equality.³⁴ They sought a stay of the operation of the Memorandum, which the Supreme Court of India granted.³⁵

After the federal election in 1991, the government changed and it issued a modified Office Memorandum, dated 25 September 1991.³⁶ The government amended the Memorandum "in order to enable the poorer sections of the SEBCs to receive the benefits of reservation on a preferential basis and to provide reservation for other economically backward sections of the people not covered by any of the existing schemes of reservation."³⁷

At issue was whether these Memoranda were constitutionally valid. Justice Reddy, writing for the majority, introduced his reasons by stating that the Indian Republic was founded with the objective of securing

32. Prasad, *supra* note 17 at 127, 143.

33. *Indra Sawhney 1992*, *supra* note 12 at para. 22.

34. *Ibid.*

35. *Ibid.* at para. 23.

36. *Ibid.* at para. 24.

37. *Ibid.*

justice, liberty, equality and fraternity for its citizens.³⁸ He noted that although poverty is present in all societies, none has had the misfortune of castes and its social division of Indian society superimposed on poverty.³⁹ According to Reddy J., the concept of equality before the law contemplates minimizing inequalities in income and opportunities, while promoting the educational and economic interests of weaker sections of people and protecting them from social injustice and exploitation.⁴⁰

Public employment, explained Reddy J. always gave a certain status and power in India.⁴¹ In order to assure equality of opportunity, it may be necessary to treat unequally situated persons unequally.⁴² Article 16(4) provides that the State may make provisions for the reservation of appointments or posts in favour of any backward class of citizens, which in the opinion of the State, is not adequately represented in the services under the State.

The word “class” within the term “backward classes” is used so as not to limit the class to those belonging to a caste and to apply across the country, and further, that class denotes a social class, and not one in Marxist terms.⁴³ As to how the “backward class of citizens” should be identified, the criteria for backwardness is determinative, not caste itself.⁴⁴ This is notable since a caste system takes its form even in non-Hindu religions, which has been judicially recognized by the Supreme Court of India.⁴⁵

The context of article 16(4) was to include the socially backward classes, as social backwardness leads also to educational backwardness.⁴⁶ The SC and ST are not included in article 16(4), but there is no reason to qualify or restrict the meaning of the expression “backward class of citizens” by finding that OBCs are similarly situated to the SC/ST.⁴⁷

With respect to the “means” test and “creamy layer” problem, the Court provided guidelines for differentiating between the forward sections

38. Only the relevant substantive legal questions relating to the equality analysis and the creamy layer concept will be discussed; *ibid.* at para. 1.

39. *Ibid.* at para. 2.

40. *Ibid.* at para. 5.

41. *Ibid.* at para. 7.

42. *Ibid.* at para. 56.

43. *Ibid.* at paras. 81-82.

44. *Ibid.* at paras. 83-84; Chaudhury, *supra* note 5, notes that the 1888 *Reports on the Condition of the Lower Classes of the Population in India* showed that in eastern Uttar Pradesh, Brahmins, Bhuminars and Rajputs (high castes) were worse off than day labourers, were in debt, and suffered from insufficient food and clothing in normal times.

45. *Ibid.* at para. 80.

46. *Ibid.* at para. 85.

47. *Ibid.* at para. 88.

of a backward class.⁴⁸ The means test signifies an income limit for the purpose of excluding persons from the backward classes.⁴⁹ Justice Reddy asserted that economic criteria should not be the basis of exclusion from a backward class, unless the advancement is so high that it includes social advancement.⁵⁰ A backward class cannot be identified by economic criteria alone, but may be identified without reference to caste.⁵¹

Justice Reddy provided the example of a member of the carpenter caste who works in the Middle East and makes a high income compared to Indian standards. He asked whether the carpenter's children should be excluded from the backward class or from the application of art. 16(4) in India.⁵² According to Reddy, J.'s criteria, the exclusion should only apply if the carpenter's income rendered him socially advanced.⁵³ The carpenter in this situation would become socially advanced if he accumulated so much wealth that he became a factory owner himself and then provided employment to others.⁵⁴ Accordingly, in such a case, the person's social status rises.⁵⁵

Likewise, Justice Reddy remarked that certain positions are treated as socially advanced in India. For example, if a member of a backward class becomes a member of any All India Service, his social status rises and he is no longer socially disadvantaged.⁵⁶

Reddy J. further remarked that income may not count for much in larger cities or in the case of a rural scenario, as the extent of an agriculturist's holdings may be difficult to measure.⁵⁷ As a result, only the socially advanced should be excluded from the purpose of art. 16(4), in order to define a truly backward class.⁵⁸ Reddy J. also emphasized that this exclusion only applies to OBCs and not to STs and SCs.⁵⁹

48. *Ibid.* at para. 86.

49. *Ibid.*

50. *Ibid.*

51. *Ibid.* at paras. 90-91. A further example of why economic criteria may be misleading is given in a recent study which observed that in Bihar, 7% of the SC experience a high standard of living, whereas twice this percentage of high caste families are among the impoverished: Lance Brennan, John McDonald & Ralph Shlomowitz, "Caste, Inequality and the Nation-State: The Impact of Reservation Policies in India, c. 1950-2000" (2006) 29 *South Asia: Journal of South Asian Studies* 117 at 146.

52. *Indra Sawhney 1992*, *ibid.* at para. 86.

53. *Ibid.*

54. *Ibid.*

55. *Ibid.*

56. *Ibid.*

57. *Ibid.*

58. *Ibid.*

59. *Ibid.*; *Thakur 2008*, *supra* note 9 at paras. 161, 165.

Justice Reddy directed that the Government of India specify the basis of exclusion of the “creamy layer” within four months.⁶⁰ The excluded persons would cease to be members of the OBC. He further directed that the impugned Office Memoranda of 1990 and 1991 be implemented subject only to such specification and exclusion of socially advanced persons from the backward classes.⁶¹

The main principle regarding the creamy layer which emerges from Justice Reddy’s reasons is that exclusion from a backward class must be based on social advancement and not merely economic criteria. Economic factors may only be considered if the advancement is so high that it renders that person socially advanced.

India’s 93rd Constitutional amendment and the Thakur litigation

In January 2007, the Indian government enacted *The Central Educational Institutions (Reservation in Admission) Act, 2006*,⁶² pursuant to the 93rd constitutional amendment allowing for reservations in certain educational institutions of higher education. The reservation quota for the SCs and STs is 15% and 7.5% respectively.⁶³ The reservation quota for OBCs is 27%.⁶⁴

A private advocate, Ashoka Kumar Thakur and others launched a constitutional attack on the *CEI Act*.⁶⁵ The petitioners/appellants brought a motion for a stay in the Supreme Court of India against the Union of India on the basis that the 27% reservation quota for OBCs was unconstitutional, and that the *CEI Act* was invalid, as it did not exclude the “creamy layer.”

The Supreme Court of India granted the stay, but specified that the *CEI Act* would be stayed only in relation to the OBC category because of the question of the creamy layer rule and whether it would apply to article 15(5) of the *Indian Constitution*.⁶⁶ The decision on the merits in

60. *Indra Sawhney* 1992, *ibid.* at para. 117.

61. *Ibid.* at para. 86; Subsequent to this decision and based on the “Report of the Expert Committee for specifying the criteria for identification of socially advanced persons among the socially and educationally backward classes”, the Government of India issued a modified Office Memorandum on 8 September 1993, which outlined the creamy layer criteria for civil posts and services under the Government of India: Sekhar, *supra* note 18 at 278-310, Appendices 6-7.

62. No. 5 of 2007 (3 January 2007) [*CEI Act*].

63. *Ibid.*, ss. 3 (i)-(ii).

64. *Ibid.*, s. 3(iii).

65. *Ashoka Kumar Thakur v. Union of India and Ors.*, (2007) 4 S.C.C. 361 [*Thakur* 2007]. In India, the rules regarding standing are relaxed. Individuals may thus bring public interest or social action litigation on behalf of the general public: Upendra Baxi, “Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India” (1985) 1985 Third World Legal Stud. 107.

66. The matter was heard over several days and the bench reserved judgment on 1 November 2007.

Ashoka Kumar Thakur v. Union of India was released on 10 April 2008.⁶⁷ The Supreme Court of India bench of five judges delivered four sets of reasons in the case.⁶⁸ The Court confirmed that the creamy layer should be excluded from reservations and that caste can be used to identify the OBCs, but it cannot be the sole criterion.⁶⁹

The Petitioners' arguments focussed on whether *The Constitution (Ninety-third Amendment) Act, 2005*⁷⁰ and the *CEI Act* violated articles 14-16 of the *Indian Constitution*.⁷¹ They argued that the creamy layer should be excluded from reservations in higher education, whereas the Respondent argued that the creamy layer concept applies only to art. 16(4) of the *Indian Constitution*, and not to articles 15(4) or 15(5).

The petitioners claimed that the *CEI Act* was invalid in view of the definition of backward class and the identification of the class based on caste. Chief Justice Balakrishnan found no constitutional violation since caste can be used as a starting point for identifying a backward class. However, he noted that within a caste group there is also inequality of status, opportunity and social standing.⁷² Balakrishnan C.J. provided the example of Brahmins who may be servants of a lower caste or of other Brahmins.⁷³ If the lists for determining backward classes take into account social and educational backwardness, aside from castes, then they do not violate art. 15(1).⁷⁴ As a result, he found that there was no violation of the *CEI Act*.⁷⁵

The Supreme Court of India unanimously found that the creamy layer should be excluded from the SEBC. Balakrishnan C.J. repeated the observations of Justice Reddy in *Indra Sawhney 1992* where it was determined that the affluent section of a backward class does not require reservations for further progress in society.⁷⁶ He went on to explain the

67. *Thakur 2008*, *supra* note 9.

68. Chief Justice Balakrishnan, Justices Pasayat, Thakker, Bhandari and Raveendran. What is interesting to note about the number of judges on a bench of the Supreme Court of India is that a decision with a larger quorum is binding on a smaller quorum at the same court. In the case at hand, the bench in *Thakur 2008* was bound by the nine-member panel in *Indra Sawhney 1992*: Sudhir Krishnaswamy & Madhav Khosla, "Reading *AK Thakur v. Unions of India*: Legal Effect and Significance" *Economic & Political Weekly* 43:29 (19 July 2008) 53 [Krishnaswamy & Khosla]; *Thakur 2008*, *ibid.* at para. 150.

69. Only the legal issues which relate to an equality analysis and the creamy layer will be mentioned.

70. No. 93 of 2005 (20 January 2006) [*Constitution Amendment Act*].

71. No educational institution challenged the Acts.

72. *Thakur 2008*, *supra* note 9 at para. 134.

73. *Ibid.* at para. 134.

74. *Ibid.* at para. 141.

75. *Ibid.* at para. 142.

76. *Ibid.* at paras. 147-148.

necessity of distinguishing a creamy layer and the rationale behind the concept in detail:

To fulfil the conditions and to find out truly what is a socially and educationally backward class, the exclusion of [sic] "creamy layer" is essential...

It may be noted that the "creamy layer" principle is applied not as a general principle of reservation. It is applied for the purpose of identifying the socially and educationally backward class...

Articles 15(4) and 15(5) are designed to provide opportunities in education thereby raising educational, social and economical levels of those who are lagging behind and once this progress is achieved by this section, any legislation passed thereunder should be deemed to have served its purpose. By excluding those who have already attained economic well being or educational advancement, the special benefits provided under these clauses cannot be further extended to them and, if done so, it would be unreasonable, discriminatory or arbitrary, resulting in reverse discrimination.⁷⁷

The Chief Justice concluded by stating that this reasoning is applicable to article 15(5) and that the creamy layer must be excluded to provide a complete identification of SEBCs.

The definition of "backward class" in s. 2(g) of the *CEI Act* does not exclude the creamy layer, but Balakrishnan C.J. deemed the application of the principle of exclusion of the creamy layer.⁷⁸ Bhandari J. noted that the failure to expressly exclude the creamy layer in the *CEI Act* could lead to an inference that Parliament meant it to be included in the definition.⁷⁹ Despite the absence of the creamy layer language, he affirmed that the creamy layer should never be included in any affirmative action legislation.⁸⁰ Including the creamy layer would mean that unequals would be treated as equals, which in his opinion would violate equality.⁸¹ Being socially advanced, one cannot be part of the SEBC; one who is socially forward is likely to also be educationally forward.⁸²

77. *Ibid.* at paras. 149-150.

78. *Ibid.* at para. 155; *CEI Act*, *supra* note 62 at s. 2(g) "Other Backward Classes" means the class or classes of citizens who are socially and educationally backward, and are so determined by the Central Government.

79. *Ibid.* at para. 17, Justice Bhandari.

80. *Ibid.* at para. 18, Justice Bhandari.

81. *Ibid.* at para. 20, Justice Bhandari.

82. *Ibid.* at para. 32, Justice Bhandari.

To prevent a violation of equality, Bhandari J.'s remedy was to sever the implied inclusion of the creamy layer in art. 15(5).⁸³ Bhandari J. also found support for the creamy layer exclusion in the text of articles 15(4) and (5): the term creamy layer is synonymous with non-SEBC.⁸⁴ He further stated that Parliament ought to have known that based on *Indra Sawhney 1992*, the creamy layer would be excluded again by this Court and if Parliament wanted to include the creamy layer, they would have said it in the text of art. 15(5).⁸⁵

Bhandari J. then raised a question which is instructive for comparative purposes: does the creamy layer exist outside of India?⁸⁶ He concluded that it does and he presented the example of the United States of America where a study found that certain groups have a better chance of being admitted to college.⁸⁷ The study concluded that Black, Latino and Native-American students who scored the same as Whites or Asian students on the SAT had a 28% better chance at gaining admission.⁸⁸ Bhandari J. stated that the failure to exclude the creamy layer excludes deserving students.⁸⁹ It is unclear from this excerpt, however, if he perceives the Black, Latino and Native-American students to be part of that creamy layer.

In conclusion, Balakrishnan C.J. and the bench found that the *Constitution Amendment Act* and the *CEI Act* were constitutional, except that the creamy layer should be excluded from reservations.⁹⁰ This Court made it clear that even when a creamy layer exclusion is not drafted in legislation, it should and will be interpreted as being applicable whenever there is reference to the OBC/SEBC. Furthermore, the Court stressed the importance of properly identifying the OBC/SEBC by excluding the creamy layer from the category.

The Supreme Court of India has confirmed that for the SEBC/OBC to be properly defined, it must exclude the creamy layer, otherwise the category is overinclusive and a violation of equality.⁹¹ However, it is unclear from certain statements from the Supreme Court of India as to whether creamy

83. *Ibid.* at paras. 30, 53, Justice Bhandari. Of note is that Bhandari J. proposed that economic criteria (income, occupation and land holdings) could be used as the exclusive means of identifying the SEBC. However, he acknowledged that *Indra Sawhney 1992* rejected the pure means test and advised that after a ten-year review of the *CEI Act*, reservations should be granted on the basis of economic criteria: *Thakur 2008*, *ibid.* at paras. 228, 234, 248.

84. *Ibid.* at para. 33, Justice Bhandari.

85. *Ibid.* at para. 52, Justice Bhandari.

86. *Ibid.* at para. 47, Justice Bhandari.

87. *Ibid.*, Justice Bhandari.

88. *Ibid.* at para. 48, Justice Bhandari.

89. *Ibid.* at para. 49, Justice Bhandari.

90. *Ibid.* at paras. 163, 193, Chief Justice Balakrishnan.

91. *Ibid.* at paras. 30, 53, Justice Bhandari.

layer is a general principle of equality, as it does not apply to the SC/ST categories or to reservations generally; it only applies to the OBC.⁹² Thus, it appears as though the test for equality and whether a reservation scheme meets constitutional muster differs when the constitutional provisions relate to the OBC/SEBC as opposed to the SC/ST categories.

Krishnaswamy and Khosla note that the equality provisions in articles 15 and 16 have different moral and policy justifications for affirmative action, as in some cases the goal might be equality of opportunity and in others the goals might be diversity or social inclusion.⁹³ When the justification for affirmative action differs by sector, the beneficiaries may be distinct.⁹⁴ Thus, based on Krishnasawmy and Khosla's arguments, the distinction between the goals of a policy is an important factor to examine when the question of creamy layer is posed. Since the object of carving out a creamy layer from a listed group is to ensure that the truly disadvantaged benefit from a government reservation, the goal of diversity may not demand a creamy layer consideration. On the other hand, equality of opportunity would.

In India, the judicial discourse is not focussed on whether affirmative action policies such as reservations should exist. Rather, the relevant questions are based on defining who should receive the benefits of reservations and the extent of preferential policies. Canada's judiciary should similarly consider the problem of overinclusion in affirmative action initiatives based on race in order to bring Canadian society closer to equality.

II. *The problem of classifying peoples*

Over and underinclusiveness

The Supreme Court of India's creamy layer concept highlights the problems associated with identifying people through a group lens within the context of affirmative action. Sometimes, either undeserving individuals are included as beneficiaries or deserving individuals are excluded. This tension regarding over and underinclusion has been explored by authors in India, Canada and the USA. The authors cited in this section agree that group categorization is an inadequate method of identifying the truly disadvantaged.

92. *Ibid.* at para 160. Chief Justice Balakrishnan stated that the creamy layer principle is not yet a principle of equality to apply to all affirmative action.

93. Krishnaswamy & Khosla, *supra* note 68 at 58.

94. *Ibid.*

Affirmative action programs are only of assistance if the intended beneficiaries are reached.⁹⁵ Being listed as an OBC has raised problems of underinclusion and overinclusion, since inclusion in the OBC category depends on the political skills, leadership and political bargaining power of the groups seeking inclusion.⁹⁶

Even those groups listed as OBC have sought to be de-listed and moved to the ST category.⁹⁷ This has demonstrated that the OBC category is unable to accommodate the interests of some communities.⁹⁸ But for those seeking SC/ST status, there is also the added advantage that the creamy layer concept does not apply to the SC/ST categories, and the SC/ST have reservations in the central and state legislatures, whereas the OBC do not.

An additional phenomenon related to the question of inclusion in a reserved category is the argument for sub-classifications where some caste groups are asking for their own reservations, apart from the OBC or SC category.⁹⁹ This is remarkable considering that India has already recognized “differential needs for affirmative action” in that the SC/ST and OBC all have their own separate quotas.¹⁰⁰ This could be compared to the situation in the USA where in Louisiana, French Acadians sought and obtained minority status, just as Italians at City University New York did.¹⁰¹ In the Canadian context one could imagine that in a comparable ST category the Inuit might request separate constitutional guarantees from the Métis or Indians. Similarly, if racial groups generally could be compared

95. Prasad, *supra* note 17 at 146; a growing number of Indians are demanding to be declared officially ‘backward’: Jenkins, “Race,” *supra* note 18 at 32; Chaudhury, *supra* note 5 at 305, argues that the politics of caste identity founded on reservations helps to push the economic problems facing the poor away from centre stage; another author has referred to the promises of reservations for fellow caste members by politicians as causing “reservation inflation”: “Leaders: Untouchable and Unthinkable; Indian Business” *The Economist* 385:8549 (6 October 2007) 17.

96. Suhas Palshikar, “Challenges before the Reservation Discourse” *Economic & Political Weekly* 40:17 (26 April 2008) 8 at 9-10 [Palshikar]; for example, the Gujjars and Meenas were both considered to be criminal tribes during the British colonial period. The Indian government recognized the Meenas as ST, but not the Gujjars. The Gujjars sought to be downgraded in the social hierarchy and considered as a “backward class,” as this would be a move “forward”: Salil Tripathi, “India’s Creeping Caste Entitlements” *Far Eastern Economic Review* 170:8 (October 2007) 49.

97. Palshikar, *ibid.* at 10.

98. *Ibid.*

99. Palshikar, *ibid.*; Frédéric Bobin, “Au Rajasthan, conflit de castes autour des quotas,” *Le Monde* (26 January 2008).

100. Clark D. Cunningham & N.R. Madhava Menon “Race, Class, Caste ...? Rethinking Affirmative Action” (1998-1999) 97 Mich. L. Rev. 1296 [Cunningham, “Race”].

101. Sean A. Pager, “Antisubordination of Whom? What India’s Answer Tells Us About the Meaning of Equality in Affirmative Action” (2007-2008) 41 U.C. Davis L. Rev. 289 at 303, 306 [Pager]. There are groups classified as white who sought minority status to be included in affirmative action and were recognized: Middle Eastern Americans in San Francisco, French Acadians in Louisiana, and Italian Americans by the City University of New York.

to the OBC lists, one might conceive of the Black community asking for separate affirmative action programs from Asians, or to be constitutionally recognized like the Aboriginals. No matter the country, there may never be a perfect formula to guarantee that each person who is truly disadvantaged will be afforded opportunities for advancement by the State.

Krishnaswamy and Khosla have argued that any method of identification which uses groups as the unit of identification will encompass problems of overinclusion and underinclusion.¹⁰² Thus, an individualized approach such as examining who belongs to the creamy layer is perhaps one mechanism for carving out deserving beneficiaries in India.

In a similar manner, using race as an identifying label in North America has presented shortcomings. Anita Indira Anand questioned whether preferential policies in Canada are fair and effective in addressing racial disadvantage.¹⁰³ According to Anand, preferential policies can be overinclusive in that they provide preferential treatment to groups which do not require them and underinclusive in that they fail to provide treatment to non-visible minorities who require preferential treatment.¹⁰⁴ Thus, preferential policies should target the poor without regard to skin colour and only target visible minorities if they are economically disadvantaged.¹⁰⁵

Sean A. Pager critiques the use of the "quadrangle" of race in the USA as disentitling the deserved and entitling the undeserved from affirmative action benefits.¹⁰⁶ The quadrangle includes Blacks, Asians, Hispanics and Native Americans and is the quasi-official definition of minorities.¹⁰⁷ These classifications vary and are contested across jurisdictions.¹⁰⁸ For example, Hispanics may include different groups, such as the Spanish but also the Portuguese who do not even speak Spanish.¹⁰⁹ Then there are Persians and Afghanis who are considered to be white and ineligible for affirmative action.¹¹⁰

102. Krishnaswamy & Khosla, *supra* note 68 at 58.

103. Anita Indira Anand, "Visible Minorities in the Multi-Racial State: When are Preferential Policies Justifiable?" (1998) 21 Dal. L.J. 92 [Anand].

104. For example, Anand points out that Japanese and Korean Canadians have high academic grades and financial resources, experience less unemployment than the average population and are more concentrated in the professional sector than the average Canadian workforce. On the other hand, Aboriginals have a high unemployment rate and few complete high school or a university degree; *ibid.* at 119-121.

105. *Ibid.* at 125.

106. Pager, *supra* note 101 at 303.

107. *Ibid.*

108. *Ibid.*

109. *Ibid.* at 304, 313.

110. *Ibid.* at 315.

Pager also notes the internal variance within categories.¹¹¹ For example, within the heterogeneous Asian category, he notes that Asian Indians, Chinese and Japanese people earn bachelors degrees at almost double the U.S.A. average, occupy twice as many managerial or professional positions as the U.S.A. norm, and own homes valued at double the U.S.A. median.¹¹² However, Cambodian, Laotian, Samoan and Tongan American statistics show opposite results.¹¹³ These internal variances raise the problem of the non-disadvantaged usurping jobs or contracts at the expense of the disadvantaged or the disadvantaged in a “successful” group being excluded if the group is no longer counted for representative purposes.¹¹⁴

Saverio Cereste describes the Minority Student Program (MSP) at Rutgers Law School-Newark which has recruited minorities since 2000, without an emphasis on race, but rather on economic and educational hardships.¹¹⁵ The University of Victoria Law School has similar admissions categories: the special access applicant and the Aboriginal applicant. The MSP and Victoria programs examine economic, social and educational disadvantage, by considering applicants on an individual basis, based on socioeconomic background, extraordinary family circumstances, community service, and employment experience.¹¹⁶ These policies encompass economic, social and educational disadvantage, and would therefore exclude a so-called creamy layer amongst racial groups. This approach seems to mirror most closely the criteria outlined for the OBC by Justice Reddy in *Indra Sawhney 1992*.

111. *Ibid.* at 308.

112. *Ibid.* at 308-309.

113. *Ibid.* at 309. With respect to affirmative action in higher education, Roy L. Brooks remarks that the Asian racial category usually contains different experiences, cultures and identities not necessarily represented by the typical Asian affirmative action beneficiary. He provides an example of the Vietnamese immigrant whose views on American military support for anti-communist groups would differ in comparison to the third-generation Japanese American, or the immigrant black versus the slave descendants who he claims have a more critical perspective on campus. These variations used in affirmative action undermine real diversity, argues Brooks, when race is used as a proxy for diversity of thought and experience: Roy L. Brooks, “Affirmative Action in Higher Education: What Canada Can Take from the American Experience” (2005) 23 Windsor Y.B. Access Just. 193 at 201-202 [Brooks]. These findings are supported by Joanne Barkman who writes that class used as a proxy for race does not work in affirmative action plans. Barkman further includes Filipino and Vietnamese Americans as the underrepresented within the Asian category: Joanne Barkman, “Alive and Not Well: Affirmative Action on Campus” (2008) 55:2 Dissent 49 at 52, 56-57.

114. Pager states that despite “judicial floundering”, there is no theory of the “Who Question” in the U.S.A. and that what is missing is a societal perspective grounded in empirical fact: Pager, *supra* note 102 at 310, 319.

115. Saverio Cereste, “Minority Inclusion without Race-Based Affirmative Action: An Embodiment of Justice Powell’s Vision” (2001-2002) 18 N.Y.L. Sch. J. Hum. Rts. 577 at 577 n. 4, 594, 597-600 [Cereste].

116. University of Victoria Law, “Admissions Requirements”, online: <http://www.law.uvic.ca/NEW-Law-site/special_access.php>; <<http://www.law.uvic.ca/NEW-Law-site/aboriginal.php>>.

Angela Onwuachi-Willig suggests that rather than treating black applicants for admission to elite colleges and universities as one monolithic group in the USA, in order to advance the true goals of affirmative action, admissions officers should consider the ancestral heritage of black applicants, as affirmative action programs are not reaching legacy blacks (descendants from slaves), the original targets of the policy.¹¹⁷

Dalhousie Law School realized an admissions program which echoes Onwuachi-Willig's arguments regarding ancestral heritage. The Indigenous Blacks and Mi'kmaq Initiative (IB&M) was implemented in 1989 to reduce "structural and systemic discrimination by increasing the representation of Indigenous Blacks and Mi'kmaq in the legal profession".¹¹⁸ According to Richard F. Devlin and A. Wayne MacKay, the motivation for establishing the program was to challenge the racism of Canadian legal culture, and legal education in particular.¹¹⁹

The IB&M Initiative does have a quota system, based on percentages of the Nova Scotian population.¹²⁰ Each year only twelve students are admitted to the program: six Black and six Mi'kmaq.¹²¹ Carol Aylward notes, though, that a true education equity programme would not be quota-based but would admit as many qualified students as applied.¹²²

Regardless of whether the field is higher education or employment, race as a group identifier in North America presents problems of over and underinclusion as it is an inaccurate indicator of disadvantage.¹²³ For

117. Angela Onwuachi-Willig, "The Admission of Legacy Blacks" (2007) 60 Vand. L. Rev. 1141 at 1149, 1160, 1162, 1198 [Onwuachi-Willig]; Boston and Nair-Reichert, *supra* note 18 at 4.

118. Dalhousie Law School, "IB&M", online: <<http://ibandm.law.dal.ca>>; the primary focus of the IB&M Initiative is on students who are Indigenous Black Nova Scotians, those who were born and raised in Nova Scotia or who have a substantial connection with a historically Black community in Nova Scotia, or those who were born and raised Mi'kmaq or have a substantial connection with a Mi'kmaw community in Mi'maq.

119. Richard F. Devlin & A. Wayne MacKay, "An Essay on Institutional Responsibility: The Indigenous Blacks and Micmac Programme at Dalhousie Law School" (1991-1992) 14 Dal. L.J. 296 at 304.

120. Carol Aylward, "Adding Colour – A Critique of 'An Essay on Institutional Responsibility: The Indigenous Blacks and Micmac Programme at Dalhousie Law School'" (1995) 8 Can. J. Women & L. 470 at 472 [Aylward].

121. Aylward at 472; email communication, Professor Michelle Williams (25 August 2008).

122. Aylward at 472. A comparable program was the Akitsiraq Law School which was a partnered initiative with the University of Victoria Law School. This was a one-time program which commenced in 2001 and offered a Bachelor of Laws to Inuit students only, at the Nunavut Arctic College. The program was initiated as a response to the growing need for Inuit lawyers in the practice of law in Nunavut, online: <<http://www.law.uvic.ca/akits.html>>; see also Kelly Gallagher-Mackay, "Affirmative Action and Aboriginal Government: The Case for Legal Education in Nunavut" (1999) 14:2 Can J.L. & Soc. 21.

123. Andrew Koppelman and Donald Reibstock remark that "truly individualized consideration is impossible," see: Andrew Koppelman & Donald Reibstock, "On Affirmative Action and 'Truly Individualized Consideration'" (2007) 101 Nw. U. L. Rev. 1469 at 1469.

these reasons, an affirmative action plan based on alleviating disadvantage which targets a racial group should be closely examined to verify whether the group as a whole is truly disadvantaged or if only certain individuals are.

Caste and race

Before discussing the Supreme Court of Canada cases, it is instructive to examine whether there are any parallels between race and caste, in order to compare Canadian categories of race to the Indian classifications based on caste. Laura Dudley Jenkins claims that caste and race are both related to birth, involve notions of purity and can result in social and occupation segregation.¹²⁴ She has compared the SC in India to the African-Americans in the U.S.A., the ST to the Amercian-Indians because both are indigenous and a culturally distinct group with special rights, and Hispanics to the OBCs, as they vary by ethnicity, national origin and heritage, language, name, or racial appearance.¹²⁵ Likewise, Sumit Sarkar argues that race-like situations and conflicts exist in South Asia if one defines race as widespread essentialization of an Other, its inferiorization, and the ascription of qualities to be inherent, ineluctably hereditary, or biological.¹²⁶

There are also differences between caste and race which are not as easily linked. Race is an immutable characteristic.¹²⁷ Caste, on the other hand, is not.¹²⁸ A person is black and continues to be black regardless of status and wealth.¹²⁹ However, given caste mobility, people move from one job to another in their lifetime and over generations.¹³⁰ A percentage of government services in India are now occupied by the descendants of low castes.¹³¹ Furthermore, when a SC person leaves the village to work in an urban centre, there is anonymity, an opportunity to obtain a government job, or prospects of upward mobility.¹³² As a result, some who were descendants of untouchables are no longer untouchables, thereby demonstrating that caste is a mutable characteristic.¹³³

124. Jenkins, "Race," *supra* note 18 at 752-753.

125. *Ibid.* at 753.

126. Sumit Sarkar, "The Relevance of the Language of Race in South Asian Conflicts" in Rik Pinxten & Ellen Precker, eds., *Racism in Metropolitan Areas* (New York: Berghahn Books 2006) 73.

127. *Corbière v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203 at para. 13 [*Corbière*]; *Eaton v. Brant County Board of Education*, [1997] 1 S.C.R. 241 at para. 67.

128. Gupta, "Politics," *supra* note 20 at 63.

129. *Ibid.* at 59, 63.

130. *Ibid.* at 63-64; Galanter, *supra* note 18 at 12.

131. Gupta, "Politics," *supra* note 20 at 63.

132. *Ibid.* at 65.

133. *Ibid.* at 63-64.

It has been argued that race in certain societies is arranged along a spectrum of colours from white to black – being closer to white is superior.¹³⁴ On the other hand, people of a caste would not agree on a social hierarchy. One caste would not accept itself as less pure than another, but they would all agree that Brahmins are at the top.¹³⁵

Because caste has some parallels to race as a category, it is informative to look to Supreme Court of India jurisprudence on the creamy layer concept and the importance of carving out the truly disadvantaged as beneficiaries of affirmative action programs. However, it must be remembered that not only groups who belong to a Hindu caste are included within the OBC category.¹³⁶ Caste is only one consideration when determining who belongs to the OBC.¹³⁷ Further, the OBC contain groups who are historically and currently disadvantaged in a similar manner in which certain racial groups have been and are disadvantaged in Canada.

Finally, the Supreme Court of India has explained that caste is not equated with class in the Marxist sense; rather, backward classes denote a social class. In a similar manner, racial groups sometimes denote a disadvantaged class in multi-racial societies. For these reasons, I would argue that Supreme Court of India decisions regarding the creamy layer and OBCs are relevant to the affirmative action debate in Canada and future litigation concerning s. 15(2) of the *Canadian Charter* and the ground of race.

III. *The context in Canada*

Canada and affirmative action

Unlike in India, in Canada specific groups are not guaranteed constitutional protection in employment, education or against discrimination in general. The only race-based category regarding rights and freedoms is found in s. 25 of the *Canadian Charter* and s. 35 of *Constitution Act, 1982* which name “aboriginal peoples of Canada” and include Indians, Inuit, and Métis.¹³⁸ However, other ethnic or racial groups are also protected against discrimination by s. 15 of the *Canadian Charter*. Consequently, the two Supreme Court of Canada decisions on s. 15(2) discussed affirmative

134. *Ibid.* at 59-61.

135. *Ibid.* at 61.

136. *Indra Sawhney 1992*, *supra* note 12, and *Thakur 2008*, *supra* note 9.

137. *Ibid.*

138. On the other hand, it should be noted that the *Indian Act*, R.S.C., 1985, c. I-5 [*Indian Act*] specifies that it does not apply to the Inuit. Section 4(1) states: A reference in this Act to an Indian does not include any person of the race of aborigines commonly referred to as Inuit.

action policies which were implemented for the benefit of Aboriginal people: *Lovelace v. Ontario*,¹³⁹ and *R. v. Kapp*.¹⁴⁰

Supreme Court of Canada s. 15(2) Charter jurisprudence

Until recently, there was only one case from the Supreme Court of Canada regarding Canada's constitutional provision on affirmative action. *Lovelace v. Ontario* was the Supreme Court of Canada's first pronouncement on and interpretation of s. 15(2) of the *Canadian Charter*.

In Canada, the concept of affirmative action is still controversial. It is not assumed that a government program will be immune from judicial scrutiny merely on the claim that the plan is aimed at ameliorating the disadvantaged. The intentions are judicially examined. *Lovelace* and *Kapp* provide two divergent approaches to interpreting s. 15(2) and examining the constitutional validity of an affirmative action program. Both cases involved Aboriginal groups who were the beneficiaries of government programs which aimed at economic amelioration. However, the economic goals were related to the social and cultural advancement of Aboriginal communities and not mere poverty alleviation.

Lovelace introduced the problem of competing group demands within the context of constitutionally sanctioned affirmative action. The case is unusual in that the appellant and the beneficiary of the respondent's affirmative action program both belonged to a disadvantaged racial group which is constitutionally recognized: Aboriginals.¹⁴¹ However, it was the *Kapp* court which acknowledged that the comparator groups were differentiated on the basis of race.

Lovelace v. Ontario (2001)

In *Lovelace* the appellants were members of various First Nation communities who sought access to the proceeds (First Nations Fund) of Ontario's first reserve-based casino.¹⁴² In the 1990s, various First Nations bands approached the Ontario government for the right to control reserve-based gaming activities and use the proceeds towards strengthening band

139. [2000] 1 S.C.R. 950 [*Lovelace*].

140. 2008 SCC 41 [*Kapp*].

141. James Hendry notes that the fact that Aboriginals are constitutionally recognized may not have influenced the *Lovelace* analysis; in his opinion the same could have followed if the groups were disabled persons: email communication, James Hendry (27 March 2009).

142. *Indian Act*, *supra* note 138 at s. 2(1), states a "reserve means a tract of land, the legal title to which is vested in Her Majesty, that has been set apart by Her Majesty for the use and benefit of a band." This includes designated lands, except as specified in ss. 18(2), 20-25, 28, 36-38, 42, 44, 46, 48-51, 58-60, and the regulations made under any of these provisions.

economic, social and cultural development.¹⁴³ The Ontario government informed the appellants in 1996 that only Ontario First Nations communities registered as bands under the *Indian Act* could receive the casino's proceeds. Since the appellant communities were not registered as bands, were non-status and did not have reserve lands, they were not entitled to proceeds from the First Nations Fund.

The appellants argued that Ontario's refusal to include them in the First Nations Fund negotiations violated their equality rights under s. 15(1) and that s. 15(2) could not be invoked as a defence. The Attorney General of Ontario (AGO) argued that s. 15(2) did act as a defence to any claim of a violation of s. 15(1). The Court decided that s. 15(2) did not in fact act as a defence, but that the impugned government program should be evaluated in terms of the s. 15(1) analysis articulated in *Law v. Canada*.¹⁴⁴

Justice Iacobucci delivered the unanimous seven-judge decision. He stated that the determination of discrimination should be interpreted in a purposive and contextual manner to realize s. 15(1)'s remedial purpose.¹⁴⁵ This inquiry is to establish whether a conflict exists between the purpose and effect of an impugned law and the purpose of s. 15(1).¹⁴⁶ The central goal of the provision is to protect against the violation of essential human dignity, as described in *Law*.

The Supreme Court of Canada rejected the relative disadvantage approach which would assess the claimant in relation to a comparator group.¹⁴⁷ This approach would be inappropriate in *Lovelace*, since the claimants and the comparator groups are both historically disadvantaged.¹⁴⁸ Assessing relative disadvantage would also be inconsistent with the substantive equality analysis and would pit one disadvantaged group against another.¹⁴⁹

143. *Ibid.* at s. 2(1), defines a "band" [as] a body of Indians (a) for whose use and benefit in common, lands, the legal title to which is vested in Her Majesty, have been set apart before, on or after September 4, 1951, (b) for whose use and benefit in common, moneys are held by Her Majesty, or (c) declared by the Governor in Council to be a band for the purposes of this Act", and "[a]n 'Indian' means a person who pursuant to this Act is registered as an Indian or is entitled to be registered as an Indian."

144. *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497 [Law]; *Lovelace*, *supra* note 139 at paras. 91, 96-97, 105, 108.

145. *Lovelace*, *ibid.* at paras. 53-55: 1) does the law, program or activity imposes differential treatment between the claimant and others; 2) is this differential treatment based on one or more enumerated or analogous grounds; and 3) does the impugned law, program or activity have a purpose or effect that is substantively discriminatory?

146. *Ibid.* at paras. 53-55.

147. *Ibid.* at para. 59.

148. *Ibid.*

149. *Ibid.*

Although distinctions may be discriminatory, substantive equality may require such distinctions to take into account the actual circumstance of an individual with social, political and economic situations.¹⁵⁰ The appropriate comparator and the contextual factors must be evaluated from the reasonable perspective of the claimant.¹⁵¹ As a result, s. 15(1) is to prevent discrimination but also to ameliorate conditions for disadvantaged persons.¹⁵² Iacobucci J. further noted that the concept of underinclusiveness within the context of equality to this point in jurisprudence has only dealt with benefit schemes, but that underinclusiveness may violate equality.¹⁵³

With respect to the appropriate comparator groups, because of the diversity in living conditions for the parties, Iacobucci J. concluded that they would be band and non-band Aboriginal communities.

On the differential treatment and grounds question, the Ba-Wab-Bon appellants claimed that they were excluded on the basis of race and ethnicity. The Lovelace party claimed that non-registration under the *Indian Act* is tied to a longstanding cultural, community and personal identity of a group of individuals constituting a discrete and insular minority within the larger Aboriginal population. They further argued that their exclusion is constructively immutable given the onerous nature of federal policies relating to band registration. Iacobucci J. did not engage in a determination of the grounds of discrimination, as he found that there was no discrimination. However, he did conclude that there was differential treatment since the province of Ontario confirmed on 2 May 1996 that the appellants were excluded from a share in the First Nations Fund and any related negotiation process.

Regarding the contextual analysis of discrimination, Iacobucci J. concluded that no discrimination existed through the operation of the casino program.¹⁵⁴

Pre-existing disadvantage, stereotyping, prejudice, or vulnerability

Iacobucci J. recalled that this is not a race to the bottom and that the claimants are not required to show that they are more disadvantaged than the comparator group.¹⁵⁵ All Aboriginal people suffer from stereotyping, prejudice, high rates of unemployment and poverty, and disadvantage in relation to education, health and housing.¹⁵⁶ However, as the Court

150. *Ibid.* at para. 60.

151. *Ibid.* at para. 55.

152. *Ibid.* at para. 60.

153. *Ibid.*

154. *Ibid.* at para. 68.

155. *Ibid.* at para. 69.

156. *Ibid.*

states, the two appellant groups face unique disadvantages from being excluded from the *Indian Act*: “(i) a vulnerability to cultural assimilation; (ii) a compromised ability to protect their relationship with traditional homelands; (iii) a lack of access to culturally-specific health, educational, and social service programs; and (iv) a chronic pattern of being ignored by both federal and provincial governments.”¹⁵⁷

The appellants further added that these disadvantages were exacerbated by the stereotype that they are “less aboriginal” and less worthy of recognition than other Aboriginal peoples. Iacobucci J. accepted that the appellants were stereotyped but found that the appellants failed to establish that the First Nations Fund stereotyped against them.¹⁵⁸ The distinction corresponded to the situation of the individuals it affected and the exclusion did not undermine the ameliorative purpose of the program. The First Nations Fund did not conflict with s. 15(1).¹⁵⁹

Correspondence, or lack thereof, between the ground(s) on which the claim is based and the actual need, capacity, or circumstances of the claimant or others

Iacobucci J. stated that there is a high degree of correspondence between the program and the actual needs, circumstances and capacities of the bands.¹⁶⁰ It is necessary to recognize how the First Nations Fund is embedded in the overall casino project.¹⁶¹ The province did not unilaterally allocate the First Nations Fund from its consolidated revenue pool; it was a partnered initiative with representatives of the First Nations bands having significant decision-making input. The program was designed to address several issues: “(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; and (iii) to ameliorate the social, cultural and economic conditions of band communities.”¹⁶² The program’s focus was also on resolving outstanding gambling issues with these Aboriginal communities.¹⁶³

157. *Ibid.* at para. 70.

158. *Ibid.* at paras. 71-73.

159. *Ibid.* at para. 73.

160. *Ibid.* at para. 82. James Hendry remarks that where there are two groups that could equally benefit from a program which could be characterized as underinclusive, the correspondence factor will act as a tie-breaker: email communication, James Hendry (27 March 2009).

161. *Ibid.* at para. 74.

162. *Ibid.*

163. *Ibid.* at para. 77.

Iacobucci J. acknowledged that the appellants had similar needs to ameliorate the poor social, cultural and economic conditions in their communities. However, he distinguished this claim on the basis that the correspondence consideration requires more than establishing a common need.¹⁶⁴ If common need were the basis of the programs, government would be placed in the position of ranking populations without paying attention to the unique circumstances and capabilities of potential program beneficiaries.¹⁶⁵ The appellants did not have a land base, due to cultural considerations and exclusion from the *Indian Act* regime.¹⁶⁶ On the other hand, the Casino was designed to be located on a reserve due to limited economic opportunities on-reserve and constraints on land use under the *Indian Act*.¹⁶⁷

The ameliorative purpose or effects of the impugned law, program or activity upon a more disadvantaged person or group in society

As this case dealt with the claimant and targeted group both being disadvantaged, Iacobucci J. extended the ameliorative purpose analysis to include the excluded group in a situation of disadvantage. In this case, the allegations were that the ameliorative program is underinclusive. As a result, exclusion from the program would be less likely to be associated with stereotyping or stigmatization or conveying the message that the excluded group is less worthy of recognition in the larger society.¹⁶⁸

Iacobucci J. concluded that the ameliorative purpose of the casino program and the First Nations Fund had been established: the First Nations Fund would provide bands with fiscal resources to ameliorate social, health, cultural, education and economic disadvantages. This would also assist in supporting the bands in self-government and self-reliance and to remove historical disadvantage and enhance the dignity and recognition of bands in Canadian society.¹⁶⁹ Iacobucci J. found that the First Nations Fund had a purpose consistent with s. 15(1) of the *Canadian Charter* and that the exclusion of the appellants did not undermine this purpose, since it was not associated with a misconception as to their actual needs, capacities and circumstances.¹⁷⁰

164. *Ibid.* at para. 75.

165. *Ibid.*

166. *Ibid.* at paras. 75-76.

167. *Ibid.* at para. 76.

168. *Ibid.* at para. 86.

169. *Ibid.* at para. 87.

170. *Ibid.*

The nature and scope of the interest affected by the impugned government activity

Finally, Iacobucci J. found that the First Nations Fund did not demean the appellants' human dignity.¹⁷¹

The relationship between s. 15(1) and (2)

Justice Iacobucci stated that the parties' concerns were addressed by the s. 15(1) analysis itself and in particular, the correspondence factor.¹⁷² The respondent submitted that s. 15(2) acts independently to protect ameliorative programs and that the *Canadian Charter* should be interpreted to support the amelioration of specific targeted groups. Iacobucci J. explained that the court was to deal with two competing approaches to understand the application of s. 15(2): one where s. 15(2) is an interpretive aid to s. 15(1) and the other where s. 15(2) is an exemption or defence to the applicability of the s. 15(1) discrimination analysis.¹⁷³

Another interpretation stems from the decision of *Roberts* from the Ontario Court of Appeal which dealt with s. 14(1) (the affirmative action provision) of the Ontario *Human Rights Code*.¹⁷⁴ Given the need to promote substantive equality, s. 14(1) could only be invoked as an exemptive clause in situations where a rational connection exists between the prohibited ground of discrimination and the program.¹⁷⁵ Iacobucci J. noted that the "rational connection" test in *Roberts* "squarely matches" the approach in examining the "correspondence factor" in the contextual analysis.¹⁷⁶

In conclusion, Iacobucci J. stated that the plain meaning of the language in these subsections is that s. 15(2) is confirmatory and supplementary to s. 15(1). The s. 15(2) phrase "does not preclude" cannot be understood as language of defence or exemption, but rather that s. 15(1) includes a special program. Section 15(2) also acts as an interpretive aid to s. 15(1) to ensure internal coherence of the *Canadian Charter*.¹⁷⁷ This also allows the possibility of a s. 1 review. Justice Iacobucci cautioned, though, that

171. *Ibid.* at paras. 88-90.

172. *Ibid.* at para. 92.

173. *Ibid.* at para. 97.

174. *Ontario Human Rights Commission v. Ontario* (1994), 19 O.R. (3d) 387 (Ont. C.A.) [*Roberts*]; *Human Rights Code*, R.S.O., 1990, c. H.19; s. 14(1), as rep. by *An Act to Repeal Job Quotas and to Restore Merit-Based Employment Practices in Ontario*, S.O. 1995, c. 4, s. 3(1): a right under Part I is not infringed by the implementation of a special program designed to relieve hardship or economic disadvantage or to assist disadvantaged persons or groups to achieve or attempt to achieve equal opportunity or that is likely to contribute to the elimination of the infringement of rights under Part I.

175. *Lovelace*, *supra* note 139 at para. 99.

176. *Ibid.* at para. 100.

177. *Ibid.* at para. 106.

future equality jurisprudence may find that s. 15(2) may be independently applicable to a case.¹⁷⁸

Iacobucci J. commented on the design of the government program and how it was established to ameliorate the social, cultural and economic conditions of band communities, which clearly related to the goals or object of the program. However, Iacobucci J. still did not refer to the language of s. 15(2) where it states “has as its object.”

This almost invisible role of s. 15(2) is further highlighted in the ameliorative purpose factor (“the ameliorative purpose or effects of the impugned law, program or activity upon a more disadvantaged person or group in society”). This factor would appear to be the most relevant one for the Court to refer to in an analysis under s. 15(2) since the word “ameliorative” is also found in its text. Instead, Iacobucci J. limited the analysis of ameliorative purpose to s. 15(1) to avoid measuring relative disadvantage between the competing disadvantaged groups.

There is no guidance from the Supreme Court of Canada in *Lovelace* as to how race in particular as a ground of discrimination would be treated under s. 15(2). Iacobucci J. did not determine the grounds of discrimination, as he had already concluded that there was no discrimination. Thus, whether the appellants in *Lovelace* were truly disadvantaged, based on a distinction within the Aboriginal category, was not examined.

Nevertheless, Iacobucci J. provides some direction as to how Aboriginal people as a race might be regarded in an affirmative action challenge based on equality. From the facts of the case, the casino program was not solely an economic initiative. Although it was to generate income for the Aboriginal bands, the income was to uplift the social, cultural and economic conditions of the band members. Likewise, in the Indian context, reservations for the OBC/SC/ST were not designed to alleviate poverty. They were implemented to uplift social and educational backwardness, but which were linked to economic backwardness.

R. v. Kapp (2008) and the revival of s. 15(2)

The Supreme Court of Canada recently pronounced on the preferred approach of a s. 15(2) analysis in the decision of *R. v. Kapp*.¹⁷⁹ This is only the second time s. 15(2) has been judicially considered by the Supreme Court of Canada.¹⁸⁰ *Kapp* was a criminal matter in which the appellants claimed a violation of their equality rights. The Supreme Court of Canada’s

178. *Ibid.* at paras. 100, 108.

179. *Kapp*, *supra* note 140.

180. However, Justice Wilson touched on the purpose of s. 15(2) in her dissenting reasons in *Harrison v. University of British Columbia*, [1990] 3 S.C.R. 451.

nine judges were unanimous in upholding a government program which targeted Aboriginal fishers in British Columbia at the exclusion of non-Aboriginals. Chief Justice McLachlin and Justice Abella delivered the majority reasons for judgment.

The *Kapp* court's approach to s. 15(2) differed greatly from *Lovelace*. The Supreme Court of Canada attached relevance to s. 15(2) by giving it an independent role in the *Canadian Charter*.¹⁸¹ The bench noted that the third factor from *Law* (whether the law or program has an ameliorative purpose or effect) relates to the meaning of s. 15(2), whereas Iacobucci J. stated that the second factor of correspondence under s. 15(1) related to any arguments which were raised by the Attorney General of Ontario, such as s. 15(2) having an independent role to play in protecting ameliorative programs.

The respondent federal government [Crown] initiated a policy to give Aboriginal people a share of the commercial fishery. The Aboriginal Fisheries Strategy included pilot sales programs which issued communal fishing licenses pursuant to the *Aboriginal Communal Fishing Licences Regulations*¹⁸² [ACFLR]. The ACFLR grant communal licences to "aboriginal organizations" which are defined as including "an Indian band, an Indian band council, a tribal council and an organization that represents a territorially based Aboriginal community."¹⁸³ The licence permitted fishers designated by the bands to fish for sockeye salmon between 7h00 on 19 August 1998, and 7h00 20 August 1998, and to use the fish caught for food, social and ceremonial purposes and for sale.¹⁸⁴ Some of the fishers were also licensed commercial fishers entitled to fish at other openings for commercial fishers.¹⁸⁵

The appellants were commercial fishers who were excluded from the fishery during the 24 hours allocated to the licensed Aboriginal fishers.¹⁸⁶ They participated in a protest fishery during the prohibited period and were charged with fishing during a prohibited time.¹⁸⁷ They argued that the ACFLR, related regulations, and the Aboriginal Fisheries Strategy violated their s. 15 equality rights on the basis of race.¹⁸⁸

181. Note that this was the government's position in *Lovelace*.

182. *Kapp*, *supra* note 140 at para. 7; S.O.R./93-332 [ACFLR].

183. *Ibid.* at para. 7.

184. *Ibid.* at para. 8.

185. *Ibid.*

186. *Ibid.* at para. 9. These commercial fishers were also licensed to fish in Area "E": Supreme Court of Canada, Factum of the Respondent, Her Majesty the Queen, in *Kapp*, *ibid.* at para. 7.

187. *Ibid.* at para. 9.

188. *Ibid.* at para. 2.

The Crown asserted that the general purpose of the licensing program was to regulate the fishery and ameliorate the conditions of a disadvantaged group. The Supreme Court of Canada dismissed the appeal and upheld the constitutional validity of the licensing program.¹⁸⁹

The s. 15(2) analysis

The Court emphasized that ss. 15(1) and (2) are a pair in promoting substantive equality.¹⁹⁰ Section 15(1) is an anti-discriminatory provision.¹⁹¹ It aims to prevent discriminatory distinctions that impact adversely on the enumerated groups or the groups based on analogous grounds.¹⁹² An additional mechanism to combat discrimination is through s. 15(2) which enables the government to develop programs to help disadvantaged groups, without the fear of a s. 15(1) challenge.¹⁹³

The Court recalled the test in *Law*: “(1) pre-existing disadvantage, if any, of the claimant group; (2) degree of correspondence between the differential treatment and the claimant group’s reality; (3) whether the law or program has an ameliorative purpose or effect; and (4) the nature of the interest affected.”¹⁹⁴ The Court suggested that the third factor relates to the meaning of s. 15(2).¹⁹⁵

The Court also stated that under *Andrews* (the seminal Supreme Court of Canada case on s. 15(1)), s. 15 does not mean identical treatment, as identical treatment may produce inequality.¹⁹⁶ Differential treatment is not necessarily discriminatory, and likewise not every distinction is discriminatory.¹⁹⁷ As such, programs designed to ameliorate disadvantaged groups will inevitably exclude individuals or other groups, but will not amount to “reverse discrimination.”¹⁹⁸

The Court accepted the appellants’ claim that they were treated differently on the basis of the enumerated ground of race.¹⁹⁹ Next, the Court accepted that the communal fishing licence which was issued pursuant to the *ACFLR* qualified as a law, program or activity within the meaning of s. 15(2).²⁰⁰ The final question was whether the licence “has as its object

189. *Ibid.* at para. 3.

190. *Ibid.* at para. 16.

191. *Ibid.*

192. *Ibid.*

193. *Ibid.* at paras. 16, 25.

194. *Ibid.* at para. 19.

195. *Ibid.* at para. 23.

196. *Ibid.* at para. 27; *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143.

197. *Kapp*, paras. 27-28.

198. *Ibid.* at para. 28.

199. *Ibid.* at para. 29.

200. *Ibid.* at para. 30.

the amelioration of conditions of disadvantaged individuals or groups.”²⁰¹ Thus, the Court launched into a s. 15(2) analysis, without examining the program under s. 15(1) first.

The Court reiterated that the purpose of s. 15(2) is remedial and enables state efforts to develop schemes which assist disadvantaged groups, especially given the phrase “does not preclude” in the provision.²⁰² If the government can demonstrate that an impugned program meets the criteria of s. 15(2), it may be unnecessary to conduct a s. 15(1) analysis at all.²⁰³ The Court recalled that since s. 15(1) prevents discrimination and s. 15(2) enables governments to pro-actively combat discrimination, the two provisions confirm each other and promote substantive equality.²⁰⁴ Most importantly, the Court stated that s. 15(2) “supports a full expression of equality, rather than derogating from it.”²⁰⁵ The justices thus endorsed an individual role for s. 15(2) within the context of the equality guarantee.

In order to interpret s. 15(2) appropriately, the Court stated that s. 15(1) should be read in a manner that does not find an ameliorative program aimed at combating disadvantage to be discriminatory and a breach of s. 15.²⁰⁶ The Court rejected the previous approach to s. 15(2) where a program would be found discriminatory before saving it as ameliorative.²⁰⁷ The Court reversed the steps in the analysis and stated that if a government fails to demonstrate that a program falls under s. 15(2), the program should then be scrutinized under s. 15(1) for discrimination.²⁰⁸

Therefore, the Court outlined the s. 15(2) test as follows:

A program does not violate the s. 15 equality guarantee if the government can demonstrate that: (1) the program has an ameliorative or remedial purpose; and (2) the program targets a disadvantaged group identified by the enumerated or analogous grounds.²⁰⁹

The Court qualified the test by stating that it is subject to future refinement, since s. 15(2) jurisprudence is still developing.²¹⁰

201. *Ibid.*

202. *Ibid.* at para. 33.

203. *Ibid.* at para. 37.

204. *Ibid.*

205. *Ibid.*

206. *Ibid.* at para. 38.

207. *Ibid.* at para. 40.

208. *Ibid.*

209. *Ibid.* at para. 41.

210. *Ibid.*

Next, the majority provided an interpretation of three phrases/terms within the text of s. 15(2) as part of its analysis: has as its object; amelioration; and disadvantaged.

"Has as its object"

The Court inquired as to whether a court should look to the purpose or the effect of the impugned legislation and whether a program should have an ameliorative purpose as its sole object. With respect to the sole object question, the Court found no justification for requiring a program to have amelioration as its sole purpose, since several goals may be implemented in a scheme.²¹¹

The Court favoured a purpose-based approach based on the language on the provision and goal of enabling governments to combat discrimination. The question to ask is "was the government's goal in creating that distinction to improve the conditions of a group that is disadvantaged?"²¹² The Court suggested that in order to determine this intention, it may be necessary to consider statements made by drafters of a program and "whether the legislature chose means rationally related to that ameliorative purpose, in the sense that it appears at least plausible that the program may indeed advance the stated goal of combatting disadvantage."²¹³

In order to prevent the inquiry from becoming effect-based, the Court suggested that the analysis should be framed as follows:

Was it rational for the state to conclude that the means chosen to reach its ameliorative goal would contribute to that purpose? For the distinction to be rational, there must be a correlation between the program and the disadvantage suffered by the target group. Such a standard permits significant deference to the legislature but allows judicial review where a program nominally seeks to serve the disadvantaged but in practice serves other non-remedial objectives.²¹⁴

"Amelioration"

Based on different applications and perhaps misuse of the term amelioration by past courts, the Supreme Court of Canada advised that this term should be given careful attention in evaluating programs under s. 15(2).²¹⁵ For guidance, they suggested that laws which are designed to restrict or punish behaviour would not qualify for s. 15(2) protection and that the

211. *Ibid.* at paras. 50-52.

212. *Ibid.* at para. 48.

213. *Ibid.*

214. *Ibid.* at para. 49.

215. *Ibid.* at para. 54.

focus should not be on the effect of a law.²¹⁶ If a law has no plausible or predictable ameliorative effect, it may also not qualify for protection.²¹⁷

"Disadvantaged"

The Court stated that the term disadvantaged encompasses vulnerability, prejudice and negative social characterization.²¹⁸ They further distinguished the purpose of s. 15(2) from broad societal legislation: the first protects a specified and targeted disadvantaged group, whereas the latter may take the form of a social assistance program, for example.²¹⁹ Finally, not all members of the group need to be disadvantaged if the group as a whole has experienced discrimination.²²⁰ Notably, this definition of "disadvantaged" appears to relate to the Indian description of social backwardness and the classification of a group as backward.

In applying the s. 15(2) analysis to the facts before them, the Court found that the fishing licence related to the goals of negotiating solutions to the Aboriginal fishing rights claims, the provision of economic opportunities to native bands and supporting their self-sufficiency.²²¹ These goals addressed the social and economic disadvantage of the native bands, which rooted in history, continues to exist.²²² As such, the means chosen to achieve the purpose of the program were rationally connected and corresponded to the purpose.²²³ The Court reiterated that because some individual members of the bands may not experience disadvantage, this does not negate the group disadvantage suffered.²²⁴ As a result, the Court found the government program to be constitutional.²²⁵

The *Kapp* test places the onus of proof on the government to show that the ameliorative program meets the s. 15(2) criteria. In *Lovelace*, the onus was on the applicants to show whether the government program violated s. 15. If there is a violation, it appears as though the justification would be contained in the correspondence factor as a rational connection test, under s. 15(1), however, Iacobucci J. noted that this approach allows for a s. 1 review.²²⁶ Based on either legal test, it is unclear whether any s. 1 analysis

216. *Ibid.*

217. *Ibid.*

218. *Ibid.* at para. 55.

219. *Ibid.*

220. *Ibid.*

221. *Ibid.* at para. 58.

222. *Ibid.* at paras. 58-61.

223. *Ibid.* at paras. 58, 60.

224. *Ibid.* at para. 59.

225. *Ibid.* at para. 61.

226. *Ibid.* at para. 108.

would ever be required or if it is subsumed by the two-part test within s. 15(2).

Michael Peirce has suggested that because s. 15(2) does not guarantee a right or a freedom, s. 1 is not engaged.²²⁷ According to Peirce, if an ancillary feature of a government program is found to be underinclusive and reviewed by s. 15(1), that feature may be upheld by s. 1.²²⁸ The *Kapp* court explained that if a program fails under s. 15(2) that it can then receive s. 15(1) scrutiny, however, they did not discuss any further application of s. 1. At this point, it appears as though s. 15(2) contains an internal balancing which would not necessitate any s. 1 analysis.

With respect to how a government affirmative action program should be reviewed, it is unclear whether the Court would use a subjective or objective test. The Court in *Kapp* suggested that the intention of the drafters of the program should be examined in order to determine “whether the legislature chose means rationally related to that ameliorative purpose, in the sense that it appears at least *plausible* that the program may indeed advance the stated goal of combating disadvantage” (my emphasis).

The word “rationally” implies an objective test; what a reasonable person would find rational. However, the words “plausible” and “may” appear to import a quasi-subjective test into the question of whether the government program meets its goal. Inevitably, the Court is forced to examine in a hypothetical fashion whether the program’s purpose would have the effect of combating disadvantage, despite the Court stressing that the focus should be solely purpose based. In this manner, s. 15(2) is a unique provision in that the court must look at some evidence which is based on the government’s intent, but not at hard data on the effects of the affirmative action program in order to conclude whether it is constitutional. Normally, such a record would be considered to be incomplete.

The *Kapp* court has breathed life into a constitutional provision which up until this decision was left motionless and underutilized by the Supreme Court of Canada. From a preliminary examination, the revival of s. 15(2) appears to be more applicant friendly than the legal test formulated in *Lovelace*. First, the burden of proof is now on the government to demonstrate that its affirmative action programs truly are aimed at combating disadvantage. This eases some of the evidence gathering necessities facing an applicant. Second, the steps enunciated by the *Kapp* court in assessing whether a government program meets s.

227. Michael Peirce, “A Progressive Interpretation of Subsection 15(2) of the Charter” (1993) 57 Sask. L. Rev. 263 at 313 [Peirce].

228. *Ibid.*

15(2) requirements are clear. The components of the legal test reflect the actual text of s. 15(2). This renders the provision perhaps more intuitive and more easily interpreted by the reader. Third, based on the legal test for s. 15(2), it seems that although the Court will scrutinize a government program for constitutional validity, because the Court will look to the purpose and the intent of the program, they will be mindful of deferring to the government.

Based on these changes, it is apparent that every challenge to a government program under s. 15(2) will not necessarily be successful merely because it is underinclusive. This was also acknowledged by Iacobucci J. when he stated that the exclusion of the appellants did not undermine the purpose of the casino project because it did not misconceive their actual needs, capacities and circumstances, although he was referring solely to s. 15(1). This allows the government the freedom and space to create ameliorative programs for selected groups, even though they may exclude others. Rather than having a chilling effect then, the *Kapp* decision might indirectly encourage governments to implement more affirmative action programs.

A Canadian creamy layer?

The *Lovelace* Court rejected the relative disadvantage approach for appropriate reasons; there should not be a race to the bottom between disadvantaged groups in order to become beneficiaries of government goods. This is indeed valid reasoning for a diverse society. However, this language possibly forecloses the opportunity to examine whether a creamy layer exists within the Aboriginal category or any racial category, or whether one should even be delineated. But it is not clear that the *Lovelace* Court had closed the door to a creamy layer analysis.

Iacobucci J. noted that an equality challenge must be assessed from the reasonable perspective of the claimant in conjunction with human dignity. The appellants in *Lovelace* argued that apart from disadvantages suffered by all Aboriginals, their circumstances were exacerbated by the stereotype that they are "less aboriginal" and less worthy than other Aboriginal peoples because they lived off-reserve and were not registered band communities or non-status Indians and Métis. They also argued that they were differentiated by the Attorney General of Ontario on the basis of race and ethnicity, along with being non-registered Indians. They claimed that their exclusion was constructively immutable given the federal band registration regime.

The *Lovelace* Court did not discuss whether the appellant Aboriginals had immutable characteristics, however this would have been an instructive

inquiry as it may have placed certain Aboriginal peoples in an “immutable” racial or ethnic category of their own within the s. 15(1) list, whereas race generally is an immutable characteristic and an enumerated ground of discrimination.²²⁹

Iacobucci J. acknowledged that the casino program involved a question of underinclusiveness. The appellants wanted to be included in the program but were excluded due to their status and the nature of their outstanding issues with the government. But they were not excluded based on any constitutional definition of Aboriginal. Section 35 of the *Constitution Act, 1982* states that Aboriginals are Indians, Inuit, and Métis. The exclusion the appellants referred to was partially based on the requirements of the *Indian Act*. However, based on the facts of *Lovelace*, these distinctions do not appear to be permanent prejudicial characteristics. Since the casino program was aimed at a certain type of Aboriginal group and a certain type of problem, such as gambling, it appears that there is no permanent hierarchy within the Aboriginal category or a creamy layer.

Framed within the Indian context, the appellants perhaps had an argument that within the racial category of Aboriginal, the status Indians, members of registered bands and on-reserve Indians were the creamy layer of the Aboriginals. However, what then would the criteria for the creamy layer be? Would the criteria merely be belonging to a band, living on-reserve and being status Indian? These factors could be compared to the social, educational and economic criteria required for OBC identification. But based on *Lovelace*, should there even be a creamy layer for Aboriginals?

The rationale for excluding the creamy layer in India is to identify the true OBCs. It is also necessary because there are limited goods and services which need to be preserved for the truly disadvantaged; seats for higher education and government employment. These scarce resources are inevitably linked to perceived or real economic prosperity. In the case of *Lovelace*, although the casino program was created to generate income, the resources required to implement the program are not unlimited. The government could enter into other agreements with the appellant Aboriginal groups regarding economic activity or self-government, however, they would be required to be selective. As noted by Iacobucci J., the casino program was not just a targeted ameliorative program, it was also a partnered initiative and not a benefits scheme.²³⁰

Similarly, in *Kapp*, the fishing licenses related to a limited natural resource. The Minister of Fisheries and Oceans manages the salmon

229. See above discussion on caste and race in Part II.

230. *Lovelace*, *supra* note 139 at para. 82.

fishery for the good of all Canadians and allocates this scarce resource among different user groups—commercial fishers, Aboriginal communities and recreational fishers.²³¹

There is perhaps a link between Canadian Aboriginals and the ST in India, but not the OBC. As noted above, Jenkins has compared the ST to American Indians in the U.S.A., because both are indigenous and a culturally distinct group with special rights. In Canada, Aboriginal peoples are indigenous, have various distinct cultures and are afforded special rights under the *Canadian Charter* and the *Constitution Act, 1982*. However, they also have a historically distinct geography and unique relationship with the government.²³²

The ST are not defined in the *Indian Constitution*, however there are generally accepted criteria published on the Ministry of Tribal Affairs' website for determining who will be added/removed from the ST State lists, based on definitions from previous committees and commissions.²³³ The ST are considered to be the most disadvantaged, along with the SC.²³⁴ For a community to be specified as ST, there must be indications of primitive traits, distinctive culture, geographical isolation, shyness of contact with the community at large, and backwardness.²³⁵ There is no comparable definition of Aboriginals under the *Indian Act* in Canada, however, the link which can be drawn is that the ST and Aboriginals in Canada may both be considered as indigenous groups which are not necessarily part

231. Supreme Court of Canada, Factum of the Respondent, Her Majesty the Queen, in *Kapp*, *supra* note 140 at para. 1.

232. See *Corbiere*, *supra* note 127, and *R. v. Van der Peet*, [1996] 2 S.C.R. 507.

233. Government of India, Ministry of Tribal Affairs, online: <<http://www.tribal.nic.in/index.asp>>. These criteria are based on definitions in the 1931 census, reports of the first Backward Classes Commission 1955, the Advisory Committee (Kalekar), on the revision of SC/ST lists (Lokur Committee) 1965, and the Joint Committee of Parliament in the Scheduled Castes and Scheduled Tribes orders (Amendment) Bill 1967 (Chanda Committee), 1969. No community has been specified as Scheduled Tribe in relation to the State of Haryana and Punjab and Union Territories of Chandigarh, Delhi and Pondicherry.

A Scheduled Area is not defined in the *Indian Constitution*. The criteria followed for declaring an area as Scheduled Area are preponderance of tribal population; compactness and reasonable size of the area; under-developed nature of the area; and marked disparity in economic standard of the people. These criteria embody principles followed in declaring "Excluded" and "Partially-Excluded Areas" under the *Government of India Act 1935*, Schedule "B" of recommendations of the Excluded and Partially Excluded Areas Sub Committee of Constituent Assembly and the Scheduled Areas and Scheduled Tribes Commission 1961.

There is also a presumption of backwardness based on residence in exclusive territorial communities: Paramanand Singh, "Some Reflections on Indian Experience with Policy of Reservation" (1983) 25 J.I.L.I. 46 at 47.

234. Cunningham, "Race," *supra* note 100.

235. Government of India, Ministry of Tribal Affairs, "Scheduled Tribes," online: <<http://tribal.nic.in/index.asp>>.

of mainstream society, have been historically marginalized, and are discriminated against.²³⁶

On this basis, I would argue that there should not be a creamy layer distinction within the Aboriginal category, similarly as there is not one in India for the ST. Due to historical circumstances, the Aboriginal groups have been constitutionally provided with protection and this protection should not be interpreted in a manner which will eventually reduce or diminish any type of ameliorative benefits or Aboriginal rights. There is no time limit or expiration date in the *Canadian Charter or Constitution Act, 1982*, regarding Aboriginal rights. In the event that one day Aboriginal people will not require ameliorative programs, the government will respond accordingly since s. 15(2) is an enabling provision and does not place any positive obligation on government to implement affirmative action. As a result, if Aboriginal communities are one day no longer disadvantaged, the government would not contemplate programs which target them. But, Aboriginal constitutional rights would nevertheless remain in force, regardless of disadvantage.

Although there was no discussion regarding a privileged class within the Aboriginal groups in *Lovelace*, the appellants argued that they belonged to a disadvantaged group and they were being excluded from the government program. Iacobucci J. clearly stated that there would be no assessment of relative disadvantage as this would encourage a “race to the bottom,” and also because he noted that the appellants and the targeted group for the program were all disadvantaged. The “race to the bottom” has also been a recognized phenomenon in India by the Supreme Court of India.²³⁷ This is a question which the Supreme Court of India engaged in when it directed that the State sever the more disadvantaged from a disadvantaged class within the OBC by identifying a creamy layer.

On the other hand, the creamy layer distinction should apply to the enumerated ground of race under s. 15 and race as a category generally. The OBCs are comparable to (visible) racial minorities in Canada, based on the great internal variances of language, culture, religion, ethnic origin, appearance and because of immigration.²³⁸ As Aboriginals have been classified as a specified race in the Canadian constitutional framework,

236. See *Corbiere*, *supra* note 127, and *Lovelace*, *supra* note 139.

237. See Justice Pasayat's remarks on the motion for a stay in *Thakur 2007*, *supra* note 65 at para. 21: “Nowhere else in the world do castes, classes or communities queue up for the sake of gaining backward status. Nowhere else in the world is there competition to assert backwardness and then [sic] to claim we are more backward than you.”

238. Here, I am using some of the indicators that Jenkins used to compare the OBCs to American Hispanics. See Jenkins, “Race,” *supra* note 18.

in India the SC/ST have been specifically classified by caste and tribe. Conversely, various other racial groups such as South Asians, East Asians or Blacks have not been categorized individually in any Canadian constitutional document by race. Similarly, the OBC have not been listed in the *Indian Constitution*.

The *Kapp* Court noted that to define the disadvantaged, not all members of a group need to be disadvantaged as long as the group as a whole has experienced discrimination.²³⁹ They also stated that the fact that some individual band members may not experience personal disadvantage does not negate the group disadvantage suffered by a band member.²⁴⁰ This language appears to preclude a creamy layer assessment within the Aboriginal category, but at the same time acknowledges that there may be a section of the group which is not truly disadvantaged. This opens the door wider to a creamy layer analysis.²⁴¹

Using the *Kapp* Court's test for s. 15(2), it appears that a creamy layer test could be applied in Canada. The government would need to show that the affirmative action program had an ameliorative purpose, and in the second part of the test, show that the program targets a disadvantaged group identified by an enumerated or analogous ground. The Supreme Court of India has stated that the OBC category is only defined as such once the creamy layer is removed. Using the same procedure in the case of race under a s. 15(2) assessment, the disadvantaged targeted racial group would need to have already shed its creamy layer members to be defined as a category.

If the creamy layer assessment is used, in practical terms, the government would need to assess which members of a racial group met the threshold of being disadvantaged. An assessment of social advancement which would include a social, educational and economic test would be required in the Canadian context in order to achieve similar results to the Indian evaluation of identifying the OBC; a Canadian version of the Mandal Report.

The Supreme Court of India emphasized that an economic test cannot be the sole criterion for defining the creamy layer, however, they also did

239. *Kapp*, *supra* note 140 at para. 55.

240. *Ibid.* at para. 59.

241. Alternatively, the examination of a creamy layer in relation to affirmative action programs targeting women may require additional considerations. Although in Canada women belong to a designated equity group, there may be arguments in favour of applying the creamy layer analysis to them as well. This is because women belong to all groups and classes, including the advantaged and disadvantaged. However, at the same, the creamy layer analysis should not displace any policy regarding gender parity. Of note is that the *Indian Constitution* does not preclude provisions for a women's reservation (art. 15(3)).

not provide any specific criteria which should be used. In Canada, some criteria for who would belong to a creamy layer have been alluded to by some of the authors cited above: the economically advantaged (Anand); people within a racial category who have bachelor degrees, hold managerial or professional positions, or who own high valued homes (Pager); or those who have not suffered disadvantage either economically or socially (Cereste). More specifically, borrowing from some of the creamy layer criteria outlined by the NCBC in India, children of the prime minister or any cabinet minister, children of judges, white collar professionals or university professors, children who come from families where the gross annual income is perhaps above \$150,000, or children of business executives in the private sector could be excluded from preferential policies which target disadvantage.

As noted above, the only race-based identification of a group in the Canadian constitutional documents is the Aboriginal population. The terms visible minority or race, for example, are not defined. Likewise, under arts. 15(4), (5) and 16(4), the backward classes are not listed in the *Indian Constitution*, but are identified by the Central and State governments. There are no separate government lists of racial groups who can be legally identified as a racial minority in Canada. In India, the State decides who is an OBC. In Canada, people self-identify as belonging to a racial category.²⁴²

For racial groups other than Aboriginals, the creamy layer distinction should be considered, given the fact that there is great internal variance within racial groups, which leads to the problem of overinclusion.²⁴³ However, the creamy layer concept will only be relevant depending on the affirmative action program and its goals. If the goal of affirmative action in Canada is to prevent inequality or disadvantage and to target the truly disadvantaged, then the creamy layer concept should be applied. If representation or diversity is the main goal of an affirmative action program, then the creamy layer concept might be inapplicable and irrelevant, as this aim of the program would merely be visual and based on optics or numbers.

It seems inevitable that a “race to the bottom” will exist whenever specialized or attractive goods are available to a limited group of people, such as jobs or seats at university. This will occur whether there is a

242. See the *Employment Equity Act*, S.C., 1995, c.44, ss. 2, 9(2) [EEA]. Employment equity is only implemented towards persons who self-identity as belonging to a designated group: women, Aboriginal peoples, persons with disabilities and members of visible minorities.

243. See above discussion in Part II.

quota or whether the job or seats are available to increase representation. Onwuachi-Willig and John Martinez explain the issue of ethnic/racial fraud during the admissions process at universities in the U.S.A. as one type of race to the "bottom."²⁴⁴ White students are trying to discover minority races in their ancestry through biological testing or in another example, a woman who checked off the "Hispanic" box in her law school application claimed in her interview that she did so because she had a child with her ex-husband who was Hispanic. Onwuachi-Willig notes that these students are trying to claim a biological race which does not match their social experience. There is no reason to doubt that forms of ethnic fraud occur or would occur while people in Canada apply for jobs which are slotted for or encourage racial minority applicants.

The creamy layer assessment would not be applicable in public sector employment, as the government's hiring goals appear to be focussed on diversity and representation of Canadian society.²⁴⁵ Although public sector employment is a limited resource, the aim of the public employer is not to alleviate disadvantage, but rather to present a civil service that reflects Canada's diverse population.

Unlike the situation in India, in Canada government may not be directly involved in any affirmative action policies regarding university education.²⁴⁶ An affirmative action plan in universities may not face judicial constitutional scrutiny under s. 15(2) unless substantial government control can be found. Thus, within the *Canadian Charter* context, the creamy layer examination could not be applied to universities. However, it may be considered by academic administrators when tailoring equity or affirmative action policies, since the creamy layer concept may be applicable to the federal and provincial human rights instruments.

As noted above, s. 14(1) of the OHRC is comparable to s. 15(2) of the *Canadian Charter* in that it allows for special programs to relieve disadvantage. In the case where a university may implement a special program to admit students who belong to racial minorities, a creamy layer analysis would certainly be appropriate. As noted in the examples above in Part II, using race as a category can be overinclusive and provide benefits to people of that category who do not require them. Admissions committees would need to set parameters for who would belong to the creamy layer, based on whether the university was seeking to alleviate disadvantage

244. Onwuachi-Willig, *supra* note 117 at 1215-1220; John Martinez, "Trivializing Diversity: The Problem of Overinclusion in Affirmative Action Programs" (1995) 12 Harv. Blackletter L.J. 49 at 49.

245. See generally, *EEA*, *supra* note 242.

246. See *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229.

and provide equal opportunity to racial groups, or whether it was simply seeking greater numbers of racial minorities to appear representative of the population. The creamy layer assessment would not be relevant though, if the university's goal was merely representation.

Examples of individualized assessments of student applicants may involve combinations of the methods used by the Rutgers Law School-Newark, the University of Victoria Law School and Dalhousie Law School's IB&M Initiative. These law schools examined applicants' socio-economic backgrounds, any adversity the student might have overcome, indigenous roots, ancestral heritage, public or community service, and cultural or economic factors, in addition to academic performance and LSAT scores. And race is only one criterion, just as caste is only one consideration when defining the OBC. In assessing whether applicants belong to the creamy layer, admissions committees may look to the suggested criteria mentioned above, such as the parents' income or occupation, or whether the applicant is already a professional. These holistic evaluations would assist the law schools in selecting the most deserving students for admission.

Affirmative action is a form through which one may correct the wrongs of discrimination. In order to achieve this goal, it is necessary to exclude the creamy layer from targeted beneficiaries in order to provide the most egalitarian opportunities possible to people who have been and who continue to be marginalized.

Conclusion

Disadvantage is not static. In the Indian context, there is caste mobility as well as economic and social mobility amongst and within generations. In Canada, although one's race may remain static, an individual's social, educational and economic status may change due to opportunity. The creamy layer is a dynamic determination with an evolving membership. The concept underlying the creamy layer is to identify advantaged individuals within a disadvantaged group, in order to alleviate disadvantage. For this reason, the creamy layer notion is relevant in any diverse society such as Canada which seeks equality. It is also an essential element of a "just society".²⁴⁷

The creamy layer concept from the Supreme Court of India ought to be imported, examined and considered by the Supreme Court of Canada in its future hearings on s. 15(2) of the *Canadian Charter*. It is suggested that when the Supreme Court of Canada assesses the ameliorative nature

247. Pierre Elliot Trudeau, "The Values of a Just Society" in Thomas S. Axworthy & Pierre Elliot Trudeau, eds., *Towards a Just Society* (Markham: Viking, 1989) 357 at 362.

of the program that it examine whether a creamy layer exists within the targeted group and whether the government has appropriately tailored the program to suit only the disadvantaged. This will permit greater scrutiny of the program in question and reveal whether or not the targeted group is in fact truly disadvantaged or in need of the special program, in order to ensure that substantive equality is pursued.