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The Door Has a Tendency to Swing Shut: The Saga of Aboriginal Peoples' Equality Claims

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By Naiomi Metallic
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Introduction

[1] Aboriginal people have faced, *and continue to face*, many forms of discrimination in this country. This includes stereotyping, prejudice and disadvantage imposed (both intentionally and unintentionally) by non-Aboriginal individuals, businesses, institutions and governments, as well discrimination from other Aboriginal individuals, institutions and governments. While much scholarly writing in the Aboriginal context has focused on s. 35 of the *Constitution Act 1982*,[1] and rightly so, there appears to be a limited amount of scholarly writing on the experience of Aboriginal people in advancing equality claims.[2] I believe it is important for Aboriginal peoples' specific experience in this area to be known. This is because, in some ways, Aboriginal peoples' experiences in pursuing equality are similar to what other disadvantages groups have faced, but, in others ways, their experiences are quite different. Much of the discrimination experienced by Aboriginal peoples is complex. By that I mean that in order to understand these forms of discrimination, a person must be aware of certain historical facts (that are not well known), certain legal and jurisdictional issues, as well as certain sociological phenomena.

[2] From the time Aboriginal people started to bring discrimination complaints before the courts, there have been significant obstacles that have operated to effectively—*and sometimes even explicitly*—prevent Aboriginal peoples from advancing pressing discrimination complaints against governments. Although there have been changes made in the law over time to attempt to eliminate such barriers, what we see is a pattern where new obstacles crop up to replace the old ones. Over and over, Aboriginal peoples see the door to equality open up only to have swing it shut again.

[3] In the first part of this paper, I attempt to provide some background on the historical events, legal and jurisdictional issues, and social context that must be understood in order to truly appreciate Aboriginal equality claims. Next, I undertake an overview of Aboriginal peoples' discrimination complaints against the federal and provincial governments. Obviously, there are other categories of discrimination complaints involving Aboriginal people, such as complaints against non-Aboriginal individuals and institution, as well as against other Aboriginal people, institutions and governments.[3] However, my focus is on Aboriginal equality claims against federal and provincial governments. To date, these have been the most litigated complaints. Further, in my view, these complaints put the relationship of Aboriginal people and the state under the microscope and tell us something important about where we find ourselves in terms of reconciliation between Aboriginal people and Canada. Finally, I provide recommendations on what can be done to address the current obstacles facing Aboriginal equality claims.

1. Background on Aboriginal discrimination complaints

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[4] Aboriginal peoples' discrimination complaints against the federal and provincial governments generally fall into two categories. First, there are those where an Aboriginal claimant alleges that a law or program results in differential treatment relative to non-Aboriginal people. Within this category, I identify three sub-categories, which I will elaborate on further below. Second, are those complaints where an Aboriginal claimant alleges they are unfairly excluded from a benefit available to other Aboriginal people. I will generally refer to the latter as "underinclusion complaints."

(1) The basis for complaints of differential treatment relative to non-Aboriginal people

[5] Section 91(24) of the *Constitution Act, 1867* assigns exclusive legislative jurisdiction over "Indians and Lands reserved for the Indians" to the federal government.[4] Aside from "aliens" (an antiquated term for immigrants and refugees) referenced under s. 91(25), no other ethnic or social group in Canada is singled out under the *Constitution Act 1867*, as a head of jurisdictional power.[5] Pursuant to this s. 91(24), Canada enacted the *Indian Act* in 1876, which has continued in force until the present day.[6] It has been amended over time, but the last major overhaul of the law occurred in 1951.[7] Since then, there been two amendments to the *Indian Act*, both regarding Indian registration.[8]

[6] Throughout history, the *Indian Act* was used by the Canadian government as a tool to implement various assimilative and paternalistic policies, including Residential and Indian Day schools, the most well-known of Canada's assimilation attempts. But the *Indian Act* included many other laws that singled out First Nations people, as noted by Woodward:

> For over a century, First Nations people subject to the *Indian Act* were deprived of many legal rights and freedoms enjoyed by other Canadians. As the Royal Commission on Aboriginal Peoples observed:
>
> > Conceived under the nineteenth century's assumptions about inferiority and incapacity and an assimilationist approach to the "Indian question", the *Indian Act* produced gross disparities in legal rights. It subjected Indians to prohibitions and penalties that would have been ruled illegal and unconstitutional if applied to other Canadians.
>
> To give a few examples, for many years, the *Indian Act* prohibited, on pain of imprisonment, Indians from engaging in key cultural activities – the potlatch and the Tamanawas dance; it prohibited the possession of intoxicants by Indians and prohibited them from being intoxicated; it restricted the ability of Indians, relative to non-Indian farmers, to sell their agricultural produce; and for a number of years, it effectively prohibited Indians from retaining legal counsel to pursue claims on their behalf by imposing a penalty on anyone who sought or obtained payment for pursuing such claims without the permission from Indian Affairs.[9]

[7] Laws such as these give rise to the first sub-category of differential treatment complaints by Aboriginal people relative to non-Aboriginal people: these are laws aimed at singling out First

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Nations in a negative or punitive way based on prejudice or stereotyping. I refer to this category as "blatant discrimination claims." The majority of above-noted blatantly discriminatory provisions in the *Indian Act* have largely been repealed.

[8] Today, the *Indian Act* primarily contains laws regarding: (1) Indian registration and Band membership rules;[10] (2) Indians' collective interests in reserve lands (how they can be surrendered, transferred, leased, expropriated, etc.) and a quasi-private property regime for Band members;[11] (3) Indian wills and estates;[12] (4) taxation of Indians and exemption from seizure of property on reserve;[13] (5) election of Band Councils;[14] (6) by-laws that can be enacted by Band Councils;[15] and (7) schools on reserve.[16] The specific regime set up in the *Indian Act* has to be appreciated in the context that is largely geared towards preserving and managing reserve lands, which are tracts of land held for the collective use and enjoyment of "Bands" as defined in the *Indian Act*, title to which ultimately vests in the Canadian government.[17] Because lands are collectively held for the use and enjoyment of the Band, the laws set out in the *Indian* Act regarding land differ substantially from the laws one finds for land ownership off reserve.

[9] Outside of the *Indian Act*, there are a handful of stand-alone federal laws on specific topics relating to First Nations. The majority of them deal with issues of land, money or taxation and are primarily geared at preserving and managing reserve lands and other band assets.[18]

[10] The unique legal regimes held in place by the *Indian Act* and specific federal laws give rise to the second sub-category of differential treatment complaints by Aboriginal people relative to non-Aboriginal people. This occurs when Aboriginal people challenge aspects of these regimes as preventing them from engaging in activities that people off-reserve are allowed to do. In this regard, a claimant will argue that the restrictions imposed by these regimes are paternalistic and unfair relative to the freedoms of people off-reserve. I refer to these as "formal equality claims." There is a tension in these types of claims between individual freedoms and maintaining regimes designed to preserve collective interests in reserve lands and other band assets. This is not to suggest that such these regimes could never be unduly or unfairly restrictive in their design or implementation, however, these types of claims demand a certain amount of balancing between individual rights and collective rights, or else collective interests in reserve lands and other band assets (which many First Nations see as beneficial to their collective identities) stand in danger of being slowly eroded.

[11] Notably absent from the *Indian Act* or other legislation that has been passed by Canada relating to Aboriginal people are laws on subject matters relating to essential services. Although Canada's jurisdiction pursuant to s. 91(24) of the *Constitution Act, 1867* enables it to pass legislation on such essential services areas as social assistance, child welfare, housing, health services, policing, etc., as it relates to First Nations on Indian reserves, the federal government chooses not to. For their part, the provinces arguably also possess the jurisdiction to extend the provision of essential services under provincial laws on reserves, however, except for Ontario who signed a cost-sharing agreement with the federal government in 1965 in this regard,[19] the majority to do not.

[12] In this stalemate between the federal and provincial governments to assume legislative jurisdiction over essential services on reserve[20] (presumably because neither level of governments

wants the additional responsibility or costs), since the mid-1960s, the federal government has opted to 'regulate' programs and service on reserve for health, social welfare, child welfare, daycare, education, housing, policing, etc., by way of a combination of directives, policies and funding agreements. Canada maintains that it attempts to provide these programs on a comparable basis to what the provinces provide off-reserve. However, First Nations have long argued that the services and funding they receive are not comparable and that they receive less than citizens' off-reserve. In this regard, an internal review by the Department of Aboriginal Affairs and Northern Development Canada (previously the "Department of Indian Affairs and Northern Development Canada"), which is the federal government department delegated jurisdiction over Indian affairs[21]) of its on-reserve Social Assistance Program undertaken in 2006 confirmed that "Overall, the program is not comparable to provincial and territorial programs and First Nations administrators are working under major restrictions related to the paucity of financial and human resources."[22]

[13] Several reports from the Auditor General of Canada have been critical of the manner that the federal government addresses essential services on-reserve.[23] In her 2011 Report, the Auditor General went so far as to state that the lack of clarity about service levels, lack of a legislative base, lack of appropriate funding mechanisms, and lack of organizations to support local service of programs on reserve, are all significant factors in the lack of progress in improving the lives and well-being of people living on reserve.[24] In his 2014 report on the situation of Indigenous peoples in Canada, Special Rapporteur, James Anaya, states that "the human rights problems faced by indigenous problems in Canada … have reached crisis proportions in many respect" and that "[t]he most jarring manifestation of these human rights problems is the distressing socio-economic conditions of indigenous peoples in a highly developed country."[25]

[14] The deplorable socio-economic circumstances many Aboriginal communities continue to find themselves in, and the various impacts of this (Aboriginal people in Canada figure at the bottom of almost every social and physical well-being indicator in this country), give rise to the third sub-category of differential treatment complaints by Aboriginal people relative to non-Aboriginal people. In recent years, Aboriginal groups have begun to bring equality challenges alleging that, due to government neglect or disinterest in their plight, they are provided services below levels provide to other Canadians. I refer to these as "adverse effects discrimination claims."

(2) The basis for underinclusion complaints

[15] Although, s. 35(2) of the *Constitution Act, 1982*, defines the "Aboriginal Peoples of Canada" as including "Indian, Inuit and Métis peoples of Canada",[26] generally, the federal government has opted only to exercise its jurisdiction, legislative and otherwise, in respect of "Indians" (more commonly referred to as "First Nations" today). Historically, Canada denied responsibility over the Inuit and Métis, however, a Supreme Court of Canada decision in 1930 found that the Inuit are included in the government's s. 91(24) jurisdiction,[27] and, more recently, the Federal Court of Appeal released a similar decision with respect to the Métis.[28] Canada has never passed legislation regarding the Inuit, but provides them with benefits pursuant to the provisions of comprehensive land claims. There remain, however, groups who are of Inuit descendant which Canada has yet to conclude any such agreements with.[29] With respect to the Métis, Canada continues to deny any significant responsibilities, legislative, fiscal or otherwise,

relating to this group of Aboriginal people. Canada's differential treatment as between Indians, Inuit and Métis has—*and continues*—to give rise to underinclusion complaints. Some provincial governments, particularly in the Prairies, have assumed some responsibilities towards the Métis, while others have not.[30] This also raises potential underinclusion complaints.

[16] To date, Canada has only legislated in respect of "Indians" / First Nations pursuant to the *Indian Act*. A key feature of the *Indian Act*, which has remained constant throughout its tenure, is that it defines who can be registered as an "Indian" under the law (often referred to as "Indian status") and, thereby, who is entitled to rights under the *Indian Act*, including the right to live on reserve, and benefits under government programs and policies for Indians. Apart from such tangible benefits, the courts have recognized that Indian status has also taken on a greater intangible benefit that goes to a person's cultural identity.[31]

[17] The history of the *Indian Act* status rules is a long and sordid one. People have written articles and books dedicated to the subject.[32] Briefly, it can be said that the *Indian Act* has contained numerous provisions, which at various points in time, have either (1) overlooked individuals with First Nations ancestry for designation as an "Indian";[33] (2) outright denied Indian status to certain individuals with connections to the First Nation community;[34] or (3) revoked the Indian status of thousands of First Nations people. Examples of this last category include: (a) women who married men without Indian status (this could be a non-Aboriginal as well as Aboriginal non-status men, such as Métis men) and their children (called the "marrying out" rule);[35] (b) peoples' whose maternal mother and grandmother had gained Indian status through marriage ("the double-mother rule");[36] (c) illegitimate children of Indian women where the father was known to be not a status Indian;[37] (d) First Nations people who obtained university degrees, became doctors or lawyers, or joined the holy orders;[38] (e) First Nations veterans who enlisted in military service in the First and Second World Wars and Korean War;[39] (f) Indian people who lived in the United States or another country for over a period of five years without the permission of Indian Affairs;[40] and (g) people who voluntarily enfranchised (for some time this was exclusively offered to male Indians and their wives and children would be automatically enfranchised with them).[41]

[18] In 1985, amendments were made to the *Indian Act* attempting to rectify some of these wrongs, which has resulted in the reinstatement as "Indians" of many thousands of people. [42] However, these amendments also introduced what is called the "second generation cut-off rule" (what some have called an effective 'blood quantum rule'[43]), which prevents the passing on of Indian status to descendants after two successive generations of mixed parenting between a person with Indian status and a person with no Indian status ("exogamous parenting").[44] The second-generation cut-off rule was applied retroactively to the children of the women who were reinstated to Indian status, and applied prospectively to all children of Indians born after 1985. Given current rates of exogamous parenting, it is projected that the second generation cut-off rule will result in a sharp decline in status Indians in a matter of a few generations.[45] Some First Nations communities predict that their last status Indian birth will occur as soon as 2030.[46] This raises fears that should the numbers of 'non-status Indians' in Canada rise dramatically as predicted as a result of the second generation cut-off rule, the federal government will still continue to deny responsibility for this group.

[19] The Indian status rules have been—*and continue to be*—unilaterally decided by the federal government without First Nation involvement, or without taking into account any other Aboriginal identity factors aside from ancestry (and, previously, gender), such as community and family connections, language, culture, or First Nation's customs and laws on membership and citizenship. These rules have cut across First Nations communities and families in various ways creating various types of distinctions between 'status' and 'non-status'. Even between status Indian there are distinctions, such as 'members' and 'non-members'[47] and 'on reserve' or 'off-reserve'.[48] A slightly more obscure distinction is that between Bands with a land-base and those without ("the landless band"). All of these distinctions are used by governments in Canada as grounds of eligibility for various programs and services. They have been—*and continue to be*—a significant source of fodder for underinclusion complaints.

2. History of Aboriginal equality complaints

(1) The Canadian Bill of Rights

[20] The door to having redress for discrimination complaints against federal laws was closed to all Canadians, including Aboriginal people, until the passing of the *Canadian Bill of Rights* in 1960.[49] However, First Nations people in Canada faced additional legal barriers to the exercise of their legal rights not experienced by others. From the years 1926 to 1951, it was effective illegal for First Nation to retain legal counsel to pursue claims on their behalf.[50] Until 1960, First Nations were also not considered citizens of Canada.[51]

(a) Drybones

[21] In the first decision to be decided under the *Canadian Bill of Rights* by the Supreme Court of Canada, called *R. v. Drybones*,[52] a majority of the Court invalidated the provision in the *Indian Act* that made it an offence for an Indian to be intoxicated off reserve.[53] The majority found that no other Canadian was subject to any similar restriction, and the provision therefore denied Indians equality before the law and the protection of the law. In doing so, the Court explicitly rejected the argument that it should adopt a "separate but equal" doctrine, Ritchie J. stating:

> The *Canadian Bill of Rights* … can have validity and meaning only when … it is seen to repudiate discrimination in every law of Canada by reason of race, national origin, colour, religion or sex … not only as between Indian and Indian, but as between all Canadians, whether Indian or non-Indian.[54]

[22] *Drybones* can be seen as an example of the first subcategory of differential treatment, a claim involving blatant discrimination. For its time, *Drybones* was seen as groundbreaking and has come to be seen as the 'high water mark' of cases decided of the *Canadian Bill of Rights*.[55] As much as the decision signaled that the door was now open for Aboriginal people to hold governments accountable for discrimination in the *Indian Act* and other related policies, the next decision issued from the Court on the *Indian Act* would effectively slam the door shut.

(b) Lavell

[23] In *Lavell v. Canada (Attorney General)*, a challenge by Aboriginal women to the marrying out rule, the Supreme Court ruled in a 5:4 decision that the rule was not discriminatory.[56] Unlike in *Drybones*, the Court appeared extremely reticent to interfere with the provisions of the *Indian Act*, suggesting that meddling with the definition of "Indian" would be akin to taking away Parliament's powers under s. 91(24)[57] and "overriding all of the special legislation imposed by Parliament under the *Indian Act*".[58] The Court was careful not to suggest it was overruling *Drybones* (although it was effectively doing so), by distinguishing the *Drybones* case as involving the only provision in the *Indian Act* creating an offence for behaviour off reserve.[59] That, the Court maintained, was quite different from rules that were "concerned with the internal regulation of the lives on Indian on Reserves", which the Court signaled was off limits.[60]

[24] In the final analysis, the Court reduced the impact of the *Canada Bill of Rights* to be about ensuring equality in the *application* of the law by bureaucrats, law enforcement and the courts.[61] Accordingly, the marrying out rule did not violate this notion of equality because it *applied* to all Indian women the same: they were all liable to have their Indian status revoked if they married someone without Indian status. The very clear message from *Lavell* to Aboriginal people was that the *Canadian Bill of Rights* could not be used as a vehicle to tackle the complex web of discrimination weaved by the *Indian Act.* The door was now shut again.

[25] *Lavell* is an example of an underinclusion claim. However, the Supreme Court approached the case as if were one that threatened dismantling of the special rights in the *Indian Act* (i.e., a formal equality claim). The Court appeared extremely concerned that finding the marrying out rule discriminatory risked eroding the special rights regime in the *Indian Act*. However, I disagree that underinclusion claims raise the prospect of eroding the special rights regime in the *Indian Act.* Potentially increasing (or not decreasing) the status Indian population has no direct impact on the special regime designed to preserve reserve land and band assets. I would argue that the real concern held by the majority in *Lavell* was the prospect of telling the government to expend resources on Indians that the government was unwilling to spend, which is a separate issue altogether from eroding the special legal protections in the *Indian Act* for reserve land and band assets.

(2) The Canadian Human Rights Act – 1977 to 2008

[26] The next important event to occur was the passage by Canada of the *Canadian Human Rights Act* in 1977 ("*CHRA*") to provide individuals with access to human rights protection in employment and in the provision of services within federal jurisdiction.[62] However, any hopes that the *CHRA* could be used by Aboriginal women or others who had been discriminated against pursuant to the provisions of the *Indian Act* were immediately dashed by the insertion of section 67 into the *CHRA*, which read: "Nothing in this *Act* affects any provision of the *Indian Act* or any provision made under or pursuant to that *Act*."[63] The provision was found to prohibit complaints of discrimination arising not only from the legislative provisions of the *Indian Act*, but also actions of the Minister and the Department of Aboriginal taken pursuant to the *Indian Act*.[64]

[27] It has been reported that the reason Canada saw fit to include this provision in the *CHRA* was because the government recognized that there were provisions in the *Indian Act* that could be vulnerable to challenge under the *CHRA* and in discussions with the National Indian Brotherhood

(which later became the Assembly of First Nations), Canada committed to reforming the *Indian Act*, including repealing the marrying out status rule. Citing the reason of wanting to facilitate such reform (by avoiding any claims against it in the meantime), Canada included section 67 in the *CHRA*.[65] In doing so, Canada committed that the provision would only be in place for a short period of time. However, section 67 remained in place for 30 years, only being repealed in 2008.[66]

[28] Although s. 67 of the *CHRA* clearly prevented full frontal attacks on the *Indian Act*, such as challenges to the Indian status rules, it did not block all claims by Aboriginal people against federal legislation or entities. As it was an exemption from human rights protection, it was read narrowly. The Canadian Human Rights Tribunal and the courts required a direct link between the subject of the complaint and the *Indian Act* for the exemption to apply.[67] As a result, many complaints against the actions of Band Council, in employment and the provision of services were not precluded by the exemption.[68] Some claims against Canada and the Department of Aboriginal Affairs were also not caught by the exemption, but significantly less so than in the case of Band Councils.[69] Therefore, instead of being entirely shut, the door was left slightly ajar. However, until the coming into effect of the *Charter* 1985, Aboriginal people in Canada were effectively prevented under the *Canadian Bill of Rights* (due to the decision in *Lavell*) and explicitly prevented under the *CHRA* (due to s. 67) from challenging any alleged discrimination based on the *Indian Act*.[70]

(3) The Charter – 1985 to the present

(a) Corbière

[29] Although the *Charter* came into effect in 1985, the first significant case to reach the Supreme Court of Canada dealing with Aboriginal equality issues was *Corbière v. Canada (Minister of Indian and Northern Affairs)*, a claim of underinclusion.[71] *Corbière* dealt with voting eligibility requirements for Band Council elections under the *Indian Act*. Section 77(1) of the *Act* restricted voters to those "ordinarily resident on the reserve".[72] In a unanimous decision (with McLachlin C.J. and Bastarache J. writing the majority reasons, and L'Heureux-Dubé writing concurring reasons), the Court found the total exclusion of off-reserve band members from band elections constituted a violation of s. 15(1), not saved by s. 1.

[30] It is noteworthy that the majority reasons contain a pithy 24 paragraphs, while L'Heureux-Dubé J.'s reasons span a hundred. In finding unjustified discrimination in the circumstances, L'Heureux-Dubé J. went into significant details on the history and disadvantage faced by the off-reserve community, while the majority confined itself to enumerating within one paragraph how the exclusion from voting adversely effected off-reserve members interests.[73] The difference between the majority and concurring reasons is striking, and suggests the majority of the judges had significant reservations about delving as deeply into the history of *Indian Act* discrimination as their colleague.

[31] Ìt bears mentioning that there was scant mention of the affirmative action provision, s. 15(2) of the *Charter*,[74] in the case.[75] This is noteworthy because the provision figures prominently in later Aboriginal underinclusion claim decisions.

[32] In the same way that the *Drybones* was a landmark ruling under the *Canadian Bill of Rights* for Aboriginal peoples' equality claims, *Corbière* represented the same under the *Charter*. The door was open again and perhaps even wider than before, as the Court here was dealing with exclusions from a right specific to the *Indian Act*—in other words, an issue "concerned with the internal regulation of the lives on Indian on Reserves"—previously judged to be out of bounds under the *Canadian Bill of Rights* in *Lavell*.

(b) Lovelace

[33] In the same way *Lavell* came quickly on the heels of *Drybones* and swung the door shut again, along came *Lovelace v. Ontario* the following year.[76] *Lovelace* involved a challenge to an Ontario government program, the First Nations Fund, to distribute profits from Casino Rama located on the Rama First Nation Reserve to the registered Bands of Ontario. The project was based on an agreement entered into between Ontario's First Nations and the government to develop the commercial casino and share the profits. A variety of non-status Indian and Métis groups challenged their exclusion from a share of the profits from the program as discriminatory under s. 15(1) of the *Charter*. While the claim was successful at the trial level, it was overturned by the Ontario Court of Appeal and the Supreme Court of Canada dismissed the subsequent appeal.

[34] It bears noting that *Lovelace* was heard subsequently to the Court's decision in *Law v. Canada (Minister of Employment and Immigration)*, where the court re-jigged its s. 15(1) equality analysis to incorporate four contextual factors and making human dignity the touchstone the equality analysis.[77] In the *Law* decision, the Court said little about s. 15(2), but hinted at its relationship with s. 15(1) as an interpretive aid.[78] But in *Lovelace*, the Court was called on to be explicit about the relationship between s. 15(1) and (2), because the Ontario Court of Appeal had held that the First Nation Fund was an ameliorative program and was therefore not discriminatory by virtue of s. 15(2).[79] The Supreme Court of Canada was thus faced with the option of giving s. 15(2) its own independent force or seeing s. 15(2) as an interpretive aid to s. 15(1). The Court chose the latter, finding that s. 15(2) informed the contextual factors under s. 15(1). In doing so, the Court confirmed that even though an ameliorative program was in issue, a full s. 15(1) analysis would still occur: "s. 15(1) scrutiny applies just as powerfully to targeted ameliorative programs" as it does to claims involving universal or general benefit schemes.[80]

[35] However, in applying the s. 15(1) *Law* approach to the case, the Court concluded that the First Nations Fund did not discriminate and its analysis largely hinged on the conclusion that that the program was intended to be ameliorative for the First Nations of Ontario.[81] In its view, the exclusion of the Métis and non-status Indians (or "non-Band Aboriginal communities" as characterized by the Court) did not undermine the ameliorative purpose of the targeted program.[82] The fact that the claimants were a disadvantaged group was not determinative[83] and their exclusion from the First Nations Fund was not because of stereotyping.[84] The program was designed to correspond to the circumstances of First Nations, and the circumstances of the Métis and non-status groups were very different. According to the Court, the non-status Indians and Métis were different from the First Nations because they lacked reserve land to support the program and they did not experience the same on-reserve gaming and gambling issues that the First Nations did.[85]

[36] Although the Court was correct that these differences do exist, what the analysis obscures is that these differences are *not* an inherent or natural (as the Court's analysis seems to imply), but, rather, one that was constructed by government policies of exclusion of these groups from the *Indian Act* scheme. The Court's analysis refuses to probe the issue of historic discrimination that has created the non-status groups in this case. Indeed, at the outset of the decision, the Court made it clear that it will not delve into these "collateral issues" as they were not properly raised in the case:

> Although the substantive equality analysis obliges the Court to consider the circumstances of these appellant aboriginal communities, including the social realities relating to their exclusion from, or non-participation in, the *Indian Act* regime, these important collateral issues are not properly raised in this appeal and, therefore, cannot be decided herein.[86]

[37] One is at loss, however, to imagine how a court could properly analyze the circumstances around the claimants' exclusion in this case, without wading squarely into these issues. What we get instead is a fairly superficial treatment of the discrimination in the *Indian* Act, in that it gets mentioned, but otherwise the effects of historical exclusion factor minimally in the s. 15(1) contextual factors analysis. Thus, although the Court says that it will give rigorous s. 15(1) scrutiny to the discrimination alleged in this case, the statement rings hollow in the face of the Court's unwillingness to engage with the complex history of discrimination presented by this case.

[38] Because of the Supreme Court's tepid approach to addressing underinclusion claims in this case, I would argue that the legacy of *Lovelace* has been to make it quite difficult for Aboriginal people to succeed in underinclusion claims under the *Charter*. It did not close the door, but it certainly made it difficult to get through.

(c) Underinclusion claims post Lovelace

[39] In the years since *Lovelace*, there have been nine reported decisions involving claims of underinclusion in an Aboriginal context, culminating in the Supreme of Canada's 2011 decision in *Cunningham*.[87] Of these, there have been a few bright moments. One unqualified success was the decision in *Esquega v. Canada,* involving a challenge to the exclusion of the off-reserve band members from running for Band Council positions under s. 77(1) of the *Indian Act*.[88] The case was virtually on all-fours with the *Corbière* case, which in large measure explains why it was a slam dunk. The Crown here did raise an argument about the ameliorative nature of the laws for on-reserve band members, however, the Federal Court was not persuaded that on-reserve members were a disadvantage group relative to band election in order to justify total exclusive of off-reserve members from running.[89]

[40] Apart from *Esquega*, the other two successful underinclusion claims are qualified successes because they have been overshadowed by subsequent decisions. The first of these is the decision in *Misquadis v. Canada (Attorney General),*[90] where groups representing several non-status Indian communities living in Ontario and Manitoba brought a s. 15 challenge against Human Resources Development Canada on the basis of its Aboriginal Human Resources Development Strategy (AHRDS). Under the AHRDS, the federal government transferred funds to certain Aboriginal organizations for them to develop, design and deliver human resources programming

to benefit all Aboriginal people, regardless of reserve status or where they lived. The claimants argued the AHRDS was underinclusive because it offered a more expansive program to Aboriginal groups who were affiliated with one of the three big national Aboriginal organizations, namely the Assembly of First Nations ("AFN"), the Métis National Council ("MNC") and the Inuit Tapirisat of Canada ("ITC"). Affiliation permitted the groups to manage the program funds directly, while groups without such affiliation, such as the claimants, had their program funds managed by a service provider selected by the government.

[41] In detailed reasons considering the decisions in *Corbiere* and *Lovelace*, Lemieux J., of the Federal Court found the claimants were differentially treated by the program,[91] being deprived of the benefits of "local community control",[92] and such treatment perpetuated historic disadvantage and stereotyped the off-reserve as being less worthy and less organized than other Aboriginal groups.[93] Lemieux J. distinguished the decision in *Lovelace* on the basis that *Lovelace* involved a specific ameliorative program targeting a community with different needs and circumstances than the complainants; in the present circumstances what was at issue was a general ameliorative program for Aboriginal people that was underinclusive, and this was discriminatory.[94] The Court found that the discrimination could not be justified under s. 1 because the exclusion of the claimants could neither be rationally connected to its purpose, nor was it minimally impairing.[95] A unanimous panel of the Federal Court of Appeal upheld the decision.[96]

[42] Any optimism generated by the decision in *Misquadis* would be tempered, however, by the decision of a differently constituted panel of the Federal Court of Appeal involving the identical program in *Gallant v. Canada (Attorney General)*.[97] This time the challenge to the AHRDS program was brought by off-reserve non-status Aboriginal groups in Prince Edward Island. The claimants were successful before the Federal Court, the applications judge following closely the analysis of Lemieux J. in *Misquadis*, however, Federal Court of Appeal overturned the ruling. The panel found the application to be premature, and further stated that any discrimination was not as a result of the AHRDS program, but as a result of the respondent's exclusion from the *Indian Act*:

> This being said, the "community control" the Applications Judge found to exist as a benefit the respondents were deprived of is in fact created by the *Indian Act* … and the historical relations between the Crown and the Indians. It is unrelated to the claim made by the respondents about a "fair and equitable distribution of funds."[98]

The statement suggests that, due to the fact differential treatment in the AHRDS could be traced to respondents' exclusion from the *Indian Act*, this ought to have been the subject of the applicant's challenge, echoing the suggestion in *Lovelace* that the claimants were involved in a "collateral" attack.

[43] The other qualified win is the decision in *McIvor v. Canada (Registrar of Indian and Northern Affairs).*[99] The focus of this challenge was the residual sex discrimination remaining in the *Indian Act* after the repeal of the marrying out rule through the amendments to the *Indian Act* in 1985. The claimant in this case, Sharon McIvor, who had lost her Indian status through marrying out, argued that she was unable to pass on Indian status to her grandchildren, whereas an Indian man, who also married a non-Indian person, could. This was because the second-generation cut-off rule was applied retroactively to the children of women who were reinstated to status in 1985,

but not to the children of status Indian men who had children with non-Indian women prior to 1985.

[44] Ms. McIvor was successful before the British Columbia Supreme Court. Ross J. in very detailed reasons, concluded that the registration provisions embodied in the 1985 *Indian Act* continued the very discrimination they were intended to eliminate, preferring descendants who trace their Indian ancestry along the paternal line over those who trace their ancestry through the maternal line.[100] She ruled that s. 6 of the *Indian Act* to be of no force or effect insofar as it authorized differential treatment between of Indian men and Indian women born prior to April 17, 1985, and matrilineal and patrilineal descendants born prior to April 17, 1985. Although Canada attempted to argue, based on *Lovelace*, that the registration provisions were ameliorative and therefore exclusion from them was not discriminatory, Ross J. rejected this argument. The judge found that, although the 1985 amendments to the *Indian Act* were ameliorative, the claim here was not one of exclusion so much as failure to eliminate the very discrimination the amendments were intended to address.[101]

[45] While still finding discrimination on appeal, the British Columbia Court of Appeal significantly reduced the scope of Ross J.'s ruling. While not disturbing the judge's decision with respect to *Lovelace*, the Court of Appeal found Ross J.'s remedy to be far too expansive, returning Indian status to all persons who had at least one female ancestor who lost status through marriage since the time the marrying out rule was first past.[102] In the Court of Appeal's view, the 1985 amendments were generally acceptable, the only unfairness being that mixed children of Indian men got spared the effects of the second generation cut-off rule for an extra generation when, under the previous rules, at least some of these mixed children would have eventually lost their status pursuant to the double-mother rule, passed in 1951.[103] In so finding, the Court of Appeal accepted that the objectives of both the double-mother rule and the second generation cut-off rule (both of which are effectively blood-quantum rules) were pressing and substantial: to prevent the "dilution" of the "cultural integrity of existing First Nations groups" and "recognize the importance of Indian ancestry to Indian status".[104] However, the legislation was not minimally impairing as it gave expanded rights to those Indians who would have lost status under the double-mother role.[105]

[46] I would argue that much like earlier *Lavell* decision an unspoken factor motivating the British Columbia Court of Appeal was the concern about the impacts of Ross J.'s ruling would have on government resources. Reinstating scores of people to Indian status likely involves increased spending, given that certain programs and benefits are linked to Indian status. By sanctioning the second-generation cut-off rule as a pressing and substantial objective, and finding discrimination on a very different basis than Ross J., the Court of Appeal the decision largely kept intact the *status quo*.

[47] The Court of Appeal's decision in *McIvor* is extremely problematic because the *Indian Act*'s effective blood quantum registration rules are accepted as reasonable and rational rules without interrogating whether they themselves are discriminatory based race or ethnic origin (not to mention whether they infringe on Aboriginal rights to self-determine who the members of their communities are). To be fair, however, the claim was never framed as a direct challenge to the second-generation cut-off rule itself based on race or ethnic origin. Instead, it was framed as denying status to the descendants of the women who married-out one generation sooner than other

status Indians based on the grounds of sex and family status. Framing the claim in such a way presented the danger that the underlying second-generation cut-off rule would be unquestionably sanctioned by the courts, which is what happened.[106] The British Columbia Court of Appeal's decision will likely present a significant barrier in a future discrimination challenge to the second generation cut-off rule.[107] [108]

[48] As for the unsuccessful underinclusion claims, what we see in these cases is a tendency to rely on the ameliorative nature of the challenged law or program to find no discrimination and a persistent unwillingness to delve into the complex issues of historic exclusion. A case that exemplifies these problems is *Ochapowace Indian Band v. Saskatchewan (Department of Community Resources).*[109] This was an attempt by the Chief of Ochapowace First Nation, on behalf of the Band, to have official intervenor status in an application to place a child in permanent care under child welfare legislation. The child in question was the child of an Ochapowace Band member, however, by operation of the second-generation cut-off rule, the child was not eligible for Indian status.[110] Saskatchewan's *Child and Family Services Act* provided that the Chief of a Band was a person having sufficient interest to intervene in such a case, provided the child was a status Indian.[111] Paired with the impacts of the second-generation cut-off rule, the effect of this provision is to prevent Bands from intervening in permanent care application of non-status Indian children whom they see as part of their community. The Ochapowace Band therefore challenged the rule as discriminatory under the *Charter*. The Saskatchewan Queen's Bench dismissed the challenge, reasoning that the intent of the provision in the *Child and Family Services Act* had an ameliorative purpose, the exclusion in question related to that purpose and furthermore, it made practical sense for the government to tie is criteria to the *Indian Act*:

> Underinclusivity in this context may include both s. 23(1)(b)'s failure to address non-Aboriginals and its failure to address non-status Indians. In either event, the ameliorative objective can only be met if s. 23(1)(b) can be put to practical use. The provision has no practical use if it treats Aboriginals and non-Aboriginals the same. It treats Aboriginals and non-Aboriginals differently precisely for the reason that treating Aboriginals and non-Aboriginals the same would not lead to a fair result. Likewise, it is not practical to expect the Courts to determine who is and who is not an Aboriginal, without the assistance of the *Indian Act,* and therefore it is not discriminatory to exclude non-status Indians from the application of the provision because to do otherwise would lead to an unworkable system.[112]

[49] The analysis in this case is particularly problematic in framing the exclusion of non-Aboriginal and non-status Indians as the same thing, as well as its willingness to simply defer to the *Indian Act* status rules. Perhaps counsel for the Band failed to bring current day problems with the Indian registration provisions to the court's attention, but the problems with the rule is apparent from the facts of this case: an Aboriginal child, a descendent from the Ochapowace band, obviously regarded as being part of the Band, is arbitrarily denied her Band's intervention in proceedings that would place her in permanent custody away from the Band, perhaps severing her connection with the Band, her home community, and her culture, forever. Yet, because the intervener provision could generally be regarding as ameliorative, and using criteria other than the *Indian Act* could be "unworkable" (according to the Court), deferring to the *Indian Act* rules was deemed acceptable.

[50] Another problematic underinclusion decision is *Micmac First Nation v. Canada (Indian Affairs and Northern Development*).[113] The case involved the Gespeg Micmac First Nation, one of the few landless Indian Bands in Canada, meaning the First Nation is recognized as a "band" under s. 2 of the *Indian Act*, however, it has no associated reserve land. Historically, bands generally had reserve land set aside for them, but in cases where Canada was late to recognize a group as a band, such as in the case of Gespeg, it is the policy of Canada not to set aside reserve land for that group. The dispute in issue involved the Minister of Aboriginal Affairs' refusal to continue to provide grants of financial assistance under the *Elementary/Secondary Program* to the Band. Grants under the program were provided to Bands to fund education services in band schools on reserve, or to cover tuition and other eligible expenses when band students attended schools off-reserve in the province. Between 1975 and 2001, Aboriginal Affairs agreed to grant financial assistance to Gespeg under the Program. During that time, Gespeg sent its children to provincial schools. However, in 2001, Aboriginal Affairs changed its program criteria such that eligibility was premised on whether the Band's students were ordinarily resident on reserve. Because of this, Aboriginal Affairs communicated that it would cease providing grants to the Band. The Band brought a judicial review based on s. 15, alleging that the criteria of having reserve land discriminated against students who did not live on reserve, but lived in the Band's traditional territory. In this regard, the Band also argued the distinction completely excluded landless bands from exercising community control over their children's education.

[51] The Federal Court found no discrimination. Martineau J. noted that students, band members or not, who do not live on a reserve are treated the same way as non-Indian students enrolled in a provincial school. In both cases, Indians and non-Indians do not have access to the benefits of the Program. He also suggested (similarly to the Supreme Court in *Lovelace*) that the applicants were trying to collaterally attack their status as a landless band, but this was beyond the ability of the Court:

> As sympathetic as the applicants' case may be, there is no application before this Court today regarding the Crown's failure to create a reserve or to set aside lands for the benefit of the Band. Rather, the Court must examine the legality of the Minister's refusal to grant financial assistance under the Program to Band students who are enrolled in elementary or secondary schools and who reside in Gaspé and surrounding areas.[114]

[52] Ultimately, the judge put great emphasis on the decision in *Lovelace*, finding that the program was a targeted ameliorative program designed to address the unique challenges faced by First Nations members living on reserves. The judge noted that Gespeg's students attended provincial schools in the region and there was nothing in evidence to indicate that the academic performance of Gespeg students was comparable to those students currently living on reserves (i.e., that they faced as large an education gap as students on reserve). The reasons ignore that, in many First Nations communities, there are no schools and the children from reserve are sent to provincial schools. In those cases, Band Councils use the program funds for tuition for their students in provincial schools. The payment of such tuition by Band Councils serve as leverage to ensure that provincial school board curriculum is responsive to the needs of First Nations students. While Gespeg made this argument, the judge characterized this as an incidental aspect of the Program, and not one that changed his analysis. The case was upheld on appeal.[115] [116]

(d) Kapp and Cunningham

[53] In order to discuss *Cunningham*, which is an extremely significant case for Aboriginal equality claims, one must first explain the Supreme Court of Canada's decision in *R. v. Kapp*.[117] *Kapp* involved a s. 15 claim by non-Aboriginal fisherman that a pilot sales program set up for three First Nations allowing them exclusive right to fish for salmon for a 24 hour period, constituted discrimination against them on the basis of race. The Supreme Court used *Kapp* as a platform to restate the s. 15(1) test to address several problems that had arisen over time with the *Law* test's contextual factors and its focus on human dignity. The Court also used the case to depart from its analytical approach to s. 15(2) taken in *Lovelace*. Whereas in *Lovelace*, s. 15(2) was determined to be a lens through which s. 15(1) would be interpreted, the Court in *Kapp* gave s. 15(2) independent force, introducing a new test to be met when an ameliorative program is subject to challenge. The test provides, once the claimant has established the impugned law or program creates a distinction based on an enumerated or analogous ground, the government can have the activity 'saved' under s. 15(2)—*avoiding full scrutiny under s. 15(1)*—if it can show that (1) the program has a remedial purpose; and (2) the program targets a disadvantaged group identified by the enumerated or analogous grounds.[118] If a law or program meets this test, the s. 15 analysis is done.

[54] The *Kapp* decision tells us that, in applying this test, the focus is on the *purpose* of the law or program, not its *effects*, but the court will not merely accept bald declarations that a program is ameliorative.[119] The law or program must be *genuinely* ameliorative. However, the ameliorative purpose need not be the sole objective of the law or program; the program could have other purposes. The key, the Court explains, is to ask whether it was rational for the state to conclude that the means chosen to reach the ameliorative goal would contribute to the ameliorative purpose.[120] Elsewhere in *Kapp*, the Court describes this as follows: "s. 15(2) precludes from s. 15(1) review distinctions made on enumerated and analogous grounds that *serve and are necessary* to the ameliorative purpose."[121]

[55] The rationale for this new approach, the Court explains in *Kapp*, is not to create an exception to substantive equality,[122] but rather to support a full expression of equality, recognizing that s. 15 does not mean identical treatment and that identical treatment may frequently produce serious inequality. Thus, the focus of s. 15(2) is to enable governments to pro-actively combat discrimination by adopting programs designed to ameliorate the situation of a disadvantaged group and this will inevitably exclude individuals from other groups. The independent force given to s. 15(2) is intended to give governments leeway to adopt innovative and equality-enhancing programs.[123]

[56] Applying this new approach to s. 15(2) to the facts in *Kapp*, the majority concluded that although the pilot sales program had several objectives, the government was hoping to redress the social and economic disadvantage of the targeted bands, and the program was therefore ameliorative and targeted a disadvantaged group based on enumerated or analogous grounds. The means chosen to achieve the purpose—giving special fishing privileges to Aboriginal communities (and excluding non-Aboriginal fishers)—was found to be rationally related to serving that purpose.[124]

[57] It is noteworthy that in a concurrent set of reasons, Bastarache J., opted to address the case from the lens of s. 25 instead of s. 15(2). It would appear that the judge's main objection to using s. 15(2) in this case was his disagreement that the primary purpose of the pilot project was ameliorative, preferring to see it as primarily aimed at management of the fishery.[125] Bastarache J. articulates a framework for the application of s. 25 to a number of laws and programs aimed at protecting the distinctive collective and cultural identity of Aboriginal people,[126] and he does not limit such protection to programs arising directly from s. 35 of the *Constitution Act, 1982*.[127] The judge describes s. 25 as operating as a shield preventing such rights from attacks by non-Aboriginals. However, despite this expansive approach to s. 25, Bastarache J. was careful to identify that there were certain limits on this shield, including claims of underinclusion. In such cases, the judge suggests that only a full s. 15 and s. 1 analysis would be appropriate:

> There is no reason to believe that s. 25 has taken Aboriginals out of the *Charter* protection scheme. One aboriginal group can ask to be given the same benefit as another aboriginal group under s. 15(1). … Macklem, at pp. 225-27, suggests that the courts should distinguish between external and internal restrictions on aboriginal laws that clash with the *Charter* and that in the case of internal restrictions, aboriginal communities should be required to satisfy the *Oakes* test to resist a challenge.[128]

The majority in *Kapp* did not similarly address how its new expanded approach to s. 15(2) would address claims of underinclusion. This would occur in *Cunningham*.

[58] The fact situation in *Cunningham* was quite different from that in *Kapp*. It involved members of the Cunningham family who had been long-time members of the Peavine Métis Settlement in Alberta. Alberta created settlements for Métis in the province in the early 20th century to respond to the fact that there large numbers of Métis people living in the province who were marginalized and required assistance, and for whom the federal government denied having any jurisdiction over. Early legislation creating the settlements was replaced following negotiations between Métis leaders and the province in the 1990s, resulting in the *Métis Settlement* ("*MSA*").[129]

[59] The case was focused on provisions in the *MSA* and its regulations that terminated the Métis status of settlement members who gained Indian status under the *Indian Act* after November 1, 1990. (Persons who had gained Indian status prior to this date were allowed to be members under grandfathering provisions.) Due to the marrying out rule in the *Indian Act*, the mother of the Cunningham family lost Indian status upon marrying the father of the Cunningham family, a Métis man. In 1985, she regained her status and her children also became eligible to apply for Indian status. Members of the Cunningham family applied for their Indian status, in particular to be eligible for benefits under Non-Insured Health Benefits (NIHB) Program offered by Health Canada (similar health benefits are not provided to the Métis by either the federal or provincial governments). However, they only gained Indian status after November 1, 1990, putting them in jeopardy of losing their entitlements under the *MSA*. Apparently, other members of the Peavine Settlement were in a similar position to the Cunninghams and this was long tolerated within the community. However, sometime in the 2000s, particular members of the then governing council of the Peavine Settlement had disagreement with members of the Cunningham family and, in

retaliation, applied for an order of *mandamus* directing the Registrar of the Settlement to remove the Cunninghams from the membership list. The Cunninghams were removed and brought a s. 15 *Charter* challenge to those sections of the *MSA* that excluded settlement members who obtained Indian status after November 1, 1990.

[60] At the trial level in 2007, Shelley J., applying the s. 15(1) *Law* analysis, concluded that the exclusion could not be said to violate the Cunninghams' human dignity.[130] The judge put much emphasis on the fact it was a personal choice of the Cunninghams to obtain their Indian status,[131] as well as on the fact that the *MSA* was the product of a partnered initiative between the Alberta Métis and the Alberta government, like the First Nation Fund in *Lovelace*.[132] She also found that the ameliorative purpose of the legislation was supported rather than undermined by the impugned provisions given that the legislative scheme entitled the governing council of the settlement to adopt policies that would allow it to accept status Indians as members in accordance with Council Policy, despite the section in the *MSA* to the contrary.[133]

[61] The Alberta Court of Appeal, now applying the Supreme Court's reformulated s. 15 framework in *Kapp*, reversed the decision of Shelly J.[134] On applying the s. 15(2) test, the court found the *MSA* to have an overall ameliorative purpose to aid the enhancement and preservation of the Métis culture and identity, and enable a degree of Métis self-government.[135] It targeted a disadvantaged group identified by an enumerated or analogous ground. However, on the question of whether it was rational for the state to conclude that the means chosen to reach the ameliorative goal would contribute to the ameliorative purpose, the Court of Appeal found that the impugned provisions of the *MSA* were arbitrary as they stood to potentially exclude Métis settlement members who had identified with and lived Métis culture for a long time.[136] In that light, the Court of Appeal could not see how the exclusion of such members had a rational connection to the enhancement and preservation of Métis culture and self-governance.[137] There was no evidence showing that significant number of status Indians without an historic connection to the Métis settlement would attempt to gain Métis status if the exclusion were struck. Therefore, the argument that the impugned provisions furthered Métis self-governance by preventing a dilution of resources available under the *MSA* was not supported.[138] Second, the Court of Appeal noted that if being Métis requires Aboriginal roots, and if the Aboriginal roots that make an individual eligible to acquire Indian status are the same Aboriginal roots that qualify him or her as Métis, removal of members because of their Indian status seems to be at odds with Métis culture.[139] For these reasons, the Court of Appeal concluded that s. 15(2) was not engaged and proceeded to a full s. 15(1) inquiry.

[62] Under s. 15(1), the Court of Appeal concluded that the impugned provisions were discriminatory, in light of the severe impacts the exclusion had on the Cunninghams. They were deprived of their right to meaningfully participate in the community and of other benefits, such as housing, transportations services, employment, recreation, land rights, identity and voting.[140] The fact that the Cunninghams made a choice to obtain Indian status was irrelevant to the analysis.[141] The Court of Appeal also found that the appellants were vulnerable to both unique disadvantage and stereotyping by being seen by some as being "less Métis" for having Indian status, which was perpetuated by the impugned provisions.[142] On the s. 1 analysis, the Court of Appeal found that the impugned provisions were not rationally connected to the underlying objectives of the *MSA* and, furthermore, the impacts of those provisions were not minimally impairing.[143] It was argued

that the provisions were saved by s. 25, however, applying the approach of Bastarache J. in *Kapp*, the Court of Appeal easily dismissed this argument relying on his point that s. 25 was not intended to be used as a shield between Aboriginal groups to block claims of underinclusion.[144]

[63] The Supreme Court of Canada reversed the decision of the Alberta Court of Appeal, specifically finding that the Court erred in its application of the s. 15(2) test. The Court makes it clear that the Court of Appeal went too far in its s. 15(2) analysis in scrutinizing impacts. At the outset of its analysis, the Court emphasizes the importance of giving significant deference to governments to encourage development of ameliorative programs:

> The purpose of s. 15(2) is to save ameliorative programs from the charge of "reverse discrimination". Ameliorative programs function by targeting specific disadvantaged groups for benefits, while excluding others. At the time the *Charter* was being drafted, affirmative action programs were being challenged in the United States as discriminatory — a phenomenon sometimes called reverse discrimination. The underlying rationale of s. 15(2) is that governments should be permitted to target subsets of disadvantaged people on the basis of personal characteristics, while excluding others. It recognizes that governments may have particular goals related to advancing or improving the situation of particular subsets of groups. Section 15(2) affirms that governments may not be able to help all members of a disadvantaged group at the same time, and should be permitted to set priorities. If governments are obliged to benefit all disadvantaged people (or all subsets of disadvantaged people) equally, they may be precluded from using targeted programs to achieve specific goals relating to specific groups. The cost of identical treatment for all would be loss of real opportunities to lessen disadvantage and prejudice.[145]

[64] Following this, the Court went on to clarify that when it stated in *Kapp* that the impugned measures must be "necessary" to the ameliorative purpose, what it meant was that "the impugned distinction *in a general sense serves or advances the object* of the program."[146] In this regard, the government was not required to furnish proof that the exclusion was essential to the realizing the object of the ameliorative program.[147] For a government to fail the s. 15(2) test, the Court suggests, it must be shown that the government adopted "*irrational means*" to pursue its ameliorative goal.[148] The Court does not provide additional guidance on what this would look like, suggesting this can be refined in future cases.[149] This extremely deferential standard, the Court explains is necessary in order to "permit governments to assist one group without being paralyzed by the necessity to assist all…".[150]

[65] The Court then suggests this approach is consistent with *Lovelace*,[151] and goes on to state that s. 15(2) applies even when the claimant is an equally disadvantaged Aboriginal group:

> Despite the shared disadvantage of the included and excluded groups, this Court in *Lovelace* concluded that social and historic differences between the two groups, as well as realization of the object of the program, supported the distinction between on-reserve and off-reserve Indians and Métis. The exclusion from the casino program of Aboriginal communities not benefitting from band status under the *Indian Act* was thus upheld.

> This brings us to the following propositions. Ameliorative programs, by their nature, confer benefits on one group that are not conferred on others. These distinctions are generally protected if they serve or advance the object of the program, thus promoting substantive equality. This is so even where the included and excluded groups are aboriginals who share a similar history of disadvantage and marginalization: *Lovelace*.[152]

Applying its clarification of s. 15(2) to the facts, first the Court confirmed that even though it did not result in the direct conferral of benefits onto individuals, the *MSA* was a special ameliorative program designed "to enhance Métis identity, culture and self-government through establishment of a Métis land base."[153] In its view, the exclusion of status Indians from the definition of Métis under the *MSA* advanced the objectives of the program. The historic distinction between Métis and Indian culture supports drawing lines between who is Indian and who is Métis and, without the distinction, achieving the object of the program would be more difficult.[154] The Court of Appeal erred in demanding positive proof that excluding Indians would have a detrimental impact on the community.[155]

[66] By accepting that the inclusion of Métis with Indian status could be detrimental to the community and was therefore a rational basis for exclusion, the decision in *Cunningham* is reminiscent of the majority decision in *Lavell*. The Court in *Lavell* suggested that striking out the marrying out rule from the *Indian Act* would erode from the special rights regime thereunder. Similarly, the Supreme Court in *Cunningham* seems to have accepted that striking out the exclusion of Métis with Indian status from the *MSA* could erode the special regime thereunder as well. But as I argue above, there is no direct connection between rectifying historic underinclusion claims and eroding special rights regimes. It is a resource issue—*a separate issue from erosion of a collective regime*—and such issues can often be overstated by governments. The Alberta Court of Appeal appears to have agreed with this, being quite skeptical that allowing Métis with Indian status in the Settlement would jeopardize the objects of the *MSA* and it therefore required proof by the government to support this contention, of which there was none. However, the Supreme Court of Canada dispensed with this requirement of proof, preferring an extremely deferential approach to government purpose.

[67] The reasoning in *Cunningham* also lacks nuance in many ways. It glosses over the large overlap that has historically existed between Métis and Indian identity. It also takes for granted that the exclusion of Indians was the choice of the Métis because the *MSA* was the product of negotiation between the provincial government and Métis. But there was no direct evidence of this. Often Aboriginal groups in negotiations with governments over membership are pressured by governments to be more exclusionary than they might want to be due to concerns about resource limitations. The Court also does not scrutinize the fact that the exclusion it is sanctioning under s. 15(2) serves to exacerbate the impacts of the infamous *Indian Act* marrying out rule. In this regard, it seems excessively harsh to deny the Cunninghams their right to live in the settlement they lived in all their lives because of their wish to regain a right that their mother was unfairly deprived of.

[68] Finally, the decision in *Cunningham* again resembles the *Lavell* decision because, in the way that *Lavell* effectively represented the closing of the door on the *Canadian Bill of Rights* for Aboriginal equality claims, I fear that *Cunningham* has similarly closed the door on the *Charter*.[156] Unless the Court modifies or clarifies its approach to s. 15(2), I believe that *Cunningham* will

operate to block most if not all underinclusion claims brought by Aboriginal claimants. I also fear that it may block even some claims of differential treatment vis-à-vis non-Aboriginal given the general message in *Cunningham* that targeted ameliorative programs ought to be shown significant deference, paired with tendency of the courts to characterize nearly all programs targeted at Aboriginal as ameliorative. I elaborate further on these points in the final section of this paper.

(e) Differential treatment relative to non-Aboriginal people

[69] Outside of underinclusion claims, there have been three s. 15 claims involving Aboriginal claimants challenging differential treatment relative to non-Aboriginal people, the first two involving formal equality claims, and the last involving an allegation of adverse effects discrimination.

[70] The first decision is *Bear v. Canada (Attorney General)*, involving a challenge to the exclusion of Indians from the Canada Pension Plan ("CPP") from 1966 to 1988.[157] The federal government's rationale to exclude Indians from the CPP was based on a few reasons. First, it considered it essential as an administrative matter to link CPP contributions to taxable income and most income earned on reserve is not taxable. There was also no consensus amongst First Nations that the CPP should apply to them. While the applications judge found this exclusion to constitute discrimination, the Federal Court of Appeal overturned this decision. The Court of Appeal concluded there was no discrimination because exclusion from the CPP is not necessarily a disadvantage, that Indians earning income on-reserve were not historically disadvantaged compared to other working Canadians, and that the purpose of the law was not intended to demean or exclude. In conclusion, the Court of Appeal found that the exclusion did not offend the human dignity of the claimant.

[71] Next is the Supreme Court of Canada's decision in *Ermineskin Indian Band & Nation v. Canada*.[158] In this case, two First Nation bands challenged ss. 61 to 68 of the *Indian Act*, which prohibited the Crown from investing their royalty monies and required instead the Crown to pay bands a specified rate of interest on those royalties while holding the money in trust for the bands. The bands argued that by precluding investment of their funds, the law discriminated against them relative to non-Indians whose property is held in trust by the Crown. Rothstein J. for the Court emphasized that although there was a distinction here based on an enumerated or analogous ground, not all distinctions are discriminatory.[159] The relevant question to be asked was whether the provisions precluding investment of Indian moneys by the Crown perpetuated prejudice or stereotyping.[160] This did not occur in the circumstances, according to Rothstein J., because the management of Indian moneys is a unique situation. Although the Crown was precluding from investing the funds, the monies remained available for the Indian Band to spend or, alternatively, invest themselves or through a trust. The scheme therefore recognized the goal of promoting aboriginal self-determination and autonomy.

[72] An important nuance that the decision appears to give short shrift to is the fact that, in order for the Band to obtain the funds to spend or invest on their own, they were required to satisfy the Crown that the release of funds will be in the best interests of the Bands. One of the Bands in the case made several request to the Crown to release funds to a trust so that it could invest the royalties, and these requests were repeatedly refused because the Band failed to meet conditions

imposed by Aboriginal Affairs. In my view, this fact put the assertion that the scheme promoted Band autonomy on shaky ground. If the Band could effectively not invest the funds, and nor could the Crown, how can it be said the Bands were not at a disadvantage relative to non-Indians? The Court's only comment in this regard was that the requirement on the bands to satisfy the Crown that a transfer was in their best interests was consistent with the Crown's obligations as a fiduciary with respect to royalties.[161]

[73] The final case is *Native Council of Nova Scotia v. Canada (Attorney General)*, involving a claim of adverse differential treatment.[162] The claim involved a challenge, brought by Chiefs of organizations representing the off-reserve in the Maritimes, to the federal government's decision to make the 2011 Census voluntary, as opposed to mandatory. They alleged that the change would compromise the quality, accuracy, reliability and comparability of data on Aboriginal peoples, particularly off-reserve and non-status Aboriginal peoples. They argued that less Aboriginal people would fill out the survey if it was voluntary, and those who would fill it in would tend to be more educated and more well off, thereby skewing the data. This, in turn, would have an adverse impact on Aboriginal people and would impact the provision of programming and services provided to these communities, since statistical data is often used to inform public policy decisions on programming.[163] The Federal Court concluded that the claimants failed to establish the change had a differential impact on Aboriginal people any more than it would have an impact on all Canadian. The alleged decline in data would affect all Canadians, not just Aboriginal people.[164] Further, the adverse effects would be the product of individual choice not to fill out the census, not by result of government action.[165]

[74] *Native Council* is the first adverse effects discrimination claim relating to Aboriginal people to be brought under the *Charter*. It is not an encouraging first case. While the Federal Court was correct to suggest all Canadian would be impacted by the move to the voluntary census, it failed to truly appreciate, given the extent to which Aboriginal people are marginalized in this county, how they stood to be affect *more than others* by the lack of reliable census data informing future policy decisions and programming concerning them.

4. The Canadian Human Rights Act – 2008 to the present

[75] As noted above, s. 67 of the *Canadian Human Rights Act*, which precluded claims based on the *Indian Act* since 1977 was repealed on June 18 2008.[166] Since the repeal of the provision there has been over 500 complaints referred to the Canadian Human Rights Commission ("the Commission") by Aboriginal claimants.[167] Commission data indicates that 167 of these complaints were service-related complaints against the federal government, and that the majority of these were directed at the department of Aboriginal Affairs.[168] The data also indicates that 24 of these complaints were referred to the Canadian Human Rights Tribunal (the "Tribunal").[169]

[76] To date, only a very few of the complaints referred to the Tribunal have been decided on their merits. One of these has been the decision of *Louie v. Canada (Indian and Northern Affairs)*.[170] In this case, a band member having individual possession of a lot of reserve land by way of a Certificate of Possession was required to obtain approval of the Department of Aboriginal Affairs for a lease arrangement he sought to enter with a non-Aboriginal man, as required under s. 58(3) of the *Indian Act*. The lease saw the Band member lease his lands for a long period of time

for a nominal amount to the non-Aboriginal man. However, this was part of a broader economic venture between the pair, where the non-Aboriginal man would finance the building of the house on the lot, which would be rented, and the pair would share the profits. Aboriginal Affairs refused to approve the lease because it did not conform to the type of leases recognized by Department's Land Management Manual.

[77] Louis made a complaint to the Commission, alleging that the denial was paternalistic and the Department should not interfere with his right to decide what to do with his Certificate of Possession lands. The Tribunal agreed finding that the Department had discriminated against Louis on the basis of race. It further stated that the approval under s. 58(3) of the *Indian Act* had to recognize and accept that status Indians as "personally responsible Canadians capable of making their own decision about benefits from leasing their lands."[171] The Tribunal expressly rejected the Department's explanation that it needed to review the lease critically in its capacity as a fiduciary for the band, specifically concluding that s. 58(3) did not give rise to any fiduciary obligations on the part of the Crown.[172] It has been argued that the *Louis* decision was in error on this last point, that Canada indeed has a fiduciary duty to protect band land, and the decision stands to have broad implications for the administration of the *Indian Act* if that finding is followed in future cases.[173] *Louis* is a formal equality claim and clearly raises the tension, referenced earlier, between individual rights protection and the prospect of eroding collective rights.

[78] Next, a number of underinclusion complaints alleging discrimination in the status provisions of the *Indian Act* have gone to the Tribunal. Two were dismissed on preliminary motions. In *Matson et al. v. Indian and Northern Affairs Canada* and *Andrews et al. v. Indian and Northern Affairs Canada*, both involving challenges to the second-generation cut-off rule, both Tribunals dismissed the claims on the basis that complaints are challenges to legislation and nothing else, and therefore should be the subject to a *Charter* complaint, as opposed to a complaint under the *Canadian Human Rights Act*.[174] Attempts were made by the complainants and the Commission in these cases to argue that such an approach was inconsistent with a broad and liberal approach to human rights legislation and would substantially reduce the impact of the repeal of s. 67, largely shutting the door to human rights by Aboriginal claimants under the *CHRA*.[175] These arguments were rejected, the Tribunal relying heavily on a Federal Court of Appeal decision from 2012 (a non-Aboriginal case) holding that challenges to legislation and nothing else must be pursuant to the *Charter* and not the *CHRA*.[176] Both Tribunal decisions were subject to judicial review and heard by the Federal Court on August 28, 2014. Pending the outcome of those judicial reviews, the Tribunal has adjourned *sine dine* the hearing of two other underinclusion complaints challenging the registration provisions in the *Indian Act*.[177]

[79] One *CHRA* challenge to the *Indian Act* status rules was heard on its merits and decided in favour of the complainant. In *Beattie v. Aboriginal Affairs and Northern Development Canada*, the complainant was successful in proving that the Registrar of Indian Affairs' failure to register her as a s. 6(1)(c) instead of a s. 6(1)(f) Indian constituted discrimination.[178] The Tribunal distinguished the case from *Matson* and related cases, because it involved a challenged to the exercise of the Registrar's discretion of how to register the claimant, whereas *Matson* and the others cases could be characterized as challenges to legislation and nothing else.[179]

[80] Moving to adverse discrimination complaints before the Tribunal, the most prominent of these is the *First Nations Child and Family Caring Society of Canada and Assembly of First Nations*' complaint against Canada (Department of Aboriginal Affairs) alleging discrimination under s. 5 of the *Canadian Human Rights* due to inequitable levels of child welfare funding provided to First Nation children and families on reserve (the "*Caring Society* case").[180] The complaint states that First Nations children living on reserves do not receive child welfare services equivalent to the level provided by provincial and territorial governments, which has translated into status Indian children being drastically over represented in the child welfare system. The complaint provides statistics supporting this, alleging that 23,000 to 28,000 Aboriginal Children are currently in care and this means that there are three times as many Aboriginal children in state care today than there were at the height of the residential school operations in the late 1940s'.

[81] If the case is successful, the repercussions could be substantial. If discrimination is found, Canada would be ordered to significantly increase its funding for child welfare services in order to bring it up to par with the level of services provided in the provinces. As noted earlier, it has long been argued on behalf of First Nations that people on reserve received less funding for a number of essential services. In fact, there are a number of cases that are at the Tribunal stage, but have yet to be heard on their merits that similarly allege inadequate funding and services in other areas of essential services, including education funding on reserve[181] and policing on reserve.[182]

[82] Despite its apparent significance, the *Caring Society* case was initially struck on a preliminary basis by the Tribunal in March 2011.[183] The Tribunal found it was unable to compare Canada's conduct to the provinces, stating, "In order to find that *adverse differentiation* exists, one has to compare the experience of the alleged victims with that of someone else receiving those same services from the same provider. How else can one experience *adverse differentiation*?"[184] The consequence to Tribunal's ruling would have meant that no adverse effects challenge to the federal government provisions of services to First Nations could succeed, given that Indians are the *only* group that the federal government provides essential services to and there would be no other group for the sake of comparison. It would have meant closing on the door on these types of claims.

[83] Fortunately, on judicial review to the Federal Court, in extremely detailed reasons, MacTavish J. overturned the Tribunal's ruling, finding its comparator analysis to be flawed. She concluded that the law does not require a mirroring comparator in every case. Comparators can be of assistance in providing discrimination, but they are not part of the test for discrimination.[185] Her decision was upheld on appeal.[186] Consequently, the *Child Welfare* decision was remitted to the Tribunal, with a differently constituted panel and is still in progress.[187]

[84] Although the forum of the Canadian Human Rights Tribunal holds out significant promise to address differential treatment by the federal government based on adverse effects, the *CHRA* has limitations. In another case alleging inadequate federal funding, the claim was dismissed on the preliminary basis that it could not be linked to any of the listed grounds of discrimination. In *Mohawks of the Bay of Quinte v. Canada (Attorney General)*, the applicants, representing four of the five largest First Nation in Ontario, alleged that the funding formula for core programs and services used by Aboriginal Affairs discriminated against them by differentiating adversely based on band size. The claimants provided evidence that they received less funding per capita than

small bands. However, the Commission rejected the complaint on the basis that Band size was not a listed prohibited ground of discrimination, despite the Applicants' attempts to link band size to the ground of ethnic origin. The dismissal was upheld by the Federal Court.[188]

[85] This case illustrates one of the drawbacks of the *CHRA*, particularly in the Aboriginal context; the closed list of grounds in the *CHRA* can limit the type of complaints that can be made. At least in theory, *Charter* provides greater flexibility in this regard with the opportunity to allege analogous grounds.[189] In addition to band size, the Canada Human Rights Commission takes the position that off-reserve residency and political belief are not listed grounds under the *CHRA* and a complaint on such grounds would not be accepted if they could not be linked to other grounds such as sex, family or disability.[190]

3. Taking stock: what can be done to keep the door open?

[86] The above review shows us that although the door to Aboriginal equality claims is perhaps not explicitly shut as it was in the past, there remain significant obstacles to mounting successful equality claims by Aboriginal people against the federal or provincial governments. In the remainder of this paper, I identify eight things that can be done to help the courts and tribunals keep the door open on Aboriginal equality claims.

(1) Gain increased awareness of Aboriginal issues

[87] At a general level, there is lack of awareness about Aboriginal issues among the public, including among judges and tribunal members. How the federal jurisdiction over "Indians" has (and has not) been exercised regarding First Nations, Inuit and Métis; what is (and what is not) in the *Indian Act*; and Canada's preference not to legislative over many areas respecting First Nations and complaints of chronic underfunding in Aboriginal programming—these are largely matters unknown to a many judges and tribunal members I believe this lack of awareness contributes to judges' and tribunal members' reticence to truly engage with the complex issues they are presented with in Aboriginal equality cases. For example, in *Lovelace*, the Supreme Court largely chose to see the differences between the First Nations and the "Aboriginal non-Band communities" in that case as inherent or personal characteristics, rather than what they really were, socially and legally constructed differences based on attempts to assimilate Aboriginal peoples. This has facilitated other courts reasoning similarly, such as in *Ochapowace, Gallant* and *Gespeg*. As indicated above, I believe the reasons in *Cunningham* also failed to display sufficient nuancing of different historical and social issues at play there. I believe that more self-directed study and judicial education in these areas, as well as legal counsel attempting to educate courts in this area (which brings into play lawyers' need to gain greater aware of these issues as well), are all things that could be done to avoid shutting the door.

(2) Stop seeing underinclusion claims to programs that rely on Indian Act definitions as collateral attacks

[88] In *Lovelace*, the Court suggested that challenging programming using *Indian Act* definitions was an inappropriate "collateral" attack and that the proper recourse for claimants was

the source of the exclusion itself. This sentiment has been echoed in later cases, such as *Ochapowace, Gallant* and *Gespeg*. This raises a real access to justice issue, in my view. Instead of bringing judicial review of a federal decision to deny entrance to a program (as in *Gallant* and *Gespeg*), or motions for standing in a child welfare proceeding (as in *Ochapowace*), claimants are getting the message that they ought to have initiated a full action, seeking declaratory relief to have s. 6 of the *Indian Act*, or parts of it, declared unconstitutional. The cost and time this would cost any individual would be significantly more than a judicial review or a motion.[191] This just adds another barrier to Aboriginal claims. In reality, the courts have and do hear many claims that could be characterized as "collateral."[192] I suggest that charactering a claim as "collateral" is a handy way of dismissing the claim and avoiding delving into the real issues it raises. If courts and tribunals had a deeper understanding of these issues, perhaps this would this would happen less frequently.

(3) Do not apply s. 15(2) to Aboriginal underinclusion claims

[89] The Supreme Court of Canada's *Lovelace* decision set the tone that Aboriginal underinclusion claims would rarely be successful under the *Charter*. There was a clear message that if the program was ameliorative, even if it excluded other disadvantaged groups, establishing a s. 15(1) violation would be difficult. As challenging as the decision in *Lovelace* made it for succeeding in Aboriginal underinclusion claims, however, *Cunningham* has made it worse. With *Lovelace*, there was at least the prospect that a claimant could potentially convince a court of there being discrimination under s. 15(1). Recall that the Court in *Lovelace* made a strong affirmation in that case "that s. 15(1) scrutiny applies just as powerfully to targeted ameliorative programs" as it does to claims involving universal or general benefit schemes.[193]

[90] Now with s. 15(2) having independent force and the Court affirming its application to claims of underinclusion (although the Court in *Cunningham* never uses the word "underinclusion", but instead references "subsets" of a disadvantaged group), the prospect of an Aboriginal claimant's underinclusion claim making it to the s. 15(1) stage is now nearly impossible.[194] The effects of the exclusion on the claimant are not considered; the focus is on the purpose of the program. What constitutes an 'ameliorative purpose' is defined quite broadly. The ameliorative purpose only has to figure as one of many objectives of the program. It does not have to be the primary objective. Once it has been shown that a program targeted at an Aboriginal group has an ameliorative purpose, the only way for a claimant to avoid the equality analysis ending there and then is to show the exclusion is not rationally related to the program. This requirement went from the government having to show that the exclusion *served and was necessary* to the ameliorative purpose in *Kapp* to the claimant basically having to show that the government adopted "irrational means" to pursue its ameliorative goal in *Cunningham*. This would appear to be an extremely difficult standard for claimants to meet. Recall that the Alberta Court of Appeal in *Cunningham* went so far as to characterize the exclusion of the Cunningham family arbitrary, yet this was not sufficient at the Supreme Court to satisfy the "irrational means" test. One is left to speculate that *any* basis furnished by the government for the exclusion that accords with the purpose—even tangentially—will satisfy the irrational means test and end the s. 15 inquiry.

[91] With such a high threshold now, one questions whether decisions such as *Corbiere* and *Esquega* would even get to a s. 15(1) analysis if the government advanced a s. 15(2) argument today. Granting the right to vote under the *Indian Act* would in all likelihood be characterized as an ameliorative program.[195] In addition, voting in Band election could be said to promote, among other things, values like identity, culture and self-government—the same values that were found to be ameliorative in *Cunningham*. Assuming voting under the *Indian Act* constitutes an ameliorative program, could it be established that the exclusion of off-reserve members is an *irrational means* of achieving the above-noted values? Note that under the s. 1 analysis in *Corbiere,* the court found that the restriction on voting to on-reserve members was rationally connected to the aim of the legislation, which was to give a voice in the affairs of the reserve only to the persons most directly affected by the decisions of the band council.[196] Under the new s. 15(2) approach, as articulated in *Cunningham,* this would seem to end the s. 15 analysis. Full stop. Arguments on effects of the exclusion, minimal impairment and proportionality would never see the light of the day. In this way, *Cunningham* is a significant step backwards in terms of the (limited) gains Aboriginal people have made under the *Charter*. The application of s. 15(2) to Aboriginal underinclusion claims will deny Aboriginal people substantive equality, even *Kapp* and *Cunningham* state that s. 15(2) was about furthering substantive equality.[197]

[92] I accept giving independent force to s. 15(2) can defensible in true cases involving allegations of 'reverse discrimination'.[198] The Court was in wrong in *Cunningham*, however, to extend s. 15(2) to claims advanced by other disadvantaged groups, particularly subsets of the targeted disadvantaged groups, who claim to be unfairly excluded from the program.[199] In such cases, a full s. 15(1) analysis ought to occur. Bastarache J. recognized this in his treatment of s. 25; that it could not shield Aboriginal underinclusion claims as this would "[take] Aboriginals out of the *Charter* protection scheme."[200] This is now what s. 15(2) will do.

[93] A significant problem with *Cunningham* is that the Court assimilates into the same pot those disadvantaged subsets of a targeted group who say they should be part of the group with those who challenge an ameliorative program as 'reverse discrimination' (the Saskatchewan's Queen Bench did the same thing in *Ochapowace*).[201] The Court views them as the same; all as excluded from the ameliorative program. But that is not accurate. The group that is challenging the program as 'reverse discrimination' does not want to be included in the targeted group (and therefore is not truly excluded). The group does not approve the targeting in the first place and is challenging the *existence* of the program. Conceptually, that group stands in stark contrast to the subset of the targeted group, who not only approve of the fact of the targeting, but say they should rightly be part of the targeted group (and are therefore truly excluded). In my view, s. 15(2)'s purpose should be not to protect from challenge all exclusions from ameliorative programs, but to protect from challenge the claims levelled at the existence of such programs.

[94] Some have argued that it was not the Court's intention in *Kapp* and *Cunningham* that s. 15(2) would become a broad justification for underinclusive laws, activities or programs excluding other disadvantaged groups and that the door is still ajar.[202] Smith and Black argue that, to ensure that the purpose of s. 15 is not undermined by s. 15(2), the criteria set out in *Kapp* and *Cunningham* must be applied with some rigour and the central focus must be on why it is necessary to exclude the claimant group, particularly if that group is disadvantaged. The authors suggest that the Court meant that a higher standard applied than simply ensuring the exclusion is not "irrational", and

suggest that courts must require the government to satisfy it that the exclusion of the group makes a meaningful contribution to the ameliorative program's goals, or show that the ameliorative purpose would be jeopardized if the claimants were included in the scheme.[203] This is a more positive reading of *Cunningham* than mine and, though I would be happy if Smith and Black were correct, it seems to me that the higher standard they promote is in fact the higher standard applied by the Alberta Court of Appeal in *Cunningham*, requiring the government to show why it was necessary to exclude the Cunninghams from the program, which was explicitly rejected by the Supreme Court.

[95] Perhaps the most cogent proposal is that by Jess Eisen, who proposed that the Court should return to seeing s. 15(2) as an interpretive aid, but not to s. 15(1), but instead to s. 1. She calls this the "limitations-interpretation approach."[204] Pursuant to this proposal, if and when a finding of discrimination is made under s. 15(1), s. 15(2) will be activated (where appropriate) in the context of the *Oakes* analysis under s. 1.[205] Eisen argues that this approach is in no way intended to undermine the importance of affirmative action programs, but to avoid s. 15(2) being used as a trump and to reflect the reality that discrimination is still possible even when governments pursue a laudable ameliorative objective.[206] While I believe this would be the ideal approach to s. 15(2), I remain highly skeptical that it would be embraced by the Supreme Court. The Court has been extremely reticent to place the justificatory heavy-lifting within s. 1 in s. 15 cases (as it does with other *Charter* rights, such as the fundamental freedoms), preferring to build such justification into the s. 15 analysis.

[96] In terms of alternatives that do not abandon the approach to s. 15(2) adopted in *Kapp*, Jena McGill has argued that because s. 15(2) now effectively supplants s. 1, a proportionality review similar to that undertaken in s. 1 should be expressly incorporated into the s. 15(2) framework.[207] This would require the government to demonstrate not only that the law or program has an ameliorative purpose, but *also* that the means chosen to pursue that ameliorative purpose and the established or anticipated effects of the ameliorative program are proportionate.[208] Others have argued that a return to the test proposed by the Ontario Court of Appeal in the *Lovelace* case could be a suitable alternative.[209] Unlike the Supreme Court in *Cunningham*, the Ontario Court of Appeal in *Lovelace* saw a distinction between true claims of reserve discrimination and underinclusion:

> Nonetheless, s. 15(2) does not immunize special programs from constitutional review. Even where the substance of a program is authorized by s. 15(2), some feature of it may be discriminatory and thus infringe s. 15(1). The language and history of s. 15(2) seem to militate against such challenges to s. 15(2) programs by members of socially advantaged or privileged groups. …
>
> But what of the challenge brought by the applicants in this case? The appellants are members of a disadvantaged group denied the benefit of this s. 15(2) project. Their claim is that the project is discriminatory because it is underinclusive. In assessing such a claim, we think it is important to distinguish between challenges by disadvantaged groups within the object of the program and challenges by disadvantaged groups outside the object of the program.[210]

[97] The Court of Appeal went on to suggest that a s. 15(2) program that excludes individuals or groups it was designed to benefit likely infringes s. 15(1) and would have to be justified pursuant to s. 1, whereas a claim made by a disadvantaged group outside the object of the program would be protected by s. 15(2).[211] Whether the claimant is 'inside' or 'outside' falls to characterizing the object or purpose of the program, a task which the Court of Appeal recognized was not always an easy one.[212] On the facts, the Court of Appeal concluded that the Métis and non-status groups Indians were outside the targeted group, after considering the historical record, the project's reserve base, matters of identification and political and financial accountability and the bands' interest and experience in casino gaming.[213] The problem with this approach, in my view, is that important issues of historic exclusion and discrimination, impacts, minimal impairment and proportionality get side-tracked into an analysis of how similar the excluded and included groups are. As noted by McGill, "if the assessment is reduced to a singular question of whether the included and excluded group "share a similar history of disadvantage and marginalization"… then the analysis could quickly descend into pure formalism…".[214] The exercise would almost seem to resemble trying to find mirror comparator groups, which the Court rejected in *Whitler*.[215]

[98] The approach I prefer is that proposed by the intervener, the Women's Legal Education and Action Fund (LEAF), before the Supreme Court of Canada in *Cunningham*.[216] LEAF made the argument that s. 15(2) applied to challenges to the very *fact* of having a targeted scheme (true cases of reserve discrimination), but not to challenges of underinclusion in the delineation of the targeted group.[217] It argued that underinclusion claims do not engage the protective purpose of s. 15(2), which is triggered only when the challenge to the ameliorative program is coming from a privileged group objecting to the *fact* of the targeting altogether.[218] LEAF argued that the following threshold test should be followed in order to determine whether s. 15(2) is applicable:

1) Is the scheme ameliorative within the meaning of s. 15(2)?
    - If yes, go to question 2.
    - If not, s. 15(2) is not engaged – go to s. 15(1).
2) Is the challenge to the very fact of targeting (instead of delineation of the targeted group)?
    - If challenge to the very fact of targeting, s. 15(2) is engaged – apply the two step *Kapp* test.
    - If challenge to the delineation of the targeted group, s. 15(2) is not engaged – go to s. 15(1).[219]

[99] Unfortunately, LEAF's argument were not accepted, which McGill has suggested means "the Court either failed to appreciate that *Cunningham* was not a "reverse discrimination" case, or failed to see why under-inclusiveness cases demand a different approach."[220] It is hoped that this article and others like it, which suggests how devastating the decision stands to be for certain disadvantaged groups in Canada,[221] will play a part of convincing the Court to change its mind.

[100] A final point to make on this subject is that if *Cunningham's* impact on underinclusion claims is not rectified in some future case, this will leave Aboriginal claimants with no choice but to advance their underinclusion claims under the *Canadian Human Rights Act*. There is no reported Tribunal decision suggesting that the government is attempting to use the affirmative action provision in the *CHRA* in the same way that s. 15(2) of the *Charter* can now be used.[222] However, if the *Matson* and *Andrews* Tribunal decisions are upheld on judicial review and any

subsequent appeals, this will mean that Aboriginal claimants will be precluded from directly challenging the *Indian Act's* second generation cut-off rule under the *CHRA* and will be forced to bring s. 15 *Charter* challenges in the courts and face *Cunningham*-type arguments that could well succeed. Thus, both the doors to the *CHRA* and the *Charter* would be closed to what is becoming one of the most pressing issues facing First Nations in the years to come.

(4) Avoid the application of s. 15(2) to claims differential treatment

[101] Beyond underinclusion claims, I fear that governments will attempt to use s. 15(2) to block all manner of claims of differential treatment relative to non-Aboriginal people brought by Aboriginal claimants, particularly those alleging adverse effects discrimination. I am particularly concerned about s. 15(2) being used to 'save' discrimination in claims like the *Caring Society* case, involving allegations of inadequate funding and services in the delivery of essential services by the federal government. In *Kapp*, the Court suggested that broad societal legislation would not necessarily constitute an "ameliorative program" saved by s. 15(2), stating that, "Section 15(2)'s purpose is to protect government programs targeting the conditions of a specific and identifiable disadvantaged group, *as contrasted with broad societal legislation, such as social assistance programs*."[223] It would follow, therefore, that the equivalent of social assistance programs provided on-reserves would also not be caught by s. 15(2)'s purpose. However, by virtue of the fact Aboriginal people are the *only* people the federal government provides a broad range of essential services to, these are *targeted* programs. The targeted nature of the *Elementary/Secondary Program* (even though this was the on-reserve equivalent of education funding for school boards in the province) is what led Martineau J. in the *Gespeg* case to find the program ameliorative. Therefore, there is a risk that whether the purpose of a program is to provide essential services, programs to recognize or accommodate Aboriginal and Treaty rights or other collective rights, or true affirmative action programs, any program provided specifically to an Aboriginal group will be characterized as ameliorative, opening the door to showing increased deference to the government.

[102] To build on this concern, there has been at least one post-*Kapp* decision from an appellate court suggesting that if the impugned program could characterized be ameliorative *vis-à-vis the claimant* (and not to some other disadvantaged group as was in the case in both *Kapp* and *Cunningham*), it was therefore protected by s. 15(2).[224] Such an approach is far too sweeping and effectively would insulate any benefit program from any s. 15 challenge. That cannot be correct. As argued above, it is my view that s. 15(2) was only intended to protect claims of 'reserve discrimination'. But even putting underinclusion claims to one side, s. 15(2) could not have been intended to shield complaints of discrimination by persons *within* the program. In earlier cases, the Supreme Court confirmed that once the government provides a benefit, it is obligated to do so in a non-discriminatory manner.[225]

(5) Strive to achieve the appropriate balance between individual and collective rights schemes

[103] As mentioned earlier, formal equality claims by Aboriginal claimants involving unique rights regime designed to protect certain collective interests of First Nations raises tensions between appropriate balancing between individual and collective rights. Under the *Charter*, the

courts have taken a cautious approach, as seen in *Bear* and *Ermineskin,* not to overly scrutinize differential treatment within a special regime designed for First Nations. Some would argue that the courts have taken an overly cautious approach, by deferring too readily to the government's design and implementation of the scheme without asking whether the proper balance had been reached.

[104] The converse of this, however, is the decision in the *Louie* case. Some have suggested that, in its zeal to find discrimination against Louie by Aboriginal Affairs for not being treated identically to land owners off-reserve, the Tribunal went too far by stating that Aboriginal Affairs did not have a fiduciary duty to the Band to ensure appropriate use of reserve land and stands to erode the protections for reserve land in the *Indian Act.* [226] The decision raises fear that the *CHRA* will be used as a tool that could potential dismantle important collective rights of First Nations. This signals the importance of courts and tribunals appreciate the nature and importance of collective rights regimes.

(6) Do not confuse underinclusion claims with attacks on collective rights schemes

[105] In both *Lavell* and *Cunningham*, the Supreme Court was prepared to accept the suggestion that finding underinclusion in a scheme designed to protect and preserve the collective rights of Aboriginal people (the *Indian Act* in the former case and the *Métis Settlement Act* in the latter case) would somehow result in the scheme being eroded or jeopardized. Letting more people into the scheme has no *direct* impact on the laws of the scheme. It is not like the *Louie* case, where an aspect of the scheme itself is ruled discriminatory and government may no longer follow it. *That* can result in the erosion of the scheme. But the argument that by allowing more people in will jeopardize the scheme, is, in reality, a *slippery slope* argument. Its logic is that these additional people will drain off the resources supporting the scheme leading to its demise. But slippery slope arguments are to be approached with extreme caution, as they are often overstated, and should be supported by clear evidence supporting the alleged impacts on resources. Further, the fact that government will have to expend resources to remedy discrimination is not an excuse to do nothing.[227]

(7) Avoid being overly deferential to the federal and provincial governments

[106] This recommendation is captured in some of the other recommendations above, however, it is worth pointing out the disparity between the success rates of Aboriginal equality claims against federal and provincial governments *as compared to* the success rates of Aboriginal equality claims against Aboriginal governments. Of the 18 cases discussed in this paper that were decided on their merits[228] (I have omitted the three human rights complaints dismissed on a preliminary basis[229]), the success rate is about 33% (6 out of 18). This compares to 5 out of 8 s.15 *Charter* claims brought by Aboriginal claimants against Aboriginal governments that were successful, resulting in a success rate of about 63%.[230] The fact that the success rate of claims against Aboriginal governments versus non-Aboriginal governments is almost twice as high gives one pause. Although each case is decided on its own facts, it raises the prospect of a double-standard; that the courts are more willing to intervene in cases involving Aboriginal as opposed to non-Aboriginal governments.

(8) Apply the listed grounds in the CHRA in a broad and liberal way

[107] As demonstrated in the *Mohawks of the Bay of Quinte v. Canada* case, where there is a sub-group of an Aboriginal group challenging differential treatment by comparison to another Aboriginal group, it can be difficult to link the basis of the exclusion to a listed ground. Where the distinction is based on Aboriginal origin in combination with some other factor not specifically listed in the *CHRA*, such as band size, residence off-reserve, or political belief, this presents a problem for grounding the *CHRA* challenge.

[108] Aboriginal advocacy groups have raised the issue that the listed grounds in *CHRA* are too narrow on their face and seem to preclude raising several important personal characteristics that are relevant to Aboriginal people, such as being a "Bill C-31 Indian", a "non-status Indian", and an "off-reserve Indian", etc.[231] However, the interpretation of the listed grounds by the Tribunal in some cases to date indicates that some of these characteristics can be encompassed within the listed grounds.[232] Further, it has been argued, based on the interpretive principle endorsed by the Supreme Court in *Brooks v. Canada Safeway Ltd.*,[233] that if "national or ethnic origin" includes "Aboriginal origin" then any subset of Aboriginal identity that has been recognized as a personal characteristic, such as "status Indian", "non-status Indian" or "off-reserve Indian", is included in this listed ground.[234] On this basis, it has been argued that the Canadian Human Rights Commission should formally adopt this as its position on the interpretation of "ethnic and national origin" vis-à-vis Aboriginal claims by publishing guidelines to this effect under its Section 27(2) guideline-making power.[235]

[109] Failing this, it has been argued that Parliament should amend the *CHRA* to reflect the additional grounds that apply in the Aboriginal context, in particular "Aboriginal residency." It has been further argued that the government's failure to do so could be challenged along similar lines to the successful challenge to underinclusion in Alberta's human rights legislation of the ground of sexual orientation in *Vriend v. Alberta*.[236] The irony, today, however, is that such a claim would have an uphill battle in fending on a *Cunningham* s. 15(2) argument.

Conclusion

[110] The story of Aboriginal peoples' attempts to have their equality claims against the federal and provincial governments heard before the courts and human rights tribunals is one characterized by a great many obstacles, perhaps more than any other disadvantaged group in Canada. No other disadvantaged group in Canada, in the last 50 years, has faced a law like section 67 of the *Canadian Human Rights Act* that actually prohibited claims against the law that is the largest source of discrimination for many Aboriginal people—the *Indian Act*—for 30 years. Although no similar explicit bans exist within the *Canadian Bill of Rights* and the *Charter*, court decisions interpreting the equality guarantees in both documents, at different times, have made challenges to the *Indian Act* and other significant sources of discrimination to Aboriginal people *effectively* out of bounds. The cases show not just one obstacle at any one time, but a multitude of problems preventing courts and tribunal members from truly grappling with the complaints before them.

[111] My review of the cases has led me to the conclusion that Aboriginal peoples in Canada are long overdue the opportunity to have their equality complaints heard on the merits, by decision-

makers who truly appreciate the historical facts, legal and jurisdiction issue and sociological phenomenon that must be understood to properly adjudicate these claims. These problems must be addressed so that the Aboriginal peoples can have a fair shot at having the very pressing and complex discrimination issues they face dealt with; so that the door to having their equality complaints dealt with is seen to be open.

[112] Currently, the Supreme Court of Canada's interpretation of s. 15(2) of the *Charter*, following its decisions in *Kapp* and *Cunningham*, threatens to be one of the most significant challenges to advancing Aboriginal equality claims against governments. This is so not only for Aboriginal underinclusion claims (which to date have been the majority equality claims advanced by Aboriginal people), but also for Aboriginal claims of differential treatment relative to non-Aboriginal people, including some very significant adverse effects claims involving the provision of inadequate funding and services to First Nations by the federal government. If the Supreme Court does not revisit its decision in *Cunningham* to clarify or modify the application of s. 15(2), this threatens to largely shut the door on Aboriginal equality claims under the *Charter*. Aboriginal people will be able to bring discrimination complaints under the *CHRA*, however, decisions from the Tribunal, currently under judicial review, may force Aboriginal people to bring some of their most pressing discrimination under the *Charter*, where such claims stand to be blocked by the decision in *Cunningham*. The close list of grounds in the *CHRA* also poses challenges to Aboriginal claims.

[113] It is hoped that this paper, detailing the challenging faced by Aboriginal people in advancing equality claims against governments, will assist in having these obstacles addressed.

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[1] *The Constitution Act, 1982, Schedule B to the Canada Act 1982 (UK),* 1982, c 11, s. 35.
[2] The works that I am aware of are: V. Savino, "Off-Reserve Aboriginal People and the Charter: Beyond Corbiere" in *Aboriginal Rights Litigation* (LexisNexis, 2003), Chapter 14; S. Grammond, "Disentangling "Race" and Indigenous Status: The Role of Ethnicity" (2008), 33 Queen LJ 487; S. Grammond, "Discrimination in the Rules of Indian Status and McIvor Case" (2009) ESCR-Netl S.E. Hamill, "McIvor v Canada and the 2010 Amendments to the Indian Act: A Half-Hearted Remedy to Historical Injustice" (2013) Can. Con. L. Forum 75; M. Ebert, "McIvor: Justice Delayed—Again" (2010) 9 Indigenous LJ 15; I. Peach, "Section 15 of the *Canadian Charter of Rights and Freedoms* and the Future of Federal Regulation of Indian Status", (2012) 45 UBC L Rev 103.
[3] This last category, claims against Aboriginal governments, has generated a significant amount of its own case law, and raises a whole host of complex issues, not to least of which is tension between individual and collective rights, Indigenous laws and customs and self-determination, all of which are beyond the scope of this paper. See J. Woodward, *Native Law* (loose-leaf), Chapter 6, "Citizenship and Civil Rights" at 6§480.
[4] *The Constitution Act*, 1867, 30 & 31 Vict, c 3, s. 91(24).
[5] *Ibid.*, at s. 91(25).
[6] *Indian Act*, SC 1876, c 18. The antecedent to the *Indian Act* passed by Parliament, in place from 1869 to 1876, was *An Act for the gradual enfranchisement of Indians, the better management of Indian Affairs, and to extend the provisions of the Act 31st Victoria, Chapter 42*, SC 1869, c. 6 (32-33 Vict.).
[7] See *Indian Act*, SC 1951, c 29.
[8] *An Act to Amend the Indian Act*, SC 1985, c 27 (Bill C-31) and Bill C-3: *Gender Equity in Indian Registration Act*, SC 2010, c 18.
[9] Woodward, *supra*, at 6§ 109 and 6§110.
[10] *Indian Act*, RSC 1985 c I-5, ss. 5-14.
[11] *Ibid.*, ss. 18-41, and 53-60.
[12] *Ibid.*, ss. 42-52.
[13] *Ibid.*, ss. 87 and 89-90.

[14] *Ibid.*, ss. 74-80.
[15] *Ibid.*, ss. 81-86.
[16] *Ibid.*, ss. 114-122. On the subject of education, it is to be noted the laws in the *Indian Act* regarding schools date back to the residential school era and do not regulate the provision of education services on reserve today.
[17] *Indian Act, supra*, s. 2.
[18] See *First Nations Land Management Act*, SC 1999, c 24, *First Nations Fiscal Management Act*, SC 2005, c 9, *First Nations Financial Transparency Act*, SC 2013, c 7, *First Nations Goods and Services Tax Act*, SC 2003, c 15, s 67, and *First Nations Oil and Gas and Moneys Management Act*, SC 2005, c 48.
[19] See the *1965 Memorandum of Agreement Respecting Welfare Programs for Indians* between the Government of Canada and the Government of Ontario, which instituted a costs sharing arrangement respecting the application of provincial welfare laws to Indian reserves in the province.
[20] Space constraints prevent me from fully elaborating on the question of whether First Nations could pass their own laws to address these gaps. Although much more could be said on this subject, the short answer is that, even assuming First Nations have the power to pass such laws (either under the *Indian Act*, *supra* or pursuant to inherent jurisdiction), the biggest barrier to enacting such laws is the lack of resources available to First Nations to establish and maintain the structures necessary to implement such laws. The vast majority of First Nations simply do not have the funds to create and maintain the infrastructure needed to run programs and services on their own. This effectively precludes First Nations from attempting to resolve the problems of lack of laws on reserve on their own.
[21] See *Department of Indian Affairs and Northern Development Act*, RSC 1985, c I-6, s. 4(a).
[22] See Indian and Northern Affairs Canada Social Policy and Programs Branch, "Effective of Program Delivery: Regional Review of the Income Assistance, National Child Benefit Reinvestment and Assisted Living Social Development Programs" (March 2006), p. 8.
[23] Office of the Auditor General of Canada, *Report of the Auditor General of Canada to the House of Commons* (1994), Vol. 14, Chapter 23, p. 14-15; *Status Report of the Auditor General of Canada to the House of Commons* (2011), Chapter 4, "Programs for First Nations on Reserve"; *Status Report of the Auditor General of Canada to the House of Commons*, Spring 2014, Chapter 5, "First Nations Policing Program—Public Safety Canada", see pp. 5-6.
[24] *Status Report of the Auditor General of Canada to the House of Commons* (2011), *ibid.*, p. 5.
[25] Human Rights Council, *Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya – Addendum – The situation of indigenous peoples in Canada*, 7 May 2014 (Advance Unedited Version), A/HRC/27/52/Add.2, p. 7.
[26] *Constitution Act 1982, supra*, s. 35(2).
[27] *Reference re: British North America Act, 1867 (U.K.), s. 91*, [1939] S.C.R. 104 (*Re Eskimo Reference*)
[28] *Canada (Indian Affairs) v. Daniels*, 2014 FCA 101, currently under appeal to the Supreme Court of Canada.
[29] See, for example, the NunatuKavut Nation : see http://www.nunatukavut.ca/home/.
[30] See *Metis Settlements Act*, RSA 2000; and *Métis Act*, SS 2001, c M-14.01.
[31] See *McIvor v. Canada (Registrar of Indian and Northern Affairs)*, [2007] 3 C.N.L.R. 72 (BCSC) at para. 133: "[T]he concept of Indian, has come to exist as a cultural identity alongside traditional concepts. The concept has become and continues to be imbued with significance in relation to identity that extends far beyond entitlement to particular programs."
[32] See P. Palmater, *Beyond Blood – Rethinking Indigenous Identity* (Purich Publishing 2011), B. Lawrence, *"Real" Indians and Others: Mixed-Blood Urban Native Peoples and Indigenous Nationhood* (Vancouver: UBC Press, 2004); S. Grammond, "Discrimination in the Rules of Indian Status and the McIvor Case" (2009) 35:1 Queen's L.J. 421; I. Peach, "Section 15 of the *Canadian Charter of Rights and Freedoms* and the Future of Federal Regulation of Indian Status", (2012) 45 UBC L Rev 103; M Ebert, "McIvor: Justice Delayed—Again" (2010) 9 Indigenous LJ 15; V. Napoleon, "Extinction By Number: Colonialism Made Easy" (2001), 16 No. 1 Can LJ & Soc'y 113; M.J. Cameron, "Revisiting Histories of Gender-Based Exclusion and the New Politics of Indian Identity" (2008) Research Paper for the National Centre for First Nations Governance; B. Lawrence, "Gender, Race, and the Regulation of Native Identity in Canada and the United States: An Overview" (Spring 2003), Hypatia vol. 18, no. 2;
[33] *Royal Commission on Aboriginal Peoples*, Vol. 1, at 312. Canada has also overlooked whole tribes, including the Passamaquoddy, whose traditional territory spans western New Brunswick and parts of Maine, and who continue to fight for recognition by the Canadian government.
[34] Persons who accepted scrip were excluded from the *Indian Act*: see SC 1876, c 18, s. 3(e).
[35] *Indian Act*, S.C. 1876, c. 18, s.3(d); *Indian Act*, S.C. 1951. c. 29, s.11(c).
[36] See *Indian Act*, S.C. 1951, c. 29, s.12(1)(a)(iv)
[37] See *Indian Act*, SC 1951, c. 29, s. 11(e).
[38] *Indian Act*, R.S.C. 1906, c. 81, s.111 and *Indian Act*, S.C. 1876, c. 18, s.3(b).

[39] See *Royal Commission Report on Aboriginal Peoples* (1996), Vol. 1, "Looking Forward Looking Back", Part Two, "False Assumptions and a Failed Relationship", Chapter 12, "Veterans".
[40] See *Indian Act*, RSC 1906, c. 81, s. 13.
[41] There were also the 'voluntary enfranchisement' provisions: see *Indian Act*, R.S.C. 1906, c. 81, s.108.
[42] Bill C-31, *An Act to Amend the Indian Act*, now S.C. 1985, c.27.
[43] See Palmater, P., *Beyond Blood – Rethinking Indigenous Identity, supra*.
[44] *Indian Act*, RSC 1985 c I-5, s. 6.
[45] S. Clatworthy, "Indian Registration, Membership and Population Change in First Nations Communities", Chapter 5 in "Volume 5: Moving Forward, Making a Difference" in the *Aboriginal Policy Series*, Thompson Education Publishing Inc., 2013
[46] M. Purvis, Rules erase Indian status" (May 28, 2008) The Sault Star.
[47] In what was pitched as means of giving greater self-determination to Indian bands, the 1985 amendments to the *Indian Act* gave Bands the ability to take control of their own membership rules independent of the Indian status rules, which allowed Bands to adopt broader membership rules, or conversely, more restrictive rules than in the *Indian Act*: see *Indian Act*, RSC 1985, c I-5, s. 10. It has been argued, however, that rather than truly being about self-determination, this was merely an attempt to 'pass on' the ability to discriminate to Bands, in light of the fact that many First Nations at the time of the amendment complained that they lacked resources to accommodate all the reinstates and their families. Although a valid compliant, the federal government provided no additional funding to Bands in this regard, but instead presented the option that would permit exclusion of the children of the women who were reinstated to Indian status. Approximately 90 Bands in Canada adopted membership rules more restrictive than the *Indian Act* (out of an approximate 230 that adopted membership codes): see S. Clatworthy, Indian Registration, Membership and Population Change in First Nations Communities", *supra*, at p. 6. Such rules have—and continue to be—the subject of discrimination complaints against First Nation governments: see *Six Nations of the Grand River Band Council v. Henderson*, [1997] 1 CNLR 202 (Ont Ct J (Gen Div)); *Grismer v. Squamish Indian Band*, 2006 FC 1088; *Raphael v. Montagnais du Lac Saint-Jean Council*, 1995 2748 (CHRT); *Jacobs v. Mohawk Council of Kahnawake*, 1998 3994 (CHRT).
[48] The 'off-reserve' population was largely born the effect of the marrying out and other rules that revoked status, resulting in thousands of people losing their right to live on reserve. Even after being reinstated after 1985, many did not return to live on reserve.
[49] *Canadian Bill of Rights*, RSC 1985, Appendix III.
[50] *Indian Act*, RSC 1927, c 98, s. 141.
[51] J. Woodward, *Native Law* (loose-leaf), Chapter 6, "Citizenship and Civil Rights" at 6§70-90.
[52] *The Queen v. Drybones*, [1970] SCR 282.
[53] Section 94 (*b*) of the *Indian Act*, RSC, 1952, ch. 149.
[54] *Drybones, supra* note #, at para. 54.
[55] D. Pothier, "The Significant of Entrenchment of Equality Rights" (2003), 19 SCLR (2d) 65 at p. 65.
[56] *Lavell v Canada (Attorney General)*, [1974] SCR 1349.
[57] *Ibid.*, at p. 1359: "In my opinion the exclusive legislative authority vested in Parliament under s. 91(24) could not have been effectively exercised without enacting laws establishing the qualifications required to entitle persons to status as Indians and to the use and benefit of Crown "lands reserved for Indians". … To suggest that the provisions of the Bill of Rights have the effect of making the whole Indian Act inoperative as discriminatory is to assert that the Bill has rendered Parliament powerless to exercise the authority entrusted to it under the constitution of enacting legislation which treats Indians living on Reserves differently from other Canadians in relation to their property and civil rights."
[58] *Ibid.*, at p. 1361.
[59] *Ibid.*, at p. 1370.
[60] *Ibid.*, at p. 1372.
[61] *Ibid.*, at p. 1366.
[62] *Canadian Human Rights Act*, RSC 1985, c H-6
[63] *Ibid.*, s. 67.
[64] *Prince v. Canada (Department of Indian Affairs & Northern Development)* (1994), 89 F.T.R. 249.
[65] Canadian Human Rights Commission, "A Matter of Rights - Special Report of the Canadian Human Rights Commission on the Repeal of Section 67 of the Canadian Human Rights Act" (October 2005), p. 5-6.
[66] *An Act to amend the Canadian Human Rights Act*, SC 2008, c. 30.
[67] See *Desjarlais v. Piapot Band*, [1989] 3 F.C. 605 (FCA).

[68] See *Bressette v. Kettle and Stony Point First Nation Band Council,* 2004 CHRT 2*; Deschambeault v. Cumberland House Cree Nation,* 2008 CHRT 48; *Jacobs v. Mohawk Council of Kahnawake,* 1998 CanLII 3994, *Raphael v. Montagnais du Lac Saint-Jean Council*, 1995 2748 (CHRT),
[69] *Courtois v. Canada (Department of Indian and Northern Affairs),* 1990 CanLII 702
[70] With no means of having the discrimination of the marrying out rule in the *Indian Act* redressed under domestic law, Aboriginal women took their complaint to the United Nations Human Rights Committee. In 1981, the Committee issues a decision ruling in favour of Sandra Lovelace, a Maliseet woman who had lost Indian status for marrying a non-Indian, finding that the marrying out rules in the *Indian Act* contravened Canada's obligation under the *United Nations Covenant on Civil and Political Rights* on the basis of denying Lovelace the right to be involved in her community and culture. This ruling, as well as the enactment of the *Canadian Charter of Rights and Freedoms,* were the impetus for the amendments to the *Indian Act* discussed above.
[71] *Corbière v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203 ("*Corbière*").
[72] *Indian Act*, RSC 1985 c I-5.
[73] *Corbière, supra* at para. 19.
[74] Section 15(2) states that equality guarantee in s. 15(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."
[75] Section 15(2) was not mentioned in the reasons of McLachlin C.J. and Bastarache J. The only mention is in the reasons of L'Heureux-Dubé J. at para. 69 of *Corbière, supra,* who notes that, in carrying out a full *Law* analysis, "no evidence has been presented that would suggest that the legislation in purpose or effect, ameliorates the position of band members living on-reserve, and therefore I find it unnecessary to consider the third factor outlined in *Law*."
[76] *Lovelace v. Ontario,* 2000 SCC 37.
[77] *Law v. Canada (Minister of Employment and Immigration),* [1999] 1 SCR 497.
[78] It did so stating that the third contextual factors involved a determination of "whether the impugned legislation or conduct had an ameliorative purpose or effects upon a more disadvantaged person or group in society": see *ibid.* at para. 72-73.
[79] *Lovelace v. Ontario*, 1997 CANLII 2265 (ON CA).
[80] *Lovelace, supra* at paras. 60-61.
[81] *Lovelace, supra* at para. 87. It was also an important consideration to the Court that the First Nations Fund had been the resulted of "partnered initiative" between the province and First Nations in the province (see para. 82).
[82] *Lovelace, supra* at para. 73.
[83] *Ibid.*, at paras. 58-60.
[84] *Ibid.*, at paras. 69-73.
[85] *Ibid.*, at paras. 74- 76
[86] *Ibid.*, at paras. 4.
[87] *R. v. Watier,* [2000] 2 CNLR 269; *Chippewas of Nawash First Nation v. Canada (Minister of Fisheries and Oceans)* (2000), 196 FTR 249 (FC), aff'd 2002 FCA 485*; Ardoch Algonquin First Nation v. Canada (Attorney General),* 2002 FCT 1058 (*sub nom. Misquadis v. Canada*); *Gallant v. Canada (Attorney General),* 2007 FC 1, rev'd 2007 FCA 392; *Esquega v. Canada (Attorney General),* 2007 FC 878, aff'd 2008 FCA 182; *Ochapowace Indian Band v. Saskatchewan (Department of Community Resources)*, 2007 SKQB 87 (sub nom. *S.P. (Re))*, aff'd 2008 SKCA 48; *McIvor v. Canada (Registrar of Indian and Northern Affairs)*, [2007] 3 C.N.L.R. 72 (BCSC), rev'd [2009] 2 C.N.L.R. 236 (BCCA), leave to appeal refused [2009] S.C.C.A. No. 234; *Micmac First Nation v. Canada (Indian Affairs and Northern Development*), 2007 FC 1036, aff'd 2009 FCA 377; and *Alberta (Aboriginal Affairs and Northern Development) v. Cunningham,* 2011 SCC 37.
[88] *Esquega v. Canada (Attorney General)*, 2007 FC 878, aff'd 2008 FCA 182.
[89] *Esquega* (FC), *supra*, at para. 90
[90] *Ardoch Algonquin First Nation v. Canada (Attorney General),* 2002 FCT 1058 (*sub nom. Misquadis v. Canada*)
[91] *Ibid.*, at para. 112: "The benefit denied or unequal treatment imposed claimed by the applicants is the inability under the AHRDS for the communities they live in to do what First Nation members living in on-reserve communities can do for their members, both on and off-reserve: decide how best to devise and implement training programs, decide which type of program is needed to serve Aboriginal peoples in their communities, allocate funding for this purpose and insure service providers function appropriately in a context of accountability."
[92] *Ibid.*, at para. 116.
[93] *Ibid.*, at para. 129.
[94] *Ibid.*, at para. 132
[95] *Ibid.*, at paras. 145-153.

[96] *Misquadis v. Canada (Attorney General)*, 2003 FCA 473, per Rothstein J.A. (as he then was), Sharlow and Stone J.A. concurring.
[97] *Gallant v. Canada (Attorney General)*, 2007 FC 1, rev'd 2007 FCA 392 per Desjardins J.A. (Noel and Trudel J.A. concurring).
[98] *Gallant* (FCA), *supra* at para. 9
[99] *McIvor v. Canada (Registrar of Indian and Northern Affairs)*, [2007] 3 C.N.L.R. 72 (BCSC), rev'd [2009] 2 C.N.L.R. 236 (BCCA), leave to appeal refused [2009] S.C.C.A. No. 234.
[100] McIvor (BCSC) at para. 288.
[101] *Ibid.*, at para. 273.
[102] *McIvor* (BCCA), *supra*, at para. 95.
[103] *Ibid.*, at paras. 132 and 155.
[104] *bid.*, at para. 129.
[105] *bid.*, at para. 145.
[106] See S. Grammond, "Discrimination in the Rules of Indian Status and McIvor Case" (2009), *supra*, at p. 4.
[107] Canada's request for leave to appeal the decision of the British Columbia Court of Appeal was dismissed with cost: 2009 CanLII 61383 (SCC). Subsequently, Canada passed Bill C-3, the *Gender Equity in Indian Registration Act*, SC 2010 c. 18. The bills is complex, but essentially its effect is to grant Indian status to the grandchildren of Bill C-31 Indians born on or after born on or after September 4, 1951 or to have a sibling born on or after September 4, 1951. The date restriction was to coincide with the British Columbia Court of Appeal's finding that the real inequality in the case was a result of giving expanded to status to people who lost status under the old rules pursuant to the second generation cut-off rule (September 4, 1951 was the date double-mother rule) took effect.
[108] Unsatisfied with the disposition of her case and Canada's legislative efforts to implement the British Columbia Court of Appeal ruling, paralleling Sandra Lovelace's strategy in the early 1980s, Sharon McIvor has petitioned the United Nations Human Rights Committee in 2010 regarding Canada's ongoing sex discrimination under the *Indian Act*. See also Ebert, M., "McIvor: Justice Delayed—Again" (2010) 9 *Indigenous LJ* 15 and Hamill, S.E., "McIvor v Canada and the 2010 Amendments to the Indian Act: A Half-Hearted Remedy to Historical Injustice" (2013) *Can. Con. L. Forum* 75.
[109] *Ochapowace Indian Band v. Saskatchewan (Department of Community Resources)*, 2007 SKQB 87 (sub nom. *S.P. (Re)*), aff'd 2008 SKCA 48.
[110] *Ibid.* at para. 22. The child was unable to be registered as a Indian because her maternal grandfather and father were not Indians.
[111] *The Child and Family Services Act*, SS 1989-90, c C-7.2, s. 23(1)(b).
[112] *Ibid.* at para. 66
[113] *Micmac First Nation v. Canada (Indian Affairs and Northern Development*), 2007 FC 1036, aff'd 2009 FCA 377.
[114] *Ibid.* at para. 13.
[115] 2009 FCA 377.
[116] The other unsuccessful underinclusion claims are *Chippewas of Nawash First Nation v. Canada (Minister of Fisheries and Oceans)*, *supra*, involving a challenge by First Nations in Ontario from the Aboriginal Fisheries Strategy, available only to West and East Coast First Nations; and *R. v. Watier*, [2000] 2 CNLR 269, involving a Métis man challenged the distinction made in the provincial *Wildlife Act* between First Nations people, who could hunt freely, and Métis, who had to have a provincial licence to hunt deer in southern Saskatchewan.
[117] *R. v. Kapp*, 2008 SCC 41.
[118] *Ibid.*, at para. 41.
[119] *Ibid.*, at para. 48.
[120] *Ibid.*, at para. 49
[121] *Ibid.*, at para. 52 (emphasis added).
[122] Although see J. Eisen, "Rethinking Affirmative Action Analysis in the Wake of Kapp" (2009-2009), 6 JLE 1 at 2 at 9, who argues that the Court takes an "the *ex ante* exemption approach" here even though it suggest it was not an 'exemption': "the Court described its own model as a "third option." Since, however, the invocation of s. 15(2) under *Kapp* can preclude the substantial operation of s. 15(1), it seems appropriate to treat it as an exception-based approach."
[123] *Ibid.*, at para. 47.
[124] *Ibid.*, at para. 58.
[125] *Kapp, supra*, at para. 73. This approach avoids brandings all programs based on recognizing Aboriginal's peoples collective and cultural identity as "affirmative action" programs. Affirmative action programs are often understood as being temporary programs, whose purpose is to assist socially disadvantaged groups participate more

actively in an employment or social sector where that group has been historically excluded. Once there is more active participation by members of the group in such sectors, the need for program is spent and resources can be invested elsewhere. This paradigm of affirmative action does not sit well in the cases of programs recognizing Aboriginal peoples' collective and cultural identity. Such programs are not intended as a temporary fix to the problem of historical exclusion, but rather to recognize special rights and interests of Aboriginal people that they possess because they are Aboriginal. See also P. Hughes, "Resiling from Reconciling: Musing on R. v. Kapp", (2009) 47 SCLR (2d) 255; D. Nouvet, *"R. v. Kapp*: A Case of Unfulfilled Potential" (2010) 8 Indigenous LJ (1) 81; and L.B. Tremblay in "Promoting Equality and Combatting Discrimination Through Affirmative Action: The Same Challenge? Questioning the Canadian Substantive Equality Paradigms" (2012), 60 Am. J. Comp. L. 181 at 202-204.

[126] *Ibid.*, at para. 89.
[127] *Ibid.*, at paras. 104-108.
[128] *Ibid.*, at para. 99 (emphasis added).
[129] *Métis Settlement Act*, RSA 2000, c. M-14.
[130] *Peavine Métis Settlement v. Alberta (Minister of Aboriginal Affairs and Northern Development),* 2007 ABQB 517
[131] *Ibid.* at paras. 203-205.
[132] *Ibid.* at para. 183.
[133] *Ibid.* at para. 204.
[134] *Cunningham v. Alberta (Aboriginal Affairs and Northern Development),* 2009 ABCA 239.
[135] *Ibid.* at para. 123.
[136] *Ibid.* at paras. 22 and 28.
[137] *Ibid.* at para.. 25
[138] *Ibid.* at paras.. 25-26.
[139] *Ibid.* at para.. 27
[140] *Ibid.* at para.. 39.
[141] *Ibid.* at para. 45.
[142] *Ibid.* at paras. 43-45.
[143] *Ibid.* at para. 70.
[144] *Ibid.* at para. 73.
[145] *Alberta (Aboriginal Affairs and Northern Development) v. Cunningham*, 2011 SCC 37, at para. 41.
[146] *Ibid.* at para. 45.
[147] *Ibid.*
[148] *Ibid.* at para.. 46
[149] *Ibid.*
[150] *Ibid.* at para.. 49
[151] *Ibid.* at para.. 50.
[152] *Ibid.* at paras. 52-53.
[153] *Ibid.* at para.. 60.
[154] *Ibid.* at paras. 54 and 74.
[155] *Ibid.* at para.. 74.
[156] I am aware of one case involving Aboriginal claimants since *Cunningham* advancing a s. 15 argument, *Pictou Landing Band Council et al. v. Attorney General of Canada*, 2013 FC 342. The case was an adverse effects discrimination claim alleging that the provision of adult care services on reserve to a severely disabled boy on reserve by Aboriginal Affairs was not comparable to the level of services offered off-reserve. The Federal Court preferred to resolve the case in relation to administrative law principles and did not consider the *Charter* argument.
[157] *Bear v. Canada (Attorney General)*, 2001 FCT 1192, rev'd by 2003 FCA 40.
[158] *Ermineskin Indian Band & Nation v. Canada*, 2009 SCC 9.
[159] *Ibid.* at para. 188.
[160] *Ibid.* at para. 189.
[161] *Ibid.* at para. 200.
[162] *Native Council of Nova Scotia v. Canada (Attorney General*), 2011 FC 72.
[163] *Ibid.* at para. 35.
[164] *Ibid.* at paras.. 46-47.
[165] *Ibid.* at para.. 48.
[166] To be more specific, the provision was repealed with respect to the federal government at the date of the coming into force of the amendment, and repeal took effect against Band Council three years later on June 18, 2011.

[167] Canadian Human Rights Commission, "Complaints to the Canadian Human Rights Commission Since the Repeal of Section 67 in 2008", March 2014. Provided to the author by the National Aboriginal Initiative of the Commission. Not that the 495 complaints does not include complaints from Aboriginal people dealing with employment situations in federal government departments.
[168] *Ibid.*, p. 3. The Commission received 61 complaints against Aboriginal Affairs. Lesser numbers of complaints were also received against a number of other departments and agencies.
[169] *Ibid.*, p. 3.
[170] *Louie v. Canada (Indian and Northern Affairs),* 2011 CHRT 2, additional decision concerning implementation of remedies: 2012 CHRT 2.
[171] *Louie v. Canada (Indian and Northern Affairs),* 2011 CHRT 2 at para. 59.
[172] *Ibid.*, at para. 55.
[173] J. Woodward, *Native Law* (loose-leaf), Chapter 6, "Citizenship and Civil Rights" at 6§41-43.
[174] *Matson et al. v. Indian and Northern Affairs Canada,* 2013 CHRT 13 and *Andrews et al. v. Indian and Northern Affairs Canada,* 2013 CHRT 21.
[175] *Matson, supra,* at para. 35.
[176] *Public Service Alliance of Canada v. Canada Revenue Agency*, 2012 FCA 7.
[177] Both involve challenges to new amendments brought by the *Gender Equity in Indian Registration Ac*t, SC 2010 c. 18, specifically the requirement of having to be born, or have sibling born, after September 4, 1951, in order to be registered under s. 6(1)(c.1): see *Renaud, Sutton and Morigeau v. Aboriginal Affairs and Northern Development Canada,* 2013 CHRT 30; *Nacey, Rainville, Dennis v. Aboriginal Affairs and Northern Development Canada*, 2014 CHRT 20.
[178] *Beattie et al. v. Aboriginal Affairs and Northern Development Canad*a, 2014 CHRT 1. Although the case does not explicitly mention this, it is supposition of the author that the reason the complainant sought this change in category was to benefit from changes occasioned by the *Gender Equity in Indian Registration Act*, SC 2010 c. 18, which would allow her to pass on Indian status to an additional generation of descendents.
[179] *Ibid.* at para. 55
[180] *First Nations Child and Family Caring Society of Canada and Assembly of First Nations v. Canada (Minister of Indian and Northern Affairs),* T1340/7008. The complaint was, in fact, filed with the Commission prior to the repeal of s. 67 in 2007.
[181] *Mississaugas of the New Credit First Nation v. Attorney General of Canada*, 2013 CHRT 32.
[182] *Grand Chief Stan Louttit et al. v. AGC,* 2013 CHRT 27.
[183] *First Nations Child and Family Caring Society of Canada and Assembly of First Nations v. Attorney General of Canada (representing the Minister of Indian Affairs and Northern Development),* 2011 CHRT 4.
[184] *Ibid.* (emphasis in original).
[185] *Canada (Human Rights Commission) v. Canada (Attorney General),* 2012 FC 445 at para. 290. MacTavish also drew on the Supreme Court of Canada's decision in *Withler v. Canada (Attorney General)*, 2011 SCC 12.
[186] *Canada (Attorney General) v. Canadian Human Rights Commission*, 2013 FCA 75.
[187] Closing arguments in the hearing are schedule for October 20-24, 2014.
[188] *Mohawks of the Bay of Quinte v. Canada (Attorney General),* 2014 FC 527.
[189] But it is noteworthy that, since *Corbiere,*the Supreme Court has been rather sheepish to find additional analogous grounds in the Aboriginal context. In *Lovelace,* the SCC declined to say that non-status and Metis or (non-Band Aboriginal groups) is analogous or enumerated grounds. Also, in Ermineskin, there is no mention of enumerated and analogous grounds, even though the Bands had characterized the grounds as "race, national and ethnic origin" (see Watson Hamilton, J., and Koshan, J., "Courting Confusion? Three Alberta Cases on Equality Post-*Kapp*" (2010) 47 Alta. L.R. 927 at 949, at p. 936). Similarly in *Cunnigham*, the Court refrained from making a determination as to whether registration as a status Indian constitutes an analogous ground of discrimination (at para. 58).
[190] Canadian Human Rights Commission, *Human Rights Handbook for First Nations*, 2011 Cat. No. HR4-10/2011E ISBN 978-1-100-18559-0, at p. 7.
[191] In this regard, it bears pointing out that Sharon McIver started her action challenging the residual sex discrimination in the *Indian Act* in 1994. The Court of Appeal's final decision in her case was rendered in 2009, some 15 years later. And, it bears noting, Ms. McIver is still seeking recourse at the UN Human Rights Commission to this day!
[192] For example, all of the main s. 35 *Constitution Act 1982* cases on Aboriginal and Treaty rights were brought as defences to regulatory offences, such as *R. v. Sparrow*, [1990] 1 SCR 1075, *R. v. Van der Peet*, [1996] 2 SCR 507, *R. v. Marshall*, [1999] 3 SCR 456, etc., could be characterized as "collateral attacks" on those statutes and

regulations the Aboriginal accused was charged under for failure to recognize and accommodate Aboriginal and Treaty rights.

[193] *Lovelace,* supra, at paras. 60-61.

[194]See S. Moreau, "R v Kapp: New Directions for Section 15" (2008-2009), 40 Ottawa L Rev 283 at 296 who argue post-Kapp that if the Court did not modify the s. 15(2) test to allow for at least some scrutiny of the government program, the Court would "turn section 15(2) into a provision that inappropriately shields discriminatory action form judicial scrutiny."

[195] This was not discussed by the majority in *Corbiere*. L'Heureux-Dubé suggested (at para. 69) that there was no evidence to suggest the exclusion of off-reserve members ameliorates the position of on-band members, but now according to *Cunningham,* such positive evidence would seemingly not be a requirement.

[196] *Corbiere, supra,* at para. 21.

[197] *Kapp, supra,* at para. 16; *Cunnigham* at para. 44. See D. Réaume in "Equality Kapped : Alberta v. Cunningham", July 22, 2011, blog post on the Women's Court of Canada website; J. McGill, "Section 15(2), Ameliorative Programs and Proportionality Review" (2013), 63 SCLR (2d) 521; J. Eisen, "Rethinking Affirmative Action Analysis in the Wake of Kapp" (2009-2009), 6 JLE 1 at 2: "Unfortunately, in the Court's attempt to guard against undue judicial interference with affirmative action programs, it has strayed from the claimant-centered, substantive approach that constitutes the best of Canadian equality jurisprudence."

[198] But see J. Eisen, "Rethinking Affirmative Action Analysis in the Wake of Kapp", *ibid.,* at 11-12, who argues that the *Kapp* approach silences the most complex aspects of s. 15(2) cases.

[199] *Cunningham, supra,* at para. 40.

[200] *Kapp, supra,* at para. 99.

[201] See also, Watson Hamilton, J. and Koshan, J., "The Supreme Court, Ameliorative Programs, and Disability: Not Getting It" (2013) 25 Can. J. Women & L. 56 at 67: "Unfortunately, *Cunningham* did not acknowledge that a different type of approach is required under s. 15(2) for claims of under-inclusiveness. In fact, the Court did not use the term under-inclusiveness at all. To the extent that the Court considered the unique issues posed by challenges to the delineation of the targeted group, they merely reinterated their deference to government…". Tremblay, L.B. in "Promoting Equality and Combatting Discrimination Through Affirmative Action: The Same Chalenge? Questioning the Canadian Substantive Equality Paradigms" (2012), 60 Am. J. Comp. L. 181, frames the problem as the Court overlooking, when stating that s. 15(1) and s. 15(2) work together to combat discrimination, that ameliorative program can and have been found to be discriminatory. See also J. McGill, *supra*, at p. 533, "the *Kapp* framework forecloses the arguments that a government law or program is both ameliorative *and* discriminatory at the same time." See also, P. Hughes, "Resiling from Reconciling: Musing on R. v. Kapp", (2009) 47 SCLR (2d) 255 at 277: "the majority's analysis of section 15(2) does not allow for a situation in which an affirmative action program has a negative impact on a subgroup of the disadvantaged group that is the target of the program… To allow that this could warrant an appropriate review of the program is not to diminish the importance of affirmative action programs…".

[202] Marcus, J., "Sometimes Help Hurts: Imagining a New Approach to s. 15(2)" (2013) 18 Appeal 121-138; Smith, L. and Black, B., "The Equality Rights", (2013) 62 SCLR (2d) 301.

[203] *Ibid.* at paras. 200-202.

[204] J. Eisen, "Rethinking Affirmative Action Analysis in the Wake of Kapp" *supra,* at p. 2.

[205] *Ibid.* at p. 16

[206] *Ibid.* at p. 31-32

[207] See J. McGill, "Section 15(2), Ameliorative Programs and Proportionality Review" (2013), 63 SCLR (2d) 521.

[208] *Ibid.,* at p. 543.

[209] Morris, M.H., and Cheng, J.K., "*Lovelace* and *Law* Revisited: The Substantive Equality Promise of *Kapp*" (2009), 47 SCLR (2d) 281; S.T. Kraicer, "R.v. Kapp: Aboriginal Fishing, Andrews, and Affirmative Action in the Supreme Court of Canada," (2009) 25 NJCL 153 at 158-159; P. Hughes, "Resiling from Reconciling: Musing on R. v. Kapp", (2009) 47 SCLR (2d) 255 at 276-277.

[210] *Lovelace v. Ontario (1997), 100 O.A.C. 344,* at paras. 65-66.

[211] *Ibid.,* at paras. 67-68.

[212] *Ibid.* at para. 69.

[213] *Ibid.* at paras. 89-90.

[214] McGill, *supra,* at 551.

[215] *Withler, supra.*

[216] As a matter of full disclosure, I was part of the drafting subcommittee who made submissions on behalf of the Women's Legal Education and Action Fund (LEAF) to the Supreme Court of Canada in *Cunningham*.

[217] *Alberta v. Cunningham*, Supreme Court of Canada, File no. 33340, Factum of the Intervener, Women Legal Education and Action Fund, at para. 7 online at http://leaf.ca/wordpress/wp-content/uploads/2011/03/Factum_LEAF_Finale_Cunningham.pdf
[218] *Ibid.*, at para. 12.
[219] *Ibid.*, at para. 18.
[220] J. McGill, *supra*, at p. 536. McGill agrees that the Court was wrong and should take the approach urged by LEAF, but recognizing that such an about face could take a long time: at p. 540.
[221] The decisions in *Kapp* and *Cunningham* has been also criticized by advocates on behalf of persons with a disability, who suggest that the decision could be applied to shut the door on many equality claims by members of that community. See T. Sheldon, "The Shield Becomes a Sword: The Expansion of the Ameliorative Program Defence to Programs that Support Persons with Disabilities", July 29, 2010, Research Paper commission by the Law Commission of Ontario. Watson Hamilton, J. and Koshan, J., "The Supreme Court, Ameliorative Programs, and Disability: Not Getting It" (2013) 25 Can. J. Women & L. 56 at 69, 71-78.
[222] *Canadian Human Rights Act, supra*, s. 16.
[223] *Kapp, supra*, at para. 55.
[224] See *Strong v. Marshall Estate*, 2009 NSCA 25 at para. 38.
[225] *Eldridge v. British Columbia (Attorney General)*, [1997] 2 SCR 426 at para. 73.
[226] J. Woodward, *Native Law* (loose-leaf), Chapter 6, "Citizenship and Civil Rights" at 6§41-43.
[227] *Eldridge v. British Columbia (Attorney General)*, [1997] 3 SCR 624, at paras. 84-96; *Council of Canadians with Disabilities v. VIA Rail Canada Inc.*, 2007 SCC 15, at paras. 224-229; and *Moore v. British Columbia (Education)*, 2012 SCC 61, at paras. 50-53.
[228] *Drybones, supra*; *Lavell, supra*; *Corbiere, supra*; *Lovelace, supra*; *Chippewas, supra*; *Watier, supra*; *Misquadis, supra; Galland, supra; Esquega, supra; Ochapowace, supra; McIvor, supra; Gespeg, supra; Cunningham, supra; Bear, supra; Ermineskin, supra; Native Council, supra; Louis, supra; Beattie et al. supra*.
[229] *Matson, supra; Andrews, supra;* and *Mohawks, supra*.
[230] Successful s. 15 challenges: *Scrimbitt v. Sakimay Indian Band Council*, [2000] 1 FC 513; *Clifton v. Harlety Ban Indian Band*, 2005 FC 1030; *Thompson v. Leq'a:mel First Nation*, 2007 FC 77; *Taypotat v. Taypotat*, 2012 FC 1036, rev'd 2013 FCA 192; and *Joseph v. Dzawada'enuxw (Tsawataineuk) First Nation*, 2013 FCA 974; Unsuccessful s. 15 challenges: *Cockerill v. Fort McMurray First Nation No. 468*, 2010 337; *Six Nations of the Grand River Band Council v. Henderson*, [1997]1 CNLR 202 (Ont. Ct. Gen. Div.); *Grismer v. Squamish Indian Band*, 2006 FC 1088.
[231] Congress of Aboriginal Peoples, *Report to Parliament - On The Readiness of First Nations Communities And Organizations To Comply With The Canadian Human Rights Act*, 2011 ("CAP Report"), available online at: https://www.aadnc-aandc.gc.ca/eng/1314987270226/1314987355242.
[232] For example, in *Deschambeault v. Cumberland Cree Nation*, *supra*, a complainant being treated differently on the basis of being Metis and not being a Treaty Indian was linked to the listed grounds of "ethnic or national origin". In *Jacobs v. Mohawk Council of Kahnawake*, *supra*, a complaint where the claimant was denied membership in an Indian band for not meeting a 50% Indian blood quantum requirement, the discrimination was linked to the grounds of "race, national or ethnic origin". In *Raphael et al. v. Conseil des Montagnais du Lac Saint-Jean, supra*; and *Laslo v. Gordon Band Council*, 1996 CHRT 12, differential treatment on the basis of a person being re-instated to Indian status by Bill C-31 has been linked to discrimination on the combined grounds of "sex" and "marital status" or "family status".
[233] *Brooks v. Canada Safeway Ltd*., [1989] 1 S.C.R. 1219.
[234] See CAP Report, *supra*. CAP argues that the logic applied by the Court in *Brooks* to find that pregnant women are entitled to protection on the ground of "sex" applies with equal force to the finding that subsets of Aboriginal identity are entitled to protection on the ground of "national or ethnic" / Aboriginal origin.
[235] *Ibid.*
[236] *Vriend v. Alberta*, [1998] 1 S.C.R. 493. For arguments in this regard, see Congress of Aboriginal Peoples, *Justice is Equality: Post-Corbière Report*, April 2008, and also CAP Report *supra*.