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The Supreme Court's Other Opportunity to Revisit Adverse Effects Discrimination under the Charter: Taypotat v Taypotat

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Case Commented On: *Taypotat v Taypotat,* 2012 FC 1036; rev'd 2013 FCA 192; leave to appeal to SCC granted 2013 CanLII 83791 (SCC)

A few weeks ago we wrote a post on *Carter v Canada (Attorney General),* 2012 BCSC 886, rev'd 2013 BCCA 435, leave to appeal to SCC granted 2014 CanLII 1206 (SCC), predicting what the Supreme Court might decide on the issue of whether the prohibition against assisted suicide amounts to adverse effects discrimination against people with disabilities, contrary to section 15(1) of the *Charter*. We mentioned that *Carter* is one of two adverse effects cases currently before the Supreme Court. This post will consider the second case, *Taypotat v Taypotat*.

Taypotat concerns a community election code adopted by the Kahkewistahaw First Nation in Saskatchewan to govern elections for the positions of Chief and Band Councillor. The adoption of the code was controversial and took a number of ratification votes, stemming in part from the fact that it restricted eligibility for these elected positions to persons who had at least a Grade 12 education or the equivalent. Although he had previously served as Chief for a total of 27 years, the Kahkewistahaw election code excluded 74 year old Louis Taypotat from standing for election because he did not have a Grade 12 education. He had attended residential school until the age of 14 and had been assessed at a Grade 10 level. His nephew, Sheldon Taypotat, was the only eligible candidate for Chief, and he won the election by acclamation. In an application for judicial review, Louis Taypotat challenged the eligibility provision and the election results under section 15(1) of the *Charter.*

At the Federal Court hearing, Taypotat argued that the election code's education requirement discriminated on the basis of educational attainment, a ground he argued to be analogous to race and age (2012 FC 1036 at para 54). The Federal Court rejected this argument, finding that no evidence had been led to support the inclusion of educational level as an analogous ground, and that "educational level is not beyond an individual's control" (at para 58). Taypotat also argued that the education requirement adversely impacted older band members and residential school survivors. The Federal Court found that requirements based on education relate to "merit and capacities" and were therefore "unlikely to be indicators of discrimination, since they deal with personal attributes rather than characteristics based on association with a group" (at para 49). The Federal Court saw no evidence of adverse effects discrimination on the basis of age or race, and dismissed the claim (at para 60).

On appeal, Taypotat's arguments focused on the adverse effects claim based on the grounds of age and Aboriginality-residence. The Federal Court of Appeal noted that in the Supreme Court's most recent equality rights decision at the time, *Quebec v A,* the Court had reaffirmed the application of section 15(1) to laws with discriminatory effects (2013 FCA 192 at para 47, citing *Quebec v A*, 2013 SCC 5, [2013] 1 SCR 61 at para 171). It also relied on *Quebec v A* for the point that neutral laws can inadvertently perpetuate stereotypes and disadvantage:

> Laws may be adopted that unintentionally convey a negative social image of certain members of society. Moreover, laws that are apparently neutral because they do not draw obvious distinctions may also treat individuals like second-class citizens whose aspirations are not equally deserving of consideration. (at para 55, citing *Quebec v A* at para 198).

Applying these principles and the test for discrimination from *R v Kapp,* 2008 SCC 41, [2008] 2 SCR 483 and *Withler v Canada (Attorney General),* 2011 SCC 12, [2011] 1 SCR 396, the Federal Court of Appeal found that while the education requirement did not directly engage a protected ground under section 15(1), it resulted in adverse effects discrimination based on the enumerated ground of age and the analogous ground of Aboriginality-residence (at para 45).

The first step of the *Kapp/Withler* test requires analysis of whether the election code created a distinction based on a protected ground. The Court referred to evidence submitted by Taypotat showing a deficit in education levels for on-reserve Aboriginal peoples in Canada, as well as an education gap between older and younger Canadians generally and on First Nations reserves specifically (at para 48, citing John Richards, "Closing the Aboriginal non-Aboriginal Education Gaps," C.D. Howe Institute Backgrounder 116 at 6). In addition, the Court took judicial notice of "readily available census information" from 2006, which provided supporting evidence of these gaps on the basis of age and Aboriginality-residence (at para 49). Support for this approach was found in Justice LeBel's judgment in *Quebec v A*, where he took judicial notice of the proportion of couples living in *de facto* unions by relying on census data (at para 51, citing *Quebec v. A* at paras 125 and 249). Based on this evidence, the Federal Court of Appeal concluded that the election code's education requirement "disenfranchise[d] … a disproportionate number of elders and on-reserve residents" (at para 52). As a result, the election code created a distinction "which has the effect of targeting segments of the membership of the First Nation on the basis of age and of Aboriginality-residence" (at para 56). The requirement of a distinction based on protected grounds was thus made out.

The challenged provision of the election code also satisfied step two of the *Kapp/Withler* test, which considers whether the distinction is discriminatory. The Court found that denial of an opportunity for election to Band Council, a fundamental social and political institution, "substantially affect[ed] the human dignity and self-worth" of persons such as Louis Taypotat, amounting to prejudice (at para 56). The education requirement also perpetuated stereotyping because it did not "correspond to the actual abilities of the disenfranchised to be elected and to occupy public office" (at para 58). The Court found that "[e]lders who may have a wealth of traditional knowledge, wisdom and practical experience, are excluded from public office simply because they have no "formal" (*i.e.* Euro-Canadian) education credentials. Such a practice is founded on a stereotypical view of elders" (at para 60).

Under section 1 of the *Charter*, the Court held that although the education requirement sought to "address the lack of education achievement among aboriginal peoples by encouraging them to

complete their secondary education" (at para 60), and thus had a pressing and substantial objective, there was no rational connection between that objective and "the disenfranchisement of a large part of the community from elected public office" (at para 62). The relevant provision of the election code was declared unconstitutional and invalidated, and new elections were ordered without the education requirement (at para 66). Louis Taypotat was re-elected Chief of the Kahkewistahaw First Nation following this judgment (*Taypotat*, Factum of the Respondent (Supreme Court of Canada), para 28).

The Federal Court of Appeal decision confirms the point that not all members of a particular group need to be adversely affected in order for adverse effects discrimination to be made out (at paras 52-53). The fact that the claimant — an elder who was a residential school survivor residing on a First Nations reserve — was a member of a group widely acknowledged to be especially vulnerable likely facilitated this finding.

The Court of Appeal also appeared unfazed by the holding in *Withler* that adverse effects discrimination will be more difficult for claimants to prove (*Withler* at para 64). However, this was one of the more contentious issues in the hearing of the *Taypotat* appeal before the Supreme Court. The Appellants (Chief Sheldon Taypotat and Council representatives of the Kahkewistahaw First Nation) argued that the evidentiary sources relied upon by the Court of Appeal were too generalized, and did not speak to the particular situation of their community (*Taypotat*, Factum of the Appellants (Supreme Court of Canada), paras 86, 88). Respondent's counsel was asked several questions about the evidentiary basis for his client's claim by members of the Supreme Court during the oral hearing, and responded that Louis Taypotat had attested to the specific impact of the education requirement on older residents of the Kahkewistahaw First Nation (Webcast of the Taypotat Hearing (2014-10-09)).

Evidentiary issues have undermined several adverse effects cases at the Supreme Court level: see e.g. *Symes v Canada,* [1993] 4 SCR 695; *Thibaudeau v Canada,* [1995] 2 SCR 627; *Health Services and Support - Facilities Subsector Bargaining Assn v British Columbia,* 2007 SCC 27, [2007] 2 SCR 391. Nevertheless, the Federal Court of Appeal's acceptance of statistical evidence in *Taypotat* does align with the approach in *Withler,* which discussed the desirability of bringing forward evidence of historical or sociological disadvantage (*Withler* at para 64).

Another argument made by the Appellants at the Supreme Court is that the education requirement goes to the merits of election candidates and is a personal attribute they can attain if they choose (*Taypotat*, Factum of the Appellants at para 69). This point was emphasized in the Appellants' presentation of oral argument, which raised questions from members of the Court about whether choice is still a relevant consideration under section 15(1). This issue arises from the Court's ruling in *Quebec v A*, where a majority indicated that the state's support of freedom of choice (of marital status in that case) was not pertinent until the section 1 analysis (*Quebec v A* at paras 334-338). Questions were also asked by members of the Supreme Court about whether Louis Taypotat's lack of education could actually be attributed to choice. We suggest that choice should not be a relevant consideration in section 15(1) claims, and that it is refuted on the facts of a case involving residential school survivors such as Taypotat in any event.

Several members of the Supreme Court also questioned whether the education requirement reflected "arbitrary disadvantage" based on age. We would argue that, similar to choice, arbitrariness is a consideration relevant under section 1 of the *Charter*, not under section 15(1). Incorporating such questions under section 15(1) presents particular problems for adverse effects discrimination claims because arbitrariness focuses on the purpose rather than effects of the law. Even if a requirement such as educational level is intended to address the merits of election candidates, and is not arbitrary in that sense, it may still disproportionately impact older persons resident on First Nations reserves in an adverse way. The rationality and justifiability of that impact should be addressed under section 1 of the *Charter*, not section 15(1).

Nor is it appropriate to consider the merit-based purpose of the education requirement under section 15(2) of the *Charter*, as the Appellants urged the Court to do (*Taypotat*, Factum of the Appellants at para 102ff). Section 15(2) allows governments to "save" ameliorative laws and programs that would otherwise be discriminatory under section 15(1) (see *Alberta (Aboriginal Affairs and Northern Development) v. Cunningham*, [2011] 2 SCR 670, 2011 SCC 37 at para 41). Section 15(2) is not relevant in adverse effects cases because by definition they involve neutral rules rather than benefit programs targeted at disadvantaged groups, which are the proper subject of section 15(2). In any event, section 15(2) should not preclude claims where, even though adopted for an ameliorative purpose, a law has discriminatory adverse effects on a group protected under section 15(1) (see Jonnette Watson Hamilton and Jennifer Koshan, "The Supreme Court of Canada, "Ameliorative Programs, and Disability: Not Getting It" (2013) 25 CJWL 56, available here).

We predicted that the Supreme Court may avoid the section 15(1) argument in *Carter* and decide the case under section 7, but the option of deciding the claim on another *Charter* right is not available in *Taypotat*. The case thus presents an important opportunity for the Court to clarify the law on adverse effects discrimination, and we eagerly await its decision.

This post is based on a paper that is forthcoming in the Review of Constitutional Studies, available on SSRN.

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