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The Supreme Court's Latest Equality Rights Decision: An Emphasis on Arbitrariness

By: Jennifer Koshan and Jonnette Watson Hamilton

Case Commented On: *Kahkewistahaw First Nation v Taypotat*, 2015 SCC 30 (CanLII)

The Supreme Court released its decision in *Kahkewistahaw First Nation v Taypotat*, 2015 SCC 30 yesterday. We commented on the Federal Court of Appeal decision in the case here. *Taypotat* was one of two appeals concerning adverse effects discrimination under section 15(1) of the *Charter* heard by the Supreme Court in October 2014, the other being *Carter v Canada (Attorney General)*, 2015 SCC 5. The Supreme Court declined to rule on the section 15(1) issue in *Carter* (see here; see also the Court's decision not to address section 15 in last week's ruling in *R v Kokopenace*, 2015 SCC 28 (CanLII), a case involving the representativeness of juries for Aboriginal accused persons). However, the Court did not have the option of avoiding section 15 in *Taypotat*. In a unanimous judgment written by Justice Abella, the Court held that the adverse effects claim in *Taypotat* was not established by the evidence.

The *Taypotat* case involved a community election code adopted by the Kahkewistahaw First Nation in Saskatchewan to govern elections for the positions of Chief and Band Councillor. The code restricted eligibility for these positions to persons who had at least a Grade 12 education or the equivalent. Louis Taypotat had previously served as Chief for a total of 27 years, but the new Kahkewistahaw election code excluded him from standing for election because he did not have a Grade 12 education. Currently 76 years old, Taypotat attended residential school until the age of 14 and was assessed at a Grade 10 level. He also holds an honorary diploma from the Saskatchewan Indian Institute of Technology recognizing his service to the community. In an application for judicial review, Taypotat challenged the eligibility provision under section 15(1) of the *Charter*. He was unsuccessful at the Federal Court level (2012 FC 1036), but the Federal Court of Appeal allowed his appeal (2013 FCA 192).

Commenting on the decisions of the courts below, Justice Abella focuses on the first step of the test for discrimination under section 15(1) of the *Charter*, whether the law or policy draws a distinction based on an enumerated or analogous ground. She notes that in his initial judicial review application, Taypotat argued that the Grade 12 educational requirement violated section 15(1) because "educational attainment is analogous to race and age" (at para 10). On appeal, he re-framed his challenge to focus on "residential school survivors without a Grade 12 education" as an analogous group under section 15(1) (at para 12). Justice Abella has this to say about the Federal Court of Appeal decision (at para 13, emphasis added):

> It did not deal explicitly with the argument that residential school survivors without a Grade 12 education constituted an analogous group for the purposes of s. 15, but concluded instead, *even though it was not pleaded*, that the education requirement had a discriminatory impact on the basis of age. In addition, *without anyone having raised* the issue, it found the education requirement discriminated on the basis of "residence on a reserve".

After identifying this procedural problem, she then summarizes the Court's holding at para 14 (emphasis added):

> While facially neutral qualifications like education requirements *may well be a proxy for, or mask, a discriminatory impact*, this case falls not on the existence of the requirement, but on the absence of any evidence linking the requirement to a disparate impact on members of an enumerated or analogous group.

The Court's approach to the test for discrimination, and its treatment of the evidence in the case, are noteworthy in several respects.

To begin with the passage above, Justice Abella correctly identifies this case as one of adverse effects discrimination. However, her statement that "education requirements *may well be a proxy for, or mask, a discriminatory impact*" is misleading — adverse effects cases are ones where it is the discriminatory *intent* that is masked, which is why the focus must be on the effects or impact of the law on the individual or group concerned.

Justice Abella goes on to note (at para 16) that the Court's most recent articulation of the approach to discrimination was "clarified" in *Quebec (Attorney General) v A*, [2013] 1 SCR 61 (an interesting characterization given the Court's 5:4 split in that case, with four sets of reasons). Justice Abella refers to her reasons for the majority on the section 15(1) issue in *Quebec v A* for the point that the equality section requires a "flexible and contextual inquiry into whether a distinction has the effect of *perpetuating arbitrary disadvantage* on the claimant because of his or her membership in an enumerated or analogous group" (at para 331, emphasis added). Her judgment in *Taypotat* goes on to use the term "arbitrary" an additional five times. Arbitrary is used as a modifier of the term "disadvantage", as well as a synonym for "discriminatory" (see e.g. para 20, where Justice Abella refers to "arbitrary — or discriminatory — disadvantage.").

We have been critical of the Court's use of the term "arbitrary disadvantage" in section 15 cases (see here and here), as well as in its human rights jurisprudence (see here), where the test for discrimination has been influenced by the Court's approach under the *Charter*. A consideration of arbitrariness in discrimination claims is problematic, as it focuses on the *purpose* of the government's action rather than its *effects*. This is a particular problem in adverse effects discrimination cases, because the neutral laws and policies that are the subject of these claims can only be assessed as discriminatory in light of their *effects*.

A focus on arbitrariness also improperly imports section 1 *Charter* considerations into section 15(1), shifting the burden to the claimant to disprove the arbitrariness of government action rather than requiring the government to prove the rationality of its action. This has been an issue since at least the Court's decision in *Law v Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497, where the "correspondence factor" necessitated consideration of whether the law corresponded with the claimant's actual needs, capacities and circumstances, essentially a consideration of arbitrariness. While the Court does not refer to its earlier decision in *Law v*

Canada in *Taypotat*, it does use the language of the correspondence factor at para 20, asking "whether the impugned law *fails to respond to the actual capacities and needs* of the members of the group" (emphasis added).

Interestingly, in *Quebec v A* Justice Abella only used the term "arbitrary" once, and we queried whether that was a slip of the pen in light of her decision's broad focus on discrimination as the perpetuation of disadvantage (see here). But *Taypotat* suggests that her usage of the term was quite intentional, and that the Court continues to view discrimination as requiring proof of arbitrariness (see also Justice Abella's post- *Quebec v A* decision in *McCormick v Fasken Martineau DuMoulin LLP*, 2014 SCC 39 (CanLII), a human rights case where she uses the language of arbitrary discrimination).

At other points in her judgment, Justice Abella articulates the approach to discrimination more broadly, without reference to arbitrariness:

> [Substantive equality] is an approach which recognizes that *persistent systemic disadvantages* have operated to limit the opportunities available to members of certain groups in society and seeks to prevent conduct that *perpetuates those disadvantages* (at para 17, emphasis added).

And:

> The s. 15(1) analysis is accordingly concerned with the *social and economic context* in which a claim of inequality arises, and with the *effects* of the challenged law or action on the claimant group: *Quebec v A*, at para. 331 (at para 18, emphasis added).

These statements of the approach to discrimination, with their broad focus on context, systemic disadvantage and the effects of government actions, are more in keeping with a substantive approach to equality. They also make it clear that the Court's references to disadvantage are actually to *historic disadvantage*, with discrimination requiring proof of the law's *perpetuation* of that historic disadvantage for the group in question.

This is confirmed by Justice Abella's statement that the focus of step 2 of the test for a violation of section 15(1) — which is whether the distinction based on a protected ground at step 1 of the test results in discrimination — should be on whether the law "imposes burdens or denies a benefit in a manner that has the effect *of reinforcing, perpetuating or exacerbating their disadvantage*" (at para 20, emphasis added).

Justice Abella's articulation of step 2 of the test for discrimination in *Taypotat* is also notable because there is no reference to "prejudice or stereotyping" here or elsewhere in the judgment. Prejudice and stereotyping were the focus of step 2 of the test prior to *Quebec v A* (see *R v Kapp*, [2008] 2 SCR 483, 2008 SCC 41 (CanLII); *Withler v Canada (Attorney General)*, [2011] 1 SCR 396, 2011 SCC 12 (CanLII)), as well as in the dissenting reasons under section 15(1) in *Quebec v A*.

Another significant aspect of the *Taypotat* judgment is Justice Abella's statement of the sort of evidence that will be required to prove an adverse effects discrimination claim (at para 33, emphasis added):

> … statistical evidence is [not] invariably required to establish that a facially neutral law infringes s. 15. *In some cases, the disparate impact on an enumerated or analogous group will be apparent and immediate*. The evidence in this case, however, does not point to any such link between the education requirement and a disparate impact on the basis of an enumerated or analogous ground.

The Court acknowledges that "education requirements for employment could, in certain circumstances, be shown to have a discriminatory impact" (at para 23), citing *Griggs v Duke Power Company*, 401 US 424 (1971), where the United States Supreme Court found that an employer's requirement that employees have a high school diploma disproportionately excluded African Americans from positions in a power plant. Justice Abella notes the USSC's metaphor that when employment requirements "are unrelated to measuring job capability [they] can operate as "built-in headwinds" for minority groups, and will therefore be discriminatory" (at para 21, quoting *Griggs* at 432).

The Court's reference to *Griggs* is problematic, as U.S. discrimination law — especially in the context of private actors such as employers — is notorious for requiring either proof of intentional discrimination or statistical proof of disparate impact discrimination, putting a heavy burden on claimants in both kinds of cases. It is telling that the Court felt the need to turn to American law to offer an example of a successful adverse impact claim, as there is a scarcity of such claims in Canada (see here and our discussion below).

As for the evidence in *Taypotat*, the problem, according to Justice Abella, was that there was "virtually no evidence about the relationship between age, residency on a reserve, and education levels in the Kahkewistahaw First Nation to demonstrate the operation of such a "headwind"" (at para 24). The Court was not prepared to accept the statistical evidence relied on by the Federal Court of Appeal, which was not specific to the Kahkewistahaw First Nation, and, in the Court's view, did not establish sufficient discriminatory impact of the education requirement on the basis of residence on a reserve or age. Although it indicates that all the claimant must prove is a *prima facie* breach (at para 34), which is language usually reserved for the human rights context rather than the *Charter*, the Court does not acknowledge the burden on the claimant of proving the adverse effects of an education requirement within his own small community of 2,000 people. This would presumably require a sociological study of some kind, or evidence of the adverse impact of similar requirements in other First Nations communities. The Court seems to have been influenced by the fact that Taypotat was Chief while the consultations for the education requirement were being debated in the community (see paras 2, 5, and 7), leading the Court to express concerns about "put[ting] the Kahkewistahaw First Nation to the burden of justifying a breach of s. 15" (at para 34).

The Court also declined to consider whether the education requirement discriminated against "older community members who live on a reserve", noting that Taypotat had not framed his claim based on that intersection between grounds initially, and there was therefore no evidence on it (at para 33). Moreover, despite the Court's emphasis on systemic discrimination and context, the residential school setting of Taypotat's education and its connection to his age was not addressed, except for the point that this argument had not been raised by the claimant in the first instance (see paras 12-13). The Court thus missed an important opportunity to comment on the intersection amongst several grounds of discrimination, an underdeveloped area in the Court's jurisprudence. This is a particularly significant omission for Aboriginal equality claimants, whose claims often engage multiple, intersecting grounds of discrimination.

Taypotat is only the ninth adverse effects discrimination decision under the *Charter* from the Supreme Court in the last 30 years, and the number of successful adverse effects claims still stands at only two (see *Eldridge v British Columbia (Attorney General)*, [1997] 3 SCR 624, 1997 CanLII 327 (SCC); *Vriend v Alberta*, [1998] 1 SCR 493, 1998 CanLII 816 (SCC)). In our review of the Court's adverse effects discrimination case law (here), we identified a number of problems arising in this type of case: more burdensome evidentiary and causation requirements and assumptions about choice, the reliance on comparative analysis, acceptance of government arguments based on the "neutrality" of policy choices, the narrow focus on discrimination as prejudice and stereotyping, and the failure to "see" adverse effects discrimination, often as a result of the size or relative vulnerability of the group or sub-group making the claim.

The Court's decision in *Taypotat* only deals with some of these issues of concern. First, and as noted above, the Court states that statistical evidence will not always be required to establish that a facially neutral law violates section 15(1), although its absence was fatal in this case. Second, the Court seems to reference causation when it states that "The evidence before us … does not rise to the level of *demonstrating any relationship* between age, residence on a reserve, and education among members of the Kahkewistahaw First Nation, let alone that arbitrary disadvantage results from the impugned provisions" (at para 34, emphasis added). This passage suggests that claimants will continue to be held to fairly onerous causation requirements in adverse effects discrimination cases, hinting at the need for a direct link between the law and the disadvantage and a dominant role for the law in causing the disadvantage. A third problem — the Court's previous reliance on prejudice and stereotyping as the primary harms of discrimination, which are difficult to prove in adverse effects cases — may be alleviated somewhat by the Court's current focus on the perpetuation of historical disadvantage. Nevertheless, Justice Abella's multiple references to "arbitrary disadvantage" continue to concern us for the reasons stated above.