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Jonnette Watson Hamilton
Faculty of Law, University of Calgary

Jennifer Koshan
Faculty of Law, University of Calgary

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Jonnette Watson Hamilton and Jennifer Koshan*

I. INTRODUCTION

The Royal Commission on Aboriginal Peoples ("RCAP") acknowledged education as essential to both enhancing the lives of Aboriginal individuals and achieving their collective goals.[1] Education can improve the capacities and talents of Aboriginal citizens to assume the responsibilities of operating self-governing and community structures.[2] In *Kahkewistahaw First Nation v. Taypotat*,[3] these 20-year-old conclusions were the focus of the first paragraphs of both the factum of the Chief and Council of the Kahkewistahaw First Nation[4] and the unanimous judgment of the Supreme Court of Canada.[5]

Education was also a key component of a more recent commission, the Truth and Reconciliation Commission of Canada ("TRC"). Its inquiry into Canada's residential schools confirmed that "the residential school

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* Professors, Faculty of Law, University of Calgary. The authors wish to thank Sonia Lawrence and an anonymous reviewer for their comments on earlier versions of this article.

1 *Report of the Royal Commission on Aboriginal Peoples*, vol. 3, *Gathering Strength* (Ottawa: The Commission, 1996), at 404 [hereinafter "*Gathering Strength*"]. See, in general, Chapter 5.9 "Education for Self-Government".

2 *Id.*, at 501. For example, recommendation 2.3.36 in *Report of the Royal Commission on Aboriginal Peoples*, vol. 2, *Restructuring the Relationship* (Ottawa: The Commission, 1996), at 326 [*Restructuring the Relationship*] provides that "[e]arly in the process of planning for self-government agreements, whether in treaties or other agreements, provisions be drafted to (a) recognize education and training as a vital component in the transition to Aboriginal government and implement these activities well before self-government takes effect".

3 [2015] S.C.J. No. 30, 2015 SCC 30, [2015] 2 S.C.R. 548 (S.C.C.), revg [2013] F.C.J. No. 938 (F.C.A.) [hereinafter "*Taypotat*"].

4 Factum of the Appellants, Chief Sheldon Taypotat, Michael Bob, Janice McKay, Iris Taypotat and Vera Wasacase as Chief and Council Representatives of the Kahkewistahaw First Nation, online: <http://www.scc-csc.ca/WebDocuments-DocumentsWeb/35518/FM010_Appellant_Chief-Sheldon-Taypotat-et-al.pdf> [hereinafter "Factum of the Appellants"], at para. 1.

5 *Taypotat*, *supra*, note 3, at para. 1.

system was an education system for Aboriginal children in name only for much of its existence."[6] Indeed, in their 2012 *Interim Report*, the TRC concluded that "[r]esidential schools constituted an assault on self-governing and self-sustaining Aboriginal nations,"[7] because "one of the most far-reaching and devastating legacies of residential schools has been their impact on the educational and economic success of Aboriginal people".[8] The TRC's finding that "the lowest levels of educational success are in those communities with the highest percentages of descendants of residential school Survivors: First Nations people living on reserves, and Inuit" is significant for the issues in *Taypotat*.[9] These findings also illustrate that, for Aboriginal people, education cannot be understood simply or necessarily as positive.

Is a minimum educational attainment level for Aboriginal citizens seeking positions of leadership in their communities a barrier to participation by already-disadvantaged individuals? Or is an educational requirement a way to help both Aboriginal individuals and communities achieve their goals? To put this in terms relevant to the *Canadian Charter of Rights and Freedoms*,[10] should such an education requirement be seen as discrimination contrary to the equality rights guarantee in section 15(1)? Or should it be shielded from Charter scrutiny under section 25, which requires Charter rights to be interpreted so as not to derogate from Aboriginal, treaty or other rights? The former question — the equality

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[6] Truth and Reconciliation Commission of Canada, *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (Winnipeg: TRC, 2015), at v, 3-4 [hereinafter "TRC *Final Report*"], online: <http://www.trc.ca/websites/trcinstitution/File/2015/Honouring_the_Truth_Reconciling_for_the_Future_July_23_2015.pdf>.

[7] Truth and Reconciliation Commission of Canada, *Interim Report* (Winnipeg: TRC, 2012) [hereinafter "TRC *Interim Report*"], online: <http://www.myrobust.com/websites/trcinstitution/File/Interim%20report%20English%20electronic.pdf>. See also the historical document, Truth and Reconciliation Commission of Canada, *Canada, Aboriginal Peoples, and Residential Schools: They Came for the Children* (Winnipeg: TRC, 2012), at 86 [hereinafter TRC, *They Came for the Children*] ("The residential school system was intended to assimilate Aboriginal children into broader Canadian society. With assimilation would come the breaking up of the reserves and the end of treaty obligations. In this way the schools were part of a broader Canadian policy to undermine Aboriginal leaders and Aboriginal self-government.")

[8] TRC *Final Report*, *supra*, note 6, at 145.

[9] *Id.*, at 146.

[10] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter "Charter"].

issue — was the exclusive focus of the Supreme Court of Canada in *Taypotat*, and it will also be ours in this article.[11]

The community election code adopted by the Kahkewistahaw First Nation in Saskatchewan to govern elections for the positions of Chief and Band Councillor was at the centre of the controversy in *Taypotat*.[12] The *Kahkewistahaw Election Act* restricted eligibility for these leadership positions to persons who had at least a Grade 12 education or an equivalent.[13] As a result, and even though Louis Taypotat had previously served as Chief for a total of 27 years between 1973 and 2007, he was disqualified from standing for election in May 2011 because he did not meet the new education minimum. Age 76 by the time the case was heard by the Supreme Court of Canada, Taypotat had attended residential school until he was 14; his general educational development had been subsequently assessed at a Grade 10 level.[14]

The Kahkewistahaw First Nation had spent 13 years developing their new community election code. There were many drafts and many public meetings with Band Council members, Elders and other First Nation members. Both the draft Act and process leading up to it were controversial within the community, in part because it was a community election code and not a customary or traditional one.[15] Several votes were needed in 2009 and 2010 to obtain a sufficient number of votes for ratification.[16] The new election code took effect in February 2011.

In an application for judicial review, Taypotat challenged the *Kahkewistahaw Election Act*'s educational requirement under section 15(1) of the Charter. He was unsuccessful at the Federal Court level, but the

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[11] For analysis of the s. 25 issues raised by *Taypotat*, see Jennifer Koshan & Jonnette Watson Hamilton, "*Kahkewistahaw First Nation v. Taypotat* — Whither Section 25 of the *Charter?*", forthcoming, Constitutional Forum.

[12] *Taypotat*, *supra*, note 3.

[13] *Kahkewistahaw Election Act*, enacted pursuant to the *Order Amending the Indian Bands Council Elections Order (Kahkewistahaw)*, SOR/2011-49, ss. 9.03, 10.01(d).

[14] *Taypotat*, *supra*, note 3, at para. 4.

[15] *Taypotat v. Kahkewistahaw First Nation*, [2012] F.C.J. No. 1125, 2012 FC 1036, at para. 8 (F.C.T.D.), affd [2015] S.C.J. No. 30 (S.C.C.) [hereinafter "*Taypotat* FC"]; *Taypotat v. Taypotat*, [2013] F.C.J. No. 938, 2013 FCA 192, at paras. 4-7 (F.C.A.) [hereinafter "*Taypotat* FCA"], revd [2015] S.C.J. No. 30 (S.C.C.) (explaining that community election codes are governed by the *Indian Act*, R.S.C. 1985, c. I-5, while customary election rules rely on First Nations' traditional norms outside the *Indian Act*. For further discussion see Standing Senate Committee on Aboriginal People, *First Nations Elections: The Choice Is Inherently Theirs* (Ottawa: Canada Senate, May 2010), at 7).

[16] *Taypotat* FCA, *id.*, at paras. 3, 8-10. The ratification votes were an issue in the judicial review before the Federal Court, who determined that the election code was adopted by the necessary broad consensus: *Taypotat* FC, *id.*, at para. 44.

Federal Court of Appeal allowed his appeal. However, his win was overturned in the Supreme Court of Canada. In a unanimous judgment written by Abella J., without the benefit of arguments from interveners, the Court held that Taypotat's adverse effects discrimination claim was not established by the evidence.

Because evidentiary deficiencies were the basis of the Court's judgment, the broader significance of *Taypotat*'s doctrinal developments is difficult to predict. For the most part, Abella J. built upon her own judgment in *Quebec (Attorney General) v. A.*, where she wrote the majority decision on the section 15(1) issue.[17] Although she relied on the unanimous decision she co-authored with McLachlin C.J.C. in *Withler v. Canada (Attorney General)*[18] and their majority decision in *R. v. Kapp*[19] to a much lesser extent, her judgment in *Taypotat* hints at an even greater return to *Andrews v. Law Society of British Columbia*[20] than *Kapp* claimed.[21] The unanimous decision in *Taypotat,* following the multiple judgments of the convoluted *Quebec v. A.*, offers an opportunity to take stock of the latest iteration of the analytical approach to a section 15(1) claim,[22] focusing as it did on issues related to grounds and the definition of "discrimination". As we will elaborate in Part II, the Court's failure to take an intersectional approach to grounds and the significant role of arbitrariness in their understanding of discrimination operated to the detriment of Taypotat's claim. Justice Abella ultimately rested her

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[17] *Quebec (Attorney General) v. A.*, [2013] S.C.J. No. 5, 2013 SCC 5, [2013] 1 S.C.R. 61 (S.C.C.), varg [2010] Q.J. No. 11091 (Que. C.A.) [hereinafter "*Quebec v. A.*"]. On the issue of whether excluding *de facto* spouses from provisions mandating property-sharing and spousal support on the breakdown of marriages and civil unions violated the equality guarantee in s. 15(1) of the Charter, Abella J. wrote the majority decision, with Deschamps J. (Cromwell and Karakatsanis JJ., concurring) and McLachlin C.J.C. (writing only for herself) agreeing there was a violation of s. 15(1). Justice LeBel (Fish, Rothstein, and Moldaver JJ., concurring) dissented on s. 15(1), holding that there was no discrimination. On the issue of whether the violation was justified under s. 1, McLachlin C.J.C. held that it was, thereby swinging the majority on the outcome to a 5:4 decision that there was no unjustified discrimination.

[18] [2011] S.C.J. No. 12, 2011 SCC 12, [2011] 1 S.C.R. 396 (S.C.C.), affg [2008] B.C.J. No. 2507 (B.C.C.A.) [hereinafter "*Withler*"].

[19] [2008] S.C.J. No. 42, 2008 SCC 41, [2008] 2 S.C.R. 483 (S.C.C.), affg [2006] B.C.J. No. 1273 (B.C.C.A.) [hereinafter "*Kapp*"].

[20] *Law Society of British Columbia v. Andrews*, [1989] S.C.J. No. 6, [1989] 1 S.C.R. 143 (S.C.C.), affg [1986] B.C.J. No. 338 (B.C.C.A.) [hereinafter "*Andrews*"].

[21] *Kapp*, *supra*, note 19, at para. 14.

[22] See Jennifer Koshan & Jonnette Watson Hamilton, "The Continual Reinvention of Section 15 of the Charter" (2013) 64 U.N.B. L.J. 19 [hereinafter "Continual Reinvention"] (reviewing the Supreme Court's three different approaches to s. 15 between 1989 and its decision in *Quebec v. A.*, *supra*, note 17).

decision on a number of evidentiary deficiencies, raising issues about the ability of courts to take judicial notice of social context evidence and whether statistical proof is needed to establish adverse effects, which we also will examine in Part II.

Taypotat is one of eight Supreme Court of Canada section 15(1) decisions in which an Aboriginal context was relevant to the claim.[23] In *Taypotat*, the Court emphasized the objectives behind the community's adoption of the *Kahkewistahaw Election Act* in finding that the educational requirement was not discriminatory. This focus raises the possibility that the educational requirement in *Taypotat* could have been seen as a matter to be shielded from scrutiny under section 25. However, section 25 was not argued before the Supreme Court, perhaps because the Court has not provided any guidance on its interpretation since *Kapp* in 2008.[24] Although a consideration of the possible role of section 25 in equality challenges is beyond the scope of this article, we conclude in Part III that, until the Court articulates its approach to section 25 and its relationship to section 15, equality rights analysis in the Aboriginal context should be considered as distinct and used cautiously outside of that context.

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[23] The other seven decisions are: *Native Women's Association of Canada v. Canada*, [1994] S.C.J. No. 93, [1994] 3 S.C.R. 627 (S.C.C.), revg [1992] F.C.J. No. 715 (F.C.A.) [hereinafter "*NWAC*"] (government funding for an Aboriginal women's group to allow participation in constitutional talks); *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] S.C.J. No. 24, [1999] 2 S.C.R. 203 (S.C.C.), varg [1996] F.C.J. 1486 (F.C.A.) [hereinafter "*Corbiere*"] (voting restrictions on off-reserve band members); *Lovelace v. Ontario*, [2000] S.C.J. No. 36, [2000] 1 S.C.R. 950 (S.C.C.), affg [1997] O.J. No. 2213 (Ont. C.A.) (distribution of reserve-based casino proceeds to Indian bands only); *Kapp*, *supra*, note 19 (priority to holders of Aboriginal fishing licences); *Ermineskin Indian Band and Nation v. Canada*, [2009] S.C.J. No. 9, 2009 SCC 9, [2009] 1 S.C.R. 222 (S.C.C.), affg [2006] F.C.J. No. 1961 (F.C.A.) (Crown management of oil and gas revenues for an Indian band); *Alberta (Aboriginal Affairs and Northern Development) v. Cunningham*, [2011] S.C.J. No. 37, 2011 SCC 37, [2011] 2 S.C.R. 670 (S.C.C.), revg [2009] A.J. No. 678 (Alta. C.A.) (Métis Settlement membership rules); and *R. v. Kokopenace*, [2015] S.C.J. No. 28, 2015 SCC 28, [2015] 2 S.C.R. 398 (S.C.C.), revg [2013] O.J. No. 2752 (Ont. C.A.) [hereinafter "*Kokopenace*"] (jury representativeness).

[24] *Kapp*, *supra*, note 19, at paras. 62-65 (McLachlin C.J.C. and Abella J. (in *obiter*)) and paras. 76*ff*. (Bastarache J., concurring). Section 15(2) of the Charter, the affirmative action provision, was argued in *Taypotat* as a basis for shielding the *Kahkewistahaw Election Act*, *supra*, note 13, although Abella J. did not deal with that argument: Factum of the Appellants, *supra*, note 4, at paras. 102-116. The Federal Court of Appeal did refer to s. 25 in its judgment: *Taypotat* FCA, *supra*, note 15, at paras. 41-42.

II. Doctrinal and Evidentiary Issues in *Taypotat*'s Approach to Section 15

1. Situating *Taypotat*

The test for determining a breach of section 15(1) of the Charter, based in *Andrews*, was reformulated into the following two questions in 2008 in *Kapp*: (1) Does the law create a distinction based on an enumerated or analogous ground? and (2) Does the distinction create a disadvantage by perpetuating prejudice or stereotyping?[25] This formulation was confirmed in 2011 in *Withler*,[26] with the added explanation that a law perpetuates disadvantage when it "treats a historically disadvantaged group in a way that exacerbates the situation of the group",[27] a point developed later in *Quebec v. A.* and *Taypotat*. In *Quebec v. A.*, Abella J. acknowledged *Kapp* and *Withler*'s restatement of the *Andrews*' principles,[28] and then backed away from their focus on prejudice and stereotyping.[29] She referred to *Kapp* and *Withler* as "guides to a flexible and contextual inquiry" and reformulated the inquiry as one 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".[30] *Taypotat* continues the shift from prejudice and stereotyping to historical disadvantage, but also emphasizes "arbitrary disadvantage" as the focal point for step (2), as we will discuss below.

The main issue in *Taypotat* related to step (1) and the question of whether the *Kahkewistahaw Election Act* drew a distinction based on an enumerated or analogous ground.[31] In *Corbiere*, the majority of the Supreme Court pointed out two reasons to limit equality claims to enumerated or analogous grounds, both of which were quoted in *Taypotat*. One reason was that those grounds "stand as *constant* markers of suspect decision making or potential discrimination", so that "we should not speak of analogous grounds existing in one circumstance and

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[25] *Kapp*, *supra*, note 19, at para. 17. *Kapp* was the Court's third attempt to specify the analytical approach to s. 15; see "Continual Reinvention", *supra*, note 22.

[26] *Withler*, *supra*, note 18, at para. 30, quoting *Kapp*, *supra*, note 19, at para. 17.

[27] *Withler*, *supra*, note 18, at para. 35.

[28] *Quebec v. A.*, *supra*, note 17, at para. 324.

[29] *Id.*, at paras. 325-30.

[30] *Id.*, at para. 331.

[31] *Taypotat*, *supra*, note 3, at para. 19.

not another".[32] The second reason was that a reliance on grounds "helps keep the focus on equality for groups that are disadvantaged in the larger social and economic context".[33] Although Abella J. relied upon *Corbiere* for these principles in *Taypotat*, she did not adopt *Corbiere*'s criteria for identifying analogous grounds, namely, that they relate to "personal characteristic[s] that [are] immutable or changeable only at unacceptable cost to personal identity", or that "the government has no legitimate interest in expecting us to change to receive equal treatment under the law."[34] As we will elaborate below, it is not clear what her method for identifying analogous grounds was, perhaps because her main concern was with the lack of evidence of disparate impact on *any* ground.

As we have already noted, the Court's dismissal of Taypotat's claim rests primarily on evidentiary failings. The Supreme Court has repeatedly articulated the importance of having sufficient facts to support a Charter claim; facts are crucial to a contextual inquiry. As Cory J. put it in *MacKay v. Manitoba*:

> *Charter* decisions should not and must not be made in a factual vacuum. To attempt to do so would trivialize the *Charter* and inevitably result in ill-considered opinions. The presentation of facts is not … a mere technicality; rather, it is essential to a proper consideration of *Charter* issues. … *Charter* decisions cannot be based upon the unsupported hypotheses of enthusiastic counsel.[35]

It is well accepted that Charter claims may be proven by both adjudicative facts and non-adjudicative facts. Adjudicative facts are those that relate to the claimant and the events underpinning the claim, while non-adjudicative facts include legislative facts — those that provide broader context relating to the purpose of the law or government action — and social facts — those that provide the background social, economic

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[32] *Corbiere*, *supra*, note 23, at para. 8 (McLachlin and Bastarache JJ.), quoted in *Taypotat*, *supra*, note 3, at para. 19 (emphasis added). Justice L'Heureux-Dubé., in a concurring opinion, rejected the idea that the recognition of an analogous ground (such as residence) in one case should be determinative in future cases; *Corbiere*, *supra*, note 23, at para. 61.

[33] *Taypotat*, *supra*, note 3, at para. 19, quoting Lynn Smith & William Black, "The Equality Rights" (2013) 62 S.C.L.R. (2d) 301, at 336. See also *Corbiere*, *supra*, note 23, at para. 11 (McLachlin and Bastarache JJ.).

[34] *Corbiere*, *id.*, at para. 13 (McLachlin and Bastarache JJ). For a critique of the majority's focus on immutability and an argument for L'Heureux-Dubé J.'s multi-variable approach to analogous grounds, see Joshua Sealy-Harrington, "Assessing Analogous Grounds: The Doctrinal and Normative Superiority of a Multi-Variable Approach" (2013) 10 J. L. & Equality 37.

[35] *MacKay v. Manitoba*, [1989] S.C.J. No. 88, [1989] 2 S.C.R. 357, at 361-62 (S.C.C.), affg [1985] M.J. No. 164 (Man. C.A.), cited by Jamal Mahmud, "Legislative Facts in Charter Litigation: Where Are We Now?" (2005) 17 N.J.C.L. 1, at 2.

and cultural context for deciding the issues in the case.[36] The Court prefers to have social and legislative facts presented through the testimony of expert witnesses in order to allow cross-examination on the value and weight of such studies and reports and the research and materials on which their opinions are based.[37] However, they have also acknowledged that expert evidence may be difficult for claimants to marshal and "beyond the resources of the particular litigants".[38] Furthermore, the Court has continued to take judicial notice of social context evidence in Charter cases without the need for experts, and even at judges' own behest, as recently as 2013 in *Quebec v. A*.[39] The Court has also recently clarified that appellate judges should be deferential to findings of both adjudicative and non-adjudicative facts made at trial, noting that "[t]he trial judge is charged with the responsibility of establishing the record on which subsequent appeals are founded."[40]

In the context of section 15, the Court has stated that adverse effects discrimination cases such as *Taypotat* may be subjected to a higher evidentiary burden.[41] The Court's unwillingness to take judicial notice, and its insistence on proof of adverse effects discrimination specific to the Kahkewistahaw First Nation both played a role in *Taypotat*, as we will explain in the following sections.

2. Step 1: Grounds and Distinctions

Commenting on the decisions of the courts below, Abella J. focused on arguments and holdings about whether the educational requirement caused "a disparate impact on members of an enumerated or analogous

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[36] *Danson v. Ontario (Attorney General)*, [1990] S.C.J. No. 92, [1990] 2 S.C.R. 1086, at para. 27 (S.C.C.), affg [1987] O.J. No. 887 (Ont. C.A.); *R. v. Spence*, [2005] S.C.J. No. 74, 2005 SCC 71, [2005] 3 S.C.R. 458, at paras. 56-57 (S.C.C.), revg [2004] O.J. No. 4449 (Ont. C.A.) [hereinafter "*Spence*"].

[37] *Spence*, *id.*, at para. 68; see also *Canada (Attorney General) v. Bedford*, [2013] S.C.J. No. 72, 2013 SCC 72, [2013] 3 S.C.R. 1101, at para. 53 (S.C.C.), varg [2012] O.J. No. 1296 (Ont. C.A.) [hereinafter "*Bedford*"], citing *R. v. Malmo-Levine*; *R. v. Caine*, [2003] S.C.J. No. 79, 2003 SCC 79, [2003] 3 S.C.R. 571, at paras. 26-28 (S.C.C.), affg [2000] B.C.J. No. 1095 (B.C.C.A.).

[38] *Spence*, *supra*, note 36, at para. 69, citing *R. v. Koh*, [1998] O.J. No. 5425, 42 O.R. (3d) 668 (Ont. C.A.) (noting the challenges claimants face in marshalling evidence of racial discrimination).

[39] *Quebec v. A.*, *supra*, note 17, at para. 125 (LeBel J.) (referring to 2011 census data on the prevalence of *de facto* couples in Canada and Quebec. Census data from 2006 had been entered at trial by experts (*id.*, para. 13)).

[40] *Bedford*, *supra*, note 37, at para. 49.

[41] *Withler*, *supra*, note 18, at para. 64.

group".[42] In the past, this issue would have been stated as "whether the distinction is made on the basis of an enumerated ground or a ground analogous to it".[43] Is Abella J.'s use of "groups" rather than "grounds" significant for identifying analogous grounds and undertaking an intersectional analysis?[44] It is difficult to answer that question because she was not explicit about her reasons for referencing groups rather than grounds and because the evidence was found to be lacking regardless of the approach taken.

Justice Abella noted that, in Taypotat's initial application, he argued that the Grade 12 educational requirement violated section 15(1) because "educational attainment is analogous to race and age".[45] The Federal Court treated this as a straightforward claim that level of education is analogous to one of the enumerated grounds, and rejected it for lack of evidence and for not being a characteristic beyond an individual's control.[46] Justice Abella, on the other hand, acknowledged that educational requirements might create a discriminatory distinction, at least in the employment context.[47] There was no hint in her judgment that education was simply a matter of individual choice. In *Taypotat*, Abella J. therefore appears to continue restricting the relevancy of considerations of choice under section 15(1), as she properly did in *Quebec v. A.*[48]

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[42] *Taypotat*, *supra*, note 3, at para. 15. See also *id.*, at paras. 16, 18, 21 and 22 for other uses of "enumerated or analogous groups".

[43] *Corbiere*, *supra*, note 23, at para. 5.

[44] For a review of the literature discussing whether a focus on "groups" is preferable to a focus on "grounds", see Jessica Eisen, "On Shaky Grounds: Poverty and Analogous Grounds under the Charter" (2013) 2:2 Can. J. Poverty Law 1, at 26-31. See also Dianne Pothier, "Connecting Grounds of Discrimination to Real People's Real Experiences" (2001) 13 C.J.W.L. 37 (arguing for an intersectional approach to grounds and noting the importance of grounds for recognizing the social and political realities associated with historical disadvantage).

[45] *Taypotat*, *supra*, note 3, at para. 10.

[46] *Taypotat* FC, *supra*, note 15, at paras. 58-59. The inevitability of the immutability criteria in *Corbiere*, *supra*, note 23, giving rise to corollary inquiries into claimants' choices is discussed by Eisen, *supra*, note 44, at 20.

[47] *Taypotat*, *supra*, note 3, at para. 23. Justice Abella discusses educational requirements under step (2) of the *Kapp* analytical framework. She is not saying that the existence of the ground might vary from case to case, but only that the determination of whether a distinction drawn on that ground is discriminatory might change, which follows the majority understanding of grounds set out in *Corbiere*, *supra*, note 23, at para. 9 (McLachlin and Bastarache JJ.).

[48] *Quebec v. A.*, *supra*, note 17, at paras. 334-43 (postponing consideration of "choice" of relationship to s. 1). For critiques of choice-based reasoning in equality cases, see, *e.g.*, Diana Majury, "Women Are Themselves to Blame: Choice as a Justification for Unequal Treatment" in Fay Faraday, Margaret Denike & M. Kate Stephenson, eds., *Making Equality Rights Real: Securing Substantive Equality under the Charter* (Toronto: Irwin Law, 2006), 209; Sonia Lawrence, "Choice, Equality and Tales of Racial Discrimination: Reading the Supreme Court on Section 15", in Sheila McIntyre &

Taypotat did raise the disparate impact of the educational requirement on older band members and residential school survivors in the Federal Court, but that Court did not deal with this claim at any length.[49] On appeal, Taypotat framed his claim as one that "residential school survivors without a Grade 12 education" were an analogous group under section 15(1).[50] Seeming to accept the lower court's holding that education was not an analogous ground, the Federal Court of Appeal held that the educational requirement nonetheless created a distinction that resulted in discrimination "on the enumerated ground of age, which [Taypotat] had specifically raised, and with the analogous ground of Aboriginality-residence recognized in *Corbiere*".[51]

Justice Abella's main concern was that the Federal Court of Appeal raised the grounds for the section 15 claim on its own initiative. She was particularly troubled that it did so for "residence on a reserve" because *Corbiere* had only recognized "*off-reserve* residence" as an analogous ground.[52] It is true that McLachlin and Bastarache JJ., writing for the majority in *Corbiere*, used the language of "Aboriginality-residence" and attributed this language to L'Heureux-Dubé J.'s concurring judgment.[53] However, L'Heureux-Dubé J. was very clear to limit the recognized analogous ground to "off-reserve band member status".[54] The phrase "Aboriginality-residence" does not appear in her judgment.[55]

If the relevant grounds had been framed by Taypotat to include "residency on reserve", the Court could have taken judicial notice that First Nations persons living on reserve are a group characterized by

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Sanda Rodgers, eds., *Diminishing Returns: Inequality and the Canadian Charter of Rights and Freedoms* (Markham, ON: LexisNexis Canada, 2006), at 115 [hereinafter "*Diminishing Returns*"].

[49] *Taypotat* FC, *supra*, note 15, at paras. 54, 59.

[50] *Taypotat*, *supra*, note 3, at para. 12.

[51] *Taypotat* FCA, *supra*, note 15, at para. 45.

[52] *Taypotat*, *supra*, note 3, at para. 26, citing *Corbiere*, *supra*, note 23, at paras. 6, 62 (emphasis in original).

[53] *Corbiere*, *id.*, at para. 14. Justices McLachlin and Bastarache earlier stated that they agreed with L'Heureux‑Dubé J. that "Aboriginality-residence (off-reserve band member status)" was an analogous ground of discrimination: *id.*, at para. 6. Although McLachlin and Bastarache JJ. sometimes used "Aboriginality-residence" without the "off-reserve" modifier (*id.*, at para. 10), they sometimes treated the two as synonyms, as when they referred to "the analogous ground of off-reserve status or Aboriginality-residence" (*id.*, at para. 16) and, in analyzing whether discrimination existed, referred only to off-reserve band members (*id.*, at paras. 18-19).

[54] *Id.*, at para. 62. Justice L'Heureux-Dubé also described band members living off-reserve as forming "part of a 'discrete and insular minority' defined by both race and residence" (*id.*, at para. 71), noting also that many of the affected persons in this group are women (*id.*, at para. 86, citing a range of social context evidence).

[55] *Id.*, at paras. 69, 72.

constructively immutable personal traits that the state has no legitimate expectation in changing. The majority recognized in *Corbiere* that Aboriginal band members must make "profound decisions … to live *on or off* their reserves, assuming choice is possible".[56] Similar to the social context evidence relied on in *Corbiere* to support off-reserve residence as an analogous ground,[57] there is evidence the Court could have relied on in *Taypotat* that establishes the constructive immutability of living on reserve, including the work of the Royal Commission on Aboriginal Peoples that Abella J. took judicial notice of in her introductory remarks.[58] Louis Taypotat also introduced social context evidence that could have been used to support the historical disadvantage associated with on-reserve residency,[59] one of the factors relevant to whether this status should be recognized as an analogous ground.[60]

What of the ground that seems to have disappeared in the Supreme Court's ruling — status as a residential school survivor? The Supreme Court also could have taken judicial notice that this ground relates to a discrete and insular minority that has suffered historical disadvantage, by relying on the RCAP Report[61] and the Federal Government's 2008 Statement of Apology to former students of residential schools.[62] The work of the TRC on the impact of residential schools, in terms of both number of persons affected and the consequences for education, could also have been noted.[63]

In earlier section 15(1) cases, the Court was prepared to take judicial notice of the constructive immutability and historical disadvantage related to new analogous grounds such as sexual orientation and marital

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[56] *Id.*, at para. 15 (emphasis added).

[57] *Id.*, at paras. 62, 71, citing *Report of the Royal Commission on Aboriginal Peoples*, vol. 4, *Perspectives and Realities* (Ottawa: The Commission, 1996), at 519.

[58] Royal Commission on Aboriginal Peoples, *People to People, Nation to Nation: Highlights from the Report of the Royal Commission on Aboriginal Peoples* (Ottawa: The Commission, 1996) [hereinafter "*People to People, Nation to Nation*"].

[59] *Taypotat* FCA, *supra*, note 15, at para. 48.

[60] *Corbiere*, *supra*, note 23, at para. 13 (McLachlin and Bastarache JJ).

[61] *People to People, Nation to Nation*, *supra*, note 58 (noting the colonial and racist rationale behind residential schools and the impact on survivors).

[62] The apology was considered in *First Nations Child and Family Caring Society of Canada v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada)*, [2016] C.H.R.D. No. 2, 2016 C.H.R.T. 2, at para. 411, citing Government of Canada, *Statement of Apology to former students of Indian Residential Schools* (June 11, 2008), online: <https://www.aadnc-aandc.gc.ca/eng/1100100015644/1100100015649>. There was also expert evidence introduced in this case on the history of residential schools and their impacts on individuals and communities.

[63] Although the TRC's final report was released in December 2015, following *Taypotat*, the work of the TRC was well underway at the time of the Court's decision and could have been the basis of judicial notice. See TRC *Final Report*, *supra*, note 6; TRC *Interim Report*, *supra*, note 7; TRC, *They Came for the Children*, *supra*, note 7.

status.[64] It is difficult to understand the basis of the Court's reticence to do so in *Taypotat*, in part because Abella J. did not articulate any criteria for recognizing analogous grounds (or "groups").

In spite of Abella J.'s focus on the failure of the claim at the grounds/groups stage, she did go on to deal with the second part of step (1) of the test for discrimination, namely whether the educational requirement created a *distinction*:

> 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.[65]

There are at least two difficulties with this passage. First, the idea that the education requirements may "mask … a discriminatory impact" is odd. In adverse effects discrimination cases, it is the distinction between groups that is masked by facially neutral provisions and the differential impact that *reveals* the discrimination.[66]

Second, it is not clear which "enumerated or analogous group" Abella J. was dealing with when she stated that "educational requirements for employment" may have discriminatory impacts in some circumstances.[67] The Court's comparisons — never explicitly drawn, but implicit in the evidence and central to discerning disparate impact — must have been

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[64] See, *e.g.*, *Egan v. Canada*, [1995] S.C.J. No. 43, [1995] 2 S.C.R. 513, at 528 (S.C.C.), affg [1993] F.C.J. 401 (F.C.A.) (La Forest J., dissenting but not on this point, recognizing sexual orientation as an analogous ground without any reference to evidence); *Miron v. Trudel*, [1995] S.C.J. No. 44, [1995] 2 S.C.R. 418, at para. 152 (S.C.C.), revg [1991] O.J. No. 1553 (Ont. C.A.) (McLachlin J., recognizing marital status as an analogous ground without any reference to evidence). There are other cases where the Court has ignored social context evidence at the grounds stage, however. See, *e.g.*, *Ontario (Attorney General) v. Fraser*, [2011] S.C.J. No. 20, 2011 SCC 20, [2011] 2 S.C.R. 3 (S.C.C.), revg [2008] O.J. No. 4543 (Ont. C.A.) (declining to recognize occupational status as a farmworker as an analogous ground in spite of the evidence) and Fay Faraday, "Envisioning Equality: Analogous Grounds and Farm Workers' Experience of Discrimination" in Fay Faraday, Judy Fudge & Eric Tucker, eds., *Constitutional Labour Rights in Canada: Farm Workers and the Fraser Case* (Toronto: Irwin Law, 2012), at 113-14.

[65] *Taypotat*, *supra*, note 3, at para. 15.

[66] Jonnette Watson Hamilton & Jennifer Koshan, "Adverse Impact: The Supreme Court's Approach to Adverse Effects Discrimination under Section 15 of the Charter" (2014) 19 Rev. Const. Stud. 191, at 196-97 [hereinafter "Adverse Impact"].

[67] *Taypotat*, *supra*, note 3, at para. 23. It is unclear whether the Court was equating eligibility to stand for election as Chief of a First Nation with eligibility for a job. The analogy may have been triggered by the Appellant's argument that the educational requirement was a "bona fide occupational requirement for holding elected office": Factum of the Appellant, *supra*, note 4, at paras. 74-82.

between Taypotat and community members who are younger, who live off-reserve or who have both characteristics. Comparisons involving residential school survivors — a category of persons overlapping with elder band members living on the reserve — were not made, consistent with the Court's more general disregard of this possible ground in *Taypotat*. Additionally, the fact that no comparator group was identified and no comparisons were expressly made raises questions about the wisdom of conflating grounds and comparator groups into a discussion of "enumerated or analogous groups". Even though the role of comparative analysis was made less formalistic in *Withler*,[68] comparisons may still be useful in establishing the differential treatment or impact that is key to finding a violation of section 15(1), especially in claims of adverse effects discrimination.

Turning to the implicit comparisons, the Court found no evidence that the education requirement in the *Kahkewistahaw Election Act* drew a distinction, or adversely impacted older community members, community members resident on the reserve, or those who have both characteristics.[69] The difficulty with this finding is the specificity of evidence that the Court seems to require, *i.e.*, statistical evidence to prove adverse effects on the grounds in question in the context of this particular First Nation community.[70] Justice Abella did not accept the evidence relied on by the Federal Court of Appeal, introduced by Taypotat, which was specific to Saskatchewan First Nations but only for those 20-24 years old.[71] The Federal Court of Appeal supplemented that evidence by taking judicial notice of the underlying 2006 census data on which it was based, showing more generalized Canadian statistical trends relating to education level, age and on-reserve status.[72] Yet Abella J. found that this

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[68] In *Withler*, *supra*, note 18, the Court reduced what had been a focus on "mirror comparator groups", while noting comparison still has a role to play throughout a s. 15(1) analysis. It noted that at step (1), a comparative approach helps determine whether there is a distinction between the claimant and others based on a protected ground: *id.*, at paras. 62-63. See also Jennifer Koshan & Jonnette Watson Hamilton, "Meaningless Mantra: Substantive Equality after *Withler*" (2011) 16 Rev. Const. Stud. 31, at 45-46.

[69] *Taypotat*, *supra*, note 3, at para. 24.

[70] *Id.*, at paras. 27, 31.

[71] See John Richards, "Closing the Aboriginal / non-Aboriginal Education Gaps", *C.D. Howe Institute*, Backgrounder No. 116 (October 2008), at 4; cited in *Taypotat* FCA, *supra*, note 15, at para. 48 (indicating high school completion rates of 39 per cent for on-reserve, and over 65 per cent for off-reserve Aboriginal persons in Saskatchewan aged 20-24 in 2006).

[72] *Taypotat* FCA, *supra*, note 15, at para. 52, citing Statistics Canada, *Educational Portrait of Canada*, 2006 Census (Ottawa: Minister of Industry, 2008), at 10 (Catalogue number 97-560).

evidence was insufficient to establish a distinction based on residency on reserve, age, or both grounds.

With regard to residence, she indicated that she had "serious doubts" about whether the educational requirement could have a disadvantageous effect on members of the First Nation based on their residence on the reserve.[73] She noted that the Chief was required to reside on the reserve under the terms of the *Kahkewistahaw Election Act*, and that this fostered, rather than excluded, participation in governance by those living on-reserve.[74] This analysis illustrates a problem with considering residence on- and off-reserve in isolation from age and/or residential school survivorship. This siloed approach does not get at the disparate impact at issue in this case.[75]

The Court next considered, separately and independently, the ground of age and whether the educational requirement had a disadvantageous impact on older First Nations members. Here the problem was entirely evidential; Abella J. showed a reluctance to generalize national trends about age and education to a specific First Nation or to a subset of that First Nation living on reserve.[76]

Finally, Abella J. considered Taypotat's argument that the educational requirement discriminated against "*older community members who live on a reserve.*"[77] However, nothing is said about this group except that there was no evidence to support the argument.[78]

What is not explained is why the Court failed to connect either age, residence on reserve or both with the status of being a residential school survivor, even though the disproportionate impact of the educational requirement on residential school survivors was raised in the initial judicial review,[79] and argued before the Supreme Court.[80]

The Court's failure to grapple with the demands of an intersectional analysis in *Taypotat* is troubling. If the Court had been prepared to consider the grounds of age, on-reserve status and residential school

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[73] *Taypotat*, *supra*, note 3, at para. 28.

[74] *Id*.

[75] It also shows the problems with considering arbitrariness under s. 15(1), as we will elaborate on in the next section.

[76] *Taypotat*, *supra*, note 3, at para. 31.

[77] *Id*., at para. 33 (emphasis in original).

[78] *Id*.

[79] *Taypotat* FC, *supra*, note 15, at para. 54.

[80] Factum of the Respondent, Louis Taypotat, online: Supreme Court of Canada, online: <http://www.scc-csc.ca/WebDocuments-DocumentsWeb/35518/FM020_Respondent_Louis-Taypotat. pdf>, at paras. 46, 48 (emphasis added).

survivorship intersectionally, it could have relied on the census data and the TRC's historical documents describing the consequences of residential schools to show the adverse impact of an education requirement on older residential school survivors living on reserves in Saskatchewan.

It is possible that by insisting on more specific statistical evidence, Abella J. was signalling the importance of recognizing the diversity of Aboriginal peoples in Canada, such that generalizations should not be made from one First Nation to the next (let alone from First Nations to other Aboriginal groups). The *C.D. Howe Institute Backgrounder* introduced by Taypotat and relied on by the Federal Court of Appeal indicates that Aboriginal education outcomes "differ markedly across the three identity population groups" (First Nation, Métis and Inuit).[81] However, because census data is based on provincial populations, the claimant would bear the burden in this kind of case to produce evidence about education levels within their own on-reserve community based on age or residential school survivor status, as well as relevant comparator evidence for off-reserve Aboriginal persons, perhaps from the same nation. This would be extremely challenging, especially if small communities such as the Kahkewistahaw First Nation do not gather that type of evidence themselves, leaving it to the individual claimant to do so.

The demand in *Taypotat* for community-specific evidence also seems at odds with *Corbiere*, where the Court emphasized the importance of considering the issues beyond the particular circumstances of the Batchewana Band, even though the claim had been framed to focus on the section 15 rights of non-resident members of that Band.[82] However, *Corbiere* engaged the much broader issue of direct discrimination against off-reserve members of all Bands in elections under the *Indian Act*, rather than consideration of the adverse effects of a specific Band's election code.[83]

Justice Abella did acknowledge in *Taypotat* that education requirements could have an adverse impact based on grounds such as race in some circumstances, relying on the American human rights case of *Griggs v. Duke Power Co*.[84] In *Griggs*, the U.S. Supreme Court was

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[81] *C.D. Howe Institute*, Backgrounder No. 116, *supra*, note 71, at 3; *Taypotat*, *supra*, note 3, at para. 32.

[82] *Corbiere*, *supra*, note 23, at paras. 45-50.

[83] The Appellants also distinguished the use of judicial notice in *Quebec v. A.* on this basis, noting that case involved legislation that covered the whole province, which was the scope of the statistics used by LeBel J. See Factum of the Appellants, *supra*, note 4, at para. 87.

[84] *Taypotat*, *supra*, note 3, at para. 23, citing *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (striking down an employment requirement of a high school diploma or mastery of intelligence tests).

prepared to rely on a much more generalized evidentiary context than our Supreme Court was prepared to do in *Taypotat*.[85] Again, this could be explained by the importance of recognizing diversity amongst Aboriginal groups in Canada, which Abella J. did advert to in *Taypotat*.[86]

3. Step 2: Discrimination

Although the focus of Abella J.'s reasons was the lack of evidence linking the educational requirement in the election code to a disparate impact on an enumerated or analogous group, she made some broader points about matters that would previously have fallen under *Kapp*'s second step: "whether the distinction creates a disadvantage by perpetuating prejudice or stereotyping?"[87]

Perhaps most importantly, Abella J. continued to downplay the need for a claimant to prove prejudice or stereotyping, consistent with her judgment in *Quebec v. A.* Indeed, there is no mention at all of either prejudice or stereotyping in *Taypotat*.[88] Despite the fact that prejudice and stereotyping were the focus of the four judges who dissented on section 15 in *Quebec v. A.*, the Supreme Court is now apparently unanimous that the appropriate question is whether the distinction "*has the effect of perpetuating arbitrary disadvantage*".[89]

Although we had hoped that Abella J. misspoke when she referred to "arbitrary disadvantage" once in *Quebec v. A.*,[90] this term prevailed in *Taypotat*, appearing six times in the test for recognizing discriminatory distinctions.[91] Justice Abella used "arbitrary" as a synonym for "discriminatory",[92] but did not indicate why she thinks this particular

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The Court in *Taypotat* failed to note that caution should be used in analogizing to a case decided in a very different doctrinal context, involving a human rights claim against a private employer.

[85] *Griggs*, *id.*, at note 6 (relying on statistical evidence of the impact of the education requirement on African Americans in North Carolina, based on census data from that state).

[86] *Taypotat*, *supra*, note 3, at para. 32. It should also be noted that *Griggs* took place within a particular socio-political context of race relations in the American south.

[87] *Kapp*, *supra*, note 19, at para. 17.

[88] The Federal Court of Appeal found discrimination based on the perpetuation of prejudice and stereotyping. See *Taypotat* FCA, *supra*, note 15, at paras. 56-59.

[89] *Taypotat*, *supra*, note 3, at paras. 16, 18, 28 and 34 (emphasis added).

[90] *Quebec v. A.*, *supra*, note 17, at para. 331. See also *McCormick v. Fasken Martineau DuMoulin LLP*, [2014] S.C.J. No. 39, 2014 SCC 39, [2014] 2 S.C.R. 108 (S.C.C.), affg [2012] B.C.J. No. 1508 (B.C.C.A.), a human rights case where Abella J. uses the language of arbitrary discrimination. More generally, see Jennifer Koshan, "Under the Influence: Discrimination Under Human Rights Legislation and Section 15 of the *Charter*" (2014) 3:1 Can. J. Human Rights 115.

[91] *Taypotat*, *supra*, note 3, at paras. 16, 18, 20, 28 (twice) and 34.

[92] *Id.*, at para. 20.

word is one that sheds light on identifying which laws violate section 15(1). The most common understanding of "arbitrary" is "not based on reason or evidence".[93] To ask whether an impugned provision is "based on reason or evidence" is to import section 1 justifications about purposes and means — not impact — into section 15. Interestingly, in *Kokopenace*, decided just before *Taypotat*, the dissenting justices noted that in *Quebec v. A.*, Abella J. "rejected an approach which would internally limit equality rights by looking at the reasonableness of state action, concluding that this was a matter best left for the justification analysis under s. 1 of the Charter."[94] *Kokopenace*'s interpretation of *Quebec v. A.* supports a reading that *Taypotat* moves away from that analytical separation by focusing on arbitrariness. Furthermore, arbitrariness has a significant meaning in section 7 jurisprudence under the principles of fundamental justice, and injecting it into the section 15 analytical framework deprives section 15 of distinctiveness under the Charter.[95]

The Court also returned to two of the four contextual factors developed in *Law v. Canada (Minister of Employment and Immigration)* as relevant to whether an impugned law is discriminatory in the sense that it results in arbitrary disadvantage.[96] First, a law that perpetuates arbitrary disadvantage is one that fails to respond to group members' "actual capacities and needs".[97] In *Law*, this was the second contextual factor, the correspondence factor, which was the subject of much criticism because it required a focus on government objectives and their link to a group's characteristics.[98] This focus also improperly shifts the burden to

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[93] *Merriam-Webster*, online: <http://www.merriam-webster.com/dictionary/arbitrary>.

[94] *Kokopenace*, *supra*, note 23, at para. 252 (Cromwell J. and McLachlin C.J.C., dissenting), citing *Quebec v. A.*, *supra*, note 17, at para. 333. Justice Abella did not sit on *Kokopenace*, which involved the issue of whether the exclusion of on-reserve residents on a jury roll violated s. 11(d), 11(f) or 15(1) of the Charter. The s. 15(1) claim was dismissed summarily by the majority (at paras. 128 and 139), and was not addressed by the dissent (at para. 201).

[95] See Jennifer Koshan, "Redressing the Harms of Government (In)Action: A Section 7 Versus Section 15 Charter Showdown" (2013) 22:1 Const. Forum 31; Sheilah Martin, "Balancing Individual Rights to Equality and Social Goals" (2001) 80 Can. Bar Rev. 299, at 329-30.

[96] *Law v. Canada (Minister of Employment and Immigration)*, [1999] S.C.J. No. 12, [1999] 1 S.C.R. 497, at para. 88 (S.C.C.), affg [1996] F.C.J. No. 511 (F.C.A.). *Law*'s contextual factors were also approved in *Kapp*, *supra*, note 19, at para. 23, where they were tied to prejudice and stereotyping.

[97] *Taypotat*, *supra*, note 3, at para. 20.

[98] See, *e.g.*, Martin, "Balancing Individual Rights to Equality and Social Goals", *supra*, note 95, at 328; Sheila McIntyre, "Deference and Dominance: Equality Without Substance" in *Diminishing Returns*, *supra*, note 48, at 102-105; Beverley Baines, "*Law v. Canada*: Formatting Equality" (2000) 11 Const. Forum 65, at 72.

the claimant to prove the arbitrariness of government action rather than requiring the government to prove the rationality of its actions.

The other factor that plays a role in *Taypotat*'s understanding of discrimination is *Law*'s first contextual factor, focused on "pre-existing disadvantage". This factor requires a search for "constant markers of suspect decision making"[99] and asks whether the distinction "imposes burdens or denies a benefit in a manner that has the effect of *reinforcing, perpetuating or exacerbating* their disadvantage"[100] or "widens the gap between the historically disadvantaged group and the rest of society rather than narrowing it".[101] Justice Abella reiterated the point from *Withler* that "evidence that goes to establishing a claimant's historical position of disadvantage" will be relevant.[102] It thus appears that the Court is coming closer to requiring the law's "perpetuation" of an historical disadvantage before discrimination can be found.[103]

The Court's statements about the overall approach to discrimination, with their broad focus on context, systemic disadvantage and the effects of government actions, are more promising than is the repeated use of "arbitrary disadvantage". Nevertheless, arbitrariness seemed to be the focus when considering the sufficiency of the evidence in establishing discrimination.[104]

The Court suggested that an educational requirement was an important qualification for leaders governing Aboriginal communities. They emphasized that the *Kahkewistahaw Election Act* was that First Nation's response to the RCAP Report and its identification of education as a top priority for self-governing communities.[105] While we do not dispute the merits of these assertions, we do maintain that they are relevant to a section 1 justification of the educational requirement — or,

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[99] *Taypotat*, *supra*, note 3, at para. 19, quoting *Corbiere*, *supra*, note 23, at para. 8.

[100] *Taypotat*, *supra*, note 3, at para. 20 (emphasis added).

[101] *Id.*, quoting *Quebec v. A.*, *supra*, note 17, at para. 332.

[102] *Taypotat*, *supra*, note 3, at para. 21, quoting *Withler*, *supra*, note 18, at para. 38 and *Quebec v. A.*, *supra*, note 17, at para. 327.

[103] The question of whether s. 15(1) claimants must show pre-existing disadvantage dates back to *R. v. Turpin*, [1989] S.C.J. No. 47, [1989] 1 S.C.R. 1296, at para. 45 (S.C.C.), affg [1987] O.J. No. 767 (Ont. C.A.), where Wilson J. held that "in most but perhaps not all cases" only historically disadvantaged groups can be discriminated against. In *R. v. Hess; R. v. Nguyen*, [1990] S.C.J. No. 91, [1990] 2 S.C.R. 906, at para. 77 (S.C.C.), revg [1988] O.J. No. 95 (Ont. C.A.); revg [1989] M.J. No. 127 (Man. C.A.), McLachlin J., writing for those dissenting on the s. 15(1) issue, recognized that *Turpin* seemed to require a court to "look for a disadvantage peculiar to the 'discrete and insular minority' discriminated against, to determine if it suffers disadvantage apart from and independent of the particular legal distinction being challenged" (quoting *Turpin*, *id.*, at para. 45).

[104] *Taypotat*, *supra*, note 3, at para. 34.

[105] *Id.*, at para. 1, quoting *Gathering Strength*, *supra*, note 1, at 433 and 540-41.

alternatively, a consideration of section 25 of the Charter — and not to whether the requirement violates section 15(1).

What might be the underlying reasons why the Court did not find the discrimination arguments in *Taypotat* persuasive, beyond its stated reasons based on the lack of evidence? Two distinguishing features make *Taypotat* stand out amongst the other equality cases involving Aboriginal claimants.[106] First, it is the only adverse effects discrimination case in the group.[107] Second, it is the only case involving a First Nation respondent and consideration of a direct conflict between an Aboriginal person and (part of) his community.[108] This type of claim is one that we suggest may be better handled by the articulation of an approach to section 25 and its relationship with section 15.[109]

III. CONCLUSION

It is understandable that the Supreme Court in *Taypotat* was concerned with the objectives underlying the election code's education requirement and was loathe to burden the Kahkewistahaw First Nation with justification of this requirement. However, by emphasizing an arbitrariness element in the test for section 15(1), rather than focusing on community goals and the First Nation's rights under section 25 or section 1, the Court may have made it more difficult for other equality rights claimants outside the Aboriginal rights context. Similarly, by incorporating stringent evidentiary requirements into section 15(1), even if motivated in part by the need to recognize the diversity of Aboriginal peoples, the Court may also be making claims more challenging for equality rights claimants in other contexts.

It is true that the Court's decision continues the welcome new direction begun in *Quebec v. A.*, which saw the broadening of discrimination beyond stereotyping and prejudice and the restriction of considerations of choice under section 15(1). However, in addition to

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[106] For a description of these cases see, *supra*, note 23.

[107] For a discussion of the challenges of adverse effects discrimination claims that *Taypotat* may be illustrative of, see "Adverse Impact", *supra*, note 66, at 226-31.

[108] Other s. 15 cases have also involved elements of such conflicts, but more indirectly. For example, in *NWAC*, *supra*, note 23, NWAC sought to participate in the consultation process for constitutional reforms in the early 1990s, arguing that the Aboriginal groups who were being formally consulted were male-dominated and would not advocate strongly for the Charter's application to Aboriginal governments.

[109] For further discussion see "*Kahkewistahaw First Nation v. Taypotat* — Whither Section 25 of the *Charter*?", *supra*, note 11.

their problematic reliance on arbitrariness and burdensome evidentiary requirements, the Court's failure to undertake any intersectionality analysis is also a disappointing feature of *Taypotat*. The decision appears to be results-oriented and reactive. Indeed, although *Taypotat* is a unanimous judgment, it raises almost as many questions about how to conduct a section 15(1) challenge as it answers.