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Abstract
The Supreme Court of Canada’s articulation for the test for discrimination under section 15 of the Charter has undergone numerous permutations over the past twenty-five years. The Supreme Court introduced its latest round of changes in its 2013 decision in Québec (Attorney General) v A and its 2015 decision in Kahkewistahaw First Nation v Taypotat. Together, these two decisions clarified that the appropriate approach to section 15 was not one focused strictly on stereotype and prejudice, but rather on all contextual factors that may inform whether an impugned law violates the norm of substantive equality. This paper critically analyzes the impact of Québec v A and Taypotat by examining how courts across the country have articulated the doctrinal messages of these two decisions, and applied them in practice. Both quantitative and qualitative analyses are employed. Under the quantitative approach, the likelihood of mounting a successful s. 15 challenge under the new framework set by Québec v A and Taypotat as compared to the prior test from Kapp and Withler is considered. Under the qualitative approach, a number of key questions are asked, including: what the meaning of the Québec v A and Taypotat touchstone for discrimination – “arbitrary disadvantage” – is; what role stereotype and prejudice continue to play as indicia of discrimination; and what other contextual factors courts will examine in assessing whether discrimination has occurred. The author concludes that although the approach under Québec v A and Taypotat requires some fine-tuning, overall it is a positive move toward a less formalistic, less onerous standard for equality claimants that better reflects section 15’s focus on substantive equality.

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The Supreme Court of Canada’s articulation for the test for discrimination under section 15 of the Charter has undergone numerous permutations over the past twenty-five years. The Supreme Court introduced its latest round of changes in its 2013 decision in Québec (Attorney General) v A and its 2015 decision in Kahkewistahaw First Nation v Taypotat. Together, these two decisions clarified that the appropriate approach to section 15 was not one focused strictly on stereotype and prejudice, but rather on all contextual factors that may inform whether an impugned law violates the norm of substantive equality. This paper critically analyzes the impact of Québec v A and Taypotat by examining how courts across the country have articulated the doctrinal messages of these two decisions, and applied them in practice. Both quantitative and qualitative analyses are employed. Under the quantitative approach, the likelihood of mounting a successful s. 15 challenge under the new framework set by Québec v A and Taypotat as compared to the prior test from Kapp and Withler is considered. Under the qualitative approach, a number of key questions are asked, including: what the meaning of the Québec v A and Taypotat touchstone for discrimination – “arbitrary disadvantage” – is; what role stereotype and prejudice continue to play as indicia of discrimination; and what other contextual factors courts will examine in assessing whether discrimination has occurred. The author concludes that although the approach under Québec v A and Taypotat requires some fine-tuning, overall it is a positive move toward a less formalistic, less onerous standard for equality claimants that better reflects section 15’s focus on substantive equality.

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IN LAW V CANADA (Minister of Employment and Immigration), Justice Iacobucci famously described section 15 of the Charter as “perhaps [its] … most conceptually difficult provision.” With the approach to section 15 having undergone five different formulations in the past twenty-five years, this statement has proven to be true. It is little wonder that the interpretation of the Supreme Court of Canada’s (“SCC”) analytical framework for section 15 has been described as “daunting,” and its evolution a “winding course.”

The 2013 decision of Quebec (Attorney General) v A introduced the latest round of changes to the analytical approach to section 15. It threw into question the previous requirement (established by R v Kapp and Withler v Canada
that discrimination be shown by evidence of stereotype or prejudice. Directly following the decision, \textit{Quebec v A}'s direct impact was unclear, not least of all because the Court split 5-4 regarding the section 15 issue. \textit{Quebec v A} was followed by \textit{Kahkewistahaw First Nation v Taypotat},\footnote{2015 SCC 30, [2015] 2 SCR 548 [Taypotat].} which contained a more unequivocal statement that the appropriate approach to section 15 was not one focused strictly on stereotype and prejudice, but rather on all contextual factors that may inform whether an impugned law violates the norm of substantive equality.

This article critically analyzes the after-effects of \textit{Quebec v A} and \textit{Taypotat} by striving to understand how courts have construed the doctrinal messages of these two decisions since they were rendered, and how those doctrines have been employed in practice. The article proceeds in three Parts.

Part I explores the evolution of the SCC's jurisprudence on section 15 and contemplates the major turning points for each iteration of the Court's approach. The history of the Court's section 15 decisions is important not only because it serves as a refresher for an area of law that has been anything but straightforward in its development, but because \textit{Quebec v A} and \textit{Taypotat} in fact incorporate concepts from prior jurisprudence in their version of the approach to section 15. A historical overview is thus helpful for situating the judgments in \textit{Quebec v A} and \textit{Taypotat}, because these two decisions mark a full-circle return to the flexible, contextual inquiry into discrimination championed by the Court in earlier section 15 cases, particularly \textit{Andrews v Law Society of British Columbia}\footnote{[1989] 1 SCR 143, 56 DLR (4th) 1 [Andrews cited to SCR].} and \textit{Law}.

Part II then examines the \textit{Quebec v A} and \textit{Taypotat} cases in detail. The debate over the role of stereotype and prejudice that was at the heart of the Court's split in \textit{Quebec v A} is introduced. I follow with a discussion of \textit{Taypotat} and reflect on the benefits of the contextual, multifactorial approach advocated for in that case.

As enlightening as \textit{Quebec v A} and \textit{Taypotat} have been for some aspects of the section 15 inquiry, they have simultaneously clouded other aspects. Courts have indeed lamented that “controversy remains about precisely how [the] discrimination evaluation is to be undertaken.”\footnote{R v Madeley, 2016 ONCJ 108 at para 132, 30 CR (7th) 171 [Madeley].} Thus, I conclude Part II by raising four key questions that have cropped up in the wake of the modifications introduced by these two cases, namely:

\begin{enumerate}
\item \textit{Quebec v A}, 2011 SCC 12, [2011] 1 SCR 396 [Withler].
\item \textit{Taypotat}, 2015 SCC 30, [2015] 2 SCR 548 [Taypotat].
\item \textit{Andrews} cited to SCR.
\item \textit{Madeley}, 2016 ONCJ 108 at para 132, 30 CR (7th) 171 [Madeley].
\end{enumerate}
(1) Is the approach introduced by *Quebec v A* and *Tapotat* different than what has come before? If so, which doctrinal changes introduced by these cases will be applied in practice?

(2) What residual role does evidence of stereotype and prejudice (thought to be required post-*Kapp* and *Withler*) play in showing disadvantage?

(3) What are the effects of *Quebec v A* and *Tapotat*’s repeated use of the phrase “arbitrary disadvantage” as a touchstone for determining whether an impugned law is discriminatory within the meaning of section 15?

(4) What factors other than stereotype and prejudice may be used to inform the “flexible, contextual” inquiry promoted by *Quebec v A* and *Tapotat*?

Part III attempts to provide answers to the above questions by reviewing section 15 cases that have considered either *Quebec v A* or *Tapotat*. The survey is pan-Canadian, examining how courts across the country have both interpreted and applied the principles articulated in *Tapotat* and *Quebec v A*. The goal is to determine whether these two decisions have coloured the section 15 analyses conducted by lower courts, and if so, how. My observations are intermingled with recommendations for future doctrinal developments and points of clarification in light of the issues that emerge from my analysis of the case law.

I. GROWING PAINS: THE EVOLUTION OF THE APPROACH TO SECTION 15

The first stage of a section 15(1) analysis has always been to determine whether a law creates a distinction based on an enumerated or analogous ground. While demonstrating differential treatment is necessary for a successful section 15 claim, it is not sufficient. Not all distinctions created by a law are considered discriminatory under section 15. Laws classify individuals based on group membership all the time, because “the application of different rules, regulations, requirements and qualifications to different persons is necessary for the governance of modern society.” Common examples are age-based laws that restrict underage people from drinking, driving, or smoking, and laws that impose different tax burdens on individuals depending on their income. It would upend effective governance to allow individuals to challenge these types of laws. Rather, the goal

of section 15 has always been to identify those laws that make a group-based distinction that—given a specific law’s content, its purpose, and its impact on those it does and does not apply to—strikes at the root of a right meant to ensure “equal protection and equal benefit of the law without discrimination.”

Once a distinction based on an enumerated or analogous ground is demonstrated, the next step of the inquiry is to determine whether that distinction is discriminatory, or, using post-Taypotat language, whether it is arbitrary. While the aim of sorting discriminatory distinctions from neutral ones is simple, the path towards it has been anything but. The test for whether an impugned law is discriminatory has evolved numerous times over the years, and has been one of the most contentious aspects of section 15 jurisprudence.

The Court first introduced its section 15 approach in the 1989 Andrews decision. The test then underwent significant revisions in each of the following sets of cases: the 1995 Equality Trilogy of Miron v Trudel, Egan v Canada, and Thibaudeau v Canada; the 1999 case of Law; the 2008 revisions introduced by Kapp and reinforced by Withler; ending with the most recent iteration in Quebec v A and Taypotat.

Each time the Court has revised the section 15 test, it has maintained that the purpose of the provision has remained the same: to capture instances where substantive, not just formal, equality is violated. What has been difficult to pin down for the Court is how to structure a test that achieves that singular goal. It is hardly surprising that settling on an approach to equality continues to beleaguer the SCC, given the Court’s own admissions regarding the conceptual pitfalls surrounding section 15. The Court’s failure to provide a positive definition of what, exactly, substantive equality is mirrors the lack of a concrete definition of equality in the Charter itself. The amorphous, undefined nature of the concept of substantive equality contributes to the difficulty of attempting to formulate a universal, one-size-fits-all definition of equality, and a universal, one-size-fits-all approach to section 15. The goal of section 15 is not absolute

12. Charter, supra note 1, s 15(1).
13. As the Court acknowledged in Law, Law, supra note 2 at para 2, citing Andrews, supra note 9.
17. See e.g. Andrews, supra note 9 at 164; Law, supra note 2 at para 2.
equality at all times and at all costs, but rather “justified equality.” Assessing whether a distinction is discriminatory or arbitrary helps a court determine “which kinds of equality are justified and which are not,” an inquiry that naturally turns on the facts of each specific case.

In pursuing its goal of protecting substantive equality, the Court has recast its approach to section 15 four times since Andrews. While its revisions have occurred in search of a laudable goal, they have introduced a great deal of uncertainty to those bringing section 15 claims and those adjudicating them.

The following Part I analysis features a brief tour through the development of the Court’s analytical approach to determining whether a law is discriminatory or arbitrary. I begin with Andrews, where the Court pioneered the ideal of substantive equality towards which all subsequent SCC decisions dealing with section 15 have strived. I then discuss the 1995 Equality Trilogy, which housed a controversy concerning the appropriate role of an impugned law’s purpose to the section 15 inquiry that split the Court three ways. I then discuss Law, which not only settled the debate of the Equality Trilogy, but also introduced a four-step, formalized framework for assessing equality claims, of which human dignity was the cornerstone. Part I concludes with a discussion of Kapp and Withler, two decisions that together brought an end to Law’s focus on human dignity, and instead refocused the section 15 inquiry on prejudice and stereotypes.

In turn, Part II opens with a discussion of Quebec v A and Taypotat, reflecting on what the section 15 approach following these two cases looks like, particularly with regards to which components are new, and which components have been repurposed from prior iterations of the test.

A. THE FOUNDATION OF SUBSTANTIVE EQUALITY: ANDREWS

The Court’s first case dealing with section 15 was Andrews. In Andrews, Justice McIntyre made it clear that the text of section 15 is rooted in four basic rights: equality before the law, equality under the law, the right to the equal protection of the law, and the right to equal benefit of the law. This expansive wording was seen by many as a protection of more than mere formal equality. Accordingly, Justice McIntyre held that an analytical approach to section 15 that only captured unequal treatment of those who were similarly situated was “seriously deficient.” In his words, “a bad law will not be saved merely because it operates equally

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20. Ibid at 249-50.
21. Ibid at 250.
22. Andrews, supra note 9 at 170.
23. Ibid at 166.
upon those to whom it has application.”

A law that treats all individuals in an identical manner, irrelevant of the differences in their characteristics and context, may very well still be a discriminatory law, creating outcomes incongruent with a more substantive concept of equality. Justice McIntyre pointed to a number of examples to illustrate his point, including the much-maligned pre-Charter decision of the SCC in Bliss v Attorney General of Canada, where the Court ruled that it was not discriminatory to deny a pregnant woman unemployment benefits to which she would have been entitled had she not been pregnant. Its reasoning? The law treated all pregnant women equally.

Justice McIntyre instead embraced a contextual definition of discrimination that considers the law’s effects on a specific claimant or group. To attain the ideal of full equality before and under the law expressed in the Charter, Justice McIntyre clarified that one must look to the impact of a law on the individual or group. While a discriminatory distinction created by a law must have some sort of negative effect (the imposition of a burden or the denial of a benefit), it is irrelevant whether the distinction is intentional or not. All that matters is that the imposition of the negative effect relates to personal characteristics of the individual or group. But imposing a negative effect on the basis of a personal characteristic is not enough. It is not discriminatory to draw a distinction based on the actual characteristics of an individual. The key consideration is whether a law bases a distinction on characteristics that are attributed to the individual because of his or her membership in a group. Justice McIntyre thus concluded that laws that draw harmful distinctions based on personal characteristics rather than an individual’s merits and capacities will “rarely escape the charge of discrimination.”

Some have since argued that the Court’s understanding of substantive equality in Andrews was too narrow because it advocated for equality as a “comparative concept.” Andrews prohibited laws from applying to individuals on the basis of irrelevant personal characteristics. Critics indicated that this pointed to a

24. Ibid at 167.
27. Andrews, supra note 9 at 165.
28. Ibid at 174-75.
30. Andrews, supra note 9 at 165.
retention of the language associated to formal equality, as well as the sort of comparative exercise that typically underpins formal equality models.31

However, to me, Andrews is more ambitious. Although the decision allows for an equality analysis to proceed on a comparative basis, that is not an inherently negative feature. Sometimes, a comparative exercise may be the simplest way to demonstrate inequality. More importantly, Andrews is a strong clarion call for judges and claimants to situate substantive equality at the heart of section 15(1). Even though Justice McIntyre did not explicitly identify the concept of “substantive equality” in his judgment, the spirit of the concept permeates the Andrews decision. Echoes of substantive equality are evident first in Justice McIntyre’s outright rejection of the similarly situated test, which can produce unacceptable outcomes while espousing a formal concept of equality.32 They are also evident in his recognition that laws may not only be discriminatory on their face but in their effects, and it is those adverse effects on a group in the real world that must be examined to detect discrimination.33 But they are most evident in his emphasis on the need for a flexible, contextual approach to section 15, one that examines the circumstances and the characteristics of an individual relative to others in society.34 A contextual test allows for a more systematic consideration of the disadvantages that the individual or group have faced in the past and continue to face, and whether the impugned law serves only to further that disadvantage.

It is therefore from Andrews that the Court’s present day understanding of substantive equality sprouts. As the Court acknowledged in Kapp: “Andrews set the template for this Court’s commitment to substantive equality—a template which subsequent decisions have enriched but never abandoned.”35

B. DEEP FRACTURES IN THE COURT: THE 1995 EQUALITY TRILOGY

As hopeful as Andrews was in its reach for something more than mere formal equality, commentators raised issues with Justice McIntyre’s articulation of the approach to section 15 following the judgment, which they argued left room for

32. Ibid at 165-68.
33. Ibid at 174.
34. Ibid at 174-75.
35. Kapp, supra note 6 at para 14.
uncertainty about what exactly constitutes discriminatory treatment.\textsuperscript{36} The main critique was that all adverse distinctions based on a prohibited ground would qualify as discriminatory, due to Justice McIntyre’s link between discrimination and laws that draw distinctions based on characteristics attributed to an individual because of his or her membership in a group. Although Justice McIntyre made clear that such laws would \textit{usually} be discriminatory, rather than \textit{always} discriminatory,\textsuperscript{37} there remained a concern that the \textit{Andrews} approach would trivialize section 15 by deeming all distinctions made by a law to be discriminatory.\textsuperscript{38}

The Court took these criticisms to heart and set about moulding the \textit{Andrews} approach to ensure an additional limitation was added to filter out those laws that imposed an adverse distinction based on a prohibited ground, but that were still considered non-discriminatory. Thus, the \textit{Andrews} approach underwent its first reformulation in the ensuing 1995 Equality Trilogy of \textit{Miron}, \textit{Egan}, and \textit{Thibaudeau}.

Unfortunately, the Equality Trilogy did not immediately provide clear answers as to what the post-\textit{Andrews} approach should be, because of the doctrinal rifts within the Court that arose in these three cases. Four judges—Chief Justice Lamer, and Justices La Forest, Gonthier, and Major—took a narrower view of the section 15 test and added a limitation based on the impugned law’s purpose. They held that adverse differential treatment is discriminatory only if the alleged enumerated or analogous ground is irrelevant to the goals and values of the impugned law. This approach is essentially a rational connection test, à la section 1: Is the distinction created by the legislation rationally connected to its purpose? Or, in the context of equality, is the distinction (based on what \textit{Andrews} considered irrelevant group characteristics) created by the impugned law one that nonetheless promotes its objectives? If so, the impugned law is not discriminatory.


\textsuperscript{37} See \textit{Andrews}, supra note 9 at 174-175. In \textit{Andrews} Justice McIntyre stated: “Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual’s merits and capacities will rarely be so classed.”

\textsuperscript{38} See \textit{e.g.} \textit{Miron}, supra note 16 at para 131.
Of course, the problem with this approach is that it gives far too much deference to Parliament and the legislatures, allowing governments to circumvent section 15 infringement so long as they can ground the distinction created by law in the respective law’s purpose. Further, the approach fails to capture what has become the true target of substantive equality in modern-day jurisprudence: not a law’s discriminatory purposes, but its discriminatory effects. Intention to discriminate was not a required feature of section 15 in *Andrews*, which instead emphasized the impact of a law on individuals and groups, in the context of combatting systemic discrimination.\footnote{Marc Gold, “Comment: *Andrews v. Law Society of British Columbia*” (1989) 34:4 McGill LJ 1063 at 1070-71.} The approach taken by Chief Justice Lamer, and Justices La Forest, Gonthier, and Major in the Equality Trilogy therefore represented a departure from *Andrews*’ broader conception of the protection afforded by section 15.

Four other judges—Justices Sopinka, Cory, McLachlin, and Iacobucci—adopted a more holistic understanding of discrimination—still narrower than that advocated for in *Andrews*, but much broader than that of Chief Justice Lamer et al. These judges similarly tied discriminatory treatment to purpose, but for them it was the purpose of section 15 itself that was pivotal, not the purpose of the impugned legislation. As Justice McLachlin (as she then was) explained in *Miron*, the purpose of section 15 is “to prevent the violation of human dignity and freedom through the imposition of limitations, disadvantages or burdens through the stereotypical application of presumed group characteristics, rather than on the basis of merit, capacity or circumstance.”\footnote{*Miron*, supra note 16 at para 140.}

This approach echoes the original approach advocated by *Andrews* in both spirit and substance. The Court continued to move beyond a simple construct of formal equality, and towards the more contemporary view that substantive equality is an essential element of discrimination; a move that is very much reflective of the spirit of *Andrews*.\footnote{*Withler*, supra note 7 at para 42.} Substantively, the violation of dignity remained linked to the imposition of burden through distinctions based on group-linked characteristics, rather than actual capacities. At the same time, the approach was somewhat of a departure from *Andrews* in the sense that it moved beyond looking at externally-presenting, concrete, and objectively ascertainable indicators of discrimination—the actual circumstances and abilities of the individual—to include the vaguer, internalized, and therefore more arguably subjective concept

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40. *Miron*, supra note 16 at para 140.
41. *Withler*, supra note 7 at para 42.
of dignity. Additional spins added to the Andrews approach were the inclusion of “historical disadvantage” and “stereotypes” as relevant factors to assessing whether a violation of dignity had occurred.

Justice L’Heureux-Dubé did not align herself with either camp, intensifying the deep divisions that ran through the Court and the state of general confusion around section 15. Instead, she proposed her own approach to section 15, one that focused on the impact of the impugned legislation on the affected group, and the nature of the interest that was targeted by the distinction created. The more severe the impact, and the more significant the interest at stake, the more likely a law was to be discriminatory.

C. RECONCILIATION AND THE INTRODUCTION OF HUMAN DIGNITY: LAW V CANADA

Individual members of the Court did not reconcile their differences with respect to the test for section 15(1) until their decision in Law. In Law, the SCC settled on a conception of section 15 that confirmed the view from the Equality Trilogy that a law will be discriminatory if the burden it imposes or the benefit it denies harms an individual’s dignity.

Specifically, the contours of human dignity were filled in by the Court’s explanation that dignity relates to feelings of “self-respect” and “self-worth” that are enhanced by laws that “are sensitive to the needs, capacities, and merits of different individuals, taking into account the context underlying their differences.” In turn, human dignity is harmed whenever a law treats people unfairly based upon “personal traits or circumstances which do not relate to individual needs, capacities, or merits,” or when people are “marginalized, ignored, or devalued.”

In addition to picking up and running with the idea of human dignity as a foundation of substantive equality from Miron, the Court in Law also identified a structured approach consisting of a list of four factors that claimants could

43. Miron, supra note 16 at paras 128, 133, 148-49, 156.
44. See ibid at paras 80-110.
45. Law, supra note 2 at para 53.
46. Ibid.
point to as support for their claim that their dignity was harmed. The approach was contextual and responsive to the specific situation of the claimant by allowing the factors to be applied flexibly and non-exhaustively. Simultaneously, by enumerating specific categories linked to the dignity inquiry, the Court made the test for section 15 violations clearer and more concrete—which is especially important when dealing with a nebulous and individualistic concept like human dignity.

The four factors Law assimilated into the section 15 inquiry are as follows:

(1) “Pre-existing disadvantage, stereotyping, prejudice, or vulnerability experienced by the individual or group at issue.”47 This factor links stereotyping, prejudice, and pre-existing disadvantage together as indicators of the claimant’s association with a historically more advantaged or disadvantaged group or groups (although subsequent jurisprudence would decouple these as separate indicators of a section 15 breach). The Court also noted that these factors were not determinative, but indicated they carried significant weight because the goal of section 15 is to protect vulnerable members of “discrete and insular minorities.”

(2) “The correspondence, or lack thereof, between the ground or grounds on which the claim is based and the actual need, capacity, or circumstances of the claimant or others.”48 This factor incorporated the focus of Andrews and the Equality Trilogy on burdens that legislation imposes that are not grounded in the claimant’s real-life characteristics and circumstances, but rather through an erroneous conception of their characteristics and circumstances based on their membership in a discrete group.

(3) “The ameliorative purpose or effects of the impugned law upon a more disadvantaged person or group in society.”49 This factor specifically speaks to claims brought by a more advantaged member of society. The Court recognized that “leg-up” legislation that creates benefits for disadvantaged groups over advantaged groups is not discriminatory as it serves the purposes of section 15 and will not violate the dignity of advantaged individuals.

47. Ibid at para 88.
48. Ibid at paras 69-71.
49. Ibid at paras 72-73.
“The nature and scope of the interest affected by the impugned law.”

This factor incorporated Justice L’Heureux-Dubé’s approach to section 15 from the Equality Trilogy. The Court recognized that consequences that are particularly severe or specific to the enumerated or analogous group are more likely to be considered discriminatory.

Despite the more categorical approach to the issue of discrimination instituted by Law and its emphasis on human dignity, Justice Iacobucci maintained that Law showed “great continuity” with Andrews, because substantive equality, in the form of guarding against systematic discrimination, remained the driving force behind the Law approach. While the four Law factors intended to get at violations of human dignity, the overall purpose of section 15 remained the same: stopping “the evil of oppression” and remedying “the imposition of unfair limitations upon opportunities, particularly for those persons or groups who have been subject to historical disadvantage, prejudice, and stereotyping.”

The approach espoused in Law was an interesting blend of abstraction and formalism. The Court coupled the already ambiguous concept of substantive equality to the even more ambiguous concept of dignity, and then attempted to pin both down through the application of its four concrete factors. Despite the Court’s attempt to resolve the issues around the conceptual looseness of “human dignity” with the structure of its four-part test, in the end, Law was criticized for being both too abstract and too formal. It was considered too abstract because human dignity was far too malleable and elusive to form the basis of equality. Its use, many argued, redirected the equality inquiry from historic and systemic disadvantage to a matter of personal experience and sentiment. The individualized nature of dignity meant the concept could not be applied reliably in a legal test, leading to unpredictable and widely varied outcomes, while also presenting an onerous evidentiary burden for claimants. Law was simultaneously criticized for its formalism, which was said to be directly contrary to the intention of Andrews. Although the Court in Law cautioned that its four-step approach was not intended as a “rigid test,” it was nonetheless “eagerly seized on by law

50. Ibid at paras 74-75.
51. Ibid at para 42.
52. Ibid.
54. Hogg, supra note 39 at 55-28, 55-29; McAllister, supra note 45. See also Nicholas Smith, “A Critique of Recent Approaches to Discrimination Law” [2007]:3 NZ L Rev 499 at 516.
students, lawyers and lower courts as a formula to be marched through” to the point that when a new approach was introduced by Kapp, lower courts were averse to discarding the Law approach.55

D. A FOCUS OF STEREOTYPE AND PREJUDICE: KAPP AND WITHLER

The analytical framework of Law lasted only nine years until the advent of Kapp in 2008. While Kapp maintained the markers of prejudice and stereotypes as focal points for section 15 analysis, it sidelined what was perceived to be Law’s most problematic element, human dignity, because the Court admitted that dignity acted as a barrier to equality rights claimants.56

Formalism was also ostensibly excised from the approach, and the four steps of Law reverted to an inquiry based on but a single question: Does the impugned law perpetuate stereotype or prejudice?57 Although the factors in Law were no longer to be applied “as if they were legislative dispositions,” the Court did leave the door open for them to be applied as a tool to help achieve the goal of section 15: “combating discrimination, defined in terms of perpetuating disadvantage and stereotyping.”58

The Kapp test underwent clarification in Withler, but remained unchanged in substance.59 Withler merely reinforced the Kapp test as the correct analytical approach to equality claims, and filled out the content of the test further. In Withler, the SCC explained that the perpetuation of disadvantage or prejudice often occurs because a law treats a historically disadvantaged group in a manner that exacerbates their situation, thereby recognizing that a group’s past experiences with systemic barriers is important.60 The Court also defined discrimination based on a stereotype as something that arises when a distinction is created by a law that does not correspond to the actual circumstances and characteristics of the claimant—the correspondence factor of Law.61 The Court noted that such stereotyping typically results in perpetuation of pre-existing prejudice and disadvantage, but a group might still be subject to a law that creates a discriminatory impact on group members even in the absence of historic disadvantage.62

56. Kapp, supra note 6 at paras 19-22.
57. Ibid at paras 17, 25.
58. Ibid at para 24.
59. Withler, supra note 7 at para 30.
60. Ibid at para 35.
61. Ibid at para 36.
62. Ibid.
While Kapp and Withler claimed to be another return to Andrews, they failed to achieve the broad, open-ended concept of equality that lay at the heart of Andrews. Kapp, like Law, attempted to shoehorn equality into a narrower-than-necessary box. However, where Law’s “box” was human dignity, Kapp’s consisted of stereotyping and prejudice. This created a large gap between the Kapp approach and its goal of substantive equality. Although substantive inequality may certainly arise from a demonstration of stereotyping and prejudice, there are many other forms of substantive inequality that are not captured under the Kapp/Withler approach. As Sophia Moreau highlights, a narrow interpretation of discrimination where a claimant must prove either prejudice or stereotype has “the unfortunate effect of blinding us to other ways in which individuals and groups, that have suffered serious and long-standing disadvantage, can be discriminated against.” This includes cases without overt prejudice and stereotyping that involve “oppression or unfair dominance of one group by another, or involve a denial to one group of goods that seem basic or necessary for full participation in Canadian society.”

The emphasis placed by Kapp and Withler on prejudice and stereotyping is also concerning because of the danger these two factors had in overtaking the remainder of the section 15 analysis. While it was clear that historical disadvantage would not be required if prejudice or stereotype were shown—a positive development for recognizing novel forms of discriminatory treatment—it was no longer clear if historical or systemic disadvantage alone would be enough. Kapp and Withler failed to treat historical disadvantage as a separate concept, collapsing it into the concepts of prejudice and stereotyping, so that it seemed impossible to demonstrate historical disadvantage without first demonstrating prejudice and stereotyping.

Another downside of Kapp and Withler is their treatment of discriminatory perceptions versus discriminatory effects. Prejudice and stereotyping are concerned with perceptions and attitudes. They try to capture society’s sentiments and views towards a group and its members. Under Kapp and Withler, a law would breach section 15 when it was based on stereotypes (i.e. perceptions that are not linked to the actual circumstances and abilities of the group) or

64. Ibid.
prejudice (i.e. preconceived notions regarding the group that are not based on reason or actual experience). However, since the time of Andrews, section 15 has been concerned with effects-based discrimination (be it intentional or not). The focus on stereotyping and prejudice failed to capture that important dimension, because it was more concerned with measuring outward attitudes—which may often times be intentional—rather than the actual negative effects a law may impose on the group.

Finally, in lieu of restoring the contextual inquiry pioneered by Andrews, Kapp and Withler ushered in further formalism in the wake of Law. Admittedly, the Court in Withler stated that regardless of whether one is examining prejudice or stereotypes as a marker for unequal treatment, the inquiry must be contextual, taking into account the actual circumstances of the group and its members, and how the law can potentially worsen those circumstances. However, providing a narrow formula that requires either stereotyping or prejudice means that a contextual inquiry can only go so far within the boundaries of those two concepts. The truth of the matter was that, following Kapp and Withler, courts indeed began applying stereotype and prejudice as rigid, narrow requirements, rather than guidelines for a flexible and contextual analysis. If the goal of Kapp had been to undo the perceived formalism of Law, the case had the opposite effect in practice, restricting the inquiry into discrimination even further.

Thus, for all of the Court’s claims that Kapp and Withler represented a return to the reasoning of Andrews, Kapp and Withler fell far short of delivering Andrews’ promise of substantive equality, and were in fact said to “amplify” the move away from that promise. For some, the Kapp/Withler approach even exemplified the “worst” version of the section 15 analytical framework up until that point. Eventually, the concerns regarding Kapp and Withler’s inappropriate focus on prejudice and stereotyping came to bear in Quebec v A, where a disagreement on the role of these two factors split the Court 5-4.

67. Withler, supra note 7 at para 37.
69. See Moreau, supra note 66 at 293.
70. Margot Young, “Unequal to the Task: ‘Kapp’ing the Substantive Potential of Section 15” (2010) 50:1 SCLR (2d) 183 at 203-04.
71. See e.g. Koshan & Hamilton, “Reinvention,” supra note 56 at 21.
II. A FOCUS ON SYSTEMIC DISADVANTAGE: SECTION 15 FOLLOWING QUEBEC V A AND TAYPOTAT

A. THE DEBATE OVER THE ROLE OF STEREOTYPE AND PREJUDICE: QUEBEC V A

The most recent iteration of the analytical approach to discrimination stems from the SCC’s 2013 decision in Quebec v A. The case dealt with the exclusion of de facto spouses from provisions under the Civil Code of Québec addressing spousal support and property division post-separation. A de facto spouse who had separated from her partner brought the suit, then subsequently challenged the Civil Code provisions that applied to married and civil-union spouses but not to de facto spouses. The challenge was brought on the basis of discrimination on the ground of marital status.

Quebec v A is a complex case that engages a multitude of issues. The significance of the Court’s judgment shifts depending on the lens from which it is viewed. Quebec v A may be used as a starting point to discuss, for example: the property and support protections that are legislated for married and civil-status partners; the role of consent and choice in relationships, and how far the law should go to provide additional protections when choice may be illusory; the impact of a Charter right claimant’s gender or wealth on her claim; or the divergence of Quebec’s unique legal regimes, and the tension between the concept of federalism that respects Quebec’s independence and the scope of Charter protections.73

The central conflict debate that arose—for the purposes of this article at least—was whether stereotypes and prejudice overtly directed, or merely sometimes informed, the section 15 inquiry. Should the existence of these two features be the singular question to ask when analyzing an equality claim, or are they merely two of many factors that can inform the analysis?

The issue led to the sort of division regarding the Court’s section 15 approach not seen since the Equality Trilogy, with the dissent led by Justice LeBel, and a slight majority by Justice Abella.

For Justice LeBel and three other justices, the distinction drawn by the impugned legislation did not violate substantive equality because the distinction did not fit the binary definition of discrimination as it was based neither on prejudice nor stereotyping. Justice LeBel described stereotyping and prejudice

72. CQLR c CCQ-1991 [Civil Code].
73. See e.g. Sonia Lawrence, “Eric & Lola Roundtable” (6 June 2013), IFLS: The Institute for Feminist Legal Studies at Osgoode (blog), online: <ifls.osgoode.yorku.ca/category/thinkingabout/roundtable/eric-lola>.
as crucial factors for determining when a law is discriminatory.\textsuperscript{74} Therefore, the case had to be decided by examining whether stereotypes or prejudice against common law couples still existed in modern Quebec society. On the issue of prejudice (defined as relating to “pejorative attitudes based on strongly held views”\textsuperscript{75}), Justice LeBel concluded that although common law couples were viewed negatively in the past, this history was insufficient to show a breach of section 15: a claimant had to show that a prejudicial attitude persisted. Common law spouses were no longer subject to “public opprobrium,” “social ostracism,” or “legislative … stigmatization,” so there was no prejudice-based discrimination.\textsuperscript{76} Similarly, the \textit{Civil Code} did not stereotype—that is, its distinctions were not based on inaccurate presumptions regarding “personal traits or circumstances that do not relate to individual needs, capacities or merits.”\textsuperscript{77} Rather, Justice LeBel characterized the \textit{Civil Code} as allowing people to freely choose to benefit from the post-separation provisions by either marrying or entering into a civil union. Those who chose to remain de facto spouses could be seen as opting out of the regime.\textsuperscript{78} The \textit{Civil Code}’s recognition of the autonomy of a couple was therefore related to the individual needs of all couples, not stereotypical views of de facto couples.

Justice Abella’s analysis also focused on stereotypes. However, rather than probing whether the claimant in the specific case had made out the presence of either factor, her judgment advocated the view that evidence of stereotyping or prejudice is not even necessary in the first place. Justice Abella argued that stereotypes and prejudice place the emphasis of the section 15 inquiry inappropriately on discriminatory attitudes and perceptions, when it really is discriminatory effects that the section attempts to capture. She voiced the concern that requiring claimants “to prove that a distinction perpetuates negative attitudes about them imposes a largely irrelevant … burden.”\textsuperscript{79} Echoing then-Justice McLachlin’s decision in \textit{Miron}, Justice Abella stressed that while attitudes may change, historical disadvantage often persists: There has rarely been “a bright line demarcating the successful evolution of an historically disadvantaged group into a barrier-free reality.”\textsuperscript{80} Even if society has significantly diminished

\begin{footnotes}
\item[74] \textit{Quebec v A, supra} note 5 at para 168.
\item[75] \textit{Ibid} at para 326.
\item[76] \textit{Ibid} at paras 248, 249.
\item[77] \textit{Ibid} at para 201.
\item[78] \textit{Ibid} at paras 269-75.
\item[79] \textit{Ibid} at para 330.
\item[80] \textit{Ibid} at para 318.
\end{footnotes}
its discriminatory attitudes towards a group, that group may continue to face unconscious discrimination.

Justice Abella’s judgment asked us to move away from using the existence of stereotypes and prejudice as a narrow gateway—one that for many claimants is an “ineffable burden”—and to instead throw open the doors to section 15. She redirected the focus of the inquiry into a more generalized, contextual one, capable of rooting out the broad range of ways in which a law’s discriminatory impact may manifest. *Kapp* and *Withler*, she argued, were never intended to restrict the inquiry to stereotypes and prejudice. Rather, these decisions “guide us … to 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.” Stereotypes and prejudice were never meant to be mandatory elements that a claimant must show in mounting a successful section 15 claim. They are simply two markers of discrimination, but they should not be used to limit other factors that may be useful in assessing a section 15 claim. “At the end of the day,” she contended, “there is only one question: Does the challenged law violate the norm of substantive equality in s. 15(1) of the *Charter*?” Justice Abella’s approach therefore favoured the dissociation of disadvantage from a strict demonstration that a negative stereotype or prejudice is the origin of said disadvantage. Other types of proof of disadvantage can be sufficient to show that discrimination has occurred, so long as those proofs go towards demonstrating a violation of substantive equality in one form or another.

Quebec v A itself is an apt example of the value of the contextual inquiry into discrimination advocated by Justice Abella. The facts of *Quebec v A* therefore bear brief mention at this point, as they exemplify how a broad, contextual inquiry can capture substantive inequality in a way that the binary formula of stereotyping and prejudice cannot.

82. *Ibid* at para 331.
83. *Ibid* at para 325 [emphasis in original].
The claimant in Quebec v A was a woman, dubbed by the press as “Lola.” Lola had been in a de facto relationship with a man, “Eric.” Lola and Eric had met in her home country of Brazil, when she was a seventeen-year-old student and he was a thirty-two-year-old wealthy businessman. He approached her on the beach, and even though she did not speak English or French and he did not speak Portuguese, he persisted in his courtship of her. Soon after, their 10-year relationship began. Lola eventually left her home country—against her parents’ wishes—and immigrated to Eric’s province of Quebec after he promised he would “take care” of her (and even though she had just barely finished high school). He would later testify that although he “knew she was young,” he “wanted to act as her guide.”

Lola and Eric lived together for seven years and had three children. The couple was on-and-off again due to his drug use and infidelity. One time he attempted to send her back to Brazil, before the couple eventually reconciled. During another period in their relationship, Lola left Eric to pursue a modelling career in London. He eventually tracked her down and begged her to return to Montreal (shortly after, their first child was born). Throughout all of this, Lola wanted to get married and frequently asked Eric to do so. Eric testified that he rebuffed her requests for “professional reasons,” because he “wanted to protect” his business. Strangely, at one point, he proposed to her on New Year’s Eve, only to subsequently claim it was a joke. Lola eventually moved out—one of the last straws had been when, two months after the birth of their third child, Eric disappeared onto his yacht to begin a relationship with a dancer from New York. Lola subsequently challenged the Civil Code’s exclusion of her from the spousal support and property-sharing benefits that extended to spouses who entered marriage or a civil union.

The point of spending a paragraph to tell Lola’s story is not to dwell on the salacious details of her relationship with Eric—nor is it to demonize Eric or

85. The couple’s real names were not used in the proceedings, but the case is widely known in Quebec as the Eric and Lola case. Margot Young has pointed out that even the selection of these two names may raise issues of gender equality, given that Lola may pack for many, as she puts it, “gendered baggage,” while Eric is relatively neutral and does not bring to bear the same sort of sexist connotations as Lola does. See Lawrence, supra note 77. Nonetheless, for the reader’s ease, I have opted to refer to the two by these media-given names, as opposed to the Court’s less-intuitive designation of “A” and “B” (the ‘A’ in Quebec v A being “Lola”).
87. Ibid.
88. Ibid.
valorize Lola—but rather to highlight in stark terms how completely ineffective stereotypes and prejudice are in determining whether the law at issue was discriminatory. Whether Justice LeBel is correct, and modern perceptions of married versus non-married women have changed in Quebec to the point that unmarried woman who live with a man are no longer viewed in a negative manner (which to me is debatable), is irrelevant. The power dynamics in relationships between men and women have historically been slanted towards men, and very much remain so today. Lola’s vulnerability and dependency as a teenaged girl who was persuaded into a relationship by a much older, more sophisticated, and powerful man in a country far removed from her own does not become evident unless a contextual inquiry into her specific circumstances is conducted. That analysis must extend to examining continuing systematic disadvantages that women like Lola face following separation, taking into account the fact that woman generally encounter greater social and economic barriers following the dissolution of their relationships than men. As the Court itself admitted in an earlier case, “the feminization of poverty is an entrenched social phenomenon,” one that is only exacerbated following divorce and separation. The gendered division of labour typically results in a role for women maintaining the household and caring for children, excluding them from the labour force and preventing them from building their own capital and career qualifications. Even though de facto spouses in these circumstances have not entered into a formal union, they are no less dependent on their partners than their married counterparts: “they form long-standing relationships; they divide household responsibilities and develop a high degree of interdependence.” Following the dissolution of a union with

89. In any event, demonstrating stereotyping and prejudice that rises to the level of “public opprobrium” or “social ostracism” is an overly onerous threshold to meet. See Quebec v A, supra note 5 at para 249.
91. Quebec v A, supra note 5 at para 300.
92. Ibid at para 284. Similarly, the Court held in Moge that mandating spousal support “recognize[s] and account[sp] for both the economic disadvantages incurred by the spouse who makes such sacrifices and the economic advantages conferred upon the other spouse.” Moge, supra note 94 at 864. In Bracklow v Bracklow, Justice McLachlin (as she then was) confirmed that support obligations are protective, by underlining the interdependencies created by marriage, and “recogniz[ing] the reality that when people cohabit over a period of time in a family relationship, their affairs may become intermingled and impossible to disentangle neatly.” See Bracklow v Bracklow, [1999] 1 SCR 420 at para 31, 169 DLR (4th) 577. In Quebec v A, Justice Abella cited these two former judgments to explain that the need underpinning the rationale behind spousal support “is conceptually applicable as much to de facto relationships as to marriages and civil unions.” See Quebec v A, supra note 5 at para 298.
their partners, de facto spouses are similarly just as economically vulnerable as their married counterparts (or those in civil unions). Yet, simply because these de facto spouses did not consent to enter into a formally created union (for reasons that may in large part relate to an additional layer of vulnerabilities not faced by those who are in a position to consent to a formal union), the law does not offer them the protection that their formally married counterparts have.

Justice LeBel’s conclusion that de facto spouses no longer face stigma in modern-day Quebec demonstrated why a narrowed focus on prejudice and stereotype completely failed to capture the more complex elements of Lola’s discrimination claim. A number of other elements provide persuasive support for a finding of discrimination when one looks outside the box of prejudice and stereotype: the law at issue created effects that exacerbated the historic disadvantage experienced by unmarried individuals, impacted women disproportionately, and failed to respond to the actual needs of people based on their marital status, as opposed to the arbitrary titles they bear as “married,” in a “civil union,” or merely a “de facto spouse.” By making stereotypes and prejudice the focus of section 15, the dissent would have retreated even further into formalism—for which the Court was criticized in Law—by erecting needless barriers that fail to serve the goal of substantive equality.

In contrast, Justice Abella’s more probing, comprehensive examination of the reality facing unmarried women post-separation was much more effective at capturing the discriminatory effects of the Civil Code on Lola and women like her. Even though society may not have viewed Lola with any prejudice or in a stereotypical manner because of her situation, Lola nonetheless suffered from the adverse effects of legislation that prevented her from receiving the same spousal support as a married woman would in her situation. Those effects only serve to exacerbate the disadvantage that unmarried women have faced economically and socially both historically and in the present day. Since this type of vulnerability could arise regardless of whether the woman was formally married or simply a de facto spouse, the Civil Code’s distinction was discriminatory: it bears no relation to ensuring that the more-economically disadvantaged and vulnerable spouse is protected following a divorce or separation. As Justice Abella stated: “The right to support—and the obligation to pay it—did not rest on the legal status of either husband or wife, but on the reality of the dependence or vulnerability that the spousal relationship had created.”93 If the purpose of section 15 is “to eliminate the exclusionary barriers faced by individuals in the enumerated or analogous

groups,” then all an individual should need to show is what Andrews originally required: That a distinction created by a law perpetuates disadvantage for the group or individual. And that is exactly what Justice Abella’s approach asked.

For those seeking a comprehensive approach to section 15, one that is more sensitive to rooting out substantive inequality in all its forms, Justice Abella’s judgment in Quebec v A is encouraging. Justice Abella had effectively untethered the concept of disadvantage from the concepts of prejudice and stereotypes, such that other routes of proving the existence of disadvantage could be sufficient to demonstrate discrimination. At the same time, it upended what has been the accepted section 15 test since 2008, when Kapp led most of the legal community to believe that the existence of stereotype of prejudice was a necessary precondition to making out a successful section 15 claim. The precedential impact of Justice Abella’s judgment is made all the murkier because its 5-4 split on the section 15 issue was coupled with a finding against Lola (due to one of Justice Abella’s five siding with Justice LeBel in his holding that any infringements were justified under section 1). The impact of decisions with such deep fractures and irreconcilable positions at the SCC are always uncertain. To exacerbate issues, Quebec v A is a whopping 450 paragraphs, making its takeaways even more difficult to parse out.

As a result, many were uncertain of what the test for section 15 should be in the wake of Quebec v A. Did stereotypes and prejudice have to be demonstrated? If not, then what is needed instead to demonstrate that a disadvantage is discriminatory? Is classifying a disadvantage as discriminatory even what the Court is looking for, given its use—twice—of the phrase “arbitrary disadvantage”? Is the use of the new term “arbitrary disadvantage” intentional? Or is it the result, as some mused, of a “slip of the pen”?

B. THE RETURN TO SYSTEMIC DISADVANTAGE AS A GUIDING PRINCIPLE: TAYPOTAT

It was not until two years after Quebec v A that the SCC offered up some answers to these pressing questions in the form of its judgment in Taypotat. In Taypotat, Justice Abella picked up where she left off in Quebec v A, confirming the current approach to section 15 in six succinct paragraphs. These six paragraphs elucidated

94. Ibid at para 319.
95. Brunelle, supra note 88 at 75-76.
that section 15 remains geared at protecting substantive equality. The analytical approach, she asserted, recognizes that certain groups in society have historically been subject to “persistent systemic disadvantages.” The approach therefore censures laws that draw discriminatory distinctions, that is, distinctions that perpetuate “arbitrary disadvantage” based on an individual’s membership in an enumerated or analogous group. The analysis into discriminatory or arbitrary disadvantage, Justice Abella reminded us, must be “flexible and contextual,” taking into account “the social and economic context in which a claim of inequality arises.”

Although Justice Abella did not delineate a list of specific factors that may be considered in determining whether substantive equality has been violated, she did pay particular attention to a single factor: historical disadvantage. She linked arbitrary disadvantage to whether a distinction “perpetuates” disadvantage by “recogniz[ing] that persistent systemic disadvantages have operated to limit the opportunities available to members of certain groups in society.” Accordingly, the section 15 inquiry seeks to narrow the gap between disadvantaged and advantaged groups by denouncing conduct that “imposes burdens or denies a benefit in a manner that has the effect of reinforcing, perpetuating or exacerbating their disadvantage.” This approach harkens back to Law, which relied on the language of “pre-existing disadvantage” to ensure section 15 protection extended to members of groups who were historically disadvantaged relative to other groups in society.

While the door seems open to consider other contextual factors in the flexible inquiry Justice Abella called for, historical disadvantage is clearly a central one. It is the only factor that she explicitly identifies as demonstrating the existence of arbitrary or discriminatory disadvantage. The decision to focus on historical disadvantage may have simply been a result of the facts of Taypotat, rather than a conscious decision to make historical disadvantage the new starting point of the second stage of the section 15 inquiry. Taypotat involved a challenge to the Kahkewistahaw First Nation’s Election Code, which included a Grade Twelve completion requirement for candidates who wished to be Chief or a Band Councilor. Louis Taypotat—who had been Chief for around three decades but was only educated up until Grade Ten—was disqualified from running again.

97. Taypotat, supra note 8 at paras 16-21.
98. Ibid at para 17.
99. Ibid at paras 16, 18.
100. Ibid at para 17.
101. Ibid at para 20.
for office as a result. As Taypotat was a seventy-six-year old, residential school survivor, who had spent his life living on reserve, this case readily engaged issues of historical disadvantage and can neatly be framed as a claim within historical indicia of discrimination.

Alternatively, Justice Abella may have paid particular attention to historical disadvantage because of its link to what she describes as the “root of s. 15,” that is “our awareness that certain groups have been historically discriminated against, and that the perpetuation of such discrimination should be curtailed.” As Colleen Sheppard points out, focusing on historical disadvantage recognizes “the historical realities of inequality and discrimination in Canadian Society,” and ameliorating historical disadvantage redresses the exclusion and mistreatment of specific social groups. Perhaps what Justice Abella was signaling is that understanding section 15 in relation to historical disadvantage helps ensure that constitutional equality protections remain focused on systemic disadvantages. After all, the constitutional protection for equality is generally framed “without reference to historical patterns of social disadvantage” in a manner that does not reflect the “underlying logic of substantive equality,” which is “deeply challenged when members of historically privileged groups ... allege discrimination.”

Historical disadvantage may simply be, in Justice Abella’s eyes, a powerful shortcut to ensure that the section remains focused on redressing the harm experienced by those groups that are socially disadvantaged in the present-day on the basis that they are generally the same groups that were socially disadvantaged historically.

C. LINGERING QUESTIONS FOLLOWING QUEBEC V A AND TAYPOTAT

Taypotat is a welcome companion case to Quebec v A, because it corroborated Quebec v A’s approach to discrimination in more unequivocal terms and reinforced that an analysis of discrimination must be contextual. Moreover, the change is made all the more significant because Justice Abella brought the whole Court with her; Taypotat was a unanimous decision, not the 5-4 split we saw in Quebec v A that threw the broader applicability of Quebec v A into question. Finally, Taypotat also confirmed that Justice Abella’s repeated use of the term “arbitrary” in connection with section 15 was a deliberate move.

However, for all the issues Taypotat resolved, it raised just as many. First, Quebec v A and Taypotat are complex decisions, filled with a number of concepts

102. Ibid at para 20.
104. Ibid.
that are both new and that draw from the prior jurisprudence. For example, the decisions introduced the term “arbitrary disadvantage” and reintroduced the notion of a multi-factorial approach from *Law*, all while underlining the notion that the section 15 inquiry must be flexible and case-by-case. Thus, a key question is how rights claimants and courts will choose to unpack the many takeaways from *Quebec v A* and *Taypotat*, and specifically which aspects of the decisions they will hone in on.

Second, the role of stereotyping and prejudice remains arguably ambiguous. Despite Justice Abella’s strong admonishment against the use of stereotypes and prejudice as required elements of the section 15 approach in *Quebec v A*, her decision in *Taypotat* did not refer to either term once, which implicitly may indicate that a section 15 analysis can be conducted without the claimant raising these requirements. However, given that Louis Taypotat did not in fact succeed in his claim, *Taypotat* is hardly a ringing endorsement for the notion that section 15 infringement can be demonstrated without reliance on the presence of prejudice or stereotypes. Similarly, considering the Court’s split in *Quebec v A* on the issue of the necessity of prejudice and stereotype, a clear statement delivered by the unanimous court in *Taypotat* to the effect that they are not required would have been helpful for future section 15 claimants and lower courts. Therefore, there is uncertainty relating to how courts will choose to approach the residual role of stereotype and prejudice in the section 15 inquiry, owing to the somewhat uncertain state of these two factors.

Third, the repeated use of the word “arbitrary” as touchstone for the test for discrimination is a new development, the impact of which is not yet clear. Protecting against arbitrary disadvantage now lies at the heart of the section 15 inquiry. Curiously, Justice Abella’s definition of arbitrariness as the failure of a law to “respond to the actual capacities and needs of the members of a group”105 echoes the “correspondence” factor of *Law*, which asked whether there is a correspondence between the impugned legislation and “the actual needs, capacity, or circumstances of the claimant or others with similar traits.”106 Justice Abella, however, did not explain what she hoped to achieve with the switch from the more commonly used phrase of “discriminatory disadvantage” to “arbitrary disadvantage.”

The two words certainly have different connotations. The *Oxford English Dictionary* describes the term “discrimination” as the “[u]njust or prejudicial treatment of a person or group, esp. on the grounds of race, gender, sexual

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orientation, etc.”107 “Discrimination” therefore sets the inquiry up as a comparative one, asking whether certain groups are treated in an unfair manner compared to others. In contrast, arbitrariness is not dependent on a comparative exercise between groups of people, and instead is associated with irrationality. The *Oxford English Dictionary* explains that arbitrariness is “[t]o be decided by one’s liking; dependent upon will or pleasure; at the discretion or option of anyone.”108 Therefore, there seems to be an analytical separation between arbitrariness and discrimination that is not explained in *Taypotat*. Furthermore, arbitrariness carries a specific meaning in section 7 jurisprudence under the principles of fundamental justice, and injecting it into the section 15 analytical framework may import connotations of the term from its use in section 7. To complicate matters, Justice Abella used arbitrariness both as a qualifier for disadvantage—that is, a law violates section 15 when it creates an “arbitrary disadvantage”—as well as a synonym for “discriminatory,” leading to a lack of both rigour and clarity regarding what this pivotal term is intended to mean within the section 15 framework. All this points to the third question of how courts will interpret the meaning of “arbitrary” in its application to section 15.

Fourth, Justice Abella urged in *Quebec v A* and *Taypotat* for the section 15 analysis to proceed in a flexible manner that takes into account all relevant factors based on the context of the case. Other than noting that section 15 claims may be mounted when the factor of historical disadvantage is present, Justice Abella did not detail what other factors courts may consider in asking whether a law is discriminatory or arbitrary. The fourth question therefore asks what factors courts have turned to in guiding them in their contextual inquiry into a section 15 claim.

III. A LOOK AT THE JURISPRUDENCE IN THE WAKE OF *QUEBEC V A* AND *TAYPOTAT*

In an attempt to clarify the four questions broached in Part II(C), above, I have conducted a review of all section 15 cases decided after *Quebec v A* and *Taypotat* up until the writing of this article, in order to determine how these two decisions have been interpreted by lower courts.

The methodology involved searching the Westlaw and Quicklaw databases for all cases that have considered either one of or both *Quebec v A* and *Taypotat*. Cases were initially identified because they contained at least one reference to *Quebec v A* or *Taypotat*; the pool was subsequently reviewed to select only those

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108. *Ibid* sub verbo “arbitrary”.

cases that have applied *Quebec v A* or *Taypotat* for their formulation of the s 15(1) test. Although there was no start date per se, because of the timing of the release of *Quebec v A* and *Taypotat*, the pool includes cases that start in 2013 (when *Quebec v A* was released), up until a cut-off of 30 November 2016. Thirty-three cases in total have considered *Quebec v A* after the decision was rendered, while an additional eleven have considered both *Quebec v A* and *Taypotat* in the context of applying section 15.109

I begin first with a short quantitative analysis of the jurisprudence as a whole, to determine whether courts have tended to adopt *Quebec v A*/*Taypotat*, or whether they have been resistant to recognizing stereotype and prejudice as non-mandatory elements of the section 15 analysis.110 I also ask whether there is a correlation between a section 15 approach focused strictly on stereotype/prejudice versus a multifactorial, contextual approach, and a claimant’s success in showing prima facie discrimination. I then conclude with a qualitative discussion of specific decisions to elucidate how courts have interpreted and applied the changes introduced by *Quebec v A* and *Taypotat*, structured according to the four questions posed in Part II(C), above.

A. QUANTITATIVE ANALYSIS OF THE JURISPRUDENCE POST-*QUEBEC V A* AND -*TAYPOTAT*

1. COURTS ARE INCONSISTENT AS TO WHETHER PREJUDICE AND STEREOTYPE ARE REQUIRED IN THE SECTION 15 INQUIRY

While Justice Abella made clear in *Quebec v A* that stereotype and prejudice are no longer mandatory to show discrimination, in *Taypotat*, she rendered an entire section 15 analysis without mentioning either term once. It is from this omission that I draw my concern, raised in Part II(C), above, that courts may not

109. A total of fifteen cases in fact considered *Taypotat*. However, only eleven of these cases are discussed as the remaining four considered *Taypotat* in the context of evidentiary requirements, rather than in the context of section 15.

110. In presenting the quantitative analysis, I refer the reader to the very apt comments of Sujit Choudhry and Claire E Hunter, in conducting their own quantitative review of Charter decisions. As they point out, a quantitative approach runs the danger of reductionism, such that variables that can be easily measured are divorced from the framework of constitutional adjudication or the facts and idiosyncratic features of the individual cases themselves. The understanding of what is happening in these cases is incomplete, rendering the usefulness of the analysis limited and subject to significant caveats. See Sujit Choudhry & Claire E Hunter, “Measuring Judicial Activism on the Supreme Court of Canada: A Comment on *Newfoundland (Treasury Board) v. NAPE*” (2003) 48:3 McGill LJ 525 at 533-34.
necessarily be clear on whether prejudice and stereotype continue to be required for section 15.

A review of all post-Quebec v A section 15 decisions indicates that this concern is more than theoretical. A number of courts have continued to apply the requirement of stereotype or prejudice stemming from Kapp and Withler (Table 1). Of the thirty-three cases that considered Quebec v A but not Taypotat, fifteen (45 per cent) stated that the Kapp/Wither test requiring prejudice and stereotyping is the current approach to section 15, and restricted their section 15 analysis on the facts to evidence of prejudice and stereotype accordingly.111 In contrast, seventeen out of the thirty-three cases (55 per cent) recognized that following Quebec v A, stereotype and prejudice are no longer required elements of the section 15 inquiry, and accordingly applied a broader test for discrimination.112


112. See Madeley, supra note 10 at paras 136-43; R v Nguyen, 2015 ONCA 278 at paras 82-84, 125 OR (3d) 321 [Nguyen]; R v B(TM), 2013 ONSC 4019 at paras 46-47, 4 CR (7th) 378 [B(TM)]; Children’s Aid Society of Ottawa v F(K), 2015 ONSC 7580 at para 40, 261 ACWS (3d) 583 [F(K)]; R v Shenandoah, 2015 ONCJ 541 at paras 43-44, 126 WCB (2d) 15 [Shenandoah]; R v Daybutch, 2015 ONCJ 302 at paras 84-88, 335 CRR (2d) 188 [Daybutch]; Quebec (Attorney General) c 156158 Canada Inc (Boulangerie Maxiès), 2015 QCCQ 354 at paras 266-70, 334 CRR (2d) 117 [Boulangerie Maxiès]; Barbra Schlifer Commemorative Clinic v Canada (Attorney General), 2014 ONSC 5140 at paras 84-85, 121 OR (3d) 733 [Barbra Schlifer]; Hay v Ontario (Human Rights Tribunal), 2014 ONSC 2858 at paras 91-93, 121 OR (3d) 103 [Hay]; R v Nero, 2014 ONSC 1896 at para 22, 304 CRR (2d) 320 [Nero]; R v Chambers, 2013 YKTC 77 at paras 157-58, 296 CRR (2d) 111 [Chambers YKTC]; R v Adamo, 2013 MBQB 225 at paras 127-29, 296 Man R (2d) 245 [Adamo]; Scott v Canada (Attorney General), 2013 BCSC 1651 at paras 82-83, 232 ACWS
Of those cases that considered both Quebec v A and Taypotat, a larger majority (64 per cent) embraced the new approach to section 15,¹¹³ while 36 per cent continued to regard prejudice and stereotype as required elements of discrimination.¹¹⁴ This increase is a promising one compared to the jurisprudence that considered Quebec v A alone, where only roughly half of lower courts applied the new approach. Perhaps as courts have more time to adjust to the shift in analytical focus of section 15, they will begin to show an increasing willingness to adopt it.

| TABLE 1: HAVE POST-QUEBEC V A/TAYPOTAT CASES REQUIRED EVIDENCE OF PREJUDICE AND STEREOTYPE? |
|---------------------------------|---------------------------------|---------------------------------|
|                                 | Total Number | Applied Kapp/Withler and Required Prejudice and Stereotype | Applied Quebec v A/Taypotat and Did Not Require Prejudice and Stereotype |
| Considered Quebec v A but not Taypotat | 33           | 15 (45 per cent) | 18 (55 per cent) |
| Considered Quebec v A and Taypotat   | 11           | 4 (36 per cent)  | 7 (64 per cent)  |
| Total                               | 44           | 19 (43 per cent) | 25 (57 per cent) |


Another interesting finding from my survey of post-Quebec v A/Taypotat jurisprudence is that there is a correlation between the eventual success of a claimant’s section 15 claim, and the likelihood that a court required a showing of prejudice and stereotype (Table 2). A breach of section 15 was found in only 20 per cent of decisions applying the Kapp/Withler requirement for prejudice and stereotype;115 while the remaining 80 per cent failed.116 In contrast, those courts that applied a broader test for section 15 that considered other indicators of disadvantage were more likely to find a section 15 infringement, with 64 per cent of decisions making a finding of prima facie discrimination,117 and only 36 per cent rejecting the claim on section 15 grounds.118

<table>
<thead>
<tr>
<th>Required Prejudice and Stereotype</th>
<th>Did Not Require Prejudice and Stereotype</th>
</tr>
</thead>
<tbody>
<tr>
<td>S 15 Infringed</td>
<td>4 (20 per cent)</td>
</tr>
<tr>
<td>S 15 Not Infringed</td>
<td>15 (80 per cent)</td>
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<td>16 (64 per cent)</td>
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<td></td>
<td>9 (36 per cent)</td>
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The relatively higher success rate of section 15 claims under the Quebec v A/Taypotat approach, as compared to the Kapp/Withler approach, may in part

115. See Thomson, supra note 121 at para 94; Carbone, supra note 121 at para 43; Shantz, supra note 121 at para 236; Drug Users, supra note 118 at para 143; Joseph, supra note 118 at para 58; Taypotat FCA, supra note 118 at paras 54-60.

116. See YZ, supra note 121 at para 128; 156158 Canada, supra note 118 at para 77; 16244, supra note 118 at para 80; Tan, supra note 118 at para 54; Gebl, supra note 118 at para 82; M(S), supra note 118 at paras 81-83; McKenzie-Sinclair, supra note 118 at para 141; S(VA), supra note 118 at paras 103-04; Gichuru BCCA, supra note 118 at para 106; Chambers YKCA, supra note 118 at paras 127-28; Jewish Family, supra note 118 at paras 167-68, 198-99; Bidal, supra note 118 at para 27; Tabingo, supra note 118 at para 135.

117. Sherbrooke, supra note 88 at para 55; Ejigu, supra note 120 at para 262; Adekayode, supra note 120 at paras 67-68, 77-78, 102; Ménard, supra note 120 at para 58; Catholic Children, supra note 4 at paras 80, 89-93; Descheneaux, supra note 120 at paras 172-73; Madeley, supra note 10 at para 171; Nguyen, supra note 119 at paras 91-93; Daybutch, supra note 119 at para 101; Nero, supra note 119 at para 22; Chambers YKTC, supra note 119 at paras 171-75; Adamo, supra note 119 at paras 139-42, 147; Scott, supra note 119 at para 95; Gyorffy, supra note 119 at para 40; Hall, supra note 119 at paras 18-19; Bittern, supra note 119 at para 114.

118. Muggah, supra note 120 at para 56; B(TM), supra note 119 at para 64; F(K), supra note 119 at para 69; Shenandoah, supra note 119 at para 67; Boulangerie Maxi’s, supra note 119 at para 282; Barbra Schlifer, supra note 119 at paras 118-19; Hay, supra note 119 at paras 105, 110; Gichuru BCSC, supra note 119 at para 87.
be explained by the former test’s ability to achieve what Justice Abella hoped it would: A removal of burdens on section 15 claimants by expanding the categories into which a claim of discrimination may fit.\textsuperscript{119} Alternatively, these results may simply be a consequence of courts tailoring their section 15 approaches to the relative strength of the section 15 claim at hand. That is, some courts may have simply decided to do a less fulsome section 15 inquiry because they felt that the section 15 claims were weak from the outset. In any event, these findings suggest that claimants are far better off in presenting their section 15 claims in a manner that raises the entirety of the relevant context, rather than focusing said claims on the factors of stereotypes and prejudice, as the former type of claim is more likely to succeed.

\textbf{B. QUALITATIVE ANALYSIS OF DECISIONS APPLYING KAPP AND WITHLER}

Before I turn to examining decisions of courts that have applied the new \textit{Quebec v A} and \textit{Taypotat} approach, I would like to first examine those decisions that have not. Although over half of the post-\textit{Quebec v A/Taypotat} decisions have applied the approach from \textit{Taypotat}, as discussed in Part III(A), above; a large proportion have nonetheless elected to apply the \textit{Kapp/Withler} version of the test, which requires a demonstration of prejudice or stereotype. Oddly, courts have done so despite themselves making reference to \textit{Quebec v A} and \textit{Taypotat}, indicating that these courts are aware of the decisions but have refused to acknowledge the changes advocated therein.

For example, in \textit{Thomson}, Justice Gascon of the Federal Court began by quoting from \textit{Withler} and Justice LeBel’s dissent in \textit{Quebec v A} to support his conclusion that the section 15 test requires a distinction that creates “a disadvantage by perpetuating prejudice or stereotypes.”\textsuperscript{120} Although Justice Gascon also cited the full approach to section 15 as articulated by Justice Abella in \textit{Taypotat}, he then proceeded to consider whether prejudice or stereotypes were perpetuated on the facts of the case. Justice Gascon concluded that the answer was no, because there was no prejudice that led to the conclusion “that the person is not an equal member of Canadian society, is deserving of less worth, or does not belong with the rest of us.”\textsuperscript{121} It is curious that while Justice Gascon was mindful of Justice Abella’s caution in \textit{Taypotat} to apply a broad, flexible approach to section 15, he still limited himself to an approach focusing exclusively on

\begin{itemize}
\item \textsuperscript{119} \textit{Quebec v A}, supra note 5 at paras 329-30.
\item \textsuperscript{120} \textit{Thomson}, supra note 121 at para 88.
\item \textsuperscript{121} YZ, supra note 121 at para 98.
\end{itemize}
the presence of stereotype and prejudice (and one that referenced Justice LeBel’s *Quebec v A* dissent, no less).

The Federal Court mimicked its approach in *Thomson* in the subsequent case of *YZ*. Once again, the Federal Court quoted extensively from Justice Abella’s judgment in *Taypotat*, but then instead applied the test for equality from *Withler*. Justice Boswell of the Federal Court decided that the law at issue in that case, the *Immigration and Refugee Protection Act* was discriminatory on its face because it prejudiced refugees from designated countries of origin. Furthermore, the law was also held to be based on the stereotype that refugees from these countries are queue-jumping or “bogus” claimants that come to Canada to take advantage of its generosity. Justice Boswell’s decision in *YZ* is therefore more defensible than Justice Gascon’s in *Thomson* because the claim in *YZ* succeeded on stereotype and prejudice alone, and thus, arguably, it was unnecessary to extend the analysis to other factors. Nonetheless, the decision would have been more compelling and more in line with the Court’s post-*Quebec v A* jurisprudence had Justice Boswell in the very least mentioned that stereotypes and prejudice are sufficient factors—but no longer the only factors necessary—to demonstrate discrimination.

In *Carbone*, the Alberta Court of Appeal followed a similar tack to the Federal Court by referencing the *Taypotat* decision but choosing to apply the *Kapp* requirement for prejudice and stereotypes. Justice Anderson decided that there was no section 15 breach because there was no evidence on the record that the appellant had been prejudiced. Much like *Thomson*, the decision is troubling due to its failure to consider factors outside of stereotyping and prejudice, while still disallowing the claimant’s section 15 claim. Had the Court of Appeal canvassed a broader range of factors that can be used to indicate discrimination, the outcome may have been different for the claimant.

Even more troubling are decisions such as that of the British Columbia Supreme Court in *Shantz*. In *Shantz*, Chief Justice Hinkson completely ignored the test from *Taypotat* and instead stated that the “current” framework for section 15 “used by courts today” is that from *Kapp*, which requires a demonstration of disadvantage perpetuated by prejudice or stereotyping. Chief Justice Hinkson

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122. See *ibid* at para 116.
123. SC 2001, c 27.
125. *Carbone*, *supra* note 121.
126. *Ibid* at para 43.
signaled his awareness of *Taypotat* through his use of the decision as support for the proposition that comparator groups are not necessary in analyzing section 15, yet inexplicably failed to even mention Justice Abella’s modified formulation of the approach to discrimination.

What is interesting about the decisions in *Thomson*, *YZ*, *Carbone*, and *Shantz* is that they all deal with section 15 in a perfunctory manner. Rather than conducting a fulsome discussion of the test, they all merely devote a paragraph or two to reciting the test as stated in *Kapp/Withler* and then proceed to apply the test in a mechanical manner. These decisions indicate that some courts are failing to turn their minds to the changes instated by *Quebec v A/Taypotat*, either because they have not yet caught up to the more recent jurisprudence or because they are unwilling to engage with this more analytically-demanding, nuanced approach when they could simply apply the more straightforward approach from *Kapp/Withler*. Another possible explanation is that the focus on prejudice and stereotype in these decisions simply reflects the types of arguments made by the claimants themselves.

Either way, the routine application of the *Kapp/Withler* requirement for stereotype and prejudice is patently incorrect in light of *Quebec v A/Taypotat* and does disservice to section 15 claimants. It is also discouraging to see that a large proportion (43 per cent) of judges that hear section 15 cases remain faithful to a categorical approach requiring stereotype and prejudice, particularly given that this approach seems to coincide with a lesser likelihood of success in showing section 15 infringement.

C. QUALITATIVE ANALYSIS OF DECISIONS APPLYING *QUEBEC V A* AND *TAYPOTAT*

More encouraging, however, are those judges who have taken up the changes from *Quebec v A* and *Taypotat* in earnest and have conducted flexible, contextual inquiries that survey a host of factors relevant to the discrimination inquiry. Although the changes introduced by *Quebec v A* and *Taypotat* may not have touched as many courtrooms as one would have hoped, change is clearly afoot.

In this Part, I will discuss findings from lower court decisions that have incorporated *Quebec v A* and *Taypotat*. I have examined all forty-four decisions, organizing their findings according to the four questions posed in Part II(C), above, and summarized as follows: First, on what changes to the section 15 approach introduced by *Quebec v A/Taypotat* have lower courts focused? Second,
although some courts have recognized that prejudice and stereotype are not required in the inquiry, what have these courts indicated with regards to the continuing role of these factors in determining discrimination? Third, what have courts understood to be the meaning of “arbitrary disadvantage”? And fourth, what additional contextual factors have courts looked to in determining whether substantive equality is violated? By examining post-Quebec v A/ Tapyotat judgments with these questions in mind, I hope to better understand how the effects of Quebec v A and Tapyotat have played out in practice.

1. THE FOCUS OF THE SECTION 15 INQUIRY FOLLOWING QUEBEC V A/ TAPYPOTAT

Courts that have embraced the Quebec v A/Tapyotat changes have characterized the cases as more than simply doing away with stereotype and prejudice as required factors to show discrimination. Rather, courts have seen Quebec v A/ Tapyotat as shifting the focus of the section 15 analysis away from a narrow, “improper focus” on prejudice and stereotypes to a broader, contextual inquiry. Where courts have differed is in their understanding of what the new analytical focus of section 15 is. For some courts, like the Court of Appeal for Ontario and the Court of Appeal of Quebec, “arbitrary disadvantage” serves as the “ultimate guide” for prima facie discrimination.\(^\text{129}\) For others, like the Nova Scotia Court of Appeal, post-Quebec v A/ Tapyotat analysis places the focus on determining whether the norm of substantive equality has been violated,\(^\text{130}\) so that a court conducting a section 15 analysis must always “eye the broader vista of substantive equality.”\(^\text{131}\) Still other courts, like the British Columbia Supreme Court, have seen the central question to answer as being whether the impugned law “widens the gap between the historically disadvantaged group and the rest of society rather than narrowing it.”\(^\text{132}\)

These observations indicate that courts have not been clear on whether the analytical focus of section 15 is promoting “substantive equality,” prohibiting “arbitrary disadvantage,” or “narrowing the gap” faced by disadvantaged groups. My reading of Quebec v A and Tapyotat suggests that Justice Abella continues to see substantive equality as the ultimate goal of section 15. Demonstrating that a law creates “arbitrary disadvantage” or “widens the gap” are avenues of finding a violation of substantive equality, not the ultimate focal points of section 15

\(^{129}\) See e.g. Nguyen, supra note 119 at paras 82-84, 91; Sherbrooke, supra note 88 at para 54.

\(^{130}\) See e.g. Adekayode, supra note 111 at para 65.

\(^{131}\) Muggah, supra note 120 at para 51.

\(^{132}\) See e.g. Gichuru BCSC, supra note 119 at paras 84-85; Ejigu, supra note 120 at para 153.
themselves. Therefore, courts on the one hand could be clearer on the relationship between these three concepts, because it certainly seems that some courts view curtailing “arbitrary disadvantage” and “gap widening” effects as the focus of the section 15 inquiry, rather than substantive equality.

On the other hand, these semantic differences appear to be irrelevant in practice. Regardless of the terminology used by courts to describe the underpinnings of section 15, all have employed the same means of detecting discrimination. There is a general consensus that the *Quebec v A* and *Taypotat* changes have formulated a new test that signals a removal “formalistic obstacles” in assessing discrimination claims. Moreover, there seems to be an agreement that *Quebec v A* and *Taypotat* have “fundamentally changed the legal landscape” by clarifying that there is no rigid template for approaching section 15 violations; rather, they must survey contextual factors that will “vary from case to case.”

While earlier jurisprudence “may still inform the analysis of whether an impugned law is discriminatory,” there is an understanding that “care must be taken not to rely on principles … that are at odds” with *Quebec v A* and *Taypotat*. Specifically, evidence of prejudice and stereotyping that was largely seen as required pre-*Quebec v A/ Taypotat* has been supplanted by a more flexible approach post-*Quebec v A/ Taypotat*. Perpetuation of stereotypes or prejudice merely constitute factors that may, in some cases, be relevant for the purposes of the section 15 analysis as “points of reference.” But a contextual approach means that judges must survey whichever factors may be relevant to a determination of discrimination on the facts of the case before them. And in the end, that sort of contextual inquiry seems better suited to achieving substantive equality, even if courts are not expressly articulating substantive equality as being the ultimate focus of section 15.

133. See *e.g.* *Hay*, supra note 119 at para 91; *Muggah*, supra note 120 at para 44; *Adekayode*, supra note 120 at para 65.
134. *Nguyen*, supra note 119 at paras 84, 88. See *e.g.* *Chambers YKTC*, supra note 119 at para 172.
136. See *e.g.* *Chambers YKTC*, supra note 119 at para 171; *Sherbrooke*, supra note 88 at paras 46-47.
137. See *e.g.* *ibid* at para 52; *Catholic Children*, supra note 4 at paras 48-49, 53.
138. See *e.g.* *Adekayode*, supra note 120 at para 66; *Catholic Children*, supra note 4 at para 48; *Hall*, supra note 119 at para 11; *Muggah*, supra note 120 at paras 65-66; *Sherbrooke*, supra note 88 at para 66.
2. THE CONTINUING ROLE OF STEREOTYPE AND PREJUDICE

Among the decisions that have applied Quebec v A and Taypotat to mean that stereotype and prejudice are no longer discrete elements of the section 15 test, there is general agreement that these two elements may be appropriate evidence of discrimination in some cases. In Boulangerie Maxie's, the Quebec Superior Court discussed the implications of Quebec v A within the section 15 inquiry, asking whether the decision meant that courts were forbidden from looking at whether an impugned law perpetuates prejudice or stereotype.\footnote{139} Justice Mascia concluded that while the Court in Quebec v A had jettisoned the stereotype/prejudice requirement, the decision did not exclude consideration of those factors in section 15.\footnote{140} Justice Mascia further noted that Quebec v A called for a return to a more contextual analysis to determine whether substantive equality has been violated; thus he turned his focus to “examining the negative effects of the law on a specific group.”\footnote{141} A prejudice or stereotype-focused inquiry is not always amenable to determining whether the negative effects of an impugned law rise to the level of discrimination, but in others it may be.\footnote{142} In Justice Mascia’s words: “Context is everything.”\footnote{143} Certain contexts may lend themselves to other indicia of disadvantage outside of stereotype and prejudice, while in others the only viable way of assessing whether discrimination violates substantive equality is through the use of a prejudice- or stereotype-focused analysis.\footnote{144}

Similarly, in Hay, the Ontario Superior Court of Justice upheld an administrative decision of the Human Rights Tribunal that made a finding of discrimination after adopting the Kapp/Withler test and not the Quebec v A test. Justice Dambrot noted that the approach following Quebec v A required determination of whether substantive equality was violated or not.\footnote{145} But if a decision maker determines that there has been substantive inequality on the basis of the presence of stereotype and prejudice, those factors are sufficient to ground a section 15 infringement. In many cases, the court added, a “more nuanced inquiry” may be required to determine whether differential treatment results

\footnote{139} Boulangerie Maxie’s, supra note 119 at para 275.
\footnote{140} Ibid at paras 275-76.
\footnote{141} Ibid at para 277.
\footnote{142} Ibid at paras 277-78.
\footnote{143} Ibid at para 279.
\footnote{144} Ibid at paras 279-81.
\footnote{145} Hay, supra note 119 at paras 91-93.
in discrimination; but again, this more nuanced inquiry need not be applied universally if stereotype or prejudice can be shown.146

However, some courts have favoured conducting a comprehensive inquiry that surveys prejudice and stereotyping, in addition to other contextual factors, before concluding whether there is discrimination or not. In Madeley, Justice Paciocco of the Ontario Superior Court recognized that there was “lingering disagreement” in Quebec v A regarding the nature of the test from Kapp/Withler, but stated that “all authorities agree” that section 15 may ask whether disadvantage is created through the perpetuation of prejudice or stereotypes.147 However, he also noted that Justice Abella’s judgment indicates that the “more generic question” of whether the distinction perpetuates arbitrary disadvantage must be asked.148 For him, all three factors had to be considered; there was no possibility of only probing one to the exclusion of the other two, even if a positive finding of discrimination was made.

These three decisions reveal that courts have generally taken Quebec v A and Taypotat to mean that stereotype and prejudice may be relevant to some inquiries into discrimination but only if the context demands it. This option is the most accommodating and favourable for claimants, as it allows them to bring stereotyping or prejudice into the equation but only where it may assist them in their claim. My one concern is that certain judges will prefer to conduct inquiries into discrimination that consider all relevant factors raised, as opposed to stopping the inquiry as soon as a single factor indicates discrimination (as Justice Paciocco did in Madeley). If this type of approach prevails, claimants may shoehorn in evidence of stereotypes and prejudice in an attempt to bolster their claim, even where these factors may be irrelevant. Thus, it would be preferable if future judgments make it apparent that evidence of any single contextual factor on its own is sufficient to demonstrate prima facie discrimination.

3. THE MEANING OF “ARBITRARY DISADVANTAGE”

One of the largest changes that commentators have latched on post-Quebec v Al Taypotat is the use of the term “arbitrary disadvantage.” However, many courts have simply not remarked on the meaning of, or even used, this term.149 The focus has rather been on the shift to a contextual test that considers numerous factors beyond stereotype and prejudice as indicators of disadvantage. Thus, there

146. Ibid at para 92.
147. Madeley, supra note 10 at paras 49-51.
148. Ibid at para 143.
149. See e.g. Muggah, supra note 120; Descheneaux, supra note 120; Adekayode, supra note 120.
are a limited number of decisions that have contemplated whether “arbitrary” disadvantage is different from “discriminatory” disadvantage.

One notable exception is the Court of Appeal of Quebec’s judgment in Sherbrooke. In Sherbrooke, the Court of Appeal concluded that arbitrary disadvantage occurs when a group is excluded from a benefit for “no apparent reason” or when there is “no rational basis” for legislation making the distinction it does. On the specific facts of the case, the Court upheld the trial judge’s findings that there was discrimination. The measure at issue was a university-instituted retirement plan that applied to younger professors but not their older colleagues. The plan was discriminatory because it gave a monetary benefit to the younger professors without a rational basis for the distinction. The finding of discrimination was also supported by the fact that the measures were based entirely on “stereotypes and prejudice whereby individuals lose their professional value merely by reaching a certain age, regardless of their actual capabilities.” Thus, the Court of Appeal of Quebec’s understanding of “arbitrary” seemed to coincide with the general dictionary definition of the term: conduct that lacks a rational basis.

Two other courts have interpreted arbitrary disadvantage to occur when a law’s purpose fails to address the needs of the claimant group. In Madeley, Justice Paciocco conducted an inquiry into whether “arbitrary disadvantage” had occurred by asking whether the impugned law’s purpose addressed the actual needs and circumstances of the claimant group. In Catholic Children, Justice Chappel of the Ontario Superior Court similarly stated disadvantage that is “arbitrary in nature” is assessed by asking “whether the differential treatment appears arbitrary taking into consideration the actual needs, capacity and circumstances of the claimant or group.” Laws that fail to take into account a claimant’s specific situation tend to be discriminatory. The inquiry must therefore ask whether the distinctions imposed by a law are appropriate with regard to the object of the statute, as well as those individuals who would be affected.

Both the understanding of “arbitrary” as “irrational” espoused by the Court of Appeal of Quebec, and the understanding of the term as failing to correspond to a claimant’s needs used by the Ontario Superior Court, link the concept of

150. Sherbrooke, supra note 88 at para 55.
151. Ibid at para 55.
152. Ibid at para 56.
154. Catholic Children, supra note 4 at para 56
155. Ibid.
arbitrariness to the purpose of the impugned law. Jennifer Koshan and Jonnette Hamilton have raised concerns about this approach because it imports “section 1 justifications about purposes and means—not impact—into section 15.”\(^{156}\) Their worry is that a focus on arbitrariness improperly asks a claimant to demonstrate that a law is arbitrary under section 15, rather than asking the government to demonstrate that its law is rational under section 1.\(^{157}\)

That being said, of the forty-four decisions surveyed, it was only in *Sherbrooke, Madeley*, and *Catholic Children* that courts erroneously engaged with the meaning of “arbitrary.” The vast majority of courts preferred to keep the inquiry appropriately fixed on the traditional question of whether a law was discriminatory. Therefore, in practice, few courts require claimants to investigate the purpose and associated arbitrariness of a law. So long as this remains the case—or at the very least, if courts continue to merely allow, rather than *require* claimants to show the arbitrariness of a law as a way of demonstrating discrimination—the concern that issues more appropriate for section 1 are being brought under section 15 will remain minimal, arising only when claimants themselves rely on them.

Still, an overarching goal for future section 15 jurisprudence will be untangling linguistic fuzziness. A less opaque definition of “arbitrary disadvantage” is needed. Similarly, the link between arbitrary disadvantage and discriminatory disadvantage needs to be clarified. Are the two terms meant to be synonymous? Or do they entail two different concepts, thereby requiring two different routes towards showing a section 15 breach? The post-*Quebec v Al Taypotat* jurisprudence sheds little light onto these issues, given that so few courts that have been willing to engage with the term “arbitrary” (possibly because its function is so uncertain).

4. CONTEXTUAL FACTORS OUTSIDE OF STEREOTYPE AND PREJUDICE THAT MAY BE CONSIDERED

A wide bevy of factors, outside of the strict existence of prejudice and stereotype, have been considered by courts as relevant to the inquiry into discrimination. As *Quebec v A* indicates, historical disadvantage is the most obvious factor, and several courts have seized upon it as a marker of inequality. For example, the Quebec Superior Court focused almost exclusively on the historical disadvantage factor in *Descheneaux*, which was one of the first cases decided post-*Taypotat*, and

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is interesting because of how differently the court paints the test for section 15 versus how it actually applies it. Justice Masse begins her section 15 analysis by citing the *Kapp* test as the “established” approach to section 15. However, she then cites *Taypotat* in the subsequent paragraph, and while she does not paraphrase the decision, her judgment underlines a number of passages addressing the need for the inquiry to focus on evidence of historical disadvantage. Her analysis then goes on to consider whether the impugned legislation granted a benefit to “an already privileged group … while refusing groups that have historically been victims of discrimination.”

For many courts, determining whether there is historical disadvantage requires an assessment of the “full legal, social and political context” of the impugned legislation and the claimant. For example, in *Daybutch*, Justice Feldman directly cites the Court in *Withler* in order to reaffirm that historical disadvantage is linked to “social, political, and legal disadvantage in our society.” In that case, Justice Feldman considered whether the impugned law was discriminatory for Aboriginal individuals only after first considering markers of pre-existing disadvantage, including the impact of colonialism on Indigenous people, the assimilationist policies of respective governments, the trauma inflicted by residential schools, the over-representation of Aboriginal individuals in the convicted offender population, and substance abuse issues in the Aboriginal population. In *Daybutch*, the presence of “centuries” of systemic discrimination was the determinative factor in Justice Feldman’s finding that the impugned law violated section 15.

Another interesting development following *Quebec v A* is that some courts have resurrected the *Law* framework as a guideline for factors outside of stereotype and prejudice that may be considered in the section 15 analysis. I observed earlier that *Quebec v A* and *Taypotat* both adopt some of the *Law* language and revisit concepts popularized in that case, therefore it is unsurprising to see courts drawing upon the *Law* decision to guide them towards other relevant factors.

For example, in *Chambers YKTC*, Justice Ruddy noted that the factors enumerated in *Law* are helpful tools to assess the larger social, political, and

159. Ibid at para 117.
160. Ibid at para 134.
161. See *e.g.* *Chambers YKTC*, *supra* note 119 at para 172; *Daybutch*, *supra* note 119 at paras 84-86; *Catholic Children*, *supra* note 4 at para 53.
162. *Daybutch*, *supra* note 119 at para 86.
163. Ibid at 98-99.
164. Ibid at paras 98-101. See also *Chambers YKTC*, *supra* note 119 at para 165.
legal context within which a section 15 claim is occurring. Promisingly, Justice Ruddy avoided applying Law in the rigid manner for which Law had originally drawn criticism; instead, she noted that the factors were non-exhaustive and could be mutually exclusive, that is, not all of them had to be applied formulaically. For example, the fact that the impugned legislation failed to meet the actual needs and circumstances of the claimant group was sufficient to demonstrate that the law was discriminatory. Other cases have agreed that the use of the Law factors post-Quebec v A/Tapotat are merely “suggestions for consideration,” and that they are neither exhaustive nor must they be “expressly canvassed in every case.”

In the subsequent Manitoba Provincial Court case of Bittern, Justice Carlson applied Justice Ruddy’s approach in Chambers, relying on Law as a source of non-exhaustive factors that may demonstrate discrimination. However, in Chambers, Justice Ruddy specifically acknowledged that the factors in Law need not be applied “formulaically,” as the relevant factors may “vary with the facts of a given case.” In contrast, in Bittern, Justice Carlson applied each factor mechanically, one-by-one, before coming to a conclusion on whether the impugned law was discriminatory or not.

In Madeley, Justice Paciocco similarly looked at the Law factors to guide the inquiry into whether arbitrary disadvantage, stereotypes, or prejudice were perpetuated. For him, it was important to start by assessing the first factor—pre-existing disadvantage—since “when it exists, [it] can inform decisions about relevant prejudices, stereotypes and arbitrary disadvantage.” On the facts, Justice Paciocco’s inquiry used the Law factors for guidance, by focusing on whether the law at issue exacerbated the historical economic disadvantage of the mentally disabled and the “perception of prejudice” faced by this group. But the decision also went beyond the strict application of the four enumerated Law factors to consider a host of other contextual factors, including the marginalization of the

165. Chambers YKTC, supra note 119 at para 172.
166. Ibid at para 175.
167. Ibid at paras 171-75.
168. See e.g. Shenandoah, supra note 119 at para 44.
169. Chambers YKTC, supra note 119 at para 172.
171. Madeley, supra note 10 at para 149.
mentally disabled, their “exclusion from full participation in society,” and their “experience of displacement.”

Some courts have even begun to look at the factor of “human dignity,” popularized by Law (but subsequently demoted by Kapp) as an indicator of discrimination. Whether the use of human dignity was an appropriate basis to ground a section 15 breach was one of the issues on appeal in Adekayode. In that case, the Nova Scotia Court of Appeal clarified that prejudice, stereotypes, and historical disadvantage are all non-essential elements of showing a breach of substantive equality. In so doing, it upheld the decision of the Human Rights Board of Inquiry, which had found that a challenged distinction was discriminatory on the basis that it implicated a claimant’s human dignity. The Nova Scotia Court of Appeal concluded that while human dignity cannot be used as a “confusing hurdle to substantive equality,” it is permissible to use human dignity as “a broad purposive guide” to analyze discrimination. Although Adekayode was decided in the human rights context, the court drew on section 15 jurisprudence, including the observation from Kapp that the protection of equality “has as its lodestar the promotion of human dignity,” in making its holding. Therefore Adekayode carries implications for Charter claims as well.

One of the most comprehensive discussions of the factors that may inform the inquiry into discrimination under section 15 stems from Justice Chappel’s judgment in Catholic Children. Because the section 15 inquiry is flexible, Justice Chappel stated that it must take into account “all factors that are relevant to the particular case under consideration,” including “the purposes and objectives of the impugned scheme, the actual needs, interests and circumstances of the people impacted by it, and all relevant social, political, economic and historical factors concerning the claimant or group in question.” She noted that prejudice and stereotype may be two such indicia, but that they are only possible indicia, not necessary ones. She also added that evidence of the law’s effect on human

172. Ibid at paras 25-26. Although, admittedly, the Law factors were non-exhaustive, no additional factors beyond the original four set out by that decision have since been widely recognized. Moreover, an individual’s experiences of marginalization, exclusion, and displacement – which may be circumstances indicative of discrimination – do not fit neatly into any of Law’s four original categories. On the other hand, such individualized experiences may potentially fall under the general umbrella factor recognized in Law, human dignity.

173. Ibid at para 47.

174. Adekayode, supra note 120 at paras 77, 94-97.

175. Ibid at para 95.

176. Ibid at para 94, citing Kapp, supra note 6 at para 21.

177. Catholic Children, supra note 4 at para 53.

178. Ibid at para 54.
dignity may serve as a relevant factor in determining whether the distinction has created or perpetuated disadvantage. Again, a claimant is not required to point to a law as creating an affront to his or her dignity, but a distinction’s impact on an individual’s dignity may support their inquiry where present.\textsuperscript{179}

Justice Chappel compiled a list of additional contextual factors that may be relevant in assessing discrimination,\textsuperscript{180} many of which seem sourced directly from \textit{Law}. These include:

1. The existence of historical disadvantage on the part of a claimant or group: Although not a precondition, historical disadvantage is an important factor given that one of the main purposes of section 15 is to ensure fairness for those claimants who are disadvantaged on a larger scale. Such evidence will be accorded “significant weight,” because it is logical to conclude that a differential treatment will perpetuate the burdens that vulnerable groups face.

2. Arbitrary disadvantage: It is easier to demonstrate discrimination if a claimant can show that the impugned law failed to take into account his or her situation. The inquiry must ask whether the distinctions imposed by a law reflect the purpose of the law and are appropriate vis-à-vis the claimant group.

3. Ameliorative effects: Laws that create distinctions to alleviate inequalities affecting other disadvantaged groups should be assessed considering their “overall ameliorative effects and the multiplicity of interests that it attempts to balance.”

4. The nature and scope of the benefit which the claimant has been denied: The more significant the interest affected, the more likely that treating this interest in a differential manner will amount to discrimination.

5. A comparative analysis: Although a rigid comparative analysis is not required to determine whether the impact of impugned legislation is discriminatory, it may be helpful to compare the effect of the legislation on the claimant or distinguished group to other groups affected. This comparative exercise may assist with deepening one’s understanding of the claimant’s place in society as a whole.

Finally, some courts have focused on a law’s “disproportionate effect” on either the specific claimant or the general claimant group as a central factor.

\textsuperscript{179} Ibid at para 55.
\textsuperscript{180} Ibid at para 56.
for determining section 15 breaches.¹⁸¹ For example, in Ejigu, Justice Davies of the British Columbia Supreme Court asked whether sections 16(2) and (3) of the Criminal Code (which require that an accused claiming to not be criminally responsible due to suffering from a mental disorder must do so on a balance of probabilities) had a disproportionate effect upon the claimant as a consequence of the claimants’ national origin. To answer the question, Justice Davies evaluated the specific circumstances of the claimant, taking into account the fact that she was a woman who had immigrated to Canada from Africa, who was socially isolated, and whose language and cultural difficulties affected her ability to meet the burden imposed by the impugned provisions. In doing so, Justice Davies discussed at length the obstacles Ms. Ejigu faced speaking to psychiatrists who did not speak her native language, the fact that Ms. Ejigu’s linguistic and cultural difficulties negatively impacted her ability to present her case, and the difficulty courts and counsel would have in comprehending and appreciating her cultural differences.¹⁸² After a detailed assessment of Ms. Ejigu’s personal context, Justice Davies ultimately concluded that the provisions did not violate her right to substantive equality because while Ms. Ejigu faced a disadvantage due to these cultural differences, the disadvantage did not arise because the law targeted her either directly or indirectly as a member of a disadvantaged group.¹⁸³ Rather, the disadvantage arose because of the increased burden imposed by section 16 on all mentally incapacitated accused seeking to establish a criminal defense.¹⁸⁴ Further mitigating against a finding of disadvantage were the specific accommodations made in the case: A dedicated interpreter was provided for Ms. Ejigu during all court processes, as well as her psychological assessments.¹⁸⁵

Justice Davies also considered whether the law had a disproportionate effect on the mentally ill as a whole. Justice Davies concluded that there was discrimination, because, aside from the defence of non-insane automatism, there is no other instance in the Criminal Code in which the criminally accused must establish a defence on a balance of probabilities. In all other instances, all that an accused must do is raise an air of reality (a low burden), before the burden shifts to the Crown to prove the defence does not apply.¹⁸⁶ Considering the different onus borne by the mentally ill was part of a broader analysis, which assessed

¹⁸¹. See Adekayode, supra note 120 at paras 65-66; Catholic Children, supra note 4 at para 47; Ejigu, supra note 120 at para 182.
¹⁸². Ejigu, supra note 120 at paras 178-85.
¹⁸³. Ibid at para 188.
¹⁸⁴. Ibid at paras 188-90, 194-96.
¹⁸⁵. Ibid at para 205.
¹⁸⁶. Ibid at para 256.
whether the disproportionate effect of the provision exacerbated the historical disadvantages faced by mentally ill persons, by widening the gap between mentally disabled accused persons and those accused who are not. In conducting his analysis in this manner, Justice Davies considered both the individual effects of a law on the claimant, as well as the overall effects of a law on the claimant group, in resolving whether discrimination had occurred.

These decisions demonstrate that courts have taken to heart the message of Quebec v A and Taypotat to conduct the section 15 inquiry with a broad emphasis on context and systemic disadvantage. Courts brought in stereotypes and prejudice into the inquiry when appropriate but resisted relying on these indicators when not. Courts have treated pre-existing disadvantage as a robust indicator of discrimination, but again have not made it a mandatory one. They have been willing to look at the specific context affecting the individual claimant, as well as the broader social, political, and historical context of the claimant’s associated group. Questions of power imbalances have been brought to the forefront of the inquiry. The actual adverse impacts of the law on the claimant and claimant group have been closely examined, particularly when they give rise to disproportionate effects. And while the Law factors and human dignity have seen a resurgence, they have been applied non-exhaustively and as purposive guides rather than hurdles for claimants to meet. The contextual inquiry from Quebec v A and Taypotat has proven to be more than an empty refrain; courts have operationalized it and put it to good use with their individually tailored, thorough, probing, but non-restrictive inquiries into discrimination.

I therefore have little to add on this front; the cases discussed in this Part of the article consist of contextually sensitive inquiries that draw from all possible relevant factors, very much in line with the original vision of Andrews and the promotion of substantive equality. The only recommendation that I would make relates not to what courts have done but rather to what they have failed to mention in light of Quebec v A and Taypotat.

In both Quebec v A and Taypotat, Justice Abella devotes much of her decision to a discussion of historical disadvantage as an important indicator of arbitrary or discriminatory disadvantage. In doing so, she excludes any discussion of other factors. What needs to be emphasized in future decisions is not that historical disadvantage is just another factor that can inform the section 15 inquiry, but that it is compulsory for demonstrating discrimination. As it stands, Justice Abella speaks about historical disadvantage in near-mandatory terms, making it appear as if the “court is coming closer to requiring the law’s ‘perpetuation’ of an historic

187. Ibid at paras 257-58.
disadvantage before discrimination can be found.” This outcome should not be encouraged, lest historical disadvantage become the new prejudice and stereotyping: that is, a mandatory factor that fails to capture the full range of ways in which a law can be discriminatory, and that thus serves as a barrier rather than a gateway to protecting substantive equality.

Although historical disadvantage will be highly relevant to many section 15 claims, in some circumstances it may be difficult for claimants to proffer the proof necessary to demonstrate this factor or to link historical discrimination to the present-day discrimination they may be complaining of. Additionally, there may be novel types of discrimination that are historically unprecedented either because the grounds for discrimination are novel, such as discrimination because of genetic makeup, or because a traditionally privileged group faces discrimination in a particular context, such as men being discriminated against as child-care workers. These types of claims warrant review under section 15, but will not be accompanied with a history of disadvantage. Therefore, while historical disadvantage may be a useful indicator of discrimination in many instances, it should not serve as the be all end all of the discrimination analysis as the net it casts is not quite wide enough to capture discrimination in all cases.

IV. CONCLUSION: QUEBEC V A, TAYPOTAT, AND THE JOURNEY TOWARDS SUBSTANTIVE EQUALITY

Alongside the recommendations that I have made up to this point, it is important to remember the positive developments that have emerged for section 15 claimants from the Quebec v A and Taypotat decisions. Despite the courts’ fluctuating approach to discrimination, a constant theme has arisen in that courts have recognized the importance of conducting a contextual and purposive analysis to accommodate for different understandings of equality and specific issues raised in a given case.

Some cases, like Kapp and Withler, failed in deploying this theme due to their improper focus on overly narrow indicators of restriction. By removing the requirement for claimants to show stereotyping and prejudice, Quebec v A and Taypotat reinvigorate Andrews’ promotion of a broad, contextual section 15 analysis and ensure the inquiry will not be conducted according to a “fixed and limited formula.” More importantly, their move towards a less formalistic, less

onerosous standard will better serve claimants in the pursuit of substantive equality. Marc Gold made the following comments soon after Andrews was released:

The equality provisions in the Charter are like the three-dimensional image in a holographic plate. Although one may break the plate into a thousand pieces, shining a laser beam through any one of the shards will reproduce the image in its entirety. So too is it with the concepts of “equality” [and] “discrimination” ... Out of any one of these concepts can be generated all of the principles that we distribute amongst the various clauses of s[ection] 15 ... At the risk of overstating the case, to criticize the Court for some of its shortcomings of analysis in Andrews is to ignore the very nature of equality itself. 190

Gold recognized then that equality is a concept inherently fraught with difficulty. It means different things to different individuals in different groups at different times, making it impossible to distil “equality” into a single, working definition. In my view, the approaches developed in Quebec v A and Täypotat implicitly acknowledge that in order to deploy section 15 in a purposive manner—that is, a manner that is sensitive to systemic disadvantage and aims for substantive equality—we must avoid a universal approach divorced from context.

As the SCC has made its journey towards a complete test for section 15, it has admittedly taken a circuitous route that has at times bewildered those litigants who followed. But the destination, the end goal, has always been the same: substantive equality. The question has merely been which doctrinal methodology best serves this goal. And though subsequent refinements have repeatedly kicked up the sand in otherwise settled and clear waters, there has been a slow but steady growth towards that elusive, but most admirable goal. Do Quebec v A and Täypotat end the journey? No, but they do make important strides aimed at capturing more holistically what it means to face discrimination.

190. Gold, supra note 42 at 1079.