Adverse Impact: The Supreme Court's Approach to Adverse Effects Discrimination under Section 15 of the *Charter*

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The recognition and remedying of adverse effects discrimination is crucial to the realization of substantive equality. However, the Supreme Court of Canada's analytical approach to the Charter's equality guarantee has made it difficult for equality claimants to mount successful claims of this type. Based on a comprehensive review of the Supreme Court's section 15(1) adverse effects discrimination jurisprudence, the authors identify the following barriers: more burdensome evidentiary and causation requirements; assumptions about choice; reliance on a comparative analysis; acceptance of government arguments based on the "neutrality" of their policy choices; narrow focusing on discrimination as prejudice and stereotyping; and failing to "see" adverse effects discrimination, often because of the size or relative vulnerability of the claimant subgroup. The authors also examine two adverse effects claims heard by the Supreme Court in the fall of 2014, Taypotat *and* Carter, *to analyze the application and resolution of those problem areas.*

Reconnaître la discrimination par suite d'un effet préjudiciable et y remédier est crucial pour la réalisation de l'égalité réelle. Cependant, l'approche analytique de la Cour suprême du Canada de la garantie d'égalité de la Charte a fait en sorte qu'il est difficile pour ceux qui demandent l'égalité de monter des revendications de ce type qui aboutissent. Nous appuyant sur un examen détaillé de la jurisprudence de la Cour suprême touchant l'article 15(1) et la discrimination par suite d'un effet préjudiciable, nous avons identifié les obstacles suivants : des éléments de preuve voulus et des exigences en matière de causalité plus pénibles; des hypothèses par rapport au choix; la confiance en une analyse comparative; l'acceptation des arguments du gouvernement fondée sur la « neutralité » de ses choix en matière de politique; une vue étroite de la discrimination, c'est-à-dire qu'il s'agit de préjugés et de stéréotypes; et ne pas réussir à « voir » la discrimination par suite d'un effet préjudiciable, souvent en raison de la taille ou la vulnérabilité relative du sous-groupe de demandeurs. Nous examinons également deux revendications portant sur les effets préjudiciables instruites par la Cour suprême à l'automne 2014, Taypotat *et* Carter, *afin d'analyser l'application et la résolution de ces questions difficiles.*

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I. Introduction

The recognition and remedying of adverse effects discrimination is crucial to the realization of substantive equality.[1] However, the Supreme Court's analytical approach to section 15(1) of the *Canadian Charter of Rights and Freedoms*[2] has made it difficult for equality claimants to mount successful adverse effects discrimination claims. This article comprehensively reviews and critiques the Supreme Court of Canada's adverse effects discrimination jurisprudence under section 15(1) with a view to identifying these barriers.

The Supreme Court recognized adverse effects discrimination in its very first decision under section 15(1), *Andrews v Law Society of British Columbia*.[3] Justice McIntyre accepted that facially neutral laws may be discriminatory, stating "[i]t must be recognized . . . that every difference in treatment between individuals under the law will not necessarily result in inequality and, as well, that identical treatment may frequently produce serious inequality."[4] Despite this promising start, adverse effects discrimination claims play a minor role in the Court's constitutional equality jurisprudence. Only two such claims have been successful: *Eldridge v British Columbia (Attorney General)*,[5] decided in 1997, and *Vriend v Alberta*,[6] decided in 1998. The number of section 15(1) adverse effects discrimination claims that the Supreme Court has heard, whether successful or not, is also small — only eight of sixty-six cases by our count.[7] In

1 Different terms are used interchangeably by Canadian courts to describe this form of discrimination: "adverse effects," "adverse impact," and "indirect discrimination." We use the term "adverse effects" in this paper as it is the most widely adopted.

2 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*]. Section 15 provides:

> (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability;
>
> (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

3 [1989] 1 SCR 143, 10 CHRR D/5719 [*Andrews*] (challenging the Law Society of British Columbia's requirement that lawyers be Canadian citizens).

4 *Ibid* at 164.

5 [1997] 3 SCR 624, 151 DLR (4th) 577 [*Eldridge*].

6 [1998] 1 SCR 493, 156 DLR (4th) 385 [*Vriend*].

7 See Appendix I for a list of Supreme Court of Canada cases in which claims were made under s 15(1). In addition to *Eldridge, supra* note 5 and *Vriend, ibid*, the list of the Court's adverse effects discrimination cases includes *Rodriguez v British Columbia*, [1993] 3 SCR 519, 3 WWR 553 [*Rodriguez*]; *Symes v Canada*, [1993] 4 SCR 695, 1993 CanLII 55 (SCC) [*Symes*]; *Thibaudeau v Canada*, [1995] 2 SCR 627, 1995 CanLII 99 (SCC) [*Thibaudeau*]; *Adler v Ontario*, [1996] 3 SCR

addition, the Court has described the distinction between direct and adverse effects discrimination as "artificial"[8] and "malleable"[9] in the context of claims made under human rights statutes. Despite the scarcity of successful adverse effects discrimination claims and the indeterminate nature of the concept itself — or perhaps because of these factors — in the fall of 2014 the Court heard two appeals that included section 15(1) adverse effects discrimination claims: *Carter v Canada (Attorney General)*[10] and *Taypotat v Taypotat.*[11] As a result, this seemed to be an opportune time to review the Court's treatment of adverse effects discrimination under the *Charter* and the contentious issues within this body of case law.

Our thesis is that the Court's approach to section 15(1) of the *Charter*, while accepting adverse effects discrimination in principle, has used direct discrimination as the paradigmatic case, and as a result, the Court's approach has had an adverse impact on adverse effects discrimination claims. We argue that the harms of adverse effects discrimination must be placed on an equal footing with those of direct discrimination by addressing the problems that the Court's current approach to section 15(1) creates for adverse effects discrimination claims. Those problems include more burdensome evidentiary and causation requirements and assumptions about choice, reliance on a comparative analysis, acceptance of government arguments based on the "neutrality" of their policy choices, the narrow focus on discrimination as prejudice and stereotyping, and the failure to "see" adverse effects discrimination, often

609, 140 DLR (4th) 285 [*Adler*]; *Health Services and Support - Facilities Subsector Bargaining Assn v British Columbia*, 2007 SCC 27, [2007] 2 SCR 391 [*BC Health Services*]; and *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009], 2 SCR 567 [*Hutterian Brethren*]. In the Court's most recent s 15(1) case, *British Columbia Teachers' Federation v British Columbia Public School Employers' Association*, 2014 SCC 70, arguments were made by an intervener, West Coast LEAF, that could be seen as relating to adverse effects discrimination (online: SCC, <www.scc-csc.gc.ca/case-dossier/info/fac-mem-eng.aspx?cas=35623>). However, the Court's decision is only one paragraph long and it does not deal with adverse effects discrimination, so we have not included it on our list.

8 *British Columbia (Public Service Employee Relations Commission) v BCGSEU*, 1999 SCC 652, [1999] 3 SCR 3 at para 27 [*Meiorin*] (a firefighter with the British Columbia Ministry of Forests successfully challenged the requirement that all employees pass a particular physical fitness test, as evidence established that, owing to physiological differences, most women have a lower aerobic capacity than most men and therefore a greater likelihood of failing the test, even with training).

9 *Ibid* at paras 29 and 30.

10 2012 BCSC 886, [2012] BCJ No 1196 (QL), rev'd 2013 BCCA 435, leave to appeal to SCC granted 2014 CanLII 1206 (SCC) [*Carter*, cited to BCSC]. The SCC handed down its decision in February 2015, while this article was in press: *Carter v Canada (Attorney General)*, 2015 SCC 5 [*Carter* (SCC)]

11 2012 FC 1036, rev'd 2013 FCA 192, 365 DLR (4th) 485; leave to appeal to SCC granted 2013 CanLII 83791 (SCC) [*Taypotat*, cited to FCA].

as a result of the size or relative vulnerability of the group or sub-group making the claim.

In Part II we introduce the concepts that we rely on throughout this paper: formal and substantive equality, intentional, unintentional, direct and adverse effects discrimination, and categorical exclusion and disparate impact forms of adverse effects discrimination. In Part III we review the Supreme Court's adverse effects discrimination decisions in the context of the three different analytical frameworks to section 15(1) that the Court has developed over the years,[12] and identify the contentious issues. In Part IV, we discuss the two adverse effects cases that were heard by the Supreme Court in October 2014, focusing on how the contentious issues were dealt with by the lower courts and how they were argued before the Court. Although the Court declined to consider whether the prohibition on assisted suicide violated section 15 of the *Charter* in *Carter*,[13] it did agree that it was open to Justice Smith in the British Columbia Supreme Court to consider this claim.[14] Justice Smith's decision includes a thorough adverse effects analysis that, together with the arguments advanced at the Supreme Court of Canada hearing, provides a good illustration of the current issues in this area. In *Taypotat*,[15] the second case we discuss in Part IV, the only claim before the Supreme Court is a section 15 claim, which presents the Court with an important opportunity to clarify and develop adverse effects discrimination law. In Part V, we conclude with our arguments in favour of developing this area of equality law.

II. Relevant concepts

The Supreme Court of Canada has consistently stated that the goal of section 15(1) of the *Charter* is substantive rather than formal equality.[16] Formal equality is framed in terms of treating "likes alike," or treating those who are "similarly situated" the same way. [17] In contrast, substantive equality is concerned

12 Jennifer Koshan and Jonnette Watson Hamilton, "The Continual Reinvention of Section 15 of the Charter" (2013) 64 UNBLJ 19 at 19 [Koshan & Watson Hamilton, "Continual Reinvention"].

13 *Carter* (SCC), *supra* note 10 at para 93.

14 *Ibid* at para 48.

15 *Supra* note 11.

16 See e.g. *Withler v Canada (Attorney General)*, 2011 SCC 12, [2011] 1 SCR 396 at para 2 [*Withler*]. The term "substantive equality" was not used by the Court until its 1998 decision in *Eldridge*, *supra* note 7 at 615; see Bruce Porter, "Beyond *Andrews*: Substantive Equality and Positive Obligations after *Eldridge* and *Vriend*" (1997-98) 9:3 Const Forum Const 71 at 72.

17 Margot Young, "Unequal to the Task: 'Kapp'ing the Substantive Potential of Section 15" in Sanda Rodgers & Sheila McIntyre, *The Supreme Court of Canada and Social Justice: Commitment, Retrenchment or Retreat* (Markham, ON: LexisNexis Canada, 2010) 183 at 190-91.

with ensuring that laws or policies do not impose subordinating treatment on groups already suffering social, political, or economic disadvantage in Canadian society, and recognizes that some groups may need to be treated differently to achieve equality of results.[18] The concept of substantive equality is more controversial than this definition might suggest, particularly whether it imposes positive obligations on the state and whether it requires a redistribution of resources and benefits.[19] What seems least controversial in Canada is an understanding of substantive equality that is based on the principles enunciated in *Andrews* by Justice McIntyre,[20] the most relevant of which for the purposes of this paper are: the Court's rejection of formal equality, recognizing that "identical treatment may frequently produce serious inequality";[21] the confirmation that an equality analysis must focus on the *effects* of a law, and not just its purpose;[22] the Court's identification of "the accommodation of differences . . . [as] the essence of true equality";[23] the identification of equality as a comparative concept, discernable "by comparison with the condition of others in the social and political setting in which the question arises";[24] and, the stipulation that justifications for discrimination should be addressed under section 1 of the *Charter* where the government bears the burden of proof.[25]

In *Andrews*, the Court also noted that in addition to promoting equality, section 15(1) was intended to protect against discrimination.[26] Until the Court's decision in *O'Malley* in 1985, courts consistently held that only intentional discrimination was unlawful.[27] Intentional discrimination is usu-

18 Koshan & Watson Hamilton, "Continual Reinvention" *supra* note 12 at 7, citing Patricia Hughes, "Supreme Court of Canada Equality Jurisprudence and 'Everyday Life'" (2012) 58 Sup Ct L Rev (2d) 245 at 246-47. See also Judy Fudge, "Substantive Equality, the Supreme Court of Canada, and the Limits to Redistribution" (2007) 23 S Afr J on Hum Rts 235 at 238 (specifying a number of ways to give substantive equality content).

19 Fudge, *ibid* at 235. See also Hester A. Lessard "Dollars Versus [Equality] Rights": Money and the Limits on Distributive Justice" (2012) 58 Sup Ct L Rev 299.

20 Fay Faraday, Margaret Denike & M Kate Stephenson, "In Pursuit of Substantive Equality" in *Making Equality Rights Real: Securing Substantive Equality under the Charter* (Toronto: Irwin Law, 2006) 9 at 12 [*Making Equality Rights Real*] (noting that the foundation for substantive equality rights under the *Charter* is built on the language of section 15 and on the Supreme Court of Canada's decision in *Andrews*), *supra* note 3.

21 *Andrews, supra* note 3 at 164.

22 *Ibid* at 165 [emphasis added].

23 *Ibid* at 169.

24 *Ibid* at 164.

25 *Ibid* at 176, 178.

26 *Ibid* at 180-81.

27 Walter S Tarnopolsky, *Discrimination and the Law in Canada* (Toronto: De Boo, 1982) at 118-119. In 1985 the Supreme Court first accepted unintentional, adverse effects discrimination in *Ontario Human Rights Commission & O'Malley v Simpsons Sears Ltd*, [1985] 2 SCR 536, 7 CHRR D/3102 [*O'Malley*] (the claimant's full-time employment was terminated when she refused to work Friday

ally animated by prejudice, and involves animus, contempt, or belief in the inferiority of the target group.[28] Unintentional discrimination, on the other hand, typically arises from inattention to differences, which leads to measures that are neutral on their face, but have a negative or adverse impact on some disadvantaged groups.[29] Unintentional discrimination may also follow from individuals or groups unknowingly adopting their society's prejudices and negative stereotypes into their systematic procedures or practices.[30] Stereotyping generalizes, in either a positive or a negative way, about what is seen as the essential identifying feature of a group of people.[31]

In addition to being intentional or unintentional, discrimination may also be direct or indirect. Direct discrimination involves express differential treatment that is usually obvious on the face of the law, policy or program, and includes measures that explicitly single out some people for specific treatment because they possess a certain trait.[32] Direct discrimination often overlaps with intentional discrimination because explicitly drawn distinctions tend to be intentional.[33] In contrast, indirect or adverse effects discrimination[34] is generally understood to arise when a neutral rule, which is applied equally to everyone, has a disproportionate and negative impact on members of a group identified by a prohibited ground of discrimination.[35] Its indirect nature is identified by the existence of a measure that does not obviously rely on a prohibited discriminatory ground.[36] Although intent is typically irrelevant

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and Saturday, as required by her employer, because her Seventh-day Adventist religion forbade her from doing so). See also *Bhinder v Canadian National Railway Co*, [1985] 2 SCR 561, 7 CHRR D/3093 (the claimant's employment was terminated when he refused his employer's requirement to wear a hard hat because he was a member of the Sikh religion which required him to wear a turban).

28 Denise G Réaume, "Discrimination and Dignity" (2003) 63 La L Rev 645 at 679. See also *Quebec (Attorney General) v A*, 2013 SCC 5, [2013] 1 SCR 61 [*Quebec v A*] at para 326 (per Abella J).

29 *O'Malley, supra* note 27 at para 18; Yvonne Peters, *Twenty Years of Litigating for Disability Equality Rights: Has it Made a Difference? An Assessment by the Council of Canadians with Disabilities* (2004), online: CCD, <www.ccdonline.ca/en/humanrights/promoting/20years>.

30 Sophia Moreau, "The Wrongs of Unequal Treatment" (2004) 54 UTLJ 291 at 302 [Moreau, "Wrongs of Unequal Treatment"].

31 *Ibid* at 298.

32 Sophia Moreau, "What Is Discrimination?" (2010) 38:2 Philosophy & Public Affairs 143 at 154 [Moreau, "What is Discrimination"].

33 *Ibid.*

34 The term used in the United Kingdom is "indirect discrimination", and in the United States, "disparate impact" discrimination.

35 Melina Buckley & Fiona Sampson, "LEAF and the Supreme Court of Canada Appeal of Health Services and Support-Facilities Subsector Bargaining Assn. v British Columbia" (2005) 17:2 CJWL 473 at 496. See also Moreau, "What Is Discrimination", *supra* note 29 at 154.

36 Christa Tobler, *Limits and Potential of the Concept of Indirect Discrimination* (Brussels: European Commission, 2008) at 29.

given the effects-based nature of this type of discrimination,[37] it is possible for adverse effects discrimination to be intentional in cases where a facially neutral rule is adopted in spite of knowledge of its potentially adverse impact on a particular group.[38]

Adverse effects discrimination is measured in unequal effects or the failure to take into account differences, so it can usually only be fully appreciated through a broad, contextual analysis.[39] Moreover, because the discriminatory rules appear neutral, a causal relationship between the impugned legal provision and the adverse effects will often be difficult to prove; it may be more challenging to show that adverse effects are "because of" a particular trait.[40] If a rule is shown to contribute to or worsen a group's disadvantaged position, this should be sufficient to establish the necessary connection between the rule and the disadvantage.[41]

Although adverse effects claims have seldom been successful before the Court, and although the distinction between direct and adverse effects discrimination may be malleable or arbitrary,[42] recognizing adverse effects discrimination can capture the systemic differential impact which longstanding, apparently neutral practices can have on disadvantaged groups.[43] It is thus crucial to an expansive understanding of substantive equality.

Dianne Pothier has usefully classified adverse effects claims into two types: those involving "categorical exclusions," where all members of a group or sub-group are adversely impacted by a neutral rule or policy, [44] and

37 *Ibid* at 31.

38 See text accompanying notes 56, 147 and 202-203 (discussing the intentional nature of adverse effects discrimination in *Rodriguez*, *Hutterian Brethren* and *Carter* respectively).

39 Buckley & Sampson, *supra* note 35 at 496.

40 Moreau, "What is Discrimination?", *supra* note 32 at 158-60.

41 Melina Buckley, "*Symes v Canada*" [2006] 1 WCR 31, (2006) 18 CJWL 27 at 60 (Women's Court of Canada).

42 The Supreme Court questioned the distinction between direct and adverse effects discrimination in the context of human rights legislation in *Meiorin*, *supra* note 8. McLachlin J noted that "there are few cases that can be so neatly characterized" and called the distinction "malleable" since those wishing to mask discriminatory intentions could frame rules and policies in neutral language and improperly fail to take the needs of particular groups into account. *Ibid* at paras 28-29.

43 Olivia Smith, "A Pandisability Analysis? The Possibilities and Pitfalls of Indirect Disability Discrimination" (2009) 60 N Ir Legal Q 361 at 371. See also Dianne Pothier, "Tackling Disability Discrimination at Work: Toward a Systemic Approach" (2010) 4:1 McGill JL & Health 17 at 23 [Pothier, "Tackling Disability Discrimination"].

44 Pothier uses *O'Malley*, *supra* note 27 as an example of a categorical exclusion case, where all members of the religious sub-group of observant Seventh Day Adventists were adversely affected by the rule requiring them to work on Saturdays. See Pothier, "Tackling Disability Discrimination" *supra* note 43 at 35.

"disproportionate impact" cases, where only some members of a group are adversely affected.[45] The distinction is an important one, because in disparate impact cases, the link between the adverse effect and a ground of discrimination will often be invisible and unacknowledged without careful attention to context.[46] A causal relationship between the challenged legal provision and the adverse effects will also be more difficult to prove in disparate impact cases.[47] However, if substantive equality is to be given effect, discrimination must be recognized even in cases where not all members of the group are affected the same way.

III. History and current framework of the court's section 15(1) jurisprudence

Canadian equality rights jurisprudence can be divided into three eras marking three different frameworks for analyzing all claims made under section 15(1). The first era, 1989 to 1999, was the most fruitful for adverse effects discrimination claims, with six cases heard and two successful claims. The second era (1999 to 2008) and the third era (2008 to date) each saw only one adverse effects discrimination claim, both dismissed by the Court in one paragraph.

A. The *Andrews* Era: 1989 to 1999

1. The general approach to section 15(1) claims

We have already reviewed some of the important principles established in *Andrews* in support of the goal of substantive equality.[48] Justice McIntyre organized his section 15(1) analysis around the question of whether there was discrimination based on enumerated or analogous grounds. This approach ensured that the claim fit within the overall purpose of the equality guarantee articulated by the Court: "to remedy or prevent discrimination against groups subject to stereotyping, historical disadvantage and political and social prejudice in Canadian society."[49]

45 Pothier uses *Meiorin supra* note 8, to illustrate the disproportionate impact type of case, where although women disproportionately failed a firefighter's aerobic test compared to men, some women passed the test (and some men failed it). See Pothier, "Tackling Disability Discrimination" *supra* note 43 at 36.

46 Buckley & Sampson, *supra* note 35 at 496.

47 *Ibid* at 497.

48 See Part II. See also Koshan & Watson Hamilton, "Continual Reinvention," *supra* note 12 at paras 7-17.

49 *R v Swain*, [1991] 1 SCR 933, 1991 CanLII 104 (SCC) at para 80.

In defining "discrimination" under section 15(1) of the *Charter*, *Andrews* relied on the definition established by the Court in its interpretation of human rights legislation in *O'Malley*:

> [D]iscrimination may be described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, *which has the effect* of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society.[50]

This definition focuses on the impact or effect of the law on the equality-seeking individual or group defined by personal characteristics found in the enumerated grounds in section 15(1) or in analogous grounds. It recognizes that discrimination may be direct or indirect, intentional or unintentional, and applicable to the withholding of benefits as well as the imposition of burdens. Justice McIntyre also emphasized that equality is a comparative concept, with adverse impact and inequality discernible through comparison with others.[51]

2. The adverse effects cases

Rodriguez included an adverse effects discrimination claim under section 15(1) that was dismissed by the majority but formed the basis of a dissenting judgment.[52] The claimant, who suffered from amyotrophic lateral sclerosis (ALS), a terminal illness, argued that a *Criminal Code* provision prohibiting assisted suicide violated her rights as a fully competent person to be able to choose to commit physician-assisted suicide.[53] Chief Justice Lamer, in a dissent concurred in by Justice Cory, applied the concept of adverse effects discrimination to the facially neutral prohibition to hold that it created inequality when it prevented the choice of suicide, open to other Canadians, by persons with a physical disability that so limited their movement that they were physically unable to end their lives unassisted.[54] The challenged law imposed a burden by limiting the ability of those subjected to it to act upon a fundamental

50 *Supra* note 3 at 174-5 [emphasis added], relying on *O'Malley, supra* note 27 at 551 and *Canadian National Railway Co. v Canada (Canadian Human Rights Commission)*, [1987] 1 SCR 1114, 8 CHRR D/4210 (SCC) at 1138-39.

51 *Andrews, supra* note 3 at 162.

52 *Supra* note 7. The five-person majority found there was no violation of ss 7 or 12 of the *Charter*, and that any violation of s 15(1) would be justified under s 1 (at para 185). McLachlin and L'Heureux-Dubé JJ, dissenting, would have decided the case under s 7. Only the dissenting judgment of Lamer CJ, concurred in by Cory J, addressed the equality claim on its merits.

53 *Criminal Code*, RSC 1985, c C-46, s 241(b) provides that "[e]very one who . . . (b) aids or abets a person to commit suicide, whether suicide ensues or not, is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years."

54 *Rodriguez, supra* note 7 at para 48.

decision about their life, depriving them of the ability to choose to commit suicide except in a way that was unlawful, thus limiting their autonomy and self-determination.[55]

Rodriguez was a disproportionate impact type of case,[56] and Chief Justice Lamer explicitly addressed the disparity between the group defined by the ground of physical disability and the much smaller group of terminally ill persons with physical disabilities who were unable to end their lives unassisted.[57] He held that the fact only a minority of persons with disabilities was adversely affected by the prohibition did not prevent the claimant from succeeding under section 15(1).[58]

Chief Justice Lamer also categorized the prohibition on assisted suicide as "involuntary" or unintentional discrimination, noting that "to promote the objective of the more equal society, section 15(1) acts as a bar to the executive enacting provisions without taking into account their possible impact on already disadvantaged classes of persons."[59] Despite the lack of intention and the disparate impact nature of the case, there was no question about whether the *Criminal Code* prohibition was the cause of the unequal burden imposed on the claimant.

In a separate dissenting judgment, Justices L'Heureux-Dubé and McLachlin (as she then was) held that the prohibition on assisted suicide was better addressed under section 7. They were of the view "that this is not at base a case about discrimination . . . and that to treat it as such may deflect the equality jurisprudence from the true focus of section 15 — 'to remedy or prevent discrimination against groups subject to stereotyping, historical disadvantage and political and social prejudice in Canadian society.'"[60] This

55 *Ibid.* The issue of whether the prohibition against assisted suicide has an adverse impact on persons with disabilities was before the Supreme Court in *Carter* (SCC), *supra* note 10, but the Court declined to deal with the s 15 claim, instead striking down the ban under s 7.

56 See text accompanying notes 44-47.

57 *Rodriguez, supra* note 7 at para 67.

58 *Ibid* (relying on two human rights cases, *Brooks v Canada Safeway Ltd.*, [1989] 1 SCR 1219, 4 WWR 193 [*Brooks*] (where unfavourable treatment on account of pregnancy was discrimination on the basis of sex), and *Janzen v Platy Enterprises Ltd.*, [1989] 1 SCR 1252, 10 CHHR D/6205 (where sexual harassment was discrimination on the basis of sex).

59 *Rodriguez, supra* note 7 at para 47.

60 *Ibid* at para 196, citing *R v Swain, supra* note 49 at 992 (per Lamer CJ). The argument that the challenge to the ban on assisted suicide is not at base a case about discrimination was put forward by an intervener in *Carter* (Factum of the Intervener Council of Canadians with Disabilities and the Canadian Association for Community Living at para 21, online: Supreme Court of Canada, <www.scc-csc.gc.ca/case-dossier/info/fac-mem-eng.aspx?cas=35591>). It might be inferred that the Supreme Court's refusal to deal with the s 15 claim in *Carter* indicates that McLachlin CJ still

passage suggests a failure on their part to see the assisted suicide prohibition through the lens of adverse effects discrimination, and, more broadly, a failure to recognize adverse effects discrimination as a key focus of section 15(1) of the *Charter*.[61]

Whether or not the challenged law was the cause of the adverse effects imposed on the claimant was the main issue in *Symes*.[62] The claimant, a self-employed mother, argued that an *Income Tax Act*[63] provision that did not allow her to deduct the wages paid to her nanny as business expenses discriminated against her on the basis of sex. Justice Iacobucci, writing for the majority, concluded that the claimant had not proved that women in general disproportionately paid child care expenses, although he acknowledged she had proved that women in general disproportionately bore the burden of child care. He stated:

> If the adverse effects analysis is to be coherent, it must not assume that a statutory provision has an effect which is not proved. *We must take care to distinguish between effects which are wholly caused, or are contributed to, by an impugned provision, and those social circumstances which exist independently of such a provision.*[64]

In the majority's view, those social costs "although very real, exist outside of the Act."[65] *Symes* therefore emphasizes a causation requirement for recognizing adverse effects discrimination.[66] The analysis failed to make a connection between the broader inequalities the Court recognized — that women disproportionately bear the burden of child care in society — and the equality claim that was actually made.[67]

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agrees with this view. However, the unanimous Court merely states that "[h]aving concluded that the prohibition violates s. 7, it is unnecessary to consider this question" (*Carter* (SCC), *supra* note 10 at para 93).

61 The dissenting judgment of L'Heureux-Dubé and McLachlin JJ indicates a preference for s 7 arguments over s 15 arguments that is also evident in other cases, including *Carter* (SCC), *supra* note 10. See Jennifer Koshan, "Redressing the Harms of Government (In) Action: A Section 7 Versus Section 15 *Charter* Showdown" (2013) 22:1 Const Forum Const 31.

62 *Symes, supra* note 7.

63 RSC 1952, c 148.

64 *Symes, supra* note 7 at 764-65 (emphasis added).

65 *Ibid* at 765.

66 Colleen Sheppard, "Of Forest Fires and Systemic Discrimination: A Review of *British Columbia (Public Service Employee Relations Commission) v B.C.G.S.E.U.*" (2000-2001) 46 McGill L J 533 at 547 [Sheppard, "Review of BCGSEU"].

67 Buckley, *supra* note 41 at 59. The dissent by L'Heureux-Dubé and McLachlin JJ emphasized context, which was seen as crucial for this type of claim because "[w]hen issues are examined in context, it becomes clear that some so-called 'objective truths' may only be the reality of a select group in society and may, in fact, be completely inadequate to deal with the reality of other groups." *Symes, supra* note 7 at para 241.

Also related to the causation problem was the majority's rejection of Symes' claim because she was seen to have chosen to assume childcare expenses that her husband could have assumed or shared.[68] In other words, the cause of her inequality was said to be the choice she had made, and not the law stating that her child care expenses were not incurred to earn business income (unlike golf club fees).[69] As Melina Buckley has argued, the gendered division of labour within the family severely circumscribes women's choices and is an important aspect of women's inequality. As a result, it is important to be suspicious of choice when determining causal relations between child rearing and work outside the home.[70]

Another point briefly raised by the majority in *Symes* was that the group adversely affected by the challenged provision was not the group most affected by the law, i.e., not the most vulnerable group. The majority questioned the claimant's choice of group (self-employed women) and intimated that a different subgroup of women, such as single mothers, might have succeeded where the claimant had failed.[71] This may have been a suggestion that, in disparate impact type adverse effects discrimination cases, discrimination can only be successfully claimed by especially vulnerable members of protected groups.

The third adverse effects discrimination case heard by the Supreme Court was *Thibaudeau*,[72] a case not unlike *Symes*. In *Thibaudeau*, the challenged provision was section 56(1)(b) of the *Income Tax Act*,[73] which required that the recipient of child maintenance payments from a former spouse include such payments in computing her income, while the paying spouse could deduct them. Interveners argued the facially neutral provision had an adverse impact on custodial parents, almost all of whom were women,[74] and thus caused

68 *Symes, ibid* at 763-64. For a critique of the emphasis on choice, see Rebecca Johnson, "If Choice Is the Answer, What Is the Question? Spelunking in *Symes v Canada*," in Dorothy E. Chunn and Dany Lacombe, eds, *Law As a Gendering Practice* (Oxford: Oxford University Press, 2000) 199.

69 Audrey Macklin, "*Symes* v *M.N.R.*: Where Sex Meets Class" (1992) 5:2 CJWL 498 at 507.

70 Buckley, *supra* note 41 at 53.

71 *Symes, supra* note 7 at para 139.

72 *Ibid.*

73 SC 1970-71-72, c 63.

74 See the arguments of Support and Custody Orders for Priority Enforcement (SCOPE) in *Thibaudeau, supra* note 7 at 689 and the Factum of the Charter Committee on Poverty Issues, Federated Anti-Poverty Groups of British Columbia, National Action Committee on the Status of Women and Women's Legal Education and Action Fund (The Coalition) in *Thibaudeau*, online: LEAF, <leaf.ca/wordpress/wp-content/uploads/2011/01/1995-thibaudeau.pdf>. Ninety-eight percent of those receiving child support payments which they were required to include in their income were women. See Claire F L Young, "It's All in the Family: Child Support, Tax, and *Thibaudeau*" (1994) 6 Const Forum Const 107 at 107.

sex-based discrimination.[75] However, the majority did not discuss whether the impugned provision had an adverse impact on women. Instead, it found the provision did not impose a burden or withhold a benefit by assessing the effect of the law at the level of the post-divorce family unit.[76] The relevant group for the majority's equality analysis was the separated or divorced couple, making it easy to conclude there was no burden[77] because the inclusion-in-income and deduction-from-income system reduced the overall tax burden of the family unit. The differential treatment of custodial parents and the resulting disproportionate impact on women was recognized by Justices McLachlin and L'Heureux-Dubé in separate dissenting judgments.[78]

The claimant in *Thibaudeau* had argued her section 15(1) claim on the analogous ground of family status, not sex.[79] It appears that the majority found it easier to focus on the direct discrimination claim based on family status, which facilitated a focus on the "family unit," than to examine the adverse effects claim and the disproportionate burden imposed on women. This case illustrates how direct discrimination is usually easier to recognize than adverse effects discrimination because of the direct connection between the impugned law, with its express differential treatment obvious on its face, and the ground of discrimination.[80]

A related point about the distinction between direct and adverse effects discrimination being dependent on the perspective adopted can be seen in *Adler*.[81] The claimants were members of the Jewish or Christian Reformed faiths and they argued their section 15(1) rights were violated by a failure to provide public funding for denominational schools. The impugned statutory provision, which extended public funding to Roman Catholic schools, was not neutral as to religion on its face, and may not appear to involve an adverse effects claim. However, the facially neutral aspect of the case is seen if the focus is on the publicly funded public school system which, the claimants argued, they were unable to access for religious reasons.[82] The government

75 *Thibaudeau, supra* note 7 at para 77. See also Lisa Philipps and Margot Young, "Sex, Tax and the Charter: A Review of *Thibaudeau v Canada*" (1995) 2:2 Rev Const Stud 221 at 227.

76 *Thibaudeau, supra* note 7 at para 158 (per Cory and Iacobucci JJ). See also the concurring judgments by La Forest and Sopinka JJ and Gonthier, J.

77 *Ibid* at para 160.

78 *Ibid* at paras 178-187 and paras 44-47 respectively.

79 *Ibid* at para 76 (defining the group as "a group consisting of separated or divorced parents having custody of their children and receiving maintenance payments for them").

80 Tobler, *supra* note 36 at 48.

81 *Supra* note 7.

82 The majority dismissed this claim, finding that the funding of public schools was as immune from *Charter* attack under s 93 of the *Constitution Act, 1867*, (UK) 30 & 31 Vict, c 3, as was the funding

created a distinction based on religion because it provided the benefit of a free education to people whose children attended public schools and denied that benefit to people who, because of their religious convictions, sent their children to private parochial schools.

Justices Sopinka and Major explicitly discussed the adverse effects discrimination claim in a concurring judgment, holding that no distinction based on personal characteristics was drawn by the challenged statute, either directly or indirectly. They went on to say that, even if the statute did create a distinction, it was between "public" institutions funded by the government and "private" institutions not funded by the government, a distinction not based on a prohibited ground.[83] They also held that the religion of the claimants, and not the impugned statute, was the cause of the denial of the benefit,[84] thus raising causal connection and choice issues of the kind seen in *Symes*. However, characterizing the distinction as public/private, rather than secular/religious, and attributing school attendance to choice, conceives of a religious community as a voluntary association. Doing so ignores the larger historical and social context, as well as the use of religious education to ensure that individuals brought up within a religious community will remain within that community.[85]

The claimants' argument was accepted by Justice L'Heureux-Dubé in her dissenting judgment:

> While the legislature *may not have intended* to create this distinction, *the effect of the legislative choice* is to distinguish between parents who can access the public schools, and those, like the appellants, who cannot, for religious reasons. This distinction results in the total denial of the equal benefit of funded education for the appellants on the basis of their membership in an identifiable group, a group made up of small religious minority communities.[86]

In recognizing the discrimination at play in this case, Justice L'Heureux-Dubé framed it as both unintentional and adverse effects discrimination.

The first successful adverse effects discrimination case — and subsequently the leading case in this area — was the Court's 1997 decision in

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of separate schools. *Adler, supra* note 7 at para 50.

83 *Adler, supra* note 7 at para 188.

84 *Ibid* at para 187.

85 S M Corbett, "*Adler v Ontario*: The Troubling Legacy of a Compromise" (1996) 8:1-4 Const Forum Const 64 at 66.

86 *Adler, supra* note 7 at para 66 (emphasis added). McLachlin J also found a violation of s 15(1) on the basis of religion, but, unlike L'Heureux-Dubé J, she found it was justified by s 1.

Eldridge.[87] On its face, British Columbia's Medicare system applied equally to hearing persons and to deaf persons; both groups were entitled to receive insured medical services free of charge. The claimants, who had been born deaf and who used sign language to communicate, argued that the failure to provide insured access to sign language interpreters rendered them unable to benefit from the system to the same extent as hearing persons. In a unanimous judgment written by Justice La Forest, their claim was explicitly recognized as one of adverse effects discrimination.[88] He noted that this type of discrimination is especially relevant in the case of disability because governments rarely single out disabled persons for discriminatory treatment; instead, laws of general application have a disproportionate impact on the disabled.[89] The claim in this case was of the disparate impact type, with only some members of the group defined by the ground of physical disability affected. However, because diversity within disability is well recognized,[90] the fact that only a small subgroup was adversely affected by the lack of sign language services did not prevent the claim from succeeding.

Justice La Forest noted that, unlike *O'Malley* and *Rodriguez* where the adverse effects stemmed from the imposition of a burden not faced by the mainstream population, in *Eldridge* it stemmed from a failure to ensure that deaf persons benefited equally from a service offered to everyone.[91] The lower courts had not recognized the failure to provide medically-related sign language interpretation as discriminatory because they assumed that the government had no duty to ameliorate disadvantage that was not itself created or exacerbated by the government[92] — a variation on the causal connection problem seen in *Symes* and *Adler*. Justice La Forest, however, recognized that adequate communication was "the means by which deaf persons may receive the same quality of medical care as the hearing population."[93] As Bruce Porter

87 *Supra* note 5.

88 *Ibid* at para 60.

89 *Ibid* at para 64, referencing the dissent of Lamer CJ in *Rodriguez, supra* note 7. See also Pothier, "Tackling Disability Discrimination," *supra* note 43 at 22-23 (arguing that "a substantial proportion of disability discrimination is adverse effects discrimination").

90 *Eldridge, supra* note 5 at para 57.

91 *Ibid* at para 66. This way of putting it suggests the denial was of *access to* a benefit, and not the denial of a benefit *per se* and thus makes it easier for the Court to find a government duty to provide.

92 *Ibid*.

93 *Eldridge, supra* note 5 at para 71. The government then argued that s 15(1) did not oblige governments to implement programs to alleviate disadvantages that exist independently of state action (*ibid* at para 72). La Forest J denied that providing sign language interpretation services raised the issue of whether the government had a duty under s 15(1) to take positive action, instead relying on the fact the Court has held that "once the state does provide a benefit, it is obliged to do so in a non-discriminatory manner." *Ibid* at para 73.

has pointed out, the discrimination at issue in *Eldridge* was not really tied to legislation or even to decisions of elected representatives not to act.[94] Instead, it was the result of decisions by unelected government officials not to fund programs that provide interpreter services.[95] This unusual flexibility with respect to a causal connection between government action and a ground of discrimination, and the focus instead on the government's failure to provide for a particular need, stands in stark contrast to the Court's approach to cause in *Symes* and *Adler*.

Eldridge is also notable for the strongly worded passage in which Justice La Forest concluded:

> This Court has consistently held, then, that *discrimination can arise both from the adverse effects of rules of general application* as well as from express distinctions flowing from the distribution of benefits. Given this state of affairs, *I can think of no principled reason why it should not be possible to establish a claim of discrimination based on the adverse effects of a facially neutral benefit scheme.* Section 15(1) . . . makes no distinction between laws that impose unequal burdens and those that deny equal benefits. If we accept the concept of adverse effect discrimination, it seems inevitable, at least at the s. 15(1) stage of analysis, that the government will be required to take special measures to ensure that disadvantaged groups are able to benefit equally from government services.[96]

The quoted passage is an unambiguous acknowledgment of adverse effects discrimination. It also explicitly recognized a positive duty on governments to provide benefits and thus redistribute resources to achieve substantive equality.

A year later, the Court in *Vriend*,[97] the second successful adverse effects discrimination case, also recognized the government's duty to promote equality. A majority of the Court read sexual orientation into Alberta's human rights legislation as a protected ground after finding that the *Individual Rights Protection Act*[98] was under inclusive and discriminatory.[99] The omission of sexual orientation drew a direct distinction between LGBT persons and other disadvantaged groups protected by the legislation, for example, those disadvantaged by race, disability or gender, who could bring forward claims

94 Porter, *supra* note 16 at 76.
95 *Ibid* at 76-77.
96 *Eldridge, supra* note 5 at para 77 (emphasis added).
97 *Supra* note 6.
98 RSA 1980, c I-2 [IRPA].
99 *Vriend, supra* note 6 at para 81.

on those grounds.[100] However, the majority identified the more fundamental distinction as the indirect distinction between LGBT persons and heterosexuals.[101] In doing so, it noted some problems with identifying adverse effects discrimination:

> This distinction may be *more difficult to see* because there is, on the surface, a measure of formal equality: gay or lesbian individuals have the same access as heterosexual individuals to the protection of the IRPA in the sense that they could complain to the Commission about an incident of discrimination on the basis of any of the grounds currently included. However, *the exclusion of the ground of sexual orientation, considered in the context of the social reality of discrimination against gays and lesbians, clearly has a disproportionate impact on them as opposed to heterosexuals.* Therefore the IRPA in its underinclusive state denies substantive equality to the former group.[102]

This passage recognizes that although both heterosexuals and LGBT individuals are affected by the omission of sexual orientation as a ground of discrimination, the first group is not adversely affected. This approach highlights a significant difference between grounds and the different groups that might be included within those grounds.[103] All persons have a sexual orientation, but not all persons have a sexual orientation that renders them vulnerable to a seemingly neutral law. Another point made by this passage is that persons with a sexual orientation that renders them vulnerable to discrimination could be seen as directly discriminated against by a statute which protects other disadvantaged groups and it is only when the relative impact of the statute on heterosexuals and LGBT individuals is examined that its adverse effects are seen. This is an illustration of the categorical exclusion and disparate impact point that Dianne Pothier raised,[104] with this case falling in the latter category.

In retrospect, the late 1990s were the high point for adverse effects discrimination analysis in the Supreme Court. *Eldridge* and *Vriend* featured an expansive definition of discrimination, a renewed emphasis on context,

100 *Ibid.* Although the Court used the term "homosexual" and the phrase "lesbian and gay individuals," we prefer the term LGBT (lesbian, gay, bisexual, transgender) in keeping with current practices (although "transgender" relates to gender identity rather than sexual orientation).

101 *Ibid* at para 82.

102 *Ibid* (emphasis added). *Vriend* analogized its factual situation to that in *Eldridge*, *supra* note 5, noting *Eldridge* recognized that substantive equality may be violated by a legislative omission.

103 Wayne N. Renke, "Case Comment: *Vriend v Alberta*: Discrimination, Burdens of Proof, and Judicial Notice" (1996) 34 Alta L Rev 925 at 942-43; Dianne Pothier, "The Sounds of Silence: Charter Application when the Legislature Declines to Speak" (1995) 7:1-4 Const Forum 113. L'Heureux-Dubé J was the primary promoter of a groups rather than grounds approach to s 15(1) throughout her term on the Court. See Claire L'Heureux-Dubé, "It Takes a Vision: The Constitutionalization of Equality in Canada" (2002) 14 Yale JL & Feminism 363 for a summary of her approach.

104 *Supra* note 43. See text accompanying notes 44-47.

and rigorous effects-based analysis that allowed the Court to recognize the adverse effects of the challenged laws and programs.[105] They were also the first Supreme Court decisions in which the obligation to promote substantive equality — as opposed to simply preventing discrimination — was given real effect. However, they were the last two cases in which claims of adverse effects discrimination were successful before the Court.

B. The *Law* Era: 1999 to 2008

1. The general approach

In 1999, the Supreme Court set out a new approach to section 15(1) in *Law v Canada (Minister of Employment and Immigration)*.[106] In a unanimous decision penned by Justice Iacobucci, a new analytical structure was established with a three-step test for discrimination:

> (1) Whether the purpose or effect of the law or government action imposed differential treatment between the claimant and others, either in purpose or effect;
>
> (2) Whether the differential treatment was based on one or more enumerated or analogous grounds; and
>
> (3) Whether the law's purpose or effect was discriminatory.[107]

The first step, focused on the imposition of differential treatment either in purpose or effect, continued to recognize adverse effects discrimination. Justice Iacobucci also explicitly stated that "[w]hat is required is that the claimant establish that *either* the purpose *or* the effect of the legislation infringes section 15(1), such that the onus may be satisfied by showing only a discriminatory effect."[108] He noted that in claims of adverse effects discrimination the claimant would often be able to satisfy two elements of this test — differential treatment and discrimination — at the same time because "the analysis of whether the claimant's difference has been effectively ignored by an impugned law will usually bring into play issues of human dignity."[109] While

105 Marie-Adrienne Irvine, "A New Trend in Equality Jurisprudence?" (1999) 5 Appeal Rev Current L & L Reform 54 at 55.

106 [1999] 1 SCR 497, 170 DLR (4th) 1 [*Law*]. The claimant, Nancy Law, was 30 years old when her husband died. She was precluded from receiving survivor's benefits under the Canada Pension Plan until she reached the age of 65 because she was under the age of 35 at the time of her husband's death, she was not disabled, and she did not have any dependent children. For an alternative version of this decision that considers adverse effects discrimination on the basis of sex, see Denise Réaume, "*Law v Canada*" [2006] 1 WCR 147, (2006) 18 CJWL 143 at 147 (Women's Court of Canada).

107 *Law*, *supra* note 106 at paras 39, 88.

108 *Ibid* at para 80 (emphasis in the original).

109 *Ibid* at para 85; see also para 82.

this passage may appear to reduce the burden on adverse effects claimants, it does not do so relative to direct discrimination claims, where even though differential treatment is obvious, proof of discrimination is still required.

The third step from *Law* — whether there was discrimination — centred on violations of human dignity, which was in turn assessed by considering four contextual factors, including "(2) the correspondence between the grounds and the actual need, capacity, or circumstances of the claimant."[110] This factor may originally have been intended to facilitate adverse impact cases where neutral policies did not correspond to the claimant's needs and circumstances (i.e. failed to take their differences into account).[111] However, the courts subsequently interpreted it to require analysis of the purpose of the impugned law and the rationality of that purpose in light of the claimant's circumstances.[112] To the extent that the correspondence factor became a focus on government objectives, disregarding the Court's description of the third step of the *Law* test as including assessment of whether the law's purpose *or effect* was discriminatory, this new focus appeared to make it more difficult to prove adverse impact claims.

The Court also took the opportunity in *Law* to reiterate the need for comparative analysis in section 15(1) *Charter* claims.[113] It explicitly gave courts the power to reconsider the comparator group put forward by the claimant, suggesting that there was only one appropriate comparator in each case.[114]

110 *Ibid* at para 88. The other contextual factors were (1) pre-existing disadvantage, stereotyping, and prejudice; (3) the ameliorative purpose or effects of the law upon a more disadvantaged person or group; and (4) the nature and scope of the interest affected.

111 *Ibid* at paras 69 and 71, identifying disability as a ground that has the potential to correspond with need, capacity, or circumstances and citing *Eldridge*, *supra* note 5 and *Eaton v Brant County Board of Education*, [1997] 1 SCR 241, 4 DLR (4th) 385 for this point. Sex, based on decisions in *Weatherall v Canada (Attorney General)*, [1993] 2 SCR 872, 105 DLR (4th) 210 and *Brooks*, *supra* note 58, is cited as another example.

112 See for example *Gosselin* v *Quebec (Attorney General)*, 2002 SCC 84, [2002] 4 SCR 429; *Lovelace v Ontario*, 2000 SCC 37, [2000] 1 SCR 950. Many commentators criticized this approach for importing s 1 considerations into s 15(1), contrary to the analytical framework established in *Andrews*, *supra* note 3. See e.g. Sheilah Martin, "Balancing Individual Rights to Equality and Social Goals" (2001) 80 Can Bar Rev 299 at 328; Sheila McIntyre, "Deference and Dominance: Equality Without Substance" in Sheila McIntyre and Sanda Rodgers, eds, *Diminishing Returns: Inequality and the Canadian Charter of Rights and Freedoms* (Markham, ON: LexisNexis Butterworths, 2006) 95 at 102-105; Koshan & Watson Hamilton, "Continual Reinvention," *supra* note 12 at 31-32.

113 *Law*, *supra* note 106 at para 56.

114 *Ibid* at paras 57-58, 88. This approach led to a number of decisions during the *Law* era where claims were defeated because the claimant had chosen the wrong comparator group. See e.g. *Hodge v Canada (Minister of Human Resources Development)*, at para 45, 2004 SCC 65, [2004] 3 SCR 357 (denying a woman's claim to CPP survivor benefits because she was "a former common law spouse," not a "separated common law spouse," and former spouses were not entitled to benefits whether

There was no discussion of how this approach to comparators might impact adverse effects claims. Comparators are potentially problematic for these types of claims because the government has not treated anyone differently via an impugned provision;[115] by definition, that provision is neutral on its face and treats everyone the same.[116]

2. The adverse effects case

It has been suggested that many equality rights claimants turned to human rights legislation rather than the *Charter* during the *Law* era in light of the constraints imposed by that decision.[117] That may be a reason why only one claim of adverse effects discrimination was heard by the Supreme Court in the decade following *Law*.

In *BC Health Services*[118] the challenge was to legislation that interfered with the collective bargaining rights of unions representing non-clinical health care workers, a group composed predominantly of women. The majority judgment of Chief Justice McLachlin and Justice LeBel focused on the union's freedom of association arguments. They disposed of the section 15(1) argument in short order:

> [W]e conclude that the distinctions made by the Act relate essentially to segregating different sectors of employment, in accordance with the long-standing practice in labour regulation of creating legislation specific to particular segments of the labour force, and do not amount to discrimination under section 15 of the Charter. *The differential and adverse effects of the legislation on some groups of workers relate essentially to the type of work they do, and not to the persons they are. Nor does the evidence disclose that the Act reflects the stereotypical application of group or personal characteristics.* Without minimizing the importance of the distinctions made by the Act to the lives and work of affected health care employees, the differential treatment based on personal characteristics required to get a discrimination analysis off the ground is absent here.[119]

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married or common law); *Auton (Guardian ad litem of) v British Columbia (Attorney General)*, at para 55, 2004 SCC 78, [2004] 3 SCR 657 [*Auton*](denying a claim for funded behavioral therapy for children with autism because it could not be proved that they were denied benefits as compared to a "non-disabled person, or a person suffering a disability other than a mental disability, who seeks or receives funding for a non-core therapy that is important for his or her present and future health, is emergent and has only recently began to be recognized as medically required").

115 Pothier, "Tackling Disability Discrimination," *supra* note 43 at 33.

116 Pothier has noted that the need for a mirror comparator may be even more of a barrier in disability cases where the disability raises issues that are specific to that disability. *Ibid.*

117 See Claire Mummé, "At the Crossroads in Discrimination Law: How the Human Rights Codes Overtook the *Charter* in Canadian Government Services Cases" (2012) 9 JL & Equality 103 at 105.

118 *Supra* note 7.

119 *Ibid* at para 165 (emphasis added). Deschamps J dissented in part but agreed with the majority's s 15 reasons (*ibid* at para 170). Despite the extremely short treatment of the s 15(1) issue, this quoted

In this passage, we see the Court refusing to grapple with the question of why some workers — in this case workers who are predominantly women — are excluded from a statutory collective bargaining scheme, a benefit made available to other workers.[120] The Court failed to see that gender is not merely coincidental to who is in and who is out.[121]

Instead, the Court raised the choice issue once again, with any adverse effects on women attributed to the type of work they did and not the fact they were women. As was the case in *Symes*, there was no examination of women's condition of inequality in the labour market. While the evidence showed that women remain disproportionately affected by job insecurity, by wage disparity, by a lack of social mobility, by their predominant role in care-giving within the family, and by other negative consequences of the historic and current undervaluing of women's work, that evidence was not integrated into the Court's equality analysis.[122] Indeed, the Court effectively ignored the concept of adverse effects discrimination, despite the "painful"[123] and "unusual"[124] impact of the challenged provisions on the workers' rights.[125]

In the quoted passage, the Court also indicated that the legislation did not reflect a stereotype, illustrating how stereotyping is not often seen in adverse effects cases. As we will elaborate in Part III.C.2, it is difficult to prove stereotyping in respect of facially neutral measures unless the failure to accommodate difference is intentional.

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passage has been relied upon in the lower courts. The Quebec Court of Appeal, in *Association des policiers provinciaux du Quebec c Surete du Quebec*, 2007 QCCA 1087, an equality rights claim made in the context of the dismissal of a police officer convicted of a criminal offence, addressed the equality rights argument by referencing this passage. See the discussion in John P McEvoy, "*B.C. Health Services*: The Legacy after 18 Months" (2009) 59 UNBLJ 48 at 54 n21.

120 Brian A. Langille, "Can We Rely on the ILO?" (2007), 13 CLELJ 273 at 300 (arguing that the problem with *BC Health Services* is the Court's refusal to apply the equality rights in s 15(1), thus forcing s 2(d) to do a job for which it is not suited).

121 See Buckley & Sampson, *supra* note 35 for a comment on this case based on the arguments that the Women's Legal and Education Action Fund (LEAF) would have put forward had LEAF been granted leave to intervene before the Supreme Court.

122 *Ibid* at 481.

123 *BC Health Services*, *supra* note 7 at para 166.

124 *Ibid* at para 160.

125 Bruce Ryder and Taufiq Hashmani, "Managing Charter Equality Rights: The Supreme Court of Canada's Disposition of Leave to Appeal Applications in Section 15 Cases, 1989-2010" (2010) 51 SCLR (2d) 505 at 523.

C. The *Kapp* era: 2008 to date

1. The general approach

In 2008, *R v Kapp*[126] set out yet another new approach that continues to be the prevailing test for identifying discrimination and analyzing claims under section 15(1). Chief Justice McLachlin and Justice Abella, writing for a unanimous Court on the framework for section 15(1), consolidated *Law*'s three steps into two: "(1) Does the law create a distinction based on an enumerated or analogous ground? (2) Does the distinction create a disadvantage by perpetuating prejudice or stereotyping?"[127]

There are two obvious problems with this new test from the perspective of an adverse effects claim. First, it is difficult to see adverse effects discrimination in the first step, which is stated exclusively in terms of distinctions "created" by law. If attention is not directed to distinctions visible only when the effects of the law are considered, then adverse effects discrimination is less likely to be seen.

Second, and more importantly, the definition of discrimination was narrowed through *Kapp*'s new focus on stereotyping and prejudice, whereas *Andrews* had emphasized disadvantage and *Law* had emphasized human dignity. The Court's narrow understanding of discrimination in *Kapp* may be particularly problematic for adverse effects cases, where the harms of discrimination typically go beyond prejudice and stereotyping.[128] As noted above, prejudice engages intentional forms of discrimination.[129] Similarly, stereotyping, by definition, is often absent in adverse effects cases. It is difficult to prove that a law generalizes the essence of one group of people in a provision that does not distinguish between groups, unless the adverse impact of a law on a particular group is intentionally ignored by the government because of assumptions

126 2008 SCC 41, [2008] 2 SCR 483 [*Kapp*].

127 *Ibid* at para 17. The Court also revisited its approach to s 15(2), the *Charter*'s affirmative action provision, in *Kapp*, giving that section "independent force" which allowed courts to shield ameliorative programs from claims of discrimination. See also *Alberta (Aboriginal Affairs and Northern Development) v Cunningham*, 2011 SCC 37, [2011] 2 SCR 670 (extending s 15(2) to shield under inclusive ameliorative programs) [*Cunningham*]. Section 15(2) is not relevant to adverse effects claims because it applies to targeted benefit programs, i.e. those that draw explicit distinctions between recipients and non-recipients.

128 Koshan & Watson Hamilton, "Continual Reinvention," *supra* note 12 at 47. For other critiques of *Kapp*, see Diana Majury, "Equality Kapped: Media Unleashed" (2009) 27 Windsor YB on Access Just 1; Sophia Moreau, "*R v Kapp*: New Directions for Section 15" (2008-2009) 40:2 Ottawa L Rev 283 [Moreau, "New Directions"]; Young, *supra* note 17.

129 See the text accompanying note 28.

about the group's needs and circumstances.[130] *Kapp* also maintained (albeit downplayed) the relevance of the contextual factors from *Law*, including the correspondence factor, which was seen as relevant to stereotyping.[131]

On a more positive note, the Court acknowledged some of the critiques of a strict approach to comparators in *Kapp*, noting that "*Law* has allowed the formalism of some of the Court's post-*Andrews* jurisprudence to resurface in the form of an artificial comparator analysis focused on treating likes alike."[132] This point is further developed in the Court's next major section 15(1) case, *Withler v Canada (Attorney General)*,[133] which can be seen as a companion case to *Kapp*.

In *Withler*, Chief Justice McLachlin and Justice Abella, again writing for a unanimous Court, confirmed the two-step *Kapp* test for discrimination, although it framed the test at some points as including "prejudice *or disadvantage*."[134] It also added another contextual factor:[135] where the impugned law is part of a larger benefit scheme (such as a federal employees' pension), the ameliorative effect of the law on others and the interests it attempts to balance will also influence the discrimination analysis.[136] Together with the correspondence factor as interpreted post-*Law*, this new factor encourages courts to defer to government policy choices, an approach that may hamper adverse effects claims.[137]

The Court in *Withler* also built on its acknowledgement of the problems with a strict approach to comparators in *Kapp*. The Court adopted a more flexible approach to comparison, remarking that "[i]t is unnecessary to pinpoint a particular group that precisely corresponds to the claimant group except for the personal characteristic or characteristics alleged to ground the discrimination."[138] To the extent that comparators are potentially problematic

130 *Hutterian Brethren*, *Taypotat* and *Carter*, *supra* notes 7, 11, 10 respectively, represent a subset of adverse effects claims involving intentional discrimination and thus the possibility of stereotyping, which is unusual in adverse effects claims. See the discussion in Part III.C.2 and in Part IV.

131 *Kapp*, *supra* note 126 at para 23.

132 *Ibid* at para 22.

133 *Supra* note 16 (surviving spouses of federal civil servants and Canadian Forces members unsuccessfully challenged an age-based reduction in the supplementary death benefits they received after their spouses died). For an analysis of this decision, see Jennifer Koshan and Jonnette Watson Hamilton, "Meaningless Mantra: Substantive Equality after *Withler*" (2011) 16 Rev Const Stud 31 [Koshan & Watson Hamilton, "Meaningless Mantra"].

134 *Withler*, *supra* note 16 at paras 37-39, 65, 70.

135 *Ibid* at para 30, quoting *Kapp*, *supra* note 126 at para 17.

136 *Withler*, *supra* note 16 at para 38.

137 See Koshan & Watson Hamilton, "Meaningless Mantra," *supra* note 133 at 42.

138 *Withler*, *supra* note 16 at para 63.

for adverse effects claims because no one is treated differently by the challenged facially neutral provision, a more flexible approach to comparators can only be beneficial to this type of claim.

However, and perhaps inconsistent with the previous point, the Court indicated that it would be more difficult to establish a distinction in adverse effects claims. Claimants in these cases "will have more work to do" and may need to present evidence of historical or sociological disadvantage to show how the law imposes a burden or denies a benefit to them relative to others.[139] This warning may merely be an acknowledgment that the connection between the impugned provision and the ground of discrimination is not a direct one. But proof of the impact of a discriminatory law is required in direct discrimination claims as well.[140] And the need for contextualization in adverse effects cases should be uncontroversial because contextualization is required in all cases where substantive equality is the goal. The fact a claim is based on adverse effects should not be a reason to require more in the way of proof of discrimination.

The most recent section 15(1) decision of the Supreme Court is *Quebec v A* from 2013.[141] Both Justice Abella, writing for the majority on section 15(1), and Justice LeBel, writing for the dissent on that issue, briefly acknowledged the place of adverse effects discrimination under section 15(1),[142] although the case itself did not involve adverse effects discrimination. *Quebec v A* does not explicitly respond to concerns about the shortcomings of the *Kapp / Withler* approach for adverse effects cases, but the majority did minimize the focus on stereotyping and prejudice, stating that they should be seen simply as "two of the indicia" relevant to whether there is a violation of substantive equality.[143] The section 15(1) majority seemed to accept that discrimination may involve other harms, such as oppression and denial of basic goods, and focused its analysis on broader questions of disadvantage.[144] The majority also downplayed the role of choice under section 15(1).[145] Justice Abella recognized the

139 *Ibid* at para 64.

140 See the text accompanying note 106.

141 *Supra* note 28 (an unsuccessful challenge to property and support benefits that explicitly excluded *de facto* spouses).

142 *Ibid* at para 171 (LeBel J) and para 328 (Abella J). See also para 355 (Abella J noting that "even if only some members of an enumerated or analogous group suffer discrimination by virtue of their membership in that group, the distinction and adverse impact can still constitute discrimination.")

143 *Ibid* at para 325.

144 *Ibid*, citing Moreau, "New Directions," *supra* note 128 at 292.

145 *Quebec v A*, *supra* note 28 at para 338 (declining to follow *Nova Scotia (Attorney General) v Walsh*, 2002 SCC 83, [2002] 4 SCR 325, where assumptions about choice played a key role in defeating a discrimination claim based on marital status). Choice has also been a hurdle in cases involving

factual complexities surrounding "choice" in the context of marital status, and more broadly, noted that the government objective of promoting freedom of choice was relevant to justification under section 1, not to whether there was discrimination under section 15(1).[146]

The most recent Supreme Court decisions on section 15(1) thus send contradictory signals about what the future might hold for adverse effects discrimination claims. In *Withler*, the Court warned that adverse effects discrimination may be harder to prove. *Withler* also strengthened the relevance of government policy considerations under section 15(1), which may undermine adverse effects claims by shifting the focus to the purpose, rather than the effects, of government action, just as the correspondence factor continues to do. On the other hand, in *Quebec v A* the section 15(1) majority focused on disadvantage, noting that prejudice and stereotyping alone may not capture effects-based discrimination. It also limited the role of choice and government policy objectives under section 15(1), potentially opening the field for successful adverse effects claims.

2. The Adverse Effects Case

The one adverse effects discrimination claim decided by the Court to date in the *Kapp* era came before *Withler* and *Quebec v A*. Like the decision in *BC Health Services*, the section 15(1) claim in *Hutterian Brethren*[147] received minimal attention from the Court and was dismissed by the majority in one short paragraph.

Hutterian Brethren involved a claim that Alberta's mandatory photograph requirement for drivers' licences was unconstitutional in light of the Hutterites' belief that having their photographs taken violates the second commandment. The Registrar of Motor Vehicles had been empowered to grant exemptions from a previous photograph requirement by issuing licences without photographs to persons who objected on religious grounds.[148] In 2003, this exemption was removed and a universal photograph requirement was implemented.[149] This facially neutral provision can be seen as an example

direct discrimination. See e.g. Diana Majury, "Women Are Themselves to Blame: Choice as a Justification for Unequal Treatment" in *Making Equality Rights Real, supra* note 20, 219.

146 *Quebec v A, supra* note 28 at paras 334-337. The other members of the s 15(1) majority agreed with this approach, but found the discriminatory provisions to be justified under s 1 either in whole or in part on the basis of freedom of choice (*ibid* at para 415 per McLachlin CJ, and at para 400 per Deschamps, Cromwell and Karakatsanis JJ).

147 *Quebec v A, supra* note 28.

148 *Operator Licensing and Vehicle Control Regulation*, Alta. Reg. 320/2002.

149 *Operator Licensing and Vehicle Control Regulation*, Alta. Reg. 137/2003.

of intentional adverse effects discrimination given the withdrawal of the benefit granted previously by the law.[150]

After analyzing the freedom of religion claim, a majority of the Court summarily reviewed and dismissed the section 15(1) argument in the following brief passage:

> Assuming the respondents could show that the regulation creates a distinction on the enumerated ground of religion, *it arises not from any demeaning stereotype but from a neutral and rationally defensible policy choice.* There is no discrimination within the meaning of *Andrews v Law Society of British Columbia* . . . as explained in *Kapp*.[151]

It is difficult to imagine how a law that has a disproportionately burdensome impact on a vulnerable religious minority — one whose way of life has been frequently attacked by the Alberta government in the past[152] — could be defended as a "neutral" policy choice and not raise the issue of adverse effects discrimination.[153] The majority's apparent willingness to assume the claimants could prove a distinction might be seen to recognize an adverse impact on the basis of religion, but its subsequent point that the law is neutral contradicts that assumption. Furthermore, because this was a claim of intentional adverse effects discrimination, it raised the possibility of stereotyping. The Alberta government arguably made negative assumptions about the needs and circumstances of Hutterian communities or the strength of their religious convictions when removing their exemption, at least in terms of whether this was a group that was worthy of protection. This stereotyping was not recognized by the majority, however.

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150 It also illustrates the fluidity between the categories of "imposition of a burden" and "denial of a benefit." If the previous legislation is ignored, then the new facially neutral provision appears to impose a burden, and one with disparate impact on a particular religious group.

151 *Hutterian Brethren, supra* note 7 at para 108 (per McLachlin CJ, emphasis added). The dissenting justices decided the claim on freedom of religion and did not address s 15(1).

152 Jonnette Watson Hamilton, "Space for Religion: Regulation of Hutterite Expansion and the Superior Courts of Alberta" in Jonathan Swainger, ed, *The Alberta Supreme Court at 100: History and Authority* (Edmonton: University of Alberta Press and Osgoode Society for Canadian Legal History, 2007) 159.

153 See Jennifer Koshan & Jonnette Watson Hamilton, "'Terrorism or Whatever': The Implications of *Alberta v Hutterian Brethren of Wilson Colony* for Women's Equality and Social Justice," in Sanda Rodgers & Sheila McIntyre, eds, *The Supreme Court of Canada and Social Justice: Commitment, Retrenchment or Retreat* (Markham, Ont: LexisNexis Canada, 2010) 221 at 247-48 [Koshan & Watson Hamilton, "Terrorism or Whatever"]. *Hutterian Brethren, supra* note 7, also illustrates the artificiality of the claim of "neutrality" as discussed in *Meiorin, supra* note 8 at para 39, and ignores the admonition in that case to question rules that may have a systemic impact.

D. Summary

Our examination of the Supreme Court's adverse effects discrimination jurisprudence reveals a number of problems. Adverse effects discrimination appears to be difficult to see sometimes, especially in cases such as *Adler, Symes, Thibaudeau, BC Health Services* and *Hutterian Brethren* that involve instances of disparate impact rather than categorical exclusion. The fact that the grounds on which the claims were based were larger than the group or sub-group making the claims sometimes causes problems with recognizing the discrimination, especially when the ground is sex or religion. In the case of disability, where diversity within the ground appears to be well accepted, disparate impact may be more easily seen, as evident in *Eldridge*, although the judgment of Justices McLachlin and L'Heureux-Dubé in *Rodriguez* suggest this is not always the case.[154] A related question raised by *Rodriguez, Symes* and *Vriend* is whether adverse effects claims can only be successful where they are made by especially vulnerable groups or subgroups within particular grounds.

Causal connection played a prominent role in *Symes, Adler* and *BC Health Services*, with the Court apparently demanding a direct causal link between the challenged law, through the ground, to the adverse effects experienced by the claimants, rather than attending to the broader historical and social context of the claim. This problem is closely related to the issues with evidence identified in *Symes, Thibaudeau* and *BC Health Services,* and may explain the Court's indication in *Withler* that adverse effects claims may be more difficult to prove. It is also closely related to the attributions of the cause of adverse effects to choices the claimants made, as seen in *Symes, Adler* and *BC Health Services.*

There appears to be a need to re-affirm the centrality of recognizing adverse effects discrimination to substantive equality, given the Court's inability to see that form of discrimination in the recent cases of *BC Health Services* and *Hutterian Brethren.* However, it is also evident from *Thibaudeau, Adler, BC Health Services,* and *Hutterian Brethren* that *Meiorin* made valid points about the artificiality of distinctions between direct and adverse effects discrimination. Depending on the perspective chosen or the comparator group used, discrimination may be seen as either direct or adverse effects. And *Hutterian Brethren* shows that adverse effects discrimination can be intentional as well as unintentional.[155]

154 See the text accompanying notes 60-61.

155 *Vriend* could also be seen as a case of intentional discrimination based on the legislative history of the IRPA, although that case also involved direct discrimination. See the text accompanying notes 97-104.

Our review of adverse effects discrimination cases also indicates that these claims are challenging to win if discrimination is narrowly defined as prejudice and stereotyping. The quickness with which the Court dispatched the section 15(1) claim in *BC Health Services* in particular illustrates that stereotyping is difficult to prove in adverse effects cases where the impugned provision does not overtly distinguish between groups.[156] In adverse effects cases involving intentional discrimination — when the impact of the law on particular groups is deliberately ignored based on false assumptions about their particular needs and circumstances — stereotyping should be more easily seen, *Hutterian Brethren* notwithstanding. Discrimination need not be intentional, however, so this small subset of cases does not alleviate the broader problem for adverse effects cases presented by a narrow focus on prejudice and stereotyping.[157]

One final problem in the jurisprudence is the Court's tendency to avoid section 15(1) adverse effects claims. If a case can be decided on other *Charter* grounds, as in *Rodriguez*, *BC Health Services* and *Hutterian Brethren*, the Court addresses those other grounds as the primary arguments, excluding robust consideration of claims under section 15(1). This impoverishes section 15 jurisprudence more broadly, as seen from the fact that both *BC Health Services* and *Hutterian Brethren*, despite their one-paragraph treatment of the equality claims, have been cited as precedents by lower courts.[158] This tendency is also apparent when discrimination claims involve both adverse effects and direct discrimination. As seen in *Thibaudeau* and *Adler*, the Court tends to deal only or more extensively with the direct discrimination claim, although *Vriend* is an exception.

IV. Two case studies in adverse effects discrimination

In this Part, we examine the two adverse effects discrimination cases that were heard by the Supreme Court of Canada in October 2014, which, taken together, reflect many of the contentious issues discussed in Part III.

156 Moreau, "The Wrongs of Unequal Treatment" *supra* note 30 at 296-97. See also *Quebec v A, supra* note 28 at paras 326-327 (Abella J).

157 We have also argued that a focus on prejudice and stereotyping is more generally problematic in s 15(1) claims. See Koshan & Watson Hamilton, "Continual Reinvention," *supra* note 12.

158 For cases citing *BC Health Services, supra* note 7, see *supra* note 119. For cases citing *Hutterian Brethren, supra* note 7, for the "neutral policy choice" point, see *infra* note 200.

A. *Carter v Canada*

The *Carter* case, decided by the Supreme Court in February 2015,[159] was a new challenge to the constitutionality of the criminal prohibition against assisted suicide based on adjudicative facts that were very similar to those in *Rodriguez*.[160] The claim was successful before the British Columbia Supreme Court under sections 7 and 15(1) of the *Charter*, which Justice Smith found she could entertain given developments in the law and evidence since *Rodriguez*.[161] A majority of the Court of Appeal overturned her decision, finding that she should have considered herself bound by *Rodriguez*.[162] The Supreme Court of Canada reversed the Court of Appeal's decision on this point, holding that a trial judge may reconsider settled rulings of higher courts where a new legal issue is raised and "where there is a change in the circumstances or evidence that 'fundamentally shifts the parameters of the debate'"[163] and that both conditions were satisfied.[164] Although the Supreme Court declined to deal with the equality claim,[165] it is nonetheless worthwhile to review Justice Smith's section 15(1) reasons in depth because she grappled with many of the issues raised in Part III of this paper and the claimants' and intervenors' arguments before the Supreme Court point out several of the contentious issues in this area.

As in *Rodriguez*, the claimants' section 15(1) argument in *Carter* was that the criminal prohibition against assisted suicide had an adverse impact on those who are materially physically disabled.[166] In setting out the general principles relevant for her analysis, Justice Smith highlighted the effects-based focus of section 15(1) and the fact that adverse effects claims "should be interrogated

159 *Carter* (SCC), *supra* note 10.

160 *Supra* note 7, and see the text accompanying note 53.

161 *Carter, supra* note 10 at paras 1000-1007.

162 *Carter* (BCCA), *supra* note 10, citing *Rodriguez, supra* note 7. Finch CJ, writing in dissent, would have upheld Smith J's decision on s 7, but found that *Rodriguez* continued to be binding on s 15 and s 1, so the Court of Appeal was unanimous in their treatment of s 15.

163 *Carter* (SCC), *supra* note 10 at para 44, quoting *Canada (Attorney General) v Bedford*, 2013 SCC 72, [2013] 3 SCR 1101 [*Bedford*], at para 42.

164 *Carter* (SCC), *supra* note 10 at para 45.

165 *Ibid* at para 93. The appellants had advanced two claims: (1) that the prohibition on physician-assisted dying deprives competent adults, who suffer a grievous and irremediable medical condition that causes the person to endure physical or psychological suffering that is intolerable to that person, of their right to life, liberty and security of the person under s 7 of the *Charter*; and (2) that the prohibition deprives adults who are physically disabled of their right to equal treatment under s 15 of the *Charter*. The Supreme Court found in favour of the s 7 claim.

166 There was some questioning at the Supreme Court hearing about the meaning of the term "materially physically disabled." See *infra* note 195-196.

in the same way as are intentional or explicit distinctions."[167] At the same time, she acknowledged the Supreme Court's statement in *Withler* that "effect-based discrimination claims . . . are less straightforward than those based on facial distinctions," emphasizing the passage from *Withler* indicating that distinctions will be more difficult to show in adverse effects cases.[168]

Applying the first step of the *Kapp / Withler* test for discrimination, Justice Smith found that the enumerated ground of physical disability was clearly engaged.[169] The federal and BC governments argued that the claim should fail at this step because it excluded those whose desire for assisted suicide was motivated by lack of will rather than their physical disability, suggesting that the physically disabled could still commit suicide by refusing food or drink. Justice Smith rejected this argument as "gruesome and macabre."[170] She also noted that "[i]t is not necessary for every member of a disadvantaged group to be affected the same way in order to establish that the law creates a distinction based upon an enumerated or analogous ground."[171]

Although it is not framed in these terms, the governments' contention that there are other ways for people with physical disabilities to end their lives could be seen as a causation argument, implying that it is not the law that creates the adverse impact, it is the choices made by the claimants. Justice Smith appropriately dismissed this argument by noting that "there are means of suicide available to non-disabled persons that are much less onerous than self-imposed starvation and dehydration, and it is only physically disabled persons who are restricted to that single, difficult course of action."[172] The law was therefore connected through a ground to the adverse impact experienced by the claimants, and this was sufficient to establish a distinction on the basis of physical disability.

Following on with step one, Justice Smith cited the evidence that some individuals are or may become unable to exercise their choice to end their lives without assistance "because of grievous and irremediable illness,"[173] which supported a distinction between physically disabled persons and others.[174]

167 *Carter, supra* note 10 at para 1033, citing *Andrews, supra* note 3, and *Symes, supra* note 7. This point is consistent with *Meiorin, supra* note 8, as well.

168 *Carter, supra* note 10 at para 1038, citing *Withler, supra* note 16 at para 64.

169 *Carter, supra* note 10 at para 1027.

170 *Ibid* at para 1071 (quoting from expert opinion on this point).

171 *Ibid* at para 1074, citing *Nova Scotia (WCB) v Martin*, 2003 SCC 54, [2003] 2 SCR 504.

172 *Carter, supra* note 10 at para 1076.

173 *Ibid* at para 1041.

174 *Ibid* at para 1050.

She rejected the governments' argument that since *everyone* is precluded from committing suicide with assistance, there was no distinction at play, indicating that this argument "ignores the adverse impact/unintended effects discrimination analysis central to the substantive equality approach."[175]

Under step two of the *Kapp / Withler* test, the claimants argued that the assisted suicide provisions perpetuated disadvantage, as "those with grievous illnesses suffering from physical disabilities are disadvantaged and . . . the law disadvantages them further."[176] They also argued that the law engaged in stereotyping by suggesting that physically disabled persons "lack sufficient autonomy or agency to make such momentous decisions."[177] Justice Smith noted that the focus should be on "whether the distinction perpetuates disadvantage or prejudice, or stereotypes people in a way that does not correspond to their actual characteristics or circumstances," which requires "consideration of the actual impact of the law."[178] Because she rendered her decision before *Quebec v A*, she relied on passages from *Withler* that define discrimination as including prejudice *or* disadvantage.[179]

The governments' argument that the law should be seen as a "neutral and rationally defensible policy choice," relying on *Hutterian Brethren,*[180] was dismissed by Justice Smith. She noted that section 15(1) was not fully argued in that case and it "included no discussion of adverse impact discrimination" nor any analysis of the relevant case law, and concluded that "[i]t would be mistaken . . . to read the *Hutterian Brethren* decision as a repudiation of the adverse impact analysis approved in the long line of cases I have referred to, especially in the light of what the Court later said in *Withler.*"[181] After dismissing this argument, Justice Smith turned to the contextual factors relevant to discrimination, tying these to the overarching considerations of prejudice, stereotyping, and historical disadvantage. The second and third factors were

175 *Ibid* at para 1073.

176 *Ibid* at para 1087.

177 *Ibid* at para 1088.

178 *Ibid* at paras 1080-1081.

179 *Ibid* at paras 1080-1085, citing *Withler, supra* note 16 at paras 37-39, 65, 70. For a discussion of the lack of consistency in how discrimination is defined in *Withler*, see Koshan & Watson Hamilton, "Meaningless Mantra," *supra* note 133 at 48-49.

180 *Carter, supra* note 10 at para 1089. The government also made a version of this "neutrality" argument at the distinction stage, where it is arguably more relevant. See *infra* notes 200-201 and accompanying text.

181 *Carter, supra* note 10 at para 1093. Justice Smith does not elaborate on what aspect of *Withler* she is relying on, but it is likely the point that adverse effects discrimination must be fully encompassed by the approach to s 15(1). See *Withler, supra* note 16 at paras 37 and 39, cited in *Carter, supra* note 10 at para 1082.

the most contentious, as might be expected in an adverse effects case given the extent to which these factors rely on government purposes.

For the second, correspondence factor the governments asserted that the prohibition against assisted suicide fit with the actual needs and circumstances of persons with physical disabilities who faced "heightened risk" of being induced to request physician-assisted dying "in an 'ableist' society."[182] The claimants' response was that not all persons with physical disabilities are vulnerable, and to treat them as such by denying their autonomy to make fundamental decisions about death amounted to paternalistic stereotyping.[183] In considering these arguments Justice Smith returned to the *Law* case, noting that the correspondence factor was originally intended to "take account of the fact that the Canadian conception of equality requires the government to accommodate difference."[184] She concluded that the legislation had the effect of depriving non-vulnerable people "of the agency that they would have if they were not physically disabled."[185] In finding that the second contextual factor was indicative of discrimination, Justice Smith returned this factor to its roots in cases such as *Eldridge*.[186]

For the third factor, the governments relied on *Withler*'s statement that "[w]here the impugned law is part of a larger benefits scheme . . . the ameliorative effect of the law on others and the multiplicity of interests it attempts to balance will also colour the discrimination analysis."[187] Justice Smith disposed of this argument by noting *Law*'s indication that this factor is only relevant where "the person or group excluded from ameliorative laws or activities is more advantaged in a relative sense,"[188] making the factor irrelevant in this case.[189]

Justice Smith's overall conclusion in light of all of the contextual factors was that the assisted suicide provision "perpetuates and worsens a disadvantage experienced by persons with disabilities"[190] and therefore violated section 15(1) of the *Charter*.

182 *Carter, supra* note 10 at paras 1115, 1118 and 1128.

183 *Ibid* at para 1122.

184 *Ibid* at 1107, citing the Court's reference in *Law, supra* note 106, to *Eldridge, supra* note 5 and *Weatherall, supra* note 108.

185 *Carter, supra* note 10 at para 1130.

186 See *supra* notes 91-95 and accompanying text.

187 *Carter, supra* note 10 at para 1137, relying on *Withler, supra* note 16 at para 38.

188 *Carter, supra* note 10 at para 1140.

189 *Ibid* at para 1141.

190 *Ibid* at para 1161.

While Justice Smith found that some deference to government was appropriate under section 1, the law failed the minimal impairment stage of analysis, since "a less drastic means of achieving the objective of preventing vulnerable persons from being induced to commit suicide at times of weakness would be to keep the general prohibition in place but allow for a stringently limited, carefully monitored system of exceptions."[191] Justice Smith granted the claimants a declaration that the impugned provisions were of no force and effect "to the extent that they prohibit physician-assisted suicide by a medical practitioner in the context of a physician-patient relationship," with other stipulations.[192]

Overall, Justice Smith's judgment in *Carter* showed a reluctance to accept government arguments that seek to re-introduce the formalism of some equality rights cases by relying on rigid comparisons, strict analysis of distinctions and grounds, and adherence to limited definitions and understandings of discrimination in adverse effects cases. Her resolution of the tensions in Supreme Court case law pertaining to adverse impact cases is well reasoned and is in line with Justice Abella's subsequent decision in *Quebec v A*, which focuses on disadvantage.[193]

Like *Rodriguez*, *Carter* presented an easily recognizable disparate impact type of adverse effects claim. The fact that the relevant subgroup for the discrimination claim — persons with grievous and irremediable illnesses who are materially physically disabled and decisionally capable[194] — is much smaller than the group encompassed by the ground of physical disability did not pose a problem for Justice Smith in finding an adverse distinction in *Carter*. As in *Eldridge*, this may have been because diversity within physical disability is well recognized. Nonetheless, there was much debate about the composition and vulnerability of the relevant group before the Supreme Court. Counsel for the Appellants indicated that while the section 15(1) claim applied only to persons who were materially physically unable to commit suicide, the section 7 claim encompassed the larger group of persons desiring physician assistance even if they were not physically unable to commit suicide.[195] The Appellants

191 *Ibid* at para 1243.

192 *Ibid* at para 1393.

193 *Supra* note 28 at paras 323 and 331.

194 *Carter, supra* note 10 (Factum of the Appellants at para 93, online: Supreme Court of Canada, <www.scc-csc.gc.ca/case-dossier/info/fac-mem-eng.aspx?cas=35591>) [FOA].

195 There were some questions about the scope of "materially physically disabled" at the Supreme Court hearing as well. See *Carter, supra* note 10 (Webcast of the Hearing (2014-10-15), online: Supreme Court of Canada, <www.scc-csc.gc.ca/case-dossier/info/webcast-webdiffusion-eng.aspx?cas=35591>) [Webcast].

indicated that they preferred the claim to be decided under section 7 for this reason.[196] In addition, the Attorney General of Canada and some interveners raised questions about whether the relevant subgroup for section 15 purposes *was* vulnerable compared to those persons with disabilities who might be taken advantage of if an exemption was created.[197] Although there was debate about the group of persons with disabilities whose interests were engaged, in the Supreme Court the government of Canada conceded that the law created a distinction.[198]

Perhaps because of this concession, Canada did not maintain their "neutral policy choice" argument, though the argument was put forward by one of the interveners.[199] This argument has met with mixed success at the lower court level,[200] and Justice Smith's rejection of the argument as inconsistent with adverse effects discrimination is the most detailed and persuasive of these recent decisions. We await a case in which the Supreme Court will directly engage with and reject this language from *Hutterian Brethren*.[201]

As noted in Part III, causation problems are also common in adverse effects cases.[202] Justice Smith appropriately dismissed the causation argument in *Carter*, and her decision finds some support in the subsequent Supreme Court

196 *Ibid.* See also the Factum of the Intervener Farewell Foundation For The Right To Die and Association Québécoise pour le droit de Mourrir dans la Dignité, online: Supreme Court of Canada, <www.scc-csc.gc.ca/case-dossier/info/fac-mem-eng.aspx?cas=35591> at para 24.

197 *Carter, supra* note 10 (Factum of the Attorney General of Canada at para 137, online: Supreme Court of Canada, <www.scc-csc.gc.ca/case-dossier/info/fac-mem-eng.aspx?cas=35591> [FOAG], and Factum of the Intervener Council of Canadians with Disabilities and the Canadian Association for Community Living, *supra* note 60 at para 20). The Attorney General of British Columbia did not make substantive arguments before the Supreme Court, focusing only on the issue of costs.

198 *Carter*, FOAG, *supra* note 197 at para 125; *Carter*, Webcast, *supra* note 195.

199 *Carter, supra* note 10 (Factum of the Intervener Euthanasia Prevention Coalition at para 19, online: Supreme Court of Canada, <www.scc-csc.gc.ca/case-dossier/info/fac-mem-eng.aspx?cas=35591>) [FOI]. The neutral policy argument is supported by John Keown in "A Right to Voluntary Euthanasia? Confusion in Canada in *Carter*" (2014) 28 Notre Dame JL, Ethics & Pub Pol'y 1 at 17-20, but he fails to consider adverse effects discrimination principles and the impact of the law on persons with disabilities.

200 See e.g. *Reference re: Section 293 of the Criminal Code of Canada*, 2011 BCSC 1588, [2011] BCJ No 2211 (QL) (relying on the "neutral policy choice" rationale to uphold the prohibition against polygamy in the face of an argument that it had an adverse impact based on religion); *Inglis v British Columbia (Minister of Public Safety)*, 2013 BCSC 2309, [2013] BCJ No 2708 (QL) [*Inglis*] (rejecting the "neutral policy choice" argument in the context of the cancellation of a mother and baby program for women inmates).

201 *Hutterian Brethren, supra* note 7 at para 108.

202 For lower court cases where causation arguments were successful, see e.g. *Miceli-Riggins v Canada (Attorney General)*, 2013 FCA 158, 446 NR 172 [*Miceli-Riggins*]; *R v Nur*, 2011 ONSC 4874 at para 79, 275 CCC (3d) 330 rev'd on other grounds, 2013 ONCA 677, 117 OR (3d) 401 (a claim of disproportionate impact of mandatory minimum sentences on the basis of race).

decision in *Bedford*, where the Court held that a challenge to the prostitution provisions of the *Criminal Code* could not be defended on the basis that the laws were not the cause of the harms related to prostitution.[203] *Bedford* was not a section 15(1) case,[204] but it affirmed the proposition that *Charter* claimants need only show a sufficient causal connection between government action and the harm they suffered.[205] Although the government of Canada did not persist in its causation argument at the Supreme Court in *Carter*, an intervener did contend that the prohibition "is not the cause of any adverse treatment of people with disabilities."[206] *Bedford* provides a useful response to that kind of argument.

On the issue of whether the ban on assisted suicide was discriminatory, *Carter* could be seen as a claim of *intentional* adverse effects discrimination given the Supreme Court's earlier decision in *Rodriguez*. Canada maintained the prohibition against assisted suicide in spite of the evidence that the law had a disproportionate and potentially discriminatory impact on persons with physical disabilities. The intentional nature of the government's actions in ignoring or justifying the impact of the law on a particular group made it possible to argue stereotyping in this case, even though stereotyping is typically difficult to prove in adverse effects discrimination claims. Whether the law was the result of stereotyping was a major focus of the parties' and interveners' arguments before the Supreme Court, with the debate focusing on whether the government made inappropriate assumptions about the vulnerability of the relevant group. For the Appellants and some interveners, the blanket prohibition against assisted suicide stereotyped persons with disabilities as "incapable of demonstrating rationality and autonomy,"[207] as well as "patronizing and infantilizing" them.[208] For the government of Canada and other interveners, the law appropriately took the vulnerability of persons with disabilities into account, also engaging the "ameliorative purpose" factor.[209] As we have noted, stereotyping is difficult to prove in most adverse effects cases. The subsequent recognition of this difficulty by the section 15(1) majority in *Quebec*

203 *Bedford*, *supra* note 163.

204 However, see *Bedford supra* note 161 (Factum of the Intervener Women's Coalition for the Abolition of Prostitution, online: Supreme Court of Canada, <www.scc-csc.gc.ca/factums-memoires/34788/FM075_Intervener_Coalition.pdf> (arguing that s 7 must be interpreted in light of s 15).

205 *Bedford*, *supra* note 163 at para 75.

206 *Carter*, FOI, *supra* note 199 at para 19.

207 *Carter*, FOA, *supra* note 194 at para 124.

208 *Carter*, *supra* note 10 (Factum of the Intervener Dying with Dignity, at para 15, online: Supreme Court of Canada, <www.scc-csc.gc.ca/case-dossier/info/fac-mem-eng.aspx?cas=35591>).

209 *Carter*, FOAG, *supra* note 197 at paras 135, 137; *Carter*, FOI, *supra* note 199 at paras 23-24.

v A allows courts to focus on disadvantage more broadly, as Justice Smith did in *Carter* even before *Quebec v A*.

Because only Chief Justice Lamer and Justice Cory recognized the assisted suicide prohibition as discriminatory in *Rodriguez*, *Carter* could have reaffirmed the importance of retaining adverse effects discrimination as a useful lens for analysis. However, because the Supreme Court declined to deal with section 15 of the *Charter* in *Carter*, and decided the case solely on the basis of section 7, we still await the Court's engagement with the adverse effects discrimination issues raised by this case.

B. *Taypotat v Taypotat*

Taypotat considers a community election code adopted by the Kahkewistahaw First Nation in Saskatchewan to govern elections for Chief and band councillor. The adoption of the code, after a number of ratification votes, had been controversial within the community because it restricted eligibility for these positions to those who had at least a Grade 12 education or its equivalent.[210] The *Kahkewistahaw Election Act* excluded 74-year-old Louis Taypotat — who had previously served as Chief for a total of 27 years — from standing for election because he could not produce a certificate showing that he had a Grade 12 education;[211] he had attended residential school until age 14 and had been assessed at a Grade 10 level. His nephew, Sheldon Taypotat, was the only eligible candidate for Chief, and he won by acclamation. Louis Taypotat brought an application for judicial review, challenging the eligibility provision and the election results under section 15(1) of the *Charter* as well as under the principle of equality enshrined in the *Kahkewistahaw Election Act*.[212]

At trial, Taypotat argued that the election code's education requirement discriminated on the basis of educational attainment, a ground analogous to race and age, and adversely impacted older band members and residential school survivors.[213] On the adverse effects claim, the trial court indicated that requirements based on education relate to "merit and capacities" and "are

210 *Taypotat, supra* note 11 at para 11. Community election codes are authorized under the *Indian Act*, RSC 1985, c I-5, s 74(1) and must meet certain requirements established by the Minister, including consistency with the *Charter*.

211 *Taypotat, supra* note 11, citing article 9.03(c) of the *Kahkewistahaw Election Act*, the formal name for the community election code.

212 *Taypotat, supra* note 11 at para 2. The *Kahkewistahaw Election Act* provided in article 5 that "We believe and accept the fact that democracy is founded on the principle that *everyone is equal* and that *no one is above the law*" (*ibid* at para 42, emphasis in original).

213 *Taypotat, supra* note 11(FC) at para 54. The Federal Court rejected the argument that educational level was an analogous ground protected under section 15(1), noting that no evidence had been led

unlikely to be indicators of discrimination, since they deal with personal attributes rather than characteristics based on association with a group."[214] The trial court found that there was no evidence of adverse effects discrimination on the basis of race or age, and dismissed the claim.[215]

On appeal, Louis Taypotat's arguments focused on the adverse effects claim based on the grounds of age and Aboriginality-residence. The Federal Court of Appeal reiterated the two-part test from *Kapp*, noting that in *Quebec v A* the Supreme Court had reaffirmed the application of section 15(1) to laws with discriminatory effects.[216] It also cited *Quebec v A* for the proposition that neutral laws could inadvertently perpetuate stereotypes and disadvantage:

> Laws may be adopted that unintentionally convey a negative social image of certain members of society. Moreover, laws that are apparently neutral because they do not draw obvious distinctions may also treat individuals like second-class citizens whose aspirations are not equally deserving of consideration.[217]

Applying these principles, the Court found that although the education requirement did not directly engage a protected ground, it created an adverse impact resulting in discrimination based on the enumerated ground of age and the analogous ground of Aboriginality-residence.[218]

At the first step of the *Kapp* test, the Court referred to evidence submitted by Taypotat, a report of the C.D. Howe Institute, showing a deficit in education levels for on-reserve Aboriginal peoples in Canada, as well as an education gap between older and younger Canadians generally and in First Nations reserve communities specifically.[219] In addition, the Court took judicial notice of "readily available census information" from 2006, which substantiated these gaps on the basis of age and Aboriginality-residence.[220] It found support for this approach in Justice LeBel's judgment in *Quebec v A*, where he took judicial notice of the proportion of couples living in *de facto* unions by relying on census data.[221] Based on this evidence, the Court concluded that the

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to substantiate that argument, and in any event, "educational level is not beyond an individual's control." *Ibid* at para 58.

214 *Ibid*, citing Wilson J in *Andrews*, *supra* note 3 at para 49.

215 *Taypotat*, *supra* note 11(FC) at para 60.

216 *Taypotat*, *supra* note 11 at para 47, citing *Quebec v A*, *supra* note 28 at para 171 (per LeBel J, in dissent on the s 15(1) issue) and *Withler*, *supra* note 16 at para 64.

217 *Taypotat*, *supra* note 11 at para 55, citing *Quebec v A*, *supra* note 28 at para 198 (per LeBel J).

218 *Taypotat*, *supra* note 11 at para 45.

219 *Ibid* at para 48, citing John Richards, "Closing the Aboriginal non-Aboriginal Education Gaps," (2008) *C.D. Howe Institute Backgrounder* 116 at 6.

220 *Taypotat*, *supra* note 11 at para 49; see also para 52.

221 *Ibid* at para 51, citing *Quebec v A*, *supra* note 28 at paras 125 and 249 (per LeBel J).

impugned provisions of the election code "disenfranchise[d] a very large segment of the electors of the Kahkewistahaw First Nation from elected public office within the First Nation. Moreover, a disproportionate number of elders and on-reserve residents are affected by this disenfranchisement."[222] As a result, the Court found that the election code created a distinction "which has the effect of targeting segments of the membership of the First Nation on the basis of age and of Aboriginality-residence."[223] The requirement of a distinction based on protected grounds was thus made out.

The impugned provision also satisfied step two of the section 15(1) test, i.e. it was found to be discriminatory. Applying the *Kapp* definition of discrimination, the Court found that denial of an opportunity for election to Band Council, a fundamental social and political institution, "substantially affect[ed] the human dignity and self-worth" of persons such as Louis Taypotat, amounting to prejudice.[224] The provision also perpetuated stereotyping because it did not "correspond to the actual abilities of the disenfranchised to be elected and to occupy public office."[225] More specifically, the Court found that "[e]lders who may have a wealth of traditional knowledge, wisdom and practical experience, are excluded from public office simply because they have no "formal" (i.e. Euro-Canadian) education credentials. Such a practice is founded on a stereotypical view of elders."[226]

Under section 1 of the *Charter*, the Court held that although the education requirement sought to "address the lack of education achievement among aboriginal peoples by encouraging them to complete their secondary education,"[227] and thus had a pressing and substantial objective, there was no rational connection between that objective and "the disenfranchisement

222 *Taypotat, supra* note 11 at para 52. *Taypotat* can be contrasted with a number of other post-*Withler* decisions where courts found insufficient evidence of disproportionate impact on the basis of a protected ground. See e.g. *Miceli-Riggins, supra* note 202 (insufficient evidence that qualifying provisions under the *Canada Pension Plan Act* had an adverse impact on women); *R v Hailemolokot et al.*, 2013 MBQB 285 (insufficient evidence that mandatory minimum sentencing provisions for robbery with a firearm had an adverse impact against Black males); *R v TMB*, 2013 ONSC 4019, aff'g 2011 ONCJ 528, 247 CCR (2d) 117 (insufficient evidence that mandatory minimum sentences for sexual interference had an adverse impact on Aboriginal persons); *Barbra Schlifer Commemorative Clinic v Canada*, 2014 ONSC 5140, 121 OR (3d) 733 (insufficient evidence that the repeal of the long-gun registry adversely impacted women by placing them at greater risk of violence).

223 *Taypotat, supra* note 11 at para 56.

224 *Ibid.*

225 *Ibid* at para 58.

226 *Ibid* at para 59.

227 *Ibid* at para 60.

of a large part of the community from elected public office."[228] The relevant provision of the election code was declared unconstitutional and invalidated, and new elections were ordered without the education requirement.[229] Louis Taypotat was re-elected Chief of the Kahkewistahaw First Nation following this judgment.[230]

Like *Carter*, *Taypotat* can be seen as a disparate impact type of adverse effects case, the type that has proved more difficult for claimants at the Supreme Court than those involving categorical exclusions.[231] The Federal Court of Appeal appeared to have no difficulty with this, effectively recognizing that not all members of a particular group need to be adversely affected in order for adverse effects discrimination to be made out.[232] The fact that the person making the claim in this case — a residential school survivor residing on a First Nations reserve — was a member of a group widely acknowledged to be especially vulnerable likely facilitated this finding.

Nor did the Court of Appeal appear challenged by the Supreme Court's point in *Withler* that adverse effects discrimination will be more difficult for claimants to prove. However, this was one of the more contentious issues in the hearing before the Supreme Court, as it was for the trial court. The Appellants devoted a section of their factum to the argument that the evidentiary sources relied upon by the Court of Appeal are generalized to Canada rather than speaking to the particular situation of their community, and may present other reliability problems.[233] Respondent's counsel was asked several questions about the evidentiary basis for the claim by members of the Supreme Court during the oral hearing, noting in response that Louis Taypotat had attested to the specific impact of the education requirement on older residents of the Kahkewistahaw First Nation.[234]

As noted in Part III, evidentiary problems undermined adverse effects claims in *Symes*, *Thibaudeau* and *BC Health Services*. Nonetheless, the Federal

228 *Ibid* at para 62. The requirement also failed the proportionality test (*ibid* at para 63).

229 *Ibid* at para 66.

230 *Ibid* (Factum of the Respondent at para 28, online: Supreme Court of Canada, < www.scc-csc.gc.ca/case-dossier/info/fac-mem-eng.aspx?cas=35518>).

231 See our discussion of these concepts in text accompanying notes 44-47 and our discussion of *Adler*, *Symes*, and *Thibaudeau* in Part III.A.2.

232 *Taypotat*, *supra* note 11 at paras 52-3.

233 *Ibid* (Factum of the Appellants at paras 86, 88 online: Supreme Court of Canada, <www.scc-csc.gc.ca/case-dossier/info/fac-mem-eng.aspx?cas=35518>) [*Taypotat*, FOA].

234 *Taypotat*, *supra* note 11 (Webcast of the Hearing (2014-10-09), online: Supreme Court of Canada, <www.scc-csc.gc.ca/case-dossier/info/webcast-webdiffusion-eng.aspx?cas=35518>) [*Taypotat*, Webcast].

Court of Appeal's acceptance of statistical evidence in *Taypotat* does align with the approach in other *Charter* equality cases,[235] as well as with *Withler*, which discussed the desirability of bringing forward evidence of historical or sociological disadvantage.[236]

Another argument made by the Appellants at the Supreme Court, echoing the finding made at trial, is that the education requirement goes to the merits of election candidates and is a personal attribute they can attain if they choose.[237] This point was emphasized in the Appellants' presentation of oral argument, and raised some questions from members of the Court as to whether choice was still a relevant consideration following *Quebec v A*, and whether Louis Taypotat's lack of education could actually be attributed to choice.[238] As the Court's questions suggest, and as we argued in Part III, choice should not be a relevant consideration in section 15(1) claims. It is refuted on the facts of this case in any event, especially for residential school survivors such as *Taypotat*.

Several members of the Supreme Court also questioned whether the education requirement reflected "arbitrary disadvantage" based on age.[239] With respect, arbitrariness is a consideration relevant under section 1 of the *Charter*, not under section 15(1). To incorporate questions of arbitrariness under section 15(1) presents problems for adverse effects discrimination claims similar to those raised by an exclusive emphasis on prejudice and stereotyping, because arbitrariness focuses on the purpose rather than effects of the law. That being said, the Court of Appeal's ability to find adverse effects discrimination using the concepts of prejudice and stereotyping in this case is noteworthy. This may be due to the intentional adoption of the education requirement regardless of its impact on elders, as evidenced by the controversy surrounding

235 See e.g. *M v H*, [1999] 2 SCR 3 at para 353, 1999 CanLII 686 (SCC) cited in *Taypotat*, *supra* note 11 at para 50. *M. v H.* was a direct discrimination case involving the exclusion of same sex partners from spousal support legislation. The Court in *Taypotat* also cites *R v Edwards Books and Art Ltd.*, [1986] 2 SCR 713 at para 198, 58 OR (2d) 2, a freedom of religion case.

236 *Withler*, *supra* note 16 at para 64. For other recent adverse effects cases where sufficient evidence of disproportionate impact was found, see *Inglis*, *supra* note 200 (cancellation of a program allowing female inmates to care for their children in prison adversely impacted women on the basis of race, ethnicity, disability, sex and family status); *R v Adamo*, 2013 MBQB 225, [2013] MJ No 302 (mandatory minimum sentences precluding consideration of moral blameworthiness adversely impacted offenders with mental disabilities); *R v Chambers*, 2013 YKTC 77, [2013] YJ No 86 (the *Truth in Sentencing Act*, which limited the amount of credit that courts could give for pre-trial custody at the stage of sentencing, adversely impacted Aboriginal persons).

237 *Taypotat*, FOA, *supra* note 233 at para 69.

238 *Taypotat*, Webcast, *supra* note 234.

239 *Ibid.*

the adoption of the requirement in the community. As for arbitrariness, the key point is that even if a requirement such as educational level is intended to address the merits of election candidates, it is still possible that the requirement disproportionately impacts older persons resident on First Nations reserves. The two propositions are not mutually exclusive, and the rationality and justifiability of that impact should be addressed under section 1 of the *Charter*, not section 15(1).[240]

Nor is it appropriate to consider the merit-based purpose of the education requirement under section 15(2) in this case, as the Appellants urged the Court to do.[241] Section 15(2) allows governments to "save" ameliorative laws and programs that would otherwise be discriminatory under section 15(1).[242] Section 15(2) is not relevant in adverse effects cases because by definition they do not involve targeted benefit programs.[243] In any event, section 15(2) should not preclude claims where, even though adopted for an ameliorative purpose, a law has discriminatory adverse effects on a group protected under section 15(1).[244]

V. Conclusion: The way forward

We have argued that claims of adverse effects discrimination must be taken as seriously as those of direct discrimination in order to give full effect to substantive equality. Our analysis has shown how the Supreme Court's approach to section 15(1) has relied on a direct discrimination paradigm, creating barriers that are difficult to surmount in adverse effects claims. These barriers include heightened evidentiary and causation requirements, arguments denying distinctions based on "choice," the "neutrality" of policy decisions, the difficulty of connecting adverse treatment to protected grounds via comparative analysis, and a focus on stereotyping and prejudice that may make it more difficult to prove adverse effects discrimination. These barriers must be eliminated.

240 If *Taypotat* was a human rights claim, *Meiorin, supra* note 8 would support a finding of *prima facie* adverse effects discrimination based on age and Aboriginality-residence, followed by analysis of whether the education requirement could be justified as a *bona fide* occupational requirement (BFOR). The BFOR argument would likely fail, as the requirement is not "reasonably necessary" in the sense that persons cannot be accommodated without undue hardship; individual testing of the election candidate's actual merits would likely be required to meet the *Meiorin* test. A BFOR argument was made by the Appellants in *Taypotat* as part of the s 15(1) argument, and is misplaced. See *Taypotat*, FOA, *supra* note 233 at paras 74 et seq.

241 *Taypotat*, FOA, *ibid* at para 102 *et seq.*

242 *Cunningham, supra* note 127 at para 41.

243 See discussion at notes 34-38.

244 See Jonnette Watson Hamilton and Jennifer Koshan, "The Supreme Court of Canada, Ameliorative Programs, and Disability: Not Getting It" (2013) 25 CJWL 56.

We have considered whether the separate category of adverse effects discrimination should be abandoned. *Meiorin* is persuasive on the artificiality of a separate category, yet we think it continues to be useful to retain adverse effects discrimination as a lens for analyzing section 15(1) claims. As we noted throughout Parts III and IV, judges continue to have difficulty seeing adverse impact discrimination, and maintaining a distinct category for them to reflect upon may be helpful in recognizing the systemic impact of purportedly neutral laws.[245] This flexibility could be analogized to the Supreme Court's revised use of comparators in *Withler*, where an approach facilitating many angles of analysis was advocated in order to help see the discrimination at play.[246]

We had hoped that the Supreme Court would reaffirm the place of adverse effects discrimination under section 15(1) when it decided the *Carter* and *Taypotat* appeals. Despite a promising start in *Andrews*, and the key role adverse effects discrimination plays in substantive equality, little use has been made of the category. However, the parties' and the Court's focus in the *Carter* appeal suggested that the Court would decide that case under section 7 — and it did so. Unfortunately, the focus of the factums and oral arguments in *Taypotat* suggest that the section 15(1) claim in that case may ultimately be dismissed for lack of evidence. While the decision in *Carter* perpetuates the Court's tendency to decide cases on grounds other than section 15, *Taypotat* places an adverse effects claim squarely before the Court. We hope the Court will take the opportunity presented by *Taypotat* to clarify the law in this area and to develop an approach to adverse effects claims that is truly responsive to the substantive equality aims of section 15 of the *Charter*.

245 Sheppard "Review of BCGSEU", *supra* note 66 at 533, makes a similar argument in the context of human rights legislation, as does Pothier, "Tackling Disability Discrimination," *supra* note 43 at 23.

246 *Supra* note 16 at para 63.

Appendix I

Supreme Court of Canada Section 15(1) Equality Cases[247] (Adverse Effects Discrimination Cases Highlighted)

1	*Andrews v Law Society of British Columbia*	[1989] 1 SCR 143
2	*Re Worker's Compensation Act, 1983 (Newfoundland)*	[1989] 1 SCR 922
3	*R v Turpin*	[1989] 1 SCR 1296
4	*Rudolf Wolff & Co. v Canada*[248]	[1990] 1 SCR 695
5	*R v S. (S.)*[249]	[1990] 2 SCR 254
6	*Regina v Hess; Regina v Nguyen*	[1990] 2 SCR 906
7	*McKinney v University of Guelph*[250]	[1990] 3 SCR 229
8	*R v Swain*	[1991] 1 SCR 933
9	*Tetreault-Gadoury v Canada*	[1991] 2 SCR 22
10	*R v Genereux*	[1992] 1 SCR 259
11	*Chiarelli v Canada (Minister of Employment and Immigration)*	[1992] 1 SCR 711
12	*Schachter v Canada*	[1992] 2 SCR 679
13	*Canada v Ward*	[1993] 2 SCR 689
14	*Weatherall v Canada*	[1993] 2 SCR 872
15	*Haig v Canada*	[1993] 2 SCR 995
16	*Rodriguez v British Columbia*	[1993] 3 SCR 519
17	*Symes v Canada*	[1993] 4 SCR 695
18	*R v Finta*	[1994] 1 SCR 701
19	*Native Women's Association of Canada v Canada*	[1994] 3 SCR 627
20	*Thibaudeau v Canada*	[1995] 2 SCR 627

247 The sources of this list are Martin, "Balancing Individual Rights to Equality and Social Goals," *supra* note 112 at Appendix I; Bruce Ryder, Cidalia Faria & Emily Lawrence, "What's Law Good For? An Empirical Overview of Charter Equality Rights Decisions" (2004) 24 SCLR (2d) 103 at Appendix A; Jonnette Watson Hamilton and Daniel Shea, "The Value of Equality in the Supreme Court of Canada: End, Means or Something Else?" (2010) 29 Windsor Rev Legal Soc Issues 125 at Appendix I; and a search of the Lexum collection of the Judgments of the Supreme Court of Canada, online: <www.scc-csc.lexum.com/scc-csc/en/nav.do>.

248 See also *Dywidag systems international, Canada ltd. v Zutphen Brothers Construction Ltd.*, [1990] 1 SCR 705, 1990 68 DLR (4th) 147 a companion case.

249 Challenges to the same provisions under s 15(1) regarding province of residence were also dealt with in a number of companion cases: *R v S(G)*, [1990] 2 SCR 294, 49 CRR 109, *R v P(J)*, [1990] 2 SCR 300, 1990 CanLII 67, *R v T(A)*, [1990] 2 SCR 304, 1990 CanLII 68, and *R v B(J)*, [1990] 2 SCR 307, 1990 CanLII 69.

250 *Harrison v University of British Columbia*, [1990] 3 SCR 451, 77 DLR (4th) 55, and *Stoffman v Vancouver General Hospital*, [1990] 3 SCR 483, 76 DLR (4th) 700 were companion cases raising similar issues about discrimination on the basis of age in challenges to mandatory retirement policies.

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21	*Egan v Canada*	[1995] 2 SCR 513
22	*Miron v Trudel*	[1995] 2 SCR 418
23	*Ontario Home Builders' Assoc v York Region Board of Education*	[1996] 2 SCR 929
24	*Adler v Ontario*	[1996] 3 SCR 609
25	*Eaton v Brant County Board of Education*	[1997] 1 SCR 241
26	*Benner v Canada*	[1997] 1 SCR 358
27	*Eldridge v British Columbia*	[1997] 3 SCR 624
28	*Vriend v Alberta*	[1998] 1 SCR 493
29	*Vancouver Society of Immigrant and Visible Minority Women v Canada (Minister of National Revenue-M.N.R.)*	[1999] 1 SCR 10
30	*Law v Canada*	[1999] 1 SCR 497
31	*M v H*	[1999] 2 SCR 3
32	*Corbiere v Canada*	[1999] 2 SCR 203
33	*Winko v British Columbia*[251]	[1999] 2 SCR 625
34	*Delisle v Canada*	[1999] 2 SCR 989
35	*Granovsky v Canada*	[2000] 1 SCR 703
36	*Lovelace v Ontario*	[2000] 1 SCR 950
37	*Little Sisters Book and Art Emporium v Canada*	[2000] 2 SCR 1120
38	*Re Therrien*	[2001] 2 SCR 3
39	*Dunmore v Ontario (Attorney General)*	[2001] 3 SCR 1016
40	*Lavoie v Canada*	[2002] 1 SCR 769
41	*Sauve v Canada (Chief Electoral Officer)*	[2002] 3 SCR 519
42	*Nova Scotia (Attorney General) v Walsh*	[2002] 4 SCR 325
43	*Gosselin v Quebec (Attorney General)*	[2002] 4 SCR 429
44	*Siemens v Manitoba (Attorney General)*	[2003] 1 SCR 6
45	*Trociuk v British Columbia (Attorney General)*	[2003] 1 SCR 835
46	*Nova Scotia (W.C.B.) v Martin*	[2003] 2 SCR 504
47	*R v Malmo-Levine; R v Caine*	[2003] 3 SCR 571
48	*Canadian Foundation for Children, Youth and the Law v Canada (AG)*	[2004] 1 SCR 76
49	*Newfoundland Association of Public Employees v Newfoundland*	[2004] 3 SCR 38
50	*Auton (Guardian ad litem of) v British Columbia (Attorney General)*	[2004] 3 SCR 657
51	*Reference re Same-Sex Marriage*	[2004] 3 SCR 698

251 There are three companion cases to *Winko*: *Bese v British Columbia (Forensic Psychiatric Institute)*, [1999] 2 SCR 722, 135 CCC (3d) 212; *Orlowski v British Columbia (Forensic Psychiatric Institute)*, [1999] 2 SCR 733, 135 CCC (3d) 220; and *R v LePage*, [1999] 2 SCR 744, 135 CCC (3d) 205.

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52	*Hodge v Canada (Minister of Human Resources Development)*	[2004] 3 SCR 357
53	*Gosselin (Tutor of) v Quebec (Attorney General)*	[2005] 1 SCR 238
54	*Charkaoui v Canada (Citizenship and Immigration)*	[2007] 1 SCR 350, 2007 SCC 9
55	*Canada (Attorney General) v Hislop*	[2007] 1 SCR 429, 2007 SCC 10
56	*Health Services and Support - Facilities Subsector Bargaining Assn. v British Columbia*	[2007] 2 SCR 391, 2007 SCC 27
57	*Baier v Alberta*	[2007] 2 SCR 673, 2007 SCC
58	*R v Kapp*	[2008] 2 SCR 483, 2008 SCC 41
59	*Ermineskin Indian Band and Nation v Canada*	2009 SCC 9, [2009] 1 SCR 222
60	*AC v Manitoba (Director of Child and Family Services)*	2009 SCC 30, [2009] 2 SCR 181
61	*Alberta v Hutterian Brethren of Wilson Colony*	2009 SCC 37, [2009] 2 SCR 567
62	*Withler v Canada (Attorney General)*	2011 SCC 12, [2011] 1 SCR 396
63	*Ontario (Attorney General) v Fraser*	2011 SCC 20, [2011] 2 SCR 3
64	*Alberta (Aboriginal Affairs and Northern Development) v Cunningham*	2011 SCC 37, [2011] 2 SCR 670
65	*Quebec (Attorney General) v A*	2013 SCC 5, [2013] 1 SCR 61
66	*British Columbia Teachers' Federation v. British Columbia Public School Employers' Association*	2014 SCC 70