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OBSTACLES TO CROSSING THE DISCRIMINATION THRESHOLD: CONNECTING INDIVIDUAL EXCLUSION TO GROUP-BASED INEQUALITIES

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In two important unanimous judgments, Quebec (Commission des droits de la personne et des droits de la jeunesse) v Bombardier Inc (Bombardier Aerospace Training Centre) and Kahkewistahaw First Nation v Taypotat, the Supreme Court of Canada concluded that there was insufficient evidence of discrimination. Consequently, it dismissed both claims without requiring that the defendants justify the allegedly exclusionary criteria being challenged. While these cases arose in very different factual and legal contexts, there are troubling common threads that tie them together. Most poignantly, in both cases, the plaintiffs do not succeed in proving what is often referred to as a prima facie case of discrimination, and the predominant justification for this failure is the inadequacy of the evidence. These cases, therefore, provide an important starting point for thinking about how to prove discrimination. They raise questions regarding the use of the terminology "prima facie discrimination", the role of factual inferences in statutory or constitutional discrimination analysis and the significance of broader evidence about social context in individual discrimination cases. Finally, they remind us that how plaintiffs lose matters. The fact that the Court did not get beyond the preliminary finding of prima facie discrimination stands in stark contrast to many anti-discrimination cases where the heart of the dispute revolves around the adequacy of the justification for the challenged exclusionary criteria.

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Dans deux arrêts importants rendus à l'unanimité, soit Québec (Commission des droits de la personne et des droits de la jeunesse) c Bombardier Inc. (Bombardier Aéronautique Centre de formation) et Première Nation de Kahkewistahaw c Taypotat, la Cour suprême du Canada a conclu à l'insuffisance de la preuve de discrimination. Elle a, par conséquent, rejeté les deux pourvois sans exiger que les intimés justifient les critères d'exclusion en cause. Alors que ces arrêts relèvent de contextes factuels et juridiques très différents, ils ont des points communs troublants. Ce qui est le plus frappant dans ces deux affaires, est l'échec des deux demandeurs à prouver ce qui est souvent décrit comme un cas de discrimination prima facie, et le fait que cet échec est principalement motivé par l'insuffisance de la preuve. Ces deux affaires fournissent donc un important point de départ pour envisager la meilleure façon d'établir la preuve de discrimination. Elles soulèvent des questions concernant l'utilisation de l'expression « discrimination prima facie », le rôle des inférences factuelles dans l'analyse légale ou constitutionnelle de la discrimination, et l'importance d'une preuve plus ouverte quant au contexte social dans les affaires de discrimination individuelle. Elles nous rappellent que la manière dont les plaignants ont échoué compte également. Le fait que la Cour n'ait pas dépassé le stade des conclusions préliminaires de discrimination prima facie s'avère radicalement opposé à son attitude dans maintes affaires de lutte contre la discrimination dans lesquelles le litige est centré sur la suffisance de la justification des critères d'exclusion en cause.

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1. Introduction

In two important unanimous judgments, *Quebec (Commission des droits de la personne et des droits de la jeunesse) v Bombardier Inc (Bombardier Aerospace Training Center)*[1] and *Kahkewistahaw First Nation v Taypotat*,[2] the Supreme Court of Canada concluded that there was insufficient evidence of discrimination and dismissed both claims without requiring that the defendants justify the exclusionary criteria being challenged. *Bombardier* involved a statutory claim of discrimination brought by Javed Latif, a Canadian citizen of Pakistani origin, when he was refused access to a Canadian pilot training program provided by Bombardier. Latif maintained that Bombardier's refusal, which was based on a negative security check he received in the United States, constituted a form of racial profiling and discrimination on the basis of national or ethnic origin in violation of the Quebec *Charter of Human Rights and Freedoms*.[3] In *Taypotat*, applicant Louis Taypotat argued that the high school diploma requirement recently added as an eligibility criterion for seeking election as Chief of the Kahkewistahaw First Nation constituted a form of race and age-based discrimination in violation of the equality guarantees of the *Canadian Charter of Rights and Freedoms*.[4]

While these cases arose in very different factual and legal contexts, there are troubling common threads that tie them together. Most poignantly, in both, the plaintiffs do not succeed in proving what is often referred to as a *prima facie* case of discrimination, and the predominant justification for this failure is the inadequacy of their evidence. These cases, therefore, provide an important starting point for thinking about how discrimination is proven. What kind of evidence and how much evidence is needed to substantiate a *prima facie* case of discrimination? What role does evidence about the broader social context play in relation to individual claims of discrimination? And should we be concerned about the growth of obstacles to traversing the initial threshold of *prima facie* discrimination?[5]

These cases also provide us with an occasion to reflect upon the significance of how plaintiffs lose. It is often important that those seeking to rely on potentially exclusionary criteria be required to justify such criteria. Indeed, they often have access to the information and data that makes a full assessment of the criteria possible. But, in these cases, neither Bombardier

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1 2015 SCC 39, [2015] 2 SCR 789 [*Bombardier* SCC].

2 2015 SCC 30, [2015] 2 SCR 548 [*Taypotat* SCC].

3 *Charter of human rights and freedoms*, CQLR c C-12 [*Quebec Charter*].

4 *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 [*Canadian Charter*].

5 For another recent example of this trend, see *Stewart v Elk Valley Coal Corp*, 2017 SCC 30, 411 DLR (4th) 1 [*Stewart*].

nor the Kahkewistahaw First Nation were required to provide any rationale or justification for the exclusion of the complainants. The fact that the Court did not get beyond the preliminary finding of *prima facie* discrimination stands in stark contrast to many anti-discrimination cases where the heart of the dispute revolves around the adequacy of the defendant's justification for its exclusionary criteria.[6]

This article begins with a summary of the facts, judicial history and Supreme Court conclusions in *Bombardier* and *Taypotat*. Subsequently, we delineate the evidentiary structure of discrimination cases in Canada, both in statutory and constitutional contexts. In doing so, we examine the elements that plaintiffs must prove to make out a *prima facie* case of discrimination, and the use of factual inferences to tackle evidentiary challenges in this domain. We then examine the significance of broader social context evidence in the proof of discrimination. In light of the evidentiary challenges individuals face in proving discrimination, we maintain that making it too difficult to cross the *prima facie* discrimination threshold risks undermining constitutional and statutory equality rights.

2. Facts and Findings in the Decisions

A) The *Bombardier* Case

Javed Latif is a Canadian citizen and has been a professional pilot since 1964. He obtained a United States ("US") piloting license in 1991 and a Canadian license in 2004.[7] He was born in Pakistan and is Muslim. In March 2004, Latif received an offer of employment from a Canadian aviation services company to pilot one of Bombardier's Challenger 604 aircrafts, conditional on undergoing related training. Bombardier has two training facilities: one in Dallas, Texas, and the other in Montreal. In the wake of the terrorist attacks of September 11th, 2001, the US legislated a mandatory security check requirement for all non-US citizens undertaking pilot training. There is no equivalent security approval requirement in Canada. Having previously undergone training in the US, Latif decided to do the necessary training in Dallas. His request was refused, however, since his security check produced a negative response. He was given no justification or reason for this determination. Unable to train in the US, Latif applied to train at Bombardier's facilities in Montreal under his Canadian license. Steven Gignac, the Director of Quality Standards at Bombardier's Aircraft Training Centre in Montreal, refused Latif's request to train. The key reason for

6 See e.g. *British-Columbia (Public service employee relations commission) v BCGSEU*, [1999] 3 SCR 3, 176 DLR (4th) 1 [*Meiorin*]; *Moore v British Columbia (Education)*, 2012 SCC 61, [2012] 3 SCR 60 [*Moore*].

7 At the time he sought training at Bombardier, Latif had worked as a pilot for a number of years and had an "unblemished" record.

this refusal was a concern for public safety, since Latif had failed to obtain security approval in the United States.

The Quebec Human Rights Tribunal concluded that Latif had been the subject of discrimination on the basis of his national or ethnic origin, in violation of the *Quebec Charter*.[8] It held Bombardier had refused him a service normally available to the public in barring him from training at its Montreal facility, and that this exclusion was linked to his national or ethnic origins. Its conclusions in this regard were based in part on Steven Gignac's testimonial evidence, particularly his admission that he considered Latif to be a "potential terrorist"[9] as well as expert evidence of widespread racial profiling of Arabs and Muslims in US government agencies and programs post 9/11.[10] The Tribunal also found that Bombardier had failed to justify its refusal to train Latif on the basis of public security concerns, noting its failure to solicit information about safety risks from the Canadian authorities, or to make further inquiries with US authorities about the reasons for Latif being denied security clearance.[11]

The Court of Appeal of Quebec overturned the Tribunal's decision, concluding that there was insufficient evidence to support the inference made by the Tribunal that the treatment experienced by Latif was *due to* his national or ethnic origin.[12] The Court of Appeal required that there be proof of a causal link between Latif's exclusion and his national or ethnic origin.[13] It concluded that no such link existed since it found that Bombardier's refusal was based solely on Latif's failure to obtain security clearance in the US. It further found no evidence to support a conclusion of racial profiling, noting that the expert evidence did not address racial profiling in the specific

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8 *Commission des droits de la personne et des droits de la jeunesse c Bombardier inc (Bombardier Aerospace Training Center)*, 2010 QCTDP 16 at para 314, [2010] AZ-50698315 [*Bombardier* HRT]. The Quebec Human Rights Tribunal found that there had been discrimination in the provision of services and that this also interfered with Latif's right to dignity, honour and reputation. As the alleged discrimination occurred in the context of the provision of a service in Quebec, the applicable legislation was the provincial *Quebec Charter* rather than the federal *Canadian Human Rights Act*, RSC 1985, c H-6.

9 Translated from the transcript of Gignac's oral evidence. See *Bombardier* HRT, *supra* note 8 at paras 137–38.

10 *Ibid* at paras 182–208 (reviewing the expert evidence on racial profiling in the US), 301–10, 313–14.

11 *Ibid* at paras 333, 336. The Tribunal also rejected Bombardier's economic concerns regarding the preservation of jobs and revenue (at paras 339–58).

12 See *Bombardier inc (Bombardier Aerospace Training Center) c Commission des droits de la personne et des droits de la jeunesse*, 2013 QCCA 1650 at paras 14, 98, 100, 103, 127, 142, [2013] RJQ 1541 [*Bombardier* Que CA].

13 *Ibid* at paras 98, 100, 142, 144.

security clearance process used for non-US citizens' participation in pilot training programs.[14]

At the Supreme Court of Canada, Justices Wagner and Côté, writing for a unanimous bench, dismissed the appeal and also concluded that the evidence was insufficient to support the finding that Latif's national or ethnic origin was a factor in his denial of services by Bombardier.[15] It is noteworthy that, rather than requiring a causal link between the exclusion and protected characteristic, as suggested by the Court of Appeal of Quebec, the Supreme Court of Canada concluded that:

> [F]or a particular decision or action to be considered discriminatory, the prohibited ground need only have contributed to it … In short, … the plaintiff has the burden of showing that there is a connection between a prohibited ground of discrimination and the distinction, exclusion or preference of which he or she complains or, in other words, that the ground in question was a *factor* in the distinction, exclusion or preference.[16]

Nevertheless, the Court held that there was insufficient evidence to support an inference of any such connection in Latif's case.[17] In so doing, it rejected the expert evidence of widespread racial profiling in post 9/11 US security programs, since it did not pertain specifically to the pilot training security clearance process.[18] The Court's review of the other evidence also failed to convince it of the link between the exclusion and Latif's ethnic origin.[19] Thus, the Court concluded that it was unreasonable for the Tribunal to infer that his origins had been a factor in his exclusion from the pilot training

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14 *Ibid* at paras 110, 113, 118, 122, 133–34.

15 *Bombardier* SCC, *supra* note 1 at para 4. The Supreme Court's reasons focus on whether the decision made about Latif by the US authorities was discriminatory because the parties agreed that Bombardier's decision was based on the US authorities' refusal to grant him security clearance (at paras 15, 74). While the Quebec Human Rights Tribunal also found this to be the case, it additionally considered whether Bombardier's decision itself exhibited discriminatory characteristics, since Bombardier was not compelled to make this decision in the absence of any security clearance requirement in Canada. See *Bombardier* HRT, *supra* note 8 at paras 130, 136, 290, 305, 313.

16 *Bombardier* SCC, *supra* note 1 at paras 48, 52.

17 *Ibid* at para 81.

18 *Ibid* at para 89.

19 *Ibid* at paras 90–97. Of significance in this regard is the Court's silence on the behaviour of Bombardier employee Stephen Gignac who was responsible for deciding to rely on the US security clearance denial to exclude Latif.

program.[20] It held that Bombardier's denial of services to Latif did not constitute *prima facie* discrimination.[21]

B) The *Taypotat* Case

Located in Saskatchewan, the Kahkewistahaw First Nation is a community of approximately 2,000 people. Until 2011, its elections for Band Councillor and Chief offices had been carried out in accordance with the rules of the *Indian Act*.[22] In the late 1990s, the Kahkewistahaw First Nation began developing its own election code through a process of community consultation and ratification. The Federal Department of Indian Affairs and Northern Development, now Indigenous Services Canada and Crown-Indigenous Relations and Northern Affairs Canada, authorized the *Kahkewistahaw Election Act* on February 18, 2011.[23] This election code included a new requirement that candidates for Chief or Band Councillor positions have completed twelfth grade. Louis Taypotat, the 76-year-old applicant in this case, is a member of the Kahkewistahaw First Nation and a resident of its reserve. He is a residential school survivor. He also served as the Nation's elected Chief for intermittent periods totalling more than 27 years. In a general education equivalency test, he was recognized as having achieved a Grade 10 education-level. Hence, Taypotat's candidacy in the 2011 Band election was refused by the Electoral Officer of the Kahkewistahaw First Nation. He then brought an application for judicial review, challenging the decision on several bases, one being that the *Kahkewistahaw Election Act*'s educational requirement violated section 15 of the *Canadian Charter*. More specifically, he argued that "educational attainment is analogous to race and age" and that "requiring a Grade 12 education would perpetuate a

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20 See *ibid* at paras 73, 81–97. In *Bombardier*, the Supreme Court applies the reasonableness standard of review (see *Dunsmuir v New Brunswick*, 2008 SCC 9 at paras 45–64, [2008] 1 SCR 190); *Mouvement laïque québécois v Saguenay (Ville)*, 2015 SCC 16 at paras 31, 37–43, 45–51, [2015] 2 SCR 3. Its findings with regards to the inference made by the Tribunal take on greater significance when one considers the high level of deference that is associated with the reasonableness standard, in contrast to the correctness standard. The reasonableness standard queries whether the decision on appeal corresponds to one among the many reasonable decisions the Tribunal could have made, and not whether the decision was correct.

21 *Bombardier* SCC, *supra* note 1 at para 98.

22 RSC 1985, c I-5.

23 It should be noted that questions were raised at trial and before the Federal Court of Appeal about the validity of the public approval process of the *Kahkewistahaw Election Act* and the extent of community consensus required for such an act to be authorised, especially with regards to measures undertaken in the face of low participation and difficulties meeting quorum requirements. See *Taypotat v Kahkewistahaw First Nation*, 2012 FC 1036 at paras 9–12, 24–44, [2013] 1 CNLR 349 [*Taypotat* FC]; *Taypotat v Kahkewistahaw First Nation*, 2013 FCA 192 at paras 7–10, 21–24, [2014] 1 CNLR 375 [*Taypotat* FCA]; *Taypotat* SCC, *supra* note 2 at para 8.

disadvantage and stereotype, because education in aboriginal communities is less formalistic and would disproportionately affect older band members and residential school survivors."[24]

Justice de Montigny of the Federal Court of Canada declined to find the requirement discriminatory, concluding that educational attainment was not an analogous ground of discrimination since, unlike the enumerated and previously recognized analogous grounds, educational requirements relate to an individual's merit and capabilities rather than stereotypes.[25] He did not consider whether the educational requirement might result in adverse effects discrimination by creating greater obstacles for older Aboriginal members of the Kahkewistahaw community, particularly those who attended residential schools.

The Federal Court of Appeal overturned Justice de Montigny's conclusions regarding section 15, emphasizing recognition by Canadian courts of both direct and indirect discrimination.[26] It found that the *Kahkewistahaw Election Act* was discriminatory on two distinct grounds: age and "Aboriginality-residence."[27] The evidentiary basis for this conclusion included a research report, *Closing the Aboriginal/non-Aboriginal Education Gaps*, published by the CD Howe Institute, documenting disparities in educational attainment between persons above and below the age of 45 in Aboriginal communities.[28] The Federal Court of Appeal also took judicial notice of census data from 2006 showing that older Canadians tend to have attained lower levels of education than younger ones, and that the trend is reproduced among First Nations communities across the country. Regardless of place of residence, it thus found older members of the Kahkewistahaw First Nation were more likely than their younger counterparts to be ineligible to run for the positions of Band Councillor or Chief. On the Aboriginality-residence ground, and on the basis of census data from 2006, it found that Registered Indians living on-reserve report lower levels of education than those living off-reserve.[29] Hence, members of the Kahkewistahaw First Nation living on-reserve, regardless of their age, were more likely than those

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24 *Taypotat* FC, *supra* note 23 at para 54.

25 *Ibid* at para 59.

26 *Taypotat* FCA, *supra* note 23.

27 *Ibid* at paras 46, 48.

28 John Richards, "Closing the Aboriginal/non-Aboriginal Education Gaps" (2008) CD Howe Institute Backgrounder No 116 at 5–6, online: <www.cdhowe.org/sites/default/files/attachments/research_papers/mixed/Backgrounder_116.pdf>.

29 *Taypotat* FCA, *supra* note 23 at paras 49–52. In *Corbiere v Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203 at paras 14–15, 62, 173 DLR (4th) 1, the Supreme Court of Canada recognised "Aboriginality-residence," or off-reserve band member status, as an analogous protected ground for the purposes of section 15. In doing so, it asserts that "the distinction [between band members living on and off-reserve] goes to a personal

living off-reserve to be ineligible to run in the community's elections. The Federal Court of Appeal then rejected the respondents' submissions that any discriminatory effect of the *Kahkewistahaw Election Act* was justified under section 1 of the *Canadian Charter*.[30]

At the Supreme Court, Justice Abella, in another unanimous decision, allowed the Kahkewistahaw First Nation's appeal. While she confirmed the Federal Court of Appeal's finding that educational requirements may have a discriminatory impact in certain circumstances, she was of the view that there was too little evidence specific to the Kahkewistahaw First Nation to support Taypotat's claim that the *Kahkewistahaw Election Act*'s education requirement disadvantaged certain members of this community on the basis of age or residency on a reserve:

> While facially neutral qualifications like education requirements may well be a proxy for, or mask, a discriminatory impact, this case falls not on the existence of the requirement, but on the absence of any evidence linking the requirement to a disparate impact on members of an enumerated or analogous group. … there is *virtually no evidence about the relationship between age, residency on a reserve, and education levels in the Kahkewistahaw First Nation* to demonstrate the operation of … a "headwind". *Nor is there any evidence about the effect of the education provisions on older community members*, on community members who live on a reserve, or on individuals who belong to both of these groups.[31]

She concluded that Taypotat had failed to establish a *prima facie* breach of section 15.

In both *Bombardier* and *Taypotat*, therefore, the key reason why the plaintiffs lost was the inadequacy or insufficiency of their evidence, and thus their inability to prove *prima facie* discrimination. Hence, it is important to examine more closely the exigencies of proving a *prima facie* case.

3. Proving Discrimination: The Threshold Inquiry

A) Legal Burdens of Proof in Discrimination Cases

Both statutory and constitutional claims for discrimination involve a two-step approach. First, the plaintiff must prove a *prima facie* case of discrimination by demonstrating the existence of the alleged discrimination on a balance of probabilities. If this threshold is crossed, the legal burden shifts to the

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characteristic essential to a band member's personal identity, which is no less constructively immutable than religion or citizenship."

30 *Taypotat* FCA, *supra* note 23 at paras 60–63.

31 *Taypotat* SCC, *supra* note 2 at paras 23–24, 34 [emphasis added].

defendant to prove that the discrimination is justified due to a statutory exception or exemption,[32] or that it is a reasonable limit pursuant to section 1 in *Canadian Charter* cases.[33] This general two-pronged framework, with its clear shifting of the legal burdens, was endorsed in both *Bombardier* and *Taypotat*.

As affirmed in *Ontario Human Rights Commission & O'Malley v Simpsons-Sears*, a foundational, early decision of the Supreme Court of Canada in the realm of statutory discrimination, "[f]ollowing the well settled rule in civil cases, the plaintiff bears the burden. He who alleges must prove."[34] Thus, in *Bombardier*, consistent with the numerous statutory discrimination cases decided since *Simpsons-Sears*, the Court clearly states that the plaintiff has the initial legal burden to prove *prima facie* discrimination, and that the defendant then has the subsequent legal burden to "justify his or her decision or conduct on the basis of the exemptions provided for in the applicable human rights legislation or those developed by the courts."[35]

Similarly, in the constitutional context, the Court has repeatedly stated that the plaintiff has the legal burden to prove a violation of section 15, resulting in a shifting of the legal burden to the defendant, who, as provided by section 1 of the *Canadian Charter*, may seek to prove that the violation is reasonable and justified in a free and democratic society.[36] In *Taypotat*, Justice Abella's decision focused on the plaintiff's failure to prove a violation of section 15(1). She noted in conclusion: "before we put the Kahkewistahaw First Nation to the burden of justifying a breach of s. 15 in its *Kahkewistahaw Election Act*, there must be enough evidence to show a *prima facie* breach."[37] Implicit in her judgment is an affirmation of the basic framework and legal burdens in *Canadian Charter* cases.[38]

In addition to setting out the basic framework regarding legal burdens of proof in discrimination cases, *Bombardier* affirms that establishing a *prima*

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32 See e.g. *Ontario Human Rights Commission v Simpsons-Sears*, [1985] 2 SCR 536 at paras 28–29, 23 DLR (4th) 321 [*Simpsons-Sears*]; *Moore*, *supra* note 6 at para 33; *Bombardier* SCC, *supra* note 1 at paras 3, 55; *Stewart*, *supra* note 5 at para 23.

33 See e.g. *Quebec (AG) v A*, 2013 SCC 5 at paras 432, 434, [2013] 1 SCR 61, McLachlin CJ [*QC v A*]; *Taypotat* SCC, *supra* note 2 at para 34.

34 *Simpsons-Sears*, *supra* note 32 at 558.

35 *Bombardier* SCC, *supra* note 1 at paras 35–37. See also *Moore*, *supra* note 6; *Peel Law Association v Pieters*, 2013 ONCA 396 at para 34, 116 OR (3d) 80 [*Pieters*].

36 See *Canadian Charter*, *supra* note 4.

37 *Taypotat* SCC, *supra* note 2 at para 35.

38 For a review of the legal burdens in Charter cases see *R v Oakes*, [1986] 1 SCR 10 at 136–37, 26 DLR (4th) 200; *Andrews v Law Society of British-Columbia*, [1989] 1 SCR 143 at 153, 176, 183–84, 56 DLR (4th) 1 [*Andrews*].

facie case of discrimination requires proof of discrimination on a balance of probabilities.[39] As Justices Wagner and Côté explain, "use of the expression '*prima facie* discrimination' must not be regarded as a relaxation of the plaintiff's obligation to satisfy the tribunal in accordance with the standard of proof on a balance of probabilities, which he or she must still meet."[40] The civil standard or requirement of proof on a balance of probabilities has also been affirmed in the context of cases involving section 15 of the *Canadian Charter*.[41]

Yet, while the basic framework for anti-discrimination claims is widely accepted, numerous evidentiary and legal complexities arise at each step of the analysis. Notwithstanding the Supreme Court's pronouncement on the meaning of "*prima facie*" in *Bombardier*, the expression has been the focus of considerable debate and uncertainty in different legal contexts, including discrimination cases.

The Latin *prima facie* translates into English as "at first appearance," or "on the face of things."[42] A *prima facie* case is defined in the *Oxford Dictionary of Law* as one "that has been supported by sufficient evidence for it to be taken as proved should there be no adequate evidence to the contrary."[43] While it is common to rely on Latin terms and phrases in law, their usage is waning due to the risk that they may create uncertainty or not be readily understood. Indeed, in the standard textbook *The Law of Evidence in Canada*, the terms "*prima facie* evidence" and "*prima facie* proof" are critiqued because of confusion regarding their precise legal implications.[44] In some contexts, *prima facie* proof or evidence results in a "permissible fact inference," while in other contexts it results in a "compelled fact determination."[45] In other words, preliminary or *prima facie* evidence may either *permit* or *require* a fact finder to reach certain legal conclusions.[46]

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39 *Bombardier* SCC, *supra* note 1 at paras 3, 20.

40 *Ibid* at para 65. See also *Bombardier* HRT, *supra* note 8 at paras 231–32; *National Capital Alliance on Race Relations v Canada (Department of Health & Welfare)* (1997), 28 CHRR 179 at 29, 1997 CanLII 1433; *Pellerin v Conseil scolaire de district catholique Centre-Sud*, 2011 HRTO 1777 at para 27, [2011] OHRTD No 1830; *Quebec (Commission des droits de la personne et des droits de la jeunesse) c Constructions Robert Godard Inc*, 2002 QCTDP 50 at para 23, 2002 CanLII 13766; *Shaw v Phipps*, 2012 ONCA 155 at para 12, 347 DLR (4th) 616 [*Phipps*]; *Public Service Alliance of Canada v Canada (Department of National Defence)*, [1996] 3 FCR 789 at paras 23, 33, 18 FTR 319 (FCA).

41 *Canadian Charter*, *supra* note 4. See e.g. *QC v A*, *supra* note 33 at paras 186, 236.

42 Jonathan Law & Elizabeth A Martin, *A Dictionary of Law*, 7th ed (Oxford: Oxford University Press, 2014) *sub verbo* "prima facie".

43 *Ibid* at *sub verbo* "prima facie case".

44 Alan W Bryant et al, *Sopinka, Lederman & Bryant—The Law of Evidence in Canada,* 4th ed (Markham: LexisNexis, 2014) at 103–07.

45 *Ibid*.

46 *Ibid*.

Because of the uncertainty associated with Latin terms such as "*prima facie*", reduced reliance on them is often recommended: "For clarity and conciseness, it is preferable, where possible, to explain the evidentiary effect consequent upon proof of certain facts rather than to indiscriminately use these mixed Latin-English idioms."[47]

In the discrimination context, and in light of the Supreme Court's pronouncement on the meaning of *prima facie* in *Bombardier*, its use may equally represent a source of uncertainty.

B) Elements of a *Prima Facie* Case of Discrimination

As outlined in *Bombardier*, to make out a *prima facie* case of discrimination based on the *Quebec Charter*, the plaintiff must prove three elements: that (1) a distinction, exclusion or preference has occurred, which (2) relates to one of the grounds listed in section 10 of the *Quebec Charter*. It must also (3) have "the effect of nullifying or impairing the right to full and equal recognition and exercise of a human right or freedom."[48]

Notably, unlike other statutory anti-discrimination provisions in Canada, section 10 of the *Quebec Charter* protects equality only in the exercise of another right or freedom.[49] Hence, in *Moore*,[50] a case involving the *British Columbia Human Rights Code*,[51] the Supreme Court of Canada indicated that the *prima facie* case of discrimination required proof (1) that

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47 *Ibid* at 107.

48 *Bombardier* SCC, *supra* note 1 at paras 3, 35. Section 10 of the *Quebec Charter*, *supra* note 3, provides:

> Every person has a right to full and equal recognition and exercise of his human rights and freedoms, without distinction, exclusion or preference based on race, colour, sex, gender identity or expression, pregnancy, sexual orientation, civil status, age except as provided by law, religion, political convictions, language, ethnic or national origin, social condition, a handicap or the use of any means to palliate a handicap.
>
> Discrimination exists where such a distinction, exclusion or preference has the effect of nullifying or impairing such right.

49 *Quebec Charter, supra* note 3, s 10. This is similar to the text of article 14 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 UNTS 221 art 15 (entered into force 3 September 1953) [emphasis added]:

> *Prohibition of discrimination*
>
> The enjoyment *of the rights and freedoms set forth in this Convention* shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

50 *Supra* note 6.

51 RSBC 1996, c 210.

the complainant has "a characteristic protected from discrimination under the Code," (2) that the complainant "experienced an adverse impact," and (3) "that the protected characteristic was a factor in the adverse impact."[52]

Notwithstanding this difference, both frameworks require evidence of some connection between the protected characteristic or ground of discrimination and the alleged adverse impact. The Supreme Court in *Bombardier* clarifies that complainants need not show that the adverse impact they experienced was exclusively *due* to the protected characteristic. Still, there must be some link between the adverse impact experienced by the individual complainant and the group-based protected characteristic.[53] In numerous discrimination cases, particularly where the defendant's motives are not explicitly articulated, this connection may be difficult to prove based on the information to which the complainant has access. Consequently, proving a connection—the relational element of the *prima facie* case of discrimination—often represents a significant hurdle for plaintiffs.[54] It was this part of the *prima facie* discrimination analysis that Latif and Taypotat failed to prove in their respective cases.

While *Taypotat* engages with the *Canadian Charter* rather than a human rights statute, interestingly, the Court also employs the language of the *prima facie* case of discrimination to describe the burden resting with the plaintiff.[55] Proving discrimination under section 15 of the *Canadian Charter* requires that the plaintiff demonstrate that (1) the law makes a distinction on the basis of one or several enumerated or analogous grounds, and that

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52 *Moore*, *supra* note 6 at para 33. The Supreme Court of Canada more recently engaged, in depth, with the third contribution element of the *prima facie* case of discrimination in *Stewart*, *supra* note 5.

53 *Bombardier* SCC, *supra* note 1 at paras 48, 52.

54 See e.g. Laverne Jacobs, "The Universality of the Human Condition: Theorizing Transportation Inequality Claims by Persons with Disabilities in Canada, 1976–2016", Can J Hum Rts [forthcoming in 2018].

55 *Taypotat* SCC, *supra* note 2 at paras 21, 34. The use of this expression in *Taypotat* is unusual, considering the language of the *prima facie* case of discrimination is used much less frequently in cases involving section 15 of the *Canadian Charter*, *supra* note 4, than in cases of statutory discrimination. It is not used in the Supreme Court's section 15 decisions in *Andrews*, *supra* note 38 (the only use of the expression is in a passage cited from a Federal Court decision). See also *Law v Canada*, [1999] 1 SCR 497, 170 DLR (4th) 1 [*Law*]; *R v Kapp*, 2008 SCC 41, [2008] 2 SCR 483 [*Kapp*]; *Withler v Canada (AG)*, 2011 SCC 12, [2011] 1 SCR 396 [*Withler*]; *QC v A*, *supra* note 33. The expression was nonetheless used in the following Supreme Court decisions, all involving section 15: *Eldridge v British Columbia (AG)*, [1997] 3 SCR 624 at paras 18, 20, 151 DLR (4th) 577; *Nova Scotia (AG) v Walsh*, 2002 SCC 83 at para 173, [2002] 4 SCR 325; *Canadian Foundation for Children, Youth and the Law v Canada (AG)*, 2004 SCC 4 at paras 73, 89, [2004] 1 SCR 76; *Adler v Ontario*, [1996] 3 SCR 609, at paras 59, 86, 140 DLR (4th) 385, L'Heureux-Dubé J.

(2) the distinction creates a disadvantage by reinforcing, perpetuating or exacerbating the prejudice, stereotypes or historical disadvantage experienced by those that share the trait identified as the enumerated or analogous ground.[56] In other words, the plaintiff must show that "the law at issue has a disproportionate effect on the claimant based on his or her membership in an enumerated or analogous group."[57]

It should be noted that considerable controversy surrounds the second step of the Charter analysis, that is, the demonstration of substantive discrimination through evidence of the reinforcement, perpetuation or exacerbation of prejudice, stereotypes or historical disadvantage experienced by those who share the trait identified as the enumerated or analogous ground.[58] Moreover, the injection of this element into the analysis mandated in the statutory context has been the subject of doctrinal and jurisprudential debate.[59] Nevertheless, in this article, we do not examine either the difficulties of proving this aspect of the second element of the section 15 analysis, or the propriety of incorporating it into the statutory framework. Our focus rests with the requirement, in both the statutory and constitutional contexts, of a connection between the adverse impact and protected characteristic and the evidentiary hurdles this requirement may represent.

4. Factual Inferences and *Prima Facie* Discrimination

As indicated previously, one of the most difficult obstacles for plaintiffs in establishing *prima facie* discrimination is proving a connection between individual exclusion or disadvantage and one or more group-based ground(s) of discrimination. Indeed, the essence of discrimination is mistreatment of an individual based on his or her affiliation with a particular group or groups.[60] Thus, Latif had to prove that Bombardier's refusal to allow him to participate in training was connected to his national or ethnic origin, and Taypotat had to show that the high school diploma requirement disadvantaged him in relation to his age, Aboriginal status or residency on

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56 *Kapp*, *supra* note 55 at para 17; *Withler*, *supra* note 55 at para 30; *QC v A*, *supra* note 33 at paras 171, 173–74, 177, 180, 186, 201–03, LeBel J; *Taypotat* SCC, *supra* note 2 at paras 19, 20. See also Bruce Ryder, "The Strange Double Life of Canadian Equality Rights" (2013) 63 SCLR (2d) 261 at 267–68, 287–89 [Ryder].

57 *Taypotat* SCC, *supra* note 2 at para 21.

58 See e.g. Ryder, *supra* note 56.

59 *Ibid*. The Supreme Court of Canada recently considered the issue in *Stewart*, *supra* note 5 at paras 45, 106.

60 *Canadian Charter*, *supra* note 4, s 15; *Quebec Charter*, *supra* note 3, s 10; *Andrews*, *supra* note 38 at 174–75; *McGill University Health Centre (Montreal General Hospital) v Syndicat des employés de l'Hôpital général de Montréal*, 2007 SCC 4 at para 49, [2007] 1 SCR 161.

a reserve. In both *Bombardier* and *Taypotat*, the Supreme Court of Canada concluded that the complainants failed to prove a connection between their individual circumstances and a ground of discrimination, on a balance of probabilities. It is this critical conclusion that we find most striking, particularly in light of the fact that, in both cases, the Court recognizes the need to "adopt an approach that takes the context into account."[61]

In contrast, there has been a willingness on the part of some Canadian courts and tribunals to be particularly attentive to the evidentiary hurdles faced by plaintiffs when assessing *prima facie* discrimination. While still using the civil standard, adjudicators and judges in discrimination cases have made creative use of factual inferences,[62] creating a tactical incentive for defendants to adduce evidence providing an explanation for the treatment or experience subject to complaint.[63] In such cases, based on preliminary evidence adduced by the plaintiff, the judge or adjudicator makes a factual inference to the effect that a *prima facie* case of discrimination has been proven on a balance of probabilities. If the defendant has not adduced evidence to counter this inference, then the adjudicator or judge may conclude that there is a *prima facie* case of discrimination.[64] In some cases, it is thus suggested that the "evidentiary burden" shifts once certain facts are proven.[65] Most scholars of evidence in Canada, however, appear to prefer to

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61 *Bombardier* SCC, *supra* note 1 at para 69; *Taypotat* SCC, *supra* note 2 at para 18.

62 Different terminology is used to refer to such inferences. Although we have adopted the term "factual inference" here for consistency and precision, the expression "inference of discrimination" is more frequently used in statutory discrimination cases (e.g. *Clennon v Toronto East General Hospital*, 2009 HRTO 1242 at para 68, 70 CHRR D/45 [*Clennon*]; *Phipps*, *supra* note 40, *Pieters*, *supra* note 35). In medical liability cases such as *Snell v Farell*, [1990] 2 SCR 311, 72 DLR (4th) 289 [*Snell*] and *Benhaim c St-Germain*, 2016 SCC 48, 402 DLR (4th) 579 [*St-Germain*], the term used is "adverse inference".

63 Although our focus here is the Canadian context, it is noteworthy that, in *Civil Rights Act Title VII* employment discrimination cases in the United States particularly involving circumstantial evidence, the plaintiff can make a *prima facie* case of discrimination by presenting non-direct evidence that, in the absence of an explanation on the part of the respondent, is sufficient to support the Court making the inference that discrimination occurred. In its 2015 decision in *Peggy Young v United Parcel Service Inc*, 135 S CT 1338 at 20, 191 L Ed 2d 279, a majority of the US Supreme Court confirmed that "an individual plaintiff may establish a prima facie case by 'showing actions taken by the employer from which one can infer, if such actions remain unexplained, that it is more likely than not that such actions were based on a discriminatory criterion illegal under' Title VII." Once the plaintiff has made a *prima facie* case, the "burden of production" shifts to the respondent to show their behaviour or decision was not in fact discriminatory. That said, the plaintiff still bears the legal burden of demonstrating the existence of discrimination.

64 Note that it is not necessary for them to conclude that there is *prima facie* discrimination—it is a permissible fact inference not a compelled one.

65 e.g. *Phipps*, *supra* note 40 at para 12; *Pieters*, *supra* note 35 at para 34.

speak simply of a shifting tactical burden to adduce evidence.[66] The plaintiff maintains the legal burden to prove *prima facie* discrimination. There is only a heightened risk of a factual inference being made, and *prima facie* discrimination being found, if no explanatory evidence is adduced by the defendant during the hearing.

For example, in a fairly early Canadian Human Rights Tribunal decision, *Gauvreau v National Bank*,[67] the complainant was found to have made his case of *prima facie* discrimination without adducing any direct evidence thereof. The complainant, Gauvreau, a lawyer who uses a wheelchair, was contacted by a head-hunter for the National Bank for a position as Director of Legal Affairs. In the course of the hiring process for this position, Gauvreau reached a fairly advanced stage where he was to have a face-to-face meeting with the Chair of the Bank's Board of Directors, and subsequently with the Bank's Chief Executive Officer. Gauvreau was under the impression that these meetings were merely "courtesy visits" as he had already been given his start date for the position. After those two meetings, however, he was denied the position.[68] Considering the manner in which his application was rejected and the fact that the reasons he was eventually given referred to criteria that had not been part of the job description circulated by the Bank,[69] Gauvreau argued that his denial was related to negative perceptions of his physical disability by the Chair of the Board and the CEO.[70] Although Gauvreau did not have any direct evidence to support his allegations of discrimination, the circumstances and context in which he was refused the position, in the absence of any alternate, non-discriminatory explanations provided by the respondents, were held to be sufficient to warrant a finding of *prima facie* discrimination. Having found a *prima facie* case of discrimination, the Tribunal further held that the respondent had not satisfied its legal burden to "justify its decision in having refused to hire" the complainant based on any statutory exemption.[71] The factual framework in *Gauvreau* exemplifies the unequal distribution of knowledge in the context of discrimination claims: only the respondent knew the true reasons for its about-face in refusing to hire Gauvreau.[72] The Canadian Human Rights Tribunal acknowledged this imbalance when making a factual inference of a *prima facie* case of discrimination, based on the very limited evidence adduced by the complainant, and the failure of the respondent to provide an alternative non-discriminatory explanation for its decision.

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66 e.g. *Snell*, *supra* note 62 at 329.

67 (1992), 17 CHRR 25, TD 1/92 (CHRT) [*Gauvreau*].

68 *Ibid* at 6–7.

69 *Ibid* at 20–21, 32.

70 *Ibid* at 2, 19.

71 *Ibid* at 21.

72 *Ibid* at 20–21, 32.

In *Clennon v Toronto East General Hospital*, a more recent human rights tribunal decision, the Ontario Human Rights Tribunal noted that there were few elements of proof evidencing the applicant's pretention that she had been dismissed in a discriminatory manner on the basis of her age.[73] In this context, however, the Tribunal only required from the applicant that she demonstrate that she was qualified for her previous position, that she was terminated, and "that a considerably younger employee who was no better qualified subsequently obtained the position,"[74] before turning its gaze towards the respondent hospital to provide some non-discriminatory explanation for dismissing the applicant.[75] Again, recognizing the informational disparities, the Tribunal was willing to infer *prima facie* discrimination in the absence of a non-discriminatory explanation of Clennon's dismissal, such as inadequate job performance. This created a tactical incentive for the hospital to provide additional information about the reasons for her dismissal. Further scrutiny of the hospital's explanations revealed that the applicant's age was a factor in its decision not to take *earlier* steps to address her performance issues, and thus, in her dismissal. In the absence of any exemption or justification, her claim was successful.[76]

The Court of Appeal for Ontario's decision in the case of *Shaw v Phipps* clarifies the relationship between factual inferences and the burden of proof resting with plaintiffs in discrimination cases, in particular with regards to drawing a connection between the adverse treatment and the complainant's protected characteristic.[77] This case concerned the treatment of a postal worker, Phipps, by a police officer, Shaw. While on patrol in a wealthy Toronto neighbourhood, with instructions to locate "white Eastern European men with a vehicle," Shaw noticed Phipps, a Black letter carrier, carrying out his duties. Shaw was of the view that Phipps was acting suspiciously and, believing his uniform might be a "ruse," stopped and questioned him. As in the cases described previously, there was no direct evidence available to Phipps to prove a connection between his race and the treatment he received from Shaw. Yet, on the basis of the fact that Phipps' appearance did not correspond to the Eastern European men Shaw was supposed to locate, that Shaw did not stop or investigate any other workers in the neighbourhood apart from Phipps, and that he questioned a *white*

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73 *Clennon*, *supra* note 62 at para 68.

74 *Ibid* at para 78.

75 *Ibid* at paras 75, 79.

76 *Ibid* at paras 104–06. See also *Radek v Henderson Development (Canada) Ltd*, 2005 BCHRT 302 at para 486, [2005] BCHRTD No 302 [*Radek*], where the British Columbia Human Rights Tribunal Adjudicator inferred that the disabled complainant's gait affected the manner in which she was approached by a mall's security personnel. Since the respondent mall had not adduced any evidence to the contrary, the Adjudicator concluded the complainant's disability had been a factor in the adverse treatment she received.

77 See *Phipps*, *supra* note 40.

letter carrier in the same neighbourhood about Phipps,[78] the Adjudicator at the Human Rights Tribunal of Ontario inferred that "his colour was probably 'a factor, a significant factor, and probably the predominant factor' in Constable Shaw's actions towards Mr. Phipps."[79]

The Court of Appeal for Ontario upheld the Tribunal's decision. In so doing, it confirmed that the use of factual inferences in the assessment of discrimination claims does not mean that the burden of proof shifts to the defendant before *prima facie* discrimination is proven.[80] Rather, the decision-maker may make an inference of discrimination based on limited evidence adduced by the plaintiff, in the absence of evidence from the defendant as to an alternate and non-discriminatory explanation for the behaviour or treatment subject to complaint. The plaintiff is still required to prove *prima facie* discrimination on a balance of probabilities, but the defendant is incentivised to adduce evidence of non-discriminatory conduct to avoid a factual inference of *prima face* discrimination being made.[81] As explained by the Ontario Human Rights Tribunal, "[the] ultimate issue is whether an inference of discrimination is more probable from the evidence than the actual explanations offered by the respondent."[82]

The decision in *Phipps* was endorsed, and the place of factual inferences in the *prima facie* discrimination analysis further clarified, by the Court of Appeal for Ontario in *Peel Law Association v Pieters*.[83] There, the application pertained to the experience of two lawyers and an articling student, all three of them Black, when they entered the Peel Law Association lawyer's lounge at the Brampton Courthouse. The premises being reserved for lawyers and law students, the librarian approached the applicants to ask them to produce proof that they were lawyers or law students. However, she had not and did not do so for others making use of the lounge. The difficulty there, as in many discrimination cases, lay in finding direct evidence that the librarian's behaviour was linked in some way to the applicants' race. Consequently, the Vice-Chair at the Ontario Human Rights Tribunal made an inference that the librarian's treatment of the applicants was linked to their race, and as such, was discriminatory, explaining that the Peel Law Association "failed to provide a credible and rational explanation for why the [librarian] … stopped to question the applicants when she did. The inference I draw from this, as well as all of the surrounding circumstances, is that this decision was,

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78 *Ibid* at para 23.

79 *Ibid* at para 5. See also *Phipps v Toronto Police Services Board*, 2009 HRTO 877 at para 16, 21, [2009] OHRTD No 868 [*Phipps* HRTO].

80 *Phipps*, *supra* note 40 at paras 28–29.

81 *Ibid*.

82 *Phipps* HRTO, *supra* note 79 at para 17, cited with approval by the Court of Appeal for Ontario in *Phipps*, *supra* note 40 at para 28.

83 *Pieters*, *supra* note 35.

in some measure, because of their race and colour."[84] The Court of Appeal for Ontario concluded that it had been reasonable for the Ontario Human Rights Tribunal's Vice-Chair to make such an inference.[85]

In her comparison of the Court of Appeal of Quebec decision in *Bombardier* and that of the Court of Appeal for Ontario in *Pieters*, Béatrice Vizkelety advocates for an interpretation of the *prima facie* case that resembles that which can be gleaned from *Pieters*.[86] She argues that the place of factual inferences in the discrimination context "is premised on the fact that it is often difficult for the applicant to show that the prohibited ground is a factor in the adverse treatment and, more importantly, [that] respondents are uniquely positioned to know why they [adopted] the behaviour that is complained of."[87] She qualifies the approach taken in *Pieters* as being reminiscent of approaches frequently used in medical malpractice cases, where "the applicant's initial burden will require 'little affirmative evidence' before the respondent is required to explain his or her actions."[88] In *Pieters*, the Court of Appeal for Ontario drew from the Supreme Court's judgment in the medical liability case of *Snell v Farrell*[89] to support the propriety of factual inferences being made at the *prima facie* stage of the discrimination analysis.[90] Indeed, in medical liability, just as in discrimination cases, the defendant tends to be the best person to explain what happened since they have more knowledge of and direct involvement in the process leading to the result.[91]

As Vizkelety explains, and as affirmed by the Court of Appeal for Ontario in *Pieters*, it is important not to confound standard of proof with a greater willingness to make factual inferences.[92] While *Snell* does not explicitly

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84 *Ibid* at para 85.

85 *Ibid,* at paras 128, 133.

86 Béatrice Vizkelety, "Revisiting the *Prima Facie* Case and Recognizing Stereotypes Based on Unconscious Bias in Racial and Ethnic Discrimination" (2013) 20 Charter & Hum Rts Litigation 45 at 49, 51 [Vizkelety].

87 *Ibid* at 49.

88 *Ibid*.

89 *Snell*, *supra* note 62.

90 *Pieters*, *supra* note 35 at para 71.

91 This seems obvious in the medical liability context, where the doctor tends to have more knowledge than the patient with regards to the consequences to be expected from any particular medical treatment. See e.g. *Snell*, *supra* note 62 at 322, 328–29. In the context of discrimination, see e.g. *Simpsons-Sears*, *supra* note 32 at 559; *Pieters*, *supra* note 35 at para 72; Ryder, *supra* note 56 at 277; *Stewart*, *supra* note 5 at para 107, Gascon J dissenting.

92 Vizkelety, *supra* note 86; *Pieters*, *supra* note 35 at para 73. This is also reflected in the Commission's factum to the Supreme Court in *Bombardier*: *Quebec (Commission des droits de la personne et des droits de la jeunesse) v Bombardier Inc (Bombardier Aerospace Training Center)*, 2015 SCC 39, [2015] 2 SCR 789 (Factum of the Appellant at paras 90–93).

say so,[93] in medical liability cases, the standard of proof to be met by the plaintiff is not actually lowered.[94] Applicants in these cases must still prove each of the required elements of civil liability on a balance of probabilities.[95] The statement that little affirmative evidence will be needed before the evidentiary burden shifts refers to how courts may be more willing to make factual inferences based on the limited evidence put forward by the plaintiff. If, following a certain medical treatment, a patient experiences an abnormal result, on the basis of "some affirmative evidence" adduced by the plaintiff, the Court can *infer* that the physician was negligent, or that this negligence caused the abnormal result.[96] This inference, when made, may lead the Court to conclude that the plaintiff has established fault or causation on a balance of probabilities. It creates a tactical burden of sorts for the defendant physician to show an absence of fault or causation by, for example, giving a credible alternative explanation for the adverse outcome.[97]

The importance of factual inferences within the discrimination analysis may lie in their role in helping to ensure the fulfilment of the broad remedial and human rights purposes of statutory and constitutional protections for equality and non-discrimination.[98] Indeed, in *Simpsons-Sears*, Justice McIntyre found the role of the Court in applying human rights and anti-discrimination statutes was to "seek out" their purpose and give them effect.[99] Evidentiary tools such as factual inferences may foster greater accountability on the part of private and public decision makers. The existence of a tactical burden for defendants to present evidence responds to the contextual realities of discrimination and the asymmetries of knowledge between complainants and defendants.

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93 *Snell*, *supra* note 62 at 329–30.

94 See *ibid* at 330; *St-Jean c Mercier*, 2002 SCC 15 at para 116, [2002] 1 SCR 491 [*St-Jean*].

95 *Snell*, *supra* note 62 at 330; *St-Jean*, *supra* note 94, at para 116; see also *Aubin c Moumdjian*, 2004 CanLII 11982 at para 17, REJB 2004-60842 (QC Sup Ct).

96 The Supreme Court of Canada recently pronounced itself on *permissible* adverse inferences of causation in the context of medical liability cases in *St-Germain*, *supra* note 62.

97 See e.g. *Snell*, *supra* note 62 at 329–30; *Hassen v Anvari*, 2003 CanLII 1005, [2003] OJ No 3543 (Ont CA); *Moumdjian c Aubin*, 2006 QCCA 1264, [2006] RRA 827.

98 These are the objectives compiled from a review of Supreme Court of Canada cases pertaining to discrimination. See e.g. *CN v Canada (Canadian Human Rights Commission)*, [1987] 1 SCR 1114 at 1134, 40 DLR (4th) 193; *Quebec (Commission des droits de la personne et des droits de la jeunesse) v Montréal (City)*, 2000 SCC 27, [2000] 1 SCR 665; *Quebec (Commission des droits de la personne et des droits de la jeunesse) v Boisbriand (City)*, 2000 SCC 27 at para 34, [2000] 1 SCR 665; *Kapp*, *supra* note 55 at para 25; *Withler*, *supra* note 55 at para 2; *Meiorin*, *supra* note 6 at para 44; *Canada (Human Rights Commission) v Canada (AG)*, 2012 FC 445 at para 9, 74 CHRR D/230. See also Ryder, *supra* note 56 at 264.

99 *Simpsons-Sears*, *supra* note 32 at 547.

The plaintiffs in *Bombardier* and *Taypotat* shared with those from such cases as *Gauvreau*, *Clennon*, *Phipps* and *Pieters* a difficulty in providing the Court with direct evidence, and sufficient circumstantial evidence, to prove their pretentions on a balance of probabilities without any factual inferences being made by the courts. In the latter cases, however, and unlike the approach taken by the Supreme Court in *Bombardier* and *Taypotat*, the evidentiary difficulties were recognized by the courts and tribunals as characteristic of discrimination cases. Thus, they found value in making use of factual inferences in assessing whether the complainant had met their burden, thereby ensuring the existence of an incentive for defendants to explain their action(s) that were the subject of the complaints. This approach served the purpose of enhancing the potential for discrimination to be successfully challenged.

5. Evidence about Social Context: Connecting Individual Exclusion to Group-based Inequalities

Beyond the question of the place of factual inferences in establishing *prima facie* discrimination, *Bombardier* and *Taypotat* raise important questions about the impact of broader evidence of societal discrimination in specific cases. In both cases, the Supreme Court of Canada requires evidence linked directly to the specific institutional actor or community. In *Bombardier*, the Court insists that "[e]vidence of discrimination, even if it is circumstantial, must nonetheless be tangibly related to the impugned decision or conduct."[100] Thus, it rejects the inference that the refusal of US authorities to give Latif security clearance was discriminatory on the basis of a social context of discrimination against Arabs and Muslims. The Court insists that a sufficient and specific connection between the ground and the adverse treatment be shown to substantiate the discrimination claim. Similarly, in *Taypotat*, as noted above, the Court concludes that "there is virtually no evidence about the relationship between age, residency on a reserve, and education levels in the Kahkewistahaw First Nation."[101] Census data and research studies showing educational inequity in Canadian Aboriginal communities generally did not suffice to prove a link between educational requirements, age and Aboriginality with respect to the Kahkewistahaw First Nation. These two cases, therefore, raise questions about the relevance of evidence regarding social context in individual cases.

Both cases also involved broader systemic issues of inequality. In *Bombardier*, the post-9/11 treatment of immigrants from Arab and/or predominantly Muslim countries and racial profiling were of critical importance. *Taypotat* directly implicated the historical inequities in

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100 *Bombardier* SCC, *supra* note 1 at para 88.

101 *Taypotat* SCC, *supra* note 2 at para 24.

educational opportunities experienced by First Nations individuals, particularly the widely acknowledged wrongs associated with the residential school era.[102] Indeed, evidence of social context often details the broader structural, systemic and historical dimensions of discrimination.

A) Racial Profiling: Conscious and Unconscious Bias

In *Bombardier*, the Court was faced with allegations of discrimination linked to racial profiling. Latif maintained that he was subjected to differential treatment based on his national and ethnic origin—that in effect, he was a victim of racial profiling. As Michèle Turenne explains:

> Racial profiling designates any action taken by one or more persons in authority in regard to a person or group of persons, for safety, security or public protection reasons, that is based on *actual or presumed factors of kinship*, such as race, colour, ethnic or national origin, or religion, *with no real ground or reasonable suspicion*, and that has the effect of exposing the person to different examination or treatment.
>
> Racial profiling also includes any action of people in authority *who apply a measure disproportionately to segments of the population,* especially because of their race, ethnic or national origin, or religion, whether real or presumed.[103]

Embedded in the *Bombardier* case were two potential sources of racial profiling. There was, first, the alleged racial profiling by US government authorities in their national security clearance processes post 9/11. Second, there was the alleged racial profiling by Bombardier and specifically its employee Steven Gignac in his decision to refuse access to Canadian training programs to Latif without making additional inquiries about whether

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[102] Canada, Truth and Reconciliation Commission of Canada, *Final Report of the Truth and Reconciliation Commission* (Ottawa: Lorimer and Co Publishers, 2015) [*TRC Report*].

[103] Michèle Turenne, "Le profilage racial: une atteinte au droit à égalité—Mise en contexte, fondements, perspectives pour un recours" in Service de la formation continue, Barreau du Québec, *Développements récents en profilage racial* (Cowansville: Yvon Blais, 2009) 37 at 50, cited with approval by the Tribunal in *Bombardier*. See *Bombardier* HRT, *supra* note 8 at para 282 [translated by authors, emphasis added by the HRT]. In his in-depth study of racial profiling in policing in Canada, David Tanovich defines racial profiling as occurring "when law enforcement or security officials, consciously or unconsciously, subject individuals at any location to heightened scrutiny based solely or in part on race, ethnicity, Aboriginality, place of origin, ancestry, or religion or on stereotypes associated with any of these factors rather than on objectively reasonable grounds to suspect that the individual is implicated in criminal activity. Racial profiling operates as a system of surveillance and control." See David Tanovich, *The Colour of Justice: Policing Race in Canada* (Toronto: Irwin Law, 2006) at 13 [Tanovich].

his training would put public security at risk.[104] Latif and the Quebec Commission des droits de la personne et des droits de la jeunesse alleged that the security clearance requirements directly targeted or mainly affected Arabs and Muslims. They relied on social context expert evidence from Professor Reem Bahdi, who had done extensive research on racial profiling in US government agencies against persons of Arab origin, Muslims and those from Muslim-majority countries.[105] The claim was also based on the evidence and testimony about the precise incident and events surrounding Bombardier's refusal to train Latif.[106]

The Quebec Human Rights Tribunal concluded, on the basis of "the whole of the testimony heard and from Professor Bahdi's expert evidence,"[107] that the refusal to train Latif constituted *prima facie* discrimination based on national or ethnic origin. The Tribunal was particularly concerned about Bombardier employee Gignac's labelling of Latif as a "potential terrorist," his failure to seek additional counsel from Canadian authorities on public security, and his refusal to seek additional information from US authorities. The Tribunal also took into account the expert evidence on the pervasiveness of racial profiling in the US to understand the context within which Bombardier and the US authorities made their respective decisions.[108] In short, the Quebec Human Rights Tribunal was willing to infer a *prima facie* case of discrimination based on broad expert evidence of racial profiling of Arabs and Muslims post 9/11, as well as the racial stereotyping that could be inferred from Gignac's actions, words and decisions. Notably, in addition to compensatory and moral damages, and on the basis of its appraisal of Gignac's profiling and discriminatory treatment of Latif, the Tribunal ordered Bombardier to pay punitive damages, reserved only for the intentional and unlawful infringement of *Quebec Charter* rights.[109]

In contrast to the Quebec Human Rights Tribunal ruling, both the Court of Appeal of Quebec and the Supreme Court of Canada rejected the discrimination claim against Bombardier. Both courts focused on the question of racial profiling by the US government authorities.[110] They both found that one cannot infer, from evidence attesting to the existence

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104 This second potential source of racial profiling was not addressed by either the Court of Appeal of Quebec or the Supreme Court of Canada. As discussed below, Gignac had discretion regarding whether or not to rely on the US security clearance program or not, given the absence of any similar Canadian security requirements.

105 See e.g. *Bombardier* HRT, *supra* note 8.

106 See e.g. *Bombardier* SCC, *supra* note 1 at paras 78, 90–97.

107 *Bombardier* HRT, *supra* note 8 at para 314 [translation by authors].

108 *Ibid* at paras 298–99, 309.

109 *Ibid* at paras 426, 439, 442; *Quebec Charter, supra* note 3, art 49.

110 *Bombardier* Que CA, *supra* note 12 at paras 98, 100, 103, 127, 142; *Bombardier* SCC, *supra* note 1 at para 4.

of widespread stereotypes against Arabs and Muslims in US society and government agencies generally, that the US authorities' specific decision refusing the security clearance to Latif was based on such stereotypes. As noted by the Supreme Court of Canada:

> [I]t cannot be presumed solely on the basis of a social context of discrimination against a group that a specific decision against a member of that group is necessarily based on a prohibited ground under the [Quebec] Charter. In practice, this would amount to reversing the burden of proof in discrimination matters.[111]

It is on this basis that Professor Bahdi's report was held insufficient to allow the courts to conclude that Latif was the subject of a discriminatory decision by US authorities. The Supreme Court then went on to find that all of the other evidence presented regarding this decision was "not sufficient to support an inference of a connection between Mr. Latif's ethnic or national origin and his exclusion"[112] and that the Quebec Human Rights Tribunal decision was therefore "clearly unreasonable."[113] Despite an articulated commitment to deference to the trier of fact and specifically the Quebec Human Rights Tribunal, the Supreme Court of Canada concluded that the Tribunal's decision was unreasonable.[114]

In ways that parallel the creative reliance on factual inferences discussed above, human rights tribunals and some courts have drawn on sociological evidence of conscious and unconscious racial bias to assist them in assessing claims of discrimination.[115] In the *Pieters* case discussed above, for example, Justice Jurianz of the Court of Appeal for Ontario highlighted the ways in which courts have recognized racism and bias as a "sociological fact."[116] In this regard, he cited *R v Parks*, where the Court of Appeal for

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111 *Bombardier* HRT, *supra* note 8 at para 88. As noted above, rather than reversing the burden of proof as suggested by the Supreme Court of Canada, a greater willingness to rely on evidence regarding the broader social context could simply create a tactical burden on defendants to adduce evidence of non-discrimination.

112 *Bombardier* SCC, *supra* note 1 at para 81.

113 *Ibid*.

114 *Ibid* at paras 73, 81. See also Paul Daly, "Discrimination, Deference and Pluralism: *Québec* (Commission des droits de la personne et des droits de la jeunesse) *v Bombardier Inc* (Bombardier Aerospace Training Center), 2015 SCC 39" (24 July 2015), *Administrative Law Matters* (blog), online: <www.administrativelawmatters.com/blog/2015/07/24/discrimination-deference-and-pluralism-quebec-commission-des-droits-de-la-personne-et-des-droits-de-la-jeunesse-v-bombardier-inc-bombardier-aerospace-training-center-2015-scc-39/>.

115 See e.g. *Pieters*, *supra* note 35; *Radek*, *supra* note 76; *Nassiah v Peel (Regional Municipality) Services Board*, 2007 HRTO 14, 61 CHRR D/88 [*Nassiah*]. This is precisely what the Human Rights Tribunal did in *Bombardier HRT*, *supra* note 8. This juridical development is also apparent in US anti-discrimination cases: see *supra* note 63.

116 *Pieters*, *supra* note 35 at para 112.

Ontario addressed issues relating to racism and jury selection: "Racism, and in particular anti-black racism, is a part of our community's psyche. A significant segment of our community holds overtly racist views. A much larger segment subconsciously operates on the basis of negative racial stereotypes."[117] Indeed, this same passage was cited with approval by the Supreme Court of Canada in *R v S(RD)*,[118] a key case on judicial bias and systemic racism.

Moreover, in an important case from British Columbia, *Radek v Henderson Development (Canada) Ltd*,[119] Gladys Radek successfully alleged racial and social profiling by a shopping mall against Indigenous persons and persons with disabilities. Radek maintained that she had been subjected to individual discrimination on the basis of the intersecting grounds of race, colour, ancestry and disability when she was asked to leave the mall by three security guards while trying to go for coffee with a friend.[120] She also maintained that the mall policies and their application created a more general pattern of systemic discrimination against Indigenous persons and persons with disabilities. In her comprehensive decision, Tribunal adjudicator Lyster reviews the evidentiary challenges of proving discrimination and enumerates five key principles, subsequently endorsed in numerous cases, including the Court of Appeal for Ontario in *Phipps* and *Pieters*:

> 1. The prohibited ground or grounds of discrimination need not be the sole or the major factor leading to the discriminatory conduct; it is sufficient if they are a factor;
>
> 2. There is no need to establish an intention or motivation to discriminate; the focus of the enquiry is on the effect of the respondent's actions on the complainant;
>
> 3. The prohibited ground or grounds need not be the cause of the respondent's discriminatory conduct; it is sufficient if they are a factor or operative element;
>
> 4. There need be no direct evidence of discrimination; discrimination will more often be proven by circumstantial evidence and inference; and

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117 *Ibid* at para 113, citing *R v Parks*, 15 OR (3d) 324 at para 54, 84 CCC (3d) 353 (Doherty JA) (Ont CA). See also *Phipps*, *supra* note 40 at para 34.

118 [1997] 3 SCR 484 at para 46, 151 DLR (4th) 193 [*R v S(RD)*]. See also *R v Williams*, [1998] 1 SCR 1128, 159 DLR (4th) 493, a criminal law case where the accused, Mr. Williams, sought the Court's permission to ask potential jury members a list of precise questions to determine whether they might be biased against him because he was Black. In order to grant Mr. Williams' application, the Court had to find that this racial bias was in fact widespread in Canadian society. The Court took judicial notice of that fact, but its doing so should not be removed from its context, that is, criminal law, and preoccupations for the fairness of the accused's trial.

119 *Radek*, *supra* note 76.

120 *Ibid* at para 465; note the acceptance of intersectionality by Adjudicator Lyster.

> 5. Racial stereotyping will usually be the result of subtle unconscious beliefs, biases and prejudices.[121]

It is interesting to note that these principles endorse the possibility of finding discrimination even in the absence of an intent to discriminate—indeed, the differential treatment at the heart of racial profiling may emerge from unconscious biases and stereotyping.[122] Thus, after assessing the divergent accounts of what happened on the day in question, Lyster concludes that:

> "[A]ll three security guards were operating on the basis of subtle stereotyping. I need not determine if that stereotyping was conscious or unconscious; it is its effects that are of concern. Under the influence of that stereotyping, Ms. Radek's and Ms. Wolfe's [Radek's friend] race, ancestry, colour and disabilities rendered them suspicious."[123]

In another shopping mall case, *Nassiah v Peel (Regional Municipality) Police Board*, an immigrant woman of colour was unduly detained on suspicion of shoplifting.[124] The complaint concerned Nassiah's treatment by the police officer called in to assist in the shoplifting investigation. The Ontario Human Rights Tribunal adjudicator made use of expert evidence attesting to the occurrence of racial profiling in policing in the Toronto Region to conclude that the complainant's skin colour was a factor in the heightened investigation to which she was subjected by a Peel Police Board officer.[125] While indicating and clearly cognizant of the fact that the Toronto Region and the Peel Region are geographically distinct, the adjudicator considered the social science evidence applicable as "[t]he multi-ethnic character of Peel is sufficiently similar to Toronto that … studies in the Toronto area can be reliably applied to the Peel region."[126] Hence, in *Nassiah*, the evidence is found "useful in identifying factors or clues that point toward racial profiling/discrimination that might otherwise appear neutral if taken in isolation and without an awareness of the phenomenon of racial profiling."[127]

In tune with these types of decisions, Vizkelety explains:

> [S]ocietal discrimination cannot be a substitute for evidence of a discriminatory treatment in a particular case. However, … stereotypes (express or implicit) are most

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121 *Ibid* at para 482.

122 For a discussion of unconscious bias, see Colleen Sheppard, "Institutional Inequality and the Dynamics of Courage" (2013) 31:2 Windsor YB Access Just 103 at 107–10; Tanovich, *supra* note 103 at 13–15, 21–24.

123 *Radek*, *supra* note 76 at para 485.

124 *Nassiah*, *supra* note 115. The adjudicator in this case was the same as in the HRTO decision in *Phipps*, *supra* note 40.

125 *Nassiah*, *supra* note 115 at paras 108–37.

126 *Ibid* at para 130.

127 *Ibid* at para 131.

> likely shaped and sustained by societal biases. Thus, where a tribunal can identify the existence of widespread stereotypes against a particular racial or ethnic group in society, then societal discrimination cannot be said to be completely irrelevant to the task of assessing and understanding the respondent's attitude or behaviour towards the complainant.[128]

In short, there are compelling examples of broader evidence of social context, including systemic realities of racism, stereotyping and unconscious bias, being relied upon to assist judges and adjudicators in understanding the likelihood of discrimination. While it is always important not to base one's conclusions exclusively on group-based generalizations—a phenomenon that ironically is often at the root of discrimination itself—when used carefully, an understanding of societal inequalities and patterns of exclusion allows adjudicators to make certain inferences of discrimination.[129] And of course, any factual inferences may still be refuted by defendants, who in most instances have greater knowledge of the underlying bases of their decisions to exclude or deny equal treatment.

Applying these insights to the *Bombardier* case reinforces the reasonableness of the Quebec Human Rights Tribunal's decision. The expert evidence provides important insights about widespread biases and stereotypes about Muslims and threats to national security post 9/11. When situated within the broader social context, the labelling of Latif as a "potential terrorist" and the decision by Bombardier to exclude Latif without any follow up with Canadian authorities makes an inference of *prima fac*ie discrimination plausible and arguably reasonable. As the Tribunal noted, Bombardier employee Gignac:

> [N]ever tried to know whether Mr. Latif objectively constituted a risk to the security … of Canadians or aviation. He had no idea of the objective reasons that Mr. Latif was considered a threat to the national security of the United States. What is more, he never showed any interest in finding out those reasons … [and he] never felt it worthwhile to seek advice from either Transport Canada or the Canadian Security Intelligence Service.[130]

These important considerations were not assessed by either the Supreme Court of Canada or the Court of Appeal of Quebec, since both courts considered them relevant only once a *prima facie* case of discrimination is established rather than as integral to it.[131] We agree that the authorities'

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128 Vizkelety, *supra* note 86 at 52–53.

129 See Colleen Sheppard, Book Review of *Le contexte social du droit dans le Québec contemporain: L'intelligence culturelle dans la pratique des juristes* by Jean-François Gaudreault-Desbiens & Diane Labrèche (2013) 28:1 CJLS 101 at 103–04.

130 *Bombardier* HRT, supra note 8 at paras 335–36.

131 *Bombardier* SCC, *supra* note 1 at para 97.

reasons for denying security clearance to Mr. Latif would indeed have been pertinent at the justification stage of the discrimination analysis. Yet Gignac's failure to take any steps to ascertain the reasons for the denial of clearance in the United States or to inquire with Canadian authorities as to their position also informs the analysis regarding *prima facie* discrimination. It is not the reasons in themselves that are pertinent at the *prima facie* stage in *Bombardier*, but rather the fact that Gignac's decision to deny services to Latif was taken without any attempt to ascertain if there were indeed valid security concerns.

B) Adverse Effects Discrimination and Societal Inequalities

In *Taypotat*, adverse effects discrimination was the basis of the claim—most specifically that the apparently neutral high school diploma requirement could be understood to have an adverse impact on older Aboriginal members of the Kahkewistahaw First Nation residing on its reserve. In this case, therefore, the applicant relied upon social science evidence to connect age, Aboriginal reserve residency and educational achievement. Yet the Supreme Court of Canada in *Taypotat* was unwilling to infer the existence of discrimination on the basis of broad social science evidence.[132] The discrimination claim had been upheld by the Federal Court of Appeal on the basis of general statistical evidence and 2006 census data substantiating the existence of educational disadvantage facing older Aboriginal persons living on reserves in Canada.[133] No specific evidence was provided regarding high school graduation rates within the Kahkewistahaw First Nation. Nevertheless, the record in the case made clear that Taypotat was 76 years old and had attended a residential school in his youth.[134] Departing from the Federal Court of Appeal, the Supreme Court of Canada concluded that the statistical and census evidence did not suffice to prove that a high school diploma requirement constituted a source of adverse effect discrimination on the basis of age, race (Aboriginal status) or reserve residency status.[135]

It is noteworthy that Justice Abella draws on the path-breaking race discrimination case, *Griggs et al v Duke Power Co* in assessing Taypotat's claims.[136] In the *Griggs* case, the US Supreme Court recognized "disparate impact" discrimination for the first time in a case involving Title VII of the

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132 See *Taypotat* SCC, *supra* note 2 at paras 23–24, 27, 30–32, 34.

133 *Ibid* at paras 30, 32, citing Richards, *supra* note 28 at 5–6. Part of the problem with the census data may have been that it was admitted through judicial notice at the Federal Court of Appeal.

134 *Taypotat* SCC, *supra* note 2 at para 4; *Taypotat* FC, *supra* note 23 at para 4; *Taypotat* FCA, *supra* note 23 at para 13.

135 *Taypotat* SCC, *supra* note 2 at paras 31–32.

136 (1971), 401 US 424, 91 S Ct 849 [*Griggs*]; *Taypotat* SCC, *supra* note 2 at para 23.

Civil Rights Act.[137] The US Supreme Court found that standardized testing and a high school diploma requirement for hiring and promotion had a disparate impact on Black candidates and employees. The US Supreme Court's decision focused on whether there could be a finding of discrimination in the absence of an overt intent to discriminate. It concluded that discrimination could flow from facially neutral requirements, noting that "good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability."[138]

Given that high school educational requirements were at issue in both *Griggs* and *Taypotat*, it is interesting to review the evidentiary basis upon which the US Supreme Court concluded that the high school requirement was discriminatory. The preliminary finding of racial disparity linked to the high school requirement was not highly contested in *Griggs*, despite the general nature of the evidence adduced. Indeed, the US Supreme Court sets out the key evidence of racial bias in relation to high school education requirements and standardized tests in just one short footnote, stating: "In North Carolina, 1960 census statistics show that, while 34% of white males had completed high school, only 12% of Negro males had done so. *U.S. Bureau of the Census, U.S. Census of Population: 1960, Vol. 1, Characteristics of the Population, pt. 35, Table 47*."[139]

Similarly, with respect to standardized tests challenged in *Griggs*, there was general data indicating that "58% of whites pass[ed] … the test, as compared with only 6% of … blacks."[140]

It is striking that this data is state-wide census data; none of the data was based on any studies of Duke Power Company itself.[141] Indeed, in an important article, Alfred Blumrosen explains how, in *Griggs*, the US Supreme Court did not require specific evidence of exclusion of African-Americans at the Duke Power plant, noting that "[s]uch proof may not have existed at all, or if it did exist, may have involved such small numbers of persons as to be insignificant."[142] Instead, the Court relied on broader statistical data to support the claim that the high school diploma and standardized test requirements used at the plant disadvantaged Black candidates.[143] The Court accepted that if North Carolina-wide data, and even evidence from

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137 *Civil Rights Act*, 42 USC Title VII §2000e–2000e-15 (1970).

138 *Griggs*, *supra* note 136 at 432.

139 *Ibid*, n 6.

140 *Ibid* at 431.

141 *Ibid*; see also Alfred Blumrosen, "Strangers in Paradise: Griggs v. Duke Power Co. and the Concept of Employment Discrimination" (1972) 71:1 Mich L Rev 59 [Blumrosen].

142 *Ibid* at 92.

143 *Ibid* at 91–92.

Louisiana, a different state altogether, tended to show that a high school diploma requirement or standardized testing operated as "headwinds" in the face of Black applicants, who were thus disproportionately unsuccessful in accessing the positions they sought, then it was probable that the same phenomenon was occurring at Duke Power Company.[144] Blumrosen praised the US Supreme Court for adopting an effects-based approach that would ensure the implementation and advancement of the broad purposes of the anti-discrimination protections.[145]

This review of the evidence in *Griggs* is important because of Justice Abella's references to it in *Taypotat* and because of its stature as the leading case recognizing adverse effects or disparate impact discrimination in the US.[146] Significantly, it reveals that the general nature of the evidence regarding disparate impact in *Griggs* aligns with *Taypotat*, where national and provincial census data and general research studies provide the backdrop for the claim of discrimination.[147] In *Taypotat,* however, Justice Abella maintains that there is a lack of *specific* evidence that older members of the Kahkewistahaw First Nation were less likely to have a high school education. She thus concludes that the high school requirement was not a facially neutral source of discrimination. Despite her apparent support for *Griggs*, she rejects the use of broad statistical evidence to satisfy Taypotat's burden to prove *prima facie* discrimination. In commenting on the inadequacy of the broad social science evidence, she writes:

> [T]he data relates to all Aboriginal people in Canada, including the Métis, the Inuit, and First Nations. It is less helpful in shedding light on the relationship between age and education in the specific context of the members of the Kahkewistahaw First Nation. It captures a vastly larger, more diverse population than the community affected by the Code in this case and does not meaningfully illuminate whether and

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144 *Ibid* at 91. Similarly, in the Canadian case of *Janzen v Platy Enterprises Ltd*, [1989] 1 SCR 1252 at 1284–85, 59 DLR (4th) 352, the Supreme Court refers to social science literature reporting on a Canada-wide survey regarding sexual harassment in its discussion of whether sexual harassment represented sex-based discrimination. The sexual harassment at issue in that case was specific to a given workplace, but the Court did not voice any concerns over finding sex had been a factor in the disparate treatment experienced by the complainants on the basis of such country-wide evidence.

145 Blumrosen, *supra* note 141 at 91. Interestingly, at 93, Blumrosen foresees the possibility that in cases that do not involve situations of gross disparity, courts may be stricter in their use of statistical evidence in discrimination cases. In the Canadian context, most would view inequities in Aboriginal education as gross disparities.

146 *Ibid* at 62.

147 In reviewing the lower court opinions in *Griggs*, the evidentiary basis is basically the same. The data relied on by the USSC was summarized in footnote 5 of Judge Sobeloff's reasons at the US Court of Appeals Fourth Circuit (concurring in part and dissenting in part). See *Griggs v Duke Power Co*, 420 F2d 1225, 2 Fair EmplPracCas (BNA) 310.

> to what extent the Grade 12 education requirement functions to disadvantage older community members of the Kahkewistahaw First Nation.[148]

While in some contexts, it may be hard to make a connection between more general evidence and the likelihood of actual inequality in a specific community, it would seem quite plausible, in the context of Aboriginal education, to expect that the general provincial and national patterns would also characterize the Kahkewistahaw First Nation community.[149] It is particularly striking that the Court had difficulty connecting a high school completion requirement to the grounds of age and Aboriginality-residence at a time when the Truth and Reconciliation Commission was documenting and publicizing the historical denials of educational equality during the residential schools era.[150] At a minimum, a preliminary factual inference of discriminatory impact would seem to be very reasonable on the basis of the data before the Court.[151] It could then have been relied upon to shift the evidentiary burden to the Kahkewistahaw First Nation to adduce evidence of non-discrimination. Moreover, despite Justice Abella's suggestion to the contrary, there was direct evidence of the effect of these provisions on at least one older community member, Mr. Taypotat himself, a 76-year-old residential school survivor and an individual who had already served as Chief for over 27 years.[152]

Justice Abella was justifiably concerned that the evidentiary record was not strong in this case. It is difficult for appellate courts to adjudicate cases where the factual record appears incomplete. Indeed, this case had an unusual number of twists and turns in the framing of the discrimination arguments before the trial and appellate courts. The judicial review application raised several issues, including whether there had been "broad consensus" within the Kahkewistahaw First Nation for the *Elections Act* to be validly enacted and whether Taypotat had received fair treatment by the Elections Officer.[153] Discrimination was pleaded, but was not the primary focus of Taypotat's arguments. While it is unfortunate that the

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148 *Taypotat* SCC, *supra* note 2 at para 33.

149 As was done by the adjudicator in *Nassiah*, *supra* note 115 at para 130, in finding that the ethnic diversity within the Ontario cities of Toronto and Peel are similar enough to infer that patterns of racial profiling shown to exist in policing in the Toronto region can be expected to also occur in the Peel region.

150 See *TRC Report*, *supra* note 102.

151 The general evidence available indicated a situation of stark inequality in educational attainment for older Aboriginal persons, similar to the stark racial inequality in *Griggs*, *supra* note 136 at 431. It is unlikely that specific communities would diverge from the broader trends.

152 *Taypotat* SCC, *supra* note 2 at para 4.

153 *Taypotat* FC, *supra* note 23 at paras 24–44; *Taypotat* FCA, *supra* note 23 at paras 21–24.

Supreme Court of Canada was faced with meandering legal arguments and a slim evidentiary basis for the various equality claims, it was nevertheless a case that raised important questions about social science evidence and discrimination. Most specifically, it would seem to be precisely the kind of case where it is appropriate to rely on broad social science evidence as the basis for inferring *prima facie* discrimination.

As noted by Adjudicator Lyster in the shopping mall racial and disability profiling case *Radek*, plaintiffs may face difficulties in accessing specific statistical evidence of discrimination:

> If the remedial purposes of the *Code* are to be fulfilled, evidentiary requirements must be sensitive to the nature of the evidence likely to be available. In particular, evidentiary requirements must not be made so onerous that proving systemic discrimination is rendered effectively impossible for complainants. In my view, to accept … the necessity of statistical evidence, would, in the context of a complaint of the type before me, render proof of systemic discrimination impossible.[154]

Lyster's conclusions on this matter were informed by a concern articulated by the Supreme Court of Canada in *Law*, where Justice Iacobucci wrote:

> First, I should underline that none of the foregoing discussion implies that the claimant must adduce data, or other social science evidence not generally available, in order to show a violation of the claimant's dignity or freedom. Such materials may be adduced by the parties, and may be of great assistance to a court in determining whether a claimant has demonstrated that the legislation in question is discriminatory. However, they are not required. A court may often, where appropriate, determine on the basis of judicial notice and logical reasoning alone whether the impugned legislation infringes s. 15(1).
>
> Second, it is equally important to emphasize that the requirement that a claimant establish a section 15(1) infringement in this purposive sense does not entail a requirement that the claimant prove any matters that cannot reasonably be expected to be within his or her knowledge.[155]

In *Radek*, the Tribunal also added a concern that is directly pertinent to *Taypotat*:

> Statistical evidence of disproportionate effect will be solely within a respondent's knowledge and control. A complainant could not possibly be expected to be able to produce such statistics unless the respondent collected and maintained the necessary data in the first place. To create an absolute requirement of statistical evidence in all

154 *Radek*, *supra* note 76 at para 509.

155 *Ibid* at para 510, citing *Law*, *supra* note 55 at paras 77–80.

> cases of alleged systemic discrimination would be to put complainants at the mercy of the record-keeping choices of respondents.[156]

Thus, the Tribunal adopted an evidentiary approach more generous to the complainant, recognising the difficulties she might have in providing proof based on information that would not reasonably be accessible to her.[157] It would seem that similar concerns might have generated a different outcome in *Taypotat*.

In reviewing the Supreme Court of Canada's decision in *Taypotat*, moreover, we were struck by Justice Abella's "intuitive" feeling that the high school education requirement was problematic and could have an adverse effect on older Aboriginal reserve residents. As she notes, "I think intuition may well lead us to the conclusion that the provision has some disparate impact."[158] While intuition is not generally recognized as a basis for legal conclusions, Justice Abella's concern resonates with the idea that reason and emotion are interconnected—a theme examined in Jennifer Nedelsky's important article on "Embodied Diversity and the Challenges to Law."[159] Nedelsky draws on the work of neurologist Antonio Damasio on "somatic markers", which she explains are "the gut feelings that are the starting points of decision-making" and "the product of experience, education and culture."[160] For Nedelsky, rather than discounting emotion from legal reasoning, we need to be attentive to it. As she puts it, "since judgment cannot be simply disconnected from affect, we would need ways of evaluating and changing affect that would not simply rely on disembodied reason."[161] Thus, Justice Abella's intuitive sense that there may be some risk of inequity linked to the educational requirement appears to be a somatic marker; while acknowledging it, in this case she does not evaluate it further. Had she done so, she might have been more willing to consider whether there was in fact sufficient social science evidence, particularly in light of all we know about the historical educational disadvantages linked to residential schools and Indigenous peoples in Canada, to draw a factual inference of discrimination in *Taypotat*.

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156 *Radek*, *supra* note 76 at para 511.

157 *Ibid* at paras 509–11.

158 *Taypotat* SCC, *supra* note 2 at para 34. She then goes on, however, to emphasize in the same paragraph that "While the evidentiary burden need not be onerous, the evidence must amount to more than a web of instinct."

159 Jennifer Nedelsky, "Embodied Diversity and the Challenges to Law" (1997) 42:1 McGill LJ 91. Cited with approval in *R v S(RD)*, *supra* note 118 at para 42.

160 Nedelsky, *supra* note 159 at 106, citing AR Damasio, *Descartes' Error: Emotion, Reason, and the Human Brain* (New York: Putnam, 1994). Nedelsky also describes somatic markers at 102 as "emotional responses that (for the most part) we have learned, through experience, to associate with certain images."

161 Nedelsky, *supra* note 159 at 116.

6. Conclusion

The cases of *Bombardier* and *Taypotat* raise concerns about the obstacles facing litigants in crossing the *prima facie* discrimination threshold. While the Supreme Court has affirmed a two-step approach to discrimination claims in both the statutory and constitutional context, there remain significant questions about the evidentiary requirements of proving *prima facie* discrimination. One of the key difficulties at this stage is proving a connection between the ground(s) of discrimination and the harm or adverse impact experienced. In many anti-discrimination cases, ascertaining this connection with sufficient certainty is a challenge. In racial profiling cases, there may only be circumstantial evidence that an individual's group-based identity prompted the discriminatory exclusion or mistreatment. In adverse effects discrimination cases, linking an apparently neutral rule or criterion to a ground of discrimination is often based on broad societal evidence rather than specific evidence about an institution or discrete community. In this article, we have argued that in order to advance the underlying objectives of human rights laws and anti-discrimination protections, it is important for courts and tribunals to be sensitive to the evidentiary challenges facing plaintiffs. Two fruitful mechanisms for facilitating proof of *prima facie* discrimination include the use of factual inferences and reliance on contextual evidence of societal discrimination.

It is also important to note that the outcomes in *Bombardier* and *Taypotat* may have been the same even if the Supreme Court had concluded that there was *prima facie* discrimination. In *Taypotat*, had the Supreme Court found the educational requirement to contravene section 15 equality rights, it would have been required to assess whether the violation could be justified in accordance with section 1 of the *Canadian Charter*. In *Bombardier*, it would have been necessary to justify the discriminatory exclusion of Latif in relation to concerns for national security and public safety. We maintain that it would have enhanced fairness in both of these cases to have reached the justificatory phase. Given the two-step process of anti-discrimination or equality claims, a finding of *prima facie* discrimination still leaves room for defendants to adduce evidence that justifies the exclusion or harm. Indeed, defendants tend to have much greater access to data and information about the reasons for potentially exclusionary policies or practices.

Bombardier and *Taypotat* are complex cases that raise fundamental issues about individual and group-based exclusion in contexts of widespread societal inequality and concern—racial profiling post 9/11 and educational inequality of Indigenous peoples in the wake of the Residential Schools era. These are precisely the kind of cases where a large and liberal interpretation of human rights protections should prompt judicial ingenuity and creativity

to enhance equitable inclusion. While factual inferences and social science evidence may not always suffice to prove specific allegations of *prima facie* discrimination, greater reliance on these evidentiary tools is crucial for ensuring human rights decisions are attuned to the complex realities of conscious and unconscious bias in a world of disparate power and privilege.