**Case Brief - *Kahkewistahaw First Nation v. Taypotat,* 2015 SCC 30**

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**Facts**

Kahkewistahaw First Nation in Saskatchewan spent 13 years developing an Election Code which included a Grade 12 educationrequirement for candidates who wished to be Chief or a Band Councillor. Louis Taypotat, who had been Chief for most of the previous three decades, was 76 years old and had a Grade 10 education.

Despite the fact that he was Chief for much of the consultation process that led to the development of the new Election Code, he challenged the process, his disqualification and the constitutionality of the Grade 12 requirement. He argued that was that the Grade 12 educational requirement violated s. 15(1)  of the *Canadian Charter of Rights and Freedoms* (“the “Charter”) because “educational attainment is analogous to race and age” for the purposes of s. 15(1) .

In the Federal Court, de Montigny J. dismissed the application. The Federal Court of Appeal allowed the appeal, finding that the educational requirement was discriminatory because it has a disproportionate effect on older community members who live on a reserve. [[1]](#footnote-1)   On May 28, 2015, the Supreme Court of Canada (“SCC”)overturned the Court of Appeal’s decision in *Kahkewistahaw First Nation v. Taypotat,* 2015 SCC 30 (“KFN”).

**Decision**

15(1) of the Charter provides that:

Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

The focus of s. 15 is whether a law draws *discriminatory* distinctions which have the effect of perpetuating arbitrary disadvantage based on an individual’s membership in an enumerated or analogous group.[[2]](#footnote-2) This is analyzed in a two-part test.

The first part of the test asks whether a law creates a distinctionon the basis of an enumerated or analogous ground.[[3]](#footnote-3) The second part of the test examines whether the impugned law fails to respond to the actual capacities and needs of the members of the group and instead imposes burdens or denies a benefit in a manner that has the effect of reinforcing, perpetuating or exacerbating their disadvantage.[[4]](#footnote-4)

To establish a *prima facie* violation of s. 15(1), the claimant must demonstrate that the law at issue has a disproportionate effect on the claimant based on his or her membership in an enumerated or analogous group.[[5]](#footnote-5)

The SCC noted that educational requirements “that are unrelated to measuring job capability can operate as “built-in headwinds” for minority groups” have been found to be discriminatory.[[6]](#footnote-6) Likewise, residence *off-reserve* has been recognized as an analogous ground of discrimination under s.15(1).[[7]](#footnote-7)

The SCC held that in this case, however, the claimant presented virtually no evidence about the relationship between age, residency on a reserve, and education levels in the Kahkewistahaw First Nation, nor was “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.”[[8]](#footnote-8)

Given the lack of evidence, the SCC held that Mr. Taypotat failed to establish a *prima facie* case that the Grade 12 educational requirements in Kahkewistahaw First Nation’s Election Code breached s.15(1) of the Charter. As a result, Kahkewistahaw First Nation did not have to go through the exercise of justifying the educational requirements found in the Election Code.

1. KFN, at para 14. This argument, formulated by the FCA, and put forward by Mr. Taypotat before the SCC was not raised in the initial judicial review. [↑](#footnote-ref-1)
2. KFN, at para 18. [↑](#footnote-ref-2)
3. KFN, at para 19. [↑](#footnote-ref-3)
4. KFN, at para 20. [↑](#footnote-ref-4)
5. KFN, at para 21. [↑](#footnote-ref-5)
6. KFN, at para 23. See also, *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 S.C.R. 3. [↑](#footnote-ref-6)
7. See *Corbiere v. Canada (Minister of Indian and Northern Affairs)*,[1999] 2 S.C.R. 203. [↑](#footnote-ref-7)
8. KFN, at para 24. [↑](#footnote-ref-8)