Federal Court of Appeal | Cour d'appel fédérale

Date: 20130813

Docket: A-427-12

Citation: 2013 FCA 192

CORAM: **BLAIS C.J.**
MAINVILLE J.A.
NEAR J.A.

BETWEEN:

LOUIS TAYPOTAT

Appellant

and

CHIEF SHELDON TAYPOTAT, MICHAEL BOB, JANICE MCKAY, IRIS TAYPOTAT and VERA WASACASE as Chief and Council representatives of the KAHKEWISTAHAW FIRST NATION

Respondents

Heard at Regina, Saskatchewan, on June 26, 2013.

Judgment delivered at Ottawa, Ontario, on August 13, 2013.

REASONS FOR JUDGMENT BY: MAINVILLE J.A.

CONCURRED IN BY: BLAIS C.J.
NEAR J.A.

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REASONS FOR JUDGMENT

MAINVILLE J.A.

[1] This is an appeal from a judgment of de Montigny J. of the Federal Court (the "Judge") dated August 30, 2012 and cited as 2012 FC 1036 (the "Reasons") which dismissed the appellant's judicial review application seeking (a) to invalidate paragraphs 9.03(c) and 10.03(d) of the *Kahkewistahaw Election Act* which require that a candidate in an election to the public offices of the Chief or the councillors must have attained a minimum education level of Grade 12, or an equivalent or higher level of education, as evidenced by a certificate; (b) that the individual

respondents be removed from office; and (c) that new elections be held for the position of Chief and the positions of councillors of the Kahkewistahaw First Nation.

[2] For the reasons set out below, the impugned provisions of the *Kahkewistahaw Election Act* imposing a minimum education requirement to run for public office violate the equality provisions of subsection 15(1) of the *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 (the "*Charter*"), as well as the fundamental principle of equality set out in the *Kahkewistahaw Election Act* itself. I would consequently allow the appeal, set aside the judgment of the Federal Court, annul, invalidate and void the impugned provisions, and order that a new election for the office of Chief be held within 60 days of the judgment of this Court.

Background

[3] The appellant is now 74 years old and has been a member of the Kahkewistahaw First Nation (the "First Nation") his entire life. He was elected Chief of the First Nation for 27 years, from 1973-1989, 1992-1993 and 1997-2007, in elections held pursuant to the *Indian Act*, R.S.C. 1985, c. I-5. In the last election for Chief held under the *Indian Act* in 2009, the appellant lost to his nephew, the respondent Sheldon Taypotat, by only four votes (Reasons at para. 3; transcript of examination of Chief Sheldon Taypotat, p. 11 lines 22 to 23, reproduced in Appeal Book ("AB") at p. 672).

[4] In recent years, the Kahkewistahaw First Nation began moving towards a community election code, and a proposal for this purpose was developed and widely distributed throughout its membership. Though such codes are sometimes referred to as "custom" election codes, this is a misnomer resulting from the outdated definition of "council of the band" set out in subsection 2(1) of the *Indian Act*. Indeed, many of these codes do not necessarily reflect customary aboriginal leadership selection rules. I shall therefore refer to such codes in these reasons as community election codes. The expression "customary" elections should be reserved for those bands which have never selected their leadership under the terms of the *Indian Act*.

[5] Under subsection 74(1) of the *Indian Act*, the Minister may declare through an order that the Chief and Council of an Indian "band" are to be selected through elections held in accordance with the terms of the *Indian Act*, including the *Indian Band Election Regulations*. The vast majority of Indian bands were subject to such orders at one time or another, though a few have continued to select their leadership through purely customary rules. In recent years, the responsible Federal Minister has developed a policy providing for a process for the revocation of such orders, thus allowing the concerned Indian bands to select their elected Chief and Council in accordance with their own community election codes, which need not necessarily reflect any customary selection process.

[6] Certain requirements are set out under that policy to revoke an order under subsection 74(1) of the *Indian Act* (Exhibit A to the affidavit of Vera Wasacase sworn August 3, 2011; AB at pp. 479-480). A written community election code must be prepared which meets certain minimum

requirements established by the Minister, including consistency with the *Charter*. That code must also be approved by the band Council and must be supported by the majority of the members of the concerned First Nation as expressed in a vote by secret ballot.

[7] In this case, the ratification of the proposed community election code by the membership of the Kahkewistahaw First Nation was fraught with difficulties. The appellant attributes these difficulties to the provisions of the code restricting eligibility to the offices of the Chief and the councillors to those who have at least a Grade 12 education. This restriction caused deep concerns among the membership of the community, notably among the elders (Affidavit of Louis Taypotat sworn July 7, 2011 ("Appellant's Affidavit") at paras 4-5, AB at p. 36; Affidavit of Lionel Frederick Louison sworn August 3, 2011 ("Louison Affidavit") at para. 31, AB at pp. 194-195).

[8] A first vote to ratify the community election code was held on September 6, 2008, but only 164 votes were cast out of 984 eligible voters. As a result, this vote did not meet the majority participation level required by the Minister (Louison Affidavit at para. 12, AB at pp. 189-190).

[9] A second ratification vote was held on March 29, 2009 in which only 231 votes were cast out of 1007 eligible voters (Louison Affidavit at para. 19, AB at p. 191). Since voter participation was again well below the minimum ministerial requirement, a decision was made to carry out a continuation vote. The final result of the combined second vote and continuation vote was that a total of 483 ballots were cast out of 1007 eligible voters, of which 409 ballots were marked "Yes",

72 were marked "No", and 3 ballots were rejected or spoiled (Louison Affidavit at para. 29, AB at pp. 193-194).

[10] Though an absolute majority of the electors of the band had not voted, the results were nevertheless deemed significant enough for the Minister to revoke, in February of 2011, the order under subsection 74(1) of the *Indian Act*, thus allowing the Kahkewistahaw First Nation to select its membership pursuant to its own community election code (Louison Affidavit at para. 32, AB at p. 195; Appellant's Affidavit Exhibit D, AB at pp. 61-62; Affidavit of Chief Sheldon Taypotat sworn August 4, 2011 ("Chief Taypotat's Affidavit") at para. 25 and Exhibit G thereto, AB pp. 623 and 650 to 652).

[11] The first elections under the new *Kahkewistahaw Election Act* were thus held in May of 2011. This new community election code contained an important restriction to eligibility for public office as it set a minimum education requirement. The impugned provisions of the *Kahkewistahaw Election Act* read as follows:

> **Eligibility Requirements**
>
> 9.03 A Candidate must:
> …
> (c) have attained a minimum education level of Grade 12 or an equivalent or higher level of education;
>
> **Candidate Declaration**
>
> 10.01 In order to be accepted as a Candidate in an Election, a person shall declare their intention to run as a Candidate no later than 4:00 p.m., local time, on the tenth (10^{th}) day prior to the Nomination Meeting by providing to the Electoral Officer all of the following Declaration Documents:

> …
> (d) a copy of a certificate evidencing that the person has attained a minimum education level of Grade 12 or an equivalent or higher level of education;

[12] Prior to the first elections held under this new community election code, a petition signed by 340 members of the Kahkewistahaw First Nation was circulated challenging the *Kahkewistahaw Election Act* on the ground that its provisions requiring Grade 12 education violated the "human right to be treated equally", the aboriginal and treaty rights of the members of the First Nation and the principle of equality set out in the community election code itself (Appellant's Affidavit at para. 13 and Exhibit I thereto, AB at pp. 38 and 133 to 165). The petition was not acted upon by the Membership Committee of the Kahkewistahaw First Nation, which is the body empowered to process amendments to the community election code (*Kahkewistahaw Election Act* sections 25.01 to 25.03).

[13] Though the appellant only attended a residential school until the age of 14, and was evaluated at a Grade 10 education level, he nevertheless submitted his nomination as a candidate for the office of Chief. However, this nomination was not certified by the Electoral Officer on the ground that the appellant did not have a certificate proving that he had a Grade 12 or higher education (Reasons at para. 4; Appellant's Affidavit at para. 11, AB at p. 37; Affidavit of Corina Rider sworn July 28, 2011 ("Rider Affidavit") at para. 14, AB at p. 295). As a result, the respondent Sheldon Taypotat was the only eligible candidate nominated for the position of Chief, and he was therefore declared elected by acclamation as there would be no election for that position (Rider Affidavit at para. 17, AB at p. 296).

[14] In the remaining elections for the councillor positions, 277 persons voted out of a much larger group of eligible voters. This was considerably lower voter participation than in prior elections (Appellant's Affidavit at para. 18, AB at p. 39; Chief Sheldon Tapotat's Affidavit at para. 29, AB at p. 624). As a result of these first elections under the new community election code, the respondents Michael Bob, Janice McKay, Iris Taypotat and Vera Wasacase were declared elected as councillors (Appellant's Affidavit at para. 18; Rider Affidavit at para. 29, AB at p. 298).

[15] Shortly after these elections, the appellant filed his application for judicial review in the Federal Court.

The Decision of the Federal Court

[16] The Judge found that the *Kahkewistahaw Election Act* had been validly adopted even though an absolute majority of the eligible electors of the First Nation had not participated in the ratification vote and had not ratified it. He recognized that a "broad consensus" was required in order to adopt a community election code, but he found that a flexible approach must be applied to find such a consensus (Reasons at paras. 24 to 35). Taking into account all the circumstances, particularly the fact that 48% of eligible voters participated in the combined second and continuation ratification votes, and that 84% of those who so voted were in favour of ratification, he concluded that the community election code had been adopted by a broad consensus of the members of the Kahkewistahaw First Nation (Reasons at paras. 36 to 39 and 44).

[17] The Judge disregarded the appellant's submissions that the low turn-out rate and the petition by 340 members of the First Nation challenging the education requirements of the *Kahkewistahaw Election Act* demonstrated a lack of consensus with respect to that election code. He was of the view that the low turn-out rate could be attributed to voter apathy (Reasons at para. 41), and that little weight should be given to the petition since some members who had voted in favour of ratification had also signed the petition (Reasons at para. 43).

[18] The Judge further found that the decision of the Electoral Officer to disqualify the appellant on the ground that he did not meet the education requirement set out in the *Kahkewistahaw Election Act* was reasonable in light of the terms of that election code (Reasons at paras. 45 to 49). He further found that the Electoral Officer did not, in these circumstances, breach any duty to act fairly by failing to provide the appellant with an oral hearing prior to disqualifying him as a candidate (Reasons at paras. 50 to 53).

[19] Turning his mind to the appellant's submissions under the *Charter*, the Judge concluded that education requirements are not an analogous ground of discrimination under section 15 "since they deal with personal attributes rather than characteristics based on association with a group" (Reasons at para. 59). He therefore found no infringement to subsection 15(1) of the *Charter* (Reasons at para. 61).

Analysis

[20] To the exception of the submissions based on subsection 15(1) of the *Charter* and on the principle of equality set out in the *Kahkewistahaw Election Act* itself, all the other issues raised by the appellant may be dismissed without difficulty.

[21] First, the numerous issues raised by the appellant concerning the lack of a "broad consensus" with respect to the ratification of the *Kahkewistahaw Election Act* should be dismissed on the ground that the appellant did not challenge the Minister's decision to revoke the order under subsection 74(1) of the *Indian Act*. If the appellant was of the view that this decision was made without the required community consensus, he should have challenged it at the appropriate time or, at the very least, he should have included the Minister as a party to his judicial review proceedings.

[22] These reasons should therefore not be understood as an endorsement of the Judge's position with respect to the "broad consensus" required to convert from *Indian Act* elections to a community election code, which remains a matter to be decided in an appropriate case. In this case, it was not appropriate to determine this matter in the absence of the Minister. Indeed, since the revocation of the subsection 74(1) *Indian Act* order was not at issue in the Federal Court, the appellant's challenge to the validity of the vote leading to that order and to the adoption of the community election code could have resulted in a legal vacuum with respect to the election process of the Kahkewistahaw First Nation, with the attending confusion and disarray which such a vacuum would entail.

[23] As for the alleged lack of a "broad consensus" with respect to the provisions of the *Kahkewistahaw Election Act* setting out a Grade 12 education qualification requirement, I acknowledge that the petition signed by 340 members of the Kahkewistahaw First Nation shows deep divisions on the issue within the community. Contrary to the Judge, I find no contradiction with the fact that certain members of the community may have both voted to ratify the community election code and signed the petition. This simply indicates that some members may be in favour of the community taking over its own electoral process while still being opposed to the restrictive eligibility requirement set out in the code itself.

[24] That being said however, the *Kahkewistahaw Election Act* sets out its own amendment procedure in section 25. In his application, the appellant is not challenging the failure of the Membership Committee to call for a new vote on a specific amendment specifically targeting the impugned educational qualification requirements. In these circumstances, I need not address the "broad consensus" issues with respect to the impugned provisions. It suffices to note that these provisions are incorporated within the community election code as it now stands, and that they are the object of serious concern and broad dissent within the membership of the First Nation.

[25] The issues raised by the appellant with respect to the duty to act fairly and to the interpretation of the *Kahkewistahaw Election Act* by the Electoral Officer should also be dismissed. Without regard to the constitutional validity of the impugned provisions, the decision of the Electoral Officer disqualifying the appellant on the basis of his lack of educational qualifications was correct in light of the clear wording of the community election code (*Simon v. Samson Cree*

Nation, 2001 FCT 467, [2002] 1 C.N.L.R. 343 at paras. 39 to 42). That decision was therefore necessarily reasonable.

[26] There was consequently no need to determine the applicable standard of review of the Electoral Officer's decision not to certify the appellant's candidacy, and I therefore neither endorse nor dispute the Judge's application of the reasonableness standard in this case. Moreover, I find no error in the Judge's conclusion that, in the circumstances of this case, no duty to hold an oral hearing was incumbent on the Electoral Officer before disqualifying the appellant under the clear provisions of the *Kahkewistahaw Election Act*.

[27] The appellant's submissions under section 3 of the *Charter* can also be easily dismissed. That section provides that "[e]very citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein." (« Tout citoyen canadien a le droit de vote et est éligible aux élections législatives fédérales ou provinciales.»)

[28] The Supreme Court of Canada stated in *Haig v. Canada*, [1993] 2 S.C.R. 995 at p. 1033, that "[s]ection 3 of the *Charter* is clear and unambiguous as is its purpose: it is limited to the elections of provincial and federal representatives." The appellant nevertheless submits that section 3 extends to elections to governance structures of First Nations as these structures should be deemed as equivalent to "legislative assemblies" taking into account aboriginal peoples' inherent right to self-governance. This submission cannot however be sustained in light of *Baier v. Alberta*, 2007

SCC 31, [2007] 2 S.C.R. 673 where Rosthstein J., writing for the majority, noted the following, at para. 39:

> Voting and candidacy rights are explicitly protected in s. 3 of the *Charter* but only in relation to the House of Commons and provincial legislatures. The intervener Public School Boards' Association of Alberta submits that school boards as institutions of local government have constitutional status in the "conventional or quasi-constitutional sense". However, it is not for this Court to create constitutional rights in respect of a third order of government where the words of the Constitution read in context do not do so.

[29] Moreover, should section 3 of the *Charter* apply to First Nation elections, the logical result would be that non-aboriginal Canadian citizens would be entitled to participate in such elections. That result would defeat the very purpose of aboriginal self-government. I consequently find no merit in the appellant's submissions with respect to section 3 of the *Charter*.

[30] The appellant also submits that he has a treaty right to participate in the governance of his First Nation, but he fails to identify any treaty provision setting out that right. Moreover, he asserts a similar inherent aboriginal right, but has submitted no evidence supporting such a right, save some references to vague statements made in examinations on affidavit. The onus of establishing the benefit of an aboriginal or treaty right is incumbent on the claimant asserting the right (*R. v. Van der Peet*, [1996] 2 S.C.R 507 at para. 132; *R. v. Sioui* [1990] 1 S.C.R. 1025 at pp.1066-1067; *R. v. Marshall*, [1999] 3 S.C.R. 456 at para. 111). Since the appellant has failed to submit any cogent evidence on these matters, his submissions based on an alleged aboriginal or treaty right should also fail.

[31] This leaves us with the principal issue raised by this appeal, which is whether the impugned provisions of the *Kahkewistahaw Election Act* violate the principle of equality set out under subsection 15(1) of the *Charter* and reiterated in the community election code itself.

[32] Subsection 15(1) of the *Charter* reads as follows:

> **15.** (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

[33] This subsection applies the *Kahkewistahaw Election Act* adopted by the Kahkewistahaw First Nation.

[34] Subsection 32(1) of the *Charter* provides that it applies "(a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament…; and (b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province." Thus, on the face of section 32, the *Charter* applies not only to Parliament, the provincial legislatures and the federal and provincial governments themselves, but also to all matters within the authority of those entities (*Godbout v. Longueuil (City)*, [1997] 3 S.C.R. 844 at para. 48; *Greater Vancouver Transportation Authority v. Canadian Federation of Students – British Columbia Component*, 2009 SCC 31, [2009] 2 S.C.R. 295 at paras. 13 to 16).

[35] Consequently, the *Charter* has been found to apply to a university (*McKinney v. University of Guelph*, [1990] 3 S.C.R. 229; *Harrison v. University of British Columbia*, [1990] 3 S.C.R. 451),

to a hospital (*Stoffman v. Vancouver General Hospital*, [1990] 3 S.C.R. 483), to a college (*Douglas/Kwantlen Faculty Assn. v. Douglas College*, [1990] 3 S.C.R. 570; *Lavigne v. Ontario Public Service Employees Union*, [1991] 2 S.C.R. 211), to a transit authority (*Greater Vancouver Transportation Authority v. Canadian Federation of Students – British Columbia Component*, above), etc. Moreover, the *Charter* even applies to a private entity in respect of certain inherent government actions, such as when implementing specific government policies or programs (*Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624 at paras. 41 to 44).

[36] In this case, the Council of the Kahkewistahaw First Nation (formed of an elected Chief and councillors) is clearly a *sui generis* government entity which exercises government authority within the sphere of federal jurisdiction under the *Indian Act* and other federal legislation. Pursuant to ss. 18(2), ss. 20(1), ss. 28(2), para. 57(*a*), ss. 58(1), and para. 58(4)(*b*) of the *Indian Act*, the Council plays a key role in the management of reserve land. Pursuant to ss. 52.1(1), s. 59, ss. 64(1), ss. 66(1), and par. 73(1)(*m*) of the *Indian Act*, it also plays a key role in the management of band assets and band monies. The Council also holds extensive by-law making powers under ss. 81(1), ss. 83(1)(2), and ss. 85.1(1) of the *Indian Act*. Moreover, the Council is entrusted with the management of numerous federal government programs destined to Indian members of the First Nation. It consequently largely acts as a government under federal legislation and in matters within the authority of Parliament.

[37] Moreover, there can be no doubt that the election process through which the Council members are elected under sections 74 to 79 of the *Indian Act* is subject to *Charter* scrutiny,

including scrutiny under section 15 (*Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203 ("*Corbiere*")). The fact that the Minister has taken measures to revoke the order under subsection 74(1) of the *Indian Act* so as to allow the First Nation to determine itself its election code does not result in the repudiation of *Charter* scrutiny. Indeed, a government should not be able to shirk its *Charter* obligations by simply conferring its powers to another entity: *Eldridge v. British Columbia (Attorney General)*, above, at para. 42; *Godbout v. Longueil*, above, at para. 48. As a result, the application of *Corbiere* (and of subsection 15(1) of the *Charter*) cannot be avoided through the adoption by a First Nation of a community election code pursuant to the revocation of an order under subsection 74(1) of the *Indian Act*.

[38] As noted above, many government actions affecting the lives of aboriginal peoples living on reserve result from decisions of the band Councils acting under the *Indian Act*, under other federal legislation or pursuant to government programs. As citizens of Canada, aboriginal peoples are as much entitled to the protections and benefits of the rights and freedoms set out in the *Charter* as all other citizens. This includes protection for aboriginal peoples from violations to these rights and freedoms by their own governments acting pursuant to federal legislation and in matters falling in the sphere of federal jurisdiction.

[39] Moreover, the rights and freedoms set out in the *Charter* would be ineffectual if the Council members could be selected in a manner contrary to the *Charter*. I have no doubt that if a First Nation adopted a community election code restricting eligibility to public office to the male members of the community, such a code would be struck down pursuant to section 15 of the

Charter. To decide otherwise would be to create a jurisdictional ghetto in which aboriginal peoples would be entitled to lesser fundamental constitutional rights and freedoms than those available to and recognized for all other Canadian citizens.

[40] I recognize that the protections of the civil and political rights set out in the Constitution of the United States of America do not fully extend to Indian Tribes in the USA. The US Congress has nevertheless attempted to fill the void with human rights legislation specifically targeting Indian Tribes, notably the *Indian Civil Rights Act* of 1968, but with limited success (*Santa Clara Pueblo v. Martinez*, 439 U.S. 49 (1978)). This situation largely results from the legal position of Indian Tribes in the USA, which have been historically considered as being outside of the scope of the US Constitution. I consider this American approach to be inapplicable to Canada. Contrary to the United States, Canadian aboriginal citizens should not and cannot be allotted lesser fundamental constitutional rights and freedoms than other Canadian citizens.

[41] In the case of Canada, First Nations are specifically included in the Constitution pursuant, notably, to sections 25 and 35 of the *Constitution Act, 1982*. Moreover, under the historic treaties between the Crown and First Nations, including Treaty No. 4, the aboriginal signatories have recognized the Crown, which in return has acknowledged them as its subjects, without any restriction as to the rights and freedoms that subjects of the Crown may enjoy.

[42] Of course, the guarantee in the *Charter* of certain fundamental rights and freedoms cannot be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms

that pertain to the aboriginal peoples of Canada (section 25 of the *Charter*). However, no aboriginal, treaty or other rights have been raised in these proceedings as a bar to the appellant's challenge to the provisions of the *Kahkewistahaw Election Act* on the basis of subsection 15(1) of the *Charter*. On the contrary, the preamble of this community election code sets out important fundamental principles under which the First Nation will govern itself, including notably the principle of equality:

> The history and foundation of First Nations is rooted in the belief that they know who they are and why they were put on Mother Earth. It is therefore essential and beneficial for the membership of the Kahkewistahaw First Nation to adhere to and comply with the following principles:
> …
>
> 5. We believe and accept the fact that democracy is founded on the principle that every one is equal and that no one is above the law.
>
> 6. We also accept the fact that democracy allows for majority rule with minority rights preserved.
> [Emphasis added]

[43] The Judge was of the view that since the impugned provisions of the *Kahkewistahaw Election Act* distinguished on the basis of education, there was no discrimination under subsection 15(1) of the *Charter*, as the distinction was made "on the basis of merit and capacities" (Reasons at para. 59). However, his analysis was incomplete.

[44] In *R. v. Kapp*, 2008 SCC 41, [2008] 2 S.C.R. 483 the Supreme Court of Canada reworked the three-stage analytical framework which had been derived from *Law v. Canada (Minister of Employment and Immigration*, [1999] 1 S.C.R. 497 ("*Law*") into a two-part test for showing discrimination under subsection 15(1) of the *Charter*. Where a violation of subsection 15(1) is

alleged, a court must ask the following questions: "(1) Does the law create a distinction based on an enumerated or analogous ground? (2) Does the distinction create a disadvantage by perpetuating prejudice or stereotyping?" (*R. v. Kapp*, above, at para. 17; *Quebec (Attorney General) v. A*, 2013 SCC 5 at para. 162).

[45] An education requirement may not be *per se* a personal characteristic which is immutable, like race, or constructively immutable, like religion. However, as the analysis below shows, even if education was excluded as an analogous ground of discrimination, the education requirement at issue nonetheless creates a distinction resulting in discrimination on the enumerated ground of age, which the appellant has specifically raised, and with the analogous ground of Aboriginality-residence recognized in *Corbiere*.

[46] An educational requirement may in certain circumstances be a disguised way of discriminating (voluntarily or involuntarily) on the basis of an enumerated ground, such as age, or an analogous ground, such as Aboriginality-residence. Where an educational requirement has the effect of excluding persons on the basis of their age or their Aboriginality-residence, and where there is no appropriate justification for such a requirement, a court may conclude that the requirement is discriminatory.

[47] Indeed, our law has established that even a well-intended or facially neutral scheme can have the effect of discriminating. As recently reiterated by LeBel J. in *Quebec (Attorney General) v. A*, above, at para. 171, "[s]ection 15 applies not only to laws enacted with discriminatory intent, but

also, even if there is no such intent, to laws with discriminatory effects." Moreover, as noted in *Withler v. Canada (Attorney General)*, 2011 SCC 12, [2011] 1 S.C.R. 396 at para. 64, a claimant may show that a law creates a distinction indirectly where, "although the law purports to treat everyone the same, it has a disproportionately negative impact on a group or individual that can be identified by factors relating to enumerated or analogous grounds".

[48] In this case, the impugned provisions of the *Kahkewistahaw Election Act* create a distinction that discriminates on the basis of both age and of Aboriginality-residence. The education gap within the on-reserve aboriginal population of Canada is well documented and is specifically referred to by the appellant in the material submitted in support of his application. Moreover, the education gap between older and younger Canadians is also well-known. As noted in the Appellant's Affidavit at para. 14, "[t]he analysis of Statistics Canada data contained in this paper from the 2006 census shows that in Saskatchewan, only 39% of First Nations persons living on reserve have graduated from high school. The percentage is higher for persons who are older." The evidence submitted by the appellant notably sets out that "[a]s with non-Aboriginals, younger Aboriginals (under 45) have higher education levels than older ones (age 45 and older)" (John Richards, "Closing the Aboriginal non-Aboriginal Education Gaps" *C.D. Howe Institute*, Backgrounder 116, at p. 6, AB at p. 173.)

[49] This evidence is confirmed by readily available census information.

[50] The Supreme Court of Canada has taken judicial notice of census information in numerous cases involving the *Charter*. In *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713 at para. 198,

La Forest J., writing in a concurrent opinion with respect to the *Charter*, took judicial notice of Census figures pertaining to the percentage of Canadians who are Moslem and whose day of worship is Friday. La Forest J. noted at paras. 195-196 that in constitutional cases involving the *Charter*, a court is permitted, where it deems it expedient, to take judicial notice of broad social and economic facts and to take the necessary steps to inform itself about them, and he provided a long list of cases where this had been done. In *M. v. H.*, [1999] 2 S.C.R. 3 at para. 353, Batarache J., writing in concurring reasons in another *Charter* case, took judicial notice of 1996 Census figures pertaining to the growing trend of the percentage of Canadian children who's parents were in common law relationships over those children who's parents were married.

[51] More recently, in *Quebec (Attorney General) v. A*, above, at paras. 125 and 249, LeBel J. referred to the present day proportion of couples in *de facto* unions by taking judicial notice of figures from the 2011 Census released after the trial and appeal decisions in that case and thus not part of the evidentiary record of those hearings. LeBel J. explained at paras. 237 to 239 of his reasons that in appropriate circumstances a court may take judicial notice of certain facts that are not the subject of reasonable dispute. In this matter, he relied on the principles set out in *R. v. Find*, 2001 SCC 32, [2001] 1 S.C.R. 863 at para. 48 (and reiterated in *R v. Spence*, 2005 SCC 71, [2005] 3 S.C.R. 458 at para. 53) that a Court may take judicial notice of facts that are (1) either so notorious or generally accepted as not to be the subject of debate among reasonable persons, or (2) capable of immediate and accurate demonstration by resort to readily accessible sources of indisputable accuracy.

[52] According to data from the 2006 census, 15% of Canadians between the age of 25 and 64 had less than a high school education. However, this number increases considerably with age, ranging from 11% for 25-34 year olds to 23% for 55-64 year olds: Statistics Canada, *Educational Portrait of Canada*, 2006 Census (Ottawa: Minister of Industry 2008) at p. 10 (Catalogue number 97-560). Moreover, a higher percentage of First Nations and registered Indians report achieving considerably less high school education, and the percentage varies significantly depending on residency on reserve. Thus, according to the 2006 Census, 50% of Registered Indians aged 25 to 64 living on reserve report achieving less than high school education, while the percentage drops to 31% for Registered Indians living off reserve: *Ibid*. at p. 23. These facts are indisputable, confirm the appellant's evidence and support his submissions.

[53] The impugned provisions of the *Kahkewistahaw Election Act* requiring a Grade 12 education consequently disenfranchise a very large segment of the electors of the Kahkewistahaw First Nation from elected public office within the First Nation. Moreover, a disproportionate number of elders and on-reserve residents are affected by this disenfranchisement.

[54] A law will be found to be discriminatory if it "has the effect of perpetuating or promoting the view that the individual is less capable, or less worthy of recognition or value as a human being or as a member of Canadian society" (*Law* at para. 51). Discrimination is to be viewed though the lens of two concepts: (1) the perpetuation of prejudice or disadvantage to members of a group on the basis of personal characteristics identified in the enumerated or analogous grounds; and (2)

stereotyping on the basis of these grounds that results in a distinction that does not correspond to a claimant's or group's actual circumstances and characteristics (*Withler* at para. 32.)

[55] As already mentioned, the devaluating of individuals need not be intentional to be considered an infringement of subsection 15(1) of the *Charter*. Laws may be adopted that unintentionally convey a negative social image of certain members of society. Moreover, laws that are apparently neutral because they do not draw obvious distinctions may also treat individuals like second-class citizens whose aspirations are not equally deserving of consideration (*Quebec (Attorney General) v. A*, above at para. 198).

[56] The distinction made under the impugned provisions of the *Kahkewistahaw Election Act*, though said to be neutral, is in fact a distinction which has the effect of targeting segments of the membership of the First Nation on the basis of age and of Aboriginality-residence. The impugned provisions of the *Kahkewistahaw Election Act* substantially affect the human dignity and self-worth of the affected individuals and perpetuate prejudice or stereotyping towards those members of the community who are elders or who reside on the reserve and who have not had the same opportunities and advantages with respect to education attainment. The impugned provisions create a distinction that is discriminatory as it impacts adversely on the older members of the community and on those members residing on the reserve.

[57] The distinction made in the *Kahkewistahaw Election Act* restricts access to the elected Council, a fundamental social and political institution of the First Nation, and impedes full political

membership in the community itself for many elders and residents of the reserve. As such, it perpetuates prejudice against these persons and attacks their sense of self-worth.

[58] Moreover, the distinction also perpetuates stereotyping that does not correspond to the actual abilities of the disenfranchised to be elected and to occupy public office. The elected positions of Chief and councillor are public offices in a government. These are not civil service positions for which *bona fides* education requirements may be justifiable. These are elected *public* offices. Elections to public offices allow the electors to select the individuals they consider best suited to represent their political interests. Such an election is not a job competition to select whom is the best educated, but rather a political selection as to whom the electors deem most suitable and able to represent and lead them.

[59] To be denied access to the opportunity to be elected to public office on the basis of the false view that because elders are not sufficiently "educated" and are consequently less worthy or less capable of taking up the duties of these elected offices can scarcely fail to be experienced as demeaning because it is demeaning. Elders who may have a wealth of traditional knowledge, wisdom and practical experience, are excluded from public office simply because they have no "formal" (*i.e.* Euro-Canadian) education credentials. Such a practice is founded on a stereotypical view of elders.

[60] The respondents however submit that the distinction based on education set out in the impugned provisions of the *Kahkewistahaw Election Act* has an ameliorative purpose in that it seeks

to address the lack of education achievement among aboriginal peoples by encouraging them to complete their secondary education. The respondents thus raise a justification defence based on section 1 of the *Charter*, which allows for reasonable limits on the rights and freedoms set out in the *Charter* "as can be demonstrably justified in a free and democratic society." I am not persuaded by these submissions.

[61] The analysis used for the purpose of section 1 of the *Charter* is the one first set out in the well known case of *R. v. Oakes*, [1986] 1 S.C.R. 103. This analysis has been summarized as follows in *Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27, [2007] 2 S.C.R. 391 at paras. 138-139:

> The analysis for assessing whether or not a law violating the *Charter* can be saved as a reasonable limit under s. 1 is set out in *Oakes*. A limit on *Charter* rights must be prescribed by law to be saved under s. 1. Once it is determined that the limit is prescribed by law, then there are four components to the *Oakes* test for establishing that the limit is reasonably justifiable in a free and democratic society (*Oakes*, at pp. 138-40). First, the objective of the law must be pressing and substantial. Second, there must be a rational connection between the pressing and substantial objective and the means chosen by the law to achieve the objective. Third, the impugned law must be minimally impairing. Finally, there must be proportionality between the objective and the measures adopted by the law, and more specifically, between the salutary and deleterious effects of the law (*Oakes*, at p. 140; *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, at p. 889).
>
> The s. 1 analysis focuses on the particular context of the law at issue. Contextual factors to be considered include the nature of the harm addressed, the vulnerability of the group protected, ameliorative measures considered to address the harm, and the nature and importance of the infringed activity: *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 S.C.R. 877, and *Harper v. Canada (Attorney General)*, [2004] 1 S.C.R. 827, 2004 SCC 33. This said, the basic template of *Oakes* remains applicable, and each of the elements required by that test must be satisfied. The government bears the onus of establishing each of

> the elements of the *Oakes* test and hence of showing that a law is a reasonable limit on *Charter* rights on a balance of probabilities (see *Oakes*, at pp. 136-37).

[62] The encouragement of educational achievement by aboriginal peoples may be viewed as a pressing and substantial objective. However, there can be no rational connection between that objective and the disenfranchisement of a large part of the community from elected public office, nor can such a measure be viewed as a proportionate response. Logic, reason and common sense dictate that disqualifying many elders from public office as an "example" as to why education is important is simply an eccentric proposition and a disproportionate measure which has no cogent or balanced connection with the alleged objective of improving education attainment.

[63] The respondents' submission that minimum impairment has been achieved since the appellant has not been denied an opportunity to achieve Grade 12 certification is also without merit. Though some evidence was tendered to show that there are some education facilities and services in the community, no evidence was submitted to show that these facilities and services would accept a 74 year old or be capable of addressing the needs of an elderly residential school survivor. Moreover, I consider it inappropriate and unreasonable to require a 74 year old elder of the community (who was elected as Chief for 27 years) to seek "educational upgrading" in order to run in an election for public office within his community.

[64] I therefore conclude that the impugned provisions of the *Kahkewistahaw Election Act* violate subsection 15(1) of the *Charter*. I also conclude, for the same reasons, that the impugned provisions also violate the principle of equality set out in the *Kahkewistahaw Election Act* itself.

[65] The appellant also seeks that the first elections held under the *Kahkewistahaw Election Act* be set aside, and that new elections be held for the offices of the Chief and the councillors. Contrary to the situation with respect to the election for the office of Chief, no evidence has been submitted which shows that a candidate for the position of councillor was rejected on the ground set out in the impugned provisions of the *Kahkewistahaw Election Act*. In these circumstances, I would not order that new elections be held for the positions of the councillors. However, since the appellant was precluded from running for the office of Chief on a ground which has been found to be discriminatory, I would order that new elections for that position be held forthwith.

Conclusions

[66] I would consequently allow the appeal, set aside the judgment of the Federal Court, and giving the judgment which the Federal Court ought to have given, I would:

(a) declare that the following provisions violate subsection 15(1) of the *Charter*:

(i) paragraph 9.03(c) of the *Kahkewistahaw Election Act* providing that a candidate must have attained a minimum education level of Grade 12 or an equivalent or higher level of education in order to be eligible for an election to the office of Chief or the office of councillor of the Kahkewistahaw First Nation; and

(ii) paragraph 10.01(d) of the *Kahkewistahaw Election Act* providing that in order to be accepted as a candidate in an election to the office of Chief or the office of councillor of the Kahkewistahaw First Nation a person must provide to the Electoral Officer a copy of a certificate evidencing that the person has attained a minimum education level of Grade 12 or an equivalent or higher level of education;

(b) declare that said paragraphs 9.03(c) and 10.01(d) violate the principles set out in the *Kahkewistahaw Election Act*, including more particularly the principle of equality there enunciated;

(c) annul, invalidate and void said paragraphs 9.03(c) and 10.01(d) of the *Kahkewistahaw Election Act*;

(d) order that new elections for the remainder of the term of the position of Chief of the Kahkewistahaw First Nation be organized forthwith, such election to be held on a date determined by the Membership Committee of the Kahkewistahaw First Nation, but not less than forty-five (45) days, nor more that sixty (60) days after the date of this Court's judgment. Such election shall be held in accordance with the *Kahkewistahaw Election Act* (to the exclusion of paragraphs 9.03(c) and 10.01(d) thereof), but subject to the timelines set out therein being compressed accordingly by the Membership Committee.

[67] The appellant should be entitled to his costs in this Court and in the Federal Court.

"Robert M. Mainville"
J.A.

"I agree
Pierre Blais C.J. "

"I agree
D.G. Near J.A. "

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-427-12
APPEAL FROM AN ORDER OF THE HONOURABLE MR. JUSTICE DE MONTIGNY DATED AUGUST 30, 2013, DOCKET NUMBER T-975-11	
STYLE OF CAUSE:	LOUIS TAYPOTAT v. CHIEF SHELDON TAYPOTAT, MICHAEL BOB, JANICE MCKAY, IRIS TAYPOTAT and VERA WASACASE as Chief and Council representatives of the KAHKEWISTAHAW FIRST NATION
PLACE OF HEARING:	Regina, Saskatchewan
DATE OF HEARING:	June 26, 2013
REASONS FOR JUDGMENT BY:	MAINVILLE J.A.
CONCURRED IN BY:	BLAIS C.J. NEAR J.A.
DATED:	August 13, 2013

APPEARANCES:

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