



Supreme Court finds Grade 12 requirement for Chief and Councillors does not infringe Charter rights - *Kahkewistahaw First Nation v Taypotat*, 2015 SCC 30

Former Chief Louis Taypotat of the Kahkewistahaw First Nation in Saskatchewan challenged the requirement in his First Nation’s election code that chiefs and councillors have a grade 12 education or its equivalent. He claimed it discriminated against older community members who live on a reserve. His challenge was unsuccessful in the Federal Court (2012 FC 1036), but the Federal Court of Appeal granted him an appeal (2013 FCA 192). The Supreme Court unanimously determined that the election code did not violate his equality rights.

The Kahkewistahaw First Nation developed and adopted a community election code over a process of 13 years. It came into effect in 2011. Section 9.03(c) states that candidates must have at least a grade 12 education. The Department of Indian Affairs and Northern Development requires that community election codes comply with the Charter of Rights and Freedoms. It also requires that a majority of voting members of the First Nation are in favour of the code.

Louis Taypotat, 76 years old at the time of the Supreme Court decision, was the elected Chief for a total of more than 27 years. He is a residential school survivor with a grade 10 education. The Saskatchewan Indian Institute of

...continued on page 2

UPCOMING EVENTS:

June 11-12: Jack Woodward, QC, Heather Mahony, Gary Campo and Drew Mildon will speak at the CBA National Aboriginal Law Section CLE in Cape Breton: Building Indigenous Economies.

W&Co Welcomes Peter Jones



Woodward & Company LLP is pleased to welcome Peter Jones to the firm roster. Peter joined the team on June 1, 2015. Peter is extremely excited to be a part of the leading edge work W & Co. does with First Nations.

“I look forward to gaining experience in many different areas of the law in the context of First Nations, from aboriginal title litigation to policy and governance matters,” says Peter. Although Peter’s experience is mainly as a barrister, he will be expanding his practice on the solicitor’s side as well.

Peter was called to the bar in 2013 and has practiced primarily in the area of civil litigation, including in the areas of Environmental Litigation, Wills and Estates, Insurance and Taxation. He has represented clients in both Supreme and Provincial Court, as well as in front of the B.C. Human Rights Tribunal. Peter is also a professional musician and he continues to perform around Victoria. He has performed with Michael Bubl , the Canadian Tenors and the Paperboys. ❖

Technology gave him an honorary diploma in recognition of his service to his community. The Supreme Court noted that Mr. Taypotat was Chief throughout much of the community consultation process that developed the code.

Mr. Taypotat claimed before the Supreme Court that the election code's education requirement violated his s. 15(1), Charter right to equality, because it disproportionately affects older community members who live on reserve.

Although the Court agreed that provisions such as education requirements might mask discrimination, that was not the case here. Justice Abella wrote that there was "virtually no evidence about the relationship between age, residency on a reserve, and education levels in Kahkewistahaw First Nation" that showed the education requirement would have a discriminatory impact. Justice Abella noted that the election code, overall, was designed to include on-reserve members in governance. She concluded that the code did not violate the rights of members living on reserve. She called the Federal Court of Appeal's decision to raise the issue of residency on its own "particularly troubling" because residence on reserve has never been identified as a ground of discrimination in previous Charter rulings.

The Court also rejected Mr. Taypotat's argument that the code violated equality rights based on age, again for inadequate evidence. The Federal Court of Appeal had relied on two forms of census data. Firstly, they recognized statistics about education levels for older Canadians generally. Secondly, they accepted education data about Aboriginal people across Canada. The Supreme Court found that both were too general to draw conclusions about older members of Kahkewistahaw First Nation.

The Supreme Court also commented that statistical evidence is not always necessary to show that equality rights have been infringed. Sometimes the impact on an enumerated or analogous group will be "apparent and immediate."

Justice Abella further commented that "intuition might lead us" to conclude that the education requirement affects people differently. However, a "web of instinct" is not enough to find a breach of equality rights, and to require the Kahkewistahaw First Nation to justify that breach. The evidence here was insufficient to establish a relationship between age, residence on reserve, and education, or to establish that the education requirement in the election code caused disadvantage. ❖

On June the 2nd, 2015, the Truth and Reconciliation Commission released its final report on the tragedy of the residential schools and the attempt at cultural genocide they represented. Woodward & Company LLP would like to acknowledge the courageous Elders and First Nations peoples who testified before the Commission to help it, us, and other Canadians face the past and shape future efforts towards true reconciliation.

Congratulations Chief Roger William!



W&Co wishes to congratulate Xeni Gwet'in Chief Roger William for receiving an honorary Doctorate of Laws from the University of Northern British Columbia on May 29th.

Chief William said he was honoured to be nominated for the degree. He also pointed out that the timing coincidence between the university's anniversary and the start of the rights and title litigation. "UNBC opened its doors 25 years ago and we started our fight 25 years ago."

Woodward and Company believes Chief William is a deserving choice for the honour, noting that he spent endless hours with Elders and community members, plus he set a record for the number of hours he spent giving his testimony and answering questions during the William case. In addition, the trial and its historic outcome resulted in written documentation about the Tsilhqot'in way of life, which is a significant contribution to Indigenous knowledge. ❖