S.C.C. No. 35518

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE FEDERAL COURT OF APPEAL)

BETWEEN:

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

Appellants
(Respondents),

- and -

LOUIS TAYPOTAT,

Respondent
(Appellant).

MEMORANDUM OF ARGUMENT

I. STATEMENT OF FACTS

1. The Charter Committee on Poverty Issues and Canada Without Poverty ("CCPI/CWP") ask this Honourable Court to grant them leave to intervene, file a joint factum and make joint argument in the Appeal from the Federal Court of Appeal decision in *Taypotat v. Taypotat*, 2013 FCA 192 (the "Decision"), pursuant to Supreme Court Rule 55.

2. The Court of Appeal held in the Decision that requiring a candidate for public office of a First Nation to have a minimum of a Grade 12 education was discriminatory,

contrary to s. 15 of the *Canadian Charter of Rights and Freedoms* ("*Charter*"). The Court further held that the discrimination was not justified under s. 1.

II. QUESTIONS IN ISSUE

3. Should the Court grant CCPI/CWP leave to intervene in the Appeal?

III. ARGUMENT

4. Pursuant to Supreme Court Rule 55, leave to intervene may be granted where a party has an interest in the subject matter before the Court and the proposed intervener will be able to make submissions that are useful and different from the other parties.[1]

A) The Appellants' Claim Relating to Level of Education as an Analogous Ground

5. CCPI/CWP support the Decision and the Respondent in this Appeal. Simply put, it is discriminatory to require that people running for public office (of a First Nation or otherwise) have at least a Grade 12 education. CCPI/CWP seek to present an additional argument regarding s. 15 of the *Charter*, which is complementary to the s. 15 analysis found in the Decision.

6. CCPI/CWP will ask this Court to conclude that level of education, properly constituted as social condition, is an analogous ground worthy of protection under s. 15 of the *Charter*. The proposed intervention is appropriate because the Appellants have directly raised the issue of level of education as an analogous ground under s. 15.

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1 Supreme Court Rules 55-57, *R. v. Finta*, [1993] 1 S.C.R. 1138.

7. In their factum, the Appellants have correctly identified the "real ground in issue – education requirements."[2] The Appellants argue that "the distinguishing characteristic being challenged – level of education – is neither an enumerated nor analogous ground."[3] The Appellants contend that there is no discrimination because no enumerated or analogous ground is triggered in this case.

8. The Appellants go on to contend that "regardless of whether this Court proceeds on the basis of a distinction based on *education*, age, or "Aboriginality-residence", there is no discrimination or denial of substantive equality"[4] (emphasis added). The Appellants contend that the education provisions do not violate substantive equality because the Grade 12 requirement is "merit based."[5]

9. Without the submissions of CCPI/CWP, it is likely that there will be no party taking a contrary position on the analogous ground issue that is directly raised in this Appeal. The Respondent will likely be content to ground his s. 15 claim on the basis of age or Aboriginality-residence in accordance with the judgment of the Federal Court of Appeal. As such, CCPI/CWP will likely be the only party challenging the Appellants' claim on this issue, or seeking to argue that level of education (properly constituted as social condition) is a prohibited ground of discrimination under s. 15 of the *Charter*.

B) <u>The Nature of the Proposed Legal Argument</u>

10. CCPI/CWP will submit that the discrimination at issue in this case is based on level of education as a component of social condition and that social condition should be recognized as an analogous ground of discrimination under s. 15 of the *Charter*. CCPI/CWP will make three points in support of this argument.

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2 Appellants Factum at para 62.
3 Appellants Factum at para 52.
4 Appellants Factum at para 65.
5 Appellants Factum at para 68-9.

(i) Level of Education as a Component of Social Condition in Human Rights Law

11. First, CCPI/CWP will submit that social condition, as it has come to be understood in human rights legislation, includes level of education.

12. Social condition was first included in human rights legislation in Canada with the adoption of the *Quebec Charter of Human Rights and Freedoms* in 1975. Over the past four decades, social condition has come to be defined in Quebec human rights jurisprudence, with level of education being recognized as a central component. Quebec tribunals and courts have accepted the following definition of social condition:

> [T]he definition of 'social condition' contains an objective component. A person's standing in society is often determined by his or her occupation, income or education level, or family background. It also has a subjective component, associated with perceptions that are drawn from these various objective points of reference. A plaintiff need not prove that all of these factors influenced the decision to exclude. It will, however, be necessary to show that, as a result of one or more of these factors, the plaintiff can be regarded as part of a socially identifiable group and that it is in this context that the discrimination occurred.[6]

13. This definition, including level of education as a component of social condition, was adopted by a panel appointed by the federal Minister of Justice, and chaired by former Supreme Court Justice Gérard La Forest, to review the *Canadian Human Rights Act* in 1999.[7] The La Forest panel recommended the inclusion of the ground of social condition as it has been defined under the *Quebec Charter*, with the clarification that protection be limited to disadvantaged groups.[8] The aim of a general definition of social condition was "to target protections by using personal characteristics in the same manner as equality concerns are raised under the *Charter*."[9] The panel noted that the subjective

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6 Canadian Human Rights Act Review Panel, *Promoting Equality : A New Vision* (Ottawa : Canadian Human Rights Review Act Panel, 2000) (the "La Forest Report") at p. 107.
7 *Ibid.*
8 *Ibid* at p. 111 and 113.
9 *Ibid* at p. 109.

component of the definition of social condition is important because "it helps distinguish between people who are perceived to be part of a socially identifiable and stereotyped group and other individuals..."[10]

14. Other provinces have included social condition in human rights legislation and have also defined it as including level of education. New Brunswick's *Human Rights Act* defines social condition as "the condition of inclusion of the individual in a socially identifiable group that suffers from social or economic disadvantage on the basis of his or her source of income, occupation or level of education."[11] The Northwest Territories' *Human Rights Act* defines social condition as "the condition of inclusion of the individual, other than on a temporary basis, in a socially identifiable group that suffers from social or economic disadvantage resulting from poverty, source of income, illiteracy, level of education or any other similar circumstance."[12] Manitoba's *Human Rights Code* includes the ground of "social disadvantage" defined as "diminished social standing or social regard due to, [*inter alia*] low levels of education."[13]

15. CCPI/CWP will submit that the ground of social condition, as it has been defined in Quebec and other provincial human rights legislation, best captures the form of discrimination at issue in the present case. The Appellant First Nation is applying an objective restriction based on level of education (or, more specifically, the need for at least a Grade 12 education in a formal Euro-Canadian sense) which, on a subjective level, is tied to prejudicial and stereotyping assumptions, assigning those who have not finished "High School" a lower social status. This prejudice taints the First Nation's *Election Act*, which is based on the assumption that those with less than a Grade 12 education do not have the knowledge or intelligence required to govern, and are so lacking in worth that their names should not even be put to the people for a vote.

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10 *Ibid* at p. 111.
11 *Human Rights Act*, RSNB 2011, c 171 at s. 2.
12 *Human Rights Act*, SNWT 2002, c 18 at s.1.
13 *The Human Rights Code*, C.C.S.M. c. H175.

16. The Grade 12 education requirement deprives the Respondent and others who, because of their disadvantaged condition, were unable to complete a high school education, of equal dignity and respect. The traditional wisdom (especially in First Nation communities) that such people have accumulated over their lives is discounted and devalued on the basis of mainstream society's cultural prejudices. Such treatment constitutes discrimination based on the social condition of having a low level of education and violates the principles of substantive equality that underlie s. 15 of the *Charter*.

(ii) Social Condition Meets the Criteria for Recognition Under s. 15

17. Second, CCPI/CWP will submit that social condition meets the requirements for recognition as an analogous ground of discrimination under s. 15 of the *Charter*.

18. Social condition identifies a group that has experienced historical disadvantage; lack of political power; and is vulnerable to having its interests disregarded. The characteristics that define social condition are immutable, in the sense adopted by this Court in *Corbiere* in relation to Aboriginality-residence. When a social group is stigmatized or stereotyped by society, barriers are created for that group, which then makes the ability to change very difficult. In this case, the Respondent is an elder who attended residential schools but did not graduate.[14] For the Respondent, like for others who are similarly situated, the social condition of level of education – that is, lower level of education combined with other dimensions of social disadvantage – is constructively immutable like marital status, citizenship, or Aboriginality-residence. It is thus equally deserving of recognition as an analogous ground under s. 15.

19. This Court has also acknowledged that one indicator of an analogous ground "is whether the ground is included in federal and provincial human rights codes."[15] As noted above, social condition has been listed in the human rights legislation of Quebec,

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14 Decision at para 3 and 13.
15 *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203 at para 60.

New Brunswick, the Northwest Territories, and Manitoba (as social disadvantage).[16] In addition, this Court has recognized that the *Charter* should generally be assumed to provide protection as least as broad as provided under international human rights treaties ratified by Canada.[17] Social or economic status is recognized as a ground of discrimination under international human rights law and concerns expressed by United Nations human rights treaty monitoring bodies regarding absence of such protections in some jurisdictions in Canada are further considerations in favour of this Court recognizing social condition as an analogous ground under section 15 of the *Charter*.[18]

(iii) Social condition and the Broader Purposes of s. 15

20. Third, CCPI/CWP will submit that this case provides the Court with an important opportunity to consider the issue of analogous grounds in light of the Court's general re-appraisal of its approach to s. 15, commenced in *R v. Kapp*,[19] and continuing in *Withler v. Canada*.[20] The Court has stated that the main question, in deciding whether a ground of discrimination should be recognized as analogous, is whether this would further the purpose of s. 15. CCPI/CWP will submit that recognizing social condition would further a purposive approach to analogous grounds, consistent with the principle of substantive equality, as reaffirmed in the Court's post-*Kapp* jurisprudence.

B) The Interest of the Proposed Intervener

21. CCPI/CWP are directly affected by the outcome of this Appeal.

22. Both CCPI/CWP have a lengthy track record of working with and representing people living in poverty, to combat discriminatory political, social, and legal stereotypes and

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16 *Charte des droits et libertés de la personne du Québec*, L.R.Q., c. 12, *Human Rights Act*, RSNB 2011, c 171; *Human Rights Act*, SNWT 2002, c 18; *The Human Rights Code*, C.C.S.M. c. H175.
17 *Divito v Canada (Public Safety and Emergency Preparedness)*, [2013] SCR 157 at paras 22-23.
18 La Forest Report at p. 107.
19 [2008] 2 S.C.R. 483.
20 [2011] 1 S.C.R. 396.

prejudice related to social disadvantage. The issue of social condition as a prohibited ground of discrimination under the *Charter* and domestic human rights legislation has been a particular focus of CCPI/CWP's work. As outlined in the affidavit of Ms. Farha, both CCPI and CWP have extensive experience and well recognized expertise in assisting this Court, other domestic courts and tribunals, Parliamentary and legislative committees, the La Forest panel and other expert panels, and international human rights bodies in considering these issues.

23. In sum, CCPI/CWP asks this Honourable Court to grant it leave to intervene in this Appeal. The argument proposed will be useful and different from the arguments presented by the parties, while remaining focussed on the issue raised in the Appeal, namely whether the impugned requirement that a candidate for public office of a First Nation to have a minimum of a Grade 12 education violates 15 of the *Charter*. CCPI/CWP submit that the interests of justice will be served if they are allowed to bring their substantial expertise to the Court in order to provide useful assistance in deciding this Appeal.

IV. SUBMISSIONS ON COSTS

24. CCPI/CWP do not seek costs and submit that they should not be liable to pay costs.

V. ORDER SOUGHT

25. CCPI/CWP seek an Order:

(a) granting leave to intervene in the hearing of this Appeal pursuant to Rule 55 of the Supreme Court Rules;

(b) granting leave to file a factum up to 15 pages in length;

(c) granting leave to make oral argument at the hearing of this Appeal, up to 15 minutes in length, time permitting;

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 8th day of May, 2014.

Per: _____

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THOMPSON DORFMAN SWEATMAN LLP
Counsel for Canada Without Poverty and
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Per: _____

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VI. TABLE OF AUTHORITIES

	AUTHORITY	PARA
	Canadian Human Rights Act Review Panel, *Promoting Equality : A New Vision* (Ottawa : Canadian Human Rights Review Act Panel, 2000) at pp. 106-114	13, 19
	Corbiere v. Canada (Minister of Indian and Northern Affairs), [1999] 2 S.C.R. 203	18
	Divito v Canada (Public Safety and Emergency Preparedness), [2013] 3 SCR 157	19
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