

**SUPREME COURT OF CANADA**

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| **Citation:** Kahkewistahaw First Nation *v.* Taypotat, 2015 SCC 30, [2015] 2 S.C.R. 548 | **Date:** 20150528**Docket:** 35518 |

Between:

Chief Sheldon Taypotat, Michael Bob, Janice McKay, Iris Taypotat

and Vera Wasacase as Chief and Council Representatives

of the Kahkewistahaw First Nation

Appellants

and

Louis Taypotat

Respondent

**Coram:** McLachlin C.J. and Abella, Cromwell, Moldaver, Karakatsanis, Wagner and Gascon JJ.

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| **Reasons for Judgment:**(paras. 1 to 35) | Abella J. (McLachlin C.J. and Cromwell, Moldaver, Karakatsanis, Wagner and Gascon JJ. concurring) |

Kahkewistahaw First Nation *v.* Taypotat, 2015 SCC 30, [2015] 2 S.C.R. 548

Chief Sheldon Taypotat, Michael Bob, Janice McKay,

Iris Taypotat and Vera Wasacase as Chief and Council

Representatives of the Kahkewistahaw First Nation Appellants

v.

Louis Taypotat Respondent

**Indexed as: Kahkewistahaw First Nation *v.*** Taypotat

2015 SCC 30

File No.: 35518.

2014: October 9; 2015: May 28.

Present: McLachlin C.J. and Abella, Cromwell, Moldaver, Karakatsanis, Wagner and Gascon JJ.

on appeal from the federal court of appeal

 *Constitutional law — Charter of Rights — Right to equality — Elections — Eligibility requirements — Kahkewistahaw Election Act requires that candidates for Chief or Band Councillor have Grade 12 education — Whether education requirement violates s. 15(1) of Canadian Charter of Rights and Freedoms — Kahkewistahaw Election Act, s. 9.03(c).*

 In the 1996 Report of the Royal Commission on Aboriginal Peoples, education was identified as a top priority for promoting collective and individual well-being in Aboriginal communities, and for helping those communities prepare to assume the complete range of responsibilities associated with self-government. In response to these goals — promoting good governance and encouraging education — the 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. Only the constitutional issue is before this Court. His argument was that the Grade 12 educational requirement violated s. 15(1) of the *Canadian Charter of Rights and Freedoms* 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. The grounds on which it based its decision, age and residence on a reserve, were not pleaded.

 *Held*: The appeal should be allowed and the decision of de Montigny J. restored.

 The approach to s. 15 was most recently set out in *Quebec (Attorney General) v. A*, [2013] 1 S.C.R. 61, at paras. 319-47. Itrequires a flexible and contextual inquiry into whether a distinction has the effect of perpetuating arbitrary disadvantage on the claimant because of his or her membership in an enumerated or analogous group. It is an approach which recognizes that persistent systemic disadvantages have operated to limit the opportunities available to members of certain groups in society and seeks to prevent conduct that perpetuates those disadvantages. The focus of s. 15 is on laws that draw *discriminatory* distinctions — that is, distinctions that have the effect of perpetuating arbitrary disadvantage based on an individual’s membership in an enumerated or analogous group. The s. 15(1) analysis is accordingly concerned with substantive equality.

 The first part of the s. 15 analysis asks whether a law creates a distinctionon the basis of an enumerated or analogous ground. The second part of the analysis focuses on arbitrary — or discriminatory — disadvantage, that is, 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.

 To establish a *prima facie* violation of s. 15(1), the claimant must therefore 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. At the second stage of the analysis, the specific evidence required will vary depending on the context of the claim.

 While facially neutral qualifications like education requirements may well be a proxy for, or mask, a discriminatory impact, this case falls 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. 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. Most significantly, the record is silent about the education levels of members of the Kahkewistahaw First Nation who live on a reserve.

 Statistical evidence is not always required to establish that a facially neutral law infringes s. 15. In some cases, the disparate impact on an enumerated or analogous group will be apparent and immediate. The evidence in this case, however, does not point to any such link between the education requirement and a disparate impact on the basis of an enumerated or analogous ground. While the evidentiary burden need not be onerous, the evidence must amount to more than a web of instinct. Accordingly, the education provisions in the *Kahkewistahaw Election Act* do notrepresent a *prima facie* violation of s. 15.

**Cases Cited**

 **Applied:** *Quebec (Attorney General) v. A*, 2013 SCC 5, [2013] 1 S.C.R. 61; **referred to:** *Withler v.**Canada (Attorney General)*, 2011 SCC 12, [2011] 1 S.C.R. 396; *R. v. Kapp*, 2008 SCC 41, [2008] 2 S.C.R. 483; *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143; *Corbiere v. Canada (Minister of Indian and Northern Affairs)*,[1999] 2 S.C.R. 203; *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497; *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971); *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 S.C.R. 3; *R. v. Mian*,2014 SCC 54, [2014] 2 S.C.R. 689.

**Statutes and Regulations Cited**

*Canadian Charter of Rights and Freedoms*, s. 15.

*Civil Rights Act of 1964*, Pub. L. 88-352, 78 Stat. 241 (1964), Title VII.

*Indian Act*, R.S.C. 1985, c. I-5.

*Kahkewistahaw Election Act* [en. pursuant to the *Order Amending the Indian Bands Council Elections Order (Kahkewistahaw)*, SOR/2011-49], ss. 9.03(c), 9.04, 9.05, 10.01(d).

**Authors Cited**

Canada. Royal Commission on Aboriginal Peoples. *Report of the Royal Commission on Aboriginal Peoples*, vol. 3, *Gathering Strength*. Ottawa: The Commission, 1996.

Canada. Statistics Canada. *Educational Portrait of Canada, 2006 Census*. Ottawa: Minister of Industry, 2008.

Richards, John. *Closing the Aboriginal/non-Aboriginal Education Gaps*. C.D. Howe Institute Backgrounder 116 (online: https://www.cdhowe.org/), 2008.

Smith, Lynn, and William Black. “The Equality Rights” (2013), 62 *S.C.L.R.* (2d) 301.

 APPEAL from a judgment of the Federal Court of Appeal (Blais C.J. and Mainville and Near JJ.A.), 2013 FCA 192, 447 N.R. 352, 365 D.L.R. (4th) 485, [2014] 1 C.N.L.R. 375, [2013] F.C.J. No. 938 (QL), 2013 CarswellNat 3091 (WL Can.), setting aside a decision of de Montigny J., 2012 FC 1036, 417 F.T.R. 160, 268 C.R.R. (2d) 77, [2013] 1 C.N.L.R. 349, [2012] F.C.J. No. 1125 (QL), 2012 CarswellNat 3389 (WL Can.). Appeal allowed.

 Eugene Meehan, Q.C., *Marie-France Major*, James D. Jodouin and Marcus R. Davies, for the appellants.

 Mervin C. Phillips and Leane Phillips, for the respondent.

 The judgment of the court was delivered by

1. Abella J. — In the 1996 Report of the Royal Commission on Aboriginal Peoples, education was identified as a top priority for promoting collective and individual well-being in Aboriginal communities, and for helping those communities prepare to assume the complete range of responsibilities associated with self-government:

In our public hearings, Aboriginal parents, elders, youth and leaders came forward to tell us of the vital importance of education in achieving their vision of a prosperous future. Education is seen as the vehicle for both enhancing the life of the individual and reaching collective goals.

. . .

 Over the past two decades, as the determination to re-establish self-governing nations has gathered momentum, Aboriginal people have repeatedly stressed the importance of building their capacity to operate contemporary self-governing structures. . . .

. . .

 . . . Education is essential to hone the talents needed to assume the responsibilities of the present and future . . . .

(*Report of the Royal Commission on Aboriginal Peoples*, vol. 3, *Gathering Strength* (1996), at pp. 433 and 540-41)

1. In response to these aspirational goals — promoting good governance and encouraging education — the Kahkewistahaw First Nation in Saskatchewan spent 13 years developing an Election Code which included a Grade 12 requirement for candidates who wished to be Chief or a Band Councillor. This had the effect of preventing Louis Taypotat, who had been Chief for most of the previous three decades, from running again for office. 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. The only remaining issue in this appeal is the constitutional challenge.

Background

1. The Department of Indian Affairs and Northern Development has an established process by which First Nations communities who have been subject to the election provisions of the *Indian Act*,R.S.C. 1985, c. I-5, can elect their leaders under their own Election Codes.Before the Minister authorizes a community to take this step, the community has to prepare a written election code which meets certain minimum requirements, including compliance with the *Canadian Charter of Rights and Freedoms*. A majority of the voting members of the First Nation must be in favour of the Code.
2. Louis Taypotat is 76 years old. He is a member of the Kahkewistahaw First Nation, a community of approximately 2,000 people in Saskatchewan. He has a Grade 10 education and received an honorary diploma from the Saskatchewan Indian Institute of Technology in recognition of his service to his community. He was the elected Chief of the Kahkewistahaw First Nation for a total of more than 27 years — from 1973 to 1989, from 1992 to 1993 and from 1997 to 2007. His elections were held under the procedure set out in the *Indian Act*.
3. In the late 1990s, the Kahkewistahaw First Nation began the process of developing its own community Election Code. The community consultation to develop and ratify the code took 13 years. Much of the process, which was conducted publicly and openly, was under the guidance of Louis Taypotat as Chief.
4. The first draft of the Code was developed in 1998. It included a provision that required candidates for Chief or Band Councillor to have “formal education at a post-secondary level or equivalent education/experience”. Subsequent drafts, including the final version, specified that candidates are required to have at least a Grade 12 education: *Kahkewistahaw Election Act*,s. 9.03(c). Candidates have to demonstrate to the Electoral Officer that they have the requisite level of education before they are permitted to run: *Kahkewistahaw Election Act*, s. 10.01(d).
5. The first ratification vote of the final version of the Code, the *Kahkewistahaw Election Act*, was held in September 2008 while Louis Taypotat was Chief. Turnout was too low to reflect the support required by the Department. A second ratification vote was held in March 2009. Turnout was again too low to satisfy the Department. As a result, the Department approved a “continuation vote” to supplement the second vote. In order to ensure its integrity, only members who had not voted in the second vote were eligible to vote in the continuation vote. It was held in January 2010.
6. The continuation vote resulted in the *Kahkewistahaw Election Act* getting between 84 and 85 per cent approval*.* As a result, the Department removed the Kahkewistahaw First Nation from the election provisions of the *Indian Act* and authorized it to operate pursuant to its own *Kahkewistahaw Election Act* on February 18, 2011*.*
7. The first election under the *Kahkewistahaw Election Act* was scheduled for May 13, 2011. Louis Taypotat submitted documents to enable him to run as a candidate for Chief, but the Electoral Officer refused to certify his candidacy because he did not demonstrate that he had a Grade 12 or equivalent level of education. His nephew, Sheldon Taypotat, who had previously been elected as Chief in May 2009, in the last election held under the *Indian Act*, became Chief.
8. Louis Taypotat brought an application for judicial review of the *Kahkewistahaw Election Act* process. Of particular relevance, he argued that the Grade 12 educational requirement violated s. 15(1) of the *Charter* because “educational attainment is analogous to race and age” for the purposes of s. 15(1).
9. The Federal Court dismissed the application. Justice de Montigny held that Louis Taypotat had produced no evidence to demonstrate that education was an analogous ground for the purposes of s. 15.
10. On appeal, Louis Taypotat advanced 10 separate grounds. The newly formulated basis for his s. 15 submission, which had not been raised in his application for judicial review to the Federal Court, was that residential school survivors without a Grade 12 education constituted an analogous group for the purposes of s. 15.
11. Although it dismissed nine of the grounds for appeal “without difficulty”, the Federal Court of Appeal allowed Mr. Taypotat’s claim under s. 15 of the *Charter*. It did not deal explicitly with the argument that residential school survivors without a Grade 12 education constituted an analogous group for the purposes of s. 15, but concluded instead, even though it was not pleaded, that the education requirement had a discriminatory impact on the basis of age. In addition, without anyone having raised the issue, it found the education requirement discriminated on the basis of “residence on a reserve”.
12. Before this Court, Louis Taypotat relied on the Federal Court of Appeal’s conclusions to reformulate his s. 15 claim. He now argues that the education requirement violates s. 15(1) because it has a disproportionate effect on older community members who live on a reserve.
13. 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.

Analysis

1. The approach to s. 15 was most recently set out in *Quebec (Attorney General) v. A*, [2013] 1 S.C.R. 61, at paras. 319-47. It clarifies thats. 15(1) of the *Charter* requires a “flexible and contextual inquiry into whether a distinction has the effect of perpetuating arbitrary disadvantage on the claimant *because of his or her membership in an enumerated or analogous group*”: para. 331 (emphasis added).
2. This Court has repeatedly confirmed that s. 15 protects substantive equality: *Quebec v. A*, at para. 325; *Withler v.**Canada (Attorney General)*, [2011] 1 S.C.R. 396, at para. 2; *R. v. Kapp*,[2008] 2 S.C.R. 483, at para. 16; *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143. It is an approach which recognizes that persistent systemic disadvantages have operated to limit the opportunities available to members of certain groups in society and seeks to prevent conduct that perpetuates those disadvantages. As McIntyre J. observed in *Andrews*,such an approach rests on the idea that not every difference in treatment will necessarily result in inequality and that identical treatment may frequently produce serious inequality: p. 164.
3. The focus of s. 15 is therefore on laws that draw *discriminatory* distinctions — that is, distinctions that have the effect of perpetuating arbitrary disadvantage based on an individual’s membership in an enumerated or analogous group: *Andrews*,at pp. 174-75; *Quebec v. A*, at para. 331. The s. 15(1) analysis is accordingly concerned with the social and economic context in which a claim of inequality arises, and with the effects of the challenged law or action on the claimant group: *Quebec v. A*,at para. 331.
4. The first part of the s. 15 analysis therefore asks whether, on its face or in its impact, a law creates a distinctionon the basis of an enumerated or analogous ground. Limiting claims to enumerated or analogous grounds, which “stand as constant markers of suspect decision making or potential discrimination”, screens out those claims “having nothing to do with substantive equality and helps keep the focus on equality for groups that are disadvantaged in the larger social and economic context”: *Corbiere v. Canada (Minister of Indian and Northern Affairs)*,[1999] 2 S.C.R. 203,at para. 8; Lynn Smith and William Black, “The Equality Rights” (2013), 62 *S.C.L.R.* (2d) 301, at p. 336. Claimants may frame their claim in terms of one protected ground or several, depending on the conduct at issue and how it interacts with the disadvantage imposed on members of the claimant’s group: *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497, at para. 37.
5. The second part of the analysis focuses on arbitrary — or discriminatory — disadvantage, that is, 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:

 The root of s. 15 is our awareness that certain groups have been historically discriminated against, and that the perpetuation of such discrimination should be curtailed. If the state conduct widens the gap between the historically disadvantaged group and the rest of society rather than narrowing it, then it is discriminatory. [*Quebec v. A*,at para. 332]

1. To establish a *prima facie* violation of s. 15(1), the claimant must therefore 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. At the second stage of the analysis, the specific evidence required will vary depending on the context of the claim, but “evidence that goes to establishing a claimant’s historical position of disadvantage” will be relevant: *Withler*,at para. 38; *Quebec v. A*, at para. 327.
2. The question in this case is which “enumerated or analogous group” faces discrimination, and whether Mr. Taypotat has established that the education requirement set out in the *Kahkewistahaw Election Act* has a disproportionate effect on the members of any such group.
3. There is no question that education requirements for employment could, in certain circumstances, be shown to have a discriminatory impact in violation of s. 15. In *Griggs v. Duke Power Co.*,401 U.S. 424 (1971), for example, the United States Supreme Court concluded that it was a violation of Title VII of the *Civil Rights Act of 1964* for an employer to require that employees have a high school diploma to work as, among other things, a coal handler or in maintenance at a power plant. The effect of this facially neutral requirement was to disproportionately exclude African Americans from positions in the plant. The court concluded that:

. . . practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to “freeze” the status quo of prior discriminatory employment practices. [p. 430]

As the court observed, employment requirements that are unrelated to measuring job capability can operate as “built-in headwinds” for minority groups, and will therefore be discriminatory: p. 432. See also *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 S.C.R. 3.

1. In this case, however, 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 such 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.
2. That may well be because the bases on which the Federal Court of Appeal decided the s. 15 issue — age and residence on a reserve — were not pleaded by Louis Taypotat either in his judicial review application or as a ground of appeal from the Federal Court to the Federal Court of Appeal. The Federal Court of Appeal instead appears to have raised the issues on its own initiative.
3. In *R. v. Mian*, [2014] 2 S.C.R. 689, at para. 41, this Court clarified that an appellate court may only raise new issues on its own initiative when failing to do so would risk an injustice. The court must also be satisfied that there is a “sufficient basis in the record on which to resolve the issue”: para. 51. The Federal Court of Appeal’s decision to raise the issue of residence on a reserve on its own initiative is particularly troubling because “residence on a reserve” has not been recognized as an analogous ground for the purposes of s. 15. *Corbiere* recognized *off-reserve* residence as an analogous ground, but declined to address whether residence on a reserve would similarly trigger the protection of s. 15: paras. 6 and 62. The Court’s recognition of off-reserve residence as an analogous ground in *Corbiere* relied in part on the argument that First Nations people living off-reserve have experienced unique disadvantages relative to community members living on a reserve and that, for many, the decision to live off-reserve was either forced or heavily constrained. With respect, I would be reluctant to impose a simple mirror inference without argument or evidence from the parties.
4. In this case, there was no factual record to support deciding the appeal as a violation of the s. 15 rights of community members who live on a reserve. Most significantly, the record is silent about the education levels of members of the Kahkewistahaw First Nation who live on a reserve. The only evidence on the record dealing with education and residence on a reserve covers First Nations persons between 20 and 24 in Saskatchewan as a whole. The data does not address education levels among other age groups: John Richards, *Closing the Aboriginal/non-Aboriginal Education Gaps* (2008) (online) (the “C.D. Howe Report”), at p. 4.
5. Finally, even if it had been properly raised and argued by the parties, I have serious doubts about the merits of the argument that the education requirements in the *Kahkewistahaw Election Act* have the effect of imposing arbitrary disadvantage on community members based on their residence on the reserve. The *Kahkewistahaw Election Act* specifically requires that the Chief and three of the four Councillors *must* reside on the reserve during their term: ss. 9.04 and 9.05. Far from having the effect of excluding community members who live on the reserve, the *Kahkewistahaw Election Act* is specifically designed to foster their participation in community governance. As a result, in the context of the *Kahkewistahaw Election Act* as a whole, it is difficult to conclude that it has the effect of perpetuating arbitrary disadvantage against these community members.
6. Accordingly, in my view the Court of Appeal erred in concluding that the education provisions in the *Kahkewistahaw Election Act* represent a *prima facie* violation of the s. 15 rights of community members who live on the reserve.
7. Turning to theconclusion reached by the Federal Court of Appeal that the education requirements discriminate against older members of the community, we confront similar evidentiary vacuums. The Federal Court of Appeal relied on two pieces of statistical evidence in support of this conclusion. The first was data from the 2006 census, about which the Federal Court of Appeal took judicial notice. That data showed that

 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). [para. 52]

1. Census data can certainly be a useful evidentiary tool to demonstrate that a law has a disadvantaging impact. But this case is about a particular Election Code in a particular First Nations community. I find it difficult to draw even a weak inference about the correlation between age and education among the almost 2000 members of the Kahkewistahaw First Nation from census data about the Canadian population generally. As a result, in my respectful view, the Court of Appeal erred in taking judicial notice of this data as a key to its conclusion that the Kahkewistahaw First Nation’s Election Code would have a disadvantaging effect on older community members.
2. The second statistical basis for the Federal Court of Appeal’s finding was aggregate educational data in the C.D. Howe Report dealing with all aboriginal people in Canada: pp. 4-5. The Federal Court of Appeal used this data to conclude that the provision would have a disproportionate impact on older community members in the Kahkewistahaw First Nation. But the 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 illuminatewhether and to what extent the Grade 12 education requirement functions to disadvantage older community members of the Kahkewistahaw First Nation.
3. Finally, in his submissions before this Court, Mr. Taypotat reframed the Federal Court of Appeal’s conclusion slightly, asserting that the education provisions discriminate against *older community members who live on a reserve*, rather than, as the Court of Appeal found, against both older community members *and* those who live on the reserve. On this issue, too, the record is silent and we are left only with Mr. Taypotat’s bare assertion. This is not to say that statistical evidence is invariably required to establish that a facially neutral law infringes s. 15. In some cases, the disparate impact on an enumerated or analogous group will be apparent and immediate. The evidence in this case, however, does not point to any such link between the education requirement and a disparate impact on the basis of an enumerated or analogous ground.
4. I think intuition may well lead us to the conclusion that the provision has some disparate impact, but 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. While the evidentiary burden need not be onerous, the evidence must amount to more than a web of instinct. The evidence before us, even in combination, does not rise to the level of demonstrating any relationship between age, residence on a reserve, and education among members of the Kahkewistahaw First Nation, let alone that arbitrary disadvantage results from the impugned provisions.
5. I would therefore allow the appeal with costs and restore the decision of de Montigny J.

 *Appeal allowed with costs.*

 Solicitors for the appellants: Supreme Advocacy, Ottawa; Bainbridge Jodouin Cheecham, Saskatoon.

 Solicitors for the respondent: Phillips & Co., Regina.