Federal Court

Cour fédérale

Date: 20130924

Docket: T-1903-11

Citation: 2013 FC 974

BETWEEN:

**ERIC JOSEPH, MARGARET JOSEPH,
PAULA MOON, GERALDINE FITCH**

Applicants

and

**THE DZAWADA'ENUXW (TSAWATAINEUK)
FIRST NATION BAND COUNCIL and
THE DZAWADA'ENUXW (TSAWATAINEUK)
FIRST NATION**

Respondents

REASONS FOR JUDGMENT

[1] This is a judicial review of the respondents' adoption of a new electoral code (the 2011 Code) and a decision made by the electoral officer appointed under that Code.

[2] In their amended application, the applicants seek:

1. An order in the nature of *certiorari* pursuant to paragraph 18.1(3)(b) of the *Federal Courts Act*, RSC 1985, c F-7, quashing or setting aside the decisions or one or more of them; and

2. An order pursuant to paragraph 18.1(3)(b) of the *Federal Courts Act* or section 52 of the *Constitution Act, 1982*, or both, declaring the 2011 Dzawada'enuxw (Tsawataineuk) First Nation Custom Code (the "Custom Code") to be invalid on one or more of the following bases:

(i) The September 13, 2011 general meeting was not in accordance with the notice issued for the said general meeting (notice) dated August 15, 2011; and

(ii) The 2011 Code violates section 15 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*) and is therefore invalid to the extent that it prohibits electors who do not reside on the reserve for a period of one year from being nominated for the position of Council Chair and other Council positions; and

(iii) The 2011 Code was not accepted by a broad consensus of the Band membership; and

(iv) The 2011 Code is not acceptable to broad consensus as practiced by the membership of the Band; and

(v) The 2011 Code is contrary to the principles of natural justice; and

(vi) The Band Council acted beyond their jurisdiction and denied the applicants natural justice in the election amendment process.

3. In the alternative, an order in the nature of *mandamus* pursuant to paragraph 18.1(3)(a) of the *Federal Courts Act*, directing the Council to amend the 2005 Regulations pursuant to the 2005 Regulations or enact new Band Custom Election Regulations, by a date to be set by the Court; that:

(i) are in compliance with the *Charter*, and in particular, allow members of the Dzawada'enuxw (Tsawataineuk) First Nation (the members of the Band) who do not reside on any of the Band's reserves, but who are otherwise qualified to vote in Band elections; to participate equally in free and fair elections and in the Band Custom Election Regulations amendments process and respect the custom and right to vote by referenda in order to reach broad consensus on amendments of the Election Regulations; and

(ii) makes necessary changes to comply with the *Constitution Act, 1982*, and in particular, that permit members of the Band who do not reside on any of the Band reserves, but who are otherwise qualified to vote in Band Council elections and to vote for all positions on the Council, to stand as candidates for any and all positions on the Council, and to nominate qualified persons as candidates for any and all positions on the Council; and

(iii) are based on the custom of the Band as accepted by a broad consensus of the membership of the Band; and

(iv) are supervised independently from the Band Council and Band administration;

4. An order in the nature of *mandamus* pursuant to paragraph 18.1(3)(a) of the *Federal Courts Act*, directing the Council to hold a general election pursuant to the Band Custom 2005 Election Regulations, as amended, pursuant to the custom of the Band by referenda and in accordance with paragraph 3 above, by a date to be set by the Court; and

5. An injunction enjoining the Band Council from exercising any authority or performing any duties as a Council except:

(i) signing Band payroll cheques and accounts payable that have been already approved in annual budgeting by Council and other expenditures already approved as per financial policies of the Band; and

(ii) initiatives that are or may be essential to the health and safety of the Band; and

(iii) carrying out orders from this Court that pertain to the Band general elections, amendment process and referenda;

6. An order that this Court retain jurisdiction of this matter until the 2005 Regulations are amended in accordance with paragraphs 3 and 4 above and elections are enacted; and

7. Costs; and

8. Such further and other relief as the applicants may advise and this Honourable Court may deem just.

[3] The respondents seek the dismissal of the application with costs.

Background

[4] The Band is located in coastal British Columbia. It has five allocated reserves, with only a single residential village on the Gwa-Yee Reserve located in Kingcome Inlet. The First Nation has approximately 520 members, with approximately 90 members living on-reserve. The Band's Council is a Custom Council within the meaning of the *Indian Act*, RSC 1985, c I-5 (the Act).

[5] The Band held a general meeting on September 13, 2011 and voted to replace its previous election regulations (the 2005 Regulations) with the 2011 Code. The 2005 Regulations were adopted by a referendum that included votes from non-resident members. The vote at the general meeting was by physically present members only.

[6] A general Band election was held under the 2011 Code on April 19, 2012 and the results announced by the electoral officer on April 23, 2012. The resident Councillor and chair positions were acclaimed, while the non-resident Councillor position was contested, with one of the applicants, Eric Joseph, losing to another candidate.

The Decision

[7] The impugned sections of the 2011 Code are:

> 3. In this code…
>
> "resident" refers to the residential status of an "on reserve" candidate who is considered to have his or her residence on Gwa-yee reserve. A person's residence is interpreted by the following rules:
>
> a. a residence is the place a person normally eats and sleeps;
>
> b. a person can only be resident in one place at one time, and a person is resident in that place until another place of residence is acquired.
>
> c. a person must be resident on the Gwa-yee reserve for a minimum of one (1) year prior to the elections.
>
> …
>
> 92. Any elector who:
>
> a. is resident on the Gwa-Yee Reserve or any other Dzawada'enuxw Reserve shall be eligible to be nominated for the position of Office of council Chair;
>
> b. is resident on the Gwa-Yee Reserve or any other Dzawada'enuxw Reserve shall be eligible to be nominated for a position of Office of resident councillor; or
>
> c. is non-resident on the Gwa-Yee Reserve or any other Dzawada'enuxw Reserve, shall be eligible to be nominated for the position of Office of non-resident councillor.

[8] The applicants also challenge the electoral officer's decision under the 2011 Code to disallow the applicant, Eric Joseph, from running for the office of Council chair.

Issues

[9] The applicants' memorandum raises the following issues:

1. Does the 2011 Code reflect a broad consensus of the First Nation's membership?

2. Do the impugned provisions of the 2011 Code violate section 15 of the *Charter* by discriminating against non-resident members and, if so, is that discrimination justified under section 1 of the *Charter*?

3. Was the passing of the 2011 Code a breach of natural justice?

[10] I would rephrase the issues as follows:

1. What is the appropriate standard of review?

2. Was the passing of the 2011 Code procedurally fair?

3. Does the 2011 Code reflect a broad consensus of the First Nation's membership?

4. Do the impugned provisions of the 2011 Code violate section 15 of the *Charter* by discriminating against non-resident members and if so, is that discrimination justified under section 1 of the *Charter*?

5. What is the appropriate remedy?

<u>Applicants' Written Submissions</u>

[11] The applicants argue that when a First Nation organizes its elections pursuant to a customary election code instead of the Act's provisions, the custom code must reflect a broad consensus of the Band membership. There is a subjective element to broad consensus and it is not sufficient for the respondents to rely on the unanimous vote at a general meeting. The evidence shows the meeting was difficult to attend and only one non-resident member attended. No provision for proxy or absentee balloting was made despite requests from off-reserve members.

[12] The applicants further argue that affidavit evidence establishes that the Band has a history of permitting non-resident members to vote in referenda and elections without requiring them to be physically present. The amendments to the previous Code in 2005 included proxy voting and that Code itself requires mail-in ballots be sent to non-resident members for elections. Therefore, a process that only permits voting by present members cannot represent a broad consensus. The 2005 amendment process was voted on by 62 members while the 2011 amendment was voted on by 15 members. The 2005 Code also limited the ability of non-resident members to run for Council, but does not necessarily reflect the current broad consensus of the membership. The significant change of further restricting the definition of residency requires broad consensus.

[13] The applicants argue the Band's decisions are subject to *Charter* scrutiny and ask this Court to apply the two-step test for discrimination under section 15 of the *Charter* as established in *R v Kapp*, 2008 SCC 41, [2008] 2 SCR 483 at paragraph 17. Aboriginality-residence was identified as a ground of discrimination analogous to those enumerated in section 15 in *Corbiere v Canada*

(Minister of Indian and Northern Affairs), [1999] 2 SCR 203. The 2011 Code fulfils the first step of the *Kapp* test by creating a distinction based on that ground.

[14] The applicants further argue that the 2011 Code creates a disadvantage by perpetuating prejudice or stereotyping, thus fulfilling the second step of the *Kapp* test. The applicants rely on this Court's judgment in *Esquega v Canada (Attorney General)*, 2007 FC 878, 2007 FCJ No 1128 (QL) (varied on other grounds 2008 FCA 182, [2008] FCJ No 762 (QL)), where the Court held that a provision of the Act limiting Council offices to resident members was discriminatory. Based on these decisions, the applicants argue that non-resident members face a pre-existing disadvantage and that prohibitions such as those in the 2011 Code perpetuate the harmful stereotype that non-resident members have no interest in participating in Band governance and are therefore less worthy of doing so.

[15] The applicants argue the evidence establishes that the First Nation has not adequately addressed the issues faced by non-resident members; therefore, the impugned provisions perpetuate their disadvantage and vulnerability. Similarly, the applicants argue there is no relationship between the provision and the actual need, capacity or circumstances of non-resident members, as the fact they live off the reserve does not make them less capable of serving their community. The applicants argue that some of the respondents' affidavit evidence perpetuates this negative stereotype. The Band Council's obligation is to govern the First Nation as a whole, which includes both resident and non-resident members. The interest affected is an extremely important one: the right to full participation in one's First Nation.

[16] The applicants argue that the residency requirement is not an ameliorative program as contemplated by subsection 15(2) of the *Charter* as there is no evidence that resident members are more disadvantaged than non-resident members.

[17] In analyzing the alleged violation of section 15 of the *Charter* under section 1, the applicants argue that ensuring the First Nation is governed by resident members is not a pressing and substantial objective. Similarly, the residency requirement is not minimally impairing, as at the very least, a minimally restrictive rule would allow a non-resident to run for Council chair. The injurious impact of the restriction to non-resident members is disproportionate to the importance of the objective.

[18] The applicants argue the appropriate remedy if a *Charter* violation is found is to nullify the entire 2011 Code and quash the recent election results under that Code.

[19] Finally, the applicants argue the 2011 Code was adopted through a process that breached procedural fairness. Non-resident members were given insufficient notice of the general meeting, forced to travel to the Gwa-Yee Reserve in order to vote, denied access to a boat after being promised one by Council and given the wrong time and place for the general meeting.

[20] The applicants argue that the injunctive relief they seek, as described above, strikes an appropriate balance, permitting the Council to take necessary steps for the financial well-being of the First Nation while restricting the ability of the Council to take any further steps when it is operating outside of the rule of law.

Respondents' Written Submissions

[21] The respondents argue that the appropriate standard of review for whether the 2011 Code reflects the Band's customs is reasonableness, given the Chief and Council's expertise in such customs. Whether the 2011 Code violates the *Charter* and whether the procedure used to adopt it was fair, are questions considered on a correctness standard. The respondents argue that section 25 of the *Charter*, which has the potential to act as a shield against *Charter* review, is an indication that correctness review should be tempered with deference.

[22] The respondents argue that the Court need not consider whether there is a broad consensus given that the electoral Code amendment process had been codified for more than a decade. Given that the process was written down and followed by the Band, there is no need to resort to a separate test to determine custom. There is no vacuum in the Band's custom to be filled through analyzing broad consensus.

[23] The respondents' alternative argument is that if there is in fact an overarching common law criterion of broad community consensus, it has been met in this case for two reasons: the previous use of the amendment process since 1999 and the members' participation in the general meeting. There is no evidence anyone other than two of the applicants have expressed concern with the amendment process.

[24] On procedural fairness, the respondents argue the procedural irregularities did not amount to a breach of fairness. The First Nation is in a constant struggle to maintain the basic structures of

government in the context of a remote village, a large number of non-resident members and a very limited budget. The Council first gave 30 days' notice of the general meeting by electronic mail and then postponed the meeting to give notice by postal mail as requested by one of the applicants. The meeting was again postponed to allow more time for review and input and a third notice was mailed to the members.

[25] The respondents argue that there is no evidence other than hearsay that any members were prevented from attending the meeting due to a lack of private boat transportation. The respondents claim their own evidence shows that the Band was willing to arrange such transportation if the interest was sufficient, but only one non-resident member expressed a willingness to travel to the village for the meeting.

[26] The respondents further argue there is no evidence that a change in the meeting start time or venue prevented any willing individual from attending and that the well-established quorum for a general meeting is 15, which was met. Therefore, the customary process was carried out properly.

[27] On the *Charter* issue, the respondents agree that the 2011 Code is subject to *Charter* review but notes that the Court should avoid pronouncing on the constitutional question if it is not necessary to dispose of the matter.

[28] The respondents concede that the first step of the *Kapp* test is met, as the 2011 Code creates a distinction based on Aboriginality-residence. The respondents maintain, however, that this distinction is not the kind invidious distinction prohibited by section 15 of the *Charter*.

[29] A reasonable person in the position of the applicants would not experience the differential treatment in this case as the perpetration of prejudice or discrimination or as treatment indicating he or she is of less worth or dignity. The effect of the Code is to advance the goals of self-government. The governance structure of the First Nation includes many opportunities for non-residents to participate: voting in elections and Band meetings, nominating all offices, holding office as a non-resident Councillor and having access to all Councillors.

[30] In other cases, stereotypes against non-resident Band members led to the deprivation of the core civil right of voting, which is not the case here. Non-resident members are represented by all Councillors and particularly the designated non-resident Councillor. There is no compelling evidence that non-resident members' interests have not been adequately represented or addressed. Both resident and non-resident Aboriginal people have experienced disadvantage and it does not remedy discrimination to pit the two groups against each other.

[31] The respondents emphasize that it is not the willingness or ability of non-resident members to participate in governance, but the knowledge base, experience in the community and current connection to the community needs that gives rise to the requirement that the majority of the Council be resident. This distinction reflects the correspondence between the need for current and continuous community connection and residency. The nature of the interest affected is important but limited as non-residents may participate in the public life of the Band.

[32] The respondents rely on section 25 of the *Charter* as an interpretative lens that should be considered by this Court when evaluating whether the custom Code, a fundamental aspect of self-governance, offends section 15.

[33] The respondent argues this case is different from *Esquega* as that decision involved a total ban on non-resident members participating in Band governance and it was a challenge to the Act as opposed to a custom code adopted by a Band's members. A partial restriction on non-resident members is the kind of balancing of interests contemplated by the Supreme Court in *Corbiere* at paragraphs 104 and 105.

[34] If the restriction violates section 15, the respondents maintain it is saved by section 1. The pressing and substantial objective is to ensure that Council members have a real, substantial and present connection to the community; the objective of provision of local government has been previously held to be a valid objective in *Cockerill v Fort McMurray First Nation #468*, 2010 FC 337, [2010] FCJ No 393 (QL) at paragraphs 35 and 37, rev'd on consent, [2011] FCJ No 1736 (QL) (CA).

[35] The restriction is rationally connected to this objective as most decisions made by the Band Council have immediate effect on members living on-reserve and it would be prohibitively expensive for the Band to fund non-resident Councillors to attend meetings. Similar rational connection analysis was accepted in *Cockerill*. The restriction is minimally impairing because non-resident members have access to all other forms of participation in Band governance. In *Corbiere*, the Supreme Court alluded to a "creative design of an electoral system" that would balance the

interests of on-reserve and off-reserve members equally. The current system strikes that balance. The salutary effects on the governance and economic interests of the Band outweigh the deleterious effects identified by the applicants.

[36] The respondents object to the injunctive relief sought by the applicants. The applicants have not sought to set aside the recent election results or sought the removal of the current Councillors from office and the process for reviewing election results is an appeal under the Act. Therefore, the granting of an injunction which effectively amounted to overturning that election would be a collateral attack. There is no evidence that the governance of the Band would not proceed in good faith until the next election. The respondents also object to the order of *mandamus* sought by the applicants, as the applicants have not established that there is a public law duty on the respondents to hold a general election.

[37] The respondents' position on remedy is that if the 2011 Code violates the *Charter*, an order of invalidity under section 52 of the *Constitution Act, 1982* is appropriate but ask that the effect of the declaration be suspended for 12 months following the issuance of judgment. This would allow the respondents to engage in a process of consultation to establish an appropriate voting regime.

<u>Analysis and Decision</u>

[38] **<u>Issue 1</u>**

<u>What is the appropriate standard of review?</u>

Where previous jurisprudence has determined the standard of review applicable to a particular issue before the court, the reviewing court may adopt that standard (see *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at paragraph 57).

[39] On the constitutional question, a standard of correctness applies (see *Dunsmuir* at paragraph 58). Similarly, no deference is owed on matters of procedural fairness. As I note below, it is not necessary to consider the standard of review for assessing whether the 2011 Code reflects a broad consensus within the Band.

[40] I will next deal with Issue 4.

[41] **<u>Issue 4</u>**

<u>Do the impugned provisions of the 2011 Code violate section 15 of the *Charter* by discriminating against non-resident members and, if so, is that discrimination justified under section 1 of the *Charter*?</u>

The Supreme Court has recently confirmed the two-step test a court should apply when considering whether a law violates the equality guarantee in section 15:

> (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?

(see *Kapp* at paragraph 17; *Withler v Canada (Attorney General)*, 2011 SCC 12 at paragraph 30, [2011] 1 SCR 396; *Quebec (Attorney General) v A*, 2013 SCC 5 at paragraphs 185, 324 and 418).

[42] In this case, the parties agreed that the 2011 Code creates a distinction based on the analogous ground of Aboriginality-residence by reserving Band Council offices for those Band members who reside on the reserve.

[43] It is useful, however, to recall the analysis that led the Supreme Court to identify Aboriginality-residence as an analogous ground of discrimination fourteen years ago in *Corbiere* (at paragraph 62):

> Here, several factors lead to the conclusion that recognizing off-reserve band member status as an analogous ground would accord with the purposes of s. 15(1). From the perspective of off-reserve band members, the choice of whether to live on- or off-reserve, if it is available to them, is an important one to their identity and personhood, and is therefore fundamental. It involves choosing whether to live with other members of the band to which they belong, or apart from them. It relates to a community and land that have particular social and cultural significance to many or most band members. Also critical is the fact that as discussed below during the third stage of analysis, band members living off-reserve have generally experienced disadvantage, stereotyping, and prejudice, and form part of a "discrete and insular minority" defined by race and place of residence. In addition, because of the lack of opportunities and housing on many reserves, and the fact that the *Indian Act*'s rules formerly removed band membership from various categories of band members, residence off the reserve has often been forced upon them, or constitutes a choice made reluctantly or at high personal cost. For these reasons, the second stage of analysis has been satisfied, and "off-reserve band member status" is an analogous ground. It will hereafter be recognized as an analogous ground in any future case involving this combination of traits. …

[44] The determinative issue is therefore whether the 2011 Code's restriction on Band Council offices creates a disadvantage by perpetuating prejudice or stereotyping. The application of this stage of the *Kapp* test has been the subject of much jurisprudential debate, but in this case, the established case law dealing with Aboriginality-residence is of assistance.

[45] The Supreme Court held in *Corbiere* that disenfranchising off-reserve Band members was discriminatory (at paragraphs 17 and 18):

> 17 Applying the applicable *Law* factors to this case -- pre-existing disadvantage, correspondence and importance of the affected interest -- we conclude that the answer to this question is yes. The impugned distinction perpetuates the historic disadvantage experienced by off-reserve band members by denying them the right to vote and participate in their band's governance. Off-reserve band members have important interests in band governance which the distinction denies. They are co-owners of the band's assets. The reserve, whether they live on or off it, is their and their children's land. The band council represents them as band members to the community at large, in negotiations with the government, and within Aboriginal organizations. Although there are some matters of purely local interest, which do not as directly affect the interests of off-reserve band members, the complete denial to off-reserve members of the right to vote and participate in band governance treats them as less worthy and entitled, not on the merits of their situation, but simply because they live off-reserve. The importance of the interest affected is underlined by the findings of the Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples* (1996), vol. 1, *Looking Forward, Looking Back*, at pp. 137-91. The Royal Commission writes in vol. 4, *Perspectives and Realities*, at p. 521:
>
>> Throughout the Commission's hearings, Aboriginal people stressed the fundamental importance of retaining and enhancing their cultural identity while living in urban areas. Aboriginal identity lies at the heart of Aboriginal peoples' existence; maintaining that identity is an essential and self-validating pursuit for Aboriginal people in cities.
>
> And at p. 525:

> Cultural identity for urban Aboriginal people is also tied to a land base or ancestral territory. For many, the two concepts are inseparable. ... Identification with an ancestral place is important to urban people because of the associated ritual, ceremony and traditions, as well as the people who remain there, the sense of belonging, the bond to an ancestral community, and the accessibility of family, community and elders.

> 18 Taking all this into account, it is clear that the s. 77(1) disenfranchisement is discriminatory. It denies off-reserve band members the right to participate fully in band governance on the arbitrary basis of a personal characteristic. It reaches the cultural identity of off-reserve Aboriginals in a stereotypical way. It presumes that Aboriginals living off-reserve are not interested in maintaining meaningful participation in the band or in preserving their cultural identity, and are therefore less deserving members of the band. The effect is clear, as is the message: off-reserve band members are not as deserving as those band members who live on reserves. This engages the dignity aspect of the s. 15 analysis and results in the denial of substantive equality.

[46] In a case more similar to the one at bar, I held in *Esquega* that the Act's limitation of Band Council positions to on-reserve members was discriminatory (at paragraphs 87 to 92):

> 87 In my view, the application of these factors to the case at hand also leads to the conclusion that off-reserve band members are discriminated against under step three of the *Law* test.

> 88 As noted in *Corbiere*, band members who live off-reserve have historically faced disadvantage as a result of legislation and policies designed to deny them the right participate in band governance. Such legislation perpetuates the wrongful notion that band members who live off-reserve have no interest in participating in band governance and are therefore less worthy of doing so.

> 89 In my view, there does not appear to be any correspondence between the willingness or ability of off-reserve band members to participate in band council, and their residency status. Affidavit evidence submitted by the applicants indicates that the removed band council, which included off-reserve band members, worked

> diligently to alleviate serious problems on the Gull Bay Reserve and in the Gull Bay First Nation Community at large.
>
> 90 The respondent submitted that the residency requirement in subsection 75(1) of the *Indian Act* served an ameliorative purpose in that it ensured that band councillors were located on-reserve, and were directly familiar with the issues relevant to decision-making. As noted above in *Corbiere*, in addition to addressing local issues, band councils represent individuals who live off-reserve in many important capacities. In any event, I am not persuaded that the preservation of band council positions for on-reserve members to the exclusion of off-reserve members helps a more disadvantaged group. In fact, under cross-examination, Lynn Ashkewe admitted that having a band council formed solely of on-reserve members would not make them more accessible to the majority of members, who live off-reserve.
>
> 91 Finally, the nature and scope of the interest affected is of fundamental importance to off-reserve band members. The residency requirements set out in subsection 75(1) deny individuals who live off the reserve the ability to participate in the representative governance of their band. While off-reserve members now have the right to vote in band council elections, I still believe that they hold a fundamental interest in participating in band council and making decisions on behalf of their band. In the context of Gull Bay First Nation, this prohibition applies to over half of their band members and prevents them from becoming leaders of their band.
>
> 92 In my view, subsection 75(1) of the *Indian Act* does discriminate against off-reserve members by prohibiting them from participating in the representative governance of their band through band council on the basis of their "Aboriginality-residency" status.

[47] Notably, the four factors considered in this exerpt have since been de-emphasized in equality jurisprudence, but are still relevant to "focussing on the central concern" of section 15 of combating discrimination (*Kapp* at paragraph 24).

[48] Other decisions concerning restrictions on the participation of off-reserve members include the decision of Mr. Justice Barry Strayer in *Thompson v Leq'a:mel First Nation*, 2007 FC 707,

[2007] FCJ No 955 (QL) and the decision of Mr. Justice James O'Reilly in *Cockerill*. Notably, Mr. Justice O'Reilly held that although that Band's denial of voting rights of non-resident members violated section 15, it was saved under section 1.

[49] The respondents argue the 2011 Code restrictions are necessary because only on-reserve members have the "knowledge base, experience in the community and current connection to the community needs" to guide the Band in providing on-reserve services. The respondents have proffered no evidence comparing the knowledge, experience and connection of on-reserve members to that of off-reserve members. It is supported by mere assertion in the respondents' affidavits. In the absence of such evidence, I can only conclude that this claim is based in the exact stereotype identified and rejected in *Corbiere* that off-reserve members have less to contribute to Band governance.

[50] The respondents offer two further arguments to distinguish the 2011 Code from the laws struck down in the decisions above: that the 2011 Code is a custom code adopted by the Band itself instead of imposed by the Act and that the designation of a non-resident Band Councillor represents a more balanced approach than a total ban on voting or holding office.

[51] The first argument is answered by the Court's decision in *Clifton v Hartley Bay (Electoral Officer)*, 2005 FC 1030, [2005] FCJ No 1267 (QL), where I performed a *Charter* review of electoral restrictions of off-reserve members in a custom electoral code. While the fact that a Band chooses on its own to adopt electoral restrictions instead of being subjected to them by the Act is relevant to the context, it does not excuse discriminatory laws.

[52] Similarly, the respondents' request that I consider section 25 of the *Charter* as an "interpretative lens" in applying the *Kapp* test is of little assistance, given that the decisions above are quite alive to considerations of Aboriginal self-government but nonetheless teach that discrimination based on off-reserve residency is unacceptable.

[53] For the final argument, that the current restrictions constitute a legitimately balanced approach, the respondent rightfully relies on a passage from *Corbiere* at paragraph 104, where the Supreme Court contemplated:

> 104 The appellant Her Majesty the Queen suggests that the current model meets the criterion of minimal impairment because of the administrative difficulties and costs involved in setting up, for example, a two-tiered council where one tier would deal with local issues and the other with issues affecting all band members, or in maintaining a voter's list and conducting elections where the electorate may be widely dispersed. Even assuming that such costs could legitimately constitute a s. 1 justification, these arguments are unconvincing. It must be remembered that the burden of justifying limitations on constitutional rights is upon the government. The government has presented no evidence to show that a system that would respect equality rights is particularly expensive or difficult to implement. Rather, there are many possible solutions that would not be difficult to administer, but would require a creative design of an electoral system that would balance the rights involved. Change to any administrative scheme so it accords with equality rights will always entail financial costs and administrative inconvenience. The refusal to come up with new, different, or creative ways of designing such a system, and to find cost-effective ways to respect equality rights cannot constitute a minimal impairment of these rights. Though the government argues that these costs should not be imposed on small communities such as the Batchewana Band, the possible failure, in the future, of the government to provide Aboriginal communities with additional resources necessary to implement a regime that would ensure respect for equality rights cannot justify a violation of constitutional rights in its legislation.

[54] I would note that these comments were made in the context of a section 1 analysis as opposed to section 15, but I take the respondents' point that the Supreme Court has signalled some willingness to entertain a governance structure that contains some distinctions between resident and non-resident members short of complete disenfranchisement.

[55] In this sense, the case at bar appears to be novel, as courts have considered both the disenfranchisement of non-resident members and Council positions that are completely closed to non-resident members, but not a Council where only some positions are reserved to resident Band members. I agree with the respondents that on the spectrum between total exclusion of non-resident members and complete symmetry between resident and non-resident members, the 2011 Code is closer to the symmetrical approach than the laws considered in *Corbiere* and *Esquega*. I also agree that there may very well be a point on that spectrum short of symmetry that passes constitutional muster.

[56] I am not convinced, however, that the 2011 Code is the balanced structure envisioned by the Supreme Court, much as it may be an improvement on previous models.

[57] Given the extremely significant interest that all members have in a Band Council's decisions, a structure which gives a permanent supermajority to resident members and denies non-resident members the chance to lead the Council as chair cannot be said to be balanced. This is particularly the case when the proportions between the Band's membership and the Band Council are inverted: upwards of three-quarters of the Band are non-resident while three of four Council spots are not available to them, to say nothing of the chair. This approach is not so much "creative"

as it is a minor variation on the model struck down in *Esquega*. While non-resident members are represented in Council deliberations by the non-resident Councillor, when push comes to shove, that Councillor can be easily outvoted by the resident Councillors.

[58] I therefore find that my analysis from paragraphs 87 to 92 of *Esquega* applies to the 2011 Code restrictions. The distinction it contains creates a disadvantage by perpetuating the stereotype that non-resident Band members have reduced ability or interest in contributing to Band governance. The second step of the *Kapp* test is met and the 2011 Code restriction therefore violates section 15 of the *Charter*.

[59] I am sympathetic to the uncertainty faced by the respondents and other Bands across Canada as to what kind of governance structure would satisfy section 15, but it is not the role of the Court to dictate legislation. Rather, the spirit of *Charter* dialogue requires that a court only consider laws as passed by law makers, instead of ordering particular changes *ex ante* and in the absence of a proper evidentiary record.

[60] Although it violates section 15, the 2011 Code may be saved by section 1. The respondents rely heavily on the decision in *Cockerill* where a Band's residency requirement for Council offices was held to be a reasonable limit demonstrably justified in a free and democratic society. I would note, however, that Mr. Justice O'Reilly's finding in that decision was reversed on appeal, on consent (see [2011] FCJ No 1736 (QL) (CA)).

[61] The first pressing and substantial objective presented by the respondents is to ensure that Council members have a real, substantial and present connection to the community. I accept this as a legitimate objective.

[62] The rationale connection between this objective and the 2011 Code restrictions, however, is lacking. As I discussed above, the assumption that only resident members will have a substantial connection to the community is based on the stereotype rejected in *Corbiere*: that non-resident members have less capacity to contribute to Band governance. To uphold a discriminatory law at the section 1 stage based on the very same discriminatory logic that led to its rejection at the section 15 stage would be perverse. The law is therefore not saved by this section 1 rationale.

[63] I also do not accept the respondents' financial rationale for limiting Band Council eligibility, which I think should be properly understood as a distinct objective.

[64] At the section 1 stage, the onus is on the respondents to defend the infringement. The only evidence the Band has relied on regarding the feasibility of any form of deliberation other than in-person on-reserve meetings is a single paragraph in an affidavit from the current Council chair describing the ability to meet in person as "important". This is not sufficient to justify a discriminatory restriction on the ability to run for office, if only because Band members can judge such importance for themselves in casting their ballots. Therefore, the Band has not proven on a balance of probabilities it could not meet the objective of preserving resources in a less impairing way.

[65] While this Court must have some deference to the Band Council's choice when performing a section 1 analysis, the 2011 Code restrictions do not survive since they are based on the stereotyping rejected in *Corbiere* or for financial reasons which are not borne out on the evidence.

[66] I therefore find that the 2011 Code restriction violates section 15 of the *Charter* and is not saved by section 1 of the *Charter*.

[67] **Issue 5**

What is the appropriate remedy?

At the hearing, the parties asked for the opportunity to make further submissions on remedy after being informed of the decision on the merits due to the complexity of this case. They shall be given the opportunity to do so as well as to make any submissions on costs. I remain seized to deal with these matters and any other remaining matters.

[68] Because of my finding on Issue 4, I need not deal with Issues 2 and 3.

"John A. O'Keefe"

Judge

Ottawa, Ontario
September 24, 2013

ANNEX

<u>Relevant Statutory Provisions</u>

***Constitution Act, 1982*, Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11**

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

1. La *Charte canadienne des droits et libertés* garantit les droits et libertés qui y sont énoncés. Ils ne peuvent être restreints que par une règle de droit, dans des limites qui soient raisonnables et dont la justification puisse se démontrer dans le cadre d'une société libre et démocratique.

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.

15. (1) La loi ne fait acception de personne et s'applique également à tous, et tous ont droit à la même protection et au même bénéfice de la loi, indépendamment de toute discrimination, notamment des discriminations fondées sur la race, l'origine nationale ou ethnique, la couleur, la religion, le sexe, l'âge ou les déficiences mentales ou physiques.

25. The guarantee in this Charter of certain rights and freedoms shall not 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 including

(a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and

(b) any rights or freedoms that now exist by way of land claims agreements or may be so acquired.

25. Le fait que la présente charte garantit certains droits et libertés ne porte pas atteinte aux droits ou libertés -- ancestraux, issus de traités ou autres -- des peuples autochtones du Canada, notamment :

a) aux droits ou libertés reconnus par la proclamation royale du 7 octobre 1763;

b) aux droits ou libertés existants issus d'accords sur des revendications territoriales ou ceux susceptibles d'être ainsi acquis.

52. (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

52. (1) La Constitution du Canada est la loi suprême du Canada; elle rend inopérantes les dispositions incompatibles de toute autre règle de droit.

***Federal Courts Act*, RSC 1985 c F-7**

18.1 … (3) On an application for judicial review, the Federal Court may	18.1 … (3) Sur présentation d'une demande de contrôle judiciaire, la Cour fédérale peut :
(a) order a federal board, commission or other tribunal to do any act or thing it has unlawfully failed or refused to do or has unreasonably delayed in doing; or	a) ordonner à l'office fédéral en cause d'accomplir tout acte qu'il a illégalement omis ou refusé d'accomplir ou dont il a retardé l'exécution de manière déraisonnable;
(b) declare invalid or unlawful, or quash, set aside or set aside and refer back for determination in accordance with such directions as it considers to be appropriate, prohibit or restrain, a decision, order, act or proceeding of a federal board, commission or other tribunal.	b) déclarer nul ou illégal, ou annuler, ou infirmer et renvoyer pour jugement conformément aux instructions qu'elle estime appropriées, ou prohiber ou encore restreindre toute décision, ordonnance, procédure ou tout autre acte de l'office fédéral.

FEDERAL COURT

SOLICITORS OF RECORD

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