Off-Reserve Indians Allowed to Participate in Band Council Elections

A man born on one of the reserves of the Leq'à:mel First Nation, successfully challenged provisions of the Leq'à:mel First Nation Election Regulations, arguing that they violated section 15(1) (equality) of the *Canadian Charter of Rights and Freedoms*. The Applicant, an off-reserve band member, wanted to be able to vote in the band election and run for political office. The Applicant was born on the reserve, but later moved to Vancouver, which is not part of the Canadian Traditional Stó:lo Territory (CTST). However, sections 3.1(b) and 4.1(b) of the Regulations require that members who wish to participate in elections must live within the CTST [1].

In order to determine whether the distinction between the Applicant and those who live on-reserve, was an infringement of section 15(1) of the *Charter*, the Federal Court of Canada applied the three-part test set out in *Law v Canada* (the "Law" test).

The first step in the Law test is determining whether the law in question "makes a distinction that denies equal protection or equal benefit" [2]. The Court found that, based on *Corbiere v Canada (Minister of Indian and Northern Affairs)*, the first stage of the test was satisfied given that a band member is denied the right to vote based on where they live [3].

The second step is to determine whether or not that distinction is made on the basis of a personal characteristic that a person cannot or should not be expected to change [4]. The Court found that the provisions were discriminatory given that the Applicant would have to move from Vancouver to the reserve to qualify, and that "the Band has no legitimate interest in expecting the Applicant to change his residence from Vancouver to someplace in the CTST" [5].

The final stage of the Law test involves determining whether a distinction is discriminatory within the meaning of section 15 [6]. The Supreme Court of Canada has made it clear that in order for an infringement to be made out, the group in question must be subject to "disadvantage, stereotyping and prejudice" [7]. In this case, the Court found ample evidence to conclude that section 15(1) was violated because of three contextual factors, namely the "attitudes of stereotyping of urban [A]boriginals who do not live with their people" [8]; the differential treatment between the Applicant and others; and the interests affected by the negative distinction.

Upon finding a violation of section 15(1), the Court considered whether the violation could be justified under section 1. The Court found that it could not, based *R v Oakes* (the "Oakes" test). In order for a *Charter* violation to be justified under section 1, it must fulfill the following requirements: (1) have a sufficiently important objective; (2) have a rational connection between the restriction and the objective; (3) represent the least drastic means to accomplish the objective; and (4) have a disproportionately severe effect on the persons it restricts [9].

Applying the Oakes test, the Court found that the evidence did not establish an important objective and did not explain why a band member not living on the reserve should not be allowed to vote in a band election [10]. No rational connection was shown between the right to vote and the requirement that a member must live on-reserve. As for the remaining two steps of the test, the Court noted that since the "important objective" element had not been made out, there was no need to consider the third step (whether the least drastic means to reach the objective had been used). Finally, the Court found that the denial of the vote to off-reserve members is "clearly disproportionately severe" [11].

The Court found that sections 3.1(b) and 4.1(b) were unconstitutional and therefore invalid as they violated section 15(1) of the *Charter*. The declaration of invalidity was suspended until August 1, 2008 in order to provide the Leq'à:mel First Nation with the opportunity to amend the offending sections "by its own democratic process" [12]. The Applicant also requested the Court to declare the election in question void, the Court refused, holding that it would be too disruptive to the "ongoing business" of the Leq'à:mel First Nation [13].

Sources:

- Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to theCanada Act 1982 (UK), 1982, c 11 (CanLII).
- *Corbiere v Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR (CanLII).
- *Law v Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497 (CanLII).
- *R v Oakes*, [1986] 1 SCR 103 (CanLII).
- *Terry Randolph Thompson v Leq'à:mel First Nation Council,* 2007 FC 707 (CanLII).

[1] *Terry Randolph Thompson v. Leq'à:mel First Nation Council,* 2007 FC 707 (CanLII) at para 2. .
[2] *Thompson*, *supra*, note 1 at para 11.
[3] *Ibid* at para 11.
[4] *Ibid* at para 12.
[5] *Ibid* at para 14.
[6] *Ibid* at para 15.
[7] *Corbiere v Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR at para 5 (CanLII).
[8] *Thompson*, *supra*, note 1 at para 17.
[9] *R v Oakes*, [1986] 1 SCR 103 at para 71(CanLII).

[10] *Thompson*, *supra*, note 1 at para 24.
[11] *Ibid* at para 24.
[12] *Ibid* at para 25.
[13] *Ibid* at para 27.