Corbiere v. Canada (1999)

John Corbiere was a status Indian belonging to the Batchewana First Nation, an Ojibway band near Sault Ste. Marie, Ontario. He was among the two thirds of Batchewana Band members who did not live on the band's reserve land and were not permitted to vote in band elections. This restriction was imposed by section 77(1) of the *Indian Act*,[1] which limited the right to vote to band members who are "ordinarily resident on the reserve."

As of 1999, almost half Canada's Indian bands elected their chiefs and councils according to the *Indian Act*'s section 77(1) scheme that excluded non-resident members from the list of electors. The other bands held elections according to "customary" processes, as the *Indian Act* provides.[2]

Corbiere claimed that section 77(1) denied him equality as guaranteed by section 15(1) of the *Canadian Charter of Rights and Freedoms*, which reads:

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.

Corbiere argued that "aboriginality-residence" is analogous to the legal grounds of discrimination that section 15(1) prohibits, and that the distinction made by section 77(1) of the *Indian Act* cannot be justified in a free and democratic society.

The 1999 Supreme Court of Canada decision in *Corbiere v. Canada*[3] (*Corbiere*) affirmed and extended the rulings of two lower courts: Section 77(1) of the *Indian Act* violates the equality rights of Batchewana Band members living off-reserve and other Indians in the same situation.[4]

Aboriginal Rights and Freedoms: Sections 25 and 35 of the *Constitution Act 1982*

Existing aboriginal and treaty rights are recognized and affirmed by section 35 of the *Constitution Act 1982*. Section 25 of the *Charter* provides that the rights and freedoms in the *Charter* cannot "abrogate or derogate from any aboriginal, treaty or other rights or freedoms."

An intervener in the case, the Lesser Slave Lake Regional Council, argued that the exclusion of off-reserve band members from voting amounts to "a codification of aboriginal or treaty rights under s. 35, or falls under 'other rights or freedoms' protected under s. 25."[5] Thus they claimed that this provision of the *Indian Act* is exempt from *Charter* challenge.

A second intervener, the Native Women's Association of Canada, argued that section 25 protects aboriginal rights from challenge by non-aboriginal people, but does not prevent aboriginal people from challenging aboriginal rights on *Charter* grounds.[6]

The Supreme Court noted that the reference in section 25 of the *Charter* to "any aboriginal, treaty *or other* right or freedom" is "broader" than the aboriginal and treaty rights covered by section 35. Accordingly, section 25 may protect "statutory rights" (including, possibly, parts of the *Indian Act*) from the operation of *Charter* rights. However, the Court did not accept that *any* legislation relating to aboriginal people is automatically within the scope of "other rights and freedoms" protected by section 25.[7]

The Court said that "given the limited argument on the issue, it would be inappropriate to articulate general principles pertaining to s. 25 in this case. Suffice it to say that a case for its application has not been made out here."[8] In other words, the legal arguments on section 25 were too incomplete to allow the Court to render a decision on the effect of that section. In this portion of the decision, the Supreme Court followed the decision of the Federal Court of Appeal, which found that (a) there was not enough evidence of origins in traditional Batchewana practices to establish that the exclusion of non-resident members from voting was a section 35 aboriginal right, and (b) the system of democratic election imposed by the *Indian Act* "is not aimed at protecting and affirming Aboriginal difference," so it is not among the *Indian Act* provisions that might be protected by section 25 as an "other right or freedom" relating to aboriginal peoples.[9]

Nonetheless, when considering the *Charter* right of equality, the Court held that legislation "must be evaluated with special attention to the rights of Aboriginal peoples" and "the protection of Aboriginal and treaty rights guaranteed in the Constitution."[10] Therefore, while the decision did not turn on an interpretation of sections 25 and 35 of the *Constitution Act, 1982*, basic principles of aboriginal law underlie and colour the Supreme Court's analysis of equality issues.

The *Law* Analysis

Law v. Canada[11] (*Law*) is the Supreme Court of Canada case that created a new test for equality claims under section 15(1) of the *Charter*. *Corbiere* is the first case in which the Court revisited the test set out in*Law*. Its main legal significance is reflected in a split in the Court on how to apply the new test.

In *Law*, Justice Iacobucci said:

[T]he determination of whether legislation fails to take into account existing disadvantage, or whether a claimant falls within one or more of the enumerated and analogous grounds, or whether differential treatment may be said to constitute discrimination within the meaning of s. 15(1), must all be undertaken in a *purposive and contextual* manner.[12]

Law set out three broad inquires or stages of analysis to determine whether legislation violates section 15(1). These inquiries are:

> *(A) Does the impugned law (a) draw a formal distinction between the claimant and others on the basis of one or more personal characteristics, or (b) fail to take into account the claimant's already disadvantaged position within Canadian society resulting in substantively differential treatment between the claimant and others on the basis of one or more personal characteristics?*
> *(B) Is the claimant subject to differential treatment based on one or more enumerated and analogous grounds?*
> *(C) Does the differential treatment discriminate, by imposing a burden upon or withholding a benefit from the claimant in a manner which reflects the stereotypical application of presumed group or personal characteristics, or which otherwise has the effect of perpetuating or promoting the view that the individual is less capable or worthy of recognition or value as a human being or as a member of Canadian society, equally deserving of concern, respect, and consideration?[13]*

For the third stage of the analysis, Justice Iacobucci set out four contextual factors that should be applied.

- The first is whether there is pre-existing disadvantage, stereotyping, prejudice, or vulnerability experienced by the individual or group at issue.
- Secondly, the court must consider the correspondence, or lack thereof, between the ground or grounds on which the claim is based and the actual need, capacity, or circumstances of the claimant or others.
- The third contextual factor is the ameliorative purpose or effects of the impugned law upon a more disadvantaged person or group in society.
- The fourth and final factor for consideration is the nature and scope of the interest affected by the impugned law.[14]

Applying *Law* to *Corbiere*

A difference in opinion on the Supreme Court as to the correct application of the *Law* analysis resulted in two concurring sets of reasons in *Corbiere*. Fifty-

seven pages – the bulk of the written judgment – are taken up with the reasons of a concurring minority of the Court. Justice L'Heureux-Dubé, joined by Justices Gonthier, Iacobucci and Binnie, wrote a detailed exploration of context in the second stage of the *Law* test. The reasons of the majority, written by Justices Bastarache and McLachlin and joined by Chief Justice Lamer and Justices Cory and Major, take up only ten pages of the written judgment and begin, "we believe this case can be resolved on simpler grounds."[15] So, while there was a consensus on the final decision itself, the Court was divided on the correct way to reach a decision.

The Minority's Reasons

Justice L'Heureux-Dubé begins her analysis of the section 15(1) framework by restating the principle in *Law*that "at all three stages, it must be recognized that the focus of the inquiry is purposive and contextual."[16]

The first stage of analysis, establishing differential treatment, is dealt with swiftly and without commentary. There is no question that there is differential treatment between band members living on reserves and those living off reserves.[17]

The second stage, which involves determining whether "aboriginality-residence" (or "off-reserve band member status"[18]) is an analogous ground, involves more analysis. Here, L'Heureux-Dubé engages in an examination of whether "aboriginality-residence" has the potential to violate human dignity, the underlying value in section 15(1). She cites the precedent in *Law*: "Human dignity is harmed when individuals and groups are marginalized, ignored, or devalued.... Human dignity ... concerns the manner in which a person legitimately feels when confronted with a particular law."[19] Another contextual factor to consider in identifying an analogous ground of discrimination is whether a personal characteristic is "immutable, difficult to change, or changeable only at unacceptable personal cost."[20]

L'Heureux-Dubé held that these factors may or may not be present in a given group, depending on the social or legislative context. Essentially, a determination of whether a ground of discrimination is analogous to the grounds enumerated in section 15(1) depends upon each particular context.[21] Given the legislative context of section 77(1) of the *Indian Act,* "off-reserve band member status" is an analogous ground.[22] The implication, though, is that when other legislation is subjected to a section 15(1) challenge by off-reserve band members, a court would have to re-determine whether that new context creates another analogous ground.

In the third stage of analysis, L'Heureux-Dubé examines more fully the four contextual questions set out in*Law*. First, she finds that off-reserve band members do suffer from disadvantage, vulnerability, stereotyping and prejudice. Citing the 1996 Report of the Royal Commission on Aboriginal Peoples, she notes that the common prejudice and stereotype in Canadian society is that aboriginal people belong on reserves or in rural places, and thus they are discriminated against and disadvantaged in urban settings. Moreover, their disadvantage is exacerbated by being "apart from the communities to which many feel connection." They experience "racism, culture shock, and difficulty maintaining their identity." She adds that this disadvantage is doubled in the case of aboriginal women. [23]

Next, she considers the relationship between the basis of the differential treatment and the individual's characteristics or circumstances. Though some of the matters that are dealt with by the band council, such as law enforcement and traffic control, affect only the residents of the reserve, there are many other matters that affect all band members, regardless of where they live. Policies and spending on "education, creation of new housing, creation of facilities on reserves, and other matters that may affect off-reserve band members' economic interest" are the concern all band members, wherever they live. Since voting rights affect these sorts of interests, which are unrelated to the residency-based differential treatment, they provide another indicator of discriminatory treatment.[24]

The final factor L'Heureux-Dubé considers is the nature of the affected interest. "The more important and significant the interest affected, the more likely it will be that differential treatment affecting this interest will amount to a discriminatory distinction."[25] The "functions and powers" of the elected band councils profoundly affect the interests of all band members, including those who do not reside on-reserve. "The band council has the power to affect directly the cultural interests of those off-reserve who identify with the band and reserve."[26] Decisions made by the council may affect "contact with the land, elders, Aboriginal languages, [and] spiritual ceremonies," as well as the potential for the reserve to grow and accommodate those off-reserve members who wish to return to the reserve.[27]

The decision notes that Indians' connections with reserve communities are often severed involuntarily or reluctantly.[28] The Batchewana Band gave up much of its ancestral land in pre-Confederation treaties; at one period in the late 1800s, the Batchewana Band's land was reduced to a mere 15 acres.[29]

Furthermore, for over a century, the government's official policy was to encourage "enfranchisement," or assimilation of Indians into mainstream Canadian society. Legislation had been in place since 1857 to deprive women of

Indian status if they married non-Indian men. In 1985, Bill C-31[30] reversed this discriminatory policy and restored Indian status to many women, and to some of their descendants. Thus there was an abrupt increase in the number of status Indians living off-reserve.[31] As of 1991, more than two thirds of the Batchewana Band's 1426 registered members lived off-reserve.[32]

In view of these contextual factors, L'Heureux-Dubé determines that the distinction between on-reserve and off-reserve residency "reinforces the stereotype that band members who do not live on reserve are less aboriginal and less valuable that those who do."[33]

The Majority's Reasons

By and large, the majority agreed with the reasons of the minority, and thus did not delve into a detailed examination of the issues. However, the disagreements were important enough to warrant separate reasons.

The majority reasons, written by Justices McLachlin and Bastarache, differ from the minority reasons in their insistence that contextual analysis is not appropriate for determining whether an alleged ground of discrimination is analogous to the grounds enumerated in section 15(1). The majority finds that both enumerated grounds and analogous grounds are merely *suspect* grounds of discrimination; in other words, they do not indicate that discrimination *necessarily* exists. Therefore, analogous grounds are not determined by a contextual or fact-based analysis. Analogous grounds do not change from case to case.[34]

There is a rationale and advantage to keeping the second and third stages of the *Law* analysis separate. In the second stage, where analogous grounds are identified, cases that involve non-analogous grounds may be screened out. The majority maintains that this is a more efficient use of judicial resources and it avoids trivializing the guarantee of equality.[35]

How are analogous grounds identified? "[T]he thrust of identification of analogous grounds at the second stage of the *Law* analysis is to reveal grounds based on characteristics that we cannot change or that the government has no legitimate interest in expecting us to change to receive equal treatment under the law."[36]

The majority determines that "aboriginality-residence" is an analogous ground that fits the criteria in the second step of the *Law* analysis, though they are careful to note that it should not be confused with ordinary residency decisions faced by the average Canadian. The residency decisions of Indian band members are "profound." [37] Thus, "aboriginality-residence" is always a ground that

invites suspicion of unjustifiable discrimination.

Section 1 Analysis

All *Charter* Rights, including the right to equality, are subject to such reasonable limits as can demonstrably justified in a free and democratic country. The application of this limitation – entrenched in section 1 of the*Charter* – involves the three part test set out in *R. v. Oakes*.

The Supreme Court was unanimous in its application of the *Oakes* test to this case. The purpose of section 77(1) of the *Indian Act* is pressing and substantial. Parliament's objective is to ensure "that those with the most immediate and direct connection with the reserve have a special ability to control its future." The legislation is rationally connected to that purpose. However, the Court finds that the restriction is not minimally impairing. For instance, the Court suggests that a "two-tiered council" that divided issues between those that affect only on-reserve members and those issues that affect all band members would infringe equality rights to a lesser and more justifiable degree.[38]

Remedy

Unanimously, the Supreme Court made an order that applies generally to all Indian bands. The issue of the remedy was the Court's key departure from the reasons of the Federal Court and the Federal Court of Appeal. The Supreme Court opted to declare invalid the words "and is ordinarily resident on the reserve" in section 77(1) of the *Indian Act*.

In 1993, the Federal Court had issued a declaration that made the section 77(1) prohibition on off-reserve voting inapplicable to the Batchewana Band. The order applied only to the Batchewana Band because, as the trial judge believed, "I must confine myself to the actual case I have before me, its pleadings and its evidence." The court also suspended the declaration for a period of months, as "[a]ny declaration with immediate effect could bring into doubt the ability of the Batchewana Band Council as presently elected to carry on the ordinary governance of the reserve."[39]

In 1996, the Federal Court of Appeal had instead ordered a constitutional exemption, which would "provide*Charter* relief only to the extent it was needed, instead of striking down legislation which served a legitimate purpose and was otherwise constitutional." The order exempted the Batchewana Band from the words "and is ordinarily resident on the reserve" in section 77(1), thereby adding off-reserve members to the list of voters. The court explained:

It is also significant that section 1 may impact differently on other bands where different and more extensive evidence may be offered to attempt to justify a

residency requirement for voting in band elections…. While this remedy may ultimately be extended to other bands whose electoral histories are similar to that of the [Batchewana Band], insufficient evidence has been presented in this case to permit this.

The Federal Court of Appeal's declaration was made effective immediately, as the Band had by this time complied with the trial court's order and adopted the new voting rules.[40]

The Supreme Court did not sympathize with the appeal court's reasoning:

If a constitutional exemption were granted, this would place a heavy burden on off-reserve band members, since it would require those in each band to take legal action to put forward their claim. Equality within bands does not require such a heavy burden on claimants…. [T]he appropriate remedy is one that applies to the legislation in general … and not one confined to the Batchewana Band.[41]

Accordingly, the Court preferred to "read down' the *Indian Act*: that is, to sever from section 77(1) the words that denied the vote to members not resident on the reserve. This approach was partly to "ensure that, should Parliament choose not to act, all non-residents will be included as voters under s. 77(1), but the nature of band governance and the requirements for voting will otherwise remain the same."[42] The Court also recognized that, if Parliament were to leave the legislation untouched and many Indian bands had to open their voting systems to non-residents, "s. 77(1) or related sections of the Indian Act may be the subject of a constitutional challenge by on-reserve band members or others."[43]

The Supreme Court's declaration of invalidity was suspended for 18 months to give Parliament time to redraft the legislation so that it would minimally impair of *Charter* rights.[44] Ten years after the ruling, the legislation remains unaltered, even though a key phrase in it is no longer of any force or effect. The result is that Indian bands that have not established customary election procedures must allow for voting by off-reserve members.

Jim Young (July 22, 2009)

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[1] R.S.C. 1985, c. I-5.
[2] *Corbiere v. Canada (Minister of Indian and Northern Affairs), [1999] 2 S.C.R. 203 at para. 26* ("*Corbiere*").
[3] [1999] 2 S.C.R. 203.
[4] *Batchewana Indian Band (Non-resident members) v. Batchewana Indian*

Band (F.C.), [1994] 1 F.C. 394 ("*Batchewana trial*"); *Batchewana Indian Band (Non-resident members) v. Batchewana Indian Band (C.A.)*, [1997] 1 F.C. 689 ("*Batchewana appeal*").
[5] *Corbiere* at para. 51.
[6] *Ibid.*
[7] *Ibid.* at para. 52 (emphasis added).
[8] *Ibid.* at paras. 20, 53.
[9] *Ibid.* at para. 41; *Batchewana appeal*.
[10] *Corbiere* at para. 67.
[11] *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497(emphasis in original).
[12] *Ibid.* at para. 41.
[13] *Corbiere* at para. 55; *Law v. Canada* at para. 88.
[14] *Law v. Canada* at paras. 62-75.
[15] *Corbiere* at para. 1.
[16] *Ibid.* at para. 56.
[17] *Ibid.* at para. 57.
[18] *Ibid.* at para. 6.
[19] *Ibid.* at para. 59, citing *Law v. Canada* at para. 53.
[20] *Corbiere* at para. 60.
[21] *Ibid.* at para. 61.
[22] *Ibid.* at para. 62.
[23] *Ibid.* at paras. 71-72.
[24] *Ibid.* at paras. 73-78.
[25] *Ibid.* at para. 79.
[26] *Ibid.* at para. 81.
[27] *Ibid.* at para. 82
[28] *Ibid.* at para. 91.
[29] *Ibid.* at para. 27.
[30] *An Act to amend the Indian Act*, S.C. 1985, c. 27.
[31] *Corbiere* at paras. 30, 85-86.
[32] *Ibid.* at para. 27.
[33] *Ibid.* at para. 92.
[34] *Ibid.* at paras. 7-9.
[35] *Ibid.* at para. 11.
[36] *Ibid.* at para. 13.
[37] *Ibid.* at para. 15.
[38] *Ibid.* at paras. 21, 98-104
[39] *Batchewana trial, supra* note 4.
[40] *Batchewana appeal, supra* note 4.
[41] *Corbiere* at para. 113.

[42] *Ibid*. at para. 118.
[43] *Ibid*. at para. 120.
[44] *Ibid*. at para. 126.