Federal Court  Cour fédérale

Date: 20180809

Docket: T-762-15

Citation: 2018 FC 822

Vancouver, British Columbia, August 9, 2018

PRESENT: The Honourable Madam Justice Roussel

BETWEEN:

CLIFFORD RAY CARDINAL

Applicant

And

BIGSTONE CREE NATION, BIGSTONE CREE NATION COUNCIL, CHIEF GORDON T. AUGER, COUNCILLOR CLARA MOBERLY, COUNCILLOR BERT ALOOK, COUNCILLOR EDWARD BIGSTONE, COUNCILLOR JOSIE AUGER, COUNCILLOR STELLA NOSKIYE, COUNCILLOR ART BIGSTONE, COUNCILLOR FREDA ALOOK, COUNCILLOR IVAN ALOOK

Respondents

JUDGMENT AND REASONS

I. Overview

[1] The Applicant seeks judicial review of a decision made on March 24, 2015 by the Chief and Council of the Bigstone Cree Nation [BCN], removing him from his position as BCN

Councillor for failing to comply with the residency requirements set out in the BCN Election Code. Under its terms, the Chief and Councillors are required to assume residency on the reserve for which they were elected within three (3) months of their election and to remain "permanently resident" there throughout their term of office.

[2] The Applicant contends that the process by which he was removed from office was procedurally unfair and contravened the principles of natural justice. He also alleges that the residency requirement provisions in the BCN Election Code infringe his equality rights under subsection 15(1) of the *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

[3] The Respondents argue that the Applicant was afforded procedural fairness as he was given ample notice and opportunity to comply with the residency requirements prescribed by the BCN Election Code. They also argue that the residency requirements do not offend subsection 15(1) of the *Charter* and if so, they are saved by section 1 of the *Charter*.

[4] For the reasons that follow, the application for judicial review is allowed.

II. Background

[5] The BCN is a Treaty 8 First Nation, located in northern Alberta. It is comprised of three (3) communities: Wabasca/Desmarais, Chipewyan Lake and Calling Lake. Wabasca is the largest community. The other two (2) communities are smaller and more isolated.

[6] The Applicant is a member of the BCN and is affiliated with the Calling Lake Reserve. For the past three (3) decades, he has owned a house that is situated approximately one hundred and fifty (150) meters outside the boundary of the Calling Lake Reserve.

[7] The Applicant was first elected to the BCN Council to represent the Calling Lake community in 2010. In order to meet the residency requirements of the BCN Election Code, the Applicant moved in with his son, who lives on the Calling Lake Reserve. This arrangement was approved by the BCN Chief and Council.

[8] The Applicant served on the BCN Council until the end of his four (4) year term. In September 2014, the Applicant was defeated in the general election and he moved off the reserve. When the election results were overturned on appeal, the Applicant was re-elected in a by-election on November 20, 2014.

[9] On February 10, 2015, the BCN Chief sent the Applicant a letter reminding him of the residency requirements for elected Councillors. The letter informed the Applicant that he had until the end of February 2015 to assume permanent residency on the Calling Lake Reserve failing which, he would be in contravention of the BCN Election Code and the removal provision for failing to meet the residency requirements would have to be implemented immediately. The letter further indicated that the Applicant would be required to demonstrate and prove that he was indeed a resident of the Calling Lake Reserve by the end of February 2015. He could do so by providing the location of the residence where he was residing and a confirmation from the

housing department or several Calling Lake residents attesting to his residency. The BCN Chief concluded by stating that he looked forward to the Applicant's response very soon.

[10] On February 20, 2015, the BCN Chief sent a letter to the BCN Councillors, including the Applicant, bringing to their attention that he had received calls from members of the Calling Lake community. He recommended that the ongoing problems and concerns regarding such things as housing issues and other matters be discussed with "our colleagues from Calling Lake". He added that "our colleagues are a part of the problem" and asked that the matter be dealt with *in camera*.

[11] At a meeting of the BCN Chief and Council on February 24, 2015, it was decided that the Applicant would have to submit his verification of residency by March 2, 2015.

[12] On March 2, 2015, the Applicant obtained a transfer of occupancy form from the Director of the Opasikoniwew Housing Authority [Housing Authority] and submitted it to the executive secretary of the BCN Council so that it could be taken to the Chief and Council.

[13] On March 16, 2015, the BCN Chief wrote to the Applicant again. He commended the Applicant on his leadership experience and reminded him of the Council's obligation to apply the BCN Election Code. He advised the Applicant that in his opinion, the evidence provided by the Applicant was not enough to prove his residency on the reserve and would be considered invalid information. He put the Applicant on notice that unless he provided twenty (20) signatures from eligible voters who reside on the Calling Lake Reserve attesting to the fact that

he was a resident there, he and the Council would have no choice but to implement his removal from office.

[14] The Applicant obtained a total of sixteen (16) signatures and provided them to the BCN Chief on March 24, 2015, the second day of a regularly scheduled BCN Council meeting. Approximately one (1) hour after the meeting started, the Chief requested that the meeting proceed in the absence of the Applicant in order to discuss issues relating to him.

[15] During the *in camera* portion of the meeting, a motion was carried to reject the Applicant's transfer of occupancy form. A further motion was carried to remove the Applicant from Council. The Applicant was then called back into the meeting and advised of the decision.

[16] The Applicant's removal was subsequently confirmed in writing on April 8, 2015 when he received a letter signed by the Chief and the eight (8) Councillors who were present at the meeting. The letter informed the Applicant that he was removed from office for breaching the residency requirements of the BCN Election Code, effective March 24, 2015.

[17] The Applicant seeks judicial review of the decision removing him from office on March 24, 2015.

III. The BCN Election Code

[18] Originally, the BCN comprised five communities – Wabasca, Calling Lake, Chipewyan Lake, Peerless Lake and Trout Lake. In December 2009, Her Majesty the Queen in Right of

Canada and the BCN entered into a land settlement agreement which included, among other things, the creation of the Peerless Trout First Nation, new reserve lands and the award of financial compensation. The agreement also acknowledged the BCN's inherent Aboriginal right and treaty right to govern relations among its members and to self-government.

[19] Pursuant to the said land agreement and the amending provisions of the BCN's Customary Election Regulations, the BCN Council and electors adopted the BCN Election Code which changed the manner of election of Chief and Council and its composition. Whereas the Chief and Councillors were previously elected at large by the BCN membership, each community now had direct representation on Council.

[20] For the purposes of the present proceedings, the relevant provisions of the BCN Election Code read as follows:

> **2. <u>DEFINITIONS</u>**
>
> For the purpose of this Election Code, including the Schedules hereto:
>
> **[…]**
>
> 2.2 "**Affiliated**" or "**Affiliation**" means a Member's connection to one Community for electoral purposes as determined pursuant to Section 6 of this Election Code and as specified on the List of Electors.
>
> 2.3 "**Affiliated Community**" or "**Community Affiliation**" means the Community where a Member resides, or if a Member does not reside in one of the Communities, the Community with which with(sic) the Member is affiliated as determined pursuant to Section 6 of the Election Code for electoral purposes, and as specified on the List of Electors.
>
> […]

2.7 "**Candidate**" means an Elector who has been nominated in an Election pursuant to Section 8 of this Election Code.

[…]

2.9 "**Community'** and "**Communities'** means individually and collectively respectively, the Reserve settlements making up BCN, being the Wabasca/Desmarais Community, the Calling Lake Community and the Chipewyan Lake Community.

[…]

2.14 "**Councillor from Calling Lake**" means a Councillor elected by the Electors Affiliated with the Calling Lake Community.

[…]

2.23 "**Elector**" means a person whose:

a) name appears on the Membership List;
b) is the full age of eighteen (18) years of age on or before Election Day; and
c) is Affiliated with one of the Communities.

[…]

3. COMPOSITION, QUORUM AND TERM OF OFFICE OF THE COUNCIL

3.1 Composition

(a) BCN shall be governed by a Council consisting of:

i) one (1) Chief, elected by the Electors of BCN;

ii) six (6) Councillors from Wabasca/Desmarais;

iii) two (2) Councillors from Calling Lake; and

iv) two (2) Councillors from Chipewyan Lake.

[…]

8. NOMINATIONS

[…]

8.3 Electors Eligible for Nomination

(a) Subject to the limitations in Subsections (b) through (i), any Elector is eligible to be nominated as Candidate.

[…]

[…]

17. RESIDENCY REQUIREMENTS FOR CHIEF AND COUNCILLORS

Within three (3) months of their Election and thereafter throughout their term of office:

(a) the Chief shall assume residency and remain permanently on any of the Reserves;

(b) the Councillors from Calling Lake shall assume residency and remain permanently resident on the Reserve at Calling Lake;

(c) the Councillors from Chipewyan Lake shall assume residencey (sic) and remain permanently resident on the Reserve at Chipewyan Lake;

(d) the Councillors from Wabasca/Desmarais shall assume residency and remain permanently resident on a Reserve at Wabasca/Desmarais.

18. SUSPENSION OF CHIEF OR COUNCILLOR

18.1 By Resolution of Council, the Chief or a Councillor may be suspended without pay for the following reasons:

[…]

(b) any of the grounds set out in Section 19.1.

[…]

19. REMOVAL FROM OFFICE

19.1 The removal of a Chief or Councillor from office shall be determined by the Council on the following grounds:

[…]

> (g) Contrary to Section 17, failing to obtain residency, or failing to continue to permanently reside, on an appropriate BCN Reserve while holding office; or
>
> […]
>
> 19.2 Upon confirmation of the grounds for removal, the Council by Resolution may remove the Chief or Councillor from their office.
>
> **20. BY-ELECTIONS**
>
> […]
>
> 20.3 Ineligible Candidate
>
> […]
>
> (b) The person whose removal from office by Council pursuant to Section 19 has prompted the holding of a By-election is not eligible to be a Candidate in that By-election or for any office in the next General Election.

IV. Issues and Standard of Review

[21] The Applicant claims that the decision of the BCN Council removing him from office was procedurally unfair and in violation of the principles of natural justice. He also contends that the residency requirement provisions of the BCN Election Code infringe his right to equality and cannot be saved by section 1 of the *Charter*.

[22] While the Applicant refers to natural justice and procedural fairness as separate concepts in his pleadings, it is not necessary for me to distinguish them for the purpose of this proceeding (*Sparvier v Cowessess Indian Band*, [1993] 3 FC 142, 63 FTR 242 at paras 59-61 [*Sparvier*]). My decision shall focus only on procedural fairness.

[23] It has long been established that issues of procedural fairness are to be reviewed against the standard of correctness (*Mission Institution v Khela*, 2014 SCC 24 at para 79; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43). However, the Federal Court of Appeal has recently held that issues of procedural fairness do not necessarily lend themselves to a standard of review analysis. Instead, the role of this Court is to determine whether the procedure was fair having regard to all of the circumstances (*Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54 [*Canadian Pacific*]; see also *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 79 [*Dunsmuir*]).

[24] Similarly, it is equally confusing to define an applicable standard of review for a constitutional issue that is being raised for the first time in this Court. Notwithstanding, constitutional issues are typically reviewable on a standard of correctness (*Erasmo v Canada (Attorney General)*, 2015 FCA 129 at paras 29-30 [*Erasmo*]; *Atawnah v Canada (Public Safety and Emergency Preparedness)*, 2015 FC 774 at para 47; *Joseph v Dzawada'enuxw (Tsawataineuk) First Nation*, 2013 FC 974 at para 39 [*Joseph*]; *Dunsmuir* at para 58).

[25] The Respondents submit in their memorandum of fact and law that the interpretation and application of custom election acts by a band Council, including the decision to remove a Councillor from office, is reviewable on a standard of reasonableness because the interpretation must be informed by the customs upon which they are based, a matter of which electoral bodies and the Chief and Council are likely to have a better understanding than the Court. While I agree that the reasonableness standard of review applies presumptively to a band Council decision when it is interpreting its customary election regulations, the Applicant's arguments do not focus

on the purely technical application by the Respondents of the residency requirement provisions in the BCN Election Code. Rather, the Applicant is asserting that the band Council has denied him procedural fairness and that the residency requirement provisions are of no force and effect because they contravene subsection 15(1) of the *Charter*.

A. *Procedural fairness and natural justice*

[26] The Applicant contends that he was denied procedural fairness on the following grounds: (1) he had the legitimate expectation that the procedure by which he established residence on the reserve after his election in 2010 would be followed again after his election in November 2014; (2) the transfer of occupancy form and list of signatures which supported his residency were not put before the Council and therefore there was an incomplete record before the Council when it reached its decision to remove him from Council; (3) he was not aware there was going to be a hearing to remove him from office on March 24, 2015; (4) he was not given an opportunity to be heard at the meeting or to submit any written materials; (5) no information was provided to him as to what he had to respond to; (6) he was excluded from the *in camera* hearing; and (7) no reasons were provided to him as to how the decision to remove him was made.

[27] With the exception of requiring that the BCN Council confirm the grounds for removal and proceed by way of resolution, the BCN Election Code does not establish any particular process for removing a Councillor from office if they fail to meet the residency requirements.

[28] Notwithstanding, band Councils must nevertheless act in accordance with the rule of law and they are obliged to respect the duty of procedural fairness in exercising their powers and

taking decisions in the interests of those they represent (*Prince v Sucker Creek First Nation*, 2008 FC 1268 at para 39; *Sparvier* at paras 57-58). Thus, the Applicant was entitled to procedural fairness in being removed from his position as Councillor (*Parenteau v Badger*, 2016 FC 535 at para 49 [*Parenteau*]).

[29] It is also well established that the concept of procedural fairness is highly variable and its content is to be decided in the specific context and circumstances of each case (*Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para 21 [*Baker*]; *Canadian Pacific* at para 40; *Canada v Akisq'nuk First Nation*, 2017 FCA 175 at para 20). While the Supreme Court of Canada articulated a list of five (5) non-exhaustive factors to be considered when determining what procedural fairness requires in a given set of circumstances (*Baker* at paras 23-28), the ultimate question remains, in my view, whether the Applicant knew the case he had to meet and whether he had a full and fair chance to respond (*Canadian Pacific* at para 56; *Parenteau* at para 49).

[30] Upon review of the record, I am not persuaded that the Applicant's rights to procedural fairness were breached by the Respondents.

[31] The Applicant knew that he was required to establish permanent residency on the reserve within three (3) months of his election. The Applicant was notified by letter dated February 10, 2015 that he had until the end of February 2015 to assume permanent residency on the Calling Lake Reserve and to prove that he fulfilled the residency requirements, failing which his removal

would be implemented immediately pursuant to section 19.1 of the BCN Election Code. He was also told the information he was required to provide.

[32] This was not a new issue for the Applicant. When the Applicant was first elected to the position of Councillor in 2010, he was reminded of his obligations by two (2) inter-office memoranda dated November 8, 2010 and December 9, 2010 (Applicant's Record, Volume One, at 152-153). In order to satisfy the residency requirements of the BCN Election Code, the Applicant moved in with his son who was living on the reserve. He was later reminded of his obligations in March 2014 when the BCN Chief wrote to the Applicant asking him to confirm that he had assumed residency on the Calling Lake Reserve in compliance with section 17 of the BCN Election Code. The issue of the Applicant's residency arose again after his re-election in November 2014. When cross-examined on his affidavit, the Applicant stated that his colleagues on Council had begun, as a joke, an unofficial countdown to the date when he would be required to live on the reserve (Applicant's Record, Volume Three, at 598-599).

[33] In addition to knowing he was required to assume residency on the reserve within a specified timeframe and that the BCN Council intended to immediately implement the removal provisions in the BCN Election Code if he did not do so, the Applicant was also aware that a meeting would be held regarding the issue of his residency. The Applicant stated on cross-examination that when he obtained the transfer of occupancy form on March 2, 2015, he told the Director of the Housing Authority that he needed the form because the Chief and Council were going to have a meeting and he wished to submit it to them (Applicant's Record, Volume Three, at 154-155).

[34] The Applicant submits that he had the legitimate expectation that he would be able to satisfy the residency requirements in the same manner as he did during his first term in office but was not permitted to do so.

[35] This argument cannot succeed as the Applicant did not proceed in the same manner. In 2011, the Applicant and his son signed a tenancy agreement with the Housing Authority. The Applicant is listed as one of the occupants and the unit occupied is identified in the agreement. The Applicant also provided a letter from his son stating that the Applicant was living with him. In contrast, the Applicant submitted an incomplete transfer of occupancy form in March 2015. Although the form is signed by the Director of the Housing Authority and it identifies the Applicant as the new occupant, those portions of the form which indicate the name, address, phone and band number of the previous occupant including the lot number and street name of the lot being transferred, are not filled out. The form is also not witnessed. More importantly, the Applicant did not provide any document from his son confirming that the Applicant was or would be residing with him.

[36] The Applicant also contends that the documentation which supported his residency was not put before the Council. Again, the Applicant's argument is not supported by the record. The minutes of the Council meeting held on March 24, 2015 show that a motion was put forward to reject the transfer of occupancy form and that the motion was carried seven to one (Applicant's Record, Volume Five, at 1067).

[37] While it is unclear from the record whether the Applicant's list of sixteen (16) signatures was submitted to the BCN Council, the failure to do so would not have been determinative. There is no indication on the face of the document the purpose for which the signatures were collected or when the individuals signed. The Applicant also admitted on cross-examination that he did not personally collect the signatures and there is no evidence of what the individuals were told when their signature was requested. The BCN Chief and executive director further state in their affidavits that they do not recognize any of the signatures on the document. In that context, it would not have been unreasonable for the BCN Council to reject the Applicant's list of signatures. Moreover, I consider the Applicant's list of signatures attesting to his residency on the reserve difficult to reconcile with the Applicant's argument that he was unable to establish residency on the reserve.

[38] The Applicant further complains that he was excluded from the *in camera* meeting and that he was not permitted to address the Chief and Council before or after they convened without him.

[39] The Applicant's complaint is without merit.

[40] Procedural fairness does not always require that a person be afforded an oral hearing (*Baker* at paras 33-34; *Parker v Okanagan Indian Band Council*, 2010 FC 1218 at para 62). It is the opportunity to respond that matters. Although the Applicant was not offered the opportunity to address the Chief and Council in a formal manner prior to the meeting, the record demonstrates that the Applicant was present at the Council meeting when the BCN Chief

indicated that he wanted to proceed *in camera*. According to the Applicant's own statement in cross-examination, everyone knew that the purpose of the *in camera* meeting was to deal with the Applicant's residency (Applicant's Record, Volume Three, at 181-182). It also appears from the record that there was an informal discussion on the issue prior to the *in camera* portion of the meeting (Applicant's Record, Volume Two, at 428). Although it is unclear what those discussions entailed, there is no evidence that the Applicant protested his exclusion from Council or that he sought to formally address his fellow colleagues before they proceeded *in camera*. One can only presume that it is because the Applicant's views had already been communicated to Council. There is also no evidence that the Applicant requested that Council resort to the lesser sanction of suspension without pay provided in section 18 of the BCN Election Code.

[41] Finally, the Applicant's submission that the residency requirements have been inconsistently applied is also without merit. The Applicant has adduced no clear and convincing evidence to persuade me that the BCN Chief and Council have applied a different process for enforcing compliance when made aware of a failure to comply with the residency requirements.

[42] To conclude, I have considered the importance of the removal decision, both to the Applicant and the members of the Calling Lake community who voted for him. However, I am not persuaded, based on the evidence before me, that the Applicant's rights to procedural fairness were breached. The Applicant knew the case he had to meet and was given an opportunity to respond. He was informed both orally and in writing that his colleagues on Council had an issue with his failure to assume residency on the reserve for which he was elected. He was also forewarned of the consequences of non-compliance and was given an opportunity to respond by

submitting documentation establishing his compliance with the residency requirements. The documentation that the Applicant submitted did not meet the expectations of the BCN Council. Moreover, unlike in *Lavallee v Ferguson*, 2016 FCA 11 [*Lavallee*], there is no evidence in this case of "ongoing and legitimate efforts" by the Applicant to establish residency which could have satisfied the requirement in the BCN Election Code that the Applicant "assume residency" on the Calling Lake Reserve (*Lavallee* at para 29). Finally, it was reasonable for the BCN Council to exclude the Applicant from the meeting to encourage a frank and open discussion between Council members.

B. *Equality rights under section 15 of the* Charter

[43] As a preliminary matter, the Respondents submit in their memorandum of fact and law that there is insufficient evidence before the Court to determine the constitutional argument. They request that the Applicant's constitutional relief be directed to trial.

[44] The Respondents do not elaborate further on the issue, nor do they articulate the type of evidence that would be better suited to proceeding by way of action. While I find that there are shortcomings in the evidence adduced by both parties, I am not persuaded that they result from the nature of the proceedings. Both parties have provided affidavit evidence in support of their position and the principal affiants have been cross-examined on their affidavits. They have also produced additional evidence in response to a number of undertakings. In my view, both parties have had more than ample opportunity and time to adduce evidence on the constitutional argument given that the application for judicial review was filed on May 8, 2015 and only heard in March 2018. Moreover, I am not persuaded that the conversion of this application into an

action is justified considering that the principal relief sought by the Applicant on this application for judicial review is to have the decision removing him from Council set aside.

[45] I also recognize that generally, constitutional questions cannot be raised for the first time in the reviewing court if the issue was not raised before the administrative decision-maker. The Respondents did not assert an objection on this ground. In *Erasmo*, the Federal Court of Appeal determined that the constitutional issue in that case could be raised for the first time before this Court because, in the circumstances of that case, the Sentence Manager at the Stony Mountain Institution was not an adequate and available forum for the appellant to raise his constitutional concerns (*Erasmo* at paras 31-38). The same reasoning applies here. Accordingly, I will proceed to consider the Applicant's constitutional argument.

[46] Subsection 15(1) of the *Charter* states:

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.	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.

[47] The Supreme Court of Canada has recently reaffirmed the two-step analytical framework for establishing whether a law infringes the guarantee of equality under subsection 15(1) of the *Charter*. The first part of the analysis "asks whether, on its face or in its impact, a law creates a

distinction on 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" (*Kahkewistahaw First Nation v Taypotat*, 2015 SCC 30 at paras 19-20; see also *Quebec (Attorney General) v Alliance du personnel professionnel et technique de la santé et des services sociaux*, 2018 SCC 17 at para 25; *Quebec (Attorney General) v A*, 2013 SCC 5 at paras 323-325; *Withler v Canada (Attorney General)*, 2011 SCC 12 at para 30; *R v Kapp*, 2008 SCC 41 at para 17).

[48] Regarding the first part of the analysis, the Supreme Court of Canada has already determined that Aboriginality-residency as it pertains to off-reserve band member status constitutes a ground of discrimination analogous to the enumerated grounds in subsection 15(1) of the *Charter* (*Corbiere v Canada (Minister of Indian and Northern Affairs*), [1999] 2 SCR 203 at paras 6, 62 [*Corbiere*]). While the issue in *Corbiere* concerned the exclusion of off-reserve members from the right to vote in band elections pursuant to subsection 77(1) of the *Indian Act*, RSC 1985, c I-5 [*Indian Act*], decisions of this Court have extended the analysis in *Corbiere* to those cases where Councils are chosen in accordance with the custom of the band (*Woodward v Council of the Fort McMurray*, 2010 FC 337 at paras 28-29 [*Woodward*]; *Thompson v Leq'á:mel First Nation*, 2007 FC 707 at para 8 [*Thompson*]; *Clifton v Hartley Bay (Electoral Officer)*, 2005 FC 1030 at paras 44-45 [*Clifton*]).

[49] The question in this case is whether the residency requirement prescribed by the BCN Election Code creates a distinction. The Respondents submit that it does not because the residency requirement applies to the Chief and to all elected Councillors.

[50] I agree with the Respondents that, on its face, the residency requirement provision is neutral and makes no distinction based on the analogous ground of Aboriginal residency. However, the distinction comes not from its wording but from its impact as it imposes a differential treatment and has a disproportionate effect on band members because of their off-reserve band member status. Unlike candidates who already reside on the reserve, off-reserve candidates are required to establish residency on the reserve within three (3) months of their election.

[51] For these reasons, I find that the residency requirement provision in the BCN Election Code creates a distinction based on the analogous ground of Aboriginal residency.

[52] With regards to the second part of the analysis, I am of the view that the distinction created by the residency requirement imposes a burden on off-reserve members and denies them a benefit in a manner that has the effect of perpetuating the erroneous notion that band members who live off the reserve have no interest and a reduced ability in participating in band governance. The distinction also reinforces the historical stereotype that off-reserve band members are less worthy and entitled, not on the basis of merit, but because they live off reserve.

[53] At this point in my analysis, it is useful to recall the words of the Supreme Court of Canada in *Corbiere*:

> 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.

[54] In discussing the issue of pre-existing disadvantage, stereotyping and vulnerability in *Corbiere*, the Supreme Court of Canada also indicated that "band members living off-reserve form part of a 'discrete and insular minority', defined by both race and residence, which is vulnerable and has at times not been given equal consideration or respect by the government or by other in Canadian or Aboriginal society". It also noted the existence of general stereotypes in society relating to off-reserve band members, including the one that to be "truly Aboriginal", one has to live on the reserve (*Corbiere* at para 71).

[55] In *Esquega v Canada (Attorney General)*, 2007 FC 878 [*Esquega*] (reversed on other grounds by 2008 FCA 182), this Court found that the residency requirement in subsection 75(1) of the *Indian Act* violated section 15 of the *Charter*. Under the terms of this provision, "no person other than an elector who resides in an electoral section may be nominated for the office of councillor to represent that section on the council of the band". Relying on *Corbiere*, the Court found that "band members who live off-reserve have historically faced disadvantage as a result of legislation and policies designed to deny them the right to participate in band governance" and that "[s]uch 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" (*Esquega* at para 88). The Court also found that off-reserve members hold a fundamental interest in participating in band Council and making decisions on behalf of their band (*Esquega* at para 91). The Court concluded that subsection 75(1) of the *Indian Act* discriminated "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" (*Esquega* at para 92).

[56] This Court reached a similar conclusion in *Joseph*. In that case, the Dzawada'enuxw (Tsawataineuk) First Nation 2011 Code provided positions for both resident and non-resident band members. However, while three quarters (¾) of the band members were non-resident, three (3) out of the four (4) positions on Council were not available to them, including the position of the Chair. The Court noted that even if the non-resident members were represented in Council deliberations by the non-resident Councillor, "when push comes to shove, that Councillor can be easily outvoted by the resident Councillors". The Court found that the distinction in the 2011 Code created "a disadvantage by perpetuating the stereotype that non-resident Band members have reduced ability or interest in contributing to Band governance" and concluded that the restriction therefore violated section 15 of the *Charter* (*Joseph* at paras 57-58).

[57] A similar result was also reached in *Thompson* where this Court found paragraph 3.1(b) of the Leq'á:mel First Nation Election Regulations and Procedures to be invalid as contrary to subsection 15(1) of the *Charter*. This provision stipulated that in order to be eligible for the position of Chief or Councillor for the Lakahahmen First Nation, a person was required to reside in the Canadian Traditional Stó:lo Territory (*Thomspon* at para 25).

[58] In this case, the residency requirement in the BCN Election Code does not appear on its face to be discriminatory. However, in reality, it imposes a burden on off-reserve members wishing to run for office, the effect of which is clearly discriminatory, thus perpetuating the pre-existing disadvantage of the group it was intended to benefit. In order to serve the community with which the band member is affiliated, the band member must, once elected, relocate on the reserve. This relocation comes only at a great cost, both personally and financially (*Corbiere* at paras 14, 62).

[59] For example, the BCN Chief indicates in his affidavit that he asked the Applicant if his wife would be moving with him onto the Calling Lake Reserve. The Applicant responded that his wife would continue to reside at their home off reserve (Applicant's Record, Volume Two, at 190, para 37). The obligation to reside on the reserve once elected thus had the effect of forcing the Applicant to change his domestic situation. It also required the Applicant's son and wife to change theirs when the Applicant moved in with them during his first term in office (Applicant's Record, Volume Five, at 989).

[60] Another example of the residency requirement's impact on off-reserve band members who wish to be elected as Councillors is found in a letter dated March 3, 2016. The BCN Councillor writes that while she had the support of her husband to move onto the reserve if elected, her children were not happy with the situation. She further indicates that she and her husband had to do major renovations to the home they moved into, spending over $10,000.00 "just to make it livable" and that her family went through a lot of struggles in order to live on the reserve (Applicant's Record, Volume Two, at 316).

[61] In addition to the personal and financial burden, the newly elected candidate's relocation on reserve is subject to the availability of housing and to the band Council's approval. It appears from the evidence on the record that as of April 2017, the total registered population of the BCN consisted of 7944 members, of which 4560 members resided off reserve. Both parties also agree that there is a shortage of band provided housing in the BCN reserve of Calling Lake. This situation can subject an elected candidate living off-reserve to arbitrary and political decisions, unlike an elected candidate living on reserve.

[62] Moreover, even if an elected candidate is allocated a lot on the reserve through a Temporary Land Occupancy Agreement, as was the case for the Applicant and another elected Councillor, the agreement requires the occupant to make improvements to the land before the end of the first anniversary of the agreement failing which other BCN members will be given the opportunity to utilize the property (Applicant's Record, Volume Five, at 1080).

[63] I acknowledge the argument of the Respondents that the Applicant could have established residency by moving a trailer or mobile home on the land that was assigned to him in June 2010. However, there is a dispute between the parties on whether the Applicant could do so to establish his residency. Even if this was an option for the Applicant, the fact remains that he must do so at the personal cost and inconvenience of maintaining two (2) residences if he does not wish to sell his residence off reserve. The Applicant indicates in his affidavit that he has resided in the same location since the 1980's. It would be unreasonable to expect that the Applicant sell his residence and move onto the reserve prior to being elected as there is no guarantee that he will be successful in his bid for office. Similarly, it would be unreasonable to expect the Applicant to

sell his residence after being elected as a term in office is four (4) years and there is no guarantee of re-election at the end of the term.

[64] In the context of their section 1 argument, the Respondents submit that the foundation of the residency requirement is the custom of the BCN. They argue that to be an accepted leader by the community, one must live amongst the people of the reserve community the leader represents. This argument, in my view, is troublesome since it is akin to the stereotype noted by the Supreme Court of Canada in *Corbiere* that to be "truly Aboriginal", one must live on the reserve (*Corbiere* at para 71).

[65] The fact is that while off-reserve members may now vote and be elected as Councillors of the BCN, the requirement that they establish residency on the reserve during their term in office imposes on them a burden that on-reserve members do not have. It also perpetuates the stereotype that only members on the reserve are able to decide the affairs of the band.

[66] Consequently, I find that the residency requirement in the BCN Election Code discriminates against off-reserve band members by prohibiting them from participating in the representative governance of their band Council on the basis of their off-reserve band member status.

C. *Is the residency requirement justified under section 1 of the* Charter*?*

[67] To establish that the infringement is justified, the Respondents have the onus of demonstrating that the residency requirement provisions have a pressing and substantial

objective and that the means chosen to achieve it are proportionate to it (*R v Oakes*, [1986] 1 SCR 103 at paras 69-70).

[68] The Respondents contend that the objectives of the residency requirement are: (1) to adhere to a long-standing custom; (2) to provide elected officials with the opportunity to better connect with the community on reserve that they are representing and foster a better level of involvement in local governance; (3) to give effect to the will of the BCN electors; and (4) to encourage off-reserve members to return where they can lead with the skills acquired off reserve. They argue that the residency requirement's goal to foster a Councillor's real, substantial and present connection to the community is a legitimate objective which is inextricably connected to the restriction imposed.

[69] While I agree that the objective may be legitimate, I am not satisfied that there is a rational connection between the objectives advanced by the Respondents and the limit on the ability of off-reserve band members to participate in their band Council's decision-making.

[70] I recognize that those most affected by the decisions of the band Council are those who live on the reserve. Nevertheless, the Supreme Court of Canada found that off-reserve band members also have important interests in band governance. They have an important financial interest in the affairs of the band. They are co-owners of the band's assets and the band Council represents them in negotiations with the government and within Aboriginal organizations. The availability of services on the reserve is equally important to off-reserve band members, especially those like the Applicant who live in the vicinity of the reserve (*Corbiere* at paras 17,

78, 80). Given that approximately half of the BCN's members live off the reserve, it is difficult to rationalize why on-reserve Councillors would be more connected with the people and communities they represent. It has not been demonstrated why a Councillor residing on the reserve can represent the interests of the off-reserve members and yet, an off-reserve Councillor cannot represent the interests of the on-reserve members.

[71] Aside from broad statements in the Respondents' affidavit evidence such as "since the signing of the treaty 8 in 1899, elected Bigstone Cree Nation Chiefs and Councillors have always resided on the Bigstone Cree Nation lands and never off-reserve", "people want their leaders to live amongst them", the Respondents have presented no evidence on the connection between the willingness or ability of off-reserve band members to participate in their band Council and their residency status. On the contrary, the Respondents have adduced evidence that suggests that the residency status is based on the stereotypes that were rejected by the Supreme Court of Canada in *Corbiere*. The following statement is contained in one of the Respondent's affidavits: "[o]ur people believe that the best leadership comes from those living on the reserve. It is not so much a matter of whether or not the person is able to do the job, but whether the person is accepted by the people as a leader" (Applicant's Record, Volume Two, at 318).

[72] Even if I accepted that the restriction on residence was rationally connected to the objectives advanced by the Respondents, I cannot agree with the Respondents' argument that the residency requirement is minimally impairing because it does not disenfranchise members from voting or standing for office or from participating in the governance of their band.

[73] In support of their argument, the Respondents rely on a decision of this Court in *Orr v Peerless Trout First Nation*, 2015 FC 1053, confirmed on appeal at 2016 FCA 146. This decision, in my view, is distinguishable. The issue in that case concerned a band member's ineligibility to run for office because the member was a plaintiff in a civil action against the band. Unlike the BCN Election Code, the restriction provided in the Peerless Trout First Nation's Customary Election Regulations did not create a distinction based on an analoguous ground nor did it perpetuate a disadvantage, the effect of which infringed a band member's right to equality under subsection 15(1) of the *Charter*.

[74] The evidence shows that the issue of the residency requirement has been the subject of debate within the BCN membership for a number of years (Applicant's Record, Volume Five, at 1026, 1027, 1176). Minutes of a meeting held in April 2014 with the Chipewyan Lake membership demonstrate that three (3) residency options were considered: 1) that the elected member live on the reserve; 2) that the elected member live within a certain distance from the affiliated community; and 3) that the residency requirement be removed (Applicant's Record, Volume Five, at 1027). The issue of the residency requirement was also under consideration in 2017. It appears from the record that one of the options considered was that the elected Councillor be required to live on any BCN reserve or within a 30 kilometer radius from the BCN reserve that the Councillor represented. The Respondents have not presented any evidence nor did they make any submissions on why these other options would not meet the objectives of the BCN.

[75] The Respondents argue that restrictions on residency are not particular to First Nations and they refer to members of Parliament and members of provincial legislative assemblies incurring the social and economic costs of establishing two (2) residences. In my view, the Respondents' comparison fails to take into account that the discrimination is grounded on the Applicant's off-reserve band member status. In *Corbiere*, the Supreme Court of Canada noted the following at paragraph 15:

> ... reserve status should not be confused with residence. The ordinary "residence" decisions faced by the average Canadians should not be confused with the profound decisions Aboriginal band members make to live on or off their reserves, assuming choice is possible. The reality of their situation is unique and complex. Thus no new water is charted, in the sense of finding residence, in the generalized abstract, to be an analogous ground.
> …

[76] The Respondents also argued that the changes that resulted from the adoption of the 2009 BCN Election Code marked a profound change in the manner in which elections were held. By providing that two (2) candidates must reside in each of the smaller communities, the BCN Election Code introduced the concept of direct representation. The Respondents contend that this change reflects the voice of its membership and submit that this Court should show deference to the BCN's inherent right to self-government.

[77] While I recognize the importance of the Respondents' inherent right to self-government, this Court has repeatedly stated that it must be exercised in compliance with the *Charter* (*Thompson* at para 8; *Woodward* at paras 28-29; *Clifton* at para 45). The right to decide who better represents the interests of the band's membership ultimately lies in the hands of each band member at the time of election.

[78] Accordingly, I find that the Respondents have not satisfied their burden of demonstrating that the residency requirement is justified as a reasonable limit under section 1 of the *Charter*.

D. *Remedy*

[79] The Applicant seeks the following relief:

> a. A Declaration that he was wrongfully removed from office as a BCN Councillor and that the decision of BCN Chief and Council rendered March 24, 2015 be set aside;
>
> b. A Declaration that the Applicant was at all times since March 24, 2015 a holder of the office of BCN Councillor;
>
> c. A Declaration that he was and remains eligible to receive the benefits and emoluments associated with holding office as a BCN councillor;
>
> d. A Declaration that the provisions of s. 17(b) and 19.1(g) of the Election Code are unconstitutional and are of no force or effect;
>
> e. A Declaration that the Applicant is eligible to run in the next BCN Chief and Council election; and
>
> f. An Order for costs on a full indemnity basis or as the Court may deem appropriate.

[80] The Respondents argue that the Court is without jurisdiction regarding the relief sought in b., c. and e. above. They further argue that the relief claimed by the Applicant is in the nature of damages which cannot be awarded in an application for judicial review. In the alternative, the Respondents request that if this Court finds subsections 17(b) and/or 19.1(g) of the BCN Election Code to be invalid as contrary to subsection 15(1) of the *Charter* and unjustifiable under section 1 of the *Charter*, such a declaration be suspended for a period of one year following the

issuance of judgment in order to give the BCN an opportunity to amend the sections through a process of consultation by its own democratic process.

[81] I agree with the Respondents that the relief requested by the Applicant in b., c. and e. cannot be granted by this Court, albeit for a different reason. The BCN Election Code establishes several grounds which may lead to the removal of a Councillor. With the passage of time, I simply do not have the evidence that would enable me to declare that the Applicant continued to meet all the requirements prescribed in the BCN Election Code to be an elected Councillor since his removal from office. I am equally unable to declare that he meets all of the BCN Election Code's requirements to be a candidate in the next election which, according to the parties, should be held sometime in September 2018. However, the fact that he was removed from office by Council and that his removal prompted a by-election should not prevent the Applicant from being a candidate in the next general election despite the wording of subsection 20.3(b) of the BCN Election Code.

[82] Regarding the other relief claimed by the Applicant, I note that he does not seek a declaration of invalidity with respect to subsections 17(c) and 17(d) of the BCN Election Code which impose a residency requirement on the Councillors of Chipewyan Lake and Wabasca/Desmarais Reserves. These two (2) provisions are worded in the same manner as subsection 17(b) which is applicable to the Councillors from the Calling Lake Reserve. The only logical conclusion would be that subsections 17(c) and 17(d) of the BCN Election Code are equally of no force and effect on the basis that they infringe subsection 15(1) of the *Charter*. However, as the issue was not specifically addressed by the parties at the hearing and in the

absence of a request to declare them constitutionally invalid, I will not issue a declaration to that effect. As a result, subsection 19.1(g) of the BCN Election Code must stand as it refers to section 17 as a whole.

[83] Therefore, the only relief left for the Applicant is to have this Court set aside the decision of the BCN Council removing him from Council and declare subsection 17(b) of the BCN Election Code of no force and effect because it is contrary to section 15 of the *Charter* and cannot be saved by section 1 of the *Charter*.

[84] The Respondents request that if the Court grants a declaration of invalidity, that such declaration be suspended for a period of one (1) year following the issuance of the judgment.

[85] The Respondents' request will not be granted.

[86] In *Carter v Canada (Attorney General)*, 2016 SCC 4, the Supreme Court of Canada wrote at paragraph 2:

> … To suspend a declaration of the constitutional invalidity of a law is an extraordinary step, since its effect is to maintain an unconstitutional law in breach of the constitutional rights of members of Canadian society … The burden on the Attorney General who seeks an extension of a suspension of a declaration of constitutional invalidity is heavy.
> …

[87] In the case at hand, the next general election is to be held in September 2018. If I were to suspend my declaration, it would have the effect of perpetuating the same violation. Candidates

who wish to become a Councillor but are not willing to assume residency on the reserve will continue to be denied the opportunity of being a candidate for a position on Council and as a result, will be deprived of the protection of their *Charter* right to equality for the next four (4) years.

E. *Costs*

[88] At the hearing, the Applicant requested that he be significantly indemnified for bringing his application before the Court. He argued that the issues raised were important and suggested costs in the amount of $20,000.00.

[89] The Respondents, on the other hand, argued that the bulk of the Applicant's argument focused on the procedural fairness issues, not the constitutional issues. The Respondents also contend that the Applicant is responsible for the delays incurred in bringing this matter to a hearing. They suggest that each party bear its own costs. In the alternative, they ask that any costs payable to the Applicant be off-set by an amount that the Applicant is required to reimburse to the Respondents.

[90] In the exercise of my discretion, I have decided not to award the Applicant increased costs. The Applicant is only partially successful in his arguments and secondly, he is partly responsible for the long delay in bringing this matter to a hearing. As a result, the Applicant shall be awarded costs assessed in accordance with Column III of Tariff B. Moreover, I shall not order that the Applicant's costs be off-set with any amounts the Applicant may owe to the Respondents as it would be inappropriate for me to do so in this application for judicial review.

JUDGMENT in T-762-15

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed;

2. The March 24, 2015 decision of the Bigstone Cree Nation Council removing Clifford Ray Cardinal from Council is set aside;

3. Subsection 17(b) of the BCN Election Code is of no force and effect because it is contrary to section 15 of the *Charter*;

4. The Applicant is not ineligible under subsection 20.3(b) of the BCN Election Code to be a candidate for office in the next general election for the sole reason that he was removed from office by Council on March 24, 2015;

5. Costs shall be payable by the Respondents to the Applicant and they shall be assessed in accordance with Column III, Tariff B of the *Federal Courts Rules*, SOR/98 106.

"Sylvie E. Roussel"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-762-15
STYLE OF CAUSE:	CLIFFORD RAY CARDINAL v BIGSTONE CREE NATION ET AL
PLACE OF HEARING:	EDMONTON, ALBERTA
DATE OF HEARING:	MARCH 13, 2018
JUDGMENT AND REASONS:	ROUSSEL J.
DATED:	AUGUST 9, 2018

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