COURT NO. T-3038-90

B E T W E E N:

JOHN CORBIERE, CHARLOTTE SYRETTE, CLAIRE ROBINSON
FRANK NOLAN, each on their own behalf and
on behalf of all non-resident members of the Batchewana Band,

Plaintiffs,

— and —

HER MAJESTY THE QUEEN as represented by the
Minister of Indian and Northern Affairs Canada
and The Attorney General of Canada and the
BATCHEWANA INDIAN BAND,

Defendants.

REASONS FOR JUDGMENT

STRAYER J.

Relief Requested

The plaintiffs are all members of the Batchewana Indian Band. The plaintiff Corbiere resides on Rankin Indian Reserve 15D, a reserve of the Batchewana Band. The other plaintiffs reside off the reserve. In their statement of claim they seek: a declaration that "in the circumstances of this case" certain sections of the *Indian Act*, *The Indian Band Election Regulations*, and certain bylaws of the Batchewana Indian Band contravene sections 15, 2(d) and 7 of the *Canadian Charter of Rights and Freedoms*; a declaration that these provisions, providing as they do that a band member must be ordinarily resident on the reserve to be eligible to vote in band elections, do

not apply to elections held under the *Indian Act* for the Batchewana Band of Indians; orders which would in effect grant or restore to all adult members of the band, wherever resident, the right to vote; an order to set aside the result of any election held after the issuance of the statement of claim filed on November 19, 1990; and costs.

During the course of argument counsel for the plaintiffs abandoned any argument based on section 7 of the Charter and also withdrew the request for an order setting aside the last election which I understand was held in December, 1990.

Facts

The defendant Batchewana Indian Band took no part in the trial of this action. When reference is made herein to the "defendants" it is a reference to Her Majesty and the two Ministers named in the style of cause.

Before going into the facts I would note that at the beginning of the trial counsel for the plaintiffs drew to the attention of the Court the fact that the plaintiffs had not served notices of a constitutional issue on the Attorney General of each province, as is required by subsection 57(1) of the *Federal Court Act* which had only recently come to his attention. That section requires such notice to be served at least ten days before the date on which a constitutional question is to be argued. I directed on May 17, 1993, the first day of the trial, that he serve such notice on each of the provincial attorneys general with the indication that any such attorney general wishing to participate should so advise the Court by June 1, 1993 in which case such attorney general would be provided with a transcript of the evidence and argument at trial and would have an opportunity to present argument and

evidence to the Court with, of course, the participation of the parties. In my view this met the requirements of section 57 that an Act or Regulation "shall not be adjudged to be invalid" until such notice has been given. Such notice was given and no provincial attorney general has indicated any interest in participating in this matter so I can now proceed to judgment.

Notwithstanding the detail in the statement of claim as to past examples of members of the band not resident on the reserve being allowed to vote even after the *Indian Act* precluded this, counsel clarified that he was not suggesting that some form of estoppel entitled such members to vote now.

Counsel for the defendants contended that since in paragraph 6 of the statement of claim the plaintiffs state that they bring the action

> on behalf of all members of the Batchewana Band of Indians who do not ordinarily reside on any reservation set aside for the Batchewana Indian Band

the plaintiffs must prove that they have the support of all such persons. It was clearly not so proven in this case. Counsel for the defendants did not produce jurisprudence in support of his proposition and I am not satisfied without more that such is the law. I have held elsewhere[1] that named plaintiffs may bring a class action on behalf of a category of fellow Indian band members for constitutional determinations involving communal rights, even where some members of the class expressly oppose the action. In any event, the plaintiffs in the same paragraph of the statement of claim state that they bring the action on their own behalf as well. I am satisfied, having regard to the relaxed requirements for standing to bring actions for declarations in

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1. *Twinn et al v. The Queen* [1987] 2 F.C. 450. See also *Montana Band et al v. The Queen* [1991] 2 F.C. 30 where the Federal Court of Appeal refused to strike out a statement of claim on behalf of all members of certain bands seeking constitutional declarations of aboriginal rights. Admittedly in that case standing was not raised as an issue.

constitutional and other public law cases,[2] that the plaintiffs would in any event suing in their own capacity have standing to seek the declarations herein. With respect to the plaintiff John Corbiere, who does have the right to vote in Batchewana band elections, his standing has already been adjudicated upon by Joyal J. on February 18, 1991 and that decision was not appealed.

There was extensive evidence submitted, particularly through the agreed statement of facts, as to the history of this band, its reserve lands, its voting practices, and the distribution of its membership as between those who reside on and off the reserves of the band. Following is a summary of such facts as appear to me to be pertinent.

History of the Batchewana Band:
Lands, Population, and Voting Practices

A salient fact is that for much of its post-treaty history, this band did not have a land base upon which many of its members could live. The area traditionally used by this band lies on the east shore of Lake Superior north of the present city of Sault Ste-Marie. In 1850 the band entered into the Robinson-Huron Treaty with Her Majesty in which it surrendered most of this land in return in part for a reserve of 246 square miles. In 1859 the band by the Pennefather Treaty surrendered all of this reserve except Whitefish Island, a small island in the St. Mary's River at Sault Ste-Marie. For the next twenty years the band's only land base was Whitefish Island. Starting in 1879 some small reserves were purchased for the band but these did not attract major settlement. Until 1952 a number of members of the band lived on the Garden River reserve which did not belong to this band,

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2. See e.g. *Thorson v. A.G. Canada* [1975] 1 S.C.R. 138; *Minister of Justice v. Borowski* [1981] 2 S.C.R. 575; *Minister of Finance v. Finlay* [1986] 2 S.C.R. 607.

such use of the Garden River reserve having been arranged pursuant to the Pennefather Treaty. Finally in 1952 a substantial reserve of 3,763.9 acres was established for the band at Rankin Location immediately adjacent to Sault Ste-Marie. Since 1952 this reserve has been developed by the band and apparently is the place where the most band members live on any reserve. A further small reserve was established for the band in 1962 at Batchewana Bay.

For much of the time since 1850, a majority of the members of the band have not lived on reserves of that band. In 1953, one year after the establishment of its Rankin reserve, only 34% of the band lived on the band's reserves.[3] Due largely to an ambitious housing programme on Rankin reserve, by 1980 the situation had reversed with some 66.5% of the band living on reserves of the band. In 1985 this figure had increased to nearly 69%. Thereafter the position was quickly reversed due to a rapid increase in the membership of the band, with most of the new members living off the reserve.[4] It is not in dispute that this rapid increase in membership came about as a result of the amendments to the *Indian Act* in 1985[5] ("Bill C-31")which restored eligibility for membership in Indian bands of many Indians who had previously lost their Indian status. Statistics provided by the defendants show that, in the period 1985-1989, of the total growth of 678 in band membership, 574 were brought in by virtue of Bill C-31.[6] Most of the Indians restored to band membership pursuant to this legislation were women, and the children of such women, who had lost their status through marriage to non-Indians. There were also some who recovered their status which had

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3. Agreed statement of facts, para. 33.

4. Exhibit D-11, as amended at trial.

5. S.C. 1985, c.27.

6. Exhibit D-16, page 3 and Table 2-2.

been lost because they or their parents had become "enfranchised" voluntarily. One of the present plaintiffs, Frank Nolan, recovered his Indian status which had been lost by his father having been enfranchised in 1928. The result of this rapid increase in the membership of the band was that, although in 1985 some 69% of the band lived on band reserves, by 1991 that situation was almost exactly reversed with some 68% living off the reserve. During this period the total band membership grew from 543 to 1,426.

It is obvious that most of those members residing off band reserves who want to live on a reserve cannot expect to do so very soon. For most, subsidies are required, coming from government funding whose recipients are chosen by, or under the control of, the band council. From 1952 when the band obtained Rankin Reserve and thus a sound land base, until 1985 when Bill C-31 was adopted, membership living on the band's reserves had with a fairly vigorous housing programme gone to 386. Between 1985 and 1991 the on-reserve population grew by only 68, whereas the off-reserve population grew by 730 (an average of over 121 per year). Evidence of the subsidized reserve housing programme for 1992[7] indicates 21 units under construction, of which 16 were for non-residents of the reserve. At this rate it will be many years before those members who want to live on the reserve will be able to do so, if ever. Two of the named non-resident plaintiffs in the present case testified and neither said clearly that he or she wanted to live on the reserve. Two other non-resident band members testified they would like to live on the reserve but were in effect unable to do so because of housing funds not being available, either from the band subsidy programme or their own resources. I think it is legitimate to infer that many of the non-resident members on whose behalf this action is brought face

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7. Ex. 250, Schedule F; and evidence of Chief Vernon Syrette.

similar problems and will have no practical access to housing on the reserve for a long time.

Elections for the Batchewana band council have, since 1899, been governed by the *Indian Act*. At that time the *Indian Act* did not require that band members be resident on a band reserve in order to vote for the band council and it is not in dispute that for several decades non-residents freely voted. In 1951 the *Indian Act* was amended[8] to require that band members to vote in band elections had to be "ordinarily resident on the reserve". An Order in Council of that year listed the Batchewana Band as one of the bands whose elections were to be in accordance with the *Indian Act*.[9] Thereafter there seems to have been some looseness in applying the residence requirement, this being deduced from the fact that the Department of Indian Affairs approved of polls being set up off the reserve for band elections. It is clear, however, that by 1962 the Department took the firm position that members of the band ordinarily resident off the reserve were not entitled to vote. This position was taken even with respect to members of the band residing on *a* reserve, namely the Garden River reserve (where some members of the Batchewana Band had been accommodated ever since the Pennefather Treaty) because such members were not resident on a reserve *of the Batchewana Band*. The evidence indicated that there had been some protests about this situation, including a petition signed by approximately 135 band members in 1988 requesting the Department to "restore" to non-resident members their rights to vote in band elections. The Department rejected this petition on the basis of the requirements of present section 77 of the *Indian Act* that they be ordinarily resident on a band reserve, and denied that there was any "traditional right" for off-reserve band members to vote at band

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8. S.C. 1951, c.29; now section 77.

9. P.C. 6016, November 12, 1951.

elections. An "appeal" from the 1988 election (presumably a request that the Governor in Council set aside that election) brought by two of the present plaintiffs (Charlotte Syrette and Claire Robinson) was rejected by the Department for similar reasons. This action was brought prior to the election held on December 10, 1990, where the residence requirements were again applied in accordance with section 77 of the *Indian Act*.

It should also be noted before leaving the history of election practices that the plaintiffs and others have advocated that an Order in Council should be passed deleting the Batchewana Band from the relevant Order in Council as one of those bands whose elections are to be governed by the *Indian Act*.[10] Those who advocate this change are apparently of the view that as the effect would be to have band elections governed by the custom of the band, such custom would permit voting by band members not resident on a band reserve. The Department of Indian and Northern Affairs has adopted a policy, whose contents are not in dispute,[11] which in effect means that the Minister would not make such an order unless those who now have the right to vote so decide. A request for such a change must be supported, *inter alia*, by a resolution of the band council which is of course elected exclusively by those resident on the reserve. Such a change must also be supported by the band membership and the council can choose to have such support determined in a plebiscite or public meeting where only the "electors" can vote. As will be demonstrated below, an "elector" is by definition a person ordinarily resident on the reserve. Thus those very people now disqualified from voting because elections are conducted under the

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10. By subsection 74(1) the Minister may declare by order that the elections of particular bands are to be held in accordance with the Act. Such a declaration can also be repealed. When this is done by the definition of "council of the band" *infra* note , s.2, the council must be elected pursuant to band custom.

11. Set out in Exhibit D-7.

Indian Act would not have a voice in requesting a reversion to elections conducted by custom nor, would it appear, in defining that custom.

Relevant Provisions of the Indian Act

Section 2(1) of the *Indian Act*[12] provides the following definitions:

> "band" means a body of Indians
>
> > (a) for *whose use and benefit in common, lands,* the legal title to which is vested in Her Majesty, *have been set apart* before, on or after September 4, 1951,
> >
> > (b) for *whose use and benefit in common, moneys are held* by Her Majesty, or
> >
> > (c) declared by the Governor in Council to be a band for the purposes of this Act;
>
> "council of the band" means
>
> > (a) in the case of a band to which section 74 applies, the council established pursuant to that section,
> >
> > (b) in the case of a band to which section 74 does not apply, the council chosen according to the custom of the band, or, where there is no council, the chief of the band chosen according to the custom of the band;
>
> "elector" means a person who
>
> > (a) is registered on a Band List,
> >
> > (b) is of the full age of eighteen years, and
> >
> > (c) is not disqualified from voting at band elections;
>
> "Indian moneys" means all moneys collected, received or held by Her Majesty for the use and benefit of Indians or bands;
>
> "member of a band" means a person whose name appears on a Band List or who is entitled to have his name appear on a Band List;
>
> "reserve"
>
> > (a) means a tract of land, the legal title to which is vested in Her Majesty, that has been set apart by Her Majesty *for the use and benefit of a band,* and

12. R.S.C. 1985 c.I-5.

> (b) except in subsection 18(2), sections 20 to 25, 28, 36 to 38, 42, 44, 46, 48 to 51, 58 to 60 and the regulations made under any of those provisions, includes designated lands. . . . (Emphasis added).

From this it will be noted that there are no residence requirements as to membership in a band. Each member of a band, including the plaintiffs, forms part of the "body of Indians" for whose use and benefit the Crown holds land and monies. There is no dispute that all the plaintiffs are such members, as are many other non-residents of this band's reserves similarly situated to the three non-resident plaintiffs.

By subsection 4(3) of the *Indian Act* certain sections are said not to apply to any Indian who does not ordinarily reside on a reserve. By implication it would appear that all other provisions of the Act potentially apply to band members not resident on a reserve. Subsection 18(1) provides as follows:

> 18.(1) Subject to this Act, reserves are held by Her Majesty *for the use and benefit of the respective bands* for which they were set apart, and subject to this Act and to the terms of any treaty or surrender, the Governor in Council may determine whether any purpose for which lands in a reserve are used or are to be used is for the use and benefit *of the band.* (Emphasis added).

Thus, the reserves in question here are held by Her Majesty for the use and benefit of the Batchewana Band which by virtue of the foregoing definitions includes all of its members whether resident on the reserve or not.

Subsection 20(1) provides as follows:

> 20.(1) No Indian is lawfully in possession of land in a reserve unless, with the approval of the Minister, possession of the land has been allotted to him by the council of the band.

This means that no member of a band can be lawfully in possession of land on the reserve unless it is allotted to him by the council of the band which is

of course elected by those already resident on the reserve. This provides a means of control of entry to voting rights: by for example refusing the head of a household the right to possession of a piece of land for establishing a home on the reserve, the council can exclude that person and his family from the vote.

Subsection 39(1) of the Act provides that reserve lands may not be surrendered to Her Majesty (which would normally happen in the process of lands being leased or sold by the Crown to others) unless such surrender (and thus the terms of disposition) are approved by "a majority of the electors" of the band at a meeting or in a referendum. It has been noted above in the definition in subsection 2(1) that an "elector" is a person "not disqualified from voting at band elections". As will be seen below, by subsection 77(1) a person not ordinarily resident on the reserve is disqualified from voting in band elections. Therefore the "electors" who can approve a disposition of reserve lands do not include those members of the band living off the reserve even though the land is held for the use and benefit of all members of the band. An example of the effect of this restriction can be seen in the present case. In 1992 a referendum was held, presumably under sub-paragraph 39(1)(b)(iii) of the Act, to seek approval of a settlement reached between Her Majesty and the Batchewana Band concerning the disposal of Whitefish Island. This involved a payment of some $3.4 million to the band. The plaintiff Frank Nolan tried to vote in that referendum which involved property common to the band, but was refused the vote because he was not a resident on the reserves of the band.

The following provisions of the Act are found under the heading "Management of Indian Moneys" ("Indian moneys" being defined in subsection 2(1) as quoted above).

> 61.(1) Indian moneys shall be expended only for the benefit of the Indians or *bands for whose use and benefit in common* the moneys are received or held, and subject to this Act and to the terms of any treaty or surrender, the Governor in Council may determine whether any purpose for which Indian moneys are used or are to be used is for *the use and benefit of the band.* (Emphasis added).
>
> 62. All Indian moneys derived from the sale of surrendered lands or the sale of capital assets of a band shall be deemed to be capital moneys of the band and all Indian moneys other than capital moneys shall be deemed to be revenue moneys of the band.
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> 64.(1) With the consent of the council of a band, the Minister may authorize and direct the expenditure of capital moneys of the band
>
> > (a) to distribute per capita to the members of the band an amount not exceeding fifty per cent of the capital moneys of the band derived from the sale of surrendered lands;
> >
> > (j) to construct houses for members of the band, to make loans to members of the band for building purposes with or without security and to provide for the guarantee of loans made to members of the band for building purposes. . . .

The net result of these provisions would appear to be that moneys held by the Crown on behalf of Indian bands is held for the "use and benefit in common" of those bands. Those designated "capital moneys" come from the sale of assets such as surrendered lands. The Minister may authorize the expenditure of such capital moneys for a variety of purposes more or less directly related to the reserve of the band. However, some such expenditures could directly affect non-members such as the distribution per capita to members of the band of capital moneys under paragraph 64(1)(a) and the expenditure of money for the construction of houses for members of the band (no matter where previously resident) pursuant to paragraph 64(1)(j). It will be noted that such expenditures of capital moneys cannot be made by the Minister without the consent of the band council, which is of course elected only by those band members living on band reserves in the case of the Batchewana Band. With respect to revenue moneys the following provisions apply:

> 66.(1) With the consent of the council of a band, the Minister may authorize and direct the expenditure of revenue moneys for any purpose that in the opinion of the

> **Minister will promote the general progress and welfare of the band or any member of the band.**

This provision means that with the consent of the *council* the Minister can authorize the use of revenue moneys for any purpose the Minister thinks will be for the benefit of the *band* or any member of the band. As an example of how this provision works, the Batchewana Band Council decided that $100,000 from the band's revenue account should be invested in a company, Thermal Dynamics Corporation. The Minister apparently approved. The Minister also recently received a request for the use of some or all of the $3.4 million placed in the revenue account from the Whitefish Island settlement. (It was not explained to me why these funds were put in the revenue account). As the band council had not provided an adequate explanation for the intended expenditure, the Minister refused to authorize it. With an adequate explanation presumably he would have done so, even though the majority of band members being non-resident would have had no input, directly or indirectly, into the band council's request.

It should be noted here that according to the evidence of a departmental officer there are very substantial sums held by bands in their own bank accounts over which the Minister has no control. These funds come from governmental grants both federal and provincial, and from revenues raised by the band through fees, etc. Such funds are for the most part (one possible exception being bursaries for band members for post-secondary education) used for services on reserves and for the benefit of those residing on reserves. It appears to me that they do not fall within the definition of "Indian moneys" in subsection 2(1) quoted above because they are not held by Her Majesty and thus do not fall within the regime of sections 61-69 of the Act.

With respect to voting rights subsection 77(1) contains the key provision under attack in this action.

> 77.(1) A member of a band who has attained the age of eighteen years *and is ordinarily resident on the reserve* is qualified to vote for a person nominated to be chief of the band and, where the reserve for voting purposes consists of one section, to vote for persons nominated as councillors. (Emphasis added).

The powers of the band council to make bylaws are set out in subsection 81(1) among which are included

> (i) the survey and allotment of reserve lands among the members of the band and the establishment of a register of Certificates of Possession and Certificates of Occupation relating to allotments and the setting apart of reserve lands for common use, if authority therefor has been granted under section 60. . . .

It should be noted that apart from attacking the validity of subsection 77(1) of the *Indian Act*, the plaintiffs also attack section 3 of the *Indian Band Election Regulations* and certain bylaws of the Batchewana Indian Band. The Regulation in question[13] and the band bylaws[14] do nothing more than provide some criteria for determining whether a person is "ordinarily resident" on a reserve. Nothing turns on these provisions. It is not clear to me that any authority was delegated to the band council to enact such bylaws but I make no finding on that point. The essential issue to be addressed is that of the validity of subsection 77(1) of the Act which requires ordinary residence on the reserve for a member to be an "elector" and thus to exercise the various voting powers granted only to electors.

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13. C.R.C., c.952, section 3.

14. Numbers 86-67 and 86-73.

The Plaintiffs' Pleadings

To determine whether the plaintiffs have adequately pleaded the necessary allegations to justify the kind of declaration which it seems to me is most pertinent, it is helpful to set out certain paragraphs of the statement of claim. That document alleges *inter alia* the following:

> 65. The Batchewana Band of Indians, as an Indian Band, is a body of Indians for whose use and benefit in common lands have been set aside and/or for whose use and benefit in common, monies are held by Her Majesty the Queen.
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> 66. Residence on the reservation [sic] is not essential to retain the status of a Band member. Provided that Indian status is not given up voluntarily, or membership altered by joining another Band, Band membership is retained even if the Band member has moved off the Reservation. The plaintiffs state and the fact is that therefore, the Band has a continuing existence which is independent of the place of residence of its members.
>
> 67. Members of the Batchewana Indian Band who reside on the Reservation set aside for the Band, live on an inflexible land base held on collective behalf of the entire Band membership by Her Majesty the Queen. Resident and non-resident Band members share in a group claim upon all Reservation lands and on all capital and revenue funds accumulated on behalf of all Band members.
>
> 68. The plaintiffs therefore plead and the fact is that all members of the Band, whether resident or non-resident on the Reservation, have an equality of interest and benefit in Band lands, assets and activities.
>
> 69. The plaintiffs state that the status of Band membership is analogous to citizenship.

These allegations should be kept in mind in relation to the relief sought, part of which is set out as follows:

> 74. The plaintiff therefore claims:
>
> a) A declaration that, in the circumstances of this case, section 77 of the Indian Act, section 3 of the Indian Band Election Regulations and By-Law numbers 86-67 and 86-73 of the Batchewana Indian Band contravene sections 15,2(d) and 7 of the Canadian Charter of Rights and Freedoms.
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> b) A declaration that section 7 of the Indian Act, section 3 of the Indian Band Election Regulations and By-Law numbers 86-67 and 86-73 of the Batchewana Indian Band providing that a Band member must be ordinarily resident on the reserve to be eligible to vote or stand for election in Band elections, do not apply to elections held under the Indian Act for the Batchewana Band of Indians.

Issues

The following appear to be the relevant issues:

(1) Does the denial of the vote in band elections or the status of "elector" to members of the Batchewana Band not ordinarily resident on its reserves infringe section 15 of the Charter?

(2) If so, can such limitations be justified under section 1 of the Charter?

(3) Is the "freedom of association" of band members not ordinarily resident on the reserve, as guaranteed by paragraph 2(d) of the Charter, infringed by such restrictions?

(4) If so, are such limitations justified under section 1 of the Charter?

Conclusions

Is Subsection 15(1) of the Charter Infringed?

Subsection 15(1) provides as follows:

> 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.

It must first be observed that the alleged ground of discrimination here is based on the place of residence of band members. Place of residence is not one of the grounds enumerated in subsection 15(1).

In accordance with the decision of the Supreme Court of Canada in *Andrews et al v. Law Society of British Columbia*[15] I must first determine whether there is discrimination within the meaning of subsection 15(1). For there to be discrimination, there must be a law with some negative impact on those who allege discrimination. I am satisfied that the denial of the vote in band council elections, or for other purposes such as the approval of the surrender of any interest in the reserve, has a significant negative impact on those not ordinarily resident on the reserve. I must then, however, determine whether the ground upon which that denial occurs is one which is analogous to the grounds listed in subsection 15(1). There have been several cases where province of residence has not been considered to be an analogous ground.[16] This conclusion was reached in part because the non-residents in question did not have the characteristics of a "discrete and insular minority", that is they did not constitute a group which in the "entire social, political and legal fabric of our society" constituted a group which was inherently or historically disadvantaged. There was also a recognition in those cases of the impact of federalism which legitimizes differences of treatment of individuals from one province to another.

I am of the view that band members not resident on a reserve may well constitute such a traditionally disadvantaged group, at least such members of the Batchewana Band who make up the group that is relevant for

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15. [1989] 1 S.C.R. 143.

16. See e.g. *Turpin v. Her Majesty the Queen* [1989] 1 S.C.R. 1296; *Her Majesty the Queen v. Sheldon S.* [1990] 2 S.C.R. 254.

the declarations I have been asked to make. I make no observation or findings with respect to the situation of other bands. But in respect of the Batchewana Band, historically ever since 1850 there has been a substantial portion of the band which has not been able to reside on reserve lands. While the evidence is insubstantial as to the reasons for this at various times throughout their history, I believe I can conclude that for a substantial part of that period the lands were either inadequate in scope (being almost non-existent for a certain period) or unsuitable to sustain large numbers of people. It is apparent from the rate of settlement of the Rankin Reserve after its creation in 1952 that there had been many members who wished to live on a reserve. Between 1953 and 1985 the proportion of band members living on reserves had more than doubled from approximately 34% to some 69%. This demonstrates the impact which the creation of an appropriate reserve and a vigorous housing programme had on the ability of non-residents to exercise a choice of residence. With the amendments to the *Indian Act* in 1985, however, the proportions were again reversed so that by 1991 some 68% were living off the reserve. By far the largest cause of this phenomenon was the sudden large increase in membership of the band brought about by Bill C-31 in 1985.[17] It is important to keep in mind why the new members added pursuant to Bill C-31 had previously been denied even membership in the band and thus any possibility of residence on the reserve. For the most part they were women, or the children of such women, who had lost their Indian status through marriage to a non-Indian, a result which was dictated by the former paragraph 12(1)(b) of the *Indian Act*. (Indian men did not, however, lose status by marrying non-Indians). This provision was successfully attacked before the United Nations Human Rights Committee.[18] It is no coincidence

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17. See Exhibit D-16, Table 2-2; see also note 6 *supra* and accompanying text.

18. *Lovelace v. Canada* [1983] Can. Human Rights Yearbook 305. While the U.N. Human Rights Committee found that paragraph 12(1)(b) discriminated on grounds of sex in depriving Mrs. Lovelace of Indian status, the Covenant had not been in force when that happened. The Committee found other ongoing violations of the International Covenant.

that it was repealed by Parliament in Bill C-31 effective the day section 15 of the Charter came into force. Some others who retrieved their status pursuant to Bill C-31 had been denied such status because of their own, or (such as in the case of the plaintiff Frank Nolan) their parents' actions in choosing to be "enfranchised" and to exercise the rights of a Canadian citizen, this having caused them to lose their Indian status. It may fairly be said, therefore, that those regaining status through Bill C-31 were historically denied membership in their band (and thus the right to live on a reserve) because of sex or race, their mother having married outside the Indian race or their parents having been obliged to give up Indian status in order to enjoy the same rights and undertake the same obligations as Canadians of other races. Having been restored to the band membership they had lost under gender or racially based laws, they now find that their ability to reside on a reserve is limited. Further, their right to have a say directly or indirectly in the use or disposition of lands and revenues held by the Crown on behalf of all members of the band is non-existent because they do not live on the reserve. Having no electoral voice in the election of the band council they have no say in the pace at which the band council makes land available on the reserve for newcomers nor in the allocation of housing funds which the band council obtains from the Government of Canada for the provision of housing on the reserve. I believe it is therefore possible to characterize those persons not ordinarily resident on any of the Batchewana Band's reserves as, in general, forming a group which historically has suffered disadvantages because of their inability to move onto the reserves. This is not to say, of course, that there are not some members of the group who have no desire to move onto reserves and who are by any normal measurement better off by not being on the reserves. But as demonstrated earlier, there must be many among those on whose behalf this action is brought who cannot change their place of residence to the reserve, any more readily than a person can change his citizenship — a characteristic

found in *Andrews* to be analogous to those specifically mentioned in subsection 15(1). Although it was described there as "immutable",[19] citizenship like residence on or off a reserve is sometimes capable of change, but with considerable difficulty and is subject to the decisions of others.

Also, according to *Andrews*, in determining whether such a group is the victim of "discrimination" it is proper to look at the purpose of the law which allegedly denies them certain advantages. The Court in that case emphasized that discrimination involves distinctions based on *irrelevant* personal differences.[20] To determine whether a characteristic is "irrelevant" one must look at the nature and purpose of the legislation. Here it appears to me that the conclusions one may draw will differ with the provision of the *Indian Act* in question. I am persuaded by the expert evidence and argument submitted on behalf of the defendant Ministers that in part it is the object of the *Indian Act* to provide for a form of local government on reserves which is analogous to municipal government. It is apparent, for example, that most of the by-law making powers which the band council has under subsection 81(1) relate purely to the administration of the reserve. Further, the evidence indicates that most of the operational funding provided by the federal government to Indian bands (which does not, as I understand it, consist of "Indian moneys" as defined by the Act) and whose expenditure is controlled by the latter subject to certain government guidelines, relates to purely local purposes such as the provision of education on the reserve, social assistance, land management, and recreation. It is true that some of these funds can be spent in ways which will have a direct impact on non-resident members, such as the provision by the band council out of government funds of bursaries to band members for post-secondary education or the allocation of housing funds

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19. See note 15 *supra* at 195.

20. *Ibid* at 165, 193.

for non-residents such as the new members brought in by Bill C-31. With respect to such local government functions of the band council, I do not think it is possible to say that a requirement of residence on a reserve as a condition for voting for such a local government can be described as an irrelevant personal characteristic. It is of course true, according to the evidence, that in at least four provinces in Canada non-resident property owners may vote in municipal elections. In the remaining provinces provincial law requires that a person reside in the municipality in order to vote there. While no doubt arguments can be made for the merits of both approaches, a strong rationalization can be developed for requiring that in order to vote in a municipality a person should have a very direct connection with it by residing in the municipality: it is the residents who must bear the consequences of decisions by the municipal council as to the allocation of resources or the imposition of laws and it is those persons who arguably should have the exclusive right to vote for the municipal council. To the extent that the *Indian Act* similarly requires that band members reside on the reserve in order to be able to chose a band council which is primarily involved in the governance of the territory making up the reserve, I do not think it can be regarded as for a discriminatory purpose.

It appears to me, however, that the restriction of the franchise to those band members ordinarily resident on the reserve is based on an irrelevant personal characteristic when that franchise has to do with the disposition of lands and Indian moneys held by Her Majesty "for the use and benefit of the band",[21] the "band" including all members and not simply those resident on the reserve. The impact of decisions concerning these dispositions is not, like that of ordinary band council decisions, confined primarily to residents of the reserve. Such decisions relate instead to the use and

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21. See *Indian Act supra* note 12 subsections 18(1), 61(1).

disposition of communal property in which every band member has a share wherever he or she may live. Therefore to impose as a condition of voting on such matters the requirement of ordinary residence on the reserve is to deny rights because of a personal characteristic which is irrelevant to the scope and existence of those rights.

I must therefore conclude that the combination of provisions of the *Indian Act* denying those members of the Batchewana Band not ordinarily resident on any of its reserves the right to vote, directly at a meeting or in a referendum, or indirectly through voting for the band council, on the use or disposition of lands or moneys held by Her Majesty for the use and benefit of the band, contravene subsection 15(1) of the Charter. The only relevant provision of the Act which the plaintiffs have specifically attacked in their pleadings is subsection 77(1) which requires ordinary residence on a band reserve to vote in band elections. This provision when used by reference to define "electors" creates the infringing result which is complained of, *inter alia*, in paragraphs 65-68 of the statement of claim quoted earlier. It will suffice to hold subsection 77(1) an infringement of subsection 15(1) for the purposes I have identified, although the unconstitutional consequences flow from its impact on such provisions as paragraph 39(1)(b), subsections 64(1) and 66(1). The latter two are included because they require the consent only of the band council which under the present dispensation is elected only by those members of the band resident on the reserve.

On the other hand, I do not include in my finding of invalidity arrangements whereby the band council has the sole authority to make decisions on the spending of grants from the government of Canada from sources other than "Indian moneys" as referred to in section 62 of the Act. As I understand it, there are many funds provided by the government to

Indian bands for various programmes which do not come within the regime of sections 61 to 69. Such parliamentary appropriations are for the most part for purely on-reserve purposes and reflect the judgment of Parliament as to how its funds should be spent. It appears to me that in respect of such funds non-resident band members can assert no communal rights.

If subsection 15(1) rights are infringed, is such limitation justifiable under section 1?

This question must be answered in two parts: first, in respect of the application of subsection 77(1) to band council elections for the purpose of electing a council to carry on the ordinary governance of the reserve itself; and secondly, with respect to the effect of subsection 77(1) on entitlement to vote directly or indirectly (by electing members of the band council) on the disposition of reserve lands or Indian moneys held by Her Majesty for the use and benefit of the band as a whole.

With respect to the first application of subsection 77(1), I have already concluded that this does not infringe subsection 15(1) of the Charter. If however I should be wrong in this, I would still find for essentially the same reasons that the limitation of the vote for the band council, in respect of the functions of the band council in ordinary governance of the reserve, to those ordinarily resident on that reserve, is a reasonable limit prescribed by law which is demonstrably justified in a free and democratic society. While this is not the only conceivable way of qualifying the right to vote it is clearly within a permissible range of legitimate options for Parliament.

With respect to the application of subsection 77(1) in a way to preclude members of the band not ordinarily resident on a reserve from having any political say in decisions concerning the disposition of the reserve itself or of "Indian moneys", I find no justification within the requirements of section 1 of the Charter. No rationale has been seriously advanced as to why members not resident on a reserve should have no input into such decisions when these decisions involve property held for the use and benefit of the entire band and in which each member of the band has a communal interest. In the present case it is clear that band membership has always exceeded by a substantial proportion the number of members resident on the reserves of the Batchewana band. A fundamental concept of the *Indian Act* is that a person may have Indian status, band membership, and enjoy communal rights in property, both land and moneys, held by Her Majesty for the use and benefit of the band, without living on a reserve. How then can a law be justified which denies those who do not live on a reserve — some willingly, some unwillingly — any control over the disposition of that property when the consent of those who happen to live on the reserve must be obtained by Her Majesty for any such disposition? Counsel for the defendants suggested that it would be most unfair if a majority of members not resident on the reserve could outvote those resident on the reserve and approve the surrender of part or all of a reserve. He suggested that the limitation of the vote in such matters to reserve residents was therefore reasonable. I do not accept this rationale. In my view it is instead reasonable that both the resident and non-resident members of the band should have a vote directly or indirectly in such matters. It will be noted that in subsections 39(1), 64(1), and 66(1) involving respectively the surrender of reserve lands, and the expenditure of capital and revenue moneys, the approval of the Governor in Council or of the Minister of Indian Affairs is required in addition to band approval. Thus the government can prevent unfair treatment of either the resident or non-

resident members: but to do so it is important that the government first know the views of each category of members. At the moment there is at least no formal machinery for the government to know the views of non-resident members so that these may be taken into account. For these reasons I conclude that subsection 77(1) insofar as it precludes any participation by non-resident members in such decisions is not a reasonable limitation on the rights of those members under subsection 15(1) of the Charter.

Is freedom of association infringed?
If so, is such infringement justified under section 1 of the Charter?

Paragraph 2(d) of the Charter provides as follows:

2. Everyone has the following fundamental freedoms:

(d) freedom of association.

The plaintiffs contend that the freedom of non-resident members to associate with the resident members is infringed by subsection 77(1) which has the effect of disqualifying non-resident members from voting under the Act.

This issue was not argued very fully and I think it is unnecessary for me to decide it. Even if freedom of association is infringed in respect of the denial of a vote for council in respect of the governance of the reserve, I would for the same reasons as stated above find that in this context subsection 77(1) is a reasonable limitation on that freedom justified under section 1 of the Charter. It limits the right to choose the band council in respect of the governance of the reserve to those most directly affected, namely those who live on the reserve.

With respect to the other effects of subsection 77(1), those in respect of surrender of the reserve or disposition of Indian moneys, as I have

found these provisions to infringe subsection 15(1) of the Charter it is not necessary for me to consider whether they also infringe freedom of association.

Disposition

I have therefore concluded that a declaration should issue, to the effect that the restriction on the right to vote in subsection 77(1) of the Act to those ordinarily resident on the reserve infringes in certain respects the rights under subsection 15(1) of the Charter of such of the plaintiffs and those on whose behalf they sue who are not resident on any reserve of the Batchewana Band. Such rights are infringed by the effects of subsection 77(1) in preventing such persons any vote in respect of any potential surrender of all or part of a reserve under subsection 39(1) of the Act, or in respect of any use of Indian moneys under subsections 64(1) and 66(1) which provide for consent being given on behalf of the band by the band council for which such persons cannot vote.

Such a declaration is based, *inter alia*, on the allegations in paragraphs 65 to 68 of the statement of claim, as quoted above. The declaration being made is a portion of the relief sought in paragraph 74(a) of the statement of claim. It is confined to voting rights of members of the Batchewana Band because as a trial judge I must confine myself to the actual case I have before me, its pleadings and its evidence. The declaration must be for invalidity of subsection 77(1) in its entirety, even though I have endeavoured to describe the particular effects of it which are impermissible. It is not possible to sever the invalid parts as subsection 77(1) conforms with or violates the Charter depending on the other sections governed by it. Nor is it possible to "read in" some saving interpretation: to attempt to apply the

criteria laid down by the Supreme Court in *Schachter*[22] for reading in would in the circumstances of this case be completely speculative as to Parliament's intentions.

I believe that this is a case where the operation of such a declaration should be suspended to allow time for parliamentary consideration of the modifications in the *Indian Act* which might be appropriate. There is no simple deletion or addition which will readily correct this situation and Parliament must have the opportunity to consider its options to make the Act conform to the constitution. Any 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. This is therefore an appropriate case in which to postpone the effect of the declaration.

In *Schachter* at the trial stage I achieved such a postponement of the coming into effect of a declaration by suspending the operation of my judgment pending appeal[23] and Parliament did in fact amend the law prior to the appeal process being completed. At that time the Supreme Court had not yet endorsed prospective overruling except in the unique circumstances of the *Manitoba Language Rights Reference*.[24] Subsequently the Court developed the concept of allowing a "transitional period" for the coming into effect of declarations.[25] When the *Schachter* case reached that Court it stated, without addressing the possibility of allowing delays by the suspension of operation of a judgment pending appeal, that the proper way to allow for

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22. *Schachter v. Her Majesty the Queen* [1992] 2 S.C.R. 701 at 705-15.

23. [1988] 3 F.C. 515 at 550.

24. [1985] 1 S.C.R. 721.

25. See *R. v. Brydges* [1990] 1 S.C.R. 190 at 217-18; *R. v. Swain* [1991] 1 S.C.R. 933 at 1022.

Parliament or legislatures to correct legislation "to fill the void" is to suspend temporarily the declaration of invalidity.[26] This imposes on the trial judge the necessity of trying to estimate, in a case such as this where there will undoubtedly be an appeal, the time which must be allowed for those appeals to be taken and disposed of in two higher courts. In order to provide some time for deliberation on the part of all those concerned as well as some time for the taking of appeals, while at the same time not unduly denying the plaintiffs the fruits of their lawsuit, I will suspend the declaration of invalidity until July 1, 1994, subject to further order of the Court. It will of course be open to the defendants to seek further extensions if a good case can be made for them.

As counsel for the plaintiffs requested, to which counsel for the defendant Ministers did not object, costs will not be dealt with in my initial order but will be the subject of further submissions by counsel orally or in writing.

I will dismiss all other forms of relief sought by the plaintiffs in paragraph 74 of the statement of claim other than that set out in subparagraph (a). The relief requested in subparagraph (b) is too broad having regard to my findings that the Act can operate validly in respect of band council elections as long as the powers of the band are confined to certain matters. Similarly subparagraphs (c) and (d) in seeking a mandatory order or an injunction are too broad because they assume that non-resident members of the band should be entitled to vote for all purposes. As I understand it the plaintiffs withdrew the request for an order setting aside the last election as set out in subparagraph (e) and having regard to my findings

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26. [1992] 2 S.C.R. 679 at 715-16.

and the suspension of the declaration of invalidity this would not be appropriate.

OTTAWA, CANADA
September 9, 1993

Original signed by
B. L. Strayer

Judge

IN THE FEDERAL COURT OF CANADA

Court No. T-3038-90

B E T W E E N:

JOHN CORBIERE, CHARLOTTE SYRETTE, CLAIRE ROBINSON, FRANK NOLAN, each on their own behalf and on behalf of all non-resident members of the Batchewana Band,

Plaintiffs,

— and —

HER MAJESTY THE QUEEN as represented by the Minister of Indian and Northern Affairs Canada and the Attorney General of Canada and the BATCHEWANA INDIAN BAND,

Defendants.

— REASONS FOR JUDGMENT —

FEDERAL COURT OF CANADA

NAMES OF COUNSEL AND SOLICITORS OF RECORD

COURT FILE NO. : T-3038-90

STYLE OF CAUSE : JOHN CORBIERE ET AL v. HER MAJESTY THE QUEEN ET AL

PLACE OF HEARING: SAULT STE. MARIE, ONTARIO

DATES OF HEARING: MAY 17 TO 21, 1993

REASONS FOR JUDGMENT OF STRAYER, J.

DATED: SEPTEMBER 9, 1993

APPEARANCES:

RAYMOND COLAUTTI and GREG CAMPBELL	REPRESENTING THE PLAINTIFFS
JOHN B. EDMOND	REPRESENTING THE DEFENDANT HER MAJESTY THE QUEEN

SOLICITORS OF RECORD :

PAROIAN RAPHAEL COUREY COHEN & HOUSTON WINDSOR, ONTARIO	FOR THE PLAINTIFFS
JOHN C. TAIT, Q.C. DEPUTY ATTORNEY GENERAL OF CANADA	FOR THE DEFENDANT HER MAJESTY THE QUEEN
LANG MICHENER TORONTO, ONTARIO	FOR THE DEFENDANT BATCHEWANA INDIAN BAND