Federal Court  Cour fédérale

Date: 20190522

Docket: T-1576-17

Citation: 2019 FC 721

Ottawa, Ontario, May 22, 2019

PRESENT: Mr. Justice Paul Favel

BETWEEN:

JUDITH CLARK,
BARBARA JADIS-BRUISED HEAD,
MISIKSK JADIS, TERRANCE JADIS AND
PATRICIA ANN BERNARD

Applicants

and

ABEGWEIT FIRST NATION BAND
COUNCIL AND WENDY FRANCIS, IN HER
CAPACITY AS THE ABEGWEIT FIRST
NATION ELECTORAL OFFICER

Respondents

JUDGMENT AND REASONS

I. Overview

[1] The Applicants are members of the Abegweit First Nation [the First Nation] in the Province of Prince Edward Island who are all residing outside the First Nation's three reserves: Morell, Scotchfort and Rocky Point. The Band was established in 1972.

[2] On September 20, 2017, the Applicants were not allowed to vote on the proposed amendments to the *Code Respecting Membership for the Abegweit Band of Indians* [the Membership Code] as they were not listed as eligible voters pursuant to section 2 of the *Election Regulations of Abegweit Band Custom System for Election of Chief and Council* [the Election Regulations]. The Applicants contend that their equality rights were unfairly infringed due to the voting restriction contained in the Election Regulations.

[3] On October 18, 2017, the Applicants filed a Notice of Application seeking judicial review, pursuant to section 18.1 of the *Federal Courts Act*, RSC 1985, c F-7, of sections 2 and 3 of the Election Regulations that require members 18 years and older of the First Nation to have resided on one of the First Nation's reserves on a full-time basis for at least six consecutive months immediately preceding election day to be an eligible voter (section 2) or to be eligible to run for Chief or Councillor (section 3).

[4] On April 25 2019, the Applicants filed a Notice of Constitutional Question regarding the constitutional validity of sections 2 and 3 of the Election Regulations. They submit that the on-reserve residency requirements found in sections 2 and 3 violate the Applicants' equality rights,

thus being contrary to subsection 15(1) of the *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act*, 1982, Schedule B to the *Canada Act* 1982 (UK), 1982, c 11 [*Charter*].

[5] The Applicants also allege that section 3 of the Election Regulations unfairly denies off-reserve Band members the right to run for and maintain the position of Chief or Councillor of the First Nation, due to residency requirements. Therefore, they submit that the impugned on-reserve residency requirement in the Election Regulations is invalid and discriminatory being contrary to subsection 15(1) of the *Charter*.

[6] The Respondents do not contest that section 2 of the Election Regulations is discriminatory as violating section 15(1) of the *Charter* and cannot be justified under section 1 of the *Charter*. They also do not contest that section 3 of the Election Regulations is contrary to subsection 15(1) of the *Charter*. However, the Respondents argue that the residency requirement for the right to run for Chief and Councillor is saved by section 1 of the *Charter*. In the alternative, they submit that only the Chief should be required to live on-reserve.

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

II. Background

[8] The First Nation is subject to the *Indian Act*, RSC, 1985, c I-5 [*Indian Act*]. The Applicants all live off-reserve and are all registered as “Indians” within the meaning of section 6 of the *Indian Act*.

[9] The Applicants submit that as of September 2017, the First Nation counts 379 members, including 163 who live off-reserve. First Nation members living off the reserves thus represent 43% of the First Nation members.

[10] The Respondents submit that as of April 5, 2019, there were 274 adult First Nation members of which 131 resided on reserve and 143 resided off reserve.

[11] The Respondent, the First Nation's Band Council [the Band Council], is comprised of one Chief and two Councillors who are elected every four years pursuant to the Election Regulations.

[12] The Respondent, Ms. Francis was appointed as the electoral officer [Electoral Officer] of the First Nation by the Band Council for the September 20, 2017, plebiscite.

[13] The Election Regulations were first enacted on July 29, 1982, and there have been attempts to amend them over the years with varying degrees of success. The Election Regulations were amended in 1994. In June 2009, a community engagement session took place to permit First Nation members to address the issue of the off-reserve voting process. Later, on November 19, 2009, the First Nation held a plebiscite, inviting all First Nation members to vote on whether the provisions in the Election Regulations should be amended to allow all First Nation members, including those residing off-reserve, to vote in First Nation elections. Following the results of the 2009 plebiscite, the residency requirements in the Election Regulations remained unchanged.

[14] On September 11, 2017, the Band Council called a plebiscite to approve or refuse proposed amendments to the Membership Code. The Membership Code provided that the definition of eligible voter was as defined in the Election Regulations. Prior to the plebiscite on September 16, 2017, the Applicants sent a letter to the Electoral Officer requesting that their names be added to the list of eligible voters in time for the plebiscite.

[15] On September 18, 2017, the Electoral Officer denied the Applicants' requests. Her response was that in order to be eligible to vote in First Nation elections, one must be a member of the First Nation, 18 years and older, who has resided on one of the First Nation's reserves on a full-time basis for at least six consecutive months immediately preceding election day.

[16] The plebiscite was held on September 20, 2017, without permitting non-resident First Nation members, including all the Applicants, to exercise their right to vote. The Applicants argue that this election process was unfair because a large number of First Nation members 18 years or older were not able to participate in the First Nation's democratic process because they resided off-reserve.

[17] The Applicants contend that their equality rights were unfairly infringed due to section 2 of the Election Regulations because they were denied their right to vote at the plebiscite.

[18] The Applicants also allege that section 3 of the Election Regulations unfairly denies off-reserve First Nation members the right to run for and maintain the position of Chief or Councillor of the First Nation, due to residency requirements. Therefore, it is submitted that the

impugned residency requirement provisions in the Election Regulations are invalid and discriminatory for being contrary to subsection 15(1) of the *Charter*.

[19] The parties later suspended the present application and signed a settlement agreement on February 28, 2018 [Settlement Agreement] to address the issue of Band members' voting rights in a plebiscite to be held before March 31, 2019. Specifically, the Settlement Agreement provided that all registered First Nation members would be permitted to vote regardless of their residency and that all First Nation members residing in Prince Edward Island would be eligible to run for positions on the Band Council, with the exception of the Chief position. The Settlement Agreement also permitted all First Nation electors to vote in the plebiscite, regardless of their residency. The Settlement Agreement was intended to trigger amendments to sections 2 and 3 of the Election Regulations.

[20] Pursuant to section 22 of the Election Regulations, amendments may be made to the Election Regulations provided that 75% of those who vote in a plebiscite approve the proposed changes.

[21] The plebiscite was held on March 25, 2019. The required 75% approval threshold for the plebiscite was not attained and therefore the residency requirements of sections 2 and 3 of the Election Regulations were not amended and thus remained in effect.

[22] Considering that the next election for Chief and Council was scheduled for April 17, 2019, the Applicants filed a motion for interlocutory relief on April 2, 2019, asking this Court to

postpone the election until a decision in the present matter was rendered. On April 5, 2019, Mr. Justice Patrick Gleeson issued an order granting the motion to postpone the election.

[23] The Applicants seek the following relief:

> a. A declaration pursuant to sections 18 and 18.1 of the *Federal Courts Act* and pursuant to sections 24(1) and 52 of the *Constitution Act, 1982* that the Respondents' refusal of their request to be added to the voters list for the September 11, 2017 plebiscite violated the equality rights of the Applicants protected by subsection 15(1) of the *Canadian Charter of Rights and Freedoms*.
>
> b. A declaration pursuant to sections 18 and 18.1 of the *Federal Courts Act* and sections 24(1) and 52 of the *Constitution Act, 1982* that the following portion of section 2 of the *Election Regulations of Abegweit Band Custom System for Election of Chief and Council* is contrary to law, invalid for being contrary to subsection 15(1) of the *Canadian Charter of Rights and Freedoms* and is of no force or effect:
>
> > who has resided on one of the Abegweit Band Reserves on a full-time basis for at least six consecutive months immediately preceding election day.
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> c. A declaration pursuant to sections 18 and 18.1 of the *Federal Courts Act* and sections 24(1) and 52 of the *Constitution Act, 1982* that the following portion of section 3 of the *Election Regulations of Abegweit Band Custom System for Election of Chief and Council* is invalid for being contrary to subsection 15(1) of the *Canadian Charter of Rights and Freedoms* and is of no force or effect:
>
> > who has resided on one of the Abegweit Band Reserves on a full-time basis for at least six consecutive months immediately preceding election day and, in the event that he or she is elected, must be willing to reside on the Reserve on a full-time basis during his or her elected term.
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> d. An order that this Court retain jurisdiction of this matter until the relevant provisions of the *Election Regulations of Abegweit Band Custom System for Election of Chief and Council* are

> amended or replaced in compliance with the law and the judgment rendered by this Court.
>
> e. Such other relief as this Honourable Court deems just; and
>
> f. Costs in favour of the Applicants.
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> (Applicants' Memorandum of Law and Fact, para 78)

[24] The Respondents do not contest that section 2 of the Election Regulations is discriminatory and cannot be justified under section 1 of the *Charter*. They also do not contest that section 3 of the Election Regulations is contrary to subsection 15(1) of the *Charter*. However, the Respondents argue that the residency requirement for the right to run for Chief and Councillor is saved by section 1 of the *Charter*. In the alternative, they submit that only the Chief should be required to live on reserve.

III. The Band Election Regulations

[25] For the purposes of the present proceedings, the impugned provisions of the Election Regulations read as follows:

> 2. To be eligible to vote at Band elections an elector must be a Band member of the full age of 18 years who has resided on one of the Abegweit Band Reserves on a full-time basis for at least six consecutive months immediately preceding election day.
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> 3. To be eligible to run for the position of Chief or Councillor of the Abegweit Band, a candidate must be a Band member of the full age of 18 years who has resided on one of the Abegweit Band Reserves on a full-time basis for at least six consecutive months immediately preceding election day and, in the event that he or she is elected, must be willing to reside on the Reserve on a full-time basis during his or her election term.

IV. Issues and Standard of Review

[26] The Applicants submit that the application raises the following issues:

1. Whether the residency requirement as per section 2 of the Band Election Regulations is invalid for being discriminatory to Band members, 18 years or older, who reside outside the Abegweit Band reserves, thus contrary to subsection 15(1) of the *Charter*.

2. Whether the residency requirement as per section 3 of the Band Election Regulations is invalid for being discriminatory as it violates the Applicants' equality rights as protected by subsection 15(1) of the *Charter*.

3. If so, whether such infringements are justified under section 1 of the *Charter*.

4. Whether it was reasonable or correct for the Respondent Electoral Officer to refuse the Applicants' request to be added to the list of eligible voters for the September 11, 2017, plebiscite?

[27] The Applicants claim that the residency requirement provisions of the Election Regulations violate their right to equality and thus cannot be saved by section 1 of the *Charter*. Courts have previously stated that "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; *Cardinal v Bigstone Cree Nation*, 2018 FC 822 at para 24 [*Cardinal*]). In such cases where a Band Council interprets and applies its own election regulations the standard is typically that of reasonableness. Nonetheless, the Court finds that the correctness standard applies to the issues that have been raised by the Applicants who are asking the Court to declare that the residency requirements are of no force and effect and contrary to subsection 15(1) of the *Charter* (*Cardinal* at para 25).

V. Analysis

[28] The parties do not dispute that the Election Regulations enacted by the First Nation is subject to the *Charter*.

[29] The Court notes that to fully assess issues in a judicial review application, the Court is typically aided by a fulsome record, detailed affidavit evidence, cross-examination of the affiants and possibly responses to requests to undertakings. In this matter the Applicant's evidence comes in the form of affidavits from each of the five Applicants while the Respondents' evidence comes in the form of an affidavit from one person. There was no cross-examination of the affiants and much of the evidence is general in nature. Nevertheless, the Court will render a decision based on the evidence and argument presented by the parties.

A. *Preliminary Issue*

[30] As a preliminary matter, the Court will address the Applicants' request to strike or give no weight to the statements of belief and opinion contained in several paragraphs in the Affidavit

of Mr. Knockwood, a Councillor of the First Nation [Councillor Knockwood]. It is submitted that such opinions and beliefs contravene subsections 81(1) and 81(2) of the *Federal Courts Rules*, SOR/98-106 [*Federal Courts Rules*]. The Applicants further submit that the Court should draw an adverse inference from these beliefs and opinions because the Respondents were unable to provide evidence to support the statement that on-reserve Chief and Councillors can govern effectively in terms of addressing issues in a timely manner, in comparison with off-reserve members. The Applicants argue that in *Joseph*, the Court did not accept the statements in a similar affidavit and found that the respondents had failed to present evidence to support their statement that on-reserve band members had "the knowledge base, experience in the community and current connection to the community needs" (*Joseph* at para 49).

[31] It is well-established that, as in the case at bar, the Court may strike portions of affidavits, however, "the discretion to strike an affidavit or part of it should be exercised sparingly and only in exceptional circumstances" and "only where it is in the interest of justice to do so, for example or in cases where a party would be materially prejudiced where not striking an affidavit or portions of an affidavit would impair the orderly hearing of the application" (*Canada (Board of Internal Economy) v Canada (Attorney General)*, 2017 FCA 43 at para 29).

[32] The Respondents on the other hand argued that the affidavit of Councillor Knockwood should be considered in its entirety. The Respondent pointed to a passage from *Cardinal* where the evidence the Court considered in that case referred to the affiant's description of his community's "belief".

[33] After carefully considering the contents of the affidavit of Councillor Knockwood as well as the parties' submissions, and although the impugned paragraphs contain statements of belief and opinion that are contrary to Rule 81 of the *Federal Courts Rules*, the Court is of the view that they do not need to be struck because they are not prejudicial to the Applicants (*Mckenzie v Lac La Ronge Indian Band*, 2017 FC 559 at para 30; *Armstrong v Canada (Attorney General)*, 2005 FC 1013 at paras 42-43).

B. *Submissions of the Parties on Issue 1: Right to vote under section 2 of the Election Regulations*

[34] The Applicants argue that the Supreme Court of Canada [the SCC] has previously determined in *Corbiere v Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203 [*Corbiere*] that residency requirements for voting at band elections under subsections 75(1) and 77(1) of the *Indian Act*, which are similar to sections 2 and 3 of the Election Regulations, were invalid as the wording "ordinarily resident on the reserve" violated the equality rights of the off-reserve band members and such violations were not justified under section 1 of the *Charter*. The SCC found that the exclusion of "Aboriginality-residence" is a ground analogous to those enumerated in section 15 of the *Charter*. The distinction between off-reserve band members and members living on the reserves was found to be discriminatory as it was determined to be "a personal characteristic essential to a band member's personal identity" (*Corbiere* at para 14).

[35] It is further submitted that in *Clifton v Hartley Bay (Electoral Officer)*, 2005 FC 1030 [*Clifton*], the Federal Court found that similar to the *Indian Act*'s exclusion of off-reserve band members in *Corbiere*, the band election regulations in that case also violate subsection 15(1) of

the *Charter*, and were not justified under section 1 of the *Charter*, when they exclude off-reserve band members from participating in band council elections (*Clifton* at paras 48 and 58).

[36] The Applicants argue that they have the right to vote and participate in band governance. They submit that Band Council is presumed to represent all members of the First Nation, as per section 35 of the *Constitution Act, 1982*, with respect to matters related to the collective nature of Aboriginal rights, Aboriginal title and treaty rights. The Applicants support the finding in *Corbiere* that "[t]he reserve, whether [band members] 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" (*Corbiere* at para 17).

[37] The Respondents do not contest that the exclusion of off-reserve First Nation members in the First Nation's election process is discriminatory and therefore contrary to subsection 15(1) of the Charter. They also do not contest that such violation is not saved by section 1 of the *Charter*.

[38] The Respondents also submit that it cannot amend the Election Regulations on its own without First Nation electors' approval. Section 22 of the Election Regulations requires that the First Nation holds a plebiscite and that any amendments require the approval of 75% of the votes cast. The Respondents further noted that the parties had reached the Settlement Agreement, held a plebiscite with the votes of both on-reserve and off-reserve First Nation members, however, the amendments did not pass the 75% threshold to amend sections 2 and 3 of the Election Regulations.

[39] As a note, the parties both submitted that it is arguable that there may have been some confusion as to the structure of one of the three ballot questions, the one related to section 3 of the Election Regulations as per the Settlement Agreement, but this possible confusion is not determinative of any of the issues raised.

C. *Submissions of the Parties on Issue 2: Right to run for and sit on Council under section 3 of the Band Election Regulations*

[40] The Applicants submitted case law to support that both the Federal Court and Federal Court of Appeal have found that residency requirements for the right to run for and maintain the position of councillor are unconstitutional (*Joseph*; *Thompson v Leq'á:mel First Nation*, 2007 FC 707 [*Thompson*]; *Esquega v Canada (Attorney General)*, 2007 FC 878 and upheld in *Canada (Attorney General) v Esquega*, 2008 FCA 182).

[41] The Applicants further argue that the Federal Court has recently made a similar finding as in *Corbiere* with regards to the residency requirement in terms of running for and maintaining band council positions in *Cardinal*:

> [52] […] 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.

[42] The Respondents do not contest that section 3 of the Election Regulations violates subsection 15(1) of the *Charter* by denying Band members' right to run for Chief or Council,

however, they contend that such residency requirement is justified under section 1 of the *Charter*.

D. *Analysis: Discrimination under subsection 15(1) of the Charter*

(1) Issues 1 and 2

[43] As the evidence for issues one and two both relate to the on-reserve residency requirement to vote in and to run in a First Nation election as set out in sections 2 and 3 of the Election Regulations (or correspondingly the off-reserve residency exclusion) the Court will consider the evidence regarding these issues together. Also, since both the Applicants and the Respondents agree that section 2 and 3 of the Election Regulations offend section 15(1) of the *Charter* it also makes sense to address the issues together. As stated previously, the Court notes that the affidavit evidence is general in nature and does not detail the precise discriminatory impacts to the Applicants. Nevertheless, the Court will consider the issue on the evidence that is before it.

[44] As previously found in *Corbiere* that there is a clear distinction between on and off-reserve band members when residency requirements are applied, the Applicants argue that it is discriminatory to require for band members to live on reserves to be able to participate in First Nation elections when band members' off-reserve status is part of their personal identities. In support of the present application, the Applicants provided affidavits from Ms. Judith Clark and Ms. Patricia Ann Bernard, both Band members and now living off-reserve, who have testified that several factors and circumstances may determine whether a band member lives on or off the

reserves: lack of housing within the Scotchfort reserve, differences in post-secondary funding, health benefits, tax programs and employment services between members who live off-reserve and those who live on-reserve. The remaining Applicants also submitted affidavits outlining similar experiences and describing their connections with the First Nation.

[45] The Applicants contend that the onus is on the Respondents to support the infringement for the residency requirements. For instance, in *Joseph*, the Court found that the respondents failed to provide evidence regarding the importance for a Chief or Councillor to have “in person” “on-reserve” meetings.

[46] The Applicants submit that when applying the three-step analysis under section 15 of the *Charter* as set out in *Law v Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497 [*Law*], sections 2 and 3 of the Band Election Regulations are contrary to subsection 15(1) of the *Charter*, and such violation is not justified under section 1 of the *Charter*.

[47] Following the first step, the Applicants submit that by excluding off-reserve First Nation members from voting and running for Council, the impugned provisions create a clear distinction between on and off -reserve members because off-reserve members are thus denied equal benefit and it imposes an unequal burden.

[48] The second step addresses the issue of discrimination. Finding that there is a distinction, this step determines whether such distinction is discriminatory. The Applicants argue that

similarly to *Corbiere*, they experience differential treatment based on the analogous ground of discrimination.

[49] The third and final step determines whether the distinction constitutes in fact discrimination. The Applicants contend that off-reserve First Nation members are evidently omitted from participating in the democratic process and such exclusion constitutes a "historic disadvantage" to off-reserve First Nation members who are not allowed to vote in their own Band elections.

[50] When assessing a claim under section 15(1) this Court's jurisprudence establishes a two-step approach as described in *Cardinal* at para 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).

[51] Notwithstanding the new formulation of the test and the Applicant's submissions on the former test, this slight variation between the tests does not ultimately affect the Court's finding on the issue of discrimination.

[52] The first stage consists of determining whether such distinction is discriminatory on its face. In this stage, the Applicants needed to establish that the impugned law creates a distinction based on the grounds enumerated in section 15 of the *Charter* or an analogous ground (*Chipesia v Blueberry River First Nations*, 2019 FC 41 at para 58 [*Chipesia*]). "The case law has recognized only four analogous grounds: citizenship, marital status, sexual orientation and place of residence in the special case of residence on and off an Indian reserve." (*Chipesia* at para 58). [Emphasis added]. The Court finds that there is a clear distinction between on and off-reserve Band members because the exclusion of a Band member to vote or run for Chief and Council applies to all Band members who have the "off-reserve status" (*Corbiere* at para 15). As found in *Corbiere*, off-reserve Band members are also unable to change their residence to be eligible to vote and be added to the list of eligible voters because the impugned law requires them to reside on one of the First Nation Reserves on a full-time basis for at least six consecutive months immediately preceding election day.

> This suggests that the thrust of identification of analogous grounds at the second stage of the *Law* analysis is to reveal grounds based on characteristics that we cannot change or that the government has no legitimate interest in expecting us to change to receive equal treatment under the law. To put it another way, s. 15 targets the denial of equal treatment on grounds that are actually immutable, like race, or constructively immutable, like religion.
>
> (*Corbiere* at para 13)

[53] Therefore, the Court is of the view that it is difficult, if not impossible, for First Nation members living off the reserves to move on one of the reserves to qualify for the right to vote or the right to run for Chief or Council. To be forced to do this comes "at unacceptable cost to personal identity" (*Corbiere* at para 13). In the case at bar, the Applicants have not provided evidence in the form of official percentages or statistics, to prove to the Court that there is, for

instance, lack of housing, making it difficult if not impossible for most of the First Nation members to either move on one of the reserves or stay on the reserves. The Applicants did however provide affidavits from Ms. Clark and Ms. Bernard and the other Applicants who have testified that there was difficulty in accommodating all First Nation members for housing on the reserves.

[54] In the case at bar, all First Nation members living off-reserve are denied the right to vote at First Nation elections as per section 2 of the Election Regulations. Section 2 requires that a First Nation member must live on one of the three First Nation reserves to exercise their right to vote. A similar analysis applies to First Nation members who are denied the right to run for Chief and Councillor under section 3 of the Election Regulations because they live off the First Nation's reserves.

[55] The Court thus finds that there is a clear distinction between on and off-reserve First Nation members for the right to vote (as per section 2 of the Election Regulations) and the right to run for Chief and Councillor (as per section 3 of the Election Regulations). There is a distinction based on the analogous ground of Aboriginality residency. The first part of the test is satisfied.

[56] Regarding the second part of the analysis and based on the evidence in this case, the finding in *Cardinal* is also applicable to the present situation. In *Cardinal* the Court held "the distinction created by the residency requirement imposes a burden on off-reserve members and denies them a benefit 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. This distinction also reinforces the historical stereotype that off-reserve band members are less worthy and entitled, not on the basis of merit, but mainly because they live off reserve" (at para 52). To be fair to the Respondents, they did not allege that the Applicants have no interest in the governance of the First Nation but the point is nevertheless applicable to the present case.

[57] The only direct evidence of any stereotyping or prejudice comes from the affidavit of Councillor Knockwood where he provided that off-reserve members are not able to attend to the day-to-day management of the affairs of the First Nation. The only evidence of disadvantage is related to the lack of housing and the lack of responsiveness to off-reserve First Nation members' concerns as set out in the various affidavits of the Applicants. Therefore, the Court finds that the Applicants are in a group subject to prejudice because of the stereotyping and disadvantage. In *Clifton*, the Court did find that denying non-resident band members the right to vote perpetuates the historic disadvantage of off-reserve band members and the same holds true for the Applicant's in this case. It was also found in *Corbiere*, at paragraph 19 that "the differential treatment resulting from the legislation is discriminatory because it implies that off-reserve band members are lesser members of their bands or persons who have chosen to be assimilated by the mainstream society."

[58] The Court therefore concludes that both the first and second part of the test are met and, for the same reasons, sections 2 and 3 of the Election Regulations infringe subsection 15(1) of the *Charter*.

E. *Analysis: Whether such infringements are justified under section 1 of the Charter*

[59] Notwithstanding the concession by the Respondent that section 2 of the Election Regulations offends the Applicants' section 15(1) rights on the analogous ground of aboriginality-residence, the Court will nevertheless proceed with a section 1 *Charter* analysis for the infringements caused by the wording of both sections 2 and 3 of the Election Regulations.

[60] The Applicants and the Respondents agree that the onus is on the Respondents to demonstrate that the impugned provisions have a "pressing" and "substantial" objective and that the means chosen to attain the legislative end is "reasonable" and "demonstrably justifiable in a free and democratic society" (*Corbiere* at para 97; *R v Oakes*, [1986] 1 SCR 103 [*Oakes*]). The Applicants submit that the Respondents failed to present any evidence to support the legislative objective that is behind the impugned provisions of the Election Regulations.

[61] The Respondents submit that they have the burden of demonstrating, on a balance of probabilities, that the impugned law is reasonable and demonstrably justified under section 1 of the *Charter* (*Oakes* at para 70). They argue that the residency requirement under section 3 of the Election Regulations is contrary to subsection 15(1) of the *Charter* and they argue that such infringement is justified under section of the *Charter*.

[62] Firstly, in applying the *Oakes* test, the Respondents submit that the Election Regulations pursue an objective that is sufficiently important to justify the limitation of a *Charter* right. They thus submit that the objective of the Election Regulations is similar to that stated in *Corbiere* "to

give governing authority of the Band's affairs to those with the most immediate and direct connection to the reserve, namely on-reserve Band members, as they have a special ability to control its future". The Respondents contend that Chief and Councillors who reside on the reserves can effectively manage and operate the Band's businesses, programs and services.

> […] Although both band members living on- and off-reserve have interests in many of the functions determined by voting rights, those living on the reserve do have a more direct interest in many of the band council's functions. In terms of the "local" functions of the band council, they are the only people with an interest. In relation to functions that affect the future of the land or the building of facilities on the reserve, on-reserve band members, in general, have a more direct interest in the decisions of the band council. Decisions about reserve lands affect their current living space, and a decision to surrender the reserve would mean that they would be forced to move from their homes and, in many cases, from their source of earning a livelihood. This statement is not meant to suggest that non-residents would be more likely to surrender the reserve or to make decisions that are not in the interest of the band as a whole, but rather to recognize that those who live on the reserve have particular interests in the land, given current circumstances.
>
> (*Corbiere* at para 101)

[63] Secondly, the Respondents submit that the burden is not heavy in demonstrating that there is a rational connection between the means and the objective. The Respondents submit that the requirement to have the Chief or Councillors live on-reserve and being in proximity and connected is rationally connected to the objective which will clearly allow them to govern the day to day affairs of the First Nation's programs and services. The Respondents also argue that the day-to-day management of the First Nation's business, as described in Councillor Bernard's affidavit, illustrates the need for the Council members to be resident on-reserve and to be accessible to the businesses and to the on-reserve membership.

[64] Thirdly, the Respondents argue that there would be no minimal impairment in limiting the rights of off-reserve Band members from holding positions on the Band Council. It is submitted that if the Court declares that the residency requirement for the right to vote in First Nation elections is invalid, off-reserve First Nations members, including the Applicants, will thus be able to participate in the upcoming election. The Respondents also mention that there are currently more off-reserve First Nation members than on-reserve members, which would allow off-reserve First Nations members to have an impact on the Band's governance.

[65] Finally, it is submitted that "there must be a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of 'sufficient importance'" (*Oakes* at para 70). The Respondents argue that First Nation members living off-reserve may still be able to vote in future plebiscites for future amendments in the Election Regulations. Off-reserve members voting in elections will now have a part in determining who will represent them as their Chief or Councillors. The Respondents therefore submit that the limitation to the *Charter* right is proportionate, as it does not completely exclude off-reserve First Nation members from the election process. In the end, the Respondents submit that "[t]he residency requirement ensures that the community as a whole receives responsible and effective representation because the governing authority is located at the hub of activity – the reserve". "Therefore, the collective rights of the Band outweigh the individual rights of the Applicants".

(1) Section 2

[66] The Respondents have established that the objective of the impugned law is to give governing authority of the First Nation's affairs to those with the most immediate and direct connection to the reserve. However, the Court finds no rational connection between the right for First Nation members to vote and the requirement to reside on the reserve to fulfill the objective. The Applicants are completely excluded from participating in the election process and the Respondents have not shown (as they have conceded on this point) that such exclusion is necessary or justifiable under section 1 of the *Charter*. The evidence of Ms. Smith is that off-reserve First Nation members represent approximately 43% of the First Nation. While the Court acknowledges that there are issues that only concern local First Nation members, it is nonetheless not justified to exclude off-reserve First Nation members from voting considering that, if allowed to vote, they may still not form the majority of the voting community and that several local issues may also affect them. The Court therefore finds that section 2 of the Election Regulations contravenes subsection 15(1) of the *Charter* and is not justified as a reasonable limit pursuant to section 1 of the *Charter*.

(2) Section 3

[67] The Court is of the view that there is also no rational connection between the objective of the law and the residency requirement for the right to run for the position of Councillor for the same reasons as set out above concerning section 2 of the Election Regulations. The Court will deal separately with the Chief position later in these reasons.

[68] As observed by the Court in *Cardinal*, "Given that approximately half of the BCN's members live off the reserve, it is difficult to rationalize why on-reserve Councillors 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" (at para 70). The population figures presented by the parties, though differing, show a sizeable off-reserve population. The Court finds that the Respondents have not satisfied the Court that the justification for exclusion of off-reserve First Nation members for the Councillor position is justified. Being eligible for the position of Councillor does not mean that a First Nation member will necessarily become elected as a Councillor. The Court does not accept the Respondents' argument that the First Nation may find itself in a position where all governing persons reside off-reserve, or even out of the province or territory. The electors of the First Nation will exercise their good judgement and determine who is best suited to become their elected Councillors. Therefore, the residency requirement for the position of Councillor has not been justified by the Respondents.

[69] Turning now to the Chief position, the Court finds that the exclusion of off-reserve members for the position of Chief is justified. The Court agrees with the Respondent that if the Court finds that the residency requirement for the purposes of voting is unconstitutional, and if the Court also finds that the residency requirement for the position of Councillor is unconstitutional, which the Court has found, then the exclusion of off-reserve members from becoming candidates for Chief minimally impairs the rights of off-reserve First Nation members.

[70] The Court agrees with the Respondent that members of the First Nation have the inherent authority and power to decide whether an off-reserve Band member can run for Chief and it is ultimately part of a First Nation's internal governance to which the Court must show deference. Perhaps a properly worded and structured ballot question would provide the appropriate avenue

for the parties to address the composition of the Band Council with the symmetry discussed in *Corbiere*.

[71] The Court also notes that in *Joseph*, Justice Strayer, in reviewing para 104 of *Corbiere* concerning the balancing that may occur in crafting governance structures stated at paras 54 and 55:

> I would note that these comments were made in the context of a section 1 analysis as opposed to section 15, but I take the respondent's point that the Supreme Court has signalled some willingness to entertain a governance structure that contains some distinctions between resident and non-resident members short of complete disenfranchisement.
>
> In this sense, the case at bar appears to be novel, as courts have considered both the disenfranchisement of non-resident members and council positions that are completely closed to non-resident members, but not a Council where only some positions are reserved to resident Band members. I agree with the respondents that on the spectrum between total exclusion of non-resident members and complete symmetry between resident and non-resident members, the 2011 Code is closer to the symmetrical approach than the laws considered in *Corbiere* and *Esquega*. I also agree that there may very well be a point on that spectrum short of symmetry that passes constitutional muster.

[72] Notwithstanding the above and considering that the facts in *Joseph* were that one position out of four was available to a non-resident and that, of 520 members 90 resided on reserve, the Court noted that a "structure which gives a permanent supermajority to resident members and denies non-resident members the chance to lead the Council as chair cannot be said to be balanced" (at para 57). There was no evidence in this case that such an imbalance exists. Ms. Smith provided evidence that approximately 43% of the members resided off the First Nation while the Respondents' evidence was that out of 274 "adult" members there were 143 that

resided off-reserve. Regardless of the different manner of describing and calculating their respective populations, the evidence and circumstances are different than in *Joseph*.

[73] In the present case, the First Nation's Band Council is relatively small, consisting of one Chief and two Councillors. There is now a more meaningful opportunity for off-reserve First Nation members to participate in the governance of the First Nation, should they choose to do so, with an opportunity to not only vote but to run as candidates for two Councillor positions.

[74] Striking the portion of section 3 to permit off-reserve First Nation members to be eligible to be candidates for the Councillor positions, while excepting the Chief position, strikes an appropriate balance and respects the deference the Court has for the self-governing nature of the First Nation.

F. *The denial of the Applicants' request to be added to the list of eligible voters for the September 11, 2017 plebiscite*

[75] The finding that section 2 of the Election Regulations infringes on the section 15(1) Charter rights of the Applicants and is not justified under section 1 of the *Charter* renders the Electoral Officer's decision, to exclude the Applicant's from the list of electors for the purposes of the September 20, 2017 Membership Code plebiscite, unreasonable.

G. *Remedy*

[76] In *Joseph* Justice O'Keefe stated at para 59:

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

[77] Determining what the appropriate remedy will be for a self-governing First Nation in this particular case puts the Court in a difficult position. The evidence before the Court is that the threshold of 75% approval of those who cast a vote may be difficult to attain. The evidence before the Court is that the parties engaged in fruitful discussions with one another that lead to a Settlement Agreement. That Settlement Agreement led to a March 2019 plebiscite where all electors were entitled to vote on three ballot questions. In the March 2019 plebiscite, two of the questions (one related to section 2 of the Election Regulations and the other dealing with voting processes) received what might be described as broad community support (61% and 59% respectively). The third question (related to section 3 of the Election Regulations, excluding the Chief position) received less support (49%) in part perhaps due to some confusion with the structure of the ballot. The Court is also of the view that considerable deference must be given to First Nations who wish to develop their own laws.

[78] The Court commends the parties for working amicably to attempt to remedy the injustice created by section 2 of the Election Regulations and to work out a creative solution concerning section 3 of the Election Regulations (again, with the exception of the Chief position) as set out in the Settlement Agreement and the March 2019 plebiscite.

[79] The Court also is of the view that the Respondents clearly attempted to remedy the rights violations suffered by the Applicants by engaging in discussions which led to the Settlement Agreement. The Election Regulations, a component of the indigenous law of the First Nation which forms part of Canada's legal traditions (*Pastion v Dene Tha' First Nation,* 2018 FC 648 at para 7 to 13) has the 75% amendment approval threshold that was the bar to an otherwise amicable and fruitful discussion between members of the First Nation. Indigenous laws are multi-faceted and they not only address matters such as elections or membership. Indigenous laws may also address a community's relationship with the world around them and the relationship community members have with one another. The Court is of the view that the process leading up to the Settlement Agreement and the Settlement Agreement itself were expressions of the First Nation's indigenous law-making processes and, to the extent that such process attempted to remedy *Charter* violations, the Court is of the view that this process should be respected.

[80] The Court grants the declaration requested by the Applicants to the effect that the Respondents' refusal of the Applicants' request to be added to the voters list for the September 20, 2017 plebiscite violated the equality rights of the Applicants which are protected by section 15(1) of the *Charter*.

[81] The Court grants the declaration requested by the Applicants to the effect that the following portion of section 2 of the Election Regulations is contrary to the *Charter* and is of no force or effect:

> who has resided on one of the Abegweit Band Reserves on a full-time basis for at least six consecutive months immediately preceding election day.

[82] The Court grants the declaration requested by the Applicants, only as to the position of Councillor, to the effect that the following portion of section 3 of the Election Regulations is contrary to the *Charter* and is of no force or effect:

> who has resided on one of the Abegweit Band Reserves on a full-time basis for at least six consecutive months immediately preceding election day and, in the event that he or she is elected, must be willing to reside on the Reserve on a full-time basis during his or her elected term.

[83] The Court does not grant the declaration respecting section 3 with respect to the position of Chief. The position of Chief will still be subject to the residency requirement as contained in the Election Regulations until such time as the First Nation determines otherwise.

H. *Costs*

[84] The Applicants are entitled to costs of the application.

VI. Conclusion

[85] The application for judicial review is allowed. Regarding the Declarations sought by the Applicants as set forth in paragraph 23 of these reasons, the first Declaration will be granted as requested. The second Declaration will also be granted. The third Declaration will be granted in part with respect to the position of Councillor only.

[86] The Applicant also asked to amend the style of cause, with the consent of the Respondents, to correct the name of the second Applicant on the style of cause from “Barbara Jadis” to “Barbara Jadis-Bruised Head”. The Court orders the Style of Cause to be amended accordingly.

JUDGMENT in T-1576-17

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed.

2. The Court grants the declaration requested by the Applicants to the effect that the Respondents' refusal of the Applicants' request to be added to the voters list for the September 20, 2017 plebiscite violated the equality rights of the Applicants which are protected by section 15(1) of the *Charter*.

3. The Court grants the declaration requested by the Applicants to the effect that the following portion of section 2 of the Election Regulations is contrary to the *Charter* and is of no force or effect:

> who has resided on one of the Abegweit Band Reserves on a full-time basis for at least six consecutive months immediately preceding election day.

4. The Court grants the declaration requested by the Applicants, only as to the position of Councillor, to the effect that the following portion of section 3 of the Election Regulations is contrary to the *Charter* and is of no force or effect:

> who has resided on one of the Abegweit Band Reserves on a full-time basis for at least six consecutive months immediately preceding election day and, in the event that he or she is elected, must be willing to reside on the Reserve on a full-time basis during his or her elected term.

5. The Court retains jurisdiction of this matter until the relevant provisions of the Election Regulations are amended or replaced in compliance with the judgment rendered by this Court.

6. The Applicants are entitled to costs of the application.

"Paul Favel"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1576-17
STYLE OF CAUSE:	JUDITH CLARK, BARBARA JADIS-BRUISED HEAD, MISIKSK JADIS, TERRANCE JADIS AND PATRICIA AAN BERNARD v ABEGWEIT FIRST NATION BAND COUNCIL AND WENDY FRANCIS, IN HER CAPACITY AS THE ABEGWEIT FIRST NATION ELECTORAL OFFICER
PLACE OF HEARING:	CHARLOTTETOWN, PRINCE EDWARD ISLAND
DATE OF HEARING:	MAY 9, 2019
JUDGMENT AND REASONS:	FAVEL J.
DATED:	MAY 22, 2019

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