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Preliminary Analysis of Corbiere v. Canada

The issue before the court was whether the exclusion of non-resident band members in s. 77(1) of the *Indian Act* was a violation of s. 15 of the *Charter of Rights and Freedoms*. The Court found s. 77 (1) to contravene the Charter provisions related to equality. It found further that this was not demonstrably justifiable under section 1 of the Charter, and that it applied generally to all bands. It suspended the implementation of the declaration of invalidity for 18 months.

In other words, the court has directed that off-reserve members must be allowed to vote. The government was given 18 months to conduct consultation and determine the most effective way to implement this decision.

Points of Interest/Key Elements:

The court wrote two reasons for judgement, which diverge only on the technical interpretation of the legal test for violation of s. 15. In all other aspects, the Court agrees. The majority decision by McLachlin and Bastarache JJ. is less detailed than the careful reasons of L'Heureux-Dubé J., which is largely relied on by the majority.

- *The denial of voting rights when leadership is chosen through a system of democracy affects significant interests members have in band governance.*

This decision is significant on a number of points. In addition to supporting the idea that off-reserve members cannot be discriminated against in relation to their participation in band governance, the court considers the particular areas in which the decisions of the band government may impact on all members, irrespective of their residence.

In particular, while it concedes that some of the matters that the band governments deal with are strictly local in nature, it points out that in many areas, the council's decisions have broader impact, exerting powers over access to the reserve, management of the reserve lands, and the expenditure of band money. Since "elector" is a defined term, s. 77(1) also impacts on who can vote on the surrender of band lands. The court found that band council also exerts considerable power over safeguarding, developing and promoting sources of traditional culture and can strongly affect access of off-reserve band members to these sources. It also makes particular reference to the fact that it is through the band council that the Assembly of First Nations represents First Nations.

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The judgement includes a review of the history of the *Indian Act*, and links the creation of an off-reserve population to the historic policies toward Aboriginal peoples. In so doing, there is an implication of federal responsibility for off-reserve band members, which will strengthen the arguments for First Nations to be included in federal/provincial discussions such as social services transfer arrangements.

The judgement does not deal with the constitutionality of Bill C-31, but states that the discriminatory effects of s. 77 have a greater impact on women and those ancestors may well have had no choice but to leave the reserve. The reasoning suggests that the court would not be very sympathetic to arguments against Bill C-31, but would likely support First Nations who are unable to properly service their increased membership due to insufficient support from the federal government.

- *The historical and on-going reasons for members living off-reserve are relevant*

The court appears to confirm RCAP's recommendations in relation to the need for nation rebuilding. L'Heureux-Dubé J. notes at para. 62 of her decision:

From the perspective of off-reserve band members, the choice of whether to live on- or off- reserve, if it is available to them, is an important one to their identity and personhood, and is therefore fundamental...because of the lack of opportunities and housing on many reserves, and the fact that the *Indian Act's* rules formerly removed band membership from various categories of band members, residence off the reserve has often been forced upon them, or constitutes a choice made reluctantly or at high personal cost.

It is clear that the court recognizes that neither the community nor the individual controls the options, since many of the factors outlined are beyond the control of either. As such, this lack of real choice supports the argument of federal responsibility for off-reserve members, and for the need for processes to support nation rebuilding.

- *Difficulties in implementing will not justify excluding off-reserve members*

Perhaps one of the most significant aspects of this judgment is the court's finding that the difficulties and cost of maintaining an electoral list of off-reserve band members, and setting up a system of governance that balances the rights of on and off-reserve band members were not a justification for up-holding the exclusionary provision of s.77(1). The federal government had advanced this argument. The court states that:

"Change to any administrative scheme so it accords with equality rights will always entail financial costs and administrative inconvenience. The refusal to come up with new, different, or creative ways of designing such a system, and to

find cost-effective ways to respect equality rights cannot constitute a minimal impairment of these rights.” (McLachlin and Bastarache JJ., para. 104)

It further states that “the possible failure, in the future, of the government to provide Aboriginal communities with additional resources necessary to implement a regime that would ensure respect for equality rights cannot justify a violation of constitutional rights in its legislation.” (ibid)

Through these statements, the court appears to be directing the federal government to provide the necessary funding for First Nations to address the issue.

- *Aboriginal or Treaty Rights*

Interestingly, the court uses the terminology “Aboriginal band members” or “band members”, and does not refer to the status provisions of the *Indian Act* except in reference to Bill C-31. It is also notable that the terminology “Indian” band member is not used either. This decision does not deal directly with Aboriginal rights, nor does it discuss fiduciary obligations of the federal government. It leaves open the possibility for exemptions due to Aboriginal or treaty rights, but appears to rule out the simple remedial action of enacting customary codes to incorporate the arbitrary exclusion of non-resident members. In addressing this, the majority of the Court indicates at para. 24 that:

If another band could establish an Aboriginal right to restrict voting ...that right would simply have precedence over the terms of the *Indian Act*...

At para. 112, L’Heureux-Dubé J states the steps that would be necessary as follows:

If certain bands can demonstrate an Aboriginal or treaty right to restrict non-residents from voting, this in no way affects the constitutionality of the impugned section of the *Indian Act*. It is the order in council made pursuant to s. 74(1) bringing the band within the application of the *Indian Act*’s electoral rules, which would have to be challenged under such a claim. In analyzing such a case, it would have to be determined whether an Aboriginal right had been proven, whether the legislation as it then stands infringes that right, and whether that infringement is justified.

The decision therefore supports the concepts advanced in the RCAP report, which recognize the long-standing impacts of government interference. As noted above, however, First Nations should not assume that merely implementing “custom” provisions to exclude off-reserve members would address the issue. The fact that bands, as they currently exist, are creations of the *Indian Act* and its history make arguments based on Aboriginal and Treaty right difficult. On a more positive note, the decision clears the way

for First Nations to re-establish traditional approaches to decision making and leadership selection without prejudicing or prescribing these.

The suspension of the decision is for the specific purpose of enabling Parliament to consult with the effected groups and redesign voting provisions of the *Indian Act* in a nuanced way that respects the equality rights and all affected interests.

Potential Implications

- Urban Issues – What are the rights and obligations of First Nations in relation to members living off reserve or in urban areas?

The court is clear that there may be two tiered systems, to allow voting in relation to those matters that impact the interests to all members and those that are of a “local nature” only. However, the decision implies that the discriminatory treatment of members living off reserve in respect to services could be questioned.

- Voting Rights – How will members be provided with the opportunity to participate in elections?

An increasing number of band members do not live on the reserve. It will therefore be a challenge to design a process wherein off-reserve band members will have an opportunity to participate in elections or decision-making on issues impacting on them. This will accelerate the need for First Nations to address political accountability issues, as well as citizenship rights, and will ultimately press the federal government to provide resources to communities for the purpose of addressing fundamental self-government issues.

- Other areas of the *Indian Act* in which residency is a requirement – What are the impacts for other matters?

A careful analysis of the full impacts of this case and its implications for other areas of the *Indian Act* is required. In particular, such matters as the provisions relating to wills and estates, which require members to be “ordinarily resident” may be open to challenge in light of the findings here.

- Disputes & Uncertainty – In the transitional phase before legislative amendment or the implementation of self-government, how will disputes be resolved?

This decision will create a certain amount of uncertainty as the federal government and First Nations determine its implications. We should anticipate that members who are currently unable to access services might have justifiable demands. Because this decision requires change, we should be prepared for the likelihood of disputes utilizing forums such as the Urban Task Force to identify hotpoints and gauge potential responses.

Conclusions

1. The case draws the strong linkage between band governance and band membership, irrespective of residency, pointing out that under the existing regime the band government represents both on and off reserve residents for all purposes.
2. In relation to government functions, a distinction is drawn between matters of a purely local interest, that do not directly affect the interests of off-reserve members, and the broader authorities of the band government. Under the present *Indian Act*, councils do both.
3. This case makes no finding in relation to section 25 of the Charter, expressing no interpretative rules in this regard. Some guidance is provided for those First Nations who may wish to argue an Aboriginal or Treaty right to exclude non-residents from voting. There are two approaches discussed. The majority decision implies that if an Aboriginal or Treaty right were established, it would take precedence over the *Indian Act*. The minority judgement is more explicit suggesting that it would be the order in council made pursuant to s. 74 that would be challenged – presumably because this authorises customary elections. The court would have to determine whether an Aboriginal right had been proven, whether the legislation infringes the right, and whether the infringement is justified, before considering the potential impact of s. 25.
4. The court excludes the possibility of “reading in” voting rights for non-residents. It therefore provides the eighteen month reprieve in order for Parliament to consult with the affected group and redesign the voting provisions of the *Indian Act* in a nuanced way that balances the rights of off-reserve and on-reserve members and respects equality rights and all affected interests.
5. The case has the following effects:
 - Elections can be conducted in accordance with the usual rules pertaining to residency for the next 18 months only.
 - If Parliament does not amend the scheme within the next 18 months, off-reserve band members will gain voting rights within the existing band government. It is not clear how this would operate in light of the current regulations, but presumably it would be incumbent on the member to make efforts to exercise his/her vote should that be desired.
 - The federal government will be responsible for financing the maintenance of electoral lists of off-reserve band members and for setting up systems of governance that balances the respective rights of on & off-reserve members.

- The court is clear in directing that there needs to be “consultations” with all interested parties and does not accept the federal argument of financial constraint as a justification for failure to comply.
6. The case raises the following questions:
- There is a clear connection between membership and federal responsibility (interestingly, “Indian status” is not mentioned prominently). The implications for funding and the provision of services to off reserve members are not discussed, but one could conclude that this case strengthens the argument for federal responsibility and federal funding for off-reserve band members.
 - Band government structures that are not premised on one-person/one vote may be subject to less scrutiny. However, the court pays careful attention to the historical and other reasons that people live off-reserve, and their lack of input into the decision that ultimately effect their interests as band members. If traditional forms of government exclude off-reserve members, their authority may be limited to the extent that they impact the rights of those living off reserve.
7. General:
- The case will necessitate an acceleration of the work on elections that is currently underway within the Joint Initiative for Policy Development (LTS) and will require careful planning and implementation.
 - It highlights the difficulty that the courts face in dealing with such issues. It also demonstrates the impact of not having alternative First Nations dispute resolution mechanisms that could decide cases such as this.
 - The AFN’s on-going work in relation to women and urban issues, membership, elections and urban reserves will take on greater importance, particularly since this will entail change at a national level. However, the existing personnel capacity is strained and will likely require augmentation in order to respond.

Recommended Response:

- Letter from National Chief to all First Nations explaining the impact of the decision and reassuring First Nations that AFN is co-ordinating a response.
- Meeting with government officials to discuss key issues, the adequacy of on-going processes to respond and options for coordinating a response.
- Joint work plan and funding agreement to deal specifically with consultations in relation to issues addressed above.
- Special Communiqué to First Nations on potential implications of decision.
- Presentation of draft Work plan to Annual General Assembly.

Joint Initiative for Policy Development (LTS)
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