Federal Court  Cour fédérale

Date: 20210607

Docket: T-1468-19

Citation: 2021 FC 539

Ottawa, Ontario, June 7, 2021

PRESENT: Mr. Justice Sébastien Grammond

BETWEEN:

WALTER BRUCE JANVIER

Applicant

and

CHIPEWYAN PRAIRIE FIRST NATION AS REPRESENTED BY ITS CHIEF AND COUNCIL AND DUSTIN TWIN, IN HIS CAPACITY AS ELECTORAL OFFICER

Respondents

JUDGMENT AND REASONS

[1] Chipewyan Prairie First Nation's election code grants the right to vote only to members who reside on its reserve. Mr. Janvier, a member and a former chief of the First Nation, was denied the right to vote because the electoral officer found that he resided outside the reserve. Mr. Janvier now seeks a declaration that the residency requirement is contrary to the *Canadian Charter of Rights and Freedoms* [the Charter].

[2] The Court finds that the residency requirement is contrary to section 15 of the Charter, which prohibits discrimination. No meaningful distinction can be drawn between this case and prior judgments rendered by the Supreme Court of Canada and the Federal Court, which have decided that excluding off-reserve members from the right to vote is discriminatory. In these judgments, courts have noted that off-reserve members retain a significant interest in the governance of their First Nation. Excluding them serves only to perpetuate prejudice and disadvantage.

[3] Moreover, the First Nation did not offer any reasons why the residency requirement would be justified pursuant to section 1 of the Charter. Accordingly, the residency requirement is declared invalid. For greater clarity, this declaration of invalidity does not affect the result of past elections nor decisions made by the current council.

I. Background

[4] Chipewyan Prairie First Nation is a Dene community with three reserves in northeastern Alberta. It is a signatory to Treaty 8. In 1987, it enacted a membership code and an election code. Its council is currently comprised of a chief and three councillors, each elected for a three-year term. The elections are staggered, such that in a three-year cycle, the chief and one councillor are elected in the first year, one councillor in the second year and one councillor in the third year.

[5] At the heart of this dispute is the following provision of the election code governing eligibility:

> Every member of the Chipewyan Prairie First Nation, who is eighteen years of age [or] older and who has been resident on the Chipewyan Prairie First Nation Reserve for at least six months prior to the date of an election for Chief or Councillors for the Chipewyan Prairie First Nation is eligible to vote in that election.

[6] This provision, which I will call the residency requirement, governs not only the eligibility to vote, but also to participate in every step of the electoral process. Thus, candidates must themselves be members eligible to vote. They must be nominated by five members who are eligible to vote. Election appeals may be brought by five eligible voters. The members of the appeals committee are selected at a "meeting of eligible voters." Lastly, the code may be amended by "a majority of the eligible voters."

[7] Mr. Janvier is a member of Chipewyan Prairie First Nation and was its chief from 1984 to 2006, with the exception of one term. Upon his defeat in 2006, he was forced to seek work outside of the community.

[8] Mr. Janvier intended to be candidate for the position of chief at the election scheduled for March 20, 2019. On nomination day, the electoral officer informed him that he was not eligible, as he resided outside the reserve. Mr. Janvier's name was not on the ballot nor on the voters' list, and he was not able to vote on election day.

[9] On April 2, 2019, Mr. Janvier sent a letter to the electoral officer, appealing the results of the election and challenging the constitutional validity of the residency requirement. The letter was supported by seven other members of the Chipewyan Prairie First Nation.

[10] On April 4, 2019, the electoral officer denied Mr. Janvier's appeal, because it was not supported by five eligible voters. He came to this conclusion on the basis that, of the eight members who signed the letter, fewer than five resided on the reserve. Mr. Janvier received this letter only in August 2019.

[11] Mr. Janvier now seeks judicial review of the electoral officer's decision and a declaration that the residency requirement is of no force or effect, as it is contrary to section 15 of the *Canadian Charter of Rights and Freedoms* [the Charter] and is not saved by section 1.

II. Analysis

[12] At the hearing, Mr. Janvier clarified that he is no longer challenging the reasonableness of the electoral officer's finding that he was not residing on the reserve. He is content to advance his constitutional challenge on the basis that he was treated as an off-reserve member. Thus, his argument that the electoral officer breached procedural fairness by failing to provide adequate reasons need not be considered. The only issues in dispute are the validity of the residency requirement and, if it is invalid, the appropriate remedy.

A. *Framing the Issues*

[13] Chipewyan Prairie First Nation invites me to take a narrow view of what is at stake in Mr. Janvier's application for judicial review. The real decision under review would be the electoral officer's denial of Mr. Janvier's appeal, on the basis that he did not have the support of five eligible voters. Thus, Mr. Janvier's allegation of a Charter breach could only be examined in

relation to the requirement to have the support of five members residing on the reserve, not with respect to the denial of the right to vote. Moreover, were I to find that the electoral officer should have allowed the appeal to proceed, the First Nation argues that the proper remedy would be to remit the matter to the appeal committee instead of deciding the issue myself, as I did in *Linklater v Thunderchild First Nation*, 2020 FC 1065 [*Linklater*].

[14] I do not agree that the scope of the matter can be narrowed in this fashion. Mr. Janvier's election appeal explicitly challenged the constitutional validity of the residency requirement, especially in its application to the right to vote. As the right to vote is the gateway to other rights afforded by the election code, Mr. Janvier's appeal letter can fairly be construed as also extending to these other rights, as was the case in *Thompson v Leq'á:mel First Nation*, 2007 FC 707 at paragraph 25 [*Thompson*]. The fact that the election officer denied the appeal on a point of procedure does not prevent this Court from examining the substantive issue.

[15] Moreover, if I were to give effect to the First Nation's submission, I would in effect validate a clever attempt to insulate the residency requirement from review. As I explained above, eligibility to all the rights afforded to members of the First Nation by the election code is governed by the residency requirement. The practical consequence is that off-reserve members are denied the right to bring an appeal in which they could challenge the validity of the denial of the right to vote to off-reserve members. Yet, the First Nation cannot immunize itself from Charter review: *British Columbia (Attorney General) v Alberta (Attorney General)*, 2019 FC 195 at paragraphs 68-71, [2020] 2 FCR 124, appeal allowed on other grounds, 2021 FCA 84, and the cases cited therein.

[16] In this regard, the First Nation's suggestion that Mr. Janvier could bring an appeal with the support of five members residing on the reserve is of little comfort. An individual's access to a remedy for a breach of their Charter rights cannot depend on the consent of other persons.

[17] Lastly, I fail to understand how the validity of the residency requirement could be assessed solely with respect to the right to bring an appeal. Given the structure of the election code, it would seem that the residency requirement stands or falls with respect to all of its consequences on the electoral process. Thus, contrary to what I did in *Linklater*, I cannot remit the matter to the appeal committee without ruling on the substantive issue myself. To the extent that the First Nation is suggesting that the residency requirement could be invalid with respect to the right to vote, yet valid with respect to the right to bring an appeal, this would amount to the denial of a remedy for a Charter breach and make this Court's intervention all the more necessary.

B. *Invalidity of the Residency Requirement*

[18] Assessing an allegation that a rule of law breaches the Charter is a two-step process. The Court must first determine whether the impugned rule breaches one of the rights guaranteed by the Charter. The applicant bears the burden of proof in this regard. If such a breach is established, the party arguing for the validity of the provision must then demonstrate that it is justified, according to the test laid out in section 1 of the Charter. That party, in this case the First Nation, bears the burden of proof regarding this issue. On judicial review, constitutional issues, such as allegations that legislation breaches the Charter, are reviewed on a correctness standard: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paragraphs 55-57.

[19] Mr. Janvier asserts that the residency requirement breaches subsection 15(1) of the Charter, which reads 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.	**15**. (1) La loi ne fait acception de personne et s'applique également à tous, et tous ont droit à la même protection et au même bénéfice de la loi, indépendamment de toute discrimination, notamment des discriminations fondées sur la race, l'origine nationale ou ethnique, la couleur, la religion, le sexe, l'âge ou les déficiences mentales ou physiques.

[20] To determine whether legislation breaches subsection 15(1), the Supreme Court of Canada mandates a two-prong inquiry, which it most recently described as follows in *Fraser v Canada (Attorney General)*, 2020 SCC 28, at paragraph 27:

> To prove a *prima facie* violation of s. 15(1), a claimant must demonstrate that the impugned law or state action:
>
> - on its face or in its impact, creates a distinction based on enumerated or analogous grounds; and
> - imposes burdens or denies a benefit in a manner that has the effect of reinforcing, perpetuating, or exacerbating disadvantage.

[21] The application of this test to the residency requirement is largely dictated by the decision of the Supreme Court of Canada in *Corbiere v Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203 [*Corbiere*]. In that case, the Court invalidated section 77 of the *Indian Act*, RSC 1985, c I-5, which denied First Nation members who reside outside the reserve

the right to vote in elections for the chief and council. Although the Court was then using a somewhat different test to assess breaches of section 15, its decision remains relevant.

[22] With respect to the first prong of the test, the Court in *Corbiere* held that legislation denying the right to vote to First Nation members who do not reside on the reserve creates a distinction based on the analogous ground of "aboriginality-residence." At paragraph 14, the Court explained:

> … the distinction goes to a personal characteristic essential to a band member's personal identity, which is no less constructively immutable than religion or citizenship. Off-reserve Aboriginal band members can change their status to on-reserve band members only at great cost, if at all.

[23] Likewise, the residency requirement in this case draws a distinction based on "aboriginality-residence." It deprives First Nation members of the right to vote and other rights related to the electoral process, based solely on the fact that they do not reside on the reserve. Mr. Janvier was personally affected by this distinction. It is of no moment that he initially asserted that he was residing on the reserve. What matters is that he was perceived by the decision-maker as residing off-reserve and was denied rights on this basis: *Quebec (Commission des droits de la personne et des droits de la jeunesse) v Montréal (City); Quebec (Commission des droits de la personne et des droits de la jeunesse) v Boisbriand (City)*, 2000 SCC 27 at paragraphs 77-81, [2000] 1 SCR 665.

[24] With respect to the second prong of the test, the Court in *Corbiere* decided that the denial of the right to vote perpetuated the historic disadvantage experienced by First Nation members who do not reside on the reserve. At paragraphs 17-18, it gave the following explanation:

> Off-reserve band members have important interests in band governance which the distinction denies. They are co-owners of the band's assets. The reserve, whether they live on or off it, is their and their children's land. The band council represents them as band members to the community at large, in negotiations with the government, and within Aboriginal organizations. Although there are some matters of purely local interest, which do not as directly affect the interests of off-reserve band members, the complete denial to off-reserve members of the right to vote and participate in band governance treats them as less worthy and entitled, not on the merits of their situation, but simply because they live off-reserve.
>
> […]
>
> It denies off-reserve band members the right to participate fully in band governance on the arbitrary basis of a personal characteristic. [Section 77 of the *Indian Act*] reaches the cultural identity of off-reserve Aboriginals in a stereotypical way. It presumes that Aboriginals living off-reserve are not interested in maintaining meaningful participation in the band or in preserving their cultural identity, and are therefore less deserving members of the band. The effect is clear, as is the message: off-reserve band members are not as deserving as those band members who live on reserves.

[25] The Supreme Court's comments are equally applicable in the present case. In reality, it is difficult to draw any meaningful distinction between the residency requirement found in Chipewyan Prairie First Nation's election code and section 77 of the *Indian Act*. The residency requirement treats members who do not reside on the reserve as less deserving—in reality, not deserving at all—of participating in the First Nation's political decisions. It deprives off-reserve members not only of the right to vote, but also the right to challenge the process in a quasi-judicial forum and to participate in its change by political means. It is plainly discriminatory.

[26] This Court's case law provides additional support for this conclusion. Residency requirements have been considered in the following cases: *Clifton v Hartley Bay Indian*

Band, 2005 FC 1030, [2006] 2 FCR 24; *Thompson*; *Cockerill v Fort McMurray No. 468 First Nation*, 2010 FC 337, reversed by [2011] FCJ No. 1736 (FCA) (QL); *Joseph v Dzawada'enuxw First Nation (Tsawataineuk)*, 2013 FC 974; *Cardinal v Bigstone Cree Nation*, 2018 FC 822, [2019] 1 FCR 3; *Clark v Abegweit First Nation Band Council*, 2019 FC 721 [*Clark*]. While some of these cases suggest that some forms of residency requirements are justified under section 1, they are in unanimous agreement that such requirements breach section 15. A breach of section 15 was also found in slightly different situations in *Scrimbitt v Sakimay Indian Band Council*, [2000] 1 FC 513 (TD); *Esquega v Canada (Attorney General)*, 2007 FC 878, [2008] 1 FCR 795, varied 2008 FCA 182, [2009] 1 FCR 448 [*Esquega*].

[27] As I mentioned above, Chipewyan Prairie First Nation attempts to focus the debate on the provision that restricts the right of appeal. It argues that the requirement that an appeal be supported by five members residing on the reserve would not impose an undue burden on Mr. Janvier and would not be discriminatory. Mr. Janvier could validly bring an appeal simply by obtaining the support of five members who reside on the reserve. This, however, is besides the point. The residency requirement completely removes Mr. Janvier's right of independent participation in an appeal. The First Nation's argument is tantamount to saying that the denial of the right to vote does not affect Mr. Janvier because he might be able to persuade on-reserve members to vote for his preferred candidate. To be sure, the election code does not grant a right of appeal to members acting alone—five members must support any appeal. Nonetheless, the residency requirement deprives off-reserve members of any meaningful right of participation in the appeal process. It is disingenuous to suggest that Mr. Janvier may participate in the process if he obtains the support of five members residing on-reserve. On-reserve members are not so

limited; and the limitation contributes to perpetuate the disadvantage suffered by off-reserve members and is discriminatory for this reason. In the end, the First Nation's attempt to focus on the appeal provisions does not lead to a different result. The residency requirement is discriminatory with respect to all aspects of the electoral process it affects.

[28] These conclusions are largely dictated by the Supreme Court's decision in *Corbiere*. Unlike the Court's subsequent decision in *Kahkewistahaw First Nation v Taypotat*, 2015 SCC 30, [2015] 2 SCR 548, which found that a requirement of a grade 12 education for the chief and councillors did not discriminate on the basis of age, there is no need in this case for an elaborate evidentiary foundation for a finding that a complete denial of the right to vote perpetuates the disadvantage suffered by off-reserve members. This is exactly the issue decided in *Corbiere*. In any event, the evidence provided by Mr. Janvier in this regard, which largely parallels the findings of the Supreme Court in *Corbiere*, was not contradicted.

[29] Once a breach of section 15 is established, the analysis usually turns to the question of justification under section 1. However, at the hearing, Chipewyan Prairie First Nation made it clear that it was not arguing that the residency requirement, assuming it breaches section 15, is justified pursuant to section 1. I will simply add that no such justification is apparent from the record, and that there is no support in the cases mentioned above for the proposition that a blanket denial of the right to vote to off-reserve members can be justified.

[30] Thus, the residency requirement breaches the Charter and is of no force or effect. I wish to make clear that this finding applies to the residency requirement in all its applications

throughout the election code, including the right to be nominated and the right to participate in the process for the amendment of the code. The denial of each of these rights equally perpetuates disadvantage.

C. *Remedies*

[31] In his application and written submissions, Mr. Janvier seeks a broad range of remedies, including a declaration that the residency requirement is invalid, an order quashing the decision of the electoral officer denying Mr. Janvier the right to vote and denying Mr. Janvier's appeal, a declaration that the voters' list was invalid, and an order that Chipewyan Prairie First Nation hold a new election.

[32] For reasons that are not clearly attributable to one party or the other, it took more than two years after the March 20, 2019 election for this application to be heard. This delay bears upon the exercise of the Court's discretionary power with respect to remedies. At the hearing, Mr. Janvier did not insist on remedies regarding the March 20, 2019 election. Indeed, it would be unwise to order the holding of a new election when the next regular election will take place in less than a year; see *Thompson*, at paragraph 27.

[33] Thus, the only appropriate remedy is a declaration that the words "and who has been resident on the Chipewyan Prairie First Nation Reserve for at least six months prior to the date of an election for Chief or Councillors for the Chipewyan Prairie First Nation" in section 1 of the "Eligibility" section of the election code are of no force or effect. This remedy is similar to the one granted by the Federal Court of Appeal in *Esquega*.

[34] Chipewyan Prairie First Nation seeks a suspension of this declaration of invalidity until one month before the next election, that is, for a period of approximately nine months. The main reason for seeking this suspension is the fear that the March 20, 2019 election would be invalidated and that the validity of decisions made by the council since then would be in jeopardy. At the hearing, however, Mr. Janvier stated that he did not wish the declaration of invalidity to have any retroactive effect. As the parties are in agreement, I will simply state in the formal judgment that the declaration of invalidity of the residency requirement does not have the effect of invalidating the March 20, 2019 election, nor subsequent councillor elections, nor decisions made by the council.

[35] Chipewyan Prairie First Nation also argues that a suspension would facilitate the amendment of the electoral code. If I understand correctly, the First Nation intends to respond to a declaration of invalidity of the residency requirement by an attempt to design replacement provisions that would be justified pursuant to section 1 of the Charter. The First Nation is certainly entitled to try to find an acceptable compromise. I do not think, however, that a suspension of the declaration of invalidity is necessary or desirable to achieve this purpose. In this regard, I note that the suspension of a declaration of invalidity is an “extraordinary step” and is not granted as a matter of course: *Carter v Canada (Attorney General)*, 2016 SCC 4 at paragraph 2, [2016] 1 SCR 13. A suspension would have the effect of excluding off-reserve members from participation in the amendment process. This would only perpetuate further their exclusion from participation in the political affairs of their First Nation.

[36] Neither am I persuaded that the declaration of invalidity would pose significant practical obstacles to the process for amending the electoral code. Chipewyan Prairie First Nation argues that off-reserve members may be difficult to reach and that it may be difficult to achieve the quorum of 50% of the members if a referendum is held, as was the case in the *Thompson* and *Clark* cases. Unlike in *Thompson*, however, the election code provides a solution where the quorum is not attained:

> This Band Custom Election Code may be amended by the majority of the eligible voters who vote on an amendment. If the proposed amendment is approved by a majority of the eligible voters who [vote] but not a majority of all eligible voters, then a second vote will be held and the amendment will be approved if it receives a majority of votes cast.

[37] Thus, the concern that amending the code might become impossible appears overblown. Moreover, the election code states that the chief and council may enact regulations necessary to give effect to the code. This would include making the necessary adaptations to the logistics of the voting process, for example with respect to advance polling, mail-in or electronic voting or holding polls in locations where significant concentrations of off-reserve members reside. I trust that the First Nation will take reasonable measures to ensure that off-reserve members have an equal opportunity to participate in the political process, if it wants to avoid further litigation.

[38] In conclusion, I am not persuaded that the circumstances justify the “exceptional step” of suspending the declaration of invalidity.

III. Disposition and Costs

[39] For these reasons, I am allowing the application for judicial review. Given the lapse of time, the only relevant remedy is a declaration of invalidity of the portion of the eligibility provision of the election code that establishes the residency requirement. The declaration will not be suspended. I will also clarify that the declaration does not affect the validity of past elections or the actions of the current council.

[40] Mr. Janvier is seeking the costs of this application on a solicitor-client basis. In other words, he wants the First Nation to reimburse all the expenses he incurred to bring this application, including his lawyers' fees. I reviewed the principles governing awards of costs in First Nations governance cases in *Whalen v Fort McMurray No 468 First Nation*, 2019 FC 1119 [*Whalen*]. The default rule remains that costs are awarded according to the tariff found in the *Federal Courts Rules*, SOR/98-106. Solicitor-client costs awards are exceptional and I am not persuaded that this case fits in the narrow categories in which such an award is warranted: *Whalen*, at paragraphs 13-17.

[41] Nonetheless, I am of the view that some of the factors mentioned in *Whalen* are equally applicable to this case and warrant a somewhat elevated costs award. While Mr. Janvier may be partly motivated by self-interest, this application will contribute to clarify important issues regarding the governance of Chipewyan Prairie First Nation. Moreover, I am prepared to assume that there is an imbalance between Mr. Janvier and the First Nation's respective financial

capacities. In this regard, the fact that the members of the council were not personally named as respondents is irrelevant.

[42] The Chief Justice's notice to the parties and the profession of April 30, 2010 (https://www.fct-cf.gc.ca/content/assets/pdf/base/notice-avis-30apr2010.pdf) requires the parties to be in a position to make submissions as to the quantum of costs before the end of the hearing. Here, the parties have not done so. I have therefore little information allowing me to estimate an adequate lump sum. Instead, I will award costs according to the middle of column IV of the tariff, which will provide a somewhat elevated award compared to what would result from the application of column III.

JUDGMENT in T-1468-19

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed.
2. The words "and who has been resident on the Chipewyan Prairie First Nation Reserve for at least six months prior to the date of an election for Chief or Councillors for the Chipewyan Prairie First Nation" in section 1 of the "Eligibility" section of the election code of the Chipewyan Prairie First Nation are of no force or effect.
3. The foregoing declaration does not affect the validity of the election held on March 20, 2019, nor that of elections held since then, nor that of decisions made by the council of Chipewyan Prairie First Nation.
4. Costs are awarded to the applicant according to the middle of column IV of the tariff.

"Sébastien Grammond"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1468-19
STYLE OF CAUSE:	WALTER BRUCE JANVIER v CHIPEWYAN PRAIRIE FIRST NATION AS REPRESENTED BY ITS CHIEF AND COUNCIL AND DUSTIN TWIN, IN HIS CAPACITY AS ELECTORAL OFFICER
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