Date: 20071009

Docket: T-457-05

Citation: 2007 FC 1036

Ottawa, Ontario, October 9, 2007

Present: The Honourable Mr. Justice Martineau

BETWEEN:

LINDA JEAN, CHIEF OF THE MICMAC NATION OF GESPEG, IN HER OWN NAME AND ON BEHALF OF ALL OTHER MEMBERS OF HER BAND, AND THE CONSEIL DE LA NATION MICMAC DE GESPEG

Applicants

and

MINISTER OF INDIAN AND NORTHERN AFFAIRS CANADA

and

ATTORNEY GENERAL OF CANADA

Respondents

REASONS FOR ORDER AND ORDER

[1] The applicants dispute the legality of the refusal by the Minister of Indian and Northern Affairs Canada (the Minister) to grant financial assistance under the *Elementary/Secondary Education Program* (the Program) to student members of the Micmac Nation of Gespeg (the Band).

[2] The Program was established by the Department of Indian and Northern Affairs Canada (INAC). In its present form, the Program came into effect on September 1, 2004. Without going into detail, the Program enables the Minister to contribute to the funding of education services offered in band schools and federal schools. Moreover, when an eligible student attends an off-reserve elementary or secondary school, eligible expenses for education services and financial assistance for students—such as housing and meals, daily transportation and the purchase or rental of books and supplies—are also included in the amounts paid by the Minister up to the maximum amount per student set by the Program. The Minister's contributions under the Program are sent directly to the band council or to the organization it has designated. That is why the Band Council is one of the co-applicants in this proceeding. Nevertheless, only students listed on the Nominal Roll are eligible for financial assistance under the Program.

[3] In order to be included on the Nominal Roll, the student must be ordinarily resident on a reserve. Under the Program, ordinarily resident on a reserve means that the student lives at a municipal address on the reserve, is a child in joint custody who lives on the reserve most of the time or a child who lives on a reserve and has no other place of residence. Students continue to be considered ordinarily resident on a reserve if they return to live on the reserve with their parents, guardians or maintainers during the year, even if the students live elsewhere while attending school or working at a summer job. That being said, the use of the word "reserve" in the Program does not have the narrow legal meaning that it has in the *Indian Act*, R.S.C. 1985, c. I-5. In fact, under the Program, reserves include all land set aside by the federal government for use and occupation by an

Indian band, together with all other Crown lands recognized by INAC as settlement lands of the Indian band with whom the student resides.

[4] Therein lies the problem—the Band does not have a reserve nor does it occupy lands set aside by the federal government or any other Crown lands designated as settlement lands, although the Band has been negotiating for years with the federal and provincial governments for a land base. The Minister contends that, since the Band students do not live on a reserve or Crown lands, the Quebec provincial government must provide appropriate education services and, if necessary, financial assistance to Band students who live within the municipality of Gaspé or elsewhere in the province.

[5] There is no doubt that the applicants have an interest in disputing the legality of the ministerial refusal. In her affidavit, Ms. Linda Jean, who is the co-applicant with the Band Council, states that there are 666 Band members: 340 live in the Gaspé region and surrounding areas and 326 in Montréal. The number of Band students currently enrolled in elementary or secondary schools is not specified. However, according to the affidavit of Mr. Réjean Basque, education officer for the Band, 106 members of the Band received monies for elementary or secondary education costs for the school year 2002-03. The evidence shows that between 1975 and 2001, in order to assist Band families living below the poverty line whose children were attending an elementary or secondary school, the INAC officers agreed to grant financial assistance for the purchase of manuals and school supplies as well as a school allowance. Despite the fact that the Assistant Deputy Minister announced a change to the previous program in 1982 and asked the Regional Managers to stop the

payments to students not living on a reserve or Crown lands, these payments continued for a number of years. In 2001, the Quebec Regional Manager informed the Band Council that INAC funding would cease following a compliance exercise to ensure that services funded by INAC and distributed through various programs are offered only to those who are eligible under established regulations and standards. However, INAC continued to provide a decreasing amount of financial assistance until 2004. This application for judicial review was filed in 2005.

[6] Currently, the applicants no longer have any legitimate expectation of continuing to receive INAC funds to financially assist Band children who are enrolled in an elementary or secondary school. The applicants do not dispute that the Minister is empowered to provide for the elementary and secondary education of students living on reserves and to fund education services and assistance to students through the Program. In this case, the Minister's power to adopt the Program is based on federal jurisdiction over Indians and lands set aside for Indians; this power is complemented by the federal spending power (since the provinces have jurisdiction over education). Furthermore, it is clear that under the Program's current guidelines, Band students are not allowed to be registered on the Nominal Roll (article 6.1 of the Program).

[7] The applicants' specific complaint against the Minister is that because of the requirement to live on a reserve (or Crown lands) the Program does not apply to Indian students living on the Band's traditional territory. They argue that this infringes subsection 15(1) of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982,* which is Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11 (the Charter).

[8] Relying primarily on *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203, the applicants maintain that the conditions for applying section 15 have been met. Here, the impugned Program favours Indian band students who live on reserves (or Crown lands). Those who do not live on reserves (or Crown lands) are excluded from the Program. The applicants contend that the Program thereby draws a formal distinction based on an analogous ground, i.e., Aboriginality-place of residence. They also submit that members of a landless band suffer a disadvantage and are in quite a vulnerable position in comparison with bands that have a reserve or occupy lands set aside by the Crown.

[9] At this point, I note that in *Corbiere*, above, the Supreme Court recognized that members of First Nations bands living off-reserve are vulnerable to unfair treatment because a stereotype has been attached to this group that its members are "less Aboriginal" than band members who live on reserves. Based on the evidence in the record, it is clear that a landless band suffers real disadvantages considering the position that the group and its members occupy in the social, political and legal contexts of our society. For an Indian band and its members, the absence of any land base makes them vulnerable to cultural assimilation and impairs the ability of the members to gather together and to preserve connections to the community and to traditional lands where parents, grandparents, great-grandparents and Aboriginal ancestors previously lived. In this case, the fact of being a member of a landless band, which includes Band students for purposes of examining the legality of the Program's impugned provisions, is a personal characteristic. It is immutable or difficult to change. Indeed, the Crown does not seem disposed for the moment to create a reserve or

to set aside lands for the Band even though INAC's relationship with the Micmacs of Gespeg can be traced back to 1880.

[10] That being said, the applicants maintain that the traditional territory of the Band (even though it is currently landless) is the Gaspé region and surrounding areas. Therefore, the applicants submit that the Minister's refusal to grant the benefits of the Program to Band students enrolled in elementary or secondary schools in this region is "discriminatory" in this case because it demeans their dignity. The applicants argue that the distinction based on residence on a reserve has the effect of completely excluding landless bands from accessing a basic aspect of full membership in Canadian society, i.e., community control over their children's education.

[11] I agree with the applicants that the Program draws a formal distinction between residents and non-residents of a reserve. On the other hand, I note that students, band members or not, who do not live on a reserve or Crown lands are treated the same way as non-Indian students enrolled in a provincial school. In both cases, Indians and non-Indians do not have access to the benefits of the Program. Although there may be valid reasons to accept the applicants' arguments on the issue of analogous grounds, I consider it unnecessary to make a final determination on this point given my conclusion that, even if these grounds exist, there is no discrimination under the circumstances. My approach is consistent with that of the Supreme Court in *Lovelace v. Ontario*, [2000] 1 S.C.R. 950, which was decided after *Corbiere*, above.

[12] There are four contextual factors that provide the basis for organizing the third stage of the discrimination analysis. They are: (i) pre-existing disadvantage, stereotyping, prejudice, or vulnerability, (ii) the correspondence, or lack thereof, between the ground(s) on which the claim is based and the actual need, capacity, or circumstances of the claimant or others, (iii) the ameliorative purpose or effects of the impugned law, program or activity upon a more disadvantaged person or group in society, and (iv) the nature and scope of the interest affected by the impugned government activity. After considering each of these factors, I do not believe that using the criterion of residence on a reserve or Crown lands is ”discriminatory” in this case, in the sense that the purpose or effect of this ground of distinction demeans the dignity of the individuals affected through the imposition of disadvantage, stereotyping or political or social prejudice.

[13] As sympathetic as the applicants’ case may be, there is no application before this Court today regarding the Crown’s failure to create a reserve or to set aside lands for the benefit of the Band. Rather, the Court must examine the legality of the Minister’s refusal to grant financial assistance under the Program to Band students who are enrolled in elementary or secondary schools and who reside in Gaspé and surrounding areas. It is not sufficient for a claimant simply to assert, without more, that his or her dignity or someone else’s has been demeaned. In this case, the individuals directly affected by the impugned provisions of the Program are Band students who attend an elementary or secondary school and for whom financial assistance is claimed. On this point, the issue is not whether they have been deprived of a financial benefit—clearly they have been—but whether this deprivation promotes the view that students who do not live on reserves or Crown lands are less capable as human beings or as members of Canadian society. If it is true that

landless bands suffered a historical disadvantage in comparison with bands who had land, there is, nevertheless, no relationship between the ground of distinction used in the Program (here, living on a reserve) on the one hand, and the actual needs, capacities and circumstances of the students of an Indian band who do not live on a reserve or Crown lands, on the other hand. In fact, students who are members of a band that has a reserve or occupies Crown lands are not entitled to the benefits of the Program if they do not live on the reserve or the Crown lands.

[14] On the other hand, as the Supreme Court pointed out in *Lovelace*, above, at paragraph 86, "…exclusion from a targeted . . . program is less likely to be associated with stereotyping or stigmatization or conveying the message that the excluded group is less worthy of recognition and participation in the larger society." In this case, the Program is one of the targeted federal ameliorative programs designed to address the unique challenges faced by First Nations members living on reserves or Crown lands. From the evidence in the record, it is clear that the primary objective of the Program is to reduce the education gap that affects students who live on reserves or Crown lands by allowing them to benefit from services and programs comparable to those available to other students in the same province or area of residence. Moreover, considering the unique legal status of reserves in Canada, this INAC Program currently funds the elementary and secondary education of eligible children of non-Aboriginals who work and ordinarily reside on a reserve. The evidence in the record also shows that the secondary school enrolment rate is lower than the national average for First Nations members who live on reserves. The intended effect of the Program is therefore to reduce, if not eliminate, this education gap, and in the long term, this will help to improve the socio-economic position of First Nation members and their communities.

[15] With respect to the nature and scope of the affected interest, the evidence in the record indicates that in the past, INAC's financial assistance for band students focused more specifically on defraying the costs of school supplies and clothes, as well as school bus transportation at noon. The latter two expenses are not eligible under the Program. I am, of course, aware of the fact that for approximately 30 years, a number of Aboriginal families not living on reserves or Crown lands received financial assistance from INAC. However, the Program in its current form is not a social assistance program. Currently, band students attend provincial elementary and secondary schools in their respective municipality of residence where they have access to a whole range of provincial programs and services. On the other hand, there is nothing in the evidence to indicate that the academic performance of the band students is comparable to those of students currently living on reserves or Crown lands. The latter do not necessarily have access to the same range of provincial services, hence the Program's raison d'être.

[16] The applicants suggest that the purpose of the Program is to transfer federal jurisdiction over education on the reserves to Indian bands, if not to grant greater financial autonomy in this area. In my view, this is an incidental aspect or a secondary effect. In fact, the ongoing primary objective of the Program is to improve the level of education of students living on reserves or Crown lands. It must be remembered that establishing an Aboriginal school in a municipality or designing an education program adapted to the needs of an Aboriginal population living off-reserve falls primarily within provincial jurisdiction, although the federal spending power can incidentally provide a basis for potential funding of off-reserve initiatives. Regardless, these aspects go far beyond the narrow legal framework of this application for judicial review. It would be better to deal

with these political and constitutional issues in another forum, in particular, as part of the discussions between the Band and INAC, and with the Quebec government. I understand that negotiations have begun regarding the creation of a land base and the development of certain infrastructures to meet the particular needs of the Band and its members.

[17] Consequently, although I acknowledge that the Band and its members may have needs in common with other Aboriginal bands and communities living on reserves or Crown lands, I do not believe that the Minister's refusal to grant financial assistance under the Program to Band students enrolled in elementary or secondary schools demeans their dignity in this case. Furthermore, there is no basis on which I could find that the denial of these benefits violates the right of an Aboriginal community to control the education of its youth. Last, in order for the collective right being claimed by the applicants to be exercised, separate schools would need to be established or education programs adapted to the needs of Aboriginal children would have to be developed. I cannot conclude on the basis of the evidence in the record that the applicants currently envisage such a project; therefore, the denial of the right of Aboriginal communities to control the education of First Nation children is not really at issue and appears to me to be purely academic in this case.

[18] This application for judicial review must therefore fail. Considering the nature of the issues, the applicants' situation and the particular facts of this case, it is not appropriate to award costs to the respondents.

ORDER

THE COURT ORDERS that the application for judicial review be dismissed without costs.

"Luc Martineau"
Judge

Certified true translation
Mary Jo Egan, LLB

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-457-05
STYLE OF CAUSE:	LINDA JEAN, CHIEF OF THE MICMAC NATION OF GESPEG, ON HER OWN BEHALF AND ON BEHALF OF ALL OTHER MEMBERS OF HER BAND, AND THE CONSEIL DE LA NATION MICMAC DE GESPEG and MINISTER OF INDIAN AND NORTHERN AFFAIRS CANADA and ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	Gaspé, Quebec
DATE OF HEARING:	September 5, 2007
REASONS FOR ORDER AND ORDER BY:	The Honourable Mr. Justice Martineau
DATED:	October 9, 2007

APPEARANCES:

Richard Jeannotte David Schulze	FOR THE APPLICANTS
Dah Yoon Min Virginie Cantave	FOR THE RESPONDENTS

SOLICITORS OF RECORD:

Dionne Gertler Schulze Montréal, Quebec	FOR THE APPLICANTS
Jeannotte Plourde & Côté Gaspé, Quebec	
John H. Sims, Q.C. Deputy Attorney General of Canada Québec, Quebec	FOR THE RESPONDENTS