

Off-Reserve Gain Right to Vote

By Beverley O'Neil, Ktunaxa Nation

"274 First Nations in Canada still operate under the Indian Act Election Process."

Challenging the 'status quo' is changing how we define the 'reasonable man'. No longer is the 'reasonable man' someone who accepts, but he is now someone who questions that system, and does something about it.

On October 13, 1999, four members of the Batchewana Indian Band near Sault St. Marie, Ontario (John Corbiere, Charlotte Syrette, Claire Robinson, and Frank Nolan) heard the final decision of their challenge of the residency requirements that determined the electorates for Band elections. The Supreme Court of Canada ruled that the residency law was 'analogous ground' under Section 15 of the Canadian Charter of Rights, and therefore a violation of the rights of off-reserve Band members.

Let me give you some background to help you understand this matter better. Batchewana is a Band located near Sault St. Marie, Ontario. The Band has three reserves that total 15 acres, a fraction of the 246 square miles of the Tribe's traditional territory. A large percent of its members reside off reserve (almost 70 percent), and this is a continuing trend. The majority of the Band's population growth over the last 15 years has been attributed to Bill C-31, an Act that abolished legislated enfranchisement (a former discriminatory practice of the Indian Act). Bill C-31 reinstated Aboriginals (mostly women) who lost their Indian status - for most women enfranchisement resulted primarily as a result of marriage to a non-Indian, and for

others it was called voluntary enfranchisement, which was often relinquished to access rights available only to non-Indians. For Batchewana, 85 percent of the Band's growth was attributed to Bill C-31, and although the Batchewana's population has escalated, the reserve land base has not. This is despite promises made in their Treaty (Pennefather Treaty). Now knowing these facts, it is easy to see that Batchewana is not unique. It could be almost any Band in Canada.

First let me say that Batchewana's residency law is not an anomaly. It is also the requirement used by a further 274 First Nations in Canada who still operate under the Indian Act reinforced by the residency requirement outlined in the Indian Act Section 77(1). And although the initial understanding has been that the decision does not apply to Bands that operate under custom elections, others have said these Bands "could find their elections challenged on the same basis as Corbiere if they exclude those members residing off the reserve." The Assembly of First Nations' National office confirmed this in a letter to First Nations on September 25. "Even DIAND has not been consistent in its interpretation of the decision at first stating that it did not impact on custom election codes then later advising First Nations to seek legal opinions on their codes."

Now back to the case... in layman's terms, the Supreme Court of Canada (SCC) determined the residency requirement was

discriminatory on the basis that residency is a personal characteristic of an Indian (very much like the color of one's eyes), whereas for the average Canadian resident it is not (as changeable as one's clothes). Furthermore, although an individual can easily change residency, requiring the Indian individual to change residence to exercise their rights was determined to be unfair and discriminatory. The SCC also said the existing laws "perpetuates the historic disadvantage experienced by off-reserve band members by denying them the right to vote and participate in their band's governance." Possibly an influencing factor to Corbiere and the three other individual interests in pursuing their right to vote is, as the Court stated "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."

Certainly as First Nations re-develop their Nations, the decisions made by their Council and the voting members transcend over many matters of interest to their Nation, that is to their Nation as a whole. The decisions of Council are not confined solely to the interests and geographic boundaries of the Indian reserves and the on-reserve members. The SCC decision recognized this. "Although there are some matters of purely local interest," for example special events and festivals, "which do not 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."

On November 20, 2000, 18 months after decision was rendered, the Corbiere decision comes into full effect essentially eliminating residency as a voting requirement of Bands operating under the Indian Act election process. However, even after this 18-month stay, First Nations are no closer to preparing their community to implement this decision.

One of the many important aspects of this decision is that the decision not only affects elections, but also referendums as well as the management of Band trust funds, reserve lands, and resources.

I understand the concerns expressed by many Bands that individuals who lack knowledge of the community may as a result of this decision, govern their community. This is a fair assumption in itself in communities whose governance decisions are solely those decisions that are community based and do not affect off-reserve Band members. However, as the Supreme Court recognized, this is in fact not the case - Batchewana is not unique. Band decisions transcend many issues; the issues are much broader. Bands govern more than what one may describe as matters similar to those authorities of a municipality. First Nations' matters are much broader. First Nations are dealing with 'Nation' matters. Governance include matters such as land and natural resources, health, education, employment, culture, religion, citizenship, taxation, justice, finance, and much more... therefore, the off-reserve member has an interest. Sadly too many Bands can not welcome many of their members home due to the lack of land and finances for housing, as well as resources for community infrastructure services, social, cultural, and economic activities and the barriers that restrict a First Nation from governing itself.

So, what is being done to change this? Well, a National Working Group was formed consisting of the Department of

Batchewana's residency law is not an anomaly - it is not unique to the Batchewana Band.

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Indian Affairs and Northern Development, Native Women's Association of Canada, Congress of Aboriginal People, National Aboriginal Friendship Centres, and the Assembly of First Nations. Some organizations such as the Assembly of First Nations (AFN), United Native Nations (UNN), Friendship Centres, and other Aboriginal organizations have taken a positive and proactive approach by hosting sessions with their constituents to inform and gather ideas. Several websites also provide further information and responses to Corbiere. Some sites are the AFN (www.afn.ca), Union of BC Indian Chiefs (www.ubcic.bc.ca), and the Department of Indian Affairs and Northern Development (www.inac.gc.ca). Another, the Lesser Slave Lake Regional Council applied for an extension to the Supreme Court of Canada to "clarify" various aspects of the decision that relate to Treaty and Aboriginal Rights. The SCC has not heard this motion due to procedural delays.

The AFN has not pursued the courts. Instead it notified the Minister that "DIAND should assume all responsibility for elections until such time as adequate resources have been identified to undertake the duties and responsibilities imposed under the regulations." Furthermore, there is fear that "compliance will be seen as consent". National Chief Matthew Coon Come commented, "First Nations have never consented to regulations and, at law, this is not required." In response to the

AFN, Minister Nault announced "If First Nations are not willing to conduct their own elections however, INAC will have to, and will do so utilizing the resources which were to be made available to those First Nations refusing to conduct their own elections." From November 20 to January 1, 2001, there are approximately 20 First Nation elections. It is difficult to get an exact number because the Eskasoni First Nation election was moved to an earlier date, and although an original figure of 282 Bands affected by this decision was reported it is now considered by INAC to be 263.

The Department met with a national working group consisting of the Assembly of First Nations, Native Women's Association of Canada, and the National Association of Aboriginal Friendship Centres. In these sessions, the government was instructed these "discussions were not to be considered adequate consultations with First Nations" and instructed to undertake an appropriate process to undertake. To the dismay of these Aboriginal organizations amended and new regulations were drafted with their consultation – they contend this was not consultation. On September 2, 2000, the amended *Indian Band Election Regulations* and the *Indian Referendum Regulations* were published in the Canada Gazette. First Nations were invited to provide comments on these regulations. Training sessions were held in Winnipeg and Ottawa to gather response from First Nations. The regulations came into effect on October 20, 2000.

DIAND set-aside \$2 million for consultation Canada-wide. The AFN national office received \$200,000 for community outreach. In September, DIAND also launched a \$1.022 million advertising campaign "to inform First Nation members that it is up to them to take the initiative to be on the voters list." DIAND believes that this campaign will

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relieve the pressure on the Bands stating "There is no onus whatsoever on a band to attempt to track down off-reserve members in order to advise them of their rights post-November 20, 2000." There have not been funds allocated to assist Bands with preparing their organizations, or any other organization with assisting off-reserve members to become registered and aware. Furthermore, DIAND is adamant that Corbiere decision does not expand federal jurisdiction off-reserve and the SCC does not rule on program entitlement. The advertisements were placed in Aboriginal newspapers and major dailies, and complemented by a radio campaign. On October 20, I could not find information to off-reserve members on Corbiere on the INAC.GC.CA website – it was either absent or hidden.

On a positive note, there are some options being promoted. Batchewana is involved in a pilot project for the implementation of the decision while the Anishinabek Nation released a brochure suggesting some approaches. They suggested "dividing the local functions which relate purely to residents from those that affect all Band members and have different voting regimes for these functions; establish a system of double majority for issues that affect all Band members; establish a system which includes a right of veto for each group, on- and off-reserve members for issues that affect all Band members; or set aside special seats on a

Band council for non-residents, which give them meaningful, but not identical rights of participation." Anishinabek also recommended considering two separate governing bodies with exclusive and overlapping powers, or allowing off-reserve members to vote and run for Council.

The off-reserve member should contact your Band immediately to inform them of your whereabouts and keep them informed if this should change. Record and document this contact for future reference.

We can anticipate there will be further challenges to the Indian Act, as well as charges laid when a Band does not comply with the Corbiere decision. Minister Nault responded to the Corbiere decision by saying, "The Corbiere decision was the first in what I think will be a systematic dismantling of the Act because it can't stand the test of the Charter of Rights and Freedoms." DIAND estimates the Corbiere decision will add an estimated 190,000 individuals to the electorate essentially doubling many Band's voter lists. For Bands, it will add pressure to the already strained and scarce resources they have. For the off reserve Aboriginal hopefully it will open the door to reconnecting with your community, ultimately helping to make your community stronger.

The Corbiere decision is also available online through www.afn.ca or www.inac.gc.ca web-site.

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