Date: 20080515

Docket: A-434-07

Citation: 2008 FCA 182

CORAM: **LINDEN J.A.**
NOËL J.A.
RYER J.A.

BETWEEN:

THE ATTORNEY GENERAL OF CANADA

Appellant

and

EUGENE ESQUEGA, BRIAN KING, GWENDOLINE KING, HUGH KING SR., RITA KING, WAYNE KING, LAWRENCE SHONIAS AND OWEN BARRY

Respondents

Heard at Toronto, Ontario, on May 8, 2008.

Judgment delivered at Ottawa, Ontario, on May 15, 2008.

REASONS FOR JUDGMENT BY: LINDEN J.A.

CONCURRED IN BY: NOËL J.A.
RYER J.A.

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REASONS FOR JUDGMENT

LINDEN J.A.

[1] This is another appeal that raises the matter of the political rights of non-resident members of Indian Bands following the decision of *Corbiere* v. *Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203.

[2] The issue involved in this litigation was whether non-resident members of the Gull Bay First Nation could be nominated for the Office of Councillor of the Band, despite an apparent bar

contained in subsection 75(1) of the *Indian Act*, R.S.C. 1985, c. I-5. This provision provides as follows:

ELECTIONS OF CHIEFS AND BAND COUNCILLORS: **Eligibility:** 75. (1) No person other than an elector who resides in an electoral section may be nominated for the office of councillor to represent that section on the council of the band.	**ÉLECTION DES CHEFS ET DES CONSEILS DE BANDE :** **Éligibilité:** 75. (1) Seul un électeur résidant dans une section électorale peut être présenté au poste de conseiller pour représenter cette section au conseil de la bande.

[3] The Applications Judge held that this restriction was unconstitutional as it violated section 15 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act*, 1982 (U.K.), 1982 c. 11. In this Court, the appellant does not appeal from the merits of that decision, rather this appeal stems from the nature of constitutional remedy imposed on the parties on the basis that it is overly broad.

[4] Counsel for the appellant contends that the remedy employed by the Applications Judge, striking down subsection 75(1) in its entirety, was more extensive than necessary. According to counsel for the appellant, reading down the affected parts of this provision would be more appropriate. The remedy which he suggests is as follows:

> Subsection 75(1) of the *Indian Act* violates section 15 of the Charter and is not justified by section 1 of the Charter and is therefore invalid to the extent that it prohibits electors who do not reside on the reserve from being nominated for the office of councillor.

[5] Counsel for the respondents argue that the remedy employed by the Applications Judge should be affirmed as it would cause less confusion than that proposed by the appellant and would encourage Parliament to undertake a legislative remedy which would ultimately be more thorough and transparent. Concern about raising the remedy issue on appeal was also expressed, but that is not seen by this Court as an impediment (*Athey* v. *Leonati*, [1996] 3 S.C.R. 458).

[6] In my view, the constitutional remedy ordered by the Applications Judge was unnecessarily broad. As his reasons do not indicate that the more limited and restrained remedy of reading down was considered, I am disinclined to afford him deference on the issue of remedy. The striking down of subsection 75(1) would remove the requirement that each candidate be an "elector", as defined by section 2. As a result, it enables individuals under 18 years of age, non-members of the Band and other disqualified persons to be nominated for office. In my view, such potential problems cannot go unaddressed by this Court.

[7] Counsel for the respondents argued that the adoption of the reading down remedy could lead to further adverse consequences where a Band has more than one "electoral section", since there could be some confusion as to whom the non-resident Band councillors are elected to represent. However, we are told that such an effect would be limited to only two Bands, and even then, we are further informed by counsel for the Respondents that there is a convenient procedural method for these two Bands to adjust their electoral system accordingly. In my view, the alleged confusion with regard to reading down the affected parts of the provision would be far less than the potential problems caused by the remedy ordered by the Applications Judge.

[8] I therefore hold that the reading down remedy should be utilized here. Professor Peter Hogg in his book *Constitutional Law of Canada*, has described the remedy as follows:

> [Reading down] is a technique of judicial amendment, altering the statute to make it conform to the Constitution… Reading down… involves giving a statute a narrow interpretation in order to avoid a constitutional problem that would arise if the statute were given a broad interpretation (Peter W. Hogg, *Constitutional Law of Canada*, 4th ed., looseleaf (Toronto: Carswell, 1997).

[9] I further note that this remedy has been employed in several analogous situations (see *R.* v. *Grant*, [1993] 3 S.C.R. 223 at page 262; *Little Sisters Book and Art Emporium* v. *Canada (Minister of Justice)*, [2000] 2 S.C.R. 1120 at paragraph 159; *Ruby* v. *Canada (Solicitor General)*, [2002] 4 S.C.R. 3 at paragraph 67). In this instance, this technique is preferable as it would allow non-residents to be nominated for office as mandated by the Charter, but it would also maintain the definition of "electors" that is important for the operation of the system. I should note that in reaching this decision, the alternative remedy of severance was also considered, but the Court is of the view that the adoption of that option would result in other potential difficulties as well.

[10] That being the case, I am of the view that the judgment of the Applications Judge should be set aside and replaced by a judgment incorporating the language proposed by counsel for the appellant as outlined in paragraph 5 above.

[11] As for a stay in this appeal, counsel for the appellant seeks some time to allow information, consultation and adjustments to be organized, preferably nine months, although he did indicate that a two month stay would be acceptable. Counsel for the respondents insisted for a two month stay as

a maximum, so as to allow for the preliminary steps for the next election scheduled in November 2008 to be taken in light of the provision being read down. In my view, a stay of two months will ensure that the rights of these individuals are effectuated fully prior to their next election, while at the same time providing other Bands with a reasonable amount of time to make the necessary adjustments for their own elections which are either already in process or about to begin.

[12] In summary, the Court will order that:

1) The appeal should be allowed;

2) The judgment of the Applications Judge should be set aside to be replaced by the following:

> Subsection 75(1) of the *Indian Act* violates section 15 of the Charter and is not justified by section 1 of the Charter and is therefore invalid to the extent that it prohibits electors who do not reside on the reserve from being nominated for the office of councillor.

3) The operation of this judgment should be stayed for two months from the date of this judgment.

4) The appellant will have the costs of the appeal.

"A.M. Linden"
J.A.

"I agree
Marc Noël J.A."

"I agree
C. Michael Ryer J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-434-07
STYLE OF CAUSE:	*The Attorney General of Canada v. Eugene Esquega, Brian King, Gwendoline King, Hugh King Sr., Rita King, Wayne King, Lawrence Shonias and Owen Barry*
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	May 8, 2008
REASONS FOR JUDGMENT BY:	Linden J.A.
CONCURRED IN BY:	Noël J.A. Ryer J.A.
DATED:	May 15, 2008

APPEARANCES:

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