Corbiere *v*. Canada (Minister of Indian and Northern Affairs), [1999] 2 S.C.R. 203

Her Majesty The Queen as represented by the Minister of Indian and Northern Affairs Canada and the Attorney General of Canada *Appellant*

and

Batchewana Indian Band *Appellant*

v.

John Corbiere, Charlotte Syrette, Claire Robinson and Frank Nolan, each on their own behalf and on behalf of all non-resident members of the Batchewana Band *Respondents*

and

Aboriginal Legal Services of Toronto Inc., Congress of Aboriginal Peoples, Lesser Slave Lake Indian Regional Council, Native Women's Association of Canada and United Native Nations Society of British Columbia *Interveners*

Indexed as: Corbiere *v*. Canada (Minister of Indian and Northern Affairs)

File No.: 25708.

1998: October 13; 1999: May 20.

Present: Lamer C.J. and L'Heureux-Dubé, Gonthier, Cory, McLachlin, Iacobucci, Major, Bastarache and Binnie JJ.

on appeal from the federal court of appeal

Constitutional law -- Charter of Rights -- Equality rights -- Indian bands -- Elections of chiefs and band councils -- Voting restrictions -- Legislation providing that only band members "ordinarily resident on the reserve" entitled to vote in band elections -- Whether legislation infringes ss. 15(1) of Canadian Charter of Rights and Freedoms -- If so, whether infringement justified under s. 1 of Charter -- Canadian Charter of Rights and Freedoms, s. 1, 15(1) -- Indian Act, R.S.C., 1985, c. I-5, s. 77(1).

Constitutional law – Charter of Rights – Remedy – Indian Act voter eligibility provisions violating Charter equality rights -- Whether declaration of invalidity and suspension of effect of declaration appropriate remedy – Whether Indian band which brought Charter challenge should be exempted from suspension of effect of declaration.

Indians -- Elections of chiefs and band councils -- Voting restrictions -- Legislation providing that only band members "ordinarily resident on the reserve" entitled to vote in band elections -- Whether legislation violating Charter equality rights -- Canadian Charter of Rights and Freedoms, ss. 1, 15(1) -- Indian Act, R.S.C., 1985, c. I-5, s. 77(1).

Courts -- Supreme Court of Canada -- Jurisdiction -- Constitutional questions -- Court's jurisdiction to restate constitutional questions or make declaration of invalidity broader than that contained within questions.

The respondents, on their own behalf and on behalf of all non-resident members of the Batchewana Indian Band, sought a declaration that s. 77(1) of the *Indian Act*, which requires that band members be "ordinarily resident" on the reserve in order to vote in band elections, violates s. 15(1) of the *Canadian Charter of Rights and Freedoms*. Fewer than one third of the registered members of the band lived on the reserve. The Federal Court, Trial Division found that as it related to the disposition of reserve lands or Indian monies held for the band as a whole, s. 77(1) infringed the rights guaranteed by s. 15(1) and that the infringement was not justified under s. 1 of the *Charter*. The court granted a declaration of invalidity of s. 77(1) in its entirety and suspended the declaration for a period of 10 months. The court noted that the declaration was confined to the Batchewana Band because the pleadings and the evidence related only to that band. The Federal Court of Appeal affirmed the judgment but modified the remedy granted at trial. The court determined that the appropriate remedy was a constitutional exemption because other bands might be able to demonstrate an Aboriginal right under s. 35 of the *Constitution Act, 1982* to exclude non-residents from voting. The court declared that the words "and is ordinarily resident on the reserve" in s. 77(1) contravened s. 15(1) of the *Charter* only in relation to the Batchewana Band. The declaration of invalidity was not suspended.

Held: The appeal should be dismissed but the remedy designed by the Court of Appeal should be modified.

Before any question of constitutional exemption is considered, the legislation in its general application should be examined. In this case, because the general issues were addressed in the plaintiffs' statement of claim, and were argued before this Court and the Federal Court of Appeal, such an analysis will not take any parties by surprise. The constitutional questions, as formulated, address only the situation of the members

of the Batchewana Band. The Court's jurisdiction to restate constitutional questions, or make a declaration of invalidity broader than that contained within them is appropriately exercised when, as in this case, doing so does not, in substance, deprive attorneys general of their right to notice of the fact that a given legislative provision is at issue in this Court, or deprive those who have a stake in the outcome of the opportunity to argue the substantive issues relating to this question.

Per Lamer C.J. and Cory, McLachlin, Major and Bastarache JJ.: The test applicable to a s. 15(1) analysis has been described in *Law*. The first step is to determine whether the impugned law makes a distinction that denies equal benefit or imposes an unequal burden. The s. 77(1)'s exclusion of off-reserve band members from voting privileges on band governance satisfies this requirement. The second step is to determine whether the distinction is discriminatory. It is the first inquiry under this step that poses a problem, i.e. that of establishing whether the distinction is made on the basis of an enumerated ground or a ground analogous to it. The answer to this question will be found in considering the general purpose of s. 15(1) to prevent the violation of human dignity through the imposition of disadvantage based on stereotyping and social prejudice, and to promote a society where all persons are considered worthy of respect and consideration. The enumerated and analogous grounds stand as constant markers of suspect decision making or potential discrimination. These markers of discrimination do not change from case to case, depending on the government action challenged. What varies is whether the enumerated and analogous grounds amount to discrimination in the particular circumstances of the case. Once a distinction on an enumerated or analogous ground is established, the contextual and fact-specific inquiry proceeds to whether the distinction amounts to discrimination in the context of the particular case. To identify a ground of distinction as analogous, one must look for grounds of distinction that are like the grounds enumerated in s. 15. These grounds have in common the fact that they often

serve as the basis for stereotypical decisions made not on the basis of merit but on the basis of a personal characteristic that is immutable or changeable only at unacceptable cost to personal identity. This suggests that the thrust of identification of analogous grounds at the second step of the analysis is to reveal grounds based on characteristics that we cannot change or that the government has no legitimate interest in expecting us to change to receive equal treatment under the law. The conflation of the inquiry into the basis of the distinction and the inquiry into whether, on the facts of the case, that distinction affronts s. 15 is to be avoided.

In this case, the exclusion of off-reserve members of an Indian band from the right to vote in band elections, pursuant to s. 77(1) of the *Indian Act*, is inconsistent with s. 15 of the *Charter*. Section 77(1) excludes off-reserve band members from voting privileges on band governance, and this exclusion is based on Aboriginality-residence (off-reserve band member status). "Aboriginality-residence" as it pertains to whether an Aboriginal band member lives on or off the reserve is a ground analogous to those enumerated in s. 15. The distinction goes to a personal characteristic essential to a band member's personal identity. Off-reserve Aboriginal band members can change their status to on-reserve Aboriginals only at great cost, if at all. The situation of off-reserve Aboriginal band members is therefore unique and immutable. Lastly, when the relevant *Law* factors are applied, the impugned distinction amounts to discrimination. Off-reserve band members have important interests in band governance. By denying them the right to vote and participate in their band's governance, s. 77(1) perpetuates the historic disadvantage experienced by off-reserve band members. The complete denial of that right treats them as less worthy and entitled, not on the merits of their situation, but simply because they live off the reserve. Section 77(1) reaches the cultural identity of off-reserve Aboriginals in a stereotypical way. This engages the dignity aspect of the s. 15 analysis and results in the denial of substantive equality. The conclusion that

discrimination exists at the third step of the *Law* test does not depend on the composition of the off-reserve band members group, its relative homogeneity or the particular historical discrimination it may have suffered. It is the present situation of the group relative to that of the comparator group, on-reserve band members, that is relevant.

No case has been made for the application of s. 25 of the *Charter*. Furthermore, the infringement is not justified under s. 1 of the *Charter*. While the restriction on voting in s. 77(1) is rationally connected to the aim of the legislation, which is to give a voice in the affairs of the reserve only to the persons most directly affected by the decisions of the band council, s. 77(1) does not minimally impair the s. 15 rights. Even if it is accepted that some distinction may be justified in order to protect legitimate interests of band members living on the reserve, it has not been demonstrated that a complete denial of the right of band members living off-reserve to participate in the affairs of the band through the democratic process of elections is necessary. As an appropriate remedy, the words "and is ordinarily resident on the reserve" in s. 77(1) of the *Indian Act* are declared to be inconsistent with s. 15(1) of the *Charter* but the implementation of the declaration of invalidity is suspended for 18 months. No constitutional exemption is granted to the Batchewana Band during the period of suspension because, in the particular circumstances of this case, it would appear to be preferable to develop an electoral process that will balance the rights of off-reserve and on-reserve band members.

Per L'Heureux-Dubé, Gonthier, Iacobucci and Binnie JJ.: The framework for a s. 15(1) analysis was set out in *Law*. At all three stages, the focus of the inquiry is purposive and contextual. A court considering a discrimination claim must examine the legislative, historical, and social context of the distinction, the reality and experiences of the individuals affected by it, and the purposes of s. 15(1). In this case, s. 77(1)

infringes the right to equality without discrimination of the off-reserve members of bands affected by it.

The first stage of the s. 15(1) inquiry is satisfied. Section 77(1) of the *Indian Act* draws a distinction between band members who live on-reserve and those who live off-reserve, by excluding the latter from the definition of "elector" within the band. This constitutes differential treatment.

The second stage of inquiry is also met. The differential treatment is based on the status of holding membership in an *Indian Act* band, but living off that band's reserve. The fundamental consideration at the second stage, if the ground is not enumerated or already recognized as analogous, is whether recognition of the basis of differential treatment as an analogous ground would further the purposes of s. 15(1). The analysis at the analogous grounds stage involves considering whether differential treatment of those defined by that characteristic or combination of traits has the potential to violate human dignity in the sense underlying s. 15(1). Various contextual factors may demonstrate discriminatory potential. If the indicia of an analogous ground are not present in general, or among a certain group in Canadian society, they may nevertheless be present in another social or legislative context, within a different group in Canadian society, or in a given geographic area. The second stage must be flexible enough to adapt to stereotyping, prejudice, or denials of human dignity and worth that might occur in specific ways for specific groups of people, to recognize that personal characteristics may overlap or intersect, and to reflect changing social phenomena or new or different forms of stereotyping or prejudice.

Off-reserve band member status should be recognized as an analogous ground. 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. Also critical is the fact that band members living off-reserve have generally experienced disadvantage and prejudice, and form part of a "discrete and insular minority" defined by race and place of residence. In addition, 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.

At the third stage, the appropriate focus is on how the particular differential treatment impacts upon the people affected by it. The perspective that must be adopted is subjective and objective. All band members affected by this legislation, whether on-reserve or off-reserve, have been affected by the legacy of stereotyping and prejudice against Aboriginal peoples. When analysing a claim that involves possibly conflicting interests of minority groups, one must be especially sensitive to their realities and experiences, and to their values, history, and identity. Thus, in the case of equality rights affecting Aboriginal people and communities, the legislation in question must be evaluated with special attention to the rights of Aboriginal peoples, the protection of the Aboriginal and treaty rights guaranteed in the Constitution, and with respect for and consideration of the cultural attachment and background of all Aboriginal women and men.

A contextual view of the people affected and the differential treatment in question leads to the conclusion that this legislative distinction conflicts with the purposes of s. 15(1). Band members living off-reserve form part of a "discrete and insular minority", defined by both race and residence, which is vulnerable and has at times not been given equal consideration or respect by the government or by others in

Canadian and Aboriginal society. They experience stereotyping and disadvantage in particular ways compared to those living on-reserve. Aboriginal women, who can be said to be doubly disadvantaged on the basis of both sex and race, are particularly affected by differential treatment of off-reserve band members.

Second, the differential treatment does not correspond with the needs, characteristics or circumstances of the claimants in a manner which respects and values their dignity and difference. The powers conferred by the *Indian Act* to the band council affect interests and needs that are shared by band members living on and off the reserve.

Third, the interests affected are fundamental, and have important societal significance from the perspective of those affected. The functions and powers of the band council affect their financial interests, the ability to return and live on the reserve, services that may be important to them, and their cultural interests. The interests affected are also significant because of the ways in which, in the past, ties between band members and the band or reserve have been involuntarily or reluctantly severed. Those affected or their parents may have left the reserve for many reasons that do not signal a lack of interest in the reserve given historical circumstances such as an often inadequate land base, a serious lack of economic opportunities and housing, and the operation of past Indian status and band membership rules imposed by Parliament. This history helps show why the interest in feeling and maintaining a sense of belonging to the band free from barriers imposed by Parliament is an important one for all band members, especially for those who are now living away from the reserve, in part, because of these policies. This analysis does not suggest that any distinction between on-reserve and off-reserve band members would conflict with the purposes of s. 15(1). The principles of substantive equality do not require that non-residents have identical voting rights to

residents, but rather a system that gives non-residents meaningful and effective participation in the voting regime of the band.

The infringement of s. 15(1) is not justified under s. 1 of the *Charter*. The objective of the restriction of voting rights to band members ordinarily resident on the reserve is to ensure that those with the most immediate and direct connection with the reserve have a special ability to control its future. This objective is pressing and substantial but the restriction fails to meet the proportionality test. While restricting the vote to those living on the reserve is rationally connected to Parliament's objective, a complete exclusion of non-residents from the right to vote, does not constitute a minimal impairment of these rights. The appellants have not shown why other solutions that would not violate s. 15(1) could not accomplish the objective.

In determining the appropriate remedy, the Court must be guided by the principles of respect for the purposes and values of the *Charter*, and respect for the role of the legislature. The finding of invalidity relates to the legislation as it applies to all bands, and, in principle, there is no reason that the remedy should be confined to the Batchewana Band. The fact that other bands may be able to demonstrate an Aboriginal right to control voting does not justify confining the remedy to the Batchewana Band. The principle of democracy underlies the Constitution and the *Charter*, and is one of the important factors governing the exercise of a court's remedial discretion. It encourages remedies that allow the democratic process of consultation and dialogue to occur. Constitutional remedies should encourage the government to take into account the interests, and views, of minorities. The appropriate remedy is a declaration that the words "and is ordinarily resident on the reserve" in s. 77(1) are invalid. The effect of this declaration should be suspended for 18 months to give Parliament the time necessary to carry out extensive consultations and respond to the needs of the different groups

affected. While, in general, litigants who have brought forward a *Charter* challenge should receive the immediate benefits of the ruling, even if the effect of the declaration is suspended, this is one of the exceptional cases where immediate relief should not be given to those who brought the action. If Parliament chooses either not to act, or to change the legislation to conform with this ruling, the respondents will receive a remedy after the period of suspension expires or when the new legislation comes into effect. In this case, there are strong administrative reasons not to grant immediate relief to the members of the Batchewana Band.

Section 25 of the *Charter* is triggered when Aboriginal or treaty rights under s. 35 of the *Constitution Act, 1982* are in question, or when the relief requested under a *Charter* challenge could abrogate or derogate from "other rights or freedoms that pertain to the aboriginal peoples of Canada". This latter phrase indicates that the rights included in s. 25 are broader than those in s. 35, and may include statutory rights. However, the fact that legislation relates to Aboriginal people cannot alone bring it within the scope of the "other rights or freedoms" included in s. 25. Because it has not been shown that s. 25 of the *Charter* applies to this case, and argument on this question was extremely limited, it would be inappropriate to articulate a general approach to s. 25.

Cases Cited

By McLachlin and Bastarache JJ.

Applied: *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497; **referred to:** *R. v. Turpin*, [1989] 1 S.C.R. 1296; *Egan v. Canada*, [1995] 2 S.C.R. 513; *Schachter v. Canada*, [1992] 2 S.C.R. 679; *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519.

By L'Heureux-Dubé J.

Applied: *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497; **referred to:** *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143; *R. v. Van der Peet*, [1996] 2 S.C.R. 507; *Bisaillon v. Keable*, [1983] 2 S.C.R. 60; *Benner v. Canada (Secretary of State)*, [1997] 1 S.C.R. 358; *Benner v. Canada (Secretary of State)*, [1997] 3 S.C.R. 389; *Egan v. Canada*, [1995] 2 S.C.R. 513; *Miron v. Trudel*, [1995] 2 S.C.R. 418; *R. v. Turpin*, [1989] 1 S.C.R. 1296; *Vriend v. Alberta*, [1998] 1 S.C.R. 493; *Attorney General of Canada v. Lavell*, [1974] S.C.R. 1349; *R. v. Oakes*, [1986] 1 S.C.R. 103; *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624; *M. v. H.*, [1999] 2 S.C.R. 3; *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 S.C.R. 877; *Schachter v. Canada*, [1992] 2 S.C.R. 679; *Osborne v. Canada (Treasury Board)*, [1991] 2 S.C.R. 69; *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713; *R. v. Seaboyer*, [1991] 2 S.C.R. 577; *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519; *R. v. Sparrow*, [1990] 1 S.C.R. 1075; *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217; *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1998] 1 S.C.R. 3.

Statutes and Regulations Cited

Act for the gradual enfranchisement of Indians, the better management of Indian affairs, and to extend the provisions of the Act 31st Victoria, Chapter 42, S.C. 1869, c. 6.

Act providing for the organisation of the Department of the Secretary of State of Canada, and for the management of Indian and Ordinance Lands, S.C. 1868, c. 42, s. 8(1).

Act to amend the Indian Act, S.C. 1985, c. 27.

Act to encourage the gradual Civilization of the Indian Tribes in the Province, and to amend the Laws respecting Indians, S. Prov. C. 1857, 20 Vict., c. 26.

Canadian Charter of Rights and Freedoms, ss. 1, 2(*d*), 15(1), 24(1), 25 [am. R.S.C., 1985, App. II, No. 46].

Constitution Act, 1982, s. 35 [am. R.S.C., 1985, App. II, No. 46], 52.

Indian Act, R.S.C. 1906, c. 81, s. 172(*b*).

Indian Act, R.S.C. 1927, c. 98, ss. 51(2), 163(*a*).

Indian Act, R.S.C., 1985, c. I-5, ss. 2(1) "band", "council of the band", "elector" [rep. & sub. c. 32 (1st Supp.), s. 1], 20(1), 38(1) [rep. & sub. c. 17 (4th Supp.), s. 2], 39(1) [*idem*, s. 3], 62, 64(1), 66(1), 69, 74(1), 75, 77 [rep. & sub. c. 32 (1st Supp.), s. 14], 81(1) [*idem*, s. 15], 83 [am. c. 17 (4th Supp.), s. 10], 85.1(1) [ad. c. 32 (1st Supp.), s. 16].

Indian Act, S.C. 1951, c. 29, ss. 2(1)(*e*), 12, 14, 76(1).

Indian Advancement Act, 1884, S.C. 1884, c. 28, s. 5.

Indian Advancement Act, R.S.C. 1886, c. 44, s. 5(1).

Indian Bands Council Elections Order, SOR/97-138.

Rules of the Supreme Court of Canada, SOR/83-74, Rule 32 [am. SOR/98-489, s. 1].

Authors Cited

Canada. Indian and Northern Affairs. *Impacts of the 1985 Amendments to the Indian Act (Bill C-31): Summary Report*. Ottawa: Indian and Northern Affairs Canada, 1990.

Canada. Royal Commission on Aboriginal Peoples. *Report of the Royal Commission on Aboriginal Peoples.* Ottawa: The Commission, 1996.

Crane, Brian A., and Henry S. Brown. *Supreme Court of Canada Practice 1998.* Scarborough, Ont.: Thomson Professional Publishing Canada, 1997.

Gilbert, Larry. *Entitlement to Indian Status and Membership Codes in Canada*. Scarborough, Ont.: Carswell, 1996.

Hogg, Peter W., and Allison A. Bushell. "The *Charter* Dialogue Between Courts and Legislatures (Or Perhaps The *Charter Of Rights* Isn't Such A Bad Thing After All)" (1997), 35 *Osgoode Hall L.J.* 75.

Manitoba. Public Inquiry into the Administration of Justice and Aboriginal People. *Report of the Aboriginal Justice Inquiry of Manitoba*, vol. 1, *The Justice System and Aboriginal People.* Winnipeg: Public Inquiry into the Administration of Justice and Aboriginal People, 1991.

Roach, Kent. *Constitutional Remedies in Canada*. Aurora, Ont.: Canada Law Book, 1994 (loose-leaf updated November 1998, release 5).

APPEAL from a judgment of the Federal Court of Appeal, [1997] 1 F.C. 689 (*sub nom. Batchewana Indian Band (Non-resident members v. Batchewana Indian Band*), 206 N.R. 85, 142 D.L.R. (4th) 122, [1997] 3 C.N.L.R. 21, [1996] F.C.J. No. 1486 (QL), affirming a judgment of the Federal Court, Trial Division, [1994] 1 F.C. 394, 67 F.T.R. 81, 107 D.L.R. (4th) 582, 18 C.R.R. (2d) 354, [1993] F.C.J. No. 896 (QL), but modifying the remedy granted. Appeal dismissed but remedy modified.

John B. Edmond, for the appellant Her Majesty the Queen.

William B. Henderson and *Derek T. Ground*, for the appellant the Batchewana Indian Band.

Gary E. Corbière and *Michael Feindel*, for the respondents.

Kent Roach and *Kimberly R. Murray*, for the intervener the Aboriginal Legal Services of Toronto Inc.

Mervin C. Phillips and *Robert A. Milen*, for the intervener the Congress of Aboriginal Peoples.

Philip P. Healey, *Martin J. Henderson* and *Catherine M. Twinn*, for the intervener the Lesser Slave Lake Indian Regional Council.

Mary Eberts and *Lucy McSweeney*, for the intervener the Native Women's Association of Canada.

Sharon D. McIvor and *Teressa Nahanee*, for the intervener the United Native Nations Society of British Columbia.

The judgment of Lamer C.J. and Cory, McLachlin, Major and Bastarache JJ. was delivered by

//*McLachlin and Bastarache JJ.*//

1 MCLACHLIN AND BASTARACHE JJ. -- We have read the reasons for judgment of Justice L'Heureux-Dubé. We believe that this case can be resolved on simpler grounds. We will therefore briefly outline the reasoning upon which we base our own decision.

2 L'Heureux-Dubé J. has set out in detail the facts in this case as well as a description of its judicial history. We adopt this factual background.

3 The narrow issue raised in this appeal is whether the exclusion of off-reserve members of an Indian band from the right to vote in band elections pursuant to s. 77(1) of the *Indian Act*, R.S.C., 1985, c. I-5, is inconsistent with s. 15(1) of the *Canadian Charter of Rights and Freedoms*. There is no need for us to describe the steps applicable to a s. 15(1) analysis. They have been affirmed with great precision by Iacobucci J. in *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497.

4 The first step is to determine whether the impugned law makes a distinction that denies equal benefit or imposes an unequal burden. The *Indian Act*'s exclusion of off-reserve band members from voting privileges on band governance satisfies this requirement.

5 The next step is to determine whether the distinction is discriminatory. The first inquiry is whether the distinction is made on the basis of an enumerated ground or a ground analogous to it. The answer to this question will be found in considering the general purpose of s. 15(1), i.e. to prevent the violation of human dignity through the imposition of disadvantage based on stereotyping and social prejudice, and to promote a society where all persons are considered worthy of respect and consideration.

6 We agree with L'Heureux-Dubé J. that Aboriginality-residence (off-reserve band member status) constitutes a ground of discrimination analogous to the enumerated grounds. However, we wish to comment on two matters: (1) the suggestion by some that the same ground may or may not be analogous depending on the circumstances; and (2) the criteria that identify an analogous ground.

7 The enumerated grounds function as legislative markers of suspect grounds associated with stereotypical, discriminatory decision making. They are a legal expression of a general characteristic, not a contextual, fact-based conclusion about whether discrimination exists in a particular case. As such, the enumerated grounds must be distinguished from a finding that discrimination exists in a particular case. Since the enumerated grounds are only indicators of suspect grounds of distinction, it follows that decisions on these grounds are not always discriminatory; if this were otherwise, it would be unnecessary to proceed to the separate examination of discrimination at the third stage of our analysis discussed in *Law*, *supra*, *per* Iacobucci J.

8 The same applies to the grounds recognized by the courts as "analogous" to the grounds enumerated in s. 15. To say that a ground of distinction is an analogous ground is merely to identify a type of decision making that is suspect because it often leads to discrimination and denial of substantive equality. Like distinctions made on enumerated grounds, distinctions made on analogous grounds may well not be discriminatory. But this does not mean that they are not analogous grounds or that they are analogous grounds only in some circumstances. Just as we do not speak of enumerated grounds existing in one circumstance and not another, we should not speak of analogous grounds existing in one circumstance and not another. The enumerated and analogous grounds stand as constant markers of suspect decision making or potential discrimination. What varies is whether they amount to discrimination in the particular circumstances of the case.

9 We therefore disagree with the view that a marker of discrimination can change from case to case, depending on the government action challenged. It seems to us that it is not the ground that varies from case to case, but the determination of whether a distinction on the basis of a constitutionally cognizable ground is discriminatory. Sex will always be a ground, although sex-based legislative distinctions may not always be discriminatory. To be sure, *R. v. Turpin*, [1989] 1 S.C.R. 1296, suggested that residence might be an analogous ground in certain contexts. But in view of the synthesis of previous cases suggested in *Law*, *supra*, it is more likely that today the same result, dismissal of the claim, would be achieved either by finding no analogous ground or no discrimination in fact going to essential human dignity.

10 If it is the intention of L'Heureux-Dubé J.'s reasons to affirm contextual dependency of the enumerated and analogous grounds, we must respectfully disagree.

If "Aboriginality-residence" is to be an analogous ground (and we agree with L'Heureux-Dubé J. that it should), then it must always stand as a constant marker of potential legislative discrimination, whether the challenge is to a governmental tax credit, a voting right, or a pension scheme. This established, the analysis moves to the third stage: whether the distinction amounts, in purpose or effect, to discrimination on the facts of the case.

11 Maintaining the distinction in *Law*, *supra*, between the enumerated or analogous ground analysis and the third-stage contextual discrimination analysis, offers several advantages. Both stages are concerned with discrimination and the violation of the presumption of the equal dignity and worth of every human being. But they approach it from different perspectives. The analogous grounds serve as jurisprudential markers for suspect distinctions. They function conceptually to identify the sorts of claims that properly fall under s. 15. By screening out other cases, they avoid trivializing the s. 15 equality guarantee and promote the efficient use of judicial resources. And they permit the development over time of a conceptual jurisprudence of the sorts of distinctions that fall under the s. 15 guarantee, without foreclosing new cases of discrimination. A distinction on an enumerated or analogous ground established, the contextual and fact-specific inquiry proceeds to whether the distinction amounts to discrimination in the context of the particular case.

12 Our second concern relates to the manner in which a new analogous ground may be identified. In our view, conflation of the second and third stages of the *Law* framework is to be avoided. To be sure, *Law* is meant to provide a set of guidelines and not a formalistic straitjacket, but the second and third stages are unquestionably distinct: the former asks whether the distinction is on the basis of an enumerated or analogous ground, the latter whether that distinction on the facts of the case affronts s.

15. Affirmative answers to both inquiries are a precondition to establishing a constitutional claim.

13 What then are the criteria by which we identify a ground of distinction as analogous? The obvious answer is that we look for grounds of distinction that are analogous or like the grounds enumerated in s. 15 — race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability. It seems to us that what these grounds have in common is the fact that they often serve as the basis for stereotypical decisions made not on the basis of merit but on the basis of a personal characteristic that is immutable or changeable only at unacceptable cost to personal identity. This suggests that the thrust of identification of analogous grounds at the second stage of the *Law* analysis is to reveal grounds based on characteristics that we cannot change or that the government has no legitimate interest in expecting us to change to receive equal treatment under the law. To put it another way, s. 15 targets the denial of equal treatment on grounds that are actually immutable, like race, or constructively immutable, like religion. Other factors identified in the cases as associated with the enumerated and analogous grounds, like the fact that the decision adversely impacts on a discrete and insular minority or a group that has been historically discriminated against, may be seen to flow from the central concept of immutable or constructively immutable personal characteristics, which too often have served as illegitimate and demeaning proxies for merit-based decision making.

14 L'Heureux-Dubé J. ultimately concludes that "Aboriginality-residence" as it pertains to whether an Aboriginal band member lives on or off the reserve is an analogous ground. We agree. L'Heureux-Dubé J.'s discussion makes clear that 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.

15 Two brief comments on this new analogous ground are warranted. First, reserve status should not be confused with residence. The ordinary "residence" decisions faced by the average Canadians should not be confused with the profound decisions Aboriginal band members make to live on or off their reserves, assuming choice is possible. The reality of their situation is unique and complex. Thus no new water is charted, in the sense of finding residence, in the generalized abstract, to be an analogous ground. Second, we note that the analogous ground of off-reserve status or Aboriginality-residence is limited to a subset of the Canadian population, while s. 15 is directed to everyone. In our view, this is no impediment to its inclusion as an analogous ground under s. 15. Its demographic limitation is no different, for example, from pregnancy, which is a distinct, but fundamentally interrelated form of discrimination from gender. "Embedded" analogous grounds may be necessary to permit meaningful consideration of intra-group discrimination.

16 Having concluded that the distinction made by the impugned law is made on an analogous ground, we come to the final step of the s. 15(1) analysis: whether the distinction at issue in this case in fact constitutes discrimination. In plain words, does the distinction undermine the presumption upon which the guarantee of equality is based — that each individual is deemed to be of equal worth regardless of the group to which he or she belongs?

17 Applying the applicable *Law* factors to this case — pre-existing disadvantage, correspondence and importance of the affected interest — we conclude that the answer to this question is yes. The impugned distinction perpetuates the historic

disadvantage experienced by off-reserve band members by denying them the right to vote and participate in their band's governance. 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. The importance of the interest affected is underlined by the findings of the Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples* (1996), vol. 1, *Looking Forward, Looking Back*, at pp. 137-91. The Royal Commission writes in vol. 4, *Perspectives and Realities,* at p. 521:

> Throughout the Commission's hearings, Aboriginal people stressed the fundamental importance of retaining and enhancing their cultural identity while living in urban areas. Aboriginal identity lies at the heart of Aboriginal peoples' existence; maintaining that identity is an essential and self-validating pursuit for Aboriginal people in cities.

And at p. 525:

> Cultural identity for urban Aboriginal people is also tied to a land base or ancestral territory. For many, the two concepts are inseparable. . . . Identification with an ancestral place is important to urban people because of the associated ritual, ceremony and traditions, as well as the people who remain there, the sense of belonging, the bond to an ancestral community, and the accessibility of family, community and elders.

18 Taking all this into account, it is clear that the s. 77(1) disenfranchisement is discriminatory. It denies off-reserve band members the right to participate fully in band governance on the arbitrary basis of a personal characteristic. It 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. This engages the dignity aspect of the s. 15 analysis and results in the denial of substantive equality.

19 The conclusion that discrimination exists at the third stage of the *Law* test does not depend on the composition of the off-reserve band members group, its relative homogeneity or the particular historical discrimination it may have suffered. It is the present situation of the group relative to that of the comparator group, on-reserve band members, that is relevant. All parties have accepted that the off-reserve group comprises persons who have chosen to live off-reserve freely, persons who have been forced to leave the reserve reluctantly because of economic and social considerations, persons who have at some point been expelled then restored to band membership through Bill C-31 (*An Act to amend the Indian Act*, S.C. 1985, c. 27), and descendants of these people. It is accepted that off-reserve band members are the object of discrimination and constitute an underprivileged group. It is also accepted that many off-reserve band members were expelled from the reserves because of policies and legal provisions which were changed by Bill C-31 and can be said to have suffered double discrimination. But Aboriginals living on reserves are subject to the same discrimination. Some were affected by Bill C-31. Some left the reserve and returned. The relevant social facts in this case are those that relate to off-reserve band members as opposed to on-reserve band members. Even if all band members living off-reserve had voluntarily chosen this way of life and were

not subject to discrimination in the broader Canadian society, they would still have the same cause of action. They would still suffer a detriment by being denied full participation in the affairs of the bands to which they would continue to belong while the band councils are able to affect their interests, in particular by making decisions with respect to the surrender of lands, the allocation of land to band members, the raising of funds and making of expenditures for the benefit of all band members. The effect of the legislation is to force band members to choose between living on the reserve and exercising their political rights, or living off-reserve and renouncing the exercise of their political rights. The political rights in question are related to the race of the individuals affected, and to their cultural identity. As mentioned earlier, the differential treatment resulting from the legislation is discriminatory because it implies that off-reserve band members are lesser members of their bands or persons who have chosen to be assimilated by the mainstream society.

20 We have been asked to consider the possible application of s. 25 of the *Charter*. This section provides that rights accorded in the *Charter* must not be construed as abrogating or derogating from the rights of Aboriginals. We agree with L'Heureux-Dubé J. that given the limited argument on this issue, it would be inappropriate to articulate general principles pertaining to s. 25 in this case. Suffice it to say that a case for its application has not been made out here.

21 Having found that s. 77(1) is discriminatory, we must address the s. 1 argument of the appellants. The applicable test was recently described by Iacobucci J. in *Egan v. Canada*, [1995] 2 S.C.R. 513, at para. 182. We are satisfied that the restriction on voting is rationally connected to the aim of the legislation, which is to give a voice in the affairs of the reserve only to the persons most directly affected by the decisions of the band council. It is admitted that although all band members are subject

to some decisions of the band council, most decisions would only impact on members living on the reserve. The restriction of s. 15 rights is however not justified under the second branch of the s. 1 test; it has not been demonstrated that s. 77(1) of the *Indian Act* impairs the s. 15 rights minimally. Even if it is accepted that some distinction may be justified in order to protect legitimate interests of band members living on the reserve, it has not been demonstrated that a complete denial of the right of band members living off-reserve to participate in the affairs of the band through the democratic process of elections is necessary. Some parties and interveners have mentioned the possibility of a two-tiered council, of reserved seats for off-reserve members of the band, of double-majority votes on some issues. The appellants argue that there are important difficulties and costs involved in maintaining an electoral list of off-reserve band members and in setting up a system of governance balancing the rights of on-reserve and off-reserve band members. But they present no evidence of efforts deployed or schemes considered and costed, and no argument or authority in support of the conclusion that costs and administrative convenience could justify a complete denial of the constitutional right. Under these circumstances, we must conclude that the violation has not been shown to be demonstrably justified.

22 With regard to remedy, the Court of Appeal was of the view that it would be preferable to grant the Batchewana Band a permanent constitutional exemption rather than to declare s. 77(1) of the *Indian Act* to be unconstitutional and without effect generally. With respect, we must disagree. The remedy of constitutional exemption has been recognized in a very limited way in this Court, to protect the interests of a party who has succeeded in having a legislative provision declared unconstitutional, where the declaration of invalidity has been suspended; see *Schachter v. Canada*, [1992] 2 S.C.R. 679, at pp. 715-17; *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519, at p. 577. We do not think this is a case where a possible expansion of the

constitutional exemption remedy should be considered. There is no evidence of special circumstances upon which this possibility might be raised. The evidence before the Court is that there are off-reserve members of most if not all Indian bands in Canada that are affected by s. 77(1) of the *Indian Act*, and no evidence of other rights that may be relevant in examining the effect of s. 77(1) with regard to any band other than the Batchewana Band. If another band could establish an Aboriginal right to restrict voting, as suggested by the Court of Appeal, that right would simply have precedence over the terms of the *Indian Act*; this is not a reason to restrict the declaration of invalidity to the Batchewana Band.

23 Where there is inconsistency between the *Charter* and a legislative provision, s. 52 of the *Constitution Act, 1982* provides that the provision shall be rendered void to the extent of the inconsistency. We would declare the words "and is ordinarily resident on the reserve" in s. 77(1) of the *Indian Act* to be inconsistent with s. 15(1) but suspend the implementation of this declaration for 18 months. We would not grant a constitutional exemption to the Batchewana Band during the period of suspension, as would normally be done according to the rule in *Schachter*. The reason for this is that in the particular circumstances of this case, it would appear to be preferable to develop an electoral process that will balance the rights of off-reserve and on-reserve band members. We have not overlooked the possibility that legislative inaction may create new problems. Such claims will fall to be dealt with on their merits should they arise.

24 We would therefore dismiss the appeal and modify the remedy by striking out the words "and is ordinarily resident on the reserve" in s. 77(1) of the *Indian Act* and suspending the implementation of the declaration of invalidity for 18 months, with costs to the respondents. We would answer the restated constitutional questions as follows:

1. Do the words "and is ordinarily resident on the reserve" contained in s. 77(1) of the *Indian Act*, R.S.C., 1985, c. I-5, contravene s. 15(1) of the *Canadian Charter of Rights and Freedoms*, either generally or with respect only to members of the Batchewana Indian Band?

   Yes, in their general application.

2. If the answer to question 1 is in the affirmative, is s. 77(1) of the *Indian Act* demonstrably justified as a reasonable limit pursuant to s. 1 of the *Canadian Charter of Rights and Freedoms*?

   No.

The reasons of L'Heureux-Dubé, Gonthier, Iacobucci and Binnie JJ. were delivered by

//*L'Heureux-Dubé J.*//

25 L'HEUREUX-DUBÉ J. – Section 77(1) of the *Indian Act*, R.S.C., 1985, c. I-5, defines voter eligibility in bands whose election regime is governed by the Act's provisions. The section requires band members to be at least 18 years old, and "ordinarily resident on the reserve" to be entitled to vote. This appeal requires a determination of whether the residence requirement violates s. 15(1) of the *Canadian Charter of Rights and Freedoms*, and, if so, whether the legislation is justified under s. 1 of the *Charter*. The appeal also requires the Court to consider whether the legislation violates s. 15 in relation only to the Batchewana Band, or whether the violation occurs generally, as well as the appropriate remedy, if any, for the violation.

I. Factual Background

26 The chiefs and councils of *Indian Act* bands, pursuant to the definition of "council of the band" in s. 2(1), are chosen following the band's custom, or, if an order in council has been made under s. 74(1), by the procedures set out in the Act, including s. 77(1). The trial judge found that the policy of the Department of Indian and Northern Affairs Canada is that a band will not be deleted from the order in council placing it under the election procedures of the *Indian Act* unless the band council and the current "electors" so approve, either through a plebiscite or at a public meeting. Certain other conditions must also be met. The most recent order in council, the *Indian Bands Council Elections Order*, SOR/97-138, which came into effect on March 4, 1997, provides that 288 bands select their leadership in accordance with the *Indian Act*. This number represents just under half of the *Indian Act* bands in Canada.

27 The respondents are members of the Batchewana Indian Band, which has three reserves near the city of Sault Ste. Marie, Ontario: the Rankin, Goulais Bay, and Obadjiwan reserves. The Batchewana Band is included in the 1997 order in council, its councillors are not chosen in electoral sections, and voter eligibility for its elections is therefore governed by s. 77(1) of the *Indian Act*. The respondent John Corbiere resides on the Rankin Reserve, while the other three respondents are members of the Batchewana Band who do not live on any of the reserves. They take this action on their own behalf and on behalf of all non-resident members of the band. Of the 1,426 members of the band who were registered in 1991, 958 members, or 67.2 percent, lived off-reserve. The Batchewana Band's history, like that of many First Nations, involved the loss of most of its traditional land base. Prior to 1850, the Batchewana and other bands of the Ojibway occupied large areas of land along the eastern and northern shores of Lake Huron, the northern shore of Lake Superior, and various areas inland. In 1850, as part of the Robinson-Huron Treaty, this land was surrendered to the Crown and the

Batchewana obtained a reserve of 246 square miles. In 1859, the band surrendered all of this reserve through the Pennefather treaty, leaving it only with Whitefish Island, a small island in the St. Marys River. Under this treaty, the band's members were promised that the band would be given land on the reserve of the Garden River Band near Sault Ste. Marie. This promise was never fulfilled. For 20 years, therefore, the band owned only approximately 15 acres of land.

28 After 1879, the band began to re-acquire land. In that year, the band council purchased what is now the Goulais Bay Reserve north of Sault Ste. Marie, and its size was increased by a donation from the Roman Catholic Church in 1885. When Whitefish Island was expropriated by three railway companies in 1900 and 1902, the Goulais Bay Reserve became the band's only land. Until the 1960s or early 1970s, therefore, most band members lived on the Garden River Reserve belonging to another band. In the 1940s, the band council, made up of and elected by non-residents, assembled land which became the Rankin Reserve in 1952. The main portion of this land is surrounded by the city of Sault Ste. Marie, and portions of it also border the St. Marys River and the Garden River Reserve. The third reserve, the Obadjiwan Reserve, which became part of the Batchewana Band's land base in 1962, is quite small and, like the Goulais Bay Reserve, is located in a rural area north of Sault Ste. Marie. The largest percentage of those who live on one of the band's reserves live on the Rankin Reserve.

29 Residence on the reserve was required, by law, for band members to be eligible to vote for band councils, beginning with *The Indian Advancement Act, 1884*, S.C. 1884, c. 28, s. 5. This requirement was also contained in *The Indian Advancement Act*, R.S.C. 1886, c. 44, s. 5(1), the *Indian Act*, R.S.C. 1906, c. 81, s. 172(*b*), and the *Indian Act*, R.S.C. 1927, c. 98, s. 163(*a*). In addition, band members were required to be over 21 and male. To vote on the surrender or release of land, historically, the

requirement was not as strict, requiring, for example, residence "on or near" the lands in question (*An Act providing for the organisation of the Department of the Secretary of State of Canada, and for the management of Indian and Ordinance Lands*, S.C. 1868, c. 42, s. 8(1)) and later, requiring voters on these questions to be resident "on or near" and "interested in" the reserve (*Indian Act*, R.S.C. 1927, c. 98, s. 51(2)). Voter eligibility provisions similar to the present ones, though they provided for a minimum age of 21 years, were introduced in *The Indian Act*, S.C. 1951, c. 29, ss. 2(1)(*e*) and 76(1). From the first election in 1902 until 1962, the residency requirement was not enforced in Batchewana Band elections. Since that time, only band members living on one of the three reserves have been allowed to vote.

30 The number of Batchewana Band members has risen dramatically since 1985, and at the same time the percentage of band members living on the reserves has dramatically fallen. In 1985, 71.1 percent of the 543 registered members of the band lived on-reserve. In 1991, only 32.8 percent of the 1,426 registered members lived on the reserves. The parties agree that this trend is continuing. This dramatic increase in the number of off-reserve members occurred largely because of the passage of *An Act to amend the Indian Act*, S.C. 1985, c. 27 ("Bill C-31"), by Parliament. This legislation restored Indian status to most of those who had lost this status because of the operation of certain sections of the *Indian Act*, as well as to the descendants of such people. Prior to this legislation, women with Indian status who married non-Indian men lost their status, and their children did not get status, though men who married non-Indian women, and their children, maintained Indian status. Registered Indians who voluntarily "enfranchised" also lost Indian status. For the Batchewana Band, approximately 85 percent of the growth in band membership consisted of people who were reinstated to Indian status and band membership because of Bill C-31. Similar trends may be seen in many other bands.

II. Relevant Constitutional, Statutory, and Regulatory Provisions

31 *Canadian Charter of Rights and Freedoms*

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

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.

24. (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

25. The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including

(*a*) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and

(*b*) any rights or freedoms that now exist by way of land claims agreements or may be so acquired.

Constitution Act, 1982

35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

(2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada.

(3) For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.

(4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.

52. (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

Indian Act, R.S.C., 1985, c. I-5

2. (1) In this Act,

"band" means a body of Indians

(*a*) for whose use and benefit in common, lands, the legal title to which is vested in Her Majesty, have been set apart before, on or after September 4, 1951,

(*b*) for whose use and benefit in common, moneys are held by Her Majesty, or

(*c*) declared by the Governor in Council to be a band for the purposes of this Act;

"council of the band" means

(*a*) in the case of a band to which section 74 applies, the council established pursuant to that section,

(*b*) in the case of a band to which section 74 does not apply, the council chosen according to the custom of the band, or, where there is no council, the chief of the band chosen according to the custom of the band;

"elector" means a person who

(*a*) is registered on a Band List,

(*b*) is of the full age of eighteen years, and

(*c*) is not disqualified from voting at band elections;

20. (1) No Indian is lawfully in possession of land in a reserve unless, with the approval of the Minister, possession of the land has been allotted to him by the council of the band.

38. (1) A band may absolutely surrender to Her Majesty, conditionally or unconditionally, all of the rights and interests of the band and its members in all or part of a reserve.

39. (1) An absolute surrender or a designation is void unless
(*a*) it is made to Her Majesty;

(*b*) it is assented to by a majority of the electors of the band

(i) at a general meeting of the band called by the council of the band,

(ii) at a special meeting of the band called by the Minister for the purpose of considering a proposed absolute surrender or designation, or

(iii) by a referendum as provided in the regulations; and

(*c*) it is accepted by the Governor in Council.

64. (1) With the consent of the council of a band, the Minister may authorize and direct the expenditure of capital moneys of the band

(*a*) to distribute per capita to the members of the band an amount not exceeding fifty per cent of the capital moneys of the band derived from the sale of surrendered lands;

(*b*) to construct and maintain roads, bridges, ditches and watercourses on reserves or on surrendered lands;

(*c*) to construct and maintain outer boundary fences on reserves;

(*d*) to purchase land for use by the band as a reserve or as an addition to a reserve;

(*e*) to purchase for the band the interest of a member of the band in lands on a reserve;

(*f*) to purchase livestock and farm implements, farm equipment or machinery for the band;

(*g*) to construct and maintain on or in connection with a reserve such permanent improvements or works as in the opinion of the Minister will be of permanent value to the band or will constitute a capital investment;

(*h*) to make to members of the band, for the purpose of promoting the welfare of the band, loans not exceeding one-half of the total value of

(i) the chattels owned by the borrower, and

(ii) the land with respect to which he holds or is eligible to receive a Certificate of Possession,

and may charge interest and take security therefor;

(*i*) to meet expenses necessarily incidental to the management of lands on a reserve, surrendered lands and any band property;

(*j*) to construct houses for members of the band, to make loans to members of the band for building purposes with or without security and to provide for the guarantee of loans made to members of the band for building purposes; and

(*k*) for any other purpose that in the opinion of the Minister is for the benefit of the band.

66. (1) With the consent of the council of a band, the Minister may authorize and direct the expenditure of revenue moneys for any purpose that in the opinion of the Minister will promote the general progress and welfare of the band or any member of the band.

69. (1) The Governor in Council may by order permit a band to control, manage and expend in whole or in part its revenue moneys and may amend or revoke any such order.

74. (1) Whenever he deems it advisable for the good government of a band, the Minister may declare by order that after a day to be named therein the council of the band, consisting of a chief and councillors, shall be selected by elections to be held in accordance with this Act.

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.

(2) No person may be a candidate for election as chief or councillor unless his nomination is moved and seconded by persons who are themselves eligible to be nominated.

77. (1) A member of a band who has attained the age of eighteen years and is ordinarily resident on the reserve is qualified to vote for a person nominated to be chief of the band and, where the reserve for voting purposes consists of one section, to vote for persons nominated as councillors.

(2) A member of a band who is of the full age of eighteen years and is ordinarily resident in a section that has been established for voting purposes is qualified to vote for a person nominated to be councillor to represent that section.

81. (1) The council of a band may make by-laws not inconsistent with this Act or with any regulation made by the Governor in Council or the Minister, for any or all of the following purposes, namely:

(*a*) to provide for the health of residents on the reserve and to prevent the spreading of contagious and infectious diseases;

(*b*) the regulation of traffic;

(*c*) the observance of law and order;

(*d*) the prevention of disorderly conduct and nuisances;

(*e*) the protection against and prevention of trespass by cattle and other domestic animals, the establishment of pounds, the appointment of pound-keepers, the regulation of their duties and the provision for fees and charges for their services;

(*f*) the construction and maintenance of watercourses, roads, bridges, ditches, fences and other local works;

(*g*) the dividing of the reserve or a portion thereof into zones and the prohibition of the construction or maintenance of any class of buildings or the carrying on of any class of business, trade or calling in any zone;

(*h*) the regulation of the construction, repair and use of buildings, whether owned by the band or by individual members of the band;

(*i*) the survey and allotment of reserve lands among the members of the band and the establishment of a register of Certificates of Possession and Certificates of Occupation relating to allotments and the setting apart of reserve lands for common use, if authority therefor has been granted under section 60;

(*j*) the destruction and control of noxious weeds;

(*k*) the regulation of bee-keeping and poultry raising;

(*l*) the construction and regulation of the use of public wells, cisterns, reservoirs and other water supplies;

(*m*) the control or prohibition of public games, sports, races, athletic contests and other amusements;

(*n*) the regulation of the conduct and activities of hawkers, peddlers or others who enter the reserve to buy, sell or otherwise deal in wares or merchandise;

(*o*) the preservation, protection and management of fur-bearing animals, fish and other game on the reserve;

(*p*) the removal and punishment of persons trespassing on the reserve or frequenting the reserve for prohibited purposes;

(*p*.1) the residence of band members and other persons on the reserve;

(*p*.2) to provide for the rights of spouses and children who reside with members of the band on the reserve with respect to any matter in relation to which the council may make by-laws in respect of members of the band;

(*p*.3) to authorize the Minister to make payments out of capital or revenue moneys to persons whose names were deleted from the Band List of the band;

(*p*.4) to bring subsection 10(3) or 64.1(2) into effect in respect of the band;

(*q*) with respect to any matter arising out of or ancillary to the exercise of powers under this section; and

(*r*) the imposition on summary conviction of a fine not exceeding one thousand dollars or imprisonment for a term not exceeding thirty days, or both, for violation of a by-law made under this section.

83. (1) Without prejudice to the powers conferred by section 81, the council of a band may, subject to the approval of the Minister, make by-laws for any or all of the following purposes, namely,

(*a*) subject to subsections (2) and (3), taxation for local purposes of land, or interests in land, in the reserve, including rights to occupy, possess or use land in the reserve;

(*a*.1) the licensing of businesses, callings, trades and occupations;

(*b*) the appropriation and expenditure of moneys of the band to defray band expenses;

(*c*) the appointment of officials to conduct the business of the council, prescribing their duties and providing for their remuneration out of any moneys raised pursuant to paragraph (*a*);

(*d*) the payment of remuneration, in such amount as may be approved by the Minister, to chiefs and councillors, out of any moneys raised pursuant to paragraph (*a*);

(*e*) the enforcement of payment of amounts that are payable pursuant to this section, including arrears and interest;

(*e*.1) the imposition and recovery of interest on amounts that are payable pursuant to this section, where those amounts are not paid before they are due, and the calculation of that interest;

(*f*) the raising of money from band members to support band projects; and

(*g*) with respect to any matter arising out of or ancillary to the exercise of powers under this section.

(2) An expenditure made out of moneys raised pursuant to subsection (1) must be so made under the authority of a by-law of the council of the band.

85.1 (1) Subject to subsection (2), the council of a band may make by-laws

(*a*) prohibiting the sale, barter, supply or manufacture of intoxicants on the reserve of the band;

(*b*) prohibiting any person from being intoxicated on the reserve;

(*c*) prohibiting any person from having intoxicants in his possession on the reserve; and

(*d*) providing for exceptions to any of the prohibitions established pursuant to paragraph (*b*) or (*c*).

Rules of the Supreme Court of Canada, SOR/ 83-74

32. (1) Within 60 days after the filing of a notice of appeal, a party to an appeal who intends to raise a constitutional question shall apply to the Chief Justice or a judge to have the constitutional question stated, where the appeal raises a question of

(*a*) the constitutional validity or the constitutional applicability of a statute of the Parliament of Canada or of a legislature of a province or of regulations made thereunder;

(*b*) the inoperability of a statute of the Parliament of Canada or of a legislature of a province or of regulations made thereunder; or

(*c*) the constitutional validity or the constitutional applicability of a common law rule.

. . .

(4) The Chief Justice or a judge may state the question and direct service of the question on the Attorney General of Canada and the attorneys general of all the provinces and the ministers of justice of the governments of the territories within the time fixed by the Chief Justice or judge, together with notice that any of them who intends to intervene, whether or not the attorney general or minister of justice wishes to be heard, shall, within a time fixed in the notice that is not less than four weeks after the date of the

notice, file a notice of intervention in Form C and serve that notice upon the parties.

III. Judgments

A. *Federal Court --Trial Division*, [1994] 1 F.C. 394

32 The only defendant represented at trial was Her Majesty the Queen: the Batchewana Band took no part in the trial. Strayer J. (as he then was) reviewed the history of the Batchewana Band's land holdings, and the structure of the *Indian Act* provisions setting out a band council's powers. He then considered the test for s. 15(1) set out by this Court in *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143. He held that the denial of the vote to non-residents of the Batchewana Band had a negative impact on those not ordinarily resident on the reserve. He noted the historical difficulties of the band in maintaining an adequate land base, and therefore the inability of many of those who wished to live on the reserve to do so. He also noted that many of the band members who live off-reserve were restored to band membership because of Bill C-31. He emphasized that such people were mostly women, or the children of women who had been denied Indian status for marrying non-Indian men, and that others had lost their status for race-based reasons, having decided to enfranchise and exercise the full rights of a Canadian citizen. Strayer J. concluded that those not ordinarily resident on the Batchewana reserves therefore fell under an analogous ground.

33 He then examined the nature and purpose of the legislation, and held that he was required to determine whether it made distinctions based on irrelevant personal differences. He observed that certain of the powers of the band council relate purely to the administration of the reserve: for example, those powers enumerated in s. 81(1) of the *Indian Act*. He held that the evidence showed that most of the operational funding

provided by the government and spent by the band council relates to local purposes, although he acknowledged that in certain aspects the disbursement of these funds affects non-residents. He found that for the powers of the band council that relate to the governance of the territory of the reserve, residency is an appropriate way to determine the right to vote.

34 He noted, however, that the voting restrictions in s. 77(1) also affect other decisions that do not relate only to the interests of reserve residents, but rather to the use and disposition of communal property. He held that for such matters, residency is an irrelevant personal characteristic. He identified three provisions, in particular, where all band members' interests are implicated and which are affected by s. 77(1): votes to surrender reserve lands under s. 39(1)(*b*), and the powers of the band council under ss. 64(1) and 66(1). In short, Strayer J. concluded that as it related to the disposition of reserve lands or Indian monies held for the band as a whole, the definition in s. 77(1) violated s. 15(1), but for functions relating solely to governance of the reserve territory, s. 15(1) was not violated.

35 Strayer J. then turned to justification under s. 1. He held that for the functions affecting all band members, there was no appropriate justification advanced as to why only certain band members should have control over the property belonging to all band members. He found that, given his finding that s. 15(1) was infringed, it was not necessary to consider the respondents' claim under s. 2(*d*), freedom of association.

36 Strayer J. issued a declaration that s. 77(1) violates s. 15(1) of the *Charter*, "insofar as it has the effect of preventing members of the Batchewana Indian Band who are not ordinarily resident on any of that band's reserves from participating in the giving or refusal of assent of the band pursuant to paragraph 39(1)(b) of that Act or from being

represented by persons for whom they have an opportunity to vote in the giving of consent on behalf of the band to the expenditure of Indian moneys under subsections 64(1) and 66(1) of the *Indian Act*", and suspended the order until July 1, 1994. In his reasons, he noted that the declaration was confined to the Batchewana Band because the pleadings and the evidence related only to that band. He also noted that though he had described the effects of the legislation which were impermissible, the declaration was for the invalidity of s. 77(1) in its entirety.

B. *Federal Court of Appeal*, [1997] 1 F.C. 689

37 The judgment of the Court of Appeal panel consisting of Stone, Linden, and McDonald JJ.A. was delivered by the court. The court first considered arguments of the intervener the Lesser Slave Lake Indian Regional Council that the right to control a band's own membership and the incidents of that membership, including voting rights, constituted an Aboriginal right guaranteed by s. 35 of the *Constitution Act, 1982*. The court noted that under the test for Aboriginal rights as set out in *R. v. Van der Peet*, [1996] 2 S.C.R. 507, this determination depends on the particular Aboriginal community claiming the right, and also requires evidence that a practice was integral to the distinctive culture of the Aboriginal community before the time of contact with Europeans. The court found that there was no evidence in the record that would demonstrate that the Batchewana Band had a s. 35 Aboriginal right to exclude certain members from voting, since elections for the band had only been held since 1902. The court then addressed the possibility that s. 25 of the *Charter* might affect the s. 15 analysis. It held that since no s. 35 right was involved, and since the *Indian Act* system of elections could not be considered one of the "other rights or freedoms that pertain to the aboriginal peoples of Canada", s. 25 was not triggered.

38 The court then turned to the analysis under s. 15(1). It held that the denial of the vote to off-reserve band members constituted a denial of a benefit, since the right to vote is central to having a voice in the democratic governance of the band of which they are members. The court stated that the benefit which was denied related not only to the powers specified in Strayer J.'s judgment, but also to the other powers of the band council: to make by-laws under s. 81(1) of the *Indian Act*. It noted that many of the council's s. 81(1) powers could affect both on-reserve and off-reserve band members.

39 The court examined whether the denial of this benefit was discriminatory. It began with an examination of whether non-residency on a reserve could constitute an analogous ground. The court noted that the question of whether an analogous ground exists is a contextual one, which must be determined by examining whether distinctions on that ground could affect the human dignity of the claimant. It held that a stereotype had been attached to those living off-reserve, since many had characterized them as being unworthy of trust in using their electoral power for the benefit of the band. The court emphasized that many in this group had suffered from historical disadvantage, because large numbers of them were deprived of band membership because of discriminatory legislation that was later remedied by Bill C-31. Finally, it held that off-reserve band members are generally politically powerless. Based on these factors, it determined that an analogous ground was at issue. The court also concluded that the distinction was discriminatory, since it engaged the purpose of s. 15(1). It stressed that the distinction was discriminatory in relation to all powers of the band, not only those not related to the governance of the reserve territory.

40 The court held that the legislation was not justified under s. 1. It concluded that the goal of the legislation is "to establish a voting regime in which all those who are affected by the outcome of the vote are entitled to participate" (para. 59). The court

decided that there was no rational connection between the legislation and this objective, since non-resident members are bound by the decisions of the chief and council, in relation to all the council's powers.

41 The court determined that the appropriate remedy in this case was a constitutional exemption. It held that this was appropriate "[i]n the unusual and special circumstances of this case" (para. 76). This order was warranted, the court decided, because other bands might be able to demonstrate an Aboriginal right under s. 35 to exclude non-residents from voting. If a s. 35 Aboriginal right were demonstrated, the court suggested, the interaction of s. 25 with s. 15(1) would mean that the analysis would proceed differently. It also noted that in the context of other bands, more justificatory evidence under s. 1 might be presented. Concluding that Aboriginal rights should be determined on a case-by-case basis, it found that the exemption should be granted under the court's powers under s. 24(1) of the *Charter*. The court determined that the declaration of invalidity would not be suspended.

42 By order of Stone J.A., the judgment of the Court of Appeal was stayed pending a decision by this Court on leave to appeal: (1996), 206 N.R. 122. By order of Gonthier J. on November 24, 1998, a further stay was granted until judgment was rendered by this Court.

IV. Issues

43 Two constitutional questions have been stated in this appeal:

1. Do the words "and is ordinarily resident on the reserve" contained in s. 77(1) of the *Indian Act*, R.S.C., 1985, c. I-5, contravene s. 15(1) of the *Canadian Charter of Rights and Freedoms* with respect only to members of the Batchewana Indian Band?

2. If the answer to question 1 is in the affirmative, is s. 77(1) of the *Indian Act* a reasonable limit on the rights of members of the Batchewana Indian Band, and so not inconsistent with the *Constitution Act, 1982*?

44 Five principal issues must be determined:

(1) the approach to be taken to the s. 15 analysis in this case, given that the legislation was alleged to violate the *Charter* only in the circumstances of the Batchewana Band;

(2) the effect of s. 25 of the *Charter* and s. 35 of the *Constitution Act, 1982* on the s. 15(1) analysis in this case;

(3) whether the impugned legislation violates s. 15(1);

(4) if s. 15(1) is infringed, whether it is justified under s. 1 of the *Charter*;

(5) if necessary, the appropriate remedy.

V. Analysis

A. *Should the Section 15 Analysis Focus Only on the Batchewana Band?*

45 A preliminary question is whether the s. 15(1) analysis should focus on the Batchewana Band in particular, or on the legislation as it applies in general, to all bands affected by s. 77(1). At trial, the focus was on the particular situation of the Batchewana

Band, since the respondents asked only for a constitutional exemption applying to their band.

46 However, examining only the circumstances of the Batchewana Band in the s. 15(1) analysis would be to presume that the appropriate remedy is a constitutional exemption. As the guardians of the rights in the *Charter*, it is courts' duty to ensure that a remedy is given that is commensurate with the extent of the violation that has been found, and to determine the appropriate remedy. Before considering any question of constitutional exemption, therefore, the general application of the legislation, and the available evidence relating to that general application, should be examined. Only if there is no evidence of general invalidity will it be necessary to consider the specific circumstances of the Batchewana Band and, therefore, the doctrine of constitutional exemption.

47 The appellants argue that such an analysis would be improper because of the manner in which this case was presented at trial, which addressed specifically the circumstances of the Batchewana Band. However, the plaintiffs' statement of claim, in its allegations relating to the equality claim, alleged discrimination on the face of the legislation, and did not relate this only to the particular context of the Batchewana Band. Therefore, discrimination in s. 77(1) as it applies generally has been at issue since the beginning of these proceedings. Issues surrounding the question of the constitutionality of the legislation as it applies generally have been addressed by the parties and by the interveners in their submissions before this Court, and a general analysis was conducted by the Court of Appeal in its decision. Therefore, an analysis of the constitutionality of the law in its general application will not take any parties by surprise.

48 The constitutional questions, as formulated, address only the situation of the members of the Batchewana Band. It must therefore be determined whether considering the application of the legislation in a general sense and the possibility of a remedy other than constitutional exemption is foreclosed by the formulation of the constitutional questions. When the constitutional validity or applicability of legislation is challenged, a constitutional question must be stated by the Chief Justice or a judge of this Court, pursuant to Rule 32(1) of the *Rules of the Supreme Court of Canada*, SOR/83-74, though the parties are "generally left wide latitude" in formulating the questions which will be stated: *Bisaillon v. Keable*, [1983] 2 S.C.R. 60, at p. 71. However, this Court has held that it is not bound by the precise wording of the constitutional question. For example, in *Bisaillon* at p. 72, this Court reworded one of the stated constitutional questions to make it more narrow. In *Benner v. Canada (Secretary of State)*, [1997] 1 S.C.R. 358, the parties were unable to agree on the provisions implicated by a constitutional challenge and therefore all of the affected provisions were not included in the constitutional questions. In its formal judgment, reported at [1997] 3 S.C.R. 389, the Court subsequently made an order affecting the constitutional applicability of several sections of the challenged legislation not included in the constitutional question as stated.

49 In B. A. Crane and H. S. Brown, *Supreme Court of Canada Practice 1998* (1997), at p. 225, the authors note that the purpose of stating constitutional questions is to ensure that the Attorney General of Canada, the attorneys general of the provinces, and the ministers of justice of the territories are made aware of constitutional challenges as required by Rule 32(4), so that they may decide whether or not to exercise their right to intervene. I agree with this characterization of the purpose of the provision, and would add that it also constitutes a signal to the parties and other potential interveners about the constitutional issues being addressed. In my opinion, the jurisdiction of the Court to restate constitutional questions, or make a declaration of invalidity broader than

that contained within them, is appropriately exercised when doing so does not, in substance, deprive attorneys general of their right to notice of the fact that the constitutionality of a given legislative provision is at issue in this Court, or deprive those who have a stake in the outcome of the opportunity to argue the substantive issues relating to this question.

50 Here, the constitutional question that was served on the appropriate parties pursuant to Rule 32, though it did contain the words "with respect only to members of the Batchewana Indian Band", constituted notice to all attorneys general that the constitutional validity of the residency requirement for voting contained in the *Indian Act* was at issue. The remedy preferred by the federal Crown in this case, if there is to be one, is for a general declaration to be made rather than a constitutional exemption, and this was argued in its factum and oral argument. As emphasized above, the issues relating to the general application of s. 77(1) were argued and discussed before us and in the Federal Court of Appeal by the parties and by interveners. Despite the wording of the question, it was clear that this Court, when analysing the situation of the Batchewana Band, might set down principles that would apply to other bands. I do not believe, therefore, that any substantive prejudice has been caused to attorneys general or anyone else by the wording of the question, or that they would reasonably have made a different decision about exercising their right to intervene. In the circumstances, therefore, I will restate the constitutional questions as follows:

1. Do the words "and is ordinarily resident on the reserve" contained in s. 77(1) of the *Indian Act*, R.S.C., 1985, c. I-5, contravene s. 15(1) of the *Canadian Charter of Rights and Freedoms*, either generally or with respect only to members of the Batchewana Indian Band?

2. If the answer to question 1 is in the affirmative, is s. 77(1) of the *Indian Act* demonstrably justified as a reasonable limit pursuant to s. 1 of the *Canadian Charter of Rights and Freedoms*?

B. *Sections 25 and 35*

51 The effects of s. 25 of the *Charter* and s. 35 of the *Constitution Act, 1982*, are raised by the intervener the Lesser Slave Lake Indian Regional Council (the "Council"), but this issue was not addressed by either of the appellants or by the respondents. The Council argues that the restriction of voting rights to those who are ordinarily resident on the reserve constitutes a codification of Aboriginal or treaty rights under s. 35, or falls under the "other rights or freedoms" protected under s. 25, and that, therefore, s. 25 requires that s. 15 be interpreted so as not to abrogate or derogate from those rights in any way. It suggests that for this reason the impugned provisions are shielded from review. In contrast, the intervener the Native Women's Association of Canada argues that s. 25 guides the interpretation of other *Charter* rights so that the rights of Aboriginal peoples cannot be challenged by non-Aboriginal people, but it does not shield Aboriginal rights from challenge by members of the Aboriginal community.

52 The arguments of the Council do not, in my opinion, indicate that the relief requested by the respondents could "abrogate or derogate" from the rights included in s. 25. Section 25 is triggered when s. 35 Aboriginal or treaty rights are in question, or when the relief requested under a *Charter* challenge could abrogate or derogate from "other rights or freedoms that pertain to the aboriginal peoples of Canada". This latter phrase indicates that the rights included in s. 25 are broader than those in s. 35, and may include statutory rights. However, the fact that legislation relates to Aboriginal people cannot alone bring it within the scope of the "other rights or freedoms" included in s. 25. The Council argues that s. 77(1) protects or recognizes rights guaranteed by s. 35 including Aboriginal title, treaty rights, and Aboriginal rights of self-government. It also alleges that s. 77(1) is a statutory right that protects bands' self-determination and self-government. The Council's arguments relating to s. 25 rest, in large part, on the assertion that Bill C-31

violates Aboriginal and treaty rights, a matter which is not before this Court and in relation to which no evidence has been presented. In my opinion, therefore, the submissions of the Council do not show that s. 25 is triggered in this case.

53 Because it has not been shown to apply, and argument on this question was extremely limited, it would be inappropriate to articulate, in this case, a general approach to s. 25. In particular, I will not decide how the words "shall not be construed so as to abrogate or derogate" affect the analysis under other *Charter* provisions when the section is triggered, or whether s. 25 "shields" the rights it includes from the application of the *Charter*. I also find it unnecessary to decide the scope of the "other rights or freedoms" protected by the section. These questions will be determined when the issues directly arise and the Court has heard full argument on them.

54 I emphasize, however, that as I will discuss below, the contextual approach to s. 15 requires that the equality analysis of provisions relating to Aboriginal people must always proceed with consideration of and respect for Aboriginal heritage and distinctiveness, recognition of Aboriginal and treaty rights, and with emphasis on the importance for Aboriginal Canadians of their values and history.

C. *Section 15(1) Analysis*

(1) The Section 15(1) Framework

55 In *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497, Iacobucci J. discussed the framework within which s. 15(1) analysis must be carried out. As set out in para. 88 of *Law*, an inquiry into whether legislation violates s. 15(1) involves three broad inquiries:

(A) Does the impugned law (a) draw a formal distinction between the claimant and others on the basis of one or more personal characteristics, or (b) fail to take into account the claimant's already disadvantaged position within Canadian society resulting in substantially differential treatment between the claimant and others on the basis of one or more personal characteristics?

(B) Is the claimant subject to differential treatment based on one or more enumerated and analogous grounds?

and

(C) Does the differential treatment discriminate, by imposing a burden upon or withholding a benefit from the claimant in a manner which reflects the stereotypical application of presumed group or personal characteristics, or which otherwise has the effect of perpetuating or promoting the view that the individual is less capable or worthy of recognition or value as a human being or as a member of Canadian society, equally deserving of concern, respect, and consideration?

56 At all three of these stages, it must be recognized that the focus of the inquiry is purposive and contextual (see, e.g., *Law*, *supra*, at para. 41). A court considering a discrimination claim must examine the legislative, historical, and social context of the distinction, the reality and experiences of the individuals affected by it, and the purposes of s. 15(1).

(2) First Stage: Differential Treatment

57 The first stage of inquiry is easily satisfied in the present case. Section 77(1) of the *Indian Act* draws a distinction between band members who live on-reserve and those who live off-reserve, by excluding the latter from the definition of "elector" within the band. This constitutes differential treatment.

(3) Second Stage: Analogous Grounds

58 The differential treatment in this case is based on the status of holding membership in an *Indian Act* band, but living off that band's reserve. This combination of traits does not fall under one of the enumerated or already recognized analogous grounds. The fundamental consideration at the second stage, if the ground is not enumerated or already recognized as analogous, is whether recognition of the basis of differential treatment as an analogous ground would further the purposes of s. 15(1): *Law*, *supra*, at para. 93. These purposes are, as stated at para. 51 of *Law*:

> [T]o prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice, and to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally capable and equally deserving of concern, respect and consideration.

59 The analysis at the analogous grounds stage involves considering whether differential treatment of those defined by that characteristic or combination of traits has the potential to violate human dignity in the sense underlying s. 15(1): *Egan v. Canada*, [1995] 2 S.C.R. 513, at para. 171, *per* Cory J. In *Law*, the concept of human dignity as it relates to s. 15(1) was described by Iacobucci J., at para. 53, as follows:

> Human dignity means that an individual or group feels self-respect and self-worth. It is concerned with physical and psychological empowerment and integrity. Human dignity is harmed by unfair treatment premised on personal traits or circumstances which do not relate to individual needs, capacities, or merits. It is enhanced by laws which are sensitive to the needs, capacities, and merits of different individuals, taking into account the context underlying their differences. Human dignity is harmed when individuals and groups are marginalized, ignored, or devalued, and is enhanced when laws recognize the full place of all individuals and groups within Canadian society. Human dignity within the meaning of the equality guarantee does not relate to the status or position of an individual in society *per se*, but rather concerns the manner in which a person legitimately feels when confronted with a particular law.

The analogous grounds inquiry, like the other two stages of analysis, must be undertaken in a purposive and contextual manner: *Law*, *supra*, at para. 41. The "nature and situation of the individual or group at issue, and the social, political, and legal history of Canadian society's treatment of that group" must be considered: *Law*, *supra*, at para. 93. As stated by Wilson J. in *Andrews, supra*, at p. 152, cited with approval in *Law* at para. 29, the determination of whether a ground qualifies as analogous under s. 15(1):

> . . . is not to be made only in the context of the law which is subject to challenge but rather in the context of the place of the group in the entire social, political and legal fabric of our society. While legislatures must inevitably draw distinctions among the governed, such distinctions should not bring about or reinforce the disadvantage of certain groups and individuals by denying them the rights freely accorded to others.

60 Various contextual factors have been recognized in the case law that may demonstrate that the trait or combination of traits by which the claimants are defined has discriminatory potential. An analogous ground may be shown by the fundamental nature of the characteristic: whether from the perspective of a reasonable person in the position of the claimant, it is important to their identity, personhood, or belonging. The fact that a characteristic is immutable, difficult to change, or changeable only at unacceptable personal cost may also lead to its recognition as an analogous ground: *Miron v. Trudel*, [1995] 2 S.C.R. 418, at para. 148; *Vriend v. Alberta*, [1998] 1 S.C.R. 493, at para. 90. It is also central to the analysis if those defined by the characteristic are lacking in political power, disadvantaged, or vulnerable to becoming disadvantaged or having their interests overlooked: *Andrews*, *supra*, at p. 152; *Law*, *supra*, at para. 29. Another indicator is whether the ground is included in federal and provincial human rights codes: *Miron*, *supra*, at para. 148. Other criteria, of course, may also be considered in subsequent cases, and none of the above indicators are necessary for the recognition of an analogous ground or combination of grounds: *Miron*, *supra*, at para. 149.

61 I should also note that if indicia of an analogous ground are not present in general, or among a certain group in Canadian society, they may nevertheless be present in another social or legislative context, within a different group in Canadian society, or in a given geographic area, to give only a few examples. Here, to illustrate, the nature of the decisions band members make about whether to live on or off a reserve are different from those made by many other Canadians in relation to their place of residence. So are other factors related to the analogous grounds analysis that still affect them. The second stage must therefore be flexible enough to adapt to stereotyping, prejudice, or denials of human dignity and worth that might occur in specific ways for specific groups of people, to recognize that personal characteristics may overlap or intersect (such as race, band membership, and place of residence in this case), and to reflect changing social phenomena or new or different forms of stereotyping or prejudice. As this Court unanimously held in *Law*, *supra*, at para. 73: "The possibility of new forms of discrimination denying essential human worth cannot be foreclosed".

62 Here, several factors lead to the conclusion that recognizing off-reserve band member status as an analogous ground would accord with the purposes of s. 15(1). 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. It involves choosing whether to live with other members of the band to which they belong, or apart from them. It relates to a community and land that have particular social and cultural significance to many or most band members. Also critical is the fact that as discussed below during the third stage of analysis, band members living off-reserve have generally experienced disadvantage, stereotyping, and prejudice, and form part of a "discrete and insular minority" defined by race and place of residence. In addition, 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. For these reasons, the second stage of analysis has been satisfied, and "off-reserve band member status" is an analogous ground. It will hereafter be recognized as an analogous ground in any future case involving this combination of traits. I note that in making this determination, I make no findings about "residence" as an analogous ground in contexts other than as it affects band members who do not live on the reserve of the band to which they belong.

(4) Third Stage of Analysis

63 At the third stage, the appropriate focus is on how, in the context of the legislation and Canadian society, the particular differential treatment impacts upon the people affected by it. This requires examining whether the legislation conflicts with the purposes of s. 15(1): to recognize all individuals and groups as equally deserving, worthy, and valuable, to remedy stereotyping, disadvantage and prejudice, and to ensure that all are treated as equally important members of Canadian society. Determining whether legislation violates these purposes requires examining the legislation in the context in which it applies, with attention to the interests it affects, and the situation and history in Canadian society of those who are treated differentially by it. It must be examined how "a person legitimately feels when confronted with a particular law": *Law*, *supra*, at para. 53.

64 The perspective that must be adopted in making this determination is subjective and objective: *Law*, *supra*, at paras. 59-61; *Egan*, *supra*, at para. 56, *per* L'Heureux-Dubé J. It must be considered whether a reasonable person possessed of similar traits to the claimant would find that the legislation imposes a burden or withholds a benefit from him or her

> in a manner which reflects the stereotypical application of presumed group or personal characteristics, or which otherwise has the effect of perpetuating or promoting the view that the individual is less capable or worthy of recognition or value as a human being or as a member of Canadian society, equally deserving of concern, respect, and consideration. . . .
>
> (*Law*, *supra*, at para. 88.)

The analysis of discriminatory impact must be conducted with a careful eye to the context of who is affected by the legislation and how it affects them.

65 I would emphasize that the "reasonable person" considered by the subjective-objective perspective understands and recognizes not only the circumstances of those like him or her, but also appreciates the situation of others. Therefore, when legislation impacts on various groups, particularly if those groups are disadvantaged, the subjective-objective perspective will take into account the particular experiences and needs of all of those groups.

66 Before turning to the specific contextual factors enumerated by Iacobucci J. in *Law*, it is worth mentioning one additional factor important to the particular circumstances of this appeal. Section 77(1) implicates, in a direct way that does not affect other Canadians, the interests of two groups who have generally experienced "pre-existing disadvantage, vulnerability, stereotyping, or prejudice": *Law*, *supra*, at para. 63. All band members affected by this legislation, whether on-reserve or off-reserve, have been affected by the legacy of stereotyping and prejudice against Aboriginal peoples.

67 When analysing a claim that involves possibly conflicting interests of minority groups, one must be especially sensitive to their realities and experiences, and to their values, history, and identity. This is inherent in the nature of a subjective-objective

analysis, since a court is required to consider the perspective of someone possessed of similar characteristics to the claimant. Thus, in the case of equality rights affecting Aboriginal people and communities, the legislation in question must be evaluated with special attention to the rights of Aboriginal peoples, the protection of the Aboriginal and treaty rights guaranteed in the Constitution, the history of Aboriginal people in Canada, and with respect for and consideration of the cultural attachment and background of all Aboriginal women and men. It must also always be remembered that s. 15(1) provides for the "unremitting protection" of the right to equality, in whatever context the analysis takes place, whether there is one disadvantaged or minority group affected or more than one: see *Andrews*, *supra*, at p. 175; *R. v. Turpin*, [1989] 1 S.C.R. 1296, at p. 1326. In addition, it must be recalled that all the circumstances must always be evaluated from the perspective of a person with similar characteristics to the claimant, fully informed of the circumstances.

68 I am aware, of course, that issues have been raised about the constitutionality of distinctions created by the *Indian Act* between band members and non-band members within the Aboriginal community. One such issue was dealt with in Bill C-31, discussed below. While the discussion of context which follows necessarily touches on the experiences of Aboriginal peoples generally, the decision in this case relates only to the constitutionality of the voting distinctions made within bands themselves by s. 77(1) of the *Indian Act.*

69 Since equality is a comparative concept, the analysis must consider the person relative to whom the claimant is being treated differentially: *Law*, *supra*, at para. 56. I accept the claimants' argument that the comparison here is between band members living on- and off-reserve, since these are the two groups whom the legislation treats differentially on its face. This denies the benefit of voting for band leadership to members

of bands affected by s. 77(1) who do not live on a reserve. Because of the groups involved, the Court must also be attentive to the fact that there may be unique disadvantages or circumstances facing on-reserve band members. However, no evidence has been presented that would suggest that the legislation, in purpose or effect, ameliorates the position of band members living on-reserve, and therefore I find it unnecessary to consider the third contextual factor outlined in *Law*. I turn now to the particular contextual factors outlined in *Law* which may indicate that the legislation conflicts with the purposes of s. 15(1).

(a) *Disadvantage, Vulnerability, Stereotyping, and Prejudice*

70 Groups or individuals who are generally subject to unfair treatment in society because of their characteristics or circumstances are already demeaned in dignity, and further differential treatment of them is more likely to have a discriminatory impact, since it often perpetuates or increases that disadvantage: *Law*, *supra*, at para. 63. Pre-existing disadvantage, stereotyping, and vulnerability are important to the analysis in this case in three particular ways.

71 First, band members living off-reserve form part of a "discrete and insular minority", defined by both race and residence, which is vulnerable and has at times not been given equal consideration or respect by the government or by others in Canadian or Aboriginal society. Decision makers have not always considered the perspectives and needs of Aboriginal people living off reserves, particularly their Aboriginal identity and their desire for connection to their heritage and cultural roots. As noted by the Royal Commission on Aboriginal Peoples,

> [b]efore the Commission began its work, however, little attention had been given to identifying and meeting the needs, interests and aspirations of urban Aboriginal people. Little thought had been given to improving their circumstances, even though their lives were often desperate, and relations between Aboriginal people and the remainder of the urban population were fragile, if not hostile.
>
> The information and policy vacuum can be traced at least in part to long-standing ideas in non-Aboriginal culture about where Aboriginal people 'belong'.
>
> (*Report of the Royal Commission on Aboriginal Peoples* (1996), vol. 4, *Perspectives and Realities*, at p. 519.)

Similarly, there exist general stereotypes in society relating to off-reserve band members. People have often been only seen as "truly Aboriginal" if they live on reserves. The Royal Commission wrote:

> MANY CANADIANS THINK of Aboriginal people as living on reserves or at least in rural areas. This perception is deeply rooted and persistently reinforced. . . .
>
> . . . There is a history in Canada of putting Aboriginal people 'in their place' on reserves and in rural communities. Aboriginal cultures and mores have been perceived as incompatible with the demands of industrialized urban society. This leads all too easily to the assumption that Aboriginal people living in urban areas must deny their culture and heritage in order to succeed -- that they must assimilate into this other world. The corollary is that once Aboriginal people migrate to urban areas, their identity as Aboriginal people becomes irrelevant.
>
> (*Perspectives and Realities*, *supra*, at p. 519.)

72 Second, off-reserve band members experience particular disadvantages compared to those living on-reserve because of their separation from the reserve. They are apart from communities to which many feel connection, and have experienced racism, culture shock, and difficulty maintaining their identity in particular and serious ways because of this fact. Third, it should be noted that the context is one in which, due to various factors, Aboriginal women, who can be said to be doubly disadvantaged on the basis of both sex and race, are among those particularly affected by legislation relating to

off-reserve band members, because of their history and circumstances in Canadian and Aboriginal society.

(b) *Relationship Between the Basis of the Differential Treatment and the Claimant's Characteristics or Circumstances*

73 The second factor set out by Iacobucci J. examines the relationship between the basis on which the differential treatment occurs and the characteristics of the claimant and others, with the goal of recognizing the human dignity and right to full participation in society of all of them. Some distinctions may correspond to the needs, capacities, or circumstances of a group in a manner that does not affect their human dignity or that of others, viewed from a subjective-objective perspective (*Law*, *supra*, at paras. 69-71).

74 In the case at bar, considering this factor involves examining the legislative context surrounding the distinction at issue. The voting rights at issue affect other sections of the legislation; it must be determined how the functions of electors and powers of the band council chosen by them relate to the needs, circumstances, and human dignity of the band members included and excluded by the voting scheme. In my opinion, if the powers of electors or the chief and council they vote for affect issues that are purely local, and do not affect the interests of off-reserve band members, the differential treatment between band members contained in s. 77(1) cannot be considered to violate the right to substantive equality of the off-reserve members. Such differential treatment would relate to the different positions and needs of the two groups and could not be said, in my opinion, to stereotype off-reserve members or suggest they are less deserving, worthy, or important band members from the perspective of someone affected by them. However, if the powers of the electors and the band council affect the interests and needs of both groups, this will be an indicator that the differential treatment is more likely to be discriminatory.

75 The band council chosen by the electors has by-law making powers under s. 81(1), which include the regulation of traffic on the reserve, control over the observance of law and order, and other such powers. Strayer J., the trial judge, found that these powers are mostly of a local nature, related to the governance of the reserve itself, and he suggested that they primarily affect residents. I would agree, in general, with this characterization, and I would add to the list of provisions affecting primarily local functions the powers contained in s. 85.1. However, I would note that several paragraphs of s. 81(1) affect in a particular way all band members, irrespective of residence on the reserve. Section 81(1)(*i*) allows the band council to allot land on the reserve, where this authority has been given by the Governor in Council. Sections 81(1)(*p*) and 81(1)(*p.*1) allow by-laws relating to residence and trespass on the reserve, which may affect the ability of non-residents to use the facilities and land on the reserve, and return to live there. The ability to live on the reserve, or to participate in activities on reserve lands if they desire, has been shown to be important to non-residents, and these functions of the band council affect their circumstances and needs directly and in a fundamental way: see *Perspectives and Realities*, *supra*, at p. 49.

76 Section 83 gives the council power to make money by-laws, which include taxation of land on the reserve, licensing of businesses, appropriation of moneys to defray band expenses, and payment of remuneration to chiefs and councillors. These powers, in my opinion, are a mixture of functions that affect residents on the reserve only, and also all members of the band. While the taxation of land and businesses on the reserve and the licensing of businesses are primarily local functions, appropriation of money for various band purposes and the amounts to be paid to chiefs and councillors are matters in which all band members have an interest. In addition, under s. 83(1)(*f*), the band may make by-laws relating to "the raising of money from band members to support band projects" which may have the potential to affect all band members.

77 Although the band council's powers under ss. 81(1) and 83(1) are similar, in many ways, to those of a municipality, the exclusion of non-residents from voting rights affects other powers of the band council that relate to the needs of all members of the band, whether or not they are ordinarily resident on the reserve. Section 64(1) allows the expenditure by the Minister, with the band council's consent, of the band's capital moneys for various purposes, including distributions per capita to members of the band, and construction of new housing. The band's capital moneys come from the sale of surrendered lands or capital assets of the band (s. 62), assets that belong, collectively, to all members of the band. As found by Strayer J., all band members have important interests in these expenditures. Similarly, under s. 66(1), the Minister, with the approval of the band council, can make orders appropriating the band council's revenue moneys; the band council may be authorized to do so under s. 69. Expenditures by the band council may include matters like education, creation of new housing, creation of facilities on reserves, and other matters that may affect off-reserve band members' economic interest in its assets and the infrastructure that will be available to help them return to the reserve if they wish. Finally, s. 39(1)(*b*) requires the consent of a majority of "electors" of the band for the surrender of band lands. The definition of "elector" in s. 2(1) excludes band members who are disqualified from voting in band elections, so the wording of s. 77(1) excludes off-reserve members from voting on the question of whether the lands they own in common will be surrendered.

78 The wording of s. 77(1), therefore, gives off-reserve band members no voice in electing a band council that, among other functions, spends moneys derived from land owned by all members, and money provided to the band council by the government to be spent on all band members. The band council also determines who can live on the reserve and what new housing will be built. The legislation denies those in the position of the

claimants a vote in decisions about whether the reserve land owned by all members of the band will be surrendered. In addition, members who live in the vicinity of the reserve, as shown by the evidence of several of the plaintiffs in this case, may take advantage of services controlled by the band council such as schools or recreational facilities. Moreover, as a practical matter, representation of Aboriginal peoples in processes such as land claims and self-government negotiations often takes place through the structure of *Indian Act* bands. The need for and interest in this representation is shared by all band members, whether they live on- or off-reserve. Therefore, although in some ways, voting for the band council and chief relates to functions affecting reserve members much more directly than others, in other ways it affects all band members. Since interests are affected that are unrelated to the basis upon which the differential treatment is made (off-reserve residence status), considering the principle of respect for human dignity and substantive equality, this is an important indicator that the differential treatment is discriminatory.

(c) *Nature of the Affected Interest*

79 The fourth contextual factor which was described by Iacobucci J. in *Law, supra,* at paras. 74-75, and which is of particular importance in this case, is the nature of the affected interest. In general, the more important and significant the interest affected, the more likely it will be that differential treatment affecting this interest will amount to a discriminatory distinction within the meaning of s. 15(1).

80 Several social and legislative facts are important to analysing this contextual factor. The first is the important financial interest that non-residents have in the affairs of the band. As I outlined in the previous section, the band council must give consent for expenditures of the band's capital and revenue moneys. The band's electors also control decisions about the surrender of band lands which are owned collectively by all band

members. Second, the band council controls the allotment of land and by-laws relating to trespass and residence, which affect in important ways the ability to return and live on the reserve. Third, the council makes decisions about the availability of services that may be important to non-residents, particularly those who may live near the reserve. Also important is the role of band leadership in the work of the Assembly of First Nations and other Aboriginal organizations at the regional, national and international levels. All these factors show that the functions and powers of the band council have important significance for the lives of off-reserve band members. Denying them voting rights when band leadership is chosen through a system of democracy affects significant interests they have in band governance.

81 The importance many band members place on maintaining a connection to their cultural roots is also particularly significant. Maintaining one's cultural identity will mean different things to different off-reserve band members, but to many it will entail an identification of interests with their band. When band leadership is chosen through a democratic system, one of the most powerful expressions of identification with that band is through the exercise of voting. When certain band members are not given any say in that system, the denial of that voice affects their belonging and connection to the band of which they are members.

82 Moreover, the band council has the power to affect directly the cultural interests of those off-reserve band members who identify with their band and reserve. The Royal Commission on Aboriginal Peoples stated that sources of traditional Aboriginal culture include "contact with the land, elders, Aboriginal languages and spiritual ceremonies" (*Perspectives and Realities*, *supra*, at p. 522). As outlined in the previous section, the band council has many powers affecting access to the reserve, management of the reserve lands, and the expenditure of money for the welfare of the band.

Furthermore, the "electors" of the band can vote on the surrender of band lands. The band council therefore has considerable power to safeguard, develop and promote the sources of traditional Aboriginal culture and to affect the access of off-reserve band members to these sources.

83 Historical circumstances that have had and continue to have repercussions for the members of this group add to the reasons why the interest affected by this legislation is of important societal significance for those in the position of the claimants. Indeed, the creation of the group of off-reserve Aboriginal people can be seen as a consequence, in part, of historic policies toward Aboriginal peoples. The Royal Commission on Aboriginal Peoples describes the relationship between the federal government and Aboriginal peoples during the period from the early 1800s to 1969 as one of "displacement and assimilation" (*Report of the Royal Commission on Aboriginal Peoples*, vol. 1, *Looking Forward, Looking Back*, at pp. 137-91).

84 Maintaining a connection with the band of which they are members is of particular importance to those in the position of the claimants because they often live apart from reserves due to factors that are likely largely beyond their control. Lack of land, what are often scarce job opportunities on reserves, and the need to go far from the community for schooling, are among the reasons that members left the reserve in the past, and continue to leave. There are also particular issues affecting Aboriginal women's migration: *Perspectives and Realities*, *supra*, at pp. 573-76. The fact that those affected or their ancestors may well have had no choice but to leave the reserve signals that the interest in keeping a connection with the band of which they are members is particularly important to them because the separation from other members of the band and the reserve may well have been undesired or unchosen.

85 A considerable number of the band members who live off-reserve recently gained or regained this status under Bill C-31. This legislation modified sections of the *Indian Act* that denied Indian status to various categories of band members, though not all those who were restored to status became members of a band. It is, therefore, helpful to examine the history of the legislation that removed Indian status from them or from their ancestors. I must emphasize that this discussion is in no way related to the constitutionality of Bill C-31, in general or in the context of particular bands. Rather, I refer to it for the purpose of examining the context underlying the current legislative distinction and showing why the interest affected is an important one for band members.

86 Many of those affected are women, and the descendants of women, who lost their Indian status because they married men who did not have Indian status (see Indian and Northern Affairs Canada, *Impacts of the 1985 Amendments to the Indian Act (Bill C-31)*: *Summary Report* (1990)). Aboriginal women who married outside their band became members of their husband's band. See, for example, *The Indian Act*, S.C. 1951, c. 29, ss. 12 and 14, now repealed. Legislation depriving Aboriginal women of Indian status has a long history. The involuntary loss of status by Aboriginal women and children began in Upper and Lower Canada with the passage of *An Act to encourage the gradual Civilization of the Indian Tribes in the Province, and to amend the Laws respecting Indians*, S. Prov. C. 1857, 20 Vict., c. 26. A woman whose husband "enfranchised" had her status removed along with his. This legislation introduced patriarchal concepts into many Aboriginal societies which did not exist before: see Public Inquiry into the Administration of Justice and Aboriginal People, *Report of the Aboriginal Justice Inquiry of Manitoba* (1991), vol. 1, *The Justice System and Aboriginal People*, at pp. 476-79. As the Royal Commission on Aboriginal Peoples stated in *Perspectives and Realities*, *supra*, at p. 26:

> In the pre-Confederation period, concepts were introduced that were foreign to Aboriginal communities and that, wittingly or unwittingly, undermined Aboriginal cultural values. In many cases, the legislation displaced the natural, community-based and self-identification approach to determining membership – which included descent, marriage, residency, adoption and simple voluntary association with a particular group – and thus disrupted complex and interrelated social, economic and kinship structures. Patrilineal descent of the type embodied in the *Gradual Civilization Act*, for example, was the least common principle of descent in Aboriginal societies, but through these laws, it became predominant. From this perspective, the *Gradual Civilization Act* was an exercise in government control in deciding who was and was not an Indian.

This continued in the *Gradual Enfranchisement Act*, S.C. 1869, c. 6. This legislation, for the first time, instituted the policy that women who married men without Indian status lost their own status, and their children would not receive status. The rationale for these policies, given at the time, focussed on concerns about control over reserve lands, and the need to prevent non-Indian men from gaining access to them (*Perspectives and Realities*, *supra*, at p. 27). These policies were continued and expanded upon with the passage of the *Indian Act* in 1876, and amendments to it in subsequent years, particularly a major revision that took place in 1951.

87 The 1951 legislation was challenged under the *Canadian Bill of Rights*, S.C. 1960, c. 44 (reprinted in R.S.C., 1985, App. III), in *Attorney General of Canada v. Lavell*, [1974] S.C.R. 1349. The majority of this Court, using an approach to equality that was later rejected in *Andrews*, *supra*, held that the provisions did not violate the right to equality in the *Canadian Bill of Rights* and that even if they did, they could not be struck down as inconsistent with it.

88 These were not the only people who lost their status. The enfranchisement provisions of the *Indian Act* were designed to encourage Aboriginal people to renounce their heritage and identity, and to force them to do so if they wished to take a full part in Canadian society. In order to vote or hold Canadian citizenship, status Indians had to

"voluntarily" enfranchise. They were then given a portion of the former reserve land in fee simple, and they lost their Indian status. At various times in history, status Indians who received higher education, or became doctors, lawyers, or ministers were automatically enfranchised. Those who wanted to be soldiers in the military during the two World Wars were required to enfranchise themselves and their whole families, and those who left the country for more than five years without permission also lost Indian status. (See L. Gilbert, *Entitlement to Indian Status and Membership Codes in Canada* (1996), at pp. 23-30.)

89 This history shows that Aboriginal policy, in the past, often led to the denial of status and the severing of connections between band members and the band. It helps show why the interest in feeling and maintaining a sense of belonging to the band free from barriers imposed by Parliament is an important one for all band members, and especially for those who constitute a significant portion of the group affected, who have been directly affected by these policies and are now living away from reserves, in part, because of them.

90 All these facts emphasize the importance, for band members living off-reserve, of having their voices included when band leadership is chosen through a process of common suffrage as set out in this legislation. They show why the interest in s. 77(1) is a fundamental one, and why the denial of voting rights in this context has serious consequences from the perspective of those affected. They show why there is not only economic, but also important societal significance to the interests affected by the differential treatment contained in s. 77(1): *Law*, *supra*, at para. 74.

(d) *Conclusions on the Third Stage of Analysis*

91 In summary, therefore, a contextual view of the people affected and the differential treatment in question leads to the conclusion that this legislative distinction

conflicts with the purposes of s. 15(1). The people affected by this distinction, in general, are vulnerable and disadvantaged. They experience stereotyping and disadvantage as Aboriginal people and band members living away from reserves. They form part of a "discrete and insular minority" defined by race and residence, and it is more likely that further disadvantage will have a discriminatory impact upon them. Second, the distinction in question does not correspond with the characteristics or circumstances of the claimants and on-reserve band members in a manner which "respects and values their dignity and difference": *Law*, *supra*, at para. 28. The powers of the band council affect cultural, political, and financial interests and needs that are shared by band members living on and off the reserve. Third, the nature of the interests affected is fundamental. Given the form of representative democracy provided for in the *Indian Act*, failure to give any voice in that process to certain members of the band affects an important attribute of membership, and places a barrier between them and a community which has particular importance to them. The council and electors also make decisions about important financial, cultural, and political interests of the members that have important significance within the band and Canadian society. Finally, the interest affected is also significant because of the ways in which, in the past, ties between band members and the band or reserve have been involuntarily or reluctantly severed. Those affected or their parents may have left the reserve for many reasons that do not signal a lack of interest in the reserve given the various historical circumstances surrounding reserve communities in Canada such as an often inadequate land base, a serious lack of economic opportunities and housing, and the operation of past Indian status and band membership rules imposed by Parliament.

92 In the context of this vulnerable group, and these important interests, this distinction reinforces the stereotype that band members who do not live on reserves are "less Aboriginal", and less valuable members of their bands than those who do. A reasonable person in the position of the claimants, fully apprised of the context, would see

the differential treatment contained in s. 77(1) as suggesting that off-reserve band members are less worthy or valuable as band members and members of Canadian society, and giving them less concern, respect and consideration than band members living on reserves. Based upon this finding of discriminatory impact, the third stage of analysis, the identification of discrimination based on a violation of substantive equality and human dignity in the circumstances of this case, has been satisfied.

93 The factors discussed above outline the context surrounding the differential treatment contained in s. 77(1) of the *Indian Act*. This case involves people who have generally experienced significant historical disadvantage, and interests that are particularly important to those affected by the legislation. Taken together, they lead to a finding that from a subjective-objective perspective, the differential treatment in question violates off-reserve band members' equality rights. Yet neither of these factors should be seen as essential to my conclusions. I would also note that my discussion of the general history of off-reserve band members does not suggest that the conclusion that this legislation violates s. 15(1) would not apply to a band affected by s. 77(1) whose off-reserve members had a different composition or history from that of the general population of off-reserve band members in Canada. Every case of alleged discrimination, of course, must be considered in its own legislative and social context to determine whether it violates the constitutional rights of those affected, but in this case, both the general disadvantage and vulnerability of those affected, and the importance to all band members of the affected interests are compelling factors in my conclusions at the third stage of analysis.

94 The above analysis also does not suggest that <u>any</u> distinction between on-reserve and off-reserve band members would be stereotypical, interfere with off-reserve members' dignity, or conflict with the purposes of s. 15(1). There are clearly important differences between on-reserve and off-reserve band members, which Parliament could

legitimately recognize. Taking into account, recognizing, and affirming differences between groups in a manner that respects and values their dignity and difference are not only legitimate, but necessary considerations in ensuring that substantive equality is present in Canadian society. The current powers of the band council, as discussed earlier, include some powers that are purely local, affecting matters such as taxation on the reserve, the regulation of traffic, etc. In addition, those living on the reserve have a special interest in many decisions made by the band council. For example, if the reserve is surrendered, they must leave their homes, and this affects them in a direct way it does not affect non-residents. Though non-residents may have an important interest in using them, educational or recreational services on the reserve are more likely to serve residents, particularly if the reserve is isolated or the non-residents live far from it. Many other examples can be imagined.

95 Recognizing non-residents' right to substantive equality in accordance with the principle of respect for human dignity, therefore, does not require that non-residents have identical voting rights to residents. Rather, what is necessary is a system that recognizes non-residents' important place in the band community. It is possible to think of many ways this might be done, while recognizing, respecting, and valuing the different positions, needs, and interests of on-reserve and off-reserve band members. One might be to divide the "local" functions which relate purely to residents from those that affect all band members and have different voting regimes for these functions. A requirement of a double majority, or a right of veto for each group might also respect the full participation and belonging of non-residents. There might be special seats on a band council for non-residents, which give them meaningful, but not identical, rights of participation. The solution may be found in the customary practices of Aboriginal bands. There may be a separate solution for each band. Many other possibilities can be imagined, which would respect non-residents' rights to meaningful and effective participation in the voting regime

of the community, but would also recognize the somewhat different interests of residents and non-residents. However, without violating s. 15(1), the voting regime cannot, as it presently does, completely deny non-resident band members participation in the electoral system of representation. Nor can that participation be minimal, insignificant, or merely token.

96 Therefore, I conclude that the present wording of s. 77(1) violates the right to equality without discrimination of the off-reserve members of bands affected by it. This finding is a general one, and is in no way related to the specific situation of the Batchewana Band. Since the provision has been found to be discriminatory as it applies to all bands affected by it, there is no need to consider the specific circumstances of the Batchewana Band.

D. *Section 1*

97 This Court's approach to s. 1 of the *Charter* was set out by Dickson C.J. in *R. v. Oakes*, [1986] 1 S.C.R. 103. It was refined and summarized by Iacobucci J. in *Egan*, *supra*, at para. 182:

> A limitation to a constitutional guarantee will be sustained once two conditions are met. First, the objective of the legislation must be pressing and substantial. Second, the means chosen to attain this legislative end must be reasonable and demonstrably justifiable in a free and democratic society. In order to satisfy the second requirement, three criteria must be satisfied: (1) the rights violation must be rationally connected to the aim of the legislation; (2) the impugned provision must minimally impair the *Charter* guarantee; and (3) there must be a proportionality between the effect of the measure and its objective so that the attainment of the legislative goal is not outweighed by the abridgement of the right. In all s. 1 cases the burden of proof is with the government to show on a balance of probabilities that the violation is justifiable. [Emphasis added.]

This articulation of the proper approach was endorsed in *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624, at para. 84, in *Vriend, supra*, at para. 108, and in *M. v. H.*, [1999] 2 S.C.R. 3, at para. 76, *per* Iacobucci J.

98 Throughout the s. 1 analysis, it must be remembered that it is the right to substantive equality and the accompanying violation of human dignity that has been infringed when a violation of s. 15(1) has been found. Even when the interests of various disadvantaged groups are affected, s. 15(1) mandates that government decisions must be made in a manner that respects the dignity of all of them, recognizing all as equally capable, deserving, and worthy of recognition. The fact that various minorities or vulnerable groups may have competing interests cannot alone constitute a justification for treating any of them in a substantively unequal manner, nor can it relieve the government of its burden to justify a violation of a *Charter* right on a balance of probabilities: see *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 S.C.R. 877, at para. 88, *per* Bastarache J.

99 The first task is to determine the objective of the impugned law and whether it is pressing and substantial. In *Vriend*, *supra*, Iacobucci J. discussed the proper characterization of the objective of the impugned legislation, at paras. 110 and 111:

> Section 1 of the *Charter* states that it is the limits on *Charter* rights and freedoms that must be demonstrably justified in a free and democratic society. It follows that under the first part of the *Oakes* test, the analysis must focus upon the objective of the impugned limitation, or in this case, the omission....
>
> However, in my opinion, the objective of the omission cannot be fully understood in isolation. It seems to me that some consideration must also be given to both the purposes of the Act as a whole and the specific impugned provisions so as to give the objective of the omission the context that is necessary for a more complete understanding of its operation in the broader scheme of the legislation. [Emphasis in original.]

100 Therefore, it is the objective of the restriction of voting rights to band members ordinarily resident on the reserve that must be considered in this case, although this must be considered along with the purpose of the *Indian Act* as a whole for a complete understanding of the broader scheme of the legislation. It must be remembered that in the case of equality rights, the legislative objective must be sufficiently pressing and substantial to justify a law that has been found to violate the essential human dignity and freedom of those possessed of similar characteristics to the claimants. In this case, Parliament's objective is properly classified as ensuring that those with the most immediate and direct connection with the reserve have a special ability to control its future. This objective, in my opinion, is pressing and substantial. It accords with *Charter* values, by recognizing the important dignity and autonomy interest in one's home and livelihood, and the connection band members feel to their land. Through this provision, Parliament is also moderating the interests of groups with different and possibly conflicting interests.

101 Turning to the proportionality analysis, restricting the vote to those living on the reserve is rationally connected to Parliament's objective. Although both band members living on- and off-reserve have interests in many of the functions determined by voting rights, those living on the reserve do have a more direct interest in many of the band council's functions. In terms of the "local" functions of the band council, they are the only people with an interest. In relation to functions that affect the future of the land or the building of facilities on the reserve, on-reserve band members, in general, have a more direct interest in the decisions of the band council. Decisions about reserve lands affect their current living space, and a decision to surrender the reserve would mean that they would be forced to move from their homes and, in many cases, from their source of earning a livelihood. This statement is not meant to suggest that non-residents would be more likely to surrender the reserve or to make decisions that are not in the interest of the band

as a whole, but rather to recognize that those who live on the reserve have particular interests in the land, given current circumstances.

102 By ensuring that only those who live on the reserve can vote in relation to all of the band council's functions, s. 77(1) gives them control over the future directions that the band will take, and over decisions about the reserve land on which they live. Excluding non-residents from voting is connected to the objective because, by denying all others a vote, the legislation ensures that those with the most direct and immediate interest, residents, maintain voting control over the decisions that will affect the future of the reserve.

103 However, those seeking to uphold this law have not demonstrated that a complete exclusion of non-residents from the right to vote, which violates their equality rights, constitutes a minimal impairment of these rights. Indeed, they have not shown that any infringement of the respondents' equality rights is necessary to achieve this purpose. As I outlined earlier, the guarantee of equality does not require that on- and off-reserve band members be treated the same, and respecting the rights of dignity and belonging of off-reserve band members need not mean ignoring the particular interest of residents in decisions affecting the reserve. I discussed several possible solutions above, which would respect the dignity of off-reserve band members, but would not stereotype them or otherwise violate their right to substantive equality. The appellants have not shown why solutions like special majorities, representative band councils not based directly on population, dividing the local functions from the broader powers of the band council, or other solutions that would not have the effect of suggesting off-reserve band members are less worthy of concern, respect, and consideration could not accomplish this objective.

104 The appellant Her Majesty the Queen suggests that the current model meets the criterion of minimal impairment because of the administrative difficulties and costs involved in setting up, for example, a two-tiered council where one tier would deal with local issues and the other with issues affecting all band members, or in maintaining a voter's list and conducting elections where the electorate may be widely dispersed. Even assuming that such costs could legitimately constitute a s. 1 justification, these arguments are unconvincing. It must be remembered that the burden of justifying limitations on constitutional rights is upon the government. The government has presented no evidence to show that a system that would respect equality rights is particularly expensive or difficult to implement. Rather, there are many possible solutions that would not be difficult to administer, but would require a creative design of an electoral system that would balance the rights involved. 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. Though the government argues that these costs should not be imposed on small communities such as the Batchewana Band, 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.

105 Since this legislation does not minimally impair the respondents' equality rights, I agree with Strayer J. and the Court of Appeal that it is not justified under s. 1 of the *Charter*.

E. *Remedy*

106 I turn now to the question of the appropriate remedy. The remedial question raises four issues:

(1) whether the appropriate remedy is one that should apply to the Batchewana Band, or to the section in its general application across Canada;

(2) whether the appropriate declaration is one of invalidity or "reading in";

(3) whether the declaration should be suspended for a period of time, and, if so, for how long;

(4) if there is a suspension of the declaration, whether the Batchewana Band will be exempted from this suspension.

107 Both courts below confined their remedy to the Batchewana Band. Strayer J.'s order applied only to the Batchewana Band, and specified that s. 77(1) was unconstitutional only in its effects on certain of the provisions of the *Indian Act*. The Court of Appeal granted a constitutional exemption from the application of the words "and is ordinarily resident on the reserve" in s. 77(1), for all purposes, to the Batchewana Band. This remedy was granted under s. 24(1) of the *Charter*. The reasons for each of these decisions were different. Strayer J. confined his declaration to the Batchewana Band because the pleadings and evidence related only to that band. The Court of Appeal, in contrast, held that a constitutional exemption was the appropriate remedy, because other bands might be able to demonstrate the existence of an Aboriginal right to control their own voting procedures under s. 35 of the *Constitution Act, 1982*, which would, in the case of those bands, make s. 77(1) a valid codification of Aboriginal rights.

108 There have been various positions taken before this Court as to the appropriate remedy. The respondents support the constitutional exemption granted by the Court of Appeal, and in the alternative, they ask that the offending words in s. 77(1) be declared invalid, that the effect of the declaration be suspended for two years, and that the Batchewana Band be granted an exemption from the suspension of the declaration. Most interveners who support the position of the respondents argue that the appropriate remedy is a general declaration of invalidity, suspended for a period of time, and an exemption from the suspension for the Batchewana Band.

109 The appellant Her Majesty the Queen argues that if relief is to be given, the proper remedy is a general declaration of invalidity, together with a suspension of the effect of the declaration for a period of time, rather than a constitutional exemption. The Batchewana Band, too, argues that a constitutional exemption is inappropriate in this case. If the legislation is found to be unconstitutional, the band argues, the appropriate remedy is to make an "interim ruling" that the legislation is unconstitutional. The band asks that the Court make no order in relation to the validity of the legislation at this time, but rather declare the legislation unconstitutional, and order the band, in conjunction with its on- and off-reserve members and with the Minister, to develop its own customary voting rules that would respect the principles of the *Charter*. It argues that at the end of a reporting period, if the legislation has not been changed in the appropriate way, the Court should then make a formal order. In the alternative, it suggests, a suspended declaration of invalidity is appropriate. Finally, the intervener the Lesser Slave Lake Indian Regional Council argues for a remedy confined to this band, but suggests that if a general declaration of invalidity is made, its effect should be suspended for a period of time, and the government should be ordered to re-negotiate, in good faith, existing treaties with Aboriginal people in order to

give them more land and resources to deal with the increase in membership caused by Bill C-31.

110 In determining the appropriate remedy, the Court must be guided by the principles of respect for the purposes and values of the *Charter*, and respect for the role of the legislature: *Schachter v. Canada*, [1992] 2 S.C.R. 679, at pp. 700-701; *Vriend*, *supra*, at para. 148. The first principle was well expressed by Sopinka J. in *Osborne v. Canada (Treasury Board)*, [1991] 2 S.C.R. 69, at p. 104:

> In selecting an appropriate remedy under the *Charter* the primary concern of the court must be to apply the measures that will best vindicate the values expressed in the *Charter* and to provide the form of remedy to those whose rights have been violated that best achieves that objective. This flows from the court's role as guardian of the rights and freedoms which are entrenched as part of the supreme law of Canada.

111 The first question is whether the appropriate remedy is a constitutional exemption, or one that applies in general. The finding of invalidity above relates not only to the Batchewana Band, but to the legislation in general as it applies to all bands. Therefore, in principle there is no reason that the remedy should be confined to the circumstances of the Batchewana Band. A remedy should normally be as extensive as the violation of equality rights which has been found. The constitutional exemption may apply when it has not been proven that legislation is unconstitutional in general, but that it is unconstitutional in its application to a small subsection of those to whom the legislation applies: *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713, at p. 783; *R. v. Seaboyer*, [1991] 2 S.C.R. 577, at p. 629; *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519, at pp. 572-73, *per* Lamer C.J., dissenting. This is not the case here.

112 However, the Court of Appeal held that it would be appropriate to grant a constitutional exemption, since other bands may be able to demonstrate an Aboriginal right to exclude non-residents from decision making, which would affect the analysis of the constitutionality of this provision. With all due respect, a constitutional exemption is not an appropriate remedy in this case. 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 analysing 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: see *R. v. Sparrow*, [1990] 1 S.C.R. 1075; *Van der Peet*, *supra*. A court would also be required to examine how s. 25 of the *Charter* functions when Aboriginal rights are challenged, and how it interacts with other interpretive provisions of the *Charter*.

113 Nor would such a remedy be the order most respectful of the equality rights of off-reserve band members. If a constitutional exemption were granted, this would place a heavy burden on off-reserve band members, since it would require those in each band to take legal action to put forward their claim. Equality within bands does not require such a heavy burden on claimants. In addition, establishing as a principle that where s. 35 Aboriginal rights might be involved, equality rights must be determined on a band-by-band basis would make the equality rights of Aboriginal people much harder to uphold than those of others, in certain cases. For these reasons, the appropriate remedy is one that applies to the legislation in general, under s. 52(1) of the *Constitution Act, 1982*, and not one confined to the Batchewana Band.

114 The next issue is what form the general remedy will take. The nature of the violation of equality rights that has been found in this case is different than any that this Court has addressed before. It has been found that, though it would be legitimate for Parliament to create different voting rights for reserve residents and people living off-reserve, in a manner that recognizes non-residents' place in the community, it is not legitimate for Parliament to completely exclude them from voting rights. This is also a situation where the primary effects of this decision will not be felt by the government, but by the bands themselves. In respecting the role of Parliament, these factors should be critical.

115 In my opinion, it would be inappropriate for this Court to "read in" to the *Indian Act* voting rights for non-residents so that they would be voters for certain purposes but not others. This would involve considerable detailed changes to the legislative scheme. Designing such a detailed scheme, and choosing among various possible options, is not an appropriate role for the Court in this case (see *M. v. H.*, *supra*, at para. 142, *per* Iacobucci J.).

116 There are a number of ways this legislation may be changed so that it respects the equality rights of non-resident band members. Because the regime affects band members most directly, the best remedy is one that will encourage and allow Parliament to consult with and listen to the opinions of Aboriginal people affected by it. The link between public discussion and consultation and the principles of democracy was recently reiterated by this Court in *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, at para. 68: "a functioning democracy requires a continuous process of discussion". The principle of democracy underlies the Constitution and the *Charter*, and is one of the important factors guiding the exercise of a court's remedial discretion. It encourages remedies that allow the democratic process of consultation and dialogue to occur. In P. W. Hogg and A.

A. Bushell, "The *Charter* Dialogue Between Courts and Legislatures (Or Perhaps the *Charter of Rights* Isn't Such A Bad Thing After All)" (1997), 35 *Osgoode Hall L.J.* 75, the authors characterize judicial review under the *Charter* as a "dialogue" between courts and legislatures. The remedies granted under the *Charter* should, in appropriate cases, encourage and facilitate the inclusion in that dialogue of groups particularly affected by legislation. In determining the appropriate remedy, a court should consider the effect of its order on the democratic process, understood in a broad way, and encourage that process. As Iacobucci J. observed in *Vriend*, *supra*, at para. 176:

> [T]he concept of democracy means more than majority rule as Dickson C.J. so ably reminded us in *Oakes*, *supra*. In my view, a democracy requires that legislators take into account the interests of majorities and minorities alike, all of whom will be affected by the decisions they make.

117 Constitutional remedies should encourage the government to take into account the interests, and views, of minorities. In this way, the principle of democracy that was recognized as an underlying principle of the Constitution in *Reference re Secession of Quebec*, *supra*, and was emphasized as an important remedial consideration in *Schachter*, *supra*, and *Vriend*, *supra*, will best be given expression.

118 The above principles suggest, in my view, that the appropriate remedy is a declaration that the words "and is ordinarily resident on the reserve" in s. 77(1) are invalid, and that the effect of this declaration of invalidity be suspended for 18 months. The suspension is longer than the period that would normally be allotted in order to give legislators the time necessary to carry out extensive consultations and respond to the needs of the different groups affected. It will also allow Parliament, if it wishes, to modify s. 77(2) at the same time, which contains the same residency requirement for bands whose councillors are elected in electoral sections, and which, given the values espoused in this decision, will also require revision to conform with s. 15(1). Severing the offending words

from the rest of the statute will ensure that, should Parliament choose not to act, all non-residents will be included as voters under s. 77(1), but the nature of band governance and the requirements for voting will otherwise remain the same.

119 I recognize that suspending the effect of the declaration, combined with the extension of the suspension for such a long period is, in the words of the Chief Justice in *Schachter*, *supra*, at p. 716, "a serious matter from the point of view of the *Charter*. A delayed declaration allows a state of affairs which has been found to violate standards embodied in the *Charter* to persist for a time despite the violation". However, this best embodies the principles of respect for *Charter* rights and respect for democracy that should guide remedial considerations. Should Parliament decide to change the scheme, it will have an extended period of time in which to consult with those affected by the legislation and balance the affected interests in a manner that respects Aboriginal rights and all band members' equality interests. Should Parliament not change the scheme, off-reserve band members will gain voting rights within the existing scheme.

120 I also recognize that some may see the section, with the words "and is ordinarily residence on the reserve" no longer included, as possibly giving rise to other constitutional issues. In ordering this remedy, the Court does not foreclose the possibility that, if Parliament does not act to change the legislation, s. 77(1) or related sections of the *Indian Act* may be the subject of a constitutional challenge by on-reserve band members or others.

121 This suspension of the effect of the declaration, along with the extended period of suspension, is ordered to enable Parliament to consult with the affected groups, and to redesign the voting provisions of the *Indian Act* in a nuanced way that respects equality rights and all affected interests, should it so choose. However, should decisions be made

during that period without non-residents' involvement that directly affect their interests and which directly prejudice them, it may be that the decisions themselves could be challenged as violations of non-residents' equality rights. The suspension of the effect of the declaration, in other words, is not a suspension of non-residents' equality rights. Decisions must still be made with respect for those rights.

122 The final determination is whether the Batchewana Band will be exempted from the suspension of the effect of the declaration. In general, litigants who have brought forward a *Charter* challenge should receive the immediate benefits of the ruling, even if the effect of the declaration is suspended: see *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1998] 1 S.C.R. 3, at para. 20. In my opinion, however, this is one of the exceptional cases where immediate relief should not be given to those who brought the action.

123 Professor Roach in *Constitutional Remedies in Canada* (loose-leaf), at pp. 14-85 and 14-86, has identified two possible reasons for which, in general, the claimant in a particular case may have the right to an exemption from the suspension of the effect of the declaration of invalidity, and therefore an immediate remedy:

> Corrective justice would suggest that the successful applicant has a right to remedy while regulatory or public law approaches would only be concerned with giving the applicants enough incentive to bring their case to court.

However, I do not believe that either of these considerations applies in the case at bar. What is at issue in this Court is not a remedy affecting band councils elected under the previous regime, but rather a declaration that will have the effect of changing future election rules. If Parliament chooses either not to act, or to change the legislation to conform with this ruling, the respondents will receive a remedy after the period of

suspension expires or when the new legislation comes into effect. This both gives them a personal remedy, and gives applicants in analogous situations an incentive to bring their case forward.

124 Unlike in other cases where this Court has granted an exemption from the suspension, there are strong administrative reasons not to grant immediate relief to the members of the Batchewana Band. If an exemption from the suspension is given, the Batchewana Band will have to adapt to the inclusion of all non-residents as voters within the existing scheme in the short term. This will require some administrative adjustment. If Parliament then decides to amend the legislation, the Batchewana Band and its members will be required to adapt to a third voting system in a short period of time. This would be inappropriate, and inconsistent with the principles underlying constitutional remedies.

125 Since writing these reasons, I have had the advantage of reading the opinion of my colleagues McLachlin and Bastarache JJ. To the extent that their reasons suggest a departure from the approach to defining analogous grounds taken in *Andrews*, *Turpin*, *Egan*, *Miron*, and *Law*, I must respectfully disagree with their analysis. However, this being said, in my view there is no substantive difference in our respective reasons in the approach to the case at bar.

VI. Disposition

126 Therefore, I would dismiss the appeal, but modify the remedy designed by the Federal Court of Appeal. I would declare invalid the words "and is ordinarily resident on the reserve" in s. 77(1) of the *Indian Act* and suspend the effect of this declaration for 18 months. I would award costs to the respondents. I would answer the restated constitutional questions as follows:

1. Do the words "and is ordinarily resident on the reserve" contained in s. 77(1) of the *Indian Act*, R.S.C., 1985, c. I-5, contravene s. 15(1) of the *Canadian Charter of Rights and Freedoms*, either generally or with respect only to members of the Batchewana Indian Band?

   Yes, in their general application.

2. If the answer to question 1 is in the affirmative, is s. 77(1) of the *Indian Act* demonstrably justified as a reasonable limit pursuant to s. 1 of the *Canadian Charter of Rights and Freedoms*?

   No.

Appeal dismissed with costs but remedy modified.

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