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Differential Treatment of Equality Law post-Kapp

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Cases Considered:

Woodward v. Council of the Fort McMurray No. 468 First Nation, 2010 FC 337

There have been several posts on ABlawg concerning the Supreme Court's most significant equality rights decision of late, *R. v. Kapp*, 2008 SCC 41. Jonnette Watson Hamilton nominated *Kapp* as the leading equality rights case of the 2000s. She and I have also written on the application of *Kapp* (or lack thereof) in cases such as *Ermineskin Indian Band and Nation v. Canada*, 2009 SCC 9; *Morrow v. Zhang*, 2009 ABCA 215 (see also here); and *Cunningham v. Alberta (Aboriginal Affairs and Northern Development)*, 2009 ABCA 239. We are hosting a continuing legal education session on *Litigating Equality Claims Post-Kapp* on June 15, 2010, and hope to have a good turnout of equality rights litigators, judges and NGOs to discuss the implications of *Kapp* (note: the last date to register is June 1, 2010). The need for this session is real because, even two years post-*Kapp*, some lower courts continue to ignore the ruling in that case. The latest example is a decision of Justice James O'Reilly of the Federal Court in a case involving voting rights of non-resident members of the Fort McMurray First Nation in *Woodward v. Council of the Fort McMurray No.468 First Nation*.

The applicants in the *Woodward* case were members of the Fort McMurray First Nation (FMFN) who resided off reserve in the village of Anzac. Under the FMFN's Customary Election Regulations (1993), voting in elections for the band's chief and council was restricted to members of the band who were eighteen years of age or older and were "residents" of FMFN (section 2.7). A "resident" was defined as someone "who maintains a place of residence on one [sic] the band's reserves for at least six months of the year" (section 2.8, cited at para. 3).

After determining that the Regulations (but not a related decision of the FMFN) were subject to judicial review, Justice O'Reilly assessed whether the Regulations were part of the FMFN's customs. This issue was relevant to whether the Regulations were shielded by section 25 of the *Charter*. Section 25 provides that "[t]he 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…" If the FMFN's Customary Election Regulations reflected a customary norm of the FMFN, they might be protected under section 25 of the *Charter* "as other rights or freedoms" and be shielded from challenge by individual band members under section 15 of the *Charter* (at para. 26).

Justice O'Reilly found that the evidence called by the parties of experts and elders did not support the FMFN's argument that it was customary that only residents participated in selecting a chief. The historic practice was that "members of local bands would choose a leader by consensus" and "there was no custom of distinguishing between residents and non-residents" (at para. 21). In particular, the evidence that band members only lived on reserve lands as of the

1950s was particularly persuasive. Section 25 therefore did not apply, and it was open to individual band members to challenge the Regulations under section 15 of the *Charter*.

Section 25 of the *Charter* has not received much judicial scrutiny, particularly at the Supreme Court level. However, in a concurring judgment in *Kapp*, Justice Michel Bastarache decided the case on the basis that the Aboriginal fishing licence that was alleged to be discriminatory by non-aboriginal commercial fishers was protected from challenge under section 25 (*Kapp* at paras. 117 to 121). Justice O'Reilly does not refer to Justice Bastarache's judgment in *Kapp*, nor to the majority's reasons (where it declined to apply section 25, but suggested in *obiter* that "only rights of a constitutional character are likely to benefit" from the section (at para. 63), and questioned whether section 25 should create an "absolute bar" to *Charter* claims in any event (at para. 64)).

The FMFN's second argument concerning the customary nature of its elections related to the application of the *Charter* itself. Because the Regulations were said to be based on custom rather than delegated authority under the *Indian Act*, R.S.C. 1985, c. I-5, the FMFN argued that it did not qualify as "government" under section 32 of the *Charter* with respect to the Regulations. Section 32 of the *Charter* has been interpreted to provide that the *Charter* only applies to government actors or non-government actors implementing government policy (see *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624).

Justice O'Reilly also rejected this argument, relying on a number of other Federal Court decisions where the *Charter* had been found to apply to band regulations or policies even if those rules were based on custom. In *Thompson* v. *Leq'à:mel First Nation Council*, 2007 FC 707, the Court held that "a band council elected under Band Regulations still exercises its powers of governance under the *Indian Act* and therefore if admission to, or the right to vote for, that council is discriminatory within the meaning of subsection 15(1) of the *Charter* such discriminatory results arise under an act of Parliament" (at para. 8). Similarly, in *Clifton* v. *Hartley Bay Indian Band*, 2005 FC 1030, the Court held that "whether the Village Council is acting according to custom or the *Indian Act*, its decisions are ultimately made pursuant to its authority under the *Indian Act* and are therefore subject to the *Charter*" (para. 45). Justice O'Reilly also referred to *Scrimbitt* v. *Sakimay Indian Band Council*, [2000] 1 F.C. 513 (T.D.) in support of his decision.

These cases raise interesting and important issues about the strength and priority of customary law for First Nations. However, these issues are beyond the scope of this comment, given my interest in focusing on the Court's treatment of section 15 of the *Charter*.

Justice O'Reilly began his consideration of section 15 by citing *Corbière* v. *Canada (Minister of Indian and Northern Affairs*), [1999] 2 S.C.R. 203, where the Supreme Court found that the *Indian Act* requirement that voters in band elections be resident on reserve violated section 15 and could not be justified under section 1 of the *Charter*. FMFN attempted to distinguish *Corbière* on the basis that since that decision, "off-reserve members are now allowed to vote on many things, just not for the chief and council of the band" (at para. 32). FMFN also argued that its members "have the option of moving onto the reserve," and that the evidence of over-crowding in *Corbière* was not present in this case (at para. 32).

Justice O'Reilly's response to this submission was as follows:

> I cannot agree with the FMFN's position. I see no reason to depart from the analysis of Justice Strayer in *Thompson*, above, where he concluded that:
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> - limiting the right to vote based on residence makes a distinction that denies equal protection or equal benefit of the law;
> - that distinction is based on grounds analogous to those set out in s. 15 because it involves characteristics that the government has no legitimate interest in expecting the person to change (citing *Corbière*);
> - a distinction based on residence on the reserve is discriminatory because it implies that off-reserve members are lesser members of the band, infringes their dignity by denying them a full opportunity to participate in the band's affairs, and restricts their ability to maintain a connection with the band;
> - the fact that a person may choose voluntarily to live off the reserve is irrelevant (*Woodward* at para. 33, emphasis added).

The *Thompson* case relied on by Justice O'Reilly was decided before *Kapp*, and applied the then-governing test for section 15 of the *Charter* from *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497. The *Law* case defined discrimination as a breach of the claimant's essential human dignity, which was to be determined by assessing a range of contextual factors, including (1) pre-existing disadvantage, stereotyping, prejudice, or vulnerability experienced by the claimant; (2) the correspondence between the ground(s) on which the claim is based and the actual need, capacity, or circumstances of the claimant; (3) the ameliorative purpose or effects of the impugned law upon a more disadvantaged person or group in society; and (4) the nature and scope of the interest affected by the impugned law (*Law* at paras. 62-75).

The focus on human dignity in *Law* was critiqued as being "abstract and subjective", "confusing and difficult to apply", "formalistic", and "an *additional* burden on equality claimants, rather than the philosophical enhancement it was intended to be" (*Kapp* at para. 22, citing a range of secondary literature (emphasis in original)). In none of the Supreme Court decisions involving section 15 of the *Charter* since *Kapp* has human dignity been the focus (see *Ermineskin*, *supra* at para. 188; *A.C. v. Manitoba (Director of Child and Family Services)*, 2009 SCC 30, [2009] 2 S.C.R. 181 (at paras. 111, 150); *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 S.C.R. 567 (at para. 106)). Instead, discrimination is now to be defined in terms of whether differential treatment of the claimant based on a protected ground results in disadvantage based on prejudice and stereotyping (*Kapp* at para. 24). Human dignity should no longer be seen as the touchstone for discrimination after *Kapp*.

Justice O'Reilly thus applied the wrong test for discrimination by relying on another Federal Court case that was decided during the reign of the human dignity approach to discrimination — an approach that has since been discredited. His lack of attention to current case law under section 15, section 25, and as I will note below, section 1 of the *Charter* is troubling. However, does it make a difference to the outcome of the case?

At first blush, the answer appears to be no. Although human dignity and its associated contextual factors were recognized as potentially creating an additional burden on equality claimants in *Kapp*, that burden was found to be met in this case, and a violation of section 15 of the *Charter* was seen to be established, as noted in the above passage.

However, Justice O'Reilly went on to find that the Regulations were justifiable under section 1 of the *Charter* in spite of their violation of section 15. This was based on the considerations stipulated in *R. v. Oakes*, [1986] 1 S.C.R. 103 (although that case is not cited). Nor are the Supreme Court's more recent section 1 reasons in *Hutterian Brethren of Wilson Colony* referenced. The only case that Justice O'Reilly referred to under section 1 was *Thompson*, *supra*, where Justice Strayer held that the voting restrictions in that case could not be justified under section 1.

In *Thompson*, the voting restrictions failed at the first stage of the *Oakes* test – they were seen to have no pressing and substantial objective. Justice Strayer stated as follows:

> While no doubt it is important to the Leq'á:mel Band to identify the area traditionally occupied by it and 23 other Stó-lo First Nations enjoying historic language ties, nowhere is it explained why a present band member not living in that area should not be allowed to vote in the band election governing the three Leq'á:mel reserves that make up only a small part of the CTST [Canadian Traditional Stó:lo Territory]. Similarly, no rational connection is shown between the right to vote and the obligation to live somewhere in the CTST. To the extent that there might be some logic, in respect to purely local matters, to require that voters be resident on the reserve, this regulation does not require that. It only requires that the voter live in any one of dozens of communities, or in rural areas, scattered throughout the CTST (at para. 24).

Justice O'Reilly distinguished the section 1 reasons in *Thompson*. He found that the Customary Election Regulations fulfilled a pressing and substantial objective, that of providing local government to FMFN residents. More specifically, the residency requirement was said to properly "ensure that those most affected by the band's governance have the most say in choosing their representatives" (at para. 35). Second, he found a rational connection between the residency requirement and the objective of the Regulations, "given that most of the band's activities relate to the administration of the reserves for the benefit of the people residing there" (at para. 36). The Customary Election Regulations were seen to differ from the voting restrictions at issue in *Thompson*, as the rules in latter case covered a large geographic area and were not aimed at ensuring local governance in the interests of local residents.

Further, Justice O'Reilly found that there was minimal impairment of the claimants' section 15 rights, as they were not completely excluded from voting in band elections (as were the claimants in *Corbière*). Justice O'Reilly noted that following *Corbière*, non-resident FMFN members are entitled to vote on several issues, including reserve lands, membership of the band, and amalgamations. They are also entitled to sit on the FMFN Elder Committee and advise the chief and council on matters affecting the band (at para. 37). It was also seen as relevant that "the FMFN has very limited resources" (at para. 38), and that if non-resident members were entitled to vote for chief and council, they would make up a majority of voters. Lastly, there was "almost no evidence … as to the effect of the residency requirement" on the claimants (at para. 39), making it difficult to conclude that the deleterious effects of denying them voting rights outweighed the salutary effects of restricting voting to resident members of the FMFN.

Would a focus on discrimination as disadvantage based on prejudice and stereotyping have resulted in a more favourable outcome for the claimants under section 1 of the *Charter*? Under section 15, one of the reasons Justice O'Reilly gave for holding that the Regulations were discriminatory was that they "implie[d] that off-reserve members are lesser members of the band" (at para. 33). The implication that off-reserve members are lesser members of the band

sounds like the harm of stereotyping. Would actually calling the harm "stereotyping" have made a difference? It may have countered Justice O'Reilly's claim that there was a lack of evidence as to the effect of the residency requirement on the claimants, as surely stereotyping can be seen as such an effect. However, Justice O'Reilly's section 1 reasons suggest that the stereotyping was not so bad, as the claimants were not considered lesser members of the band for all intents and purposes, and could still play some role in influencing band governance. His reasons suggest that there may be varying degrees or effects of stereotyping, some of which are more serious and difficult to justify than others. This reading of the case implies that the post-*Kapp* focus on prejudice and stereotyping rather than human dignity may not have made a difference in the outcome of this case.

Jonnette Watson Hamilton and I noted in our post on *Ermineskin* that the focus on discrimination as defined by prejudice and stereotyping is too narrow, and that a broader range of harms flowing from discrimination should be considered, including vulnerability, powerlessness, oppression, stigmatization, marginalization, devaluation, and disadvantage. Even if those broader harms had been considered part of the definition of discrimination in this case, however, the lack of evidence of more specific effects of the Regulations on the claimants (beyond some stereotyping) would likely have made it difficult to find that these other harms had occurred in a way that was unjustifiable. Overall, then, this case could be seen as one where the evidence was insufficient to make out a claim of discrimination that was strong enough to survive section 1 scrutiny, regardless of the test for section 15 that was applied. While I do not take issue with that result, I do think it is important that courts get to their conclusions by applying the correct legal tests.