POLICY BRIEF
Issue 76 | September 16, 2020

Does the Charter Apply? The Struggle to Protect Free Speech On-Reserve

By Robert Jago

FOR YEARS, citizens of the Kwantlen First Nation in southwestern BC have tried to speak out against their experiences of intimidation, neglect, and favouritism by the community's unelected leadership. Those voices have often been repressed and reform has been slow to come.

But last week, the British Columbia Civil Liberties Association delivered a letter to the Chief and Council of the Kwantlen First Nation, to inform them that — in the view of the BCCLA — the *Canadian Charter of Rights and Freedoms* likely applies to the band government, and protects band citizens from any repression they may face for exercising those Rights and Freedoms.

The letter is simple and states something assumed as natural by any other citizen of Canada: a government may not punish a citizen for speaking out on a public issue.

While debate remains as to the *Charter's* potential effects on First Nations and their citizens, to the best of my knowledge this is the first time a civil liberties organization in Canada has accepted that the right to free speech applies to band members and their governments – governments which owe their existence to the *Indian Act*.

This is an important change in policy by the BCCLA, because while Canadians may think they live in a free country, for many of those residents on First Nations, political repression is a fact of life.

DEMOCRACY AND ITS RESTRICTIONS

According to Yellowhead associate fellow Damien Lee, "Some band councils consider themselves untouchable" — and as a consequence "when band members use their free speech to hold their leadership to account, they can become targets for social ostracization or worse. Their social networks might break down as a result; some have been hit with litigation by their leaders; others have had their family forced out of their reserve."

The situation Dr. Lee has described is very familiar. I am a citizen of the Kwantlen First Nation, and the BCCLA letter was issued after I contacted them requesting assistance.

In March of 2019, members of my First Nation petitioned our unelected hereditary government to resign and make way for a democratic system that would be more responsive to us. More than 10% of the band signed — equivalent to half of the on-reserve population — with many others afraid to sign but supportive of the move. The band partially acquiesced and launched a series of mediated governance consultations with the objective of drafting a new governance code.

However, even during the process of collecting signatures for the petition, and moving ahead through the consultations, members reported numerous incidents of harassment, intimidation, threats of violence, and ostracization. This includes the band leadership holding a ceremony at which reform advocates were condemned. It includes shutting down band social media rather than include all band members, explicit threats of violence, and calls by band employees for members of our group to be "banished" — i.e. legally exiled from reserve. I documented this situation last year in an article for the Walrus Magazine.

In that article I also told the story of Wesley First Nation band member and lawyer, Rachel Snow, who is facing a lawsuit brought against her by another band because of a Facebook page she created to take a side in a band referendum. I wrote about a case on the Sandy Lake First Nation, where a family was broken apart and a woman and child were exiled from reserve because their husband opposed the band's administration. I also looked at Indigenous reporters, who have seen their offices burned down, who have faced physical intimidation by band employees.

Since my piece in the Walrus, I've come to learn of additional examples where speaking out against one's band council can lead to repercussions, and of examples of how First Nations and resource companies might use community benefit agreements to dissuade band members from taking part in social media campaigns.

In any case, these examples show that the state of free expression and freedom of the press on too many reserves is poor.

DOES FREE SPEECH EXIST ON RESERVE? A CLOSER LOOK

In 2019, I reached out to hundreds of First Nations band administrations to seek out their views on Free Speech. I received replies from 25 First Nations governments - allowing the poll to be broadly representative, with an 80% confidence level. Of those bands that replied, significant percentages admitted to having official restrictions on free expression. The restrictions include banning reporters, and restricting social media discussion of band affairs - something that 11 of the 25 First Nations who replied reported doing.

Further studies might contextualize these types of restrictions, accounting for more widely accepted forms of censorship, such as preventing hate speech.

However, I saw those more concerning free speech restrictions this past July, when Kwantlen's band government sent members a so-called "Safe Spaces Agreement," a document that would prohibit exactly what I am doing here - speaking about our First Nation's governance to non-band members.

Among other prohibitions, Kwantlen's Safe Spaces Agreement attempted to restrict band members from publicly sharing any information about the band's governance including "updates, reports, questionnaires, any draft or final governance code, and any other written materials".

For communities that have begun moving away from the *Indian Act,* a band's governance code is effectively its constitution. And as far as I know, there are no countries in the world who declare their constitutions to be state secrets.

THE BCCLA PRECEDENT

Facing opposition, Kwantlen's government withdrew the Safe Spaces Agreement shortly after it was proposed, and before the BCCLA letter was issued. However, the support of the BCCLA is still important and still needed.

It is important first because of the precedent BCCLA sets. We at Kwantlen — through our pro-democracy working group, the Kwantlen Reform Committee — reached out to numerous civil liberties groups across Canada. Our appeal was met mostly with silence, or a refusal to engage. Until now, this has been the standard reply these organizations gave First Nations people.

Dr. Lee explains that this "reluctance" of civil liberties groups to stand up for the rights of band members "is likely more generally due to the misguided belief that band councils are traditional forms of Indigenous governance. They're not. Elected or not, *Indian Act* band councils are as Canadian as the butter tart. They do not exist outside of Canadian law, but are in fact an extension of it. Civil liberty organizations might keep this in mind if and when a First Nation individual seeks their help on issues related to the *Canadian Charter of Rights and Freedoms*."

You don't need to look far to find Canadian civil liberties and civil rights groups who will only stand with First Nations when they are up against big business, or are in a stand-off with a non-Native government. These are important campaigns and the support is welcomed by many.

But what they fail to understand is that by refusing to stand up for the free speech rights of band members against band governments, civil liberties organizations become complicit with the oppression they are fighting against.

When their oppressor sits in the band office, civil liberties groups have left First Nations individuals to struggle on their own.

With this first move, the BCCLA changes that. It will now be hard for other civil liberties groups to remain silent when First Nations people come asking for assistance.