Federal Court  Cour fédérale

Date: 20230215

Dockets: T-800-21
T-808-21

Citation: 2023 FC 220

Ottawa, Ontario, February 15, 2023

PRESENT: The Honourable Mr. Justice Favel

BETWEEN:

KAREN MCCARTHY AND LORNA JACKSON-LITTLEWOLFE

Applicants

and

WHITEFISH LAKE FIRST NATION #128

Respondent

JUDGMENT AND REASONS

I. Nature of the Matter

[1] Karen McCarthy and Lorna Jackson-Littlewolfe [Applicants] are members of Whitefish Lake First Nation #128 [WLFN or Respondent]. Ms. McCarthy and the Band Members' Alliance and Advocacy Association of Canada initiated Federal Court file T-800-21. Ms. Jackson-Littlewolfe initiated Federal Court file T-808-21 [collectively, Applications]. The Applications have been consolidated and now form the present matter before the Court.

[2] The Applicants seek judicial review of two decisions made by the WLFN Appeals Committee [Committee]. On April 14, 2021, the Committee held that Ms. McCarthy was ineligible to vote in the upcoming WLFN Election because she regained her Indian status and membership in WLFN under Bill C-31 [Bill C-31 Voting Policy Decision]. WLFN maintains that, pursuant to WLFN custom, members who regained status under Bill C-31 are ineligible to vote in WLFN elections [Bill C-31 Voting Policy or Policy].

[3] On April 20, 2021, the Committee held that Ms. Jackson-Littlewolfe was ineligible to run for Chief and Council because she lives in a common law marriage [Common Law Marriage Prohibition Decision] [collectively, Decisions]. The Committee made this Decision pursuant to section 1(c) of the *Saddle Lake Tribal Customs* [*Election Regulations*], which states that "no person living in a Common law marriage shall be eligible for nomination" [Common Law Marriage Prohibition or Prohibition].

[4] Among other relief, the Applicants seek declarations that the Bill C-31 Voting Policy, the Common Law Marriage Prohibition, and the Decisions are contrary to subsection 15(1) of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*] [*Constitution Act, 1982*]. They also seek an Order directing a new election that is *Charter* compliant.

[5] WLFN submits that the *Charter* does not apply to its Decisions by virtue of section 25 of the *Charter* and that the Applications should be dismissed. Alternatively, if the Court finds that WLFN has infringed the Applicants' section 15 *Charter* rights in a manner that cannot be saved

by section 1 or shielded by section 25, WLFN asks the Court to suspend the declarations of invalidity for a period of 12 months for the Bill C-31 Voting Policy and for a period of 6 months for the Common Law Marriage Prohibition.

[6] The Applications for judicial review are allowed for the following reasons:

1. The Decisions are unreasonable because they are unlawful. Neither the Bill C-31 Voting Policy nor the Common Law Marriage Prohibition are WLFN custom. The Common Law Marriage Prohibition is also unreasonable because the Committee failed to consider Ms. Jackson-Littlewolfe's *Charter* rights.
2. The *Charter* applies to WLFN's leadership selection processes as set out in the *Election Regulations*.
3. Section 25 of the *Charter* cannot shield the Bill C-31 Voting Policy or the Common Law Marriage Prohibition because:
    a. The Bill C-31 Voting Policy discriminates on the basis of sex. Section 28 of the *Charter*, which protects gender equality "[n]otwithstanding anything else" in the *Charter*, prohibits WLFN from invoking section 25 to shield the Bill C-31 Voting Policy; and
    b. WLFN has failed to establish that the Common Law Marriage Prohibition is a custom enacted pursuant to its inherent right to self-government. Section 25 cannot shield a *Charter* infringing custom if it does not have the force of law.
4. Both the Bill C-31 Voting Policy and the Common Law Marriage Prohibition are contrary to subsection 15(1) of the *Charter* and cannot be saved by section 1.

II. Background

[7] WLFN is a Treaty 6 Nation with a reserve near St. Paul, Alberta. The Applicants state that WLFN and Saddle Lake First Nation #125 [SLFN] form the Saddle Lake Cree Nation #462 [SLCN]. Under the *Indian Act*, RSC 1985, c I-5 [*Indian Act*], SLCN is a single band. It is a large First Nation with approximately 11,231 members. Although part of SLCN, WLFN and SLFN have their own reserves and Band Councils that conduct separate elections. WLFN does not dispute this characterization of the relationship between WLFN and SLFN.

[8] WLFN does assert that Canada wrongfully amalgamated WLFN with SLFN. This claim is the subject of Federal Court proceeding T-1728-11. Suffice to say that the parties in the present matter agree that the relationship between WLFN and SLFN is imperfect.

(1) Procedural History

[9] The Applicants originally named SLCN as a respondent in both Applications; however, the parties consented to an Order removing SLCN as a respondent.

[10] On July 30, 2021, WLFN moved to convert the Applications into actions. WLFN's motions were dismissed on October 20, 2021, with costs. On February 25, 2022, the Court issued an Order consolidating the Applications.

(2) WLFN Elections

[11] The primary event giving rise to the Applications was the 2021 WLFN election for Chief and Council [Election], held on May 6, 2021, and April 29, 2021, pursuant to the *Election Regulations*.

[12] The *Election Regulations* were enacted during the 1950s and govern both WLFN and SLFN. The introduction to the *Election Regulations* states that "[a]ll areas not covered by the outline herein shall be covered under the *Indian Act*, as spelled out in section[s] 73 to 78".

[13] Section 2(a) of the *Election Regulations* sets out who is eligible to vote in elections. Section 2(a) states that "[a]ny Band member, over the age of 21 years, on the day of the election, whether living on the Reserve or not, shall be eligible to cast a vote; with the exception of Red Ticket Indians."

[14] Section 1(c) of the *Election Regulations* prohibits members from being nominated for Chief or Council if they live in a common law marriage. It is common ground between the parties that the Common Law Marriage Prohibition stems from Christian values and moral obligations.

[15] In 1990, WLFN and SLFN passed a joint Band Council Resolution [BCR] [1990 BCR] stating that any changes to the *Election Regulations* must be agreed upon by the Band Councils of both First Nations.

[16] In 2017, Justice McVeigh found the *Election Regulations* inadequate (*Shirt v Saddle Lake Cree Nation*, 2017 FC 364 [*Shirt I*]). This matter did not involve WLFN. The Court required SLFN to develop a new process to determine the eligibility of candidates, review the eligibility of the applicants, and if any applicants were deemed eligible, hold a new election (at paras 70, 72). The applicants in *Shirt I* did not raise constitutional arguments.

[17] Later that year, WLFN and SLFN began developing a new election law. Ms. Jackson-Littlewolfe participated as a member on the WLFN Working Group. In her affidavit, Ms. Jackson-Littlewolfe explains that the new election law was intended to apply to both WLFN and SLFN. However, in 2018, WLFN leadership stopped participating. Both Ms. Jackson-Littlewolfe and Ms. McCarthy continued to attend SLFN meetings to work on the new law.

[18] In February 2019, SLFN Elders agreed on a final draft of the new election code, "*onihcikiskwapowin* – Tribal Customs Elections Code" [New Election Code]. The New Election Code does not contain the Common Law Marriage Prohibition.

[19] WLFN acknowledges that SLFN used the New Election Code in the 2019 SLFN election. However, WLFN submits that the New Election Code was enacted without consulting WLFN, contrary to the 1990 BCR. In *Shirt v Saddle Lake Cree Nation*, 2022 FC 321 [*Shirt II*], decided after the New Election Code was allegedly finalized, Justice Strickland noted that the SLCN membership never ratified the New Election Code and that the *Election Regulations*, the same law that these Applications are concerned with, continue to govern SLFN elections (at para 3). This matter also did not involve WLFN.

(3) WLFN Membership & Bill C-31

[20] According to the Governance Profile maintained by Crown-Indigenous Relations and Northern Affairs Canada, SLCN is a "Section 11 Band." This means that, pursuant to section 11 of the *Indian Act*, the federal government may add individuals to the SLCN membership list. In comparison, "Section 10 Bands" control their own membership lists.

[21] Prior to 1985, the *Indian Act* contained discriminatory provisions that prevented a status Indian woman from maintaining her Indian status and transmitting it to her children if she married a non-status man. Conversely, if a status Indian man married a non-status woman, he was able to retain his status and transmit it to his children (*McIvor v Canada (Registrar of Indian and Northern Affairs)*, 2009 BCCA 153 at paras 15-23 [*McIvor*]).

[22] When the federal government introduced Bill C-31, *An Act to Amend the Indian Act*, 1st Sess, 33rd Parl, 1985 [Bill C-31] in an attempt to remedy the historical discrimination that disenfranchised thousands of women and, by extension, their children, WLFN permitted all newly enfranchised members to obtain full membership. Notwithstanding this fact and the fact that SLCN is a Section 11 Band, WLFN maintains that "[m]embers that are of Bill C-31 descent" [Bill C-31 Members] are not entitled to vote in WLFN elections pursuant to WLFN 'custom'. WLFN maintains that the Bill C-31 Voting Policy has been a WLFN custom since Bill C-31 first came into force.

III. The Decisions and Precipitating Events

[23] Ms. McCarthy was born without Indian status because her mother married a non-status man in 1971. She regained her status and membership in SLCN/WLFN under Bill C-31. However, the Bill C-31 Voting Policy renders Ms. McCarthy ineligible to vote in WLFN elections.

[24] In the first week of January 2021, WLFN posted a list of eligible electors prior to the Election. Ms. McCarthy and her children were not on the list. Ms. McCarthy "appealed the voters list" in a January 12, 2021 letter, attaching a copy of her Indian status card and requesting that she be added to the voters list. Ms. McCarthy submitted a similar appeal in 2017, which the Committee dismissed. She did not seek judicial review of the 2017 decision.

[25] On April 14, 2021, Ms. McCarthy received a letter from the Chair of the Committee dismissing her appeal. The letter stated that, after reviewing "the relevant information", the Committee "determined that the Membership Clerk was correct that you are a Bill C-31 Member." The letter proceeded to state:

> It is common practice and the customary law of the [WLFN] that Bill C-31 people are not eligible to vote in an Election or referendum for they are not Electors. Accordingly, we regret to advise that you are not considered to be eligible to vote in the Election, based on information received from Whitefish Lake Membership office.

[26] On April 15, 2021, Ms. Jackson-Littlewolfe's accepted her nomination as a candidate for the Election. On April 20, 2021, the Chair of the Committee advised Ms. Jackson-Littlewolfe that an appeal was filed challenging her nomination pursuant to the Common Law Marriage Prohibition.

[27] On April 20, 2021, the Chair of the Committee requested a meeting with Ms. Jackson-Littlewolf to discuss the Committee's Decision regarding her eligibility as a candidate. Ms. Jackson-Littlewolfe attended a meeting that night, where the Committee gave her the following letter signed by all the members of the Committee:

> To: Lorna Jackson-Littlewolfe
>
> Please be advised that the Appeals Committee held a duly convened meeting on April 19, 2021 in the Council Chambers to address letters protesting candidates. In accordance to the Tribal Custom Electoral Bylaw Section 1(c), it has been determined that you are not an eligible candidate for the 2021 Elections, as you are in a common law relationship.
>
> …
>
> Based on the above, the Appeals Committee has ruled that you are not an eligible candidate…

[28] In her affidavit, Ms. Jackson-Littlewolfe deposes that she told the Committee that this Court struck down the *Election Regulations* in *Shirt I* and that the *Election Regulations* are discriminatory. She also told the Committee that SLFN had implemented the New Election Code and that she would be judicially reviewing the Committee's Decision.

[29] The next day, Ms. Jackson-Littlewolfe requested another letter from the Committee confirming its Decision and a copy of the Committee's meeting minutes. The Chair of the Committee provided the following letter:

> To: Lorna Jackson-Littlewolfe:
>
> Please be advised that the Appeals Committee held a duly convened meeting on April 20, 2021 in the Council Chambers to address your eligibility.

> As discussed last evening in the Council Chambers that you are not eligible to run in the Whitefish Lake Band #128 Elections 2021 pursuant to Section 1(c) of the [*Election Regulations*].
>
> We have come to a conclusion that we are going to uphold the requirement of the [*Election Regulations*], which deems that you are not eligible.
>
> Based on the above, we have made a final decision to omit your name from the list of candidates who are eligible to run…

IV. The Evidence and Preliminary Issues of Admissibility

[30] The only evidence tendered by the parties was several affidavits of Elders and former Band Council members. No one was cross-examined, leading to a limited evidentiary record for the determination of such important issues. I will set out a detailed summary of the evidentiary record in light of two issues the Court must decide. First, the Court must determine whether the Bill C-31 Voting Policy and the Common Law Marriage Prohibition are WLFN customs. Second, the Court must determine whether the Respondent possesses an "aboriginal, treaty, or other" right triggering the application of section 25 of the *Charter*.

(1) Bill C-31 Voting Policy Evidence

[31] Ms. McCarthy submitted five affidavits. In her own affidavit and to her knowledge, WLFN leadership unilaterally imposed the Bill C-31 Voting Policy without consulting the WLFN membership. She deposes that Bill C-31 Members have consistently objected to the Policy and that based on her consultations with WLFN members, they agree that the Policy is not a custom. Ms. McCarthy also explains that since initiating this application for judicial review,

she has been harassed and the WLFN Band Council passed a BCR evicting her from her band-owned home.

[32] Three former WLFN Chiefs provided affidavits: Elder Marvin Simon Sparklingeyes, Charles Brian Favel, and Ernest Raymond Houle. The last affidavit is signed by Elder Charlie Adolphus Jackson. In these affidavits, the deponents state that historically, WLFN did not categorize WLFN members; rather, WLFN sought to treat all members equally. They also express their belief that the Bill C-31 Voting Policy is not a WLFN custom. They explain that after Bill C-31 became law, past leadership denied Bill C-31 Members the right to vote without consulting the WLFN membership. They state that it is not WLFN custom to afford some members more rights than others. They also state that they do not support the Bill C-31 Voting Policy and that they believe the consensus of the WLFN membership is that all members, including Bill C-31 Members, should have the right to vote.

[33] WLFN submitted two affidavits. The first affidavit is sworn by Elder Ben Houle, who served as a Councillor of WLFN from 2005 to 2011. The second affidavit is signed by Elder Ed Cardinal, who serves as the Chair of the Committee. Elder Cardinal deposes that in the 1980s and 1990s, it was "commonly understood" that only "section 6(1)(a) *Indian Act* Indians" were entitled to vote. Elder Ben Houle deposes that prior to 1985, "it was common knowledge" and a "natural consequence" that women would lose their rights if they married out. However, he states that this practice "was not a law based in the history or traditions, customs of the Nation."

[34] Elder Ben Houle also deposes that, since Bill C-31, “it has been the consistently held view of our community that [Bill C-31 Members] do not have the right to vote or participate in elections.” Both Elder Ben Houle and Elder Cardinal state that the Bill C-31 Voting Policy has continued since 1985. They also both state that up until the late 1990s and potentially early 2000s, a representative from Indian and Northern Affairs Canada [INAC] acted as the electoral officer for WLFN elections and that the Bill C-31 Voting Policy was in place during this time. Finally, they both express their belief that changes to WLFN governance should made by the WLFN membership.

(2) Common Law Marriage Prohibition Evidence

[35] Ms. Jackson-Littlewolfe submitted four affidavits. In her own affidavit, she explains that she was formerly married but is now living in a common law marriage.

[36] Anneke Pingo swore the second affidavit, which attaches the 2016 Census data for WLFN.

[37] Former WLFN Chief and Councillor Ernest Houle swore the third affidavit. Ernest Houle states that the “the traditional qualifications for selecting leaders were whether the leader could provide for and protect the people”, not their marital status. He does not believe the Common Law Marriage Prohibition reflects WLFN traditional practices or customs, nor is it somehow based on Treaty 6. He also explains that WLFN has applied the Common Law Marriage Prohibition in an arbitrary manner depending on the proposed candidate and Band Council. For example, in 1987, Charles Favel was permitted to run as a candidate in an election even though

he was in a common law relationship. A similar situation occurred in 2013. Ernest Houle deposes that he has had "detailed conversations" with band members and believes that the majority are opposed to the Common Law Marriage Prohibition. Finally, he states that no one has challenged the Common Law Marriage Prohibition because many members lack the financial resources and fear bullying.

[38] Elder Sparklingeyes, Ms. Jackson-Littlewolfe's father, swore the final affidavit. Elder Sparklingeyes states that the Common Law Marriage Prohibition was introduced in 1953 after a hereditary Chief "left his wife to go live with another woman" in 1923. He explains that this "offended the Christian beliefs of many band members", causing them to no longer desire him as Chief. Elder Sparklingeyes believes the Common Law Marriage Prohibition no longer reflects the views of the majority of WLFN. He states that he is "aware of some people who do not vote because they don't believe our elections are fair because people are not treated equally."

[39] WLFN submitted two affidavits. One is from Ms. Shauna Jackson, the Executive Assistant to the WLFN Band Council, and the other from Elder Ben Houle. Ms. Jackson's affidavit does not contain evidence relevant to the Common Law Marriage Prohibition. The purpose of her affidavit is to show that Ms. Jackson-Littlewolfe appealed the nomination of two candidates in 2014 because they lived off the WLFN reserve.

[40] Elder Ben Houle deposes that the Common Law Marriage Prohibition reflects WLFN's "customs and traditional practices" and "historical practices of governance." He also recounts speaking with Elder and former Reverend Bill Jackson [Elder Jackson] about the Common Law

Marriage Prohibition. He deposes that Elder Jackson, an 88-year-old member of WLFN, told him the following:

- Elder Jackson's father told Elder Jackson that in 1876, WLFN's reserve was surveyed around a Mission. As a result, WLFN adopted the teachings of the Methodist Church, including the belief that a man should only have one wife;
- Even during the time that WLFN leadership was governed by a hereditary system, respected members of the community determined that their leadership must be married;
- No one "really questioned" the Common Law Marriage Prohibition during Elder Jackson's lifetime and the custom was followed "religiously";
- The current WLFN Chief and members, particularly Elders, are satisfied with the Common Law Marriage Prohibition; and
- A survey was distributed to Elders six or seven years ago. Most, if not all, of the Elders were in favour of the current *Election Regulations*.

[41] Finally, Elder Ben Houle notes that an INAC representative acted as WLFN's electoral officer in the 1990s and possibly the early 2000s.

(a) *Admissibility of Elder Ben Houle's Affidavit in T-808-21*

[42] Ms. Jackson-Littlewolfe submits that Elder Ben Houle's evidence contains hearsay statements from Elder Jackson, and that this is inappropriate because Elder Jackson was available to make a sworn statement (*Cowichan Tribes v Canada (AG)*, 2019 BCSC 1243 at paras 105-08 [*Cowichan*]).

[43] WLFN submits that oral history is hearsay by its very nature and that the evidence in Elder Ben Houle's affidavit is both necessary and reliable. WLFN also states that the "best evidence" rule ought to apply, which permits a Court to admit oral history evidence if it is the best evidence available to an Indigenous party (*Delgamuukw v British Columbia*, [1997] 3 SCR 1010 at paras 103-06, 153 DLR (4th) 193 [*Delgamuukw*]). Finally, WLFN submits that the oral history within Elder Ben Houle's affidavit satisfies the criteria in *Mitchell v Minister of National Revenue*, 2001 SCC 33 at para 30 [*Mitchell*] because:

1. It is useful, as it provides the history of the *Election Regulations* and WLFN governance;
2. It is reasonably reliable and is a result of customary knowledge transfer; and
3. The probative value clearly outweighs any prejudicial effects.

[44] In *Potts v Alexis Nakota Sioux Nation*, 2019 FC 1121 [*Potts*], Justice McDonald held that hearsay evidence is not necessary or reliable when the party introducing the evidence fails to explain why the individuals with actual knowledge of the events did not provide direct evidence themselves (at para 28).

[45] The admission of oral histories shall be determined on a case-by-case basis (*Delgamuukw* at para 87). Courts must be cognizant of the unique evidentiary challenges facing Indigenous parties claiming constitutional rights (*Mitchell* at paras 27-28). However, that does not mean that the law of evidence does not apply to oral history evidence (*Mitchell* at para 29; *Cowichan* at para 78). Rather, courts must apply the rules of evidence flexibly "in a manner commensurate with the inherent difficulties posed by such claims" (*Mitchell* at para 29).

[46] I am persuaded by the Respondent's submissions and find that Elder Ben Houle's affidavit is admissible based on the *Mitchell* criteria (at para 30). First, the evidence is useful. In order to be useful, oral histories must provide "evidence of ancestral practices and their significance that would not otherwise be available" (*Mitchell* at para 32). Here, the evidence speaks to Elder Ben Houle's understanding of the history and genesis of the Common Law Marriage Prohibition, and there is no other available source of this evidence. In my view, whether the evidence comes from Elder Ben Houle or Elder Jackson himself, it is still oral history evidence.

[47] Second, the evidence is still reasonably reliable (Mitchell at para 33). Elder Ben Houle is an WLFN Elder that represents a "reasonably reliable source" of WLFN's history. He is a life-long resident of WLFN, save for several years he spent attending college, who engages with other Elders such as Elder Jackson. Ms. Jackson-Littlewolfe has not explained why an additional person or link in the chain of oral history makes the evidence less reliable.

[48] Finally, the probative value of the evidence is not "overshadowed by its potential for prejudice" (*Mitchell* at para 30). Ms. Jackson-Littlewolfe has not explained why she would be prejudiced if the Court admitted Elder Ben Houle's affidavit. Ms. Jackson-Littlewolfe did not cross-examine Elder Ben Houle, nor is there any indication that she would have cross-examined Elder Jackson if he swore his own affidavit. Further, in light of the limited evidence in the determination of such important issues, Elder Ben Houle's affidavit provides additional context for the Court to consider.

[49] For these reasons, I will assess the weight of Elder Ben Houle's affidavit along with the other evidence. I reach this conclusion keeping in mind that the goal of the rules of evidence is to "promote truth-finding and fairness" and to "facilitate justice" (*Mitchell* at para 30).

V. Issues and Standard of Review

[50] After considering the submissions of the parties, the issues for determination are:

1. Are the Bill C-31 Voting Policy and the Common Law Marriage Prohibition 'customs' and, if so, are the respective Decisions lawful?
2. Did the Committee fail to consider the Applicants' *Charter* rights?
3. Does section 25 of the *Charter* assist WLFN?
    a. Are WLFN's decisions concerning leadership selection processes immune from *Charter* scrutiny?
    b. Can section 25 of the *Charter* shield the Bill C-31 Voting Policy or the Common Law Marriage Prohibition?
4. Is the Bill C-31 Voting Policy or the Common Law Marriage Prohibition contrary to subsection 15(1) of the *Charter*?
5. If yes, are the infringements justified under section 1 of the *Charter*?
6. What are the appropriate remedies?

[51] Issues #1 and #2 challenge the Decisions from an administrative law perspective. Issues #4 and #5 challenge the constitutionality of the Bill C-31 Voting Policy and the Common Law Marriage Prohibition (*Canadian Centre for Bio-Ethical Reform v City of Peterborough*, 2016 ONSC 1972 at para 12). This Court has jurisdiction to address both arguments. Specifically, this

Court may review "decisions made under a First Nation's election laws, including where these laws are said to be 'customary'" (*Thomas v One Arrow First Nation*, 2019 FC 1663 at para 14). The Court also has jurisdiction to declare First Nations' election regulations unconstitutional and of no force and effect (*Janvier v Chipewyan Prairie First Nation*, 2021 FC 539 at para 33).

[52] Issue #1 attracts a reasonableness standard of review. The presumption of reasonableness applies to an administrative decision-maker's interpretation of their enabling statute (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 25 [*Vavilov*]). In this case, the Committee considered their customary law and determined that the Bill C-31 Voting Policy is a WLFN common practice and custom and that the Common Law Marriage Prohibition essentially reflects a custom. Deference is owed to Indigenous decision-makers' understanding of their own Indigenous laws (*Pastion v Dene Tha' First Nation*, 2018 FC 648 at paras 21-23 [*Pastion*]).

[53] As for Issue #2, when an administrative decision-maker's decision allegedly infringes an applicant's *Charter* rights, the framework set out in *Doré v Barreau du Québec*, 2012 SCC 12 [*Doré*] and *Loyola High School v Québec (AG)*, 2015 SCC 12 [*Loyola*] applies (*Vavilov* at para 57; *Law Society of British Columbia v Trinity Western University*, 2018 SCC 32 at para 57 [*TWU 2018*]). Typically, the *Doré*/*Loyola* framework requires the Court to adopt a deferential standard of review (*Doré* at paras 54-58; *Canadian Broadcasting Corporation v Ferrier*, 2019 ONCA 1025 at para 34 [*Ferrier*]). However, since *Vavilov*, the Ontario Court of Appeal has opined that a decision-maker's refusal or failure to consider an applicable *Charter* right is a "general

question of law of central importance to the legal system as a whole" (*Ferrier* at para 35, citing *Vavilov* at para 17). Accordingly, the second issue is reviewable on the standard of correctness.

[54] The remaining issues do not attract a standard of review. Typically, whether a decision-maker's enabling statute violates the *Charter* and whether an infringement is saved by section 1 are constitutional questions that attract a correctness review (*Vavilov* at para 57). This standard also applies to whether section 25 of the *Charter* operates as the Respondent alleges (*Vavilov* at paras 55-56). However, the Committee did not pronounce on any of these questions. Accordingly, no standard of review applies to Issues #3, #4, or #5. This distinction is more academic than practical, as "no standard of review" is the functional equivalent of a "correctness review".

[55] I note that the record does not indicate that Ms. McCarthy directly questioned the constitutional validity of the Bill C-31 Voting Policy before the Committee. Likewise, WLFN never raised a section 25 *Charter* defence. None of the parties make submissions on whether new arguments can be raised for the first time on judicial review (*Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61 at paras 22-26; *Forest Ethics Advocacy Association v Canada (National Energy Board)*, 2014 FCA 245 at paras 28, 37-46).

[56] This consideration does not concern Ms. Jackson-Littlewolfe. Ms. Jackson-Littlewolfe deposes that she told the Committee that the Common Law Marriage Prohibition is discriminatory and per *Shirt I*, potentially unconstitutional.

[57] In my view, the jurisprudence supports the view that parties are permitted to raise constitutional arguments for the first time when the new argument stems from the administrative decision itself (*Fraser v Canada (Public Safety and Emergency Preparedness)*, 2021 FC 821 at para 29).

[58] Lastly, Issue #6 does not attract a standard of review because it pertains to the remedies that this Court can order.

VI. Analysis

A. *Are the Bill C-31 Voting Policy and the Common Law Marriage Prohibition 'customs' and, if so, are the respective Decisions lawful?*

(1) Bill C-31 Voting Policy

(a) *The Law*

[59] The party relying on an alleged custom must demonstrate that the custom reflects a broad consensus of the First Nation's membership (*Whalen v Fort McMurray No 468 First Nation*, 2019 FC 732 at para 32 [*Whalen I*]; *Bigstone v Big Eagle*, [1993] 1 CNLR 25 at 34, 32 ACWS (3d) 862 (FCTD)). Justice Strickland summarized the key principles regarding customary law in *Da'naxda'xw First Nation v Peters*, 2021 FC 360 [*Da'naxda'xw*]:

> [72] In summary, custom requires evidence of a practice and the manifestation of the will of the First Nation's members to be bound by that practice. Establishing band custom requires evidence demonstrating that the custom is firmly established, generalized and followed consistently and conscientiously by a majority of the community, thus evidencing a broad consensus. Chief and Council alone cannot determine that a change in circumstance comprises a

> new custom, there must be broad consensus among the membership. Similarly, custom is not frozen in time, but any change requires a broad consensus of the membership. The inquiry into whether a custom enjoys broad consensus is fact and context specific and the evidence may demonstrate that there is no consensus. Custom may be demonstrated by a one-time event like a referendum or majority vote, by a series of events, or possibly acquiescence. The burden is on the party trying to demonstrate custom to prove that there is a broad consensus and the existence of a band custom and whether or not it has been changed with the substantial agreement of the band members will always depend on the circumstances.
>
> [Citations omitted. Emphasis added.]

(b) *Parties' Positions*

[60] Ms. McCarthy submits that WLFN has failed to demonstrate that the Bill C-31 Voting Policy reflects the broad consensus of the WLFN membership. Rather, the Policy has been imposed by leadership without consulting the WLFN membership. Ms. McCarthy also notes that there is nothing in the *Election Regulations* limiting her right to vote. She states that the *Election Regulations* provide that the *Indian Act* fills any gaps and that she would be entitled to vote under the *Indian Act* regime.

[61] WLFN, referring to the affidavits of Elders Ben Houle and Ed Cardinal, submits that the Bill C-31 Voting Policy is an unwritten custom that has been in place since Parliament enacted Bill C-31. WLFN does not make submissions on whether the Bill C-31 Voting Policy is a written custom.

(c) *Conclusion*

[62] In my view, the Bill C-31 Voting Policy Decision is unlawful because the Bill C-31 Voting Policy is neither a written nor an unwritten WLFN custom.

[63] Ms. McCarthy is not entirely correct when she states in her affidavit that the *Election Regulations* say "nothing about the gender of parents or sub-categories of members that may not be permitted to vote". As noted above, section 2(a) of the Election Regulations states that "[a]ny Band member, over the age of 21 years, on the day of the election, whether living on the Reserve or not, shall be eligible to cast a vote; with the exception of Red Ticket Indians" (emphasis added). The parties have not made submissions on whether Bill C-31 Members fall into the "Red Ticket Indian" exception. I will clarify the relationship between Red Ticket Indians and Bill C-31 Members.

[64] In *Daniels v Canada (Minister of Indian Affairs and Northern Development)*, 2013 FC 6, rev'd in part 2014 FCA 101, aff'd 2016 SCC 12, Justice Phelan explained the term "Red Ticket Indians" as follows:

> [460] In the 1869 legislation *An Act for the gradual enfranchisement of Indians, the better management of Indian affairs, and to extend the provisions of the Act*, 81 Vict, c 43, the federal government introduced the statutory marrying out rule but it permitted women who married out to continue to draw annuities. The provision was continued in the *Indian Act, 1876* and an administrative practice arose of issuing those women identity cards known as "red tickets".
>
> [461] By 1951 the *Indian Act* was amended and these "red ticket Indians" were required to commute their annuities and to leave the reserves. Ultimately those women who married out, together with their first generation descendants, were reinstated to Indian status under Bill C-31 in 1985.

[65] Essentially, the *Election Regulations* state that women who lost their status and membership because they married out are not eligible to vote. As noted by Justice Phelan, these are the same women, along with their descendants, who later became Bill C-31 Members.

[66] The "Red Ticket Indian" exception, with its origin stemming from the *Indian Act* and government policy, may have arguably constituted a written custom at the time WLFN enacted the *Election Regulations*. Further, the Bill C-31 Voting Policy may stem from the "Red Ticket Indian" exception. I do note that the affidavit of Elder Ben Houle briefly discusses the situation of women "marrying out" and receiving some compensation, and I presume that he is referring to the "Red Ticket Indian" exception. There is not much discussion beyond these assertions, including what is meant by "marrying out".

[67] However, even if both these statements are true, this does not mean that the Bill C-31 Voting Policy is a written custom of WLFN. I stated above that it is arguable that the "Red Ticket Indian" exception is a written custom because it appears that WLFN simply adopted concepts and terms that were imposed on them through the *Indian Act*. There is no evidence as to whether this provision reflected the broad consensus of the community when it was adopted in the 1950s. The various affidavits, as summarized above, do not shed much light on this issue. To illustrate, Elder Ben Houle's affidavit also states that the practice of women losing their rights if they "married out" was not "based in the history or traditions, customs" of WLFN.

[68] In addition, there is an important distinction between "Red Ticket Indians" and Bill C-31 Members. Whereas "Red Ticket Indians" lost their membership upon marrying out, Bill C-31

Members have full membership in WLFN. I agree with Ms. McCarthy that there is nothing within the *Election Regulations* (other than the "Red Ticket Indian" exception, which is now obsolete) or the *Indian Act* that limits certain members' democratic rights. Accordingly, I am satisfied that the Bill C-31 Voting Policy is not a written custom of WLFN.

[69] I similarly conclude that the Bill C-31 Voting Policy is not an unwritten custom of WLFN.

[70] The affidavits of Elder Ben Houle and Elder Cardinal speak to WLFN's customs from at least 26 years ago. Elder Ben Houle deposes that prior to 1985, it was WLFN's custom that a woman would lose her rights if she married out. Elder Cardinal similarly deposes that in 1996, it was "commonly understood" that only "section 6(1)(a) *Indian Act* Indians" were entitled to vote. I am assigning this evidence little weight, as it speaks to an alleged custom from several decades ago and is based on an imposed rule that has since been deemed unconstitutional (McIvor). In my view, the relevant question is what WLFN's current custom is concerning Bill C-31 Members, bearing in mind that customary law may change over time (*Da'naxda'xw* at para 72; *McLeod Lake Indian Band v Chingee*, [1998] FCJ No 1185 at para 10, 165 DLR (4th) 358 [*Chingee*]; *Francis v Mohawk Council of Kanesatake*, 2003 FCT 115 at para 24 [*Francis*]).

[71] In this regard, both Elder Ben Houle and Elder Cardinal state that the Bill C-31 Voting Policy has continued from 1985 to this day. Elder Ben Houle deposes that since Bill C-31, "it has been the consistently held view of our community that [Bill C-31 Members] do not have the right to vote or participate in elections", but he does not explain how he knows this or his basis for this

statement. This is the only evidence tendered by WLFN that speaks to the current state of the Bill C-31 Voting Policy.

[72] In comparison, Ms. McCarthy deposes that she has consulted with WLFN members about their views on the Bill C-31 Voting Policy. While more evidence of the individuals she consulted with may have been helpful, there is no reason to doubt this statement, particularly in light of Ms. McCarthy's engagement in the WLFN Working Group. In any event, she deposes that the Bill C-31 Voting Policy does not reflect the will of the WLFN membership. The affidavits of Elder Sparklingeyes, Charles Brian Favel, and Ernest Raymond Houle corroborate Ms. McCarthy's evidence. All of these individuals depose that they do not support the Bill C-31 Voting Policy.

[73] After considering the conflicting evidence, I find that WLFN has failed to establish that the Bill C-31 Voting Policy is a custom supported by a broad community consensus. Accordingly, the Bill C-31 Policy Decision is unreasonable because it is not grounded in law.

[74] This alone is enough to grant the application for judicial review in T-800-21. Having found that the Bill C-31 Voting Policy is not a law, I will nevertheless consider its constitutionality.

[75] I also wish to conclude by addressing WLFN's evidence concerning the oversight and involvement of INAC representatives in WLFN elections from the 1900s to 2000s. In my view,

this participation has no bearing on whether the Bill C-31 Voting Policy is grounded in custom. It also does not legitimize or validate WLFN's discriminatory actions.

[76] The issues involving the Bill C-31 Voting Policy and the resulting Decision are, sadly, yet another example of the harmful impact of colonial laws and policies forced upon Indigenous peoples by the federal government. WLFN's adoption of these colonial concepts further perpetuates the divide within its membership.

(2) The Common Law Marriage Prohibition

(a) *Parties' Positions*

[77] Although neither Ms. Jackson-Littlewolfe nor WLFN directly address this issue, I am of the view that it is necessary to determine whether the Common Law Marriage Prohibition, as set out in section 1(c) of the *Election Regulations*, is a custom that was adopted or agreed to by the broad consensus of WLFN. Put simply, Ms. Jackson-Littlewolfe's submissions and supporting affidavits state that the Common Law Marriage Prohibition is not a proper reflection of WLFN traditional practices or custom because its adoption lacked the input or involvement of WLFN members. WLFN, on the other hand, submits that section 1(c) of the *Election Regulations* speaks for itself.

(b) *Conclusion*

[78] In my view, the Common Law Marriage Prohibition Decision is unlawful because the Common Law Marriage Prohibition is not a WLFN custom. The evidence before the Court only

demonstrates that the requirement to be married in order to hold a leadership position within WLFN was crystallized into the *Election Regulations* in the mid-1950s. There is no evidence of broad community consensus, past or present.

[79] On its face, the existence of section 1(c) of the *Election Regulations* would suggest that the WLFN membership views this provision as reflecting the broad consensus of WLFN. However, the evidence indicates otherwise. Further, as noted by Ms. Jackson-Littlewolfe, many WLFN members lack the financial resources to challenge the validity of the Common Law Marriage Prohibition.

[80] The onus is on WLFN to establish that the Common Law Marriage Prohibition is a WLFN custom. In this regard, WLFN has tendered one affidavit containing Elder Jackson's oral history evidence as retold by Elder Ben Houle. Nothing within this affidavit establishes that the Common Law Marriage Prohibition is a current custom that reflects the broad consensus of WLFN. The affidavit speaks to the historic evolution of the Common Law Marriage Prohibition and states that during Elder Jackson's lifetime, "no one really questioned" the 'custom'.

[81] Elder Ben Houle deposes that Elder Jackson told him that the current WLFN Chief and members, particularly Elders, are satisfied with the Common Law Marriage Prohibition. He does not explain the basis for Elder Jackson's assertion. Likewise, Elder Ben Houle deposes that a survey circulated to Elders six or seven years ago found that most, if not all, Elders were in favour of the current *Election Regulations*. With respect to WLFN's Elders and leadership, the question is not whether they alone agree on an alleged custom. Rather, as noted above, the

question to be answered is whether there is evidence of a general consensus among the WLFN membership. I note parenthetically that WLFN has not argued that it is a custom for the Elders or WLFN leadership to determine WLFN's Indigenous laws without involving the other members of the community. I also note that there is no evidence related to the survey and the questions asked. Lastly, I further note that Ms. Jackson-Littlewolfe's evidence is that the SLFN Elders did not approve of the Common Law Marriage Prohibition as that provision was absent from the proposed New Election Code.

[82] On the other hand, former WLFN Chief and Councillor Ernest Houle deposes that he has had "detailed conversations" with band members and that he believes the majority are opposed to the Common Law Marriage Prohibition. While this is a statement that is not corroborated by any additional affidavits from those he has had conversations with, it still demonstrates that there are others who hold a contrary view to Elder Ben Houle. In fact, the record demonstrates that Ms. Jackson-Littlewolfe, Ernest Houle, and Elder Sparklingeyes all disagree with the Common Law Marriage Prohibition. As set out below, I agree with Ms. Jackson-Littlewolfe that the evidence of former WLFN Chief and Councillor Ernest Houle is corroborated by the fact that more than half of WLFN members living in conjugal relationships constitute common law marriages. I also note that Ernest Houle stated that the Common Law Marriage Prohibition has been arbitrarily and inconsistently applied, as illustrated by two examples.

[83] For these reasons, I favour Ms. Jackson-Littlewolfe's evidence, limited as it may be. In my view, WLFN has failed to establish that the Common Law Marriage Prohibition is a WLFN custom. Accordingly, I find the Common Law Marriage Prohibition Decision unreasonable

because it is not grounded in law. I reach this conclusion despite what section 1(c) of the *Election Regulations* explicitly states.

[84] This alone is enough to grant the application for judicial review in T-808-21. Having found that the Common Law Marriage Prohibition is not a law, I will nevertheless consider its constitutionality.

B. *Did the Committee fail to consider the Applicants' Charter rights?*

(a) *The Law*

[85] Typically, when an administrative decision engages an individual's *Charter* rights, a reviewing court will assess the reasonableness of that decision by applying the *Doré*/*Loyola* framework (*TWU 2018* at para 57). Under this framework, a reviewing court must ask two questions. First, does the administrative decision engage the *Charter* by limiting *Charter* protections (*TWU 2018* at para 58; *Loyola* at para 39)? If so, does the administrative decision reflect a proportionate balancing of the *Charter* protections at play in light of the nature of the decision as well as the statutory and factual contexts (*TWU 2018* at para 58; *Loyola* at para 39; *Doré* at para 57)?

[86] The burden first sits with an applicant to show that the administrative decision engages and limit their section 15 *Charter* rights. The burden then shifts to a respondent to establish that "the limit was imposed in pursuit of its statutory objectives" and that the applicant's equality

rights were "not limited more than reasonably necessary given those statutory objectives" (*Bio-Ethical Reform* at para 15).

(b) *Parties' Positions*

[87] Ms. Jackson-Littlewolfe submits that the Decision excluding her from running cannot satisfy the *Doré*/*Layola* framework because the Committee failed to balance her *Charter* rights against competing government interests or other *Charter* protections. She states that this renders the Common Law Marriage Prohibition Decision incorrect and/or unreasonable. Further, Ms. Jackson-Littlewolfe submits that even if the Committee did consider her *Charter* rights against its interests, the Decision is not proportionate. Namely, imposing a particular religious conception of morality on individuals seeking office cannot be a valid government objective (*R v Big M Drug Mart Ltd*, [1985] 1 SCR 295 at 351, 18 DLR (4th) 321 [*Big M*]).

[88] WLFN submits that the Common Law Marriage Prohibition Decision is correct and/or reasonable because the Committee had no discretion in reaching the Decision. WLFN states that section 1(c) of the *Election Regulations* is absolute and the Committee was bound by the "legal constraints" of the statutory scheme (*Vavilov* at paras 99, 101). It was not open to the Committee to consider Ms. Jackson-Littlewolfe's *Charter* rights given the unequivocal nature of the *Election Regulations* (*Vavilov* at para 120).

[89] It is significant that WLFN has not identified a "statutory objective" that might justify the limit.

(c) *Conclusion*

[90] At the outset, a few additional comments must be made about the standard of review. At least part of the rationale behind the *Doré*/*Loyola* framework stems from a recognition that "an administrative decision-maker, exercising a discretionary power under his or her home statute, typically brings expertise to the balancing of a *Charter* protection with the statutory objectives at stake" (*TWU 2018* at para 79). I acknowledge that community members, including Elders, often make up First Nation election appeal committees. These committees may not have formal Canadian legal training or the same "expertise" as other administrative decision-makers when it comes to the *Charter* or the balancing act required in *Doré*/*Loyola*. However, this Court has acknowledged on multiple occasions that Indigenous decision-makers are best suited to interpret and apply their Indigenous laws (*Pastion* at paras 21-23; *Linklater v Thunderchild First Nation*, 2020 FC 1065 at para 51 [*Linklater*]). Certainly, they are best suited to know the "statutory objectives at stake" (*TWU 2018* at para 79). As such, reviewing courts should not hold Indigenous decision-makers to a standard of perfection when conducting a review under the *Doré*/*Loyola* framework (*Vavilov* at para 91).

[91] In this case, however, there is no evidence whatsoever that the Committee considered Ms. Jackson-Littlewolfe's *Charter* rights or tried to balance any limitation on these rights against a statutory or government objective. Accordingly, I agree with the Ontario Court of Appeal that this question calls for a correctness review (*Ferrier* at para 35). The deference this Court can afford the Committee is limited.

[92] As noted above, WLFN submits that the Common Law Marriage Prohibition Decision was correct and/or reasonable since section 1(c) of the *Election Regulations* is unequivocal and, therefore, it was not open to the Committee to disregard this express language and consider Ms. Jackson-Littlewolfe's *Charter* rights. Respectfully, WLFN's submission has no merit. Based on this submission, I can only assume that WLFN acknowledges that the Common Law Marriage Prohibition Decision engages Ms. Jackson-Littlewolfe's section 15 rights. Accordingly, the first step of the *Doré*/*Loyola* framework is satisfied.

[93] WLFN's argument logically flows from its position that the *Charter* does not apply to WLFN. However, for the reasons articulated below at paragraphs 114 to 132 of this judgment, I disagree that the *Charter* does not apply to WLFN elections. This Court and the Federal Court of Appeal have confirmed that the *Charter* applies to First Nations custom election legislation (*Taypotat v Taypotat*, 2013 FCA 192 [*Taypotat*]; *Linklater* at para 33). So long as this remains true, First Nations, Band Councils, and their delegate bodies must adhere to the "binding precedents" of *Doré* and *Loyola* (*TWU 2018* at para 59). WLFN has not provided any submissions on why I should depart from these binding precedents.

[94] In my view, the Supreme Court of Canada's jurisprudence does not indicate that the "legal constraints" of an enabling statute permit an administrative body to opt out of the *Charter*, as the Respondent suggests. To the contrary, the Canadian Constitution is surely a principle "legal constraint." As noted by the Supreme Court in *TWU 2018*:

> [57] …Delegated authority must be exercised "in light of constitutional guarantees and the values they reflect" (*Doré*, at para. 35)… The *Doré/Loyola* framework is concerned with ensuring that *Charter* protections are upheld to the fullest extent

> possible given the statutory objectives within a particular administrative context. In this way, *Charter* rights are no less robustly protected under an administrative law framework.
>
> …
>
> [59] Since *Charter* protections are implicated, the reviewing court must be satisfied that the decision reflects a proportionate balance between the *Charter* protections at play and the relevant statutory mandate…
>
> [Emphasis added.]

[95] This language is not permissive. I agree with Ms. Jackson-Littlewolfe that if an individual's *Charter* rights are engaged, an administrative body must consider those rights and attempt to proportionately balance any limitations on those rights against the relevant statutory objective. The second step in the *Doré*/*Loyola* is not satisfied because the Committee failed to do so. This fatal error is another reason why this Court must quash and set aside the Common Law Marriage Prohibition Decision.

C. *Does section 25 of the* Charter *assist the Respondent?*

(a) *The Law*

[96] The parties correctly note that there has been little judicial consideration on the scope of section 25 of the *Charter*.

[97] In *Corbiere v Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203, 173 DLR (4th) 1 [*Corbiere*], Justice L'Heureux-Dubé, writing for the minority, held that "[s]ection 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” (at para 52, emphasis added).

[98] *Corbiere* concerned a section 15 challenge to subsection 77(1) of the *Indian Act*, which required band members to be “ordinarily resident” on reserve in order to vote. The Batchewana Band only chose to enforce subsection 77(1) in the 1970s. When Parliament passed Bill C-31, the Band’s off-reserve membership dramatically increased. The majority of the Supreme Court did not comment on the application of section 25 of the *Charter*, other than to agree with the minority that the intervener failed to make a case for the application of section 25 (at para 20). The minority held that section 25 was not triggered because the intervener failed to show that Bill C-31 violated an Aboriginal or Treaty right (at paras 51-52). The minority rejected the intervener’s argument that subsection 77(1) of the *Indian Act* was a statutory right that protected Indigenous groups’ right to self-government (at para 52).

[99] The Supreme Court’s most in-depth discussion of section 25 is found in *R v Kapp*, 2008 SCC 41 [*Kapp*]. In *Kapp*, non-Indigenous commercial fishers brought a section 15 challenge to a government program that granted Indigenous fishers the exclusive right to fish for salmon for 24 hours. This program was a statutory right aimed at recognizing Aboriginal fishing rights.

[100] The majority of the Supreme Court noted in *obiter* that the phrase “other rights or freedoms” may include rights derived from the *Royal Proclamation, 1763* (UK), RSC 1985, App II, No 1 or from land claims agreements, but that rights protected by section 25 likely have to be

of a "constitutional character" (*Kapp* at para 63). Accordingly, the majority was concerned that a statutory right did not attract section 25 protection. The majority also questioned whether section 25 shields against *Charter* claims or is merely an "interpretative provision" (at paras 64-65). The majority ultimately declined to answer this question, finding that subsection 15(2) of the *Charter* resolved the matter (at para 61).

[101] In contrast, Justice Bastarache analyzed section 25 in his concurring reasons. He held that section 25 is not a cannon of construction, but a shield, and that in his opinion, section 25 shielded the appellants from asserting a section 15 claim (at paras 76-77). He also held that section 25 protects rights beyond those of a "constitutional character" (at para 102). In his view, section 25 protects rights that are unique to Indigenous peoples given their special status, including "statutory rights that seek to protect interests associated with aboriginal culture, territory, self-government", "sovereignty", and "the treaty process" (at paras 103, 105, emphasis added). He explained that section 25 is engaged when "*Charter* protections for individuals would diminish the distinctive, collective and cultural identity of an aboriginal group" (at para 89, emphasis added). He noted, however, that the shield is not absolute. Rather, section 25 is limited by section 28 of the *Charter* (at para 97). More will be said of this below.

[102] The Court of Appeal for Yukon recently agreed with Justice Bastarache that section 25 operates as a "shield", rather than a "lens" or an "interpretive aid" (*Dickson v Vuntut Gwitchen First Nation*, 2021 YKCA 5 at para 143, leave to appeal to SCC granted, 39856 (28 April 2022) [*Dickson CA*]). This was later affirmed in *R v Desautel*, 2021 SCC 17 (at para 39). In the event of a conflict, section 25 places collective Aboriginal, Treaty, and "other rights" above personal

Charter rights (*Dickson CA* at paras 143-44; *MacNutt v Shubenacadie Indian Band*, [2000] FCJ No 702 at para 43, 187 DLR (4th) 741 (FCA)). Further, the Court of Appeal held that the balancing of section 1 considerations is not appropriate under section 25 (at para 146).

[103] *Dickson CA* and the present case raise similar issues. Vuntut Gwitchen First Nation [VGFN] signed both a land claims agreement and a self-government agreement with Canada and Yukon in 1993. The Court of Appeal noted that, while the land claims agreement is a Treaty under section 35 of the *Constitution Act, 1982*, the self-government agreement is not. Pursuant to these agreements, VGFN adopted a constitution [VGFN Constitution] that contained a residency requirement requiring any VGFN Council member to reside in Old Crow—the seat of their government—within 14 days of being elected. The VGFN Constitution also confirmed that certain rights, akin to *Charter* rights, would be respected. As an aside, the First Nation in *Linklater* also had similar provisions.

[104] The appellant in *Dickson CA* was a member of VGFN who resided in Whitehorse. The residency requirement prohibited the appellant from running for Council. Relying on *Corbiere*, the appellant sued for a declaration that the requirement was inconsistent with subsection 15(1) of the *Charter*, could not be justified under section 1, and was therefore of no force or effect. VGFN raised numerous defences, including that the *Charter* does not apply to it or the VGFN Constitution and that section 25 of the *Charter* shields any subsection 15(1) infringement (at para 5).

[105] The chambers judge ruled that the *Charter* applies to VGFN and the VGFN Constitution. He found that the residency requirement, without the 14-day time limitation, did not infringe the appellant's subsection 15(1) rights; and in the alternative, that section 25 of the *Charter* shielded the infringement. At the same time, he found the 14-day limitation did infringe the appellant's equality rights and was not saved under section 1. He declared the time limitation invalid and of no force or effect, subject to an 18-month suspension to permit VGFN to review the residency requirement.

[106] The Court of Appeal held that:

1. The *Charter* applies to the residency requirement. The chambers judge did not err in finding that the residency requirement is a "law" within the meaning of section 32 of the *Charter* such that the *Charter* applies to the residency requirement (at paras 83-99);
2. Contrary to the chamber judge's findings, the residency requirement infringed the appellant's equality rights under subsection 15(1) of the *Charter* and was not saved under section 1 (at paras 100-17);
3. The chambers judge did not err in finding that section 25 of the *Charter* 'shielded' VGFN's right to adopt the residency requirement. The evidence established that VGFN's traditional mode of choosing its leaders was a distinctive and significant part of its culture and a right that 'pertains to' the Aboriginal peoples of Canada. In the circumstances, to apply subsection 15(1) would impermissibly derogate from VGFN's right to govern themselves in accordance with their own particular values and traditions (at paras 143-49); and

4. The chambers judge erred in failing to find that the 14-day time limitation was also shielded by section 25 (at paras 154-58).

[107] The Court of Appeal also recognized that the analytical approach for section 25 cases should be determined on a "case-by-case basis" (at para 151). In *Kapp*, Justice Bastarache suggested a three-step analysis when applying section 25: (1) determine whether there is a *prima facie Charter* infringement; (2) evaluate the "native right" to establish whether it falls under section 25; and (3) determine whether there is a true conflict between the *Charter* right and the "native right" (at para 111). In some cases, a full section 15 analysis will be unnecessary (*Dickson CA* at para 151).

[108] As discussed in the Background section of these reasons, WLFN's legislative scheme is not extensive, unlike the legislative scheme examined in *Dickson CA*.

(1) Are WLFN's decisions concerning leadership selection processes immune from *Charter* scrutiny?

(a) *Parties' Positions*

[109] WLFN submits that, like VGFN in *Dickson CA*, WLFN has an inherent right to self-government that exists outside of section 35 of the *Constitution Act,* 1982 and allows for complete immunity from the *Charter*. WLFN submits that it was a rights-bearing group prior to the execution of Treaty 6 and that it enacted customs pertaining to governance to ensure its cultural survival.

[110] WLFN states that the phrase “other rights” within section 25 protects inherent rights and that the right to self-government is inherent (*Gamblin v Norway House Cree Nation Band Council*, 2012 FC 1536 at para 34 [*Gamblin*]; *Whalen I* at para 32). WLFN submits that its inherent right to govern itself pursuant to custom does not stem from any statutory or delegated federal authority.

[111] WLFN submits that this Court should interpret section 25 in light of the Supreme Court of Canada’s interpretation of section 29 of the *Charter*. Similar to section 25, section 29 states, “[n]othing in this *Charter* abrogates or derogates from any rights or privileges guaranteed by or under the Constitution of Canada in respect of denominational, separate or dissentient schools.” WLFN states that the Supreme Court has held that section 29 renders certain rights and privileges immune from *Charter* review (*Reference re Bill 30, An Act to Amend the Education Act (Ont)*, [1987] 1 SCR 1148, 40 DLR (4th) 18; *Adler v Ontario*, [1996] 3 SCR 609, 140 DLR (4th) 385). WLFN submits that an Indigenous individual may not use the *Charter* against their own First Nation. Otherwise, its inherent right to self-government would be abrogated or derogated, contrary to the express wording of section 25.

[112] WLFN acknowledges that Aboriginal rights cannot infringe sex-based equality rights pursuant to subsection 35(4) of the *Constitution Act, 1982* and section 28 of the *Charter.* However, WLFN submits that these limits do not apply to it because its inherent right to self-government predates the *Charter* and has never been extinguished. Further, WLFN submits that customs enjoying broad community consensus should be protected even if they infringe individuals’ *Charter* rights.

[113] Ms. Jackson-Littlewolfe submits that the *Charter* applies to WLFN because, as a First Nation government, WLFN exercises powers within the authority of Parliament (*Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, s 91(24), reprinted in RSC 1985, Appendix II, No 5 [*Constitution Act, 1867*]). Consequently, it is subject to the *Charter* pursuant to section 32 (*Godbout v Longueuil (City)*, [1997] 3 SCR 844 at para 48, 152 DLR (4th) 577; *Dickson CA* at paras 83-99).

[114] Ms. McCarthy submits that section 25 was not intended to shield First Nations from the *Charter* such that Indigenous Canadians cannot bring *Charter* claims against their own First Nation (*Kapp* at para 99, Bastarache J, dissenting). She notes that this Court has consistently applied the *Charter* in First Nation election cases (*Cardinal v Bigstone Cree Nation*, 2018 FC 822 [*Cardinal*]; *Clifton v Hartley Bay (Electoral Officer)*, 2005 FC 1030 [*Clifton*]; *Thompson v Leq'á:mel First Nation*, 2007 FC 707; *Joseph v Dzawada'enuxw (Tsawataineuk) First Nation*, 2013 FC 974).

(b) *Conclusion*

[115] I agree with the Applicants that the *Charter* applies to WLFN leadership selection processes by virtue of subsection 32(1) of the *Charter*. The Supreme Court of Canada held in *Eldridge v British Columbia (AG)*, [1997] 3 SCR 624, 151 DLR (4th) 577 [*Eldridge*] that subsection 32(1) applies in one of two circumstances:

> [44] …First, it may be determined that the entity is itself "government" for the purposes of s. 32. This involves an inquiry into whether the entity whose actions have given rise to the alleged *Charter* breach can, either by its very nature or in virtue of the degree of governmental control exercised over it, properly be

> characterized as "government" within the meaning of s. 32(1). In such cases, all of the activities of the entity will be subject to the *Charter*, regardless of whether the activity in which it is engaged could, if performed by a non-governmental actor, correctly be described as "private". Second, an entity may be found to attract *Charter* scrutiny with respect to a particular activity that can be ascribed to government.
>
> [Emphasis added.]

[116] In my view, subsection 32(1) applies to WLFN's leadership selection processes because WLFN is a government or carries on functions of a government. In making this finding, and similarly to the Court in *Dickson CA* as set out below, I decline to determine the source of WLFN's power to govern itself. Rather, in what follows, I reach this finding regardless of whether WLFN's authority to self-govern stems from an inherent right or a federal statute.

(i) Subsection 32(1) of the *Charter* applies to Indigenous nations exercising inherent rights to self-government

[117] From an Indigenous perspective, the right to self-government is not granted from the Crown, nor is it something that can be taken away (Kent McNeil, "The Jurisdiction of Inherent Right Aboriginal Governance" 2007 National Centre for First Nations Governance 1 at 3). Rather, it is an inherent right consisting of powers gifted from the Creator that Indigenous nations have always possessed (Gordon Christie, "Obligations, Decolonization and Indigenous Rights to Governance" 27 Can JL & Jurisprudence 259 at 278; Canada, Report of the Royal Commission on Aboriginal Peoples, Vol 2, Restructuring the Relationship (Ottawa: Minister of Supply and Services, 1996) at 109).

[118] From a Canadian legal perspective, Indigenous peoples' inherent right to self-government flows from their "special status" (*Kapp* at para 103, Bastarache J, dissenting). As I recently stated in *Labelle v Chiniki First Nation*, 2022 FC 456 [*Chiniki*]:

> [10] The inherent jurisdiction of Indigenous nations is independent from the constitutional framework of Canada, though it has the same origin as section 35 of the *Constiution Act, 1982*… That is, it "arise[s] from the fact that prior to the arrival of Europeans in North America aboriginal peoples lived on the land in distinctive societies, with their own practices, customs and traditions" (*R v Van der Peet*, [1996] 2 SCR 507 at para 44).

[119] In my view, there is no doubt that the inherent right to self-government relates to the survival of "aboriginal culture, territory, self-government", "sovereignty", and "the treaty process" (*Kapp* at paras 103, 105, Bastarache J, dissenting).

[120] In any event, I am of the respectful view that *Dickson CA* is more instructive than *Kapp* because it grapples with an inherent rights argument rather than a statutory right. With that said, the clear distinguishing factors between *Dickson CA* and the present matter is that *Dickson CA* involved a settlement agreement that recognized VGFN's right to self-government and had the force of law through federal and territorial statutes. VGFN also had an extensive Constitution. The Court of Appeal in *Dickson CA* declined to determine the "source" of the First Nation's power to self-govern. Instead, the Court of Appeal held that regardless of the "source" of VGFN's authority, section 25 protected the residency requirement. I take this to mean that even if VGFN did not negotiate a successful settlement agreement, in the circumstances of that case, section 25 would have shielded the residency requirement.

[121] Before the chambers judge, VGFN, citing *Corbiere*, conceded that if it was a "band" under the *Indian Act* governing itself pursuant to custom, the *Charter* would apply (*Dickson CA* at para 90). However, VGFN submitted that it was different from an *Indian Act* band because it was "not relying on customs allowed under the *Indian Act* or any other federal law, but on its *inherent and historic* rights and practices, which have now been *recognized* in (as opposed to *granted by*) the Final and Self-Government Agreements" (Dickson CA at para 90, emphasis in original). As a result, VGFN submitted that the *Charter* did not apply to it or its Constitution.

[122] Relying on this Court's jurisprudence, WLFN makes essentially the same argument. That is, the *Indian Act* does not grant WLFN the authority to govern itself according to custom. Rather, it recognizes WLFN's inherent right to govern itself according to custom. As such, WLFN submits that it is immune from the *Charter*.

[123] I agree with WLFN that this Court has recognized that the *Indian Act* does not grant First Nations the ability to enact Indigenous customary law. As I stated in *Chiniki*:

> [11] This Court has previously held that "band customary law is a law of Canada subject to the supervisory jurisdiction of the Federal Court" (*Shotclose v Stoney First Nation*, 2011 FC 750 at para 68 [*Shotclose*]). While this is true, in my view, section 2 of the *Indian Act* is an acknowledgement of First Nations' inherent jurisdiction to self-government, which is derived from their own legal orders and traditional governance models. In other words, while section 2 of the *Indian Act* imposes an elective model of governance on First Nations, it does not grant First Nations the right to run elections according to their custom (*Pastion v Dene Tha' First Natio*n, 2018 FC 648 [*Pastion*] at para 7). As Justice Grammond recently explained in *Bertrand v Acho Dene Koe First Nation* [*Bertrand*]:
>
> > [36] The *Indian Act* states that a First Nation's council is "chosen according to the custom of the band," unless the election regime in sections 74-80 is specifically made applicable to that First Nation.

> In doing so, Parliament referred to a set of norms that find their source and legitimacy outside of the Canadian legal system and that can be described as Indigenous law: *Gamblin v Norway House Cree Nation Band Council*, 2012 FC 1536 at paragraph 34; *Pastion v Dene Tha' First Nation*, 2018 FC 648 at paragraph 7, [2018] 4 FCR 467 [*Pastion*]. In *Bone v Sioux Valley Indian Band No 290*, [1996] 3 CNLR 54 (FCTD), at paragraph 31 [*Bone*], Justice Heald mentioned that the *Indian Act*
>
> …does not confer a power upon a Band to develop a custom for selecting its council. Rather, it recognizes that an Indian Band has customs, developed over decades if not centuries, which may include a custom for selecting the Band's Chief and Councillors.

[124] Likewise, in *Gamblin*, Justice Mandamin stated:

> [34] The [Norway House Cree Nation [NHCN]] Council is a custom First Nation council. The capacity of NHCN to make laws concerning matters of leadership and governance are not derived from the *Indian Act* or other statutory power. Rather it is a result of the exercise of the First Nation's aboriginal right to make its own laws concerning governance… The implication is that the jurisdiction of the NHCN Council to manage governance of NHCN affairs is not necessarily derived from a statutory source such as the *Indian Act*.

[125] In light of this jurisprudence, I accept that WLFN has an inherent right to self-government in relation to matters of leadership selection. Therefore, I find that section 25 of the *Charter* applies to WLFN's inherent right to self-government, even absent a settlement agreement or a detailed constitution as in *Dickson CA*. In my view, *Dickson CA* squarely deals with WLFN's argument about the applicability of the *Charter*.

[126] In *Dickson CA*, the Court of Appeal held that the chambers judge did not err in finding that subsection 32(1) of the *Charter* applies to VGFN (at para 98). The chambers judge found

that the First Nation's "exercise of its legislative capacity and the VGFN Constitution" bring the residency requirement within the scope of subsection 32(1), whether "as a government" or an entity exercising inherently governmental activities (*Dickson CA* at para 91). Namely, even if VGFN's right to self-government was an exercise of an inherent right, it still made up part of "Canada's constitutional fabric" due in part to the treaty process (*Dickson CA* at para 91).

[127] Neither the chambers judge nor the Court of Appeal attempted to resolve "the fundamental question of the source of the rights and authority of the VGFN" (at paras 91, 93). Indeed, the Court of Appeal stated that such an exercise would be "perhaps futile" (at para 93). The Court of Appeal concluded:

> [98] In all the circumstances, I am satisfied that the chambers judge did not err in proceeding on the basis that in enacting the Residency Requirement, the VGFN Council was "by its very nature" exercising 'governmental' powers within the meaning of s. 32 of the *Charter* and that the *Charter* — which of course includes s. 25 — therefore applies to the Residency Requirement. In my opinion, this is so regardless of the source of the authority that is now exercisable by the VGFN under the [Self Government Agreement] and Constitution.
>
> [Emphasis added.]

[128] I adopt this reasoning in the present matter. WLFN is obviously not "Parliament" or a provincial "legislature" within the meaning of section 32 of the *Charter* (*Dickson CA* at para 84). However, WLFN is a Treaty 6 Nation whose members are also Canadian citizens. Notwithstanding my finding on the constitutionality of the *Election Regulations*, WLFN has nevertheless enacted its own Indigenous laws following its resile from a hereditary leadership system, further demonstrating its exercise of governmental powers. In my view, this is sufficient

for WLFN to be properly characterized as a "government" within the meaning of subsection 32(1) (*Eldridge* at para 44).

(ii) Subsection 32(1) of the *Charter* applies to Indian Bands exercising governmental authority under the *Indian Act*.

[129] In *Taypotat*, the Federal Court of Appeal held that an Indian Band holding its elections pursuant to custom constituted a "*sui generis* government entity" under subsection 32(1) of the *Charter*, and thus, attracted *Charter* scrutiny (at paras 36-37). The Federal Court of Appeal also found that the First Nation was exercising its governmental powers under the *Indian Act* and other federal legislation enacted under the authority of Parliament (at para 36).

[130] The Court of Appeal in *Dickson CA* offered the following summary of *Taypotat*:

> [86] The applicability of s. 32(1) to first nations in the context of the *Indian Act* was discussed in *Taypotat v. Taypotat*… At issue was whether a provision in the *Kahkewistahaw Election Act* imposing a minimum education requirement for eligibility to run for public office, violated s. 15(1) of the *Charter*. The council of the first nation played a key role in the management of reserve land, had extensive bylaw-making powers and was "entrusted with the management of numerous federal government programs destined to Indian members of the First Nation." On this basis, the Court ruled that the council was "clearly a *sui generis* government entity" that had acted as a "government" under federal legislation and in matters within the authority of Parliament… The [Federal Court of Appeal] stated:
>
> > As noted above, many government actions affecting the lives of aboriginal peoples living on reserve result from decisions of the band councils acting under the *Indian Act*, under other federal legislation or pursuant to government programs. As citizens of Canada, aboriginal peoples are as much entitled to the protections and benefits of the rights and freedoms set out in the *Charter* as all other citizens. This includes protection for aboriginal peoples from

> violations to these rights and freedoms by their own governments acting pursuant to federal legislation and in matters falling in the sphere of federal jurisdiction.
>
> Moreover, the rights and freedoms set out in the *Charter* would be ineffectual if the Council members could be selected in a manner contrary to the *Charter*. I have no doubt that if a First Nation adopted a community election code restricting eligibility to public office to the male members of the community, such a code would be struck down pursuant to section 15 of the *Charter*. To decide otherwise would be to create a jurisdictional ghetto in which aboriginal peoples would be entitled to lesser fundamental constitutional rights and freedoms than those available to and recognized for all other Canadian citizens. [At paras. 38–9…]

> [87] Notably, *Taypotat* was appealed to the Supreme Court of Canada (see *Kahkewistahaw First Nation v. Taypotat*, 2015 SCC 30) and was reversed; but only on the basis that the impugned provisions did not *prima facie* violate s. 15. Abella J., speaking for the Court, did not comment at all on s. 32, simply proceeding on the basis that s. 15 applied.
>
> [Emphasis in original.]

[131] In *Taypotat*, the First Nation had conducted its elections under subsection 74(1) of the *Indian Act* until 2011 (at para 10). The Federal Court of Appeal "warned that the application of *Corbiere* and s. 15 of the *Charter* could not be 'avoided' by a [F]irst [N]ation's adopting a community election code" (*Dickson CA* at para 86). The Federal Court of Appeal stated:

> [37] …The fact that the Minister has taken measures to revoke the order under subsection 74(1) of the *Indian Act* so as to allow the First Nation to determine itself its election code does not result in the repudiation of *Charter* scrutiny. Indeed, a government should not be able to shirk its *Charter* obligations by simply conferring its powers to another entity: *Eldridge v. British Columbia (Attorney General)*, above, at para. 42; *Godbout v. Longueil*, above, at para. 48. As a result, the application of *Corbiere* (and of subsection 15(1) of the *Charter*) cannot be avoided through the adoption by a

> First Nation of a community election code pursuant to the revocation of an order under subsection 74(1) of the *Indian Act*.

[132] On this basis, a First Nation governing itself pursuant to custom election laws, such as WLFN, is still subject to *Charter* scrutiny. I note, however, that unlike *Taypotat*, WLFN has never held its elections under the *Indian Act*. According to Ms. Jackson-Littlewolfe's affidavit, as set out above, WLFN was governed by a hereditary leadership system up until sometime in the 1950's, at which point it introduced its customary *Election Regulations*. Elder Ben Houle's affidavit further confirms this evolution in governance processes.

[133] Notwithstanding this distinction, it is open to the Court to find that WLFN exercises its governmental authority within the "sphere of federal jurisdiction" (*Taypotat* at para 36). First, while the *Election Regulations* are customary law, they expressly incorporate sections 73 to 78 of the *Indian Act* by reference. Therefore, WLFN's governance is at least partially regulated by legislation that falls within the sphere of federal jurisdiction. Second, even if WLFN is a true "customary band", WLFN is part of SLCN, a band recognized under the *Indian Act*. As such, it still plays a key role in the management of reserve land, has extensive bylaw-making powers, and is entrusted with the management of numerous federal government programs (*Taypotat* at para 36). Accordingly, I am satisfied that WLFN is a *sui generis* government entity that acts as a government under federal legislation and in matters within the authority of Parliament by virtue of section 91(24) of the *Constitution Act, 1867*.

(2) Can section 25 of the *Charter* shield the Bill C-31 Voting Policy or the Common Law Marriage Prohibition?

(a) *Parties' Positions*

[134] The Respondent pleads that section 25 shields the *Charter* infringements by elevating Aboriginal, Treaty, and "other rights" such that they take precedence over other *Charter* rights. WLFN states that the "determination by the collective Members of the Nation to determine the traditions, customs and condition precedent by which leadership of the Nation is selected" justifies the *Charter* infringements.

[135] While Ms. McCarthy disagrees that section 25 shields the Bill C-31 Voting Policy, she agrees the section 25 of the *Charter* can protect certain rights of a "constitutional character" from a discrimination claim (*Kapp* at para 63). However, in her view, gender discrimination receives a unique level of *Charter* protection by virtue of section 28 of the *Charter* and subsection 35(4) of the Constitution Act, 1982 (*Kapp* at para 97, Bastarache J, dissenting).

[136] Ms. Jackson-Littlewolfe submits that section 25 does not assist WLFN because WLFN has failed to provide sufficient evidence that the Common Law Marriage Prohibition relates to an Aboriginal, Treaty, or other right (*Cunningham v Alberta (Minister of Aboriginal Affairs and Northern Development)*, 2009 ABCA 239 [*Cunningham*], rev'd on other grounds 2011 SCC 37). She states that WLFN would have to establish an Aboriginal, Treaty, or other right that "specifically deals with exclusion of members" from serving in leadership because they are in a common law relationship (*Cunningham* at para 72). In her view, WLFN has not established this.

[137] To the contrary, Ms. Jackson-Littlewolfe states that the evidentiary record demonstrates that the Common Law Marriage Prohibition was adopted in the 1950s, does not reflect traditional Indigenous practices, and is not related to Treaty rights or pre-contact customs.

Further, she notes that the Prohibition cannot reflect the membership's current practices or will given that the majority of conjugal relationships at WLFN are common law marriages. Ms. Jackson-Littlewolfe submits that the affidavit of Elder Ben Houle baldly asserts that the Election Regulations reflect WLFN's customs, traditions, and historical practices of governance and that this assertion is based on hearsay statements. She submits that this is an insufficient evidentiary basis for this Court to make any findings regarding WLFN's section 25 arguments.

[138] WLFN disagrees with Ms. Jackson-Littlewolfe that there is insufficient evidence to establish this right. WLFN submits that the affidavit of Elder Ben Houle establishes WLFN's "political history, from 1876 onwards", including WLFN's "communal approach to leadership and governance".

(b) *Conclusion*

[139] I agree with the Applicants that, in this particular case, section 25 of the *Charter* does not shield the Bill C-31 Voting Policy or the Common Law Marriage Prohibition.

[140] First, section 25 cannot apply to shield the Bill C-31 Voting Policy because, as WLFN concedes, the Bill C-31 Voting Policy discriminates on the basis of sex (*McIvor* at paras 87-94). Section 28 of the *Charter* states that "notwithstanding anything in this *Charter*, the rights and freedoms referred to in it are guaranteed equally to male and female persons." As noted by Justice Bastarache in *Kapp*:

> [97] Is the shield absolute? Obviously not. First, it is restricted by s. 28 of the *Charter* which provides for gender equality "notwithstanding anything in this Charter". Second, it is restricted

> to its object, placing *Charter* rights and freedoms on a juxtaposition to aboriginal rights and freedoms. *R. v. Van der Peet*, 1996 CanLII 216 (SCC), [1996] 2 S.C.R. 507, at para. 46, provides guidance in that respect.
>
> [Emphasis added.]

[141] Having found that the *Charter* applies to WLFN's *Election Regulations*, section 28 clearly limits the application of section 25 with respect to the Bill C-31 Voting Policy.

[142] Turning to the Common Law Marriage Prohibition, Ms. Jackson-Littlewolfe cites *Cunningham* for the proposition that there must be a proper evidentiary basis for a court to invoke section 25. I agree with Ms. Jackson-Littlewolfe that WLFN has failed to demonstrate that they possess an "Aboriginal, treaty, or other right" to select leadership in a manner that discriminates against and excludes members living in common law relationships.

[143] In *Cunningham*, the Alberta Court of Appeal wrote:

> [72] I do not need to deal with the question of whether the case satisfies the approach outlined in *Kapp* as I agree there is no real evidentiary basis that would enable analysis of s. 25, which is triggered when "aboriginal, [or] treaty" rights are impacted. An evidentiary basis is essential to the analysis of Charter issues… In this case, the evidence would need to establish an aboriginal right that specifically deals with exclusion of members on the basis of their Indian status… No such evidence is in the record…
>
> [Citations omitted.] [Emphasis added.]

[144] I respectfully disagree that a First Nation seeking to invoke section 25 must establish an Aboriginal or Treaty right in order to trigger the application of section 25. Section 25 is broader than section 35 because it expressly refers to "other rights" (*Corbiere* at para 52, L'Heureux-

Dubé J, dissenting; *Kapp* at para 102, Bastarache J, dissenting; *Dickson CA* at paras 145-46). The nature of the evidence required will depend on the nature of the right and should be assessed on a case-by-case basis (*Dickson CA* at para 74; *Kapp* at para 65). It is clear that evidence will always be required. In this case, WLFN asserts that its right to self-govern and choose its leaders according to custom is an inherent right that falls under the umbrella of "other rights".

[145] Presumably, in order to establish a section 35 right, the evidentiary foundation must be enough to satisfy the various tests enunciated by the Supreme Court pertaining to Aboriginal Title, Aboriginal Rights, and Treaty Rights. That evidentiary foundation will be different—and certainly more burdensome—than what is required to establish a statutory right, as was the case in *Kapp* (Bastarache J, dissenting).

[146] Likewise, in my view, an evidentiary foundation must be present when an Indigenous group claims an "other right", such as the inherent right to self-govern according to custom. When members of a First Nation disagree on the content or scope of their customs, the Federal Court routinely examines evidence about customary law. That is, the Court must determine whether the party relying on the alleged custom has sufficiently demonstrated that the custom reflects a broad consensus of the First Nation's membership (*Whalen I* at para 32).

[147] I acknowledge that in Dickson CA, the chambers judge considered the traditional governance and law-making activities of VGFN and noted that VGFN custom and practice "since time immemorial has been that Vuntut Gwitchin leaders reside on Vuntut Gwitchin Territory" (*Dickson CA* at paras 9, 27, emphasis added). However, I take the chamber judge's

findings of fact to be those before the Court in *Dickson CA*. I do not take this statement to impose a pre-contact requirement under section 25, similar to what is required under section 35. Indeed, as previously noted, customary law may evolve over time in order to respond to the changing needs of Indigenous communities (*Da'naxda'xw* at para 72; *Chingee* at para 10; *Francis* at para 24). This aligns with the Court of Appeal's approach in *Dickson CA*. Namely, the Court of Appeal did not impose a pre-contact requirement, but considered the modern purpose of the residency requirement:

> [147] Even if one accepts the majority's obiter suggestion in *Kapp* that the impugned law must be "of a constitutional character" before s. 25 may be engaged, it is my opinion that the Residency Requirement is indeed a "constitutional" law. Obviously, it is found in the Constitution; but more substantively, it is clearly intended to reflect and promote the VGFN's particular traditions and customs relating to governance and leadership — a matter of fundamental importance to a small first nation in a vast and remote location. The evidence is persuasive that among the discerning features of the Vuntut Gwitchin society is the emphasis it places, and has always placed, on its leaders' connection to the land, their expectation of ongoing personal interaction between leaders and others, and their wish to resist the "pull" of outside influences. In this sense, the First Nation's adoption of the Residency Requirement constitutes the exercise of a right that in its modern form "pertain[s] to the aboriginal peoples of Canada"….
>
> [Emphasis added.]

[148] In the context of customary law, I agree with Justice Bastarache that the appropriate question is whether the alleged custom goes to "the distinctive, collective and cultural identity of an aboriginal group" at this moment in time. In my view, it does not matter whether the custom developed prior to colonialism or is a product of colonialism, as in this case. What matters is that there is a broad consensus within the community in which those customs have the force of law.

[149] Ultimately, I find that section 25 of the *Charter* cannot shield a ‘custom’ enacted pursuant to a First Nations’ inherent right to self-government if that custom is not supported by the broad consensus of the community.

[150] For the reasons set out above in paragraphs 77 to 83 of this judgment, I have concluded that the Common Law Marriage Prohibition is not a custom of WFLN and, accordingly, is unlawful. It necessarily follows that section 25 of the *Charter* does not shield the Common Law Marriage Prohibition from *Charter* scrutiny.

[151] I pause to note that there may be situations within a First Nations community where the evidence establishes certain requirements for leadership, including, for example, Indigenous language requirements that may exclude certain individuals from candidacy on a Band Council. Subject to the evidence in the context of a particular case, that language requirement may be shielded from *Charter* scrutiny, particularly in light of federal legislation to protect Indigenous languages and First Nations’ efforts to do the same (see e.g. *Indigenous Languages Act*, SC 2019, c 23). Such an initiative may be addressed differently than provisions that do not directly relate to the integrity of a First Nation’s distinctive identity.

D. *Is the Bill C-31 Voting Policy or the Common Law Marriage Prohibition contrary to subsection 15(1) of the* Charter*?*

(a) *The Law*

[152] Since section 25 does not shield the Bill C-31 Voting Policy or the Common Law Marriage Prohibition, it is appropriate to consider the Applicants’ *Charter* arguments.

[153] To establish an infringement of section 15 of the *Charter*, the Applicants must show that the Bill C-31 Voting Policy and the Common Law Marriage Prohibition:

1. Create a distinction based on an enumerated or analogous ground; and
2. Impose burdens or deny benefits in a manner that has the effect of reinforcing, perpetuating, or exacerbating disadvantage (*Fraser v Canada (AG)*, 2020 SCC 28 at para 27 [*Fraser*]).

[154] The test remains the same in the context of a First Nation's election law. This Court in *Cardinal* set out the applicable two-step test to establish an infringement of section 15 of the *Charter*:

> [47] The Supreme Court of Canada has recently reaffirmed the two-step analytical framework for establishing whether a law infringes the guarantee of equality under subsection 15(1) of the Charter. The first part of the analysis "asks whether, on its face or in its impact, a law creates a distinction on the basis of an enumerated or analogous ground [...]. The second part of the analysis focuses on arbitrary -- or discriminatory -- disadvantage, that is whether the impugned law fails to respond to the actual capacities and needs of the members of the group and instead imposes burdens or denies a benefit in a manner that has the effect of reinforcing, perpetuating or exacerbating their disadvantage" (*Kahkewistahaw First Nation v Taypotat*, 2015 SCC 30 at paras 19-20; see also *Quebec (Attorney General) v Alliance du personnel professionnel et technique de la santé et des services sociaux*, 2018 SCC 17 at para 25; *Quebec (Attorney General) v A*, 2013 SCC 5 at paras 323-325; *Withler v Canada (Attorney General)*, 2011 SCC 12 at para 30; *R v Kapp*, 2008 SCC 41 at para 17).

(b) *Parties' Positions*

[155] Ms. McCarthy submits that the Bill C-31 Voting Policy is explicitly discriminatory on the basis of sex and attempts to revive the discrimination that Bill C-31 sought to eliminate (*McIvor*

at paras 87-94). She submits that this Court should follow Justice McKay's decision in *Scrimbitt v Sakimay Indian Band Council*, [2000] 1 FC 513, [1999] FCJ No 1606 [*Sakimay*]. In *Sakimay*, Justice MacKay found the Sakimay Band's Bill C-31 Voting Policy discriminatory on the basis of sex (at paras 50-51, 70, 78). Ms. McCarthy also submits that the *Election Regulations* do not divide members into different classes. She states she is a member of WLFN just like any other and is therefore entitled to vote.

[156] Ms. Jackson-Littlewolfe submits that the Common Law Marriage Prohibition violates her section 15 equality rights on the basis of marital status, an analogous ground (*Miron v Trudel*, [1995] 2 SCR 418, 124 DLR (4th) 693; *Quebec (AG) v A*, 2013 SCC 5 at paras 316-18 [*Quebec v A*]). She submits that the Prohibition creates an express distinction by limiting her democratic rights in comparison to those who are not married. She states that this discrimination reinforces, exacerbates, and disadvantages her financially, socially, and psychologically (*Fraser* at paras 27, 76). Ms. Jackson-Littlewolfe reiterates that the majority of WLFN members in relationships live in a common law marriage. She states that out of all eligible candidates, approximately one in four are prohibited from running. Thus, the Prohibition's disadvantage has widened, rather than narrowed over time (*Quebec v A* at para 332).

[157] WLFN concedes that the Bill C-31 Voting Policy and the Common Law Marriage Prohibition infringe the Applicants' section 15 equality rights.

(c) *Conclusion*

[158] Similar to the respondents in *Clark v Abegweit First Nation*, 2019 FC 721 [*Clark*], WLFN concedes that both the Bill C-31 Voting Policy and Common Law Marriage Prohibition violate section 15 of the *Charter*. Notwithstanding this concession, and in light of my finding concerning the effect of section 25 of the *Charter*, it is still necessary to engage in a section 15 analysis, as I did in *Clark*.

[159] To reiterate, applicants must first establish that the impugned law creates a distinction based on an enumerated or analogous ground within section 15 of the *Charter* (*Chipesia v Blueberry River First Nation*, 2019 FC 41 at para 58 [*Chipesia*]). Issues surrounding the transmission of Indian status have been described as discrimination on the basis of sex (*McIvor* at paras 92-93). Similarly, I find that the Bill C-31 Voting Policy creates a distinction between WLFN members due to the historical discrimination suffered by women who married non-status men.

[160] There are four recognized analogous grounds, marital status being one of them (*Chipesia* at para 58). Clearly, the Common Law Marriage Prohibition also creates a distinction between WLFN members.

[161] Turning now to the second part of the analysis, I find that the Bill C-31 Voting Policy denies certain WLFN members from participating in their community's governance by denying them the ability to vote. The affidavit evidence of Elder Sparklingeyes, Brian Favel, and Ernest Houle demonstrates this, as do the actions of WLFN.

[162] Similarly, the Common Law Marriage Prohibition denies WLFN members living in common law marriages from participating in the governance of their community on the erroneous notion that they are somehow unfit or unable to lead their community. The affidavit of Ms. Jackson-Littlewolfe clearly sets out the discriminatory treatment, as does the *Election Regulations* itself.

[163] I conclude that the two steps of the test are met and that both the Bill C-31 Voting Policy and the Common Law Marriage Prohibition infringe section 15 of the *Charter*.

E. *If yes, are the infringements justified under section 1 of the* Charter*?*

(1) The Law

[164] Section 1 of the *Charter* permits a government entity to infringe an individual's *Charter* rights by demonstrating that the law is a reasonable limit that can be demonstrably justified in a free and democratic society. First, WLFN must establish that the limit on *Charter* rights is prescribed by law (*Frank v Canada (AG)*, 2019 SCC 1 at para 36-37 [*Frank*]). WLFN must then present "cogent and persuasive evidence" that the infringements are justified (*R v Oakes*, [1986] 1 SCR 103 at 138-40, 26 DLR (4th) 200 [*Oakes*]). Under the *Oakes* test, WLFN must demonstrate:

1. The objectives of the Bill C-31 Voting Policy and the Common Law Marriage Prohibition are pressing and substantial;
2. The limit on the Applicants' *Charter* rights is rationally connected to the objectives;

3. The limit impairs the right or freedom no more than is reasonably necessary to accomplish the objectives; and
4. There is proportionality between the deleterious and salutary effects of the limit (*Oakes* at paras 138-40; *Frank* at para 38).

[165] Below I apply this framework to the Bill C-31 Voting Policy and the Common Law Marriage Prohibition.

(2) Bill C-31 Voting Policy

(a) *Parties' Positions*

[166] Ms. McCarthy submits that the Bill C-31 Voting Policy cannot be saved by section 1 because it is not prescribed by law. She reiterates that the Bill C-31 Voting Policy is not a custom and states that an unwritten policy without the force of law cannot be "prescribed by law" (*Sakimay* at para 70).

[167] At the time that Ms. McCarthy submitted her application record, she did not know what objective WLFN would put forward to justify the Bill C-31 Voting Policy. Ms. McCarthy submits that the Policy is not minimally impairing because it is a blanket prohibition on a significant and fundamental interest—the right to vote (*Corbiere* at para 80). She submits that WLFN could have adopted a membership or election code that addresses different categories of members (*Corbiere* at para 103). Ms. McCarthy asserts that this is not minimally impairing

because Bill C-31 Members still have a connection to WLFN (*Frank*). Ms. McCarthy has not made submissions on the fourth step of the *Oakes* test.

[168] WLFN submits that the Bill C-31 Voting Policy is prescribed by law. WLFN argues that *Sakimay* is distinguishable because the First Nation in that case failed to lead "sufficient evidence to establish the custom" (at para 68). WLFN submits that in this case, the Court has two affidavits demonstrating the "rationale, longevity, and acceptance" of the memberships' Bill C-31 Voting Policy.

[169] WLFN also submits that the Policy is justified. WLFN submits that the "pressing and substantial objective" of the Bill C-31 Voting Policy relates to WLFN's right to self-government and collective decision-making. In support of this position, WLFN notes that Elder Ben Houle deposes that WLFN's approach to members that "married out" has been in place since before Bill C-31 came into force. Aside from this, WLFN does not make submissions on how the Bill C-31 Policy is rationally connected to this objective. WLFN also fails to make submissions on how the Bill C-31 Policy is minimally impairing. On the fourth step of the *Oakes* test, WLFN submits that there is proportionality between the salutary and deleterious effects of the Bill C-31 Voting Policy. Specifically, WLFN submits that the collective will of the Nation's membership to govern itself and control voting rights in accordance with its customs outweighs the democratic rights of individuals.

(b) *Conclusion*

[170] Having found that the Bill C-31 Voting Policy is not a WLFN custom, I agree with Ms. McCarthy that the infringement is not prescribed by law. Accordingly, *Sakimay* is directly on point:

> [65] …In [*R v Therens*, [1985] 1 SCR 613, 18 DLR (4th) 655,] Mr. Justice Le Dain, dissenting on other grounds, wrote of section 1, in terms later endorsed, as follows:
>
> > The requirement that the limit be prescribed by law is chiefly concerned with the distinction between a limit imposed by law and one that is arbitrary. The limit will be prescribed by law within the meaning of s. 1 if it is expressly provided for by statute or regulation, or results by necessary implication from the terms of a statute or regulation or from its operating requirements. The limit may also result from the application of a common law rule.
>
> [66] In the case at bar, neither the *Indian Act* nor the Sakimay Band Membership Code adopted under the Act incorporates Sakimay's Bill C-31 policy, and that policy, and the action in this case based upon it, are not prescribed by law in the sense defined by Le Dain J. Indeed, the *Indian Act* expressly precludes membership code provisions which would incorporate the Sakimay policy that contradicts Parliament's intent and action in enacting Bill C-31. There are no Sakimay Band Council resolutions or minutes of meetings of Council decisions, at least none in evidence before the Court, which would authorize refusing the applicant's right to vote.

[171] The same can be said in the present case. The Bill C-31 Voting Policy imposes an arbitrary limit on Ms. McCarthy's *Charter* rights that does not reflect the broad consensus of the WLFN membership. It is therefore unnecessary to consider the *Oakes* test.

(3) Common Law Marriage Prohibition

(a) *Parties' Positions*

[172] Ms. Jackson-Littlewolfe does not provide submissions on whether the limits of the Common Law Marriage Prohibition are prescribed by law. She submits that the objective of the Common Law Marriage Prohibition is to ensure that leadership subscribes to certain religious morals. While Ms. Jackson-Littlewolfe similarly does not provide submissions on whether this objective is pressing and substantial, she states that this cannot be a legitimate government objective. Ms. Jackson-Littlewolfe also states that a blanket prohibition is not minimally impairing. Finally, she submits that there is no proportionality between any benefit and the harm of prohibiting a quarter of the WLFN electorate from running.

[173] WLFN reiterates the same submissions as with the Bill C-31 Voting Policy. WLFN only adds that the objective of the Common Law Marriage Prohibition is for leaders to be "secure and committed to building a family within [the] community." WLFN also adds that the infringement is minimally impairing because it is "reasonably necessary" to impair an individual's rights "so that collective rights prevail".

(b) *Conclusion*

[174] I find that the Common Law Marriage Prohibition is not saved by section 1.

[175] In my view, the Common Law Marriage Prohibition is not prescribed by law because it is not a WLFN custom. Alternatively, I also agree with Ms. Jackson-Littlewolfe that the Common Law Marriage Prohibition does not have a legitimate government objective.

[176] The objective of the Common Law Marriage Prohibition is best characterized as imposing a religious moral obligation on candidates. WLFN submits that the objective of the Common Law Marriage Prohibition is for leaders to be "secure and committed to building a family within [the] community", which stems from Christian values. The affidavit of Elder Sparklingeyes and Elder Ben Houle confirms as much. WLFN has not argued that the objective stems from any secular purpose.

[177] I am sensitive to the fact that some Indigenous communities adhere to Christian values because of colonialism and decades of assimilationist policies and laws, including residential schools. With that said, so long as the *Charter* applies to First Nations' election laws, I agree with Ms. Jackson-Littlewolfe that a religious moral obligation cannot be a valid government objective. Justice Dickson discussed this point in *Big M* at 351:

> …the diverse socio-cultural backgrounds of Canadians make it constitutionally incompetent for the federal Parliament to provide legislative preference for any one religion at the expense of another religious persuasion.
>
> In an earlier time, when people believed in the collective responsibility of the community toward some deity, the enforcement of religious conformity may have been a legitimate government object of government but since the *Charter*, it is no longer legitimate. With the *Charter*, it has become the right of every Canadian to work out for himself or herself what his or her religious obligations, if any, should be and it is not for the state to dictate otherwise.

[178] In considering section 1 of the *Charter*, Justice Dickson rejected the secular explanation offered by the appellants, noting that the true objective of the impugned law was "in pith and substance" a "religious matter." The Supreme Court concluded, "[t]he characterization of the

purpose of the Act as one which compels religious observance renders it unnecessary to decide the question of whether s. 1 could validate such legislation…" (at 353).

[179] I note that *Big M* concerned a section 2(a) *Charter* argument rather than a section 15 claim. Counsel for Ms. Jackson-Littlewolfe cites *Big M* without addressing this distinction. In my view, there is no reason why Justice Dickson's analysis regarding valid government objectives cannot be applied in the context of a section 15 claim. Although the present matter engages distinct protected grounds, *Big M* is still instructive because the government objective is religious in nature. In my view, this is what is most important in the context of a section 1 analysis.

[180] Ultimately, WLFN has failed to satisfy the first prong of the *Oakes* test because imposing a religious obligation on candidates is not a valid government objective. It is therefore unnecessary to consider the remaining steps of the *Oakes* test.

F. *What are the appropriate remedies?*

[181] Ms. McCarthy acknowledges that ordering a new election is an exceptional remedy; however, she submits that it is warranted in this case because: the Bill C-31 Voting Policy has disenfranchised Bill C-31 Members for decades; current Chief and Council have not been elected by the WLFN membership as a whole; WLFN has maintained the Policy despite this Court's ruling in *Sakimay*; the Applicants have made numerous requests to cease discriminatory conduct; and ordering a new election would restore members' confidence in WLFN's electoral practices.

Ms. McCarthy also states that she cannot obtain an alternative remedy because the appeal process under the *Election Regulations* is not supported by custom (*Shirt I* at paras 43-49).

[182] Ms. Jackson-Littlewolfe submits that the Court has jurisdiction to issue a declaration that the Common Law Marriage Prohibition and Decision violates her section 15 *Charter* rights as I did in *Clark*. She states that the Court should order WLFN to use the New Election Code or create its own *Charter*-complaint election regulations.

[183] Finally, both Applicants submit that they are entitled to costs on an elevated lump sum basis because there is a significant power imbalance between the parties, including access to financial resources. Further, they state that these Applications has a significant public interest component (*Whalen v Fort McMurray No 468 First Nation*, 2019 FC 1119 at paras 17, 21, 27, 30, 32, 35 [*Whalen II*]). The Applicants also indicate that they are willing to make further submissions on costs.

[184] WLFN requests that the Court not order a new election if the Court finds that it has unjustifiably infringed the Applicants' *Charter* rights and that the infringement is not shielded by section 25 (*Clifton*; *Clark*). WLFN submits that Chief and Council have been legitimately elected by hundreds, if not thousands, of WLFN members and that ordering a new election would disenfranchise them. WLFN also submits that ordering a new election when Chief and Council are over halfway through their term militates against calling a new election.

[185] Alternatively, in T-800-21, WLFN asks the Court to suspend the declaration of invalidity for a period of 12 months so that WLFN may establish its own membership code under section 10 of the *Indian Act* and take steps to amend the *Election Regulations*. WLFN states that pursuant to subsection 10(4) of the *Indian Act*, a new membership code will not deprive the Applicants of membership and will be a membership supported endeavour. In T-808-21, WLFN asks the Court to suspend the declaration of invalidity for 6 months to allow WLFN to hold a referendum for the Common Law Marriage Prohibition. WLFN is not opposed to this Court retaining jurisdiction over this matter.

[186] The Court quashes and sets aside the Decisions because the Bill C-31 Voting Policy and the Common Law Marriage Prohibition are not WLFN customs. The Court will not order a new election. In my view, WLFN will need some time to address the impact this Judgment and Reasons has on the *Election Regulations*.

[187] The Court declares the Bill C-31 Voting Policy and the Common Law Marriage Prohibition unconstitutional and of no force and effect. The Court suspends the declaration of invalidity so that WLFN may (a) adopt its own membership code pursuant to section 10 of the *Indian Act* in order to address membership rights in the First Nation within 12 months and (b) amend the *Election Regulations* in a manner that reflects the broad consensus of the WLFN membership within 6 months in order to prepare for the next election.

[188] The Court directs counsel to provide additional submissions on the matter of costs as set forth in the Order, below.

VII. Conclusion

[189] For all of these reasons, the Applications for judicial review are allowed.

JUDGMENT in T-800-21 and T-808-21

THIS COURT'S JUDGMENT is that:

1. The applications for judicial review in T-800-21 and T-808-21 are allowed. The Decisions are unreasonable because they are unlawful.

2. The *Charter* applies to WLFN's leadership selection processes as set out in the *Election Regulations*.

3. Section 25 of the *Charter* cannot shield the Bill C-31 Voting Policy or the Common Law Marriage Prohibition.

4. Both the Bill C-31 Voting Policy and the Common Law Marriage Prohibition are contrary to subsection 15(1) of the *Charter* and cannot be saved by section 1.

5. The Court declares both the Bill C-31 Voting Policy and the Common Law Marriage Prohibition unconstitutional and of no force and effect. The declarations of invalidity are suspended for seven months after the date of this judgment.

6. The Court directs further submissions on costs. The Applicants will serve and file their submissions on costs by March 3, 2023. The Respondent will serve and file its submissions on costs by March 21, 2023. The submissions will not exceed 10 pages.

"Paul Favel"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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