



Court File No. T-800-21

FEDERAL COURT

KAREN MCCARTHY and BAND MEMBERS ALLIANCE
AND ADVOCACY ASSOCIATION OF CANADA

APPLICANTS

AND:

WHITEFISH LAKE FIRST NATION #128 and SADDLE LAKE CREE NATION #462

RESPONDENTS

NOTICE OF APPLICATION

TO THE RESPONDENTS: WHITEFISH LAKE FIRST NATION #128 and SADDLE LAKE CREE NATION #462

A PROCEEDING HAS BEEN COMMENCED by the applicant. The relief claimed by the applicant appears on the following page.

THIS APPLICATION will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court orders otherwise, the place of hearing will be as requested by the applicant. The applicant requests that this application be heard at Edmonton

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or a solicitor acting for you must prepare a notice of appearance in Form 305 prescribed by the Federal Courts Rules and serve it on the applicant's solicitor, or where the applicant is self-represented, on the applicant, WITHIN 10 DAYS after being served with this notice of application.

Copies of the Federal Courts Rules information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPLICATION, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

May 14, 2021

**ORIGINAL SIGNED BY
JENNIFER SORVISTO
A SIGNÉ L'ORIGINAL**

Issued by: _____
(Registry Officer)

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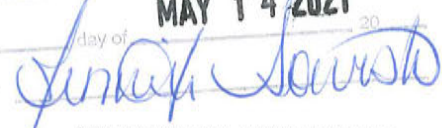
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I HEREBY CERTIFY that the above document is a true copy of the original issued out of / filed in the Court on the

day of MAY 14 2021 A.D. 20

Dated this MAY 14 day of 20



**JENNIFER SORVISTO
REGISTRY OFFICER
AGENT DU GREFFE**

APPLICATION

This is an application for judicial review under s. 18.1 of the *Federal Courts Act* in respect of the decision of the Whitefish Lake Appeals Committee (the "Committee") dated April 14, 2021 and communicated to the Applicant on April 15, 2021 wherein the Committee denied the Applicant the right to vote in the Whitefish Lake First Nation #128 ("WLFN") election set for April 29, 2021 on the basis of its purported custom (the "Decision"). The Decision was based on a purported custom whereby the WLFN does not permit any member to vote if they regained their membership in accordance with Bill C-31. The Applicant seeks to challenge the Decision, as well as this discriminatory practise, as being unconstitutional and discriminatory.

The Applicant makes application for:

1. A declaration that the Applicant is entitled to vote in WLFN elections;
2. A declaration in accordance with s. 24(1) of the *Charter* that the WLFN's practise of denying members classified as Bill C-31 members the right to vote is discriminatory and contrary to section 15(1) of the *Charter* and is not saved by section 1.
3. A declaration in accordance with s. 52(1) of the *Constitution Act, 1982* that the WLFN's practise of denying voting rights to Bill C-31 members unjustifiably discriminates against this category of WLFN band members.
4. An Order in the nature of *certiorari* quashing the Decision;
5. An Order in the nature of *mandamus* directing a new election to be held and an order in the nature of *quo warranto* setting aside the 2021 election on the basis that a range of WLFN electors were denied their right to vote and therefore the current Council is not validly in office and a new election is necessary;
6. An interlocutory and/or permanent injunction requiring the WLFN to permit all band members the right to vote, regardless of their status as Bill C-31 members.
7. An order that this Court retain jurisdiction until such time as the discriminatory practise is remedied or addressed;
8. An Order for costs;
9. Such further and other relief as counsel may advise and this Honourable Court considers just; and,

The grounds for the Application are:

Overview:

1. This application seeks to have the Court resolve a long standing relic of gender discrimination created by the pre-1985 *Indian Act*, whereby men and women were treated differently in respect of their ability to retain and transmit Indian status to their children. Indian status women who married someone without status lost their status rights; whereas, Indian status men did not lose their status in this manner. Bill C-31 sought to remedy this discrimination. When Bill C-31 received royal assent in 1985, it began the process of remedying decades of discrimination by permitting categories of individuals to regain their previously lost status. However, when these individuals regained their membership at the respondent first nations in this case, these first nations informally created a second class of membership for these individuals wherein they received fewer rights and privileges. This served to simply continue the discrimination that Bill C-31 sought to eliminate.
2. The Applicant is one of the WLFN members that has been discriminated against on the basis that she is a Bill C-31 member. On April 14, 2021, the WLFN advised the Applicant that she would again not be permitted to vote, due to her status as a Bill C-31 member and the WLFN's practise of denying them the right to vote. This application seeks an order declaring that this discrimination is contrary to section 15 of the *Charter of Rights and Freedoms* ("*Charter*") and seeks to have the Applicant be given the basic democratic rights she is entitled to as a WLFN member.

The Parties

3. The Applicant, Karen McCarthy ("Applicant"), is a registered member of WLFN.
4. The Respondent, WLFN, is a First Nation based in northeastern Alberta in Treaty 6 territory. The WLFN has approximately 2,378 members, of which 600 are off-reserve and 1,778 reside on the WLFN reserve.
5. The Respondent, Saddle Lake Cree Nation #462 is a Band as defined in the *Indian Act* R.S.C. 1985, c. I-5. The WLFN and the SLCN communities are joined as one First Nation under the *Indian Act* as Saddle Lake #125. However, in many respects, they operate as different First Nations. Because the SLCN and WLFN operate with the same custom election code and practises, the SLCN is named as a Respondent due to the impact this matter could have on their governance.
6. The SLCN has a registered population of 11,146. This includes the 2,378 members of the WLFN. The two communities are often viewed as different First Nations, however, from the perspective of the federal government, they are one

“band”. For these reasons, the SLCN and the WLFN are collectively referred to as the “First Nation” and any reference to SLCN or WLFN includes the other.

7. The Applicant, Band Members Alliance and Advocacy Association of Canada (“BMAAAC”), is a national not-for-profit society incorporated under the *Canada Not-for-Profit Corporations Act*. BMAAAC’s mission is to assist band members in obtaining access to justice and ensuring good governance and financial accountability for First Nations in Canada. BMAAAC claims public interest standing in this proceeding and supports the Applicant’s desire to ensure the democratic rights of all WLFN members are respected.

Background:

8. The Applicant has been a member of the SLCN since 1986. The Applicant’s children are members of SLCN, and so is their father. The Applicant lives on the WLFN reserve.
9. The Applicant’s maternal grandfather was a registered member of SLCN and resided his whole life in SLCN. The Applicant’s maternal grandmother was a registered member in nearby Kehewin Cree Nation but transferred her status to SLCN upon marriage to the Applicant’s maternal grandfather. When the Applicant’s mother was born, she was registered under SLCN as a full band member.
10. Unfortunately, and as with many indigenous women of her generation, the Applicant’s mother lost her status when she married a non-indigenous man in 1971 (the Applicant’s father). This was a result of the *Indian Act’s* discriminatory provisions pertaining to Indian status, wherein men and women were treated differently. Due to these provisions, the Applicant was not given status when she was born. The same rules would not have applied to a male member of the WLFN/SLFN that married a non-indigenous woman.
11. It has long been recognized by the Court, Parliament, and by international bodies like the United Nations Human Rights Committee that this unfair treatment amounted to institutionalized discrimination against indigenous women.
12. In 1985, Parliament passed Bill C-31 and amended the *Indian Act* to attempt to rectify the discrimination in the prior system. The aim of these amendments was to bring the *Indian Act* into compliance with the *Charter* and, in fact, the provisions were made to retroactively come into effect at the same time as s. 15 of the *Charter*.
13. The amendments in Bill C-31 allowed indigenous women that had “married out” of their Indian status to regain their status. It further permitted some categories of individuals to automatically regain their membership. This also restored their

ability to transmit status. As a result, the Applicant's mother regained her status and membership in 1986. The Applicant became a member of the SLCN in 1986.

WLFN Membership and Voting in Elections:

14. As part of Bill C-31, bands were given the opportunity to create their own membership codes in order to control who can and cannot become members, in accordance with section 10 of the *Indian Act*. The concept of Indian status was separated from the concept of band membership. Many bands adopted membership codes in order to set out their membership requirements, in accordance with section 10.
15. The SLCN/WLFN elected not to control its membership list and instead, continues to permit the Department to add individuals to the First Nation's membership list in accordance with s. 11 of the *Indian Act*. As a section 11 band, they do not have multiple categories of membership. All members have the same status, in accordance with the *Indian Act*, and all members have the same voting rights. As a matter of law, there is but one category of members and they all have the same rights.
16. However, when Bill C-31 members were added to the First Nation's membership list, the nation simply refused to provide them with the full rights and privileges that other members receive. This includes depriving these members of equal access to housing, education funding, and other services.
17. Most importantly for the present application, Bill C-31 members have since 1985 been denied the ability to vote. The Applicant has attempted to vote and has repeatedly raised this issue with WLFN leadership. WLFN leadership has still not dealt with the issue. The Applicant's most recent attempt to vote was for the 2021 election.
18. The WLFN elections are governed in accordance with a customary election code. There is nothing in the WLFN election code that calls for some category of members to be denied the right to vote. On the contrary, there is only 1 category of members and they all have the right to vote, subject to the minimal eligibility requirements like age. As a result, the Bill C-31 voting discrimination is not only inconsistent with the *Charter*, it is directly contrary to the WLFN custom election code.
19. The Applicant states that the WLFN's practise of refusing the Applicant the right to vote is discriminatory and contrary to s. 15 of the *Charter* on the basis of sex, alternatively on the analogous ground of marital status, or in the further alternative on the analogous ground of indigenous membership / Bill C-31 status. The Applicant, and other Bill C-31 members are only denied the right to vote because of the *Indian Act's* prior discrimination based on sex and marital status. At most First Nations, federal legislative reform has gone a long way to

remedying this discrimination. However, at the WLFN and SLCN, this discrimination has continued through the creation of a sub-class of band members that are derogatively referred to as "Bill C-31s". To put it simply, had the Applicant's parent with Indian status been her father instead of her mother, then the Applicant would be entitled to vote at the WLFN. This is clearly discriminatory and should not be permitted to continue.

20. The Applicant also notes that, as with the section 10 membership rules, the WLFN has the ability to amend their governance code in accordance with departmental policy and the *Indian Act*. They have, to date, not amended this code to reflect the asserted custom/practise of discriminating against Bill C-31 members. This is likely because an updated membership code that enshrined this discrimination would be rejected by the WLFN members, or because this would be rejected by the Minister's office if they sought to submit this. As a result, this discrimination has persisted on the basis of an unwritten assertion by WLFN leadership that this is "custom".
21. The Applicant submits that discriminating against certain categories of members cannot constitute a "custom" as that term is defined in law. The Applicant submits that the sole aim of this "custom" is to discriminate against a category of already marginalized WLFN members. Moreover, as noted above, if it was actually a custom, it would be reflected in an updated governance / election code. The Applicant states that this discriminatory practise does not reflect a "custom" of the WLFN and this assertion of custom is little more than a veiled attempt to justify discriminating against an already marginalized group of WLFN members.
22. The Applicant also notes that the WLFN receives funding on the basis of the membership list, including the Bill C-31 members. As such, the WLFN receives funding and then uses it to preferentially benefit non Bill C-31 members. This has all the hallmarks of unlawful discrimination.

Remedies Sought:

23. As set out above, the Applicant seeks a declaration that the practise of not permitting Bill C-31 members the right to vote is discriminatory and contrary to section 15 of the *Charter*. The Applicant further requests that the Court set aside the Decision and direct a new election to take place, wherein all WLFN members (including Bill C-31 members) are given the right to vote.
24. The Applicant is bringing this application in the public interest and on behalf of WLFN band members to have their democratic rights vindicated. The Applicant submits that she should be entitled to advance costs and/or costs in any event of the cause.

This Application will be supported by the following material:

1. Affidavit of the Applicant, Karen McCarthy, to be served.
2. The Rule 317 response, requested below;
3. Such further and additional materials as the Applicants may advise and this Court may allow.

The Applicant requests, pursuant to Rule 317 of the *Federal Courts Rules*, that the Respondent WLFN send a certified copy of the following material that is not in the possession of the Applicant but is in the possession of the WLFN to the Applicant and to the Registry:

All material considered by the WLFN in coming to the Decision, including, but not limited to:

- All evidence or information relied upon in coming to the Decision;
- Records regarding any meeting of Council or the Committee where the Decision was discussed (the "Meetings")
- Records regarding notice of the Meetings, minutes of the Meetings, the agenda for the Meetings, notes from any participants in the Meetings and any other record of the Meetings (including audio or video recordings);
- Any WLFN Laws, Bylaws or resolutions that were relied upon or considered in relation to the Decision;
- All evidence or information that was considered in coming to the Decision;
- The membership list for both WLFN and SLCN as well as the list of electors that actually voted in the last SLCN and WLFN elections; and
- Any other materials that are relevant to the decision

May 13, 2021.

[REDACTED]

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