Court File No.: T-808-21

FEDERAL COURT

BETWEEN:

LORNA JACKSON-LITTLEWOLFE

Applicant

and

WHITEFISH LAKE FIRST NATION #128

Respondent

RESPONDENT'S RECORD

February 7, 2021

Ian Bailey
Bailey & Wadden LLP
2300 CN Tower
10004 – 104 Avenue
[redacted]

Solicitors for the Respondent

Marty Moore
Justice Centre for Constitutional Freedoms
253-7620 Elbow Drive SW
[redacted]

Solicitors for the Applicants

TAB 1

Court File No.: T-808-21

FEDERAL COURT

LORNA JACKSON-LITTLEWOLFE

Applicant

- and -

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

Respondents

APPLICATION UNDER Sections 18(1) and 18.1 of the *Federal Courts Act* and Rule 301 of the *Federal Courts Rules*.

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, Alberta.

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.

Date: May 14, 2021

ORIGINAL SIGNED BY
JENNIFER SORVISTO
A SIGNÉ L'ORIGINAL

Issued by: _____
(Registry Officer)

Address of local office: Scotia Place
10060 Jasper Avenue
Tower 1, Suite 530
Edmonton, Alberta
T5J 3R8

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 ____ day of MAY 14 2021 20____
JENNIFER SORVISTO
REGISTRY OFFICER
AGENT DU GREFFE

TO: Whitefish Lake First Nation #128
Administration Building
PO Box 271
Goodfish Lake, Alberta
T0A 1R0
[redacted]

AND TO: Saddle Lake Cree Nation #462
PO Box 100
Saddle Lake, Alberta
T0A 3T0
[redacted]

AND TO: The Attorney General of Canada
Prairie Regional Office - Edmonton
10423 101 Street
3rd Floor, Epcor Tower
Edmonton, Alberta
T5H 0E7
[redacted]

APPLICATION

1. This is an Application for Judicial Review pursuant to sections 18(1) and 18.1 of the *Federal Courts Act* regarding a decision of the Respondent, Whitefish Lake First Nation #128 ("WLFN") which deemed that Lorna Jackson-Littlewolfe (the "Applicant") was "not an eligible candidate" for Council and Chief in the Whitefish Lake First Nation 2021 Elections ("2021 Elections") held on April 29, 2021 and May 6, 2021 respectively. This decision to deny the Applicant's candidacy (the "Decision") was made in reliance on section 1(c) of the Saddle Lake Tribal Customs (the "Election Regulations"), which states that "[n]o person living in a Common Law marriage shall be eligible for nomination" (the "Common Law Marriage Prohibition").

2. Pursuant to section 52(1) of the *Constitution Act, 1982*, the Applicant challenges the constitutionality of the Common Law Marriage Prohibition on the basis that it unjustifiably discriminates against her based on marital status, contrary to section 15(1) of the *Charter*.

The Applicant makes this application for:

3. The Applicant seeks the following relief:

(a) An Order abridging the time for the service of this application, if necessary;

(b) A Declaration pursuant to section 52(1) of the *Constitution Act, 1982*, that the Common Law Marriage Prohibition unjustifiably discriminates based on marital status contrary to section 15(1) of the *Charter* and is therefore of no force or effect;

(c) A Declaration pursuant to section 24(1) of the *Charter* that the Decision infringes the Applicant's section 15(1) *Charter* rights;

(d) An Order in the nature of *mandamus* pursuant to 18(1) of the *Federal Courts Act* and section 24(1) of the *Charter* setting aside the 2021 Elections and directing Whitefish Lake First Nation #128 to immediately hold a new Election

for Council and Chief using the *onihcikiskwapowin* – Tribal Customs Elections Code;

(e) In the alternative, an Order in the nature of *mandamus* pursuant to section 18(1) of the *Federal Courts Act* and section 24(1) of the *Charter* setting aside the 2021 Elections and directing Whitefish Lake First Nation #128 to forthwith adopt *Charter*-compliant election regulations and immediately hold a new Election for Council and Chief thereafter;

(f) An Order that this Court retain jurisdiction of this matter until a new election is held in compliance with the law and the judgment rendered by this Court;

(g) Costs; and

(h) Such further and other relief as counsel may advise and this Honourable Court deems just and equitable.

THE GROUNDS FOR THIS APPLICATION ARE:

The Parties and Overview

4. The Applicant is a Cree woman, a mother and a grandmother, and a member of WLFN, where she lives with her common law spouse. She is also a keen observer of local and national politics, particularly in relation to matters that affect her community. After being encouraged to run for office by several members of her community, including Elders, the Applicant sought nomination as a candidate in the 2021 Elections for Council and Chief.

5. The Respondent, WLFN, is part of the Saddle Lake Cree Nation #462, which includes both the WLFN and Saddle Lake First Nation #125 ("SLFN"). WFLN and SLFN are recognized as a single band called Saddle Lake Cree Nation #462 pursuant to the *Indian Act*, RSC 1985, c I-5, but they retain separate chiefs and councils. The WLFN territory is located approximately 90 km northeast of St. Paul, Alberta. This Application impacts the election codes and customs of Saddle Lake Cree Nation #462; accordingly they are also named as a Respondent.

4. In 1955 and 1960, band meetings were held on the Saddle Lake Reserve. From these band meetings, the Saddle Lake Tribal Customs ("Election Regulations") were created. These Election Regulations, which included the disputed Common Law Marriage Prohibition, applied to the Saddle Lake Reserve, now known as SLFN, and the Goodfish Lake Reserve, now known as WLFN.

6. In 2017, the Federal Court determined that the Election Regulations were inadequate, largely on the basis of their failure to address issues such as the nomination of an election/appeals committee. The Court required Saddle Lake Cree Nation to develop a new process to determine the eligibility of candidates for election. Subsequently, Saddle Lake Cree Nation created and adopted the *onihcikiskwapowin* – Tribal Customs Elections Code, which does not contain the Common Law Marriage Prohibition.

7. Despite this fact, the WLFN Election Committee applied the old Election Regulations and held that the Applicant was ineligible to run in the 2021 Election for Council and Chief on the basis of the Common Law Marriage Prohibition. This application seeks to have this Decision and the Common Law Marriage Prohibition struck down on the basis that they violate section 15(1) of the *Charter*, which recognizes marital status as an analogous ground of prohibited discrimination.

Decision to deem the Applicant an ineligible candidate for the 2021 Elections

8. The Applicant attended the nomination meeting for the 2021 Elections on April 15, 2021, where she provided nomination documents signed by a nominator and seconder, and also made a sworn statement as requested by the electoral officer. At the nomination meeting, the officer asked the Applicant if she had a marriage certificate, and she replied in the affirmative, and added that she also had a death certificate, attesting to the death of her children's father and former husband. The Applicant's nomination was accepted at the nomination meeting.

9. On April 20, 2021, at 4:35 pm, the Applicant received an e-mail from Ed Cardinal, the Chair of the Election Appeals Committee. The e-mail stated:

> Please be advised that there has been a written letter of appeal forwarded to the Appeals Committee regarding your elibibilty [sic] run in in the 2021 Whitefish Lake First Nation #128 Elections. Section 1 (C) of the Nations Electoral By-law has been cited and referenced as the basis for your eligibility.
>
> To this end , we are seeking an audience with you today April 29th/2021 in the Tribal Council Chambers to discuss our decision relative to this matter.
>
> Kind Regards
> Ed Cardinal
> Chairman Appeals Committee

10. When the Applicant attended the Committee meeting that evening, she was provided with a new letter, signed by all the members of the Committee, which stated:

> To: Loma 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 I(c), it has been determined that you are not an eligible candidate for the 2021 Elections, as you are in a common law relationship.
>
> Also, the proxy letters that you presented to the Electoral Officer appear to be presumptuous and ambiguous in nature and have not been notarized or commissioned by a Commissioner of Oath.
>
> Based on the above, the Appeals Committee have ruled that you are not an eligible candidate; signed by the signatures below appearing:

11. The Applicant told the Committee that she felt that the second paragraph of the letter was not appropriate as she had been called to the Committee meeting only to discuss the issue of her eligibility regarding section 1(c) of the Elections Regulation, which is the Common Law Marriage Prohibition.

12. The Committee then retired *in camera* to discuss the Applicant's position. When the meeting reconvened, the Committee provided the Applicant with a revised letter, which entirely omitted the second paragraph of the previous letter. Mr. Cardinal then told the Applicant that her eligibility for candidacy was being appealed only on the basis that she was in a common law relationship.

13. The Applicant stated that a court decision in 2017 had struck down the Election Regulation, and that Saddle Lake Cree Nation had implemented new election rules.

14. The Applicant requested that the Election Appeals Committee do the right thing in reference to her position that it was not appropriate to follow the Election Regulations and specifically the Common Law Marriage Prohibition. However, Mr. Cardinal responded that "it's already done," indicating that in fact the Appeal Committee had already made its decision the previous day.

15. The next day, the Applicant asked Mr. Cardinal for a letter outlining the Decision. Mr. Cardinal provided a letter later that day, which stated:

> To: Loma 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 I(c) of the Tribal Custom Election Bylaw.
>
> We have come to a conclusion that we are going to uphold the requirement of the Tribal Custom Elections, 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.

The Decision and the Common Law Marriage Prohibition violate section 15(1) of the *Charter*

16. The Decision is expressly based on the Applicant's marital status, which is a recognized ground of prohibited discrimination under section 15(1) of the *Charter*. As a corollary, the distinction imposed by the Common Law Marriage Prohibition perpetuates prejudice on the basis of stereotyping and offends the Applicant's essential worth and dignity as an individual.

The Applicants rely on the following statutory provisions, rules and principles:

17. *Constitution Act, 1982*, being Schedule B to the Canada Act 1982 (UK), 1982, c 11, including the *Canadian Charter of Rights and Freedoms*.

18. *Federal Courts Act*, R.S.C. 1985, c. F-7, s. 18.1.

19. *Federal Courts Rules*. SOR/98-106.

This Application will be supported by the following material:

20. The Affidavit of Lorna Jackson-Littlewolfe, to be filed;

21. Such further and other affidavits and material as counsel may advise and this Honourable Court permits.

Pursuant to Rule 317 of the *Federal Courts Rules*, the Applicant requests that the Respondents send the following material that is not in the possession of the Applicant but is in the Respondent's possession, to the Applicant and to the Registry:

22. The record of all documents and other materials before the Respondents informing the Decision.

23. The record of all documents and other materials related the adoption, review and continued utilization of the Election Bylaw, including specifically the Common Law Marriage Prohibition.

24. Such further and other material that may be in the possession, power or control of the Respondents and which may be relevant to these proceedings.

Date: May 14, 2021

Jocelyn Gerke and **Marty Moore**
Lawyers for the Applicant

Justice Centre for Constitutional Freedoms
#253, 7620 Elbow Dr SW
Calgary, Alberta T2V 1K2
[redacted]

TAB 2

Court File No.: T-808-21

FEDERAL COURT

BETWEEN:

LORNA JACKSON-LITTLEWOLFE

Applicant

and

WHITEFISH LAKE FIRST NATION #128

Respondent

AFFIDAVIT OF BEN HOULE

I, Ben Houle, of Whitefish Lake First Nation reserve #128, in the province of Alberta, SWEAR THAT:

1. I am a Member of the Whitefish Lake First Nation (the "Nation") and, as such, have personal knowledge of the matters hereinafter deposed to except where stated to be on information or belief, in which case I believe the same to be true.

2. The WFLFN #128 is a First Nation based near the Goodfish Lake, north of Vilna, Alberta. The WFLFN #128 is a signatory to the written text of Treaty 6, dating back to 1876. We were one of the original adherents and negotiators of Treaty 1876. Treaty 6 consists of both the written text and the oral promises that were made by the Commissioners.

3. I was born in 1962 and, but for the years 1981-1984 when I went to college, have spent my entire life living on the Whitefish Lake First Nation Reserve.

I am considered an Elder of the Whitefish Lake First Nation, as a result of our traditions and customs.

4. I was elected to the position of Councillor from the years 2005 to 2008, and again 2008 to 2011. As a result, I have become extremely familiar with our customs, practices, and history related to governance of the WFLFN #128. I have learned about our customs, practices, and history through my discussions with WFLFN #128 elders, former leaders, through my experience working as a Councillor and former leader of WFLFN #128, and through review of WFLFN #128 records.

5. I am advised by WFLFN #128's elders, former leaders, and by historical records that the Customary Election Regulations, including the Common Law Provision, are a reflection of the WFLFN #128's customs and traditional practices and reflect our historical practices of governance.

6. By way of example, I spoke recently, in November, 2021 with Elder and retired Reverend Bill Jackson, an eighty-eight (88) year old Elder and former Minister in our community, about the historical significance of how our Nation's governance practices and traditions were, are, and remain to this day. I was advised by Reverend Jackson that:

   (a) He worked as a Minister for the Methodist Church in Whitefish Lake #128 from 1954 when he went to bible college, and that he moved back onto the Whitefish Lake Reserve in approximately 1972;

   (b) He recalled that his father, Thomas Jackson, a former Councillor of the Nation, told him when he was a teenager that, at the time the Whitefish Lake Reserve #128 was first surveyed, in 1876, the Reserve was surveyed around the existing Mission at that time, and that the Nation, around the time Chief Pakan (James Seenum), the first Chief of Whitefish Lake First Nation #128, was alive, the Nation adopted and accepted the teachings of the Methodist Church; that some of our Members had two (2) wives, some had one wife (1) and

some had none, and that they would come to follow the teachings that if a man were to marry a woman, it would be one (1) only;

(c) When Reverend Jackson and I spoke, he told me that his father, Thomas Jackson, told him at that time, respected Members of the Nation sat down and determined some rules on how their governance would come to be (notwithstanding that at that time the Nation's governance was determined by a hereditary Chief system of governance), which included committing to the institution of marriage; that is to say, that if a Member were going to become a leader of our community, marriage would demonstrate that they were secure and committed to building a family within our community;

(d) In addition, Reverend Jackson remarked that up until the time when he was quite young, he recalled that his father, Thomas Jackson, who became a Councillor in 1944, telling him and others as he grew up in his formative years, including councillors in the community that one thing they were sure about within the context of the ability for a Member to run as a candidate for Council, that if they were not married, and were common law instead, that they could not run. They [the Members] followed that rule and no-one really questioned that over time;

(e) Further, Reverend Jackson recalled multiple occasions when his father would tell him stories of Members that were living in common law relationships that desired to become councillors, only to be told that they were not permitted to do so, and that custom and tradition was followed religiously;

(f) Reverend Jackson also told me of several notable leaders in our community; one of which, my late cousin Tom Houle, the most recent former Chief of our great Nation, was originally living common law before contemplating to run for the position as Councillor, before discussing the matter with Reverend Jackson directly and becoming married before running;

(g) The same was true for the current Chief of our Nation, Stan Houle, and Members, in particular Elders in our community, have been

satisfied with this custom and tradition for as long as he could remember;

(h) In addition, Reverend Jackson recalled a survey that was distributed to Elders in our community approximately six (6) or (7) years ago by the Nation, in which the Elders were asked if any changes should be recommended to the Customary Election Regulations of the Nation, and most, if not all of the Elders surveyed, he recalled, remained in favour of the current iteration of the Customary Election Regulations.

7. I believe that our ability to continue to practice our methods of governance are a right promised to us through treaty, or otherwise. In canvassing the evidence and opinions of our Elders, like Reverend Bill Jackson, I understand that oral history in our community was and is often passed down from our Elders in the home, when Councillors and other respected Members in our community would visit and be told stories about our familial past, our traditions and customs, the "old ways", the ways of our ancestors, and that in so doing this oral history would spread among the community and be accepted as "the way".

8. Reverend Jackson, in our call, told me that his father would often, during his time as a Councillor, speak with his eldest brother Alec Jackson about the history of the Nation, his goals and the importance of our traditions and customs; that other Councillors and Members would visit their family home and they would discuss things openly, to help and teach the younger Members about our history and way of life, and that it must always be protected.

9. My own father, Allan Houle, who was on Council for many years and in fact was Chief of our Nation for over twenty (20) years, would always tell me and my siblings about the significance of our traditions and customs and that they should always be maintained. He would tell us about his four (4) brothers and five (5) sisters, and that if we wanted to make any changes to how we governed ourselves, it would be a membership driven endeavour.

That is to say, we would make the decision on if any changes to our customs should occur.

10. During our history, we have had many iterations of our "voters list". Up until the late 1990's, and potentially into the early 2000's, Indigenous and Northern Affairs Canada, or INAC, as they were then known, would send a representative to be our electoral officer for the purposes of overseeing our elections. Part of their responsibilities was to uphold and enforce our traditional customs as enshrined in our Customary Election Regulations and elsewhere through our oral traditions and customs as Indigenous people which included, among other things, the residency requirement, the criminal record check, and the common law prohibition in our Customary Election Regulations. Attached as Exhibit "1" to this my Affidavit is a copy of a Council Resolution evidencing that Jim Ruller, an INAC representative, was the part of the Appeal Committee for our Nation in 1996.

11. I believe that if the Customary Election Regulations governing the Nation's elections for the position of Chief and Council should be amended, they should be amended by the Members of our Nation in a referendum. In speaking with Reverend Jackson, he also remarked that as Members, it is incumbent on us all, as Members are "waking up" and becoming more involved in our political processes, to make any changes they want to see to our governance processes.

12. I make this Affidavit in support of the Respondent's response to the application by the Applicant for judicial review.

SWORN BEFORE ME at the City of Edmonton in the Province of Alberta, this 3rd day of ~~November~~ December, 2021.

A Commissioner for Oaths in and for the Province of Alberta

Tara Lillian Edwards
A Commissioner for Oaths
in and for Alberta
My Commission Expires June 15, 2023

Ben Houle

WHITEFISH LAKE BAND ADMINISTRATION No. 128

Your File

Our File

GOODFISH LAKE
Alberta T0A 1R0
Box 271
Phone 636-7000
Fax 636-7006

This is Exhibit " 1 " referred to in the Affidavit of Ben Houle

Sworn before me this 3rd day of December, 2021

Tara Lillian Edwards
A Commissioner for Oaths
in and for Alberta
My Commission Expires June 15, 2023

Moved that we approve the following as presented to be the Official 1996 Electoral Voting List.

Any appeals regarding the list should be made directly to the Appeals Committee 48 hours prior to election on this 25th day of September 1996.

Appeals Committee: Allan Makokis, Jim Ruller, Pauline Houle, Ed Cardinal

(2021)
1 year - 1996

Indian and Northern Affairs Canada / Affaires indiennes et du Nord Canada

Chronological no. - N° consécutif: #16 - 96/97

File reference no. - N° de référence du dossier: 1 - 1

BAND COUNCIL RESOLUTION
RÉSOLUTION DE CONSEIL DE BANDE

NOTE The words "from our Band Funds" "capital" or "revenue", whichever is the case, must appear in all resolutions requesting expenditures from Band Funds.
NOTA Les mots "des fonds de notre bande" "capital" ou "revenu" selon le cas doivent paraître dans toutes les résolutions portant sur des dépenses à même les fonds des bandes.

	Cash free balance - Solde disponible
The council of the / Le conseil de: WHITEFISH LAKE BAND #128	Capital account / Compte capital $
Date of duly convened meeting / Date de l'assemblée dument convoquée: D J 25 M 09 Y A 96 — Province: ALBERTA	Revenue account / Compte revenu $

DO HEREBY RESOLVE
DÉCIDE, PAR LES PRÉSENTES

WHEREAS THE CHIEF AND COUNCIL OF THE WHITEFISH LAKE BAND #128 HAVE BEEN ELECTED TO BE THE GOVERNING BODY OF THE WHITEFISH LAKE BAND #128 BY THE MEMBERSHIP; AND

WHEREAS THE CHIEF AND COUNCIL OF THE WHITEFISH LAKE BAND #128 ARE RESPONSIBLE FOR THE MEMBERSHIP OF THE WHITEFISH LAKE BAND #128 FOR PEACE, ORDER AND GOOD GOVERNANCE OF THE WHITEFISH LAKE BAND #128; AND

WHEREAS THE CHIEF AND COUNCIL ARE POSTING THE ELIGIBLE VOTERS LIST FOR THE ELECTION TO BE HELD ON SEPTEMBER 30,1996, THE LIST IS PURSUANT TO DOCUMENTS GOVERNING THE WHITEFISH LAKE BAND #128, AND

WHEREAS THE CHIEF AND COUNCIL WILL APPOINT AN APPEAL COMMITTEE TO ENSURE ALL APPEALS ARE RULED UPON, AND

THEREFORE BE IT RESOLVED THAT:

1. AT A DULY CONVENED MEETING HELD ON SEPTEMBER 24, 1996, IT WAS AGREED BY THE CHIEF AND COUNCIL OF WHITEFISH LAKE BAND #128, THAT THE APPEAL COMMITTEE WILL CONSIST OF ED CARDINAL, JIM RULER, PAULINE HOULE, AND ALLAN MAKOKIS.

Quorum (three)

(Chief - Chef)

(Councillor - Conseiller) (Councillor - Conseiller) (Councillor - Conseiller)

(Councillor - Conseiller) (Councillor - Conseiller) (Councillor - Conseiller)

(Councillor - Conseiller) (Councillor - Conseiller) (Councillor - Conseiller)

TAB 3

Court File No.: T-808-21

FEDERAL COURT

BETWEEN:

LORNA JACKSON-LITTLEWOLFE

Applicant

and

WHITEFISH LAKE FIRST NATION #128

Respondent

AFFIDAVIT OF SHAUNA JACKSON

I, Shauna Jackson, of Whitefish Lake First Nation reserve #128, in the province of Alberta, SWEAR THAT:

1. I am a Member of the Whitefish Lake First Nation (the "Nation") and, as such, have personal knowledge of the matters hereinafter deposed to except where stated to be on information or belief, in which case I believe the same to be true.

2. I am the Executive Assistant to Chief and Council of the Nation and have previously been involved in the Appeal Committee with respect to the administrative matters concerning the decisions, reviews and appeals as overseen by the Appeal Committee when it comes to our elections.

3. I believe the Appeal Committee was introduced as an appellate body in the early 2000's. Since then, to my knowledge, though there have been several appeals at that level, no-one has ever appealed to the Federal Court until now.

4. One of the appeals, in particular, concerned the residency of two individuals who sought nomination as candidates for the position of Councillor in the 2014 election. One of the conditions in our Customary Election Regulations, which have been in place since 1958, is that a Member must reside on Reserve in order to be nominated.

5. This particular appeal was brought by the Applicant, Lorna Jackson-Littlewolfe, in order to uphold the customs, traditions and values enshrined in our Customary Election Regulations. On the advice of legal counsel, we have redacted the name(s) of the individuals in question. Attached as Exhibit "1" to this my Affidavit is a redacted copy of that letter of appeal.

6. I believe that if the Customary Election Regulations governing the Nation's elections for the position of Chief and Council should be amended, they should be amended by the Members of our Nation in a referendum, as it is our responsibility, as a collective, to determine how our governance should be maintained, updated and amended.

7. I make this Affidavit in support of the Respondent's response to the application by the Applicant for judicial review.

SWORN BEFORE ME at the City of Edmonton in the Province of Alberta, this 3rd day of November, 2021.

A Commissioner for Oaths in and for the Province of Alberta

Tara Lillian Edwards
A Commissioner for Oaths
in and for Alberta
My Commission Expires June 15, 2023

Shauna Jackson

This is Exhibit " 1 " referred
to in the Affidavit of
Shauna Jackson
Sworn before me this 3rd
day of December, 2021

Tara Lillian Edwards
A Commissioner for Oaths
in and for Alberta
My Commission Expires June 15, 2023

Nov. 17, 2014

To Elections Committee

I, Lorna Jackson-Littlewolfe, Is questioning 2 candidates; naming [redacted] and [redacted]
Have they varified that they live in Goodfish Lake, AB?
As far as I know [redacted] in Edmonton, AB. and [redacted] resides in Saddle Lake, AB.
According to Saddle Lake Tribal Customs they have to be residing in Goodfish Lake, AB Section (1)(d).

Nov 17/14
@ 4:29 pm

[redacted]

TAB 4

Court File No.: T-800-21

FEDERAL COURT

BETWEEN:

LORNA JACKSON-LITTLEWOLFE

Applicant

and

WHITEFISH LAKE FIRST NATION #128

Respondent

RESPONDENT'S MEMORANDUM OF ARGUMENT

February 7, 2021

Ian Bailey
Bailey & Wadden LLP
2300 CN Tower
10004 – 104 Avenue
[redacted]

Solicitors for the Respondent

Marty Moore
Justice Centre for Constitutional Freedoms
253-7620 Elbow Drive SW
[redacted]

Solicitors for the Applicants

TABLE OF CONTENTS

OVERVIEW

1. This application for Judicial Review concerns the Applicant's challenge of the Decision (defined herein) of the Whitefish Lake First Nation #128 ("WLFN #128" of the "Nation") election whereby she was not permitted to run for Chief and Council in the WFLFN #128 election of April 29 and May 6, 2021, respectively (the "Election").

2. The Applicant is a Member of the Whitefish Lake First Nation #128 and sought to run in the 2021 WFLFN #128 Election, which was scheduled for April 29 and May 6, 2021, respectively (the "2021 Election").

3. The Applicant's nomination was denied pursuant to section 1(c) of the Saddle Lake Tribal Customs (the "Decision"), which were implemented following band meetings held on the Saddle Lake Reserve in 1955 and 1960 (the "Customary Election Regulations") which provides that "[n]o person living in a Common Law marriage shall be eligible for nomination." (the "Common Law Provision").

4. The application ultimately requires a determination by the court of competing constitutional claims and competing evidence about the purpose and effects of the Common Law Provision.

PART 1: FACTS

5. As set out in the Nation's Certified Tribunal Record ("CTR"), the Applicant was denied the ability to run in the 2021 general election as a result of the Common Law Provision in the Customary Election Regulations.

6. The Applicant then subsequently filed for Judicial Review of the Appeal Committee's Decision and, more broadly, the Common Law Provision insofar as its impact on the Applicant's section 15(1) equality rights pursuant to the *Charter*.

The History of the Common Law Marriage Provision in the Customary Election Regulations

7. As mentioned above, the Customary Election Regulations were implemented in 1955 and 1960 respectively. Elder Ben Houle, who was a member of Council of the WLFN #128 from 2005 to 2011 in two terms, and who has lived on the Whitefish Lake First Nation Reserve #128 almost his entire life, has knowledge about the history of the Nation, its traditions and customs, from stories passed down by Elders within the community, as well as his own first-hand knowledge.[1]

[1] Houle Affidavit at paras #3, 4, 5 and 7.

8. Mr. Houle further recounts speaking with Elder and former Reverend, Bill Jackson, about the history of the Common Law Prohibition, and how it came to be. He recounts at paragraph 6:

> (b) He recalled that his father, Thomas Jackson, a former Councillor of the Nation, told him when he was a teenager that, at the time the Whitefish Lake Reserve #128 was first surveyed, in 1876, *the Reserve was surveyed around the existing Mission at that time*, and that the Nation, around the time Chief Pakan (James Seenum), the first Chief of Whitefish Lake First Nation #128, was alive, *the Nation adopted and accepted the teachings of the Methodist Church; that some of our Members had two (2) wives, some had one wife (1) and some had none, and that they would come to follow the teachings that if a man were to marry a woman, it would be one (1) only*;
>
> (c) When Reverend Jackson and I spoke, he told me that his father, Thomas Jackson, told him at that time, *respected Members of the Nation sat down and determined some rules on how their governance would come to be* (notwithstanding that at that time the Nation's governance was determined by a hereditary Chief system of governance), *which included committing to the institution of marriage; that is to say, that if a Member were going to become a leader of our community, marriage would demonstrate that they were secure and committed to building a family within our community*;
>
> (d) In addition, Reverend Jackson remarked that up until the time when he was quite young, he recalled that his father, Thomas Jackson, who became a Councillor in 1944, telling him and others as he grew up in his formative years, including councillors in the community that one thing they were sure about within the context of the ability for a Member to run as a candidate for Council, that *if they were not married, and were common law instead, that they could not run. They [the Members] followed that rule and no-one really questioned that over time*;

(e) Further, Reverend Jackson recalled multiple occasions when his father would tell him stories of Members that were living in common law relationships that desired to become councillors, only to be told that they were not permitted to do so, *and that custom and tradition was followed religiously* (emphasis added)

9. In more recent times within the WLFN #128 community, Mr. Houle further states:

> 6(h) In addition, Reverend Jackson recalled a survey that was distributed to Elders in our community approximately six (6) or (7) years ago by the Nation, in which the Elders were asked if any changes should be recommended to the Customary Election Regulations of the Nation, and most, if not all of the Elders surveyed, he recalled, remained in favour of the current iteration of the Customary Election Regulations.

10. Mr. Houle further recounted discussions with his own father, Allan Houle, who was on Council and was in fact Chief of the Nation for over 20 years, that:

> 9… [He] would always tell me and my siblings about the significance of our traditions and customs and that they should always be maintained. He would tell us about his four (4) brothers and five (5) sisters, and that if we wanted to make any changes to how we governed ourselves, it would be a membership driven endeavour. That is to say, we would make the decision on if any changes to our customs should occur."

11. Although the Saddle Lake election in 2019 used an updated Customary Election Regulation, it is readily apparent that this was not done in accordance with any consultation with the Whitefish Lake First Nation. Accordingly, the Nation did not recognize the 2019 Customary Election Regulations of Saddle Lake Cree Nation.

PART 2: POINTS IN ISSUE

12. The issues arising in this proceeding are as follows:

    a. Does the decision-making of Indigenous governments enjoy complete immunity from *Charter* scrutiny pursuant to s. 25?

    b. If the answer to paragraph 12(a) above is no, does the Common Law Provision of the Customary Election Regulations infringe on the Applicant's section 15(1) equality rights? If so, is the infringement justified under section 1 of the *Charter*?

c. In the event the Common Law Prohibition or the Decision is not justified under section 1 of the Charter, does section 25 of the *Charter* act as a shield against competing *Charter* rights?

PART 3: SUBMISSIONS

Standard of Review

13. The Nation agrees that whether the Common Law Provision infringes section 15(1) of the Charter is a question of law, reviewable pursuant to the *Oakes* test. Likewise, the question of whether section 25 shields or provides complete immunity to decisions of the inherent rights of the First Nation as self-government.

14. Likewise, the question of whether the Decision by the Appeal Committee was reasonable attracts a reasonableness standard of review.

The Legislative History of Section 25

15. Section 25 of the *Charter* reads:

> **25.**The guarantee in this *Charter* of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including:
>
> (a) any rights or freedoms that have been recognized by the Royal Proclamation of October7, 1763; and
>
> (b) any rights or freedoms that now exist by way of land claims agreements or may be so acquired.

16. As noted by Celeste Hutchinson ("*Hutchinson*")[2]:

> Section 25 was initially introduced to protect the rights of Aboriginal peoples. From an Aboriginal perspective, at the time the *Charter* was being drafted the biggest threat to Aboriginal rights, including treaty and other rights, was section 15 of the *Charter*. Section 25 was created to address these concerns.[3]

[2] Hutchinson, C: Case Comment on R. v. Kapp: An Analytical Framework for Section 25 of the Charter, (2007) 52 McGill L.J. 173
[3] Ibid at pp. 178

17. Indeed, citing Jane Arbour[4], *Hutchinson* notes that the entire process leading to the enactment of the *Charter*:

> suggests that the original and sustained intent of the drafters ... was to ensure that the protection of rights by the Charter would not affect the rights of Aboriginal peoples in Canada. ...
>
> ... [The] purpose for section 25 can be stated: to prevent Charter rights and freedoms from diminishing other rights and freedoms of Aboriginal peoples in Canada, whether those rights are in the nature of Aboriginal, treaty, or "other" rights.[5]

18. Peter Hogg ("*Hogg*"), one of the pre-eminent constitutional minds in Canada, noted that: "Aboriginal rights are rights held by aboriginal peoples, not by virtue of Crown grant, legislation or treaty, but "reason of the fact that aboriginal peoples were once independent, self-governing entities in possession of most of the lands now making up Canada."[6]

19. Against this backdrop, *Hogg* reinforces the notion of a hierarchy of rights within the Constitution Act, 1982 concerning Indigenous peoples, noting likewise that:

> "the point of section 25 was to allay the concern that the equity guarantee of section 15 could be construed as invalidating rights that were limited to aboriginal peoples. In effect, section 25 says that aboriginal and treaty rights take priority over Charter rights."[7]

20. It is under this lens that a review of section 25 and its application to Indigenous governments in the context of a *Charter* application must be conducted.

Judicial Treatment of Section 29 of the *Charter* Compared to Section 25

21. By way of further consideration, the distinct correlation between the language in sections 25 and 29 of the *Charter*, and the judicial treatment of s. 29 in particular, requires review. Section 29 of the *Charter* reads as follows:

> 29. Nothing 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 (emphasis added).

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[4] The Protection of Aboriginal Rights Within a Human Rights Regime: In Search of an Analytical Framework for Section 25 of the Canadian Charter of Rights and Freedoms" (2003) 21 Sup. Ct. L. Rev. 3 at 43

[5] Hutchinson, supra, at note 2.

[6] Hogg, P: The Constitutional Basis for Aboriginal Rights, 2008. pp. 179

[7] Ibid at pp. 182

22. In light of the almost identical phrasing in both ss. 25 and 29 of the *Charter*, the judicial treatment and impact of s. 29 of the *Charter*, it bears reminding that this has also been considered by the Supreme Court of Canada. Indeed, in *Reference re Bill 30, An Act to Amend the Education Act (Ont.)*[8] the Supreme Court found that:

> "s. 29 is there to render immune from *Charter* review rights or privileges which would otherwise , i.e. but for s. 29, be subject to review."[9]

23. In *Adler v. The Queen in Right of Ontario*[10], almost a decade later, the Supreme Court went further, stating that s.29 of the *Charter*:

> "explicitly exempts from Charter challenge all rights and privileges "guaranteed" under the Constitution in respect of denominational, separate or dissentient schools".

24. The distinction between the existence of the s. 25 right and the exercise of that right, that is to say, the right of self-government is by definition not to be abrogated or derogated from, and the exercising of the right must still respect the *Charter* rights of Indigenous individuals, creates a doctrinal impediment to the express language enshrined in s. 25.

25. The Nation submits that if the *Charter* were to apply in protecting individual Indigenous people in their relations with their own governments, this would inextricably amount to a limitation of the powers by those governments, and thus lead to an interpretation that could only be characterized as a derogation from the right of self-government, which is contrary to the express language in s. 25.

26. Furthermore, in the context of section 25, if the Nation were to invoke its inherent s. 25 *Charter* rights as it has here, vis-à-vis the Decision and, more generally, the decision of the Nation to adopt its Customary Election Regulations having regard for its own traditions, customs and history as a First Nation self-government, that this should provide complete immunity to the Nation's decision-making from any *Charter* review.

Legal Interpretation of Section 25 – When is it Triggered?

27. Section 25 of the *Charter* has largely been ignored judicially; as the diverging opinions of the Supreme Court of Canada in *Kapp*[11] demonstrate. In *Corbiere*[12], the minority held that "[s]ection 25 is triggered when s. 35 Aboriginal or treaty rights

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[8] *Reference re Bill 30, An Act to Amend the Education Act (Ont.)*, [1987] 1 SCR 1148
[9] Ibid *at para. #63.*
[10] *Adler v. Ontario*, [1996] 3 SCR 609.
[11] *R. v. Kapp*, 2008 SCC 41.
[12] [1999] 2 S.C.R. 203 at para. 52.

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.'"

28. The Supreme Court of Canada has commented on section 25 only a handful of times. The *Quebec Secession Reference*[13] indicates in passing that section 25 was included in the *Charter* to protect minority rights. This idea has led to lower courts to find that section 25 is less a rule of construction, and more of a shield to ensure that Aboriginal rights — understood as minority rights defined in treaties, section 35, statute, and case law — are not diminished by the application of the *Charter*.[14]

29. For example, in *Redhead*, Oliphant J. stated "the section does not confer new rights upon aboriginal people. It merely confirms certain rights held by aboriginal people."[15]. The Federal Court of Appeal came to this conclusion in *Shubenacadie*[16] as well, writing that "section 25 of the Charter has been held to be a shield which protects the rights mentioned therein from being adversely affected by other Charter rights."[17] Most recently, in *Kapp*, Bastarache J.'s minority reasoning re-affirmed this idea, stating the fundamental purpose of section 25 is "protecting the rights of aboriginal peoples where the application of the Charter protections or individuals would diminish the distinctive, collective and cultural identity of an aboriginal group."[18]

30. Consequently, and strictly from a doctrinal approach, the Nation submits that section 25 of the *Charter* operates not only as a shield, which more recently the Court of Appeal of the Yukon in *Dickson*[19] have found, but enjoys complete immunity from *Charter* scrutiny.

The Right to Self-Government in s. 35 of the Charter

31. The concept of 'aboriginal self-government' generally refers to the exercise of jurisdiction by Indigenous peoples over their lands and the Members of their respective nations or communities. The Nation submits that there is presently no jurisprudence on the question of the relationship between the *Charter* and Indigenous governments as *sui generis* governments exercising their jurisdiction in that regard.

32. Indeed, in the only case that dealt with the matter of the Indigenous right of self-government within the context of s. 35(1) of the *Charter*, the Supreme Court of Canada has held that Indigenous people must *prove* that the specific jurisdiction being claimed was exercised by them as part of the practices, customs and traditions

[13] [1998] 2 SCR 217.
[14] Hutchinson, supra note 3 at 180.
[15] *R . v. Redhead*, 1995 CanLii 16082 (M.B.Q.B.) at p. 573 (not reproduced)
[16] *Shubenacadie Indian Band v. Canada (Human Rights Commission)* (2000), 187 DLR (4th) 741
[17] Ibid at para 43.
[18] Kapp para. #89
[19] *Dickson v. Vuntut Gwitchin First Nation*, 2021 YKCA 5

that were integral to their distinctive culture at the time of assertion of Crown sovereignty.[20] In *Pamajewon,* the Supreme Court applied the "integral to the distinctive culture" test formulated in *Van der Peet*[21] placing the onus on Indigenous claimants to prove the activity in relation to what they assert was an Indigenous right was an "element of a practice, custom or tradition integral to [their] distinctive culture" at the time of first contact with Europeans.[22]

33. Swiffen notes that:

> In the case of a right to self-government, these aspects of the test seem especially problematic. The nature of government is to be forward-looking and responsive to citizens' changing needs and interests. Indigenous governments are responsive to their present-day cultural, political, and economic contexts and pursue the collective goals that their various communities choose. Why must a historical continuity be demonstrated with pre-contact governance in order to advance indigenous self-determination today?[23]

34. The Nation therefore submits that the question of whether the *Charter* would apply to decisions of Indigenous governments if the decisions of the said government was an expression of an inherent right has never been determined. Similarly, as in *Dickson*[24], the evidence before the Court is that the Nation was an inherent right bearing Nation before the execution of Treaty No. 6 in 1876, that it enacted the Customary Election Regulations to preserve its cultural survival by preserving its way of life with respect to the election of leadership within its community, and that it has been adhered to religiously for over seven decades.[25]

Self-Government within the context of s. 25

35. The current legal framework surrounding the decision-making of Indigenous governments has centred around the notion that, from an administrative law standpoint at least, once it is accepted that Indigenous governments are exercising statutory or delegated federal authority, it has inexorably led to courts concluding that this authority is subject to the *Charter*.

36. However, in the context of the authority and capacity to make laws concerning matters of leadership and governance, this court has consistently held that that capacity is not derived from the *Indian Act*, but rather, as Mandamin J. stated in *Gamblin*[26]:

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[20] *R.* v. *Pamajewon*, [1996] 2 S.C.R. 821
[21] *R v Van der Peet*, [1996] 2 SCR 507
[22] Ibid at para. #46
[23] Constitutional Reconciliation and Canadian Charter of Rights and Freedoms, Amy Swiffen, 2019: pp. 100, footnote 75.
[24] *Dickson*, supra at note 19 at para. #129.
[25] Houle Affidavit at para. #6(e).
[26] *Gamblin v. Norway House Cree Nation Band Council*, 2012 FC 1536..

> "…it is a result of the exercise of the First Nation's aboriginal right to make its own laws concerning governance."[27]

37. This exercising of the Nation's rights have resulted from the "inherent law-making capacity of a First Nation … [which custom] … is a consensual and community-based means of producing law that, while not materially constrained by ancestral practices, enables contemporaries to find their own path between tradition and modernity:"[28]

38. The Nation further submits that there are two sources for Indigenous self-government rights that fall under the "other rights and freedoms" protected by s. 25: statute and inherency. In *Corbiere,* L'Heureux-Dubé J. opined that statutorily created rights could qualify as "other rights and freedoms" under s. 25[29]. Although the courts have held to date that election codes and membership codes created by band councils, pursuant to the *Indian Act*, that is, the actions of band councils pursuant to those custom codes are forms of delegated federal authority, the Nation submits that their inherent rights to self-government have never been extinguished.

39. Put another way, the Nation submits that the subjection of the Nation to the *Charter* implies that pre-existing self-government rights were extinguished. As set out by Swiffen[30], citing Patricia Monture-Angus, this would mean "the concept of extinguishment implies the existence of something that can be extinguished; it means groups that did come under the jurisdiction of the *Indian Act* also possessed rights at one time. Furthermore, it is trite to suggest that "Indigenous communities that came under the Indian Act cannot be said to have meaningfully chosen to abdicate their capacity for self-government."[31]

40. It would appear that the right of self-government can also arise in relation to other Indigenous and treaty rights as a result of the communal nature of those rights . In support of this argument, Wilson J. of the British Columbia Supreme Court, in *Campbell et al v. AG BC/AG Cda & Nisga'a Nation et al*[32], opined that, in the context of s. 25:

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[27] Ibid at para. #34.
[28] *Whalen v. Fort McMurray First Nation*, 2019 FC 732 at para. #32.
[29] *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203 at para. #52.
[30] Swiffen, supra at note 23, pp. 102.
[31] Swiffen, supra at note 23, pp. 102.
[32] *Campbell et al v. AG BC/AG Cda & Nisga'a Nation et al, 2000 BCSC 1123*

> "One must keep in mind that the *communal nature* of aboriginal rights is on the face of it at odds with the European/North American concept of *individual* rights articulated in the *Charter* […] the purpose of [Section 25] is to shield the distinctive position of aboriginal peoples in Canada from being eroded or undermined by provisions of the *Charter*."[33] (emphasis added)

41. It is also trite to suggest that s. 25 of the *Charter* only requires an establishment of an aboriginal or treaty right. To the contrary, the express language in s. 25 also includes "other rights or freedoms that pertain to the aboriginal peoples of Canada". To that end, it is clear that the right to self-government and by extension the right to determine how leadership of a First Nation is chosen, is inherently captured in the language "other rights or freedoms" in s. 25.

42. As the Nation has submitted, it is one of the founding Nations that adhered to Treaty 6 in 1876. Indeed, though it was improperly amalgamated in 1900 and 1902 with the Saddle Lake Cree Nation, which matter is currently being litigated[34], there have been steps over the years to amend the Customary Election Regulations. Although the Nation resiled from any discussions with Saddle Lake Cree Nation about amending the Customary Election Regulations in 2018, the Nation submits that the fact Saddle Lake adopted the new Customary Election Regulations in 2019 without a vote or referendum of the Members means the "broad consensus" of the Members has not been obtained, and the Whitefish Lake First Nation #128 does not support the 2019 Customary Election Regulations, as evidenced by their decision to utilize the previous iteration.

43. The Nation submits that whatever rights to self-government exist, whether they are derived from aboriginal, treaty, contractual or other sources, that they are s. 25 rights or freedoms. Consequently, the Nation submits that the Charter cannot abrogate or derogate from the right to govern. As Kerry Wilkins notes in "…But We Need Eggs: The Royal Commission, the Charter of Rights and the Inherent Right of Aboriginal Self-Government"[35]:

> "In common usage, 'derogation' from a right does not require suppression, amputation or abrogation; it also occurs whenever a right is diminished, impaired or infringed.[36]

44. Moreover, the Nation refutes the suggestion by the Applicant that there is a lacking of evidence in this regard. To the contrary, the Affidavit of Ben Houle establishes

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[33] Ibid at paras. 155, 158.
[34] Federal Court File T-1728-11.
[35] Kerry Wilkins notes in "…But We Need Eggs: The Royal Commission, the Charter of Rights and the Inherent Right of Aboriginal Self-Government; The University of Toronto Law Journal , Winter, 1999, Vol. 49, No. 1 (Winter, 1999)
[36] Ibid at pp. 112.

that the WLFN #128's political history, from 1876 onwards, has included a communal approach to leadership and governance decision-making.

45. Ironically, the Affidavit of Elder Marvin Sparklingeyes, citing the "Christian beliefs of many band members"[37] corroborates Mr. Houle's own account. Further still, the Affidavit of Marvin Sparklingeyes does not contradict that of Mr. Houle. In fact, what is on record before the court is:

    a. The history of governance with respect to the WLFN #128 was communally determined before 1955 and 1960[38];

    b. The Customary Election Regulations reflected the community desire to ensure marriage was a foundational condition precedent before running in an election for the office of Chief or Council[39];

    c. The etymology of this provision was considered long before 1955 and 1960[40];

    d. Leaders, both past and present, have continued to ascribe to the provisions contained within the Customary Election Regulations out of respect to the customs, traditions and history of the WLFN #128[41];

    e. Of the Elders surveyed in the community, the knowledge keepers of the WLFN #128, either by majority or universally, desired to keep the Customary Election Regulations in their current iteration[42]; and

    f. If any changes are to occur to the Customary Election Regulations, it is the preference of the Members to hold a referendum to properly reflect the will of the Members for any material changes[43].

46. In response to the Applicant's submission that the Nation is subject to the Charter as a result of the application of s. 32, the Nation submits that to the contrary, "s. 32 militates very strongly against extending the Charter's reach to inherent-right communities"[44].

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[37] Sparklingeyes Affidavit, Applicant's Motion Record, paras. #18 and #19, AR 202
[38] Houle Affidavit at para. #6.
[39] Ibid at para. #6(d)
[40] Ibid at paras. #6(b) and #6(c).
[41] Ibid at para. #6(g)
[42] Ibid at para. #6(h)
[43] Ibid at para. #11.
[44] Kerry, supra, note 35; p. 119

External Protections v. Internal Restrictions

47. Statutory powers of the *Indian Act* confers on band councils qualify as "other rights or freedoms of the aboriginal peoples of Canada" for the purposes of s. 25.

48. Further still, in the event the Applicant submits that *Campbell* is distinguishable as it concerned a s. 3 argument that, on its face, is limited strictly to elections for the House of Commons and legislative assemblies, the Court found that s. 25 is: "itself is as much an answer to a submission concerning sections 7 and 15(1) as it is an answer to the s. 3 submission."[45]

49. The seminal case with respect to the interpretation of s. 25 within Canadian jurisprudence was dealt with in *Kapp*. In the context of whether, if the fishing licence in Kapp fell under s. 25, the result would "constitute an absolute bar to the appellant's s. 15 claim, as distinguished from an interpretative provision informing the construction of potentially conflicting Charter rights"[46], Chief Justice Abella, writing for the majority, noted that:

> "These issues raise complex questions of the utmost importance to the peaceful reconciliation of aboriginal entitlements with the interests of all Canadians. In our view, prudence suggests that these issues are best left for resolution on a case-by-case basis as they arise before the Court."[47]

50. In the alternative, if the court finds that s. 25 does not provide Indigenous governments with complete immunity from Charter scrutiny…

Does the Common Law Prohibition of the Customary Election Regulations infringe on the Applicant's section 15(1) equality rights?

51. The Nation concedes that the Common Law Prohibition within the Customary Election Regulations would be considered an infringement of the Applicant's individual s. 15(1) rights, insofar as marital status has been recognized as an analogous ground within the meaning of s. 15(1) of the *Charter*[48].

52. In answering the question above in the affirmative, the question is then whether the impugned section of the Nation's Customary Election Regulations is justified under section 1, as determined by the *Oakes*[49] test. The burden in establishing this justification rests on the Nation.

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[45] Ibid at para. #166.
[46] Kapp, supra at note 11 at para. #64.
[47] Ibid at para. #65
[48] Applicant's Record, at para. #36
[49] *R. v. Oakes*, [1986] 1 SCR 103

53. The *Oakes* test requires the following:

    a. There is a pressing and subjective objective for the limitation of *Charter* rights;

    b. The limit on *Charter* rights is rationally connected to the objective;

    c. The limit impairs the right or freedom no more than is reasonably necessary to accomplish the objective; and,

    d. There is proportionality between the deleterious and salutary effects of the limit.[50]

54. The Applicant suggests, incorrectly, that Members of the Nation in common law relationships are deemed "unworthy"[51]; there is no evidence that supports such inflammatory assertions. The Nation submits that a section 1 inquiry is about the sufficiency, by contemporary standards, of the *original* purposes that the Nation sought to achieve when it enacted the Customary Election Regulations. As set out in the affidavit of Ben Houle, noting from respected Elder and former reverend Bill Jackson, respected members of the community determined, collectively, on some of the rules by which the Nation's governance would come to be, which included, *inter alia*, committing to the institution of marriage as a demonstration that the potential leader was "secure and committed to building a family within [the] community"[52].

55. There can be no doubt, as noted above, that "Indigenous governments are responsive to their *present-day cultural, political, and economic contexts* and pursue the collective goals that their various communities choose"[53]

56. Those collective rights, and in particular the right of self-government and the ability to choose the leadership and governance of the Indigenous government, have existed in Indigenous governments since time immemorial. In *Calder*, for example, the Court reasoned that prior to European contact, Indigenous settlers lived "organised in societies" [54], the foundations of which necessitated collective decision-making and normative world-building."[55]

57. By extension, the limitation on the individual s. 15 *Charter* rights is connected to the objective of preserving the collective right, which Indigenous rights, by s. 25, are not to "abrogated or derogated".

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[50] Ibid at paras. 69-71.
[51] Applicant's Record at para. #44.
[52] Ben Houle Affidavit, para. 6(c).
[53] Swiffen, supra, at note 23.
[54] *Calder v British Columbia (AG)*, [1973] SCR at 328.
[55] Swiffen, citing Joshua Nichols, Reconciliation and the Foundations of Aboriginal Law in Canada (PhD Dissertation, University of Victoria, 2016)

58. In reviewing section 1(c) of the Customary Election Regulations, it is clear in reviewing the Common Law Provision, a custom statute of the Whitefish Lake First Nation #128 collectively with Saddle Lake Cree Nation, the impairment on the individual s. 15 *Charter* rights is limited only to what is reasonably necessary. It is reasonably necessary that an individual's rights be impaired so that the collective rights prevail.

59. Finally, the proportionality approach to the deleterious and salutary effects of the limit can readily be described, as above, by ensuring that the collective will of the Nation's membership to govern itself as it deems necessary in order to preserve its traditions, customs and inherent rights as Indigenous people prevails, notwithstanding the impact on an individual right to participate in the Nation's governance.

60. In the alternative, given certain cases – *Shubenacdie*[56], for example, where the court held that: "section [25] can only be invoked as a defence if it had been found that the appellant's conduct had violated subsection 15(1) of the Charter"[57], and *Grismer*[58], the cases reflect an approach where section 25 is seen as a possible justification for a *Charter* infringement; put another way, an alternative or secondary justificatory provision in addition to section 1 in Charter cases where Indigenous rights are engaged[59].

61. Accordingly, the Nation submits that in the event it is found that the Common Law Prohibition and, by extension, the Decision by the Appeal Committee to deny the Applicant's ability to run for the office of Chief or Council is shielded by s. 25 as the inherent right of self-government, as "other rights and freedoms", of the Whitefish Lake First Nation #128 and the determination by the collective Members of the Nation to determine the traditions, customs and conditions precedent by which leadership of the Nation is selected, and accordingly the Applicant's application for judicial review must fail.

The Decision was Reasonable

62. With respect to the reasonableness of the Decision, the Nation submits that the Decision was reasonable. The express governing rules outlined in the Customary Election Regulations, and in particular, the Common Law Prohibition, make it clear that "[n]o person living in a Common Law marriage shall be eligible for nomination"

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[56] *Shubenacadie*, supra at note 16.
[57] Ibid at para. #43.
[58] *Grismer v. Squamish Indian Band*, 2006 FC 1088

[59] Swiffen, supra at note 23 – pp. 90.

63. According to the Supreme Court of Canada in *Vavilov*[60], a reasonableness review "must be on the decision actually made", not on reasons that could have been made. Furthermore, the Nation submits that the Appeal Committee's decision should be considered reasonable in light of the legal and factual constraints before them. Accordingly, the Appeal Committee was bound by the Customary Election Regulations, the governing statutory scheme. It was not open to the Appeal Committee to disregard the express language in the Customary Election Regulations surrounding the Common Law Prohibition, notwithstanding the Applicant's s. 15 *Charter* rights and whether or not they were infringed. Indeed, as set out in *Vavilov*, where the words employed are precise and unequivocal, their ordinary meaning will be determinative.

64. Therefore, it would not have been open to the Appeal Committee to consider or interpret the Applicant's s. 15 equality rights, as their decision "must be consistent with the text, context and purpose of the provision."[61]

65. As such, having regard for these circumstances, the Nation submits that the Appeal Committee, in determining that the Applicant was living in a common law relationship and was thus deemed to be ineligible to run in the election for Chief and Council, was reasonable in its decision-making.

Oral History Should Be Admitted

66. Oral history evidence constitutes, by its very definition, hearsay evidence. The Nation submits the evidence provided by Elder Ben Houle in his affidavit is both necessary and reliable in order for the Nation to advance its response to the Applicant's Record.

67. The courts have divided oral history evidence into three categories: (i) creation stories; (ii) genealogical stories; and (iii) stories of past practices, events, customs or traditions[62].

68. The Nation submits that the "best evidence" rule applies in these circumstances, which provides that even if none of the recognized exceptions to the hearsay rule apply, a judge may still admit oral history evidence if it is the best evidence available to an Indigenous party, as set out by the Supreme Court of Canada in *Delgamuukw v. British Columbia*.[63]

69. The Supreme Court expounded upon the principles set out in *Delgamuukw*, *supra*, in *Mitchell*[64] where the Supreme Court established a three part admissibility test for

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[60] *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65
[61] Ibid at para. #120.
[62] *William et al. v. British Columbia et al*, 2004 BCSC 148 at para. #21.
[63] *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010
[64] *Mitchell v. MNR*, [2001] 1 SCR 911

oral history: (i) it must be useful to prove a relevant fact; (ii) it is reasonably reliable; and (iii) its probative value is not overshadowed by its prejudicial effect.[65]

70. The Nation submits that the affidavit of Ben Houle, which recounts first-hand knowledge of respected Elder of the WLFN #128 and former reverend Bill Jackson on the etymology of the Nation's traditions and customs with respect to the Customary Election Regulations, in addition to that of his father and former Chief for over twenty (20) years, Allan Houle, in addition to his own experience, knowledge and political history as a former Councillor of the Nation from 2005 to 2011.

71. As a result, the Nation submits:

    a. The evidence of former reverend and respected Elder, Bill Jackson, is useful in providing the history of the Nation's Customary Election Regulations and, in particular, the collective and communal governance traditions and customs of the Nation in establishing not only the Common Law Prohibition and how the current leadership of the Nation still applies these principles, but also the history Customary Election Regulations themselves;

    b. The evidence is reasonably reliable and are in accordance with the oral history traditions and customs of the Nation for passing down such oral history, and which affidavit was not cross-examined by the Applicant; and

    c. The probative value of the evidence contained in Ben Houle's affidavit clearly outweighs any potential prejudicial effect of its contents.

A Note on the Shirt Case

72. The Nation submits that the *Shirt* case referred to by the Applicant evidences that, contrary to the Applicant's position, no evidence was produced to determine whether the Customary Election Regulations were in fact Charter compliant.[66]

73. Further still, the Court noted that any changes to the Customary Election Regulations had not successfully been passed by Membership.[67]

Remedies

74. In response to the Applicant's request that this Court order a new election within sixty (60) days of the judgment of this Court, the Nation submits that this would be an extraordinary remedy.

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[65] Ibid at para. #30.
[66] *Shirt v. Saddle Lake Cree Nation*, 2017 FC 364 at para. #67, Applicant's BOA at Tab 1.
[67] Ibid at para. #29

75. There are a number of cases in which, although applications for judicial review were allowed, the court has declined to order a new election. In *Clifton*[68], which dealt with residency provisions in customary election regulations of the Hartley Bay Indian Band, although the residency provision was declared invalid, the Court ordered that the declaration of invalidity be suspended as the election was several months from the decision of the court, and the election from 2003 was not set aside[69].

76. Although the Court determined that the invalidity suspension in *Janvier*[70], it did so on the basis that off-reserve Members, in that instance, would have been prevented from participating in the amendment process. There is no such obstacle in this present case, and so the Nation submits that in the event the court finds the Common Law Provision to be constitutionally invalid, that the appropriate remedy is to suspend the declaration for a period of six months to permit the Nation to remedy the situation with its own referendum. This would accord with the prevailing view of Members as well from the evidence on the record.[71]

77. Likewise, in *Clark*[72], a further residency matter and which the court found violated Clark's s.15(1) equality rights, the Court declared those provisions invalid with respect to the position of councillor, and retained jurisdiction of the matter until the "relevant provisions of the Election Regulations are amended or replaced in compliance with the judgment rendered by this Court"[73], but did not determine that a new election should be held.

78. As noted above, the election for Chief and Councill ordinarily occurs in November of any election year. The next election for Chief and Council will occur in November, 2023. To order a new election on sixty (60) days' notice would prejudice not only the Members who participated in the election for Chief and Council in this last election, but also create a situation where the new duly elected Chief and Council would have less than half of the remaining term before a new election is to be called.

PART 4: ORDER SOUGHT

79. The Whitefish Lake First Nation #128 asks this Court to:

    a. Dismiss the Judicial Review Application of the Applicant in this Action;

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[68] *Clifton v. Benton*, 2005 FC 1030.
[69] Ibid at para. #68.
[70] *Janvier v. Chipewyan Prairie First Nation*, 2021 FC 539 at para. #35
[71] Houle Affidavit, para. #11.
[72] *Clark v. Abegweit First Nation Band Council*, 2019 FC 721
[73] Ibid, judgment of the Court.

b. In the alternative, in the event the Court determines that the Whitefish Lake First Nation's s. 25 Charter rights do not provide complete immunity from Charter scrutiny, or that s. 25 does not shield the Decision in this instance, at that the Applicant's s. 15(a) equality rights have be infringed and are not saved by s. 1, that:

    i. The Court suspend invalidity for a period of 6 months following the date of judgment of the Court to permit the Nation to make global amendments to the Customary Election Regulations.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 7th day of February 2022

Ian Bailey
Bailey & Wadden LLP
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[redacted]

Solicitors for the Respondent

PART 5: LIST OF AUTHORITIES

Articles

1. Hutchinson, C: Case Comment on R. v. Kapp: An Analytical Framework for Section 25 of the Charter, (2007) 52 McGill L.J. 173

2. Hogg, P: The Constitutional Basis for Aboriginal Rights, 2008.

3. Swiffen, A. Constitutional Reconciliation and Canadian Charter of Rights and Freedoms, 2019.

4. Wilkins, K. "…But We Need Eggs: The Royal Commission, the Charter of Rights and the Inherent Right of Aboriginal Self-Government The University of Toronto Law Journal , Winter, 1999, Vol. 49, No. 1 (Winter, 1999)

Case Law

1. *Adler v. Ontario*, [1996] 3 SCR 609.

2. *Calder v British Columbia (AG)*, [1973] SCR at 328

3. *Campbell et al v. AG BC/AG Cda & Nisga'a Nation et al, 2000 BCSC 1123*

4. *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65

5. *Clark v. Abegweit First Nation Band Council*, 2019 FC 721

6. *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203

7. *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010

8. *Dickson v. Vuntut Gwitchin First Nation*, 2021 YKCA 5

9. *Mitchell v. MNR*, [2001] 1 SCR 911

10. *Gamblin v. Norway House Cree Nation Band Council*, 2012 FC 1536.

11. *Grismer v. Squamish Indian Band*, 2006 FC 1088

12. *Janvier v. Chipewyan Prairie First Nation*, 2021 FC 539

13. *Reference re Bill 30, An Act to Amend the Education Act (Ont.)*, [1987] 1 SCR 1148

14. *R. v. Oakes*, [1986] 1 SCR 103

15. *R.* v. *Pamajewon*, [1996] 2 S.C.R. 821

16. *R v Van der Peet*, [1996] 2 SCR 507

17. *Whalen v. Fort McMurray First Nation*, 2019 FC 732 at para. #32.

18. *William et al. v. British Columbia et al*, 2004 BCSC 148 at para. #21.