

Court File No.

FEDERAL COURT

B E T W E E N:

TERRY WAYNE FRANCOIS

Applicant

-and-

NISICHAWAYASIIHK CREE NATION

Respondent

NOTICE OF APPLICATION

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

TO THE RESPONDENT:

A PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the applicant. The relief claimed by the applicant appears below.

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 363 Broadway Street, Winnipeg, Manitoba.

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 file a notice of appearance in Form 305 prescribed by the *Federal Courts Rules* and serve it on the applicant's solicitor or, if 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: _____

Issued by:

Registry Officer

Address of local office:

363 Broadway Street
Winnipeg, Manitoba
R3C 3N9

TO: **NISICAWAYASIIHK CREE NATION #313**



Respondent

APPLICATION

1. The Applicant, Terry Wayne Francois, brings this application challenging the decision of the Respondent Nisichawayasihk Cree Nation (“**NCN**”) banishing him for a minimum of five years from NCN reserve lands where he lived with his daughters, without any prior notice or opportunity to be heard (the “**Banishment Decision**”). Mr. Francois asserts that the Banishment Decision was procedurally unfair, unreasonable and amounts to an unjustified violation of his rights under sections 7, 8, 9, 11(h) and 12 of the *Canadian Charter of Rights and Freedoms* (the “**Charter**”).

2. Mr. Francois also challenges the “**Banishment Law**” and the “**Checkstop Law**” (each as defined below) on which the Banishment Decision is based. Mr. Francois asserts that the Banishment Law is *ultra vires* and that it unreasonably violates his treaty rights, rights under the *Indian Act*, and *Charter* rights under sections 7 and 12. Similarly, Mr. Francois asserts that the Checkstop Law violates his *Charter* rights under sections 7, 8 and 9.

RELIEF SOUGHT

3. Mr. Francois seeks the following relief:

- (a) an interim and/or interlocutory injunction staying the Banishment Decision pending the final determination of this matter;
- (b) an Order quashing the Banishment Decision;
- (c) a Declaration, pursuant to section 24(1) of the *Charter*, that the Banishment Decision unreasonably infringes Mr. Francois’ section 7, 8, 9, 11(h) and 12 *Charter* rights;
- (d) a Declaration that the Banishment Law is *ultra vires* and/or an unreasonable violation of his treaty and statutory rights;
- (e) a Declaration, pursuant to section 52(1) of the *Constitution Act, 1982*, that the Banishment Law (see below) unjustifiably infringes his section 7 right to liberty and his *Charter* section 12 right to be free from cruel and unusual punishment, neither of which infringements are saved by s. 1;

(f) a Declaration, pursuant to section 52(1) of the *Constitution Act, 1982*, that the Checkstop Law (see below) unjustifiably infringes his *Charter* section 7 right to liberty; his *Charter* section 8 right to be secure against unreasonable search or seizure; and his *Charter* section 9 right not to be arbitrarily detained, and that none of these infringements are saved by s. 1;

(g) costs; and

(h) such further and other relief as counsel may advise and this Court considers appropriate.

FACTS

The Parties

4. Mr. Francois is a member of NCN who has lived on and off NCN reserve lands since he was a child. For the past decade, Mr. Francois has lived on NCN reserve lands in a dwelling located at [REDACTED] (the “**Home**”) with his family. Mr. Francois has five daughters, three of whom currently live in the Home. Another daughter, along with his first grandchild, also live on NCN reserve lands.

5. NCN is a Treaty 5 First Nation headquartered in Nelson House, Manitoba, approximately 850 km north of Winnipeg and 80 km west of Thompson, Manitoba. NCN is a Section 10 Band that manages its own membership under the *Indian Act* and is governed by a Chief and Council.

Permanent NCN Checkstop

6. In 2019, NCN adopted and approved the *Community Protection Law 2019*, c. C-1 (the “*CPL*”).

7. Section 16(1) of the *CPL* authorizes NCN’s Chief and Council to set up a checkstop to enable peace officers to conduct inspection of vehicles, persons and personal property of everyone seeking to enter NCN lands. Pursuant to section 16(1) of the *CPL*, the stated purposes of the checkstop are: 1) to ensure that motorists are properly licenced and insured; 2) to ensure that no one is transporting contraband; 3) to ensure that no one is being “harboured” on NCN lands; 4) to

ensure that no one is being exploited, trafficked, or involved in gang activity; 5) to ensure that people entering NCN have proper work permits or are NCN residents ; 6) to ensure that no one seeking to enter NCN lands is under a banishment order or other court order; and 7) to ensure that no one is violating any other laws.

8. Subsection 16(2) of the *CPL* provides that all persons seeking to enter NCN lands are subject to search at a checkstop, and that anyone who refuses to be searched will be denied entry.

9. Subsection 16(3) of the *CPL* prescribes a modified search procedure for “sacred bundles”, but still prescribes that all who refuse to allow their sacred bundle to be searched will be denied entry.

10. Subsection 16(4) of the *CPL* authorizes the confiscation of “illegal substances” found during a search.

11. Sections 16(1)-(4) are referred to hereinafter collectively as the “**Checkstop Law**”.

12. NCN has been operating a permanent roadside checkstop (the “**Checkstop**”) at the entry to NCN reserve lands for several years. It has used dogs to conduct searches at these checkstops on occasion, including on the date of the events giving rise to this Application. The *CPL* is silent on the use of sniffer dogs.

The Banishment Law

13. Section 17 of the *Community Protection Law* is entitled “Eviction and Banishment” (subsections 17(1), (4), and (8) are referred to herein collectively as the “**Banishment Law**”).

14. Subsection 17(1) states:

Authority to evict or banish

17 (1). A person who

- (a) poses a significant threat to the health, safety or wellbeing of NCN or any person residing on or visiting NCN Lands,
- (b) has engaged in human trafficking, harbouring or other criminal activity, or

(c) refuses to comply with NCN Laws,

may be evicted from any residence, building or other premises or banished from NCN Lands by order of Chief and Council or any person or entity to whom Chief and Council has delegated such authority by regulation.

15. While subsection 17(3) provides that a hearing on an eviction order can be requested within seven days, subsection 17(4) provides that a person subject to a banishment order can request a hearing “**no earlier than five (5) years from the date of the banishment order**” [emphasis added].

The December 2024 Incident

16. On December 30, 2024, Mr. Francois was driving to his Home from Thompson, MB, with one of his daughters, bringing take-out pizza for his family. He stopped at the Checkstop at the entry point to NCN. Mr. Francois was willing to consent to a search of his vehicle by NCN peace officers, as he had done numerous times in the past. However, on this occasion, a dog was brought forward to search inside Mr. Francois’ vehicle. Mr. Francois refused to permit the dog to search his vehicle, believing that such a search was not authorized by law. Mr. Francois expressed his strong objections to the peace officers; he then proceeded to leave the Checkstop and drive Home.

17. On his way Home, Mr. Francois was stopped by RCMP officers who inquired about the incident at the Checkstop. After Mr. Francois explained his position, the RCMP officers allowed him to proceed to his Home.

18. The next morning, however, three RCMP officers arrived at Mr. Francois’ Home to arrest him on criminal charges, including assault with a weapon by driving away from the Checkstop the previous night. Mr. Francois recoiled from the officers, told them that the charges were bogus, protested his innocence and expressed his refusal to leave his Home. The RCMP officers chose to physically remove Mr. Francois from his Home, whereupon Mr. Francois pulled away. After some resistance, Mr. Francois relented and told the RCMP officers that he would go with them.

19. Mr. Francois was charged and then released from RCMP custody on December 31, 2024. The RCMP officers told him that he was not permitted to stay at his Home or remain on NCN

reserve lands while the charges were pending. Mr. Francois was forced to stay in Thompson at his own expense, rather than returning to his Home.

20. On May 21, 2025, the charges against Mr. Francois were resolved, with Mr. Francois pleading guilty under section 129 of the *Criminal Code* to resisting an NCN peace officer in the execution of her duties on December 30, 2024, and to resisting the RCMP officers when they came to arrest him on December 31, 2024. Mr. Francois was fined \$500 and \$100, respectively. The other charges were stayed.

Banishment of Mr. Francois

21. On or about May 22, 2025, Mr. Francois attempted to return Home, however, he was told by an NCN peace officer at the Checkstop that he was not permitted on NCN reserve lands and had been banished. This was the first time Mr. Francois had heard that he was banished. Mr. Francois complied with the NCN peace officer's direction and left.

22. Mr. Francois began reaching out to NCN officials to get an explanation. He learned that Terry B. Linklater, the NCN Director of Justice, had decided to banish him, but at no time was Mr. Francois ever made aware of the purported basis for his banishment. When Mr. Francois spoke to Mr. Linklater on the phone around the end of May 2025, he simply told him that he was not allowed on to NCN reserve lands and that he was banished, without providing an explanation, or an opportunity for Mr. Francois to respond to any basis for the banishment. When Mr. Francois communicated to Mr. Linklater that his actions against related to an issue between a member of Mr. Linklater's family and a member of Terry's family, Mr. Linklater denied that and hung up.

23. In June 2025 two of Mr. Francois' daughters were graduating. Mr. Francois sought and received permission to attend their graduation ceremonies held on NCN reserve lands on June 24 and June 27, 2025.

24. When Mr. Francois arrived at NCN on June 24, 2025 to attend the first graduation ceremony, he was handed a letter that was dated June 10, 2025, informing him that he had been banished, effective December 30, 2024, and that he could request a hearing "no earlier than **December 30, 2029**" [emphasis in the original].

Alleged “Conditional Banishment”

25. The Banishment Decision letter opens by stating: “This letter is to inform you that on May 5, 2022 Chief and Council passed a motion to place you on a conditional banishment.”

26. Mr. Francois was never previously informed of any “conditional banishment” against him in 2022.

Upgrade to Full Banishment

27. The Banishment Decision letter continued:

We have received information that you were convicted of:

- Assault on peace officer with a weapon (striking Carol with your vehicle)
- Resisting arrest by fighting with RCMP members.

For this reason, your conditional banishment will be upgraded to a full banishment as of December 30, 2024.

Attempt to Appeal Banishment Decision Internally

28. Mr. Francois then attempted to challenge the Banishment Decision by reaching out to elected NCN Councillors. He was told that the Councillors had no choice but to sign off on the Banishment Decision and that there was nothing they could do.

GROUND OF APPLICATION

29. Mr. Francois challenges the Banishment Decision, the Banishment Law and the Checkstop Law, on the following grounds.

The Banishment Decision was procedurally unfair

30. Given the serious nature of the decision and its importance and detriment to Mr. Francois, a high degree of procedural fairness was owed before the Banishment Decision was taken. Mr. Francois however, received no procedural fairness whatsoever.

31. Mr. Francois had no notice of the banishment allegations against him, or opportunity to respond to those allegations, prior to receiving the Banishment Decision letter dated June 10, 2025,

on June 24, 2025. He had not been informed or notified of any alleged “conditional banishment” prior to receiving the Banishment Decision letter, which would have put him on notice that he risked “full banishment.” Nor was Mr. Francois ever made aware of any conditions that he had to meet in order to remain eligible to reside on NCN lands.

32. Despite the alleged “conditional banishment” stating that “if TERRY WAYNE FRANCOIS returns to Nisichawayasihk Cree Nation and its traditional territory, that he/she be charged with trespassing”, Mr. Francois continued to live with his family in his Home on NCN reserve lands in 2022, 2023 and 2024, and was processed by NCN peace officers through the Checkstop countless times without ever being told that he was conditionally banished and without ever being charged with trespassing.

33. The Banishment Decision letter states that the December 2024 incident was “the second incident, on record, where your actions jeopardized the safety of our First Nations Safety Officers.” Mr. Francois is not aware of any inferentially-alleged first incident.

34. Mr. Francois was given no opportunity, at any time, to respond to allegations or claims against him, which formed the basis for either the alleged “conditional banishment” or the full banishment.

35. Terry B. Linklater, in making the Banishment Decision against him, was biased or is reasonably apprehended to be biased in that:

- a) Mr. Linklater indicated a closed mind about the Banishment Decision when Mr. Francois tried to speak with him in May 2025; and
- b) there had been a recent negative issue between a member of Mr. Linklater’s family and a member of Terry’s family.

Chief and Council have fettered their discretion

36. NCN Chief and Council improperly fettered their discretion by simply signing off on Terry B Linklater's decision to banish Mr. Francois.

The Banishment Decision is unreasonable

37. To the extent that reasons for the Banishment Decision are discernible, they do not bear the hallmarks of reasonableness – transparency, justification, and intelligibility – that would make the Banishment Decision a reasonable exercise of discretion. For example and without limitation:

- a. the Banishment Decision fails to explain how Mr. Francois:
 - (a) poses a significant threat to the health, safety or wellbeing of NCN or any person residing on or visiting NCN Lands;
 - (b) has engaged in human trafficking, harbouring or other criminal activity; or
 - (c) refuses to comply with NCN Laws, [*Community Protection Law* s. 17(1)],

or on which, if any, of these sections the Banishment Decision against Mr. Francois is even based. At most, the Banishment Decision claims that Mr. Francois in two incidents (one of which is not described or known) “jeopardized the safety of [NCN] First Nations Safety Officers” without explaining whether Mr. Francois currently “poses a significant threat”. Furthermore, Mr. Francois is alleged to have intentionally violated unspecified NCN laws, without any explanation of a necessary finding that Mr. Francois “refuses to comply with NCN Laws”. Mr. Francois:

- (a) does not pose a threat to anyone's health, safety or wellbeing;
 - (b) has not engaged in human trafficking, harbouring or other related criminal activity;
 - or,
 - (c) is willing to comply with NCN Laws;
- b. the Banishment Decision purports to be based on a failure to comply with an alleged 2022 “conditional banishment” which itself was apparently based on unspecified “outstanding fines”, a failure to apologize for unspecified “inappropriate conduct directed towards FNSO” and possibly based on an unspecified incident where Mr. Francois' conduct allegedly “jeopardized the safety of our First Nations Safety Officers.” Mr. Francois was only informed about the “conditional banishment” after it had been upgraded to a full banishment, according to the June 10, 2025 letter itself; and

c. the Banishment Decision further states that the reason Mr. Francois' "conditional banishment will be upgraded to a full banishment" was because he was convicted of assault on a peace officer with a weapon for allegedly striking an officer with his vehicle, which is not true. In fact, that allegation had been amended, and Mr. Francois only pled guilty to resisting a peace officer under section 129 of the *Criminal Code*, for which he received a \$500 fine, which he subsequently paid. In regard to the Banishment Decision's allegation that Mr. Francois had been convicted of "fighting" with RCMP members, the charge was that Mr. Francois had resisted RCMP officers "by pulling away contrary to Section 129(a) of the *Criminal Code*." Mr. Francois pled guilty to this charge and received a \$100 fine, which he also paid before it was due.

The Banishment Decision unreasonably limited Mr. Francois' *Charter* rights

38. Where an individual's *Charter* rights are engaged by an administrative decision, the decision-maker must consider those rights, and attempt to balance any limitations on those rights against the decision-maker's statutory objective. Failure to do so is a fatal constitutional error.

39. The Banishment Decision engaged Mr. Francois' rights under sections 7, 8, 9, 11(h) and 12 of the *Charter*. NCN did not consider these *Charter* rights of Mr. Francois before making the Banishment Decision.

40. Furthermore, the Banishment Decision unreasonably, disproportionately and unjustifiably violated Mr. Francois' rights as guaranteed by sections 7, 8, 9, 11(h) and 12 of the *Charter*, for the reasons explained below.

41. Specifically, in regard to Mr. Francois' right to not be punished again, protected by section 11(h) of the *Charter*, the Banishment Decision expressly states that because Mr. Francois had been convicted, NCN was choosing to impose full banishment on him. Mr. Francois was already punished for the offences to which he pleaded guilty, and paid the fines that were imposed as punishment. NCN is now punishing Mr. Francois again with a minimum five-year banishment, in violation of section 11(h). Further, NCN cannot justify this violation of Mr. Francois' section 11(h) rights under section 1.

The Banishment Law violates section 7 of the *Charter*

42. The Banishment Law provides that NCN can banish members from NCN lands for a minimum of five years, which constitutes a significant interference with the liberty of NCN members, denying them access to their homes, their families and their community. Such a mandatory minimum term of banishment for a person who is deemed to fall into one of the three categories eligible for banishment is overbroad, arbitrary and grossly disproportionate.

43. A member who refuses to comply with NCN Laws or who has been deemed to pose a significant threat to the health, safety or wellbeing of NCN or a person on NCN lands could – through rehabilitation or other personal or situational changes – pose no threat in much less time than five years.

44. Empowering Chief and Council to banish a member for a minimum of five years if they are found to have engaged in harbouring or other criminal activity may also be an inordinate length of time to achieve NCN's objectives to prevent harm on NCN lands.

45. Yet, the Banishment Law allows for no shorter period of banishment than five years, with no possibility for calibration of the banishment, either before or after it is ordered, to prevent harm on NCN lands in a proportionate manner.

46. NCN cannot demonstrate that the Banishment Law is reasonably justified. Accordingly, the Banishment Law violates section 7 of the *Charter* and cannot be saved by section 1.

The Banishment Law violates section 12 of the *Charter*

47. Section 17(4) of the *CPL* provides that a banished person may apply for readmission to NCN lands no earlier than five years from the effective date of banishment. Readmission is at the discretion of NCN's Peacekeepers Tribunal. Banishment decisions have no inherent end point. Absent an application for readmission, banishment is permanent. This is effectively a five-year mandatory minimum sentence, which is grossly disproportionate to the scope of possible conduct that the Banishment Law may capture. As such, it is a cruel and unusual punishment, contrary to section 12 of the *Charter*. Furthermore, NCN cannot demonstrate that the Banishment Law is

reasonably justified. Accordingly, the Banishment Law violates section 12 of the *Charter* and cannot be saved under section 1.

The Banishment Law is *ultra vires* and unreasonably interferes with members' rights

48. NCN reserve lands were established pursuant to Treaty 5, with such lands being established in proportion to “each family”.

49. NCN is a “band” under the *Indian Act*, which is defined as “a body of Indians (a) for whose use and benefit in common, lands, the legal title to which is vested in Her Majesty, have been set apart....” Likewise, NCN reserve lands are a “reserve” under the *Indian Act*, which is defined as “a tract of land, the legal title to which is vested in Her Majesty, that has been set apart by Her Majesty for the use and benefit of a band....”

50. The Banishment Law is thus *ultra vires* the authority of NCN in that it purports to deprive members of their treaty and statutory rights to the use and benefit of reserve lands. The Banishment Law further unreasonably interferes with these rights.

The Checkstop Law unjustifiably infringes section 9 of the *Charter*

51. Roadside checkstops by law enforcement are a form of detention under section 9 of the *Charter*. A checkstop that stops everyone without exception – where the officer has no discretion whatsoever as to who gets stopped – is arbitrary.

52. The Checkstop Law provides for the detention and search of all vehicles, motorized and non-motorized, as well as persons and personal property, that attempt to enter NCN lands. It contains no language relating to reasonable and probable grounds. It contains no guidance for officers, or any criteria whatsoever governing the operation of the Checkstop. As such, it is an arbitrary detention within the meaning of section 9.

53. The Checkstop Law encompasses more purposes than are constitutionally permissible. NCN is using the Checkstop Law as a broad law enforcement, criminal investigation, general public safety and regulatory tool. This goes far beyond the limited purposes for which checkstops are constitutionally permissible.

54. Furthermore, NCN cannot demonstrate that the Checkstop Law is reasonably justified. Accordingly, the Checkstop Law violates section 9 of the *Charter* and cannot be saved under section 1.

The Checkstop Law unjustifiably infringes section 8 of the *Charter*

55. The Checkstop Law engages members' reasonable expectation of privacy protected under *Charter* section 8, by allowing their persons, personal property and vehicles to be searched at the Checkstop.

56. The Checkstop Law contains no requirement that the searching officer obtain a warrant prior to conducting the search, nor does it require the officer to have reasonable and probable grounds.

57. The Checkstop Law, therefore, is not a reasonable authorizing law.

58. Further, to the extent the Checkstop Law can be viewed as authorizing the use of sniffer dogs, sniffer dogs may only be used in warrantless searches where the officer has a reasonable suspicion based on objectively discernible facts that evidence of a crime is present.

59. In any event, the only valid purposes of a roadside checkstop are to ensure proper licencing, insurance, driver sobriety and vehicular fitness, none of which requires the use of a sniffer dog. The use of sniffer dogs at the Checkstop to carry out such searches, therefore, is not reasonable.

60. In the absence of any warrant requirements whatsoever, and by permitting searches in the absence of reasonable and probable grounds, and in the unreasonable use of sniffer dogs, the Checkstop Law is an unreasonable law within the meaning of section 8 of the *Charter*, which cannot be justified under section 1.

The Checkstop Law unjustifiably violates section 7 of the *Charter*

61. NCN members who fail to comply with the unreasonable, arbitrary and grossly disproportionate requirements of the Checkstop Law described above, are not allowed entry onto NCN Lands, preventing them from accessing their families, homes and community. Failure to comply with the Checkstop Law can also lead to banishment.

62. The Checkstop Law therefore deprives members of their *Charter* section 7 right to liberty, not in accordance with the principles of fundamental justice. The Checkstop Law violates section 7 of the *Charter* and cannot be saved by section 1.

The Applicant relies on the following statutory provisions, rules and principles:

- a) *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982 c 11, including the *Canadian Charter of Rights and Freedoms*.
- b) *Treaty No. 5, between Her Majesty the Queen and the Sauteaux and Swampy Cree Tribes of Indians at Berens River and Norway House with adhesions*.
- c) *Federal Courts Act*, RSC 1985, c F-7, s 18.1.
- d) *Federal Courts Rules*, SOR/98-106.
- e) *Indian Act*, RSC 1985, c I-5.
- f) *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171, Can TS 1976 No 47 (entered into force 23 March 1976).
- g) *Nisichawayasi Community Protection Law*, 2019 c C-1 (NCN).
- h) *Othasowewin* (NCN).
- i) *Peacekeepers Tribunal Law* (NCN).
- j) *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UNGAOR, 61st Sess, Supp No 49, Vol III, UN Doc A/61/49 (2008).
- k) *Universal Declaration of Human Rights*, GA Res 217 A (III), UN Doc A/810 (1948).

This Application will be supported by the following material:

- a) the Affidavit of Terry Wayne Francois, to be filed; and

b) such further and other affidavits and material as counsel may advise and this Court permit.

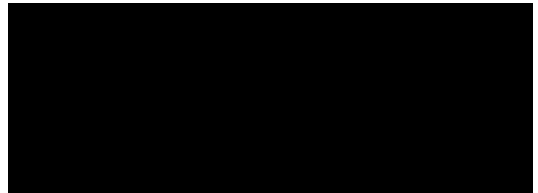
Pursuant to Rule 317 of the *Federal Courts Rules*, the Applicant requests that the Respondents send the following material that is not in the possession of the Applicant but is in the Respondent's possession, to the Applicant and to the Registry:

- a) all documents and other materials in the possession and control of NCN informing the Banishment Decision;
- b) all documents and other materials related to the adoption, review and continued utilization of section 17 of the NCN *Community Protection Law*;
- c) all documents and other materials related to the adoption, review and continued utilization of section 16 of the NCN *Community Protection Law*; and
- d) such further and other material that may be in the possession, power or control of the Respondent and which may be relevant to these proceedings.

Date: July 24, 2025



Marty Moore
Phil Dunlop (Student-at-Law)



Counsel for the Applicant