Federal Court  Cour fédérale

Date: 20250212

Docket: T-903-19

Citation: 2025 FC 267

Ottawa, Ontario, February 12, 2025

PRESENT: The Honourable Madam Justice Strickland

BETWEEN:

ROBERT HOULE

Applicant

and

SWAN RIVER FIRST NATION AND SWAN RIVER FIRST NATION CHIEF AND COUNCIL

Respondents

JUDGMENT AND REASONS

[1] The Applicant, Mr. Robert Houle [Applicant or Mr. Houle], is a member of the Swan River First Nation [SRFN]. He was nominated to run for the office of Councillor in the SRFN election for Chief and Councillors to be held on June 14, 2019. On May 3, 2019, the SRFN Electoral Officer refused to accept Mr. Houle's nomination [Nomination Decision] because he was not eligible to run for office under s. 9.1(a)(2) of the *Swan River First Nation Customary Election Regulations As Amended March 8, 2007* [*Election Regulations*]. Section 9.1(a)(2) of the

Election Regulations requires those electors who seek to be nominated to run for office as SRFN Chief or Councillor to have resided on the SRFN reserve [Reserve] for at least one year prior to nomination [Residency Requirement]. Mr. Houle challenges the constitutionality of the Residency Requirement. He asserts that it discriminates against those SRFN members, like him, who do not live on the Reserve. Accordingly, that it should be struck down pursuant to s. 15 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*], and is not protected by s. 25 of the *Charter*.

[2] The Respondents, SRFN and SRFN Chief and Council, oppose Mr. Houle's challenge. They assert that even if the Residency Requirement breaches s.15, it is shielded by s. 25 of the *Charter*.

Procedural Background

[3] This matter began by way of an application for judicial review on May 30, 2019. It initially proceeded together with a similar matter brought by Ms. Shawna Jean (Court File No. T-904-19) who was nominated but was not permitted to run for the office of Chief in the June 14, 2019 SRFN election. The two Applications for Judicial Review [collectively, the Applications] were consolidated by Order dated July 18, 2019.

[4] In his Application for Judicial Review, Mr. Houle sought the following relief: an Order setting aside the Nomination Decision; a declaration that he is eligible to run as a candidate for the position of Councillor of SRFN in the 2019 General Election; a declaration that s. 9.1(a)(2)

of the *Election Regulations* contravenes s. 15 of the *Charter* and is, accordingly, unconstitutional and is of no force or effect; and, costs on a solicitor and his own client basis.

[5] Subsequently, the Respondents brought a motion seeking to have the Applications converted to actions pursuant to s. 18.4(2) of the *Federal Courts Act*, RSC, 1985, c F-7 [*Federal Courts Act*]. The premise of the Respondents' request was that they intended to defend the Applications on the basis of ss. 1 and 25 of the *Charter* and s. 35 of the *Constitution Act, 1982*, in accordance with their asserted treaty/Aboriginal rights. They argued that the procedures of an action were required to have a fair and just determination of the particular treaty/Aboriginal rights and defences advanced. In addition, that the unique nature of these particular Applications was such that the rationale in support of the speedy judicial review process were not applicable. The applicants, both self-represented, opposed the motion.

[6] By Order dated November 6, 2020, the then Case Management Judge granted the motion and converted the Applications into an action. The then Case Management Judge noted that a s. 18.4(2) Order does not "convert" an application into an action, replace a notice of application with a statement of claim, or require that a litigant file a statement of claim alongside the notice of application. Rather, that the notice of application remains the operative originating document. The substantive law remains the law of judicial review. All that happens after a s. 18.4(2) Order is that the *Federal Courts Rules*, SOR /98-106 [*Rules*] relating to actions become available to the parties in prosecuting and defending the application (citing *Canada (Human Rights Commission) v Saddle Lake Cree Nation*, 2018 FCA 228 at paras 23–24; *Brake v Canada (Attorney General)*, 2019 FCA 274 at para 43).

[7] Subsequently, by Order dated November 30, 2020, the then Case Management Judge addressed the procedure going forward, which included the following:

> 1. The Applicants are granted leave to amend their Notice of Application. They shall serve and file any amended Notice of Application by January 15, 2021.
>
> 2. The Respondents shall serve and file a Statement of Defence by February 16, 2021.
>
> 3. The Applicants shall serve and file any Reply by February 26, 2021.
>
> 4. The parties shall exchange their affidavits of documents by March 26, 2021.
>
> 5. The parties shall complete examinations for discovery by May 14, 2021.
>
> 6. The parties shall submit a status report of the proceeding by May 31, 2021.
>
> 7. The Respondents shall serve any affidavits or statements of expert witnesses by August 13, 2021.
>
> 8. The Applicants shall serve any affidavits or statements of expert witnesses by October 15, 2021.
>
> 9. ……

[8] An Amended Notice of Application was duly filed which added, as relief sought, a declaration that s. 9.1(a)(2) of the *Election Regulations* is not protected by s. 25 of the *Charter* as it is not a Treaty or Aboriginal Right. The Respondents filed a Defence and Applicant then filed a Reply.

[9] A Notice of Constitutional Question was filed on August 17, 2022. By Order dated September 9, 2022, the matter was set down for trial on February 14, 2023.

[10] However, given that the Supreme Court of Canada's decision on appeal of *Dickson v Vuntut Gwitchin First Nation*, 2021 YKCA 5 was under reserve and would address s. 25 of the *Charter* in the context of a residency requirement, the trial was placed in abeyance pending the Supreme Court's decision. On March 28, 2024, the Supreme Court rendered its judgment in *Dickson v Vuntut Gwitchin First Nation*, 2024 SCC 10 [*Dickson*]. On April 9, 2024, the trial of this matter was rescheduled to September 23, 2024.

[11] In advance of trial, the parties filed an Agreed Statement of Facts within the Trial Record.

[12] On September 16, 2024, Ms. Jean filed a Notice of Discontinuance in T-904-19.

[13] A Joint Book of Documents was filed on September 22, 2024, which, among other things, included an affidavit of Ms. Jean dated July 22, 2020 [Jean Affidavit], and an affidavit of Mr. Houle dated August 7, 2020 [Houle Affidavit], both of which had been made in response to the motion seeking to convert the Applications to an action. Ultimately, Mr. Houle did not seek to enter the Jean Affidavit or the Houle Affidavit as evidence at trial. Mr. Houle, who is self-represented, did not testify.

Agreed Documents

[14] At trial, it was agreed that four documents would be admitted into evidence. These were the *Election Regulations*; the Nomination Decision; the nomination decision concerning Ms. Jean; and, the text of Treaty No. 8.

Witnesses

[15] The trial of this matter was heard on September 23, 2024, with closing submission made the following morning.

[16] There was no expert testimony concerning any Treaty or other rights, or any other matters.

[17] Mr. Houle called two witnesses. The first was Ms. Darlene McRee, a SRFN Elder who currently sits on the Elders Council. The second was Ms. Jean, who is a SRFN member (and is also the daughter of Ms. McRee).

[18] The Respondents called three witnesses: Mr. Dustin Twin Sr., a SRFN Elder and former Chief and Councillor; Mr. Gordon Courtorielle, a SRFN Elder and former Chief and Councillor; and, Mr. Mark Giroux, a currently elected SRFN Councillor.

[19] The parties did not develop protocols concerning Elder evidence or address the information identified in the Federal Court's *Practice Guideline for Aboriginal Law Proceedings* (September 2021 (4th Edition)), which had been previously brought to their attention, other than by way of brief introductory questions to the Elder witnesses.

Agreed Facts

[20] Given the limited evidence put forward at trial, I am setting out below the Agreed Statement of Facts, in whole.

AGREED STATEMENT OF FACTS

The Parties:

1. The Applicants, Robert Houle and Shawna Jean (the "Applicants") are members of the Swan River First Nation ("SRFN").

2. The SRFN is a band, as defined in the *Indian Act*. The SRFN has existed in and around the shores of the Lesser Slave Lake since the 1930's when Kinoosayo's Band was split. It's members are Indigenous people and have existed since time immemorial and since before European contact with North America.

3. The SRFN has two reserves - Swan River 150E and Assineau River 150F, both of which are on or near the southern shore of Lesser Slave Lake near the town of Kinuso, Alberta (the "SRFN Reserve"). The SRFN reserve 150E encircles the town of Kinuso, Alberta.

4 The SRFN has approximately 1,500 members. Approximately 500 members reside on the SRFN Reserve while the remaining members reside off the SRFN Reserve.

5. At all times material to this application, the Applicants did not reside on the SRFN Reserve. The Applicant, Robert Houle, resided in St. Albert, Alberta. The Applicant, Shawna Jean, resided between Edmonton and the Chipewyan Prairie First Nation.

6. The Applicant, Robert Houle, resided in the town of Kinuso, which is encircled by the SRFN Reserve but is not part of the Reserve, for between 3-5 years during his childhood. He left the reserve for education and work reasons. Mr. Houle regularly returned to SRFN territory for family or community gatherings while living off-reserve.

7. The Applicant, Shawna Jean, resided near the SRFN Reserve in Kinuso for 18 years during her childhood. She left Kinuso for education and work reasons. She returned to Kinuso as an adult for 2.5 years and taught for 1 year. Mrs. Jean regularly returned to

SRFN territory for family or community gatherings while living off-reserve.

Historical Background:

8. Since time immemorial, ancestors of the Indigenous peoples that currently make up the SRFN have engaged in a range of governance practises that were used to organize and govern their community/society. These practises included methods of decision making, leadership selection, the sharing of resources, and other important elements necessary to operating their community.

9. The governance practises of the SRFN have evolved over the years, however, they retain a number of specific elements with the pre-contact SRFN society.

10. The ancestors of the SRFN existed in smaller family units that stayed together during the fall, winter and spring while engaging in hunting and trapping. In the summer, they would gather on the shores of Lesser Slave Lake in larger units, and with other nearby Indigenous groups.

11. Leadership selection with the SRFN's ancestors was informal and did not involve the election of individuals. Leaders were selected from amongst the members on the basis of their inherent skills and ability to lead and provide for the members.

12. Since the 1930's SRFN's elected leaders ordinarily resided with the members on the reserve lands of the SRFN.

13. The parties disagree about the extent to which, prior to the 1930s, leaders were required to reside on the Reserve or the traditional territory.

Treaty 8:

14. Prior to 1899, Euro-Canadian settlers had begun moving into the traditional territory of the SRFN. As a result, the Crown was eager to enter into Treaty with the Indigenous peoples in what is now northern Alberta, Saskatchewan, and British Columbia, and parts of the Northwest territories.

15. On June 21, 1899, Kinoosayo, entered into Treaty 8 with the Crown.

16. SRFN headman Felix Giroux represented what would become SRFN at treaty negotiations.

17. At the time of entering treaty, the Crown assured the Indigenous people that the treaty would enable them to both survive in the face increasing Euro-Canadian settlement, and to thrive economically, physically, and culturally. They were further assured that their way of life would remain unchanged and that they could continue to operate their society as they had in the past.

18. The Crown made various promises, including inter alia, that the Crown would not interfere with their mode of life, and that they could take land in severaly (as opposed to a reserve). Indigenous People understood that this meant their governance practises would be permitted to continue without interference.

19. Both the Crown and the SRFN understood that Treaty 8 would last forever.

SRFN After Treaty:

20. Shortly after the entering of Treaty, SRFN's ancestors began requesting that lands be surveyed and set aside pursuant to the terms of Treaty 8. Families settled more permanently in and around the Swan River area, on the south central shores of Lesser Slave Lake. The Crown initiated a reserve creation process in 1902, however the formal creation of the Swan River Reserve 150E and 150F was not done until approximately 1912.

21. After settling on their reserve lands, the SRFN's ancestors continued their prior forms of governance. Felix Giroux served as headman of the Swan River group until SRFN was created in the 1930's and the first Chief selected was August Sound.

22. From the time of band establishment settlement to present, the SRFN continued to only be governed by members from their territory. Following reserve settlement, the SRFN was governed by members ordinarily resident on a SRFN Reserve. This included the leaders that governed the SRFN after headman Felix Giroux: onward post 1930's the position was changed to Chief with the first being August (Sound), Gene Giroux (Davis), August Chalifoux, Victor Twin, Paul Sound, Gordon Courtoreille, Charlie Chalifoux, Dusty Twin, Richard Davis, Leon Chalifoux, Ryan Davis, and Gerald Giroux (current chief). All of these leaders were ordinarily resident on the SRFN's Reserve lands.

SRFN's Written Election Codes:

23. In 2005, the SRFN adopted the Customary Election Regulations of the Swan River First Nation (the "2005 Code"). That 2005 Code provided, inter alia:

> Section 6.5(a): "any Elector continuously resident on reserve for at least three (3) months prior to the date of nomination is eligible to be nominated for the position of Councilor."
>
> Section 14: "All members of the Council must be resident on the Swan River Reserve for the duration of their term of office."
>
> Section 15.2(e): "Any Councilor may be removed from office by the Council on the following grounds: ... While in office, they fail to remain resident on reserve for the duration of their term in office"

24. In 2007, the 2005 Election Code was replaced. This amended Code included the following sections:

> Section 9.1(a)(2): To be eligible, the candidate must be “Resident on the reserve for at least 1 (One) year prior to Nomination.
>
> Section 14.4: "All members of the Council must be a resident on the Swan River First Nation Reserve for the duration of their term of office."
>
> (hereinafter the “Residency Requirement")

25. The above governance Code is the subject of the Applicants’ judicial review application.

The Applicants seek to Run for Chief and Council:

26. The 2019 SRFN Chief and Council election was scheduled for June 14, 2019 (the “Election”).

27. The Applicants sought to run for Chief and Council in the Election. The Applicant, Robert Houle, sought to run for Council. The Applicant, Shawna Jean, sought to run for Chief.

28. The Electoral Officer did not accept the Applicants' nomination because they did not comply with the Residency Requirement.

29. The Applicants sought an injunction to postpone the Election until this application For judicial review could be decided. That motion was dismissed.

> 30. The Election took place on June 14, 2019.
>
> 31. The Swan River First Nation Custom Election Regulations contain an amending formula which requires that "Amendments to the Customary Election Regulations may be prepared and presented by the Band Council upon written request to the Council by Twenty five (25%) percent of the electors of the Swan River Band." The Applicants have not submitted any proposed amendments in accordance with this procedure.
>
> 32. The next SRFN is scheduled to take place in June, 2022.

The Notice of Constitutional Question

[21] The Notice of Constitutional Question identifies the legal basis for the question as follows:

> The Applicants challenge the Residency Requirement as being discriminatory and contrary to Section 15 of the Charter.
>
> The Respondents take the position, *inter alia*, that the SRFN possesses rights of self-government, including a right to select its leaders in a manner determined pursuant to its customs and traditions. The right to maintain a Residency Requirement is part of the "aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada", as protected by Section 25 of the Charter.

Issues

[22] The Supreme Court in *Dickson* set out the analysis that is required by a court when a party seeks to invoke s. 25 in the face of a *Charter* claim. Given that the Applicant alleges a breach of s. 15 based on the Residency Requirement and that the Respondents claim that s. 25 shields the Residency Requirement, the parties agree that the *Dickson* analytical framework is to be applied in this case.

[23] Specifically, the Supreme Court identified the following four-step framework for assessing s. 25 claims (*Dickson*, at paras 179–183):

i. First, the *Charter* claimant must show that the impugned conduct *prima facie* breaches an individual *Charter* right. If no *prima facie* case is made out, then the *Charter* claim fails and there is no need to proceed to s. 25.

ii. Second, the party invoking s. 25 – typically the party relying on a collective minority interest – must satisfy the court that the impugned conduct is a right, or an exercise of a right, protected under s. 25. That party bears the burden of demonstrating that the right for which it claims s. 25 protection is an Aboriginal, treaty, or other right. If the right at issue is an "other right", then the party defending against the *Charter* claim must demonstrate the existence of the asserted right and the fact that the right protects or recognizes Indigenous difference.

iii. Third, the party invoking s. 25 must show irreconcilable conflict between the *Charter* right and the Aboriginal, treaty, or other right or its exercise. If the rights are irreconcilably in conflict, s. 25 will act as a shield to protect Indigenous difference.

iv. Fourth, courts must consider whether there are any applicable limits to the collective interest relied on. When s. 25's protections apply, for instance, the collective right may yield to limits imposed by s. 28 of the *Charter* or s. 35(4) of the *Constitution Act, 1982*.

[24] Where s. 25 is found not to apply, the party defending against the *Charter* claim may show that the impugned action is justified under s. 1 of the *Charter*.

Preliminary Issue - Status of the *Election Regulations*

[25] During the trial, Ms. Jean testified that she had not received any information about a 2007 referendum with respect to amendments to the 2005 version of the SRFN election regulations [*2005 Election Regulations*] and that she did not know if a vote had taken place. She testified that she did not accept the *Election Regulations* because she did not vote on them and, according to her, they were not ratified properly. Therefore, she declined to acknowledge them.

[26] Conversely, Mr. Twin testified that the *Election Regulations* were adopted by the members of SRFN by referendum, as had been the first version, the *2005 Election Regulations*, and that this was required in order for the federal government to recognize the *Regulations*. He testified that he voted in that referendum.

[27] In closing submissions, Mr. Houle suggested that, if a referendum were not properly carried out with respect to the *Election Regulations,* then this would run afoul of procedural safeguards. He also suggested that, although there was testimony that the *Election Regulations* had been voted on, that this did not clarify whether or not there had been a referendum. He suggested that the Elder who testified about voting in that referendum may have been misinterpreting having voted on the referendum as voting in the election that year. Ultimately, his position appeared to be that because ratification was questioned, the *Election Regulations* did not necessarily reflect the will of the SRFN members.

[28] In my view, this position cannot succeed.

[29] First, the Amended Notice of Application, among other things, seeks to have the Nomination Decision set aside, a declaration that Mr. Houle is eligible to run as a candidate for election and a declaration that s. 9.1(a)(2) of the *Election Regulations* be declared unconstitutional, of no force or effect and that it is not protected by s. 25 of the *Charter*. Mr. Houle did not raise the status of the *Election Regulations* as an issue in the Amended Notice of Application. Rather, his entire case is a constitutional challenge to s. 9.1(a)(2) as found in the *Election Regulations*. In that regard, the Agreed Statement of Facts indicates that the *2005 Election Regulations* were replaced in 2007. The 2007 version amended and replaced the former s. 6.5(a) requirement that an elector must be continuously resident on the Reserve for at least three months prior to nomination to be eligible for nomination to run for the position of Councillor, with the s. 9.1(a)(2) eligibility requirement stating that candidates must be resident on the Reserve for at least one year prior to nomination. The Agreed Statement of Facts, having indicated that the *2005 Election Code* was replaced, also states that the "above governance Code is the subject of the Applicants' judicial review application." In my view, Mr. Houle cannot now raise, at trial, the status of the *Election Regulations* and assert a related breach of procedural fairness, which has not previously been pleaded.

[30] Second, it is also not open to Mr. Houle to assert that the *Election Regulations* were not ratified, and therefore do not have the force of law, while at the same time challenging the constitutionality of the Residency Requirement (which is a provision of those very *Election Regulations*) and seeking to have it struck out. If the *Election Regulations* did not have the force of law because of a ratification issue, then the constitutional challenge would be moot.

[31] Finally, the *Election Regulations* have been in use by SRFN for the last 17 years. Ms. McRee's testimony was that she was not sure, or was not aware, if she had received a referendum package in 2007. The only evidence before me suggesting that they may not have been ratified was that of Ms. Jean. However, Ms. Jean had no actual knowledge of the ratification process. Her view was that, because she did not receive voting information, that she did not accept that ratification had been properly conducted. Conversely, Mr. Twin recalled voting on the referendum and his evidence on that point was not challenged on cross-examination.

[32] I find that, even if ratification had been raised as an issue in the Amended Notice of Application, the evidence tendered by the Applicant does not establish that the *Election Regulations* were not properly ratified. Therefore, I do not accept his suggestion that they do not represent the will of the majority of SRFN members.

i. Does the Residency Requirement constitute a *prima facie* breach of the Applicant's s. 15 *Charter* rights?

Applicant's position

[33] Mr. Houle submits that the Residency Requirement discriminates against him based on the analogous ground of "Aboriginality-residence", as established in *Corbiere v Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203 [*Corbiere*].

[34] He submits that this is not a circumstance subsequently identified as an analogous ground in *Dickson*, being "non-resident status in a self-governing Indigenous community" (*Dickson*, at

para 198). This is because the Residency Requirement is not a part of a constitution passed by members of SRFN, nor are the *Election Regulations* a free and democratic exercise of SRFN's inherent right to self government (citing *Dickson*, at para 192). Rather, in this matter, the *Election Regulations* are a custom code incorporated by reference into the *Indian Act*, RSC 1985, c I-5 [*Indian Act*] with the source of the selection process being an Act of Parliament as understood in s. 2(1) of the *Federal Courts Act* (citing *Bellegarde v Carry the Kettle First Nation*, 2024 FC 699 at para 90 [*Bellegarde*]). According to the Applicant, this makes this matter distinguishable from *Dickson.*

[35] Applying the *Corbiere* analytical framework for s. 15 (*Corbiere*, at para 55), the Applicant first submits that the Residency Requirement denies "off-reserve" SRFN members the opportunity to seek nomination in an election and restricts this opportunity to the limited pool of candidates who live on-reserve. This is a differential distinction and amounts to a total bar to about 70 percent of the SRFN membership who live off-reserve.

[36] Second, that off-reserve members of SRFN often lack choice about where to reside. A lack of housing exists on the SRFN Reserve and strict adherence to the Residency Requirement excludes even those who reside in Kinuso, a community surrounded by the SRFN Reserve boundaries. This differential treatment creates disadvantage, stereotyping and prejudice, which are defined by place of residence (citing *Corbiere*, at para 62).

[37] And, third, this Court has considered infringement of s. 15(1) rights beyond the narrow scope of the right to vote that was determined in *Corbiere*, including infringement by the

customs of a band (citing *Cockerill v Fort McMurray First Nation No 468*, 2010 FC 337 at paras 28–29 [*Cockerill*]; *Thompson v Leq'á:mel First Nation*, 2007 FC 707 at para 8 [*Thompson*]; *Clifton v Hartley Bay Indian Band*, 2005 FC 1030 at paras 44–45 [*Clifton*]); *Cardinal v Bigstone Cree Nation*, 2018 FC 822 at para 48 [*Bigstone*]).

[38] Accordingly, the Residency Requirement creates a *prima facie* infringement on the Applicant's analogous equality rights via Aboriginality-residence by reinforcing, perpetuating or exacerbating disadvantage.

Respondents' position

[39] The Respondents submit that in *Dickson*, the Supreme Court found that the analogous ground of "Aboriginality-residence" does not take into account a residency requirement that is not imposed by the Crown (as was the case in *Corbiere*) and is instead created by a First Nation that is exercising its inherent rights of self-government. The Supreme Court recast this analogous ground as "non-resident status in a self-governing Indigenous community".

[40] The Respondents acknowledge that the Residency Requirement draws a distinction between those ordinarily resident on-reserve and those that are ordinarily resident elsewhere. In their opening submissions, the Respondents argued that this distinction does not reinforce, perpetuate, or exacerbate disadvantage. Rather, this distinction is a reflection of how SRFN has been governed. Accordingly, it is not a discriminatory distinction. Notwithstanding this argument, the Respondents also acknowledged the outcomes in *Dickson* and *Corbiere* in relation to s. 15 and submitted that this case is "likely best decided" at the s. 25 stage. At closing, the

Respondents confirmed that they were not contesting the s. 15 argument. While they did not formally concede the issue, they acknowledged the Supreme Court's finding in *Dickson* and, in light of binding precedent, that the outcome was reasonably evident.

Analysis

[41] For the reasons that follow, I am satisfied that the Residency Requirement amounts to a *prima facie* breach of the Applicant's s. 15 *Charter* rights. The Residency Requirement creates a distinction based on off-reserve band member status. It also reinforces and exacerbates existing disadvantage as non-resident, or off-reserve, members of SRFN.

[42] The provision at issue is s. 9.1(a)(2) of the *Election Regulations*, which states as follows:

> **PART 9 – CANDIDACY**
> **Eligibility of Candidates**
>
> (a) Only electors who meet the requirements of a candidate as set out in this code may be nominated as a candidate:
>
> 1) ….
>
> 2) Resident on the reserve for at least 1 (One) year prior to Nomination.
>
> …..

[43] I note in passing here that s. 14.4 of the *Election Regulations* includes a second residency requirement. It states that all members of Council must reside on the SRFN Reserve for the duration of their term of office. The Applicant has not challenged that provision in this matter.

[44] Section 15 of the *Charter* addresses equality before and under the law and equal protection and benefit of the law:

> 15 (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

[45] To establish a *prima facie* breach of s. 15 rights, claimants must demonstrate that the impugned law: (a) on its face or in its impact, creates a distinction based on an enumerated or analogous ground; and (b) imposes a burden or denies a benefit in a manner that has the effect of reinforcing, perpetuating or exacerbating disadvantage (*Dickson*, at para 188, citing *R v Sharma*, 2022 SCC 39 at para 28, amongst others).

a) Does the Residency Requirement on its face or in its impact, create a distinction based on an enumerated or analogous ground?

[46] In *Corbiere*, the Supreme Court dealt with a s. 15 claim based on a residency requirement imposed by the Crown by way of s. 77(1) of the *Indian Act*. Section 77(1) required band members to ordinarily reside on-reserve in order to vote in band elections. The Supreme Court determined that the first stage of the s. 15 inquiry was easily satisfied in that case because s. 77(1) of the *Indian Act* draws a distinction between on- and off- reserve band members by excluding the latter from the definition of "elector" within the band. That constituted differential treatment (at para 57). The Supreme Court then recognized the analogous ground of "off-reserve band member status", known also as "Aboriginality-residence", holding that:

> 62 Here, several factors lead to the conclusion that recognizing off-reserve band member status as an analogous ground would accord with the purposes of s. 15(1). From the perspective of off-

> reserve band members, the choice of whether to live on- or off-reserve, if it is available to them, is an important one to their identity and personhood, and is therefore fundamental. It involves choosing whether to live with other members of the band to which they belong, or apart from them. It relates to a community and land that have particular social and cultural significance to many or most band members. Also critical is the fact that as discussed below during the third stage of analysis, band members living off-reserve have generally experienced disadvantage, stereotyping, and prejudice, and form part of a "discrete and insular minority" defined by race and place of residence. In addition, because of the lack of opportunities and housing on many reserves, and the fact that the *Indian Act*'s rules formerly removed band membership from various categories of band members, residence off the reserve has often been forced upon them, or constitutes a choice made reluctantly or at high personal cost. For these reasons, the second stage of analysis has been satisfied, and "off-reserve band member status" is an analogous ground. It will hereafter be recognized as an analogous ground in any future case involving this combination of traits. I note that in making this determination, I make no findings about "residence" as an analogous ground in contexts other than as it affects band members who do not live on the reserve of the band to which they belong.

[47] In *Dickson*, the challenge to the residency requirement arose in the context of the legal framework established by the modern land claim treaty process and self-government agreements among the Vuntut Gwitchin First Nation [VGFN] and the federal and Yukon governments. There, 11 specific treaties were negotiated under an umbrella agreement. This included the VGFN Final Agreement, a land claim agreement between the VGFN and the federal and Yukon governments which was approved and given effect by federal and territorial legislation. The VFGN Final Agreement has treaty status under s. 35 of the *Constitution Act, 1982*. As contemplated by the VGFN Final Agreement, the VGFN and the two governments concluded the VGFN Self-Government Agreement by which VGFN would have self-government powers, including the power to adopt a VGFN Constitution, legislative powers and taxation powers. The VGFN Constitution details how the VGFN is governed. Under the VGFN Constitution, a VGFN

citizen who seeks to run for the position of Chief of Councillor must meet a residency requirement. That is, they must reside on VGFN's settlement land or relocate there within 14 days after the election day. That provision was challenged by the appellant, Ms. Dickson.

[48] Relying on *Corbiere*, Ms. Dickson argued that the residency requirement created a distinction on the basis of the analogous ground of "Aboriginality-residence". Conversely, the VGFN sought to distinguish *Corbiere* on the basis that it was decided in relation to off-reserve band membership under the *Indian Act*. Therefore, any distinction drawn by the residency requirement in *Dickson* was not based on an analogous ground. The Supreme Court held:

> [192] We agree that *Corbiere* is not fully dispositive of the question. *Corbiere* dealt with a s. 15(1) claim based on a residency requirement under the *Indian Act* that required band members to reside on reserve to vote in band elections. Contrary to the provision at issue in *Corbiere*, the residency requirement in this case is part of the constitution of a self-governing First Nation. As the VGFN observes, the residency requirement "is not imposed by the Crown, but by VGFN Citizens freely and democratically exercising their inherent right to self-government" (R.F., at para. 143). Since Aboriginality-residence, as set out in *Corbiere*, does not take this into account, we will not rely on it as an analogous ground in this case.

[49] However, the Supreme Court found that non-resident status in a self-governing indigenous community is an analogous ground.

[50] In its analysis under that ground, the Supreme Court acknowledged that *Corbiere* recognized an Aboriginal person's off-reserve residence as an analogous ground because this characteristic is constructively immutable and stated that it is essential to a band member's personal identity and changeable only at great personal cost (*Dickson*, at para 193).

[51] The Supreme Court also rejected the VGFN's assertion that the distinction at play in the residency requirement was not inherently suspect as it "does not subject a group subject to historic disadvantage to differential treatment, or bear the kind of stigma reflected in *Corbiere*" holding that:

> [196] …While *Corbiere* is not directly applicable in the case of an impugned provision enacted by a self-governing First Nation, this Court's discussion of disadvantage faced by non-resident Indigenous people was not constrained to the context of *Indian Act* provisions and provides helpful guidance. Justice L'Heureux-Dubé's discussion of Aboriginality-residence, adopted by the majority, outlines the difficulties faced by Indigenous people living away from their communities. She emphasized that, for off-reserve band members, the choice of whether to live on- or off-reserve "is an important one to their identity and personhood", in terms of relating to a community and to land that have "particular social and cultural significance to many or most band members" (*Corbiere*, at para. 62). Justice L'Heureux-Dubé further observed that "band members living off-reserve have generally experienced disadvantage, stereotyping, and prejudice, and form part of a 'discrete and insular minority' defined by race and place of residence" (para. 62).

[52] The Supreme Court concluded that recasting Ms. Dickson's potential analogous ground from "Aboriginality-residence" to "non-resident status in a self-governing Indigenous community" qualified as an analogous ground under *Corbiere*. It also stated that "[t]he historical and continued disadvantage faced by Indigenous people living away from their traditional lands means that distinctions based on 'non-resident status in a self-governing Indigenous community' will serve as 'constant markers of suspect decision making or potential discrimination' (*Corbiere*, at para 8)" (*Dickson*, at para 198).

[53] Thus, while the analogous grounds differ in *Corbiere* and *Dickson*, recognition of the disadvantage faced by non-resident First Nation members remained constant.

[54] In my view, similar to *Corbiere*, the Residency Requirement in this case draws such a distinction between on- and off-reserve members. Although the circumstances in *Corbiere* concerned a requirement imposed by s. 77 of the *Indian Act* that band members ordinarily reside on-reserve in order to vote in band elections, while in this matter the Residency Requirement requires band members to be ordinarily resident on the Reserve for at least one year in order to be eligible to be nominated to run for office, this factual difference does not affect the required analysis. It is the distinction between on- and off-reserve that is relevant.

[55] I agree with the Applicant that the Residency Requirement creates a distinction between SRFN members living on-reserve and SRFN members living off-reserve based on the analogous ground of "off-reserve band member status".

b) Does the Residency Requirement impose a burden or deny a benefit in a manner that has the effect of reinforcing, perpetuating or exacerbating disadvantage?

[56] At the second stage of the s. 15 *prima facie* breach analysis, the question is whether the Residency Requirement, which draws a distinction between SRFN members based on the analogous ground of "off-reserve band member status", reinforces, perpetuates or exacerbates Mr. Houle's disadvantage as an off-reserve SRFN member (*Dickson,* at para 199).

[57] At trial, the evidence touching on disadvantage was somewhat limited and was focused on the immediate living circumstances. I will describe it below.

[58] Ms. McRee testified that she was mainly raised and lived off-reserve. In 2021, after she had retired, she moved back to the town of Kinuso where she resides in her daughter's house. The town is encircled by the SRFN Reserve and Ms. McRee testified that her daughter's house is 333 feet off the Reserve. However, she is still considered to live off-reserve and, because of the Residency Requirement, she could not run for SRFN elected office.

[59] Ms. McRee testified that because she is an Elder, SRFN helps her with some things like her utility bill, and she is invited to SRFN events. But, even though she lives only 333 feet from the Reserve, "you're close but then you're not part of that group. So there's a –a distinction".

[60] As to housing on the Reserve, Ms. McRee testified that she has applied for housing but in each instance, she was advised on further inquiry that her application had been lost. Much of Ms. McRee's evidence about housing concerned her opinion that she and her family members had not been treated fairly as compared to others in the allocation of housing by SRFN's housing committee. However, I find that this issue is discrete from the *Charter* issues before me. Ms. McRee also testified that if she were offered a house on-reserve she would live there.

[61] As to reserve services, Ms. McRee testified that while SRFN assists off-reserve members with funeral expenses, she understood that on-reserve members received greater assistance. Concerning other services, she testified that on-reserve members would receive funding if they had to travel off-reserve to see a doctor, while off-reserve members would not receive this funding. Further, that SRFN would provide social services support to on-reserve members, but those living off-reserve, including in Kinuso or elsewhere in Canada, would not receive these

social service payments from SRFN. Ms. McRee acknowledged that she received the SRFN per capita distribution and had also obtained work contracts from SRFN to provide services on the Reserve.

[62] Ms. Jean's testimony was that she has lived off-reserve her whole life. She had resided in Kinuso as a child, had returned there after attending university, and stayed until she was 19. She lived there from 1998 to 2001. In 2006, she moved to Chipewyan Prairie First Nation. She testified that when attending school in Kinuso, she felt that she did not belong to the town because she was considered to be an Indian from Swan River and that she did not belong to SRFN because she did not live on-reserve. As to why she sought a nomination to run for office, she testified that she felt the off-reserve SRFN members were not represented, even though they comprise of the highest segment of the SRFN population, and that the Residency Requirement was discriminatory to her and other off-reserve SRFN members.

[63] Concerning housing, Ms. Jean testified that persons seeking available housing complete a housing application form and the housing committee chooses who is provided with housing. She applied for housing, but was told that her application was not found. She applied again in 1999 when she was teaching at the SRFN school but was again told that her application was not found. Ms. Jean testified that, as she felt she was no longer being honoured with the process, she did not apply again. However, she also testified that she had been "instructed" that even though there was on-reserve housing available for teachers, it would be in "her best interest" not to request to live on-reserve and that she should make it a verbal condition that she would accept the job but not ask for housing. On cross-examination, she confirmed that she understood that there was

housing criteria applied by the housing committee in providing housing to applicants but testified that she was not familiar with the criteria. When asked why she bought a house in Kinuso, rather than building one on the Reserve, she testified that in 2019 – after she had brought her application for judicial review – she had asked Chief and Council to do so and was told that there was no availability.

[64] Ms. Jean testified that as an off-reserve SRFN member, she sought to access services provided by the Reserve. However, she had only been provided with educational funding for her last year of university and the last term of her master's degree. She testified that she could not receive services for her autistic child from SRFN as she does not reside on-reserve. Although she lives on the Chipewyan reserve, she is considered off-reserve there as well (she is not a Chipewyan member) so also does not receive services from that First Nation. She testified that she would access other SRFN services were they available to her, but because she is an off-reserve member, she cannot do so.

[65] Mr. Twin testified, with respect to housing, that, due to a lack of funding, the list of members seeking on-reserve housing has grown to perhaps 40 or 50 applicants.

[66] Mr. Giroux testified that he has been a Councillor for the past 11 years. He explained that the SRFN Reserve surrounds the town of Kinuso, noting that when he pulls out of his driveway, he is in the town, but when he pulls into his driveway, he is on-reserve. He testified that the current on-reserve SRFN population is about 370 members and there are about 1,267 members altogether (meaning that there are about 897 off-reserve members). These numbers fluctuate as

members come and go. He explained that SRFN has a funding arrangement with the federal government and that this places constraints on which members get services. For example, the federal government provides funding to SRFN for those members who need social assistance. On-reserve members can access that funding from SRFN while off-reserve members would have to seek social assistance under the umbrella of the government where they reside. Further, that the funding received is based on the needs of the Reserve, such as housing, and places restrictions on how funds are to be used. Other funds, such as the Agriculture Benefit Claim, are SRFN's own money, some of which is used for the benefit of both on- and off-reserve members.

[67] As to how a member would obtain land on the Reserve, Mr. Giroux testified that an applicant must make the request and fill out a residency clause or form, confirming that they are living on the Reserve. If they do not have somewhere to stay on the Reserve, they might live in a camper until they could be provided with a house. If they bought a house and wanted to move it on to SRFN Reserve land, Council would assist with infrastructure. Mr. Giroux testified that he was not aware of Mr. Houle ever requesting land on the SRFN Reserve and that he had inquired with the housing department who had advised him that Mr. Houle had never requested a house on the Reserve. And, to Mr. Giroux's knowledge, Mr. Houle had not completed a residency form.

[68] I note that in *Corbiere*, the Supreme Court engaged in a lengthy discussion of the historical disadvantage of off-reserve First Nations people, describing how their exclusion from democratic band governance processes perpetuates a history of discriminatory laws and policies

that “encourage[d] Aboriginal people to renounce their heritage and identity, and to force them to do so if they wished to take a full part in Canadian society” (at paras 88, 91–96).

[69] Subsequently, the issue of residency requirements for those who seek to run for Chief or Counsel have been addressed by this Court. One such decision is *Bigstone.* There, Justice Roussel considered a residency requirement that required elected chief and council to assume residency on the reserve within three months of the election. She found that the distinction created by the residency requirement imposed a burden on off-reserve members and denied them a benefit in a manner that had the effect of perpetuating the erroneous notion that band members who live off-reserve have no interest and a reduced ability to participate in band governance. Further, that the distinction also reinforced the historical stereotype that off-reserve band members are less worthy and entitled, not on the basis of merit, but because they live off-reserve (*Bigstone*, at para 52).

[70] Following a review of the jurisprudence, Justice Roussel concluded that the residency requirement in the election code before her imposed a burden on off-reserve members wishing to run for office, the effect of which was clearly discriminatory, thus perpetuating the pre-existing disadvantage of the group it was intended to benefit. She found that in order to serve the community with which the band member is affiliated, the band member must, once elected, relocate on the reserve. This relocation came only at a great cost, both personal and financial (*Bigstone*, at para 58). Further, that:

> [65] The fact is that while off-reserve members may now vote and be elected as Councillors of the BCN, the requirement that they establish residency on the reserve during their term in office imposes on them a burden that on-reserve members do not have. It

> also perpetuates the stereotype that only members on the reserve are able to decide the affairs of the band.
>
> [66] Consequently, I find that the residency requirement in the BCN Election Code discriminates against off-reserve band members by prohibiting them from participating in the representative governance of their band Council on the basis of their off-reserve band member status.

(See also *Cunningham v Sucker Creek First Nation* 150A, 2021 FC 1221 at para 34 [*Sucker Creek*]).

[71] The Supreme Court in *Dickson* rejected an argument by the VGFN that there was no evidence of historical disadvantage experienced by VGFN members living away from traditional territory, finding that the evidence in *Corbiere* remained applicable to non-resident members of First Nations. The Supreme Court also cited The Royal Commission on Aboriginal Peoples as well as the 2019 report issued by the National Inquiry into Missing and Murdered Indigenous Women and Girls as further support of historical disadvantage. It found that the appellant in that case was being denied "or at least significantly deterred from, the exercise of a fundamental right – the right to run for Council – because of her non-resident status". This distinction on the basis of the analogous ground of non-resident status in a self-governing Indigenous community had the effect of reinforcing, perpetuating and exacerbating that appellant's disadvantage as a non-resident. Not allowing her to participate in the electoral politics of her community further distanced her from that community, making it difficult to preserve her identity as a VGFN citizen (at para 203).

[72] In my view, the reasoning in *Corbiere, Dickson*, *Bigstone*, and *Sucker Creek* also applies in this case. The denied benefit for the Applicant is his ability to be nominated, and therefore to

stand for elected office. The burden is that off-reserve members must move onto the SRFN Reserve one year prior to the election in which they wish to run for office in order to be nominated for and to run for office. This imposes a personal and financial burden not borne by on-reserve members. And, in this case, even if a candidate was willing to move on-reserve for a year prior to nomination, this imposes an additional burden as, of course, there is no certainty that, if nominated, they would be elected. Their lives would be disrupted and expenses incurred simply to be afforded the opportunity to run for office – a burden not imposed upon on-reserve members. There is also a real issue of whether they would be able to access housing on-reserve in order to comply with the Residency Requirement. Further, the Residency Requirement has the effect of reinforcing, perpetuating and exacerbating the historically recognized discrimination of a non-resident or off-reserve First Nations band members.

[73] I conclude that the Applicant has established both branches of a *prima facie* s. 15(1) breach.

ii. Is the Residency Requirement an "aboriginal, treaty or other right" under s. 25 of the *Charter*?

Applicant's position

[74] The Applicant submits that the Residency Requirement is not an "other right" under s. 25 and that this matter can be distinguished on its facts from *Dickson*, where the Supreme Court found an "other right" to exist. As I understand it, the Applicant essentially submits that, unlike the VGFN, SRFN has not entered into a self-governing agreement with the federal and provincial governments, nor has it enacted a constitution pursuant to such agreements. VGFN's

constitution provided for the composition, structure and powers of the First Nation government institutions, as well as membership and election procedures. However, SRFN does not have such a constitution that would enable election procedures. Rather, it has only the *Election Regulations*, which contain the Residency Requirement.

[75] Further, the Applicant submits that it is a significant distinguishing feature that the VGFN's latest amendment to its residency requirement was an improvement that ensured that a non-resident VGFN citizen would have a four-year paid elected position before being required to reside on-reserve. In contrast, the 2007 amendment to the Residency Requirement in the *Election Regulations* was harsher, increasing the time that a member must live on-reserve before being eligible to run for office from three months, as required by the 2005 *Election Regulations*, to one year.

[76] Finally, the Applicant asserts that the Residency Requirement is not a reflection of SRFN custom or tradition that has existed since time immemorial. Prior to Treaty No. 8, the ancestors of SRFN lived a nomadic lifestyle, dictated by the seasons and the availability of resources. Accordingly, it was not possible to reside in one place for an extended period of time, let alone one year. Further, the intention of Treaty signatories was that this way of life would be maintained, as reflected in Elders' stories and a reluctance to be confined to a reserve. The desire to maintain freedom of movement is also evidenced by the reporting of negotiators leading up to Treaty No. 8, and the fact that a unique provision regarding land-in-severalty was included in the final version of that Treaty.

[77] The Applicant submits that the actions of the lakeshore bands following the Treaty, by remaining one community spread across the shores of Lesser Slave Lake with a single Chief, reinforces the notion that they were expressing their right to not be confined to a reserve. It was not until the 1930's that federal government policy and intervention actively restricted leaders to a smaller population and required leaders to reside on a reserve. These actions not only infringed upon the recognized rights of Treaty No. 8 communities, but also abrogated the Indigenous difference that the land-in-severalty provision provides.

[78] The Applicant submits that to uphold the Residency Requirement would be an affront to the spirit and intent of Treaty No. 8, specifically the land-in-severalty provision, and would breathe life into the concerns that leaders expressed prior to Treaty regarding being confined to reserves. The right to traditional modes of life for individual SRFN members includes freedom of travel and residence apart from the reserve as reflected in the land-in-severalty provision of Treaty No. 8 and the history of prominent leaders. These rights fall within Aboriginal and treaty rights protected by s. 25 of the *Charter.* As SRFN's traditional governance practices include aspects of mobility and travel – which would encompass the aspect of governing apart from a reserve, which was a traditional practice – s. 25 is not applicable.

[79] Finally, if the Residency Requirement is found to protect Indigenous difference, it must be made clear that this judicial review does not deal with a residency requirement for leaders. Rather it deals with those seeking nomination to lead.

Respondents' Position

[80] The Respondents submit that SRFN has an "other right" to set criteria for election to its governing body, which is the same "other right" as the Supreme Court found in *Dickson*.

[81] The Respondents submit that the right to set criteria for election to its governing party is part of its inherent right of self-government. This right is also recognized by statute through the *Indian Act*, which recognizes the authority of First Nations to be governed by their own customary laws. The Respondents argue that courts have found that customary election laws such as the *Election Regulations* are "analogous to constitutions" (citing *Whalen v Fort McMurray No 468 First Nation*, 2019 FC 732 at para 48 [*Whalen*]). Further, Article 3 of the *United Nations Declaration on the Rights of Indigenous Peoples*, adopted into Canadian law through the *United Nations Declaration on the Rights of Indigenous Peoples Act*, SC 2021, c 14, recognizes the right of First Nations to self-determination and to "freely determine their political status". *Dickson* establishes that this is a right that qualifies for protection under s. 25 of the *Charter*.

Analysis

[82] As the Applicant submits, at issue in *Dickson* was the requirement in the VGFN Constitution that the elected Chief and Councillors reside on the settlement land of the First Nation, or relocate there within 14 days of the election.

[83] In that regard, the Supreme Court stated that it had been invited to interpret s. 25 in connection with a residency requirement that was part of the constitutional law of a self-governing First Nation. It noted that while *Corbiere* considered the constitutionality of a voting requirement that might be compared to the residency requirement contested in *Dickson,* the requirement in *Corbiere* was under the *Indian Act,* rather than an Indigenous constitution. Because *Corbiere,* and other existing jurisprudence of the Court, provided only a modest guide to the appeal in *Dickson*, this invited caution. As a result, its reasons in *Dickson* focused on the task then before it – determining how s. 25 applies to the residency requirement in the constitution of a self-governing First Nation challenged by one of its own members under s. 15(1) of the *Charter* (at paras 104–106). As the Applicant submits, that is not the circumstance before me, as SRFN does not have a constitution arising from a self-governing agreement which constitution includes a residency requirement. Rather, in this matter, the requirement is found in the *Election Regulations*.

[84] However, in discussing rights within the scope of s. 25, the Supreme Court held that the rights protected under s. 25 are not limited to those that are constitutionally entrenched and may instead include ordinary statutory rights (*Dickson*, at para 149, referencing *Corbiere*, at para 52). Further,

> [150] While we would not give effect to the formal restriction on the source of an "other" right proposed by Ms. Dickson, the text and purpose of s. 25 do suggest a substantive restriction. Since s. 25 was intended to protect rights associated with Indigenous difference — understood as interests connected to cultural difference, prior occupancy, prior sovereignty, or participation in the treaty process — whether a right warrants s. 25 protection on the basis that it is an "other" right will hinge on whether it protects or recognizes those interests. In short, a party seeking the protection of s. 25 for a right alleged to be an "other" right must

> establish both the existence of the right and the fact that the right protects or recognizes Indigenous difference.

[85] It ultimately found that the adoption of the residency requirement was an exercise of an "other right" under s. 25. The VGFN had a right to restrict the membership and composition of its governing bodies and its exercise of that right through the residency requirement, which protected interests associated with Indigenous difference. The Supreme Court concluded that whether or not the residency requirement might also be understood as an exercise of an inherent right to self-government, it is an "other right" protected under s. 25 (*Dickson*, at para 204).

[86] The Supreme Court also addressed the "constitutional character" of the residency requirement in *Dickson*, holding that:

> [218] Finally, we agree with both courts below that the residency requirement is of a "constitutional character" in a substantive, rather than formal, sense (trial reasons, at para. 207; C.A. reasons, at para. 147). The question of whether a "constitutional character" will always be required for s. 25 protection need not be decided: here it is clear that the residency requirement has a significant constitutional dimension. Beyond the mere fact that the residency requirement is part of the VGFN Constitution, it is an aspect of the First Nation's law that preserves and enshrines an important dimension of VGFN leadership traditions and practices, and VGFN leaders' connection to the land. We particularly note the Court of Appeal's conclusion that the residency requirement "is clearly intended to reflect and promote the VGFN's particular traditions and customs relating to governance and leadership — a matter of fundamental importance to a small first nation in a vast and remote location" (para. 147). On any reasonable understanding of what it means for a right or its exercise to have a "constitutional character", the residency requirement meets this standard.

a) Does the "other right" exist?

[87] In this matter, Mr. Twin, a SRFN Elder, testified that he has lived on the SRFN Reserve all of his 77 years, except when he was removed to a residential school and, as an adult, when he left on occasion to pursue work off-reserve to support his family. He was elected Chief twice (from 1983-85 and from 1996-99) and also served as a Councillor for six years, the last time being around 1988.

[88] He testified that SRFN elections were governed by the *Indian Act* until the federal government permitted the adoption of custom election codes. For a short period of time, about ten years, SRFN adopted a custom family system of governance. The six family groups identified by SRFN, through a vote of their own or by the traditional way of selecting a headman, each chose a headman to represent them at council. Mr. Twin was chosen in the customary way of talking with his family group who chose him to represent them by consensus, rather than by electing him. A Chief was elected from the six headmen by all of the SRFN people.

[89] Mr. Twin testified that after the family system, SRFN went directly to its current custom election code system. This occurred after a process that included the review of the custom codes used by other First Nations, town meetings and ultimately a referendum by which the *2005 Election Regulations* were ratified. Mr. Twin's evidence was that the *Election Regulations* were also adopted by referendum.

[90] Section 2(1) if the *Indian Act* defines the "council of the band" as meaning:

> (**a)** in the case of a band to which section 74 applies, the council established pursuant to that section,
>
> **(b)** in the case of a band that is named in the schedule to the *First Nations Elections Act*, the council elected or in office in accordance with that Act,
>
> **(c)** in the case of a band whose name has been removed from the schedule to the *First Nations Elections Act* in accordance with section 42 of that Act, the council elected or in office in accordance with the community election code referred to in that section, or
>
> **(d)** in the case of any other band, the council chosen according to the custom of the band, or, if there is no council, the chief of the band chosen according to the custom of the band; (*conseil de la bande*)

[91] It has to be said here that there is not a lot of evidence before me as to how SRFN fits within this definition. The parties do not refer the Court to any order of the Minster made pursuant to s. 74 of the *Indian Act* that the council of the band of SRFN shall be selected by elections to be held in accordance with the *Indian Act*, nor to an order, made at the request of SRFN, revoking the application of section 74 for SRFN (see *Taypotat v Taypotat*, 2013 FCA 192 at paras 5–6; *Chipesia v Blueberry River First Nations*, 2019 FC 41 at paras 23–24; *Bellegarde*, at para 82). Nor do they suggest or demonstrate that SRFN is listed as a participating nation in the schedule to the *First Nations Election Act*, SC 2014, c 5 [*First Nations Election Act*]. Mr. Twin's evidence was that SRFN was governed by custom election codes from the time that this option became available, prior to which elections were subject to the process set out in the *Indian Act*.

[92] I note that in *Sound v Swan River First Nation* (FC), [2004] 1 FCR 336, this Court found that SRFN is a customary band whose election procedures, at that time, were governed by the Customary Election Regulations of the Swan River First Nation. Those regulations were first adopted in 1993 and were intended to express the customary election practices of the band. Among other things, the regulations addressed eligibility to vote, inclusion on the voters' list, conduct of elections and appeals against election results (at para 6). At that time, elections for the band council were conducted on the basis of six main family groups for the band (at para 9). Eligibility to vote depended upon recognition by the council of a potential voter's membership in a particular family group, pursuant to s. 7 of the then regulations. This generally supports Mr. Twin's evidence as to the existence of prior SRFN custom codes or regulations.

[93] It would appear that SRFN custom election regulations, in one form or another, have existed since at least 1993. That said, the only election regulations that are before this Court are the *Election Regulations*. It is unclear from the evidence before me whether, prior to 1993, SRFN council was chosen according to unwritten custom (see *Ratt v Matchewan*, 2010 FC 160 at paras 8–10 [*Ratt*]) or by way of the election process determined by s. 74(1) of the *Indian Act*.

[94] However, and in any event, the preamble to the *Election Regulations* indicates that: SRFN's inherent right to self-government was recognized and reaffirmed in Treaty No. 8; the customs, traditions and institutions of SRFN's self-government have been established with the consent and participation of its members; SRFN desires democratic, fair and open leadership elections; SRFN now desires that its customs and traditions in relation to the election of Chief and Councillors be incorporated and recorded in written customary election regulations and

procedures; and, that a majority of the electors approved by petition or referendum of the adoption of the *Election Regulations* – which are stated in s. 2(1) to come into effect upon the passing of a majority (50% +1) of the Electors.

[95] As will be discussed further below, this Court's jurisprudence has held that, in order to establish the custom of the band in relation to elections for Chief and Council, it is necessary to show that the alleged custom is supported by a "broad consensus" of the members of the First Nation, which can include ratification of a custom code by a majority of the band.

[96] The Respondents submit that the right to set criteria for election for governance by Chief and Council – its law-making authority – is an inherent right of self-government, which right is also demonstrated by the *Indian Act* as it recognizes the right of First Nations to govern by way of their own customary laws. In my view, it is not necessary in these circumstances to determine whether the source of the "other right" asserted by the Respondents arises from SRFN's inherent right of self-governance. In this case, it is sufficient to find that one source of the "other right", being the right to effect and impose the Residency Requirement which restricts the eligibility of SRFN members to be nominated to run for office, that is, the right to restrict the membership and composition of its governing bodies, arises by way of the *Election Regulations*, which codify SRFN election customs. This is a statutory right as the exercise of SRFN's authority to govern via the *Election Regulations* stems from the *Indian Act.*

[97] In that regard, and while not at issue in this case, I note that in *Dickson*, the first issue addressed by the Supreme Court was whether s. 32(1) of the *Charter* had application to VGFN's

residency requirement. The Supreme Court found that the *Charter* applies under VGFN's constitution because VGFN is government by nature. In discussing the features that can assist in determining if an entity performs governmental function the Court held:

> [82] Fourth, although (as the trial judge found) the Vuntut Gwitchin have been self-governing since time immemorial, and even if the VGFN has lawmaking authority under an inherent right to self-government, the VGFN is also recognized as a legal entity under the federal implementing legislation. To that extent, it derives *at least some* of its lawmaking authority under federal law. In other words, at least one source of the VGFN's lawmaking authority flows from Parliament, in that the VGFN exercises powers that Parliament otherwise would have exercised through its legislative jurisdiction under s. 91(24) of the *Constitution Act, 1867*. This of course is not to suggest that Indigenous self-government is necessarily an emanation of federal authority. Parliament can, as here, be a source of the self-government authority, and it is this fact that triggers the application of the *Charter* in this case.
>
> (emphasis added)

[98] The Supreme Court noted that its approach was narrower than that taken by the courts below and concluded that the *Charter* applied to the VGFN's residency requirement only insofar as that requirement flowed from an exercise of statutory power under s. 91(24) of the *Constitution Act, 1867*. It stated that "[w]e make no comment on whether an exercise of an inherent right of self-government untethered from federal legislation would be subject to the Charter, which in our view need not be decided in this case in view of the self-government arrangements in issue. As this Court has often noted, a 'policy [of] restraint in constitutional cases is sound' as it is 'based on the realization that unnecessary constitutional pronouncements may prejudice future cases, the implications of which have not been foreseen'" (at para 91; see also para 101).

[99] In the matter before me, the application of the *Charter* is not at issue, nor has SRFN entered into self-government agreements or enacted its own constitution. Rather, my point here is that the *Election Regulations* are not "untethered" from federal law.

[100] In that regard, and in the context of the jurisdiction of this Court, Justice Mainville in *Ratt* held that, in the absence of an order under s. 74(1) of the *Indian Act*, the customary leadership selection process was codified and approved under a custom code and that this was a condition precedent under the *Indian Act* to the recognition of a band council under that Act. The exercise of authority by that band council under the *Indian Act* was dependent on the custom code. Consequently, the council selected pursuant to the custom code and the bodies purporting to supervise the proper selection of the Chief and council under that custom, such as the Elders Council, fell under the meaning of "federal board, commission or other tribunal" as defined in the *Federal Courts Act* (at para 103).

[101] In *Bellegarde*, also in the context of the jurisdiction of this Court, Justice Régimbald held that in recognizing "custom" as an eligible leadership selection process, the *Indian Act* "incorporates by reference" all customs followed by First Nations to democratically select their leaders, and then recognizes those leaders as the "Council of the band" for the purposes of s. 2(1) of the *Indian Act* and the discharge of the powers existing within the *Indian Act* (at para 50). Further, the incorporation by reference of the custom leadership selection process recognizes those customs as federal law for the purposes of the *Indian Act*, alongside the other election processes under s. 74 of the *Indian Act* and the *First Nations Election Act* (at para 51). In the result, powers exercised by First Nations in relation to the selection of leaders, even through

custom, are incorporated by reference in the *Indian Act* and are therefore in part conferred by an "Act of Parliament" (and therefore fell within the meaning of "federal board, commission or other tribunal" under s. 2(1) of the *Federal Courts Act*), (at para 52; see also paras 65, 90; and, *Buffalocalf v Nekaneet First Nation*, 2024 FCA 127 at paras 19–20 [*Buffalocalf*] which held that, when selected through custom, the powers exercised by First Nations in relation to the selection of their leaders are incorporated by reference in the *Indian Act* and are accordingly conferred by an Act of Parliament).

[102] The Court's jurisdiction is not at issue in this matter. However, *Ratt*, *Bellegarde* and *Buffalocalf* serve to illustrate the connection of custom election codes to the *Indian Act*.

[103] In that regard, it is also of note that pre-*Dickson* decisions of this Court have evoked the analogous ground of "off-reserve band member status" in instances where First Nations have selected their councils pursuant to band custom. In those cases, the Court determined that "a band council elected under Band Regulations still exercises its powers of governance under the *Indian Act*" (*Thompson*, at para 8; see also *Woodward v Council of the Fort McMurray*, 2010 FC 337 at paras 28–29; *Bigstone*, at para 48, citing *Cockerill*, at paras 28–29; *Clifton*, at paras 44–45).

[104] In this case, as set out above, s. 2(1)(d) of the *Indian Act* defines "council of the band" as including "the council chosen according to the custom of the band." SRFN has chosen to effect the *Election Regulations*, which prescribe the election of Chief and Council, including eligibility for nomination to run for office by way of the Residency Requirement. Here a "source" of the

right or authority to enact the *Election Regulations* and to govern pursuant to those regulations is s. 2(1)(d) of the *Indian Act*. Or, as the Respondents frame it, s. 2(1)(d) of the *Indian Act* recognizes the right of First Nations to govern by way of their own customary law. *Dickson* held that the text and purpose of s. 25 of the *Charter* demonstrate that its protections are not restricted to rights with constitutional status (understood as rights that cannot be repealed or altered by ordinary legislation) and that "the rights protected under s. 25 are not limited to those that are constitutionally entrenched and may instead include ordinary statutory rights" (*Dickson*, at para 149). Given this, I conclude that, in this case, the authority and right to effect and impose the Residency Requirement, which restricts the eligibility of SRFN members to be nominated to run for office, arises by way of the *Election Regulations*, which is a statutory right and an "other right" under s. 25.

[105] And, as indicated above, the Supreme Court in *Dickson* agreed that the residency requirement in that matter was of a "constitutional character" in a substantive, rather than formal way. There, the residency requirement had a significant constitutional dimension. However, beyond being a part of the VGFN constitution, it was an aspect of the VGFN's law that preserved and enshrined an important dimension of VGFN leadership traditions and practices, and VGFN leaders' connection to the land. The Supreme Court noted the Yukon Court of Appeal's finding that the residency requirement "is clearly intended to reflect and promote the VGFN's particular traditions and customs relating to governance and leadership — a matter of fundamental importance to a small first nation in a vast and remote location" and held that "[o]n any reasonable understanding of what it means for a right or its exercise to have a 'constitutional character', the residency requirement meets this standard" (*Dickson* at para 218).

[106] This reasoning similarly applies in this matter.

[107] Before moving on to address whether this right protects or recognizes Indigenous difference, I will address the Applicant's submissions concerning Treaty No. 8 and SRFN custom concerning a residency requirement.

Treaty No. 8

[108] As I understand the argument, the Applicant is asserting that the Treaty No. 8 land-in-severalty provision and/or the right to a traditional mode of life confirms the rights of mobility and residency of SRFN members, beyond the Reserve, and that those rights are treaty rights protected by s. 25 of the *Charter*. Further, that the Residency Requirement, if it is an "other right", breaches those rights as it precludes freedom of movement and the right to live off-reserve. Essentially, the Applicant proposes competing treaty rights, which he submits should defeat any "other right" of SRFN to effect and enforce the Residency Requirement. In his view, the Residency Requirement arises from intervention by the federal government and reflects a corruption of traditional governance practices.

[109] The Respondents interpret the Applicant's arguments in the context of the term "ordinarily resident." The term "Resident of the Reserve" is defined in s. 3 of the *Election Regulations* as meaning "a person is ordinarily resident on the Swan River Reserve". The Respondents submit that the Applicant's view that the Residency Requirement means potential Chief and Councillor nominees must be constantly present with all members of SRFN, be physically confined to the Reserve or not be permitted freedom of movement, improperly

characterizes the Residency Requirement and then uses this improper characterization to assert that the Residency Requirement is inconsistent with SRFN's history, custom and even Treaty No. 8.

[110] The Respondents submit that jurisprudence establishes that the term "ordinarily resident" is well known and is applied in a flexible manner (citing *Attorney General of Canada et al v Canard*, 1975 CanLII 137 (SCC), at 199; *Earl v Canada (Minister of Indian and Northern Affairs)*, 2004 FC 897 at para 24, among other cases). Further, that the requirement to be resident on the SRFN Reserve simply means that the SRFN Reserve must be the place of ordinary residence of nominees. Therefore, the Applicant's arguments challenging a conception of residence that has never been in use – disallowing travel, living off-reserve, as well as freedom of movement – does not assist him.

[111] I would first observe that, to the extent that the Applicant asserts that the right not to be confined to a reserve and the right to mobility arise in these circumstances, and that these asserted rights are Treaty No. 8 rights protected by s. 25 of the *Charter*, the evidence before me as to Treaty No. 8 is nominal.

[112] There is no expert evidence before me regarding Treaty No. 8. Beyond the bare text of the Treaty, there is the testimony of Ms. McRee. She testified that her understanding of the Treaty was that it was intended to last forever and to look after First Nations Treaty members who surrendered their land. Asked if she had heard of the term "land-in-severalty," Ms. McRee testified that her understanding was that every Treaty Indian was to be given 160 acres of land.

Ms. McRee was then referred by the Applicant to the text of Treaty No. 8 and was asked to read the portion of it which had been highlighted:

> And Her Majesty the Queen hereby agrees and undertakes to lay aside reserves for such bands a desire reserves, the same not to exceed in all one square mile for each family of five for such number of families as may elect to reside on reserves, or in that proportions for larger or smaller families; and for such families or individual Indians m [*sic*] may prefer to live apart from band reserves, Her Majesty undertakes to provide land in severalty to the extent of 160 acres to each Indian….

[113] When then asked about her understanding of this provision, Ms. McRee testified that before she read the provision, she thought each Treaty Indian was to be given 160 acres on-reserve. But, having now read the provision, she understood that if a person wanted the 160 acres then they did not have to live on-reserve. Asked if it was her understanding that living on-reserve is a Treaty right, Ms. McRee stated that in her opinion, reserves were created by government to control Indians. But, having now read the subject provision, she thought that Treaty Indians should be able to live wherever they want and be given their 160 acres. Asked if she was familiar with a Treaty No. 8 term or connection around a "way of life", she testified that she was not. Ms. McRee was also asked about SRFN governance but said that she did not have knowledge of pre-Treaty governance.

[114] Ms. Jean's evidence as to Treaty No. 8 was that it was a territorial distinction. She was also asked if she knew of any promises made pursuant to Treaty No. 8. She indicated "education" and "medical" and that the Treaty outlines the services, programs and funds to be provided to the reserve system. Referred to the land-in-severalty provision, she testified that her

understanding is that Treaty Indians do not necessarily have to live on the reserve to access those lands.

[115] In my view, given the nominal evidence before me concerning Treaty No. 8, it is not possible nor advisable for this Court to attempt to interpret and define what rights are afforded by the Treaty, which includes the land-in-severalty provision, or to construe those rights to determine what, if anything, they entail with respect to SRFN governance. More specifically, with respect to the location of residency of potential SRFN leaders. That is, for the purposes of the *Dickson* framework, if these rights as asserted and described by the Applicant exist and have application in these circumstances. And, if so, whether they trump SRFN's "other right", by way of the *Election Regulations*, to enact and enforce the Residency Requirement (see *Dickson*, at para 91). Nor does the Notice of Constitutional Question seek relief pursuant to any Treaty No. 8 rights.

SRFN Custom

[116] That said, it is true that the Residency Requirement is not a reflection of SRFN governance and custom as it existed since time immemorial.

[117] However, customs change. They are not frozen in time. The agreed facts include that, following reserve settlement in the 1930's, SRFN was governed by members ordinarily resident on a SRFN Reserve.

[118] There was also some evidence at trial speaking to the residency requirements post-Treaty No. 8 and prior to 2005. For example, Mr. Twin testified that he could not remember anyone sitting on council who was not resident on the Reserve and that the requirement arose because SRFN members wanted their council members to have knowledge of the First Nation by having lived there and occupied the land. He testified that even before SRFN election laws were written down, they were passed down through the generations, including residency. In 1996, he attended university in Calgary and was nominated and elected to council. Under the governance regulations in effect at that time, students who otherwise lived on-reserve were considered to be ordinarily resident on the Reserve. He finished his school term (his last semester) and returned to his home on the SRFN Reserve and took up his duties as a Councillor. However, on a later occasion, when he had been living and working in Edmonton for about 10 to 15 years, although he had a home on-reserve, his nomination to run for a SRFN Councillor position was refused because he was not ordinarily resident there. He appealed the decision, the appeal was denied, and he accepted that determination.

[119] Mr. Courtorielle also testified that there has always been a residency requirement and that he did not know of anyone having served as Chief or Councillor that was not resident on the Reserve.

[120] Significantly, by way of a referendum held in 2005 supported by majority vote by its members, SRFN adopted the *Election Regulations*, signifying their desire to codify their chosen election customs by ratifying the implementation of same. Customs evolve and it is open to First Nations to decide to effect election codes, including codes adopting Western approaches to

election and governance (see, for example, *Hunt v Kwakiutl First Nation*, 2024 FC 367 at para 33 [*Hunt*]).

[121] In *Whalen*, Justice Grammond discussed custom laws recognized by the *Indian Act* stating:

> [32] For a large number of First Nations including FMFN, the *Indian Act* states that the council is chosen according to the "custom" of the First Nation, but does not define what that "custom" is or who has the power to declare it. "Custom", in this sense, does not necessarily mean law rooted in practice or historical tradition. As Professor John Borrows aptly noted, "not all Indigenous laws are customary at their root or in their expression, as people often assume": *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010) (Borrows, Indigenous Constitution), at page 24. A review of this Court's jurisprudence shows that we understand "custom" to mean the norms that are the result of the exercise of the inherent law-making capacity of a First Nation: *Gamblin v. Norway House Cree Nation Band Council*, 2012 FC 1536, 55 Admin. L.R. (5th) 1, at paragraph 34; *Pastion*, at paragraph 13; *Mclean v. Tallcree First Nation*, 2018 FC 962, at paragraph 10. In other words, 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" [footnote omitted]: Ghislain Otis, "Elections, Traditional Governance and the *Charter*" in Gordon Christie, ed., *Aboriginality and Governance: A Multidisciplinary Perspective from Québec* (Penticton, B.C.: Theytus Books, 2006) 217, at page 220. Thus, it may be preferable to use the phrase "Indigenous law" instead of "custom". This Court has been prepared to recognize the existence of a rule of Indigenous law when it is shown to reflect the broad consensus of the membership of a First Nation: *Bigstone v. Big Eagle*, [1993] 1 C.N.L.R. 25 (F.C.T.D.), at page 20.

[122] Justice Grammond went on to say that there are two main ways in which such a "broad consensus" may arise. First, a law may be enacted by a majority vote of the membership of a First Nation, either at an assembly or in a referendum. Second, "broad consensus" can be

evidenced by a course of conduct which expresses the First Nation's membership's tacit agreement to a particular rule (at para 33; see also *Beardy v Beardy*, 2016 FC 383 at para 93 citing *Francis v Mohawk Council of Kanesatake*, 2003 FCT 115 and *McLeod Lake Indian Band v Chingee*, 1998 CanLII 8267 (FC), 153 FTR 257 (FCTD) holding that a custom may either be established through repetitive acts in time or through a single act such as the adoption of an electoral code; *Hunt*, at para 31 holding that custom may be demonstrated by a one-time event like a referendum or majority vote, by a series of events, or possibly acquiescence).

[123] Based on the evidence before me, it has been demonstrated that, since the establishment of the SRFN Reserve, SRFN custom has included a residency requirement for its leaders requiring them to be ordinarily resident on the Reserve when holding office. Further, that since at least 2005, by way of the ratification by the majority of SRFN members of the *2005 Election Regulations,* and for the following 19 years, the Residency Requirement for eligibility to be nominated to run for office has been codified as part of SRFN current custom. This was so, pursuant to the *Election Regulations*, when the Applicant sought to run for the position of Councillor.

[124] I appreciate the Applicant's point that the issue of a residency requirement and being ordinarily resident on-reserve is a post-treaty development as, prior to Treaty No. 8, SRFN and other First Nations had a more nomadic way of life and reserves did not exist. However, since at least 2005, SRFN custom, by the choice of the majority of SRFN members, has included the Residency Requirement. I am not persuaded, based on the evidence before me, that this choice can be disregarded or displaced merely because it does not reflect prior custom. And, as

discussed above, I am also not persuaded that the very limited evidence pertaining to Treaty No. 8 is sufficient to determine what, if any, mobility and related rights were afforded to SRFN members by the Treaty and if these conflict with and oust the "other right" to effect the Residency Requirement by way of the *Election Regulations*.

b) If characterized as an "other right", does the Residency Requirement protect or recognize Indigenous difference?

[125] The Applicant's arguments in this regard are premised on his view that the Residency Requirement does not reflect a custom or tradition of SRFN since time immemorial. His submissions also refer to matters, such as negotiations leading up to the signing of Treaty No. 8 and stories of Elders, which are not in evidence before the Court. Essentially, his position is that in the 1930's, the federal government's policy and intervention actively restricted leaders to smaller populations and required leaders to reside on a reserve. He submits that these actions not only infringed upon recognized rights of Treaty No. 8 communities, but abrogated the Indigenous difference that the land-in-severalty provision provides.

[126] I have found above that the Respondents have established that the Residency Requirement is an exercise of an "other right" under s. 25 – the right to effect and impose the Residency Requirement, which restricts the eligibility of SRFN members to be nominated to run for office, that is, to set criteria for nomination for election to membership in its governing body. However, the Respondents must also demonstrate that this right protects Indigenous difference, understood as interests connected to cultural difference, prior occupancy, prior sovereignty, or participation in the treaty process (*Dickson*, at paras 151–152, 180).

[127] In *Dickson*, the Supreme Court noted that the trial judge had made key factual findings about the historical and cultural context of residency. The trial judge noted that the historical evidence showed that "the Vuntut Gwitchin show a preference for leaders who demonstrate a knowledge of the land and traditions, commitment to community service, effective communication skills and wealth", and that "the consistent leadership theme narrated by the Elders is being accountable to the Vuntut citizens on a daily basis in Old Crow and at the annual General Assembly" (at para 211). The trial judge summarized his factual findings with respect to VGFN leadership and residency, including that: (i) the Vuntut Gwitchin people have governed themselves according to their traditional practices pre-dating the creation of Canada in 1867; (ii) since time immemorial to the present day, all VGFN Chiefs and Councillors have been residents in the VGFN Traditional Territory; and (iii) even in modern times, post the Final Agreement in 1993, the practice is for elected citizens to reside in Old Crow (*Dickson*, at para 212).

[128] The Supreme Court in *Dickson* also noted that the Yukon Court of Appeal had emphasized the significance of the connection between VGFN leadership and VGFN land, noting the evidence of a former VGFN Chief that "the very identity of the Vuntut Gwitchin has always been deeply rooted in the land itself" and that "Vuntut Gwitchin practices, customs and traditions related to leadership and governance are also rooted in the land itself" (at para 213). In the Chief's view, the VGFN's "decision-making processes are based on reaching consensus and having a Council who does not reside in our community would be wholly incompatible with our traditional governance." The Yukon Court of Appeal had also observed that the right to impose residency-based restrictions on the membership of its governing bodies enabled Vuntut Gwitchin society to preserve the distinctive emphasis it places on "its leaders' connection to the land". The

Supreme Court held that this was "plainly a foundation for the connection between Indigenous difference and the residency requirement in the VGFN Constitution" (*Dickson*, at para 210).

[129] Ultimately, the Supreme Court held:

> [216] The inquiry at this stage is whether the residency requirement protects Indigenous difference, such that it should be protected from abrogation or derogation by Ms. Dickson's s. 15(1) *Charter* right. We have considered Ms. Dickson's arguments that the residency requirement works to erode Indigenous difference by making non-resident citizens feel like "less valuable" members of the community and distancing them from the community's governance structure, on the one hand, and that the requirement is not based on traditional practices, on the other. However, we cannot accept Ms. Dickson's arguments that there is no evidence that the residency of the Councillors is "demonstrative of their knowledge of the land, or their interest in the land" or that the requirement is based on modern ideas of democracy (para. 83).
>
> [217] In light of the evidence and the factual findings at trial, we are satisfied that the residency requirement is an exercise of a right that protects interests associated with Indigenous difference. Requiring VGFN leaders to reside on settlement land helps preserve the leaders' connection to the land, which is deeply rooted in the VGFN's distinctive culture and governance practices. The residency requirement promotes the VGFN's expectation that its leaders will be able to maintain ongoing personal interactions between leaders and other community members. It also bolsters the VGFN's ability to resist the outside forces that pull citizens away from its settlement land and prevents erosion of its important connection with the land. Such interests are associated with various aspects of Indigenous difference, including Vuntut Gwitchin cultural difference and prior sovereignty, as well as their participation in the treaty process that culminated in the enactment of the VGFN Constitution.
>
> (emphasis added)

[130] In this matter, the Agreed Statement of Facts includes that, since time immemorial, ancestors of the Indigenous peoples that currently make up SRFN have engaged in a range of governance practices, which included methods of decision-making and leadership selection. The governance practices have evolved over the years, but they retain a number of specific elements of the pre-contact SRFN society. Leadership selection amongst SRFN's ancestors was informal and did not involve the election of individuals. Leaders were selected from amongst the membership on the basis of their inherent skills and ability to lead and provide for the members. And, since the 1930's, SRFN's elected leaders ordinarily resided with its members on SRFN Reserve land.

[131] The witnesses who testified before me all agreed that the land in and around the SRFN Reserve (the parties did not further describe what area comprises SRFN traditional territory), is very important to SRFN members and their culture.

[132] Ms. McRee stated that, in the Cree culture practiced at Swan River, the land plays an important central role, although she did not feel that members needed to be on the land for a one-year period in order to feel connected to the land.

[133] Ms. Jean testified that if the Residency Requirement were removed, and if she were elected, she would move back to the SRFN Reserve, although, on cross-examination she stated that she believed elected members should "be in the vicinity" of the Reserve. She testified that she believed that in order to be a part of the governing system, persons should be part of SRFN to fulfil a functional and productive positive leadership role.

[134] Ms. Jean also testified that she is involved with the SRFN community, both on- and off-reserve. She testified that SRFN people were migratory and were not restricted to one piece of land. They moved wherever food and water could be sourced. In her view, it was the *Indian Act* that established the reserves, and without the *Indian Act*, there would be no distinctions between on- or off- reserve. However, she agreed that ancestors passed down important cultural knowledge and that this knowledge often relates to the land. Further, that hunting, trapping, survival and other skills are very much respected in the SRFN community. She also agreed that elected leaders should know of and practice these skills and values to ensure that they have a strong connection to the land and to set an example for other members. She added that she has lived off-reserve all of her life and that "my connection came off". But she had seen Elders leave the Reserve to teach people and noted that SRFN members often hunt outside reserve land. In her view, the connection to the land is not limited to reserve land and SRFN culture is based throughout Canada. She was of the view that the cultural importance of the land to the community could be exercised without having to reside on the Reserve for one year prior to nomination to run for office. In that regard, she testified that she is a contemporary Jingle dancer and teaches that tradition and attends ceremonies throughout Alberta, British Columbia and Saskatchewan, and that such practices are not restricted to SRFN. She views herself as ordinarily resident on the land generally – not restricted to SRFN Reserve land.

[135] Mr. Twin's evidence was that the Residency Requirement is in place because SRFN members wanted council members to have knowledge of SRFN by having lived there and having occupied the land. The fear was that if a member was elected who did not have this knowledge, this could be a threat to SRFN's existence. He testified that there are informal laws that are

passed down through the generations. For example, with respect to hunting and taking care of the lands south of SRFN, which are considered to be their traditional territory. Asked if the Residency Requirement helps support the SRFN government, Mr. Twin testified that it is the right thing for the people and has been for decades. People like him had lived on the Nation (Reserve) for most of their lives and that members seeking elected office should have knowledge of the Nation's history, the people, and the issues they face.

[136] Mr. Courtorielle described his life over the years on the SRFN Reserve. He is a knowledge keeper and also teaches school children about the land and how to make a livelihood from it. In his view, the Residency Requirement (in one form or another) has worked well over the years and to change it would mean that off-reserve members would be running for office without having lived on the Reserve. He likened this to a leader of another country running for office in a country where they had never lived. Asked whether, when he left the Reserve for a month at a time to trap, if he felt less connected to the Reserve, he said that he guessed that he did because he and his family are always on the Reserve. He did not want to leave, but had to in order to earn money to support his family.

[137] Mr. Giroux was asked if a special relationship existed between SRFN and the lands in and around the Reserve and he testified that there was. These lands are where ceremonies have been passed down and practiced, and where loved ones are buried. He testified that he is connected to the land, it is his home, his people, it is everything. He stated that although some people say that the federal government made members stay on the Reserve, this actually had the effect of developing a strong nucleus. Otherwise, SRFN members would have been fanned out

across Canada. He questioned how 1,200 people spread across Canada could be considered a nation. As to the Residency Requirement, Mr. Giroux testified that if a member wants to be a leader, then they should know all of the SRFN customs, what the members do there, and their practices, from hunting to powwows and pipe ceremonies, and protocols around meetings. For example, with respect to meetings, members do not just go and meet. There are protocols followed first, like having a sweat, a talk or a pipe ceremony. Asked on cross-examination about the commencement of the observation of such ceremonies, Mr. Giroux testified that most of the Elders are residential school survivors, so these ceremonies were beaten out of them. However, since the early 2000's, in light of reconciliation and other developments, these customs are being revived.

[138] In my view, the evidence in this matter may not be as comprehensive as was the case in *Dickson*. However, it is sufficient to establish the significance of the connection between SRFN leadership and SRFN land, which connection is acknowledged by the parties. SRFN leaders were and are expected to be deeply connected to the land, to have knowledge of the land and SRFN culture, and to preserve and restore same. That is, the Residency Requirement is a right that protects interests associated with Indigenous difference. Requiring those who wish to be nominated to run for election to the offices of Chief and Council to reside on the Reserve for 12 months prior to nomination helps to ensure that potential leaders have a connection to the land, which is rooted in SRFN's culture and governance practices, "prevents erosion" of that important connection and, ensures that potential candidates have knowledge of SRFN customs and traditions (see *Dickson*, at para 217).

[139] Finally, I acknowledge the Applicant argument that this case can be distinguished from *Dickson* on the basis that in *Dickson*, the VGFN had amended and "improved" its residency requirement such that a non-resident VGFN member would have to actually be elected before being required to relocate (within 14 days) to settlement lands (*Dickson v Vuntut Gwitchin First Nation*, 2020 YKSC 22, at para 146). Conversely, that in this case, the residency requirement in the *2005 Election Regulations* was amended in the current *Election Regulations* to make the Residency Requirement for nomination eligibility more, not less, stringent, increasing it from three months to one year.

[140] I would first note that the change to the residency requirement in *Dickson* was not a fact that determined the outcome of that decision.

[141] That said, I agree that the one-year pre-nomination Residency Requirement is very onerous. As discussed above, it imposes a significant burden on off-reserve members that is not imposed on members on-reserve. However, both a requirement to live on-reserve when elected and a requirement to live on-reserve prior to being eligible to be nominated to run for election are residency requirements. Thus, the question at this stage would appear to be limited to whether the evidence establishes that the present, pre-nomination Residency Requirement protects and recognizes interests associated with Indigenous difference. In my view, the effect of the Residency Requirement is to ensure that those members who are seeking election will, by way of the requirement to live on-reserve prior to nomination, have become familiar with the SRFN's connection to the land, its customs, traditions and the issues facing the community before they can be nominated to run for elected office. That is, like in *Dickson*, the Residency

Requirement protects and recognizes Indigenous difference by preserving the connection between the members of SRFN leadership and the SRFN Reserve lands and customs. While this requirement may very reasonably be viewed as harsh, its ultimate purpose is to protect Indigenous difference.

[142] The Applicant also submits that *Dickson* is distinguishable because, unlike VGFN, SRFN is not "self-governing". The Respondents take issue with this assertion. They also submit that SRFN does not, as yet and like most First Nations, have its own constitution. However, it is governed by a custom code, being the *Election Regulations*. The Respondents submit that the lack of a constitution does not mean SRFN is not self-governing or serve to distinguish *Dickson*. Further, s. 25 of the *Charter* does not contain such a distinction. That is, s. 25 does not state that it applies only to self-governing communities – it applies to the Aboriginal peoples of Canada. A distinction cannot be made on the basis submitted by the Applicant as it would mean, for example, that if Canada did not agree to a formal self-governing agreement, including a constitution, then s. 25 would not apply to protect against the abrogation or derogation of any aboriginal, treaty or other rights or freedoms that pertain to the Aboriginal peoples of Canada for First Nations without their own constitution – which cannot be what is intended by s. 25.

[143] Given my reasons above, it is sufficient to say here that I do not agree with the Applicant that the Supreme Court's s. 25 analysis in *Dickson* can be distinguished simply because the VGFN had its own constitution. I agree with the Respondents that the lack of a formal constitution does not reduce protections afforded by s. 25 of the *Charter*.

iii. Does an irreconcilable conflict exist between the Residency Requirement and the Applicant's s. 15 Charter rights?

Applicant's position

[144] The Applicant argues that any perceived conflict between his s. 15 rights and SRFN's collective "other right" is reconcilable.

[145] His position is largely premised on a factual distinction between *Dickson* and this matter. Specifically, in *Dickson*, pursuant to the VGFN Constitution, any member, whether they reside on- or off-reserve, is eligible for nomination in an election. This allows for members of the VGFN to elect the candidates they view as best suited for leadership, regardless of residence. It is only upon successful election that leaders are required to reside on-reserve. In contrast, SRFN electors are restricted to voting only for members who have resided on-reserve for at least one year prior to an election. The Applicant submits that this serves as a much more stringent bar in comparison to the residency requirement in *Dickson*. Further, that the Court could reconcile any conflict by requiring SRFN to amend its Residency Requirement to ensure that s. 15(1) and s. 25 rights can co-exist. In requiring these amendments, the Court would not be abrogating any right of SRFN. Rather, it would be enacting the right enshrined in Treaty No. 8 to not be confined to a reserve as envisioned through the land-in-severalty provision and further respecting Indigenous difference.

Respondents' position

[146] The Respondents submit that there is an irreconcilable conflict between SRFN's collective right and the Applicant's individual *Charter* right, such that s. 25 must operate to shield SRFN's collective right. Here, just as in *Dickson,* there is no way to reconcile the Applicant's individual *Charter* claims (and the relief he seeks) with SRFN's collective rights. The collective right of SRFN must therefore take precedence.

Analysis

[147] In *Dickson*, the Supreme Court stated that in determining whether the VGFN had established that the conflict between the two rights was irreconcilable, such that the s. 25 right would be protected from the abrogation or derogation that would flow from giving effect to Ms. Dickson's s. 15(1) right, the two rights must be first properly interpreted, then compared to one another, as required by the s. 25 framework. The Supreme Court in that case concluded that the VGFN had demonstrated that the conflict between the two rights is irreconcilable and that, as a result, s. 25 could be invoked to protect the VGFN's residency requirement (at paras 219–220).

[148] In that regard, with respect to Ms. Dickson's s. 15(1) right, she had made out a *prima facie* case as a result of the distinction drawn on the basis of the analogous ground of non-resident status in a self-governing Indigenous community. She was unable to hold a position on the VGFN Council because she lived away from the settlement land. This distinction on the basis of her non-resident status reinforced and exacerbated the historical and continuing disadvantage faced by Indigenous people living away from their traditional lands (at para 221). As to the

content of the “other right”, the Supreme Court held that, at its core, the residency requirement protects and recognizes Indigenous difference by preserving the connection between the members of VGFN leadership and VGFN lands. The other ways the residency requirement protects these interests, such as promoting the VGFN’s ability to resist the pull of outside influences, are bound up in this connection (at para 222).

[149] The Court rejected Ms. Dickson’s argument that the VGFN could have adopted measures that would give effect to both the individual democratic rights at stake, and VGFN’s collective rights to govern and set eligibility criteria for their elected leaders. For example, that a single Councillor be selected from the VGFN citizens living in Whitehorse. The Supreme Court held that permitting one Councillor to reside in Whitehorse would undermine, in a non-incidental way, the VGFN’s right to decide on the membership of its governing bodies (at para 225). In that case, the Indigenous difference protected by the residency requirement was inextricably tied to leaders’ connection to the settlement land.

[150] The Supreme Court agreed with the Yukon Court of Appeal’s statement that “to apply s. 15(1) would indeed derogate from the Vuntut Gwitchin’s rights to govern themselves in accordance with their own particular values and traditions and in accordance with the ‘self-government’ arrangements entered into in 1993 with Canada and Yukon” (*Dickson*, at paras 224–225). In that regard, the Court of Appeal referred to evidence from the Executive Director of the VGFN that Ms. Dickson’s initial proposal to eliminate the residency requirement was not supported because it conflicted “with the widely held view that Vuntut Gwitchin

self-government and the protection of our culture is critically linked to the seat of our government being in Old Crow" (*Dickson*, at para 225).

[151] The Supreme Court held that for it to allow one of the four Councillors to reside in Whitehorse would unacceptably diminish this connection and concluded:

> [226] As a result, we cannot accept that the effects of such a change to the composition of the VGFN Council on the interests that the residency requirement advances would be merely incidental. To borrow the words of Professor Macklem, giving effect to Ms. Dickson's *Charter* right in such a manner would pose "a real risk to the continued vitality of [I]ndigenous difference" (p. 232). Giving effect to Ms. Dickson's s. 15(1) right would abrogate or derogate from an "other" right that belongs to the VGFN. The two rights are, therefore, irreconcilably in conflict.

[152] In the matter before me, the Applicant has also established a *prima facie* breach of his s. 15(1) right not to be discriminated against based on his off-reserve band member status as a result of the Residency Requirement, which precluded him from being nominated to run for office as a SRFN Councillor. The Applicant was unable to run for this governance position because he did not reside on the SRFN Reserve during the 12 months prior to the election. This distinction on the basis of his off-reserve status reinforces and exacerbates the historical and continuing disadvantage faced by First Nations members who do not live on their community's reserve land.

[153] As discussed above, the evidence in this matter is sufficient to establish that SRFN leaders have been and are expected to be deeply connected to the land and that they will have knowledge of the land, SRFN culture, and that they will act to preserve and restore same. In the context of s. 25, the Residency Requirement recognizes and serves to protect Indigenous

difference by preserving the connection between the members of SRFN leadership and SRFN Reserve lands. That is, the pre-nomination Residency Requirement ensures that potential nominees and candidates who run for office will have gained this knowledge prior to election. As in *Dickson*, removing the Residency Requirement would undermine, in a non-incidental way, SRFN's right to effect and impose the Residency Requirement. That is, to decide on the membership of its governing body. The Indigenous difference protected by the Residency Requirement is inextricably tied to leaders' connection to the Reserve land. What the Residency Requirement protects is that persons like the Applicant, who have never lived on the SRFN Reserve, will have a connection to the land and SRFN customs, which SRFN deems essential to its governance.

[154] I appreciate the Applicant's view that a one-year pre-election Residency Requirement is onerous. However, the analysis required is a comparison of an individual's right not to be discriminated against with the collective right of SRFN to preserve Indigenous difference. To apply s. 15(1) would derogate from the SRFN right to effect and impose the Residency Requirement, which restricts the eligibility of SRFN members to be nominated to run for office, that is, to govern itself in accordance with its own particular values and traditions, as reflected by ratification of the *Election Regulations* by the majority of the SRFN members.

[155] Unlike *Dickson*, the Applicant here does not propose a method by which the s. 15 and s. 25 rights can be reconciled. Rather, he simply submits that it is possible for the Court to reconcile any conflict by requiring an amendment of the Residency Requirement to ensure this. Similarly, the remedy that he seeks in his Amended Notice of Application does not propose a

method of reconciliation. All it seeks is an order that the Nomination Decision be set aside, a declaration that the Applicant is eligible to run as a candidate for the position of Councillor, and a declaration that the Residency Requirement is unconstitutional and of no force and effect and is not protected by s. 25 of the *Charter*.

[156] In his closing arguments, the Applicant submitted that any conflict between individual and collective rights could be reconciled by removing the Residency Requirement while maintaining the requirement to move to the Reserve after election (which requirement has not been challenged in this matter). While I agree that the Applicant's proposal would impose a much less onerous burden on off-reserve members seeking election, as I have found above, reconciling these rights in the way the Applicant seeks would undermine, in a non-incidental way, SRFN's right to effect and impose the Residency Requirement and thereby to decide on the membership criteria and composition for its governing body. Accordingly, I am not persuaded that this would preserve Indigenous difference.

[157] Before leaving this point, I would observe that s. 17.1 of the *Election Regulations* addresses amendments to the *Election Regulations*:

> **17.1** Amendments to the Customary Election Regulations may be prepared and presented by the Band Council upon written request to the Council by Twenty five (25 %) percent of the electors of the Swan River Band.
>
> **17.2** Once received by the Council, the amendment request, the Council shall provide to the members of the Band, sixty (60) days notice of the proposed amendments to the Customary Election Regulations. Notices shall be publicly posted in the Swan River First Nation Band Office.

> **17.3** Amendments shall be consented to by a majority of the electors of the Band by way of Referendum or petition held sixty (60) days after the posting of the proposed amendment.

[158] Mr. Giroux testified that the *Election Regulations* set out the amendment process and that Chief and Council do not have authority to simply delete provisions of the *Regulations*. Rather, amendment must be made by the will of the SRFN members. To Mr. Giroux's knowledge, neither Mr. Houle nor Ms. Jean had ever submitted a petition in an effort to amend the *Election Regulations*, nor had anyone else. He testified that the prior Chief and Council had applied for funding to review the *Election Regulations* as its wording was not ideal and problems had arisen in connection with its terms. Funding was subsequently received by the current Chief and Council and that former Chiefs, Elders and others are now working with legal counsel to identify concerns with the *Election Regulations*. Whatever they might suggest will be taken to the SRFN members and discussion meetings will be held, perhaps early in 2025. But, at the end of the day, it is up to the membership to decide if they want to amend the regulations, effect new ones, or do anything at all.

[159] Asked about the amendment provision in the *Election Regulations*, Ms. Jean acknowledged that this process starts with a petition. She confirmed that she had not pursued a petition, nor had she or the Applicant filed an appeal of the Nomination Decision or the decision concerning her nomination for Chief. She testified that she brought her application for judicial review instead. She also testified that, in her view, Chief and Council members should live in the vicinity of the Reserve and that she had approached Chief and Council about the possibility of a boundary system. She acknowledged that she had not brought a petition in an effort to have the *Election Regulations* amended to reflect a boundary system and that Chief and Council do not

have the authority to amend the *Election Regulations*. However, she noted that they are the elected governing body and are the people to whom members take their concerns.

[160] There is no evidence that the Applicant has sought to utilize the *Election Regulations* amendment process in an effort to have the pre-nomination Residency Requirement changed. And, as noted above, the post-election residency requirement has not been challenged. While the Applicant acknowledged when arguing before me that Chief and Council cannot unilaterally change the *Election Regulations* and that the amendment process prevails in that regard, he suggested that Chief and Council could possibly push for a petition and that, in his view, the *Election Regulations* are outdated.

[161] Although not relevant to the Applicant's constitutional challenge, I raise the above simply to identify that there are remedies available to the Applicant, and other SRFN members both on- and off-reserve, who may wish to have the Residency Requirement amended. Further, that the evidence is that Chief and Council have requested a review of the *Election Regulations* and will bring any proposed amendments to the SRFN members for determination.

[162] Similarly, while the Applicant makes other arguments, including that it is unreasonable for "imaginary lines" drawn around the community of Kinuso (which is surrounded by the SRFN Reserve) to determine eligibility for fundamental rights such as full participation in the SRFN election system, these are not relevant to the grounds of his Application for Judicial Review or his constitutional challenge.

iv. Do applicable limits exist to limit SRFN's collective interest?

[163] In *Dickson*, the Supreme Court held that even when s. 25 of the *Charter* would otherwise prioritize an Aboriginal, treaty, or other right, there may be other relevant limitations on the application and effect of s. 25. It noted as examples s. 28 of the *Charter* and s. 35(4) of the *Constitution Act, 1982*. Section 28, embedded like s. 25 in the "General" provisions of the *Charter*, directs that "[n]otwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons." Section 35(4) provides: "Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons." These ensure that a right protected under s. 25 does not shelter gender-based discrimination. However, the Supreme Court noted that precisely demarcating the limits of s. 25's protections, including those resulting from other constitutional sources, is best left to cases when they arise on the facts (*Dickson*, at paras 173, 227).

[164] In this case, neither party submits that there are applicable further limitations.

Section 1 of the *Charter*

[165] Finally, because I have found that s. 25 applies to the Residency Requirement, SRFN need not justify the requirement under s. 1 of the *Charter* (*Dickson*, at para 227).

Conclusion

[166] For the reasons above, I conclude that s. 25 operates as a shield to protect the Residency Requirement from the Applicant's s. 15(1) claim.

Costs

[167] Both parties sought costs but neither made submissions as to quantum or otherwise.

[168] Pursuant to Rule 400(1) of the *Rules*, the Court has full discretionary power over the amount and allocation of costs and the determination of by whom they are to be paid. In exercising that discretion the Court may consider the factors set out in Rule 400(3), which include: the result of the proceeding; the importance and complexity of the issues; whether the public interest in having the proceeding litigated justifies a particular award of costs; any conduct of a party that tended to shorten or unnecessarily lengthen the duration of the proceeding; and, any other matter that the Court considers relevant. The Court may fix all or part of any costs by reference to Tariff B and may award a lump sum in lieu of, or in addition to, any assessed costs (Rule 400(4)).

[169] In this matter, in the absence of submissions beyond requests for costs, I am of the view that an award costs to the Respondents, as the successful party, based on Column III of Tariff B is appropriate (Rule 407).

JUDGMENT IN T-903-19

THIS COURT'S JUDGMENT is that:

1. The application for judicial review, as converted to an action, is dismissed; and

2. The Respondents shall have their costs based on Column III of Tariff B.

"Cecily Y. Strickland"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-903-19
STYLE OF CAUSE:	ROBERT HOULE AND SHAWNA JEAN v SWAN RIVER FIRST NATION AND SWAN RIVER FIRST NATION CHIEF AND COUNCIL
PLACE OF HEARING:	EDMONTON, ALBERTA
DATE OF HEARING:	SEPTEMBER 23, 2024, SEPTEMBER 24, 2024, SEPTEMBER 25, 2024
REASONS FOR JUDGMENT AND JUDGMENT:	STRICKLAND J.
DATED:	FEBRUARY 12, 2025

APPEARANCES:

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Evan C. Duffy	FOR THE RESPONDENTS

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