Federal Court  Cour fédérale

Date: 20250908

Docket: T-139-19

Citation: 2025 FC 1482

Ottawa, Ontario, September 8, 2025

PRESENT: The Honourable Madam Justice Strickland

BETWEEN:

WAYNE GARRY CUNNINGHAM

Applicant

and

SUCKER CREEK FIRST NATION 150A

Respondent

ORDER AND REASONS

[1] This matter was comprised of two parts, both of which have previously been determined. These reasons are concerned with costs.

[2] In the first part of this matter, I determined that s. 6.4 of the *Customary Election Regulations of the Sucker Creek First Nation #150A* [Election Regulations], which requires electors to continuously reside on the Sucker Cree First Nation [SCFN] reserve for at least six months prior to the date of their nomination to run for election to the positions of Chief or

Councillor [Residency Requirement], unjustifiably infringed the Applicant's rights under 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*] (*Cunningham v Sucker Creek First Nation 150A*, 2021 FC 1221) [Part One]. More specifically, I found that the Residency Requirement discriminates against the Applicant, on the basis of his off-reserve band member status, by prohibiting him from participating in band governance as an elected representative to Chief and Council and that the infringement of the Applicant's s. 15 rights was not justified by s. 1 of the *Charter*.

[3] I also exercised my discretion and permitted SCFN to raise s. 25 of the *Charter* in the second part of this judicial review, should it elect to do so.

[4] SCFN did elect to proceed with the second part of the judicial review. In that regard, SCFN filed a Notice of Constitutional Question which asked, in essence, if s. 25 of the *Charter* should be applied in this case to shield or otherwise protect the Election Regulations from a declaration of invalidity made pursuant to s. 15 of the *Charter*. For the reasons set out, I concluded that s. 25 operates as a shield to protect the s. 6.4 Residency Requirement from the Applicant's s. 15 claim (*Cunningham v Sucker Creek First Nation 150A*, 2025 FC 1174) [Part Two].

[5] As to costs, in Part One, I ordered that the parties were to include any joint or other submissions as to costs with the Part Two submissions. However, the parties instead requested that they be permitted to make written submissions regarding costs after the Court's decision on

Part Two of this judicial review had been issued. On June 5, 2025, I issued a direction to the parties informing them that separate or joint written submissions as to costs, not exceeding three pages in length, could be submitted and that a separate order would respond to the same. The parties were encouraged to reach a mutually agreed costs proposal. I subsequently issued my decision in Part Two on July 15, 2025.

[6] I have now reviewed the parties' costs submissions.

[7] As the parties acknowledge, Rule 400(1) of the *Federal Courts Rules*, SOR/98-106 [Rules] provides that the Court has full discretionary power over the amount and allocation of costs. Rule 400(3) sets out factors in awarding costs that the Court may consider in exercising its discretion, this includes the result of the proceeding, the importance and complexity of the issues and whether the public interest in having the proceeding litigated justifies a particular award of costs. Rule 400(6)(a) specifies that, notwithstanding any other provision of the Rules, the Court may award or refuse costs with respect to a particular issue or step in a proceeding.

[8] This is an unusual set of circumstances. The Applicant, who started out as a self-represented litigant in his s. 15 *Charter* challenge, ultimately retained council and was successful in Part One.

[9] As he acknowledges in his costs submissions, in Part Two the Applicant retained counsel and received significant financial assistance from the Court Challenges Program. This assistance does not affect the assessment of costs. However, in these circumstances, it is a factor that should

be considered insofar as this is not a case where there has been an imbalance of power and resources in the subject litigation. The Applicant was not successful in Part Two of this matter.

[10] Another factor to be considered is that the law pertaining to s. 25 of the *Charter* evolved between the time of the determination of Part One and the determination of Part Two. Specifically, the Supreme Court of Canada issued its decision in *Dickson v Vuntut Gwitchin First Nation*, 2024 SCC 10 [*Dickson*] and set out the required s. 25 analytical framework – which was interpreted and applied in Part Two. For both parties, and likely for other First Nations who are also governed by custom election laws, the s. 25 issue was both novel and significant.

[11] The Respondent submits that this is not a case of divided success. In these unusual circumstances, I do not agree.

[12] I do agree that the case was complex and novel. I am also of the view that both parties made best efforts to provide relevant expert evidence in support of their respective arguments, in the face of the evolving law, at the time that their experts were retained and instructed.

[13] Considered in its entirety, it is my view that this is a circumstance in which it is just that both parties bear their own costs.

ORDER IN T-139-19

THIS COURT ORDERS that both parties shall bear their own costs.

"Cecily Y. Strickland"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-139-19
STYLE OF CAUSE:	WAYNE GARRY CUNNINGHAM v SUCKER CREEK FIRST NATION 150A
PLACE OF HEARING:	EDMONTON, ALBERTA
DATE OF HEARING:	APRIL 15, 2025
ORDER AND REASONS:	STRICKLAND J.
DATED:	SEPTEMBER 8, 2025

APPEARANCES:

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