Federal Court Cour fédérale

Date: 20250715

Docket: T-139-19

Citation: 2025 FC 1174

Ottawa, Ontario, July 15, 2025

PRESENT: The Honourable Madam Justice Strickland

BETWEEN:

WAYNE GARRY CUNNINGHAM

Applicant

and

SUCKER CREEK FIRST NATION 150A

Respondent

JUDGMENT AND REASONS

[1] This is the second part of the judicial review concerning the decision of the Sucker Creek First Nation Election Appeal Committee, which upheld the determination of the Electoral Officer of Sucker Creek First Nation [SCFN] that Mr. Cunningham [Applicant] was ineligible for nomination to stand for election as Chief of SCFN.

[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 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 [*SCFN No.1* or 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. Further, that the infringement of the Applicant's s. 15 rights was not justified by s. 1 of the *Charter* (*SCFN No.1*, at paras 49, 69). 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.

[3] SCFN has elected to proceed with part two of the judicial review [Part Two]. In that regard, pursuant to an Order of the case management judge dated March 9, 2022, SCFN filed a Notice of Constitutional Question on April 14, 2022. This asks, 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*.

[4] For purposes of clarity, I note here that the parties agree that what is at issue before me is not the constitutionality of the whole of the Election Regulations. Only the Residency Requirement is at issue.

[5] SCFN filed its Part Two application record on May 10, 2024 (comprised of some 10,000 pages) and the Applicant filed his responding record on July 17, 2024. The matter was originally set down to be heard on September 12, 2024, but due to exceptional circumstances was adjourned on consent. It was heard on April 15, 2025.

[6] The factual background to this matter has been set out in *SCFN No. 1*. It is not in issue. It suffices to say here that SCFN is an Indian Band as defined by the *Indian Act*, RSC 1985 c I-15 [*Indian Act*]. The SCFN reserve lands are located along the southwest shore of Lesser Slave Lake, north of Edmonton, Alberta. The Applicant was raised as a Cree speaker and claims strong connections to his culture, traditions and to SCFN members. Growing up, he and his family lived in the hamlet of Joussard, a community located on the outskirts of the SCFN reserve. Neither he nor his parents were eligible for membership in SCFN until amendments to the *Indian Act* were made in 1985. The Applicant applied for and became a member of SCFN in 2002. The Applicant has never lived on the SCFN reserve. His home is located about 12 kilometres, or five miles as the crow flies, from the SCFN reserve boundary – about a 10-minute drive to the SCFN Band Office.

Relevant Legislation

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

> **Equality before and under law and equal protection and benefit of 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.

> **Aboriginal rights and freedoms not affected by Charter**
>
> **25** The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including
>
> > **(a)** any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and
> >
> > **(b)** any rights or freedoms that now exist by way of land claims agreements or may be so acquired.

The Customary Election Regulations of the Sucker Creek First Nation #150A

> **6.4 Persons Eligible for Nomination**
>
> **a)** Subject to 6.4(b) and 16.3, any Elector who is Eighteen (18) years of age or older on or by the Election Day and who continuously resided on the First Nation for at least six (6) months prior to the date of nomination is eligible to be nominated for the position of Chief or Councillor.
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> **b)** A person may only be nominated for the position of Chief or Councillor. No one may run for both offices.

Issue

[7] The sole issue in Part Two of this matter is whether the Residency Requirement is protected, or shielded, by s. 25 of the *Charter*. As will be discussed below, the framework for assessing that issue was set out by the Supreme Court of Canada [Supreme Court] in *Dickson v Vuntut Gwitchin First Nation*, 2024 SCC 10 [*Dickson*].

The Evidence

[8] SCFN has submitted the following affidavits in support of its position:

a) Affidavit of Fred Badger, sworn on February 19, 2020;

b) Affidavit of Dickie Willier, sworn on February 19, 2020 [Dickie Willier Affidavit]:

c) Affidavit of Deborah Willier, sworn on February 27, 2020 [Deborah Willier Affidavit];

d) Affidavit of Matthew Willier, sworn on June 19, 2023;

e) Affidavit of Chief Roderick Willier, sworn on December 19, 2023; and

f) Affidavit of Fred Willier, sworn January 19, 2024.

[9] The Applicant has submitted the following affidavits in support of his position:

a) Affidavit of Wayne Garry Cunningham, sworn January 28, 2020 [Cunningham Affidavit]; and

b) Supplemental Affidavit of Wayne Cunningham, sworn December 14, 2023.

[10] The parties have also filed transcripts from the cross-examination of affiants, and SCFN has filed various answers to undertakings arising from those cross-examinations.

Expert Evidence

[11] Each party has also filed an expert affidavit.

[12] SCFN submitted the expert affidavit of Mr. Peter Fortna, of Willow Springs Strategic Solutions Inc., sworn on November 29, 2022, with attached expert report entitled *History of Sucker Creek First Nation Nehitaw Governance Traditions – From 1800-2020* [Fortna Report] as well as the Supplemental Affidavit of Peter Fortna, sworn on February 28, 2023.

[13] SCFN seeks to have Mr. Fortna qualified as an expert in the following areas:

a) the history of Indigenous communities in Northern Alberta, including performing historic and archival research regarding these communities and their historic customs, practices and traditions, as well as interpreting historic documents; and

b) Indigenous community-based research, including collecting and interpreting information from Indigenous communities in Northern Alberta regarding Indigenous history, customs, practices and traditions.

[14] The Applicant does not oppose the proposed qualifications, which qualifications I accept.

[15] The Applicant has submitted the expert affidavit of Dr. Patricia A. McCormack, of Native Bridges Consulting, Inc., sworn on December 6, 2023, including her expert report [McCormack Report]. The Applicant proposes that Dr. McCormack be qualified as an expert in this proceeding as:

> an anthropologist and ethnohistorian specializing in the ethno-history of Aboriginal people in North America, and, in particular, the people of the subarctic, Canadian North and Northwestern Plains.

[16] SCFN does not oppose the proposed qualifications of Dr. McCormack, which qualifications I accept.

Preliminary Observation

[17] As the parties discussed when appearing before me, the expert affidavits and other supporting documentation were prepared prior to the Supreme Court's decision in *Dickson*. Further, their written submissions were prepared prior to my post-*Dickson* decision in *Houle v Swan River First Nation*, 2025 FC 267 [*Houle*], which concerns a neighbouring Cree First Nation which, like SCFN, adopted a custom election code. Thus, the parties' written submissions with respect to some aspects of this matter may not reflect these developments. For example, much of the historical information provided may not have application in this circumstance where a custom election code has been adopted by SCFN, although it may still assist in determining if the Election Regulations, or more specifically the Residency Requirement, preserves Indigenous difference.

[18] In these reasons, I will endeavour to address this by also incorporating the parties' oral arguments made at the hearing that may be relevant to this change of circumstance.

Dickson Framework

[19] 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.

[20] 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*.

[21] 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*.

Analysis

i. Did the Residency Requirement breach the Applicant's s. 15 *Charter* rights?

[22] As noted above, in Part One of this judicial review, I found that the Residency Requirement discriminates against the Applicant, on the basis of his off-reserve band member status, by prohibiting him from running for the office of Chief and Council. That is, the Residency Requirement breached the Applicant's equality rights under s. 15 of the *Charter*. Accordingly, the first aspect of the *Dickson* framework has been satisfied.

ii. Is the Residency Requirement an "other right" or the exercise of an "other right" under s. 25? If so, does the Residency Requirement protect or recognize Indigenous difference?

a) Is the Residency Requirement an "other right"?

SCFN's position

[23] SCFN submits that its characterization of the Residency Requirement as an "other right" is similar to the Supreme Court's characterization in *Dickson*, being "the right to set criteria for membership in its governing body" (*Dickson*, at para 185). However, unlike *Dickson*, where the right was grounded in a First Nation's constitution and a s. 35 treaty, SCFN's right is grounded in its inherent right to self-governance through custom law, as recognized by s. 2(1)(d) the *Indian Act*.

[24] SCFN submits that the Election Regulations demonstrate the clear intention of the SCFN members to express their inherent self-governance powers in accordance with their own distinctive customs and practices. The evidence supports that the Election Regulations constitute a band customary law achieved by broad consensus (citing *Da'naxda'xw First Nation v Peters*, 2021 FC 360 at paras 66–67 [*DFN*]). As such, the Residency Requirement qualifies as an "other right" within the meaning of s. 25.

[25] When appearing before me, SCFN added that this matter is indistinguishable from *Houle*, where I found that it was not necessary to determine whether the source of the "other right" asserted arose from the First Nation's inherent right of self-governance. Rather, that it was sufficient to find that one source of the "other right" arose by way of the First Nation's election regulations, which codified its election customs. This was a statutory right as the exercise of the First Nation's authority to govern via its election regulations stemmed from the *Indian Act*.

Applicant's position

[26] The Applicant argues that the s. 25 analysis of the Residency Requirement, as an alleged "other right" under s. 25, is subject to several limits. First, the asserted right lacks a constitutional character. Second, the "collective interest" at stake is that of on-reserve members of SCFN rather than the SCFN membership, generally. This is because the Residency Requirement was passed via plebiscite in which off-reserve members were not allowed to participate [1996 Plebiscite]. The Applicant submits that this point, in and of itself, is a "fatal flaw" to SCFN's case as SCFN seeks to protect a collective right or interest "based on a political distinction or division within the SCFN membership". Lastly, a balancing of the Applicant's individual rights against

collective rights is integral within the legal tradition of *wâhkôhtowin*, which governed the bands living in the area around Lesser Slave Lake prior to adhesion to Treaty No. 8. In that context, it is "not clear" whether the Applicant's individual *Charter* rights must yield completely to SCFN's asserted collective right.

[27] The Applicant submits that in *Dickson*, the residency requirement was found to have a constitutional dimension because it was part of the Vuntut Gwitchin First Nation [VGFN] Constitution and because it was an aspect of VGFN's law that preserves and enshrines an important dimension of VGFN leadership traditions and practices and VGFN's leaders' connection to the land (citing *Dickson*, at para 218). Here, the Election Regulations in and of themselves do not have constitutional character or status. Further, the McCormack Report establishes that a connection to the land is not present here. More specifically, SCFN's legal tradition, as expressed through *wâhkôhtowin*, includes a connection to traditional land, which has some parallels with the traditional law at issue in *Dickson*. But the SCFN legal tradition does not contemplate reserve land. To the extent that it may include reserve land, it does not extend exclusively to reserve land. In *Dickson*, protecting the residency requirement shielded a traditional practice that the VGFN leaders reside on traditional territory – not in a city located hundreds of kilometres away. The Applicant submits that although SCFN tries to draw parallels to *Dickson*, it offers no evidence to demonstrate that residing on reserve land, rather than on traditional land in close proximity to the SCFN reserve, preserves an important dimension of SCFN's traditional leadership practice. The Applicant further submits that, in the absence of such evidence, SCFN appears content to defend a Residency Requirement rooted in colonial practice and imposed under the *Indian Act* as somehow expressive of *wâhkôhtowin*. Yet SCFN is

dismissive of the Applicant's strong kinship connections to SCFN members living on- and off-reserve, as well as his connection to his language, culture and traditional practices carried out on SCFN traditional lands. This evidence relates directly to whether the Residency Requirement is consistent with traditional leadership practices as expressed in *wâhkôhtowin*.

[28] The Applicant submits that even if this Court finds that a constitutional dimension exists in the Residency Requirement, SCFN failed to produce the necessary evidence to establish the right. SCFN asks this Court to determine the existence of the other right based on an argument that the Election Regulations meet the legal test of representing a band custom, however, the Applicant asserts that this is not an issue before the Court.

[29] In any event, the evidence is insufficient. SCFN cannot meet its evidentiary onus by arguing that a lack of evidence exists on certain arguments. More specifically, if the right SCFN asserts is based on establishing that the Election Regulations are broadly supported by the SCFN membership, then it must provide sufficient evidence to demonstrate that it has met the required test (*DFN*, at para 72; *Hunt v Kwakiutl First Nation*, 2024 FC 367 at para 31 [*Hunt*]) but it has failed to do so. The Applicant asserts that the Election Regulations were approved in the 1996 Plebiscite where off-reserve members could not vote and that SCFN has not been able to provide any evidence regarding the voter turnout in the 1996 Plebiscite or details of how the vote was conducted. The Applicant submits that this problem cannot be overcome by the evidence SCFN relies on regarding subsequent reviews of the Election Regulations nor by SCFN's suggestion that the Election Regulations have been unchallenged between 1996 and the 2018 election, and that there is evidence of ongoing concern.

Analysis

[30] As a starting point, and for purposes of providing context, the Supreme Court in *Dickson* described the purpose of s. 25 of the *Charter* as follows:

> [107] The purpose of s. 25 is to uphold certain collective rights and freedoms of Indigenous peoples when those collective rights conflict with an individual's *Charter* rights. When an individual's *Charter* right would abrogate or derogate from an Aboriginal, treaty, or other right, s. 25 requires the collective Indigenous right to take precedence, even if the *Charter* claimant is a member of the First Nation concerned.
>
> ……
>
> [143] We thus conclude that the purpose of s. 25 is to protect certain Indigenous collective rights from the application of conflicting individual *Charter* rights or freedoms, when such application would diminish the Indigenous difference protected and recognized by the collective rights. When the application of the individual right would undermine in an essential or non-incidental way the Indigenous difference protected by the collective right, s. 25 directs that the collective right be given primacy. This differs from the process of determining whether the impairment of an individual *Charter* right is justified in a free and democratic society under s. 1 of the *Charter*, which is not solely targeted at protecting the collective minority right as a social and constitutional good.

[31] As I recently described in *Houle*, the challenge to the residency requirement in *Dickson* arose in the context of the legal framework established by the modern land claim treaty process and self-government agreements among the 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 that 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 (*Houle*, at para 47).

[32] Like *Houle*, and unlike *Dickson*, in this matter SCFN does not have a constitution arising from a self-governing agreement, which constitution includes a residency requirement. Rather, the Residency Requirement is found as a provision within the Election Regulations.

[33] In *Dickson*, the Supreme Court explicitly narrowed its approach to the application of s. 25 of the *Charter*. It 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 v Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203 [*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. The Supreme Court stated that because *Corbiere*, and other existing jurisprudence of the Supreme Court, provided only a modest guide to the appeal before it in *Dickson*, this invited caution. As a result, the Supreme Court's 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* (*Dickson*, at paras 104–106; *Houle*, at para 83).

[34] This brings us to the first basis on which the Applicant argues that, in this matter, *Dickson* can be distinguished, or its application limited, being that the asserted "other right" (here, embodied in or exercised by the Residency Requirement) does not have a constitutional character.

- *Constitutional Character*

[35] In *Dickson*, Ms. Dickson argued that only rights with constitutional status – in the sense that they cannot be repealed or altered by ordinary legislation – are protected under s. 25. The Supreme Court held that *Charter* rights are not absolute and that potential limitations on the scope of "other rights" under s. 25 include limits on the right's sources, which it referred to as "formal" restrictions, and limits on the nature of the right, which it referred to as "substantive" restrictions. Further:

> [149] It is clear from the text and purpose of s. 25 that the provision's protections are not restricted to rights with "constitutional status", understood as rights that cannot be repealed or altered by ordinary legislation, as argued by Ms. Dickson. The possibility of such a formal restriction is foreclosed, in particular, by the express inclusion of rights recognized by the *Royal Proclamation, 1763*, which is not one of the documents that comprise the Canadian Constitution by virtue of s. 52(2) and is seen as having "force as a statute" in a manner analogous to the status of the Magna Carta (*Calder v. Attorney-General of British Columbia*, [1973] S.C.R. 313, at p. 395, per Hall J.). Further, as the intervener the Attorney General of Canada notes, were s. 25 intended to only protect rights and freedoms with constitutional status, "the provision would presumably have referred to a right or freedom guaranteed by the Constitution of Canada, as was done in

> s. 29 of the *Charter*" (I.F., at para. 45). As a result, the rights protected under s. 25 are not limited to those that are constitutionally entrenched and may instead include ordinary statutory rights (see also *Corbiere*, at para. 52, per L'Heureux-Dubé J.).
>
> [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.
>
> [151] The Attorney General of Canada intervenes to say that a restriction on the scope of "other" rights is that they must have a "constitutional character" in a substantive, rather than a formal, sense (see, e.g., I.F., at para. 44). While Bastarache J. suggested that a "constitutional character" requirement stands in opposition to a broader, minority rights approach focused on protecting rights associated with Indigenous difference (*Kapp*, at paras. 102-3), it may be that the two are compatible if protecting Indigenous difference has inherent constitutional significance. However, since the asserted right at issue here has a constitutional character, we would leave for another day whether "constitutional character" represents a distinct substantive restriction on "other" rights.

[36] The Supreme Court later returned to the question of constitutional character of the *Dickson* residency requirement, holding:

> [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.

[37] In this matter, the Applicant submits that a "constitutional dimension" is required to establish an "other right", which is protected by s. 25. He bases this on *Dickson* at paragraph 143 and *R v Kapp*, 2008 SCC 41 at paragraph 63.

[38] In my view, these two paragraphs do not assist the Applicant. Paragraph 143 of *Dickson* (set out above in paragraph 30 of these reasons) speaks to the purpose of s. 25 and the second branch of the *Dickson* analytic framework, which requires SCFN, as the party defending against the *Charter* claim, to demonstrate both the existence of the asserted right and the fact that it protects or recognizes Indigenous difference. Paragraph 63 of *Kapp* concerns whether a commercial fishing license lies within s. 25. The Supreme Court held that the wording of s. 25 suggested that not every aboriginal interest or program falls within the scope of s. 25. Rather, that only rights of a constitutional character are likely to do so. It questioned, without deciding, if a fishing license was a s. 25 right or freedom.

[39] And, as set out above, in *Dickson* the Supreme Court did not determine if "constitutional character" represents a substantive restriction on "other rights". But it did find that the residency requirement in that case preserved and enshrined an important dimension of VGFN's leadership traditional practices and its leaders' connection to the land. Further, that the evidence established

that it was intended to reflect and promote VGFN's particular traditions and customs relating to governance and leadership. As such, the Supreme Court held that the residency requirement had a "constitutional character."

[40] Accordingly, if a constitutional character is required in this case, then the Residency Requirement will meet that criterion if it is established on the evidence that it, too, preserves SCFN leadership practices and SCFN's traditions and customs relating to governance – which I have found below that it does.

[41] But even if that were not so, in *Dickson* the Supreme Court also held that it was not persuaded that the rights protected under s. 25 are limited to those that are constitutionally entrenched and found that they may instead include ordinary statutory rights. This leads to the role of the Election Regulations in this matter.

- *Source of the Other Right and the Role of the Election Regulations*

[42] SCFN submits that its right to set criteria for membership in its governing body, that is, the right to select its leaders in accordance with the Election Regulations, is a right grounded in its inherent right to self-governance through custom law recognized by the *Indian Act*. Referencing *Hunt*, SCFN submits that this Court has repeatedly found that the power to enact custom election laws flows from the inherent jurisdiction of Indigenous nations. SCFN submits that s. 2(1)(d) of the *Indian Act* does not grant First Nations the right to run elections according to their customs, but it does recognize that power. The Election Regulations evince the clear intention of SCFN members to express the SCFN's inherent self-governance powers in

accordance with its own distinctive customs and practices. SCFN submits that the evidence supports the conclusion that the Election Regulations represent a broad consensus of SCFN's members, both on- and off-reserve. Accordingly, the Election Regulations, in particular the Residency Requirement, constitute band customary law, which qualifies as an "other right" within the meaning of s. 25.

[43] Conversely, the Applicant submits that the evidence does not support that the Election Regulations represent the broad consensus of the SCFN members and that SCFN has not met its evidentiary burden in that regard.

[44] I note that s. 2(1) of the *Indian Act* defines "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)

[45] Further, that the preamble of the Election Regulations includes the following recitations:

> PREAMBLE
>
> WHERE AS:

> A. The Sucker Creek First Nation has the Inherent Right, Aboriginal Right, Treaty Right and authority to govern relations among its members and between the First Nation and other Governments.
>
> B. The Aboriginal Right of the Sucker Creek First Nation to be self-governing was recognized and affirmed in Treaty No. 8 entered into between Her Majesty The Queen in Right of Canada and the Sucker Creek First Nation.
>
> C. The Customs, traditions and practices of the Sucker Creek First Nation in regards to self-governing have been established with the consent and participation of the members of the First Nation.
>
> D. The current customs and traditions of the Sucker Creek First Nation require democratic, fair, and open elections for the leadership.
>
> E. The Sucker Creek First Nation now desires that the customs and traditions of the First Nation in relation to the Election of the Chief and Councillors be incorporated and recorded in written customary election regulations and procedures; and
>
> F. A majority of the Electors of the Sucker Creek First Nation approved by Petition the adoption of the Customary Election Regulations of the Sucker Creek First Nation as outlined herein;

[46] As I found in *Houle*, it is not necessary in these circumstances to determine whether the source of the "other right" arises from SCFN's inherent right of self-government. That is because one source of the "other right", being the right to effect and impose the Residency Requirement, which restricts the eligibility of SCFN 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 SCFN election customs. This is a statutory right as the exercise of SCFN's authority to govern via the Election Regulations stems from, and is tethered to, federal law, being the *Indian Act* (see *Houle*, at paras 97–103). More specifically:

> [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.

[47] Given *Dickson*, and my reasoning in *Houle*, I conclude that in this case, one source of the authority and right to effect and impose the Residency Requirement, which restricts the eligibility of SCFN members to be nominated and run for office, arises by way of the Election Regulations, which is a statutory right and an "other right" under s. 25 of the *Charter*.

- *SCFN Band Custom*

[48] As SCFN submits, I have previously summarized the general principles applicable to the determination of a band custom in *DFN*. This was subsequently revisited and supplemented by Chief Justice Crampton in *Hunt*, which held:

> [31] In *Da'naxda'xw First Nation v Peters*, 2021 FC 360, at para 66-71 [***Da'naxda'xw***], Justice Strickland reviewed the jurisprudence applicable to the determination of "band custom." She then distilled several principles. For the present purposes, the relevant principles are as follows:

> 1. Custom requires evidence of a practice and the manifestation of the will of the First Nation's members to be bound by that practice.
>
> 2. Establishing band custom requires evidence demonstrating that the custom is firmly established, generalized and followed consistently and conscientiously by a majority of the community, thus evidencing a broad consensus.
>
> 3. The inquiry into whether a custom enjoys broad consensus is fact and context specific and the evidence may demonstrate that there is no consensus.
>
> 4. Custom may be demonstrated by a one-time event like a referendum or majority vote, by a series of events, or possibly acquiescence.
>
> 5. The existence of a band custom and whether or not it has been changed with the substantial agreement of the band members will always depend on the circumstances.
>
> 6. The burden is on the party trying to demonstrate custom to prove that there is a broad consensus: *Da'naxda'xw* at para 72.

[32] An additional relevant principle is that the requisite broad consensus does not require a demonstration of unanimity. A broad consensus may be established notwithstanding evidence of a small number of band members who persistently object to a custom that is followed by the rest of the band: *Francis v Mohawk Council of Kanesatake (T.D.)*, 2003 FCT 115, at para 36.

[33] Moreover, band custom may evolve over time, such that current custom may be compatible with modern institutions and democratic processes: *Macleod Lake Indian Band v Chingee*, 1998 CanLII 8267 (FC), 1998 CarswellNat 1629, [1999] 1 C.N.L.R. 106 (Fed. T.D.), at para 16, quoting Woodward, *Native Law* (1994), at page 166.

[34] Finally, the custom of a band "can be evidenced by a course of conduct which expresses the First Nation's membership's tacit agreement to a particular rule": *Whalen* at para 36.

[49] I also addressed band custom in *Houle*, referencing *Whalen v Fort McMurray No. 468 First Nation*, 2019 FC 732:

> [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).

[50] Against this backdrop, it is necessary to consider the evidence pertaining to the adoption of the Elections Regulations, which include the Residency Requirement.

[51] The Dickie Willier Affidavit states that in 1995, SCFN began work on its custom election law to enable it to move away from elections under the *Indian Act*. Following a series of community meetings, the Election Regulations were passed by a vote in 1996. The Election Regulations were accepted by the then Minister of Indian Affairs and have governed Chief and Council elections ever since. This affidavit also states that the Election Regulations are the formal/English expression of SCFN customary Indigenous laws and were carefully considered, drafted and approved by SCFN members. Important statements about SCFN's rights were included in the Preamble.

[52] The Deborah Willier Affidavit states that the Election Regulations were passed by referendum in 1996 and that the first election held under the Election Regulations occurred in 1997. Further, that in 2003, SCFN undertook a review of the Election Regulations. A copy of the information package circulated to SCFN members is attached as an exhibit to her affidavit. This

includes a notice to all SCFN members indicating that it was directed to all SCFN band members, both on- and off-reserve, informing them of an information meeting to be held on-reserve on September 18, 2003, to discuss proposed changes and, of the special general meeting to vote on the proposed changes to be held on-reserve on October 4, 2003. Members were asked to provide their current mailing addresses so that an Elector's List could be prepared and information packages forwarded regarding the proposed amendments. Those changes were indicated in the proposed revised draft, also part of the exhibit, and included amending the definition of "Elector" to remove the requirement of being a resident on-reserve and to clarify that s. 6.4 required electors eligible for nomination to continuously reside on-reserve for the six months immediately prior to the date of nomination. The Deborah Willier Affidavit states that the changes were not passed by the SCFN members.

[53] The Deborah Willier Affidavit also states that SCFN undertook another review of the Election Regulations in 2015. Notice of an August 14, 2015, referendum is attached as an exhibit to that affidavit as well as a supporting band council resolution. The proposed revisions included that an "Elector" would now be defined as a person whose name is entered on SCFN's Membership List and is the full age of eighteen years on or before the day of the election or by-election. The proposed s. 6.4.6 states that persons eligible for nomination must (among other things) satisfy the residence requirements of the Election Regulations. Residency is defined as maintaining a residence at SCFN for at least twelve months prior to election day. That is, the Residency Requirement was proposed to be increased from six to 12 months. The 2015 Sucker Creek Electoral Code Referendum, prepared by the Electoral Officer, Laurence Lewis, is also attached as an exhibit to the Deborah Willier Affidavit. The 2015 referendum report describes,

among other things, the four community consultation meetings held in 2015 (three of which were off-reserve in Edmonton, Calgary and Grand Prairie), that the notice was also posted in the SCFN newsletter, and that the referendum package was mailed to the last known residential mailing address of record of every SCFN elector, being 986 electors (of which 41 were returned) and that five votes were cast electronically. The referendum report's voter turnout summary indicates that of the total number of eligible voters (being 1462), 193 eligible ballots were received, amounting to a voter turn out of 13.4%. The 2015 proposed changes to the Election Regulations were declared "defeated" (I note that the threshold of voter participation for ratification specified in the band council resolution was 25% +1).

[54] In *SCFN No.1*, I found that the evidence supported that off-reserve SCFN members gained the right to vote in 2000, despite the fact that SCFN did not amend the Election Regulations:

> [14] I also note that the Election Regulations contain another very significant residency requirement. The definition of an "Elector" [in the Election Regulations] precludes members of SCFN who do not reside on the reserve from voting in Chief and Council elections. The record indicates that in both 2003 and 2015 the SCFN undertook reviews of the Election Regulations, including proposals to remove the residency requirement for voting – but not for running for the offices of Chief and Councillor. The proposed amendments failed to pass. <u>However, the uncontested evidence is that since approximately 2000, off-reserve SCFN members have in fact been permitted to vote and did so in the Election. In effect, the residency requirement contained in the Election Regulations which precludes off-reserve SCFN members from voting for Chief and Council is ignored and is not enforced, while the residency requirement precluding off-reserve SCFN members from running for office is enforced by the Election Officer</u>. Despite the fact that the residency requirement precluding off-reserve [SCFN] members from voting in [SCFN] elections remains a provision of the Election Regulations, this is not raised as an issue in this matter.

(emphasis added)

[55] Thus, the evidence establishes that the SCFN custom relating to voting by off-reserve members changed. However, SCFN's adherence to the s. 6.4 Residency Requirement has remained constant.

[56] The Applicant submits that SCFN has not been able to provide any evidence regarding the voter turn-out in 1996 or details of how the vote was conducted. The suggestion being that there may not have been broad consensus. In my view, this cannot succeed. First, in response to an undertaking arising from the cross-examination of Deborah Willier in which she was requested to use best efforts to confirm the date of the 1996 referendum, who was eligible to vote, voter turn out and the result of the vote, she provided two September 17, 1996, Band Council Resolutions resolving that a majority of the Electors of SCFN approved, by plebiscite held on August 28 and 29, 1996, the adoption of the Election Regulations, and resolving the adoption of same. She also confirmed that no records of voter turnout were located (and that in 1996, in accordance with Canada's conversion policy, ratification votes were restricted to on-reserve members). Thus, there is evidence that the 1996 Plebiscite took place and that the majority of voters approved the adoption of the Election Regulations. Further, there is no evidence that the 1996 Plebiscite results were challenged at that time, or subsequently, on the basis of a lack of majority or otherwise. The same Election Regulations have been used in every SCFN election for the last 28 years.

[57] The Applicant also points out that off-reserve members were not permitted to vote in the 1996 Plebiscite that enacted the Election Regulations. This is true. But, as seen from the above,

off-reserve members were able to and did vote on the proposed amendments in 2003 and 2015. More significantly, there is no evidence of any formal challenge to the Residency Requirement other than this judicial review. Rather, the evidence demonstrates that the Residency Requirement contained in the Election Regulations is firmly established, generalized and has been followed consistently by a majority of the community in all elections since 1997, thus evidencing a broad consensus.

[58] In that regard, the Applicant asserts that while the Election Regulations may not have been challenged in court, there is evidence of ongoing concern, particularly with respect to the unequal treatment of off-reserve members. In support of this assertion, the Applicant refers to the cross-examination testimony of Mr. Fred Badger, who stated that the Election Regulations were changed as a result of the Supreme Court decision in *Corbiere*. The Applicant asserts that if this is so, then it is an acknowledgement of the "court challenge to similar provisions in that case". In my view this does not assist the Applicant. And, as I have indicated above, while the residency requirement for voting was no longer enforced, the Election Regulations – including the Residency Requirement – were not amended and have been enforced.

[59] The Applicant also asserts that Chief Roderick Willier testified that off-reserve members were allowed to vote because a particular council member lobbied for change, believing it would assist his re-election. The Applicant surmises that if a SCFN Councillor thought that permitting off-reserve members to vote would assist him in his re-election, it follows that off-reserve members likely voiced their concerns regarding their voting rights. I find this to be speculative. It also contradicts the assertion that voting was permitted in response to *Corbiere* – which I find to

be far more likely. And, in any event, such a concern does not address the Residency Requirement or alter the broad consensus that led to the adoption and continued use of the Election Regulations.

[60] The Applicant also asserts that in March 2019, members of the Elders Group wrote to Chief and Council seeking permission to engage in a review of the Election Regulations. And, that in August 2019, they held a meeting to discuss a potential review of the Election Regulations and Code of Ethic of Chief and Council, among other issues. Further, that the evidence of Dickie Willier was that at a meeting with Chief and Council, it was determined that a review would not be conducted until after the current proceeding was complete. According to the Applicant, this demonstrates that "concerns" were raised in the wake of the 2018 election. Again, however, concerns and discussions about a potential review is not evidence that either the Election Regulations or band custom changed.

[61] Finally, the Applicant submits that he did not take further action to contest the Residency Requirement because he did not want to interfere with this judicial review. While this may be so, this again does not rebut SCFN's long-time adherence to the Election Regulations, inclusive of the Residency Requirement.

[62] In summary, the evidence establishes that in 1996, the SCFN membership chose, by way of the 1996 Plebiscite, to enact the Election Regulations. Despite two intervening referendums in 2003 and 2015, those Election Regulations have been used in every subsequent SCFN election. While by custom, the Election Regulations' definition of an "Elector" which restricts voting

eligibility to on-reserve members, is no longer enforced, there is no evidence that the Residency Requirement has not been continuously observed, has been amended or has even been challenged prior to the Applicant's judicial review. I find that the Election Regulations demonstrate broad consensus by the majority of the SCFN membership, both on- and off-reserve, with respect to SCFN governance (other than the change of custom as to voting eligibility). This includes the Residency Requirement found in s. 6.4.

[63] For the reasons above, I find that SCFN has established that the Residency Requirement is an exercise of "other right" within the meaning of s. 25 of the *Charter* – the right to effect and impose restrictions on the eligibility of SCFN members to run for office. That is, to set criteria for nomination for election to membership in the governing body.

[64] Before leaving this point, I acknowledge the Applicant's submission that the evidence described above demonstrates a "substantive limitation on the collective right" which SCFN relies upon when invoking s. 25 to protect the Residency Requirement. He argues that the evidence demonstrates that SCFN is invoking s. 25 to protect a collective right or interest "based on a political distinction or division" within the SCFN membership and, as such, is not a proper candidate for s. 25 protection. When appearing before me, the Applicant also argued that the purpose of the Residency Requirement was to protect the interest of on-reserve members only, which is a minority.

[65] I would first note, generally, that in terms of "substantive" restrictions on a s. 25 "other right", *Dickson* describes these as whether the right at issue protects Indigenous difference

(*Dickson*, at para 150). I am not persuaded that the Applicant's above arguments fit within that context. In any event, having reviewed the evidence relied upon by the Applicant, I do not agree that it supports this view. The fact remains that there have been two subsequent efforts to amend the Election Regulations in which off-reserve members were entitled to participate. Accordingly, I do not agree with the Applicant that the right protected by the Residency Requirement, "properly construed", is a right held only by on-reserve members. There is also no evidence of any effort to otherwise challenge or amend the Residency Requirement by any off-reserve or other SCFN member (other than this judicial review). In my view, the broad consensus that effected the Election Regulations inclusive of the Residency Requirement, regardless of initial purpose, has not been displaced and the Election Regulations have customarily been used since 1996.

[66] This leaves the question of whether the Residency Requirement protects or recognizes Indigenous difference.

b) Does the Residency Requirement protect or recognize Indigenous difference?

SCFN's position

[67] SCFN submits that its right to set criteria for membership for Chief and Council as found in the Election Regulations protects or recognizes Indigenous difference. Indigenous difference may be thought of as "interests connected to Aboriginal cultural difference, Aboriginal prior occupancy, Aboriginal prior sovereignty or Aboriginal participation in the treaty process" (*Dickson*, at paras 136, 150) and includes "distinctive philosophies, traditions and cultural

practices" (*Dickson*, at para 51). Similar to the outcome in *Dickson*, SCFN submits that its Residency Requirement protects SCFN's cultural difference, prior sovereignty and its participation in the treaty process.

[68] First, SCFN's right to determine criteria for leadership selection is a component of its right to self-governance through customary law, here exercised by way of the Election Regulations. The Election Regulations presumptively protect and recognize SCFN's distinctive philosophies, traditions and cultural practices. Further, where the "other right" is rooted in customary law, it logically flows that the customary law is an exercise of prior sovereignty, which protects Indigenous difference. The Respondent submits that the Supreme Court's recognition that an "other right" in s. 25 is broader than an Aboriginal right in s. 35 confirms that First Nations are not required to establish a continuity between historic and current practices in order for their laws to protect or promote Indigenous difference. Rather, it is sufficient that SCFN's Election Regulations is a custom law *because* custom laws, by definition, reflect the current distinctive customs and cultural practices of SCFN.

[69] Second, SCFN refers to the Supreme Court's determination in *Dickson* that the right to impose residency requirements preserved the distinctive emphasis the VGFN placed on its leaders' connection to the land (citing *Dickson*, at paras 206, 210). SCFN submits that it is uncontested that its reserve lands are part of SCFN's traditional lands. The unique legal and historic status of reserve lands strongly indicates that SCFN's Residency Requirement, which ties directly back to the distinct cultural value that SCFN members place on their reserve lands, promotes and protects Indigenous difference.

[70] Third, in the event SCFN must demonstrate a connection between the Residency Requirement and historic leadership selection practices, the evidentiary burden to draw that connection is low. In this regard, SCFN submits that *Dickson* does not require SCFN to establish that its election law meets the test for Aboriginal rights under the test in *R v Van der Peet*, [1996] 2 SCR 507 [*Van Der Peet*] (*Dickson*, at paras 145, 150), that the protection of Indigenous minority interests under s. 25 should be given "generous and liberal interpretation" (*Dickson*, at para 114), and that Aboriginal rights and "other rights" are not frozen in time (*Van der Peet*, at paras 62, 64, 168, 170 and 173).

[71] Further, evidentiary hurdles exist when investigating historical practices of Indigenous peoples, who are often semi-nomadic and do not keep written records.

[72] Regardless, the expert evidence about the organization of Cree societies and their leadership selection practices is largely consistent and undisputed. However, SCFN challenges Dr. McCormack's evidence that in historic times, band leadership was not connected to territory or specific locations, and her conclusion that the Residency Requirement does not reflect traditional cultural values. Although SCFN reserve lands were surveyed in 1901, SCFN submits that it is too simplistic to use this fact to assert that leadership identification was completely divorced from residency amongst band members or territoriality. Further, historic records reveal the importance of geography to the decisions of various Cree bands around Lesser Slave Lake, including SCFN, to organize themselves into distinct communities, which were specifically connected to discrete geographical locations.

[73] Finally, SCFN submits that the Fortna Report demonstrates the importance of leaders being intimately connected to and living amongst band members in the same location. The Fortna Report ties this importance back to *wâhkôhtowin*, finding, among other things, that it is necessary to be physically a part of the local community and to share the land on which the community resides. SCFN members interviewed for the Fortna Report conveyed concerns that off-reserve candidates may lack familiarity with the challenges faced by on-reserve members. The Residency Requirement promotes SCFN's expectation that its leaders will be able to maintain ongoing personal interactions between leaders and other community members (citing *Dickson*, at para 217). SCFN submits that both the values of leaders' connection to the land and connection to the individuals living on the land were found in *Dickson* to be "associated with various aspects of Indigenous difference, including…cultural difference and prior sovereignty" (citing *Dickson*, at para 217) which cannot be distinguished from the circumstances in this case.

Applicant's position

[74] The Applicant submits that the Residency Requirement does not recognize or protect Indigenous difference. He argues that SCFN does not provide evidence to support its assertion that the Residency Requirement is an exercise of its inherent right to self-government invoked in band custom election law, here the Election Regulations. Further, by relying on the exercise of a custom right which is not connected, or only minimally connected to historical practice, SCFN fails to connect its asserted right to the fundamental elements of Indigenous difference (citing *Dickson*, at para 138).

[75] The Applicant also submits that SCFN fails to address why the historic cultural value in its reserve lands "should be protected at the expense of its interest in traditional lands." SCFN's legal tradition, as expressed through *wâhkôhtowin*, includes a connection to traditional land, but does not contemplate reserve land. To the extent that it may include reserve land, it does not extend "exclusively" to reserve land. Dr. McCormack's evidence demonstrates that the historical cultural connection to land did not contemplate reserve lands.

[76] The Applicant submits that where expert opinions diverge with respect to *wâhkôhtowin* and the Residency Requirement, Dr. McCormack's evidence should be preferred. Her analysis makes clear that the values of *wâhkôhtowin* prior to adhesion to Treaty No. 8 demonstrate that the Residency Requirement is fundamentally at odds with the traditions that ground Indigenous difference.

[77] Even if SCFN successfully establishes that the Residency Requirement protects Indigenous difference, the Applicant submits that personal autonomy must be balanced against the kinship and social obligations that give *wâhkôhtowin* full expression. It is not at all clear that the Applicant's individual rights must yield completely to any collective interest.

- *Legal Backdrop*

[78] In *Dickson*, the Supreme Court stated that Indigenous difference is understood as interests connected to cultural difference, prior occupancy, prior sovereignty or participation in the treaty process (para 150).

[79] In *Houle*, I summarized the Supreme Court's treatment of Indigenous difference, on the facts of *Dickson*, as follows:

> [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).

[80] And, applying these concepts to the applicant's situation in *Dickson*, the Supreme Court concluded:

> [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.

- *Affidavit Evidence*

[81] The Dickie Willier Affidavit describes SCFN leadership from pre-treaty to current times. Mr. Dickie Willier states that he is an Elder of SCFN and that he was authorized by the members of the SCFN Elders Council to swear his affidavit. When cross-examined on his affidavit, he described the role of Elders and testified that between 12 to 16 Elders usually attend Elder

meetings, including the ones which authorized his affidavit. Further, that those Elders voted unanimously to accept the wording of his affidavit.

[82] Therein he deposes that before Treaty No. 8, the Cree people followed their own laws, customs and traditions. The Crown recognized their authority and jurisdiction over their lands and people when entering Treaty No. 8 with their ancestors on the south shore of Lesser Slave Lake in 1899, on lands which later became the SCFN reserve. Since 1899, Canada has kept records called "Treaty Pay Lists" to record the payments made to SCFN and other First Nations under Treaty No. 8. SCFN's membership clerk reviewed the relevant Treaty Pay Lists between 1899 and 2006 and prepared a record of who was recorded as the Chief and Councillors. Mr. Dickie Willier deposes that based on his review of this record, and from his own personal knowledge, that the members of SCFN have never selected a Chief or Headman who did not "live amongst us". When cross-examined on his affidavit, he was asked about this statement and testified what he meant was people who live on-reserve. He also testified that all SCFN Chiefs or leaders have lived on-reserve and that "it's our custom that people live on reserve…that our leaders live on reserve". Further, that when the Election Regulations were made, SCFN wanted its leadership to live on-reserve.

[83] In his affidavit Mr. Dickie Willier also states that SCFN's first election for Chief and Council under the *Indian Act* occurred in 1953 when Xavier (Scotty) Willier was elected Chief. He lived on the SCFN reserve, even though under the *Indian Act*, SCFN could have elected a Chief who was not even a band member.

[84] In 1995, SCFN started working on its own custom election law so that they could move away from elections under the *Indian Act*. SCFN held a series of community meetings amongst SCFN members, which resulted in the Election Regulations being passed by vote in the 1996 Plebiscite. The Election Regulations were accepted by the then Minister of Indian Affairs, and the Election Regulations have governed SCFN Chief and Council elections ever since. Mr. Dickie Willier deposes that the Election Regulations are the formal/English expression of SCFN's customary/Indigenous laws. They were carefully considered, drafted and approved by SCFN members and, in his view, should be respected by the Court and by those who want to run for leadership. His affidavit evidence is that this is why important statements about SCFN's rights are included in the Preamble of the Election Regulations (as indicated above, the Preamble declares SCFN's inherent and other rights and authority to govern relations among its members; the recognition of that right by Treaty No. 8; that the customs, traditions and practices of SCFN in regard to self-governing have been established with the consent and participation of its members; its current customs and traditions require democratic, fair and open elections for leadership; and, that it desires that its customs and traditions in relation to election of Chief and Council be incorporated in its written custom code).

[85] Mr. Dickie Willier deposes that SCFN leaders have always been selected from within SCFN reserves and that it is important to SCFN that its leaders understand the unique issues and concerns that come from living at Sucker Creek. Most of the decisions made by Chief and Council relate to the administration of funding from Canada, which is provided only for on-reserve members. These relate to on-reserve members' social assistance, housing, kindergarten to grade 12 education, economic development and on-reserve infrastructure. He deposes that

SCFN's Election Regulations are not intended to discriminate against any of its members but that it is hard to understand how members who live in Edmonton, Calgary, Phoenix and other places around the world can effectively understand and respond to on-reserve issues if they do not live there. Further, that there are so many members who live off-reserve "they could easily take control of Chief and Council and become responsible for making important decisions about our lives without ever having set foot in our community".

[86] Mr. Dickie Willier also deposes that SCFN members who live off-reserve have opportunities for input into the actual decisions that may impact them directly. All adult SCFN members can vote in all important decisions at SCFN, including Chief and Council elections, referendums on land surrenders, referendums on settlement of historic claims against Canada, and referendums on accessing capital account monies held in Ottawa on behalf of SCFN. These members are also able to access other programs and sources of funding available for registered Indians who do not live on-reserve.

[87] Mr. Dickie Willier deposes that all of this information was considered and balanced by SCFN members when the Election Regulations were created. It has also been considered and discussed over the years when SCFN has reviewed the Election Regulations and held referendums in 2003 and 2015. In each instance, SCFN members, supported by its Elders, have maintained the requirement that its elected leaders live on SCFN reserve lands: "This is the desire and the will of our members. We should respect our own Indigenous laws… If the law is to be changed, it should be changed by our people."

[88] I note here in passing that s. 14 of the Election Regulations requires all members of Council to be resident on-reserve for the duration of their term of office. That residency provision is not at issue in this matter.

[89] Mr. Matthew Willier was interviewed by Mr. Fortna as part of the background for the Fortna Report. He attaches to his affidavit the interview transcript. During that interview, Mr. Matthew Willier describes the advent of *An Act to Amend the Indian Act*, SC 1985, c 27 (Bill C-31), and concerns arising around the sudden, large influx of members and the effect this would have on First Nation leadership. Eventually, this concern was addressed, in part, by way of residency requirements included in custom election codes. The concerns of Elders and others was that members residing elsewhere, like in Vancouver, could run for office simply by virtue of being a SCFN member but would have no understanding of life on-reserve and issues concerning the on-reserve community. He states that he has told off-reserve leadership hopefuls that "if you want to lead here, come and live here. How can you live in Grand Prairie, Prince George, Calgary and know what is going on in our community? Live here. Experience it. Get chased by a res dog. Right? Roll your quad on a res road because they are horrible." He described the on-reserve communities as quasi-communal and quasi-reciprocal and, while these communities had strayed from some of these values, they are slowly making their way back – including by the use of custom election codes.

[90] The Deborah Willier Affidavit states that she has been employed by SCFN as the executive assistant to Chief and Council since 2010. With respect to SCFN finances, the majority of SCFN's budget funding is transferred from Indigenous Services Canada to SCFN under a

Comprehensive Funding Agreement [Funding Agreement], a copy of which is an exhibit to her affidavit, and that Canada publishes program guidelines for administering such funding. Under the Funding Agreement and program guidelines, the majority of funding received can only be spent on providing infrastructure and services to members who live on-reserve. The Deborah Willier Affidavit provides example of this, including that:

- the funding SCFN receives for social assistance/income support can only be provided to people who live on-reserve. If off-reserve members require social assistance, they must apply through other government departments;

- funding for housing is only provided to SCFN to build and maintain on-reserve homes. This funding comes through the Canada Mortgage and Housing Corporation and from Indigenous Services Canada. Funding is not received to assist off-reserve members with affordable housing;

- funding is received from Indigenous Services Canada for operations and maintenance of public works on-reserve including for water treatment, roads, building maintenance, garbage disposal and other infrastructure. This funding can only be used on-reserve;

- funding is received for education for kindergarten to grade 12 students who have to be bussed to schools off-reserve and SCFN pays tuition to Alberta for their education. Members who live off-reserve have access to schools in whatever community they live in, according to provincial law. SCFN also receives some additional funding for post-secondary education of their members. Ms. Deborah Willier states that this is one of the

few, small funding areas in which SCFN receives and administers funds for the benefit of both on- and off-reserve members; and

- SCFN administers health programs for on-reserve members including the Aboriginal Head Start on-reserve program, Canada prenatal nutrition program, the National Native Alcohol and Drug Abuse program, Mental Health, National Aboriginal Youth Suicide Prevention Strategy, Home and Community Care, Public Health, and medical transportation, amongst others.

[91] Ms. Deborah Willier also states that Chief and Council are responsible for ensuring programs and services are delivered in accordance with the terms of the Funding Agreement and also for meeting with members, fielding their questions, and developing priorities for SCFN. And, in addition to these roles, Chief and Council have a responsibility to manage other collective band assets in a responsible manner. However, important decisions about the management of collective band assets such as land surrenders and designations, settlement of historic/specific claims against Canada, and withdrawals from the Nation's capital account are made by way of membership-wide referendums involving all of the Nation's eligible voters—whether they live on- or off-reserve.

- *Expert Evidence*

[92] The parties agree that the findings of the McCormack Report and the Fortna Report considerably overlap and are aligned in most respects.

McCormack Report

[93] The McCormack Report states that all northern Indigenous peoples, including Cree, lived a life based on hunting, fishing and gathering. It describes this as follows:

- Because wildlife resources were distributed unevenly across the land, people moved seasonally to areas where resources were available, never living in a single place year-round. These movements were often called "seasonal rounds";

- People lived in "band societies", which comprised of small groups of related people who lived and worked together to provide themselves with food and other necessities, sharing what they produced with one another;

- The bands varied in size, ranging from a single nuclear family to several families who came together periodically. The McCormack Report refers to these as "local bands";

- There were no formal or separate political structures. Each local band governed itself by means of face-to-face relationships, the appropriate statuses and roles of the kinship system and adherence to their underlying values. The McCormack Report states that together, local bands "owned" and controlled the land and its resources, the technology for production, and all crucial basic knowledge and that this was the basis of their sovereignty;

- Local bands changed in size and composition over the year as they joined together from time to time for seasonal hunting, fishing or socialization and later dispersed;

- Leaders emerged at the local band level and traditionally there was more than one leader (*Oneeganiowak*). Leaders would have been people with excellent bush skills, spiritual knowledge and interpersonal skills. Traditional leadership reflected personal competence and authority of senior individuals but did not involve coercive power, which would have violated respect for personal autonomy;

- The groups of people with similar cultures and language living together in one region have been known as "regional bands". They often came together for a period of time on

the shores of a lake or a river, especially in late spring or early summer. The McCormack Report states that, while there is no evidence of formal leadership structures during the time that members of a regional band may have gathered together, the leaders and elders of the local bands undoubtedly played roles in managing disposition of food and dealing with potential discord;

- Bands were egalitarian, meaning that all members had equal access to resources, and shared the same fundamental or "core" values. The McCormack Report identifies these values as personal autonomy, sharing/reciprocity, kinship, and respect. Together, these underlie what Crees call "the doctrine of … *wâhkôhtowin* the laws governing relationships".

- Because people did not live on any specific area year-round, leadership was not linked to territory or specific locations, but to local bands;

- Local bands had lands they recognized as theirs, today often called "traditional lands", being a region much larger than land set aside for reserves, which were far too small to allow people to support themselves, nor were they expected to do so;

- SCFN is a very small portion of the traditional land of the SCFN and their relatives, which extends along the south shore of Lesser Slave Lake and include lands to the north and probably to the south as well. The traditional land of Crees in the Lesser Slave Lake region, including SCFN, are still defined by social networks – their long-standing relationships with one another. In the present day, when people have fixed residences, they still participate in activities on the land and with kin;

- The only obvious change to leadership as a result of the fur trade was that certain prominent or "leading" men emerged as intermediaries with fur traders on behalf of one or more local bands. Local bands would still have had their own leaders;

- There was no immediate impact of Treaty No. 8 on Cree leadership. It provided for one Chief for every treaty band and headman according to the size of the band and also for reserves and land in severalty (the latter apparently infrequently utilized). Members of local bands were

apprehensive about being forced to on live on reserves and were promised the ability to continue their traditional way of life, even after reserves were surveyed, which included seasonal movement of local bands on their lands;

- The SCFN reserve was surveyed in 1901, and other reserves were later created at Lesser Slave Lake for other Cree communities. Any requirement to live on reserves to be able to vote or to run for office would have been put in place in the late 20th century and in the present century. The McCormack Report states that electoral systems of Alberta and Canada influenced the ways in which Indian Bands/First Nations developed their various systems of governance. Further, that today, most band elections involve competing persons and segments of the population "which is at odds with traditional patterns of leadership and undoubtedly violates some of the key aspects of *wâhkôhtowin*. Denying someone directly related to the social community the right to run for band office or even to vote without meeting special on-reserve residence requirements is denying *wâhkôhtowin*." Local band governance by elected officials is an *Indian Act* practice at odds with traditional leadership practices as well as the treaty assurance that people would never be required to live on a reserve. "A band that requires people running for office to live on the reserve is not following traditional customs and does not represent an "Aboriginal right";

- The McCormack Report concludes that there is no evidence that leadership was ever related to where one lived, even after reserves were established. It was still based on families, formerly the local bands, and not residence. Traditional leaders were not elected, but emerged from the local bands. Dr. McCormack states that "it is my opinion that the SCFN residency requirement does not reflect traditional culture and values, and that in fact it may violate *wâhkôhtowin*, which should extend to everyone in the regions who are related to one another and respect traditional values."

Fortna Report

[94] The Fortna Report centres around the concept of *wâhkôhtowin*, described as being concerned with kinship or the state or act of being related, not only in the sense of human-to-human relations, but to the whole of creation. The Fortna Report states that the principles that have guided approaches to governance and leadership at SCFN in the past are embedded in the concept of *wâhkôhtowin*: the sense of interconnectedness is reflected in the specific concern a good leader took in their community, as well as in the form in which decisions were made collectively through consent, and the community's relationship with the land.

[95] The Fortna Report states that:

- Generally, northern Cree society was organized around social connections as well as the availability of resources, with a strong emphasis on family autonomy and rootedness in place. The following of seasonal rounds, family connections, and participation in the local economy of harvesting are manifestations of *wâhkôhtowin*. While larger regional interrelated bands congregated annually during the summer at the lake to collect resources and strengthen kinship ties, for the rest of the year, small family units migrated throughout specific areas, accessing specific resources in the appropriate seasons. This annual cycle of harvesting and migrating, congregating and separating was more than simply the act of survival. The importance of collective harvesting within a specific territory is closely related to social engagement and opportunities to care for relationships. Over time, Cree communities became grounded in their specific places, and the local knowledge they developed informed their *wâhkôhtowin* in that place;

- Northern Cree communities were marked by the absence of a hierarchical structure and individual Chiefs; instead, leaders were often heads of families, and a leader needed to represent a variety of abilities and strengths, such as good hunting and communication skills, as well as a strong concern for the wellbeing of the community and its members. Leaders within pre-treaty Cree communities did not have the power to make decisions without the consent of the community. Leaders in Cree communities were

elected for a lifetime; upon their death, it was common for a brother to assume the Chief's role;

- While the arrival of the fur trade in the area of Lesser Slave Lake by the late 18th/early 19th century resulted in a broad range of changes for the local Indigenous communities, leadership and governance structures amongst the communities remained relatively unchanged;

- The first notable changes to leadership and governance amongst the community that would become SCFN came with the negotiations of Treaty No. 8 in the summer of 1899, when the Canadian government asked the local First Nations to elect a Chief as well as headmen. While the concept of "Chief" was likely foreign to the communities, leadership remained closely connected to *wâhkôhtowin*, with communities generally choosing leaders with a strong understanding of place, multiple kinship ties to the representative community, and an inherent understanding of their homeland. Kinoosayo was chosen as Chief by the SCFN community, who were impressed by his strong rhetorical and persuasive abilities as well as his confident yet humble mannerisms. Kinoosayo served as Chief until 1918. Upon his death, the role of Chief was assumed by his brother Astachukun, who served until his death in 1936;

- The first election under the *Indian Act* occurred in 1936, at which point the four bands (Sawridge, Swan Lake, Driftpile, and Sucker Creek) were legally separated. Lifetime leaders were replaced with leaders who were chosen in elections held every two years. However, SCFN initially chose to repeatedly re-elect Chiefs who remained well connected to their *wâhkôhtowin* through strong kin relations as well as close engagement with the community and solid connection to the local environment. This allowed the community to maintain stability, mirroring the traditions for selecting leaders from the pre-treaty era;

- Overtime, as colonialism became more entrenched in the northwest and many communities following *wâhkôhtowin* began to lose their way. By the 1990s, a number of communities like SCFN sought to retake control of their governance structures. The development of Custom Election Codes by SCFN in 1995/1996 provided an opportunity to (re)-connect the community to their traditional values relating to *wâhkôhtowin* and governance. The unique laws and guidelines of the Nation's Election

> Regulations seek to ensure that traditional practices and values, such as the importance of the relationships between the community and the land, or the length of time in office, continue to be maintained and practiced by successive leaders, hopefully connecting the Nation's future with its ancestors;
>
> • The Fortna Report states that the inclusion of specific processes through which SCFN can challenge election results or propose changes to the Custom Election Regulations reflect the thoughtful foresight taken by the creators of the Custom Election Regulations to support the First Nation, should the need for adjustments arise. As any proposed changes must pass a referendum, it is therefore ensured that the perspective of the entire community is taken into account and that decisions are not made unilaterally.

Analysis

[96] As can be seen from the above summary of the two expert reports, they largely agree about the history and leadership of SCFN. However, where they part company is with respect to whether the Residency Requirement in SCFN's Election Regulations aligns with or departs from the Cree legal tradition of *wâhkôhtowin*. Dr. McCormack concludes that the Residency Requirement is a denial of *wâhkôhtowin*. Mr. Fortna concludes that the Residency Requirement is a "reflection" of it.

[97] In my view, and as discussed above, by choosing to adopt the Election Regulations, SCFN chose to define its current custom of governance which custom was adopted by the majority of SCFN on-reserve members and has been continuously used for all elections since 1996. The Residency Requirement, which is a part of that custom, has not subsequently been

amended, nor challenged beyond this judicial review. Accordingly, in my view, it is not necessary to look behind that custom.

[98] And, whether or not the adoption of the Election Regulations "presumptively" protects and recognizes SCFN's distinctive philosophy, tradition and cultural practices as SCFN submits, the choice to adopt a custom election code like the Election Regulations cannot be construed as somehow signalling an abandoning or diminishing of past claims of sovereignty, self-governance, traditions and practices. Rather, the adoption simply demonstrates a choice by the First Nation to incorporate, adopt or modernize a leadership election process, which process may also reflect Western democratic practices. While there can be no doubt that the adoption of such election processes was greatly shaped and affected by colonialism, treaty-making and the *Indian Act*, to my mind, this does not lessen the validity of the choice or diminish past and current culture and sovereignty.

[99] In any event, the evidence is clear that what is now known as SCFN was in times past part of a Cree population that lived a semi-nomadic life, governed by seasons and available resources, on their traditional lands around the Lesser Slave Lake area. It is also clear that traditional leaders arose and were accepted because of kinship (relationships with others and the ability to communicate well) and their skills and knowledge (including knowledge of their traditional lands).

[100] In terms of the place of residence of such leaders, while local bands did not remain in one place, both experts agree that the bands did not simply travel randomly over large distances but

likely came to know and travel specific areas, which areas may have varied depending on resource availability. These areas would have been larger than the current day reserves and the traditional lands would have been used by more than one local band. Thus, while at that time leadership was not connected to a specific place in the sense that a leader must live in a certain fixed geographical place in order to assume leadership, I agree with SCFN that the evidence demonstrates that band leaders could only emerge from those band members *who lived together* and that band members lived in a "place", even though that place changed during the course of the seasonal rounds. In other words, leaders lived with their community and in that way knew the community, even though that community itself moved around within its traditional territory.

[101] The Fortna Report indicates that by the time of the negotiations for Treaty No. 8, Cree communities had established summer fishing settlements along the south shore of Lesser Slave Lake with the main communities of Sawridge, Swan River, Drift Pile River, Sucker Creek and a group of settlements on the north side of Buffalo Bay, known as Grouard. The subsequent surveys of reserve land in 1901 and 1912 largely confirmed this distribution of band members.

[102] The evidence also establishes that following the first survey of the SCFN reserve in 1901 and for the next nearly 125 years, to be a SCFN leader has meant living on-reserve. The Fortna Report explains that since Treaty No. 8, local residency had increasingly become a part of the SCFN community and helped to maintain connections – not only with other community members, but also with SCFN's ancestral territories. In this regard, "Chief Kinoosayo spent extended amounts of time conferring with community members on the reserve and developing positions based upon those conversations". And, after the first Chief and Council elections under

the *Indian Act*, it remained important for SCFN culture to have their leadership living in and among their people. The Fortna Report details a story from Chief Xavier (Scotty) Willier, who was Chief from 1936-1941, 1953-1967 and from 1973-1975, which explained that Chief Willier "used to walk [around] Christmas time, he'd walk the entire reserve and visit every home. He'd go and spend the night at a person's house, go to the next house, and he'd just go around the community and make that personal touch […] So, he listened to you. He cared about what happened to you […]".

[103] This evidence also aligns with the importance of relationships as encompassed by *wâhkôhtowin*, which concerns, among other things, fundamental values of kinship, reciprocity and respect.

[104] In other words, the Residency Requirement in the Election Regulations, animated by the expert and historical evidence above, enshrines an aspect of SCFN's Indigenous difference, being the importance of its leadership having familiarity and physical proximity with its members – where they are congregated as a community – which occurs from living in and amongst their people. Pre-treaty, this would have been on those traditional lands occupied by the local bands during the seasonal rounds. Post-treaty, the SCFN community is congregated on the reserve. That is, the on-reserve community is the nucleus of the SCFN membership.

[105] While it is true that the historic connection to the land was to the SCFN traditional lands, those lands include what is now the SCFN reserve. It is unclear to me how, as a result of the Residency Requirement, the historic cultural value in SCFN's reserve lands are "protected at the

expense of its interest in traditional lands" as the Applicant submits. Whatever connection on- and off-reserve SCFN members have to SCFN traditional lands, beyond the reserve, is not affected by a determination that the Residency Requirement is an "other right". The question here is whether a restriction on the eligibility of SCFN members to be nominated to run for office (i.e., the right to restrict the membership and composition of SCFN's governing body to those who have resided on-reserve for six months prior to nomination to run for office) protects Indigenous difference under s. 25 of the *Dickson* framework. I also accept the SCFN's submission that reserve lands have a special connection to SCFN as they were created by Treaty No. 8 and its promises to SCFN. Its special status is a matter of fact and law.

[106] More significantly, the evidence establishes a cultural and spiritual connection to the land – which includes the reserve. The Fortna Report states that land is of specific significance as it was not something to be owned by an individual, but rather provided the material, spiritual, and ancestral contexts within which the community lived. The land was crucial to the survival of the community and, in turn, the community ensured that it did not harm the land through exploitation. At the same time, the land provided the environment in which the community harvested individually and collectively, and cared for each other socially, politically and economically. Within the concept of *wâhkôhtowin*, the Fortna Report states that "the land on which an Indigenous community resides is not merely a backdrop but a life form and part of creation in itself. This relationship between the land and the community was cared for, celebrated and affirmed through rituals and ceremonies". From a leadership standpoint, the Fortna Report also states that, following Treaty No. 8 negotiations when SCFN was asked to elect a Chief and headmen, the community generally chose leaders with a "strong understanding of place" and an

"inherent understanding of their homeland". Further, that following elections under the *Indian Act*, SCFN elected Chiefs with a "solid connection to the local environment". On cross-examination, Dr. McCormack stated that she agreed with a statement she had made in a prior report, which included, among other things, that "[t]he close connection between the local bands and the land they use suggest the intimacy of the relationship that the local Aboriginal people enjoyed with their homeland…" She also agreed that beyond providing livelihood and economic supports, the lands within the traditional territory are also important for cultural and spiritual connection.

[107] In conclusion, there is no doubt that SCFN have governed themselves in accordance with the traditional customs and practices since before documentation by historical record keeping and prior to Canada's creation in 1867. SCFN leaders have resided with the SCFN community, on lands which have cultural and spiritual significance, either as part of a local band conducting its seasonal rounds, by living with the community after the creation of the SCFN reserve and, currently, in accordance with the Election Regulations. In my view, the Residency Requirement in the Election Regulations is an exercise of a right that protects interests associated with Indigenous difference as it relates to cultural difference. Requiring SCFN leaders to live in and amongst their membership is a manifestation of a longstanding custom pre-dating Treaty No. 8, and also reflects *wâhkôhtowin*, which finds its basis in, among other things, values of kinship, respect and reciprocity and the relationship with the land. The connection and familiarity between SCFN leadership and people living on the land is rooted in SCFN's distinctive culture and historic governance practices. Like in *Dickson*, the Residency Requirement promotes an expectation that SCFN's leadership will have and be able to maintain ongoing personal

interactions between leaders and other community members. That is, after the six-month residency period, potential leaders will know the community members and the matters that are of concern to them. And, that they will have knowledge of the land, which is grounded in SCFN's culture and leadership practices. This interest is associated with cultural difference and prior sovereignty as well as participation the Treaty No. 8 process (*Dickson*, at para 217).

- *Wâhkôhtowin*

[108] As to the role of *wâhkôhtowin*, the evidence confirms that this is a principle that has governed Cree relations, or interconnectedness with all things, for as long as can be determined. In this litigation, the Court is asked to determine the role or scope of *wâhkôhtowin* in the context of current SCFN governance. I am not convinced that this is either necessary or appropriate.

[109] First, it seems to me that by deciding to adopt and to continue to use the Election Regulations, SCFN made a decision about how their leadership would be selected. While decision-making by collective consensus appears to be an aspect of *wâhkôhtowin*, even if it were not, the decision to effect the Election Regulations, which includes the Residency Requirement, is still a decision made by SCFN by way of broad consensus as to its current chosen custom. I am not convinced that the Court should look behind this in an effort to ascertain whether or not the SCFN decision is in conformity with *wâhkôhtowin*.

[110] Second, it is obvious that, historically, *wâhkôhtowin* did not take reserves into consideration as reserves did not exist. However, since around 1901, there has been a SCFN custom that leaders will live on-reserve. The Dickie Willier Affidavit attests to this. Thus, it may

be that the concept of *wâhkôhtowin* has been adapted or observed in a different way by SCFN in light of the establishment of the SCFN reserve. In that case, the six-month pre-nomination Residency Requirement adopted in 1996 was conceptually not a great departure from the pre-existing requirement to live on-reserve in order to be a leader of SCFN, but may instead reflect the fact that in more recent years, many SCFN members either chose to live off-reserve and were spread across the country, or were unable to live on reserve, for any number of reasons.

[111] On this point, on cross-examination, Mr. Fortna was asked by Applicant's counsel how *wâhkôhtowin* could act as a guiding principle when there are "divisions" between being able to stand for office as an on-reserve or as an off-reserve SCFN member. He responded that this was one of the reasons why it was important for SCFN to have weighed some of these concerns when developing the Election Regulations. Further, that he was not sure it was appropriate for him to weigh in on a matter like this because it was for the community to decide how it was going to govern itself. When pressed on the point, he testified that one of the challenges that Cree governance as a whole, including SCFN, has faced since 1899, is trying to adapt, adjust and to be flexible within the constraints of colonial governance and the *Indian Act*. The community adapted in a number on ways, including through the continued election of the same members. However, colonialism may have served to narrow *wâhkôhtowin* in the sense that it is more involved with those on-reserve, particularly when much of the scope of leaders' responsibility is to determine the things that happen on-reserve. It was his opinion that the Election Regulations do try to balance differing *wâhkôhtowin* values and the constraints of colonialism and the *Indian Act*. For example, s. 17 of the Election Regulations allows for the amendment of the Regulations

if a member seeks change. But again, in his view, it is for the community to interpret what these things mean and what *wâhkôhtowin* means to it.

[112] On cross-examination, Dr. McCormack, who did not conduct any interviews of SCFN members but relied on her existing experience and expertise, agreed that while Cree communities may share core values, each community might express these in different ways. Asked if there are ways of identifying the customs amongst communities, she said interviews would be difficult and it would be easier if a person lived there and observed what the community was doing. She also agreed that the core values must be held by the community, there must be some degree of consensus amongst the community that those values are applicable, and that communities balance values in terms of acceptable or unacceptable behaviour.

[113] And, when cross-examined on his affidavit, it was put to Mr. Dickie Willier and he agreed that SCFN customs and traditions have evolved under the influence of intervening events like Treaty No. 8 and the *Indian Act*.

[114] What I take from this evidence is that how *wâhkôhtowin* applies may vary and that how it applies or is interpreted is to be determined by the relevant community. In this case, SCFN.

[115] The Applicant criticizes the Fortna Report because, during cross-examination, Mr. Fortna acknowledged that while he had conducted interviews with SCFN members (an unnamed elder, Chief Roderick Willier, Elders Fred and Dorothy Willier, Matthew Willier, and the SCFN Band Council including statements by Councillor Matthew Willier) he did not recall any of them

specifically mentioning *wâhkôhtowin*. He agreed that there was no extensive discussion of the concept. When asked why *wâhkôhtowin* then played such a large role in his report, he stated that he thought "it was just a product of a white person interviewing non- or interviewing an Indigenous non-Cree – or me as a non-Indigenous, non-Cree speaker talking to Indigenous people, I think folks are often polite and they try to talk in a language I understand; as a result, you know, and its my interpretation of that language, at times, that led to my use of the term." He agreed that he took the information and put it in the framework of *wâhkôhtowin* for the purposes of his opinion.

[116] While the Fortna Report does largely centre around the concept of *wâhkôhtowin*, I am not convinced that much turns on the concern raised by the Applicant. This is because there is no dispute between the two experts about the existence of the concept and its general underpinnings – which is supported by the work of other scholars that each of the experts have cited. In other words, there is no dispute that conceptually, *wâhkôhtowin* did and does exist. The issue is what impact, if any, this has on the Election Regulations and Residency Requirement, and whether the Residency Requirement protects and preserves Indigenous difference.

[117] Dr. McCormack's opinion is that because today, most band elections involve competing persons and segments of the population, that this "is at odds with traditional patterns of leadership and undoubtedly violates some of the key aspects of *wâhkôhtowin*." In her view, denying someone directly related to the social community the right to run for band office or even to vote without meeting special on-reserve residence requirements is denying *wâhkôhtowin*.

[118] The McCormack Report also concludes that there is no evidence that leadership was ever related to where one lived, even after reserves were established. Rather, it was based on families (formerly the local bands), not residence, and that the SCFN Residency Requirement does not reflect traditional culture and values, and may violate *wâhkôhtowin* "which should extend to everyone in the regions who are related to one another and respect traditional values".

[119] However, and as noted above, there actually is evidence in the Dickie Willier Affidavit that, for SCFN, leadership was connected to living on the reserve. Further, as noted above, on cross-examination, Mr. Dickie Willier stated that "it's our custom that people live on reserve, you know, that our leaders live on reserve."

[120] In my view, Dr. McCormack's report and her testimony on cross-examination, while undoubtedly sound with respect to the concept of *wâhkôhtowin*, also acknowledges and validates SCFN's concern about members who do not live on-reserve being part of SCFN governance.

[121] In that regard, in her report, Dr. McCormack included a footnote stating as follows:

> Indian Bands are rightly concerned about members who live at some considerable distance from their reserves getting involved in Band governance. Those persons may not be part of the broader *wâhkôhtowin* community, unless they work hard at maintaining their personal ties. In such cases, there maybe other ways of handling Band affairs.

[122] On cross-examination, she was asked about this footnote and stated that she was reacting to bands' concerns about people who do not live on the reserve coming in and "you know, how can you know what's going on in the reserve until you've been on a quad and fallen in the mud".

She stated that she accepted that this was a valid concern and that there "ought to be ways of dealing with outsiders coming in who you worry about taking over without violating *wâhkôhtowin*, the values of non-interference and kinship and reciprocity to protect the individual people who are in your reserve and the vicinity of the reserve." The exchange then continued:

> Q And I take it you would agree with me those choices are best left with the community?
>
> A Yes, depending on what the issue is.
>
> Q Because it's the community that needs to decide where those boundaries lie?
>
> A Well, but there's an Aboriginal right that exists, and so they have to be able to balance that with the Aboriginal right which ties into the values that I've written about in this report and that I've spoken about. You can't just suddenly tell people you're a member of this social community but we're not going to let you get involved in this issue. They're not coming from Vancouver, they're coming from maybe just outside the reserve.
>
> Q But where those lines are drawn is up to the community, you would agree with me that that's really the appropriate place -- those are the appropriate decision makers?
>
> A Depends on the issue. Depends on -- I mean, who is going to be appropriate, if your decision maker is trying to deny the core values of non-interference and reciprocity and kinship, maybe they're not the right people to make those decisions.
>
> Q How can the community deny its own core values?
>
> A By refusing to acknowledge them, by behaving in a way that doesn't acknowledge the core values.
>
> Q So in your opinion, if the community has a consensus that conflicts with your understanding of *wâhkôhtowin*, then it's not a valid expression of *wâhkôhtowin*?
>
> A Well, it depends on what it is. I mean, I just think if they're trying to follow the Indian Act, that's an imposed system and people have become -- they've bought into the Indian Act even though it wasn't something that they were required to do by the treaty. And I think that that's at odds with the Aboriginal right as I define it earlier in the report.

> Q But to be clear, you've done no specific investigation of the thought process that went into the development of the custom election regulation?
>
> A No.
>
> Q And so you have no way of knowing what was considered or not considered by the community when they developed that regulation?
>
> A I've never seen any detail on it.
>
> ……
>
> […]
>
> MS. JEFFS QUESTIONS THE WITNESS:
>
> Q MS. JEFFS: I didn't want to interrupt the exchange but you were talking about community, and there was a discussion where you were talking about the community deciding on the boundaries. And I just want to -- -- what in your mind and as you talked about community in the report, what is the community?
>
> A Well, that's a really good question. I think of the community as everyone who is engaged socially with one another. So there are people who are related by kinship, there are people who engage with each other socially. That wouldn't include people say living in Vancouver but it would include everyone in the vicinity of the reserve. I would have problems if people living in the vicinity of the reserve said I'm not part of that community, I would see that as a denial of kinship, one of the core values.

[123] To the extent that Dr. McCormack's opinion is that by adopting a custom election code, a First Nation entirely abandons its prior culture and values, I prefer the opinion of Mr. Fortna. That is, that over time and faced with prevailing circumstances, First Nations may choose to adapt these values, including by choosing to adopt custom election codes that contain residency requirements.

[124] Thus, while Dr. McCormack is of the view that First Nations who have adopted custom election codes are at odds with traditional leadership practices and that requiring members to live on-reserve to be eligible to run for office is denying *wâhkôhtowin*, I am not persuaded that this leads to the conclusion that the Residency Requirement does not serve to protect and preserve Indigenous difference.

[125] Indeed, Dr. McCormack's own evidence supports that a residency requirement is a valid concern as it ensures that leaders remain connected to the community. In effect, her opinion is that the Residency Requirement should be extended to apply beyond the SCFN reserve, to encompass areas close to the reserve where SCFN members live, and which members are engaged with the community – but not be extended to further places like Vancouver. That is, her opinion is that persons like the Applicant who live close to the reserve, on traditional lands and who are engaged with the community reserve, should be entitled to remain where they live but still be eligible for nomination to run for office. In effect, that kinship interconnectedness (*wâhkôhtowin*) exists and should be preserved – just not in the way that the SCFN have chosen to do so.

[126] In my view, the decision as to where to draw the Residency Requirement boundary – whether geographical and/or based on interaction with the on-reserve community – must lie with SCFN.

[127] And really, this is the crux of the Applicant's position. His evidence is that he lives in close proximity to the SCFN reserve, he is engaged with the on-reserve community and SCFN

culture, and engages in activities such as hunting on reserve lands as well as lands beyond the reserve on SCFN traditional territory. His affidavit evidence in this regard is not disputed by SCFN. His view is that although he does not and has never lived on-reserve, in his circumstances, he should not be required to live on-reserve for six months in order to be eligible to be nominated to run for Chief and Council.

[128] This view is not without merit. Indeed, when cross-examined, Mr. Dickie Willier acknowledged that SCFN members who live near the reserve and who participate in SCFN functions are part of the SCFN community in that way.

[129] However, the application of the s. 25 test does not change depending on the characteristics of the individual bringing the *Charter* challenge. As held in *Dickson*:

> [165] Section 25 is directed at safeguarding Aboriginal, treaty, or other rights that aim to protect Indigenous difference. Accordingly, the focus of s. 25 is on collective rights, irrespective of the identity of the individual or entity bringing the *Charter* challenge. The result is that the same analytical framework applies whether or not the *Charter* claimant is Indigenous, whether s. 25 is being asserted by an Indigenous group, or, as in this case, both parties are Indigenous. The s. 25 shield finds immediate application if a claimed *Charter* right abrogates or derogates from a collective s. 25 right, regardless of the parties involved.

[130] The Supreme Court also rejected creating a distinct analysis for so-called "internal" claims within an Indigenous community for the reasons it set out, which included that s. 25's protection of Indigenous difference seeks to shield a *collective* right. "The inquiry into whether the claimed *Charter* right would diminish Indigenous difference is an inquiry into the protection of Indigenous difference *as understood and established by the collective*," rather than by

individual Indigenous community members (*Dickson*, at para 168, emphasis original). Further, that there is no basis in the text of s. 25 for finding that the protective shield should apply differently based on the parties' identities (*Dickson*, at para 169).

[131] Accordingly, a claimant's identity – in any sense, and not simply in the context of Indigeneity – does not affect a s. 25 *Charter* analysis. To the extent that the Applicant argues that the test must be interpreted and applied differently to reflect his particular profile (i.e., as a member of SCFN who resides 12 kilometres from the SCFN reserve, and who is connected to SCFN community and culture), I do not agree.

[132] On this point, the Applicant's identity and profile are considerations in step one of the *Dickson* framework where the *Charter* claimant must show that the impugned conduct *prima facie* breaches an individual *Charter* right. Only if this is established does the matter proceed to a s. 25 analysis (*Dickson*, at para 179). I addressed this in Part One of this judicial review and found that the Applicant's s. 15 rights were breached. I do not understand the *Dickson* framework to require a further consideration of the Applicant's profile when assessing whether the SCFN has established that the Residency Requirement is an "other right" under s. 25 and where the focus is on collective rights.

[133] Similarly, when appearing before me, the Applicant asserted that a finding that the Residency Requirement is an "other right" would potentially conflict with or otherwise impede the s. 15 analogous ground of "Aboriginality-Residence" as established in *Corbiere*. As I understood it, the Applicant's point was that *Corbiere* hinges on a distinction between reserve

boundaries which should "give pause" to what might happen to that analogous ground if the *Dickson* framework is interpreted as somehow prioritizing or preferring reserve land to the exclusion of off-reserve traditional lands.

[134] First, the analogous ground analyses in *Corbiere* comes into play in this matter when assessing whether a breach of s. 15 occurred. Specifically, whether the Residency Requirement creates a distinction between SCFN members living on-reserve and SCFN members living off-reserve. That falls within the first step of the *Dickson* framework – not the second step in which s. 25 is invoked. Second, as addressed above, I do not agree with the Applicant that *Dickson* – or a determination of the Residency Requirement is an "other right" – serves to prioritize or prefer reserve land (which are on traditional lands) to the exclusion of off-reserve traditional lands.

[135] Ultimately, the Applicant's arguments boil down to the issue of collective versus individual rights. However, *Dickson* clearly contemplates that if a claimed individual *Charter* right abrogates or derogates from a collective s. 25 right, then s. 25 will shield the collective right, regardless of the parties involved. Thus, the findings in *Corbiere* can remain true in the context of a *prima facie* s. 15 analysis. However, if they are met with a s. 25 claim, and a First Nation can successfully establish the existence of a right that protects Indigenous difference and irreconcilably conflicts with the individual right, *Dickson* holds that the collective right will prevail over the individual right.

[136] To conclude on this point, it is SCFN collectively that decided that to be eligible for nomination to run for the office of Chief or Councillor, members must first live on-reserve for

six months. The reserve, in effect, is the applicable physical eligibility boundary chosen by SCFN. For the reasons above, I have found that the Residency Requirement preserves Indigenous difference. The fact that this boundary excludes the Applicant does not change this finding.

[137] Before leaving this part of the *Dickson* analysis, I note that the Applicant argues that if Indigenous difference is made out, then this Court is required to balance the *wâhkôhtowin* values of personal autonomy and kinship to "give *wâhkôhtowin* its full expression". In my view, it is not this Court's place to do so. The Supreme Court in *Dickson* recognized the need for great caution when a claim is brought by an Indigenous person against their own community to "avoid unnecessarily or unwittingly imposing incompatible ideas or legal principles upon the distinctive Indigenous legal system" (para 172). In my view, it is neither necessary nor prudent for this Court to engage in a balancing of *wâhkôhtowin.* Nor do I think that this is required for the purposes of the s. 25 *Dickson* analysis.

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

SCFN's position

[138] SCFN argues that the Applicant's individual s.15 equality *Charter* right is in direct and irreconcilable conflict with SCFN's collective right to determine criteria for leadership selection generally, and with SCFN's collective right to establish and maintain the Residency Requirement. If the Residency Requirement were struck down as being unconstitutional, this would have the effect of allowing any SCFN member to run for Chief and Council, regardless of

whether they live one kilometre off-reserve or in another country. This is a "non-incidental impact" on SCFN's collective right to select membership criteria for Chief and Council.

[139] SCFN also asserts that, at this stage in the s. 25 analysis, the Court is not to assess whether alternative residency requirements could be substituted for the version enacted by the community. Similarly, it is not the Court's place to determine whether other criteria that also reflect *wâhkôhtowin* could be adopted by SCFN. Rather, the only question is whether enforcing the Applicant's right would diminish Indigenous difference as understood and established by the collective in a non-incidental way (citing *Dickson*, at para 168).

Applicant's position

[140] The Applicant submits that if SCFN's alleged "other right" recognizes or protects Indigenous difference, then any conflict with the Applicant's *Charter* rights is incidental and not irreconcilable. The facts here are distinct from *Dickson*, in that the Applicant does not live a great distance away from the SCFN reserve, but next to it on SCFN traditional lands. The Applicant submits that SCFN has not established that his residence near reserve land conflicts with a collective right that recognizes and protects Indigenous difference.

Analysis

[141] In *Houle*, I addressed this step in the s. 25 framework:

> [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.

[142] In Part One of this judicial review, the Applicant successfully established that the Residency Requirement discriminates against him, on the basis of his off-reserve band member status, by precluding him from participating in band governance as an elected representative to Chief and Council. He was unable to hold the position as Chief because he did not reside on the SCFN reserve during the six months prior to the subject election. I found that the Residency Requirement therefore breaches s. 15 of the *Charter*.

[143] And, as I have found above in Part Two of this judicial review, SCFN has established the existence of an "other right", found within the Residency Requirement, that enshrines an aspect of SCFN's Indigenous difference, that aspect being the importance of its leadership having familiarity, proximity and interconnectedness with its members, which occurs from living in and amongst SCFN members – wherever they are centralized. And, more generally, the Residency

Requirement enshrines an aspect of SCFN's Indigenous difference by preserving SCFN's connection to the land, which is rooted in their distinctive culture and governance practices.

[144] In my view, these two rights are irreconcilably in conflict. Electing an off-reserve SCFN member as Chief would undermine, in a non-incidental way, SCFN's right to decide on the membership of its governing bodies. That is, to effect and impose the Residency Requirement. The Indigenous difference protected by the Residency Requirement is inextricably tied to SCFN leaders living with SCFN's membership where it is localized, on land where they derive cultural and spiritual significance – here, being on-reserve. What the Residency Requirement protects is that SCFN members who do not live in and amongst the concentration of SCFN on-reserve members will, prior to running for office, gain familiarity with, connection to and an understanding of the on-reserve community and its concerns, and to the land, all of which SCFN deems essential to its governance.

[145] I appreciate that the Applicant lives a short distance away from the SCFN reserve and describes his place of residence as being on SCFN traditional lands. However, the focus of s. 25 is on collective rights, "irrespective of the identity of the individual […] bringing the *Charter* challenge" (*Dickson*, at para 165). Further, s. 25's protection of Indigenous difference "seeks to shield a *collective* right. The inquiry into whether the claimed *Charter* right would diminish Indigenous difference is an inquiry into the protection of Indigenous difference *as understood and established by the collective*, rather than by individual Indigenous community members" (*Dickson*, at para 168, emphasis original). Therefore, I do not accept as determinative his argument that his specific circumstances do not undermine Indigenous difference or result in an

irreconcilable conflict. Here, the "collective" established the Election Regulations, which include the Residency Requirement. The Election Regulations have been in use since 1996 and, other than this judicial review, have not been challenged. If the s. 25 collective right were not protected from the abrogation or derogation that would follow from giving effect to the Applicant's s. 15(1) individual right, this would affect SCFN's s. 25 "other right" in a non-incidental way and would also result in an irreconcilable conflict. This is because permitting an off-reserve SCFN member to run for office as Chief without first residing on-reserve for six months would undermine, in a non-incidental way, SCFN's right to decide on the membership of its governing bodies.

[146] As discussed above, I also appreciate that some SCFN members, like the Applicant, live close to the reserve, are engaged with the on-reserve community and, like on-reserve members, may hunt and trap on reserve lands and on traditional lands outside the reserve. However, many other SCFN members are more broadly scattered. As seen from the 2021 SCFN Voters List (provided in response to an undertaking from the cross-examination of Deborah Willier), members live in communities across Alberta (for example, in Edmonton, High Prairie, Fort Mcleod, Wabasca, Enilda, Regina, Hinton, Red Deer and Calgary, to name a few) as well as in British Columbia (for example, in Nanaimo, Sooke, Prince George, Kelowna and Revelstoke) and a few even further afield. Without the Residency Requirement, these SCFN members would be able to run for office potentially without any familiarity with, connection to or understanding of the on-reserve community and its concerns as well as SCFN culture and traditions more generally.

[147] When drafting the Election Regulations, SCFN could have elected to take a different approach to the six-month on-reserve nomination eligibility requirement. For example, they could have chosen to apply this only to SCFN members who live beyond a 10, 50 or 100 kilometre radius from the reserve lands and/or who have demonstrated a clear connection to the on-reserve community. But, SCFN did not chose to do so and it is not the role of this Court to effect changes to the Election Regulations. Those Regulations do, however, include and amendment process (s. 17) available to all SCFN members. There is no evidence that the Applicant or any other SCFN has sought to utilize this process.

iv. Are there applicable limits to the collective interests relied on by SCFN?

[148] 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* (see *Dickson*, at para 173).

[149] Here, neither party submits that limitations of this sort apply to this matter.

[150] And, finally, because I have found that s. 25 applies to the Residency Requirement, SCFN need not justify the requirement under s. 1 of the *Charter* (see *Dickson*, at para 227; *Houle*, at para 165).

Conclusion

[151] For the reasons above, I conclude that s. 25 operates as a shield to protect the s. 6.4 Residency Requirement from the Applicant's s. 15 claim.

[152] And, while not relevant to SCFN's constitutional challenge, I also point out that the Residency Requirement could be amended to include nomination of off-reserve members who live near the SCFN reserve, are involved in the SCFN on-reserve community and who engage with SCFN culture and traditions. However, it is ultimately for the SCFN members to cause the Election Regulations to be amended to effect this, or other change, if there is a will to do so.

Costs

[153] 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 submissions regarding costs after the Court's decision on Part Two of this judicial review has 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, may be submitted on or before June 13, 2025. A separate order will respond to same. The parties are encouraged to reach a mutually agreed cost proposal.

JUDGMENT IN T-139-19

THIS COURT'S JUDGMENT is that

1. Section 25 of the *Charter* shields s. 6.4 of the *Customary Election Regulations of the Sucker Creek First Nation #150A*, the Residency Requirement, from a declaration of invalidity, which would otherwise arise from its infringement of the Applicant's individual s. 15 *Charter* right; and

2. A separate Order as to costs will follow.

"Cecily Y. Strickland"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Allyson F. Jeffs	FOR THE APPLICANT
Keltie L. Lambert	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Emery Jamieson LLP Edmonton, Alberta	FOR THE APPLICANT
Witten LLP Edmonton, Alberta	FOR THE RESPONDENT