SUPREME COURT OF YUKON

Citation: *Dickson v. Vuntut Gwitchin First Nation*, 2020 YKSC 22

Date: 20200608
S.C. No. 18-AP012
Registry: Whitehorse

BETWEEN

CINDY DICKSON

PETITIONER

AND

VUNTUT GWITCHIN FIRST NATION

RESPONDENT

AND

GOVERNMENT OF YUKON and ATTORNEY GENERAL OF CANADA

INTERVENORS

Before Chief Justice R.S. Veale

Appearances:

Bridget Gilbride and Harshdeep (Harshi) Mann	Counsel for the petitioner
Krista Robertson and Kristopher Statnyk	Counsel for the respondent
Mark Radke and Katie Mercier	Counsel for the Government of Yukon
Marlaine Anderson-Lindsay and Sylvie McCallum Rougerie	Counsel for the Attorney General of Canada

REASONS FOR JUDGMENT

INTRODUCTION

[1] Ms. Dickson is a member of the Vuntut Gwitchin First Nation ("VGFN") and resides in Whitehorse, Yukon. She applies for a declaration, pursuant to s. 52 of the *Constitution Act, 1982*, that the residency requirement in the VGFN Constitution is

inconsistent with s. 15(1) of the *Charter of Rights and Freedoms* (the "*Charter*"), not justified under s. 1 of the *Charter*, and therefore of no force and effect. The residency requirement permits her to run as a candidate for Chief or Councillor and if elected she must relocate to Settlement Land within 14 days after election day (the "residency requirement"). This effectively requires Ms. Dickson, if elected, to move to the community of Old Crow, some 800 kilometers north of Whitehorse, the VGFN seat of government on its Settlement Land. Ms. Dickson does not seek a remedy for any issues in the past election process or the procedure at the Vuntut Gwitchin General Assembly held August 6 – 10, 2019.

[2] There are approximately 260 Vuntut Gwitchin citizens living in Old Crow and approximately 301 living elsewhere, primarily in Whitehorse and other parts of Canada. Vuntut Gwitchin define themselves by their homeland and move back and forth to Old Crow as evidenced by Ms. Dickson herself and the present Chief, who was born in Whitehorse, but moved to Old Crow before being elected. Old Crow is the most northerly Yukon community without road access but has a regular flight schedule to Whitehorse.

[3] This is a complex case with many cultural, political and legal ramifications. The following issues will be addressed:

1. Should the Court decline to hear the application on the ground that it is fundamentally a political question best left to negotiation among VGFN, Yukon and Canada?
2. Does the *Charter of Rights and Freedoms* apply to Ms. Dickson's challenge to the residency requirement in the VGFN Constitution?

3. If the *Charter of Rights and Freedom* applies, does the residency requirement infringe Ms. Dickson's s. 15(1) equality right?

4. Does Ms. Dickson's equality right under s. 15(1) of the *Charter* abrogate or derogate from the VGFN right to have a residency requirement for its Chief and Council under s. 25 of the *Charter*?

[4] I will set out facts, agreements and statutes applicable to all the issues as comprehensively as possible.

[5] It is important to consider the factual basis from both Ms. Dickson and the VGFN perspective. Ms. Dickson is a Vuntut Gwitchin citizen who wants to participate. She presently lives in Whitehorse, but she has a home in Old Crow that she shares with her uncle. She has extensive experience in the cultural and political life of the Vuntut Gwitchin and has made sincere efforts to become a member of Council. She has medical reasons, on behalf of her son, for staying near the hospital in Whitehorse. There are several other factors that ground her decision to live in Whitehorse.

The Vuntut Gwitchin Historical, Cultural and Self-Government Leadership

[6] In this section, I present the perspective of the Vuntut Gwitchin government as set out by the First Nation's counsel, one of whom is a Vuntut Gwitchin citizen. There is little dispute about the historical and cultural context of residency. What follows is unchallenged evidence from Chief Dana Tizya-Tramm, Elders Robert Bruce Jr. and William Josie, the latter being the Executive Director of the VGFN as well as the thesis of Shelagh Beairsto on Gwitchin Nation Leadership.

[7] In her 1999 thesis entitled *Dinjii Kat Chih Ahaa: Gwitchin Nation Leadership*, Shelagh Beairsto sets out the leadership history in the pre-contact era, the fur trade and

missionary eras, culminating in an examination of Vuntut leadership in the modern era. Despite the massive changes that have impacted them, 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. In the pre-contact era, wealth was food, clothing and shelter to survive the harsh climate. In the fur trade and missionary eras, wealth became the acquisition of furs and guns and European goods. In the modern era, leadership remains tied to the collective ownership of land and resources but the concept of wealth incorporates consumer goods and traditional knowledge. However, 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.

[8] The Vuntut Gwitchin are a distinct sub-group of the Gwich'in Nation, which is an Indigenous nation whose territories extend across portions of what are now Alaska, Yukon and the Northwest Territories. The Vuntut Gwitchin Traditional Territory encompasses a vast area of North Yukon approximately 55,000 square miles in size, including a wetlands complex of thousands of lakes known as the "Old Crow Flats", situated in and around the present day community of Old Crow, Yukon ("Vuntut Gwitchin Territory"). The deep connection between Vuntut Gwitchin culture and land is reflected in their name, which in English translates to "People of the Lakes". The Vuntut Gwitchin Territory was unglaciated during the last ice age and archeological evidence suggests its human use and occupation dates back as far as 40,000 years.

[9] The present day community of Old Crow was established as a permanent Vuntut Gwitchin village in the early 1900s at the base of the Crow Mountain and the confluence

of the Crow River and Porcupine River. The place name “Old Crow” is in honour of a historical Vuntut Gwitchin Chief who went by the name “Deetru’ K’avidhdik”, which in the English language translates to “Crow May I Walk”.

[10] Old Crow is the most northern community in the Yukon, situated above the Arctic Circle and approximately 800 kilometres north of the City of Whitehorse. There are no roads providing regular access to Old Crow from outside of the Vuntut Gwitchin Territory. With the exception of navigating the Porcupine River system by boat in summer months, Old Crow is only regularly accessible from outside the Vuntut Gwitchin Territory by flying in and out by airplane [with the occasional temporary winter road to deliver construction materials for the school and other community buildings].

[11] The Vuntut Gwitchin were constituted as a political entity prior to the assertion of British sovereignty and have governed themselves in accordance with their own laws since time immemorial. These laws included rules and customs to determine how their leaders are to be selected. The methods of Vuntut Gwitchin leadership selection have varied and evolved over time. Prior to the *Indian Act*, R.S.C. 1985, c I-5 (the “*Indian Act*”), being imposed, the Vuntut Gwitchin selected their leaders by consensus. Under their laws, Vuntut Gwitchin leaders were selected based on their knowledge and skills in relation to Vuntut Gwitchin Territory so they could fulfill the critical role of looking after the general welfare of the collective Vuntut Gwitchin community. Vuntut Gwitchin custom and practice since time immemorial has been that Vuntut Gwitchin leaders reside on Vuntut Gwitchin Territory.

[12] Despite the imposition of the *Indian Act*, the Vuntut Gwitchin have continued their governance practice of making significant decisions collectively through processes of

community deliberation and discussion. This method of decision-making was and remains the foundation of Vuntut Gwitchin community self-sufficiency, culture and survival on the land. The governance bodies and processes established by the Vuntut Gwitchin in their contemporary self-government are the modern expression of this tradition.

[13] The displacement and alienation of Vuntut Gwitchin people from Vuntut Gwitchin Territory through imposed colonial laws and policies including residential schools, *Indian Act* administration and resource development without Vuntut Gwitchin consent or involvement has caused significant harm to the integrity and health of the Vuntut Gwitchin as a collective. The Vuntut Gwitchin continue to address and recover from these harms as they implement self-government. The relative remoteness and isolation of Vuntut Gwitchin Territory from larger urban service centres to the south has to some extent protected the Vuntut Gwitchin culture and land-based way of life. Nevertheless, the pressures of cultural assimilation and displacement persist on the Vuntut Gwitchin as a minority group in Canada. There is also the reality of the pull of post-secondary education and employment, which is also important to the Vuntut Gwitchin.

[14] As indicated, there are approximately 260 Vuntut Gwitchin citizens living in Old Crow, and approximately 301 living elsewhere. These numbers are in constant flux, with Vuntut Gwitchin citizens typically residing both in and outside of Old Crow over the course of their lives. Given the fluidity of residency, Vuntut Gwitchin citizens do not typically define themselves by their residency at a place in time; rather their primary identity is that of a Vuntut Gwitchin citizen.

[15] The seat of the government of the Vuntut Gwitchin is in Old Crow. It provides critical services to the community. The vast majority of programs and services administered and overseen by the government of the Vuntut Gwitchin relate to the community of Old Crow. Today, the elected Chief and Council Members are full-time and reside in the community.

[16] The residency requirement is now written into the VGFN Constitution and challenged in this case.

[17] Some explanation of the categories of land is required. Settlement Land as it is discussed in this case refers to Category A Settlement Land consisting of 2,990 square miles (or 7,744.06 square kilometres).

[18] Category A Settlement Land is fee simple title and VGFN does not cede, release or surrender aboriginal claims, rights, titles and interests on that land except to the extent that they are inconsistent with the Final Agreement.

[19] The reference to VGFN Traditional Territory are those lands identified by VGFN as its Traditional Territory to which its citizens may have the right to harvest for subsistence and other rights set out in the VGFN Final Agreement such as participation in land use planning.

[20] When Article II, s. 2 of the VGFN Constitution refers to the “seat of government located within Settlement Land” that effectively means to the community of Old Crow at the confluence of the Crow and Porcupine rivers where the approximately 260 VGFN citizens reside.

Ms. Dickson and the Residency Requirement

[21] Cindy Dickson is a VGFN citizen who was born in Whitehorse. Like many VGFN citizens, she resided in Old Crow from age 9 to 16, when she moved back to Whitehorse to finish her high school education before Old Crow had a full high school education program. She also visited Old Crow during summers.

[22] She has lived in other Yukon communities and Victoria, British Columbia, briefly and then back to Whitehorse to attend Yukon College to complete her Bachelor of Social Work degree.

[23] She has worked for the Council of Yukon First Nations as Manager of the Northern Contaminants Program. She is the founding director and current Executive Director of the Arctic Athabaskan Council, which is an intergovernmental forum promoting cooperation among eight Arctic states.

[24] In 2013, she began working as Regulatory and Community Relations Coordinator for Chance Oil and Gas Limited, an oil and gas exploration company in Yukon. In that role, she engages with Yukon communities including Old Crow.

[25] She is also a Trustee with the Vuntut Gwitchin Business Trust, which is involved in the management of VGFN Settlement Lands.

[26] She has maintained her connection to Old Crow:

> Since leaving Old Crow to pursue work and post-secondary education, I have continued to visit Old Crow as often as is affordable and practicable given my other responsibilities. I own a cabin in Old Crow and I still have many friends and family living there. I make efforts to visit and contribute to the community, both through my work and my personal life, so I can remain connected to Old Crow and assist the community how I can. [Dickson affidavit #1, para. 19]

[27] Her 15-year-old son is hypoglycemic and one reason she lives in Whitehorse to be close to a hospital, although arrangements to have hypoglycemic resources in Old Crow were made for his last visit.

[28] However, she states at paras. 45, 46, 58 and 59 of her Affidavit #1:

> 45. I choose to live in Whitehorse, and not Old Crow, for several reasons. There are many resources and opportunities for both my son and me in Whitehorse that are not available in Old Crow. For example, crucial services such as emergency health care and opportunities that I value very much, including my job. In addition, my son's father, who is not Vuntut Gwitchin, lives in Whitehorse.
>
> 46. My decision to live in Whitehorse does not diminish how important being a VGFN citizen is to me and it does not affect how much I want to contribute to the development of the VGFN and support my fellow VGFN citizens. It also does not diminish how much I value our nation's Traditional Territory and Settlement Land.
>
> …
>
> 58. If I ever wanted to move to Old Crow permanently, I would either have to spend a significant amount of money to fix my grandfather's old house and share it with my uncle. Or I would have to try and find another place to live in Old Crow which can be difficult.
>
> 59. My grandfather's house is typical for Old Crow in that many homes there require major repairs. [reference omitted].

[29] Although there is a VGFN government office in Whitehorse to serve VGFN citizens, Ms. Dickson feels excluded from participating as a Council member. She also finds Old Crow has some shortcomings in services that contribute to her desire to live in Whitehorse. They are:

1. there is a nurse staffing the Heath Centre with limited medical resources in Old Crow and the doctor flies in to take appointments. Although glycogen

has, on one occasion, been shipped in when her son is there, it is not ideal as a Medevac is required to fly to Whitehorse;

2. she could stay at her grandfather's house with her uncle, which I understand she owns. But she would have to make major repairs which is typical for houses in Old Crow. She has bought a washer and dryer for it;
3. while a high school education is available in Old Crow, it does not provide the same number of teachers and the better facilities and curriculum found in Whitehorse;
4. she finds job opportunities more limited in Old Crow;
5. her social life would be more limited in Old Crow and it would be difficult to find a partner; and
6. although Old Crow has internet connection, it can be very slow and cuts out.

[30] Ms. Dickson also filed a copy of the *Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls*, dated June 3, 2019. She states that she can relate to many of the comments in the report as they reflect her experience as an Indigenous woman who moved from Old Crow to live in an urban setting.

[31] Many opinions have been expressed for and against the residency requirement in filed affidavits. Some advocate that VGFN non-resident citizens feel that they are not being treated equally and need representation, while others express the view that it is the VGFN citizens who reside in Old Crow whose needs are the greatest to meet the challenges arising from the remoteness of the VGFN homeland.

[32] William Josie, VGFN citizen and Executive Director of VGFN, presented the numerous views this way:

> There were a range of views put forward in discussions on the residency requirement. Some VGFN citizens expressed support for the Petitioner's position that VGFN citizens should be able to be nominated and hold office while residing off-settlement land. Others thought the CRC's proposal to allow VGFN citizens residing off-settlement land to be nominated to run for Council went too far from the objects of our VGFN Constitution. Many expressed concern about the issue being brought to court and the potential for the court to make decisions about Vuntut Gwitchin self-government. Others expressed concern about the potential for a seat of our government being situated in another self-governing Yukon First Nation's Traditional Territory. Ultimately, the CRC proposed amendment was accepted, with the Chief and Council abstaining from the vote to ensure no members of the General Assembly felt political pressure. The prevailing view was that Old Crow and our Traditional Territory is our country – these are the lands where our ancestors lived and survived and that this where our authority comes from and why we are able to have self-government today – so it is important for our self-government to be based on our land. [W. Josie, Affidavit #2, para. 18]

The Residency Requirement

[33] Chief Dana Tizya-Tramm states that Vuntut Gwitchin leaders have always resided in the VGFN Traditional Territory. According to Elder Robert Bruce Jr. and William Josie, the Executive Director of VGFN, the residency requirement first appeared as a constitutional amendment at the General Assembly held on April 11, 2006.

[34] By consensus after discussion, the amendment to Article XI, s. 1, required VGFN citizens to be "resident on settlement land" to be eligible to be elected as Chief or Councillor. The Constitutional Reform Committee ("CRC") was established to review the amendments after two years. Ms. Dickson was a member of the CRC reviewing the

VGFN Constitution from January to October 2018. To avoid any perceived conflict in interest, she resigned from the CRC when she became a candidate in the November 19, 2018 election.

[35] In October 2018, Ms. Dickson, who lived in Whitehorse and Sandra Charlie, who then resided in Grande Prairie, Alberta, filed nomination papers to run as candidates for the VGFN council election on November 19, 2018.

[36] Both nominations were rejected. Ms. Dickson sent an email on November 5, 2018, inquiring why their nominations were rejected. She also indicated a willingness to go to dispute resolution and begin a legal case.

[37] William Josie, the Executive Director, also a Vuntut Gwitchin citizen explained the residency requirement in a letter to Ms. Dickson and Ms. Charlie, dated November 6, 2018.

[38] Ms. Charlie decided to move to Old Crow in December 2018 and she is now employed by VGFN. However, she still supports a Councillor position for a VGFN Whitehorse resident.

[39] On January 18, 2019, Ms. Dickson filed her petition in this Court seeking a declaration that the residency requirement is of no force and effect as being inconsistent with s. 15(1) of the *Charter* and not justified under s. 1 of the *Charter*.

[40] The CRC held a community meeting in Whitehorse on July 10, 2019. Ms. Dickson attended and learned of a proposed amendment to the residency requirement:

> If an eligible candidate for Chief and/or Councillor does not reside on Settlement Land during the election and wins their desired seat, they must relocate to Settlement Land within 14 days after election day.

[41] Ms. Dickson had previously raised the issue about attending the annual General Assembly remotely by teleconference or video. William Josie had responded to that request indicating that the Constitution and custom required attendance in person. He stated that the personal attendance could only be changed by the members at the General Assembly. Ms. Dickson raised the matter again at the CRC meeting in Whitehorse.

[42] The annual General Assembly took place in Old Crow from August 6 – 10, 2019. Ms. Dickson spoke in person at the General Assembly meeting on August 6, 2019, and explained why she filed her court petition. She also filed a petition at the Assembly with 48 signatures of VGFN citizens supporting the proposal that at least one VGFN councillor be chosen from the VGFN residents of Whitehorse.

[43] On August 7, 2019, the General Assembly discussed the proposed residency requirement, which Ms. Dickson challenges in this case. On August 10, 2019, the proposed residency requirement was passed in an Omnibus resolution passing 189 amendments to the Constitution. While she voted for the Omnibus resolution as it contained resolutions she supported, she did not support the residency requirement.

Findings of Fact

[44] I find the following facts:

1. The Vuntut Gwitchin people have governed themselves according to their traditional practices pre-dating the creation of Canada in 1867.
2. Since time immemorial to the present day, all VGFN Chiefs and Councillors have been residents in the VGFN Traditional Territory.

3. Even in modern times, post the Final Agreement in 1993, the practice is for elected citizens to reside in Old Crow. Chief Tizya-Tramm, former Chiefs Bruce Charlie and Robert Bruce Jr. all resided in Whitehorse at various times but all returned to reside in Old Crow during their terms as Chiefs.
4. VGFN citizens have always been mobile and approximately 301 live elsewhere, primarily in Whitehorse and other parts of Canada. Approximately 260 citizens reside in Old Crow.
5. The vast majority of programs and services administered by the VGFN government are for VGFN citizens residing on Settlement Land as a result of constraints in funding arrangements for self-government.
6. Notwithstanding the limited fiscal capacity, the VGFN government has established a citizen advocate office in Whitehorse, staffed by a full-time employee, to provide access to programs and services for VGFN citizens in Whitehorse. This includes various cost sharing arrangements with Kwanlin Dun First Nation in Whitehorse to reimburse that government for costs of delivering services to VGFN citizens who access services in Kwanlin Dun First Nation Settlement Lands.
7. The Chief and Councillors are all full-time paid positions.
8. Although Ms. Dickson owns a cabin in Old Crow, it would require major repairs, which is typical for housing in Old Crow. She would also have to share that house with her uncle.

9. There may not be immediately available housing for a successful non-resident candidate, but there is Vuntut Gwitchin staff housing that can be made available.

The VGFN Final Agreement

[45] The Final Agreement is a land claim agreement within the meaning of s. 35 of the *Constitution Act, 1982*:

> 35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

[46] The Final Agreement includes an extinguishment of rights to Non-Settlement Land including mines and minerals, mines and minerals in all Settlement Land and Fee Simple Land. It does not extinguish rights to Settlement Land or any other Aboriginal rights such as self-government, which are not inconsistent with the Settlement Agreement. This is pursuant to s. 2.5.1.2 which states as follows:

> that Yukon First Nation and all persons eligible to be Yukon Indian People it represents, as of the Effective Date of that Yukon First Nation's Final Agreement, cede, release and surrender to Her Majesty the Queen in Right of Canada all their aboriginal claims, rights, titles and interests in and to Category A and Category B Settlement Land and waters therein, to the extent that those claims, rights, titles and interests are inconsistent or in conflict with any provision of a Settlement Agreement;

[47] Chapter 24 of the Final Agreement is entitled “Yukon Indian Self-Government” and is a comprehensive agreement that sets out the principles and a process that fundamentally alters the power relationship between Canada, Yukon and the Vuntut Gwitchin. The following clauses give some flavour to First Nation self-government:

> 24.1.1 Government shall enter into negotiations with each Yukon First Nation which so requests with a view to

> concluding self-government agreements appropriate to the circumstances of the affected Yukon First Nation.
>
> 24.1.2 Subject to negotiation of an agreement pursuant to 24.1.1 and in conformity with the Constitution of Canada, the powers of a Yukon First Nation may include the powers to:
>
> > 24.1.2.1 enact laws and regulations of a local nature for the good government of its Settlement Land and the inhabitants of such land, and for the general welfare and development of the Yukon First Nation;
>
> …
>
> 24.1.3 Self-government agreements shall not affect:
>
> > 24.1.3.1 the rights of Yukon Indian People as Canadian citizens; and
> >
> > 24.1.3.2 unless otherwise provided pursuant to a self-government agreement or legislation enacted thereunder, their entitlement to all of the services, benefits and protections of other citizens applicable from time to time. [my emphasis]

[48] Chapter 24.2.0 sets out an extensive list of "Subjects for Negotiation" including education and training; civil and family matters; tax law, economic development; and financial transfers, which are only some of the 17 items listed. Specifically, negotiations respecting a self-government agreement may include among other subjects:

> 24.2.1.1 the Yukon First Nation constitution;
>
> 24.2.1.2 the Yukon First Nation's community infrastructure, public works, government services and Local Government Services;
>
> …

[49] Chapter 24.3.0 entitled "Devolution" sets up the negotiation process for the devolution of programs and services from Yukon to the Vuntut Gwitchin, which includes

education, health and social services, justice and employment opportunities, each containing specific subjects to be negotiated.

[50] Chapter 24.5.0 states:

> **24.5.0 Yukon First Nation Constitutions**
>
> 24.5.1 Negotiations regarding a Yukon First Nation constitution may include the following:
>
> 24.5.1.1 composition, structure and powers of the Yukon First Nation government institutions;
>
> 24.5.1.2 membership;
>
> 24.5.1.3 election procedures;
>
> 24.5.1.4 meeting procedures;
>
> 24.5.1.5 financial management procedures;
>
> 24.5.1.6 composition and powers of all committees;
>
> 24.5.1.7 the rights of individual members of a Yukon First Nation with respect to the powers of the Yukon First Nation government institutions;
>
> 24.5.1.8 amending procedures;
>
> 24.5.1.9 internal management of the Yukon First Nation, including regional or district management structures; and
>
> 24.5.1.10 use, occupation and disposition of the Yukon First Nation's Settlement Land and resources.
>
> …
>
> 24.10.3 Yukon First Nations constitutions may be amended only by internal amending formulae or by amendment to the self-government Legislation. [my emphasis]

[51] Chapter 24.9.0, entitled “Legislation”, addresses the drafting and recommendation of legislation to bring the self-government agreements into effect in the Yukon Legislative Assembly and Parliament of Canada for their respective legislative authority.

[52] Chapter 24.12.0 entitled “Protection” states the following:

> 24.12.1 Agreements entered into pursuant to this chapter and any Legislation enacted to implement such agreements shall not be construed to be treaty rights within the meaning of section 35 of the Constitution Act, 1982.
>
> 24.12.2 Nothing in this chapter or in the Settlement Agreements shall preclude Yukon First Nations, if agreed to by the Yukon First Nations and Canada, from acquiring constitutional protection for self-government as provided in future constitutional amendments.
>
> 24.12.3 Any amendments to this chapter related to the constitutional protection for self-government in whole or in part shall be by agreement of Canada and the Yukon First Nations.
>
> 24.12.4 Nothing in 24.12.1, 24.12.2 or 24.12.3 shall be construed to affect the interpretation of aboriginal rights within the meaning of sections 25 or 35 of the Constitution Act, 1982.

[53] Chapter 9 – “Settlement Land Amount” has the following objective:

> 9.1.1 The objective of this chapter is to recognize the fundamental importance of land in protecting and enhancing a Yukon First Nation's cultural identity, traditional values and life style, and in providing a foundation for a Yukon First Nation's self-government arrangements. [my emphasis]

The VGFN Self-Government Agreement

[54] As set out in its preamble, the Self-Government Agreement was negotiated and entered into in accordance with Chapter 24 of the Final Agreement. The preamble describes the mutual intentions of the parties, which include maintaining traditional Vuntut Gwitchin decision-making structures within contemporary Vuntut Gwitchin society, protecting Vuntut Gwitchin's land-based way of life and achieving certainty in the relationship between Vuntut Gwitchin, Canada and Yukon:

> WHEREAS:
>
> Vuntut Gwitchin have traditional decision-making structures and are desirous of maintaining these structures;
> the Parties wish to support and promote the contemporary and evolving political institutions and processes of the Vuntut Gwitchin First Nation;
>
> …
>
> the Parties wish to achieve certainty with respect to the relationship between the Vuntut Gwitchin First Nation and Government, including jurisdiction over land and other resources within the Traditional Territory of the Vuntut Gwitchin First Nation;
>
> …
>
> the Parties recognize and wish to protect a way of life that is based on an economic and spiritual relationship between Vuntut Gwitchin and the land; [my emphasis]

[55] Article 2.0 of the Self-Government Agreement sets out as key principles the Vuntut Gwitchin desire:

> 2.1 The Vuntut Gwitchin First Nation has traditional decision-making structures and desires to maintain these traditional structures integrated with contemporary forms of government.

> 2.2 The Parties are committed to promoting opportunities for the well-being of Citizens equal to those of other Canadians and to essential public services of reasonable equality to all Citizens. [my emphasis]

[56] Article 3.0 sets out the "General Provisions" of the Self-Government Agreement. Section 3.6 replicates provisions under Chapter 24.1.3 of the Final Agreement regarding the retention of the rights and entitlements of Vuntut Gwitchin citizens as Canadian citizens:

> 3.6 This Agreement shall not:
>
> 3.6.1 affect the rights of Citizens as Canadian citizens; and
>
> 3.6.2 unless otherwise provided pursuant to this Agreement or in law enacted by the Vuntut Gwitchin First Nation, affect the entitlement of Citizens to all of the benefits, services and protections of other Canadian citizens applicable from time to time. [my emphasis]

[57] Article 9.0 of the Self-Government Agreement provides that upon the effective date of the Self-Government Agreement, the *Indian Act* ceases to apply to the Vuntut Gwitchin, and that the Vuntut Gwitchin First Nation is a legal entity with the capacity, rights, powers and privileges of a natural person.

[58] The requirements of the VGFN Constitution are set out in Article 10.0 of the Self-Government Agreement. Article 10.0 provides that the VGFN Constitution shall "establish governing bodies and provide for their powers, duties, composition, membership and procedures" (s. 10.1.2) and the recognition and protection of the rights and freedoms of Vuntut Gwitchin citizens (s. 10.1.4). It also states that the VGFN Constitution must "provide for the challenging of the validity of laws enacted by the

Vuntut Gwitchin First Nation and for the quashing of invalid laws" (s. 10.1.5) and "provide for the amending of the Constitution by the Citizens" (s. 10.1.6).

[59] Section 10.2 states as follows:

> The Constitution may provide for any other matters relating to the Vuntut Gwitchin First Nation government or to the governing of Settlement Land, or of persons on Settlement Land.

[60] Article 13.0 of the Self-Government Agreement sets out the "Legislative Powers" of the Vuntut Gwitchin and contains several subsections listing powers including those related to programs and services for Vuntut Gwitchin citizens and laws related to local or private matters on Settlement Land. Article 13.4.0 sets out the emergency powers and Article 13.6.0 sets out powers related to administration of justice. Additionally, Article 14.0 sets out the taxation powers of the Vuntut Gwitchin.

Vuntut Gwitchin First Nation Constitution

[61] The VGFN Constitution is a very comprehensive document, created by VGFN citizens, that consists of 22 Articles which counsel for VGFN says is a complete code addressing the issues raised by Ms. Dickson.

[62] The following are some of the pertinent Articles:

> **Article I – Objects**
>
> 1. The objects of the Vuntut Gwitchin First Nation are to:
>
> (a) have authority in respect of communities and lands of the Vuntut Gwitchin First Nation and the occupants thereof as prescribed in the Vuntut Gwitchin First Nation Final Agreement;
>
> (b) promote and enhance the general welfare of the Vuntut Gwitchin First Nation;

(c) promote, enhance and protect the history, culture, values, traditions and rights of the Vuntut Gwitchin First Nation;

(d) promote respect for the ancestral homeland of the Vuntut Gwitchin First Nation including the natural resources thereof;

…

Article II – Vuntut Gwitchin First Nation Authority/Location

1. Subject to the terms of the Vuntut Gwitchin Final Agreement and the Vuntut Gwitchin Self-Government Agreement, the operations and authority of the Vuntut Gwitchin First Nation shall extend to and over all land and resources, all Citizens, all occupants of Settlement Land and all matters within the jurisdiction of Vuntut Gwitchin First Nation, and to the collective rights and interests of Citizens.

2. The seat of government for the Vuntut Gwitchin First Nation shall be located within Settlement Land as advised by the General Assembly.

3. This Constitution is the supreme law of the Vuntut Gwitchin First Nation, subject only to the:

   (a) Vuntut Gwitchin First Nation Self-Government Agreement; and

   (b) rights and freedoms set out in this Constitution.

4. In the event of an inconsistency or conflict between this Constitution and the provisions of any Vuntut Gwitchin Law, the Vuntut Gwitchin Law is, to the extent of the inconsistency or conflict, of no force or effect.

5. The validity of a Vuntut Gwitchin Law may be challenged in the Supreme Court of Yukon Territory until the Vuntut Gwitchin Court is established. [my emphasis]

[63] Under Article IV – "Rights of Citizens", the VGFN Constitution sets out rights similar to the *Charter* in the *Constitution, 1982*, but not as extensively. For example, Article IV, s. 7, the equivalent equality clause states:

> 7. Every individual is equal before and under the laws of the Vuntut Gwitchin First Nation and has the right to the equal protection an[d] equal benefit of Vuntut Gwitchin First Nation law without discrimination.

[64] Section 15 of the *Charter* states:

> 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.

[65] Relevant to this case, Article IV, s. 5, grants the power to Chief and Council to make laws for the (a) qualifications of voters; and (b) qualifications of candidates to elections of office.

[66] The VGFN Constitution then sets out the Organization of the VGFN government which is divided into the VGFN General Assembly, the Elders Council, Chief and Council, and Youth Council with the role and power of each delineated in detail.

[67] With respect to the terms of office and qualifications for Chief and Council, Article XI states:

> <u>QUALIFICATIONS</u>
>
> 1. Any person desiring to run for Chief and Councillor must meet the following qualifications:
>
> (a) Be 18 years of older;
>
> (b) Be ordinarily resident in Canada;

> (c) No indictable offence convictions for 5 years preceding the election; and
>
> (d) Be a Citizen
>
> 2. <u>If an eligible candidate for Chief or Councillor does not reside on Settlement Land during the election and wins their desired seat they must relocate to Settlement Land within 14 days after election day</u>. [my emphasis]

[68] Article XI, s. 2, is the residency requirement at issue in this case. There is no residency requirement for participation in the annual General Assembly, or being a member of the Elders' Council or Youth Council.

The *Constitution* of Canada

[69] The *Constitution* of Canada consists of the *Constitution Act, 1867,* 30 to 31 Vict. C. 3 (formerly the *British North America Act, 1867*) and the *Constitution Act, 1982*. The *Constitution Act, 1982*, has Parts I – VII. Part I contains the Canadian *Charter of Rights and Freedoms,* ss. 1- 34, and Part II contains *Rights of the Aboriginal Peoples of Canada.*

[70] Section 52 of the *Constitution Act, 1982*, states:

> 52. (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.
>
> (2) The Constitution of Canada includes
> (a) the *Canada Act 1982*, including this Act;
>
> (b) the Acts and orders referred to in the schedule; and
>
> (c) any amendment to any Act or order referred to in paragraph (*a*) or (*b*).

[71] Part II contains only ss. 35 and 35.1. In the interest of brevity, the principal clause is:

> 35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
>
> (2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada.
>
> (3) For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.
>
> (4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.

[72] There are two other sections of the *Constitution Act, 1982*, that must be set out. The first is s. 25 which is part of the *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.

[73] The second is the Application of the *Charter*:

> 32. (1) This Charter applies
>
> (a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and

> (b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

The Implementing Legislation

[74] The *Yukon First Nations Land Claims Settlement Act*, S.C. 1994, c. 34 (the "*Land Claims Settlement Act*"), is the federal legislation that pursuant to s. 4(d) approves, gives effect to and declares valid the VGFN Final Agreement.

[75] Among other things, the *Land Claims Settlement Act* contains the following Preamble:

> AND WHEREAS the Government of Canada has undertaken to recommend to Parliament the enactment of legislation for approving, giving effect to and declaring valid final agreements and transboundary agreements;

[76] Section 6 states that a final agreement is a land claims agreement within the meaning of s. 35 of the *Constitution Act, 1982.*

[77] The *Yukon First Nations Self-Government Act*, S.C. 1994, c. 35 (the "*Self-Government Ac*t"), came into force on February 14, 1995. Section 4 states that the purpose of the *Self-Government Act* is to bring into effect the VGFN self-government agreement the day the *Self-Government Act* comes into force.

[78] Section 7 states that the First Nation is a legal entity having the capacity, rights, powers and privileges of a natural person and s. 17 states that the *Indian Act* ceases to apply to the self-governing VGFN Government.

[79] Section 8(1) of the *Self-Government Act* states that a first nation's constitution shall provide for:

> …
>
> (b) the governing bodies of the first nation and their composition, membership, powers, duties and procedures;
>
> …
>
> (d) the recognition and protection of the rights and freedoms of citizens;
>
> …

[80] Section 15 states that the Supreme Court of Yukon has jurisdiction for any matter or proceeding arising out of the *Self-Government Act* or out of a self-government agreement of a first nation.

[81] The Yukon legislature similarly enacted the *First Nations (Yukon) Self-Government Act* ("*Territorial Act*") to approve self-government agreements negotiated pursuant to Chapter 24 of the UFA. Pursuant to the *Territorial Act*, Yukon passed an Order in Council approving the Self-Government Agreement on behalf of Yukon.

Challenged Evidence

[82] Counsel for Ms. Dickson challenges the opinions expressed in the affidavit of Dave Joe, filed by VGFN, on the grounds that the evidence is inadmissible as it purports to be expert opinion evidence of negotiations of the VGFN Self-Government Agreement with Canada and Yukon. The issue is the extent to which opinion evidence about negotiations can be used in the interpretive process.

[83] Dave Joe, a member of the Champagne and Aishihik First Nation, was the Chief Negotiator for the Vuntut Gwitchin First Nation for their Final Agreement and Self-Government Agreement. In particular, in paras. 5, 7, 8, 9, 11 and 12 of his affidavit, filed March 27, 2019, he expressed opinions about whether the parties reached agreement

on the application of the *Charter*. He opined that particular sections were not intended to unconditionally apply the *Charter* to the VGFN exercise of self-government.

[84] Counsel for Ms. Dickson submits that the Court should follow the principle of contractual interpretation in the Supreme Court of Canada judgments in *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, at para. 57, and *Teal Cedar Products Ltd. v. British Columbia*, 2017 SCC 32, at para. 63, which state that surrounding circumstances will be considered in interpreting the terms of a contract but they must never be allowed to overwhelm the terms of the agreement.

[85] Counsel for Ms. Dickson submits that a quotation from Groberman J.A. in *British Columbia (Minister of Technology, Innovation and Citizens' Services) v. Columbus Real Estate Inc.*, 2018 BCCA 340, at paras. 63 – 65, should be followed. The trial judge's decision not to consider "the subjective intentions of the parties" or any "negotiator's opinion about why something was included in the contract" was approved. Groberman J.A. stated that the court must consider the factual matrix surrounding a contract but does not suggest that subjective evidence is helpful.

[86] In my view, the interpretation of Yukon First Nation Final Agreements should not be bound by contract principles, although they may be helpful markers in considering the appropriate interpretation. Rather, as stated by Binnie J. in *Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53, at paras. 10 and 12:

> [10] … Thoughtful administration of the treaty will help manage, even if it fails to eliminate, some of the misunderstandings and grievances that have characterized the past. Still, as the facts of this case show, the treaty will not accomplish its purpose if it is interpreted by territorial officials in an ungenerous manner or as if it were an everyday commercial contract. The treaty is as much about building relationships as it is about the settlement of ancient

> grievances. The future is more important than the past. A canoeist who hopes to make progress faces forwards, not backwards.
>
> …
>
> [12] … The historical treaties were typically expressed in lofty terms of high generality and were often ambiguous. The courts were obliged to resort to general principles (such as the honour of the Crown) to fill the gaps and achieve a fair outcome. Modern comprehensive land claim agreements, on the other hand, starting perhaps with the *James Bay and Northern Québec Agreement* (1975), while still to be interpreted and [page120] applied in a manner that upholds the honour of the Crown, were nevertheless intended to create some precision around property and governance rights and obligations. Instead of *ad hoc* remedies to smooth the way to reconciliation, the modern treaties are designed to place Aboriginal and non-Aboriginal relations in the mainstream legal system with its advantages of continuity, transparency, and predictability. … [my emphasis]

[87] Karakatsanis J. adopted this approach in *First Nation of Nacho Nyak Dun v. Yukon*, 2017 SCC 58 (“*Nacho Nyak Dun”*), in para. 37, stating:

> [37] Paying close attention to the terms of a modern treaty means interpreting the provision at issue in light of the treaty text *as a whole* and the treaty's objectives (*Little Salmon*, at para. 10; *Moses*, at para. 7; ss. 2.6.1, 2.6.6 and 2.6.7 of the Final Agreements; see also the *Interpretation Act*, R.S.C. 1985, c. I-21, s. 12). Indeed, a modern treaty will not accomplish its purpose of fostering positive, long-term relationships between Indigenous peoples and the Crown if it is interpreted "in an ungenerous manner or as if it were an everyday commercial contract" (*Little Salmon*, at para. 10; see also D. Newman, "Contractual and Covenantal Conceptions of Modern Treaty Interpretation" (2011), 54 S.C.L.R. (2d) 475). Furthermore, while courts must "strive to respect [the] handiwork" of the parties to a modern treaty, this is always "subject to such constitutional limitations as the honour of the Crown" (*Little Salmon*, at para. 54). [my emphasis]

[88] In the context of these interpretive principles, it would not be appropriate to rule opinions expressed in the affidavit of a negotiator as inadmissible but rather give appropriate weight depending on the circumstances. An example of this is the inclusion of evidence from Barry Stuart, the Chief Land Claims Negotiator for Yukon in *Nacho Nyak Dun*, at paras. 46 – 47, expressing the opinion that the First Nations' interest in resources was best served by constitutionally protecting the sharing of management responsibility for water, wildlife, forestry, land and culture rather than simply acquiring vast tracts of lands as settlement lands. Thus, a negotiator's opinion is admissible as in that case it was found to be helpful to explain what First Nations gave up in Settlement Land in exchange for the constitutional protection of land use management participation and sharing in their Traditional Territory.

[89] Counsel for Ms. Dickson also submits that paragraphs 8, 9 and 11 in the affidavit of William Josie should be ruled inadmissible. Mr. Josie chaired the Constitutional Reform Committee ("CRC") which was struck in 2017 by a resolution of the General Assembly to review the VGFN Constitution, last amended in 2006.

[90] The CRC is not formally created in the VGFN Constitution. It appears to be an *ad hoc* committee to review the Constitution and seek input and feedback on potential amendments to the VGFN Constitution which would be presented to the General Assembly.

[91] In paragraphs 8, 9 and 11 of his affidavit, Mr. Josie explains the proposed amendment to the residency requirement and the reasoning of the CRC. Counsel for Ms. Dickson submits that it is not permissible for an affiant to speak for anyone but him or herself based on *West Moberly First Nations v. British Columbia*, 2018 BCSC 1835.

In that case, the court gave no weight to the affidavit of the former chair of a three-person Joint Review Panel, purporting to speak on behalf of the other panel members about their deliberations and rationale for conclusions. In particular, the former chair of the Joint Review Panel presented evidence that challenged the Joint Review Panel report in an argumentative way and purported to speak on behalf of the three Joint Review Panel members. The court ultimately rejected the affidavit of the former Chair of the Joint Review Panel on the ground that the Joint Review Panel was an administrative decision-maker performing an adjudicative function.

[92] In my view, the CRC is not an administrative decision-making body and Mr. Josie is entitled to give his explanation of the reasons for the amended residency requirement.

ISSUES

Issue 1: Should the Court decline to hear the application on the ground that it is fundamentally a political question best left to negotiation among VGFN, Yukon and Canada?

[93] The submission of VGFN is that the residency requirement before the Court is a purely political question that the Court should decline to answer.

[94] Counsel for VGFN submits that the test in *Reference Re Canada Assistance Plan (B.C.)*, [1991] 2 S.C.R. 525, at p. 545, later adopted in *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, at paras. 26 - 27, should be considered:

> [26] …
>
> Thus the circumstances in which the Court may decline to answer a reference question on the basis of "non-justiciability" include:

> (i) if to do so would take the Court beyond its own assessment of its proper role in the constitutional framework of our democratic form of government or
>
> (ii) if the Court could not give an answer that lies within its area of expertise: the interpretation of law.
>
> [27] As to the "proper role" of the Court, it is important to underline, contrary to the submission of the *amicus curiae*, that the questions posed in this Reference do not ask the Court to usurp any democratic decision that the people of Quebec may be called upon to make. The questions posed by the Governor in Council, as we interpret them, are strictly limited to aspects of the legal framework in which that democratic decision is to be taken. …

[95] Counsel for VGFN submits that the proper role of the Court is one of restraint as stated in *Nacho Nyak Dun*, at para. 4:

> In my view, this proceeding is best characterized as a judicial review of Yukon's decision to approve its land use plan. In a judicial review concerning the implementation of modern treaties, a court should simply assess whether the challenged decision is legal, rather than closely supervise the conduct of the parties at each stage of the treaty relationship. Reconciliation often demands judicial forbearance. Courts should generally leave space for the parties to govern together and work out their differences. [my emphasis]

[96] I acknowledge that the above principles arise in the context of a reference and a judicial review, and present useful principles to consider. However, the case at bar seeks an interpretation of law relating to the issue of whether the *Charter* applies to the VGFN Constitution. This case is not the classic case of VGFN v. Canada but rather has the additional dimension of a VGFN and Canadian citizen seeking to apply the *Charter*, the supreme law of Canada, to her First Nation.

[97] Counsel for VGFN also cite authors Peter Hogg and Mary Ellen Turpel in their article *Implementing Aboriginal Self-Government: Constitutional and Jurisdictional Issues* (1995), 74:2 Can. Bar. Rev. 187, at 190 ("Hogg & Turpel"):

> The inherent nature of the right of self-government does not answer the question of what the right means today, and how it relates to the existing constitutional and political structures. Uncertainties on these issues make high level political discussions on what Aboriginal self-government means in a contemporary political context essential, because at present the issues are wide open to judicial interpretation if left to the courts, and they are not suitable for resolution by courts.[9] It is in the best interests of both governments and Aboriginal peoples to explore options short of constitutional amendment (although constitutional amendment would be the preferred approach). [my emphasis]

[98] At footnote 9, the authors state:

> The issues are not suitable for resolution by courts because only political discussions can adequately address matters of jurisdiction, financing and intergovernmental cooperation. Legal reasoning in the constitutional context is not broad enough to embrace all of these dimensions.

[99] I do not view the residency requirement as a "purely political" question to be determined in another forum, but rather a question of the interpretation of law.

[100] This dispute is brought by Ms. Dickson, a Vuntut Gwitchin citizen who seeks a declaration that the residency requirement in the VGFN Constitution is invalid primarily under the *Charter,* or alternatively under the VGFN Constitution. Thus, she presents a question of interpretation at the outset as to which constitution applies.

[101] I conclude that the Court should not decline to hear this question of interpretation of law. In my view, a political discussion or negotiation has taken place in negotiating the VGFN Final Agreement, the VGFN Self-Government Agreement and the VGFN Constitution. Should there be another political discussion nationally, the Vuntut Gwitchin

can take advantage of that under s. 3.5 of the VGFN Final Agreement or s. 3.3 of the VGFN Self-Government Agreement.

Issue 2: Does the *Charter of Rights and Freedoms* apply to Ms. Dickson's challenge to the residency requirement in the VGFN Constitution?

[102] Counsel for VGFN submits that there are four compelling arguments for concluding that Ms. Dickson's application should be subject to the VGFN Constitution, not the *Charter*.

[103] Firstly, VGFN submits that Article IV, ss. 1, 4 and 7 of the VGFN Constitution recognizes and protects the equality rights of Ms. Dickson in relation to the VGFN Government:

> 1. The Constitution hereby guarantees the rights and freedoms hereinafter set out subject only to such reasonable limits as can be demonstrably justified in a free and democratic Vuntut Gwitchin society.
>
> …
>
> 4. Subject to residency and other requirements set out in Vuntut Gwitchin Law, every Citizen who is at least 18 years of age is eligible to vote in Vuntut Gwitchin First Nation elections and to hold office in Vuntut Gwitchin Government.
>
> …
>
> 7. Every individual is equal before and under the laws of the Vuntut Gwitchin First Nation and has the right to the equal protection an equal benefit of Vuntut Gwitchin First Nation law without discrimination.

[104] In other words, Ms. Dickson can have her application addressed under the VGFN Constitution, which incidentally she pled as an alternative remedy. Counsel for VGFN

submit that the VGFN Final Agreement and VGFN Self-Government Agreement specifically provided for this:

(a) In s. 24.5.0 of the VGFN Final Agreement entitled *Yukon First Nation Constitutions,* the following is stated:

> 24.5.1 Negotiations regarding a Yukon First Nation constitution may include the following:
>
> 24.5.1.1 composition, structure and powers of the Yukon First Nation government institutions;
>
> …
>
> 24.5.1.7 the rights of individual members of a Yukon First Nation with respect to the powers of the Yukon First Nation government institutions; [my emphasis]
>
> …

(b) In s. 10.0 of the VGFN Self-Government Agreement, entitled *Vuntut Gwitchin First Nation Constitution*:

> 10.1 The Vuntut Gwitchin First Nation Constitution shall:
>
> …
>
> 10.1.4 recognize and protect the rights and freedoms of Citizens;
>
> 10.1.5 provide for the challenging of the validity of laws enacted by the Vuntut Gwitchin First Nation and for the quashing of invalid laws; [my emphasis]
>
> …

[105] Secondly, VGFN submits, that in negotiations, it did not agree with the unconditional application of the *Charter* and that no agreement was reached as to the

application of the *Charter* and the VGFN Final Agreement and VGFN Self-Government Agreement were therefore left silent on this matter.

[106] To buttress this opinion, VGFN points to the Nisga'a Final Agreement, which explicitly stated that the *Charter* applies to the Nisga'a Government.

[107] With respect to the words of Chapter 24.1.2 of the VGFN Final Agreement that a self-government agreement be subject to negotiation "and in conformity with the Constitution of Canada", VGFN submits that this means that the self-government arrangements in the VGFN Final Agreement and VGFN Self-Government Agreement did not alter the division of powers between Canada and Yukon or provinces and did not affect the application of ss. 25 and 35 of the *Charter* to the exercise of VGFN rights to self-government.

[108] Thirdly, VGFN submits that the *Charter* was not developed with any consideration for the VGFN legal, political traditions or governance systems. It submits that in contrast to the *Charter of Rights and Freedoms* focus on individual rights, the VGFN legal orders are collective in nature. An example of this is the VGFN imperative to protect their culture and settlement land requiring that no all-weather road can be constructed to Old Crow until the approval of a land use plan pursuant to s. 11.10.0 of the VGFN Final Agreement.

[109] Fourthly, VGFN submits that the principle of judicial deference should apply as stated by Grammond J. in *Pastion v. Dene Tha' First nation*, 2018 FC 648, at para. 23:

> … The enactment of Indigenous election legislation, such as the Election Regulations at issue in this case, is an exercise of self-government. The application of laws is a component of self-government. It is desirable that laws be applied by the same people who made them. Therefore, where Indigenous laws ascribe jurisdiction to an Indigenous decision maker,

> deference towards that decision maker is a consequence of the principle of self-government.

Analysis

[110] The VGFN Final Agreement and the VGFN Self-Government Agreement do not expressly refer to the application of the *Charter.* However, as stated above, in s. 24.1.2, the Self-Government Agreement to be negotiated was to be "in conformity with the Constitution of Canada". The *Constitution Act, 1982*, includes the *Charter.* Peter Hogg stated in his definitive work *The Constitutional Law of Canada*, Vol. 1, 5th ed (Toronto: Carswell, 2007) ("*Constitutional Law of Canada*"):

> The *Charter of Rights* is part of the Constitution of Canada because it is Part I of the *Constitution Act, 1982*, which is Scheduled B of the *Canada Act, 1982*, which is expressly named in s. 52(2).

[111] In my view, the specific reference to the Constitution of Canada, cannot be narrowly interpreted to simply refer to the division of powers between Canada and the provinces without some words of limitation.

[112] The wording of s. 24.1.3.1 of the VGFN Final Agreement is more prescriptive in that it clearly states that self-government agreements "shall not affect the rights of Yukon Indian People as Canadian Citizens". Thus, a Vuntut Gwitchin citizen like Ms. Dickson should have the right to make a *Charter* application on equality rights to challenge the VGFN Constitution. This does not in any way suggest that Article IV s. 7 – Rights of Citizens in the VGFN Constitution is not a valid expression of Vuntut Gwitchin law but simply that Ms. Dickson may apply for a remedy under s. 15 of the *Charter* and the jurisprudence interpreting it.

[113] Section 24.1.3.2 of the VGFN Final Agreement states that self-government agreements shall not affect "their entitlement to all of the services, benefits and protections of other citizens" unless otherwise provided pursuant to a self-government agreement or legislation enacted thereunder. In my view, that would require an affirmative statement that the self-government agreement or legislation, specifically Article IV – Rights of Citizens was provided in place of the *Charter.*

[114] The criticism that the *Charter* does not reflect the legal, political traditions or governance systems of the VGFN is met, to some extent, by the provision of s. 25 of the *Charter* which states that the *Charter* shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights. In other words, the guarantee of certain rights and freedoms in the *Charter of Rights and Freedoms* may be construed to ensure that the culture and governance system of the particular aboriginal group may be protected or maintained. I will address s. 25 in greater detail below.

[115] The reference to judicial deference in *Pastion v. Dene Tha' First Nation* must be considered in its proper context of that case, which was a challenge to the results of an election pursuant to election laws passed by the First Nation "chosen according to the custom of the band under the *Indian Act*". It was not a question of the application of the *Charter* as in the case at bar.

[116] Section 52(1) is the basis of Ms. Dickson's claim that the residency requirement should be declared of no force and effect. Section 52(1) begins with the words:

> 52(1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

[117] As stated previously, the *Charter* is part of the *Constitution Act, 1982*, and is supreme. See also *Cuddy Chicks Ltd. v. Ontario (Labour Relations Board)*, [1991] 2 S.C.R. 5, at para. 14. The effect of s. 52(1) is to put the *Constitution Act, 1982*, and thus the *Charter of Rights and Freedoms* in a position of legal paramountcy.

[118] In my view, nothing in the VGFN Final Agreement or VGFN Self-Government Agreement explicitly states that the *Charter* does not apply to the VGFN Government.

[119] I do agree that the VGFN Final Agreement explicitly provided that negotiations of a Yukon First Nation Constitution may include the rights of members of the First Nation with respect to powers of the First Nation (s. 24.5.1.7). I also agree that the VGFN Self-Government Agreement stated that the VGFN Constitution shall provide for challenging the validity of VGFN laws. However, neither section suggests that this in any way ousts the application of the *Charter.*

[120] Similarly, various provinces have their own statutory charters of rights. Due to the implementation of the *Charter,* the statutory bills of right have lost much of their impact. Nevertheless, Prof. Hogg (p. 34-8) and case law indicate that the statutory bills of rights remain in force and effect to the extent they are broader in scope than the *Charter*. Indeed, in *Godbout v. Longueuil (City)*, [1997] 3 S.C.R. 844 ("*Godbout*"), the Supreme Court of Canada applied the Quebec Charter.

[121] The question remains as to whether s. 32 of the *Charter* applies to the VGFN Constitution and government.

[122] Section 32 addresses the application of the *Charter*:

> 32(1) This Charter applies
>
> (a) to the Parliament and government of Canada in respect to all matters within the authority of

> Parliament including all matters relating to the Yukon Territory and Northwest Territories; and
>
> (b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

[123] The precise wording of s. 32 that the *Charter* applies "to all matters within the authority of Parliament including all matters relating to the Yukon Territory" goes some distance to apply the *Charter* to the VGFN government in a general way. However, the *Charter* pre-dates the VGFN Final Agreement and the VGFN Self-Government Agreement as well as the *Land Claims Settlement Act* and the *Self-Government Act*, the latter two being federal statutes. In my view, s. 32 does not provide an exhaustive list of governments subject to the *Charter.*

[124] The Supreme Court of Canada interprets the purpose of s. 32 of the *Charter* to capture all governmental authority in Canada, including municipalities. In *Godbout*, the court struck down a residency requirement for employees of the City of Longueuil. While five judges relied upon s. 5 of the Quebec Charter, La Forest, L'Heureux-Dubé and McLachlin JJ. struck the residency requirement down under s. 7 of the *Charter.*

La Forest J., speaking for the majority stated the following:

> [48] The possibility that the Canadian Charter might apply to entities other than Parliament, the provincial legislatures and the federal or provincial governments is, of course, explicitly contemplated by the language of s. 32(1) inasmuch as entities that are controlled by government or that perform truly governmental functions are themselves "matters within the authority" of the particular legislative body that created them. Moreover, interpreting s. 32 as including governmental entities other than those explicitly listed therein is entirely sensible from a practical perspective. …

[125] In applying the *Charter* to the municipality of the City of Longueuil, La Forest J. reasoned that municipalities performed "quintessentially governmental functions" in that they were democratically elected, imposed taxes and made laws.

[126] In *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624 ("*Eldridge*"), the issue was whether the failure of a hospital to provide sign language interpreters as an insured benefit under the Medical Services Plan violated s. 15 of the *Charter*. La Forest J., speaking for the court, stated that it is well established that the *Charter* applies to activities of government. He added, at paras. 41 – 44, that even an entity that is not part of government may be found to attract *Charter* scrutiny because the act performed is truly governmental in nature. Thus, an entity like a hospital may be implementing a statutory scheme or government program and it will be subject to the *Charter* for that act but not its other private activities.

[127] Counsel for Ms. Dickson submitted that the judgment in *Band (Eeyouch) v. Napash,* 2014 QCCQ 10367 ("*Band v. Napash*"), should be followed. In that case, the trial judge decided that the Chisasibi Alcohol By-law was subject to *Charter* scrutiny. The trial judge reviewed *Godbout* and a number of cases determining that the *Indian Act* was subject to *Charter* scrutiny. In *Band v. Napash*, however, the regulatory power exercised by the Band flowed from the federal *Cree-Naskapi of Quebec Act* assented to in June 1984. The trial judge concluded that despite the special treatment for the Crees in the signing of the James Bay Agreement, their situation was akin to the *Indian Act*.

[128] However, counsel for VGFN distinguish *Band v. Napash* as the James Bay Agreement extinguished "native claims, rights, title and interests" and the by-laws of the band council were subject to the approval of the Minister of Indian Affairs and Northern

Development. Counsel for VGFN concedes that s. 15 of the *Charter* applies to bands under the *Indian Act* or custom election codes under the *Indian Act*. See *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203, ("*Corbiere*").

[129] Counsel for VGFN submit that VGFN's authority to govern themselves does not arise by federal or territorial statute but through their inherent right to choose how their political leaders will be selected. By the same token, Canada and Yukon submit that it is through their enacting legislation (the *Land Claims Settlement Act,* the *Self-Government Act*, for example) that the First Nation self-governments derive their power. Both of these submissions have merit. However, it is worth noting the view of Hogg & Turpel, cited above, at p. 214:

> Despite the silence of section 32 on Aboriginal governments, it is probable that a court would hold that Aboriginal governments are bound by the *Charter*. This would be so where self-government institutions have been created by statute, because the *Charter* applies to all bodies exercising statutory powers. Where self-government institutions have been created by an Aboriginal people and empowered by a self-government agreement, the source of the self-government powers is probably a treaty right (if the self-government agreement has treaty status) or an aboriginal right (the inherent right of self-government) or both. Even here, the self-government agreement requires the aid of a statute to make clear that the agreement is binding on third parties. The statute implementing the self-government probably constitute a sufficient involvement by the Parliament of Canada to make the *Charter* applicable. [footnotes omitted] [my emphasis]

[130] The VGFN exercise of its legislative capacity and the VGFN Constitution bring it within the scope of s. 32(1) of the *Charter*, pursuant to the principles set out in *Eldridge* as being either "government" or exercising inherently "government" activities. Thus, the *Charter* applies to the residency requirement of the VGFN Constitution whether viewed

from an exercise of inherent right or an exercise of the VGFN Self-Government Agreement implemented by federal and territorial legislation. Both are parts of Canada's constitutional fabric. As stated by Justice Karakatsanis in *Nacho Nyak Dun*, at para. 1:

> As expressions of partnership between nations, modern treaties play a critical role in fostering reconciliation. Through s. 35 of the *Constitution Act, 1982*, they have assumed a vital place in our constitutional fabric. …

[131] To summarize, I conclude that the *Charter* as part of the *Constitution Act, 1982*, is the supreme law of Canada and applies to the VGFN government, Constitution and laws for these reasons:

1. The *Charter of Rights and Freedoms* is part of the *Constitution Act, 1982*, and hence applies to the VGFN Constitution and laws.
2. The rights of VGFN citizens as Canadian citizens includes the exercise of their rights and freedoms guaranteed in the *Charter.*
3. The VGFN right of self-government is both inherent and validated by Canada and Yukon legislation and thus part of the *Constitution Act, 1982*.
4. The *Charter* applies to the VGFN Constitution, and laws pursuant to s. 32 of the *Charter* as the VGFN acts as a government and exercises government activities.
5. The VGFN government, Constitution and laws are part of Canada's constitutional fabric.
6. Article IV – Rights of Citizens remains in effect in the VGFN Constitution and the *Charter of Rights and Freedoms* in the *Constitution Act, 1982*, also applies.

Issue 3: If the *Charter of Rights and Freedom* applies, does the residency requirement infringe Ms. Dickson's s. 15(1) equality right?

[132] The answer to this question requires an analysis of *Corbiere*, cited above. In that case, the Supreme Court of Canada found that the exclusion of non-resident members of the Batchewana Indian Band (the " Batchewana Band") from the right to vote in Batchewana Band elections pursuant to s. 77(1) of the *Indian Act*, was inconsistent with s. 15(1) of the *Charter.* Section 77(1) stated that a member of a band must be ordinarily resident on the reserve to be qualified to vote.

[133] Peter Hogg, in *Constitutional Law of Canada*, cited above, at pp. 55 – 85, stated that residence is not an analogous ground under s. 15 as it lacks the element of immutability. Residency is not permanent or unchangeable. The Court appears to have coined the term Aboriginality-residence (off-reserve band member status) to distinguish it from the typical place of residence issue that arises under the right to vote in s. 3 of the *Charter*. In his article, entitled *Equality as a Charter Value in Constitutional Interpretation* (2003), 20 S.C.L.R. (2d) 113 – 134, at para. 3, Professor Hogg stated that the exclusion of place of residence as an analogous ground was based on it being a "freely chosen" status.

[134] It is important to consider the factual context of *Corbiere* at the outset. It is set out in the judgment of L'Heureux-Dubé J. as follows:

1. The Batchewana Band has three reserves near Sault Ste. Marie, Ontario: the Rankin, Goulais Bay and Obadjiwan.
2. As of 1991, the Batchewana Band had 1,426 members of which 958 members, (67.2%) lived off reserve.

3. Prior to 1850, the Batchewana Band occupied large areas of land along the eastern and northern shores of Lake Huron, the northern shore of Lake Superior, and various areas inland.
4. The Batchewana Band's history involved the loss of most of its land base.
5. In 1850, as part of the Robinson-Huron Treaty, their land was surrendered to the Crown and the Batchewana obtained a reserve of 246 square miles.
6. In 1859, the Batchewana Band surrendered all of this reserve through the Pennefather treaty, leaving it only with Whitefish Island, a small island in the St Mary's River. For 20 years, the Band owned only approximately 15 acres of land.
7. After 1879, the Batchewana Band began to reacquire land by purchasing what is now the Goulais Bay Reserve, north of Sault Ste. Marie. Its size was increased by donation from the Roman Catholic Church in 1885.
8. The Goulais Bay Reserve became the Batchewana Band's only land when Whitefish Island was expropriated by three railway companies in 1900 and 1902.
9. Until the 1960s or early 1970s, most Batchewana Band members lived on the Garden River Reserve, which belonged to another band.
10. In the 1940s, the Batchewana Band Council, made up of and elected by non-resident members, assembled land which became the Rankin Reserve in 1952. The main portion of this land is surrounded by the City of Sault Ste. Marie.

11. The third reserve, the Obadjiwan is quite small and like Goulais Bay is located in a rural area north of Sault Ste. Marie.

12. Rankin Reserve has the largest percentage of those who live on one of the Batchewana Band's reserves. Corbiere lived on Rankin Reserve.

13. Although residence on the reserve was required by law to be eligible to vote for band councils, from the first election in 1902 until 1962, the residency requirement was not enforced in Batchewana Band elections. However, since 1962 only Batchewana Band members living on one of the three reserves have been allowed to vote.

14. In 1991, only 32.8 percent of the 1,426 registered members lived on the reserves and the trend to live off reserve was continuing.

15. For the Batchawana Band, approximately 85 percent of the growth in Batchewana Band membership consisted of non-status people who were reinstated to Indian status as a result of the 1985 amendments to the *Indian Act*.

16. The only defendant represented at trial was Her Majesty the Queen. The Batchewana Band took no part in the trial.

17. Finally, s. 25 of the *Charter* was not the focus of the case, although there is some commentary in the judgment of L'Heureux-Dubé J.

[135] The Supreme Court of Canada applied the three-part analysis for s. 15 of the *Charter* set out in *Law v. Canada (Minister of Employment and Immigration*), [1999] 1 S.C.R. 497, at para. 88, ("*Law* case"):

> … (A) Does the impugned law (a) draw a formal distinction between the claimant and others on the basis of one

> or more personal characteristics, or (b) fail to take into account the claimant's already disadvantaged position within Canadian society resulting in substantively differential treatment between the claimant and others on the basis of one or more personal characteristics?
>
> (B) Is the claimant subject to differential treatment based on one or more enumerated and analogous grounds?
>
> and
>
> (C) Does the differential treatment discriminate, by imposing a burden upon or withholding a benefit from the claimant in a manner which reflects the stereotypical application of presumed group or personal characteristics, or which otherwise has the effect of perpetuating or promoting the view that the individual is less capable or worthy of recognition or value as a human being or as a member of Canadian society, equally deserving of concern, respect, and consideration? [my emphasis]

[136] In the *Law* case, the Court described a general purpose of s. 15(1) as the promotion or protection of human dignity. Iacobucci J. described it as follows at para. 53:

> … Human dignity means that an individual or group feels self-respect and self-worth. It is concerned with physical and psychological integrity and empowerment. Human dignity is harmed by unfair treatment premised upon personal traits or circumstances which do not relate to individual needs, capacities, or merits. It is enhanced by laws which are sensitive to the needs, capacities, and merits of different individuals, taking into account the context underlying their differences. Human dignity is harmed when individuals and groups are marginalized, ignored, or devalued, and is enhanced when laws recognize the full place of all individuals and groups within Canadian society. Human dignity within the meaning of the equality guarantee does not relate to the status or position of an individual in society per se, but rather concerns the manner in which a person legitimately feels when confronted with a particular law. Does the law treat him or her unfairly, taking into account all of the circumstances regarding the individuals affected and excluded by the law?

[137] Or as Professor Hogg stated, in *Constitutional Law of Canada,* cited above, at para. 4, does the impugned law impair human dignity?

[138] The majority judgment was authored by McLachlin and Bastarache JJ., on behalf of five members of the court. L'Heureux-Dubé J. wrote a concurring judgment on behalf of four members of the court. The judgments agree that "Aboriginality residence" as it pertains to whether an Aboriginal band member lives on or off the reserve is an analogous ground in s. 15(1) of the *Charter.*

[139] The majority found that the first part of the *Law case* test was satisfied by the *Indian Act*'s exclusion of off-reserve band members from voting privileges in Band governance. In other words, the off-reserve band member status constituted a ground of discrimination analogous to the enumerated grounds in s. 15(1).

[140] McLachlin and Bastarache JJ. qualified this finding by stating, in para. 7 of *Corbiere*, that the enumerated grounds function as legislative markers that must be distinguished from a finding that discrimination exists in a particular case. Thus, decisions on the enumerated grounds are not always discriminatory and the circumstances of each case must amount to discrimination. By way of example, the judges stated in para. 9, that sex will always be a ground, but sex-based legislative distinctions may not always be discriminatory. McLachlin and Bastarache JJ. state in para. 8:

> … The enumerated and analogous grounds stand as constant markers of suspect decision making or potential discrimination. What varies is whether they amount to discrimination in the particular circumstances of the case.

[141] McLachlin and Bastarache JJ. then state at para. 10:

> … If "Aboriginality-residence" is to be an analogous ground (and we agree with L'Heureux-Dubé J. that it should), then it must always stand as a constant marker of potential legislative discrimination, whether the challenge is to a governmental tax credit, a voting right, or a pension scheme. This established, the analysis moves to the third stage: whether the distinction amounts, in purpose or effect, to discrimination on the facts of the case. [my emphasis]

[142] As to the third stage, McLachlin and Bastarache JJ. state:

> [17] … The impugned distinction perpetuates the historic disadvantage experienced by off-reserve band members by denying them the right to vote and participate in their band's governance. Off-reserve band members have important interests in band governance which the distinction denies. They are co-owners of the band's assets. The reserve, whether they live on or off it, is their and their children's land. The band council represents them as band members to the community at large, in negotiations with the government, and within Aboriginal organizations. Although there are some matters of purely local interest, which do not as directly affect the interests of off-reserve band members, …
>
> [18] Taking all this into account, it is clear that the s. 77(1) disenfranchisement is discriminatory. It denies off-reserve band members the right to participate fully in band governance on the arbitrary basis of a personal characteristic. It reaches the cultural identity of off-reserve Aboriginals in a stereotypical way. It presumes that Aboriginals living off-reserve are not interested in maintaining meaningful participation in the band or in preserving their cultural identity, and are therefore less deserving members of the band. The effect is clear, as is the message: off-reserve band members are not as deserving as those band members who live on reserves. This engages the dignity aspect of the s. 15 analysis and results in the denial of substantive equality. [my emphasis]

[143] The Court went on to state in para. 19 of *Corbiere*, that the discrimination that exists in *Corbiere* does not depend on the composition of the off-reserve members groups, i.e. those who live off reserve by free choice, those forced by economics and social considerations, or those expelled by the *Indian Act*. Rather, the court says:

> … Even if all band members living off-reserve had voluntarily chosen this way of life and were not subject to discrimination in the broader Canadian society, they would still have the same cause of action. They would still suffer a detriment by being denied full participation in the affairs of the bands to which they would continue to belong while the band councils are able to affect their interests, in particular by making decisions with respect to the surrender of lands, the allocation of land to band members, the raising of funds and making of expenditures for the benefit of all band members. The effect of the legislation is to force band members to choose between living on the reserve and exercising their political rights, or living off-reserve and renouncing the exercise of their political rights. The political rights in question are related to the race of the individuals affected, and to their cultural identity. As mentioned earlier, the differential treatment resulting from the legislation is discriminatory because it implies that off-reserve band members are lesser members of their bands or persons who have chosen to be assimilated by the mainstream society. [my emphasis]

[144] The Supreme Court of Canada has recently affirmed a two-step analytical framework to determine if a law infringes the guarantee of equality under s. 15(1) of the *Charter*. The first part asks whether, on its face or in its impact, a law creates a distinction on the basis of an enumerated or analogous ground. The second part of the analysis focusses on arbitrary - or discriminatory – disadvantage, that is whether the impugned law fails to respond to the actual capacities and needs of the members of the group and instead imposes burdens or denies a benefit in a manner that has the effect of reinforcing, perpetuating or exacerbating their disadvantage (see *Kahkewistahaw First Nation v. Taypotat*, 2015 SCC 30, at paras. 19 – 20).

[145] I turn now to the distinctions between the case at bar and those of *Corbiere*:

1. The case at bar does not have Canada as a defendant but rather as an intervenor. This case is between a VGFN citizen who lives off Settlement

Land and the VGFN Government. Thus, it is not the federal government that imposes the residency requirement in the *Indian Act* but the VGFN citizens present and voting at the VGFN General Assembly, exercising their inherent right of self-government.

2. Unlike *Corbiere*, the VGFN citizens have the right to vote regardless of residency. So no one is deprived of voting in the Chief and Council elections regardless of where they reside in Canada.

3. Unlike *Corbiere*, the Vuntut Gwitchin First Nation has a Self-Government Agreement with Canada and Yukon containing the s. 2.1 Principle that the VGFN has traditional decision-making structures and desires to maintain them integrated with contemporary forms of government.

4. Section 8(1)(b) of the *Yukon First Nations Self-Government Act*, cited above, provides that the VGFN Constitution shall provide for: "the governing bodies of the first nation and their composition, membership, powers, duties and procedures".

5. The VGFN residency requirement is set out in the VGFN Constitution ratified by the VGFN General Assembly in 1992 and last amended on August 10, 2019. Significantly, the last amendment improved the residency requirement by assuring a non-resident VGFN citizen would have a four-year paid elected position before being required to reside in Old Crow.

[146] For ease of reference, I repeat the residency requirement here:

> QUALIFICATIONS
>
> 1. Any person desiring to run for Chief and Councillor must meet the following qualifications:
>
> (a) Be 18 years of older;
>
> (b) Be ordinarily resident in Canada;
>
> (c) No indictable offence convictions for 5 years preceding the election; and
>
> (d) Be a Citizen
>
> 2. If an eligible candidate for Chief or Councillor does not reside on Settlement Land during the election and wins their desired seat they must relocate to Settlement Land within 14 days after election day. [my emphasis]

[147] It would appear that the *Law case* test of infringement of Ms. Dickson's s. 15(1) equality right is, at first glance, met for these reasons:

1. The impugned residency requirement does draw a formal distinction between Ms. Dickson and others based on residency.
2. Ms. Dickson is subject to differential treatment because she would have to incur the cost of moving to Old Crow and uprooting her family if successfully elected. Thus the residency requirement does impose the obligation of moving to Old Crow upon a non-resident VGFN citizen, who is elected to the VGFN Council.

Is residency an analogous ground?

[148] In *Corbiere,* the Supreme Court of Canada ruled unanimously that aboriginal residency is an analogous ground and must always stand as a constant marker of

legislative discrimination. Thus, the first step in the s. 15(1) equality analysis is met in the case at bar.

Is the residency requirement, as a general principle, discriminatory?

[149] The residency requirement as a general principle, is not discriminatory for a number of reasons.

[150] Firstly, there is no denial of the right to vote based on residency. A Vuntut Gwitchin citizen can vote in Chief and Council elections regardless of where they reside. Furthermore, non-resident VGFN citizens have the right to be eligible to run for the position of Chief or Councillor. This meets the two guaranteed rights set out in s. 3 of the *Constitution Act, 1982.* The non-resident VGFN citizens have not been disenfranchised.

[151] Secondly, the *Corbiere* decision stands on the accepted evidentiary base that there was a historic disadvantage for the off-reserve band members that was perpetuated by denying them the right to vote. In this case, the evidence presented by Ms. Dickson is that being a resident in Old Crow would place her at a disadvantage as it would deny her the advantage of residing in Whitehorse with its benefits not found in Old Crow. Thus, the historic disadvantage may weigh heavier on the residents of Old Crow rather than the non-residents. As stated by L'Heureux-Dubé, at para. 69:

> [69] Since equality is a comparative concept, the analysis must consider the person relative to whom the claimant is being treated differentially: Law, supra, at para. 56. I accept the claimants' argument that the comparison here is between band members living on- and off-reserve, since these are the two groups whom the legislation treats differentially on its face. This denies the benefit of voting for band leadership to members of bands affected by s. 77(1) who do not live on a reserve. Because of the groups involved, the Court must also be attentive to the fact that there may be unique

> disadvantages or circumstances facing on-reserve band members. However, no evidence has been presented that would suggest that the legislation, in purpose or effect, ameliorates the position of band members living on-reserve, and therefore I find it unnecessary to consider the third contextual factor outlined in Law. … [my emphasis]

[152] Thirdly, this case is not about a section of the *Indian Act* but rather about the incredible accomplishment of replacing the *Indian Act* with the VGFN Constitution created and amended by the Vuntut Gwitchin at their General Assembly where resident and non-resident views were freely expressed for and against the residency requirement.

[153] I conclude that when equality is treated as a comparative concept, the equality right of Ms. Dickson has not been infringed. The evidence is that all VGFN citizens have suffered displacement and alienation from imposed colonial laws, residential school and resource development without the consent or involvement of VGFN citizens. The purpose and effect of the residency requirement is to enhance the homeland and preserve it for all VGFN citizens.

[154] Finally, giving a contextual interpretation that considers the historical disadvantages suffered by all VGFN citizens at the hands of the government of Canada through the *Indian Act* and other government policy, the residency requirement is not an infringement of Ms. Dickson's equality right but recognition of the role of non-residents VGFN citizens in their homeland. The residency requirement does not discriminate but ensures a role that respects rather than denigrates the rights of non-resident VGFN citizens.

[155] Again, L'Heureux-Dubé addressed this issue as follows at para. 114 of *Corbiere*:

> The next issue is what form the general remedy will take. The nature of the violation of equality rights that has been found in this case is different than any that this Court has addressed before. It has been found that, though it would be legitimate for Parliament to create different voting rights for reserve residents and people living off-reserve, in a manner that recognizes non-residents' place in the community, it is not legitimate for Parliament to completely exclude them from voting rights. This is also a situation where the primary effects of this decision will not be felt by the government, but by the bands themselves. In respecting the role of Parliament, these factors should be critical.

[156] I conclude that equality does not require equal treatment especially in the context of establishing a residency requirement for an elected representative on the VGFN Council. Contrary to *Corbiere*, at para. 13, which described the disenfranchisement from voting "on the basis of a personal characteristic that is immutable or changeable only at unacceptable cost to personal identity", the residency requirement involves taking up residence in Old Crow with a salary, not unlike any VGFN citizen that returns from Whitehorse to take employment. In my view, it cannot be discriminatory to require a legislator to reside in the Settlement Lands which will be the focus of the legislative function of Chief and Council. Nor is it discriminatory to require the legislators to be subject to the laws enacted by Chief and Council. There will be a cost to a non-resident relocating to Old Crow but it is mitigated by a four-year paid salary.

[157] The decision in *Cardinal v. Bigstone Cree Nation,* 2018 FC 1536 ("*Bigstone Cree*"), rejects many of the reasons expressed above. However, I find that *Bigstone Cree* is quite distinguishable from the facts of the case at bar.

[158] In *Bigstone Cree*, the facts are as follows:

1. Bigstone Cree Nation ("BCN") is a Treaty 8 First Nation located in northern Alberta.

2. It is comprised of three communities: Wabasca/Desmarais, Chipewyan Lake and Calling Lake.
3. Wabasca is the largest community. Chipewyan Lake and Calling Lake are smaller and more isolated.
4. Mr. Cardinal is affiliated with Calling Lake Reserve and for the past three decades has owned a house that is situated approximately one hundred and fifty metres outside the boundary of Calling Lake Reserve.
5. In December 2009, BCN and Canada entered into a land settlement agreement acknowledging BCN's right to self-government.
6. The BCN Chief and Councillors, prior to 2009, were elected at large. The BCN Election Code at issue changed the manner of electing Chief and Council such that six councillors reside in Wabasca, two councillors reside in Calling Lake and two councillors reside in Chipewyan Lake.
7. The Chief and Councillors are required to assume permanent residency in their affiliated community within three months of their election. Failure to so reside was grounds for removal from office.

[159] The court followed *Corbiere* and concluded that the residency requirement of the BCN Election Code infringed Mr. Cardinal's right to equality under s. 15(1) and could not be saved by s. 1 of the *Charter.*

[160] I distinguish *Bigstone Cree* for the following reasons:

1. The fact that Mr. Cardinal's residence was 150 metres from Calling Lake may have diminished the importance of the residency requirement.

2. The Bigstone Cree amendment to its Election Code was a reversal of its previous at large requirement whereas the VGFN adopted its election custom that had sustained it since pre-contact times.

3. The *Bigstone Cree* case applied the *Corbiere* decision that was based on the vulnerability of non-resident status while the VGFN circumstances suggest the vulnerability applies both to resident and non-resident VGFN citizens.

[161] To the extent that *Bigstone Cree* represents a rigid application of the *Corbiere* decision, I decline to follow it. I prefer the more nuanced approach in *Pastion v. Dene Tha' First Nation*, 2018 FC 648, at paras. 22 – 23, which adopts a deferential approach to First Nation decision-makers as a principle of self-government.

The 14-day Requirement

[162] However, the words requiring the successful elected non-resident to relocate "within 14 days" after election arguably creates a disadvantage in that it imposes an arbitrary disenfranchisement. I turn to whether it can be saved by a reasonable limits analysis under s. 1 of the *Charter*:

> The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

[163] In order to justify a breach of s. 15(1) of the *Charter*, the proportionality analysis in *R. v. Oakes*, [1986] 1 S.C.R. 103, must be considered:

1. The objective of the residency requirement must be "pressing and substantial".

2. The objective of residency requirement must be proportionate in three ways:

    i. it must have a connection to the objective.

    ii. the residency requirement must be minimally impairing of the equality right.

    iii. the residency requirement must be proportionate to and balanced in the interests of the Vuntut Gwitchin citizens residing in Old Crow and the non-resident citizens.

[164] I have concluded that it is not necessary to do a complete s. 1 analysis as the 14-day requirement is neither a minimal impairment of Ms. Dickson's equality right nor is it proportionate and balanced.

[165] The "within 14 days" condition of the residency requirement is a potentially arbitrary disenfranchisement of a successful candidate who was unable to find housing or could not relocate in such a short time frame. In my view, the residency requirement would not be saved under s. 1, subject to a consideration of severing the words, which I discuss below.

Severance

[166] The practice of severance is utilized when only part of a provision is held to be invalid and the rest can independently survive. Professor Hogg describes it in his *Constitutional Law of Canada*, at p. 40.14, as follows:

> Severance is a doctrine of judicial restraint, because its effect is to minimize the impact of a successful *Charter* attack on the law: the court's intrusion into the legislative process goes no further than is necessary to vindicate the *Charter* right.

[167] The two leading cases on severance related to a s. 15 *Charter* right are *Tétreault-Gadoury v. Canada*, [1991] 2 S.C.R. 22, and *Benner v. Canada*, [1997] 1 S.C.R. 358.

[168] I have concluded that the residency requirement without the words "within 14 days" is constitutionally valid and not in breach of Ms. Dickson's s. 15 equality right. It is appropriate, in the context of the Vuntut Gwitchin self-government and society to require a non-resident citizen to reside in the community where the VGFN laws are passed and have their impact.

[169] It is appropriate to sever those words from the provision as it would create a rather Draconian time limit that could result in an arbitrary disenfranchisement of a non-resident citizen who has every intention of complying with the residency requirement.

[170] I declare that the words "within 14 days" are of no force and effect pursuant to s. 52 of the *Constitution Act, 1982*.

[171] I also suspend the declaration for a period of 18 months to give the VGFN General Assembly an opportunity to review the matter before the next election date in 2022. I do add a note of caution that placing strict timeliness always raises the possibility of an arbitrary disenfranchisement and it may be more appropriate to leave the matter of removal from office to the Review Council in Article XII(1)(d) in the VGFN Constitution.

Issue 4: Does Ms. Dickson's equality right under s. 15(1) of the *Charter* abrogate or derogate from the VGFN right to have a residency requirement for its Chief and Council under s. 25 of the *Charter*?

[172] In the event that I may be in error in finding no breach of Ms. Dickson's equality right (with severance of the words "within 14 days"), I turn now to whether the residency requirement (with severance of the words "within 14 days") is shielded by s. 25.

[173] Section 25 of the *Charter of Rights and Freedoms* states:

> 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.

[174] At the outset, it is important to note that the VGFN right of self-government is not challenged in this case. What is challenged is the exercise of that right in the form of this residency requirement as set out in the VGFN Constitution:

> Article XI – Terms of Office and Qualifications
>
> …
>
> 2. If an eligible candidate for Chief or Councillor does not reside on Settlement Land during the election and wins their desired seat they must relocate to Settlement Land within 14 days after election day.

[175] Counsel for Ms. Dickson began with the submission that the purpose of s. 25 is to protect aboriginal collective rights from abrogation or derogation by the Canadian state, not the First Nation governments to use as a shield from *Charter* scrutiny while infringing the *Charter* rights of their own citizens.

[176] I do not accept this position. A great part of this judgment has been devoted to establishing why the *Charter of Rights and Freedoms* applies to this First Nation's

government. Having concluded that the *Charter* does apply, this submission suggests that Ms. Dickson must be granted her s. 15(1) equality right but the First Nation would be deprived of any consideration of s. 25. I reject this position because it completely emasculates s. 25 from a First Nation government perspective. Such an interpretation would result in treating First Nation governments exactly like non-First Nation governments that can only place s. 1 reasonable limits on the guaranteed rights and freedoms "as can be demonstrably justified in a free and democratic society." In my view, there must first be a determination that there is a s. 15 breach that cannot be saved by s. 1 and then proceed to a s. 25 analysis.

[177] I do accept the distinction between the right of self-government and the exercise of that right as stated in a background paper to the Royal Commission on Aboriginal Peoples entitled *Partners in Confederation: Aboriginal Peoples, Self-Government and the Constitution* (Ottawa: Minister of Supply and Services, 1993) at p. 39:

> This approach distinguishes between the *right* of self-government proper and the *exercise* of governmental powers flowing from that right. Insofar as the right of self-government is an Aboriginal right, section 25 protects it from suppression or amputation at the hands of the Charter. However, individual members of Aboriginal groups, like other Canadians, enjoy Charter rights in their relations with governments, and this protection extends to Aboriginal governments. In this view, then, the Charter regulates the manner in which Aboriginal governments exercise their powers, but it does not have the effect of abrogating the right of self-government proper. [my emphasis]

[178] I note that this distinction was stated by Brian Slattery in an article entitled *First Nations and the Constitution: A question of Trust* (1992), 71:2 Can. Bar. Rev. 261, at 286 - 287.

[179] In determining the purpose of s. 25, I prefer the view of Hogg and Turpel in their article *Implementing Aboriginal Self-Government: Constitutional and Jurisdiction Issues*, cited above, at p. 214 – 215:

> Assuming that the *Charter* is applicable to Aboriginal governments, we must consider the effect of section 25 of the *Charter.* Section 25 provides that the *Charter* is not to be construed "so as to abrogate or derogate from any aboriginal, treaty or other rights of freedoms that pertain to the aboriginal peoples of Canada". The main purpose of section 25 is to make clear that the prohibition of racial discrimination in section 15 of the *Charter* is not to be interpreted as abrogating aboriginal or treaty rights that are possessed by a class of people defined by culture or race. It is, therefore, designed as a shield to guard against diminishing aboriginal and treaty rights in situations where non-Aboriginal peoples might challenge the special status and rights of Aboriginal peoples as contrary to equality guarantees. However, because Aboriginal governments were not contemplated by the drafters of the *Charter,* it is unclear how section 25 might be interpreted to exempt the exercise of Aboriginal government from the *Charter.*
>
> …
>
> The point here is that the application of the *Charter,* when viewed with section 25, should not mean that Aboriginal governments must follow the policies and emulate the style of government of the federal and provincial governments. Section 25 allows an Aboriginal government to design programs and laws which are different, for legitimate cultural reasons, and have these reasons considered as relevant should such differences invite judicial review under the *Charter*. Section 25 would allow Aboriginal governments to protect, preserve and promote the identity of their citizens through unique institutions, norms and government practices. [my emphasis]

[180] I should point out that Hogg & Turpel made references to Yukon First Nation Self-Government Agreements in their analysis. Although the above quotation does not include specific reference to a *Charter* application by a member of a First Nation, I

prefer the interpretation of s. 25 as a shield to protect, preserve and promote the identity of VGFN citizens on their homeland.

[181] I am also of the view that an interpretation of s. 25 in this case must reflect the context that the VGFN *Self-Government Act* and the VGFN Constitution which were negotiated after the inclusion of s. 25 in the *Constitution Act, 1982*.

[182] The VGFN, Canada and Yukon made specific reference to s. 25 and s. 35 in s. 24.12.0 of the VGFN Final Agreement where the parties agreed not to construe the *Self-Government Agreement* or *Self-Government Legislation* as s. 35 treaty rights. And in s. 24.12.4, nothing in the preceding sections of s. 24.12.0 could be construed to affect the interpretation of aboriginal rights in either ss. 25 or 35 of the *Constitution Act, 1982.*

An interpretation of s. 25

[183] There is no decision of the Supreme Court of Canada on facts similar to the case at bar.

[184] There is some commentary on s. 25 in *R. v. Kapp*, 2008 SCC 41 ("*Kapp*"). In that case Canada's Aboriginal Fisheries Strategy, a program to issue a commercial fishing licence to three aboriginal bands was challenged by mainly non-aboriginal commercial fishers as a breach of their s. 15(1) equality rights. Those facts are completely distinct from the case at bar, but it is the analytical approach to s. 25 that is important.

[185] The majority found that the program was constitutional under s. 15(2) as a law, program or activity with its objects as the amelioration of conditions of disadvantaged individuals or groups.

[186] As there was no breach of s. 15(1), there was no need to consider s. 25 of the *Charter.* However, the Court commented on s. 25 as follows at paras. 62 – 65:

> [62] Having concluded that a breach of s. 15 is not established, it is unnecessary to consider whether s. 25 of the *Charter* would bar the appellants' claim. However, we wish to signal our concerns with aspects of the reasoning of Bastarache J. and of Kirkpatrick J.A., both of whom would have dismissed the appeal solely on the basis of s. 25.
>
> [63] An initial concern is whether the communal fishing licence at issue in this case lies within s. 25's compass. In our view, the wording of s. 25 and the examples given therein -- aboriginal rights, treaty rights, and "other rights or freedoms", such as rights derived from the Royal Proclamation or from land claims agreements -- suggest that not every aboriginal interest or program falls within the provision's scope. Rather, only rights of a constitutional character are likely to benefit from s. 25. If so, we would question, without deciding, whether the fishing licence is a s. 25 right or freedom.
>
> [64] A second concern is whether, even if the fishing licence does fall under s. 25, the result would constitute an absolute bar to the appellants' s. 15 claim, as distinguished from an interpretive provision informing the construction of potentially conflicting *Charter* rights.
>
> [65] These issues raise complex questions of the utmost importance to the peaceful reconciliation of aboriginal entitlements with the interests of all Canadians. In our view, prudence suggests that these issues are best left for resolution on a case-by-case basis as they arise before the Court. [my emphasis]

[187] I conclude from this commentary that:

1. The first question to be addressed is whether the breach of s. 15(1) is established. I have concluded that Ms. Dickson’s s. 15(1) right is not breached, having severed the words “within 14 days”.

2. Only “aboriginal, treaty or other rights or freedoms” of a “constitutional character” are likely to benefit from s. 25.

3. The Court poses the question of whether s. 25 is an absolute bar or an interpretive provision informing the construction of potentially conflicting *Charter* rights?

[188] The Supreme Court acknowledged that the issues raised under s. 25 are:

1. of the utmost importance to the peaceful resolution of aboriginal entitlements with the interests of all Canadians; and
2. complex issues that should be resolved on a case-by-case basis.

[189] In my view, it is important to place *Kapp* in its proper context. It was a case of non-aboriginal fishers challenging a federal program to grant commercial licences to three aboriginal bands. The majority did not require any examination or analysis of s. 25 but felt compelled to respond to the views expressed by Justices Bastarache and Kirkpatrick.

[190] Bastarache J., in a lengthy analysis of the legislative history and the various interpretive approaches to s. 25, concludes at para. 110:

> … Section 25 is protective and its function must be preserved. Section 25 was not meant to provide for balancing *Charter* rights against aboriginal rights. There should be no reading down of s. 25 while our jurisprudence establishes that aboriginal rights must be given a broad and generous application, and that where there is uncertainty, every effort should be made to give priority to the aboriginal perspective. …

[191] Thus I find the assertion that "only rights of a constitutional character are likely to benefit from s. 25" to be less than a binding precedent, somewhat speculative and hopefully avoided by the "prudence" of leaving these issues for a case-by-case analysis.

[192] I interpret the words "case-by-case basis" to mean that it would not be appropriate to develop a comprehensive analytical framework to interpret s. 25 at the

outset but rather develop principles that may be applied as the case law evolves. If I am correct in this view, the first principle to consider is the reasons for s. 25.

[193] The purpose of s. 25 is to ensure First Nation self-government rights be woven into Canada's constitutional fabric and protected as courts seek to reconcile aboriginal rights, treaties or other rights or freedoms with the interests of all Canadians.

[194] The general question about what right or freedom is of a "constitutional character" presents a challenge. Constance MacIntosh, in her article entitled *Developments in Aboriginal Law: the 2008 – 2009 Term* (2009), 48 S.C.L.R. (2d) 1 – 41, at para. 40, states:

> The majority do not endorse Bastarache J.'s assessment of the scope of section 25. In particular, they "would question, without deciding" whether Bastarache J.'s assessment that the licence falls within the scope of section 25 was correct. The brief reasons they offer to support a more narrow reading of scope is that "the wording of s. 25 and the examples given therein … suggest that not every aboriginal interest or program falls within the provision's scope. Rather, only rights of a constitutional character are likely to benefit from s. 25." The difficulties with this tentative approach are legion. What does the category of "rights of a constitutional nature" mean? Does it mean rights that are recognized under the Constitution? If so, given that the provision explicitly refers to protecting treaty and Aboriginal rights – which are protected under section 35 regardless – what role then is left for section 25? The majority's suggested approach to scope seems to leave section 25 without a role to play. This is contrary to the generally accepted rules of interpretation. The split between the majority and minority, which in some ways comes down to divergent opinions on whether or not the ejusdem generis rule is at play, has considerable consequences.

[195] An important point to be made in the interpretation of s. 25 is in comparing it to s. 35. Section 35 is limited to existing aboriginal and treaty rights and those that may be acquired. Section 25 is clearly worded more broadly and expansively to include "other

rights or freedoms that pertain to the aboriginal peoples of Canada". If s. 25 is not interpreted more broadly than s. 35, the promise of giving the First Nations of Canada protected space in the *Constitution* of Canada will ring hollow.

[196] Counsel for Ms. Dickson submits that the "other rights or freedoms" being limited to rights of a "constitutional character" should be interpreted to mean rights that are not broader in scope than aboriginal or treaty rights. The Supreme Court of Canada did not explicitly state such a limitation in *Kapp.* It did express doubt about whether a fishing licence, in that case, is a s. 25 right or freedom. It did not, in my view, state that "other rights and freedoms" would be limited to aboriginal or treaty rights. In my view, s. 25 expressly added "other rights or freedoms that pertain to the aboriginal peoples of Canada" to expand the interpretation of s. 25, as Hogg and Turpel assert, "to protect, preserve and promote the identity of their citizens through unique institutions, norms and government practices".

[197] I note that L'Heureux-Dubé J. supports the broader interpretation "other rights and freedoms" in *Corbiere*, at para. 52, as follows:

> … Section 25 is triggered when s. 35 Aboriginal or treaty rights are in question, or when the relief requested under a Charter challenge could abrogate or derogate from "other rights or freedoms that pertain to the aboriginal peoples of Canada". This latter phrase indicates that the rights included in s. 25 are broader than those in s. 35, and may include statutory rights. However, the fact that legislation relates to Aboriginal people cannot alone bring it within the scope of the "other rights or freedoms" included in s. 25. …

[198] A similar approach was proposed by Jane Arbour in her seminal article *The Protection of Aboriginal Rights within a Human Rights Regime: In Search of an*

Analytical Framework for Section 25 of the Canadian Charter of Rights and Freedoms (2003), 21 S.C.L.R. (2d) 3, at para. 180:

> In my view, section 25 serves the purpose of ensuring that the protection of individual rights does not diminish the collective nature of Aboriginal groups or the distinctive nature of Aboriginal collectivities. That is, the provision acts as a directive that the Charter operates within a Constitution that provides space for the Aboriginal peoples of Canada to be Aboriginal. Section 25 ultimately serves the purpose of protecting the rights of Aboriginal peoples where the application of the Charter protections for individuals would diminish the distinctive, collective, cultural identity of an Aboriginal group.

[199] I agree that s. 25 provides space for the Vuntut Gwitchin First Nation to protect, preserve and promote the identity of their citizens through unique institutions, norms and government practices.

[200] The use of the words “shall not be construed” is significant. It is imperative rather than discretionary to ensure that there will be constitutional space for other rights or freedoms that pertain to the aboriginal peoples of Canada. As stated by Williamson J. in *Campbell v. British Columbia (A.G.)*, 2000 BCSC 1123, at para. 156, s. 25 does not create any substantive rights but is triggered when aboriginal treaty or other rights or freedoms are challenged on the basis of the *Charter.*

[201] In my view, there is no definitive interpretation that can encompass the myriad of factual and legal issues that will require an interpretation of s. 25. Canada in its intervention, in an effort to provide a comprehensive interpretive guide where the rights cannot be reconciled stated:

> Where it can be shown that: (i) an aboriginal, treaty, or other right or freedom that pertains to aboriginal peoples is necessary for the maintenance of an aboriginal group’s distinctive culture; and that (ii) upholding the *Charter* right

> would undermine the aboriginal group's ability to maintain that distinctive culture, the *Charter* right may, in the factual context of the case, be interpreted in such a way to avoid eroding the distinctive culture, but only to the extent necessary to maintain that distinctive culture.

[202] The difficulty with this interpretive guide is that it introduces two requirements that may not be appropriate:

1. The aboriginal group has the onus to establish that the "other right or freedom", for example, is necessary to maintain the group's distinctive culture when it may simply be a culture practice or tradition; and
2. Again the aboriginal group has to demonstrate that it is maintaining a distinctive culture.

[203] My concern is that this proposed interpretive lens takes the interpretation of s. 25 from a focus of shielding a right or freedom to requiring the First Nation to establish that it involves a "distinctive" aboriginal culture, practice or tradition. The interpretive lens approach has the disadvantage of placing the onus on First Nations to establish the validity of their constitutional practice before the particular *Charter* guarantee is construed. This may result in the promise of s. 25 as a shield for their Constitutions being read down if they do not meet the "constitutional character" of the *Constitution Act* or "distinctive culture".

[204] The *Constitution Act, 1982,* and the VGFN Constitution are profoundly different in their approach. The *Constitution Act, 1982,* is a statement of general principles rather than specific details better left to the legislature. The VGFN First Nation Constitution is a comprehensive statement of principles with substantive detail beginning with 32 definitions, 22 Articles with numerous subsections. That process must be respected and

be reflected in the protection provided by s. 25. Whether s. 25 should be an absolute bar, an interpretive provision or a shield will depend upon the facts and context of each case.

[205] Abrogate means to repeal or do away with a law. Derogate is somewhat less Draconian and means to repeal in part or, to destroy, impair or lessen the effect of. However, the wording “abrogate or derogate” suggests that a wide range of impacts are sufficient to trigger the protection of s. 25.

[206] The context in which this residency requirement exists must be understood:

1. The Vuntut Gwitchin First Nation, along with other Yukon First Nations, began a 20-year negotiation process with Canada and Yukon to reach the Umbrella Final Agreement (a land claim agreement), which included the right to negotiate a Self-Government Agreement.
2. In a monumental achievement, the Vuntut Gwitchin First Nation reached a self-government agreement that preserved their inherent right to self-government and at the same time brought the VGFN Constitution into the constitutional fabric of Canada.
3. The VGFN Self-Government Agreement acknowledged, among other things,
    a) that the Vuntut Gwitchin are desirous of maintaining their traditional decision-making structure;
    b) that Canada, Yukon and VGFN recognized and wished to protect a way of life based on an economic and spiritual relationship between the Vuntut Gwitchin and the land; and

c) the desire to maintain traditional decision-making structures, integrated with contemporary forms of government.

[207] In my view, the constitutional character of the residency requirement is established, in any event, by the fact it is not simply a law passed by Chief and Council but is the will of the First Nation expressed at its General Assembly as part of its Constitution. That is not to say that the simple act of adopting a residency requirement as part of the VGFN Constitution justifies its constitutional character. Its constitutional character is established by that fact that it is based upon hundreds of years of leadership by those who reside on the land, understand the essence of being Vuntut Gwitchin and that the custom or tradition exists today.

[208] There is no removal of a non-resident right to vote as in *Corbiere* or, indeed, the right to run and sit as a Chief or Councillor. It is undoubtedly the collective response of a First Nation to the continual erosion of Vuntut Gwitchin land, culture and community. It is based on the principle that a legislator should reside in the community for whom laws are passed, be aware of the needs of the community and be subject to the laws that are passed.

[209] Counsel for VGFN made the point that Yukon has a residency requirement for voting and running for election that requires 12 months residency before the right to vote and run for election. By contrast, VGFN permits the right to vote and run for non-residents residing off Settlement Land. The Court of Appeal of Yukon found the Yukon's 12 months residency requirement was justified in the decision of Nemetz C.J.Y.T. in *Re Yukon Election Residency Requirement*, [1986] Y.J. No. 14 (Y.T.C.A.).

[210] The right of Ms. Dickson to run, be elected and reside in Whitehorse, some 800 kilometres away from the ancestral VGFN would derogate or impair the residency requirement that the VGFN members themselves have constitutionalized as a self-governing First Nation. There are many policies, economic, health and education factors that pull Vuntut Gwitchin from their homeland. It is not unreasonable for the Vuntut Gwitchin to promote a policy that enhances and strengthens their homeland.

[211] The purpose of the residency requirement is not to limit or denigrate VGFN members who choose or are forced, for personal, economic or educational reasons, to reside away from their ancestral lands. It is the decision of a self-governing First Nation to retain a historic practice or custom which would have been unthinkable or impossible to breach in the past. The fact that modern technology and transportation makes a non-resident Chief or Councillor possible, does not mean that a historic tradition must be abandoned to protect a *Charter* right, the precise purpose that s. 25 was placed in the *Charter.*

[212] I conclude that s. 25 shields the Vuntut Gwitchin First Nation's right to adopt a residency requirement (with severance of the words "within 14 days") captured in the broader wording of "other rights or freedoms that pertain to aboriginal peoples of Canada."

SUMMARY

[213] I summarize my response to the issues:

Issue 1: Should the Court decline to hear the application on the ground that it is fundamentally a political question best left to negotiation among VGFN, Yukon and Canada?

[214] The Court should hear the application.

Issue 2: Does the *Charter of Rights and Freedoms* apply to Ms. Dickson's challenge to the residency requirement in the VGFN constitution?

[215] The *Charter of Rights and Freedoms* applies to the VGFN government and the residency requirement.

Issue 3: If the *Charter* applies, does the residency requirement infringe Ms. Dickson's s. 15(1) equality right?

[216] The residency requirement, with the severance of the words "within 14 days", does not infringe Ms. Dickson's s. 15(1) equality right as a non-resident VGFN citizen. The words "within 14 days" are declared to be of no force and effect pursuant to s. 52 of the *Constitution Act, 1982*. I suspend the declaration of invalidity of the words "within 14 days" for a period of 18 months to permit the VGFN General Assembly to review the residency requirement to determine if they wish to amend it.

Issue 4: Does Ms. Dickson's equality right under s. 15(1) of the *Charter* abrogate or derogate from the VGFN right to have a residency requirement for its Chief and Council under s. 25 of the *Charter*?

[217] If Ms. Dickson's s. 15(1) *Charter* right is breached, I conclude that s. 25 shields the residency requirement (with severance of the words "within 14 days").

[218] Counsel may speak to costs in case management, if necessary.

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VEALE C.J.