COURT OF APPEAL OF YUKON

Citation: *Dickson v. Vuntut Gwitchin First Nation*, 2021 YKCA 5

Date: 20210721
Docket: 20-YU872

Between:

Cindy Dickson

Appellant/
Respondent on Cross Appeal
(Petitioner)

And

Vuntut Gwitchin First Nation

Respondent/
Appellant on Cross Appeal
(Respondent)

And

Government of Yukon, Attorney General of Canada, Carcross/Tagish First Nation, Council of Yukon First Nations, Métis Nation of Ontario, and Teslin Tlingit Council

Intervenors

Before: The Honourable Chief Justice Bauman
The Honourable Madam Justice Newbury
The Honourable Mr. Justice Frankel

On appeal from: An order of the Supreme Court of Yukon, dated June 8, 2020 (*Dickson v. Vuntut Gwitchin First Nation*, 2020 YKSC 22, Whitehorse Docket 18-AP012).

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Place and Date of Hearing:	Whitehorse, Yukon May 18–20, 2021
Place and Date of Judgment:	Vancouver, British Columbia July 21, 2021

Written Reasons by:
The Honourable Madam Justice Newbury

Concurred in by:
The Honourable Chief Justice Bauman

Concurring Reasons (Dissenting in part) by: (p. 81, para. 166)
The Honourable Mr. Justice Frankel

Summary:

The Vuntut Gwitchin form a small first nation ("VGFN") located on territory in the far north of Yukon. It was one of 11 first nations who negotiated and finalized self-government arrangements with Canada and Yukon over 20 years, culminating in an "Umbrella Agreement" in 1992. In accordance with the VGFN's Final Agreement (which is a treaty for purposes of s. 35 of the Constitution Act, 1982) and Self-Government Agreement signed in 1993, the VGFN adopted a Constitution that provides for personal rights and freedoms, including equality rights, very similar to those contained in the (Canadian) Charter of Rights and Freedoms. However, in this case only a claim under the Charter was addressed by the court below.

The Constitution also contained a requirement (the "Residency Requirement") that any member of the VGFN's Council must reside on the "Settlement Land" — effectively in Old Crow, the main community there. Later, this Requirement was revised such that any person elected to Council (which consists of four members) would have to take up residence on the Settlement Land within 14 days of being elected.

The appellant is a member of the VGFN and, like many other members, resides in Whitehorse (800 km south of Old Crow.) She has a job there and her son needs to be near a full-service hospital. The appellant wanted to run for election to Council, but was precluded from doing so by the Residency Requirement. Relying on Corbiere (SCC 1999), she sued in the Supreme Court of Yukon for a declaration that the Requirement was inconsistent with s. 15(1) of the Charter, could not be justified under s. 1 thereof, and was therefore of no force or effect.

The chambers judge below ruled that the Charter applies to the Residency Requirement, subject to the deletion of a 14-day time limitation. He found that the Requirement, without the time limitation, did not infringe the appellant's rights under s. 15(1) of the Charter; and in the alternative, that s. 25 of the Charter applied to 'shield' the Residency Requirement from being abridged by the assertion of personal rights and freedoms guaranteed by the Charter. At the same time, he found the 14-day limitation did infringe the appellant's equality rights and was not saved under s. 1. He declared the time limitation invalid and of no force or effect, subject to an 18-month suspension to permit the VGFN to review the Residency Requirement.

On appeal, C.A. found that:

1. *The chambers judge did not err in proceeding on the basis that the Residency Requirement is a "law" within the meaning of s. 32 of the Charter such that the Charter applies to the Requirement;*
2. *Subject to possible justification under s. 1 of the Charter, the Requirement infringed the appellant's equality rights under s. 15(1) even though it was obviously not intended to perpetuate disadvantage or stereotyping. Its effect was to make a distinction based on the appellant's place of residence, requiring her to choose between participating in the VGFN's council election on one hand and remaining in Whitehorse on the other.*

3. *The chambers judge did not err in finding that s. 25 of the Charter 'shielded' the VGFN's right to adopt the Residency Requirement, including the words "within 14 days". The evidence established that the VGFN's traditional mode of choosing its leaders was a distinctive and significant part of its culture and was a right that 'pertains to' the Aboriginal peoples of Canada. In the circumstances, to apply s. 15(1) would impermissibly derogate from the VGFN's right to govern themselves in accordance with their own particular values and traditions.*
4. *It would not be appropriate at this point to suggest any general rule to the effect that s. 25 should be considered and applied only after a court has determined that a Charter right or freedom has been breached and can or cannot be justified; and*
5. *Given the foregoing, the chambers judge erred in failing to find that the 14-day time limitation would also have been shielded by s. 25. Accordingly, he had erred in severing those words as infringing the appellant's rights under s. 15(1).*

In the result, the C.A. allowed the appeal and cross appeal and dismissed the appellant's petition.

Frankel J.A. (dissenting in part) agreed that the Residency Requirement is valid for the reasons given by the majority. However, he did not agree with the majority's disposition of appellant's appeal. In his view, that appeal should be dismissed, not allowed. Further, he did not agree that this court's order should contain declarations.

Reasons for Judgment of the Honourable Madam Justice Newbury:

[1] Indigenous self-government is commonly referred to by leaders and public officials in Canada as an essential part of the process of reconciliation, but often as an abstract and faraway goal. In some cases, however, years of negotiation have succeeded in bringing about comprehensive self-government agreements that have replaced the acknowledged paternalism of the *Indian Act*, setting many first nations on a new path. This appeal raises several important issues concerning self-government arrangements reached between the Vuntut Gwitchin First Nation on the one hand, and the governments of Canada and Yukon on the other.

[2] The parties' arguments, some raised for the first time in a Canadian court, look ahead to the future in a way that previous jurisprudence concerning Indigenous peoples did not. They require us to consider the Canadian *Charter of Rights and Freedoms,* with its emphasis on personal rights and freedoms, in a different way than before; and to attempt to resolve, in the spirit of reconciliation, whether and how those rights affect, and are affected by, collective rights of self-governing first nations. In the course of addressing these issues, we must apply principles of interpretation to arrangements that have aspects both of treaties and constitutions, and do so in a way that recognizes their unique and historic context.

Overview

[3] The facts of this case are not contentious and may be simply stated. The petitioner/appellant, Ms. Dickson, sought to stand for election to the Council of the Vuntut Gwitchin First Nation ("VGFN"), the body having day-to-day responsibility for the First Nation's "general welfare and good government". Ms. Dickson, whose qualifications for serving as a Councillor are undoubted, resides in Whitehorse rather than on the "Settlement Land" of the VGFN. For reasons related to her son's health needs, she feels she cannot move to Old Crow, the main centre in the Settlement Land. However, the constitution of the VGFN specified that any Councillor must reside on the Settlement Land. Since Ms. Dickson was unwilling to commit to

moving to Old Crow, the VGFN Council, after extensive discussion, declined to remove the requirement from the constitution and rejected her candidacy.

[4] Ms. Dickson petitioned in the Supreme Court of Yukon for a declaration that the requirement (the "Residency Requirement") was inconsistent with s. 15(1) of the *Charter*, could not be justified under s. 1 thereof, and was therefore of no force or effect.

[5] In response, the VGFN asserted several arguments — that the Supreme Court of Yukon did not have jurisdiction or alternatively, should exercise its discretion to decline jurisdiction; that the *Charter* does not apply to the VGFN's constitution; in the alternative, that if the Residency Requirement did infringe s. 15(1), it was a 'reasonable limit' under s. 1; and in the further alternative, that s. 25 of the *Charter* 'shields' the VGFN constitution from s. 15(1). (The pleadings of both parties also addressed the VGFN counterpart to s. 15(1) of the *Charter*, Article IV(7) of the First Nation's constitution, which guarantees equality rights to VGFN citizens. However, that part of the pleadings was not addressed by the court below and remains outside the scope of this appeal.)

[6] For reasons indexed as 2020 YKSC 22, the chambers judge below, Chief Justice Veale, made the following declarations:

> 1. The *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c. 1 1 (the "*Charter*") applies to the Vuntut Gwitchin First Nation government, the Vuntut Gwitchin First Nation Constitution, and laws made by the Vuntut Gwitchin First Nation government, including the residency requirement in Section 2 of Article XI of the Vuntut Gwitchin First Nation Constitution (the "*Residency Requirement*");
> 2. The *Residency Requirement*, with the severance of the words "within 14 days", does not infringe the Petitioner's *Charter* section 15(1) equality rights;
> 3. The words of the *Residency Requirement* "within 14 days" infringe the Petitioner's *Charte*r section 15(1) equality rights and are not saved under section 1 of the *Charter*, and are therefore declared invalid and of no force or effect pursuant to s. 52 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c. 1 1; and
> 4. The declaration of invalidity of the words "within 14 days" is suspended for a period of 18 months to permit the Vuntut Gwitchin First Nation

> General Assembly to review the Residency Requirement to determine if they wish to amend it.

The Vuntut Gwitchin First Nation

[7] Like the chambers judge, I begin with the Vuntut Gwitchin First Nation and the vast northern territory on which its ancestors led a largely nomadic existence for many centuries. The territories of the Vuntut Gwitchin, a "distinct sub-group" of the Gwitchin Nation, extend into the far north across portions of what is now Yukon, the Northwest Territories and Alaska. The VGFN's traditional territory includes an area of approximately 55,000 square miles, including a complex of wetlands known as the "Old Crow Flats". The present-day community of Old Crow is the main settlement of the VGFN in its Settlement Land (as defined in its Final Agreement with Canada and Yukon) and evidently was established as a permanent village in the early 1900s. The community is approximately 800 kilometres north of Whitehorse and there is no regular access by road from outside the Vuntut Gwitchin territory. Thus as noted by the judge below, Old Crow is regularly accessible only by plane, "with the occasional temporary winter road to deliver construction materials for the school and other community buildings." (At para. 10.)

[8] The VGFN is comprised of approximately 560 citizens, of whom 260 live in Old Crow and 301 elsewhere. The First Nation has established an office in Whitehorse to serve its members living there, but the "seat of government" of the First Nation is in Old Crow. The chambers judge found that most programs and services administered and overseen by its government relate to the community of Old Crow. The population numbers are said to be in constant change as Vuntut Gwitchin citizens typically reside both in and away from Old Crow over the course of their lives in order to receive education, to secure employment or for other reasons. The judge noted that "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." (At para. 14.)

[9] The judge described the traditional governance and law-making activities of the VGFN as follows:

> 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.
>
> 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.
>
> 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. [At paras. 11–3; emphasis added.]

Legislative Background

[10] At some point in the 1970s, the governments of Canada and Yukon entered into negotiations with the 14 first nations in Yukon with a view to reaching self-government agreements with each of them. Finally, on May 30, 1992 an "umbrella agreement" was initialed by Canada, Yukon and 11 of the first nations, providing a template for "final agreements" to be concluded with each. The Supreme Court of Canada has described the umbrella agreement as a "monumental achievement": see *First Nation of Nacho Nyak Dun v. Yukon* 2017 SCC 58 at

para. 2. A year later, on May 29, 1993, the VGFN, Canada and Yukon signed a "Final Agreement" and the Vuntut Gwitchin Self-Government Agreement (the "SGA") in accordance with chapter 24 of the Final Agreement. Also on that date, the VGFN constitution came into effect. Like counsel and the chambers judge below, I shall refer to that document hereafter as the "Constitution".

[11] A year later, Canada enacted the *Yukon First Nations Land Claims Settlement Act*, S.C. 1994, c. 34, which validated and gave effect to final arrangements with, *inter alia*, the Vuntut Gwitchin. Section 6 of that *Act* stated that each final agreement was a "land claims agreement" for purposes of s. 35 of the *Constitution Act, 1982*. As a result, the VGFN Final Agreement constitutes a "treaty" for purposes of s. 35. In addition, the *Yukon First Nations Self-Government Act*, S.C. 1994, c. 35 came into force on February 14, 1995 with the stated purpose of bringing into effect the VGFN's SGA. (At para. 77.) The SGA is *not* a treaty. By s. 17 of the *Yukon First Nations Self-Government Act*, the *Indian Act* ceased to apply to the VGFN, and the Vuntut Gwitchin *Band* was replaced by the Vuntut Gwitchin First Nation. Section 7 of the statute states that the VGFN is a legal entity having the capacity, rights, powers and privileges of a natural person.

[12] Similarly, the Legislature of Yukon enacted the *First Nations (Yukon) Self-Government Act*, R.S.Y. 2002, c. 90, approving self-government agreements negotiated under chapter 24 of the Final Agreement. Pursuant to this statute, Yukon passed an Order-in-Council approving the SGA on behalf of Yukon.

[13] I will refer to these federal and territorial statutes collectively as the "Enacting Legislation".

The Agreements

[14] I have attached to these reasons copies of excerpts from the Final and Self-Government Agreements as Schedules A and B respectively, and a copy of the Constitution as Schedule C. I will attempt to describe in very general terms the provisions of those documents that are relevant to this appeal.

The Final Agreement

[15] The chambers judge described the salient portions of the Final Agreement at paras. 46–53 of his reasons. As he noted, it included the extinguishment by the First Nation of all its Aboriginal claims, rights and interests in and to "Non-Settlement Land" (as defined), and all mines and minerals within the Settlement Land and "Fee Simple Land". More important for our purposes is chapter 24 of the Final Agreement, headed "Yukon Indian Self-Government". The chambers judge noted in particular the following portions of 24.1:

> 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. [At para. 47; emphasis added.]

[16] As well, he noted 24.5.0, which 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. [At para. 50; emphasis added.]

He then continued:

> 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.
>
> 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.
>
> 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. [At paras. 51–3.]
>
> [Emphasis added.]

The Self-Government Agreement ("SGA")

[17] The chambers judge dealt with the SGA (which, I note again, is not a "treaty") at paras. 54–60 of his reasons. He quoted from its recitals at para. 54 and cited Articles 2.1 and 2.2, which state:

> 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. [At para. 55; emphasis added.]

[18] He observed that s. 3.6 of the SGA replicates provisions in 24.1.3 of the Final Agreement regarding the retention of the rights and entitlements of the First Nation's members (referred to as "Citizens") *as Canadian citizens.* Again, s. 3.6 states:

> 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. [At para. 56; emphasis added.]

Consistent with the Enacting Legislation, Article 9 of the SGA contemplated that on its effective date, the *Indian Act* would cease to apply to the VGFN and the First Nation would become a legal entity with the powers and capacities of a natural person.

[19] The chambers judge also noted Article 10.0 of the SGA, which set out the required terms for the First Nation's Constitution, including the recognition and protection of (Vuntut Gwitchin) Citizens' rights; processes for challenging the validity of laws enacted by the First Nation and for the quashing of invalid laws; and for the

amendment of the Constitution by VGFN Citizens. Article 13, headed “Legislative Powers”, stated in part:

> 13.1 The Vuntut Gwitchin First Nation shall have the exclusive power to enact laws in relation to the following matters:
>
> 13.1.1 administration of Vuntut Gwitchin First Nation affairs and operation and internal management of the Vuntut Gwitchin First Nation;
>
> 13.1.2 management and administration of rights or benefits which are realized pursuant to the Final Agreement by persons enrolled under the Final Agreement, and which are to be controlled by the Vuntut Gwitchin First Nation; and
>
> 13.1.3 matters ancillary to the foregoing. [Emphasis added.]

[20] In s. 13.2, various matters over which the First Nation would have the “power to enact laws” in Yukon were listed, including the adoption of Citizens’ inheritance and wills; solemnization of marriage of Citizens; licensing for the purpose of raising revenue; matters of a local or private nature on Settlement Land in relation to the control and protection thereof; the allocation or disposition of rights and interests in and to Settlement Land, including expropriation; the protection of fish, wildlife and habitat; control of construction of buildings; and “planning, zoning and land development.” Other general powers relating to the administration of justice, taxation, “programs and services” for the benefit of the First Nation, standards of financial accountability, and dispute resolution were established.

The Constitution

[21] At para. 62 of his reasons, the chambers judge set out various portions of Articles I and II of the Constitution. These were as follows:

> 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. [Emphasis added.]

[22] As the judge noted at para. 63, Article IV of the Constitution guarantees to Citizens various personal rights and freedoms. Under s. 1 of Article IV these are "subject only to such reasonable limits as can be demonstrably justified in a free and democratic Vuntut Gwitchin society". Echoing many of the rights and freedoms set out in the *Charter*, Article IV includes freedom of conscience and religion; freedom of thought, belief or opinion and expression; freedom of peaceful assembly; and freedom of association. Equality rights are the subject of s. 7 of Article IV, which states:

> 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.

This right is of course similar to the right guaranteed by s. 15(1) of the *Charter*, although the *Charter* uses somewhat more extensive terms:

> 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.

[23] The Constitution contemplates four "branches" of government — namely, the General Assembly, the Elders' Council, the Council, and the (future) Vuntut Gwitchin Court. The General Assembly is comprised of all Citizens of the VGFN who are 16 years old or over. The Assembly is required to meet in August of each year and has a quorum of 25 members. Section 2(e) of Article VI states that consensus is to be encouraged for decision-making by the Assembly but that where consensus cannot be reached, "decisions shall be passed by simple majority vote".

[24] The Council is "elected by the eligible voters of the Vuntut Gwitchin First Nation pursuant to the *Election Act* and relevant legislation." It consists of one Chief and four Councillors. The quorum is three members, including the Chief. Their terms of office are four years, running from the second weekend of each January. I reproduce some additional provisions of the Constitution that are relevant:

> ARTICLE VIII – COUNCIL
>
> ...
>
> 6. The Council shall determine their own rules and procedures. The Council shall strive to make all decisions by consensus. In the event a consensus cannot be reached, the Council shall make the decision by simple majority vote.
>
> 7. The Council shall hold regular public meetings and shall hold special meetings at the call of the Chief or upon written request signed by three or more of its Councillors.
>
> ARTICLE IX – COUNCIL DUTIES AND POWERS
>
> 1. It shall be lawful for the Chief and Councillors, by and with the advice of the General Assembly and the Elders Council, to make Vuntut Gwitchin Laws for the peace, order and good government of the Vuntut Gwitchin First Nation in accordance with section 13.0 of the Vuntut Gwitchin First Nation Self-Government Agreement.
>
> 2. All Vuntut Gwitchin Laws enacted by the Council shall be consistent with the objects of this Constitution. The Council shall establish, by law, a general procedure for the enactment of Vuntut Gwitchin Laws.

3. Without limiting the foregoing, the duties and powers of the Council also shall include:

    (a) considering direction provided by the General Assembly through resolution;

    (b) setting clear policies and guidelines and ensuring good management and reporting in all aspects of the Vuntut Gwitchin Government within the jurisdiction of the Council;

    (c) proposing new legislation under the jurisdiction of the Vuntut Gwitchin First Nation;

    (d) establishing a system of laws according to the traditions, needs and ideals of the Vuntut Gwitchin First Nation and in accord with the objectives of this Constitution;

    (e) implementing Vuntut Gwitchin Laws considered by the General Assembly;

    (f) exercising all jurisdiction, power and authority of the Vuntut Gwitchin First Nation and fulfilling any duties of the Vuntut Gwitchin First Nation pursuant to the Vuntut Gwitchin First Nation Final Agreement and the Vuntut Gwitchin First Nation Self-Government Agreement;

    ...; and

    (h) exercising such powers and doing such things as may be necessary to fulfill the objects of this Constitution.

...

ARTICLE XI – TERMS OF OFFICE AND QUALIFICATIONS

QUALIFICATIONS

1. Any person desiring to run for Chief or Councillor must meet the following qualifications:

    (a) Be 18 years or 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. [Emphasis added.]

[25] The Constitution also contemplates, in Article XV, the establishment of a Vuntut Gwitchin Court, the membership and organization of which are to be established by Vuntut Gwitchin Law. This court has not yet been established. Under

s. 5 of Article II, the validity of a Vuntut Gwitchin Law may be challenged in the Supreme Court of Yukon until the new court is established.

The Residency Requirement

[26] The chambers judge described the colonization, displacement and cultural assimilation that members of the VGFN and their predecessors have experienced since the *Indian Act* was imposed on them:

> 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. [At para. 13; emphasis added.]

[27] Prior to the imposition of the *Indian Act*, the Court noted, the Vuntut Gwitchin had selected their leaders by consensus, based on their knowledge and skills in relation to Vuntut Gwitchin territory so that they could "fulfill the critical role of looking after the general welfare of the collective Vuntut Gwitchin community." As seen earlier, the judge found as a fact that Vuntut Gwitchin custom and practice "since time immemorial has been that Vuntut Gwitchin leaders reside on Vuntut Gwitchin Territory." (At para. 11.) On this point, I note the evidence of Dana Tizya-Tramm, Chief of the VGFN:

> Based on my experience as a Vuntut Gwitchin person and the teachings I have received from Vuntut Gwitchin elders, the very identity of the Vuntut Gwitchin has always been deeply rooted in the land itself.
>
> In the English language the Gwich'in language term "Vuntut Gwitchin" translates to "People of the Lakes" which is a reference to the Old Crow Flats - a wetlands complex comprised of thousands of lakes that is situated within the VGFN traditional territory approximately 40 kilometers from the present day Vuntut Gwitchin community of Old Crow. The Vuntut Gwitchin have lived and depended on the Old Crow Flats for millennia and continue to do so today as VGFN citizens travel there year-round for trapping, harvesting and to "spring out" on the land at family encampments.

> ...
>
> Vuntut Gwitchin practices, customs and traditions related to leadership and governance are also rooted in the land itself. VGFN continues to honour and maintain these practices, customs and traditions today through the exercise of traditional governance practices as recognized in the VGFN Self-Government Agreement ("SGA"). [Emphasis added.]

The Chief describes the VGFN Constitution as "our North Star in the modern exercise of our right to self-determination." He continues:

> ... No matter what environment or circumstances we face as Vuntut Gwitchin, we are held up by our history, culture, values, traditions and rights. It is a fundamental objective of our Constitution to protect these as set out in Article 1(1)(c) which states that the object of VGFN is to "promote, enhance and protect the history, culture, values, traditions and rights of the Vuntut Gwitchin First Nation."

and further:

> In addition to the protections provided by our Constitution, our geographic remoteness and isolation in Old Crow relative to other communities in the Yukon has served to protect our history, culture, values, traditions and rights by acting as a buffer to the impacts arising from the settlement and colonization of the North by non-Indigenous peoples. Our commitment to remain on our lands against assimilation practices such as residential school and administration from distant locations has been core to preserving our distinct culture. Attached as Exhibit "A" is a true copy of the Ni'inlii Declaration, which was made by the Gwich'in youth attending the bi-annual gathering of the Gwich'in Nation in 2016. The Declaration captures our collective will to uphold our laws, traditions and self-government. [Emphasis added.]

[28] In the Chief's opinion, it would be "inconceivable" to the Elders that the VGFN Council could be comprised of people living elsewhere, "including potentially outside of Yukon or even Canada." He states:

> …Our decision-making processes are based on reaching consensus and having a Council who does not reside in our community would be wholly incompatible with our traditional governance. I have always understood based on the knowledge of our history shared with me orally by my Elders and past leaders, and on my experiences as a VGFN citizen, that our goal as Vuntut Gwitchin in achieving self-government was to be able to preserve these values.

[29] When it was first ratified in 1993, the Constitution did not contain any specific requirement concerning the residence of Councillors. It did state, however, that the

"seat of government" for the First Nation would be located on Vuntut Gwitchin lands. In 2006, the Constitution was amended by the General Assembly to require that a VGFN Citizen be "resident on Settlement Land" to be eligible for nomination and election to Council. This had the perhaps unintended effect of requiring that a person who lived off the Settlement Lands move to Old Crow before being eligible to run for office — thus risking considerable expense and inconvenience if he or she were not elected in the result. The Council's constitutional reform committee formed the view that this was unduly onerous and proposed an amendment to "strike a balance between maintaining the core principle that the seat of government will be on VGFN lands, and the value of having as many VGFN Citizens as possible be eligible for election to the Council." Evidently, the compromise provision was to require that anyone elected become a resident of the Settlement Land within 14 days of being elected.

[30] At around the same time, i.e., in the run-up to the 2019 annual meeting, Ms. Dickson advanced a proposal to eliminate the Residency Requirement for Council members altogether. Mr. William Josie deposes that this proposal was discussed at length by the constitutional reform committee and at the public meetings in both Old Crow and Whitehorse. He continues:

> It was generally not supported because it conflicts with the widely held view that Vuntut Gwitchin self-government and the protection of our culture is critically linked to the seat of our government being in Old Crow. Most VGFN citizens, including myself, have experienced or observed the harmful effects of colonization and assimilation through displacement or alienation from our land, including by Residential Schools, child welfare policies, federal funding policies, and *Indian Act* government.
>
> There continues to be strong forces that pull VGFN citizens away from our lands and into the cities. Our government cannot succumb to this pressure and begin to "farm out" our Council to the cities. The seat of our government must stay on our Lands so that there will always be a place for VGFN citizens to come home. Furthermore, most of the services and matters the Council deals with related to Settlement Land and the physical presence of Council to deal with local matters, given our remoteness, is important to the functioning of government. [At para. 15; emphasis added.]

[31] The matter was discussed thoroughly in the General Assembly that took place in early 2019. Various viewpoints were expressed but ultimately the

Committee's proposed amendment was accepted. After other proposed amendments had been individually reviewed and voted on, the chair proposed that the Residency Requirement be discussed again with Ms. Dickson present. (She had voluntarily removed herself from the meeting at an earlier point after some members expressed discomfort about being able to speak freely with her present.) Ms. Dickson had brought with her a petition signed by several Citizens in support of a new proposal that would allow at least one VGFN Councillor to be chosen from Citizens based in Whitehorse. She did not return to the meeting after a break, and the members of the General Assembly who were present decided not to vote again on the amendment and to move on to other agenda items.

[32] On the last day of the Assembly, all members present, including Ms. Dickson, "accepted by consensus" a resolution to pass all amendments that had been agreed upon during the three-day Assembly. Accordingly, at the time Ms. Dickson filed her amended petition, the Residency Requirement read as follows:

> 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. [Emphasis added.]

Ms. Dickson

[33] I come at last to Ms. Dickson herself. The chambers judge described her circumstances at paras. 21–29 of his reasons. She was born in Whitehorse but had resided in Old Crow from age 9 to 16, when she moved back to Whitehorse to finish her high school education. (At that time, Old Crow did not have a full high school education program.) After living elsewhere briefly, she returned again to Whitehorse to attend Yukon College and to complete her degree in social work. She has worked since 2013 as a regulatory and community relations co-ordinator for an oil and gas exploration company in Yukon. She is also a trustee of the Vuntut Gwitchin Business Trust, which participates in the management of VGFN Settlement Land and she has maintained connections to Old Crow. She deposed that she visits there as often as she can and still has friends and family there. In summary, there is no doubt, and the

VGFN did not deny, that Ms. Dickson would be a promising candidate for election to the Council.

[34] Ms. Dickson has a 15-year-old son who is hypoglycemic. Although arrangements to have hypoglycemic resources in Old Crow were made for his last visit, she (understandably) wishes to be close to a hospital should any emergencies arise concerning her son. Her son's father, who is not Vuntut Gwitchin, also lives in Whitehorse. If she were to live at Old Crow, Ms. Dickson would likely stay in a house that she owns, which requires extensive repairs. The trial judge summarized her position thus:

> 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. [At para. 29; emphasis added.]

[35] Ms. Dickson deposes that when her nomination for candidacy was rejected and the Council failed to respond to her requests for dispute resolution, she felt as though she "did not matter as a Vuntut Gwitchin citizen" and that:

> …I was shocked. I did not expect the VGFN to wait until after nominations closed to tell me I did not qualify as a candidate. I know candidates in the past who were permitted to run for Chief and Council, even though they were

> not living in Old Crow at the time they submitted their nomination forms, including Norma Kassi and Garry Njootli.
>
> I was also upset that the VGFN did not provide me with a fair dispute resolution process or allow me to participate in the community meeting about my candidacy.
>
> By being excluded from Council, I find it harder to connect with my fellow VGFN members. I want to contribute to my community as a Council member so I can improve the services and opportunities available to VGFN members, both in and outside of Old Crow. I am upset that VGFN does not allow me this opportunity. It is hurtful and makes me feel like less of a citizen.

It will be noted that the last sentence quoted above echoes some of the earlier jurisprudence under s. 15 of the *Charter*: see *Law v. Canada (Minister of Employment and Immigration)* [1999] 1 S.C.R. 497 at 529.

[36] Various members of the VGFN filed affidavits in support of Ms. Dickson's position. These supporters included Mr. Bruce Charlie, who was Chief in 2018. He expressed the view that the community would be better served if VGFN members living off Settlement Land were able to run for and serve on Council. In his words:

> Those persons who have moved away for legitimate reasons such as employment, access to health care, or education ... should not be excluded from participating in our government. Also, those members living off Settlement Lands have valuable knowledge and skills to offer as leaders of our community, and have better knowledge of the needs of other members living off Settlement Lands who make up a large portion of our Nation.

Others living in Whitehorse endorsed the suggestion that at least one position on the Council should be reserved for Citizens who live in Whitehorse, given the large community of VGFN Citizens located there.

The Chambers Judge's Analysis

[37] I turn now to the legal issues as formulated by Veale C.J. below, and his responses to them.

A Political Question?

[38] The VGFN submitted that the validity of the Residency Requirement was a "purely political question" that the Court should decline to answer. The First Nation

relied in part on *Nacho Nyak Dun*, where the Court stated that “Reconciliation often demands judicial forbearance. Courts should generally leave space for the parties to govern together and work out their differences.” (At para. 4.)

[39] The First Nation also cited an article by Professor Peter Hogg and M.E. Turpel entitled “Implementing Aboriginal Self-Government: Constitutional and Jurisdictional Issues” (1995) 74:2 *Can. Bar Rev.* 187, where it was suggested that the issues of what the right of self-government “means today, and how it relates to the existing constitutional and political structures” are not suitable for resolution by courts. It was in the best interests of both governments and Aboriginal peoples, the authors wrote, to explore constitutional amendment or other options short of that. The authors observed in a footnote that “Legal reasoning in the constitutional context is not broad enough” to embrace the various matters of jurisdiction, financing and intergovernmental co-operation. (See the chambers judge’s reasons at paras. 97–8.)

[40] The judge was not persuaded that the Residency Requirement in this case was a “purely political” matter or that it was otherwise not appropriate for judicial determination. Instead, he described the case as a question of the interpretation of law in the context of an application brought by Ms. Dickson for a declaration that the Residency Requirement was invalid “primarily under the *Charter*.” (At paras. 99–100.) He observed that extensive *political* discussions and negotiations had taken place leading to the Final Agreement, the SGA, and the Constitution — from which I infer he took the view that the time had come for judicial resolution of the issue. No one has taken serious issue with this conclusion on appeal.

Applicability of s. 15 of the Charter

[41] This issue was more contentious. The chambers judge’s analysis is found at paras. 110–131. Rather than rehearsing his analysis here, I reproduce below his summary of findings in support of the conclusion that the “VGFN exercise of its

legislative capacity and the VGFN Constitution" bring the Residency Requirement within the scope of s. 32(1) of the *Charter*:

> 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. [At para. 131; emphasis added.]

Did the Residency Requirement Infringe Ms. Dickson's Equality Rights Under s. 15?

[42] Chief Justice Veale turned next to *Corbiere v. Canada (Minister of Indian and Northern Affairs)* [1999] 2 S.C.R. 203, the leading case on terms like the Residency Requirement. *Corbiere* arose in the context of s.77 of the *Indian Act,* which excluded off-reserve members of a band from voting in council elections. The Batchewana Band had lost most of its land base through treaties. In later years, until the early 1970s, the Band lived on a reserve that in fact belonged to another band. The Batchewana had had a residency requirement but had not enforced it until about 1962 when only Band members living on one of three small reserves had been allowed to vote. Less than 33% of registered band members lived on the reserve and approximately 85% of the growth in Band membership consisted of people who had been reinstated to Indian status as a result of amendments made in 1985 to the *Indian Act*. (See para. 134 of the chambers judge's reasons.) Interestingly, the Band itself took no part in the trial of the case.

[43] A majority of the Supreme Court of Canada and the concurring minority agreed that "Aboriginality residence" as it pertains to whether an Aboriginal band member lives on or off the reserve is an "analogous ground" for purposes of s. 15(1)

of the *Charter*. Applying the three-part test enunciated in *Law* at para. 88, the majority in *Corbiere* observed:

> 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. [At para. 8; emphasis added.]

[44] With respect to the third stage of the *Law* test, the majority stated:

> … 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, the complete denial to off-reserve members of the right to vote and participate in band governance treats them as less worthy and entitled …simply because they live off-reserve.
>
> . . .
>
> 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. [At paras. 17–18; emphasis added.]

[45] The majority in *Corbiere* added that discrimination exists regardless of the reasons why off-reserve members reside where they do. In the Court's words, they would still "suffer a detriment by being denied full participation in the affairs to which they would continue to belong while the band councils are able to affect their interests ...". In the end, the differential treatment resulting from s. 77 of the *Indian Act* was seen as discriminatory because it implied that "off-reserve band members are lesser members of their bands or persons who have chosen to be assimilated by the mainstream society." (At para. 19.)

[46] The chambers judge in the case at bar noted that the Supreme Court of Canada had recently affirmed a *two-step* analytical framework (as opposed to the three steps described in *Law*) to determine whether a law infringes the guarantee of equality under s. 15 of the *Charter*. (At para. 144.) The first step is to ask whether on its face or in its effect, the impugned law has a disproportionate impact on a protected group. The second focusses on "arbitrary" — or "discriminatory" — disadvantage, that is, whether the law has the effect of reinforcing, perpetuating or exacerbating disadvantage. (See *R. v. Kapp* 2008 SCC 41 at para. 17; *Quebec (Attorney General) v. A* 2013 SCC 5 at para. 324; *Kahkewistahaw First Nation v. Taypotat* 2015 SCC 30 at paras. 19–21; *Fraser v. Canada (Attorney General*) 2020 SCC 28 at paras. 50–76).

[47] At para. 145, the judge summarized what he saw as the differences between *Corbiere* and the case at bar:

> 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.

[48] He found that "at first glance", the *Law* test of infringement of Ms. Dickson's equality rights was met, given that the Residency Requirement draws a formal distinction between her and others based on place of residence; and that Ms. Dickson was subject to differential treatment "because she would have to incur the cost of moving to Old Crow and uprooting her family if successfully elected." (See para. 147.)

[49] As to whether the Residency Requirement was discriminatory "as a general principle", however, the chambers judge noted that the case at bar did not involve the right to *vote* based on residency. Any Vuntut Gwitchin Citizen, he observed, can vote to elect the Chief and Council regardless of where he or she resides. All such Citizens also have the right to be eligible to run for the position of Chief or Councillor. This was said to meet the two guaranteed rights set out in s. 3 of the *Charter*, which refers to the right to vote in an election of "members of the House of Commons or the Legislative Assembly". (At para. 150.)

[50] Next, the judge observed that *Corbiere* rested on the "accepted evidentiary base" that there was an historic disadvantage for off-reserve band members that was perpetuated by denying them the right to vote. In the case at bar, on the other hand:

> ... 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. [At para. 151; emphasis added.]

On this point, he also quoted from the reasons of L'Heureux-Dubé J. in *Corbiere*:

> ... Because of the groups involved, the Court must … 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*. [At para. 69; emphasis added.]

[51] Third, the judge noted, this case does not concern a provision of the *Indian Act* but is instead about the "incredible accomplishment" of replacing that *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." (At para. 152.)

[52] Considering all these factors and treating equality as a "comparative concept" (see *Corbiere* at para. 69), Veale C.J. found that Ms. Dickson's equality rights had *not* been infringed. In his words:

> ... 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.
>
> 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. [At paras. 153–4; emphasis added.]

[53] Veale C.J. also emphasized that in *Corbiere*, the disenfranchisement had been described as based on a "personal characteristic that is immutable or changeable only at unacceptable cost to personal identity". In contrast, he said:

> ... the Residency Requirement here involved "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. [At para. 156.]

[54] Finally, the judge distinguished *Cardinal v. Bigstone Cree Nation* 2018 FC 822 for reasons set out at para. 160. His final conclusion under this rubric was that to the extent *Bigstone Cree* represented a "rigid application" of *Corbiere*, it should not be followed. He preferred the "more nuanced" approach taken in *Pastion*

v. Dene Tha' First Nation 2018 FC 648, which adopted a more deferential view of First Nation decision-makers "as a principle of self-government". (At para. 161.)

The 14-Day Limitation

[55] At the same time, the chambers judge suggested that "arguably", the requirement that an elected Councillor relocate to Old Crow *within 14 days* created an "arbitrary disenfranchisement."(At para. 164.) He found it unnecessary to carry out a complete *Oakes* analysis of the time limitation, stating simply that it did not impair Ms. Dickson's equality rights only minimally, nor was it proportionate and balanced. Accordingly, he severed the words "within 14 days" from the Residence Requirement in Article XI(2) of the Constitution, such that it would read:

> 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.

He suspended the declaration for a period of 18 months to give the General Assembly an opportunity to review the matter before the next election in January 2022. (At para. 171.)

Application of s. 25 of the Charter

[56] In the event he was wrong in ruling that (aside from the 14-day time limit) the Residency Requirement did not discriminate against Ms. Dickson within the meaning of s. 15(1), Veale C.J. turned to consider whether the Requirement was "shielded" by s. 25 of the *Charter*. It reads:

> 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. [Emphasis added.]

At the outset, he emphasized that VGFN's right of self-government *generally* was not being challenged by Ms. Dickson. Rather, she objected to the exercise of that right *in the form of the Residency Requirement*. (At para. 174.)

[57] Ms. Dickson submitted that s. 25 was intended to protect collective Aboriginal rights from abrogation or derogation *"by the Canadian state"*, and not for the purpose of shielding *First Nations governments* from *Charter* scrutiny "while infringing the *Charter* rights of their own citizens." (At para. 175.) The judge did not accept this argument, which in his analysis would 'emasculate' s. 25 from the viewpoint of First Nations governments. In his words:

> ... 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 [one may?] proceed to a s. 25 analysis. [At para. 176; emphasis added.]

[58] He preferred the approach described by Hogg and Turpel in their 1995 article, *supra*:

> ... 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. [At 214–5; emphasis added.]

[59] Even though the authors did not specifically mention a *Charter* application brought by a member of a first nation, Veale C.J. said he preferred the interpretation of s. 25 as a shield "to protect, preserve and promote the identity of VGFN Citizens on their homeland". As well, he stated, any interpretation of s. 25 should reflect the context of the *Self-Government Act* and the Constitution, both of which had been negotiated *after* s. 25 of the *Charter* was enacted. (At para. 181.)

[60] Veale C.J. went on to emphasize that although the Final Agreement constitutes a "treaty", the parties were in agreement that neither the SGA nor the "self-government legislation" would be construed as giving rise to treaty rights under s. 35. Further, 24.12.4 of the Final Agreement states:

> Nothing in 24.12.1, 24.12.2 or 23.12.3 shall be construed to affect the interpretation of Aboriginal rights within the meaning of sections 25 or 35 of the *Constitution Act, 1982*.

[61] Turning directly to the interpretation of s. 25, the chambers judge observed that there was no authority from the Supreme Court of Canada involving facts similar to those in the case at bar. However, the Supreme Court had made some *obiter* comments in *Kapp*, in which a program aimed at recognizing Aboriginal fishing rights was challenged by other commercial fishers as a breach of their equality rights under s. 15. The majority of the Court (*per* McLachlin C.J.C. and Abella J.) upheld the program on the basis that it was intended to ameliorate "conditions of disadvantaged individuals or groups" and found it unnecessary to reach any conclusions concerning the applicability of s. 25 of the *Charter*.

[62] However, the majority went on to express their "concerns" with aspects of the reasoning of Bastarache J. (and of Kirkpatrick J.A., writing for herself in this court), both of whom would have dismissed the appeal solely on the basis of s. 25. The majority's initial concern was whether the communal fishing licence at issue in *Kapp* came within the scope of s. 25. The majority suggested that not every Aboriginal interest or program was engaged by s. 25. Rather, only rights of a "constitutional character" were "likely to benefit" from the provision. If this was correct, the majority

questioned whether the fishing licence was a "s. 25 right or freedom." (At para. 63.) Chief Justice McLachlin and Abella J. continued:

> 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.
>
> 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. [At paras. 64–5; emphasis added.]

[63] In contrast, Bastarache J. found that s. 25 provided a "complete answer" to the appeal and indeed that it was not necessary to engage in a full analysis of the application of s. 15. It was, he said, sufficient to establish the existence of a "*potential conflict*" between s. 15 of the *Charter* and the fishing program. He found at para. 110 that s. 25 was "protective" and not meant to provide for "balancing *Charter* rights against aboriginal rights." I will discuss these principles at greater length below.

[64] In light of the majority's preference in *Kapp* for a "case-by-case" approach under s. 25, the chambers judge in the case at bar embarked on a consideration of "principles that may be applied as the case law evolves." In his analysis, the purpose of s. 25 was 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. [At para. 193.]

[65] As for what constitutes a right or freedom of a "constitutional character", he noted an article by Constance MacIntosh entitled "Developments in Aboriginal Law: the 2008 – 2009 Term (2009)" 48 *S.C.L.R*. (2d) 1. There the author suggested that if the phrase "rights of a constitutional nature" were regarded as referring only to rights

that are recognized by the (Canadian) constitution, some difficulties might arise. She continued:

> ... given that the provision [s. 25] 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. [At para. 40.]

[66] The judge reasoned that while s. 35 of the *Constitution Act, 1982* is limited to "existing aboriginal and treaty rights" and those that might be acquired hereafter, the wording of s. 25 is broader, referring to "other rights or freedoms that *pertain to the aboriginal peoples of Canada".* (My emphasis.) If s. 25 were not interpreted more broadly than s. 35, he said, the promise of giving First Nations "protected space" in the (Canadian) Constitution would "ring hollow". (At para. 195.) In his words:

> 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". [At para. 196; emphasis added.]

[67] This approach, the judge noted, had been taken by L'Heureux-Dubé J. in *Corbiere* at para. 52 and by Jane Arbour in her 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. Veale C.J. quoted this passage from Ms. Arbour's article with approval:

> 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. [At para. 80.]

[68] The judge endorsed the view that s. 25 "provides space" for the VGFN to "protect, preserve and promote the identity of their citizens through unique institutions, norms and government practices." The wording of the section was imperative rather than discretionary, he noted, but there was no definitive interpretation that could encompass the many factual and legal issues requiring the interpretation of s. 25. He described the approach suggested by Canada — that s. 25 be regarded as providing only an "interpretive lens" — as problematic, in that it would place the onus on a first nation to establish that the aboriginal right in question is necessary to maintain its distinctive culture and that it is maintaining that distinctive culture. This approach might result in the protective shield of s. 25 being "read down" if a first nation did not meet the "constitutional character" criterion or if a "distinctive culture" were not shown. (At para. 203.)

[69] The judge found that the *Constitution Act, 1982* and the Constitution of the VGFN were "profoundly different". Whereas the former is a statement of general principles, the latter is a comprehensive set of principles with substantive detail, various defined terms, and 22 articles with numerous subsections. Whether s. 25 of the *Charter* should be regarded as imposing an absolute bar, an interpretive "lens", or a shield would depend on the facts and context of each case. He regarded the words "abrogate or derogate from" in s. 25 as suggesting that a "wide range of impacts are sufficient to trigger" its protection. He noted as well the following contextual factors that must inform this case:

> 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. [At para. 206; emphasis added.]

[70] Finally, the chambers judge considered how s. 25 relates to Ms. Dickson's rights, in a passage that is sufficiently important to quote at length:

> 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 [the] 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.
>
> 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.
>
> ...
>
> 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.
>
> 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 [for which] s. 25 was placed in the *Charter*. [At paras. 207–11; emphasis added.]

In the result, he concluded that s. 25 shielded the VGFN's right to adopt a Residency Requirement (without the phrase "within 14 days") as falling within the scope of "other rights or freedoms that pertain to aboriginal peoples of Canada" in s. 25.

[71] I repeat here for convenience the Court's final order and declaration:

> 1. The *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c. 1 1 (the "*Charter*") applies to the Vuntut Gwitchin First Nation government, the Vuntut Gwitchin First Nation Constitution, and laws made by the Vuntut Gwitchin First Nation government, including the residency requirement in Section 2 of Article XI of the Vuntut Gwitchin First Nation Constitution (the "*Residency Requirement*");
> 2. The *Residency Requirement*, with the severance of the words "within 14 days", does not infringe the Petitioner's *Charter* section 15(1) equality rights;
> 3. The words of the *Residency Requirement* "within 14 days" infringe the Petitioner's *Charte*r section 15(1) equality rights and are not saved under section 1 of the *Charter*, and are therefore declared invalid and of no force or effect pursuant to s. 52 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c. 1 1; and
> 4. The declaration of invalidity of the words "within 14 days" is suspended for a period of 18 months to permit the Vuntut Gwitchin First Nation General Assembly to review the Residency Requirement to determine if they wish to amend it.

On Appeal

[72] Ms. Dickson appeals the order, submitting that the chambers judge erred in law in:

a) finding that the Residency Requirement in its entirety did not infringe her rights under s. 15(1) of the *Charter*; and

b) finding that s. 25 of the *Charter* shields the Vuntut Gwitchin First Nation's right to adopt the Residency Requirement (without the words "within 14 days".)

[73] VGFN joins issue on each of these grounds, submitting that the judge was correct on both. It also cross appeals on the bases that the judge erred in law in:

(a) Concluding that the *Charter* applies to the VGFN Government, Constitution and laws; and

(b) Declaring that the words "within 14 days" included in the Residency Requirement are of no force or effect pursuant to s. 52 of the *Constitution Act, 1982*. The chambers judge erred in this respect by:

(i) Incorrectly holding that s. 25 of the *Charter* only applies if it has been determined that a Charter right or freedom has been breached and cannot be saved by s. 1.

(ii) Incorrectly finding that the words "within 14 days" infringe Ms. Dickson's rights under s. 15(1) of the *Charter* and are not saved by s. 1.

[74] I note at the outset that the VGFN's first ground of cross appeal is framed in terms of whether the *Charter* applies to the First Nation's "Government, Constitution and laws". Presumably, this is because para. 1 of the judge's order is thus worded. I agree with Ms. Dickson that the Order is overbroad in this respect. As the discussion below will indicate, when faced with issues that have not been addressed previously and constitutional questions are involved, courts find it best to proceed on a case by case basis, leaving room for the law to evolve in an appropriate evidentiary context. Accordingly, I will address the issues in terms of whether the *Charter* applies *to the Residency Requirement* specifically.

[75] I also note that the ground of cross appeal advanced in para. (b)(i) above is not aimed at the Court's *order* (which, strangely, makes no mention of s. 25 of the *Charter*), but at the judge's reasons. (See *Knapp v. Town of Faro* 2010 YKCA 7 at para. 6.) However, Ms. Dickson did not take objection to this wide view of the cross appeal and s. 25 occupied a great deal of counsel's time (including that of counsel for the intervenors) and submissions in this court.

[76] I propose to address the issues raised on the appeal and cross appeal in the following order:

1. Did the chambers judge err in law in proceeding on the basis that the Residency Requirement is a "law" within the meaning of s. 32 of the *Charter* and that s. 15(1) therefore applies to it?

2. Did the chambers judge err in law in finding that the Residency Requirement in its entirety did not constitute an infringement of Ms. Dickson's rights under s. 15(1) of the *Charter*?

3. Did the chambers judge err in finding in the alternative that even if s. 15(1) was breached, s. 25 of the *Charter* 'shields' the VGFN's right to adopt the Residency Requirement (without the words "within 14 days")?

4. Did the chambers judge err in finding that s. 25 should be considered and applied only *after* a court has determined that a *Charter* right or freedom has been breached and cannot be justified under s. 1?

5. Assuming the *Charter* applies, did the chambers judge err in finding that the words "within 14 days" infringed Ms. Dickson's right to equality under s. 15(1) of the *Charter* and were not saved by s. 1?

Interpretation

[77] First, a few words about interpretation. Obviously, the resolution of the issues set out above will involve the interpretation — or "construction" — of various words and phrases used in the *Charter*, as well as in the Final Agreement, SGA and Constitution of the VGFN — all of which provide a new context for the understanding of Aboriginal rights and their relationship to existing Canadian laws. Certainly where treaty rights are concerned, there is longstanding authority for the liberal and even generous interpretation thereof: see Hogg, *Constitutional Law of Canada* (5th ed., looseleaf) at §28.6(d); *Nowegijick v. the Queen* [1983] 1 S.C.R. 29; *R. v. Sioui* [1990] 1 S.C.R. 1025; *R. v. Marshall* [1999] 3 S.C.R. 456.

[78] The Supreme Court of Canada considered principles of interpretation more recently in *R. v. Desautel* 2021 SCC 17. The central issue in that instance was whether the phrase "aboriginal peoples of Canada" in s. 35(1) of the *Constitution Act, 1982* extends to Aboriginal persons who are not Canadian citizens or residents, but the majority's reasons provide some guidance concerning the general approach to be taken by courts in connection with the "principles of construction and the

Aboriginal perspective". It was argued by several of the intervenors in *Desautel* that interpretive principles in favour of Aboriginal peoples were relevant to rights under s. 35. The majority of the Court *per* Rowe J. commented as follows:

> The relevant interpretive principle is that, in interpreting s. 35(1), any doubt or ambiguity should be resolved in favour of Aboriginal peoples (*Van der Peet*, at para. 25; *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29, at p. 36). ...
>
> That said, Mr. Desautel and several interveners explain that Aboriginal perspectives involve a strong connection to ancestral territory, even where the Aboriginal group has been dispossessed of that territory, or where the territory is now divided by international borders. As this Court held in *Sparrow*, at p. 1112, it is "crucia[l] to be sensitive to the aboriginal perspective itself on the meaning of the rights at stake". Therefore, "a morally and politically defensible conception of aboriginal rights will incorporate both [Aboriginal and non-Aboriginal] legal perspectives" (*Van der Peet*, at para. 49, citing M. Walters, "British Imperial Constitutional Law and Aboriginal Rights: A Comment on *Delgamuukw v. British Columbia*", (1992) 17 *Queen's L.J.* 350, at p. 413; see also J. Borrows, "Creating an Indigenous Legal Community" (2005), 50 *McGill L.J.* 153, at p. 173). This perspective confirms the interpretation of s. 35(1) which I set out above. [At paras. 45–6; emphasis added.]

[79] Rowe J. ended his reasons with some observations on the courts' role in the "vindication" of Aboriginal rights:

> This Court has to be mindful of its proper role in the vindication of Aboriginal rights. As this Court held in *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, at p. 169, "the courts are guardians of the Constitution and of individuals' rights under it". The role of giving an authoritative interpretation of laws and of the Constitution belongs to the courts (H. Brun, G. Tremblay and E. Brouillet, *Droit constitutionnel* (6th ed. 2014), at pp. 808-9, no. X.11 and X.13).
>
> When the existing Aboriginal and treaty rights of the Aboriginal peoples of Canada were recognized and affirmed by the enactment of the *Constitution Act, 1982*, this gave rise to an obligation for the courts to "give effect to that national commitment" (*R. v. Marshall*, [1999] 3 S.C.R. 533 ("*Marshall No. 2*"), at para. 45). As the majority of this Court recently confirmed in *Uashaunnuat*, at para. 24:
>
> > Although s. 35(1) recognizes and affirms "the existing aboriginal and treaty rights of the aboriginal peoples of Canada", defining those rights is a task that has fallen largely to the courts. The honour of the Crown requires a generous and purposive interpretation of this provision in furtherance of the objective of reconciliation. [Emphasis added, citation omitted.]
>
> In my view, the authoritative interpretation of s. 35(1) of the *Constitution Act, 1982,* is for the courts. It is for Aboriginal peoples, however, to define

> themselves and to choose by what means to make their decisions, according to their own laws, customs and practices. [At paras. 84–6; emphasis added.]

[80] In *Nacho Nyak Dun,* decided in 2017, a unanimous court addressed more specifically the interpretation of "modern treaties" between Indigenous peoples and the Crown, which were "intended to renew the relationship between Indigenous peoples and the Crown to one of equal partnership". Karakatsanis J. for the Court stated:

> ... In resolving disputes that arise under modern treaties, courts should generally leave space for the parties to govern together and work out their differences. Indeed, reconciliation often demands judicial forbearance. … [Authorities omitted.] It is not the appropriate judicial role to closely supervise the conduct of the parties at every stage of the treaty relationship. This approach recognizes the *sui generis* nature of modern treaties, which, as in this case, may set out in precise terms a co-operative governance relationship.
>
> That said, under s. 35 of the *Constitution Act, 1982*, modern treaties are constitutional documents, and courts play a critical role in safeguarding the rights they enshrine. [At paras. 33–4; emphasis added.]

[81] Further on in its reasons, referring to Chapter 11 of the umbrella agreement of the Yukon First Nations, the Court emphasized the importance of the *text* of such treaties in light of the fact that they were evidently the product of "meticulous negotiation" by "well-resourced parties". (Citing *Quebec (Attorney General) v. Moses* 2010 SCC 17 at para. 7.) At the same time, it warned that the provision at issue must be read in light of the text as a whole and the treaty's objectives. In the words of Karakatsanis J.:

> ... 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" ... [Authorities omitted] 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).
>
> By applying these interpretive principles, courts can help ensure that modern treaties will advance reconciliation. Modern treaties do so by addressing land claims disputes and "by creating the legal basis to foster a positive long-term relationship" (*Little Salmon*, at para. 10). Although not exhaustively so, reconciliation is found in the respectful fulfillment of a modern treaty's terms. [At paras. 37–8; emphasis added.]

[82] We were not referred to any cases that have addressed principles of interpretation as regards *self-government agreements* specifically, although I note the highly deferential approach adopted by the Federal Court in *Pastion v. Dene Tha' First Nation* at paras. 18–23. That case was a judicial review of an election decision of the first nation's election appeal board.

Did the Chambers Judge Err in Finding that the Residency Requirement is a "Law" to which the Charter Applies?

[83] As a "threshold issue", the VGFN submitted on its cross appeal that the judge below erred in failing to limit the determination of the application of the *Charter* to "the law at issue". I have already indicated my view that the question before us is the "narrower" one formulated by the VGFN, and under this rubric, I address only the applicability of the *Charter* to the *Residency Requirement*. In fairness, that is what the chambers judge did as well at many places in his reasons (e.g., paras. 130, 174), although as noted earlier, para. 1 of the order was overbroad.

[84] The VGFN next contends that Veale C.J. failed to analyse s. 32 of the *Charter* correctly. Section 32(1) provides:

> 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.

Obviously, the VGFN is neither "Parliament" nor a legislature or government of a province; however, the judge noted that s. 32 was not an exhaustive list of governments subject to the *Charter*, citing *Godbout v. Longueuil (City)* [1997] 3 S.C.R. 844. There, La Forest J. speaking for the majority reasoned:

> 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. ... [At para. 48.]

In the result, the majority held in *Godbout* that municipalities such as the City of Longueuil perform "quintessentially government functions" and that the City was subject to s. 32.

[85] More helpful for our purposes is a passage from the Court's reasons in *Eldridge v. British Columbia (Attorney General)* [1997] 3 S.C.R. 624. La Forest J. there summarized the law concerning s. 32 as follows:

> As the case law discussed above makes clear, the *Charter* may be found to apply to an entity on one of two bases. First, it may be determined that the entity is itself "government" for the purposes of s. 32. This involves an inquiry into whether the entity whose actions have given rise to the alleged *Charter* breach can, either by its very nature or in virtue of the degree of governmental control exercised over it, properly be characterized as "government" within the meaning of s. 32(1). In such cases, all of the activities of the entity will be subject to the *Charter*, regardless of whether the activity in which it is engaged could, if performed by a non-governmental actor, correctly be described as "private". Second, an entity may be found to attract *Charter* scrutiny with respect to a particular activity that can be ascribed to government. [At para. 44; emphasis added.]

[86] The applicability of s. 32(1) to first nations in the context of the *Indian Act* was discussed in *Taypotat v. Taypotat* at the Federal Court level: see 2013 FCA 192. At issue was whether a provision in the *Kahkewistahaw Election Act* imposing a minimum education requirement for eligibility to run for public office, violated s. 15(1) of the *Charter*. The council of the first nation played a key role in the management of reserve land, had extensive bylaw-making powers and was "entrusted with the management of numerous federal government programs destined to Indian members of the First Nation." On this basis, the Court ruled that the council was "clearly a *sui generis* government entity" that had acted as a "government" *under federal legislation* and in matters *within the authority of Parliament*: see para. 36; my emphasis. The Court warned that the application of *Corbiere* and s. 15 of the

Charter could not be "avoided" by a first nation's adopting a community election code. The Court stated:

> As noted above, many government actions affecting the lives of aboriginal peoples living on reserve result from decisions of the band councils acting under the *Indian Act*, under other federal legislation or pursuant to government programs. As citizens of Canada, aboriginal peoples are as much entitled to the protections and benefits of the rights and freedoms set out in the *Charter* as all other citizens. This includes protection for aboriginal peoples from violations to these rights and freedoms by their own governments acting pursuant to federal legislation and in matters falling in the sphere of federal jurisdiction.
>
> Moreover, the rights and freedoms set out in the *Charter* would be ineffectual if the Council members could be selected in a manner contrary to the *Charter*. I have no doubt that if a First Nation adopted a community election code restricting eligibility to public office to the male members of the community, such a code would be struck down pursuant to section 15 of the *Charter*. To decide otherwise would be to create a jurisdictional ghetto in which aboriginal peoples would be entitled to lesser fundamental constitutional rights and freedoms than those available to and recognized for all other Canadian citizens. [At paras. 38–9; emphasis added.]

[87] Notably*, Taypotat* was appealed to the Supreme Court of Canada (see *Kahkewistahaw First Nation v. Taypotat* 2015 SCC 30) and was reversed; but only on the basis that the impugned provisions did not *prima facie* violate s. 15. Abella J., speaking for the Court, did not comment at all on s. 32, simply proceeding on the basis that s. 15 applied.

[88] In *Mitchell v. M.N.R.* 2001 SCC 33, the Court allowed an appeal from the Federal Court of Appeal, which held that a Mohawk of Akwesasne did not have an Aboriginal right to bring goods into Canada duty-free. Again, this was not a case involving a *self-governing* first nation; but I note the comments of Binnie J. for the minority, recognizing the *sui generis* nature of Aboriginal self-government. In particular, he quoted from the *Report of the Royal Commission on Aboriginal Peoples* (1996, Vol. 2 at 240-1) in which "shared sovereignty" was described in terms that resemble the self-government arrangements in existence in the case at bar:

> Shared sovereignty, in our view, is a hallmark of the Canadian federation and a central feature of the three-cornered relations that link Aboriginal governments, provincial governments and the federal government. These

> governments are sovereign within their respective spheres and hold their powers by virtue of their constitutional status rather than by delegation. Nevertheless, many of their powers are shared in practice and may be exercised by more than one order of government. [At para. 130 of *Mitchell;* emphasis added.]

[89] Binnie J. went on to observe that the Royal Commission had not explained precisely how "shared sovereignty" was expected (in 1996) to work in practice, although it had "recognized as a critical issue how '60 to 80 historically based nations in Canada at present, comprising a thousand or so local Aboriginal communities' would 'interact with the jurisdictions of the federal and provincial governments' in cases of operational conflict...." He continued:

> It is unnecessary, for present purposes, to come to any conclusion about these assertions. What is significant is that the Royal Commission itself sees aboriginal peoples as full participants with non-aboriginal peoples in a shared Canadian sovereignty. Aboriginal peoples do not stand in opposition to, nor are they subjugated by, Canadian sovereignty. They are part of it. [At para. 135; emphasis added.]

[90] Counsel for VGFN conceded below (see para. 128 of the reasons) that s. 15(1) of the *Charter* applies generally to bands and to "custom election codes" under the *Indian Act*, citing *Corbiere*. But VGFN's situation is obviously very different from that of bands in such cases. The VGFN says it is not relying on customs allowed under the *Indian Act* or any other federal law, but on its *inherent and historic* rights and practices, which have now been *recognized* in (as opposed to *granted by*) the Final and Self-Government Agreements. (See para. 129.) In response, Ms. Dickson (as well as Canada and Yukon) submit that the self-governing Yukon First Nations derive their authority to enact laws such as the Residency Requirement from the various self-government agreements entered into with Canada and Yukon, and from the Enacting Legislation — which can of course be varied or reversed by later legislation of Parliament or Yukon.

[91] The chambers judge did not purport to resolve the fundamental question of the source of the rights and authority of the VGFN set forth in the self-government arrangements, and this will remain an unresolved question, at least at this level. (*Cf. Gamblin v. Norway House Cree Nation Band Council* 2012 FC 1536 at para. 34,

quoted in *Pastion* at para. 12.) Veale C.J. found that the First Nation's "exercise of its legislative capacity and Constitution" were sufficient to bring it within the scope of s. 32(1) of the *Charter* — *either* as 'government' or as an entity exercising inherently 'governmental' activities. In his words:

> 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. … [At para. 130.]

[92] Finally under this rubric, I note *Sga'nism Sim'augit (Chief Mountain) v. Canada (Attorney General)* 2013 BCCA 49, which concerned a final agreement reached between Canada, British Columbia, and the Nisga'a Tribal Council. As the Court noted, this treaty granted the Nisga'a Government powers to make laws "in relation to matters vital to the Nisga'a, including the preservation of Nisga'a culture, language and education, land and resources, and other matters integral to the continuing viability of the Nisga'a Nation as an Aboriginal people within Canada." The Treaty expressly recognized that "[t]he Nisga'a Nation has the right of self-government, and the authority to make laws, as set out in this Agreement". (At para. 2.)

[93] One of the issues before the Court was whether the delegation of powers was invalid because the Treaty did not specify the source of each delegated power. (See *Saumur v. City of Quebec* [1953] 2 S.C.R. 299 at 333.) Harris J.A. for the Court answered this question in the following way:

> The Treaty does not expressly identify the source of any law-making or self-government powers conferred on the Nisga'a Government. It is not possible to attribute any particular powers in the Treaty to a matter in respect of which either Parliament or the Legislature has been empowered to make laws. What does seem clear is that the Treaty contemplates that, between them, Parliament or the Legislature had the capacity to delegate all authority contained in the Treaty. ...
>
> ...

> I agree with the conclusion of the trial judge that: (a) there is no authority requiring the specification of the source of authority where there is a joint delegation; (b) that it is not necessary to specify the source of authority where there is joint delegation if each of the delegating authorities have the jurisdiction to delegate; and (c) to require that the source of authority be specified would, in the case of a treaty, frustrate negotiation ("possibly to the point of futility") and, thereby vitiate the constitutional imperative to negotiate treaties to further reconciliation. [At paras. 99, 101; emphasis added.]

This reasoning reflects the notion that rather than engage in the perhaps futile debate regarding inherent Aboriginal rights and the source of the authority to self-govern, courts should recognize the *sui generis* nature of modern treaties (and, I would suggest, self-government agreements) and interpret them in a manner consistent with the "national commitment" to reconciliation.

[94] In response to Ms. Dickson's argument that s. 15 of the *Charter* applies to this case, the First Nation points out various references in the SGA to its "exclusive power" to enact laws in relation to the administration of VGFN affairs and its internal management, to enact "laws of a local or private nature" on Settlement Land in relation to those matters listed in s. 13.3; and various other heads of authority described earlier in these reasons. Like the (Canadian) *Charter*, moreover, the (VGFN) *Constitution* guarantees to Citizens the rights and freedoms set out in Article IV, most of which track exactly the personal rights and freedoms guaranteed in the *Charter*. Why, the VGFN seems to ask, was Ms. Dickson's recourse to s. 15 of the *Charter* necessary?

[95] As well, the VGFN referred us to the evidence of Mr. Dave Joe, who was the First Nation's chief negotiator for the VGFN Final Agreement and SGA. He observes that the Yukon Final Agreements "stand in contrast" to modern land claim agreements in Canada that state expressly that the *Charter* applies to their exercise of self-government. (See for example the Nisga'a Agreement, discussed in *Chief Mountain*.) Mr. Joe recalls that the VGFN's intention with respect to 24.1.3 of the Final Agreement and s. 3.6 of the SGA was to ensure that VGFN Citizens would have the same rights *in relation to the federal and territorial governments* as non-VGFN citizens, such as the right to vote and rights to own property. These

clauses, he deposes, were “not intended to unconditionally apply the *Charter* to VGFN self-government.” Mr. Joe goes on to recall that the VGFN did not wish to:

> ... expressly adopt the *Charter* framework for fear that it would undermine the core values in their own Constitution. The *Charter* was not developed with any consideration of Vuntut Gwitchin legal and political traditions or governance systems. These concerns were the subject of significant discussion and negotiation in the course of developing the Agreements, and the result of these negotiations was that VGFN did not agree to adopt the *Charter* as binding on VGFN government.

and further:

> The key basis for VGFN's rejection of the application of the *Charter* as expressed during the negotiation of the Agreements is that the *Charter* is based on individual rights in relation to the state and state power. By contrast, most VGFN cultural and political values maintained in VGFN legal orders are collective in nature. VGFN did not want to expressly adopt the *Charter* framework for fear that it would undermine the core values in their own Constitution. The *Charter* was not developed with any consideration of Vuntut Gwitchin legal and political traditions or governance systems. These concerns were the subject of significant discussion and negotiation in the course of developing the Agreements, and the result of these negotiations was that VGFN did not agree to adopt the *Charter* as binding on VGFN government.
>
> . . .
>
> The theme of preserving Vuntut Gwitchin culture was pressed throughout our negotiations, and is echoed in the first ‘*Whereas*’ clause in the Self-Government Agreement. The clause states that "Vuntut Gwitchin have traditional decision making structures and are desirous of maintaining these structures." VGFN wanted to ensure that the colonial structures of *Indian Act* band councils were not replicated in VGFN self-government structures and processes. In the years I acted as Chief Negotiator, I observed that all of the VGFN Chiefs I worked with lived in the lands within VGFN traditional territory. I attended community meetings at which VGFN Chiefs spoke, and it was clear that their words carried respect and authority within the VGFN community, in large part due to the respect held for leadership roles performed in relation to the land. [Emphasis added.]

(I note parenthetically that counsel for Ms. Dickson objected to the admissibility of this evidence in the court below, pointing out that under the rules of contractual interpretation, evidence of the parties’ subjective intentions or understanding would not be admissible or relevant. The chambers judge ruled that the interpretation of First Nations’ final agreements should not be bound by principles of contract, citing *Beckman v. Little Salmon/Carmacks First Nation* 2010 SCC 53 at paras. 10 and 12.

With respect to Mr. Josie's testimony regarding the negotiations, the judge also found Mr. Josie had not been speaking on behalf of an administrative tribunal and was entitled to "give his explanation of the reasons for the amended residency requirement." (At para. 92.).)

[96] For her part, Ms. Dickson referred in her factum to excerpts from the Parliamentary debates relating to the two federal statutes which gave effect to the Final Agreement and the SGA, including assurances provided by the Minister of Indian Affairs and Northern Development that the "principles embodied in the *Charter* ... and the Constitution of Canada as a whole will continue to apply" to the Yukon First Nations. This assurance was elaborated upon by Mr. Ted McWhinney, who told the House that the new arrangements were "subject to the Canadian Constitution. It is subject to the *Canadian Charter of Rights and Freedoms*."

[97] I have little doubt that just as the VGFN negotiators did not wish to acknowledge the *Charter* as binding on them, the negotiators for Canada could not be seen to agree to any '*Charter*-free zone', given the *Charter*'s status as the "supreme law" of Canada. Fortunately, the negotiations did not founder on this point. As it is, the Final and SGA Agreements — especially 24.1.2, 24.1.3 of the Final Agreement and ss. 3.6, 3.6.1, 3.6.2 and 13.5.1 of the SGA — support the conclusion that the *Charter* does apply to the Residency Requirement. Indeed, all VGFN Citizens remain entitled to their rights under the *Charter* in the same way as other citizens of Canada.

[98] In all the circumstances, I am satisfied that the chambers judge did *not* err in proceeding on the basis that in enacting the Residency Requirement, the VGFN Council was "by its very nature" exercising 'governmental' powers within the meaning of s. 32 of the *Charter* and that the *Charter* — which of course includes s. 25 — therefore applies to the Residency Requirement. In my opinion, this is so regardless of the source of the authority that is now exercisable by the VGFN under the SGA and Constitution.

[99] I close this portion of my reasons by noting the perhaps prophetic comments of Professor Hogg, who observed in his text that when the Charlottetown Accord was being negotiated in the early 1990s, Aboriginal leaders were included and were "treated as if they were already a third order of government." He continued:

> … the agreement by all first ministers and territorial leaders that the aboriginal peoples have an "inherent" right of self-government should probably be regarded as an informal recognition that the right exists now, albeit in inchoate form, despite the failure to ratify the express declaration to that effect in the Accord. This recognition by all governments should facilitate the negotiation of self-government agreements between governments and first nations, which can of course take place under the existing constitutional provisions, and which is already in progress in some parts of the country. Nor is there any reason why the provisions of self-government agreements, which are modern treaties, should not have constitutional status … The movement to self-government can and will proceed despite the failure of the Charlottetown Accord. [At §28.11.]

Did the Chambers Judge Err in Finding that the Residency Requirement did not Constitute an Infringement of Ms. Dickson's Rights under s. 15(1)?

[100] At the outset, it may be useful to refer to the way in which equality claims under s. 15(1) are to be assessed in accordance with the evolving case law.

[101] The Supreme Court of Canada has always emphasized that s. 15 is concerned with "substantive equality" as opposed to formal equality, and that the analysis must be contextual. Thus it is not enough that the impugned law draws a distinction based on an enumerated or analogous ground; something more is required. In *Andrews v. Law Society of British Columbia* [1989] 1 S.C.R. 143, the Court identified three key elements to a discrimination claim — differential treatment, an enumerated or analogous ground, and discrimination in a substantive sense involving factors such as prejudice, stereotyping, and disadvantage. In subsequent cases, including *Egan v. Canada* [1995] 2 S.C.R. 513 and *Eldridge*, *supra*, the Court moved towards a two-step analysis in which the second step had two components. In the words of Cory J.:

> ... The first step is to determine whether, due to a distinction created by the questioned law, a claimant's right to equality before the law, equality under the law, equal protection of the law or equal benefit of the law has been denied. During this first step, the inquiry should focus upon whether the

> challenged law has drawn a distinction between the claimant and others, based on personal characteristics.
>
> Not every distinction created by legislation gives rise to discrimination. Therefore, the second step must be to determine whether the distinction created by the law results in discrimination. In order to make this determination, it is necessary to consider first, whether the equality right was denied on the basis of a personal characteristic which is either enumerated in s. 15(1) or which is analogous to those enumerated, and second, whether that distinction has the effect on the claimant of imposing a burden, obligation or disadvantage not imposed upon others or of withholding or limiting access to the benefits or advantages which are available to others. [At paras. 130–31.]

[102] Some years later, in *Law*, Iacobucci J. for the Court offered a 'synthesized' articulation that required courts to address three questions:

> ... First, 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? If so, there is differential treatment for the purpose of s. 15(1). Second, was the claimant subject to differential treatment on the basis of one or more of the enumerated and analogous grounds? And third, does the differential treatment discriminate in a substantive sense, bringing into play the purpose of s. 15(1) of the *Charter* in remedying such ills as prejudice, stereotyping, and historical disadvantage? The second and third inquiries are concerned with whether the differential treatment constitutes discrimination in the substantive sense intended by s. 15(1). [At para. 39; emphasis by underlining in original.]

[103] Iacobucci J. also emphasized the *effect* of differential treatment as an important part of the analysis, noting that where the treatment in question "has the effect of perpetuating or promoting the view that the individual is less capable, or less worthy of recognition or value as a human being or as a member of Canadian society" the fundamental purpose of s. 15 is likely to be violated. (*Law* at para. 51.) Human dignity was key to this approach. In his words:

> ... 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. ... 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. [At para. 53.]

[104] Almost ten years later, in *Kapp*, Chief Justice McLachlin and Abella J. for the majority acknowledged that several difficulties had arisen from the attempt in *Law* to employ human dignity as the "legal test". Critics had pointed out that human dignity is an abstract and subjective notion that is not only confusing and difficult to apply, but which had placed an additional burden on equality claimants "rather than the philosophical enhancement it was intended to be." The majority suggested that the factors cited in *Law* should not be read literally but rather as a way of focussing on the "central concern of s. 15 identified in *Andrews* — combatting discrimination, defined in terms of perpetuating disadvantage and stereotyping." (At para. 24.)

[105] The majority viewed a "purpose-based" approach as more appropriate than an "effect-based" approach to the assessment of governmental measures that seek to *ameliorate* disadvantaged groups. The majority suggested that analysing the "means" employed by the government can "easily turn into assessing the *effect* of the program." Courts were encouraged to frame the primary issue as: "Was it rational for the state to conclude that the means chosen to reach its ameliorative goal would contribute to that purpose?"

[106] By 2020, the Supreme Court had made it clear that 'adverse impact' discrimination violates the notion of substantive equality: see *Eldridge*, *Taypotat*, *Withler v. Canada (Attorney General)* 2011 SCC 12, and *Quebec (Attorney General) v. A*. In *Fraser*, the Court stated that whether the lawmaker *intended* to create a disparate impact is irrelevant: see para. 69; *Ontario v. G*. 2020 SCC 38 at para. 69. As well, the Court emphasized that differential treatment can be discriminatory even if it is "based on choices" made by the claimant. Thus in *Fraser* itself, the fact that many women *choose* to work on a part-time basis provided no defence against the differential effects of the impugned pension law on part-time workers.

Corbiere

[107] There is no doubt that while Ms. Dickson is not technically "disenfranchised" by the Residency Requirement, her inability to serve on the Council without moving to the Settlement Land is an incursion on her equality rights. For those brought up in the Western democratic tradition, this incursion is indeed a serious one. As counsel for the appellant emphasized, Canadian courts have heeded the warning in *Corbiere* that Aboriginal residency conditions on voting or council participation are "constant markers" of potential discrimination. (See paras. 10 and 17–8.) Courts have ruled almost invariably that such conditions offend the equality rights of first nations people living away from their communities, coming close to treating voting rights in this context as absolute. (See for example *Clifton v. Hartley Bay Indian Band* 2005 FC 1030; *Thompson v. Leq'á:mel First Nation* 2007 FC 707; *Woodward v. Council of the Fort McMurray* 2010 FC 337, *rev'd* [2011] FCJ No. 1736 (C.A.); *Joseph v. Dzawada'enuxw (Tsawataineuk) First Nation* 2013 FC 974; *Clark v. Abegweit First Nation Band Council* 2019 FC 721; and *Bigstone Cree*, *supra*.) These cases arose in the context of band elections and most involved the application of customary election regulations permitted under ss. 75 and 77 of the *Indian Act.*

[108] In the case at bar, the chambers judge effectively stood *Corbiere* on its head, finding that those Citizens who reside on the Settlement Land are at a *disadvantage* which is historic and ongoing. This finding *per se* is clearly supported by the evidence. Mr. Josie deposed, for example, that it was to counter the "strong forces that *pull VGFN Citizens away*" (my emphasis) from the Settlement Land that the General Assembly and Council decided that the seat of its government must stay on Settlement Land and Councillors must be physically present to deal with local matters. Conversely, the judge found that Ms. Dickson enjoyed *advantages* as a result of living in Whitehorse as opposed to Old Crow.

[109] Ms. Dickson does acknowledge that many of her personal circumstances — the fact Whitehorse has health resources that are superior to those in Old Crow, the availability of better housing in Whitehorse, and the fact she has a good job in the south — may be seen as "benefits"; but in her submission, if they are benefits they

do not offset the serious effects of disenfranchisement. Further, she says, the Requirement exacerbates the difficulties faced by VGFN Citizens living away from their territory and in maintaining their culture and community. It is for this reason that Ms. Dickson deposes she feels "like less of a citizen." (See *Law* at 529.)

[110] In my respectful view, the judge's turnabout of advantage and disadvantage between residents and non-residents of Settlement Land runs contrary to the approach taken in *Corbiere* and cases following it, and indeed comes perilously close to the notion that the fact a claimant has *chosen* to live away from her Aboriginal community precludes her from invoking her rights under s. 15. The Court in *Corbiere* made it clear this is not the case. The voting restriction in that instance was still found to engage the "dignity" aspect of the s. 15 analysis and to result in the denial of substantive equality. (At para. 18.) The majority went on to say this about the "comparator group" of on-reserve band members:

> ... It is accepted that off-reserve band members are the object of discrimination and constitute an underprivileged group. It is also accepted that many off-reserve band members were expelled from the reserves because of policies and legal provisions which were changed by Bill C-31 and can be said to have suffered double discrimination. But Aboriginals living on reserves are subject to the same discrimination. Some were affected by Bill C-31. Some left the reserve and returned. The relevant social facts in this case are those that relate to off-reserve band members as opposed to on-reserve band members. 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. [At para. 19; emphasis added.]

In other words, it appears the Supreme Court would still draw the inference of discrimination from the detriment (here, the inability to run for office) suffered by the appellant – even where as a practical reality, she places greater value (again, understandably, given her son's needs) on retaining the *advantages* of living in Whitehorse. It is the fact Ms. Dickson is placed in the position of *having to choose* between the right to seek office and the right to remain in the south that gives rise to the *Charter* infringement under s. 15(1). (See also *Ontario v. G*. at paras. 86-92.)

[111] The judge in the case at bar also emphasized the *purpose* of the Residency Requirement in finding that discrimination had not been shown. The Requirement was not, he observed, being imposed by the government of Canada or Yukon, nor arbitrarily, nor for the purpose of perpetuating disadvantages experienced by persons living away from the Settlement Land. In his analysis, when equality is looked at "as a comparative concept" — which I take to mean from the viewpoint of *both* Ms. Dickson's rights and the VGFN's right as a self-governing entity to adopt the Residency Requirement — 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." (At para. 156.) To quote again from the crucial portion of his reasons on this point:

> 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. <u>The purpose and effect of the residency requirement is to enhance the homeland and preserve it for all VGFN citizens.</u> [At para. 153; emphasis added.]

[112] This reasoning would seem to run counter to the principle, enunciated most clearly in *Fraser*, that the intent or purpose of the impugned law is now regarded as "irrelevant". As seen above, the focus is now on the *effect* of the law. This being the case, the chambers judge's comments seem more appropriate in relation to *justifying* the Residency Requirement under s. 1 than to determining whether discrimination has been shown.

Section 1

[113] This brings us to s. 1 of the *Charter*. The majority in *Corbiere* briefly considered the Batchewana Band's argument that the voting restriction could be justified under s. 1 of the *Charter*. The majority found at para. 21 that the restriction on voting was rationally connected to the aim of the legislation, but that it did not impair the s. 15 rights of the claimants only minimally. Even if one accepted that some distinction could be justified to protect the legitimate interests of Band members living on reserve, it had not been demonstrated that a *complete denial* of voting rights of Band members living off-reserve was necessary. As for the suggestion of a more nuanced voting restriction, the Band had presented "no evidence of efforts deployed or schemes considered and costed, and no argument or authority in support of the conclusion that costs and administrative convenience could justify a complete denial of the constitutional right." (At para. 21; emphasis added.)

[114] It will be recalled that in the case at bar, there was some discussion of adopting a law that would reserve one seat on the VGFN Council for someone residing in Whitehorse. This possibility was not "costed" or seriously pursued in the court below, however, and the focus of discussion in the meetings remained the requirement that all (four) Council members live on the Settlement Land. As Mr. William Josie recalled:

> The [committee] considered the Petitioner's proposal to eliminate the residency requirement for Council members both during her time on the CRC and after her resignation. The proposal was discussed amongst the CRC and at the public meetings in Old Crow and Whitehorse. It was generally not supported because it conflicts with the widely held view that Vuntut Gwitchin self-government and the protection of our culture is critically linked to the seat of our government being in Old Crow. Most VGFN citizens, including myself, have experienced or observed the harmful effects of colonization and assimilation through displacement or alienation from our land, including by residential schools, child welfare policies, federal funding policies, and *Indian Act* government.
>
> There continues to be strong forces that pull VGFN citizens away from our lands and into the cities. Our government cannot succumb to this pressure and begin to 'farm out' our Council to the cities. The seat of our government must stay on our lands so that there will always be a place for VGFN citizens to come home. Furthermore, most of the services and matters the Council

> deals with related to settlement land and the physical presence of Council to deal with local matters, given our remoteness, is important to the functioning of government. [Emphasis added.]

[115] Had the justification of the Residency Requirement under s. 1 been pursued, there was evidence that might well support a "rational connection" between the Requirement and the protection of VGFN culture as a "pressing and substantial" objective. The significance of the VGFN's insistence that its seat of government be on Settlement Land was also explained by Ms. Shelagh M. Beairsto in her master's thesis, "Dingii Kat Chih Agaa:Gwitch'in Notions of Leadership", prepared in 1999 at the University of Manitoba. Ms. Beairsto described the particular attributes of leadership on which the Gwitchin traditions are based:

> Knowledge of the land and tradition once more emerges as desirable characteristics of leaders in the modern era. In the pre-contact era and the fur trade era, knowledge of the land was reflected by the ability of a leader to interact successfully with his people and with the land. If the group survived without serious hardship, the leader likely had a good understanding of the land and its resources. …
>
> Gwitch'in peoples' relationship with the land remains closely linked with their perceptions of the world around them. A modern Gwitch'in leader must demonstrate his or her commitment to the land. Most recently, this has been exhibited through the Vuntut Gwitch'in peoples attempt to challenge oil and gas development in their traditional territory through the Supreme Court of Canada. … In the modern era, Gwitch'in people have strongly advocated the preservation and collective ownership of land as a means of sustaining wealth in their community. This was particularly evident in the negotiations of the land claims and self-government agreements. Elders told their negotiators to focus their negotiations on securing Vuntut Gwitch'in ownership and protection of land in their traditional territory rather than large monetary compensations. … The continued relationship between Gwitch'in people and their land comprised their collective wealth. To an extent, modern leadership is bettered by the ability of leaders to promote economic sustainability while acting as stewards of the land. [At 123-5 and 147; emphasis added.]

[116] But factors of this kind have very seldom, if ever, succeeded in justifying laws that infringe s. 15 by means of the so-called "constant marker" of potential discrimination — the loss of voting or participatory rights of Aboriginal persons living away from their communities. In both *Corbiere* and cases following it (cited above at para. 107), courts have held with some tenacity to the standard three-part *Oakes* analysis and rejected arguments based on societal factors like those asserted here.

(Again, none of the *Corbiere* line of cases involved self-governing first nations.) I do note *Woodward*, where the Federal Court found that a voting restriction was justified under s. 1 for broad cultural reasons. O'Reilly J. reasoned:

> In my view, FMFN has satisfied its burden of showing that the residency requirement is justified as a reasonable limit under s. 1 of the Charter. The FMFN has very limited resources. In fact, at the moment its finances are being co-managed. The vast majority of its programs are run for the benefit of reserve residents. In matters seriously affecting the interests of non-residents, members of the band living off the reserve do play a role. However, it would not be reasonable, in an election for Chief and Council, to give a majority vote to non-residents, which would be the effect of finding that the definition of "elector" in the Regulations was unconstitutional.
>
> While the burden is clearly on FMFN to justify the infringement of s. 15, I note that there is almost no evidence before me as to the effect of the residency requirement on the applicants. Ms. Woodward states in her affidavit that she wants "to participate in the political life of the Nation including the nomination process and to vote in the upcoming election". The Cockerills do not put forward any evidence of the effect of the residency requirement on them. [At paras. 38–39]

The Court's order in *Woodward* was reversed by consent, for reasons that are not public.

[117] Veale C.J. did not find it necessary to engage in a s. 1 analysis of the Residency Requirement — apart from the 14-day limitation — in this case, given his finding that discrimination had not been proven (see para. 156) *and,* one might add*,* given his findings in the alternative regarding s. 25 of the *Charter*. With all due respect, it seems to me that we must proceed to our consideration of s. 25 on the assumption that contrary to the chambers judge's conclusion, the Residency Requirement *was* discriminatory under existing jurisprudence. To this extent, the appeal must be allowed.

Does s. 25 of the Charter 'Shield' the Residency Requirement?

[118] I begin by setting out again the wording of s. 25 of the *Charter* and s. 35 of the *Constitution Act, 1982.* (Section 35 is technically not part of the *Charter,* and is therefore not subject to s. 1: see Hogg, *supra*, at §28.8.) The two provisions state:

> 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.
>
> ...
>
> 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. [Emphasis added.]

Kapp

[119] As some courts and authors have observed, the phrase "aboriginal and treaty rights" in s. 35 appears to be narrower than the reference in s. 25 to "any aboriginal, treaty or other rights or freedoms that *pertain to the aboriginal peoples* of Canada". In *Kapp*, one of the few cases that have considered s. 25, the majority of the Supreme Court stated in *obiter* that the wording of the section suggests 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. [At para. 63; emphasis added.]

The majority did not comment any further on the subject.

[120] As previously mentioned, Mr. Justice Bastarache did discuss s. 25 at length in concurring reasons, beginning at para. 76. He was obviously aware of the difficulties of 'balancing' personal rights and freedoms against collective ones. He noted that

the manner in which collective rights can exist within the "liberal paradigm otherwise established by the *Charter*" is a source of ongoing tension in the jurisprudence and academic literature, especially in the Aboriginal context. He cited the analysis of Bruce H. Wildsmith in *Aboriginal Peoples and Section 25 of the Canadian Charter of Rights and Freedoms* (1988), who wrote:

> Under one mode of interpreting section 25, the section admonishes the decision maker to construe the *Charter* right or freedom so as to give effect to it, if possible, without an adverse impact on section 25 rights or freedoms. If it is not possible to so construe the *Charter* right or freedom so as to avoid a negative impact on native rights, then the force of section 25 is spent. Effect is given to the *Charter* right or freedom despite the [negative] impact on native rights. Under the second mode of interpreting section 25, the conflict between *Charter* rights and section 25 rights, if irreconcilable, would be resolved by giving effect to the section 25 rights and freedoms. In short, native rights remain inviolable and unaffected by the rights or freedoms guaranteed by the *Charter*. [At 10-11.]

[121] In the view of Bastarache J., most of the academic literature regarded s. 25 as a shield rather than an "interpretive lens". He agreed that s. 25 should be read as giving "primacy" to the Aboriginal right in question, consistent with the wording and history of the provision and with pronouncements of the government when the *Charter* was amended in 1983. (See para. 81.)

[122] With respect to the text of s. 25, Bastarache J. described the word "construe" as very broad and noted that the *Oxford English Dictionary* (2nd ed.) defined it as meaning "[t]o analyze or trace the grammatical construction of a sentence; to take its words in such an order as to show the meaning of the sentence." He found the term to be ambiguous, observing that the phrase "shall not be construed" in the English version of s. 25 was ambiguous "in terms of the effect of the provision", whereas the French phrase "*ne porte pas atteinte aux*" was clearly understood to mean "will not prejudicially affect". In other sections of the *Charter*, the phrase has been interpreted to constitute a *bar* to competing rights. Indeed, the phrase "shall be so construed and applied as not to abrogate, abridge or infringe" appears in s. 2 of the *Canadian Bill of Rights*, R.S.C. 1985, App. III and was construed in *R. v. Drybones* [1970] S.C.R. 282 to mean that if a law cannot be "sensibly construed and applied" without

infringing the right in question, the law must be declared inoperative. (At p. 294; see also paras. 87–8 of *Kapp*.)

[123] In any event, Bastarache J. did not regard the linguistic difference as decisive. He acknowledged that it was arguable that interpreting s. 25 as constituting a "shield" would not be in keeping with the "flexible, non-hierarchical approach" to *Charter* rights that the Supreme Court has espoused. Nevertheless, he reasoned:

> ... where collective rights are clearly prioritized in terms of protection (as I believe is the case here), individual equality rights have typically given way. In *Reference re Bill 30*, Wilson J. stated at p. 1197, that although the special minority religion education rights conferred by s. 93 of the *Constitution Act, 1867* " si[t] uncomfortably with the concept of equality embodied in the *Charter*", s. 15 can be used neither to nullify the specific rights of the protected group nor to extend those rights to other religious groups. It is also instructive to read the reasons of former Chief Justice Dickson in *Mahe v. Alberta*, [1990] 1 S.C.R. 342, at p. 369, where, speaking of the application of s. 15 in the context of minority language rights in education, he said: "[I]t would be totally incongruous to invoke in aid of the interpretation of a provision which grants special rights to a select group of individuals, the principle of equality intended to be universally applicable to 'every individual'". In my opinion, and as argued by J. M. Arbour [see *supra*], s. 25 serves the purpose of protecting the rights of aboriginal peoples where the application of the *Charter* protections for individuals would diminish the distinctive, collective and cultural identity of an aboriginal group ... [At para. 89; emphasis added.]

[124] Bastarache J. noted the uncertainty in the literature concerning exactly what rights and freedoms are contemplated by s. 25 and concerning suggestions of a "proportionality test" like that in *Oakes* to be used in determining whether a law would truly "abrogate" an Aboriginal right or freedom. Under the heading "Scope of Section 25 Protection", he explored the meaning of the words "other rights or freedoms", disagreeing with the majority's position that the rights protected should be limited to those of a "constitutional character". In his view, a broader approach was warranted, more consistent with the relevant principles of interpretation. He then continued:

> I believe that the reference to "aboriginal and treaty rights" suggests that the focus of the provision is the uniqueness of those persons or communities mentioned in the Constitution; the rights protected are those that are unique to them because of their special status. As argued by Macklem, s. 25 "protects federal, provincial and Aboriginal initiatives that seek to further

> interests associated with indigenous difference from *Charter* scrutiny": see p. 225. Accordingly, legislation that distinguishes between aboriginal and non-aboriginal people in order to protect interests associated with aboriginal culture, territory, sovereignty or the treaty process deserves to be shielded from *Charter* scrutiny. [At para. 103; emphasis added.]

[125] Under the heading "Approach to Section 25", Bastarache J. expressed his agreement with the reasons of Kirkpatrick J.A. in this court (see 2006 BCCA 277) that the applicability of s. 25 is a "threshold issue" that is triggered before any consideration of the *Charter* right in question. In his analysis, this did not mean the *Charter* claim need not be defined properly; it "simply means that there is no need to go through a full s. 15 analysis, for instance in this case, before considering whether s. 25 applies." He continued:

> I do not think it is reasonable to invoke s. 25 once a *Charter* violation is established. One reason for this position is that there would be no rationale for invoking s. 25 in the case of a finding of discrimination that could not be justified under s. 1, simply because, in the context of s. 15, as in this case for instance, considerations that serve to justify that an Act is not discriminatory would have to be relitigated under the terms of s. 25. Another reason is that a true interpretative section would serve to define the substantive guarantee. Section 25 is meant to preserve some distinctions, which are inconsistent with weighing equality rights and native rights. What is called for, in essence, is a contextualized interpretation that takes into account the cultural needs and aspirations of natives. ...
>
> ...
>
> I also think it is contrary to the scheme of the *Charter* to invoke s. 25 as a factor in applying s. 1. Section 1 does not apply to s. 25 as such because s. 25 does not create rights; to incorporate s. 25 is inconceivable in that context. Section 1 already takes into account the aboriginal perspective in the right case. 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. It seems to me that the only reason for wanting to consider s. 25 within the framework of s. 15(1) is the fear mentioned earlier that individual rights will possibly be compromised. Another fear that is revealed by some pleadings in this case is that rights falling under s. 25 will be constitutionalized; this fear is totally unfounded. Section 25 does not create or constitutionalize rights. [At paras. 109–110; emphasis added.]

[126] Applying the three steps described in his reasons at para. 111 to the facts in *Kapp*, Bastarache J. concluded that the fishing rights in question fell under s. 25, which he described as a "necessary partner" to s. 35, in that it protects the purposes of s. 35(1) and enlarges the reach of measures needed to fulfill the promise of reconciliation. He found that a "real conflict" existed in *Kapp* since the right to equality guaranteed to every individual by s. 15 was not capable of application consistently with the rights of Aboriginal fishers holding licences under the impugned sales program. In these circumstances, he would have ruled that s. 25 applied and provided a "full answer" to the claims of discrimination brought largely by non-Aboriginal fishers in *Kapp*.

[127] As seen earlier, the chambers judge in the case at bar agreed that the wording of s. 25 was broader than that of s. 35. In his analysis, if s. 25 were not interpreted more broadly than s. 35, the promise of giving the First Nations of Canada "protected space" in the Constitution would "ring hollow". In any event, he regarded the Residency Requirement in this case as a law of "constitutional character." I repeat here for convenience para. 207 of his reasons:

> 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 the 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. [Emphasis added.]

[128] He also characterized as "less than a binding precedent" the majority's suggestion in *Kapp* that the provision should be limited to "rights of a constitutional character". (At para. 191.)

Other Authorities

[129] There are very few cases post-*Kapp* in which courts have discussed s. 25. In *Joseph, supra*, the Court rejected the applicability of s. 25 in ruling that an election

structure that reserved a single council seat for an off-reserve member violated s. 15(1) of the *Charte*r. At para. 52, the Court stated:

> Similarly, the respondents' request that I consider section 25 of the *Charter* as an "interpretative lens" in applying the *Kapp* test is of little assistance, given that the decisions above [*Corbiere*, etc.] are quite alive to considerations of Aboriginal self-government but nonetheless teach that discrimination based on off-reserve residency is unacceptable.

However, neither *Joseph* nor *Cunningham v. Alberta (Minister of Aboriginal Affairs and Northern Development)* 2009 ABCA 239, *rev'd on other grounds* 2011 SCC 37, also decided post-*Kapp*, involved self-government agreements; nor was it argued that the law in question had been enacted for the protection and enhancement of the first nation's cultural survival.

Academic Comment on s. 25

[130] Time and resources do not permit me to delve deeply into the divergent academic commentaries that have been written concerning the scope and operation of s. 25. In general terms, they reflect two competing interpretations of the provision — one as a 'canon of interpretation' through which courts may construe *Charter* rights in a manner that does not undermine Aboriginal rights; and second, as a 'shield' that serves to protect Aboriginal rights that infringe the *Charter*. (See Amy Swiffen, "Constitutional Reconciliation and the Canadian Charter of Rights and Freedoms" (2019) 24:1 *Rev. of Const. Stud.* 85 at 90-6.) There is considerable disagreement over the proper approach in cases of "real conflict" between Aboriginal and *Charter* rights. I refer the reader to Bruce H. Wildsmith, *supra*, discussed in *Kapp*; Douglas E. Sanders, "Aboriginal Peoples and the Constitution" (1981) 19:3 *Alta. L. Rev*. 410; Kent McNeil, "The Constitutional Rights of the Aboriginal Peoples of Canada" (1982) 4 *S.C.L.R*. 255; Brian Slattery, "The Constitutional Guarantee of Aboriginal and Treaty Rights" (1982–1983) 8 *Queens L.J.* 232, and "First Nations and the Constitution: a Question of Trust" (1992) 71:2 *Can. Bar Rev*. 261; W.S. Tarnopolsky and G-A. Beaudoin, eds., *The Canadian Charter of Rights and Freedoms*: *Commentary* (1982), which includes a chapter by Kenneth M. Lysyk (later a judge of the Supreme Court of British Columbia) entitled "The Rights and

Freedoms of the Aboriginal Peoples of Canada" at 467; Noel Lyon, "Section 25 of the Canadian Charter of Rights and Freedoms" in *Current Issues in Aboriginal and Treaty Rights* (1984), cited by Wildsmith, *supra* at 21*;* William Pentney, "The Rights of the Aboriginal Peoples of Canada and the Constitution Act, 1982: Part I: The Interpretive Prism of Section 25" (1988) 22:1 *UBC L. Rev*. 21; James Youngblood Henderson, "Empowering Treaty Federalism" (1994) 58:*2 Sask. L. Rev*. 241; Hogg and Turpel, *supra*; Kerry Wilkins, "But We Need the Eggs: the Royal Commission, the Charter of Rights and the Inherent Right of Aboriginal Self-Government" (1999) 49:1 *U.T.L.J.* 53; Patrick Macklem, *Indigenous Difference and the Constitution of Canada* (2001); Thomas Isaac, "Canadian Charter of Rights and Freedoms: The Challenge of the Individual and Collective Rights of Aboriginal People" (2002) *Windsor Y.B. Access to Justice* 431; Jane Arbour's 2003 article, *supra*; Celeste Hutchinson, "Case Comment on R. v. Kapp: An Analytical Framework for Section 25 the Charter" (2007) 52:1 *McGill L.J.* 173; David Milward, *Aboriginal Justice and the Charter: Realizing a Culturally Sensitive Interpretation of Legal Rights* (2012); and Amy Swiffen, *supra*.

[131] As well, I note that the dean of Canadian constitutional scholars, the late Peter Hogg, observed at §28.7 of his text that s. 25 "makes clear that the equality guarantee in s. 15 of the *Charter* does not invalidate Aboriginal or treaty rights". In cases of conflict, he stated, aboriginal and treaty rights take priority over *Charter* rights. (See also "The Constitutional Basis of Aboriginal Rights" (2010) 151 *Lex Electronica* 179 at 182.)

The Parties' Positions

[132] In her factum, Ms. Dickson accepts that s. 25 protects rights which are "*in addition to* aboriginal and treaty rights" referred to in s. 35. She says the phrase "rights … that pertain to aboriginal peoples of Canada" in s. 25 must be read in the context of the whole provision, which protects (i) collective rights held by Aboriginal groups for the benefit of the collective; and (ii) rights that are distinct and unique to Aboriginal groups or *sui generis* rights held by Aboriginal groups. In addition, she

agrees with the majority's suggestion in *Kapp* that the rights protected must be of a "constitutional character".

[133] At the same time, Ms. Dickson interprets the phrase "rights … that pertain to the aboriginal peoples of Canada" to mean that s. 25 was intended to protect rights belonging to Aboriginal peoples *by virtue of being Aboriginal,* as is the case under s. *35* of the *Constitution Act, 1982.* Counsel naturally referred us to *R. v. Van der Peet* [1996] 2 S.C.R. 507, the seminal decision on the meaning of "existing aboriginal rights" in s. *35*. In a much-quoted paragraph, Chief Justice Lamer described "aboriginal rights" in that context as follows:

> To satisfy the integral to a distinctive culture test the aboriginal claimant must do more than demonstrate a practice, custom of tradition was an aspect of, or took place in, the aboriginal society in which he or she is a part. The claimant must demonstrate that the practice, custom or tradition was a central and significant part of the society's distinctive culture. He or she must demonstrate, in other words, that the practice, custom or tradition was one of the things which made the culture of the society distinctive — that it was one of the things that truly *made the society what it was*.
>
> ... To recognize and affirm the prior occupation of Canada by distinctive aboriginal societies it is *to what makes those societies distinctive* that the court must look in identifying aboriginal rights. The court cannot look at those aspects of the aboriginal society that are true of every human society (e.g., eating to survive), nor can it look at those aspects of the aboriginal society that are only incidental or occasional to that society; the court must look instead to the defining and central attributes of the aboriginal society in question. It is only by focusing on the aspects of the aboriginal society that make the society distinctive that the definition of aboriginal rights will accomplish the purpose underlying s. 35(1). [At 553–4; emphasis by underlining added.]

See also *R. v. Pamajewon* [1996] 2 S.C.R. 821, a case decided under s. 35, at paras. 23-5, and *Desautel* at paras. 51-5.

[134] Relying on this reasoning, the appellant contends that a "right to be on Council" is not unique or distinctive to the VGFN, but is a particular version of a *universal* civil and political right that flows from citizenship itself and is recognized in s. 3 of the *Charter* and in the United Nations International Covenant on Civil and Political Rights. In a similar vein she noted the comment made by Binnie J. at para. 164 of *Mitchell*, *supra*, in which the right to trade was found to "relate to

national interests that all of us have in common rather than to distinctive interests that for some purposes differentiate an aboriginal community." The same is true, Ms. Dickson contends, of the nature of the right to vote and to seek election in democratic societies — these do not make the VGFN distinctive, nor do they make the rights of internal self-government "aboriginal." We must bear in mind, however, that it is not the right to vote that is said to come within the scope of s. 25 in this instance; it is the VGFN's right to set its own criteria for leadership positions under its Constitution.

[135] With respect to the "purpose" of s. 25, Ms. Dickson submits here as she did below that:

> ... the purpose of s. 25 is to protect existing collective rights of Aboriginal peoples from abrogation or derogation by the Canadian (or territorial) state, not for First Nation governments to distinguish between sub-groups of their own citizens in a manner that is discriminatory. This is particularly true where the distinction denies participation in the governance of the nation.

Effectively, this proposition construes the phrases "before and under the law" and "equal benefit of the law" in s. 15(1) as referring only to laws passed by "the state" — by which Ms. Dickson means Canada or a province. With respect, this is inconsistent with the fact that the VGFN now acts as a "government" (as found above) and is able to pass its own laws within the terms of the Constitution. Further, there is no indication on the face of s. 15 that it is limited in the way Ms. Dickson asserts.

[136] The VGFN's submission on this topic is set on a broader plane. First, however, it objects to the "undue spectre" of the First Nation's government treating a portion of its own citizenry in a manner that is contrary to democratic and human rights — rights that have been incorporated into Part IV of its Constitution. As stated in its factum:

> ... This argument is simply wrong in fact and is contradicted by the evidence. Prior to the creation of Canada and continuing today, VGFN society has been governed by distinct legal and governance traditions. Within contemporary VGFN society, the Constitution sets out a comprehensive system of structures, processes and mechanisms that provide for the institutional

> sharing of governance responsibilities, rule of law, constitutionalism, democracy and protection of rights and freedoms of VGFN Citizens. In addition, ss. 28 and 35(4) of the *Constitution Act, 1982* ensure the ultimate constitutional guarantee of gender equality. Finally, the Constitution itself is a human rights instrument, providing for VGFN's collective exercise of self-determination in a manner consistent with human rights principles as they relate to the specific historical, cultural and social circumstances of Indigenous peoples. [Emphasis added.]

[137] As for the purpose of s. 25, the First Nation argues in favour of the full recognition of the "special position" of Indigenous peoples within the "constitutional fabric" of Canada and the "inherent differences between the liberal enlightenment concept of individual rights and the collective nature of Indigenous rights." We are asked to depart from the usual approach taken to Indigenous matters under the *Indian Act* and use an "interpretive lens" of reconciliation rather than competing collective and personal interests. This means taking a "generous and liberal" view of s. 25 as intended to protect the content of Indigenous rights from being weakened or undermined by *Charter* rights and freedoms; and reflects respect for the underlying constitutional value of protecting the rights of Indigenous peoples as distinct minority groups within Canadian society. (See *Reference re Secession of Quebec* [1998] 2 S.C.R. 217 at para. 82.)

[138] Finally, the VGFN submits that the exclusion of VGFN's Aboriginal claims, rights and interests from s. 25 would "unfairly treat the constitutional imperative of reconciliation as a distant legalistic goal devoid of meaningful content." Treaties such as the Final Agreement are said to be "models for reconciliation" because they serve to "reconcile the pre-existing sovereignty of Indigenous peoples with the assumed sovereignty of the Crown". Where the scope and nature of existing Aboriginal rights have not been defined by treaty, VGFN submits that the honour of the Crown requires the interests of Indigenous peoples at least to be preserved until the rights have been defined and reconciled with other rights and interests through a process of honourable negotiation. (See *Haida Nation v. British Columbia (Minister of Forests)* 2004 SCC 73 at paras. 20, 32–3.) Permitting s. 15 to abrogate or derogate from the First Nation's right to implement the Residency Requirement in the meantime would, it contends, be tantamount to allowing lands and resources subject

to strong *prima facie* Aboriginal rights claims, to be "irreparably changed and denuded until recognized and affirmed by the Crown". In the First Nation's words, this is not reconciliation and it is not honourable.

The Intervenors' Positions

[139] The positions of some of the intervenors on the meaning and scope of s. 25 should also be noted. Canada did not take a position as to whether s. 25 is engaged in the circumstances of the present case, but submitted that generally it is engaged where an Aboriginal group relies on a treaty or other right or freedom of similar *constitutional character* in response to a *Charter* challenge. If s. 25 is engaged and the *Charter* right or freedom conflicts with that of the Aboriginal group, Canada submitted, s. 25 operates first as an interpretive provision that informs the interpretation of the right or freedom under the *Charter*. However, if the two cannot be reconciled through interpretation, s. 25 requires the court to "modify" the interpretation of the (individual) right or freedom to the extent necessary to avoid compromising the distinctive culture of the Aboriginal group.

[140] In contrast, the intervenor Council of Yukon First Nations submitted that *if* the *Charter* applies to self-governments of the Yukon First Nations (and the Council says it does not), the chambers judge was correct to hold that s. 25 acts as a "shield" to protect and promote the identity of VGFN citizens through "unique institutions, norms and government practices." The Council goes further and asserts that the Residency Requirement is entitled *presumptively* to the protection afforded by s. 25, subject to rebuttal. In its submission, one should presume that validly enacted constitutions of self-governing first nations are "constitutional" for purposes of the "shield of s. 25" and the onus to challenge such laws as lying outside the scope of s. 25 should be on the individual claimant.

[141] The Carcross/Tagish First Nation, which was represented at the hearing of this appeal by Ms. Turpel-Lafond, also focused on s. 25, contending that the chambers judge correctly identified the purpose of that section but erred in its application by requiring an "unjustifiable" *Charter* infringement to precede an

analysis of s. 25. Counsel proposed a modified three-step version of Bastarache J.'s framework advanced in *Kapp*, on the premise that s. 25 is not a source of rights but is a shield triggered when s. 35 and other Indigenous rights conflict with the *Charter*. Three "steps" were identified for courts in analysing s. 25 issues, namely (i) identify whether the dispute involves a rights-holding group within the meaning of s. 35 (in contrast to a band under the *Indian Act*, for example); (ii) identify whether the dispute involves customs, practices or traditions rooted in Indigenous legal orders; and (iii) determine whether the court should engage in the matter at all or defer to self-determination, and any internal dispute mechanism in the first nation's constitution or internal practices. This final step, counsel says, "recognizes that the court has a necessary role in reconciliation and protecting the space for Indigenous legal orders."

[142] Applying this approach in the case at bar, the Carcross First Nation contends:

> Because the challenged action in this case, which is the legislative and governance powers of VGFN, clearly flows from unique institutions, norms and government practices rooted in the Indigenous legal order of VGFN, a s. 35 rights holding group, C/TFN submits there is very little ambiguity in whether s. 25 is engaged as a full shield in this case nor the application of s. 25 to C/TFN Laws or governance practices. However, in instances where more ambiguity may exist, the application of s. 25 as a saving provision may be assisted by consideration of UNDRIP. Decisions made regarding protection of rights under s. 25 should be made from the starting point that the Indigenous rights enshrined within UNDRIP, particularly those related to self-determination, should be valued, respected, and protected.

Analysis

[143] At the outset of these reasons, I noted that the case at bar raised some issues that have never been dealt with by a Canadian court. This is certainly true of the issues regarding s. 25 and how it relates to personal *Charter* rights held by citizens of self-governing first nations. Canadians are accustomed to the 'supremacy' of these personal rights and Canadian courts have steadfastly enforced them, even where the effect is to necessitate the expenditure of public funds or far-reaching legislative amendments. Section 25, however, places rights that "pertain to the aboriginal peoples of Canada" in a different category, protecting those rights

from being abrogated, “abridged or infringed” (see *Drybones* at 294) by personal rights under the *Charter.* Self-governing first nations are now in a position to use this tool, which in my opinion is better characterized as a ‘shield’ than a ‘lens’ or interpretive aid that would ‘read down’ or ‘modify’ rights in the event of a conflict.

[144] Questions relating to s. 25 are particularly difficult because of the fact that the “real conflict” found by the court below is between an individual’s *personal* right of equality under s. 15(1) of the *Charter* and a *collective* right — perhaps a “constitutional” one — being exercised by a *self-governing* first nation. The kinds of considerations relevant to the determination of which rights ‘pertain to’ Aboriginal persons are obviously not the same as those normally examined under s. 1 in determining whether an infringement of a claimant’s equality right is “justified in a free and democratic society.” Where the “collective” is a first nation that has survived years of paternalism and the suppression of its culture, the better view seems to be that under s. 25, the collective right should prevail undiminished.

[145] I have dealt at some length with the reasons of Bastarache J. in *Kapp*, since it is the only case of which I am aware that has grappled with the interaction of ss. 15 and 25. Bastarache J. disagreed with the majority’s *obiter dicta* that the rights or freedoms protected by s. 25 of the *Charter* should be restricted to those of a constitutional character (at para. 102); and he rejected the notion that s. 25 should be invoked only once a *Charter* violation has been established. (At para. 109.) In the end, he wrote that s. 25 is “protective” in that it was *not meant to provide for the balancing of Charter rights against Aboriginal rights*. In summary:

> ... 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. [At para. 110.]

[146] I respectfully agree with these comments and indeed it seems to me that the purpose of s. 25 is to *obviate* the weighing or ‘balancing’ of those considerations that would be relevant to justification under s. 1 — the rationality, proportionality and minimal impairment of the Residency Requirement — as against those that are

engaged by s. 25 — here, the governance traditions of the VGFN, the importance of the land to the concept of leadership in the First Nation, and its legal self-government arrangements generally. The characterization of s. 25 as a 'shield' (a term used recently in *Desautel* to describe the provision) permits a court to consider the *Charter* validity of the impugned law without performing a second 'balancing exercise'. On this point, I note the submission of counsel for the VGFN to the effect that reconciliation is unlikely to be achieved if historic Aboriginal rights are subjected to "another framework" for balancing, 'reading down', or modification. It is difficult to disagree with that submission.

[147] Even if one accepts the majority's *obiter* suggestion in *Kapp* that the impugned law must be "of a constitutional character" before s. 25 may be engaged, it is my opinion that the Residency Requirement is indeed a "constitutional" law. Obviously, it is found in the Constitution; but more substantively, it is clearly intended to reflect and promote the VGFN's particular traditions and customs relating to governance and leadership — a matter of fundamental importance to a small first nation in a vast and remote location. The evidence is persuasive that among the discerning features of the Vuntut Gwitchin society is the emphasis it places, and has always placed, on its leaders' connection to the land, their expectation of ongoing personal interaction between leaders and others, and their wish to resist the "pull" of outside influences. In this sense, the First Nation's adoption of the Residency Requirement constitutes the exercise of a right that in its modern form "pertain[s] to the aboriginal peoples of Canada". As Ms. Beairsto writes in her thesis*, supra*:

> Gwitch'in leaders are forced to be accountable to their people since they are constantly challenged at an informal level to identify why they make certain decisions. Each year political leaders as well as administrative leaders are subject to open public criticism and to strong direction at a General Assembly. ...
>
> Unlike dominant Western leadership, a Gwitch'in person is not recognized as a leader because he or she holds a position within the community. Leaders are recognized as leaders because they demonstrate appropriate leadership skills and attributes such as knowledge of land and traditions, commitment to community service, effective communication skills, and wealth. Unlike Western political or corporate leaders, Gwitch'in leaders only possess the influence that their people allow them to possess. If a leader does not demonstrate the appropriate behaviours, peoples will simply stop following

> that person. In dominant Western political systems, it is often difficult to remove ineffective leaders because of their inaccessibility. This is particularly true of corporate leadership. Corporations are comprised of individuals who may have no common bond outside the reality that they happen to work for the same organization. … Leadership among Gwitch'in people functions on a far more personal level.
>
> As the people of Old Crow implement their land claims and self-government agreements, leadership practice becomes increasingly important. Vuntut Gwitch'in people have regained the prerogative to develop their own leadership structures. The community remains under tremendous pressure from Western governments to assume Western hierarchical models of leadership. However, it is evident from this study that both young people and old people maintain a strong understanding of what Gwitch'in leadership is and what attributes their leaders should possess. Their understanding of leadership does not reflect a Western hierarchical leadership model. [At p. 151-4; emphasis added.]

[148] I also agree with the chambers judge below that if we were to characterize s. 25 merely as an interpretive tool or "lens", the promise of self-government would surely "ring hollow". Again in my respectful view, the purpose of the provision is to protect certain Aboriginal rights from being abrogated or diminished by the judicial interpretation of personal rights and freedoms guaranteed by the *Charter*. Where a conflict is encountered, the language of. s. 25 is clear: derogation from the Aboriginal right is not permitted. This is a reflection of the "special status" of Aboriginal persons in the (Canadian) constitution. (See *Kapp* at para. 103.) As Hogg and Turpel write:

> 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. [At p. 215; emphasis added.]

[149] Moreover, to the extent there may be any ambiguity or lack of clarity, it seems to me that agreements such as the SGA must be interpreted not only liberally, but with serious consideration given to the First Nation's point of view. In the circumstances of this case at least, to apply s. 15(1) would indeed derogate from the Vuntut Gwitchin's rights to govern themselves in accordance with their own

particular values and traditions *and* in accordance with the "self-government" arrangements entered into in 1993 with Canada and Yukon.

The 'Order' Issue

[150] The VGFN takes issue on its cross appeal with the fact that despite the chambers judge's finding — with which they agree — that the Residency Requirement was protected by s. 25, he also posited that s. 25 could be considered only "if it is first established that there is a breach of s. 15 and that the breach cannot be saved by s. 1." (At para. 176.) This followed his rejection of Ms. Dickson's argument that s. 25 was intended *only* to protect Aboriginal collective rights from abrogation or derogation "by the Canadian state". The judge suggested such an interpretation would "emasculate" s. 25 and mean that laws of First Nation governments would, like other governments in Canada, be subject to the test of "reasonable limits" in s. 1 of the *Charter*.

[151] In my opinion, it would not be appropriate for us to pronounce any general rule that a court must or must not consider the applicability of s. 25 until it has carried out a full analysis of the *Charter* right in question. The Supreme Court of Canada has made it clear that constitutional cases like this are best decided on a case-by-case basis, and with the benefit of an adequate evidentiary record and full argument. The case at bar could have been resolved by an analysis under s. 25 without a full equality analysis under ss. 15(1) and 1; in other cases, the situation might be different.

[152] I do note, however, that if courts were expected to analyze fully the ss. 15 and 1 implications of a *Charter* claim before considering the applicability of s. 25, it would be difficult, if not impossible, to keep s. 25 considerations separate from the issue of reasonable limits and perhaps from s. 15(1) itself. The result would be what the shield of s. 25 avoids — the weighing of individual rights against collective rights

and the 'reading down' of one of the other, or both. On this point, the comments of Bastarache J. in *Kapp* are apt:

> I do not think it is reasonable to invoke s. 25 [only] once a *Charter* violation is established. One reason for this position is that there would be no rationale for invoking s. 25 in the case of a finding of discrimination that could not be justified under s. 1, simply because, in the context of s. 15, as in this case for instance, considerations that serve to justify that an Act is not discriminatory would have to be relitigated under the terms of s. 25. Another reason is that a true interpretative section would serve to define the substantive guarantee. Section 25 is meant to preserve some distinctions, which are inconsistent with weighing equality rights and native rights. What is called for, in essence, is a contextualized interpretation that takes into account the cultural needs and aspirations of natives. ...
>
> I also think it is contrary to the scheme of the *Charter* to invoke s. 25 as a factor in applying s. 1. Section 1 does not apply to s. 25 as such because s. 25 does not create rights; to incorporate s. 25 is inconceivable in that context. Section 1 already takes into account the aboriginal perspective in the right case. 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. ... [At paras. 108–110; emphasis added.]

[153] There are practical reasons for this approach too: as the Carcross First Nation submitted, if courts were required as a rule to carry out a full analysis under ss. 15 and 1 before considering the applicability of s. 25, self-governing Yukon First Nations would end up spending "significant resources defending moot challenges ultimately prohibited by s. 25". In short:

> Defending unnecessary *Charter* challenges brought against SGYFN [self-governing first nations] is expensive, time-consuming, and will chip away at the capacity of the Indigenous government to carry out its primary duties and responsibilities.

The 14-day Limitation

[154] At para. 165 of his reasons, Veale C.J. ruled that the words "within 14 days" in the Residency Requirement could result in the "potentially arbitrary disenfranchisement" of any person who was successfully elected but unable to move

to Old Crow within the time stipulated. He feared that the Requirement could not be saved *under s. 1 of the Charter* unless the time limitation was severed.

[155] The VGFN contends that the chambers judge erred in law in failing to apply s. 25 as a shield to the Residency Requirement, *including* the 14-day limitation. It says the judge was required to consider and apply s. 25 *independent of* any analysis of ss. 15(1) and 1 of the *Charter* and that he therefore should have dismissed Ms. Dickson's claim on the basis that the entire Residency Requirement was 'shielded' by s. 25.

[156] Indeed, the First Nation goes farther, suggesting that the judge was required to resolve Ms. Dickson's claim under Article IV of the [VGFN] Constitution — the Constitution's counterpart to s. 15 — after dismissing the claim under s. 15 of the *Charter*. I understand that counsel was referring here to s. 7 of Article IV, which states:

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

[157] Having pursued her claim under the *Charter*, Ms. Dickson may elect hereafter to pursue a similar claim under the VGFN Constitution. That process would of course be subject to Vuntut Gwitchin law and principles. However, since the chambers judge's order made no reference to the claim under Article IV having been pursued before him, this is not a proper ground of appeal.

[158] Returning to the question at hand, I agree with the VGFN that it was erroneous to apply s. 1 of the *Charter* to the 14-day limitation given that at a later point, the chambers judge ruled that s. 25 'shields' the Residency Requirement from derogation by ss. 15(1). Accordingly, I conclude that the chambers judge erred in severing the limitation from the Residency Requirement.

New Evidence Application

[159] Finally, I should note that Ms. Dickson sought to adduce new evidence at the hearing of this appeal in the form of an affidavit she swore on April 14, 2021. The

evidence is said to "cast serious doubt" on the conclusions of the chambers judge: see *Barendregt v. Grebliunas* 2021 BCCA 11 at paras. 34 and 40.

[160] In her affidavit, Ms. Dickson relates what has happened to elected members of the Council since the November 2018 election. It appears that some resignations have occurred and other members have been appointed to fill the vacancies on the Council. Ms. Dickson contends that this evidence demonstrates that the VGFN is unable to maintain Councillors and that the Residency Requirement "impairs" the functioning of its governing body.

[161] I do not see this new evidence as bringing into serious doubt any of the findings of fact or even conclusions of law reached by the chambers judge. There may be many reasons for the resignations and vacancies besides the alleged unworkability of the Residency Requirement. In any event, the question of whether the Requirement is advisable or not is not one for the Court. As with the election laws of Canada or any province, is for the relevant legislative body — here, the VGFN's General Assembly and Council — to legislate on the topic. If it becomes apparent to members of the First Nation that the Requirement should be varied in some way, it is for the VGFN as a self-governing entity to make what amendments it deems appropriate.

Summary of Conclusions

[162] Given the length of these reasons, it may be helpful to summarize here my findings on the questions under appeal:

1. The chambers judge did not err in proceeding on the basis that the Residency Requirement is a "law" within the meaning of s. 32, such that the *Charter* is applicable to the Requirement;

2. Subject to possible justification under s. 1 of the *Charter*, the Residency Requirement does infringe Ms. Dickson's equality rights under s. 15(1) — even though it was obviously not intended to "[perpetuate] disadvantage and stereotyping". To this extent the appeal must be allowed;

3. The chambers judge did not err in finding that even if s. 15(1) was breached, s. 25 of the *Charter* 'shielded' the VGFN's right to adopt the Residency Requirement, including the words "within 14 days";

4. It would not be appropriate to suggest at this point any general rule that s. 25 should be considered and applied only after a court has determined that a *Charter* right or freedom has been breached and can or cannot be justified under s. 1; and

5. Given my conclusion concerning the nature of s. 25 as 'shielding' certain Aboriginal rights, the chambers judge erred in failing to find that the phrase "within 14 days" would also have been shielded. Accordingly, he erred in severing those words on the basis that they infringed Ms. Dickson's rights under s. 15(1) of the *Charter*. Accordingly the cross appeal must be allowed.

Disposition and Costs

[163] In the result, I would order that the new evidence application be dismissed, the appeal and cross appeal be allowed, the chambers judge's order be set aside, and the petition be dismissed. In addition, since the court below made a declaratory order that was divided into separate paragraphs, I would order that:

> This court Orders and Declares that:
>
> 1. The *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c. 11 (the "*Charter*") applies to the residency requirement in Section 2 of Article II of the Constitution of the Vuntut Gwitchin First Nation (the "Residency Requirement");
> 2. Subject to possible justification under s. 1 of the *Charter*, the Residency Requirement does infringe the Petitioner's equality rights under s. 15(1) of the *Charter*;
> 3. If the Residency Requirement does breach the Petitioner's equality rights under s. 15(1) of the *Charter*, then s. 25 of the *Charter* applies to shield the Residency Requirement, with the result that the Requirement is valid.

I do not propose to comment on my colleague Justice Frankel's reasons since the propriety of the chambers judge's order was not raised by any party and is not relevant to the substantive issues that were raised.

[164] Both parties sought costs in this court and at the trial level. My tentative view is that the result of the appeals was mixed and that accordingly it may be appropriate for the parties to bear their own costs. However, if counsel wish to make further submissions on this subject, they may do so in writing within 30 days. None of the intervenors sought costs.

A Final Word

[165] In closing, we are indebted to all counsel, including counsel for the intervenors, who made extensive and thoughtful submissions on the challenging issues on this appeal. I note in particular the advocacy of Mr. Statnyk, who is himself a member of the VGFN. He spoke eloquently about his people, and clearly and persuasively about the law.

"The Honourable Madam Justice Newbury"

I agree:

"The Honourable Chief Justice Bauman"

Reasons for Judgment of the Honourable Mr. Justice Frankel:

[166] For the reasons given by Justice Newbury, I agree that Ms. Dickson's challenge to the Residency Requirement in the VGFN Constitution fails. I further agree with my colleague's "disposition" in para. 163 of her reasons that: (a) Ms. Dickson's application to adduce new evidence should be dismissed; (b) the VGFN's cross appeal should be allowed; (c) the chambers judge's order should be set aside; and (d) Ms. Dickson's petition should be dismissed. However, I do not agree that Ms. Dickson's appeal should be allowed. Rather, it should be dismissed. In addition, I do not consider it appropriate for this Court to make any declarations.

[167] Justice Newbury's conclusion that Ms. Dickson's appeal should be allowed is based on the fact that the chambers judge's order contains a recital that the Residency Requirement without the 14-day requirement does not infringe Ms. Dickson's s. 15(1) equality rights and we have concluded he erred in that regard: see paras. 117 and 162(2) above. However, that recital should not have been included in the order and should not be treated as an independently appealable declaration.

[168] Context is important. I will begin with the remedy Ms. Dickson sought in her petition, namely:

> [A] declaration pursuant to section 52 of the *Constitution Act, 1982* that the words "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" in Article XI(2) [of the Vuntut Gwitchin First Nation Constitution] are inconsistent with section 15(1) of the *Charter* and are not justified under section 1, and therefore are of no force and effect;

[169] In its response to the petition the VGFN opposed the granting of this declaration on the following bases:

> (a) the Supreme Court of Yukon does not have jurisdiction, or alternatively, should decline to exercise its jurisdiction;
>
> (b) in the alternative, the *Charter* does not apply to the VGFN Constitution pursuant to s. 32 of the *Charter*;

(c) in the further alternative, s. 15 of the *Charter* must be interpreted in light of s. 25 of the *Charter*; and

(d) in the further alternative, any breach of s. 15 of the *Charter* arising from the Residency Requirement is a reasonable limit justified under s. 1 of the *Charter*.

[170] In his reasons for judgment, the chambers judge addressed the parties' submissions, which included arguments involving ss. 1, 15, 25, and 32 of the *Charter*. He summarized his findings as follows:

> 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. <u>The words "within 14 days" are declared to be of no force and effect pursuant to s. 52 of the *Constitution Act, 1982*.</u> 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").
>
> [Emphasis added.]

Of note is that the only declaration made in these reasons is the one in para. 216 that I have underlined: see also para. 170.

[171] However, the order approved by all counsel that was submitted to the registry and entered after being signed by a clerk of the court contains four declarations. That order states:

> THIS COURT ORDERS AND DECLARES that:
>
> 1. The *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c. 11 (the "*Charter*") applies to the Vuntut Gwitchin First Nation government, the Vuntut Gwitchin First Nation Constitution, and laws made by the Vuntut Gwitchin First Nation government, including the residency requirement in Section 2 of Article XI of the Vuntut Gwitchin First Nation Constitution (the "*Residency Requirement*");
>
> 2. The *Residency Requirement*, with the severance of the words "within 14 days", does not infringe the Petitioner's *Charter* section 15(1) equality rights;
>
> 3. The words of the *Residency Requirement* "within 14 days" infringe the Petitioner's *Charte*r section 15(1) equality rights and are not saved under section 1 of the *Charter*, and are therefore declared invalid and of no force or effect pursuant to s. 52 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c. 11; and
>
> 4. The declaration of invalidity of the words "within 14 days" is suspended for a period of 18 months to permit the Vuntut Gwitchin First Nation General Assembly to review the Residency Requirement to determine if they wish to amend it.

[172] Ms. Dickson filed an appeal. Her notice of appeal seeks an order that:

> (1) The appeal be allowed.
>
> (2) A declaration pursuant to section 52 of the *Constitution Act, 1982*, … that the residency requirement at Article XI(2) of the Vuntut Gwitchin First Nation Constitution is inconsistent with section 15(1) of the *Canadian Charter of Rights and Freedoms* … and is not saved by section 1 or section 25, and is therefore of no force or effect.

[173] In her factum, Ms. Dickson alleges the chambers judge erred in law:

> (a) By finding that the Residency Restriction, in its entirety, was not an infringement of Ms. Dickson's s. 15(1) *Charter* rights.
>
> (b) By finding that s. 25 of the *Charter* shields the Vuntut Gwitchin First Nation's right to adopt the Residency Restriction with severance of the words "within 14 days".

The relief sought is an order allowing the appeal and declaring that the Residency Requirement is inconsistent with s. 15(1) of the *Charter*, is not saved by s. 1 or s. 25, and is therefore of no force or effect.

[174] The VGFN cross appealed. Its notice of cross appeal only challenges the chambers judge's conclusions that:

> (a) the *Charter* applies to the VGFN government, the VGFN Constitution, and the laws made by the VGFN government, including the Residency Requirement; and
>
> (b) the words "within 14 days" infringe s. 15(1) of the *Charter*, are not saved under s. 1, and are declared invalid and of no force or effect.

That notice seeks the following orders:

1. The Order that the *Charter* applies to VGFN government, Constitution and laws made by the VGFN government is quashed;
2. The Appellant Ms. Dickson's appeal is dismissed;

[175] In its cross appeal factum, the VGFN alleges the chambers judge erred in law by:

> (a) Concluding that the *Charter* applies to the VGFN Government, *Constitution* and laws; and
>
> (b) Declaring that the words "within 14 days" included in the Residency Requirement are of no force or effect pursuant to s. 52 of the *Constitution Act, 1982*. The chambers judge erred in this respect by:
>
> (i) Incorrectly holding that s. 25 of the *Charter* only applies if it has been determined that a *Charter* right or freedom has been breached and cannot be saved by s. 1.
>
> (ii) Incorrectly finding that the words "within 14 days" infringe Ms. Dickson's rights under s. 15(1) of the *Charter* and are not saved by s. 1.

The relief sought by the VGFN on both its cross appeal and Ms. Dickson's appeal is the same, namely, that Ms. Dickson's appeal be dismissed and the cross appeal be allowed.

[176] In her factum on the cross appeal, Ms. Dickson seeks an order dismissing the cross appeal.

[177] From the foregoing, it is clear that the validity of the Residency Requirement is the only substantive issue in this litigation. Ms. Dickson challenged that

requirement and the VGFN supported it. The various arguments they made both in the Supreme Court and in this Court were in an effort to present a juridical pathway to the result each sought to achieve.

[178] I turn now to the Supreme Court order. In my view, it was poorly drafted, as it contains unnecessary and inappropriate recitals. In particular, paragraphs 1 and 2 are problematic.

[179] It is well established that "an order ought not recite or include either arguments or reasons" and that "the operative terms in an order are limited to the court's ultimate disposition of the matter before it": *Knapp v. Town of Faro*, 2010 YKCA 7 at para. 6; *Canadian Centre for Bio-Ethical Reform v. South Coast British Columbia Transportation Authority*, 2018 BCCA 344 at para. 67. Based on these principles, the only declaration that should have been set out in the order entered to give effect to the chambers judge's decision is the one stated in para. 216 of his reasons. An order properly drafted to reflect the chambers judge's disposition of Ms. Dickson's petition would have been worded along these lines:

> This Court Declares that the words "within 14 days" in Article XI(2) of the Vuntut Gwitchin First Nation Constitution are invalid and of no force and effect.
>
> This Court Orders that the above declaration is suspended for 18 months.

[180] I am, of course, aware of another well-established principle, namely, "that appeals are brought from the formal order entered in the court appealed from, not from the reasons for judgment that gave rise to the order": *Cambie Surgeries Corporation v. British Columbia (Attorney General)*, 2017 BCCA 287 at para. 28; *Knapp* at para. 6. However, this does not mean that every recital in an order forms part of the ultimate disposition of a matter and can be the subject of an appeal.

[181] That not every recital in an order amounts to an operable and appealable term is reflected in *Wang v. Grace Canada Inc.*, 2018 BCCA 255, aff'g 2017

BCSC 1932, leave to appeal ref'd [2018] S.C.C.A. No. 538. Grace Canada terminated Mr. Wang's employment and his union filed a grievance. Mr. Wang unsuccessfully applied for federal employment insurance benefits. The grievance was settled and Mr. Wang signed a release. He then commenced an action against Grace Canada in the Supreme Court of British Columbia claiming that it had forged certain documents and made fraudulent statements to the Employment Insurance Commission. Grace Canada applied to strike Mr. Wang's claim on the basis that the court lacked jurisdiction to hear it or, in the alternative, to have it dismissed because it was precluded by the release and settlement agreement and, therefore, disclosed no cause of action, was an abuse of process, or raised no genuine issue for trial. In granting that application, the chambers judge expressed his conclusions as follows:

> [24] For all of the forgoing reasons, I am issuing a declaration that this court is without jurisdiction over this action and I am ordering that it be struck.
>
> [25] If I am incorrect, I would, nevertheless, have dismissed the action pursuant to Rule 9-6 of the *Supreme Court Civil Rules* [Summary Judgment] on the basis that it discloses no genuine issue for trial as a result of all claims having been released.

The order entered to give effect to the judge's decision reads:

> THIS COURT ORDERS that:
>
> 1. A declaration that this Court is without jurisdiction over the Action as pleaded in the Notice of Civil Claim;
> 2. This Action is struck in its entirety for want of jurisdiction on the basis of the foregoing declaration;

[182] Mr. Wang's appeal failed on the basis that the claim was precluded by the settlement agreement and, therefore, should be dismissed pursuant to Rule 9-6 of the *Supreme Court Civil Rules* as not raising a genuine issue for trial: at para. 24. In the course of dismissing the appeal, Chief Justice Bauman said this about the order:

> [28] I would note that the form of the order under appeal declares that the Court is without jurisdiction, and goes on to state the "Action is struck in its entirety for want of jurisdiction on the basis of the foregoing declaration." However, I do not consider this to be an impediment to upholding the dismissal of the claim on the alternative grounds discussed. <u>In my view, the operative part of the order, read in light of the judge's reasons, is that the "Action is struck". The dismissal of the claim is in fact the thing being ordered. The references to lack of jurisdiction simply amount to recitals or</u>

> reasons for striking the claim and are not themselves the order: *Law v. Cheng*, 2016 BCCA 120.
>
> [Emphasis added.]

[183] *Law v. Cheng*, 2016 BCCA 120, the case cited by Chief Justice Bauman, was a family law matter involving an application relating to the parenting arrangement for a child. In support of his application, Mr. Law alleged Ms. Cheng had repeatedly disobeyed a previous order relating to the child. The chambers judge, after finding that Ms. Cheng had willfully disobeyed the previous order, went on to make a number of the parenting orders sought by Mr. Law: 2015 BCSC 1607 at paras. 16–17. The order entered to give effect to the chambers judge's reasons included the follow recital:

> AND UPON THE COURT finding that the respondent [the mother] has willfully disobeyed paragraph 5 of the order pronounced by the Honourable Mr. Justice G.C. Weatherill on October 31, 2014 by repeatedly removing the Child from his permanent residence in the Lower Mainland of British Columbia without the written consent of the claimant [the father] and without court order, and contrary to the expressed non-consent of the claimant, the Child's joint guardian.

[184] Ms. Cheng filed an appeal in which she sought to challenge only the above recital; she did not challenge the parenting arrangement set out in the order. In quashing that appeal, Justice MacKenzie stated the following:

- The recital was a "finding" that should not have been included in the order: at para. 14.
- That "finding" should have been confined to the reasons for judgment: at para. 18.
- "[The] Court has no jurisdiction to entertain an appeal from a recital to an order that is not part of the operative terms of the order": at para. 18.
- "To be an order, a thing must be capable of enforcement or execution": at para. 21.

[185] Returning to the case at bar, the only "things" ordered by the chambers judge that had enforceable legal effect were: (1) a declaration that the words "within 14

days" in the Residency Requirement are invalid and of no force or effect; and (2) the suspension of that declaration for 18 months. His treatment of the other issues argued by the parties were but steps in the reasoning process leading to his ultimate and operative conclusion. That those steps (findings) were included in the order does not make them operative and appealable terms.

[186] Take, for example, a case in which person X files a petition seeking a declaration that a provision of a Yukon statute is invalid because it infringes s. 15(1) of the *Charter*. The Yukon Government submits there is no infringement but argues, in the alternative, that any infringement is saved by s. 1 of the *Charter*. A chambers judge finds no infringement and dismisses the petition. The entered order (wrongly) includes a recital that the impugned provision does not infringe s. 15(1). X appeals. On that appeal, the Government again advances s. 1. This Court agrees with X that the provision infringes s. 15(1) but upholds it under s. 1. In those circumstances, it makes no sense to both allow X's appeal and affirm the dismissal of the petition.

[187] What Ms. Dickson and the VGFN sought from this Court was a determination with respect to the validity of the Residency Requirement as a whole. In the end, the VGFN prevailed. Put simply, Ms. Dickson lost and the VGFN won. Accordingly, I consider Ms. Dickson's appeal to have failed and the VGFN's cross appeal to have succeeded.

[188] I am further of the view that this Court should not pronounce an order containing the declarations set out in para. 163 of Justice Newbury's reasons. The operative parts of this Court's order should be restricted to the outcome of this litigation, which is that Ms. Dickson's application for a declaration of invalidity has failed. It should not contain a recitation of the some of the steps in the reasoning process leading to that outcome. To do so continues the error made in the drafting of the chambers judge's order.

[189] I would dispose of this case with an order that dismisses Ms. Dickson's new evidence application and her appeal, allows the VGFN's cross appeal, sets aside the chambers judge's order, and dismisses Ms. Dickson's petition.

[190] I prefer to express no opinion on costs at this time.

"The Honourable Mr. Justice Frankel"

Schedule A

Excerpts from the Vuntut Gwitchin First Nation Final Agreement

VUNTUT GWITCHIN

FIRST NATION

FINAL AGREEMENT

. . .

VUNTUT GWITCHIN FIRST NATION FINAL AGREEMENT

between

THE GOVERNMENT OF CANADA,

THE VUNTUT GWITCHIN FIRST NATION

and

THE GOVERNMENT OF YUKON

. . .

WHEREAS:

The Vuntut Gwitchin First Nation asserts aboriginal rights, titles and interests with respect to its Traditional Territory;

the Vuntut Gwitchin First Nation wishes to retain, subject to this Agreement, the aboriginal rights, titles and interests it asserts with respect to its Settlement Land;

the parties to this Agreement wish to recognize and protect a way of life that is based on an economic and spiritual relationship between Vuntut Gwitchin and the land;

the parties to this Agreement wish to encourage and protect the cultural distinctiveness and social well-being of Vuntut Gwitchin;

the parties to this Agreement recognize the significant contributions of Vuntut Gwitchin and the Vuntut Gwitchin First Nation to the history and culture of the Yukon and Canada;

the parties to this Agreement wish to enhance the ability of Vuntut Gwitchin to participate fully in all aspects of the economy of the Yukon;

the *Constitution Act, 1982*, recognizes and affirms the existing aboriginal rights and treaty rights of the aboriginal peoples of Canada, and treaty rights include rights acquired by way of land claims agreements;

the parties to this Agreement wish to achieve certainty with respect to the ownership and use of lands and other resources of the Vuntut Gwitchin First Nation Traditional Territory;

the parties wish to achieve certainty with respect to their relationships to each other;

the Vuntut Gwitchin First Nation, Canada and the Yukon have authorized their representatives to sign this land claims agreement;

NOW THEREFORE,

in consideration of the terms, exchanges of promises, conditions and provisos contained herein, the parties to this Agreement agree to the following.

...

CHAPTER 1 - DEFINITIONS

In the Umbrella Final Agreement, the following definitions shall apply unless otherwise provided in a particular chapter.

...

"Settlement Agreement" means a Yukon First Nation Final Agreement or a Transboundary Agreement.

...

CHAPTER 2 - GENERAL PROVISIONS

2.1.0 The Umbrella Final Agreement

2.1.1 Ratification of the Umbrella Final Agreement by the Yukon First Nations, through the Council for Yukon Indians, and by Canada and the Yukon signifies their mutual intention to negotiate Yukon First Nation Final Agreements in accordance with the Umbrella Final Agreement.

Specific Provision

2.1.1.1 This Agreement is the Yukon First Nation Final Agreement for the Vuntut Gwitchin First Nation, concluded in accordance with 2.1.1.

2.1.2 The Umbrella Final Agreement does not create or affect any legal rights.

2.1.3 A Yukon First Nation Final Agreement shall include the provisions of the Umbrella Final Agreement and the specific provisions applicable to that Yukon First Nation.

2.2.0 Settlement Agreements

2.2.1 Settlement Agreements shall be land claims agreements within the meaning of section 35 of the *Constitution Act, 1982*.

2.2.2 Nothing in a Yukon First Nation Final Agreement shall affect any aboriginal claim, right, title or interest of a Yukon First Nation claimed in British Columbia or the Northwest Territories.

2.2.3 Settlement Agreements shall not affect the identity of aboriginal people of the Yukon as aboriginal people of Canada.

2.2.4 Subject to 2.5.0, 5.9.0, 5.10.1 and 25.2.0, Settlement Agreements shall not affect the ability of aboriginal people of the Yukon to exercise, or benefit from, any existing or future constitutional rights for aboriginal people that may be applicable to them.

2.2.5 Settlement Agreements shall not affect the rights of Yukon Indian People as Canadian citizens and their entitlement to all of the rights, benefits and protection of other citizens applicable from time to time.

...

2.4.0 Settlement Legislation

2.4.1 Upon ratification of the Umbrella Final Agreement, and upon ratification of a Yukon First Nation Final Agreement, Canada shall recommend to Parliament, and the Yukon shall recommend to the Legislative Assembly, Settlement Legislation.

2.4.2 Prior to ratification of the Umbrella Final Agreement, the parties to the Umbrella Final Agreement shall negotiate guidelines for drafting the Act that Canada will recommend to Parliament and the Act that the Yukon will recommend to the Yukon Legislative Assembly, which shall, among other things:

2.4.2.1 approve, give effect to and declare valid those Settlement Agreements which have been ratified at the same time as the Umbrella Final Agreement and enable subsequently ratified Settlement Agreements to be approved, given effect and declared valid by order-in-council;.

2.4.2.2 acknowledge that a Settlement Agreement is a land claims agreement within the meaning of section 35 of the *Constitution Act, 1982*;

2.4.2.3 provide that a Settlement Agreement is binding on third parties; and

2.4.2.4 provide that where there is any doubt in the meaning of Settlement Legislation, any Settlement Agreement may be examined as an aid to interpretation.

...

CHAPTER 9 - SETTLEMENT LAND AMOUNT

9.1.0 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.

...

CHAPTER 24 - YUKON INDIAN SELF-GOVERNMENT

24.1.0 General

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;

24.1.2.2 develop and administer programs in areas of Yukon First Nation responsibility;

24.1.2.3 appoint representatives to boards, councils, commissions and committees as provided for in the Settlement Agreements;

24.1.2.4 allocate, administer and manage Settlement Land;

24.1.2.5 contract with Persons or governments;

24.1.2.6 form corporations and other legal entities;

24.1.2.7 borrow money; and

24.1.2.8 levy and collect fees for the use or occupation of Settlement Land including property taxes.

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.

24.2.0 Subjects for Negotiation

24.2.1 Negotiations respecting a self-government agreement for a Yukon First Nation may include the following 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;

...

...

24.9.0 Legislation

24.9.1 The parties to the Umbrella Final Agreement shall negotiate guidelines for drafting Legislation to bring into effect agreements negotiated pursuant to 24.1.1.

24.9.2 Subject to 24.9.1, the Yukon shall recommend to its Legislative Assembly, Legislation separate from the Settlement Legislation to bring into effect those agreements negotiated pursuant to 24.1.1 for which the Yukon has legislative authority.

24.9.3 Subject to 24.9.1, Canada shall recommend to Parliament Legislation separate from the Settlement Legislation to bring into effect those agreements negotiated pursuant to 24.1.1 for which Canada has legislative authority.

...

24.12.0 Protection

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 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*.

Schedule B

Excerpts from the Vuntut Gwitchin First Nation Self-Government Agreement

VUNTUT GWITCHIN FIRST NATION SELF-GOVERNMENT AGREEMENT

. . .

This Agreement made this 29th day of May, 1993.

AMONG:

The Vuntut Gwitchin First Nation as represented by the Chief and Council of the Vuntut Gwitchin First Nation (hereinafter referred to as the "Vuntut Gwitchin First Nation")

AND:

The Government of the Yukon as represented by the Government Leader of the Yukon (hereinafter referred to as "the Yukon")

AND:

Her Majesty the Queen in Right of Canada as represented by the Minister of Indian Affairs and Northern Development (hereinafter referred to as "Canada")

being the Parties (collectively referred to as "the Parties") to this Vuntut Gwitchin First Nation Self-Government Agreement (hereinafter referred to as "this Agreement").

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 have negotiated the Vuntut Gwitchin First Nation Final Agreement, securing the rights and benefits therein including a commitment to negotiate the Vuntut Gwitchin First Nation Self-Government Agreement;

the Vuntut Gwitchin First Nation asserts, subject to Settlement Agreements, continuing aboriginal rights, titles and interests with respect to its Settlement Land;

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 wish to provide for the effective management, administration and exercise of the rights and benefits of the Vuntut Gwitchin First Nation and Vuntut Gwitchin which are secured by Vuntut Gwitchin First Nation Final Agreement;

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;

the Vuntut Gwitchin First Nation, Canada and the Yukon have authorized their representatives to sign this Vuntut Gwitchin First Nation Self-Government Agreement;

NOW THEREFORE,

In accordance with Chapter 24 of the Vuntut Gwitchin First Nation Final Agreement, and

In consideration of the terms, exchange of promises, conditions, and provisos contained herein, the Parties agree to the following:

...

1.0 DEFINITIONS

1.1 In this Agreement:

...

"Chief and Council" has the same meaning as in the Constitution;

"Citizen" means a citizen of the Vuntut Gwitchin First Nation as determined by the Constitution;

"Constitution" means the constitution of the Vuntut Gwitchin First Nation, in effect on the Effective Date, as amended from time to time;

...

"Final Agreement" means the Vuntut Gwitchin First Nation Final Agreement between the Government of Canada, the Vuntut Gwitchin First Nation and the Government of the Yukon, initialled by the negotiators for the Parties on the 31st day of May, 1992;

"Government" means Canada or the Yukon, or both, depending upon which government or governments have responsibility, from time to time, for the matter in question;

"Law" includes common law;

...

"Self-Government Legislation" means the Legislation which brings this Agreement into effect;

...

3.0 GENERAL PROVISIONS

3.1 This Agreement shall not affect any aboriginal claim, right, title or interest of the Vuntut Gwitchin First Nation or of its Citizens.

3.2 This Agreement shall not affect the identity of Citizens as aboriginal people of Canada.

3.3 This Agreement shall not affect the ability of the aboriginal people of the Vuntut Gwitchin First Nation to exercise, or benefit from, any existing or future constitutional rights for aboriginal people that may be applicable to them.

...

3.5 Except for the purpose of determining which Citizens are "Indians" within the meaning of the *Indian Act*, R.S.C. 1985, c. I-5, the *Indian Act*, R.S.C. 1985, c. I-5, does not apply to Citizens, the Vuntut Gwitchin First Nation or Settlement Land.

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 a 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.

...

9.0 LEGAL STATUS OF THE VUNTUT GWITCHIN FIRST NATION

9.1 Upon the Effective Date, the Indian Act. R.S.C. 1985, c. I-5, Vuntut Gwitchin Tribal Band shall cease to exist and its rights, titles, interests, assets, obligations and liabilities, including those of its band council, shall vest in the Vuntut Gwitchin First Nation.

9.2 The Vuntut Gwitchin First Nation is a legal entity and has the capacity, rights, powers and privileges of a natural person and, without restricting the generality of the foregoing, may:

9.2.1 enter into contracts or agreements;

9.2.2 acquire and hold property or any interest therein, sell or otherwise dispose of property or any interest therein;

9.2.3 raise, invest, expend and borrow money;

9.2.4 sue or be sued;

9.2.5 form corporations or other legal entities; and

9.2.6 do such other things as may be conducive to the exercise of its rights, powers and privileges.

9.3 The act of acquiring or the holding of any rights, liabilities or obligations by the Vuntut Gwitchin First Nation or by any entity described in 9.2.5, shall not be construed to affect any aboriginal right, title or interest of the Vuntut Gwitchin First Nation, its Citizens or their heirs, descendants or successors.

10.0 VUNTUT GWITCHIN FIRST NATION CONSTITUTION

10.1 The Vuntut Gwitchin First Nation Constitution shall:

10.1.1 contain the Vuntut Gwitchin First Nation citizenship code;

10.1.2 establish governing bodies and provide for their powers, duties, composition, membership and procedures;

10.1.3 provide for a system of reporting, which may include audits, through which the Vuntut Gwitchin First Nation government shall be financially accountable to its Citizens;

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 ;

10.1.6 provide for amending the Constitution by the Citizens; and

10.1.7 be consistent with this Agreement.

10.2 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.

10.3 The citizenship code established in the Constitution shall enable all persons enrolled under the Final Agreement to be Citizens.

...

13.0 LEGISLATIVE POWERS

13.1 The Vuntut Gwitchin First Nation shall have the exclusive power to enact laws in relation to the following matters:

13.1.1 administration of Vuntut Gwitchin First Nation affairs and operation and internal management of the Vuntut Gwitchin First Nation;

13.1.2 management and administration of rights or benefits which are realized pursuant to the Final Agreement by persons enrolled under the Final Agreement, and which are to be controlled by the Vuntut Gwitchin First Nation; and

13.1.3 matters ancillary to the foregoing.

...

13.5.0 Laws of General Application

13.5.1 Unless otherwise provided in this Agreement, all laws of General Application shall continue to apply to the Vuntut Gwitchin First Nation, its Citizens and Settlement Land.

...

13.6.0 Administration of Justice

13.6.1 The Parties shall enter into negotiations with a view to concluding an agreement in respect of the administration of Vuntut Gwitchin First Nation justice provided for in 13.3.17.

...

16.0 SELF-GOVERNMENT FINANCIAL TRANSFER AGREEMENT

16.1 Canada and the Vuntut Gwitchin First Nation shall negotiate a self-government financial transfer agreement in accordance with 16.3, with the objective of providing the Vuntut Gwitchin First Nation with resources to enable the Vuntut Gwitchin First Nation to provide public services at levels reasonably comparable to those generally prevailing in Yukon, at reasonably comparable levels of taxation.

...

SCHEDULE A

RATIFICATION OF THE VUNTUT GWITCHIN FIRST NATION SELF-GOVERNMENT AGREEMENT

1.0 DEFINITIONS

1.1 In this schedule:

"Eligible Voter" means a person who is on the official voters list prepared pursuant to 3.0 of Schedule A to Chapter 2 of the Final Agreement.

"Ratification Committee" means the Ratification Committee established pursuant to 2.0 of Schedule A to Chapter 2 of the Final Agreement; and

2.0 GENERAL

2.1 Ratification of this Agreement by the Vuntut Gwitchin First Nation in accordance with this schedule shall be considered ratification by all persons eligible to be Citizens that the Vuntut Gwitchin First Nation represents.

2.2 This Agreement shall be ratified by the Vuntut Gwitchin First Nation before being considered for ratification by Canada and the Yukon.

2.3 Government shall consider the ratification of this Agreement within three months after the publication of its ratification by the Vuntut Gwitchin First Nation or as soon as practicable thereafter,

...

Schedule C

The Vuntut Gwitchin First Nation Constitution

VUNTUT GWITCHIN FIRST NATION

CONSTITUTION

Ratified by the Vuntut Gwitchin First Nation General Assembly: 1992

Last amended by the Vuntut Gwitchin First Nation General Assembly: August 10, 2019

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PREAMBLE

We, the Vuntut Gwitchin First Nation of the North Yukon, having boundless pride in our ancient cultural heritage and ancestral homeland and desiring to exercise our inherent right of self-government to exercise responsibility for the general welfare of our Citizens and to provide for the good government of our communities, lands and resources, hereby adopt this Constitution.

DEFINITIONS

1. In this Constitution:

"**Canada**" means, unless the context otherwise requires, Her Majesty the Queen in right of Canada;

"**Chief**" means the leader of Vuntut Gwitchin First Nation chosen as a result of a duly held election;

"**Child**" means a child born in or out of wedlock, a legally adopted child and a child adopted in accordance with the accepted custom of the Vuntut Gwitchin First Nation;

"**Citizen**" means a person whose name is on the First Nation Citizenship List;

"**Council**" means the Council of the Vuntut Gwitchin First Nation as chosen as a result of a duly held election;

"**Councillor**" means either the Deputy Chief or Councillor as chosen as a result of a duly held election;

"**Elder**" means a Citizen who is sixty years of age;

"**Elders Council Member**" means a Citizen who is sixty years of age or older and who chooses to be a member of the Elders Council;

"**Elector**" means a person who is on the First Nation Citizenship List, who is 18 years of age or older and who is not disqualified from voting;

"**First Nation**" means the Vuntut Gwitchin First Nation;

"**First Nation Citizenship List**" means the list of Citizens that is maintained by the Vuntut Gwitchin First Nation;

"**Generally Accepted Accounting Principles**" means the accounting principles generally accepted in Canada as amended from time to time, as applicable pursuant to the public sector accounting standards established by the Public Sector Accounting Standards Board of the Canadian Institute of Chartered Accountants or its successor;

"**General Assembly**" a governing body composed of eligible Citizens that provides direction to Chief and Council;

"**General Election**" means a regularly scheduled election held in accordance with Vuntut Gwitchin Laws, in which all Citizens who are at least 18 years old are entitled to vote;

"**Governing Body**" means a body established under the Constitution, which includes the General Assembly, Vuntut Gwitchin First Nation Court, Elders Council, and Council;

"**Non-Settlement Land**" means all land and water in the Yukon other than Settlement Land and includes Mines and Minerals in Category B Settlement Land and Fee Simple Settlement Land, other than Specified Substances as defined in the Umbrella Final Agreement;

"**Public Institution**" means a Vuntut Gwitchin Government body, board, commission, corporation, organization or tribunal established under Vuntut Gwitchin Law;

"**Resident**" means a person who the majority of the time, regularly lives on Vuntut Gwitchin Settlement Land but who may or may not be a Citizen of Vuntut Gwitchin;

"**Review Council**" means the body responsible for:

(a) recounts in an election;

(b) serving as the Citizenship/Enrollment Committee;

(c) receiving complaints about Chief and Council;

(d) where necessary, removal from office; and

(e) when necessary, appointments of interim Councillor.

"**Settlement Land**" means Category A Settlement Land, Category B Settlement Land or Fee Simple Settlement Land, as defined in the Umbrella Final Agreement;

"**Traditional Territory**" means, subject to a Yukon First Nation Final Agreement, with respect to each Yukon First Nation and each Yukon Indigenous Person enrolled in that Yukon First Nation's Final Agreement, the geographic area within the Yukon identified as that Yukon First Nation's Traditional Territory on the map referred to in 2.9.0 in the Umbrella Final Agreement;

"**Umbrella Final Agreement**" means the 1993 agreement signed between Canada, Yukon and Council of Yukon First Nations;

"**Vuntut Gwitchin Court**" means a court established under Vuntut Gwitchin legislation;

"**Vuntut Gwitchin Laws**" includes this Constitution and any law passed in accordance with the procedure set out in the Governance Act or relevant legislation;

"**Vuntut Gwitchin First Nation**" means the collectivity of Citizens who share the language, culture, and laws of the Vuntut Gwitchin, and their descendants;

"**Vuntut Gwitchin Nation Fiscal Financing Agreement**" means a fiscal financing agreement within the meaning of that term in the Umbrella Final Agreement;

"**Vuntut Gwitchin Government**" means both the elected and administrative bodies forming the government of the Vuntut Gwitchin First Nation;

"**Vuntut Gwitchin Settlement Trust**" means a Vuntut Gwitchin First Nation settlement trust within the meaning of that term in the Umbrella Final Agreement;

"**Youth Council**" means the collective of eligible youth of Vuntut Gwitchin First Nation;

"**Youth Representatives**" means the eligible youth chosen to represent the Youth Council;

"**Yukon**" means, unless the context otherwise requires, Her Majesty the Queen in right of Yukon; and

"**Yukon First Nation Final Agreement**" means a land claims agreement for a Yukon First Nation that includes provisions specific to that Yukon First Nation and incorporates the provisions of the Umbrella Final Agreement.

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;

   (e) use, manage, administer and regulate the lands of the Vuntut Gwitchin First Nation including the natural resources thereof;

   (f) control the disposition of rights and interests in and to the traditional lands and resources for the Vuntut Gwitchin First Nation;

(g) use, manage and administer the money and other assets of the Vuntut Gwitchin First Nation, including any and all benefits to be realized by the Vuntut Gwitchin First Nation from the settlement of the land claims of the Vuntut Gwitchin;

(h) promote and carry out community development and charitable works for the benefit of the Vuntut Gwitchin First Nation;

(i) ensure that the Vuntut Gwitchin First Nation meets its obligations and discharges its responsibilities under this Constitution, its laws, the Vuntut Gwitchin First Nation Final Agreement, the Vuntut Gwitchin First Nation Self-Government Agreement and agreements ancillary thereto;

(j) maintain a registry of Citizens; and

(k) do such other things related to the foregoing as may be conducive to the general welfare and good government of the Vuntut Gwitchin First Nation.

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 the 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.

ARTICLE III – CITIZENSHIP

1. Citizenship shall be determined by the Citizenship Code of the Vuntut Gwitchin First Nation through the authority of the Review Council.

2. Every eligible person residing on or off Settlement Land can apply to be a Citizen in accordance with Vuntut Gwitchin Law.

ARTICLE IV – RIGHTS OF CITIZENS

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.

2. Every Citizen has the right to enter, remain in and leave Vuntut Gwitchin Lands in accordance with Vuntut Gwitchin Law.

3. Every Citizen has the right to make political choices, to participate in political activities, and to express a view on any public issue.

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.

5. Chief and Council must make laws in respect of Vuntut Gwitchin First Nation elections and referenda, including the establishment of:

   (a) qualifications of voters;

   (b) qualifications of candidates for election to office;

   (c) an independent officer to administer elections and referenda;

   (d) procedures for the conduct of elections and referenda; and

   (e) areas or locations within which elections or referenda will be held.

6. Every Citizen has the following fundamental freedoms:

   (a) freedom of conscience and religion;

   (b) freedom of thought, belief or opinion and expression;

   (c) freedom of peaceful assembly; and

   (d) freedom of association.

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.

8. Every Citizen has the right to life, liberty and security of the person and the right not to be deprived thereof, except in accordance with the principles of fundamental justice.

9. Every Citizen has the right to be secure against unreasonable search and seizure.

10. Every Citizen has the right not to be arbitrarily detained or imprisoned.

11. Any person charged with an offence contrary to a validly existing Vuntut Gwitchin First Nation law has the right:

    (a) to be informed without unreasonable delay of the specific offence;

    (b) to be tried within a reasonable time;

    (c) not to be called as a witness in proceedings against the person in respect of the offence;

    (d) to be presumed innocent until proven guilty according to Vuntut Gwitchin First Nation law and to a fair and public hearing before an independent and impartial justice tribunal;

    (e) not to be denied reasonable bail without just cause; and

    (f) if finally acquitted of the offence, not to be tried for it again and if finally found guilty and punished for the offence and if the punishment of the offence has been varied from time of the commission and the time of sentencing, to have the benefit of the lesser punishment.

12. Every Citizen has the right not to be subjected to any cruel or unusual treatment or punishment.

13. A witness who testifies in any proceedings has the right not to have any incriminating evidence so, given to be subsequently given against that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence.

14. Any part or witness to any proceedings who does not understand or speak the language in which the proceedings are conducted or who is deaf, has the right to the assistance of an interpreter.

15. Gwich'in is the official language of the Vuntut Gwitchin First Nation.

16. Everyone has the right to use the Gwich'in or English in any debates or other proceedings of the General Assembly or Council.

17. The laws, records and journals of the Vuntut Gwitchin First Nation shall be printed and published in English and may be translated into Gwich'in language.

18. Either the Gwich'in language or English may be used by any person in any pleading issuing to any Court or published by the Vuntut Gwitchin Council within the Vuntut Gwitchin First Nation Traditional Territory.

19. Anyone whose rights or freedoms as guaranteed by this Constitution have been infringed upon or denied may apply to the Vuntut Gwitchin Court to obtain such remedy as the Court considers appropriate and just in the circumstances. Until a Court is established, any such person may also apply to any other court of competent jurisdiction.

20. (a) Every Citizen shall have reasonable access to information about him or her (and his or her minor children) personally which has been provided to or obtained by the Vuntut Gwitchin First Nation and which is within the possession or control of the Vuntut Gwitchin First Nation.

    (b) The Vuntut Gwitchin First Nation may keep and use such personal information as any person may provide to it or as it may otherwise obtain in connection with the enrollment of that person as a beneficiary of the Vuntut Gwitchin Final Agreement or as a Citizen of the Vuntut Gwitchin First Nation, or in connection with the access to or the provision of any program, service or benefit, or the application of any law, of the Vuntut Gwitchin First Nation by or to that person, provided that such information shall be kept protected by such security safeguards as are appropriate to its sensitivity.

ARTICLE V – ORGANIZATION OF THE VUNTUT GWITCHIN FIRST NATION GOVERNMENT

1. The Vuntut Gwitchin First Nation government shall have four branches: the General Assembly, the Elders Council, the Council and the Vuntut Gwitchin Court. A branch of the government shall not exercise the powers of another branch, except as this Constitution may permit.

2. The Elders Council, General Assembly, Chief and Council shall be guided by the Code of Conduct established for the Vuntut Gwitchin Government.

3. Elected officials of the Vuntut Gwitchin Government shall abide by the Oath of Office that is appended as Schedule II to this Constitution.

ARTICLE VI – VUNTUT GWITCHIN FIRST NATION GENERAL ASSEMBLY

1. There shall be a General Assembly composed of the Citizens of the Vuntut Gwitchin First Nation. The powers, duties and responsibilities of the General Assembly shall include:

    (a) consideration and approval of proposals and reports received from the Council;

    (b) consideration and review of proposals, legislation and financial reports received from Council;

    (c) consideration and approval of Elders Council proposals;

    (d) amending this Constitution; and

(e) providing direction to Chief and Council through General Assembly resolutions.

2. A meeting of the General Assembly shall be held each year during a date in the month of August and special meetings of the General Assembly may be held at the call of the Council at any other time:

(a) a notice of a meeting of the General Assembly with the proposed agenda shall be posted throughout the community of Old Crow and to Citizens not residing on Settlement Land with no less than two weeks' notice. Notice shall be given through electronic media;

(b) a notice of a meeting of the General Assembly with the proposed agenda shall be posted throughout the community of Old Crow and such notice shall be given no less than two weeks before the meeting. Notice of any meeting of the General Assembly shall be given through print and the electronic media and such notice shall allow sufficient time to make arrangements to permit the members to be present;

(c) the quorum for a General Assembly shall be 25 members present and eligible to vote in the General Assembly;

(d) the Chair of the General Assembly shall be chosen by the General Assembly Coordinator in consultation with the Executive Office. The General Assembly Coordinator shall be a Citizen;

(e) consensus will be encouraged for all decision-making of the General Assembly. In cases where consensus cannot be reached, decisions shall be passed by simple majority vote;

(f) Chief and Councilors are considered observers and non-voting members of the General Assembly and serve as members for the purposes of achieving quorum; and

(g) Only members who are sixteen years of age or older may vote in meeting of the General Assembly.

ARTICLE VII – ELDERS COUNCIL

ELIGIBILITY CRITERIA

1. To become a Elders Council Member, one must be:

(a) 60 years of age or older; and

(b) a Citizen.

2. An individual who meets the eligibility criteria for becoming an Elders Council Member, but who chooses not to participate in the Elders Council is still considered an Elder.

3. The Elders Council shall advise the Council on all matters and may:

   (a) provide advice and guidance to Vuntut Gwitchin governing bodies excluding the Vuntut Gwitchin Court;

   (b) appoint the Elder's representative to the Review Council;

   (c) preserve and protect Vuntut Gwitchin First Nation traditions, customs, laws, culture and language; and

   (d) upon recommendation from Chief and the Councillors, appoint members to Council committees.

GOVERNANCE

4. The Elders Council shall determine their own rules and procedures for the conduct of their business.

5. If an Elder sits on the Review Council, they shall not be a n Elders Council Member for the duration of their term on Review Council.

ARTICLE VIII – COUNCIL

1. There shall be a Council elected by the eligible voters of the Vuntut Gwitchin First Nation pursuant to the Election Act and relevant legislation.

2. The Council shall consist of one Chief and four Councillors.

3. In the event that the required number of nominees have not been nominated to fill all the positions on the Council, the Elders shall recommend suitable candidates to the community at large in a duly called public meeting. All recommended candidates shall be consulted prior to nomination and the membership at large in Old Crow must, by consensus, approve the recommendations prior to the affirmation of the recommended candidate under this process.

4. The quorum of the Council shall be three members, including the Chief (or in the absence of the Chief, the Deputy Chief) acting in consultation with the other members, to the extent that is practical.

5. The terms of office for the Chief and four Councillors shall be four years, commencing on the 2nd Wednesday of January immediately following their election. For greater certainty, the Chief and Councillors holding office on the day of the election remain in office until the 2nd Wednesday of January.

6. The Council shall determine their own rules and procedures. The Council shall strive to make all decisions by consensus. In the event a consensus cannot be reached, the Council shall make the decision by simple majority vote.

7. The Council shall hold regular public meetings and shall hold special meetings at the call of the Chief or upon written request signed by three or more of its Councillors.

ARTICLE IX – COUNCIL DUTIES AND POWERS

1. It shall be lawful for the Chief and Councillors, by and with the advice of the General Assembly and the Elders Council, to make Vuntut Gwitchin Laws for the peace, order and good government of the Vuntut Gwitchin First Nation in accordance with section 13.0 of the Vuntut Gwitchin First Nation Self-Government Agreement.

2. All Vuntut Gwitchin Laws enacted by the Council shall be consistent with the objects of this Constitution. The Council shall establish, by law, a general procedure for the enactment of Vuntut Gwitchin Laws.

3. Without limiting the foregoing, the duties and powers of the Council also shall include:

   (a) considering direction provided by the General Assembly through resolution;

   (b) setting clear policies and guidelines and ensuring good management and reporting in all aspects of the Vuntut Gwitchin Government within the jurisdiction of the Council;

   (c) proposing new legislation under the jurisdiction of the Vuntut Gwitchin First Nation;

   (d) establishing a system of laws according to the traditions, needs and ideals of the Vuntut Gwitchin First Nation and in accord with the objectives of this Constitution;

   (e) implementing Vuntut Gwitchin Laws considered by the General Assembly;

   (f) exercising all jurisdiction, power and authority of the Vuntut Gwitchin First Nation and fulfilling any duties of the Vuntut Gwitchin First Nation pursuant to the Vuntut Gwitchin First Nation Final Agreement and the Vuntut Gwitchin First Nation Self-Government Agreement;

   (g) as they deem advisable, establishing any trust for the benefit of the Vuntut Gwitchin First Nation, constituting any persons as trustees thereof and vesting therein any property of the Vuntut Gwitchin First Nation; and

   (h) exercising such powers and doing such things as may be necessary to fulfill the objects of this Constitution.

ARTICLE X – CHIEF AND DEPUTY CHIEF

1. The Chief shall be the general spokesperson for the Vuntut Gwitchin First Nation and the chief executive of Vuntut Gwitchin Government.

2. The Chief shall hold no other office except as provided in this Constitution.

3. The Chief shall be the presiding officer of the Council.

4. The Chief shall have the power, in accordance with Constitution and any law and subject to the approval of the Council to:

   (a) establish committees of the Council and to appoint the members to subcommittees;

   (b) ensure that resolutions approved, and Vuntut Gwitchin Laws enacted by the Council are implemented;

   (c) make recommendations to the General Assembly or to the Council and to make periodic reports of the state of the Vuntut Gwitchin First Nation; and

   (d) exercise such additional powers as may be authorized by Vuntut Gwitchin Law.

5. The Deputy Chief, who is appointed from the four Councilors shall perform such duties of the Chief or exercise such powers as may be delegated to them.

6. In the absence or incapacity of the Chief, the Deputy Chief shall, under the direction of the Council, perform all the duties and exercise all the powers of the Chief.

7. Either the Chief or Deputy Chief should be present on the Traditional Territory at all times. In the event that both Chief and Deputy Chief must be absent, an interim Deputy Chief shall be appointed.

ARTICLE XI – TERMS OF OFFICE AND QUALIFICATIONS

QUALIFICATIONS

1. Any person desiring to run for Chief or Councillor must meet the following qualifications:

   (a) Be 18 years or 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.

ARTICLE XII – REVIEW COUNCIL

RESPONSIBILITIES

1. The Review Council means the body responsible for:
   (a) recounts in an election;
   (b) serving as the Citizenship/Enrollment Committee;
   (c) receiving complaints about Chief and Councillors;
   (d) when proven, according to Vuntut Gwitchin Law, removal from office; and
   (e) when necessary, appointments of interim Council members.
2. The Review Council comprises the following five members, appointed for a three-year term:
   (a) one person appointed by the Council who is not the Chief or a Councilor;
   (b) two persons appointed on the recommendation of the General Assembly; and
   (c) two persons appointed on the recommendation of the Elders Council.
3. The scope and authority of the Review Council shall be set out in the Governance Act and related legislation.

CODE OF CONDUCT

4. All members of the Review Council must abide by the Code of Conduct established for the Vuntut Gwitchin Government.

ARTICLE XIII – YOUTH COUNCIL

ELIGIBILITY

1. To be eligible for Youth Council, youth must be:
   (a) between the ages of 16-30; and
   (b) a Citizen.
2. Youth between the ages of 16-30 who are not Citizens residing on Settlement Land may participate in Youth Council as determined through its terms of reference.

3. A Youth Representative and alternate shall be chosen by eligible youth.

4. The Youth Representatives shall report regularly to the Youth Council.

PURPOSE

5. The Youth Representatives shall provide leadership to Vuntut Gwitchin First Nation youth regarding participation in the community and Vuntut Gwitchin Government.

GOVERNANCE

6. The Youth Council shall determine their own rules and procedures for the conduct of their business.

7. All members of the Youth Council shall abide by the Code of Conduct established for the Vuntut Gwitchin Government.

ARTICLE XIV – VACANCIES AND REMOVAL FROM OFFICE

REMOVAL FROM OFFICE

1. Any member of the Council who, during the term during which he or she is elected, is convicted of an indictable offence as defined in the Criminal Code, RSC 1985, c C-46, shall automatically be suspended from his or her office.

2. During the 45 days following the conviction, the Review Council will determine whether that office will be forfeited or whether the member will continue their office subject to terms and conditions.

3. If a Councillor is convicted of an offence that is not an indictable offence but that, in the sole discretion of the Review Council is a breach of the Oath of Office or Code of Conduct, they may be removed from office or be subject to terms and conditions imposed by Review Council.

4. If, on complaint through proper outlined in Vuntut Gwitchin legislation by a Citizen, Review Council determines there has been a breach of the Councillor's Oath or Office or Code of Conduct, a councillor may be removed from office or be subject to terms and conditions imposed by Review Council.

5. The decision of the Review Council shall be final and such Council member shall not be eligible to be returned to office for at least six years following the action.

6. The Review Council shall undertake its responsibilities with respect to removal from office in accordance with the procedure outlined in Vuntut Gwitchin Law.

VACANCIES

7. Subject to Article XI, vacancies in the membership of the Council or in the offices of the Council shall be filled in the following manner:

   (a) If the vacancy occurs within six months of a General Election, the Review Council will appoint an interim Council member to serve until the election period begins; and

   (b) If the vacancy occurs when more than six months remaining before a General Election, a by-election will be held in accordance with the procedure set out in the Elections Act.

ARTICLE XV – VUNTUT GWITCHIN COURT

1. There shall be a Vuntut Gwitchin Court whose membership and organization shall be established by the Administration of Justice Act and any other applicable Vuntut Gwitchin Laws.

2. Vuntut Gwitchin Court shall have power to hear and decide all cases of alleged violation of Vuntut Gwitchin Laws and to impose such penalties as are provided by Vuntut Gwitchin Laws.

3. Vuntut Gwitchin Court shall establish its own rules and procedures in legislation.

4. Vuntut Gwitchin Court may establish and administer a system of legal aid and general legal counselling for persons coming before the Vuntut Gwitchin Court.

ARTICLE XVI – FINANCIAL ADMINISTRATION

1. Vuntut Gwitchin First Nation financial administration will:

   (a) be prudent, open, and accountable;

   (b) provide for effective, efficient and responsible use of the financial resources of the Vuntut Gwitchin First Nation and its Citizens;

   (c) prepare, maintain and publish its accounts in a manner consistent with the Generally Accepted Accounting Principles; and

   (d) manage finances in accordance with Vuntut Gwitchin Law.

2. Council shall establish a financial administration system that will include mechanisms to prepare and present an annual budget in accordance with the Appropriations Act.

3. At any time during regular office hours, or at any other time upon giving reasonable notice and arranging a time satisfactory to the Council, the records of the proceedings of a governing institution, the approved budget and the audited financial statements of the

Vuntut Gwitchin First Nation may be inspected at the administrative office of the Vuntut Gwitchin Government by any Citizen subject to and in accordance with any applicable privacy and freedom of information laws.

4. Unless in accordance with applicable privacy and freedom of information laws, no person shall be entitled to make copies of records or to remove records from the office of the Vuntut Gwitchin Government.

5. Vuntut Gwitchin Government shall make policies providing for allocations to Governing Bodies and Public Institutions.

AUDIT OF ACCOUNTS

6. The books, accounts and records of the Vuntut Gwitchin First Nation shall be audited at least once a year by a chartered accountant and the report thereof shall be submitted to Chief and Council for approval and presented to the General Assembly.

7. The fiscal year of the Council shall end on March 31 of each year.

ARTICLE XVII – THE SEAL

1. The Council shall have a seal, which shall remain with the Chief or his or her agents and shall be affixed to all documents required to be in writing under the seal.

ARTICLE XVIII – AMENDMENTS TO CONSTITUTION

1. This Constitution may be amended only in accordance with the following steps:

   (a) Step 1: Council shall adopt a resolution, by simple majority vote, proposing an amendment to this Constitution;

   (b) Step 2: written notice of the proposed amendment is given by the Council to all Citizens eligible to vote at a General Assembly at least fourteen (14) days before the meeting of the General Assembly at which the amendment is to be considered;

   (c) Step 3: General Assembly shall then determine whether to proceed with or change the proposed amendment. The quorum for the General Assembly must be present at the time the amendment is considered for debate and decision; and

   (d) Step 4: the amendment is approved by eligible voting members of the General Assembly. Consensus will be encouraged for all constitutional amendments of the General Assembly. In cases where consensus cannot be reached, amendments shall be passed by 60% majority vote.

2. For the purposes of approving amendments to this Constitution, Chief and Council shall be considered voting members of the General Assembly.

3. Any amendment to this Constitution must be consistent with the Vuntut Gwitchin First Nation Self-Government Agreement and the rights and freedoms stated within this Constitution.

ARTICLE XIX – TRANSITION

1. This Constitution shall be the sole Constitution of the Vuntut Gwitchin First Nation.

2. Any and all laws, ordinances, resolution and agreements enacted or entered into by the Vuntut Gwitchin First Nation shall remain valid to the extent that they are consistent with this Constitution.

3. The Council shall be constituted, and its members shall take office in accordance with the provisions of this Constitution within one year of the ratification of this Constitution.

4. Until the members of the Council shall take office in accordance with this Constitution, the Old Crow Band Council shall have all the powers and duties of the Council.

ARTICLE XX – RATIFICATION OF THIS CONSTITUTION

1. This Constitution shall come into force as provided in the Settlement Agreements or Self-Government Agreements and when approved by a majority of the members of the Vuntut Gwitchin First Nation present and voting when assembled for the purpose by the Vuntut Gwitchin First Nation.

2. The official copy of this Constitution as approved at such assembly may be signed at the assembly by members of the Vuntut Gwitchin First Nation and shall thereafter be safeguarded as provided by the Council.

ARTICLE XXI – CHALLENGING AND QUASHING OF LAWS

VALIDITY OF VUNTUT GWITCHIN LAWS

1. The validity of a Vuntut Gwitchin Law may be challenged by a Citizen in the:

   (a) Yukon Supreme Court; and

   (b) Court of the Vuntut Gwitchin First Nation, once established.

2. Any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

ARTICLE XXII – OTHER INTERPRETATION

1. In this Constitution:

   (a) unless it is otherwise clear from the context, the use of the word "including" means "including, but not limited to", and the use of the word "includes" means "includes, but is not limited to";

   (b) unless it is otherwise clear from the context, a reference to a "section", "subsection" or "paragraph" means a section, subsection or paragraph, respectively, of this Constitution;

   (c) headings and subheadings are for convenience only, do not form a part of this Constitution, and in no way define, limit, alter, or enlarge the scope or meaning of any provision of this Constitution; and

   (d) unless it is otherwise clear from the context, the use of the singular includes the plural, and the use of the plural includes the singular.

2. If there is a conflict between different versions of this Constitution, the English language version will prevail.

CONFLICT OF LAWS

3. In this Constitution there is a conflict between laws if compliance with one law would be a breach of the other law.

STATUS OF SCHEDULES

4. All Schedules to this Constitution form part of this Constitution.

COMMENCEMENT

5. This Constitution is in effect as of the effective date of the Vuntut Gwitchin First Nation Final Agreement.

SCHEDULE I: VUNTUT GWITCHIN FIRST NATION CITIZENSHIP CODE

PREAMBLE

The Vuntut Gwitchin First Nation have occupied the lands known as the northern portions of the Yukon Territory since time immemorial. Therefore, the Vuntut Gwitchin First Nation considers the control of its Citizenship to be its fundamental right and responsibility.

DEFINITIONS

1. In this Citizenship Code:

"**Adopted Child**" means a person who, while a minor, is adopted in accordance with the relevant laws on adoption, which includes Vuntut Gwitchin Law or customary laws;

"**Canada**" means, unless the context otherwise requires, Her Majesty the Queen in right of Canada;

"**Chief**" means the leader of Vuntut Gwitchin First Nation chosen as a result of a duly held election;

"**Child**" means a child born in or out of wedlock, a legally adopted child, and a child adopted in accordance with the accepted custom of the Vuntut Gwitchin First Nation;

"**Citizen**" means a person whose name is on the First Nation Citizenship List;

"**Councillor**" means either the Deputy Chief or Councillor chosen as a result of a duly held election;

"**Council**" means the Council of the Vuntut Gwitchin First Nation chosen as a result of a duly held election;

"**Elder**" means a Citizen who is sixty years of age or more and resides in the Yukon;

"**Enrollment/Statistician Officer**" means the officer of the Vuntut Gwitchin First Nation who is responsible for maintaining the First Nation Citizenship List;

"**First Nation**" means the Vuntut Gwitchin First Nation;

"**First Nation Citizenship List**" means the list of Citizens, which is maintained by the Vuntut Gwitchin First Nation;

"**Ordinarily Resident**" means a person who lived or has lived the majority of his or her life in the Yukon. In making such determination, temporary absences from the Yukon for reasons such as travel, education, medical treatment, military service or incarceration, shall be considered periods of residence provided the Person was Ordinarily Resident prior to such temporary absences;

"**Resident**" means a person ordinarily residing the majority of the time on Settlement Land who may or may not be a Citizen;

"**Review Council**" means the body responsible for:

(a) recounts in an election;

(b) serving as the Citizenship/Enrollment Committee;

(c) receiving complaints about Chief and Council;

(d) when proven, according to Vuntut Gwitchin Law, removal from office; and

(e) when necessary, appointments of interim Councilor.

"**Vuntut Gwitchin First Nation**" means the collectivity of Citizens who share the language, culture, and laws of the Vuntut Gwitchin, and their descendants;

"**Vuntut Gwitchin Government**" means the government of the Vuntut Gwitchin First Nation; and

"**Vuntut Gwitchin Laws**" includes this Constitution; and any law passed in accordance with the procedure set out in the Governance Act.

FIRST NATION CITIZENSHIP ENROLLMENT

EXCLUSIONS

2. The following persons shall not be eligible to be registered as a Citizen:

   (a) a person who is enrolled in another self-governing First Nation in Canada; and

   (b) a person who is a Citizen of another self-governing First Nation or member of a First Nation Band as defined in the Indian Act in Canada.

APPLICATIONS

3. Any adult person may apply to the Enrollment Committee to be enrolled as a Citizen.

4. Any adult person may apply to the Enrollment Committee to enroll their Minor child as a Citizen.

5. Any person who, by order of a court in Canada or pursuant to Legislation, has been vested with the authority to manage the affairs of an adult incapable of managing his or her own affairs may apply to the Enrollment Committee on behalf of the adult.

MINOR CHILDREN

6. If the parents of a minor child are citizens of a different self-governing Indigenous Nation or an Indian Band, the minor child is considered a citizen of the Nation or Indian Band of the parent's choice.

7. If parents of a minor child are legally separated or divorced, the minor child will retain Citizenship of the parent with whom they are primarily resident or the Citizenship of the parents' joint decision, if they agree.

FIRST NATION ENROLLMENT COMMITTEE

8. The Enrollment Committee is the same body as the Review Council and is responsible for:

   (a) receiving completed applications for Citizenship or Enrollment;

   (b) approving and certifying eligible applicants and forwarding the same to the Enrollment/Statistician Officer;

   (c) forwarding the names of applicants who have been refused Citizenship and/or Enrollment together with all relevant information and documentation to the Enrollment/Statistician Officer;

   (d) determining whether or not a child has been adopted pursuant to Vuntut Gwitchin custom; and

   (e) providing information about adoption to the Enrollment/Statistician Officer.

ENROLLMENT

9. Any enrolled person as per section 3.2.0 of the Vuntut Gwitchin First Nation Final Agreement is a Citizen.

PROCEDURE TO APPLY FOR ENROLLMENT

10. Any adult person who seeks to become a Vuntut Gwitchin First Nation Citizen will file an application with the Enrollment/Statistician Officer with the following documentation:

    (a) birth certificate; and

    (b) confirmation that the applicant is not enrolled under another land claim agreement as per section 3.4.0 of the Vuntut Gwitchin First Nation Final Agreement.

11. If the applicant cannot confirm enrollment under the Vuntut Gwitchin First Nation Final Agreement they can confirm eligibility by showing that they are:

(a) a descendant of a deceased or living enrolled person; or

(b) an adopted person of an enrolled person.

12. The Enrollment Committee may, in its discretion, and upon consideration of all relevant circumstances, consider an applicant to have sufficient ancestry with the Vuntut Gwitchin First Nation so as to justify enrollment.

ENROLLMENT APPEAL BOARD

13. On an ad hoc basis, an appeal board ("Enrollment Appeal Board") may be appointed by the Chief and Council and shall consist of three persons, all Citizens, none of whom shall concurrently sit on the Enrollment Committee.

14. The Enrollment Appeal Board shall hear any appeals from the decisions of the Enrolment Committee.

15. An appeal must be written and contain a brief statement of the grounds of the appeal.

16. An appeal may be made by the Council, any member, or the person in respect of whose name the protest is made or his or her representative.

17. The Enrollment Appeal Board shall have the authority to affirm, vary, deny or refer the subject matter back to the Enrollment Committee for reconsideration or further investigation.

18. A decision of the Enrollment Appeal Board shall be final.

WITHDRAWAL AND TERMINATION

19. Any member may withdraw his or her Citizenship upon written application to the Enrollment Committee.

FIRST NATION ENROLLMENT/STATISTICIAN OFFICER

20. An Enrollment/Statistician Officer will be hired by the Vuntut Gwitchin Government and shall have the following responsibilities:

(a) notifying each applicant of the results of the findings and determination of the Committee;

(b) maintaining an up to date First Nation Citizenship List; and

(c) providing any individual seeking to become a Citizen, the application form that identifies the enrollment requirements and outlines the application process.

AMENDMENT

21. The Citizenship Code may only be amended using the amendment procedure provided for under Article XVIII of this Constitution.

EFFECTIVE DATE

22. This Citizenship Code will become effective on the effective date of the Vuntut Gwitchin First Nation Final Agreement and the Vuntut Gwitchin First Nation Self-Government Agreement.

SCHEDULE II: OATH OF OFFICE

Each person who is elected to the position of Chief or Councillor is required by this Constitution to swear or affirm loyalty to the Vuntut Gwitchin First Nation and obedience to this Constitution, and must answer the following questions asked by an Elder accordingly:

Question: "Will you accept from the people the sacred responsibility of government? Will you be loyal to the Vuntut Gwitchin First Nation, uphold its values, and protect and obey its Constitution?"

Answer: "I will."

Question: "Will you seek the guidance of the Elders and respect their wisdom? Will you be faithful to your role and to those who seek your advice, and will you keep secret all matters entrusted to your confidence?"

Answer: "I will."

Question: "Will you work to preserve the peace and unity of the Vuntut Gwitchin First Nation, to secure the well-being of the people, and to provide good, effective, and accountable government for the Vuntut Gwitchin First Nation?"

Answer: "I will, and may I have the wisdom to continue to protect our land and our people."