

CANADA / JUDGMENT

Bird v. Canada (Indigenous Services)

2026 FC 425

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Decision Content

Date: 20260401

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Citation: 2026 FC 425

Ottawa, Ontario, April 1, 2026

PRESENT: The Honourable Madam Justice Strickland

BETWEEN:

LAURA BIRD

LLOYD YEW

Applicants

and

CANADA (INDIGENOUS SERVICES CANADA) AND

CANOE LAKE CREE FIRST NATION

Respondents

JUDGMENT AND REASONS

[1] The Applicants, Laura Bird and Lloyd Yew, by way of an application for judicial review, challenge the decision of the Respondent, the Canoe Lake Cree First Nation [CLCFN], to enact The Canoe Lake Cree First Nation Citizenship Law [Citizenship Law]. The Applicants claim that the Citizenship Law was enacted contrary to the Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11 [Charter], the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), c 11 [Constitution Act, 1982], and my judgment in *McCallum v Canoe Lake Cree First Nation*, 2022 FC 969 [McCallum].

Background/General Overview [2] It is agreed by the parties and has been recognized in jurisprudence that prior versions of the Indian Act, RSC 1985, c I-5 discriminated against Indigenous women, including by providing that if an Indian woman married a non-Indian man, the woman would lose her Indian status. Conversely, if an Indian man married a non-Indian woman, he retained his Indian status (and his wife also became entitled to that status). Amendments to the Indian Act made in 1985, through Bill C-31, An Act to Amend the Indian Act, 1st Sess, 33rd Parl, 1985 [1985 Amendments], were an attempt by Canada to eliminate discrimination based on sex and be Charter compliant. The 1985 Amendments, among other things, permitted women previously discriminated against to regain their lost status. Further amendments to the Indian Act were made in 2011 and 2017 responding to jurisprudence which found that the discrimination based on sex was not resolved by the 1985 Amendments (Bill C-3, Gender Equity in Indian Registration Act, 3rd Sess, 40th Parl, 2011; Bill S-3, An Act to amend the Indian Act in response to the Superior Court of Quebec decision in *Descheneaux c. Canada* (Procureur général), 1st Sess, 42nd Parl, 2017).

[3] The 1985 Amendments also permitted Indian bands, for the first time, to determine their own membership, which had previously been determined by Canada. Specifically, section 10 of what is now the Indian Act permits a band to assume control of its own membership if it establishes written membership rules and if a majority of the electors of the band give their consent for the band to control its own membership. Pursuant to subsection 9(2) of the Indian Act, the names in a Band List of a band immediately prior to April 17, 1985, constituted the Band List of that band on April 17, 1985. And, pursuant to subsection 10(4) of the Indian Act, membership rules established by a band under section 10 could not deprive any person who had the right to have their name entered on the Band List for that band, immediately prior to the time the rules were established, of the right to have his or her name so entered by reason only of a situation that existed or an action that was taken before the rules came into force.

- [4] On or about June 17, 1987, the CLCFN assumed control of its band membership under section 10 of the Indian Act, and enacted the Canoe Lake Indian Band Membership Code [1987 Membership Code].
- [5] The membership provisions in the 1987 Membership Code were based on the membership provisions contained in the 1985 Amendments. In McCallum, I addressed this as follows:
- [7] The parties agree that the 1987 Membership Code is problematic. The membership criteria in the Code are based on provisions of the Indian Act, as they existed following amendments made to the Act in 1985, which provisions have been found not to comply with the Canadian Charter of Rights and Freedoms [Charter] because they perpetuated discrimination (see *McIvor v Canada* (Registrar of Indian and Northern Affairs), 2009 BCCA 153 [McIvor] at paras 117, 151; *Descheneaux c Canada* (Procureur Général), 2015 QCCS 3555 [Descheneaux] at paras 155, 171, 217-218). The crux of the discrimination identified in *McIvor* and *Descheneaux* was that the 1985 amendments to the Indian Act perpetuated the advantage of those who gained Indian status through male ancestors, rather than through female ancestors (*McIvor* at paras 93, 111-112, 122, 154-156; *Descheneaux* at paras 133-134, 149-155, 167-171). Amendments to the Indian Act subsequent to the enactment of the 1987 Membership Code, enacted in response to *McIvor* and *Descheneaux*, have expanded eligibility for Indian status.
- [6] Apparently in recognition of these decisions and legislative changes, on June 15, 2016, the CLCFN held a referendum for the purpose of deciding whether to repeal the 1987 Membership Code and replace it with the Canoe Lake Cree First Nation Membership Code [2016 Membership Code]. Although after the referendum it was understood that the 2016 Membership Code was in force, the 1987 Membership Code was utilized with respect to an election held in 2020. Ultimately, in *McCallum*, I determined that the 2016 Membership Code had not been validly adopted as it was not compliant with the amending provisions of the 1987 Membership Code which required “a majority of a majority” for ratification. This meant that the 1987 Membership Code remained in force; its constitutionality was challenged.
- [7] In *McCallum*, the parties agreed that the 1987 Membership Code essentially served to freeze in place the provisions of the Indian Act as they existed in 1987 (the 1985 Amendments) and that those provisions were subsequently found to be unconstitutional. I agreed with the parties and, therefore, held that the 1987 Membership Code discriminated against the applicants and other CLCFN community members on the basis of sex, contrary to section 15 of the Charter.
- [8] As to remedy, I found the 1987 Membership Code, which was a very brief document, to be constitutionally non-compliant and declared it invalid. However, the declaration of invalidity was suspended for 12 months. I did not set aside the 2020 election but held that if the CLCFN had ratified a new membership code on or before June 29, 2023 (12 months from my decision), then, on or before the day that was 3 months from the date of ratification of the

new membership code, a new election would be held. For the purposes of that election, the CLCFN membership would be determined by the new membership code. If the CLCFN had not ratified a new membership code on or before June 29, 2023, then Chief and Council would, on that date, give notice in writing to the Minister that the CLCFN no longer has a membership code and, therefore, no longer met the criteria of subsection 10(1) of the Indian Act. Control of the CLCFN's Band List would be deemed to have been returned to the Department of Indigenous Services upon the giving of that notice. Also on June 29, 2023, a new election would be called by Chief and Council to be held within three months of that date. The CLCFN membership for the purposes of that election would be determined pursuant to section 11 of the Indian Act and the Band List maintained by the Department of Indigenous Services.

- [9] On June 2, 2023, the CLCFN ratified and enacted the Citizenship Law. As will be discussed in greater detail below, the Citizenship Law provides for an automatic right of citizenship to the CLCFN members if: they are registered under the Indian Act as a status Indian; they are listed under the CLCFN on the Indigenous Services Canada [ISC] Band List or Indian Registry; and, they are registered on the existing Citizenship List of the CLCFN and met the first two criteria as of the date that the Citizenship Law was passed. In effect, those CLCFN members who were previously recognized as CLCFN members under the 1987 Membership Code would automatically retain that status under the new Citizenship Law.
- [10] For others who wish to become citizens, a citizenship application and acceptance process is set out in the Citizenship Law. Subject to the terms and provisions of the Citizenship Law, a person who was not on the Citizenship List when the Citizenship Law came into effect may be eligible to be enrolled as a citizen if: they submit an application; are a direct descendant of an original Band Member for the CLCFN who was alive on September 19, 1906, at the time of entering Treaty 10; and, are registered on the ISC Band List or Indian Registry maintain by ISC. In addition, specified criteria are set out which are to be considered by a Citizenship Review Panel when making a recommendation to Council with respect to the application for citizenship. Council may accept or reject those recommendations, taking into consideration listed factors which primarily pertain to resources available to the CLCFN. If citizenship is recommended and is accepted by Council, then Council may impose a period of probationary and conditional citizenship for up to two years [Probationary Period] as set out in section 12.01. Following the Probationary Period and if citizenship is granted then, for the next five years, the citizenship rights of new citizens are restricted [Restricted Rights Period], as set out in section 12.02, during which they are not eligible to run for public office or receive per capita distribution payments, funding or services in relation to housing.

- [11] The Applicants assert that, because of the discriminatory provisions of the Indian Act, they did not have status under the Indian Act and, therefore, were not on the ISC maintained Band List when the 1987 Membership Code came into effect. And, because the 1987 Membership Code adopted the discriminatory provisions of the Indian Act as they existed in 1987, the Applicants were not eligible for membership under that Code. The Applicants both later regained their status.
- [12] In this application, the Applicants allege, in essence, that the reason they are not automatically eligible for CLCFN membership under the Citizenship Law is that the 1987 Membership Code was based on the past discriminatory provisions of the Indian Act, preventing them from being included on the Band List. They seek to have this Court declare the whole of the Citizenship Law unconstitutional and of no force and effect as it discriminates on the basis of sex in violation of section 15 of the Charter, which discrimination is not justified by section 1 of the Charter. They submit that the Citizenship Law maintains the same discriminatory distinctions that impaired the rights of the Applicants under the 1987 Membership Code.
- [13] They also seek a declaration that the Citizenship Law violates section 35 of the Constitution Act, 1982 and is therefore of no force and effect by virtue of section 52.

On February 19, 2026, after the parties had filed their written submissions, the Applicants filed a Notice of Constitutional Question. The Notice does not actually identify specific questions. It states that the questions are to be argued at the hearing and sets out nine paragraphs described as the material facts giving rise to the constitutional question. It also set out what it describes as the legal basis for the constitutional question including:

10. The Applicants challenge the validity and effect of the Citizenship Law on the basis that the law as a whole, and Sections 7, 8, 9, 12, 15, 18, 19 and 21 in particular, operate to create a two-tier system of citizenship that is discriminatory contrary to Sections 15 and 28 of the Charter and is also unconstitutional under Section 35(4) of the Constitution Act, 1982.
- [14] The Notice then goes on to discuss the application of the framework from *Dickson v Vuntut Gwitchin First Nation*, 2024 SCC 10 [Dickson] and to assert other legal basis of its constitutional challenge.

Legislation [15] The provisions of the legislation relevant to this matter are set out in Schedule A of these reasons. That legislation is the Indian Act, the Charter, the Constitution Act, 1982 and the Citizenship Law.

Issues [16] The Applicants submit that the issues before me are:

Whether the Citizenship Law discriminates based on gender or analogous grounds, contrary to section 15 of the Charter?

If so, is the discrimination saved by section 1 of the Charter?

If not, what is the appropriate remedy?

[17] The CLCFN submits that in addition to the issues identified by the Applicants there are three other issues:

A preliminary issue, being whether the Applicants failed to exhaust the administrative remedies available to them. If so, that is determinative;

No Aboriginal Rights are breached by the Citizenship Law; and

Whether section 25 of the Charter shields all non-gender claims.

[18] With respect to the issue of whether the Citizenship Law discriminates based on gender or other analogous grounds contrary to section 15 of the Charter and, if so, whether the discrimination justified pursuant to section 1 of the Charter, Canada submits that it supports the application of the Charter to Indigenous governing bodies and the laws they enact, including the Citizenship Law. Canada defers to the Indigenous parties' submissions regarding the application of the Charter to the Citizenship Law. Canada takes no position on the appropriate remedy to be applied by the Court should it determine that the Citizenship Law is contrary to section 15 of the Charter. However, Canada does take issue with the remedy sought by the Applicants.

[19] In my view, the issues that arise on this application can be framed as follows:

Preliminary issue – whether the Applicants failed to exhaust the administrative remedies available to them.

Does the Citizenship Law discriminate based on gender or analogous grounds, contrary to section 15 of the Charter?

If so, does section 25 of the Charter act as a shield?

If there is a breach of section 15, which is not shielded by section 25, is the breach justified under section 1 of the Charter?

If not, what is the appropriate remedy?

Section 35(4)

Standard of Review [20] The parties make no submissions as to the standard of review.

[21] While the Applicants frame the Notice of Application for Judicial Review [Notice of Application] as challenging the decision of the CLCFN to enact the Citizenship Law, their application does not actually challenge that decision. They do not assert that the law was invalidly enacted, or that the decision to enact it was unreasonable or procedurally unfair. The challenge contained in the Notice of Application is concerned with the constitutionality of the Citizenship Law. This is reflected in subsequently filed Notice of Constitutional Question.

- [22] In *McCarthy v Whitefish Lake First Nation* #128, 2023 FC 220 [McCarthy], Justice Favel addressed a number of issues, including three that pertained to sections 25, 15(1) and 1 of the Charter, as well as remedies. With respect to those issues, he held:
- [54] The remaining issues do not attract a standard of review. Typically, whether a decision-maker's enabling statute violates the Charter and whether an infringement is saved by section 1 are constitutional questions that attract a correctness review (Vavilov, at paragraph 57). This standard also applies to whether section 25 of the Charter operates as the Respondent alleges (Vavilov, at paragraphs 55–56). However, the Committee did not pronounce on any of these questions. Accordingly, no standard of review applies to Issues #3, #4, or #5. This distinction is more academic than practical, as “no standard of review” is the functional equivalent of a “correctness review”.
- [23] In my view, similarly, no standard of review applies in this case in that no decision-maker made determinations as to the allegations of unconstitutionality which are now before me. However, more generally, the standard of review of correctness applies to constitutional questions (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 53-55; *Collins v Saddle Lake Cree Nation* #462, 2023 FC 1239 [Collins] at para 35).
- [24] This Court has also held that even if there has not been a "decision," the Court has jurisdiction to hear a challenge to the constitutional validity of a legislative enactment, which in this case is the Citizenship Law (see *Collins* at para 50; see also *Janvier v Chipewyan Prairie First Nation*, 2021 FC 539 at para 12).
- Scope of the Judicial Review [25] As a preliminary matter I note that in the Notice of Application, the Applicants state that they are challenging the decision of the CLCFN to enact the Citizenship Law contrary to the Charter, the Constitution Act, 1982 and *McCallum*. The remedies sought include a declaration that the entirety of the Citizenship Law is unconstitutional and invalid.
- [26] The Notice of Application does not challenge specific provisions of the Citizenship Law as unconstitutional. However, the grounds of the application include the factual backdrop and that:
- 10) The Citizenship Law discriminates on the basis of sex and/or analogous grounds and is in breach of section 15 of the Canadian Charter of Rights and Freedoms. The Citizenship Law grants automatic citizenship to those who are already on the Band List, and were therefore eligible under the discriminatory 1987 Membership Code. But all others must apply for membership at the discretion of Chief and Council. Even if discretionary membership is granted, the person is subjected to a probationary and restrictive rights period where they are denied equal access to certain civil rights, such as: the right to run for public office; the right to housing; the right to educational funding, as well as other types of social funding. As a result, those discriminated against under the 1987 Membership Code continue to suffer discrimination on the basis of sex as they do not have an automatic right to membership and are subjected to a period of restricted rights. Further, descendants of those who accepted Métis scrip who are not already on the Band List are prohibited from applying for

membership. However, those who are descendants of those who accepted Métis scrip who are already on the Band List are entitled to automatic membership. Whether one is already on the Band List is determined on the basis of sex or analogous grounds.

....

- 16) The Citizenship Law discriminates on the basis of sex against Indigenous women and descendants of Indigenous women, as Indigenous men and descendants of Indigenous men who were entitled to membership under the unconstitutional 1987 Membership Code are entitled to automatic membership under the Citizenship Law. Whereas those who were unconstitutionally discriminated on the basis of sex again by the 1987 Membership Code are subjected to a discretionary application process and a period of restricted rights under the Citizenship Law.
- [27] What is apparent from the Notice of Application is that the underlying basis of the Applicants' Charter challenge is the exclusion from the automatic right of citizenship and the requirement to apply for citizenship, which they view as discriminatory. The Notice of Application does not specify any impugned provisions of the Citizenship Law. However, it does make direct reference to the automatic right of citizenship which is contained in section 7.0; the eligibility criteria and application process which are set out in sections 8.0, 9.0, 18.0 and 19.0; the Probationary Period and Restricted Rights Period which are set out in section 12; and the prohibition on descendants of those who accepted Métis scrip who are not already on the Band List from applying for membership which is contained in section 15.03.
- [28] The Notice of Application makes no reference to the revocation of citizenship provisions set out in section 13.04 which the Applicants raised at the hearing. Nor does the Notice of Application reference the protest provisions in section 21, which the Applicants raised in their written submissions and at the hearing.
- [29] Rule 301(e) of the Federal Court Rules, SOR/98-106 states that an application shall be commenced by a notice of application in Form 301 and setting out "a complete and concise statement of the grounds intended to be argued, including a reference to any statutory provision or rule to be relied on." Additional grounds not included in a Notice of Application are generally not properly in issue (*Tl'azt'en Nation v Sam*, 2013 FC 226 at para 6; *Desjarlais v Yahey*, 2025 FC 1992 at paras 128-135). Therefore, the Applicants arguments regarding sections 13.04 and 21 of the Citizenship Law are not properly in issue as specific impugned provisions and will not be addressed as such in these reasons.

The Evidence [30] The parties filed the following affidavits in support of the application for judicial review:

The Applicants filed the affidavit of Lloyd Yew sworn June 17, 2023; the affidavit of Laura Bird sworn June 20, 2023; and, the affidavit of Craig McCallum sworn June 23, 2023;

The CLCFN submitted the affidavit of Bernice Iron sworn October 13, 2023; the affidavit of Lisa Iron sworn October 13, 2023; the affidavit of Gladys Iron sworn October 13, 2023; and, the affidavit of Robin George sworn October 13, 2023.

- [31] Transcripts of the November 29, 2023, cross-examinations of the affiants Craig McCallum; Laura Bird; Lloyd Yew; Bernice Iron; Robin George and Lisa Iron were also filed as evidence.
- [32] While I have reviewed and considered all of this evidence, for purposes of these reasons, it is not necessary to mention or refer to each individual item. In my analysis, I have referenced the most pertinent evidence in the context of the issue being addressed.

Issue 1: Have the Applicants failed to exhaust the administrative remedies available to them? The CLCFN's Position [33] The CLCFN submits that the Citizenship Appeal Tribunal [Appeal Tribunal] is empowered to deal with legal issues relating to the Citizenship Law. Therefore, all of the arguments that the Applicants now make to this Court could have been made to the Appeal Tribunal. And, if the Applicants were unsatisfied with that result, then they could have proceeded to judicial review with the full evidentiary record and any reasons given by the Appeal Tribunal. By failing to do so, the Applicants have failed to exhaust the available administrative remedies. The CLCFN submits that this issue alone justifies dismissing the application (citing *C.B. Powell Limited v Canada* (Border Services Agency), 2010 FCA 61 at para 30 [C.B. Powell]; *Budlakoti v Canada* (Citizenship and Immigration), 2015 FCA 139 [Budlakoti]). Further, that "courts should respect the legislative choice of the tribunal as the first instance decision maker by giving the tribunal the opportunity to deal with the issue first and to make its views known" (citing *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61 at para 24).

- [34] The CLCFN submits that in *Budlakoti*, the Federal Court of Appeal dismissed an appeal of an application for judicial review because the applicant had failed to take the step of applying for citizenship first, then judicially reviewing that decision if they were unsatisfied with the result of the application. There, Justice Stratas held that "by coming directly to this Court on judicial review, the appellant is impermissibly bypassing the administrative scheme Parliament has set up under the Citizenship Act for determining issues of citizenship" (*Budlakoti* at para 73). It was irrelevant that the applicant wanted to raise Charter issues – they were still required to utilize the administrative scheme before coming to Court (*Budlakoti* at para 63-64; *C.B. Powell* at para 36). The CLCFN submits the Applicants have taken the same procedural approach in this matter and that it should similarly be fatal to their application for judicial review.
- [35] Further, to the extent that the Applicants may assert that the Appeal Tribunal does not have jurisdiction to decide Charter issues, the CLCFN disagrees. It submits that issue depends on whether the Appeal Tribunal has jurisdiction to decide questions of law (citing *Quebec (Commission des normes, de l'équité, de la santé et de la sécurité du travail) v Caron*, 2018 SCC 3 at para 94). The Appeal Tribunal has such jurisdiction, as set out in the enabling statute, the Citizenship Law, sections 20.01 to 20.15. Section 25 and section 15 of the Charter are also referred to in sections 1.02 and 1.08 of the Citizenship Law. The CLCFN submits that

this Court has confirmed that various tribunals constituted by First Nations have the jurisdiction to decide Charter issues and, therefore, this is not an obstacle to proceeding to the Appeal Tribunal before coming to Court (citing Collins at para 45; McCarthy; and, Linklater v Thunderchild First Nation, 2020 FC 1065 [Thunderchild]). As stated in Thunderchild, “the principle of self-government requires, at the very least, that the decision-maker to whom [the First Nation] entrusted the responsibility to apply its laws should be given the opportunity to make the initial decision” (Thunderchild at para 51). Further, where an administrative decision maker has not addressed the Charter issue before the Court, the Court lacks “the benefit of the reasons that the Appeal Tribunal could have provided” in relation to the Charter issue (Thunderchild at para 53). This is especially important when section 25 of the Charter is in issue, because those reasons could have “provided useful insights as to the application of the Charter in an Indigenous context, including the potential application of section 25” (Thunderchild at para 53). The CLCFN submits that all these rationales are applicable to the present case.

[36] The CLCFN submits that this application should be dismissed on the basis of the Applicants’ failure to pursue these arguments with the Appeal Tribunal.

Applicants’ Position [37] The Applicants did not address this issue in their written submissions. When appearing before me, the Applicants argued that this Court has previously set out the factors to be considered in determining whether the Court should refuse relief on the ground of prematurity (citing Almrei v Canada (Citizenship and Immigration), 2014 FC 1002 at para 34). Further, that the Supreme Court has identified considerations relevant to deciding whether an alternative remedy or forum is adequate so as to justify a discretionary refusal to hear a judicial review application and, in each context, the reviewing court applies the same basic test: is the alternative remedy adequate in all the circumstances to address the applicant’s grievance? (citing Strickland v Canada (Attorney General), 2015 SCC 37 [Strickland] at para 42). The principles set out in Strickland were also considered in Yatar v TD Insurance Meloche Monnex, 2024 SCC 8 where the Supreme Court of Canada noted that the Court should consider not only the available remedy but also whether judicial review is appropriate (at para 56).

[38] The Applicants argue that in this case the alternative remedy, an appeal to the Appeal Tribunal, is inadequate primarily because the citizenship scheme as a whole has been challenged and the Appeal Tribunal has no authority to find the Citizenship Law to be invalid. Nor can the Appeal Tribunal provide the remedy that the Applicants seek, being that the CLCFN membership list be remitted back to the ISC upon declaration of invalidity of the Citizenship Law as a whole, and/or a declaration that the CLCFN failed to comply with my order in McCallum. Under the Citizenship Law, the only authority of the Appeal Tribunal is to refer a refused citizenship application back to Chief and Council. Further, even if the Appeal Tribunal is able to address a Charter challenge arising from a denied citizenship application, this would not be a complete remedy because the Appeal Tribunal does not have the jurisdiction to address other provisions alleged to be discriminatory, including the section 12.02 five year period of restricted rights.

- [39] The Applicants submit that Budlakoti, relied on by the CLCFN, is distinguishable as it dealt with citizenship for Canada and there was no allegation that the application process was discriminatory in and of itself as is the case here.
- [40] And, finally, that this matter has already been before this Court and the Applicants are arguing that the CLCFN did not comply with this Court's previous order. Whether a party has complied with a prior court order is a decision for the Court to make, not a tribunal.

Analysis

General Principles

- [41] It is well established that when an administrative process has been legislatively effected, the parties who are governed by it must exhaust that process before seeking recourse to the courts. As held in *C.B. Powell*:
- [30] The normal rule is that parties can proceed to the court system only after all adequate remedial recourses in the administrative process have been exhausted. The importance of this rule in Canadian administrative law is well-demonstrated by the large number of decisions of the Supreme Court of Canada on point: *Harelkin v. University of Regina*, [1979] 2 S.C.R. 561; *Canadian Pacific Ltd. v. Matsqui Indian Band*, [1995] 1 S.C.R. 3; *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929; *R. v. Consolidated Maybrun Mines Ltd.*, [1998] 1 S.C.R. 706 at paragraphs 38-43; *Regina Police Association Inc. v. Regina (City) Board of Police Commissioners*, [2000] 1 S.C.R. 360, 2000 SCC 14 at paragraphs 31 and 34; *Danyluk v. Ainsworth Technologies Inc.*, [2001] 2 S.C.R. 460, 2001 SCC 44 at paragraph 14-15, 58 and 74; *Goudie v. Ottawa (City)*, [2003] 1 S.C.R. 141, 2003 SCC 14; *Vaughan v. Canada*, [2005] 1 S.C.R. 146, 2005 SCC 11 at paragraphs 1-2; *Okwuobi v. Lester B. Pearson School Board*, [2005] 1 S.C.R. 257, 2005 SCC 16 at paragraphs 38-55; *Canada (House of Commons) v. Vaid*, [2005] 1 S.C.R. 667, 2005 SCC 30 at paragraph 96.
- [31] Administrative law judgments and textbooks describe this rule in many ways: the doctrine of exhaustion, the doctrine of adequate alternative remedies, the doctrine against fragmentation or bifurcation of administrative proceedings, the rule against interlocutory judicial reviews and the objection against premature judicial reviews. All of these express the same concept: absent exceptional circumstances, parties cannot proceed to the court system until the administrative process has run its course. This means that, absent exceptional circumstances, those who are dissatisfied with some matter arising in the ongoing administrative process must pursue all effective remedies that are available within that process; only when the administrative process has finished or when the administrative process affords no effective remedy can they proceed to court. Put another way, absent exceptional circumstances, courts should not interfere with ongoing administrative processes until after they are completed, or until the available, effective remedies are exhausted.

- [32] This prevents fragmentation of the administrative process and piecemeal court proceedings, eliminates the large costs and delays associated with premature forays to court and avoids the waste associated with hearing an interlocutory judicial review when the applicant for judicial review may succeed at the end of the administrative process anyway: see, e.g., *Consolidated Maybrun*, supra at paragraph 38; *Greater Moncton International Airport Authority v. Public Service Alliance of Canada*, 2008 FCA 68 at paragraph 1; *Ontario College of Art v. Ontario (Human Rights Commission)* (1992), 99 D.L.R. (4th) 738 (Ont. Div. Ct.). Further, only at the end of the administrative process will a reviewing court have all of the administrative decision-maker's findings; these findings may be suffused with expertise, legitimate policy judgments and valuable regulatory experience: see, e.g., *Consolidated Maybrun*, supra at paragraph 43; *Delmas v. Vancouver Stock Exchange* (1994), 119 D.L.R. (4th) 136 (B.C.S.C.), aff'd (1995), 130 D.L.R. (4th) 461 (B.C.C.A.); *Jafine v. College of Veterinarians (Ontario)* (1991), 5 O.R. (3d) 439 (Gen. Div.). Finally, this approach is consistent with and supports the concept of judicial respect for administrative decision-makers who, like judges, have decision-making responsibilities to discharge: *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190 at paragraph 48.
- [33] Courts across Canada have enforced the general principle of non-interference with ongoing administrative processes vigorously. This is shown by the narrowness of the "exceptional circumstances" exception. Little need be said about this exception, as the parties in this appeal did not contend that there were any exceptional circumstances permitting early recourse to the courts. Suffice to say, the authorities show that very few circumstances qualify as "exceptional" and the threshold for exceptionality is high: see, generally, D.J.M. Brown and J.M. Evans, *Judicial Review of Administrative Action in Canada* (looseleaf) (Toronto: Canvasback Publishing, 2007) at 3:2200, 3:2300 and 3:4000 and David J. Mullan, *Administrative Law* (Toronto: Irwin Law, 2001) at pages 485-494. Exceptional circumstances are best illustrated by the very few modern cases where courts have granted prohibition or injunction against administrative decision-makers before or during their proceedings. Concerns about procedural fairness or bias, the presence of an important legal or constitutional issue, or the fact that all parties have consented to early recourse to the courts are not exceptional circumstances allowing parties to bypass an administrative process, as long as that process allows the issues to be raised and an effective remedy to be granted: see *Harelkin*, supra; *Okwuobi*, supra at paragraphs 38-55; *University of Toronto v. C.U.E.W*, Local 2 (1988), 55 D.L.R. (4th) 128 (Ont. Div. Ct.). As I shall soon demonstrate, the presence of so-called jurisdictional issues is not an exceptional circumstance justifying early recourse to courts.
- [42] In *Budlakoti*, the applicant brought an application for judicial review seeking a declaration that he was a Canadian citizen. He also raised a constitutional issue being that he was a stateless person entitled to Canadian citizenship under sections 6 and 7 of the Charter. The Federal Court of Appeal restated the general rule described in *C.B. Powell* and held:

[57] According to this general rule, a reviewing court can only be approached as a last resort after other adequate, effective forums for relief have been pursued and have failed: see, e.g., *JP Morgan*, above at paragraph 81; *Froom v. Canada (Minister of Justice)*, 2004 FCA 352, [2005] 2 F.C. 195; *Forest Ethics Advocacy Association v. Canada (National Energy Board)*, 2014 FCA 245, 465 N.R. 152. In this case, the appellant has approached the reviewing court, the Federal Court, not as a last resort but as a first resort. This Court's comments in paragraphs 100 and 101 of *JP Morgan* are apposite:

...[T]he question is not whether [parties'] rights can be fully vindicated. They can. The question is how to do it consistent with proper practices and procedures, when to do it, in what forum, and by what means.

For some, judicial review in the Federal Court is a preferred tool of first resort. They are wrong. It is a tool of last resort, available only when a cognizable administrative law claim exists, all other routes of redress now or later are foreclosed, ineffective or inadequate, and the Federal Court has the power to grant the relief sought.

[58] Important rationales lie behind the general rule that a reviewing court should be approached as a last resort, not a first resort: *Wilson*, above at paragraphs 30-33; *Forest Ethics Advocacy Association*, above at paragraphs 40-45. One rationale—of force in this case—is that where Parliament has set up an exclusive statutory scheme in which a particular administrative official, here the Minister, grants citizenship based on particular statutory standards and in accordance with legislatively prescribed procedures, a person seeking citizenship cannot bypass that scheme and go directly to a reviewing court.

[43] The Court of Appeal went on to describe the rare circumstances in which the general rule might be relaxed and matters that would not warrant that discretionary determination including that “[t]he existence of constitutional issues, alone, is not enough to warrant early, immediate access to a reviewing court where an adequate and effective forum for relief exists elsewhere: *Forest Ethics Advocacy Association*, above. Something extra—for example, urgent circumstances—are required before the general rule can be relaxed: *Okwuobi v. Lester B. Pearson School Board*; *Casimir v. Quebec (Attorney General)*; *Zorrilla v. Quebec (Attorney General)*, 2005 SCC 16, [2005] 1 S.C.R. 257 at paragraphs 51-53.” (at para 60).

[44] The Court of Appeal rejected the applicant's argument that the Minister was not an adequate or effective forum because the Minister did not have to power to consider the Charter when exercising powers under the Citizenship Act, RSC 1985, c C-29. The Court found that if the applicant applied to the Minister, he could present the Charter as a value that the Minister had to take into account when deciding whether the applicant was entitled to citizenship and that the failure to do so could result in a reviewable error (para 64).

Jurisdiction of the Appeal Tribunal to consider the Charter

- [45] The parties agree that the Charter applies to the Citizenship Law (see, as examples of the Charter being applied to First Nation legislation, *Taypotat v Taypotat*, 2013 FCA 192 at paras 38-39 (reversed on other grounds 2015 SCC 30) [*Taypotat* (FCA)]; *Thunderchild* at paras 32-33; *Dickson* at paras 92, 101; *Houle v Swan River First Nation*, 2025 FC 267 [*Houle*]; *Cunningham v Sucker Creek First Nation* 150A, 2021 FC 1221 [*Cunningham* 2021]).
- [46] As discussed above, the Citizenship Law, which has been ratified by the electors of the CLCFN, sets out a process by which those who are not automatically granted citizenship can apply to become Citizens. It also includes a process by which negative citizenship decisions by Council can be appealed to the Appeal Tribunal. The question is whether the Appeal Tribunal has the jurisdiction to apply the Charter to the Citizenship Law.
- [47] In *Tan v Canada* (Citizenship and Immigration), 2026 FCA 36, the Federal Court of Appeal stated:
- [42] Administrative tribunals with the power to decide questions of law by virtue of their enabling statute have presumptive jurisdiction to determine issues of constitutional law, including the constitutional validity of a provision of their enabling statutes: *Martin* at para. 34; *York Region District School Board v. Elementary Teachers' Federation of Ontario*, 2024 SCC 22 at para. 87, citing *R. v. Conway*, 2010 SCC 22 at para. 22. Presumptive jurisdiction to consider constitutional questions can only be rebutted “by an explicit withdrawal of authority to decide constitutional questions or by a clear implication to the same effect, arising from the statute itself rather than from external considerations”: *Martin* at para. 42.
- [43] The grant of jurisdiction to consider questions of law can be explicit or implicit: *Martin* at paras. 35-41, 48; *Zoghbi* at para. 43. Explicit authority is set out in the terms of the tribunal's statutory grant of authority. The existence of implied jurisdiction requires consideration of the governing statute as a whole: *Covarrubias v. Canada* (Minister of Citizenship and Immigration), 2006 FCA 365 at para. 49 (*Covarrubias*). In *Martin*, the Supreme Court stated:
- [48] ... Relevant factors will include the statutory mandate of the tribunal in issue and whether deciding questions of law is necessary to fulfilling this mandate effectively; the interaction of the tribunal in question with other elements of the administrative system; whether the tribunal is adjudicative in nature; and practical considerations, including the tribunal's capacity to consider questions of law. Practical considerations, however, cannot override a clear implication from the statute itself. [...] If the tribunal is found to have jurisdiction to decide questions of law arising under a legislative provision, this power will be presumed to include jurisdiction to determine the constitutional validity of that provision under the Charter.
- [48] In the Indigenous law context, in *Thunderchild*, Justice Grammond held:

- [34] That brings us to the question of who has jurisdiction to apply the Charter to the Election Act. Again, a decision of the Federal Court of Appeal gives highly relevant indications. In *Perry*, at paragraph 45, the Court stated that a First Nation election appeal tribunal is presumed to have jurisdiction to deal with constitutional questions. In other words, an election appeal tribunal can deal with constitutional issues, unless there is a specific exclusion in its enabling legislation. This holding is in line with decisions of the Supreme Court of Canada recognizing such jurisdiction to administrative tribunals: *Nova Scotia (Workers' Compensation Board) v Martin*; *Nova Scotia (Workers' Compensation Board) v Laseur*, 2003 SCC 54, [2003] 2 SCR 504 [Martin]. In *Fort McKay First Nation v Laurent*, 2009 FCA 235, at paragraphs 57–67 [Laurent], the Federal Court of Appeal reached the same conclusion and found that an “election arbitrator” had the power to decide constitutional questions. See also *Awashish v Conseil des Atikamekw d’Opitciwan*, 2019 FC 1131 at paragraphs 41–42; *McKenzie v Ambroise*, 2020 FC 340.
- [49] Justice Grammond held that, in the circumstances before him, the presumption was not rebutted. The Thunderchild First Nation Appeal Tribunal Act granted the Appeal Tribunal broad powers, including the power to invalidate Thunderchild laws that were contrary to its constitution and could determine any question of law that arises during an application. Justice Grammond noted that the Supreme Court of Canada has stated that an explicit grant of this kind includes the power to decide whether legislation is contrary to the Charter (*Nova Scotia (Workers' Compensation Board) v Martin*; *Nova Scotia (Workers' Compensation Board) v Laseur*, 2003 SCC 54 [Martin] at para 40). He also noted that, when the Appeal Tribunal Act intended to withhold jurisdiction over certain matters, it said so explicitly. He concluded that the Appeal Tribunal had jurisdiction to decide that certain provisions of the Thunderchild Election Law were contrary to the Charter and thus invalid.
- [50] In this case, the Citizenship Law appeal process, which engages the Appeal Tribunal, has a limited scope, it is concerned only with appeals of citizenship decisions. The Citizenship Law also does not contain language conveying broad powers as was the case in *Thunderchild*, nor does it explicitly grant the Appeal Tribunal the jurisdiction to decide questions of law. However, as confirmed in *Tan*, the grant of jurisdiction to consider questions of law can be implicit. The Citizenship Law, in section 1, Statement of Intent and Notice, acknowledges that the determination of Indian status and citizenship based on gender as set out in the Indian Act has been found to be discriminatory by courts in various jurisdictions (s 1.05) and that the Citizenship Law shall not be interpreted as contrary to section 15 of the Charter (s 1.08). Given this, and considering the purpose of the Citizenship Law in whole and the CLCFN’s authority to determine its own membership list, I am satisfied that the Appeal Tribunal has implicit jurisdiction to decide questions of law.
- [51] Additionally, from a practical perspective, the required composition of the Appeal Tribunal includes a practising lawyer who is familiar and has experience with the CLCFN (section 20.02).

- [52] Further, a First Nation tribunal is presumed to have jurisdiction to deal with constitutional questions unless there is a specific exclusion in its enabling legislation (Thunderchild at para 34). The Citizenship Law contains no such exclusion.
- [53] Given the above, I find that the Appeal Tribunal has jurisdiction to apply the Charter when considering appeals of applications for citizenship that have been denied or revoked by Council.

Effective remedy

- [54] However, the limited scope of the Appeal Tribunal's jurisdiction raises the further question of whether it is able to provide an effective remedy.
- [55] Section 20.01 of the Citizenship Law is narrow in terms of what can be sent to the Appeal Tribunal for review. It states "[a]ny applicant whose application for citizenship is denied or revoked, if they so decide, shall apply within thirty (30) days of the decision of the Council for a review of the decision by the First Nation Membership Appeal Tribunal." Therefore, in order to bring their challenge to the Appeal Tribunal, the Applicants would have had to apply for citizenship and been denied. They could then apply for a review of the decision by the Appeal Tribunal. The evidence, including that of the Applicants themselves, is that they have not made applications for citizenship.
- [56] It is clear from the Citizenship Law that the Appeal Tribunal has the jurisdiction to review decisions of Council to deny or revoke citizenship. Thus, had the Applicants applied for and been denied citizenship, they could have made their Charter arguments concerning automatic citizenship and the requirement to apply for citizenship in that venue. However, as the CLCFN acknowledged when appearing before me, it is not clear that the Appeal Tribunal's jurisdiction extends to also permit it to entertain and make determinations concerning matters other than appeals under section 20. In particular, the Restricted Rights Period – which commences only after the granting of citizenship and following any Probationary Period. Further, had Applicants applied for and been granted citizenship, they would not have recourse to the Appeal Tribunal to challenge the provisions setting out the Restricted Rights Period. At that point they likely would have to seek judicial review regarding its constitutionality.
- [57] And, in terms of effective remedy, Budlakoti is distinguishable. There the applicant had brought an application for judicial review and sought a declaration that he was a Canadian citizen. This Court dismissed that application. On appeal, the applicant argued that unless that relief was granted, he would continue to be stateless, in contravention of the Charter and the Convention on the Reduction of Statelessness. The Court of Appeal found that the applicant had other adequate and effective forums for relief that had not been exhausted. Specifically, he could apply for national status or citizenship in India and in Canada but had not done so. The Court of Appeal also rejected the applicant's argument that the Minister was not an adequate or effective forum because he did not have the power to consider the

Charter when exercising powers under the Citizenship Act.

- [58] Thus, while in Budlakoti the obtaining of citizenship was open to the applicant by way of a legislative process, which was an available and effective remedy, in this case the remedy sought is not a declaration of citizenship. Rather, the Applicants seek to have the legislative regime which affords a path to citizenship declared unconstitutional, in whole. Given the limited jurisdiction of the Appeal Tribunal, it is not apparent that the Appeal Tribunal has the authority to do so. Nor could the Appeal Tribunal provide the other remedies sought by the Applicants in this application for judicial review, being an order that the CLCFN membership list be returned to the ISC upon declaration of invalidity of the Citizenship Law and/or a declaration that the CLCFN failed to comply with my order in McCallum.
- [59] In my view, it would have been preferable had the Applicants first applied for citizenship and, if denied, raised their constitutional and other arguments before the Appeal Tribunal before pursuing judicial review. This would have also perhaps narrowed the scope of any subsequent judicial review. However, in these circumstances, it is not apparent that the Appeal Tribunal has jurisdiction to address the Probationary Period and mandatory Restricted Rights Period or to declare the Citizenship Law in whole to be unconstitutional. Nor would the Appeal Tribunal have jurisdiction to provide all of the remedies that the Applicants seek. Thus, I am not convinced that the administrative process affords an effective remedy such that was required to be pursued prior to judicial review.

Issue 2: Does the Citizenship Law discriminate based on gender or analogous grounds, contrary to section 15 of the Charter? [60] Subsection 15(1) of the Charter states “[e]very 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.”

- [61] The Supreme Court of Canada has identified a two-step analytical framework for establishing whether a law infringes the guarantee of equality under subsection 15(1) of the Charter. The first part of the analysis “asks whether, on its face or in its impact, a law creates a distinction on the basis of an enumerated or analogous ground The second part of the analysis focuses on arbitrary – or discriminatory – disadvantage, that is, whether the impugned law fails to respond to the actual capacities and needs of the members of the group and instead imposes burdens or denies a benefit in a manner that has the effect of reinforcing, perpetuating or exacerbating their disadvantage” (*Kahkewistahaw First Nation v Taypotat*, 2015 SCC 30 at paras 19-20 [*Taypotat* (SCC)]); see also *Quebec (Attorney General) v Alliance du personnel professionnel et technique de la santé et des services sociaux*, 2018 SCC 17 [*Alliance*] at para 25; *Cardinal v Bigstone Cree Nation*, 2018 FC 822 at para 47; *Fraser v Canada*, 2020 SCC 28 at para 27 [*Fraser*]; *R v Sharma*, 2022 SCC 39 [*Sharma*] at para 28).

Applicants’ Submission [62] The Applicants acknowledge the two-step analysis required to establish whether a law infringes the guarantee of equality under subsection 15(1) of the Charter.

- [63] With respect to the first step, the Applicants submit that it is clear that the Citizenship Law creates a distinction between existing citizens and prospective citizens. The question is whether that distinction is based on sex and/or an analogous ground. The Applicants submit that a review of the history of amendments to the Indian Act, found in decisions such as *McIvor v The Registrar, Indian and Northern Affairs Canada*, 2007 BCSC 827 [McIvor] partially rev'd 2009 BCCA 153, leave of appeal to the Supreme Court of Canada refused and *Descheneaux c Canada (Procureur Général)*, 2015 QCCS 3555 [Descheneaux], would lead to the inevitable conclusion that the distinction is based on sex and/or an analogous ground. However, this case is simplified by my decision in *McCallum* which found that the 1987 Membership Code discriminated against the applicants and other CLCFN community members on the basis of sex, contrary to section 15 of the Charter. The Applicants submit that the 1987 Membership Code forms the basis for the distinction found in section 7 of the Citizenship Law.
- [64] According to the Applicants, in *McCallum* this Court found that the basis in the Citizenship Law for distinguishing between the existing citizens and prospective citizens created a distinction on the basis of sex, and was discriminatory and contrary to section 15 of the Charter. They also submit that any argument that the 1987 Membership Code was not discriminatory is *res judicata* as between the parties (*Penner v Niagara (Regional Police Services Board)*, 2013 SCC 19 at para 88).
- [65] The Applicants submit that this does not mean that every prospective citizen is being discriminated against on the basis of sex. However, the class of prospective citizens includes a comparator group of individuals that are being discriminated against on the basis of sex, similar to how they were under the 1987 Membership Code. The Applicants say that they fall within that group.
- [66] And, although the impugned provisions do not explicitly draw a distinction based on sex, their effect is that the prospective citizens with connections to the CLCFN are the group of disenfranchised, disadvantaged status Indians who have had to regain status because one of their female ancestors lost status because of discriminatory provisions in the Indian Act. In contrast, the existing members are part of the group of non-disenfranchised men who never lost status. This is a clear and established distinction and discrimination based on sex.

The CLCFN's Submissions [67] The CLCFN points out that the Citizenship Law makes no express distinction based on sex. Therefore, the question is whether it results in adverse effect discrimination on the basis of sex/gender. The CLCFN submits that the Applicants have failed to present sufficient evidence to support this assertion.

- [68] The CLCFN submits that the Applicants' overall approach is reductionist and relies on incorrect assumptions about the composition of the CLCFN's current citizens compared to the composition of the prospective CLCFN citizenship applicants. The Applicants' assertion that the existing CLCFN citizens are part of the "non-disenfranchised men" and all prospective applicants are disenfranchised people that "have had to regain status because

one of their female ancestors lost status” is a false dichotomy that is unsupported by any evidence. Rather, the situation is far more complex and the composition of the CLCFN and potential CLCFN applicants is diverse.

- [69] The CLCFN also submits that the Applicants incorrectly assert that McCallum is dispositive of this issue. They submit that the Court is not being asked to evaluate whether the Applicants were discriminated against by Canada when they lost their status, nor is the Court being asked to evaluate whether the Applicants were discriminated against under the 1987 Membership Code. Rather, the Applicants’ challenge is to the entirety of the current Citizenship Law – a law that would make them eligible for CLCFN citizenship if they simply submitted an application.
- [70] Further, that by grandfathering in existing members, the CLCFN was operating under the legal constraints put in place by Canada as it pertains to the membership codes of First Nations. ISC will not approve a membership code that does not ensure all individuals on the membership list are granted membership under any new rules.
- [71] On this point, the CLCFN submits that the membership code of virtually every First Nation contains a similar grandfathering provision and that the Applicants’ attempt to frame this as discriminatory ignores this legal constraint as well as the actual purpose of the grandfathering provision in the CLCFN.
- [72] The CLCFN also submits that the Applicants take issue with the provisions of the Citizenship Law which place restrictions on the rights of new citizens for a period of time (the Probationary and Restricted Rights Periods). While these provisions clearly make a distinction between the rights of current citizens and new citizens, this is not a distinction on the basis of sex/gender. It is well established that not all distinctions are discriminatory, and not all distinctions are contrary to section 15 of the Charter. The CLCFN submits that the Applicants cannot rely on discrimination that was imposed on them by Canada prior to 1985. The question is whether the Citizenship Law now in force discriminates against them.
- [73] Finally, the CLCFN submits that the Applicants also take issue with the Métis Scrip provision of the Citizenship Law which does make distinctions, however, there is no distinction on the basis of sex/gender. The Applicants have not put forward any other ground of discrimination in relation to the Métis Scrip provision and, therefore, the challenge to this provision must also fail at the first stage of the section 15 test.

Analysis i. Impact of McCallum [74] As the Applicants point out, in McCallum I held as follows:

- [100] Given the agreement of the parties on this issue, it is sufficient to say that I agree with them that the 1987 Membership Code discriminates against the Applicants and other CLCFN community members on the basis of sex, contrary to s 15 of the Charter.
- [101] Section 7 of the 1987 Membership Code freezes in place eligibility for membership as it was at the time immediately prior to the 1987 Membership code coming into force. At that time, entitlement to be on the CLCFN Band List was based on the criteria in s 6 of the Indian Act.

This includes the former ss 6(1)(a) and 6(1)(c) of the Indian Act, which disadvantaged the descendants of female ancestors with Indian status as compared to descendants of male ancestors with Indian status. As found in *McIvor*, those provisions were an “echo of historic discrimination” (*McIvor* at para 111).

[102] For bands whose membership is managed by the Department of Indigenous Services pursuant to s 11 of the Indian Act, the legislative amendments in response to *McIvor* and *Descheneaux* have expanded eligibility for Indian status, and therefore for band membership. However, for the CLCFN under the 1987 Membership Code, persons who have become eligible for Indian status due to these legislative changes remain ineligible for membership in CLCFN because their ancestors were not eligible for membership immediately prior to the 1987 Membership Code coming into force. This ‘echo’ of ss 6(1)(a) and 6(1)(c) is a *prima facie* infringement of the rights to equality protected by s 15 of the Charter. And, as in *McIvor* and *Descheneaux*, the infringement of the Applicants’ rights under s 15 is not justified pursuant to s 1 of the Charter.

(emphasis added)

[75] The membership eligibility provisions contained in the 1987 Membership Code which perpetuated the discriminatory provisions of the pre-1985 Indian Act were:

- 7) Commencing on the date this Code comes into force, a person is entitled to have his name entered in the Band List if:
 - a) that person was entered in the Band List or was entitled to be entered in the Band List immediately prior to this Code coming into force
 - b) both of that person’s parents are entered or were or are entitled to be entered in the Band List; or,
 - c) one of that person’s parents is or was entered in the Band List and the other parent is or was entered in the Band List of another Band;

[76] The Citizenship Law provisions as to automatic citizenship are as follows:

7.01 A person has a right to be a Citizen of the First Nation by having their name entered automatically on the Citizenship List if:

- a) they are registered under the Indian Act as a status Indian; and
- b) they are listed under the First Nation on the ISC Band List or Indian Registry; and
- c) they are registered on the existing Citizenship List of the First Nation and they have satisfied a) and b) as of the date this Law is passed.

[77] The Citizenship List is defined as meaning the list of persons maintained by the CLCFN under the terms of the Citizenship Law and includes a Band List controlled by the CLCFN pursuant to section 10 of the Indian Act – which captures the 1987 Membership Code Band List.

[78] Further, section 10 of the Indian Act permits a band to assume control of its own membership. It also addresses acquired rights:

Acquired rights

- (4) Membership rules established by a band under this section may not deprive any person who had the right to have his name entered in the Band List for that band, immediately prior to the time the rules were established, of the right to have his name so entered by reason only of a situation that existed or an action that was taken before the rules came into force.
- (5) For greater certainty, subsection (4) applies in respect of a person who was entitled to have his name entered in the Band List under paragraph 11(1)(c) immediately before the band assumed control of the Band List if that person does not subsequently cease to be entitled to have his name entered in the Band List.

[79] In this regard, the CLCFN refers to a web page of Crown-Indigenous Relations and Northern Affairs (Government of Canada, “Getting out of the business of Indian registration”, (last modified 28 November 2018), online: <www.rcaanc-cirnac.gc.ca/eng/1540403121778/1568898903708>). This is described as a fact sheet designed in support of the Collaborative Process on Indian Registration, Band Membership and First Nation Citizenship. It describes section 10 of the Indian Act, the requirements that a band must meet to assume control of its own membership, and then states:

In addition to these three specific requirements, bands are also required to respect the acquired rights of individuals who are currently members or entitled to be members of their band. In other words, the band cannot deny membership to persons who were entitled to be a member on the day before the band's membership rules came into force. The minister cannot approve a code if these acquired rights are not preserved. If the requirements of section 10 are met, Crown-Indigenous Relations and Northern Affairs Canada (CIRNAC) will notify the band of the change of membership control and provide the band with a copy of its band list. From that day forward, the band is required to maintain its own band list and CIRNAC has no further responsibility with respect to the band's membership. Any individual who wishes to be a band member must contact the band to be added to their membership list.

[80] Thus, those CLCFN members who were on, or were entitled to be on, the CLCFN Band List on the day before the 1987 Membership Code came into effect could not, pursuant to subsection 10(4) of the Indian Act, be denied membership under that Code and, based on the definition of the Citizenship List, nor could they be denied membership under the Citizenship Law. That is, they were effectively grandfathered into citizenship.

- [81] This may explain why the Citizenship Law makes a distinction between those members who automatically receive citizenship and those who must apply for it. However, this does not change the fact that some of those who were excluded from membership in 1987 – and therefore cannot automatically obtain citizenship under the Citizenship Law – were excluded due to discrimination based on sex.
- [82] To this extent, I agree with the Applicants that discrimination based on sex was previously determined in *McCallum*.
- [83] But where the Citizenship Law departs from the 1987 Membership Code is that, under the former, persons who became eligible for (and obtained) Indian status due to legislative changes after the 1985 Amendments to the Indian Act remained ineligible for CLCFN membership because their ancestors were not eligible for membership immediately prior to the 1987 Membership Code coming into force. There was no way forward. However, under the Citizenship Law, those who may have been so discriminated against with the result that they are not eligible for automatic citizenship, are now able to apply for citizenship. As the CLCFN puts it, there is now a path forward to citizenship for those persons.
- [84] The question is, is that path – or process – discriminatory.
- ii. Section 15 Test – Step One [85] The Supreme Court in *Dickson* restated the two-step test for assessing a subsection 15(1) Charter challenge, being that the claimant must demonstrate that the impugned law or state action:
- (a) creates a distinction based on enumerated or analogous grounds, on its face or in its impact; and
 - (b) imposes a burden or denies a benefit in a manner that has the effect of reinforcing, perpetuating, or exacerbating disadvantage.
- (citing *Sharma* at para 28, *R v C.P.*, 2021 SCC 19 at paras 56, 141; *Fraser* at para 27; *Taypotat* (SCC), at paras 19-20).
- [86] In *Sharma*, the Supreme Court also discussed cases of adverse impact discrimination which “occurs when a seemingly neutral law has a disproportionate impact on members of groups protected on the basis of an enumerated or analogous ground” (*Sharma* at para 29 citing *Fraser* at para 30; see also *Withler v Canada (Attorney General)*, 2011 SCC 12 [*Withler*] at para 64; *Taypotat* (SCC), at para 22).
- [87] It noted that the two steps of the section 15 test are not watertight compartments because each step considers the impact of the impugned law on the protected group. However, while there may be overlap in the evidence that is relevant at each step, the two steps ask fundamentally different questions. Therefore, the analysis at each step must remain distinct:
- [31] The first step examines whether the impugned law created or contributed to a disproportionate impact on the claimant group based on a protected ground. This necessarily entails drawing a comparison between the claimant group and other groups or

the general population (*Andrews v. Law Society of British Columbia*, 1989 CanLII 2 (SCC), [1989] 1 S.C.R. 143, at p. 164). The second step, in turn, asks whether that impact imposes burdens or denies benefits in a manner that has the effect of reinforcing, perpetuating, or exacerbating a disadvantage. The conclusion that an impugned law has a disproportionate impact on a protected group (step one) does not lead automatically to a finding that the distinction is discriminatory (step two).

- [88] The Supreme Court stated that all laws are expected to impact individuals. Therefore, merely showing that a law impacts a protected group is insufficient. At step one of the subsection 15(1) test, “claimants must demonstrate a disproportionate impact on a protected group, as compared to non-group members. Said differently, leaving a gap between a protected group and non-group members unaffected does not infringe s. 15(1)” (Sharma at para 40). In that regard, at step one, “the claimant must present sufficient evidence to prove the impugned law, in its impact, creates or contributes to a disproportionate impact on the basis of a protected ground” (para 42). Causation is therefore a central issue. Claimants must establish a link or nexus between the impugned law and the discriminatory impact (para 43). The words “contributed to” recognize that the impugned law need not be the only or dominant cause of the disproportionate impact (paras 45, 49(b)).
- [89] Ideally, claims of adverse impact discrimination should be supported by two types of evidence: evidence about the full context of the claimant groups situation and evidence about the outcomes that the impugned law or policy has produced in practice (para 49). The Court summarized the first step as follows:
- [50] In summary, the first step asks whether the impugned provisions create or contribute to a disproportionate impact on the claimant group based on a protected ground as compared to other groups. If a claimant establishes that the law or state action creates or contributes to a disproportionate impact, the court should proceed to the second step. But to be clear, while the evidentiary burden at the first step should not be undue, it must be fulfilled. The particular evidentiary burden on claimants will depend on the claim. What remains consistent is that there is a burden on claimants at step one.
- [90] In this matter, to be considered for citizenship, the Citizenship Law requires that persons not eligible for automatic citizenship make an application in accordance with the Citizenship Law process and that each application will be considered on its own merits (section 8.08).
- [91] The eligibility requirements of the Citizenship Law are that person must submit an application; be a direct descendant of an original Band Member who was alive at the time Treaty 10 was entered into; and, are registered on the ISC Band List or Indian Registry (section 8.01). These eligibility requirements, unlike the 1987 Membership Code, are not directly tied to the individual’s parent being listed on prior Band Lists. That is, on their face, they do not perpetuate the prior discrimination based on parental gender previously found in the Indian Act and echoed in the 1987 Membership Code. The question is whether their

impact creates or contributes to a disproportionate impact on the basis of a protected ground.

- [92] The evidence on this point comes from the Applicants and Craig McCallum.
- [93] In her affidavit, Laura Bird describes herself as a status Indian registered under the Indian Registry to the CLCFN. She regained her status in 1985.
- [94] She deposes that she is the daughter of Jerry Iron and Delia McCallum, however, her birth certificate incorrectly lists her father as Daniel McCallum, her stepfather. Her biological father, Jerry Iron, was a status Indian and a member of the CLCFN. Her mother, Delia McCallum, was a status Indian and a member of the CLCFN but lost her status and membership when she married Daniel McCallum, who was a non-status person. Delia McCallum regained her status in 1985.
- [95] Further, that she was denied status due to discriminatory provisions in the Indian Act. Specifically, because Delia McCallum and Jerry Iron were not married when she was born prior to the 1985 amendments to the Indian Act, and because status was passed on through the paternal line.
- [96] She states in her affidavit that “[h]ad Delia McCallum been male, I would have inherited status from Delia upon birth and been on the band list for CLCFN in 1985, and therefore been on the band list under CLCFN’s previous 1987 Membership Code, and therefore be entitled to automatic citizenship under the Citizenship Law.”
- [97] When cross-examined on her affidavit, she deposed that what precluded her from being on the Band List at the time when the 1987 Membership Code came into effect was that her birth certificate incorrectly lists Daniel McCallum, a non-CLCFN member, as her father. When asked if she had taken any steps to correct this, she stated that she had been advised that birth certificates are administered by the Province of Saskatchewan (not the CLCFN) and that she would have to apply to the Province to have her birth certificate changed. She testified that she initially had not done so to avoid hurting her stepfather’s feelings. Both of her parents have now died. When asked why she had not, since then, sought to have her birth certificate changed, she stated “[b]ecause I thought with this court that I didn’t have to, that we would automatically be registered into the band list. I didn’t think I needed to pursue it.” She acknowledged that if both of her biological parents were CLCFN members she would have been eligible for membership under the 1987 Membership Code.
- [98] Craig McCallum was originally an applicant in this matter but subsequently withdrew from the application. He is the son of the Applicant Laura Bird. He deposes that his father (Wayne Opikokew) is a status Indian and a member of the CLCFN. Craig McCallum states that he, along with approximately 1,300 other people, their children and future descendants, have been denied their right to be a band member of the CLCFN and included on the Band List under the 1987 Membership Code. Had his maternal grandmother “been male” he would have been entitled to membership in the CLCFN from birth and included in the CLCFN Band

List under the 1987 Membership Code. Further, with respect to the effect of the Citizenship Law:

29. Under the Citizenship Law, because I was not registered on the band list under the 1987 Membership Code due to its discriminatory provisions, I am not eligible for automatic membership under the Citizenship Law, as I would have been but for the discrimination. Instead, because my ancestor was female rather than male, I must apply for membership, which can be granted or denied at the discretion of Chief and Council and, if granted, I would be subjected to a period of restricted rights wherein I would not be entitled to run for office in CLCFN or receive other benefits of membership in CLCFN. People whose ancestors are male, instead, get to be members automatically with no restricted rights period.
- [99] In his affidavit, the Applicant, Lloyd Yew deposes that he regained his status in 2011 following amendments to the Indian Act and that he is registered to (affiliated with) the CLCFN.
- [100] Further, that his mother, Theresa McCallum, was a non-status Indian as her father was enfranchised under previous provisions of the Indian Act, having taken scrip and received payments from Canada. His father, Martin Yew, was a non-status Indian who was entitled to regain status after 1985, but not to pass that status on to him.
- [101] Lloyd Yew states that his paternal grandfather, Philip Yew, was a status Indian who lost his status after he was adopted by Christian missionaries. His paternal grandmother, Madeline Yew (nee Iron) was a status Indian and member of the CLCFN but, due to the discriminatory provisions of the Indian Act at that time, lost her status when she married Philip Yew. Lloyd Yew deposes that “[h]ad my paternal grandmother, Madeline Yew, been male, I would have always been a member in CLCFN, and would be entitled to membership automatically under the Citizenship Law notwithstanding that one of my ancestors accepted scrip.” By which I understand him to mean that, but for the discrimination based on gender faced by female status Indians – which caused his grandmother to lose status when she married a non-status Indian – he would have been on the Band List maintained by Canada and the CLCFN Band List when the 1987 Membership Code came into effect and, therefore, automatically on the Citizenship List under the Citizenship Law.
- [102] I would note here in passing that while the CLCFN raises issues such as Laura Bird’s failure to have caused the amendment of and to provide her long form birth certificate and the veracity of Lloyd Yew’s father’s affiliation with CLCFN, the CLCFN does not substantially challenge that the Applicants, and others in similar situations, were subject to prior discrimination based on sex. The CLCFN does not dispute that the Applicants, and other members of their group, are not eligible for automatic citizenship under the Citizenship Law because the prior discriminatory provisions of the Indian Act, as echoed in the 1987 Membership Code, precluded them from previously being eligible for membership and therefore automatic citizenship.

- [103] Rather, they submit that the Court is not being asked to evaluate whether the Applicants were discriminated by Canada when they lost their status or whether the Applicants were discriminated against under the 1987 Membership Code. Their challenge is to the entire Citizenship Law – pursuant to which they would likely be eligible for citizenship if they were to apply – and the consideration of which under the Citizenship Law does not discriminate based on sex.
- [104] To my mind, this misses the point that the Applicants are making, being that they would not have to apply for citizenship under the Citizenship Law, but for the prior historic discrimination, which detrimentally impacts their eligibility for automatic membership under the Citizenship Law.
- [105] I do not agree with the CLCFN’s argument that the Applicants “cannot rely on” discrimination that was imposed on them by Canada prior to 1985 (specifically, that Laura Bird’s mother, Delia, is not a party to this proceeding and the Court is not evaluating whether she was discriminated against by Canada or the CLCFN) or that the sole question is whether the Citizenship Law now in force discriminates against the Applicants. In my view, such a narrow and isolated perspective cannot succeed. The Applicants have established a link or nexus between the Citizenship Law provision pursuant to which they are not afforded automatic citizenship and its discriminatory impact. Further, as held in *Sharma*, the impugned law need not be the only or dominant cause of the disproportionate impact (para 45). Given the historic context of the Citizenship Law – that is, the prior discriminatory Indian Act provisions echoed in the 1987 Membership Code which caused the Applicants not to be eligible for automatic citizenship under the Citizenship Law – the exclusion of the Applicants and their comparator group contributes to that pre-existing discrimination.
- [106] In this matter, the grandfathering in, or acquired rights requirement of the Indian Act, likely explains why the Citizenship Law creates a distinction between those who had citizenship under the 1987 Membership Code and are granted automatic citizenship under the Citizenship Law and those that were excluded from citizenship under the 1987 Membership Code and must apply for citizenship under the Citizenship Law. As the CLCFN argues, not all of those who must apply for citizenship are individuals who have been discriminated against based on sex. However, as I found in *McCallum*, the 1987 Membership Code discriminated against the applicants in that matter and other CLCFN community members on the basis of sex, contrary to section 15 of the Charter. Therefore, there is a group of individuals – including the Applicants – who were discriminated based on sex and the Citizenship Law creates a distinction as those individuals are required to apply for citizenship and are also subject to a period of restricted rights if granted citizenship. The claimant group is therefore those who were previously denied membership due to discriminatory provisions limiting passing status through the maternal line and who therefore must apply for membership under the Citizenship Law. The comparator group is those who receive automatic membership under the Citizenship Law

and were not denied membership as status was passed through the paternal line.

[107] In addition to the Applicants' submissions on the application process and Restricted Rights Period being discriminatory, they submit that section 15.03 establishes an outright ban on citizenship for individuals whose ancestors had accepted Métis scrip, even if they are a direction descendant of an original Band member. This restriction would not apply to the existing members with an ancestor who accepted scrip as they would have a right to automatic membership.

[108] This submission by the Applicants is based on a different claimant and comparator group than the one set out above based on the distinctions found in McCallum. Without a more fulsome factual background and submissions on whether a distinction is being made with respect to those who accepted Métis scrip, the Applicants have not met their onus on this stage of the test. On the record before me, I cannot find that this first step of the section 15 step is met for the subgroup of individuals whose ancestors had accepted Métis scrip.

[109] In summary, the first step of the section 15 test asks whether the impugned provisions create or contribute to a disproportionate impact on the claimant group based on a protected ground as compared to other groups. In this matter, the Applicants have established that the Citizenship Law contributes to the disproportionate historic adverse impact on them of discrimination based on sex by requiring them to apply for citizenship and, if granted, being subject to the Restricted Rights Period.

[110] That is, the first part of the section 15 test has been met for those who were previously denied membership due to discriminatory provisions limiting the passing of status through the maternal line and who, therefore, must apply for membership and, if granted, be subject to a period of restricted rights under the Citizenship Law.

iii. Section 15 Test – Step Two Applicants' Position [111] On the second step of the section 15 test, the Applicants submit that the Citizenship Law imposes burdens and denies benefits to a disadvantaged group on an arbitrary basis. The burdens and restrictions are contained in section 12 of the Citizenship Law. The application process, combined with the restrictions imposed, amounts to an unfair burden. Conversely, those who are afforded automatic citizenship do not need to go through the application process, do not need to justify their connection or contributions to their community, and are not subject to the potential of a protest meeting. Further, the Restricted Rights Period is an unfair burden. The Applicants, even if granted citizenship, are denied benefits such as housing and funding for five years without any reasonable justification. They are also denied political rights to run for office for up to seven years after being approved as citizens. The Applicants rely on *Corbiere v Canada* (Minister of Indian and Northern Affairs), 1999 CanLII 687 (SCC); *Grismer v Squamish First Nation*, 2006 FC 1088 and *Descheneaux* to argue that the same discrimination is being perpetuated by the Citizenship Law as descendants of CLCFN members who happen to be women are treated differently and treated as less deserving of entitlement to participate in band governance on an arbitrary basis.

The CLCFN's position [112] The CLCFN reiterates that the Citizenship Law does not make any distinction based on sex/gender. While there is a distinction made between the rights of current citizens and new citizens (and with respect to the Métis scrip provision), this is not a distinction on the basis of sex/gender. However, in the event the Court finds that there is an adverse impact on the basis of sex/gender through one of the impugned provisions, the CLCFN submits that any such distinction is not discriminatory in that it does not impose burdens or deny benefits in a manner that has the effect of reinforcing, perpetuating, or exacerbating disadvantage.

[113] The CLCFN submits that one of the primary purposes of the Citizenship Law is to provide a process that would allow descendants of disenfranchised women to apply and regain their citizenship in the CLCFN. The aim of the law is not to perpetuate disadvantage but, on the contrary, to rectify the historic disadvantage by creating a process to allow people like the Applicants to apply for and obtain citizenship. While the Applicants appear to be of the view that the only acceptable process to address this circumstance was to make everyone automatic members, the CLCFN submits that the process established through the Citizenship Law is a reasonable process for re-integrating those disenfranchised CLCFN members. Ultimately, the Applicants have not demonstrated that any distinction based on sex/gender has the effect of reinforcing, perpetuating, or exacerbating disadvantage.

Analysis [114] The second step of the subsection 15(1) test requires the claimant to establish that the impugned law imposes burdens or denies benefits in a manner that has the effect of reinforcing, perpetuating, or exacerbating the historic or systemic disadvantage against that group (Sharma at para 54).

[115] The Supreme Court of Canada described the question at this stage as (Withler at para 71):

...The question is whether the lines drawn are generally appropriate, having regard to the circumstances of the groups impacted and the objects of the scheme. Perfect correspondence is not required. Allocation of resources and legislative policy goals may be matters to consider. The question is whether, having regard to these and any other relevant factors, the distinction the law makes between the claimant group and others discriminates by perpetuating disadvantage or prejudice to the claimant group, or by stereotyping the group.

[116] The analysis involves looking at the circumstances of members of the group and the negative impact of the law on them. This is a contextual analysis grounded in the actual situation of the group and the potential of the impugned law to worsen their situation (Sharma at para 52). In that regard, in Sharma the Supreme Court held that to determine whether a distinction is discriminatory under the second step, courts should also consider the broader legislative context:

[57] Such an approach is well-supported in our jurisprudence. In *Vriend v. Alberta*, 1998 CanLII 816 (SCC), [1998] 1 S.C.R. 493, this Court held "[t]he comprehensive nature of the Act must be taken into account in considering the effect of excluding one ground from its protection" (para. 96). Similarly, in *Withler*, the analysis was said to entail consideration of "the full context of the claimant group's situation and the actual impact of the law on that

situation” (para. 43). Where the impugned provision is part of a larger legislative scheme (as is often so), the Court explained, that broader scheme must be accounted for (para. 3), and the “ameliorative effect of the law on others and the multiplicity of interests it attempts to balance will also colour the discrimination analysis” (para. 38 (emphasis added)). In *Taypotat, Abella J.* harboured “serious doubts” that the impugned law imposed arbitrary disadvantage, particularly after considering the context of the relevant legislation “as a whole” (para. 28).

- [58] Most recently, in *C.P.*, the constitutionality of s. 37(10) of the Youth Criminal Justice Act, S.C. 2002, c. 1 (“YCJA”) was at issue. The impugned provision did not provide young persons an automatic right of appeal to this Court where an appellate judge below dissents on a question of law, as the Criminal Code provides to adult offenders. Chief Justice Wagner, writing for four members of this Court, explicitly and carefully considered the entire legislative scheme, observing that the YCJA is designed to balance multiple goals — not only enhanced procedural protections, but also timely intervention and prompt resolution (para. 146). He further explained that an “approach requiring line-by-line parity with the Criminal Code without reference to the distinct nature of the underlying scheme of the YCJA would indeed be contrary to the contextual approach” (para. 145). In choosing not to provide young persons with an automatic right to appeal, he concluded “Parliament did not discriminate against them, but responded to the reality of their lives” (para. 162). Therefore, step two was not satisfied. We would endorse this approach, as it is consistent with *Withler*, *Taypotat*, and *Vriend*.
- [59] Relevant considerations include: the objects of the scheme, whether a policy is designed to benefit a number of different groups, the allocation of resources, particular policy goals sought to be achieved, and whether the lines are drawn mindful as to those factors (*Withler*, at para. 67; see also paras. 3, 38, 40 and 81).
- [117] Finally, the Supreme Court addressed the scope of the state’s obligations to remedy social inequalities, noting two relevant principles in that regard. First, that subsection 15(1) does not impose a general, positive obligation on the state to remedy social inequalities or enact remedial legislation. Were it otherwise, courts would be impermissibly pulled into the complex legislative domain of policy and resource allocation, contrary to the separation of powers. Second, that when the state does legislate to address inequality, it can do so incrementally.
- [118] The CLCFN submits that for years, Canada defined CLCFN’s membership according to Canada’s definitions. This resulted in members being disenfranchised, disconnected from the community, and threatened the survival of the CLCFN’s unique culture. Both the Applicants and the CLCFN are victims of these policies. The CLCFN submits that it is rectifying this through its new Citizenship Law that sought to balance various competing objectives. After much deliberation and debate in the community, the Citizenship Law created an application process for new citizens and provided clear definitions as to who qualified for citizenship in the CLCFN.

- [119] The CLCFN describes how the Citizenship Law was developed. In that regard, the affidavit of Gladys Iron states that around 2021 a membership committee [Membership Committee] was established to review and consult with the CLCFN about membership issues, the goal being to develop a membership code that would be inclusive and reflective of the CLCFN's culture and traditions. She put her name forward and was selected as a member of that committee. The Membership Committee also included Robin George, who is a non-citizen, as seen from her affidavit.
- [120] Gladys Iron deposes that a consultant was engaged to assist with this process and that there were a number of meetings held to discuss membership, including what it means to be a member and what the committee members felt should define a CLCFN member. There were also discussions about the rights and responsibilities of members and how steps could be taken to protect the CLCFN's culture, traditions and values. From the initial sessions with the consultant, the Membership Committee moved into consultations with CLCFN members. Members were engaged and provided feedback about the proposed membership requirements. The court challenge in McCallum triggered further discussions about the definition of membership, how prospective members could be required to establish proof of their entitlement to membership, and other important issues. This also triggered discussions about the discrimination created by Canada that was alleged by the applicants in that proceeding.
- [121] Gladys Iron deposes that the membership consultations became an increasingly important priority and the Membership Committee held consultations meetings on reserve, off reserve, and at various different cities in both Alberta and Saskatchewan. For example, between March 24 and May 30, 2023, twelve such consultation meetings were held. Ms. Iron deposes that during these meetings members were engaged and proposed various changes and additions to the draft membership code that was being developed. Further, that all of the draft membership code provisions were discussed and some of them were debated extensively. She states that the challenge with an exercise of that type was to try and balance the different viewpoints and come to a consensus about what the CLCFN, as a community, viewed as being appropriate and reflective of CLCFN culture, customs, traditions, and values. Further:

16.The process of reclaiming our traditional law making authority takes a lot of effort and time, is gradual, and requires a great deal of work within our community. The probationary membership rules are reflective of this process. We want to re-integrate members that were taken from us through colonialism or were otherwise disconnected from our community. However, it was apparent from our consultations with members, that this cannot happen overnight. We determined that we need processes to ensure that a re-integration process could be gradual for new citizens and permit us to maintain our community's values and to teach these new members about our culture and history.

.....

19. The Citizenship Law meets important objectives of Canoe Lake Cree First Nation which include: 1) creating a fair application process for the privilege of being granted citizenship based on connection to the community; 2) allowing all eligible applicants to apply and be approved, regardless of gender or marriage; and 3) protecting, preserving, and creating a process and structure that does not allow citizenship for those with little or no connection to the Nation, but maintains the distinctiveness of Canoe Lake Cree First Nation, its Cree heritage, culture, traditions, customs, and values for the present and future generations.
- [122] The CLCFN submits that, ultimately, the considerations in the Citizenship Law reflect a balancing of a number of competing objectives. The CLCFN recognizes the harms caused by Canada's discriminatory policies, including Canada's discrimination against women. The Citizenship Law seeks to rectify that by permitting these prospective citizens to apply and be eligible to obtain CLCFN citizenship.
- [123] Further, that the CLCFN also operated within certain legal constraints that continue to be imposed by Canada. Specifically, subsections 10(4) and 10(5) of the Indian Act protect "acquired rights" and prohibit the CLCFN from adopting a membership code that would remove people from the list the 1985 Amendments restored to the list (citing *Sawridge Band v Canada*, 1997 CanLII 5294 (FCA) at para 2). Accordingly, while the Applicants assert that the CLCFN improperly gave some categories of individuals "automatic" citizenship, while others had to submit an application, this is required by Canada's legislation – those with acquired rights cannot be removed from the Citizenship List and made to re-apply. At the same time, the CLCFN could not make everyone on the ISC List automatically a citizen since no one knows if all of those individuals even want to be citizens of the CLCFN.
- [124] The CLCFN submits that other concerns identified by the First Nation relate to potential members that are seeking only the financial benefits of citizenship without any interest in its corresponding responsibilities of citizenship. For example, the CLCFN recently received an offer exceeding \$150 million from Canada to settle an outstanding treaty obligation. This has caused a recent "surge of interest" from people who are now claiming they are entitled to citizenship in the CLCFN. This includes people that were previously involved with other First Nations or Métis organizations.
- [125] This assertion stems from the affidavit evidence of Bernice Iron, specifically her evidence that:
9. In addition, since CLCFN has received an offer from Canada to settle an outstanding Treaty obligation for \$150,000,000.00, there has been a recent surge of interest from many people who are now claiming they are entitled to citizenship in CLCFN including declaring their interest in running for office of Chief or Council who previously had no interest in CLCFN or who were previously advocating on behalf of other Indigenous groups such as the Metis organization or other First Nations.

[126] The CLCFN submits that this was the rationale behind the Probationary Period and Restricted Rights Period in the Citizenship Law. And, overall, the Citizenship Law sought to balance various concerns and interests of the CLCFN members.

[127] In addition to the CLCFN's evidence as to the context of the Citizenship Law, it is also of note that the "statement of intent and notice" contained in section 1.0 of the Citizenship Law includes that:

1.03 The First Nation has jurisdiction over Citizenship as an essential function of government and self-determination, based upon its unique culture, traditions, values, heritage and history.

1.04 Citizenship is a core jurisdiction that should be maintained through customary and traditional processes and a determination of Citizenship is integral to the First Nation.

1.05 Determination of Indian status and Citizenship based on gender as set out in the Indian Act has been found to be discriminatory by courts in various jurisdictions and is contrary to the United Nations International Covenant on Civil and Political Rights.

1.06 This Citizenship Law is enacted to reflect the First Nation determining its own Citizenship in accordance with its historical practices, culture, traditions, values, heritage, history, and inherent rights.

1.07 This Citizenship Law and its processes shall be interpreted and applied in accordance with principles of fundamental fairness including rules of natural justice, inherent customary laws, and traditions and values of the First Nation.

1.08 This Citizenship Law shall not be interpreted as contrary to s. 15 of the Charter of Rights and Freedoms.

[128] Further, section 6.01 describes the purpose of the Citizenship Law, being to set out rules: to determine who may or may not enjoy the privilege of being a citizen; to establish, maintain, and administer the Citizenship List; to protect the continued existence of the citizens of the CLCFN; and, set out the rights possessed by those who enjoy the privilege of being a citizen of the CLCFN.

[129] The Citizenship Law also sets out factors for Council to consider when deciding whether to accept an application for citizenship that bear in mind the available resources:

- a) the First Nation has sufficient resources to address and protect the health, welfare and social well-being of all of its existing Citizens;
- b) the First Nation has sufficient resources to address all current social, housing, health and welfare of its existing Citizens;
- c) the First Nation has sufficient housing, land, and other resources to accommodate new Citizens;

- d) the First Nation-owned entities that support various community investments and Citizenship initiatives are not compromised as a result of accommodating new Citizens; and
- e) any other considerations or information the Council deems material or relevant to its decision whether to approve the application of new Citizens.

(section 18.08)

[130] I accept that in drafting and crafting the Citizenship Law, the CLCFN attempted to balance granting citizenship to potential applicants and fairness to the community as a whole. The statement of intent illustrates there was no intent to discriminate based on gender, which was recognized as a live issue. Rather, the intent was to reflect the CLCFN determining its own citizenship in accordance with its historical practices, culture, traditions, values, heritage, history, and inherent rights. Further, the CLCFN found that it was required to grandfather in all existing members, as discussed above. Faced with this, it chose not to automatically grant membership to all individuals on the ISC list, some of whom were previously denied membership because of past gender discrimination, as it did not know whether everyone on that list was interested in becoming a member. I also note that, when cross-examined, Craig McCallum explained that in 2020 there were approximately 2,000 eligible adults on the ISC list but only approximately 700 of them are on the CLCFN voter list. Thus, granting automatic citizenship to everyone on the ISC list would have the effect of nearly tripling CLCFN citizenship overnight. When appearing before me, the CLCFN also argued that unintended consequences could potentially arise from unilaterally granting membership to the remaining approximately 1,300 individuals.

[131] In sum, I accept that the CLCFN, for the purpose of protecting its culture, traditions and values, developed a process whereby individuals who do not automatically have citizenship can apply to obtain citizenship.

[132] Having considered the context of the Citizenship Law, the question is whether the distinction created between those individuals that need to apply, and if granted are subject to limitations such as the Restricted Rights Period, and those that are granted automatic citizenship creates a burden or denies benefits that reinforces, perpetuates, or exacerbates disadvantage.

[133] Section 18.03 of the Citizenship Law requires applications for citizenship to include the following documentation: birth certificate; status under the ISC Band List of Indian Registry maintained by ISC; marriage or divorce certificate; a genealogy chart that includes the names of the applicant's parents and grandparents; a criminal record and vulnerable sector check; agreement that the applicant will not be entered on the Citizenship List and be a citizen until they complete the application process; a current address for service; and, such further and other information as may be required by the Citizenship Review Panel or Council.

- [134] A completed application will be reviewed by the Citizenship Review Panel. The Panel will advise, in writing, of their recommendation as to whether to approve the application based on whether they are satisfied or not that: i) the person is duly eligible for citizenship; ii) the applicant is of good character; and iii) granting of citizenship will not be harmful, detrimental, or contrary of the interests of the First Nation (s 18.07). Upon receipt of that recommendation, Council will decide whether to approve or deny the application. Council can take into consideration the recommendations of the Citizenship Review Panel and choose to dismiss or adopt those recommendations upon considering the factors set out in section 18.08.
- [135] In terms of the requirement to submit an application with the specified documentation, I am not persuaded that the burden of doing so is such that it amounts to a burden that exacerbates or perpetuates disadvantage of those individuals who are not automatically granted citizenship. The application process is not onerous. It applies to every individual who seeks citizenship, not just those within historically discriminated against group. The application process itself does not discriminate on the basis of sex/gender. The application process achieves the objective of initiating a process by which citizenship can be obtained by those who were previously discriminated against by way of the 1987 Membership Code, and others. And, although there is risk that citizenship will not be granted, there is also an appeal mechanism.
- [136] I note that to be eligible for citizenship an individual must be a status Indian. The acquiring of that status also requires the making of an application. Specifically, subsection 5(5) of the Indian Act states that to be registered on the Indian Registry the name of an individual who is entitled to be registered is not required to be recorded in the Indian Register unless an application for registration is made to the Registrar (Indian Act s 5(5)).
- [137] Bearing in mind the legislative intent discussed above and the balance between admitting citizens while maintaining the integrity of the community, I conclude that in these circumstances the requirement to apply for citizenship does not, in and of itself, impose a burden or deny a benefit that reinforces, perpetuates, or exacerbates disadvantage.
- [138] While the Applicants challenge the Citizenship Law as a whole, this is based on the distinction between automatic citizenship and the requirement to apply for citizenship. Because I have found that the requirement to apply for citizenship does not impose a burden that perpetuates disadvantage on historically discriminated against prospective citizens, I do not agree that the whole of the Citizenship Law, for that reason, infringes section 15 of the Charter. Nor do its specific provisions that pertain to the automatic right of citizenship (section 7) and the requirement to apply for citizenship (sections 8 and 18).
- [139] I note in passing here that while the Applicants also list in the Notice of Application and the Notice of Constitution Question sections 9 and 19 of the Citizenship Law, these are concerned with the additional citizenship criteria that will be considered when an application is made (but which are not necessarily determinative (section 9)) and notice of

approval/denial of the application (section 19). While these sections are concerned with the process of determining an application, they are not concerned with the distinction between automatic citizenship and the requirement to apply for citizenship. Nor are they specifically addressed in that context by the Applicants. Accordingly, they will not be further addressed in these reasons.

- [140] However, there is also the discretionary Probationary Period. Under section 12.01, Council may impose a period of probationary conditional citizenship of a maximum of two years so that the applicant can have the opportunity to establish or re-establish social and cultural ties with the First Nation, to learn the First Nation's customs, traditions, values, heritage and history and otherwise adopt the way of life of the First Nation. At the end of the Probationary Period, or sooner, if agreed by the applicant and Council, citizenship can be granted.
- [141] This is followed by the Restricted Rights Period, which is mandatory. Under section 12.02, for the first five years from "conditional acceptance," new citizens who have completed any imposed probationary period are not eligible to:
- a) run for office of Council in any Canoe Lake Cree Nation First Nation Election;
 - b) receive any per capita distribution payments issued by the First Nation from any source;
 - c) receive funding of any kind from any monies distributed or granted from the First Nation for any purpose including but not limited to funds from any Trust Agreement, for educational purposes, or for community development purposes; and
 - d) receive services in relation to housing matters including making applications to receive housing owned and managed by the First Nation.
- [142] In my view, the optional Probationary Period does not deny a benefit that reinforces, perpetuates, or exacerbates disadvantage. In an attempt to ensure its citizens understand and adopt its customs, traditions, values, heritage and history, the CLCFN can choose which prospective applicants require re-integration and which applicants are already sufficiently integrated and do not require such a period. The period is a maximum of two years and can be shorter or even eliminated.
- [143] This would mean that applicants like Laura Bird, who have lived on the CLCFN reserve for significant periods of or their entire life, who have a clear connection to the community and who have only been denied automatic citizenship because of the past discrimination based on sex – which discrimination this is explicitly recognised in the Citizenship Law – could be granted immediate citizenship without a Probationary Period. All that is required is that they apply. For other citizenship applicants, the CLCFN could more gradually allow them to be granted citizenship by utilizing the application process and Probationary Period.

- [144] I do not reach the same conclusion with respect to the mandatory Restricted Rights Period. While this is also temporary, it is in addition to the Probationary Period, it is much longer and it applies to all prospective applicants without affording Council the discretion to shorten or remove it. In my view, for the category of individuals, including the Applicants, who have previously been prohibited from obtaining membership based on discriminatory provisions that violate section 15 of the Charter, a mandatory restriction of rights once citizenship is granted is a burden and denies a benefit perpetuating disadvantage.
- [145] There is no evidence in the record before me which explains why a five year Restricted Rights Period – in addition to the two year Probationary Period which is explicitly described as providing an opportunity to establish or re-establish social and cultural ties with the CLCFN, to learn its customs, traditions, values, heritage and history and otherwise adopt its way of life – supports the legislative purpose of the Citizenship Law. It would appear that the purpose of reintegration, including preventing admission of those who may only be seeking to benefit financially from citizenship can be achieved by the optional Probationary Period. In my view, an additional five-year restriction on political, funding and housing rights, once the requirements for citizenship have been met and citizenship has been granted, even in light of the legislative intent, denies a benefit and perpetuates disadvantage on historically discriminated against prospective citizens.
- [146] Therefore, I conclude that under the second step of the section 15 analysis, the mandatory Restricted Rights Period under section 12.02 of the Citizenship Law, infringes the guarantee of equality under subsection 15(1) of the Charter.

Issue 3: Does section 25 of the Charter act as a shield? Applicants' Position [147] The Applicants written submissions on section 25 of the Charter predate the Supreme Court's decision in *Dickson* and are not detailed. They include the following:

37. Even if it is found by the Supreme Court to be appropriate for Indigenous Nations to discriminate based on residency requirements or other grounds, this case is about discrimination on the basis of sex. Section 28 of the Charter, expressly provides that notwithstanding anything else in the Charter, including s. 25, the rights referred to are guaranteed equally to men and women. Section 28 prohibits Canoe Lake from invoking s. 25 to shield against discrimination based on sex (McCarthy at para 6).
- ...
39. Additionally, even if establishing rules of citizenship was an Aboriginal right under s. 35 of the Charter, s. 35(4) prohibits sex based inequality of Aboriginal rights. Subsection 35(4) of the Constitution Act, 1982 makes it clear that all aboriginal and treaty rights are guaranteed equally to male and female persons. Indigenous Nations cannot deny Aboriginal rights based on gender, even under s. 35.

[148] When appearing before me, the Applicants acknowledged the purpose of section 25 as described in Dickson (see para 143) as well as the framework for assessing “other rights” under section 25 (Dickson at paras 178-183) which the Applicants submitted is difficult to achieve and that the CLCFN has not done so in this case. The Applicants submitted that the Indigenous difference that the CLCFN attempts to illustrate is a continuation or echo of the colonial distinction. While there may be an Indigenous difference that the CLCFN is attempting to protect, the onus of proof is on the CLCFN. And, even if an “other right” is established, the CLCFN has not established an irreconcilable conflict as required by the third element of the Dickson framework (Dickson at paras 161, 181). The Applicants argued that section 15 and section 25 of the Charter could be reconciled, pointing to McCallum, by giving the CLCFN the opportunity to come back with a solution. This shows the possibility of dual compliance.

[149] As to the fourth element, the Applicants submit that in this case, section 28 of the Charter and section 35(4) of the Constitution Act, 1982 are clear limits on any protection provided by section 25. The Applicants also note that in Dickson the Supreme Court expressed that great caution should be exercised when the claim is brought by an Indigenous person against their own community so as to avoid unnecessarily or unwittingly imposing incompatible ideas or legal principles upon the distinctive Indigenous legal system (at para 172).

The CLCFN’s position [150] The CLCFN submits that it has an “other right” to determine its citizens and define the criteria for citizenship in the First Nation. The “other right” is similar to that found in Dickson described as “a right to restrict the membership and composition of its governing bodies” as well as in Houle. Here, the CLCFN submits that First Nations have a right to define their citizens and set criteria for citizenship. This qualifies as a right under section 25 of the Charter because it protects Indigenous difference (citing Dickson at para 204).

[151] The CLCFN emphasizes that the right of a First Nation to define itself and set the criteria for its citizenship speaks to sovereignty and is fundamental. It notes that this right is expressly recognized in the United Nations Declaration on the Rights of Indigenous Peoples [UNDRIP] Article 33. UNDRIP has been received in Canada and is affirmed as a source for the interpretation of Canadian law (United Nations Declaration on the Rights of Indigenous Peoples Act, SC 2021, c 14, Preamble). Additionally, it would be a component of the right to self-government which has also been recognized by Parliament (An Act Respecting First Nations, Inuit and Métis children, Youth and Families, SC 2019, c 24, ss 8, 18; see Reference re An Act respecting First Nations, Inuit and Métis children, youth and families, 2024 SCC 5 at paras 56-66).

[152] The CLCFN disagrees with the Applicants that section 25 of the Charter has no application due to section 28. It submits that the Applicants have not demonstrated that each of the provisions they impugn create a distinction on the basis of sex/gender.

[153] The CLCFN submits that its right to define the criteria for membership cannot be reconciled with the Applicants' request to remove that right and return CLCFN citizenship decisions to the Minister. In this circumstance, section 25 operates as a shield of the CLCFN's collective rights and that the Applicants' Charter challenge can be dismissed on this basis.

[154] The CLCFN submits that it adopted the Citizenship Law pursuant to its right to decide who is a member of its Nation. It must be given the constitutional protection afforded by section 25 to self-determine and make decisions about the community's collective needs.

Analysis [155] In *Dickson*, the Supreme Court of Canada described the purpose of section 25 as "ensuring that the designated rights and freedoms of Indigenous peoples are protected where giving effect to conflicting individual Charter rights and freedoms would diminish Indigenous difference" (at para 117, see also paras 107, 143). Where the application of an individual right would undermine in an essential or non-incidental way the Indigenous difference protected by the collective right, section 25 directs that the collective right be given primacy (para 143). The Court went on to set out a framework to be applied when a party is seeking to invoke section 25 in the face of a Charter claim:

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

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

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

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

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

[156] For the reasons set out below, I find that section 25 of the Charter does not act as a shield to the breach of subsection 15(1) of the Charter.

Step 1 – prima facie breach

[157] Having found above that a prima facie breach of section 15 of the Charter is established with respect to section 12.02 of the Citizenship Law, this step is met.

Step 2 – “other right”

[158] The CLCFN submits that it has an “other right” to determine its citizens and define the criteria for citizenship in the First Nation.

[159] To establish that a collective Indigenous right constitutes an “other right,” the CLCFN “must demonstrate the existence of the right and also show that the right, or its exercise, protects interests associated with Indigenous difference” (Dickson at para 209).

[160] In Dickson, the Supreme Court found that the adoption of a residency requirement in Vuntut Gwitchin First Nation’s [VGFN] constitution, which required elected Chief and Councillors to reside on or relocate to VGFN’s settlement lands, was an exercise of an “other right” under section 25. The VGFN had a right to restrict the membership and composition of its governing bodies and its exercise of that right through the residency requirement, which protected interests associated with Indigenous difference. The Supreme Court concluded that, whether or not the residency requirement might also be understood as an exercise of an inherent right to self-government, it was an “other right” protected under section 25 (Dickson, at para 204).

[161] In Houle, I found that the authority and right to effect and impose a residency requirement, which restricted the eligibility of Swan River First Nation members to be nominated to run for office, arose by way of the that First Nation’s Election Regulations, which was a statutory right and an “other right” under section 25 (at paras 97-104). Similarly, in *Cunningham v Sucker Creek First Nation* 150A, 2025 FC 1174 [Cunningham 2025], I determined that the residency requirement in that First Nation’s election regulations, which required electors to continuously reside on the Sucker Creek First Nation [SCFN] reserve for at least six months prior to the date of their nomination to run for election to the positions of Chief or Councillor, unjustifiably infringed the applicant’s rights under section 15 of the Charter. However, the residency requirement was protected, or shielded, by section 25 of the Charter. As I had previously found in Houle, it was not necessary to determine whether the source of the “other right” arose from SCFN’s inherent right of self-government. That was because one source of the “other right,” being the right to effect and impose the residency requirement, which restricted the eligibility of SCFN members to be nominated to run for office, that is, the right to restrict the membership and composition of its governing bodies, arose by way of the election regulations, which codified SCFN election customs. This was a statutory right as the exercise of SCFN’s authority to govern via the election regulations stemmed from, and was tethered to, federal law, being the Indian Act (Cunningham 2025 at para 46; Houle at paras 96-104).

- [162] My point here is that whether or not the Citizenship Law (in particular the right to determine and to define the criteria for citizenship), as the CLCFN suggests, may be an exercise of an inherent right to self-government, I need not make that determination. This is because one source of the authority and right to effect and impose the impugned provisions determining membership and limiting membership rights, arises by way of the Citizenship Law, which is a statutory right and therefore an “other right” under section 25 of the Charter. While I appreciate that Houle and Cunningham concerned a right to restrict membership and composition in the context of the First Nations governing body, it appears to me that the same principle would apply with respect to the restriction of membership and membership composition of a First Nation itself, which is governed by the Citizenship Law and section 10 of the Indian Act.
- [163] That said, the CLCFN must also establish that the right to determine its citizens and define criteria for citizenship protects Indigenous difference such that it should be protected from abrogation or derogation by the Applicants’ section 15 Charter right (Dickson at para 216). The Supreme Court of Canada explained the meaning and importance of Indigenous difference in Dickson:
- [136] In Kapp, Bastarache J. drew upon Professor Macklem’s view that the broad scope of the interests of the Indigenous peoples of Canada that may be recognized as constitutionally entrenched are those related to “[I]ndigenous difference”. Professor Macklem observed that Indigenous difference reflects “four complex social facts [that] lie at the heart of the relationship between Aboriginal people and the Canadian state” (p. 4). These are: “. . . Aboriginal cultural difference, Aboriginal prior occupancy, Aboriginal prior sovereignty, and Aboriginal participation in a treaty process . . .” (p. 4).
- ...
- [138] Indigenous difference is an appropriate criterion for circumscribing the “other rights or freedoms” under s. 25 because it helps identify the contours of the provision’s protective purpose if there is a conflict with an individual Charter right. Indigenous difference connects the “other righ[t] or freedo[m]” to the collective minority interest that s. 25 is designed to serve. When Indigenous difference is not shown to underlie the competing collective interest, the ultimate justification for setting aside the individual Charter right falls away. The concept of Indigenous difference connects the “other rights” to the rest of s. 25 and gives content to what it means for a right or freedom to belong to or benefit — to meaningfully “pertain to” — the Aboriginal peoples of Canada.
- [164] The evidence before me on this point is limited. However, it is sufficient to demonstrate the CLCFN’s right to determine its citizens and define criteria for citizenship protects Indigenous difference, in that it helps to protect cultural differences in assuring its citizens are exposed to, learn and appreciate its culture and traditions – thereby preserving them – and that it may also protect Indigenous differences in that it relates to prior sovereignty as the CLCFN would have historically decided who are its citizens.

Step 3 – irreconcilable conflict

- [165] The third step requires the Court to determine whether the CLCFN has established that the conflict between the two rights is irreconcilable, such that the section 25 right would be protected from the abrogation or derogation that would flow from giving effect to the Applicants' section 15 right (Dickson at para 219).
- [166] The Supreme Court in Dickson addressed the question of whether a Charter right and "other right" are irreconcilable including as follows:
- [164] In sum, s. 25 does not serve as a "shield" whenever a right falling within its scope is at issue. Rather, when a Charter right is engaged by the exercise of an Aboriginal, treaty, or other right, courts must consider whether the two rights can be reconciled. If giving effect to a Charter right would only affect incidentally or in a non-essential manner the s. 25 identified right — in the sense that it would not undermine Indigenous difference — or if the Charter right can be interpreted in a manner consistent with the Aboriginal, treaty, or other right, then it would be inappropriate to give priority to the right within the scope of s. 25. It is only when the s. 25 right is affected in a non-incidental manner, thereby creating an irreconcilable conflict between the two rights, that s. 25 will protect the Indigenous right by rendering the individual right ineffective to the extent of the conflict. In this sense, s. 25 will sometimes function as what author Arbour describes as a "pop up shield" (p. 13). At other times, it will have only an interpretive role.
- [167] The CLCFN submits that its right to define the criteria for membership cannot be reconciled with the Applicants' request to remove that right and return the CLCFN citizenship decisions back to the Minister. Giving effect to the Applicants' section 15 Charter right, in the context of the Citizenship Law as a whole, would not affect only incidentally, or in a non-essential manner, the CLCFN's section 25 right to determine the criteria for membership and the members of the CLCFN. That is because it would undermine Indigenous difference.
- [168] The CLCFN submits that the Applicants' approach is that either automatic citizenship is granted to all of the approximately 2,000 members listed in the ISC which would, overnight almost triple the current membership of 700 individuals, or the membership list be returned to ISC control. This demonstrates that the rights are irreconcilable.
- [169] The Applicants' only submission regarding a method by which their individual section 15 Charter rights can be reconciled with the CLCFN's collective section 25 Charter rights is that, because in McCallum the 1987 Membership Code was sent back to the CLCFN to make another attempt at drafting a constitutional citizenship code, dual compliance is possible.
- [170] I agree with the CLCFN that, in light of the development of the Citizenship Law, the Applicants' request to return control of the CLCFN's citizenship list to the ISC would be irreconcilable with the CLCFN's right to define its membership.

- [171] However, in my view, this is not the only possible relief in this case.
- [172] Ultimately, and viewed broadly, in the context of section 25 of the Charter the Citizenship Law recognizes and serves to protect Indigenous difference by ensuring that individuals who wish to become Citizens are exposed to and learn about the CLCFN's culture and traditions before being granted citizenship. And, by doing so, ensuring that those culture and traditions are preserved now and for future generations. Removing this requirement would undermine, in a non-incidental way, the CLCFN's right to effect and impose law that determines who its citizens are the criteria for citizenship eligibility. That is, to decide on CLCFN's membership.
- [173] That said, the Citizenship Law also includes section 12.02, the mandatory Restricted Rights Period, which goes beyond the more general purpose of the Citizenship Law and, unlike the application requirement and the section 12.01 Probationary Period, breaches the Applicants' section 15 Charter right because it perpetuates the historic discrimination based on sex. I am not persuaded that that provision serves to protect Indigenous difference given that this is already protected by the section 12.01 permissive Probationary Period. Given this, and as will be discussed with respect to remedies, section 12.02 cannot stand.

Step 4 – further limitations

- [174] In *Dickson*, the Supreme Court held that even when section 25 of the Charter would otherwise prioritize an Aboriginal, treaty, or other right, there may be other relevant limitations on the application and effect of section 25. It noted as examples, section 28 of the Charter and subsection 35(4) of the Constitution Act, 1982. "These provisions – which apply notwithstanding any other provision in the Charter or the Constitution Act, 1982, respectively – ensure that a right protected under s. 25 does not shelter gender-based discrimination" (*Dickson* at para 173). Stated another way, "the primacy afforded to the collective rights under s. 25 is subject to the equality guarantee for 'male and female persons' under s. 28 of the Charter and s. 35(4) of the Constitution Act, 1982" (*Dickson* at para 110).
- [175] However, the Supreme Court held that precisely demarcating the limits of section 25's protections, including those resulting from other constitutional sources, was best left to cases when they arise on the facts (*Dickson* at para 173).
- [176] This is such a case.
- [177] The Applicants argue that section 28 of the Charter prohibits the CLCFN from invoking section 25 to shield against discrimination based on sex. They also argue that subsection 35(4) of the Constitution Act, 1982 (with respect to their section 35 submissions which are addressed below) makes it clear that all aboriginal and treaty rights are guaranteed equally to male and female persons.

- [178] The CLCFN argues that the Applicants have not demonstrated that each of the provisions they impugn create a distinction on the basis of sex/gender. Although the Applicants challenge the entire Citizenship Law, they do not specify how provisions other than the grandfathering provision make a distinction based on sex/gender.
- [179] In *McCarthy*, the First Nation conceded that a voting policy and a prohibition against a person living in a common law marriage being eligible to run for Chief and Council in the First Nation's election regulations, violated section 15 of the Charter (at para 158). Justice Favel also noted that issues surrounding the transmission of Indian status have been described as discrimination on the basis of sex (citing *McIvor*, at paras 92-93). Similarly, he found that the voting policy created a distinction between First Nation members due to the historical discrimination suffered by women who married non-status men (at para 159). On the second part of the section 15 test, Justice Favel found that the voting policy denied certain First Nation members from participating in their community's governance by denying them the ability to vote (at para 161). He concluded the voting policy infringed section 15 of the Charter on the basis of sex (at para 163).
- [180] With respect to the application of section 28 to section 25, he stated:
- [139] I agree with the Applicants that, in this particular case, section 25 of the Charter does not shield the Bill C-31 Voting Policy or the Common-Law Marriage Prohibition.
- [140] First, section 25 cannot apply to shield the Bill C-31 Voting Policy because, as *WLFN* concedes, the Bill C-31 Voting Policy discriminates on the basis of sex (*McIvor*, at paragraphs 87-94). Section 28 of the Charter states that "notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons." As noted by Justice Bastarache in *Kapp*, [at paragraph 97]:
- Is this shield absolute? Obviously not. First, it is restricted by s. 28 of the Charter which provides for gender equality "[n]otwithstanding anything in this Charter". Second, it is restricted to its object, placing Charter rights and freedoms in juxtaposition to aboriginal rights and freedoms. *R. v. Van der Peet*, 1996 CanLII 216 (SCC), [1996] 2 S.C.R. 507, at para. 46, provides guidance in that respect. [Emphasis added.]
- [141] Having found that the Charter applies to *WLFN's* Election Regulations, section 28 clearly limits the application of section 25 with respect to the Bill C-31 Voting Policy.
- [181] Similarly in *Collins*, Justice Régimbald found that a voting prohibition contained in the First Nations election regulations violated section 15 of the Charter (at paras 105-111). He agreed with Justice Favel's comments in *McCarthy* with respect to section 28 and 25 of the Charter and held that section 28 precludes distinctions on the basis of sex, that would not otherwise be protected under a section 25 asserted "aboriginal, treaty or other right" (para 122).

[182] Applying this to the case at hand, given that the violation of section 15 with respect to the Restricted Rights Period was on the basis of sex, section 28 of the Charter prevents the CLCFN from utilizing section 25 as a shield to save that provision.

Step 5 – section 1 of the Charter/ Issue 4

[183] This step also comprises the fourth issue identified in this matter, being if there is a breach of section 15, which is not shielded by section 25, whether the breach justified under section 1 of the Charter?

[184] I will address them together here.

Applicants' Position [185] The Applicants submit the discrimination cannot be justified under section 1 of the Charter. First, having established discrimination on the basis of sex under section 15 of the Charter, this ends the inquiry. This is because establishing discrimination on the basis of sex necessarily means that the Citizenship Law "fails to guarantee the Aboriginal right to be an Indigenous person and member of one's own community to men and women equally, contrary to subsection 35(4) of the Constitution Act, 1982". Given that subsection 35(4) is an absolute and unqualified right unrestrained by section 1 of the Charter, this ends the inquiry.

[186] In the alternative, the Applicants submit that the limit is not justified under section 1 of the Charter. Applying the Oakes test (*R v Oakes*, [1986] 1 SCR 103 at para 13), there is no pressing and substantial objective as the objects of the limitations on equality rights appear to be based on generalized discriminatory beliefs. Even if there is a pressing and substantial objective, the limitations on the equality rights are not rationally connected to those purposes, nor are they minimally impairing. Finally, any salutary effects of the Citizenship Law are vastly counterbalanced by the deleterious impacts and result in the disadvantaged group bearing a completely disproportionate burden. The Applicants written submissions elaborate on each aspect of the Oakes test.

The CLCFN's Position [187] The CLCFN submits that if section 25 of the Charter does not shield the entirety of the Citizenship Law, any breaches of section 15 would be saved by section 1. In that regard, one of the challenges arising from the Applicants' position is that, while they appear to take issue with specific provisions of the Citizenship Law, they seek to have the entire law declared unconstitutional, rather than just specific provisions.

[188] The primary purpose of the Citizenship Law, as a whole, is self-determination and the reclamation of the CLCFN's customary law-making authority around citizenship. The CLCFN submits that permitting the CLCFN to define itself and move out of the colonial decision making that was imposed on them is a pressing and substantial objective. Another objective is to provide a process that permits anyone to apply and have their application considered, regardless of gender.

- [189] When drafting the Citizenship Law, the CLCFN attempted to strike a balance between fairness to potential applicants but also fairness to the community as a whole. The compromise that was established is that potential citizens with connections to the CLCFN can re-apply, be fairly considered and have a period of time to re-integrate before becoming full citizens. This is a reasonable solution that minimally impairs the rights of the Applicants and others in their situation. As to the Restricted Rights Period, this is in place as a result of concerns that certain prospective members are only interested in the financial benefits of citizenship. Certain limitations imposed on citizenship for a period of time is meant to address this concern. It is a pressing and substantial objective.
- [190] The CLCFN submits that the Citizenship Law in general, and the impugned provisions in particular, all serve pressing and substantial objectives of the CLCFN including:
- (a) To restore and re-establish the Nation's law-making authority and ensure that decisions about who is a Citizen are made by the First Nation – not by an external party like the government of Canada;
 - (b) To rectify the historical discrimination that occurred against Indigenous women by giving them the right to apply and be made a Citizen, regardless of their gender;
 - (c) To ensure that prospective Citizens are not only interested in the financial benefits of Citizenship, but are committed to participating and discharging the responsibilities of Citizenship;
 - (d) To comply with legal constraints that continue to be imposed upon the CLCFN by the government of Canada, including requirements in the Indian Act that protect the acquired rights of certain categories of status Indians;
- [191] With respect to proportionality, the CLCFN submits that the means employed to meet the objectives are rationally connected, minimally impairing and proportionate. The “not particularly onerous” threshold of it being reasonable to suppose that the limit may further the goal has been met here with respect to the Restricted Rights Period, the grandfathering provision (automatic citizenship), the Métis Scrip Provision and the entire law as each will further at least one of the identified objectives.
- [192] Considering a range of reasonable options available to address the goal, the impugned provisions, and the law as a whole, minimally impair the rights of prospective citizenship applicants. The CLCFN submits that its laws are no more onerous than the laws of other First Nations regarding membership.
- [193] Finally, the CLCFN submits that the positive benefits of the Citizenship Law far outweigh any restrictions on the Applicants' equality rights. The Applicants can apply for citizenship, the fact that it is not automatically granted is a minimal impact on their rights.

Analysis [194] Section 1 states that the Charter “guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”

[195] The Supreme Court of Canada re-stated the Oakes test in Ontario (Attorney General) v G, 2020 SCC 38 [Ontario v G], as follows:

[71] The Attorney General must establish, on a balance of probabilities, that the infringement of s. 15(1) is justified under s. 1. First, there must be a pressing and substantial objective for the infringing measure. Second, the infringing measure must not disproportionately interfere with s. 15(1) rights in furtherance of that objective. The second part of the Oakes test has three parts. The state must demonstrate the infringement is rationally connected to the objective, the means chosen to further the objective interfere as little as reasonably possible with the s. 15(1) right, and the benefits of the infringing measure outweigh its negative effects (see R. v. Oakes, 1986 CanLII 46 (SCC), [1986] 1 S.C.R. 103, at pp. 138-40; Vriend, at paras. 109-10; Alberta v. Hutterian Brethren of Wilson Colony, 2009 SCC 37, [2009] 2 S.C.R. 567, at paras. 48, 53 and 76-78).

[72] The Attorney General’s burden is not to establish that the legislative scheme as a whole is a reasonable limit on s. 15(1) that can be demonstrably justified in a free and democratic society, but to justify the infringing measure itself. As this Court has underscored, “it is the infringing measure and nothing else which is sought to be justified” (RJR-MacDonald Inc. v. Canada (Attorney General), 1995 CanLII 64 (SCC), [1995] 3 S.C.R. 199, at para. 144; Toronto Star Newspapers Ltd. v. Canada, 2010 SCC 21, [2010] 1 S.C.R. 721, at para. 20). The objective of the infringing measure is thus the proper focus of the analysis; however, it may be necessary to situate the infringing measure in the context of the broader legislative scheme to understand the limitation’s function (Vriend, at para. 111).

[196] I agree with the CLCFN that the Applicants’ decision to challenge the constitutionality of the whole of the Citizenship Law, rather than those specific provisions with which it takes issue, is problematic. This is not a circumstance where, for example, the legislative jurisdiction of the CLCFN is challenged, thereby bringing the whole of the legislation into question (such as Reference re An Act respecting First Nations, Inuit and Métis children, youth and families, 2024 SCC 5).

[197] And, as the Supreme Court stated in Fraser, “it is the limitation on equality rights that must be justified, not the legislative scheme as a whole” (at para 125), citing Alliance at para 45:

[45] Where a court finds that a specific legislative provision infringes a Charter right, the state’s burden is to justify that limitation, not the whole legislative scheme. Thus, the “objective relevant to the s. 1 analysis is the objective of the infringing measure, since it is the infringing measure and nothing else which is sought to be justified” (RJR-MacDonald Inc. v. Canada (Attorney General), 1995 CanLII 64 (SCC), [1995] 3 S.C.R. 199, at para. 144; R. v. K.R.J., 2016 SCC 31 (CanLII), [2016] 1 S.C.R. 906, at para. 62).....

- [198] I have determined above that the requirement to apply for citizenship does not, in and of itself, breach section 15 of the Charter. That is, that the Applicants are not discriminated against on the basis of sex because they must apply for citizenship rather than having it afforded to them automatically. The Citizenship Law, unlike its predecessor the 1987 Membership Code, serves to provide a path forward to acquiring citizenship, all that is needed is that an individual apply. Nor is the Probationary Period infringing.
- [199] However, I have also found above that section 12.02, the mandatory Restricted Rights Period, does violate subsection 15(1) of the Charter. Therefore, only that provision will be considered for purposes of the section 1 analysis. However, that provision will also be considered in the context of the broader legislative scheme, the Citizenship Law, in order to understand its function.
- [200] In order for the Restricted Rights Period to be a reasonable limit of the Applicants' section 15 Charter right that is demonstrably justified, the CLCFN must establish that in implementing the restricted rights period, it was pursuing a pressing and substantial objective; the means chosen to implement that objective is rationally connected to the objective and must minimally impair the Charter right; and, there is proportionality between the effects of the measure and the identified objective.
- [201] For the reasons set out below, I find that section 1 of the Charter does not justify the breach of subsection 15(1) by section 12.02 of the Citizenship Law.

Pressing and substantial objective

- [202] As the Supreme Court of Canada stated in *R v K.R.J.*, 2016 SCC 31 [K.R.J.]:
- [61] A law that limits a constitutional right must do so in pursuit of a sufficiently important objective that is consistent with the values of a free and democratic society. This examination is a threshold requirement that is undertaken without considering the scope of the right infringement, the means employed, or the relationship between the positive and negative effects of the law.
- [203] The CLCFN submits that the primary purpose of the Citizenship Law is sovereignty, self-determination and the reclamation of the CLCFN's customary law-making authority around citizenship. I accept this to be the purpose of the Citizenship Law based on the statement of intent (s 1.0); the declaration that the CLCFN is asserting its sovereignty collectively by the inherent right to determine its own Band Citizenship based on genealogy, heritage, traditions, culture, values, customs and beliefs (s 3.01); and, the purpose of setting out rules to determine who can be a citizen, to establish and maintain the Citizenship List, protect the continued existence of citizens, and set out the rights of citizens (s 6.01). This primary purpose serves to provide context within which section 12.02, the Restricted Rights Period, is situated.

- [204] The Applicants do not directly address the overall purpose of the Citizenship Law. They submit that the Citizenship Law is being challenged as under inclusive and, therefore, the question is: was there a pressing and substantial objective that was satisfied by preserving the status quo of the comparator group, the existing citizens, while not extending that status to the discriminated against groups.
- [205] The Applicants acknowledge that protecting one's cultural heritage could potentially constitute a pressing and substantive objective, but assert that this must be defined with the requisite specificity and cannot merely be overly abstract or idealized objectives. They submit that the cross-examination testimony of Bernice Iron and Gladys Iron provided overly abstract or idealized objectives that are incapable of clear definition. And, once probed tended to indicate that the purpose of the restrictions on prospective citizens was based more on a generalized fear of outsiders that manifested in exclusionary rules. When appearing before me, the Applicants also argued that protecting the CLCFN's culture is a lofty objective but is overly broad and therefore cannot be protected by section 1 of the Charter (*R v Brown*, 2022 SCC 18 at paras 115-116).
- [206] The Applicants submit that the objective of the restrictions on the Applicants' section 15 rights in the Citizenship Law "is exactly what it appears to be, which is to restrict the rights of the Applicants, and those like them, based on generalized stereotyped beliefs and fears about the nature of the discriminated against group. It is based on a stereotyped belief that because of the sex of their parent or grandparent, they are less in tune with the culture of Canoe Lake." The Applicants submit that such an objective can never constitute a pressing and substantial one.
- [207] To the extent that the Applicants are asserting that the primary purpose of the Citizenship Law, and its restrictive provisions, is to intentionally continue the discrimination based on sex that arose from the Indian Act and was continued in the 1987 Membership Code, I do not agree. The purpose of the Citizenship Law is apparent from its stated intent and declaration – which intent explicitly acknowledges the past discrimination based on gender arising from the Indian Act and states that it shall not be interpreted as contrary to section 15 of the Charter. Rather, as the CLCFN submits, it is apparent from the text of the legislation that its primary purpose is to assert sovereignty by controlling its band membership and, for that purpose, providing a path forward by way of the application process and providing rules around acquiring citizenship.
- [208] In that regard, the CLCFN submits, referencing the affidavit evidence of Gladys Iron, that another objective of the Citizenship Law is to provide for a process that permits anyone to apply and have their application considered – regardless of gender. The law aims to "re-integrate members that were taken from [the CLCFN] through colonialism". The Citizenship Law seeks to rectify that through an application process that permits anyone to apply and be considered. The CLCFN submits that while the Applicants wish to see a more drastic remedy to this issue that would automatically make anyone on the ISC List a Citizen, the Citizens of the CLCFN decided on a more gradual process that would permit for

all applicants to be considered on a case-by-case basis. Moreover, the grandfathering requirement (or acquired rights) meant that the CLCFN could not adopt a citizenship law that removed the membership of the existing members and obliged them to reapply. And, even if it could, the practical effect of this would be that when that law was passed there would be no CLCFN citizens. And, to give automatic citizenship to all of the members of the ICS list would immediately increase the citizenship population from approximately 700 individuals to approximately 2,000.

- [209] The CLCFN submits that balancing the rights of those that lost status due to discrimination with the rights of the collective is a difficult but necessary exercise. It notes that the Assembly of First Nations released a Discussion Paper (Assembly of First Nations, “Transition to First Nations Control of Citizenship”, (March, 2020) at 7, online (pdf): <20-03-31-Discussion-Paper-Transition-to-First-Nations-Control-of-Citizenship-final.pdf>) that illustrates the challenge with “automatic” citizenship rights for disenfranchised individuals and how that would impact the collective rights of the First Nations:

Should First Nations be legally obliged to grant individuals citizenship, regardless of the cultural connection to the community? Viewed from the perspective of these individuals, it may seem unfair to be refused citizenship on the grounds of no cultural connection when this lack of connection is not due to their fault or choice but purely the result of discriminatory government policy. Indeed, this could be viewed as a re-entrenchment of the unconstitutional gender discrimination once present in the Indian Act. On the other hand, viewed from the perspective of First Nations collectivities, being forced to grant citizenship to individuals who have no connection to the modern-day culture of that community, and who in some cases have not experienced the lived reality of First Nations peoples in Canada, may be seen as the re-enactment of inequitable government policy. ...

- [210] The CLCFN submits that it wrestled with this exact issue and tried to strike a balance between fairness to potential applicants, but also fairness to the community as a whole. The compromise that was established was that potential citizens with connections to the CLCFN can apply, be fairly considered, and have a period of time to re-integrate into the CLCFN before becoming full citizens. The CLCFN submits that this is a reasonable solution that minimally impairs the rights of people like the Applicants.
- [211] With respect to the Restricted Rights Period, the CLCFN submits it is concerned with prospective members that are only interested in the financial benefits of citizenship without any interest in the responsibilities of citizenship, citing as an example a recent surge of interest in citizenship following an offer from Canada to settle an outstanding treaty obligation. The CLCFN submits that this is the reason certain limitations of citizenship were effected and that this a pressing and substantial objective.
- [212] I note that in considering whether there is a pressing and substantial objective, the relevant objective is that of the infringing measure (*Frank v Canada (Attorney General)*, 2019 SCC 1 [Frank] at para 46; *K.R.J.* at para 62).

- [213] Section 12.01, the Probationary Period restriction, has a similar objective to the entire Citizenship Law – being to determine who can be a citizen of the CLCFN based on tradition, culture, values customs and beliefs. The up to two year Probationary Period is not mandatory and explicitly states that its purpose is to permit an applicant the opportunity to establish or re-establish social and cultural ties with the CLCFN, to learn the CLCFN’s customs, traditions, values, heritage and history and to otherwise adopt the way of life of the CLCFN. In my view, this is a pressing and substantial objective.
- [214] Section 12.02, the mandatory Restricted Rights Period, on the other hand, does not explicitly seek to preserve the CLCFN culture and way of life. It restricts, for the five years after the two-year Probationary Period, the eligibility of new Citizens to run for office, receive per capita distribution payments and to receive funding and housing services. While I appreciate the concern about individuals seeking citizenship solely for the purpose of financial gain and about running for office without knowledge of CLCFN customs and traditions, given the prior two-year Probationary Period, it is difficult to see how the further five-year Restricted Rights Period in section 12.02 has a different pressing and substantial objective. That is, a process for the gradual reintegration of individuals that are entitled to citizenship but who do not have connections to the CLCFN and its culture already exists by way of section 12.01 and there is no evidence in the record before me that explains why a further five years is needed to accomplish that objective.

Rationally connected

- [215] The question at this stage is whether the Restrictive Rights Period in section 12.02 is rationally connected to the objective it was designed to achieve. “The rational connection step requires that the measure not be ‘arbitrary, unfair, or based on irrational considerations’ (Oakes, at p. 139). Essentially, the government must show that there is a causal connection between the limit and the intended purpose (RJR-MacDonald, at para. 153)” (Frank at para 59).
- [216] I am not persuaded that the CLCFN has met its burden in this regard.

Minimally impairing

- [217] The Supreme Court of Canada in Frank described this step as:
- [66] The second component of the proportionality test requires the government to show that the measure at issue impairs the right as little as reasonably possible in furthering the legislative objective (RJR-MacDonald, at para. 160; Oakes, at p. 139). In other words, the measure must be “carefully tailored” to ensure that rights are impaired no more than is reasonably necessary (RJR-MacDonald, at para. 160; Mounted Police Association, at para. 149). However, some deference must be accorded to the legislature by giving it a certain latitude: “If the law falls within a range of reasonable alternatives, the courts will not find it overbroad merely because they can conceive of an alternative which might better tailor objective to infringement” (RJR-MacDonald, at para. 160).

- [218] Similar to my findings above, because the section 12.01 Probationary Period serves to attain the objectives of the Restricted Rights Period, in the absence of any evidence explaining why a further additional, mandatory, period of restricted rights is required, I find that section 12.02 is not minimally impairing.
- [219] Further, section 12.02 captures not only those who may want to become citizens purely to avail of financial and other benefits or those who have no connections to the CLCFN. Section 12.02 also captures individuals who have been living on the CLCFN and have substantial connections to the community and culture and are not only applying to take advantage of financial benefits. And, as that provision is mandatory, and unlike the Probationary Period, there is no discretion of Chief and Council to waive the restricted rights periods for those individuals.
- [220] The optional Probationary Period in section 12.01 is a less impairing way of obtaining the objectives of providing a period of reintegration and delayed access to certain benefits. It can be applied to those that require such probationary periods and not applied to others. The time for such a probationary period is also flexible and can be tailored to the individual. Section 12.01 attains the objectives of 12.02 but in a less impairing way. Therefore, section 12.02 is not minimally impairing.

Proportionality

- [221] This third stage of the test was described in Frank as:
- [76] At the final stage of the Oakes test, it must be asked whether there is proportionality between the overall effects of the Charter-infringing measure and the legislative objective (Oakes, at p. 139; Hutterian Brethren, at paras. 72-73). Whereas the preceding steps of the Oakes test are focused on the measure's purpose, at this stage the assessment is rooted in a consideration of its effects (Hutterian Brethren, at para. 76). This allows a court to determine on a normative basis whether the infringement of the right in question can be justified in a free and democratic society.
- [222] The Applicants submit that whatever the speculative salutary effects of the Citizenship Law may be, they are far outweighed by its deleterious effects. The Citizenship Law perpetuates a two-tiered system of citizenship on the basis of sex, which cannot be justified in a free and democratic society. Vague notions of protecting against outsiders, unmoored from any evidence demonstrating the potential for positive benefit, cannot serve as the basis for perpetuating the continued discrimination against the Applicants.
- [223] Conversely, the CLCFN submits that the last element of the proportionality assessment under section 1 is the "final balancing" – where the Court weighs the salutary effects of the law against the deleterious effects. If this Court finds that one of the impugned provisions impairs the gender equality rights of the Applicants, then the Court is required to weigh whether the positive impacts of the law outweigh any impacts on the gender equality. The CLCFN submits that the positive benefits of the Citizenship Law far outweigh any

restrictions on the Applicants' equality rights. The Applicants can simply apply for citizenship. The fact that this is not automatic is a minimal impact on their rights. On this basis, the CLCFN submits that any elements of the Applicants' Charter challenge that survives section 25 of the Charter would be saved by section 1 of the Charter.

[224] As discussed above, I have found that the Citizenship Law in whole is not infringing as regards to the requirement that the Applicants must apply for citizenship, nor is the non-mandatory Probationary Period.

[225] However, the effect of the Restricted Rights Period in section 12.02 is to perpetuate disadvantage to the category of individuals, including the Applicants, who have been discriminated against and prohibited from obtaining membership based on discriminatory provisions that violate section 15 of the Charter. An additional five-year restriction on political, funding and housing rights, once the requirements for citizenship have been met and citizenship has been granted, has the effect of perpetuating disadvantage on historically discriminated against prospective citizens.

[226] In summary, the CLCFN has not established that section 12.02 has a pressing and substantial purpose, that its effects are rationally connected to its purpose and the provision is not minimally impairing given section 12.01 can meet the purpose of section 12.02 but in a less impairing way. In my view, the breach of the Applicants' section 15 Charter rights in section 12.02 cannot be saved by section 1.

Issue 5: If not, what is the appropriate remedy? Applicants' Position [227] The Applicants seek a declaration that the Citizenship Law discriminates on the basis of sex or other analogous grounds, violates section 15, is not justified by section 1 of the Charter, and violates section 35 of the Constitution Act, 1982. Therefore, that the Citizenship Law is unconstitutional and of no force and effect by virtue of subsection 52(1) of the Constitution Act, 1982. And/or that my order in McCallum requiring the CLCFN to ratify a constitutionally compliant membership code on or before June 29, 2023 was not complied with.

[228] The Applicants also seek an order that:

- a. Chief and Council shall immediately give notice in writing to the Minister that CLCFN no longer has a membership code, and, therefore no longer meets the criteria of s. 10(1) of the Indian Act;
- b. Should CLCFN fail to give such notice to the Minister within 10 business days of the date of the Order, the Department of Indigenous Services shall promptly, and no longer than 20 business days from the date of the Order, give notice to CLCFN that CLCFN no longer meets the criteria of s. 10(1) of the Indian Act, and therefore the Band List of CLCFN has been returned to the Department of Indigenous Services;

- c. Control of CLCFN's Band List shall be deemed to have been returned to the Department of Indigenous Services upon the giving of that notice by either CLCFN or the Department of Indigenous Services and membership in CLCFN shall be determined and maintained by the Department of Indigenous Services pursuant to s. 11 of the Indian Act;
- d. CLCFN shall immediately call a new election to be held within three months of the date of the Order and CLCFN's membership for the purposes of that election shall be determined pursuant to s. 11 of the Indian Act and the Band List maintained by the Department of Indigenous Services.

[229] When appearing before me, the Applicants argued that “under inclusion” (absence of automatic citizenship and requirement to apply) is prevalent throughout the Citizenship Law and that it would be difficult to effectively severe offending provisions. Further, that remitting the CLCFN Band List to ISC is consistent with reconciliation as it would be a temporary solution.

The CLCFN's position [230] The CLCFN submits that even if the Court were to find a Charter violation not saved by section 1 or shielded by section 25, the remedies sought by the Applicants are not appropriate relief. Rather, nothing beyond a narrowly tailored declaration should be entertained by the Court. Subsection 52(1) provides that a law that is inconsistent with the Constitution is, to the extent of the inconsistency, of no force or effect. Here, declaring the entire law unconstitutional, when the Applicants only take issue with certain provisions, ignores the limiting element of subsection 52(1). The CLCFN has legislated an entire membership scheme and the provisions challenged by the Applicants only constitute a limited portion of that scheme. If the Court does find a Charter breach, the only relief that should be considered is to sever the offending provision and issue a narrowly tailored declaration of invalidity. There is no justification to declare the entire law to be invalid.

[231] Further, subsection 24(1) Charter remedies are only available for breaches of Charter rights. Section 35 of the Constitution Act, 1982 is not part of the Charter. Therefore, if the Court were to find a breach of subsection 35(4), subsection 24(1) remedies are not available to the Applicants in relation to those breaches. Remedies for subsection 35(4) breaches are limited to subsection 52(1) remedies. While a subsection 24(1) remedy would be available for a breach of section 15, the requested remedies go beyond what is appropriate in the circumstances. Subsection 24(1) remedies are personal remedies available to persons who have had their rights or freedoms infringed. The Applicants seek to have the Court order CLCFN citizenship to be returned to the Minister, thereby automatically adding 2,000 people to the CLCFN's Citizenship List.

[232] The CLCFN submits that because the Applicants have not applied for citizenship and been refused, it is difficult to conceive of a just and appropriate remedy under subsection 24(1) that would be personal to them. The remedy sought by the Applicants, removing the CLCFN's citizenship authority and giving it back to the Minister would be grossly unfair to the CLCFN. And, in an era of reconciliation and recognition of Indigenous law-making authority, this cannot be a just and appropriate remedy.

Canada's position [233] Canada takes no position on the appropriate remedy the Court should apply if the Citizenship Law is contrary to section 15 of the Charter. However, Canada does take issue with the remedy sought by the Applicants.

[234] First, Canada submits that full statutory schemes or acts are rarely struck down in their entirety. Courts have a responsibility to exercise principled discretion when determining an appropriate and effective Charter remedy, which requires the Court to consider and balance competing remedial principles and fashion remedies that address the extent of a breach. Alternatives to an immediate declaration of invalidity of the Citizenship Law could include tailored remedies such as severance, reading in, or reading down. The Court can also make a further suspended declaration of invalidity to provide the CLCFN with another opportunity to enact a constitutionally compliant law.

[235] Second, with respect to the administration of the CLCFN's membership list, it would be a significant step to compel the First Nation to return its membership list back to ISC and cede its jurisdiction to determine its own membership. Once a First Nation assumes control of its Band List and the jurisdiction to determine its own membership under section 10 of the Indian Act, it can only return that jurisdiction back to ISC if a majority of members consent to that decision (s 13.1(2) of the Indian Act). The question of whether the CLCFN's membership list should be returned to ISC is therefore a question of governance to be determined by the First Nation, and is not an outcome that should be imposed through judicial intervention. Further, to return the membership list to ISC would be detrimental to reconciliation.

Analysis [236] Subsection 52(1) of the Constitution Act, 1982 states that any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

[237] As the CLCFN and Canada submit, the Supreme Court has held that full statutory schemes or Acts are rarely struck down in their entirety. Instead, to ensure the public has the benefit of enacted legislation, remedies of reading down, reading in, and severance, tailored to the breadth of the violation, should be employed when possible so that the constitutional aspects of legislation are preserved (*Ontario v G* at para 112; *Schachter v Canada*, 1992 CanLII 74 (SCC) [Schacter]; *R v Ferguson*, 2008 SCC 6 at para 49). The effect of subsection 52(1) is that a court faced with a constitutional challenge to a law must determine to what extent it is unconstitutional and declare it to be so (*Ontario v G* at para 86).

- [238] In this matter, I have found above that only section 12.02 of the Citizenship Law violates section 15 of the Charter and is not shielded by section 25 or saved by section 1. An appropriate remedy in this circumstance is reading down. Reading down is when a court limits the reach of legislation by declaring it to be of no force and effect to a precisely defined extent. Reading down is an appropriate remedy when “the offending portion of a statute can be defined in a limited manner” (Ontario v G at para 113).
- [239] The only appropriate remedy here is to strike section 12.02 from the Citizenship Law.
- [240] However, before leaving this point, I would make two further observations.
- [241] First, to the extent that the Applicants are suggesting that the CLCFN acted in bad faith – and therefore in breach of my order in McCallum – by enacting the Citizenship Law and that this should be a consideration supporting a remedy of striking out the whole of the legislation, I do not agree. The evidence before me is that the CLCFN effected a Membership Committee, engaged a consultant and held multiple public meetings to ascertain the view of the CLCFN members. It considered the specific issue of automatic citizenship, attempted to effect a fair application and integration process to balance the interests of those previously discriminated against on the basis of sex, and other potential applicants, with the impact of new Citizens on the First Nation. While the resultant Citizenship Law is imperfect, it was not implemented in bad faith. There was no breach of my order in McCallum.
- [242] Second, I agree with the CLCFN and Canada that ordering that the control of the CLCFN’s Band List be deemed to have been returned to the Department of Indigenous Services would not be an appropriate remedy. The CLCFN did develop the Citizenship Law in response to McCallum. The Citizenship Law filled the void which otherwise would have occurred when the declaration of invalidity of the 1987 Membership Code came into effect. And, pursuant to the Indian Act, the CLCFN has the authority to determine its own membership, which it has chosen to do by way of the Citizenship Law. Further, as indicated by Canada, which was not a party in McCallum, once a First Nation assumes control of its Band List and the jurisdiction to determine its own membership under section 10 of the Indian Act, pursuant to subsection 13.1(2) of the Indian Act, it can only return that jurisdiction back to ISC if a majority of members consent to that decision. There is no evidence that the majority of members wish to or have done so.

Issue 6: Section 35(4) [243] Before concluding I will briefly address the Applicants’ submissions on section 35 of the Constitution Act, 1982.

- [244] The Applicants submit that the Citizenship Law also violates subsection 35(4) by denying an Aboriginal right to be a member of a band on the basis of sex, which is an absolute right not subject to section 1 of the Charter.
- [245] This submission is not the focus of the Applicants arguments and appears to be an alternative argument.

- [246] They submit that even if establishing rules of citizenship was an Aboriginal right under section 35 of the Charter, subsection 35(4) prohibits sex-based inequality of Aboriginal rights. Indigenous Nations cannot deny Aboriginal rights based on gender as subsection 35(4) is clear that all Aboriginal and treaty rights are guaranteed equally to male and female persons. Accordingly, any discrimination that denies a person an Aboriginal right on the basis of sex is also an infringement of section 35 of the Constitution Act, 1982 which is not subject to the reasonable limits contained in section 1 of the Charter. They submit that “[t]he right to be an Indigenous person and member of one’s own community is an Aboriginal right (*R v Powley*, 2003 SCC 43 at para 34), and that right is guaranteed equally to men and women and is an absolute and unconditional right under s. 35(4).”
- [247] The CLCFN submits that the Citizenship Law does not infringe any Aboriginal rights. The Applicants have the onus to demonstrate the existence of the purported Aboriginal right and have failed to do so. The vague assertion that being “an Indigenous person and member of one’s own community is an Aboriginal right” lacks the specificity necessary to meet the definition of an Aboriginal right (citing *R v Pamajewon*, 1996 CanLII 161 (SCC) at para 27). The CLCFN submits that this is similar to the vague assertion of an Aboriginal right “to participate in the governance of his First Nation” that was rejected in *Taypotat (FCA)* at para 30. Further, that the Applicants have not addressed how the asserted Aboriginal right meets the “integral to the distinctive culture test” established in *R v Van Der Peet*, 1996 CanLII 216 (SCC). Additionally, paragraph 34 of *Powley* cited by the Applicants to support their asserted Aboriginal right, does not stand for the proposition that every member of a First Nation has an Aboriginal right to be a member of that First Nation. Finally, the CLCFN submits that the Aboriginal right asserted by the Applicants is not one that has been recognized in Canadian law and it should not be given its uniquely individual rather than collective nature.
- [248] The onus of establishing the existence of an Aboriginal right lies on the party asserting it. The Applicants have not put forward any evidence to support their position that the right to be an Indigenous person and member of one’s own community is an Aboriginal right. I acknowledge that when appearing before me, counsel for the Applicants referred to materials related to the addition of subsection 35(4) to the Constitution Act in 1983 which was intended to support this argument. However, none of these are included in the written submissions nor were they provided to the Court and counsel for the other parties at the hearing.
- [249] In my view, the Applicants submissions on this point are not sufficient to permit the Court to make the finding that the Applicants seek. Therefore, as I did in *McCallum* (para 103), I decline to make a finding on section 35.

Conclusion [250] For the reasons above, I have found above that the requirement to apply for citizenship does not impose a burden that perpetuates disadvantage on historically discriminated against prospective citizens. For that reason, the Citizenship Law, in whole, does not infringe section 15 of the Charter. Nor do its specific provisions that pertain to the automatic right of citizenship (section 7) and the requirement to apply for citizenship (sections 8 and 18).

[251] However, section 12.02 of the Citizenship Law does violate subsection 15(1) of the Charter because it perpetuates discrimination on the basis of sex. Further, section 25 of the Charter does not shield this breach by operation of section 28 of the Charter. The breach is also not justified by section 1 of the Charter.

[252] Accordingly, I would allow this application for judicial review, in part, and declare section 12.02 of the Citizenship Law unconstitutional and of no force or effect.

JUDGMENT IN T-1785-23

THIS COURT'S JUDGMENT is that:

This application is allowed in part. This Court declares that section 12.02 of the Citizenship Law is unconstitutional and of no force or effect.

"Cecily Y. Strickland"

Judge

APPENDIX "A"

Indian Act, RSC 1985, c I-5

Definitions

2 (1) In this Act,

Band List means a list of persons that is maintained under section 8 by a band or in the Department;

...

member of a band means a person whose name appears on a Band List or who is entitled to have his name appear on a Band List;

...

Indian Register means the register of persons that is maintained under section 5;

...

registered means registered as an Indian in the Indian Register;

Indian Register

5 (1) There shall be maintained in the Department an Indian Register in which shall be recorded the name of every person who is entitled to be registered as an Indian under this Act.

Existing Indian Register

- (2) The names in the Indian Register immediately prior to April 17, 1985 shall constitute the Indian Register on April 17, 1985.

Deletions and additions

- (3) The Registrar may at any time add to or delete from the Indian Register the name of any person who, in accordance with this Act, is entitled or not entitled, as the case may be, to have his name included in the Indian Register.

Date of change

- (4) The Indian Register shall indicate the date on which each name was added thereto or deleted therefrom.

Application for registration

- (5) The name of a person who is entitled to be registered is not required to be recorded in the Indian Register unless an application for registration is made to the Registrar.

.....

Band Lists

8 There shall be maintained in accordance with this Act for each band a Band List in which shall be entered the name of every person who is a member of that band.

Band control of membership

10 (1) A band may assume control of its own membership if it establishes membership rules for itself in writing in accordance with this section and if, after the band has given appropriate notice of its intention to assume control of its own membership, a majority of the electors of the band gives its consent to the band's control of its own membership.

Membership rules

- (2) A band may, pursuant to the consent of a majority of the electors of the band,
- (a) after it has given appropriate notice of its intention to do so, establish membership rules for itself; and
- (b) provide for a mechanism for reviewing decisions on membership.

...

Acquired rights

- (4) Membership rules established by a band under this section may not deprive any person who had the right to have his name entered in the Band List for that band, immediately prior to the time the rules were established, of the right to have his name so entered by reason only of a situation that existed or an action that was taken before the rules came into force.

Idem

- (5) For greater certainty, subsection (4) applies in respect of a person who was entitled to have his name entered in the Band List under paragraph 11(1)(c) immediately before the band assumed control of the Band List if that person does not subsequently cease to be entitled to have his name entered in the Band List.

...

Membership rules for Departmental Band List

11 (1) Commencing on April 17, 1985, a person is entitled to have his name entered in a Band List maintained in the Department for a band if

- (a) the name of that person was entered in the Band List for that band, or that person was entitled to have it entered in the Band List for that band, immediately prior to April 17, 1985;
- (b) that person is entitled to be registered under paragraph 6(1)(b) as a member of that band;
- (c) that person is entitled to be registered under paragraph 6(1)(a.1) and ceased to be a member of that band by reason of the circumstances set out in that paragraph; or
- (d) that person was born on or after April 17, 1985 and is entitled to be registered under paragraph 6(1)(f) and both parents of that person are entitled to have their names entered in the Band List or, if no longer living, were at the time of death entitled to have their names entered in the Band List.

Additional membership rules for Departmental Band List

- (2) Commencing on the day that is two years after the day that an Act entitled An Act to amend the Indian Act, introduced in the House of Commons on February 28, 1985, is assented to, or on such earlier day as may be agreed to under section 13.1, where a band does not have control of its Band List under this Act, a person is entitled to have his name entered in a Band List maintained in the Department for the band
- (a) if that person is entitled to be registered under paragraph 6(1)(d) or (e) and ceased to be a member of that band by reason of the circumstances set out in that paragraph; or

- (b) if that person is entitled to be registered under paragraph 6(1)(f) or subsection 6(2) and a parent referred to in that provision is entitled to have his name entered in the Band List or, if no longer living, was at the time of death entitled to have his name entered in the Band List.

Deeming provision

- (3) For the purposes of paragraph (1)(d) and subsection (2),
 - (a) a person whose name was omitted or deleted from the Indian Register or a Band List in the circumstances set out in paragraph 6(1)(a.1), (d) or (e) and who was no longer living on the first day on which the person would otherwise be entitled to have the person's name entered in the Band List of the band of which the person ceased to be a member is deemed to be entitled to have the person's name so entered;
 - (a.1) a person who would have been entitled to be registered under paragraph 6(1)(a.2) or (a.3), had they been living on the day on which that paragraph came into force, and who would otherwise have been entitled, on that day, to have their name entered in a Band List, is deemed to be entitled to have their name so entered; and
 - (b) a person described in paragraph (2)(b) shall be deemed to be entitled to have the person's name entered in the Band List in which the parent referred to in that paragraph is or was, or is deemed by this section to be, entitled to have the parent's name entered.

Additional membership rules — paragraphs 6(1)(c.01) to (c.6)

- (3.1) A person is entitled to have their name entered in a Band List that is maintained in the Department for a band if
- (a) they are entitled to be registered under paragraph 6(1)(a.2) and their father is entitled to have his name entered in the Band List or, if their father is no longer living, was so entitled at the time of death; or
 - (b) they are entitled to be registered under paragraph 6(1)(a.3) and one of their parents, grandparents or other ancestors
 - (i) ceased to be entitled to be a member of that band by reason of the circumstances set out in paragraph 6(1)(a.1), or
 - (ii) was not entitled to be a member of that band immediately before April 17, 1985.

Decision to leave Band List control with Department

13.1 (1) A band may, at any time prior to the day that is two years after the day that an Act entitled An Act to amend the Indian Act, introduced in the House of Commons on February 28, 1985, is assented to, decide to leave the control of its Band List with the Department if a majority of the electors of the band gives its consent to that decision.

Notice to the Minister

- (2) Where a band decides to leave the control of its Band List with the Department under subsection (1), the council of the band shall forthwith give notice to the Minister in writing to that effect.

Subsequent band control of membership

- (3) Notwithstanding a decision under subsection (1), a band may, at any time after that decision is taken, assume control of its Band List under section 10.

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11

Rights and freedoms in Canada

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

...

Equality before and under law and equal protection and benefit of law

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

Enforcement of guaranteed rights and freedoms

24 (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

Aboriginal rights and freedoms not affected by Charter

25 The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including

- (a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and
- (b) any rights or freedoms that now exist by way of land claims agreements or may be so acquired.

Rights guaranteed equally to both sexes

28 Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.

Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), c 11

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

Definition of aboriginal peoples of Canada

(2) In this Act, aboriginal peoples of Canada includes the Indian, Inuit and Métis peoples of Canada.

Land claims agreements

(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.

Aboriginal and treaty rights are guaranteed equally to both sexes

(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.

....

Primacy of Constitution of Canada

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

Canoe Lake Cree First Nation Citizenship Law

1.0 STATEMENT OF INTENT AND NOTICE

WHEREAS:

1.01 Canoe Lake Cree First Nation (hereinafter ‘the First Nation’) has assumed control of its own Citizenship as recognized by Canada pursuant to s. 10 of the Indian Act of Canada.

1.02 The First Nation has the inherent jurisdiction and the right to determine its own Citizenship which is recognized and shielded by s. 25 of the Charter of Rights and Freedoms.

1.03 The First Nation has jurisdiction over Citizenship as an essential function of government and self-determination, based upon its unique culture, traditions, values, heritage and history.

1.04 Citizenship is a core jurisdiction that should be maintained through customary and traditional processes and a determination of Citizenship is integral to the First Nation.

1.05 Determination of Indian status and Citizenship based on gender as set out in the Indian Act has been found to be discriminatory by courts in various jurisdictions and is contrary to the United Nations International Covenant on Civil and Political Rights.

1.06 This Citizenship Law is enacted to reflect the First Nation determining its own Citizenship in accordance with its historical practices, culture, traditions, values, heritage, history, and inherent rights.

1.07 This Citizenship Law and its processes shall be interpreted and applied in accordance with principles of fundamental fairness including rules of natural justice, inherent customary laws, and traditions and values of the First Nation.

1.08 This Citizenship Law shall not be interpreted as contrary to s. 15 of the Charter of Rights and Freedoms.

.....

3.0 DECLARATION

3.01 Canoe Lake Cree First Nation asserts its sovereignty collectively by the inherent right to determine its own Band Citizenship based on genealogy, heritage, traditions, culture, values, customs, and beliefs.

3.02 In determining the Citizenship of the First Nation, the government of the First Nation by its Council and Citizens shall ensure that only direct bloodline descendants of original Canoe Lake Cree First Nation Citizens are included as Citizens of the First Nation.

4.0 CONSENT OF THE ELECTORS

4.01 The majority of the Electors of the First Nation, through consultation, community dialogue, and ratification have given their consent to the First Nation maintaining control of its own Citizenship List and by the majority of the Electors authorize Council in approving this Citizenship Law.

5.0 DEFINITIONS

5.01 The following words and phrases have the following meanings:

- a) Band - means Canoe Lake Cree First Nation or a First Nation or Band as defined in the Indian Act of Canada.
- b) Band Member - means a person whose name appears on the Canoe Lake Cree First Nation Citizenship List.

....

- e) Citizen - means a Citizen or Band Member of Canoe Lake Cree First Nation recognized pursuant to a Canoe Lake Cree First Nation membership code or this Citizenship Law enacted pursuant to s. 10 of the Indian Act of Canada.

- f) Citizenship - means the position or status of being a Citizen of Canoe Lake Cree First Nation being vested with the rights, privileges, responsibilities, and duties of a Citizen, such as voting in an election, ratification, or referendum.

....

- h) Citizenship List - means the list of persons maintained by Canoe Lake Cree First Nation through its Citizenship Clerk under the terms of this Citizenship Law, and includes a Band List controlled by the Canoe Lake Cree First Nation pursuant to s. 10 of the Indian Act of Canada, and does not include the ISC Band List or Registry of status Indians controlled by Canada pursuant to s. 9 of the Indian Act of Canada.
- i) Citizenship Review Panel - means the committee appointed by the Band Council to act in such capacities as the Canoe Lake Cree First Nation Citizenship Law may provide or the Band Council may establish from time to time.
- j) Council - means the elected Chief and Council of Canoe Lake Cree First Nation as recognized pursuant to the Indian Act of Canada.

.....

- m) ISC - means Indigenous Services Canada.
- n) ISC Band List - means any list of members of Canoe Lake Cree First Nation included in a Band List or Indian Registry maintained or controlled by Indigenous Services Canada pursuant to the Indian Act prior to this Law coming into force.
- o) Law - means this Canoe Lake Cree First Nation Citizenship Law.
- p) Member - means a Citizen of Canoe Lake Cree First Nation who is registered on the Band List maintained by Canoe Lake Cree First Nation pursuant to its Membership Code or Citizenship Law in force from time to time.
- q) Membership - means those Citizens of Canoe Lake Cree First Nation inclusive of Membership established pursuant to Membership rules recognized pursuant to s. 10 of the Indian Act of Canada.

.....

- t) Status Indian - means a person who, pursuant to the Indian Act R.S.C. 1985 c. 1-5, as amended, is registered as an Indian and whose name appears on the ISC Band List or Indian Registry maintained by the Federal Department of Indigenous Services Canada or its successor Departments.

6.0 PURPOSE OF THIS CITIZENSHIP LAW

6.01 The purpose of this Citizenship Law is to:

- a) set out rules to determine who may or may not enjoy the privilege of being a Citizen;

- b) set out rules by which to establish, maintain, and administer the Citizenship List; and
- c) set out rules by which to protect the continued existence of the Citizens of the First Nation;
- d) set out the rights possessed by those who enjoy the privilege of being a Citizen of the First Nation.

7.0 AUTOMATIC RIGHT OF CITIZENSHIP

7.01 A person has a right to be a Citizen of the First Nation by having their name entered automatically on the Citizenship List if:

- a) they are registered under the Indian Act as a status Indian; and
- b) they are listed under the First Nation on the ISC Band List or Indian Registry; and
- c) they are registered on the existing Citizenship List of the First Nation and they have satisfied a) and b) as of the date this Law is passed.

.....

8.0 ELIGIBILITY FOR CITIZENSHIP

8.01 Subject to the terms and provisions of this Law, a person who is not on the Citizenship List of the First Nation when this Law is passed may be eligible to be enrolled as a Citizen of the First Nation if, they:

- a) submit an application for Citizenship with the First Nation; and
- b) are a direct descendant of an original Band Member of the First Nation alive on September 19, 1906 at the time of entering Treaty 10; and
- c) are registered on the ISC Band List or Indian Registry maintained by ISC.

.....

8.08 Except for s. 7.0, any person who may be eligible for Citizenship is not automatically entitled to be a Citizen of the Cree First Nation or to have their name entered on the Citizenship List. Such person must make an application in accordance with the application process of this Law to be considered for Citizenship, and each application will be considered on its own merits.

9.0 CITIZENSHIP CRITERIA

9.01 In addition to the criteria set out above, the following criteria will also be considered in an application for Citizenship:

- a) Family ties and the genealogy connection of the applicant to the First Nation;
- b) The applicant's previous conduct and circumstances as they relate to compatibility with the First Nation and its Citizens;

- c) The maturity and character of the applicant and whether or not the applicant will be an asset or a detriment to the First Nation and how the applicant will contribute or the potential for contribution to the benefit, well-being and long-term sustainability of the First Nation;
- d) Whether the applicant has a criminal, vulnerable sector, or young offender record;
- e) Protests by Citizens of the First Nation to the applicant;
- f) The unique culture, traditions, values, heritage and history of the First Nation;
- g) Any inaccuracy, misrepresentation or misstatement made by the applicant; and
- h) Any other considerations and factors deemed to be relevant.

9.02 If requested by the Citizenship Review Panel or Council, applicants may be required to submit a DNA test at their own cost to prove that they meet the criteria as set out in this Law, and that they are a direct descendant of Citizens and ancestors of the First Nation who entered into Treaty 10 on September 19, 1906 and are eligible to apply to become a Citizen of the First Nation.

9.03 Despite any other provision of this Law, no person shall be eligible to be a Citizen of the First Nation or have their name entered on the Citizenship List unless that person is a Registered status Indian, or unless that person in cases determined by the Citizenship Review Panel and Council to be appropriate, provides evidence satisfactory to the Citizenship Review Panel and Council showing they are a direct descendent of Citizens of the First Nation.

9.04 The absence or presence of any one of the factors listed in this section is not necessarily determinative of an application for Citizenship.

.....

12.0 RESTRICTIONS ON NEW CITIZENS AND TRANSFERRED CITIZENS

12.01 In reviewing and determining eligibility for Citizenship, on the recommendation of the Citizenship Review Panel, the Council may impose a period of probationary conditional Citizenship not to exceed two (2) years, in order that the applicant may have the opportunity to establish or re-establish social and cultural ties with the First Nation, to learn the First Nation's customs, traditions, values, heritage and history, and otherwise to adopt the way of life of the First Nation. At the end of such probationary period or sooner, if agreed to by the applicant and the Council, Citizenship may be granted.

12.02 For the first five (5) years from conditional acceptance, new Citizens or Citizens who have transferred to the First Nation and who have successfully completed their probationary period, are not eligible to:

- a) run for office of Council in any Canoe Lake Cree Nation First Nation Election;
- b) receive any per capita distribution payments issued by the First Nation from any source;

- c) receive funding of any kind from any monies distributed or granted from the First Nation for any purpose including but not limited to funds from any Trust Agreement, for educational purposes, or for community development purposes; and
- d) receive services in relation to housing matters including making applications to receive housing owned and managed by the First Nation.

....

15.0 INELIGIBILITY, REVOCATION, AND BANISHMENT OF CITIZENSHIP

15.01 Non-Indians

A person who is not a Status Indian is not eligible to apply for Citizenship.

15.02 Persons Living with Citizens

A Non-Citizen who is living with a Citizen is not eligible to apply for Citizenship in the First Nation, by reason only that the Non-Citizen is residing with a Citizen.

15.03 Métis Scrip

Notwithstanding and whether or not there is any Federal or Provincial legislation or a Court decision to the contrary, a person who is a direct descendent of an ancestor who was a Band Member and who on or after the First Nation entering Treaty 10 on September 19, 1906 was issued or is recorded as having accepted Métis Scrip is not eligible to apply for Citizenship.

15.04 Revocation of Citizenship and Banishment

- a) The Council is responsible for the health, well-being, and protection of the Citizens of the First Nation and its assets. Any Citizen who mistreats another Citizen or creates or continues to create trouble, community dysfunction, or unrest at Canoe Lake Cree First Nation may, in the sole discretion of the Council, have their Citizenship in the First Nation revoked and they will be banished upon forty-eight (48) hours' notice.
- b) A person whose Citizenship has been revoked may apply for an appeal and review of the decision of the Council pursuant to the Appeal process outlined in this Law, and will be treated as an applicant for Citizenship for the purpose of the appeal process.

15.05 An applicant who has not successfully completed their probationary period, have had their application rejected, or have been unsuccessful in having the rejection of their application overturned on appeal is not eligible to apply for Citizenship.

18.0 APPLICATION FOR CITIZENSHIP

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18.02 Applications for Citizenship must be made in writing and signed by the applicant (or in the case of a Child, signed by the person(s) who has lawful custody of the Child). Applicants are responsible to provide all information and documentation required to establish eligibility to Citizenship pursuant to this Law, and all costs of preparing and submitting such application shall be the responsibility of the applicant.

18.03 An application by an adult for Citizenship shall include all documentation necessary to support the application including the following:

- a) Birth Certificate;
- b) Status under the ISC Band List or Indian Registry maintained by ISC;
- c) Marriage or divorce certificate;
- d) A genealogy chart in Schedule “3” that includes the names of the applicant’s parents including the maternal and paternal grandparents;
- e) A criminal record and vulnerable sector check dated within thirty (30) days of the application;
- f) The applicant’s agreement that subject to their being approved, that they will not be entitled to be entered on the Citizenship List and be a Citizen of the First Nation until they complete the application process;
- g) A current address for service of all documents relating to the application; and
- h) Such further and other information as may be required by the Citizenship Review Panel or Council.

.....

18.07 Once an application is completed, the Citizenship Clerk will notify the Citizenship Review Panel in writing as to whether the applicant is eligible or ineligible for Citizenship with the First Nation. A copy of the completed application together with all accompanying materials will be provided to the Citizenship Review Panel, and upon receipt:

- a) the Citizenship Review Panel shall determine the disposition of the application and shall advise the Council and the Citizenship Clerk in writing of their recommendation, whether or not to approve the applicant for Citizenship and the reasons therefore, upon being satisfied or not that:
 - i) the person is duly eligible for Citizenship;
 - ii) the applicant is of good character; and
 - iii) granting of Citizenship will not be harmful, detrimental, or contrary of the interests of the First Nation.

18.08 Upon receiving recommendations from the Citizenship Review Panel, the Council will make a decision either to approve or deny the application for Citizenship to the First Nation. The Council may take into consideration the recommendations of the Citizenship Review Panel, may dismiss or adopt those recommendations, upon considerations which include whether:

- a) the First Nation has sufficient resources to address and protect the health, welfare and social well-being of all of its existing Citizens;
- b) the First Nation has sufficient resources to address all current social, housing, health and welfare of its existing Citizens;
- c) the First Nation has sufficient housing, land, and other resources to accommodate new Citizens;
- d) the First Nation-owned entities that support various community investments and Citizenship initiatives are not compromised as a result of accommodating new Citizens; and
- e) any other considerations or information the Council deems material or relevant to its decision whether to approve the application of new Citizens.

19.0 APPROVAL/DENIAL OF APPLICATION

19.01 Following a recommendation of the Citizenship Review panel, by way of motion, a quorum of the Council shall either approve or deny an applicant's application.

19.02 If an application is approved, the Citizenship Clerk shall immediately notify the applicant in writing, and subject to completion of any probationary period, enter the applicant's name on the Citizenship List, and post the decision of the Council in a public place at the First Nation.

19.03 If an application is denied, the Citizenship Clerk shall provide a letter of explanation to the applicant including reasons for the denial. The applicant may be granted an opportunity to appeal the decision in accordance with the appeal process specified this Law.

20.0 APPEAL PROCESS

20.01 Any applicant whose application for Citizenship is denied or revoked, if they so decide, shall apply within thirty (30) days of the decision of the Council for a review of the decision by the First Nation Membership Appeal Tribunal (the "Tribunal").

20.02 The Tribunal shall be formed by the Council from applicants who meet a criteria and requirements which include qualification by age, education, experience, and lack of conflict, and be composed of four (4) Citizens including one (1) Elder selected from amongst the Citizens of the First Nation and a practicing lawyer who is familiar and has experience with the First Nation. The Tribunal members shall serve for a term of four (4) years.

20.03 The Tribunal will hold hearings during the third quarter of any given year. The Council shall set the remuneration and expenses for Tribunal members. The Tribunal shall select a Chair from among themselves. The Tribunal shall determine its own procedure which shall be transparent to all participants and the public through notices and announcements.

20.04 The Tribunal shall convene once per year during the third quarter of the fiscal year (October to December) to consider appeals which have been filed or before September 30th of any given year.

20.05 The Tribunal shall follow governance procedures developed by Council in consultation with Citizens and which Tribunal governance procedures shall include the laws of natural justice including fairness, transparency, disclosure, adequate notice, and freedom from bias.

20.06 The Tribunal shall be assigned a staff member from the Citizenship Department who will be responsible for all administrative and logistical support for the Tribunal, including disclosure of documentation, information flow to the appellants, recording proceedings, and selection of venue.

20.07 The Tribunal hearings shall be public unless information is deemed to be of a sensitive nature, and public discourse may cause distress.

20.08 The appellant and the respondent Citizenship Review Panel shall be provided the opportunity to present argument only in favour of their positions.

20.09 Both parties may retain a lawyer and receive legal advice, but the lawyers shall not be allowed to present arguments or cross-examine witnesses at the hearing.

20.10 All Tribunal communications and processes must be recorded to provide evidence record in possible appeals on questions of procedural fairness.

20.11 The Tribunal record of proceedings and written decision shall be kept in a secure place by the Citizenship Department.

20.12 Tribunal decisions must be written and delivered within two (2) weeks of the hearings, unless there is a need for additional information that cannot be delivered within two (2) weeks, in which case the decision will be delivered as soon as possible.

20.13 If the appeal is successful, the Tribunal shall direct the application be immediately returned to the Council for reconsideration and decision within fourteen (14) days of its receipt.

20.14 If the appeal is not successful, the Tribunal shall direct the rejected application be immediately returned to the Council to record that the applicant shall not be eligible to apply for Citizenship again.

20.15 The Tribunal decision is final and binding, and shall not be the subject of appeal to the Courts.

21.0 PROTESTS BY CITIZENS

21.01 Notwithstanding the above, upon posting notice of an applicant's approval to the Citizenship, any Citizen of the First Nation may protest the acceptance by Council of any applicant by completing a protest form provided by the Citizenship Clerk within thirty (30) days of the public posting.

21.02 Special Meetings of the Citizenship will occur quarterly, and the Citizenship Clerk will set the time, date, and place for the next Special Meeting of the Citizenship to hear the protest.

21.03 The entire process to hear the protest must be completed within one (1) year of the Council receiving a protest in writing.

21.04 At the Special Meeting of the Citizenship, the Citizenship Review Panel shall present the written protest including all pertinent documentation and materials. The protestor may be present at the Citizenship meeting but will not make any presentations to the Citizenship, unless previously approved by the Citizenship Review Panel.

21.05 At least twenty-five percent (25%) of the Electors of the First Nation must be in attendance at the Special Meeting of which fifty percent plus one (50% + 1) of those Electors are required to vote to either approve or deny the protest.

21.06 If the First Nation Citizenship rejects the protest, the decision is final and binding, and the applicant will be notified in writing by the Council that their name will remain on the Citizenship List.

21.07 If the First Nation Citizenship approves the protest, the applicant will immediately be notified by the Council of this decision, and the Citizenship Clerk will remove the applicant's name from the Citizenship List.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:

T-1785-23

STYLE OF CAUSE:

LAURA BIRD, LLOYD YEW v CANADA (INDIGENOUS SERVICES CANADA) AND, CANOE LAKE CREE FIRST NATION

PLACE OF HEARING:

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STRICKLAND J.

DATED:

APRIL 1, 2026

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