

Federal Court



Cour fédérale

Date: 20250408

Docket: T-281-23

Citation: 2025 FC 648

Ottawa, Ontario, April 8, 2025

PRESENT: The Honourable Madam Justice Heneghan

BETWEEN:

GINA DONALD-POTSKIN

Applicant

and

**SAWRIDGE FIRST NATION, SAWRIDGE FIRST
NATION FORMERLY KNOWN AS THE SAWRIDGE
INDIAN BAND, ROLAND TWINN, IN HIS CAPACITY AS
CANDIDATE FOR CHIEF OF THE SAWRIDGE FIRST
NATION, ISAAC TWINN, IN HIS CAPACITY AS
CANDIDATE FOR CHIEF OF THE SAWRIDGE FIRST
NATION, DENNIS CALLIHOO, IN HIS CAPACITY AS
THE ELECTORAL OFFICER OF THE SAWRIDGE
FIRST NATION**

Respondents

REASONS AND JUDGMENT

I. INTRODUCTION

[1] Ms. Gina Donald-Potskin (the “Applicant”) seeks judicial review of the decision of Mr. Dennis Callihoo, Electoral Officer (the “Electoral Officer”) of the Sawridge First Nation (“Sawridge” or the “Respondent”).

[2] In that decision, dated January 11, 2023, Mr. Callihoo refused to accept the Applicant’s nomination to run for the office of Chief of Sawridge. He made the decision pursuant to Article 7(1)(b) of the *Constitution of the Sawridge First Nation* (the “Sawridge Constitution”) which provides that candidates for the office of the Chief must reside on or near Sawridge reserve lands.

[3] The Applicant lives in Edmonton, approximately 255 kilometers from Sawridge lands.

[4] The Applicant claims that Article 7(1)(b) of the Sawridge Constitution discriminates against her, contrary to subsection 15(1) of the *Canadian Charter of Rights and Freedoms*, s. 7, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.) 1982, Chapter 11 (the “Charter”).

[5] In this application for judicial review, the Applicant seeks an Order that:

- a) sets aside the decision of Dennis Callihoo, the Electoral Officer of Sawridge First Nation;
- b) sets aside the results of the February 15, 2023 election for the position of Chief and/or declaring that the election of Chief on February 15, 2023 is null and void, and directing a new election for Chief of the Sawridge First Nation be immediately undertaken; and
- c) the Applicant is included as a candidate for Chief in such new election for Chief of the Sawridge First Nation.

[6] Mr. Isaac Twinn is the current Chief of Sawridge. Although named as a Respondent to the application for judicial review, he did not file an application record and did not make oral submissions. He relies on the submissions made by Sawridge.

II. EVIDENCE

[7] The Applicant and Sawridge filed evidence by way of affidavit.

[8] The Applicant filed her affidavit, sworn on April 18, 2023. Attached to her affidavit are several exhibits, including a letter rejecting her candidacy for the position of the Chief, a Notice of Election, the Constitution of Sawridge Nation, and various Sawridge First Nation Acts, including the Sawridge First Nation Housing Act.

[9] The Respondent filed the affidavits of Mr. Michael McKinney, K.C.; Ms. Julia Brandle; Mr. Darcy Twin; Ms. Catherine Twinn; and Mr. Isaac Twinn.

[10] Mr. McKinney, K.C. is the General Counsel and Executive Director of Sawridge. He swore two affidavits, the first on June 9, 2023 and the second on June 21, 2023. In his first affidavit, he deposed to the process by which Sawridge allocates housing.

[11] In his second affidavit, sworn on June 21, 2023, Mr. McKinney, K.C. deposed to the events and processes that led up to the adoption of the Sawridge Constitution and the *Sawridge Elections Act* (the “Elections Act”). A copy of the Elections Act was attached as an exhibit to his affidavit.

[12] In his second affidavit, Mr. McKinney, K.C. also addressed the circumstances around the development of the Constitution. He has been the Executive Director and General Counsel of Sawridge since 1988. He deposed that in that position, he provides support to the elected Council and oversees the administration of the Sawridge government.

[13] In his second affidavit, sworn on June 21, 2023, Mr. McKinney, K.C. deposed to the meetings that were held between 2003 and 2009, leading up to the ratification of the Constitution by a majority vote of 22–1, with three ballots discarded as spoiled. He deposed as to his recollection of discussions about the composition of the Council and the balancing of interests between resident and non-resident members.

[14] Mr. McKinney, K.C. deposed to the passage of the Elections Act on January 9, 2010. He also deposed to the fact that on February 18, 2022, the Minister of Indian Affairs and Northern Development issued an order declaring that the members of the Sawridge Council would no longer be elected according to the provisions of the *Indian Act*, R.S.C. 1985, c. I-5 (the “Indian Act” or the “Act”).

[15] Mr. McKinney, K.C. was cross-examined. He maintained his evidence as provided in his affidavits. The Applicant did not object to his evidence.

[16] Ms. Brandle is a real estate broker working in Slave Lake, Alberta. In her affidavit, sworn on June 21, 2023, she deposed to the availability of housing in Slave Lake.

[17] Mr. Darcy Twin is a former Sawridge Councillor. In his affidavit, sworn on June 22, 2023, he deposed to his involvement, and that of the Applicant, in their capacity as Councillors, in the most recent housing allocation that took place in July 2019.

[18] Ms. Twinn is also a Sawridge member. In her affidavit, sworn on June 23, 2023, she deposed to her knowledge of the consultation process by which the Sawridge Constitution was drafted. She deposed to her understanding that the residency requirement is connected to Sawridge's tradition of land-based leadership.

[19] Ms. Twinn deposed as to discussions about the definition of "resident" which led to an expanded definition as now appears in the Constitution. She deposed that the definition was discussed and to her understanding, a broader definition was adopted to reflect the inclusive attitude of the members. She deposed that the Constitution was drafted and adopted according to the customs of Sawridge.

[20] Ms. Twinn deposed that residency requirements for the governing bodies of Sawridge were discussed and in January 2009, the community decided to retain a residency requirement only for the office of the Chief. She deposed to her understanding that this requirement was adopted in order to reflect the community's interest in protecting the interests of both resident and non-resident members of Sawridge.

[21] At paragraph 14 of her affidavit, Ms. Twinn deposed that in retaining a residency requirement for the position of the Chief, the community took into account Sawridge practices, values, traditions, including its connections to its lands.

[22] Ms. Twinn also deposed that the residency requirement, for members of the Sawridge as an eligibility criterion to run for the office of the Chief, is consistent with and respects the land-based leadership tradition of Sawridge.

[23] Ms. Twinn was cross-examined upon her affidavit and maintained the evidence she provided in her affidavit.

[24] The Applicant objects to the admissibility of the affidavit of Ms. Twinn on the grounds that the affidavit improperly contains opinion evidence that Ms. Twinn was not qualified to give. The Applicant focuses on those paragraphs of the affidavit that address the background consultations leading up to the adoption of the Constitution.

[25] Mr. Isaac Twinn was the Chief of Sawridge when this application for judicial review was begun. In his affidavit, sworn on June 23, 2023, he deposed that he always lived at Sawridge except when attending law school and during his articling term and graduate studies. He has lived in the Sawridge community since May 2023, shortly after his election as the Chief.

[26] Some affidavits include exhibits which are part of the evidence. The Applicant, Mr. McKinney, K.C. and Ms. Twinn were cross-examined upon their affidavits. Transcripts of those

cross-examinations are included in the application records of the respective parties, and those transcripts also form part of the evidence in this application.

III. BACKGROUND

[27] Sawridge is a “band” within the meaning of section 2 of the Indian Act. There are two reserves (the “Reserves”), within the meaning of the Indian Act, set aside for the use and enjoyment of Sawridge. One of those Reserves borders the Town of Slave Lake.

[28] Pursuant to section 10 of the Indian Act, Sawridge controls its own membership.

[29] In 2009, Sawridge ratified its Constitution by way of a referendum conducted according to the *Indian Referendum Regulations*, C.R.C., c. 957.

[30] On January 9, 2010, the Sawridge General Assembly passed the Elections Act.

[31] On February 16, 2011, the Minister of Indian Affairs and Northern Development made an order pursuant to subsection 74(1) of the Indian Act providing that the Council of Sawridge would no longer be elected according to the provisions of the Act. Since that date, elections for Sawridge have been governed by the Sawridge Constitution and the Elections Act.

[32] The Sawridge Constitution provides for three governing bodies: the General Assembly consisting of every Sawridge “elector”; the Council consisting of one full-time Chief and two part-time Councillors; and the Elder Commission consisting of two “Elder Commissioners”.

[33] The office of the Chief is the only Council position for which only Residents are eligible.

Article 7(1)(b) of the Constitution provides as follows:

7(1) No person is eligible to be nominated for election as Chief unless

b) the person is a Resident,

[34] The Sawridge Constitution defines a “resident” as follows:

a Member whose primary residence is on Sawridge Lands or within 10 km. of a Principal Office of the Sawridge First Nation

[35] The Elections Act defines “primary residence” as follows:

The place which at the time of determination in respect of a person has been for a period of at least six months the principal place of his or her true, fixed and permanent home and place of habitation whereto, when absent or away therefrom, not including absences for normal vacations, temporary work assignments, study or training, always without intention to establish a domicile at some other place, he or she intends to return;

[36] The entirety of the Town of Slave Lake is within 10 kilometers of a Principal Office of Sawridge, according to the affidavit of Catherine Twinn.

[37] Sawridge builds houses on its Reserve lands (“Sawridge Housing”). The houses are allocated by the Sawridge Council, according to the Sawridge *Housing Act*.

[38] When the evidence was filed in this application, the reserve housing included 18 detached houses that are suitable for families. All of those houses were allocated to Sawridge members.

[39] The Applicant was born in 1979. She became a member of Sawridge in October 2016, following amendments to the Indian Act. She did not become a Sawridge member at birth since her mother had lost status following her marriage to the Applicant's father.

[40] The Applicant was elected as a non-Resident Councillor in February 2019 and served in that capacity until February 2023. During that period, she lived in Edmonton, where she was a part-time student at Concordia University. She regularly travelled from Edmonton to Sawridge for her work as a non-Resident Councillor.

[41] The Applicant deposed in her affidavit that she applied for Reserve Housing in 2017. She is a single mother of four children and required a house to accommodate her family.

[42] In his affidavit, Mr. McKinney, K.C. deposed that the Applicant did not apply for Reserve Housing until July 28, 2019, following interviews of shortlisted candidates for the most recent allocation of housing.

[43] Both Mr. McKinney, K.C. and Mr. Darcy Twin deposed that the Applicant participated in the most recent allocation for housing in her capacity as a Councillor. That allocation took place in July 2019. Neither recalled that the Applicant had mentioned she had applied for Reserve Housing or should have been considered as an applicant for allocated accommodation.

[44] On January 10, 2023, the Applicant submitted her nomination to run for the position of the Chief in the 2023 Sawridge election, although she continued to reside in Edmonton. She

deposed that without accommodation in the Reserve Housing, she could not afford to risk moving to a residence within 10 kilometers of Sawridge, unless she was first elected as the Chief.

[45] On January 11, 2023, the Electoral Officer refused to accept the Applicant's nomination because she did not meet the residency requirement set out in the Constitution to run for the office of the Chief.

[46] On January 14, 2023, the Applicant presented a motion before the General Assembly to strike the residency requirement from the Constitution. The motion was defeated by a majority vote.

[47] On February 10, 2023, the Applicant commenced this application for judicial review of the decision made by the Electoral Officer, refusing to accept her nomination to run for the position of the chief.

IV. ISSUE

[48] This application turns on the relationship between the Applicant's individual rights protected by section 15 of the Charter and collective Indigenous rights protected by section 25.

[49] Subsection 15(1) and section 25 of the Charter provide as follow:

15 (1) Every individual is equal before and under the law and has

15 (1) La loi ne fait acception de personne et s'applique également à

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.

[...]

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.

tous, et tous ont droit à la même protection et au même bénéfice de la loi, indépendamment de toute discrimination, notamment des discriminations fondées sur l'ethnie, la couleur, la religion, le sexe, l'âge ou les déficiences mentales ou physiques

[...]

25 Le fait que la présente charte garantit certains droits et libertés ne porte pas atteinte aux droits ou libertés — ancestraux, issus de traités ou autres — des peuples autochtones du Canada, notamment : a) aux droits ou libertés reconnus par la proclamation royale du 7 octobre 1763; b) aux droits ou libertés existants issus d'accords sur des revendications territoriales ou ceux susceptibles d'être ainsi acquis.

V. SUBMISSIONS

A. *The Applicant's Submission*

[50] The Applicant contends that there is a *prima facie* breach of section 15 on the basis of the analogous ground of Aboriginal residency, or alternatively, that a new analogous ground of “non-resident status in an Indigenous community governed by a customary election code” should be recognized.

[51] The Applicant submits that section 25 does not protect the residency requirement.

[52] The Applicant, among other things, argues that the residency requirement for eligibility as a candidate lacks a substantive constitutional character. She draws a distinctive between eligibility “to run” from a residency requirement for the elected Chief.

[53] The Applicant also submits that the residency requirement does not protect Indigenous difference. She speaks of the residency requirement as a current practice in form, but not in substance. In this regard, she refers to the definition of “primary residence” in the Elections Act.

[54] The Applicant argues that the residency requirement creates an arbitrary distinction between those who intend to return to a residence in or near Sawridge, and those who intend to establish such residence if elected.

[55] Further, the Applicant submits that the residency requirement does not protect Indigenous difference because the Sawridge Constitution already recognizes the right to equal treatment, subject to justification. She relies on subsection 2(1) of the Sawridge Constitution, which provides as follows, to support this argument:

The following Rights and Freedoms of Members are protected subject to the collective rights of the Sawridge First Nation and such other reasonable limits prescribed by Laws of the First Nation as can be demonstrably justified in a free and democratic society:

Right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice;

Freedom of culture, language, conscience and religion;

Freedom of thought, belief, opinion and expression;

Freedom of peaceful assembly;

Freedom of association;

Right to be secure against unreasonable search or seizure;

Right not to be arbitrarily detained or imprisoned.

Right to be treated fairly;

Right to live in peace and good order.

Right not to be discriminated against based on age, sex, religion, or mental or physical disability. Right to equal Protection, treatment and benefit under Laws of the First Nation.

[56] Finally, the Applicant argues that paragraph 7(1)(b) of the Constitution cannot be saved pursuant to section 1 of the Charter.

B. *The Respondent's Submissions*

[57] At the hearing, the Respondent conceded a breach of section 15 and focused its arguments upon the application of section 25 of the Charter.

[58] The Respondent submits, in brief, that the residency requirement is “shielded” by section 25 of the Charter because it is an exercise of its collective self-government right to regulate the composition of its Council. It argues that the exercise of its right to regulate its governing body is an “other” right, related to its right to self-government.

[59] The Respondent further submits that the right to determine the composition of its governing body protects Indigenous differences. It contends that there is an irreconcilable conflict between the Applicant’s individual right to equality in nomination eligibility and the collective right to self-government, such that it is entitled to the protection of section 25.

[60] The Respondent observes that in *Dickson v. Vuntut Gwitchin First Nation*, 2024 SCC 10, the Supreme Court placed only one substantive limitation on the scope of section 25, that “other” rights must protect Indigenous difference. The Court declined to answer whether an “other” right must have a constitutional character because the right in issue has such a character; see *Dickson*, *supra* at paragraph 151.

[61] The Respondent argues that the same approach should be followed here, because the residency requirement does have a constitutional “characteristic”. In brief, the Respondent submits that the facts of this case show that it is entitled to rely on section 25 as a shield to uphold the residency requirement set out in its Constitution.

[62] The Respondent submits that although the provision at issue in this case was enacted under the inherent authority of an Indigenous group recognized under the Indian Act rather than under delegated federal legislative authority, this must not dictate a different result.

[63] The Respondent argues that the residency requirement challenged by the Applicant is the exercise of its right to regulate the composition of its Council. It submits that this right is ancillary to its inherent right of self-government.

[64] The Respondent further argues that the right to regulate the composition of its governing body is consistent with the *United Nations Declaration on the Rights of Indigenous Peoples* (“UNDRIP”) which has been incorporated into Canadian law by the *United Nations Declaration on the Rights of Indigenous Peoples Act*, S.C. 2021, c. 4.

[65] The Respondent contends that its inherent right of self-government, together with its right to select the manner the composition of its governing bodies, including the Council, is consistent with UNDRIP.

[66] The Respondent then submits that there is an irreconcilable conflict between the Applicant’s individual right to equality, that is to run for the office of the Chief without being a resident, and its collective right to manage the composition of its Council.

[67] In the face of such irreconcilable conflict, the Respondent pleads that the residency requirement is entitled to the protection of section 25.

[68] **The Respondent argues that there are no applicable limits to the collective right at issue in this case.**

VI. DISCUSSION AND DISPOSITION

[69] Since this application raises a constitutional question, correctness is the applicable standard of review; see the decision in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, [2019] 4 S.C.R. 653 at paragraph 55.

[70] I note the objections of the Applicant to the affidavit of Ms. Twinn.

[71] Although the Applicant argues that the affidavit should not be considered since it contains impermissible opinion evidence and Ms. Twinn was not qualified to give such evidence, the answer to those objections lies in the decision of the Federal Court of Appeal in *Canada (Attorney General) v. Mosaic Forest Management Corporation*, 2022 FCA 216 where the Court said the following at paragraph 17:

First, non-expert witnesses may offer their observations in the form of opinion where: (1) they are in a better position than the trier of fact to form a conclusion; (2) the conclusion is one that a lay person can make; (3) the witness has the necessary experience to draw the conclusion; and (4) the opinion is a “compendious mode of stating facts that are too subtle or complicated to be narrated as effectively without resort to conclusions”

[72] I agree with the submissions of the Respondent that Ms. Twinn is deposing to her personal involvement in meetings leading up to the creation and adoption of the Constitution. She is obviously in a better position than the Court to speak to the factual background. She and

Mr. McKinney, K.C. are the only deponents who provided evidence about the creation of the Constitution. The Applicant did not submit any evidence to contradict that of Ms. Twinn and Mr. McKinney, K.C.

[73] If Ms. Twinn’s evidence “strays” into “opinion” evidence, that evidence is admissible, within the scope of *Mosaic, supra*. The evidence is certainly relevant to the intention behind the residency requirement. It is highly relevant to the issue of community involvement since that element is critical to the debate in this case about the reliance on section 25 of the Charter, to “shield” that provision of the Constitution.

[74] The Respondent concedes that the residency requirement for eligibility to run for the office of the Chief is a *prima facie* breach of section 15.

[75] In light of this concession, it is not necessary to determine if “non-resident status in an Indigenous community governed by a customary election code”, rather than “non-resident status in a self-governing Indigenous community”, as recognized in *Dickson, supra*, is a new “analogous ground” for the purposes of section 15.

[76] The next question is whether section 25 is engaged.

[77] In its recent decision in *Dickson, supra* at paragraphs 179 to 183, the Supreme Court of Canada set out a framework to address the interplay between section 15 and section 25, as follows:

1. Has the Applicant established a prima facie breach of an individual Charter right?
2. If so, has the Respondent established that the impugned conduct is a right, or an exercise of a right, protected under section 25?
3. If so, has the Respondent established an irreconcilable conflict between the individual Charter right and the collective right protected under section 25? Section 25 will act as a shield only if there is an irreconcilable conflict.
4. Are there any applicable limits to the collective interest relied upon?

[78] The decision of the Supreme Court in *Dickson, supra* established that a party seeking protection pursuant to section 25 of the Charter must first show the existence of a right and second, that the right or its exercise is protected by section 25.

[79] The Applicant acknowledges that the Respondent has the right under the Indian Act to enact an election code in accordance with its customs.

[80] The Respondent submits that its Constitution, not the Indian Act, is the source of its authority to enact customary election laws, relying on the decision in *Reference to the Court of Appeal of Quebec in relation with the Act respecting First Nations, Inuit and Métis children, youth and families*, 2022 QCCA 185.

[81] In *Dickson, supra*, the Supreme Court of Canada based its analysis of the residency requirement on the First Nation's statutory right to provide for the composition of its governing bodies, pursuant to the self-government agreement.

[82] I agree with the Respondent that the principles in *Dickson*, supra are applicable here, despite the different sources of the authority in question.

[83] In my view, the approach adopted by the Supreme Court of Canada should apply here too. Pursuant to subsection 2(1) of the Indian Act, the Respondent has the right to elect its Council according to its customs. Subsection 2(1) provides as follows:

Council of the band means:

(pursuant to that **a**) in the case of a band to which section 74 applies, the council established section,

(b) in the case of a band that is named in the schedule to the First Nations Elections Act, the council elected or in office in accordance with that Act,

(c) in the case of a band whose name has been removed from the schedule to the First Nations Elections Act in accordance with section 42 of that Act, the council elected or in office in accordance with the community election code referred to in that section, or

(d) in the case of any other band, the council chosen according to the custom of the band, or, if there is no council, the chief of the band chosen according to the custom of the band; (conseil de la bande)

conseil de la bande :

a) Dans le cas d'une bande à laquelle s'applique l'article 74, le conseil constitué conformément à cet article;

b) s'agissant d'une bande dont le nom figure à l'annexe de la Loi sur les élections au sein de premières nations, le conseil élu ou en place conformément à cette loi;

c) s'agissant d'une bande dont le nom a été radié de l'annexe de la Loi sur les élections au sein de premières nations conformément à l'article 42 de cette loi, le conseil élu ou en place conformément au code électoral communautaire visé à cet article;

d) s'agissant de toute autre bande, le conseil choisi selon la coutume de celle-ci ou, en l'absence d'un conseil, le chef de la bande choisi selon la coutume de celle-ci. (council of the band)

[84] Section 25 of the Charter refers to “aboriginal, treaty or other rights and freedoms”.

[85] I agree with the position of the Respondent, that in this case, it is unnecessary to determine if section 25 requires a First Nation to prove that the challenged exercise of a right has a constitutional character, because the residency requirement itself possesses such a character.

[86] This element is addressed in the affidavit of Ms. Twinn and was unshaken upon her cross-examination. As she deposed in her affidavit, the residency requirement to stand as a candidate for the position of the Chief, preserves an important element of Sawridge’s leadership traditions and practices, that is the Chief’s connection to the land.

[87] In *Dickson, supra*, the majority said the following at paragraph 218:

Finally, we agree with both courts below that the residency requirement is of a “constitutional character” in a substantive, rather than formal, sense (trial reasons, at para. 207; C.A. reasons, at para. 147). The question of whether a “constitutional character” will always be required for s. 25 protection need not be decided: here it is clear that the residency requirement has a significant constitutional dimension. Beyond the mere fact that the residency requirement is part of the VGFN Constitution, it is an aspect of the First Nation’s law that preserves and enshrines an important dimension of VGFN leadership traditions and practices, and VGFN leaders’ connection to the land...

[88] I also agree with the submissions of the Respondent that the residency requirement in issue here does protect Indigenous difference. The Supreme Court, in *Dickson, supra* described rights associated with Indigenous difference as those related to cultural difference, prior occupancy, prior sovereignty, or participation in the treaty process.

[89] In my opinion, at a minimum, the residency requirement is connected to preserving cultural difference, as addressed in the affidavit of Ms. Twinn.

[90] The Applicant attempts to distinguish between a residency requirement to run for office and a residency requirement to hold office. It is clear that there is a “difference”, but I am not persuaded that residency status before winning an election is disconnected from a relationship with the land.

[91] Then there is the question of an irreconcilable conflict between the Applicant’s individual right pursuant to section 15 and Sawridge’s collective right pursuant to section 25.

[92] The Applicant argues that there is no irreconcilable conflict between the equality of candidates and land-based leadership. She contends that even if all the evidence submitted by the Respondent is accepted, at best it shows the importance of land-based leadership, not of land-based candidacy.

[93] The Respondent submits that there is an irreconcilable conflict between the collective section 25 right and the individual right pursuant to section 15, as described in *Dickson, supra* at paragraph 152:

... Those protections apply only if it is determined that there is irreconcilable conflict between the claimed *Charter* right and the s. 25 right, such that giving effect to the *Charter* right would undermine the Indigenous difference protected or recognized by the collective right...

[94] The Respondent argues that giving effect to the Applicant's arguments would unacceptably derogate from its collective right by breaking the connection between the Sawridge Chief and the Sawridge lands.

[95] In my opinion, the Respondent has established an irreconcilable conflict.

[96] The evidence shows that Sawridge members carefully and thoroughly considered the level of connection that their leadership should have to the land. The membership decided that it was important that candidates for the office of the Chief show a commitment to the land before seeking election to that position.

[97] The Respondent's right to make that decision is protected by section 25. I agree that accepting the Applicant's arguments would undermine the Respondent's section 25 right in a non-incidental manner.

[98] The Applicant observes that in *Dickson, supra*, the Supreme Court left open the possibility that section 28 of the Charter may limit the application of section 25. She argues that Residency status in Sawridge is intrinsically related to gender-based discrimination. She refers to the fact that she did not become a member of Sawridge until 2016, due to the legacy of gender discrimination.

[99] The Applicant submits that a "gender-blind" application of section 25 will perpetuate discrimination of those who have previously lost status as a result of marriage and could not

establish residence on a reserve, as a result. She argues that this group is disproportionately female.

[100] The Applicant argues that section 25 cannot shield the residency requirement, relying on section 28 and subsection 35(4) of the Charter which provide as follows:

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

35(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.

28 Indépendamment des autres dispositions de la présente charte, les droits et libertés qui y sont mentionnés sont garantis également aux personnes des deux sexes.

35(4) Indépendamment de toute autre disposition de la présente loi, les droits — ancestraux ou issus de traités — visés au paragraphe (1) sont garantis également aux personnes des deux sexes.

[101] The Applicant submits that a “gender-blind” application of section 25 to shield the residency requirement will continue gender-based discrimination upon those persons who have lost membership on the result of gender-based discrimination and consequently have not established Aboriginal residency or had the opportunity to do so, thereby losing an equal opportunity to run for office, in comparison with those persons who have not suffered such gender-based discrimination.

[102] The Applicant refers again to *Dickson, supra* where the Supreme Court said the following at paragraph 173:

Even when s. 25 would otherwise prioritize an Aboriginal, treaty, or other right, there may be other relevant limitations on the application and effect of s. 25. Examples include s. 28 of the *Charter* and s. 35(4) of the *Constitution Act, 1982*. Section 28, embedded like s. 25 in the “General” provisions of the *Charter*, directs that “[n]otwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.” Section 35(4) provides: “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.” 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 (see, e.g., McNeil (1996), at pp. 76-79; Wildsmith, at pp. 23-24; Arbour, at p. 68; Slattery (1982), at pp. 241-42; *Kapp*, at para. 97, per Bastarache J.). This being said, precisely demarcating the limits of s. 25’s protections, including those resulting from other constitutional sources, is best left to cases when they arise on the facts.

[103] The Applicant argues that section 28 should be broadly interpreted to prevent section 25 from operating in a way that continue and reinforce the gender-based discrimination that she faced.

[104] In reply, the Respondent submits that the Applicant now tries to recast her claim from one based on Aboriginal residency to one based on sex or gender, and she has not established an evidentiary foundation for that claim. Nonetheless, it argues that the residency requirement does not discriminate on the basis of sex or gender.

[105] The Respondent also contends that there is no factual basis to show that women are more likely to be non-resident than are men. It refers to the decision in *Kahkewistahaw First Nation v. Taypotat*, [2015] 2 S.C.R. 548 where the Court said the following at paragraph 34:

I think intuition may well lead us to the conclusion that the provision has some disparate impact, but before we put the Kahkewistahaw First Nation to the burden of justifying a breach of s. 15 in its *Kahkewistahaw Election Act*, there must be enough evidence to show a *prima facie* breach. While the evidentiary burden need not be onerous, the evidence must amount to more than a web of instinct. The evidence before us, even in combination, does not rise to the level of demonstrating any relationship between age, residence on a reserve, and education among members of the Kahkewistahaw First Nation, let alone that arbitrary disadvantage results from the impugned provisions.

[106] I agree with the submissions of the Respondent as to the applicability of section 28 and subsection 35(4) in this case.

[107] In *Dickson, supra*, the Supreme Court briefly touched on the issue of section 28. It said, in paragraph 173, that section 28 ensures “that a right protected under s. 25 does not shelter gender-based discrimination”.

[108] In my view, using section 25 as a “shield” in this case would not shelter gender-based discrimination.

[109] The evidence shows that Sawridge members were alert to the fact that members interested in running for the office of the Chief may experience difficulties in obtaining housing on reserve. That difficulty was a reason why the definition of “resident” was expanded to include members residing in the Town of Slave Lake. The definition of “resident” in the Constitution provides as follows:

“Resident” means a Member whose primary residence is on Sawridge Lands or within 10 km of a Principal Office of the Sawridge First Nation.

[110] It is not necessary to engage in any analysis pursuant to section 1 of the Charter since the residency requirement in this case is “saved” by section 25 of the Charter.

[111] The Applicant gave notice of a Constitutional Question pursuant to section 57 of the *Federal Courts Act*, R.S.C., 1985, c. F-7. Proof of service of the Question upon the Attorney General of Canada and the provincial and territorial Attorneys General was filed.

[112] None of the Attorneys General made submissions on the question.

[113] In my opinion, considering the decision of the Supreme Court of Canada in *Dickson*, *supra*, and the evidence and arguments in the within matter, the residency requirement in the Sawridge Constitution meets the applicable constitutional requirements. It is not necessary to engage with the Constitutional question posed by the Applicant.

[114] In the result, the application for judicial review will be dismissed.

[115] According to the Respondent, there is no agreement between the parties as to costs, following the disposition of this application for judicial review. Both parties addressed costs.

[116] The Applicant, in the event of her success on the application for judicial review, seeks lump sum costs in the amount of \$20,000.00.

[117] In the event that she is not successful, the Applicant argues that she is a “public-interest litigant” whose efforts in this litigation will benefit other First Nations across Canada who face similar rules.

[118] As well, the Applicant speaks to broad principles of access to justice, as reviewed in the decision in *Whalen v. Fort McMurray No. 468*, 2019 FC 1119. She also addressed the issue of financial imbalance between her personal circumstances and the financial resources of the Respondent.

[119] The Respondent resists the invitation for the award of lump sum costs, on the ground that there is no evidentiary foundation for such an award. It seeks elevated costs on the basis of Tariff 4 of the *Federal Courts Rules*, SOR/98-106 (the “Rules”). It seeks the higher costs on the grounds that this application raised many constitutional questions that required supplementary submissions before the hearing, that is in response to the decision of the Supreme Court of Canada in *Dickson, supra*.

[120] Pursuant to Rule 400 of the Rules, the Court has full discretion over costs.

[121] I acknowledge the submissions made on costs.

[122] In the usual course, costs are awarded to the successful party.

[123] Nonetheless, I will give the parties the opportunity to seek agreement on costs, following the Judgment in this matter. A Direction will issue in that regard.

JUDGMENT IN T-281-23

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed.

A Direction will issue regarding costs.

"E. Heneghan"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: T-281-23

STYLE OF CAUSE: SAWRIDGE FIRST NATION, SAWRIDGE FIRST NATION FORMERLY KNOWN AS THE SAWRIDGE INDIAN BAND, ROLAND TWINN, IN HIS CAPACITY AS CANDIDATE FOR CHIEF OF THE SAWRIDGE FIRST NATION, ISAAC TWINN, IN HIS CAPACITY AS CANDIDATE FOR CHIEF OF THE SAWRIDGE FIRST NATION, DENNIS CALLIHOO, IN HIS CAPACITY AS THE ELECTORAL OFFICER OF THE SAWRIDGE FIRST NATION

PLACE OF HEARING: EDMONTON, ALBERTA

DATE OF HEARING: JUNE 14, 2024

FURTHER SUBMISSIONS RECEIVED: JULY 23, 2024 & JULY 29, 2024

REASONS AND JUDGMENT: HENEGHAN J.

DATED: APRIL 8, 2025

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