

**BEYOND CHARTER APPLICABILITY: EXPLORING CHALLENGES  
AND OPPORTUNITIES FOR INDIGENOUS JURISDICTION IN  
MCCARTHY V. WHITEFISH LAKE FIRST NATION**

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**I. INTRODUCTION**

The *Karen McCarthy and Lorna Jackson-Littlewolfe v. Whitefish Lake First Nation #128*<sup>1</sup> case develops doctrine in two related areas in Aboriginal law. One area is the nature of the relationship between Aboriginal governments and the *Canadian Charter of Rights and Freedoms*,<sup>2</sup> including the relevance of the question of the source of self-government authority (delegated, constitutional, or inherency) to the application of the *Charter*. The second area of development flows from the first. It relates to the application of section 25<sup>3</sup> — specifically, what categories of rights are included in the protection of section 25 and the parameters of its “shielding” function in the context of a challenge to an internal restriction by a member of a self-governing First Nation. The development of doctrine in this area is needed.<sup>4</sup> However, there are concerns about how the courts are moving to apply section 32(1) to Indigenous governments from the perspective of constitutional reconciliation. This concern corresponds to further issues regarding the application of section 25 and the question of the relationship between the *Charter* and Indigenous jurisdiction more generally.<sup>5</sup> This comment explores these issues in the context of the case.

The *McCarthy* case involves the joined challenges of two applicants — Karen McCarthy and Lorna Jackson-Littlewolf — both seeking a review of decisions made by the Whitefish Lake First Nation (WLFN) Appeal Committee relating to the application of the community’s *Election Regulations*,<sup>6</sup> which govern WLFN elections. Both applications concern an election for Chief and Band Council of WLFN and engage both the lawfulness of the *Election Regulations* themselves and the decisions of the Appeal Committee.

Two elements of the WLFN *Election Regulations* are relevant to the appeals. One is the “Bill C-31 Voting Policy,” which provides that members who regained Indian status under Bill C-31 are ineligible to vote in WLFN elections.<sup>7</sup> McCarthy, who had regained Indian status and membership in WLFN under Bill C-31, was not included on the voter list for the 2021 WLFN Election. She appealed the exclusion to the Appeal Committee, which deemed

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<sup>1</sup> 2023 FC 220 [*McCarthy*].

<sup>2</sup> *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*].

<sup>3</sup> *Ibid*, s 25.

<sup>4</sup> Ryan Beaton, “Doctrine Calling: Inherent Indigenous Jurisdiction in *Vuntut Gwitchin*” (2022) 31:2 *Const Forum Const* 39.

<sup>5</sup> *Charter*, *supra* note 2, s 32(1).

<sup>6</sup> *McCarthy*, *supra* note 1 at para 3 (“*Saddle Lake Tribal Customs*”).

<sup>7</sup> *Ibid* at para 2; Bill C-31, *An Act to Amend the Indian Act*, 1st Sess, 33rd Parl, 1985 [Bill C-31].



her ineligible to vote under the Bill C-31 Voting Policy.<sup>8</sup> The second challenge by Jackson-Littlewolfe concerns a section of the *Election Regulations* that states that “no person living in a Common law marriage shall be eligible for nomination.”<sup>9</sup> This section excludes individuals living in common law marriages from running for elected positions. Jackson-Littlewolfe tried to run for Chief and Council in the 2021 election, but her candidacy was challenged because she lives in a common law marriage, and the Appeal Committee determined she was ineligible to stand for election under the *Election Regulations*. Both applicants sought judicial review, arguing that the Appeal Committee decisions violated their equality rights under section 15(1) of the *Charter* and that the elements of the *Election Regulations* in question were not valid WLFN customs.<sup>10</sup>

The case engages both constitutional and administrative law issues. In considering whether the decisions of the Appeal Committee were lawful from an administrative law perspective in relation to the applicant’s *Charter* rights, the Federal Court also considered whether the Bill C-31 Voting Policy and the “Common Law Marriage Prohibition” meet the jurisprudential definition of an Aboriginal “custom.” As part of its determinations, the Court also considered the application of section 25 of the *Charter*, specifically whether the customs in question were based on a right falling under the protection of section 25.<sup>11</sup> Significantly, preliminary to these determinations, the Court addressed an issue of concern from the perspective of constitutional reconciliation: whether the *Charter* applies to the laws of Indigenous governments that derive authority from inherent jurisdiction, as opposed to from section 35, treaty, or federal delegation.

## II. JUDGMENTS

The Federal Court found that WLFN failed to show that the elements of the *Election Regulations* in question were based on valid custom; therefore, they were not valid law.<sup>12</sup> Despite this determination, the Court still considered the questions of the application of section 25 of the *Charter* and whether the Appeal Committee’s decisions infringed section 15(1). In its reasoning on the application of section 25, the Court followed the approach recently articulated by the Yukon Court of Appeal in *Dickson v. Vuntut Gwitchin First Nation* (drawing on the concurrence in *R. v. Kapp*).<sup>13</sup> However, unlike in *Dickson*, where the Court of Appeal found a residency requirement for elected officials contained in the Vuntut Gwitchin First Nation (VGFN) Constitution was shielded from section 15 by section 25, the Court in *McCarthy* found that neither the Bill C-31 Voting Policy nor the Common Law Marriage Prohibition drew section 25 protection because they were not valid law. The Court further stated that the Bill C-31 Voting Policy discriminates based on sex, *contra* section 28

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<sup>8</sup> *McCarthy*, *ibid*. The Court documents indicate that the Appeal Committee had made a similar decision regarding her eligibility to vote in 2017, but McCarthy did not seek a judicial review.

<sup>9</sup> *Ibid* at para 3.

<sup>10</sup> *Charter*, *supra* note 2, s 15(1).

<sup>11</sup> *McCarthy*, *supra* note 1 at para 30.

<sup>12</sup> *Ibid* at para 6.

<sup>13</sup> *Dickson v Vuntut Gwitchin First Nation*, 2021 YKCA 5 [*Dickson CA*]; *R v Kapp*, 2008 SCC 41 [*Kapp*].

of the *Charter* and section 35(4) of the *Constitution Act, 1982*.<sup>14</sup> Thus, it would not be shielded by section 25 in any case. The Court also analyzed the alleged infringements of section 15 and found neither could be saved. As a remedy, the Court quashed and set aside the decisions of the Appeal Committee. It also declared that the Bill C-31 Voting Policy and the Common Law Marriage Prohibition were unconstitutional and of no force and effect. The declaration of invalidity was suspended, and WLFN was given twelve months to adopt its own membership code and six months to amend the *Election Regulations* to reflect the broad consensus of the WLFN membership.<sup>15</sup>

### III. FACTS

McCarthy and Jackson-Littlewolfe are both members of WLFN, a Treaty 6 Nation with a reserve near St. Paul, Alberta. WLFN, together with Saddle Lake First Nation, form the Saddle Lake Cree Nation #462 (SLCN), which is a single band under the *Indian Act* with approximately 11,231 members.<sup>16</sup> Nonetheless, WLFN and Saddle Lake First Nation have their own reserves and band councils that hold separate elections. According to evidence presented to the Court, the SLCN *Election Regulations* were enacted in the 1950s. The *McCarthy* case concerns two sections in particular. The first, section 2(a), sets out who is eligible to vote. It states that “[a]ny Band member, over the age of 21 years, on the day of the election, whether living on the Reserve or not, shall be eligible to cast a vote; with the exception of Red Ticket Indians.”<sup>17</sup>

The meaning of the term “Red Ticket Indians” is relevant to understanding this case. It is an anachronism emanating from the period after 1869 when the federal government introduced legislation titled *An Act for the Gradual Enfranchisement of Indians, the Better Management of Indian Affairs, and to Extend the Provisions of the Act*.<sup>18</sup> This *Act* included the first version of the infamous “marrying out” rule that would later be incorporated into the *Indian Act*. Under this legislation, Indigenous women who lost Indian status through marriage could continue to collect annuities and be affiliated with their band.<sup>19</sup> An administrative practice arose during this time of issuing women in this situation identity cards known as “red tickets.”<sup>20</sup>

In 1951, the *Indian Act* was amended with section 12(1)(b), which updated the marry out rule. Women who married out were now forced to give up annuities and leave their reserves. Thus, the red ticket practice ended. Eventually, the women who lost Indian status under these

<sup>14</sup> *Charter*, *supra* note 2, s 28 (“[n]otwithstanding anything in this Charter, the rights and freedoms in it are guaranteed equally to male and female persons”). *Constitution Act, 1982*, s 35(4), being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 (“[n]otwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons”).

<sup>15</sup> *McCarthy*, *supra* note 1.

<sup>16</sup> *Indian Act*, RSC 1985, c I-5; *McCarthy*, *supra* note 1 at para 7.

<sup>17</sup> *McCarthy*, *ibid* at para 13.

<sup>18</sup> SC 1869, c 6.

<sup>19</sup> *Ibid*, s 16.

<sup>20</sup> Bonita Lawrence, “*Real*” *Indians and Others: Mixed-Blood Urban Native Peoples and Indigenous Nationhood* (Lincoln: University of Nebraska Press, 2004) at 50–53. This practice stopped with the introduction of section 12(1)(b) of the *Indian Act* in 1951 (*Indian Act*, SC 1951, c 29, s 12(1)(b)). Under this section, a woman who married outside her community lost access to any rights associated with Indian status.

provisions were reinstated under Bill C-31 in 1985.<sup>21</sup> McCarthy was born without Indian status because her mother married a non-status man in 1971. McCarthy regained her status and membership in WLFN under Bill C-31. The Federal Court references Justice Phelan in *Daniels*, stating that “Red Ticket Indians” “are the same women, along with their descendants, who later became Bill C-31 Members.”<sup>22</sup> Section 2(a) of the *Election Regulations* “state[s] that women who lost their status and membership because they married out are not eligible to vote.”<sup>23</sup> The Court records indicate that WLFN allowed all members enfranchised by Bill C-31 to obtain membership. However, the Bill C-31 Voting Policy meant McCarthy and others in her situation were ineligible to vote in WLFN elections. The Appeal Committee dismissed McCarthy’s appeal of the voter’s list on the basis that it is “the customary law of the [WLFN] that Bill C-31 people are not eligible to vote in an Election or referendum.”<sup>24</sup> WLFN claimed this policy had been a custom since Bill C-31 came into force.

Jackson-Littlewolfe is in a different position. The issue in her application is not based on Indian status, but on the fact that she lives in a common law marriage, which engages another provision in the *Election Regulations*. Section 1(c) of the *Election Regulations* prohibits members from being nominated to run for election as Chief or Band Council if they live in a common law marriage.<sup>25</sup> Jackson-Littlewolfe was nominated as a candidate for the 2021 election. However, an appeal of her nomination was filed to the Appeal Committee based on the Common Law Marriage Prohibition. The Committee decided she was not an eligible candidate per section 1(c).<sup>26</sup>

Both McCarthy and Jackson-Littlewolf argued that the decisions of the Appeal Committee violated their equality rights under the *Charter*. They also argued that the elements of the *Election Regulations* were not valid WLFN customs.

#### IV. MAIN LEGAL ISSUES

The central administrative and constitutional law issues in the case all emanate from a fundamental question of whether the impugned laws represented “customs” of WLFN. The Court’s determination on the application of section 25 and its review of the Appeal Committee decisions primarily flowed from the answer to this question.

On the administrative law issues, the Court assessed the decisions of the Appeal Committee regarding the Bill C-31 Voting Policy and the Marriage Prohibition using a reasonableness standard of review, with deference to Indigenous decision-makers’ understanding of their own laws. However, per *Samantha Whalen v. Fort McMurray No. 468 First Nation*, the party relying on the alleged custom must demonstrate that the custom

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<sup>21</sup> Bill C-31, *supra* note 7.

<sup>22</sup> *McCarthy*, *supra* note 1 at para 65, citing *Harry Daniels*, *Gabriel Daniels*, *Leah Gardner*, *Terry Joudrey* and *The Congress of Aboriginal Peoples v Her Majesty the Queen, as represented by the Minister of Indian Affairs and Northern Development and the Attorney General of Canada*, 2013 FC 6 at para 461.

<sup>23</sup> *McCarthy*, *ibid* at para 65.

<sup>24</sup> *Ibid* at para 25, quoting Letter from Chair of the WLFN Appeals Committee to Karen McCarthy (14 April 2021) excerpt reproduced in *McCarthy*, *ibid*.

<sup>25</sup> *McCarthy*, *ibid* at para 14.

<sup>26</sup> *Ibid* at para 27.

reflects a broad consensus of the First Nation's membership.<sup>27</sup> Thus, the onus was on WLFN to demonstrate that the customs it alleged reflect a broad consensus of its membership.<sup>28</sup> The Court also specified that this engages the question of whether the alleged custom goes to "the distinctive, collective and cultural identity of an aboriginal group' at this moment in time."<sup>29</sup> In other words, it does not matter whether the custom developed before colonization, developed after it, or is a product of it. What matters is whether there is, at present, a broad consensus within the community in which the customs are said to have the force of law. Thus, valid customs do not need to be based on Indigenous political traditions in a historical sense, but instead on more contemporary practices of governance. This idea follows the Yukon Court of Appeal's approach in *Dickson*, which did not impose any pre-contact requirement for valid customs, but instead focused on their contemporary purpose.<sup>30</sup>

On the question of whether the Bill C-31 Voting Policy represented a valid custom, the evidence presented to the Court from both sides consisted mainly of affidavits from Elders and former elected Band Council members. McCarthy argued that WLFN leadership imposed the Bill C-31 Voting Policy without consulting the membership and, in addition, that the Policy is not a traditional practice of WLFN. She presented affidavits from three former WLFN Chiefs stating their belief that the Bill C-31 Voting Policy is not a WLFN custom and that historically, WLFN did not categorize its members based on differential citizenship. They also each stated that they believe it is the consensus of the WLFN membership is that all members, including Bill C-31 Members, should have the right to vote. WLFN submitted two affidavits from Elders stating that the Bill C-31 Voting Policy has continued since 1985 and that only the WLFN membership can change WLFN governance, not the Appeal Committee or a Canadian court.

The Court concluded that WLFN failed to show that the "Red Ticket Indian" or Bill C-31 policy exception reflected the consensus of the community. Instead, it determined it was a concept imposed through the *Indian Act*, which was later found unconstitutional by the British Columbia Court of Appeal in the *McIvor v Canada (Registrar of Indian and Northern Affairs)* decision.<sup>31</sup> It also found that the Bill C-31 Voting Policy was essentially made obsolete by Bill C-31, as nothing else in the *Election Regulations* limits the right of certain members to vote.<sup>32</sup> Thus, the Court found the "WLFN has failed to establish that the Bill C-

<sup>27</sup> 2019 FC 732 at para 32 [*Whalen*].

<sup>28</sup> On this point, the Court cited: *ibid* at para 32; *Bigstone v Big Eagle*, 1993 1 CNLR 25 at 34 (FCTD) [*Bigstone*]; *William Gordon Glendale in his Capacity as Chief of Band Council of the Da'naxda'xw First Nation and as a Member of the Hereditary Chiefs Council and Michael Jacobson-Weston and Annie Glendale in Their Capacity as Councillors of the Da'naxda'xw First Nation v Bill Peters, Norman Glendale and Robert Duncan; Bill Peters and Robert Duncan, in Their Capacity as Members of the Hereditary Chiefs Council of Da'naxda'xw First Nation v William Gordon Glendale, Michael Jacobson-Weston, and Annie Glendale*, 2021 FC 360 [*Da'naxda'xw*].

<sup>29</sup> *McCarthy*, *supra* note 1 at para 148, quoting *Kapp*, *supra* note 13 at para 89.

<sup>30</sup> *Dickson CA*, *supra* note 13 at para 141.

<sup>31</sup> 2009 BCCA 153. The Court also stated it believed there is a distinction between "Red Ticket Indians" and Bill C-31 Members. Whereas "Red Ticket Indians" lost their membership upon marrying out, Bill C-31 Members have full membership in WLFN. The Court stated, "I agree with Ms. McCarthy that there is nothing within the *Election Regulations* (other than the 'Red Ticket Indian' exception, which is now obsolete) or the *Indian Act* that limits certain members' democratic rights" (*McCarthy*, *supra* note 1 at para 68).

<sup>32</sup> In making this determination, the Court stated that less weight should be given to evidence about past consensus than to evidence that there is current consensus over a custom. On the jurisprudential definition of customary law, including the idea that it can change over time, see *Da'naxda'xw*, *supra* note 28 at para 72; *McLeod Lake Indian Band v Chingee* (1998), 165 DLR (4th) 358 at para 10; *Francis v Mohawk Council of Kanesatake*, 2003 FCT 115 at para 24.

31 Voting Policy is a custom supported by a broad community consensus.”<sup>33</sup> Following this finding, the Court determined that the Appeal Committee’s decision that McCarthy was ineligible to vote was unreasonable because the Bill C-31 Voting Policy was not a valid law.

Jackson-Littlewolfe similarly argued that the Common Law Marriage Prohibition does not reflect WLFN’s traditional practices or customs. Her evidence included four affidavits from WLFN Elders stating that most of the community opposed the Common Law Marriage Prohibition and that it had been applied arbitrarily. WLFN countered with an affidavit by one Elder stating that the Common Law Marriage Prohibition reflects WLFN’s “historical practices of governance” since 1876 when WLFN adopted the teachings of the Methodist Church.<sup>34</sup> However, the Court concluded that the Common Law Marriage Prohibition is not a valid custom, so the Appeal Committee’s decision was unreasonable. It noted several contextual factors that went into this determination, including that more than half of the WLFN members live in relationships that constitute common law marriages, and evidence that the Common Law Marriage Prohibition had been inconsistently applied in the past.<sup>35</sup> The Court also found that WLFN failed to present evidence that a broad consensus of members, past or present, supported the Common Law Marriage Prohibition. The Court also noted that the consensus question is not concerned with whether Elders agree on an alleged custom, but whether there is a broad consensus among all the community members.<sup>36</sup> Due to its finding that this element of the *Election Regulations* is not valid law, the decision of the Appeal Committee was necessarily unreasonable.

Notwithstanding the finding that the Bill C-31 Voting Policy and the Common Law Marriage Prohibition were unlawful, the Court still considered the constitutionality of the Appeal Committee’s decisions in relation to the *Charter*. The Court applied a standard of correctness on whether the Committee adequately considered the applicants’ *Charter* rights. It cited the Supreme Court of Canada’s ruling in *Law Society of British Columbia v. Trinity Western University* that if *Charter* rights are engaged in an administrative decision, the deciding body must attempt to balance any limitations of those rights against the statutory objective.<sup>37</sup> In the present case, the Court found that the WLFN Committee failed to do this. There was no evidence that the Committee considered *Charter* rights in its decisions or tried to balance any limitation against a statutory or government objective.

## V. DOES THE CHARTER APPLY TO THE INHERENT RIGHT OF SELF-GOVERNMENT?

The fact that the Appeal Committee did not consider the applicants’ *Charter* rights is unsurprising, considering WLFN’s position that the *Charter* does not apply to its leadership

<sup>33</sup> *McCarthy*, *supra* note 1 at para 73; *Dickson CA*, *supra* note 13.

<sup>34</sup> *McCarthy*, *ibid* at para 137. Jackson-Littlewolfe argued that this evidence contained hearsay. WLFN cited *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 that oral history is hearsay by its very nature. The Court should admit such evidence if it is the best evidence available to an Indigenous party. The Federal Court found Elder Ben Houle’s affidavit admissible as it satisfied the *Mitchell* criteria (*Mitchell v MNR*, 2001 SCC 33).

<sup>35</sup> *McCarthy*, *ibid* at para 81.

<sup>36</sup> “I note parenthetically that WLFN has not argued that it is a custom for the Elders or WLFN leadership to determine WLFN’s Indigenous laws without involving the other members of the community” (*McCarthy*, *ibid* at para 81).

<sup>37</sup> *Law Society of British Columbia v Trinity Western University*, 2018 SCC 32.

selection processes. WLFN argued that it has an inherent right to self-government that exists outside of the *Constitution Act, 1982*, and as such, the *Charter* does not apply to its actions. Like the VGFN in *Dickson*, WLFN maintained its right to govern itself under an inherent jurisdiction that existed before the *Indian Act*, section 35, or any treaty.<sup>38</sup> WLFN argued that its governmental actions are immune from the *Charter*, even if they infringe on individuals' *Charter* rights, including sex-based equality.<sup>39</sup>

The Court rejected this argument. Citing *Eldridge v. British Columbia (Attorney General)*,<sup>40</sup> it found that the “WLFN is a government or carries on functions of a government” under section 32(1) of the *Charter*.<sup>41</sup> Thus, it held that the *Charter* applied to its actions regardless of whether WLFN's governmental authority stems from an inherent right, treaty, section 35, or federal statute. This reasoning is similar to the Yukon Court of Appeal's approach in *Dickson*. In that case, the Court of Appeal declined to determine the source of the First Nation's power to self-govern.<sup>42</sup> Instead, it held that regardless of the source of VGFN's authority, the “exercise of its legislative capacity and Constitution” were sufficient to bring it within the scope of section 32(1) of the *Charter* — either as “government” or as an entity exercising inherently “governmental” activities.<sup>43</sup>

## VI. WHAT IS INCLUDED IN SECTION 25 PROTECTIONS?

An area in Aboriginal law where doctrine is still relatively undeveloped is the application of section 25 in the context of challenges to internal restrictions of Indigenous governments by citizens of the group.<sup>44</sup> In *Kapp*, Justice Bastarache placed section 25 at the halfway point in a section 15 *Charter* analysis after a *prima facie* infringement had been found before moving to the *Oakes* test.<sup>45</sup> If section 25 is found to apply, a complete section 15 analysis will be unnecessary.<sup>46</sup> In *McCarthy*, the Court applied this approach. It found that both of the challenged provisions were *prima facie* infringements of section 15(1), but before assessing if the infringements were justified, it turned to section 25 considerations.

<sup>38</sup> *Indian Act*, *supra* note 16; *Constitution Act, 1982*, *supra* note 14, s 25; *McCarthy*, *supra* note 1.

<sup>39</sup> *McCarthy*, *ibid* at para 112 (“WLFN acknowledges that Aboriginal rights cannot infringe sex-based equality rights pursuant to subsection 35(4) of the *Constitution Act, 1982* and section 28 of the *Charter*. However, WLFN submits that these limits do not apply to it because its inherent right to self-government predates the *Charter* and has never been extinguished”).

<sup>40</sup> *Eldridge v British Columbia (Attorney General)*, [1997] 3 SCR 624 [*Eldridge*].

<sup>41</sup> *McCarthy*, *supra* note 1 at para 116. The Court (*McCarthy*, *ibid* at para 115 [emphasis omitted]) quotes *Eldridge*, *ibid* at para 115:

[I]t may be determined that the entity is itself “government” for the purposes of s. 32. This involves an inquiry into whether the entity whose actions have given rise to the alleged *Charter* breach can, either by its very nature or in virtue of the degree of governmental control exercised over it, properly be characterized as “government” within the meaning of s. 32(1).

<sup>42</sup> The Court in *Dickson CA*, *supra* note 13 at para 93 characterized it as “perhaps futile” for courts to engage in the debate regarding inherent Aboriginal rights and the source of the authority to self govern.  
<sup>43</sup> *Ibid* at para 91, quoting *Dickson v Vuntut Gwitchin First Nation*, 2020 YKSC 22 at para 130 [*Dickson SC*].

<sup>44</sup> For more discussion, see Amy Swiffen, “Constitutional Reconciliation and the *Canadian Charter of Rights and Freedoms*” (2019) 24:1 Rev Const Stud 85; Amy Swiffen, “Special Issue on *Dickson v. Vuntut Gwitchin First Nation*, 2021 YKCA 5” (2022) 31:2 Const Forum Const 1.

<sup>45</sup> Naomi Metallic, “Checking Our Attachment to the *Charter* and Respecting Indigenous Legal Orders: A Framework for *Charter* Application to Indigenous Governments” (2022) 31:2 Const Forum Const 3; *R v Oakes*, [1986] 1 SCR 103 [*Oakes*].

<sup>46</sup> *Dickson CA*, *supra* note 13 at para 151.

The first part of this analysis is determining if the challenged provisions come within the scope of section 25 protection. In *Kapp*, the majority of the Supreme Court said in *obiter* that section 25 likely only protects rights of “constitutional character.”<sup>47</sup> In contrast, Justice Bastarache held in concurring reasons that section 25 protects rights beyond this to include “statutory rights which seek to protect interests associated with aboriginal culture, territory, self-government,” “sovereignty,” and “the treaty process.”<sup>48</sup> He argued that section 25 is engaged whenever “*Charter* protections for individuals would diminish the distinctive, collective and cultural identity of an aboriginal group.”<sup>49</sup> The Court of Appeal decision in *Dickson* drew on the broader view of section 25 articulated by Justice Bastarache as protecting collective Aboriginal, Treaty, and “other rights” above personal *Charter* rights by potentially shielding them from section 1 considerations.<sup>50</sup>

In *McCarthy*, the Court applied the precedent from *Dickson*, citing Justices Bastarache and L’Heureux-Dubé writing for the minority in *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, that the rights included in section 25 are broader than rights of a constitutional character and may include statutory rights and rights based on inherency.<sup>51</sup> It determined that the *McCarthy* case raised similar issues as in *Dickson*. Both involved challenges under section 15(1) to provisions regarding elections (in *Dickson*, the issue pertained to a residency restriction that required council members to reside in the community of Old Crow, despite VGFN’s traditional territory covering a larger area).<sup>52</sup> In both cases, what was at stake was not a treaty or section 35 right, but an “other” right recognized as falling under section 25.<sup>53</sup>

## VII. WHAT ARE THE PARAMETERS OF SECTION 25’S SHIELDING FUNCTION?

However, unlike *Dickson*, the Court in *McCarthy* found that section 25 of the *Charter* did not shield the Bill C-31 Voting Policy or the Common Law Marriage Prohibition from a section 1 analysis. It provided several reasons for this conclusion. The Court stated that while section 25 protects more than rights of a constitutional character, there must still be an evidentiary foundation when an Indigenous government claims an “other right,” such as the inherent right to self-govern according to custom.<sup>54</sup> As discussed above, the Court found that the customs alleged by WLFN were not supported by a broad consensus of the community and, as such, not valid law. The Court determined that they cannot be protected by section 25, even if enacted under an inherent right to self-government. For this reason, the Court

<sup>47</sup> *Kapp*, *supra* note 13 at para 63.

<sup>48</sup> *Ibid* at paras 102–103, 105.

<sup>49</sup> *Ibid* at para 89.

<sup>50</sup> *Dickson CA*, *supra* note 13 at paras 143–44, 146.

<sup>51</sup> *McCarthy*, *supra* note 1 at para 97 [emphasis omitted], quoting *Corbiere v Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203 at para 52: “[s]ection 25 is triggered when s. 35 Aboriginal or treaty rights are in question, or when the relief requested under a *Charter* challenge could abrogate or derogate from ‘other rights or freedoms that pertain to the aboriginal peoples of Canada’”); *Dickson CA*, *ibid*.

<sup>52</sup> *Dickson CA*, *ibid*.

<sup>53</sup> The VGFN signed a self-government agreement with Canada and Yukon in 1993. It adopted a constitution that contained the residency requirement, requiring any VGFN Council member to reside in Old Crow. In that case, however, the Court found that the evidence provided by the VGFN established that its custom mode of choosing leaders was a distinctive and significant part of its culture and a right that “pertains to” the Aboriginal peoples of Canada: *Dickson CA*, *supra* note 13 at paras 201, 207.

<sup>54</sup> *McCarthy*, *supra* note 1 at para 144.



found that neither provision in the *Election Regulations* was shielded from *Charter* scrutiny. It added that section 28 also limits the application of section 25, and actions that discriminate based on sex will not be shielded.<sup>55</sup>

Despite finding that neither of the alleged customs were valid law, the Court proceeded with an infringement analysis given that neither was shielded by section 25 of the *Charter*.<sup>56</sup> The first part of the analysis found that the Bill C-31 Voting Policy creates a distinction between WLFN members based on sex by targeting women who married non-status men and denying them the ability to vote.<sup>57</sup> Along similar lines, it found that the Common Law Marriage Prohibition creates a distinction between WLFN members on the analogous ground of marital status and denies certain WLFN members the ability to stand for election and participate in the governance of the community.<sup>58</sup> Therefore, it concluded that the Bill C-31 Voting Policy infringes on section 15 of the *Charter*. Since the Bill C-31 Voting Policy was not found to be a WLFN custom, the infringement could not be understood to be prescribed by law. Therefore, the *Oakes* test could not be applied.<sup>59</sup> Regarding the Common Law Marriage Prohibition, the Court stated that it imposes a religious moral obligation on candidates, which is not a legitimate government objective.<sup>60</sup> Therefore, it found it unnecessary to consider the remaining steps of the *Oakes* test.

### VIII. THE APPLICATION OF SECTION 32(1) TO INDIGENOUS GOVERNMENTS

The Court's interpretation of the applicability of section 25 in the context of challenges to internal restrictions by citizens of a self-governing First Nation flows in part from the determination that the *Charter* applies to Indigenous governments under section 32(1). This approach is an emerging precedent. However, it elides more profound constitutional questions relevant to reconciliation. Such deeper questions are alluded to in the Court's reasoning in *McCarthy*, even if they are not explored. For example, the Court states that section 2 of the *Indian Act* does not delegate governmental authority to Indigenous governments but *acknowledges* that First Nations have inherent jurisdiction to self-government derived from their preexisting legal orders.<sup>61</sup> This idea suggests that the jurisdiction of Indigenous nations exists independently of the settler legal order. On this point, the Court states that "[t]he inherent jurisdiction of Indigenous nations is *independent from the constitutional framework of Canada*."<sup>62</sup> This statement suggests an

<sup>55</sup> *Ibid* at para 141. *Charter*, *supra* note 2, s 28 ("Notwithstanding anything in this *Charter*, the rights and freedoms referred to in it are guaranteed equally to male and female persons"). Justice Bastarache also articulated this in *Kapp*, *supra* note 13 at para 97 stating that the section 25 shield is not absolute but restricted by section 28.

<sup>56</sup> *McCarthy*, *ibid* at para 153.

<sup>57</sup> *Ibid* at paras 153–57.

<sup>58</sup> *Ibid* at paras 160–63.

<sup>59</sup> *Ibid* at paras 170–71; *Oakes*, *supra* note 45.

<sup>60</sup> *McCarthy*, *ibid* at paras 184–80 as per *R v Big M Drug Mart Ltd*, [1985] 1 SCR 295.

<sup>61</sup> Patricia A Monture-Angus, *Journeying Forward: Dreaming of First Nations' Independence* (Halifax: Fernwood, 1999) at 150. Monture-Angus made the point at the time of the *Corbiere* decision (*supra* note 51) that the application of the *Indian Act* had been taken by courts to have extinguished any Indigenous rights that may have preceded it. However, the concept of extinguishment implies the existence of something that can be extinguished. She argued that groups who did not come under the jurisdiction of the *Indian Act* continue to have self-government rights, and those who did come under the *Indian Act* are acknowledged to have possessed such rights.

<sup>62</sup> *McCarthy*, *supra* note 1 at para 118 [emphasis added].

acknowledgement that the jurisdiction of Indigenous governments exists outside the Canadian Constitution, of which the *Charter* is a part.

At the same time, however, the Court found that the “WLFN exercises its governmental authority within the ‘sphere of federal jurisdiction.’”<sup>63</sup> It noted that the *Election Regulations* incorporate sections of the *Indian Act* by reference. It also noted that the WLFN band council manages reserve land, has bylaw-making powers, and manages federal government programs.<sup>64</sup> It reasoned that this means WLFN’s governance is “at least partially” regulated by legislation that falls within the sphere of federal jurisdiction.<sup>65</sup> Based on the interaction of Crown and Indigenous authority, it concluded that the “WLFN is a *sui generis* government entity that acts as a government under federal legislation and in matters within the authority of Parliament by virtue of section 91(24) of the *Constitution Act, 1867*.”<sup>66</sup>

Thus, on the one hand, the courts acknowledge that Indigenous jurisdiction exists independent of the Canadian Constitution, which includes the *Charter*. On the other hand, they point to imbrications with Canadian law as a basis for placing Indigenous jurisdiction “within the authority” of the Crown. The reasoning is not that the *Charter* applies to Indigenous self-governments solely by their nature as governmental institutions. Instead, the argument cites various nexus of Indigenous and Crown jurisdiction as what makes Indigenous jurisdiction part of “Canada’s constitutional fabric.”<sup>67</sup> This reasoning draws significantly on the *Dickson* decision in which the Court of Appeal accepted the lower court assessment that “the *Charter* applies to the residency requirement of the VGFN Constitution whether viewed from an exercise of inherent right or an exercise of the VGFN Self-Government Agreement implemented by federal and territorial legislation.”<sup>68</sup>

Such an approach is arguably an improvement from the notion that the *Indian Act* extinguished Indigenous jurisdiction and that Aboriginal self-government rights are a form of delegated federal authority.<sup>69</sup> However, the acknowledgement of the inherent jurisdiction of Indigenous legalities independent from the Canadian constitutional framework is potentially in tension with the application of section 32(1) of the *Charter*. It is questionable whether analyzing the difference the source of that jurisdiction makes is truly “futile,” considering that the precedent the courts draw from to make this determination pertains to cases involving institutions such as hospitals and municipal governments. Arguably, the analogy between such entities and Indigenous self-government authority is limited. As noted above, *McCarthy* cites the Supreme Court’s decision in *Eldridge*, which found that if an entity merely performs a “public function,” it is not enough to make it “‘government’ for the purposes of s. 32.”<sup>70</sup> Instead, an entity is governmental for the purposes of section 32 if it is

<sup>63</sup> *Ibid* at para 133, quoting *Louis Taypotat v Chief Sheldon Taypotat, Michael Bob, Janice McKay, Iris Taypotat and Vera Wasacase as Chief and Council Representatives of the Kahkewistahaw First Nation*, 2013 FCA 192 at para 36.

<sup>64</sup> *McCarthy*, *ibid* at para 133.

<sup>65</sup> *Ibid* at para 133.

<sup>66</sup> *Ibid* at para 133. *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, s 91(24) reprinted in RSC 1985, Appendix II, No 5.

<sup>67</sup> *Dickson SC*, *supra* note 43 at para 130.

<sup>68</sup> *Ibid*, quoted in *Dickson CA*, *supra* note 13 at para 91.

<sup>69</sup> Sébastien Grammond, *Recognizing Indigenous Law: A Conceptual Framework*, 2022 100:1 Can Bar Rev 1.

<sup>70</sup> *Eldridge*, *supra* note 40 at para 43.

linked to the authority of the Crown through a statute, government program, or objective. In *Eldridge*, the basis for finding that the *Charter* applied to a hospital was that the services in question were provided under the provincial legislation with a “direct and ... precisely defined connection” to the government policy.<sup>71</sup>

However, unlike a hospital or municipal government, citizens of Indigenous nations exercising inherent self-government powers are not exercising a form of delegated authority. In particular, leadership selection, and the structure and functioning of governing bodies, have been characterized as “manifestly” an exercise of an inherent right to self-government based on the prior existence of autonomous Indigenous peoples.<sup>72</sup> This idea is consistent with a growing body of Canadian law and jurisprudence recognizing the *sui generis* nature of Indigenous self-government rights, owing to their unique, inherent source predating the Canadian state.<sup>73</sup> If Indigenous jurisdiction exists independently and outside the Canadian constitutional framework, applying section 32(1) might be akin to imposing a constitutional relationship on Indigenous peoples without their meaningful consent.

Under the approach used in *McCarthy*, following *Dickson*, the courts refuse to resolve the fundamental question of the source of Indigenous jurisdiction in favour of relying on finding a nexus with Crown authority to bring Indigenous governments within the authority of the Canadian Constitution under section 91(24) and the scope of section 32(1). Arguably, this becomes a route to a similar destination of the old approach of interpreting the *Indian Act* as extinguishing the sovereignty of Indigenous nations — Indigenous legalities are subjected to the authority of a constitutional arrangement without their consent. This problem is reflected in the arguments from WLFN that the *Charter* does not apply because their inherent jurisdiction exists independent of the Canadian constitutional framework. Despite accepting the first part of the premise, the courts reject its implication regarding the *Charter*. For this reason, it is questionable whether the courts’ insistence that the source of the authority of Indigenous governments is not important in *Charter* cases is sustainable.

## IX. ASSESSING THE VALIDITY OF CUSTOMS

Another issue is challenging the actions of Indigenous governments based on alleged customs or customary law. The central criterion for assessing the lawfulness of claimed customs is the “broad community consensus.”<sup>74</sup> In *McCarthy*, the Court was presented with affidavits from Elders and former elected council members that expressed different perspectives on the customs in question, which perhaps spoke for itself to some extent. Of course, the perspective of community leaders may not reflect or directly indicate the views of the broader community. The questions are challenging. How broad does a consensus regarding a custom have to be to count as the force of law? What about alleged customs that violate minority rights within communities? Would these be protected if a large enough majority supported them? Would a challenge under these circumstances require evidence of

<sup>71</sup> *Ibid* at paras 49–51, quoting (and distinguishing) *Stoffman v Vancouver General Hospital*, [1990] 3 SCR 483 at para 516.

<sup>72</sup> *Campbell v AG BC/AG Cda & Nisga’a Nation*, 2000 BCSC 1123 at para 103; *Pastion v Dene Tha’ First Nation*, 2018 FC 648 at para 12.

<sup>73</sup> Patrick Macklem, “The Constitutional Identity of Indigenous Peoples in Canada: Status Groups or Federal Actors?” (21 April 2017) at 14–15, online (pdf): SSRN [perma.cc/6U2J-SPQ9].

<sup>74</sup> *McCarthy*, *supra* note 1 at para 73.

a board consensus that the community has a custom of protecting minority rights? Most importantly, how does an Indigenous community understand the source of legal validity and does the idea of broad consensus as understood by the courts reflect this?

So far the courts have approached such questions in a contextual manner and refrained from specifying a legal requirement that consensus must be ascertained in any particular way. In *Harpe v. Massie and Ta'an Kwäch'än Council*,<sup>75</sup> the Court made clear that “broad” does not mean everyone. A custom or practice must be generally acceptable to the members of the First Nation, which does not mean “that every citizen must agree on the precise nature of a custom or tradition, but rather that there be a general acceptance.”<sup>76</sup> In *Whalen*, the Court asserted there could be multiple ways of demonstrating a broad consensus.<sup>77</sup> These include a majority vote of the membership at an assembly or in a referendum, depending on factors such as “the adequacy of notice and procedure, the rate of participation, the practical possibility of locating members, and so forth.”<sup>78</sup> More than a simple majority vote may be required to change an established custom.<sup>79</sup> A broad consensus could also be demonstrated by “a course of conduct which expresses the First Nation’s membership’s tacit agreement to a particular rule.”<sup>80</sup> At the same time, while customs are “not materially constrained by ancestral practices,”<sup>81</sup> there is still a temporal element that may be relevant to determining their validity. As John Borrows writes, customs are “practices developed through *repetitive patterns* of social interaction that are accepted as binding on those who participate in them.”<sup>82</sup>

Therefore, the means of assessing consensus will depend on the circumstances of each case. However, they must also depend on the meaning of consensus on the legal authority for the Indigenous community whose alleged customs are engaged. In assessing the evidence in *McCarthy*, the Court stated that it is insufficient to show that Elders in a community support a custom for it to have the force of law.<sup>83</sup> Instead, it is the general membership whose views are at stake. Does this way of assessing consensus always accord with how the Indigenous community might see the meaning of consensus? It might, but the Court did not explore this question. It is crucial that jurists not impose a test of authenticity for the recognition of Indigenous laws.<sup>84</sup> All legal traditions are constantly evolving and impacted by external influences.<sup>85</sup> All legal traditions also borrow from other traditions.<sup>86</sup> It is for the community to decide what it will consider authentic. In *McCarthy*, the Court emphasizes the

<sup>75</sup> *Harpe v Massie and Ta'an Kwäch'än Council*, 2006 YKSC 1 [*Harpe*].

<sup>76</sup> *Ibid* at para 81.

<sup>77</sup> *Whalen*, *supra* note 27.

<sup>78</sup> *Ibid* at para 33.

<sup>79</sup> *Louis Taypotat v Sheldon Taypotat*, 2012 FC 1036 at para 29.

<sup>80</sup> *Whalen*, *supra* note 27 at para 36. See also *Peter Bigstone, Joy Mann-Sheepskin, Robert Sunkawasti and Aletha Sunkawasti v Laura Big Eagle, George Pewean, Lilian Big Eagle, Douglas Big Eagle, Daniel Bigstone and Marion Standingready*, [1992] FCJ No 16.

<sup>81</sup> *Whalen*, *ibid* at para 32, citing Ghislain Otis, “Elections, Traditional Governance and the *Charter*” in Gordon Christie, ed. *Aboriginality and Governance: A Multidisciplinary Perspective from Québec* (Penticton: Theytus Books, 2006) 217 at 220.

<sup>82</sup> John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010) at 51 [emphasis added].

<sup>83</sup> See e.g. *McCarthy*, *supra* note 1 at para 81.

<sup>84</sup> Borrows, *supra* note 82 at 38–39; Val Napoleon, “Thinking About Indigenous Legal Orders” in René Provost & Colleen Sheppard, eds, *Dialogues on Human Rights and Legal Pluralism* (Dordrecht: Springer, 2013) 229.

<sup>85</sup> H Patrick Glenn, “Doin’ the Transsystemic: Legal Systems and Legal Traditions” (2005) 50:4 McGill LJ 863 at 885–89.

<sup>86</sup> Sébastien Grammond, “Recognizing Indigenous Law: A Conceptual Framework” (2022) 100:1 Can B Rev 1.

idea of consensus at this moment in time.<sup>87</sup> However, the fact that reasons for finding the laws under dispute were invalid was also linked to the *Indian Act* sets off some alarms that more recent customs or Indigenous laws that borrow from external sources may be more likely to be seen as less authentic by Canadian courts.

## X. CONCLUSION

The *McCarthy* case is noteworthy because it follows emerging jurisprudence that the *Charter* applies to Indigenous governments by virtue of section 32(1) of the *Charter*. Other noteworthy elements of the decision that are downstream of the determination of *Charter* applicability is the finding that section 25 will not shield discrimination based on sex and that section 25 only protects Aboriginal government actions enacted under an Indigenous group's inherent right to self-government that represent customs (according to the jurisprudential definition). However, an issue that emerges from the decision is the courts' reluctance to explore the source of self-government rights. This reluctance means the courts have yet to fully articulate a rationale for imposing a settler rights paradigm reflected in the *Charter* on Indigenous jurisdiction independent and outside the Canadian constitutional framework. In *McCarthy*, it was enough that WLFN carried out governmental activities that interact with federal legislation to bring it within the authority of Parliament under section 91(24). However, the reliance on imbrication with federal legislation is limited. Considering the historical legacies of colonization that imposed the *Indian Act*, will it be possible to find an Indigenous government authority that does not interact with Crown authority, at least in some sense? Moreover, what would happen in a case where it is not possible to find such a nexus? Without more doctrinal development, the rationale is threatened to be another route to forcing Indigenous peoples into a constitutional relationship to which they never meaningfully consented.

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<sup>87</sup> *McCarthy*, *supra* note 1 at para 148.

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