Federal Court  Cour fédérale

Date: 20220629

Docket: T-126-21

Citation: 2022 FC 969

Ottawa, Ontario, June 29, 2022

PRESENT: The Honourable Madam Justice Strickland

BETWEEN:

**CRAIG MCCALLUM, LAURA BIRD,
JESSICA IRON as Litigation Guardian for JESSE IRON, LLOYD YEW,
NYDEN IRONNIGHTTRAVELLER and
RONIN IRON**

Applicants

and

**CANOE LAKE CREE FIRST NATION, CHIEF FRANCIS IRON,
WALTER COULINEUR, BERNICE IRON, LENNY IRON,
LORNE IRON, WILFRED IRON, AND
ROBERT OPIKOKEW**

Respondents

JUDGMENT AND REASONS

[1] The Applicants, by way of judicial review, challenge a decision of Chief and Council of Canoe Lake Cree First Nation [CLCFN] to utilize a membership code which precluded the Applicants, and many others, from running for office or voting in an election held on December 16, 2020 [2020 Election]. They also bring an application, pursuant to s 31 of the *First Nations*

Elections Act, SC 2014, c 5 [FNE Act], contesting the election of Chief and Council and seeking to have the 2020 Election set aside. Alternatively, they seek a declaration that the subject membership code is unconstitutional.

Background

[2] It is necessary to provide some background information to properly situate the matters now before the Court.

[3] In 1985, amendments were made to the *Indian Act*, RSC 1985, c I-5 which allowed Indian bands to control their own membership by adopting their own membership codes. More specifically, section 10 provides that:

> 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.

[4] Section 10(6) states that, where the conditions set out in subsection (1) have been met, the Council of the band shall give notice to the Minister in writing that the band is assuming control of its own membership and shall provide the Minister with a copy of the membership rules for the band. Section 10(7) states that, on receipt of such notice, the Minister shall give notice to the band that it has control of its own membership if the conditions set out in subsection have been complied with.

[5] On or about June 17, 1987, CLCFN assumed control of its band membership under section 10 of the *Indian Act* on June 17, 1987 and enacted the Canoe Lake Indian Band Membership Code [1987 Membership Code]. The parties agree that Canada recognizes the CLCFN as a Section 10 band governed by the FNE Act. Indeed, the CLCFN is listed as a participating First Nations in the schedule to that Act.

[6] The 1987 Membership Code includes the following:

> WHEREAS the Canoe Lake Indian Band is desirous of assuming control of its own membership, the following provisions shall constitute a Membership Code for the establishment and maintenance of the Band List.
>
> 1) Unless otherwise specified, the definitions contained in the Indian Act, 1970 c 1-6, as amended, apply to this Code. "Meadow Lake Tribal Council" means the organization incorporated pursuant to the laws of Saskatchewan to represent 10 Member Bands.
>
> 2) The Membership Code may be amended or repealed by a majority of the electors upon one month's notice to the electors.
>
> 3) The Chief and Council shall determine membership pursuant to the provisions of this Code.
>
> 4) The Chief and Council may appoint persons to assist in the administration of the Code and the recording and keeping of the Band List.
>
> 5) Decisions on membership within the Band shall be subject to review by a Membership Tribunal to be established by the Meadow Lake Tribal Council. The Membership Tribunal shall consist of not less than three persons who may be appointed from time to time. The Membership Tribunal shall consist of not less than three persons who have been entered in one or other of the Band Lists of the Member Bands represented by the Meadow Lake Tribal Council who are knowledgeable of the customs and values of all of the member Bands. The Membership Tribunal shall have the power to investigate and confirm, suspend or reverse decisions on membership.

> 6) An application for the review of a decision on membership by the Membership Tribunal may be made by the council of the Band, any member of the Band, or the person in respect of whose name the application for review is made or his representative within one month of a determination being made pursuant to Section 3
>
> 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;
>
> …
>
> THIS MEMBERSHIP CODE consented to on the 17th day of June, 1987 by the Canoe Lake Indian Band.

[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.

[8] Apparently in recognition of these decisions and legislative changes, on June 15, 2016 the CLCFN held a referendum [2016 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]. A ratification report [Ratification Report] indicates the total number of members of the band to be 2356, the total number of eligible electors to be 679, the number of ballots cast and counted to be 216: with 174 voting in favour of ratification and 42 voting against it. The Ratification Report states:

> Approval of Law requires a minimum Ratification of 50% plus 1 of the total eligible voters at a duly convened meeting specifically for this purpose.

[9] The validity of the ratification vote was not questioned at that time and it is generally agreed that Ms. Clarabelle Opikokew, the appointed Ratification Officer, as well as Chief and Council and CLCFN members believed that the ratification vote to have passed. Following the 2016 Referendum, some efforts were undertaken to have CLCFN community members apply for membership under the expanded criteria of the 2016 Membership Code.

[10] However, for reasons that are not apparent from the record before me, when the next election was held in December 2016 [2016 Election] it appears that determination of band membership – and therefore the ability to run for office and vote – was governed by the application of the more restrictive 1987 Membership Code.

[11] In the lead up to the 2020 Election, it came to light that that the 1987 Membership Code, and not the 2016 Membership Code, would be used to generate a voter's list for the 2020 Election. Mr. Craig McCallum sought to run for the office of Chief in the 2020 Election. He is one of the Applicants and filed two affidavits in support of this proceeding. He deposes that on October 28, 2020, in advance of the 2020 Election, he met with Ms. Opikokew (Ms. Opikokew was the Membership Clerk at that time). Ms. Opikokew informed him that the 1987 Membership Code was still being used to determine membership. According to Mr. McCallum, Ms. Opikokew advised him that although the ratification vote held in 2016 had passed, repealing the 1987 Membership Code and enacting the 2016 Membership Code, she had never received direction from Chief and Council to implement the new law, or to apply the 2016 Membership Code. As will be discussed further below, neither party submitted evidence from Ms. Opikokew.

[12] This meant that although the there are approximately 2600 CLCFN registered status Indians, of which approximately 1900 are over the age of 18 and are therefore old enough to vote, by applying the 1987 Membership Code, only about 700 of these people would have their names placed on a voter's list entitling them to run for office and vote in the 2020 Election. The Applicants (other than Nyden Ironnighttraveller) were among those not included on the prospective voter's list.

[13] On November 3, 2020, counsel for Mr. McCallum wrote to Chief Francis Iron explaining why Mr. McCallum believed his name should be on the voter's list and requesting that it be added to that list. No response to that letter was received. Concerned community members then arranged a meeting with Chief and Council to discuss the matter, which meeting was to be held

on November 6, 2020. However, at the agreed meeting time Chief and Council were not in chambers. When it was learned that they were at a meeting of Kohkums, Moshoms, and Chapans, a council of elders that gives guidance and direction to Chief and Council [Elders], the community members attended that meeting. The Elders granted them the floor to discuss the issue and Chief Francis Iron also addressed the concern. The Applicants allege that, with the approval of the Elders, Chief Francis Iron committed to implement the 2016 Membership Code and to utilize a new voter's list generated in accordance with the 2016 Membership Code membership criteria. Conversely, in his affidavit evidence, Chief Iron deposes that he only agreed to review the issue and report back to the community about whether the 2016 Membership Code should be used. That evening, Ms. Opikokew posted on Facebook that the voter's list had been updated (to reflect the 2016 Membership Code membership criteria). The affidavit evidence of Mr. McCallum that she was subsequently instructed by Chief Francis Iron to remove the post is uncontested, and it was acknowledged by Chief Iron when he was cross-examined on his affidavit that he had instructed Ms. Opikokew to take down the Facebook post so that he could seek legal advice and consult with members.

[14] On November 9, 2020, Ms. Judith Iron, an applicant in this matter, submitted an application to the Meadow Lake Tribal Council [MLTC], copied to others including CLCFN Chief and Council. She set out the background to the situation and stated that the Elders had approved the updating of the voter's list but that Chief Francis Iron had subsequently instructed Ms. Opikokew to remove her Facebook post advising that an updated voter's list had been prepared. Ms. Iron sought a review by the MLTC of the decision to utilize the 1987 Membership

Code. Ms. Iron deposes that she received no response to her application. Chief Francis Iron's evidence was that he did not receive the letter.

[15] On November 11, 2020, Chief Francis Iron published a Memo to CLCFN members dated November 11, 2020, stating:

> A meeting was held on Friday, November 6, 2020 with the KMC Group and other band members. During this meeting, the eligible voters list was discussed along with a request to expand voting status to band members not currently listed. At this meeting I stated that the list would be reviewed, and the issue will be dealt with accordingly. At no time were promises made to have this list expanded without the proper processes being adhered to. Since the meeting, we have received a primary opinion from a law group regarding the membership code.

[16] Chief Iron cut and pasted into the Memo a communication received from Mr. Dusty T. Ernewein of McKercher LLP responding to telephone calls from Chief Iron. This advises that the amending provision of the 1987 Membership Code states that amendment may occur upon approval of a majority of electors of CLCFN. The Referendum results indicated that there were 679 eligible voters for the Referendum. Accordingly, a majority would be 340 votes in favour of amendment. However, only 216 votes were cast, with 174 in favour of amending. Counsel concluded that "The Referendum vote appears to have failed to satisfy the amending requirements of approval of a majority of electors. As such the 1987 Code would still be law".

[17] Chief Iron went on to state in the Memo:

> Regarding our current membership code, it needs to be brought up to par with thorough consultation and input from all band members. Unfortunately, this issue will have to be rectified after the upcoming election by the elected leaders. I sincerely apologize

> for any miscommunication or misinformation that may have been received.

[18] The 2020 Election proceeded on the basis of a voter's list which was generated based on the membership criteria contained in the 1987 Membership Code and which excluded the Applicants and more than a thousand other CLCFN community members. The Electoral Officer's Report states that there were 722 eligible voters.

Relevant Legislation

Indian Act, RSC 1985 c I-5

> 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;
>
> …
>
> **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.
>
> …
>
> 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.

Exception relating to consent

(3) Where the council of a band makes a by-law under paragraph 81(1)(p.4) bringing this subsection into effect in respect of the band, the consents required under subsections (1) and (2) shall be given by a majority of the members of the band who are of the full age of eighteen years.

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.

Notice to the Minister

(6) Where the conditions set out in subsection (1) have been met with respect to a band, the council of the band shall forthwith give notice to the Minister in writing that the band is assuming control of its own membership and shall provide the Minister with a copy of the membership rules for the band.

Notice to band and copy of Band List

(7) On receipt of a notice from the council of a band under subsection (6), the Minister shall, if the conditions set out in subsection (1) have been complied with, forthwith

(a) give notice to the band that it has control of its own membership; and

(b) direct the Registrar to provide the band with a copy of the Band List maintained in the Department.

Effective date of band's membership rules

(8**)** Where a band assumes control of its membership under this section, the membership rules established by the band shall have effect from the day on which notice is given to the Minister under subsection (6), and any additions to or deletions from the Band List of the band by the Registrar on or after that day are of no effect unless they are in accordance with the membership rules established by the band.

Band to maintain Band List

(9) A band shall maintain its own Band List from the date on which a copy of the Band List is received by the band under paragraph (7)(b), and, subject to section 13.2, the Department shall have no further responsibility with respect to that Band List from that date.

First Nations Elections Act, SC 2014 c 5 [FNE Act]

2 The following definitions apply in this Act.

…

elector means a person who is registered on a Band List, as defined in subsection 2(1) of the *Indian Act*, and

(a) in relation to an election, is 18 years of age or older on the day of the election;

…

Contestation of election

31 An elector of a participating First Nation may, by application to a competent court, contest the election of the chief or a councillor of that First Nation on the ground that a contravention of a

provision of this Act or the regulations is likely to have affected the result.

Court may set aside election

35 (1) After hearing the application, the court may, if the ground referred to in section 31 is established, set aside the contested election.

First Nations Elections Regulations, SOR/2015-86 [Regulations]

Provision of information

3 (1) At least 65 days before the day on which an election is to be held

(a) the First Nation must provide the electoral officer with the information set out in subsection (2), if the First Nation holding the election has assumed control of its own membership under section 10 of the *Indian Act*; and

(b) the Registrar must provide the electoral officer with the information set out in subsection (2), if the Band List of the First Nation holding the election is maintained in the Department under section 11 of the *Indian Act*.

Compilation of list

(2) The electoral officer must compile a voters list that contains the following information:

(a) the names of all electors, in alphabetical order; and

(b) each elector's band membership or Register number or, if the elector does not have a band membership or Register number, their date of birth.

Revision of list

(3) The electoral officer must revise the voters list if it is demonstrated that

(a) an elector's name has been omitted from the list;

(b) an elector's name is incorrectly set out in the list; or

(c) the name of a person not entitled to vote is included in the list.

Issues

[19] Although the Applicants made lengthy (60 pages) and highly detailed submissions and identified issues and multiple sub issues, in my view, the issues in this proceeding can be appropriately framed and analysed as follows:

i. Which membership code is in force?

ii. Was there a contravention of the FNE Act or the Regulations that was likely to have affected the outcome of the 2020 Election?

iii. If the 1987 Membership Code remains in force, is it constitutional?

iv. If the 1987 Membership Code is unconstitutional, what is the appropriate remedy?

Evidence

[20] The Applicants' Record includes the following evidence which has been filed in this proceeding:

i. Affidavit of Craig McCallum, sworn January 14, 2021

ii. Affidavit of Laura Bird, sworn January 14, 2021

iii. Affidavit of Jessica Iron, sworn January 14, 2021

iv. Affidavit of Nyden Ironnighttraveller, sworn January 29, 201

v. Affidavit of Lloyd Yew, sworn February 2, 2021

vi. Affidavit of Ronin Iron, sworn January 28, 2021

vii. Affidavit of Judith Iron, sworn March 3, 2021

viii. Supplemental Affidavit of Craig McCallum, sworn March 4, 2021

ix. Affidavit of Lynda Bachiu, sworn March 4, 2021

x. Affidavit of Wilfred Iron, sworn December 2, 2021

xi. Affidavit of Chief Francis Iron, sworn December 2, 2021

xii. Affidavit of Lisa Iron, sworn December 3, 2021

xiii. Transcript of cross-examination of affidavits: Craig McCallum, December 13, 2021

xiv. Transcript of cross-examination of affidavit: Laura Bird, December 13, 2021

xv. Transcript of cross-examination of affidavit: Judith Iron, December 13, 2021

xvi. Transcript of cross-examination of affidavit: Jessica Iron, December 13, 2021

xvii. Transcript of cross-examination of affidavit: Nyden Ironnighttraveller, December 13, 2021

xviii. Transcript of cross-examination of affidavit: Lloyd Yew, December 14, 2021

xix. Transcript of cross-examination of affidavit: Wilfred Iron, January 31, 2022

xx. Transcript of cross-examination of affidavits: Chief Francis Iron, January 31, 2022

xxi. Transcript of cross-examination of affidavit: Lisa Iron, January 31, 2022

[21] The Respondent's Record contains:

i. Supplementary Affidavit of Councillor Wilfred Iron, sworn March 25, 2022.

[22] Chief Francis Iron has also caused a certified tribunal record [CTR] to be filed.

[23] 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.

Preliminary Matter

[24] Although in their written submissions the Applicants devoted considerable attention to an anticipated prematurity argument, they advised when appearing before me that this was no longer a live issue. Accordingly, it is not addressed in these reasons.

Issue 1: Which membership code is in force?

[25] In their Notice of Application, the Applicants state that this is an application for judicial review in respect of the CLCFN decision to unconstitutionally and unlawfully deny the Applicants' band membership, and its attendant rights and privileges, including by failing to implement the 2016 Membership Code. In their written submissions, the Applicants more specifically describe the judicial review aspect of this matter as pertaining to the unilateral decision of CLCFN Chief and Council not to follow the 2016 Membership Code.

[26] The Applicants' written submissions do not address the applicable standard of review and they do not frame the challenged decision of Chief and Council with respect to the ratification and application of the 2016 Membership Code in terms of a reasonableness or correctness analysis. In my view, the decision of Chief and Council regarding the interpretation of the 1987 Membership Code and, based on this, that the 2016 Membership Code had not been properly

ratified and therefore did not govern the 2020 Election, is to be assessed on the reasonableness standard.

[27] When a court reviews the merits of an administrative decision, the presumptive standard of review is reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at paras 10, 23, 25). This is inclusive of matters of statutory interpretation (*Vavilov* at para 115- 121). On judicial review, the reviewing court asks whether the decision bears the hallmarks of reasonableness – justification, transparency and intelligibility – and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision (*Vavilov* at para 99).

Applicants' position

[28] The Applicants submit that Ms. Opikokew was appointed as the Ratification Officer with respect to the 2016 Referendum. As such, she was legally empowered to determine the result and she determined that the vote had properly passed. The Applicants submit that the fact that a ratification vote to repeal and replace the 1987 Membership Code with the 2016 Membership Code was held "and that the person lawfully empowered to determine the result determined that the vote passed, is conclusive of the issue" and that the Respondents were obliged to comply with the law.

[29] Based on this view, the Applicants submit that the Respondents seek to collaterally attack the 2016 Referendum ratification vote by alleging that Ms. Opikokew, as the Ratification

Officer, erred in concluding that the vote passed and that it is an abuse of process for the Respondents to now challenge the 2016 Referendum ratification vote in this proceeding.

[30] Alternatively, that s 2 of the 1987 Membership Code is ambiguous and, therefore, this Court can rely on the CLCFN's common understanding and custom to determine its meaning. The broad consensus after the 2016 Referendum ratification vote was held was that the 1987 Membership Code required only a simple majority to amend or repeal that Code, that is, if more than 50% of the ballots cast were in favour of that measure. The Applicants submit that although similar ambiguous language in other statutes has been interpreted differently by other courts, in the context of the CLCFN, the community understood the phrase to mean a simple majority. That is the proper interpretation that should be applied by this Court, not the Respondents' more recent interpretation based on the opinion of external legal counsel that a double majority was required in order to pass.

Respondents' position

[31] The Respondents submit that s 2 of the 1987 Membership Code requires that a "majority of the electors" to vote to amend or repeal the Code. As fewer than 50% of the electors voted in the 2016 Referendum, the vote did not pass. The Respondents point to case law interpreting the phrase "the majority of the electors" as requiring a double majority. That is, requiring a majority of eligible voters to vote, and a majority of those who do vote, to vote in favour of the proposition at issue. The Respondents also submit that the Ratification Report does not state whether the vote passed and there is no evidence that the Ratification Officer made that determination. And, as the list of eligible voters was not updated to reflect the 2016 Membership

Code during the 2016 Election, it was clearly understood that the 2016 Referendum had not passed.

Analysis

[32] The core of the dispute between the parties is whether the 2016 Referendum ratification vote served to validly repeal the 1987 Membership Code and replace it with the 2016 Membership Code. This issue is dispositive because if the 2016 Membership Code was in force prior to the 2020 Election, then CLCFN was obliged to assess membership – and therefore eligibility to vote and run for office – pursuant to that Code. In that event, the decision to utilize the 1987 Membership Code with respect to the 2020 Election would be unreasonable and a reviewable error.

i. Interpretation of the 1987 Membership Code

[33] As the Applicants acknowledge, provisions in the *Indian Act* containing wording similar to s 2 of the 1987 Membership Code have been interpreted to require a double majority to determine the electors' assent.

[34] In *Cardinal et al v The Queen*, [1982] 1 SCR 508 [*Cardinal*], the Supreme Court held that the phrase "assented to by a majority… of the band… at a meeting… thereof summoned for that purpose…" contained in then s 49 of the *Indian Act* must be interpreted as meaning that the assent must be given by a "majority of a majority of eligible band members in attendance" (at para 15).

[35] In *Abenakis of Odanak v Canada (Indian Affairs and Northern Development)*, 2008 FCA 126 [*Odanak*], the Federal Court of Appeal cited and adopted the Supreme Court's interpretation in *Cardinal*, holding that s 10(1) of the *Indian Act* which refers to "a majority of the electors of the band" required "a majority of the majority" to vote in favour of taking control of the band's membership (at para 47). The Federal Court of Appeal stated its reasoning as follows:

> [41] The expression "a majority of the electors of the band" is used in subsections 2(3), 10(1) and (2), sections 13.1 and 13.2 and subsections 39(1) and (2) of the Act. Elsewhere, in sections 74, 85.1 and 120 of the Act, specific terms concerning voting rights are associated with the words "majority of the votes of the electors of the band" or "majority vote of those electors of the band".
>
> [42] There is no mistake in interpreting the words "majority of the electors" in section 10 of the Act according to the interpretation given by the Supreme Court of Canada in *Enoch Band of Stony Plain Indian Reserve No. 135 v. Canada*, 1982 CanLII 173 (SCC), [1982] 1 S.C.R. 508. That case concerned the interpretation to be given to the words "majority … of the band … at a meeting … summoned for that purpose" in section 49 of the *Indian Act*, R.S.C. 1906, c. 81, which dealt with the surrender of all or part of the reserve's lands. Estey J., writing on behalf of the Supreme Court of Canada, stated the following (paragraph 13 of the reasons):
>
> > 13 It may be helpful to analogize the first requirement of the majority to that of a prescription of quorum and it may be helpful to refer to the second requirement that the assent be given at a meeting as simply a prescribed mechanical method of determining the will of the meeting on the issue of assent. In adverting to the common law principle, *supra*, I had in mind *The Mayor, Constables, and Company of Merchants of the Staple of England v. The Governor and Company of the Bank of England* (1887), 21 Q.B.D. 160 at p. 165 where it was stated by Wills J. in reference to the acts of a corporation being those of the major part of the corporators corporately assembled:
> >
> > > This means that, in the absence of special custom, the major part must be present at the

> meeting, and that of that major part there must be a majority in favour of the act or resolution.
>
> In more recent times and to the same effect, see: Gillanders J.A., in *Glass Bottle Blowers' Association of the United States and Canada v. Dominion Glass Company Limited*, [1943] O.W.N. 652 (Labour Court); and *Itter v. Howe* (1896), 23 O.A.R. 256. To require otherwise, that is to say more than a mere majority of the prescribed quorum of eligible band members present to assent to the proposition, would put an undue power in the hands of those members who, while eligible, do not trouble themselves to attend, or if in attendance, to vote; or as it was put by Gillanders J.A. in *Glass Bottle Blowers'*, *supra*, at p. 656, it would "give undue effect to the indifference of a small minority".

> [43] In this case, the first majority of electors constitutes the quorum. The decision must then be made by the majority of those who attend the meeting. Otherwise, this would amount to giving the indifference of those who did not attend a significance that it should not have.
>
> …
>
> [46] It is interesting to note that, with the enactment of subsections 39(2) and (3) of the Act, in the case of an absolute surrender or a designation of lands, Parliament added to the majority-of-the-majority vote the possibility of holding a second round of voting which takes into consideration the more flexible rule of "a majority of the electors who did vote" (subsection 39(2)) or "a majority of the electors voting" (subsection 39(3)).

[36] Section 1 of the 1987 Membership Code explicitly adopts the definitions used in the *Indian Act*. Further, s 2 of the 1987 Membership Code provides that the code "may be amended or repealed by a majority of the electors". This wording mirrors the language in s 10 of the *Indian Act*, which requires that "a majority of the electors of the band gives its consent" to taking

control of the membership. Indeed, the remainder of the 1987 Membership Code also directly adopts other provisions of the *Indian Act*.

[37] I can see no basis to depart from the binding authority of *Cardinal* and *Odanak* in interpreting s 2 of the 1987 Membership Code. Accordingly, the approval of the "majority of the electors" requires approval by a "majority of a majority" of the electors.

[38] The result of this finding is that, regardless of what may have been believed by the Ratification Officer, Chief and Council and members of the CLCFN, in the absence of a double majority there was no authority by which the 1987 Membership Code could have been amended or repealed. Accordingly, subject to any CLCFN custom that would serve to vary s 2 of the 1987 Membership Code – which is discussed below – it remains in effect. Chief and Council did not err in their determination in that regard.

ii. Collateral attack

[39] The evidence establishes that it was, at least initially, generally believed by the CLCFN community members that the 2016 Referendum ratification vote had validly passed. This is demonstrated by:

- A video of the counting of the 2016 Referendum ratification votes which makes it very clear that all involved in that process were of the view that 108 votes (presumably plus 1) were needed of 216 cast in order for the 2016 Referendum to succeed. And, having received 176 votes, that the 2016 Referendum had passed. Ms.

Opikokew, as the Ratification Officer, was counting the ballots and Chief Francis Iron was in attendance;

- On June 30, 2016, Chief Francis Iron gave an interview to the Northern Pride newspaper in which he described the successful 2016 Referendum as a big accomplishment and that it had been one of his goals when he assumed office to make sure something like it passed. He added that the extension of rights would allow band members to feel truly part of the community, which they did not before as they were not allowed to vote or to be included for housing and funding. The article states "In order for the vote to pass, 50 percent plus one was needed. In total, 216 people voted and 174 chose to expand rights". The article goes on to report that the same vote on Flying Dust First Nation held on June 20 failed to yield the same results. The article states that under the Indigenous and Northern Affairs rules which Flying Dust followed – but Canoe Lake did not – 50 percent of the band membership plus one needed to vote, but not enough people from Flying Dust first Nation had cast a ballot. When cross-examined on his affidavit, Chief Francis Iron confirmed that the information in the news article came from him. He also confirmed that Ms. Opikokew had determined that the 2016 ratification vote had passed, but disputed that she made a determination that the 1987 Membership Code had been repealed. Chief Iron also confirmed that everyone was under the impression that the 2016 Referendum had passed;

- After the 2016 Referendum, efforts were made to have community members apply for band membership. The affidavit of Mr. Lloyd Yew deposes that about two years ago (his affidavit being sworn on February 2, 2021) he attended a meeting in Ile-a-la-

Crosse called by Joseph (Butch) Iron who was addressing about 20 people. Mr. Iron advised those in attendance that they did not need to apply for status through the Government of Canada but instead could just sign a form to immediately become a member of the CLCFN. Mr. Yew states Mr. Iron attended Ile-a-la-Crosse for this purpose about four times. He attaches as an exhibit to his affidavit the application form, signed by Mr. Iron, which is entitled:

> APPLICATION TO BECOME A CANOE LAKE CREE NATION MEMBER
>
> "Nehiyiw Opahsihk Kakikih Akisowin"
>
> MEMBERSHIP CODE RATIFIED JUNE 15, 2016
>
> PURSUANT TO SECTION (2) OF THE CODE

- When cross-examined on his affidavit, Chief Francis Iron confirmed that after the 2016 Referendum "foot workers" or people who were "pretty well contractors" (as opposed to members of a membership committee) worked on the application form document and were tasked with getting it out to CLCFN community members. When asked if these people went out to various communities to sign people up for CLCFN's membership list in accordance with the 2016 Membership Code, he agreed and confirmed that the form attached to Lloyd Yew's affidavit was the form taken to community meetings for people to sign.

[40] Based on this evidence, I am satisfied that, at least initially, Chief Francis Iron and the other CLCFN community members believed that the 2016 Referendum had passed and that the 2016 Membership Code was in effect.

[41] This leads to the Applicants' arguments on collateral attack. As I understand the submission, their view is that the Ratification Officer, Ms. Opikokew, had the legal authority to determine whether or not the 2016 ratification vote had passed. She, like everyone else, believed that only a simple majority was needed to repeal and replace the 1987 Membership Code and she made a determination that the 2016 ratification vote had properly passed. The Applicants assert that when questions arose about who was eligible to vote or run for office in the 2020 Election, the Respondents did not challenge the decision of the Ratification Officer. Instead, based on the opinion received from external legal counsel that a double majority was required in order for the 2016 Referendum to pass, Chief Francis Iron unilaterally decided the outcome of the 2016 Referendum and, accordingly, that Chief Iron and the CLCFN did not have to follow the Ratification Officer's prior, legally made, decision. The Applicants state that now, in "separate proceedings", the Respondents seek to attack the 2016 ratification vote "not by directly appealing or judicially reviewing the result, but indirectly by claiming that they do not have to follow a lawfully made decision because they believe that the decision was wrongly made".

[42] The Applicants rely on *R v Wilson* [1983] 2 SCR 594 in support of this position. There a trial judge in provincial court had held that interception of private communications of the appellant had not been lawfully made. On appeal to the Manitoba Court of Appeal, the Crown argued that the provincial court judge was without jurisdiction to go behind the interception authorizations and thereby made a collateral attack upon the order of a superior court. The Court of Appeal agreed and held that an authorization granted by a superior court of record cannot be collaterally attacked in any court. The Supreme Court of Canada, when the matter came before it, held at page 600:

> 7 In the Manitoba Court of Appeal, Monnin J.A. said:
>
> > The record of a superior court is to be treated as absolute verity so long as it stands unreversed.
>
> 8 I agree with that statement. It has long been a fundamental rule that a court order, made by a court having jurisdiction to make it, stands and is binding and conclusive unless it is set aside on appeal or lawfully quashed. It is also well settled in the authorities that such an order may not be attacked collaterally—and a collateral attack may be described as an attack made in proceedings other than those whose specific object is the reversal, variation, or nullification of the order or judgment. Where appeals have been exhausted and other means of direct attack upon a judgment or order, such as proceedings by prerogative writs or proceedings for judicial review, have been unavailing, the only recourse open to one who seeks to set aside a court order is an action for review in the High Court where grounds for such a proceeding exist. Without attempting a complete list, such grounds would include fraud or the discovery of new evidence.
>
> …..
>
> 16 The cases cited above and the authorities referred to therein confirm the well-established and fundamentally important rule, relied on in the case at bar in the Manitoba Court of Appeal, that an order of a court which has not been set aside or varied on appeal may not be collaterally attacked and must receive full effect according to its terms.

[43] I do not think that *Wilson* greatly assists the Applicants as it pertains to collateral attack by a lower court on an order of a superior court.

[44] Nor is this a situation where an a judgment issued by a court is attacked in a different or wrong forum, as was the case in *Toronto (City) v. CUPE, Local 79*, 2003 SCC 63 [*CUPE*]. There, the Supreme Court described the rule against collateral attack as being "that a judicial order pronounced by a court of competent jurisdiction should not be brought into question in subsequent proceedings except those provided by law for the express purpose of attacking it" (at

para 33, citing *Danyluk v Ainsworth Technologies Inc.*, 2001 SCC 44 at para 20) (emphasis in *CUPE*).

[45] In the administrative law context, the Applicant quotes from Donald L. Lange, The Doctrine of Res Judicata in Canada, 4th ed (Markham, Ont: LexisNexis, 2015) at 465, which states, as a general principal, that:

> "Collateral attack cases involve a party, bound by an order, who seeks to avoid compliance with that order by challenging the order itself and its enforceability not directly but indirectly in separate forum. The order being attacked usually involves an activity. A party is ordered either to do something or to refrain from doing something. The fundamental policy behind the doctrine of collateral attack is to maintain the rule of law and preserve the repute of the administration of justice."
>
> The doctrine is often considered in administrative law when, for example, a second proceeding involves the non-compliance with an administrative order that has not been previously challenged through the administrative appeal process but is challenged in the second proceeding…

[46] There is no doubt that the rule against collateral attack can also be applied to administrative orders and decisions. For example, the Supreme Court of Canada described the rule against collateral attack, in an administrative law matter, in *British Columbia (Workers' Compensation Board) v British Columbia (Human Rights Tribunal)*, 2011 SCC 52, as follows:

> [28] The rule against collateral attack similarly attempts to protect the fairness and integrity of the justice system by preventing duplicative proceedings. It prevents a party from using an institutional detour to attack the validity of an order by seeking a different result from a different forum, rather than through the designated appellate or judicial review route: see *Canada (Attorney General) v. TeleZone Inc*., 2010 SCC 62, [2010] 3 S.C.R. 585, and *Garland v. Consumers' Gas Co*., 2004 SCC 25, [2004] 1 S.C.R. 629.

[47] However, I am not persuaded that the rule against collateral attack has application in this matter. That is because the Ratification Report prepared by Ms. Opikokew is not an order or a decision. Nor does it directly compel Chief and Council to do or not to do anything.

[48] The Ratification Report lists information such as the total number of band members (2356), the total number of eligible voters (679), the number of ballots cast (216) and then states:

> RESULTS: YES: 174 NO: 42 TOTAL 216
>
> Approval of Law requires a minimum Ratification of 50% plus 1 of the total eligible voters at a duly convened meeting specifically for this purpose

[49] The Ratification Report does not include any statement of the Ratification Officer's finding as to the result or consequence of the vote. It does not state or declare that the 1987 Membership Code is repealed and replaced by the 2016 Membership Code, nor does it order Chief and Council to take any action in that regard. The Ratification Report does not address whether a majority or double majority vote of the electors was required for the 2016 Referendum ratification vote to pass. While I agree that the evidence suggests that Ms. Opikokew was of the view that the vote had passed, I do not agree that the Ratification Report amounts to a prior "order or judgment" that the Respondents now collaterally attack.

[50] Further, and relatedly, in this judicial review, the Applicants assert that they are challenging the decision of Chief and Council to utilize the 1987 Membership Code with respect to the 2020 Election. However, the implementation of membership codes is not a decision of Chief and Council, or the Ratification Officer. Whether or not to repeal and replace the 1987 Membership Code is the decision of the CLCFN electors exercised by way of the ratification

vote. That is, it is a membership decision determined in the manner prescribed in s 2 of the 1987 Membership Code.

[51] If the 2016 Membership Code was not validly effected by the vote of the majority of the electors, then Chief and Council had no authority to direct that it be utilized to determine membership for purpose of the 2020 Election. Accordingly, although the Applicants assert that they are challenging decision of Chief and Council to utilize the 1987 Membership Code with respect to the 2020 Election, the interpretation by counsel for Chief and Council that s 2 of the 1987 Membership Code meant that the 2016 Referendum vote did not have the majority needed to effect the 2016 Membership Code. This, in turn, meant that by default the 1987 Membership Code remained in effect. Section 3 of the 1987 Membership Code states that Chief and Council shall determine membership pursuant to the provisions of that Code. They had no authority to do otherwise.

[52] In summary, the Respondents are not collaterally attacking an order of the Ratification Officer because she did not make one. Further, based on the legal interpretation of s 2 of the 1987 Membership Code by their counsel, Chief and Counsel reasonably determined that the 2016 Referendum ratification vote had not been successful. Given this determination, Chief and Council had no authority to cause the 2016 Membership Code to be utilized in the 2020 Election.

iii. Abuse of process

[53] Nor do I agree with the Applicants that the Respondents have engaged in abuse of process. The Applicants rely on *Behn v Moulton Contracting Ltd*, 2013 SCC 26 at paras 39-40 to support this argument.

[54] In *Behn*, after the Crown granted licences to a logging company to harvest timber on the territory of a First Nation, a number of individuals from that First Nation erected a camp that blocked the company's access to the logging sites. The company brought a tort action against these individual members who argued, in their defence, that the licences were void because they had been issued in breach of the constitutional duty to consult and because they violated the community members' treaty rights. The company filed a motion to strike these defences.

[55] In my view, this circumstance differs from *Behn* as there the individuals concerned had been invited to raise any concerns that they had with respect to the proposed licenses but failed to do so. Accordingly, their subsequent defence to the tort action by attacking the issued licenses was found to be an abuse of process. In this matter there is no evidence that the Applicants raised their concern with the Respondents prior to the lead up to the 2020 Election and that the Respondents failed to address the concern. Rather, the evidence before me is that concerns about the validity of the 2016 Referendum vote did not come to a head until the lead up to the 2020 Election. In that event, there would have been no reason for any party to challenge its validity at an earlier time.

[56] The Applicants also rely on *Cameron v Canada (Indian Affairs and Northern Development)*, 2012 FC 579, in which this Court considered an argument concerning s 10 of the *Indian Act*. However, that case does not explicitly address abuse of process. And, as I have found above, the Ratification Report is not a prior order or decision. The response to the application for judicial review by the Respondents is, therefore, not an attempt to relitigate a prior order or decision.

[57] Finally on this point I note that in *Behn*, the Supreme Court referred to *Canam Enterprises Inc. v. Coles* (2000), 51 O.R. (3d) 481 (C.A.) in describing the doctrine of abuse of process as "engag[ing] the inherent power of the court to prevent the misuse of its procedure, in a way that would be manifestly unfair to a party to the litigation before it or would in some other way bring the administration of justice into disrepute". In my view, the Applicants have not established an abuse of process by the Respondents in this matter.

iv. Custom

[58] The Applicants next argue that because s 2 of the 1987 Membership Code is ambiguous, it must be interpreted within the context of the common understanding of the CLCFN of that phrase and its custom to determine its meaning.

[59] First, any ambiguity concerning the interpretation of the phrase was resolved by the Supreme Court of Canada in *Cardinal* and by the Federal Court of Appeal in *Odanak*.

[60] Second, a custom is a practice which is "firmly established, generalized, and followed consistently and conscientiously by a majority of the community, thus evidencing a broad consensus" (*Francis v Mohawk Council of Kanesatake*, 2003 FCT 115, [2003] 4 FC 1133 [*Francis*] at paras 35-36; *Beardy v Beardy*, 2016 FC 383 [*Beardy*] at para 97; *McKenzie v Mikisew Cree First Nation*, 2020 FC 1184 [*McKenzie*] at para 71). The codification of a written law, passed by a majority of members, is itself an expression of the customs of the community (*Beardy* at para 102; *Whalen* at para 33). The burden of establishing a custom falls on the party who alleges it (*Beardy* at para 102; *Whalen* at para 41).

[61] The Applicants submit that the broad consensus within CLCFN "was that s. 2 of the 1987 Membership Code should be interpreted as only requiring a simple majority" as demonstrated by the fact that "everyone" viewed the 2016 Ratification vote to have passed on a simple majority. However, there is no evidence that the specific issue of whether a simple or double majority was required was ever considered by the members. Further, subsequent to the 2016 ratification vote, it was the 1987 Membership Code that was – for reasons that are not explained – utilized in the 2016 Election and the evidence establishes that the membership practices used by the band administration did not change after the 2016 Referendum. Chief Francis Iron's evidence was that the 1987 Membership Code was used in the 2016 Election and Lisa Iron deposed that the current (post-2020 Election) practice is also to use the criteria in the 1987 Membership Code to determine eligibility for membership in CLCFN.

[62] This does not support that a practice of utilizing the 2016 Membership Code is firmly established, generalized, and followed consistently and conscientiously by a majority of the community.

[63] In conclusion on this first issue, in my view Chief and Council reasonably relied upon the legal opinion interpreting s 2 of the 1987 Membership Code as requiring a double majority in order to repeal that Code and, because a double majority was not achieved by the ratification vote in the 2016 Referendum, that the 1987 Membership Code remained in effect. The initial effecting of the 1987 Membership Code, and any decision to repeal and replace it with the 2016 Membership Code or otherwise, are CLCFN decisions and not the decisions of the Ratification Officer or Chief and Council. Accordingly, as neither Chief and Council or the Ratification Officer had the authority, in these circumstances, to utilize the 2016 Membership Code, I do not agree that Chief and Council made a unilateral and unreasonable decision to disregard the 2016 Referendum results and instead utilize the 1987 Membership Code for purposes of determining membership for the 2020 Election. Nor do I agree that Chief and Council are collaterally attacking a decision of the Ratification Officer or have engaged in an abuse of process.

Issue 2: Was there a contravention of the FNE Act or Regulations that affected the result of the 2020 Election?

Applicants' position

[64] Relying on their position that the 2016 Membership Code was in force, the Applicants submit that this Code should have been used to determine that they were eligible to vote and stand for election in the 2020 Election. They submit that CLCFN contravened the FNE Act by

failing to provide the electoral officer with an accurate voter's list based on the 2016 Membership Code. The Applicants also submit that the "Membership List" maintained by the Respondents, on which the Applicants' names appear, should be treated as the Band List. This lists all members of CLCFN pursuant to s 8 of the *Indian Act* and, as the Applicants are on that list, they should have been permitted to vote. The Applicants submit that the Respondents' failure to obtain evidence from the former registration clerk of CLCFN should lead the Court to draw an adverse inference about what that clerk's evidence would have been.

Respondents' position

[65] The Respondents submit that the list of electors provided to the electoral officer was accurate and that all members entitled to vote were able to vote. The Respondents state that being named on the "Membership List" does not entitle a person to vote, as that list includes "affiliates" as well as members of CLCFN. They submit that the fact that CLCFN does not maintain a "Band List" of members did not affect the results of the 2020 Election, as the only people who would have been on a "Band List" and who were not included on the "Voter's List" were those under the age of 18 and therefore not eligible to vote. The Respondents submit that the Applicants could have named the electoral officer, who was the person who made the decision as to who could run or vote in the 2020 Election, as a respondent. As they did not, any gap in the evidence is attributable to the Applicants.

Analysis

[66] Section 31 of the FNE Act contains two elements that must both be met to successfully contest an election for chief or a councillor:

i. There must be a contravention of the FNE Act or the Regulations; and

ii. The contravention is likely to have affected the result of the election.

[67] Pursuant to s 35, the Court may, if these elements are established, set aside the contested election.

[68] The onus, or legal burden of proof, is on the applicant to establish that a contravention of the FNE Act or the Regulations has occurred and that the contravention was likely to have affected the result of the election [*Bird* at para 28-30; *McNabb v Cyr*, 2017 SKCA 27 at para 23 [*McNabb*]); *Opitz v Wrzesnewskyj*, 2012 SCC 55 at para 52 [*Opitz*]; *Papequash v Brass*, 2018 FC 325 at para 33 [*Papequash*]; *O'Soup v Montana*, 2019 SKQB 185 at para 29 [*O'Soup*]). The standard of proof for establishing that the requirements of s 31 have been met is the balance of probabilities (*Good v Canada (Attorney General)*, 2018 FC 1199 at para 49 [*Good*]; *Papequash* at para 33; *McNabb* at para 23; *O'Soup* at para 29, 92).

[69] The Applicants allege contraventions of sections 9, 12, 15, and 27 of the FNE Act, and a contravention of s 3 of the *Regulations*.

[70] To support this assertion, the Applicants devote considerable energy and text to the issue of what is or is not the applicable "Band List" in this matter. The Respondents further muddy the waters by introducing the concept of an "affiliate". Having reviewed the evidence and the submissions, I find as follows.

[71] The *Indian Act* defines a "Band List" as a list of persons that is maintained under s 8 by a band or in the Department. An "elector" is defined as a person who is registered on a Band List, is 18 years old and is not disqualified from voting at band elections. A "member of a band" is a person whose name appears on a Band List or who is entitled to have his name appear on a Band List. Section 8 of the *Indian Act* states that 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". And, as discussed above, section 10 bands control their own membership based on their membership rules. Section 10(9) states that a band shall maintain its own Band List from the date on which a copy of the Band List is received from the Department.

[72] The affidavit of Wilfred Iron, a CLCFN Councillor and respondent in this matter, states that since the 1987 Membership Code was effected there have been amendments to the *Indian Act* that have changed who is entitled to Indian status under that Act. He asserts that the 1987 Membership Code is still in effect and, because of this, there are many people with Indian status who have ties to CLCFN but who are not considered to be "members". He states that CLCFN allows non-members who are registered to CLCFN with Indigenous Services Canada [ISC] to access band administered programs and services "that would normally only be available to CLCFN members". However, non-members are not entitled to vote or run for office.

[73] Mr. Iron states that CLCFN accordingly maintains a "Membership List" which lists all community members who are "members" pursuant to the 1987 Membership Code as well as all community members (to whom Mr. Iron refers as "affiliates" or "non-members") who are registered with ISC as being associated with CLCFN. Additionally, because political rights are

reserved to members, CLCFN also maintains a "Voter's List" which lists all individuals 18 years of age or older who are "members" of CLCFN [Voter's List]. Only those listed on the Voter's List are entitled to run for office or vote in CLCFN elections. Mr. Iron attached a copy of the Membership List as an exhibit to his affidavit and states that a copy of the Voter's List (for 2020) is attached as an exhibit to the affidavit of Craig McCallum.

[74] In their submissions, the Respondents refer to all of the community members on the Membership List who are not "members" (pursuant to the 1987 Membership Code) as "affiliates". This term is not found in the *Indian Act*, the 1987 Membership Code, or elsewhere.

[75] In effect, and in other words, recognizing that the 1987 Membership Code is unconstitutional, CLCFM leadership developed a workaround being a two-tier membership status. Mr. Iron's affidavit is silent as to when CLCFN began to permit non-members to access programs and services and when and how "affiliates" names were added to the Membership List.

[76] Although the Applicants assert that the document described in the index of the CTR as the "Band Membership List" should be treated as a Band List as defined in the *Indian Act*, and for purposes of voter eligibility in the 2020 Election, that document is the same document described as the Membership List attached as an exhibit to the affidavit of Wilfred Iron. There is no evidence that CLCFN has ever maintained a distinct document entitled the "Band List" as required by the *Indian Act*. And, as the Applicants indicate in their submissions, when cross-examined on her affidavit Lisa Iron, who has been the CLCFN Membership Clerk since April 2022, confirmed that no Band List is maintained.

[77] I do not agree with the Applicants that the Membership List should be treated as a "Band List" and that, because their names appear on the Membership List, that they are band members and electors. As I have found above, membership is determined by the 1987 Membership Code. The fact that "non-members" are listed on the Membership List does not in and of itself make them "members". To be members they would have to meet the membership criteria of that Code.

[78] The Applicants also assert that because none of the persons giving evidence for the Respondents could provide personal knowledge as to the Band List and the information given to Mr. Gordon Alger, the Electoral Officer for the 2020 Election, an adverse inference should be drawn that the Membership List is a Band List as set out in s 8 of the *Indian Act*.

[79] More specifically, the Applicants submit that Ms. Opikokew was the Membership Clerk in the lead up to the 2020 Election and, as such, she maintained the Membership List and gathered the information necessary for the Electoral Officer to compile the 2020 Election voter's list as required by s 3 of the Regulations. The Respondents knew that Ms. Opikokew intended to retire but they failed to obtain affidavit evidence from her prior to her retirement. The Applicants assert that they had no control over Ms. Opikokew and have been hampered by intimidation and summary dismissals of their supporters. Accordingly, as a key witness under the sole control of the Respondents whose retirement occurred "in circumstances that are clearly suspicious" the Applicants submit that the Respondents had an obligation to put forward Ms. Opikokew's evidence, failing which this Court should draw the adverse inference that her evidence would have been that the Membership List (the document described in the index of the CTR as the "Band Membership List") was the "Band List" (pursuant to s 8 of the *Indian Act*) for CLCFN

during the 2020 Election. Further, that a Voter's List that Ms. Opikokew generated after the November 6, 2020 meeting with the Elders (based on the 2016 Membership Code) should be considered to be a voter's list required by s 3 of the Regulations.

[80] I my view, there is no merit to these assertions.

[81] First, the alleged evidence of intimidation stems from the affidavit of Lloyd Yew. He states that after he made a donation to Mr. McCallum's effort to fund this litigation he attended a meeting of the Economic Development Board, of which he was a board member. At the meeting, Councillor Wilfred Iron expressed anger about the donation and said that as the Council had appointed Mr. Yew to the board it was unacceptable that he was assisting the litigation against Council. Mr. Yew states that he resigned his position as a board member and that he "felt used and pressed to resign, and believe this was an attempt to intimidate me for supporting the Applicants".

[82] I am not persuaded that Mr. Yew's resignation in these circumstances supports that the Applicants have been "hampered by intimidation and summary dismissals of the supporters" as they submit. They also do not explain how they were hampered. Nor is there any evidence supporting that Ms. Opikokew's retirement was "clearly suspicious" in light of Mr. Yew's resignation, or otherwise. I also do not see a connection between the incident described by Mr. Yew and the Respondents' failure to tender evidence from Ms. Opikokew.

[83] I am also not persuaded that the Respondents had exclusive control over Ms. Opikokew. Nor do the Applicants submit any evidence demonstrating that they attempted to obtain evidence from Ms. Opikokew – who they describe as a key witness – and that she refused their efforts. Further, as the Respondents point out, it was open to the Applicants to name the Electoral Officer as a respondent in this matter or to otherwise seek his evidence concerning the compiling of the 2020 Election voter's list pursuant to s 3 of the Regulations.

[84] In any event, even if Ms. Opikokew did prepare a voter's list revised to reflect the 2016 Membership Code criteria following the meeting with the Elders, given that I have found that that Code had not been ratified by a double majority, and was therefore of no effect, her evidence on this point would not establish that that list should be considered the 2020 Election voter's list under s 3 of the Regulations.

[85] As to the specifics of the Applicants' allegations of contraventions of the FNE Act and Regulations, while I agree that CLCFN Chief and Council did not comply with the *Indian Act* as they failed to keep a Band List identifying electors (instead utilizing what was referred to as a Voter's List), this in and of itself is not a contravention of the FNE Act. And, in any event, the maintaining of a Band List developed pursuant to the 1987 Membership Code would not have changed who was eligible to vote in the 2020 Election and, therefore, would not affect the outcome of that election.

[86] The Applicants allege that Sections 9 and 15 of the FNE Act were contravened. However, these sections state that *only* an elector of a participating First Nation is eligible to be nominated

as a candidate for the position of Chief or councillor of, or to vote in an election held by, that First Nation. The Applicants have not alleged that any persons who ran for office or cast ballots in the 2020 Election were *not* electors. They have not established a contravention of these provisions.

[87] Section 12(a) prohibits a person, in connection with an election, by intimidation or duress, from attempting to influence another person to nominate or refrain from nomination of a particular candidate; accepting or declining a nomination; or, withdrawing as a candidate. In this matter, there is no evidence that the Applicants were dissuaded from voting due to intimidation or duress. They were not permitted to vote because they were not on the voter's list prepared by the Electoral Officer (which was based on the Voter's List). The Applicants have not established a sufficient factual basis for this section to have application. Similarly, s 12(b) and (c) have not been shown to have any application to the facts of this matter.

[88] Section 27 prohibits a person from intentionally obstructing the conduct of an election. The Applicants' submission is, essentially, that because their names were not on a Band List that this amounts to intentionally obstructing the conduct of the 2020 Election. However, the election was not obstructed. Their complaint is concerned with eligibility to vote. No contravention of this section of the FNE Act has been established.

[89] As to section 3 of the Regulations, this pertains to the preparation of a voter's list by an electoral officer in advance of an election. Specifically, pursuant to s 3(1)(a), at least 65 days before an election the First Nation must provide the electoral officer with the information set out

in s 3(2). That is, the names of all electors and each elector's band membership or Register number, or if the elector does not have either of those umbers, then their date of birth. The electoral officer must then compile a voter's list containing that information.

[90] I agree with the Applicants that the Respondents' evidence does not address how the Voter's List for the 2020 Election was prepared by Ms. Opikokew.

[91] For example, Mr. Wilfred Iron's affidavit is silent about who draws up the Voter's List and when cross-examined on his affidavit he deposed that he was not directly involved in the process of Ms. Opikokew getting membership information to Gordon Alger, the Electoral Officer for the 2020 Election, in order for him to compile the 2020 Election voter's list pursuant to the Regulations. Chief Iron's affidavit is silent about voter's lists. On cross-examination, he deposed that he had no idea who prepared the Voter's List, he thought it was done in consultation with the membership clerk, which was Ms. Opikokew for the 2020 Election, and ISC. He stated that the Voter's List was not made by Gordon Alger, the Electoral Officer for the 2016 Election. Chief Iron later deposed that the Voter's List was not drawn up in consultation with ISC, that the only person who had access to the information was Ms. Opikokew and, she created the Voter's List. When asked if he had directed Ms. Opikokew to use the Voter's List prepared based on the 1987 Membership Code after Chief Iron's received the legal opinion indicating that the 2016 Membership Code had not been properly ratified, he stated that he did not direct her to do anything. When asked how Ms. Opikokew knew whether to prepare the Voter's List based on the 1987 Membership Code or the 2016 Membership Code, he stated that he could not speak for Ms. Opikokew and suggested that she had acted prematurely in advising

members after the meeting with the Elders that the 2016 Membership Code would determine who would be placed on the Voter's List.

[92] Given that is not contested that Chief Iron directed Ms. Opikokew to remove her Facebook post indicating that the Voter's List had been updated to reflect the 2016 Membership Code it is reasonable to believe that there were communications between him as Chief and Ms. Opikokew, as the Membership Clerk, concerning which of the membership codes was to be considered as having application for purposes of the 2020 Election.

[93] However, nothing turns on this. As I have found above, the 1987 Membership Code was in effect at the time of the 2020 Election. This is dispositive. Only "electors" as defined in the FNE Act are entitled to vote (s 15 of the FNE Act) or be a candidate (s 9 of the FNE Act) in elections under that Act. A person must be registered on a Band List in order to be an elector. In this matter, there was no Band List, only a Membership List and a Voter's List. The Voter's List included all of the community members who are "members" pursuant to the membership criteria set out in the 1987 Membership Code and were 18 years of age or older. That information was provided to the Electoral Officer who, based on same, generated a voter's list for the 2020 Election pursuant to s 3 of the Regulations.

[94] The Applicants' argument is premised on their view that the Membership List should be considered as a Band List and, because their names are on the Membership List, they are electors and their names should have been given to the Electoral Officer for purposes of generating the s 3 voter's list. For the reasons I have set out above, this reasoning cannot succeed as the 1987

Membership Code was not repealed and, pursuant to the 1987 Membership Code, the Applicants (other than Nyden Ironnighttraveller) were not eligible for membership and were therefore not electors in the 2020 Election.

[95] In these circumstances, the Applicants have not established that there was a contravention of s 3 of the Regulations that is likely to have affected the result of the 2020 Election. Accordingly, as the requirements of s 31 of the FNE Act have not been met, I will not exercise my discretion, pursuant to s 35, to set aside the election.

Issue 3: If the 1987 Membership Code remains in force, is it constitutional?

Applicants' position

[96] The Applicants submit that the 1987 Membership Code is unconstitutional on the basis that it unlawfully discriminates on the basis of sex or an analogous ground contrary to s 15 and 28 of the *Charter*, and s 35(4) of the *Constitution Act, 1983*. The Applicants filed a Notice of Constitutional Question, however, this is limited to the assertion that the 1987 Membership Code discriminates on the basis of sex, violates s 15 of the *Charter* and is not justified under s 1 of the *Charter*.

[97] In their written submissions the Applicants provide a historical review to demonstrate that provisions contained in the version of the *Indian Act* in effect in 1987 have been found by the courts to violate s 15 of the *Charter* in the context of registration as an Indian in the Indian Register. As a result of these decisions, Parliament took steps to address this sex-based

discrimination though a series of amendments to the *Indian Act*. The Applicants submit that the 1987 Membership Code largely adopts the impugned provisions of the *Indian Act* and, therefore, they are unconstitutional on the same basis (referencing *McIvor*, *Descheneaux* , *Corbiere v Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203 [*Corbiere*] and other jurisprudence).

[98] The Applicants submit that the 1987 Membership Code widens the existing gap between the Applicants (who were already discriminated against by the *Indian Act*) and those who are entitled to membership under the 1987 Membership Code (who were unaffected by the discriminatory denial of status) and reinforces, perpetuates and exacerbates the historical discrimination and disadvantages to which the Applicants have been subjected to. The Applicants submit that this constitutes discrimination on the basis of sex contrary to s 15 of the *Charter*, which is not justified under s 1 of the *Charter*. The Applicants submit that the Respondents appear to accept that the 1987 Membership Code is discriminatory and needs to be changed. However, they submit that this has been a longstanding issue and the efforts currently being made to address the discrimination are insufficient.

Respondents' position

[99] The Respondents acknowledge that the 1987 Membership Code essentially freezes in place the status provisions of the *Indian Act* as they existed in 1987 and that these provisions have since been deemed unconstitutional. The Respondents submit that they have attempted to remedy the issues with the 1987 Membership Code by way of the 2016 Referendum and by the extending all membership rights, excepting "political rights", to individuals affiliated with

CLCFN but who are not members under the 1987 Membership Code. Further, that CLCFN is also in the process of holding another referendum with the hope of ratifying a new membership code.

Analysis

[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*.

[103] Although the Applicants made a general allegation that the 1987 Membership Code infringes s 28 of the *Charter* (granting *Charter* rights and freedoms equally to male and female persons) and s 35(4) of the *Constitution Act, 1982* (guaranteeing the Aboriginal and Treaty rights in s 35(1) equally to male and female persons), they have not in any way particularized or elaborated upon this or provided any supporting evidentiary basis. Accordingly, I find it unnecessary to engage with this allegation.

Issue 4: If the 1987 Membership Code is unconstitutional, what is the appropriate remedy?

Applicants’ position

[104] The Applicants submit that the traditional remedy for a law found to be unconstitutional is that it will be declared of no force and effect pursuant to s 52(1) of the *Constitution Act, 1982*. While courts commonly suspend a declaration of invalidity to give governments time to address the unconstitutionality where the declaration would create a gap in the law, that approach is unacceptable and inappropriate in these circumstances. The Applicants submit that the declaration of invalidity should take effect immediately, as the discriminatory impacts of the 1987 Membership Code have been well known within CLCFN for over a decade and remain unaddressed. And, while there are current efforts underway to enact a new membership code,

ratification is a lengthy process and the ability to meet a majority requirement is not guaranteed, especially in light of voter apathy. The Applicants submit that the individuals with a constitutional entitlement to membership in CLCFN are already known, as they are reflected in the Indian Register maintained by ISC, and they should not be denied this entitlement while efforts – possible repeated efforts – are made to address this long standing problem.

[105] The Applicants also submit that, in addition to a declaration of invalidity pursuant to s 52(1) of the *Constitution Act, 1982*, the Court has the ability to effect an appropriate, just and novel remedy pursuant to s 24(1) of the *Charter*. The Applicants submit that such a remedy is necessary to achieve justice and provide a responsive remedy in these circumstances. They propose that this Court order that CLCFN return control of its Band List to ISC, which would mean that membership would be determined by ISC pursuant to s 11 of the *Indian Act* until such time as a constitutionally compliant membership code is passed by CLCFN. Alternatively, the Court could order that CLCFN is prohibited from removing any person currently on the Band List (Membership List) who holds a constitutional entitlement to membership and order that anyone who can demonstrate such an entitlement to be added to the list.

Respondents' position

[106] The Respondents submit that it is not necessary to overturn the results of the 2020 Election, nor would this be appropriate in these circumstances. Rather, the issue for this Court is what remedy is appropriate given the unconstitutionality of the 1987 Membership Code. The Respondents submit that this Court has previously suspended declarations that First Nations' customary laws are invalid to allow the First Nation to effect its own process to address the

constitutionally problem prior to the next election (for example *Clifton v Hartley Bay Indian Band*, 2005 FC 1030 [*Clifton*] and *Thompson v Leg'a:mel First Nation*, 2007 FC 707 [*Thompson*]). The Respondents submit that First Nations should be allowed to fashion solutions to legislative issues in keeping with their own laws and traditions (referencing *Awashish v Conseil des Atikamekw d'Opitciwan*, 2019 FC 1131 and *Linklater v Thunderchild First Nation*, 2020 FC 899 [*Linklater*]). The Respondents submit that any declaration of invalidity should be suspended for a period of one year to allow a referendum to take place to replace the 1987 Membership Code with a new code drafted with the input of CLCFN community members and in keeping with CLCFN's laws and traditions.

Analysis

[107] The affidavit evidence of Wilfred Iron is that on April 21, 2021, Council established a committee to review the 1987 Membership Code so that another referendum can be held to ratify a new membership code. He deposes that a draft code has been generated and community information sessions were scheduled for January 2022 with a new ratification vote to occur in June 2022. However, the Court was not provided with an update subsequent to Mr. Iron's December 2, 2021 affidavit and, as the Applicant points out, it is not a certainty that a new code will be ratified.

[108] While this uncertainty mitigates against a lengthy deferral of the declaration of invalidity, I do not agree with the Applicants' suggestion that the declaration of invalidity should take immediate effect. Among other things, this would bring into question the legitimacy of the

current Chief and Council – who were elected utilizing a voter's list prepared pursuant to the 1987 Membership Code – in a circumstance where no new membership code has been effected.

[109] I do agree with the Applicants that this issue is not a new one and that they should not be deprived of the possibility of full membership rights for a further, extended period of time. However, in my view, neither of the novel s 24 *Charter* remedies proposed by the Applicants are appropriate interim measures to fill the void if the 1987 Membership Code were declared invalid with immediate effect. Specifically, that the Court order CLCFN to return control of its Band List (Voter's List) to ISC, the effect of which would be that membership would be determined by ISC pursuant to s 11 of the *Indian Act*. I note that s 13.2(1) states that a band may, at any time after assuming control of its Band List under s 10, decide to return control of its Band List to the Department if a majority of the electors of the band gives its consent to that decision.

[110] To return control of band membership to ISC would be a very significant step which, in the normal course, is a question of governance to be determined by the members of the band. Given the reasonable option of a deferred declaration of invalidity, I see no justifiable basis upon which the Court should consider such a drastic ingress into the affairs of the CLCFN before first permitting the CLCFN the opportunity to resolve its own membership issues by effecting a new, constitutionally compliant membership code (see *Linklater* at para 34; *Clark v Abegweit First Nation*, 2019 FC 721 at para 77).

[111] As to the second proposed novel remedy, it is not the role of this Court to assess which individual members of CLCFN hold a constitutional entitlement to membership or which have

demonstrated such an entitlement so as to determine who may or may not be placed on a Band List (*Descheneaux* at para 231). Aside from the obvious practical difficulties this approach would entail, it ignores the purpose of being a section 10 band, which is to permit the First Nation to control its own membership based on membership criteria that it adopts.

[112] Accordingly, and although I have found that the 1987 Membership Code, which determines who are the electors that would be permitted to run for office and vote in that election, is unconstitutional as it breaches s 15 of the *Charter* and is not demonstrably justified as a reasonable and limit pursuant to section 1 of the *Charter*, in my view, the community will not be well served by this Court declaring the 1987 Membership Code immediately invalid. I agree with the Respondents that the best possible resolution of this matter is that CLCFN itself complete a new referendum process and enact a new, constitutionally valid, membership code. There is, of course, no guarantee that a second referendum will achieve the double majority needed for ratification and, as I indicted to the parties at the hearing of this matter, the discriminatory two-tier membership now in effect cannot continue for a further extended period of time.

[113] I will declare the 1987 Membership Code to be invalid as contrary to section 15 of the *Charter*. I will suspend that declaration for 12 months from the date of this decision to permit CLCFN the opportunity to adopt a new constitutionally valid membership code by vote of the "majority of the electors of the band", as that term is defined in *Cardinal* and *Odanak*). That is, a double majority.

[114] I will not set aside the 2020 Election. However, given that the election of the current Chief and Council was based on the unconstitutional 1987 Membership Code, I will order that a new election must be called following the adoption of, and utilizing, a new membership code. Further, and keeping in mind the principles set out in *Doucet-Boudreau v Nova Scotia (Minister of Education)*, 2003 SCC 63 at paras 55-59 when issuing a remedy under s 24(1) of the *Charter*, I will also order that if at the end of the 12-month suspension of the declaration of invalidity a new constitutionally compliant membership code has not been validly ratified, then, as of that date, CLCFN shall to deemed to have returned control of its "Band List" to ISC until such time as a new constitutionally compliant membership code has been validly ratified. The effect of this would be that CLCFN band membership would then be determined by ISC pursuant to s 11 of the *Indian Act*. In that event, I will also order that a new election must be called following the return of control of the band list to ISC.

Costs

[115] In their written submissions, the Applicants seek costs on a solicitor-client basis in any event of the cause. They submit that the within proceeding is a complex public interest case that seeks to correct serious significant electoral and band membership issues and which engages constitutional issues and discrimination affecting hundreds of members of the CLCFN community, thus warranting solicitor-client costs (citing *Whalen v Fort McMurray No 468 First Nation*, 2019 FC 1119 [*Whalen*]). The Applicants submit that they had to fund this litigation through personal resources and community donations and that their financial contributors "were subject to summary dismissal from their positions by the Respondents as a result". They submit that such reprehensible conduct can warrant justify an award of solicitor client costs (citing

Balfour v Norway House Cree Nations, 2006 FC 616 at para 21-22). Conversely, that the Respondents had the full benefit and support of CLCFN's financial resources to fund their position to the litigation (citing *Knebush v Maygard*, 2014 FC 1247 [*Knebush*] at paras 59-61; *Cowessess First Nation No 73 v Pelletier*, 2017 FC 859 at para 24).

[116] The Respondents' written submissions request that the Applicants' application for judicial review and election appeal be dismissed with costs to the successful party.

[117] When the parties appeared before me I directed that they attempt to reach agreement on an agreed lump sum. Failing that, they were to submit bills of costs and brief submissions on costs. These submissions have now been received.

[118] The Applicants have provided a bill of costs based on Tariff B – Column III with total fees and disbursements amounting to $22,991.86. They have also filed an affidavit of Craig McCallum sworn on May 27, 2022. This deposes that their counsel, MLT Akins LLP, has issued four invoices totalling $33,207.70, copies of which are attached as exhibits. Further, that $71,252.50 in additional legal fees have been accrued; a pre-bill to that effect is also attached as an exhibit. Mr. McCallum states that to date he has paid his counsel's invoices through community fundraising which raised $28,205.00, direct donations and, from his own funds. The remaining fees have not been invoiced as Mr. McCallum does not have the financial resources to pay them.

[119] The Applicants continue to seek costs on a solicitor-client basis in the amount of $101,460.20 or, alternatively, in an elevated lump sum of $70,000.00, relying on their prior written submissions. They acknowledge that solicitor-client costs are rarely granted and are typically only granted where a party's conduct was "reprehensible, scandalous or outrageous" or the litigation was brought in the public interest (*Whalen* at para 13, 16). They submit, however, that applying the factors set out in *Whalen* to the facts of this case, solicitor-client costs are warranted.

[120] The Respondents have provided a bill of costs based on Colum III of Tariff B listing fees in the amount of $11,520.00 and disbursements in the amount of $1627.45. They also list their actual fees in the amount of $46,862.00. The Respondents submit that there is a trend of awarding costs on a lump sum basis which approach is useful where the Tariff calculated fees do not serve the objective of making a reasonable contribution to the costs of litigation (referencing *Nova Chemicals Corporation v Dow Chemical Company*, 2017 FCA 27 [*Nova Chemicals*] at para 17). They submit that their Tariff B costs are approximately 25% of their actual fees and that costs should be awarded to the successful party pursuant to the Tariff.

[121] The Respondents submit that they have not engaged in any wrongful conduct during the course of the proceedings that would support an award of costs on a solicitor-client basis. And while cases providing clarity to the application of First Nation's laws are important to good governance, this does not necessarily rise to the level of widespread societal impact that would support the awarding of costs on a solicitor-client basis. Further, should success be divided, then

the proper course of action to address any perceived imbalance in resources is to decline to award costs against the Applicants and have each party bear its own respective costs.

Analysis

[122] Pursuant to Rule 400 (1) of the *Federal Courts Rules* (SOR/98-106), the Court has full discretionary power over the amount and allocation of costs and the determination of by whom they are to be paid. In exercising that discretion the Court may consider the factors set out in Rule 400(3) which include: the result of the proceeding; the importance and complexity of the issues; whether the public interest in having the proceeding litigated justifies a particular award of costs; any conduct of a party that tended to shorten or unnecessarily lengthen the duration of the proceeding; and, any other matter that the Court considers relevant. The Court may fix all or part of any costs by reference to Tariff B and may award a lump sum in lieu of, or in addition to, any assessed costs (Rule 400(4)).

[123] With respect to the awarding of solicitor-client costs, the general rule has been stated by the Supreme Court of Canada to be that solicitor-client costs are awarded only on very rare occasions, for example when a party has displayed reprehensible, scandalous or outrageous conduct, or, where reasons of public interest may justify the making of such an order (*Mackin v New Brunswick (Minister of Finance),* [2002] 1 SCR 405 [*Mackin*] at para 86; *Quebec (Attorney General) v Lacombe* 2010 SCC 38 at para 67)).

[124] On the first basis, the Applicants acknowledge that there was no misconduct by the Respondents within the litigation itself that would warrant solicitor-client costs. They submit,

however, that pre-litigation conduct can be a relevant factor in that regard, (referencing *Knebush* at paras 39-40). They submit that the confrontation of Lloyd Yew over his financial support to Craig McCallum is relevant pre-litigation misconduct as this would have the effect of discouraging financial contributions meant to equalize the playing field for Craig McCallum as a public interest litigant. The Applicants assert that the Respondents are using their positions as the government to maintain their systemic financial advantage by "starving" the Applicants of funding.

[125] I note that solicitor-client costs were not awarded in *Knebush*. Rather, in that case Justice Mandamin referred to *Roseau River Anishinabe First Nation v. Nelson*, 2013 FC 180 [*Nelson*] at paras 71-76 [*Roseau River*] but found that the conduct in *Roseau River* was much more serious than in the matter before him. In *Roseau River*, Justice Russell described egregious conduct which included a deliberate plan to thwart the legitimate decisions of the band council. Justice Russell concluded that the evidence established reprehensible, scandalous and outrageous conduct and that, in those circumstances, there was also a strong public interest component for solicitor-client costs in that case.

[126] I make no finding on whether or not pre-litigation conduct – as opposed to conduct connected to the litigation – can ground an award of solicitor-client costs. However, even if it can, I am not persuaded that the single incident relied upon by the Applicants in this matter would warrant this. Mr. Yew resigned from his position and there is no evidence that any other CLCFN community members were dissuaded from contributing to fundraising as a result of that

incident which involved one Council member, Mr. Wilfred Iron. This is not a situation of egregious conduct as was the case in *Roseau River*.

[127] With respect to solicitor-client costs in public interest litigation, the Supreme Court of Canada in *Carter v Canada (Attorney General)*, 2015 SCC 5, found that s 24(b) and s 14 of the *Criminal Code* unjustifiably infringed s. 7 of the *Charter* and were of no force or effect to the extent that they prohibited physician-assisted death for a competent adult person in stated circumstances. The Supreme Court awarded special costs on a full indemnity basis against Canada. In considering special costs, the Court held:

> [136] The appellants argue that special costs, while exceptional, are appropriate in a case such as this, where the litigation raises a constitutional issue of high public interest, is beyond the plaintiffs' means, and was not conducted in an abusive or vexatious manner. Without such awards, they argue, plaintiffs will not be able to bring vital issues of importance to all Canadians before the courts, to the detriment of justice and other affected Canadians.
>
> [137] Against this, we must weigh the caution that "[c]ourts should not seek on their own to bring an alternative and extensive legal aid system into being": *Little Sisters Book and Art Emporium v. Canada (Commissioner of Customs and Revenue)*, 2007 SCC 2, [2007] 1 S.C.R. 38, at para. 44. With this concern in mind, we are of the view that *Adams* sets the threshold for an award of special costs too low. This Court has previously emphasized that special costs are only available in "exceptional" circumstances: *Finney v. Barreau du Québec*, 2004 SCC 36, [2004] 2 S.C.R. 17, at para. 48. The test set out in *Adams* would permit an award of special costs in cases that do not fit that description. Almost all constitutional litigation concerns "matters of public importance". Further, the criterion that asks whether the unsuccessful party has a superior capacity to bear the cost of the proceedings will always favour an award against the government. Without more, special costs awards may become routine in public interest litigation.
>
> [138] Some reference to this Court's jurisprudence on advance costs may be helpful in refining the criteria for special costs on a full indemnity basis. This Court set the test for an award of

advance costs in *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2003 SCC 71, [2003] 3 S.C.R. 371. LeBel J. identified three criteria necessary to justify that departure from the usual rule of costs:

> 1. The party seeking interim costs genuinely cannot afford to pay for the litigation, and no other realistic option exists for bringing the issues to trial — in short, the litigation would be unable to proceed if the order were not made.
>
> 2. The claim to be adjudicated is *prima facie* meritorious; that is, the claim is at least of sufficient merit that it is contrary to the interests of justice for the opportunity to pursue the case to be forfeited just because the litigant lacks financial means.
>
> 3. The issues raised transcend the individual interests of the particular litigant, are of public importance, and have not been resolved in previous cases. [para. 40]

[139] The Court elaborated on this test in *Little Sisters*, emphasizing that issues of public importance will not in themselves "automatically entitle a litigant to preferential treatment with respect to costs" (para. 35). The standard is a high one: only "rare and exceptional" cases will warrant such treatment (para. 38).

[140] In our view, with appropriate modifications, this test serves as a useful guide to the exercise of a judge's discretion on a motion for special costs in a case involving public interest litigants. First, the case must involve matters of public interest that are truly exceptional. It is not enough that the issues raised have not previously been resolved or that they transcend the individual interests of the successful litigant: they must also have a significant and widespread societal impact. Second, in addition to showing that they have no personal, proprietary or pecuniary interest in the litigation that would justify the proceedings on economic grounds, the plaintiffs must show that it would not have been possible to effectively pursue the litigation in question with private funding. In those rare cases, it will be contrary to the interests of justice to ask the individual litigants (or, more likely, pro bono counsel) to bear the majority of the financial burden associated with pursuing the claim.

> [141] Where these criteria are met, a court will have the discretion to depart from the usual rule on costs and award special costs.

[128] In the matter before me, the Applicants submit that they are public interest litigants advancing matters of substantial public importance to the general community and the membership of CLCFN. While I agree that the constitutional issue the Applicants raise is very important to the CLCFN community, as stated in *Carter*, almost all constitutional litigation concerns "matters of public importance". This in and of itself is not sufficient to warrant solicitor-client costs. Rather, the issues raised must involve matters of public interest that are truly exceptional – they must have a significant and widespread societal impact (*Carter* at paras 139-140). I am not persuaded that this litigation has a significant and widespread societal impact. The issues raised by the Applicants are specific to the 1987 Membership Code and the CLCFN, and largely focus on the 2016 Referendum and the subsequent conduct of the 2020 Election, which circumstances and events are unique to CLCFN. In my view, this is not a "rare and exceptional" case warranting solicitor-client costs.

[129] I do agree that this is a circumstance where there is an imbalance between the resources at the disposal of the parties and that this is, at its heart, a governance dispute. However, while this is a relevant factor, alone it does not warrant costs on a solicitor-client basis (*Whalen* at paras 21, 25, 27).

[130] In conclusion, I am not persuaded that this matter warrants an award of costs on a solicitor-client basis.

[131] The outcome in this matter was mixed. While the Applicants did not succeed in their application for judicial review, this was because the Respondents reasonably relied on a legal interpretation of the 1987 Membership Code that a double majority was needed in order for the 2016 Referendum ratification vote to pass, with the effect that the 1987 Membership Code remained in force. The Applicant's FNE Act application did not succeed. However, the Applicants' challenge to the constitutionality of the 1987 Membership Code did succeed – which is a very significant outcome for them and many other CLCFN "non-members". Indeed, the Respondents conceded the Applicants' position on the unconstitutionality of the 1987 Membership Code.

[132] I observe in passing that I find it striking that the validity of the 2016 Referendum apparently did not arise until the lead up to the 2020 Election. In his affidavit, Chief Iron states that "[t]here had been some confusion on Council and amongst CLCFN's membership after the Referendum as to whether the vote to adopt the 2016 Membership Code had passed. As such, at the November 6, 2020 meeting I told community members that I would review the issue and report back to the community about whether the 2016 Membership Code should be used". Chief Iron does not state what the confusion was, when it arose or who was confused. Chief Iron's evidence when cross-examined on his affidavit was that after the 2016 Ratification vote no questions were raised about whether it had properly passed. He then deposed that "Nothing came up at all about the 2016 Referendum. And then we – we had an election in December, and we carried on with the same election rules as before, and nobody brought it up till this election". Chief Iron was not asked and did not explain why the 1987 Membership Code had been used to determine membership and voting rights for the 2016 Election if every one, including him,

believed the 2016 Referendum had passed. It also seems unlikely that the Membership Clerk, Ms. Opikokew would, of her own accord, have decided to use the 1987 Membership Code in developing the voter's list for the 2016 Election, particularly if she believed that the 2016 Referendum had passed. Yet there is also no evidence in the record indicating that any CLCFN members raised any concerns about this. Nor is there any explanation in the record of why, after sending people into the field to sign up band members based on the 2016 Membership Code, that effort was apparently abandoned as there is no evidence that, as a result of that effort, new members were added to the voter's list.

[133] In any event, the evidence is clear that at some point Chief and Council were alive to the unconstitutionality of the 1987 Membership Code. As a work around, "non-members" were added to the Membership List to afford them funding, housing and other benefits – but not the right to vote or run for office. The 2016 Referendum was held, but the 2016 Membership Code was not used in the 2016 Election to determine membership. The matter came to a head in the lead up to the 2020 Election and it was only after the Applicants commenced this litigation on January 15, 2021 that a committee was struck, on April 21, 2021, to attempt to effect a new membership code. As noted above, the Respondents also conceded in this litigation that the 1987 Membership Code was unconstitutional.

[134] In these circumstances, in my view, the Applicants are entitled to their costs.

[135] In *Whalen*, as in this case, the applicant sought costs on a solicitor-client basis or, in the alternative, lump sum costs or a cost award on an elevated scale. There, Justice Grammond

restated the general purposes and principles underlying cost awards as well as the circumstances in which solicitor-client costs award may be warranted and ultimately concluded that an award of costs according to the Tariff would be insufficient and that a lump sum on an elevated basis was warranted. Lump sums must not be “plucked from thin air”, and have been found to fall within a range of 25-50% of the actual legal costs of the successful party (*Nova Chemicals* at paras 15, 17; *Whalen* at para 33).

[136] In my view, a similar approach is appropriate in this matter and I award a lump sum of 40% of the Applicants’ actual costs, for an award in the amount of $40,584.08.

JUDGMENT IN T-126-21

THIS COURT'S JUDGMENT is that

1. The application for judicial review of the decision of CLCFN Chief and Council to utilize the 1987 Membership Code for purposes of the 2020 Election, rather than the 2016 Membership Code, is dismissed;

2. The Applicants' application brought pursuant to s 31 of the *First Nations Election Act*, contesting the election of Chief and Council and seeking to have the election held on December 16 2020 set aside, is dismissed;

3. The 1987 Election Code is constitutionally non-compliant and is declared invalid;

4. The declaration of invalidity is suspended until 12 months from the date of this decision, being June 29, 2023;

5. The December 16, 2020 election will not be set aside. However:

    i. if the CLCFN has ratified a new membership code on or before June 29, 2023, then, on or before the day that is 3 months from the date of ratification of the new membership code, a new election will be held. CLCFN membership for the purposes of that new election shall be determined by the new membership code;

    ii. if the CLCFN has not ratified a new membership code on or before June 29, 2023 then Chief and Council shall, on that date, give notice in writing to the Minister that the CLCFN no longer has a membership

code and, therefore, no longer meets the criteria of s 10(1) of the *Indian Act*. 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. Also on June 29 2023, a new election will be called by Chief and Council to be held within three months of that date. CLCFN membership for the purposes of that election shall be determined pursuant to s 11 of the *Indian Act* and the Band List maintained in the Department of Indigenous Services; and

6. The Applicants will have their costs paid by the Respondents in the all inclusive lump sum amount of $40,584.08.

"Cecily Y. Strickland"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-126-21
STYLE OF CAUSE:	CRAIG MCCALLUM, LAURA BIRD, JESSICA IRON as litigation guardian for JESSE IRON, LLOYD YEW, NYDEN IRONNIGHTTRAVELLER and RONIN IRON v CANOE LAKE CREE FIRST NATION, CHIEF FRANCIS IRON, WALTER COULINEUR, BERNICE IRON, LENNY IRON, LORNE IRON, WILFRED IRON, AND ROBERT OPIKOKEW
PLACE OF HEARING:	BY VIDEOCONFERENCE USING ZOOM
DATE OF HEARING:	MAY 19, 2022
JUDGMENT AND REASONS:	STRICKLAND J.
DATED:	JUNE 29, 2022

APPEARANCES:

Michael W. Marschal Sonia Eggerman	FOR THE APPLICANTS
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