Residency, Discrimination and Self-Government in First Nations communities and Canadian Jurisprudence

I. Introduction:

Many First Nations communities carry forward election and membership codes that were adopted or amended following the enshrinement of the *Charter of Rights and Freedoms*[1] within the *Constitution Act of 1982* as a means of moving away from the *Indian Act*[2]. While actively cementing individual rights in Canada, and opening avenues to remedy, the *Charter's* application in First Nations communities has lagged behind. Although, election codes, membership codes and policy documents were initially altered in the mid-to-late 1980s with international pressure from the *Lovelace*[3] case, progress to date has been slow. In many instances, these amendments were tumultuous and rife with lateral violence and misinformation surrounding First Nations having new members placed on their general lists. Community conflicts and differential approaches to members depending on status classification have persisted. Similar conflicts would be created following the landmark decision in *Corbiere*[4] and ongoing issues regarding those who are not "ordinarily resident on the reserve". These conversations would continue, with leadership of First Nations eventually turning to self-government as a means to enforce residency requirements.

II. Issues with Residency

Through an examination of relevant jurisprudence, historical documentation, Treaty arrangements and Elder's interviews, this paper will address the following identified issues;

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[1] *Canadian Charter of Rights and Freedoms*, s 7, Part 1 of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11.

[2] *Indian Act, RSC 1985, c I-5*

[3] Prior to 1985, First Nations women who married a non-Indian man were subject to losing their status due to enfranchisement. Enfranchisement could also be achieved via commutation of annuities. Following this ruling at the United Nations Human Rights Commission, women and children who were enfranchised as per previous policies were returned to the Indian Registrar as Bill C-31. *Sandra Lovelace v. Canada*, Communication No. 24/1977, U.N. Doc. CCPR/C/OP/1 at 83 (1984)

[4] *Corbiere v. Canada (Minister of Indian & Northern Affairs)* 1999 CarswellNat 663, 1999 CarswellNat 664, [1999] 2 S.C.R. 203, [1999] 3 C.N.L.R. 19, [1999] S.C.J. No. 24, 163 F.T.R. 284 (note), 173 D.L.R. (4th) 1, 239 N.R. 1, 61 C.R.R. (2d) 189, 88 A.C.W.S. (3d) 518, J.E. 99-1058

1) Where do residency requirements for elected positions sit within Canadian jurisprudence?

2) If residency is not a reflection of Indigenous practice, what is the origin of the designation "ordinarily a resident on a reserve"?

3) Do residency requirements conflict with established Aboriginal Rights?

4) Does enforcing a residency requirement reflect self-government as it is currently understood?

This discussion will outline the detrimental effects of residency clauses in community, origins of these policies and whether they truly have a place in self-governing communities. Jurisprudence has been clear in Canada in determining that "absolute rights" do not exist in a just and democratic society, and further that the Charter remains the tool by which infringing on these rights is measured.

III. Analysis

IV. *Corbiere draws a line*

On May 20, 1999, Chiefs and Councils across the country were provided notice that discrimination due to residency would no longer stand in a post-*Charter* Canada. With the invalidation of s.77(1) of the *Indian Act*, the Supreme Court of Canada provided a clear message to the Canadian government and leadership within First Nations that regardless of residency, members have an equal right to participate in their communities. As stated above, with the passage of *Bill C-31*[5] and the return of enfranchised women, another cycle of policy amendments began around First Nations tables with the goal of including off-reserve members in governance matters. This was a daunting task given, according to census data, upwards of 60 percent[6] of First Nations people reside off-reserve. Compounding these difficult realities was a narrow

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[5] *Bill C-31: An Act to Amend the Indian Act* [1985], Government of Canada, 33rd Parliament
[6] *A snapshot: Status First Nations people in Canada*, Statistics Canada, April 2021, retrieved from https://www150.statcan.gc.ca/n1/pub/41-20-0002/412000022021001-eng.htm

interpretation of *Corbiere*[7] by elected leaders and their legal counsel. Initial changes to election codes and processes focused on allowing off-reserve members to vote in elections only. Movement beyond these initial concessions varies, with many Nations choosing to retain discriminatory practices and leaving off-reserve members to proceed through legal means.

These legal challenges have shown time and again that election codes are out of step with the *Charter* and fail to meet the standard established in *Corbiere*. Some of the jurisprudence that invalidate residency requirements of varying lengths include *Clifton v Hartley Bay Indian Band,* 2005 FC 1030, [2006] 2 FCR 24 ; Thompson; *Cockerill v Fort McMurray No. 468 First Nation*, 2010 FC 337 , reversed by [2011] FCJ No. 1736 (FCA) (QL); *Joseph v Dzawada'enuxw First Nation (Tsawataineuk)*, 2013 FC 974; *Cardinal v Bigstone Cree Nation*, 2018 FC 822, [2019] 1 FCR 3 ; *Clark v Abegweit First Nation Band Council*, 2019 FC 721.[8] Most recently, the persistence of First Nations leaders to cling to archaic policies came to a head in *Janvier v. Chipewyan Prairie First Nation* [2021].

V. *Discussing Janvier v Chipewyan Prairie First Nation*

The Chipewyan Prairie First Nation, located in Northern Alberta, Treaty No. 8 Territory, last updated their election codes in 1987. For the past thirty-seven years, eligible voters have been restricted to adults who have resided on-reserve for six months prior to the election. According to data available through Crown-Indigenous Relations and Northern Affairs Canada, this number totals 388 of total membership of 1015, or 38 percent.[9] Mr. Janvier had previously served on council, however after an unsuccessful campaign in 2006, had resided off of the

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[7] Supra. 4

[8] *Janvier v. Chipewyan Prairie First Nation* 2021 CarswellNat 1743, 2021 CarswellNat 3092, 2021 FC 539, 2021 CF 539, 334 A.C.W.S. (3d) 678, 490 C.R.R. (2d) 138, para. 26

[9] *Chipewyan Prairie First Nation*, Registered Population, Crown-Indigenous Relations and Northern Affairs Canada.
https://fnp-ppn.aadnc-aandc.gc.ca/fnp/Main/Search/FNRegPopulation.aspx?BAND_NUMBER=470&lang=eng

reserve for work. During the 2019 election, he intended to seek nomination for a council position, but was ultimately denied due to the residency clause. Janvier appealed this decision through internal mechanisms to no avail and opted to seek a judicial review through the Federal Court.

In a succinct analysis, Justice Grammond considered a return and reliance on internal First Nations mechanisms, as seen in *Linklater v Thunderchild First Nation*, 2020 FC 1065. Returning decisions to administrative bodies, with clarifications, was the preferred course of action for the Court. However, once Mr. Janvier brought forward an argument that the residency provision breached his *Charter* rights; the court was compelled to act because "a remedy for a breach of [one's] Charter rights cannot depend on the consent of other persons".[10] Lastly, the fact that the residency requirement controlled every aspect of a members participation in an election, it would have been unlawful to allow validation under one aspect of the code and invalidation based upon another.

When determining that the residency requirement was ultimately invalid, Justice Grammond provided a scathing indication that the intention of the residency provision in Chipewyan Prairie First Nation's election code was akin to s.77(1) of the *Indian Act* [1985].[11] Turning to remedies, Justice Grammond provides additional commentary on the options available to Chief and Council of Chipewyan Prairie First Nation other than litigation. Special comment was provided on the ability of governing bodies to pass regulations as opposed to

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[10] Supra. 8, para. 16

[11] The Supreme Court's comments are equally applicable in the present case. In reality, it is difficult to draw any meaningful distinction between the residency requirement found in Chipewyan Prairie First Nation's election code and section 77 of the Indian Act. The residency requirement treats members who do not reside on the reserve as less deserving — in reality, not deserving at all — of participating in the First Nation's political decisions. It deprives off-reserve members not only of the right to vote, but also the right to challenge the process in a quasi-judicial forum and to participate in its change by political means. It is plainly discriminatory. Supra. 8, para. 25

"overblown" amendment processes.[12] Ultimately, it was determined that, in the interest of all members, leadership should prioritise an amicable solution to avoid further litigation. The decision to disqualify Mr. Janvier was set aside and the residency requirement invalidated for a period of 18 months. Aside from scathing commentary on First Nations' processes and politics, the Court was restricted from addressing residency issues in a broader fashion. Questionable election practices continue throughout Indian Country, and leaders have begun to include these problematic approaches in self-government discussions, losing sight of their historical connection.

VI. *Ordinarily a Resident of a Reserve*

As stated previously, the prevalence of residency requirements which limit democratic participation to a handful of people in First Nations is staggering. Many communities, especially on the Prairies, are relegated to selecting leaders from recurring candidates and a stagnant population. This recycling of leaders is a source of low voter engagement around elections, and a contributing factor in First Nations seeming to lag in terms of governance. In order to properly identify and rectify these issues, we must first explore the origins of these out-dated provisions and how they conflict with traditional practices. Until this truth telling activity is complete, we cannot move to a state of determining what role residency plays in self-government.

VII. *Origins from the Indian Act*

Like many other discriminatory practices targeting First Nation people and lands, residency policies can trace their roots to the earliest versions of the *Indian Act [1876].* In the

[12] Thus, the concern that amending the code might become impossible appears overblown. Moreover, the election code states that the chief and council may enact regulations necessary to give effect to the code. This would include making the necessary adaptations to the logistics of the voting process, for example with respect to advance polling, mail-in or electronic voting or holding polls in locations where significant concentrations of off-reserve members reside. I trust that the First Nation will take reasonable measures to ensure that off-reserve members have an equal opportunity to participate in the political process, if it wants to avoid further litigation. Supra. 8, para. 37

initial version of the Act, s. 3 and subsequent subsections clarified conditions upon which an "Indian" would lose their legal status. Of particular interest to our discussion is subsection (b) which provided a tool by which the government could determine who is an "absentee Indian".[13] This early policy was a clear attempt to place restrictions around historical travel routes and larger gathering activities. Prior to infringement, First Nations would regularly cross into their traditional territories without issue. These rights which were exercised prior to Confederation, enshrined in the *Royal Proclamation of 1763*[14] and solidified thirty years later in the *Jay Treaty [1795]*[15] were inherent in nature, and not legally subject to abrogation. Following the establishment of the *Indian Act,* these practices would change drastically.

Government policy would continue the hypocritical objective of herding First Nations into localised populations while actively negotiating and guaranteeing the opposite via the numbered treaties. Limiting movement of Indian populations would gain further support with events surrounding the return of Louis Riel and Metis resistance. Having fled after the Red River Resistance some 14 years earlier, now with First Nations allies at his side, Riel sought to push for government accountability regarding the *Manitoba Act [1870]* and the numbered treaties.[16] With a perceived threat of another uprising in the background of an expanding Canada, the

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[13] Absentees. *(b)* Provided that any Indian having for five years continuously resided in a foreign country shall with the sanction of the Superintendent General, cease to be a member thereof and shall not be permitted to become again a member thereof, or of any other band, unless the consent of the band with the approval of the Superintendent General or his agent, be first had and obtained; but this provision shall not apply to any professional man, mechanic, missionary, teacher or interpreter, while discharging his or her duty as such. *Consolidations of Indian Legislation,* Volume II: Indian Acts and Amendments 1868-1975, *Indian Act, SC 1876, c. 18, p.24*

[14] And whereas it is just and reasonable, and essential to our Interest, and the Security of our Colonies, that the several Nations or Tribes of Indians with whom We are connected, and who live under our Protection, should not be molested or disturbed in the Possession of such Parts of Our Dominions and Territories as, not having been ceded to or purchased by Us, are reserved to them, or any of them, as their Hunting Grounds. *George R, Proclamation*, 7 October 1763, reprinted in RSC 1985, App II, No. 1

[15] *Great Britain & Us-John Jay's Treaty*. (1794) Great Britain & US-John Jay's Treaty, . & Senate Ratified June 1795

[16] *Red River Rebellion,* retrieved from https://www.thecanadianencyclopedia.ca/en/article/red-river-rebellion

government began to use its colonial powers to place further restrictions on First Nations people. In the years to follow, the *Indian Act* would be amended a number of times, with greater restrictive provisions and tools for Indian Agents to exert local control.

VIII. *Advancing Indians*

It was not until 1884 and the passage of *The Indian Advancement Act* [1884] that the policy of "resident on the reserve" would become the legislated preference. Through this major amendment of the *Indian Act*, Canada would begin to divide reserves into numbered sections while attempting to distribute male members among said sections equally. From this legislation, we see the emergence of a common term in Indian country and policy, "resident on the reserve".[17] In likely its first occurrence, this eligibility requirement is placed upon prospective leaders in First Nation communities. In s. 5 of the *Indian Advancement Act*, it was determined that only "male Indians of the full age of twenty-one years, resident on the reserve (hereinafter termed electors) shall meet for the purpose of electing members of the council of the reserve".[18] While these changes may have reflected Euro-Canadian values at the time, these policies were in direct conflict with previous matriarchal governance practices. By fracturing and shifting how governance decisions were made within First Nations, the colonial government ensured disruption would continue.

This intended disruption was evident in not only how the government introduced voting restrictions based upon residency, but also sex and age. It was not until the early 1900s that the term elector was expanded to include First Nations women, however residency and age parameters still prevailed. Elections and governance decisions would continue in this manner until civil rights movements and national understanding shifted, with many of the most

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[17] Supra. 13, p. 102
[18] Ibid. p. 103

discriminatory approaches being repealed with the introduction of the 1951 *Indian Act.* While these amendments would erase some barriers for members, it would also introduce the Indian Registry and Band list. Establishing two additional classification systems while doing little to address residency. It was not until *Corbiere* that the movement away from residency was forced, mainly due to its direct connection to s.76(1) of the 1951 iteration and in later versions s.77(1).[19]

IX. *S.77(1) connections*

As alluded to previously, it was concluded by Justice Grammond in *Janvier* that it remains difficult for the Court to draw distinction between s. 77(1) of the Indian Act and custom election codes requiring residency. If one examines s. 77(1)[20] and the language from the Chipewyan Prairie Election Code[21] side by side, it is clear that one is derived from the other with specifications around timelines and Nation the only alterations. By simply adopting the language of the *Indian Act* and substituting "ordinarily resident on the reserve" with a requirement of six months, it could be argued that the Chipewyan Prairie First Nation provisions are more restrictive in practice. While some questions can be raised around the determination of "ordinarily resident", there is little recourse or justification offered to members around a six month requirement.

It is this lack of recourse that continues to raise the ire of the Court, and in recent years, an increased awareness of what First Nations practices actually were. Having to reside in one place over a number of months or years does not reflect the traditional practices of First Nations who thrived as nomadic or semi-nomadic peoples. Concepts of land stewardship, occupation and

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[19] Supra. 13, p.339

[20] 77(1) A member of a band who has attained the age of eighteen years and is ordinarily resident on the reserve is qualified to vote for a person nominated to be chief of the band and, where the reserve for voting purposes consists of one s., to vote for persons nominated as councillors. Supra. 2

[21] Every member of the Chipewyan Prairie First Nation, who is eighteen years of age [or] older and who has been resident on the Chipewyan Prairie First Nation Reserve for at least six months prior to the date of an election for Chief or Councillors for the Chipewyan Prairie First Nation is eligible to vote in that election. Supra. 8, para. 5

resource management were considered as factors in establishing Aboriginal Title in *Delgamuukw*[22] in conjunction with validating oral history. Later, these complex issues would be expanded upon by the Court in *Tsilhqot'in Nation v British Columbia, 2014 SCC 44*[23] and applied to fluid residency. With these considerations, it can be argued that having to reside on a reserve does not adhere to the rights enshrined via previous case law, nor does it align with First Nations' understanding of *Treaty.*[24]

X. Aboriginal Title and Residency

From the onset of colonisation, Canada and its legal foundations have struggled to fit Aboriginal title into the narrow boxes upon which common and civil law are constructed. This is not only caused by the inherent hypocrisy of having something that pre-existed the common law in Canada fit within its confines, but also the erasure that is required to allow the common law to prevail. To attempt to arrive at a compromise, the Court has stated time and again that Aboriginal title is *sui generis*. However, this is often an attempt to skirt the real issues and contestation that Aboriginal title creates when placed beside common and civil law. Over the years, we have witnessed these conflicts occur when Aboriginal and *Charter* rights interact, and we will continue until clarity is ultimately provided by the Court.

XI. *Revisiting Delgamuukw*

[22] *Delgamuukw v. British Columbia* 1997 CarswellBC 2358, 1997 CarswellBC 2359, [1997] 3 S.C.R. 1010, [1997] S.C.J. No. 108, [1998] 1 C.N.L.R. 14, [1999] 10 W.W.R. 34, 153 D.L.R. (4th) 193, 162 W.A.C. 161, 220 N.R. 161, 66 B.C.L.R. (3d) 285, 75 A.C.W.S. (3d) 983, 99 B.C.A.C. 161, J.E. 98-38

[23] *Tsilhqot'in Nation v. British Columbia* 2014 CarswellBC 1814, 2014 CarswellBC 1815, 2014 SCC 44, 2014 CSC 44, [2014] 2 S.C.R. 257, [2014] 3 C.N.L.R. 362, [2014] 7 W.W.R. 633, [2014] B.C.W.L.D. 3975, [2014] B.C.W.L.D. 3976, [2014] B.C.W.L.D. 3977, [2014] B.C.W.L.D. 3978, [2014] B.C.W.L.D. 3979, [2014] B.C.W.L.D. 3980, [2014] B.C.W.L.D. 3981, [2014] B.C.W.L.D. 3982, [2014] B.C.W.L.D. 3983, [2014] B.C.W.L.D. 3984, [2014] B.C.W.L.D. 3985, [2014] B.C.W.L.D. 3986, [2014] B.C.W.L.D. 3987, [2014] B.C.W.L.D. 3992, [2014] B.C.W.L.D. 3995, [2014] B.C.W.L.D. 3996, [2014] B.C.W.L.D. 4006, [2014] B.C.W.L.D. 4007, [2014] B.C.W.L.D. 4011, [2014] B.C.W.L.D. 4012, [2014] B.C.W.L.D. 4147, [2014] S.C.J. No. 44, 241 A.C.W.S. (3d) 2, 312 C.R.R. (2d) 309, 356 B.C.A.C. 1, 374 D.L.R. (4th) 1, 43 R.P.R. (5th) 1, 459 N.R. 287, 58 B.C.L.R. (5th) 1, 610 W.A.C. 1, J.E. 2014-1148

[24] *Treaty No. 8*, 1899

A clear example of these conflicts arose during the Court's consideration of *Delgamuukw.* In this landmark decision, a confluence of oral history, common law and title took place, shifting the legal landscape once again. At paragraph 114, Chief Justice Lamer laid the issue bare, drawing upon direct parallels in Aboriginal and common law and the fact that in the eyes of the law, occupation can equate to ownership.[25] Additionally, Chief Justice Lamer elaborated on the issue by outlining how Aboriginal title is held communally.[26] These statements lead one to consider that if Aboriginal rights are held by all members equally, then internal alienation cannot be justified under either Aboriginal or common law. Further, the Court also pointed to the *Indian Act* and its determination that "reserves are held by Her Majesty for the <u>use and benefit</u> of the respective bands…" and in this excerpt there is no determination of residency.[27] Through this approach, when joined with *Corbiere*, one can argue that Aboriginal rights, such as participation in governance systems, are not relegated to a handful of residents, but rather the broader Nation and territory. Also, it should be inferred that these rights are not limited in scope or application by invisible boundaries, but enshrined regardless of where one resides. As was determined when ruling on the title held by the semi-nomadic *Tsilhqot'in*.

XII. *Tsilhqot'in Nation v. British Columbia*

Expanding on *Delgamuukw's* determination that Aboriginal title, to be proven, requires sufficiency, continuity and exclusivity, the Court outlined the best approach when dealing with a semi-nomadic people.[28] While the application was not perfect, it was important for the Court to

[25] The first is the physical fact of occupation, which derives from the common law principle that occupation is proof of possession in law: see Kent McNeil, Common Law Aboriginal Title(1989), at p. 7. Thus, in Guerin , supra , Dickson J. described aboriginal title, at p. 376, as a "legal right derived from the Indians' historic occupation and possession of their tribal lands". Supra. 23
[26] A further dimension of aboriginal title is the fact that it is communally held . Aboriginal title cannot be held by individual aboriginal persons; it is a collective right to land held by all members of an aboriginal nation. Decisions with respect to that land are also made by that community. This is another feature of aboriginal title which is sui generis and distinguishes it from normal property interests. Ibid. para. 115
[27] Ibid. para. 121
[28] Supra. 24, para. 32

have a starting place. In terms of occupation, it was not necessary for a community to prove permanent occupation, rather, the Court was satisfied that if a Nation communicated to others that they were holding land for their purpose, that would suffice.[29] It is also necessary to point out that this occupation did not attribute possession to the Nation nor did it determine *nemo dat*; rather, the Court stated it established a claim to occupation. In terms of continuity, the Court declined to have a Nation provide "an unbroken chain of continuity", instead, only an inference that they had occupied said territory pre-contact needed to be provided.[30] Lastly, when exploring exclusivity, a Nation must establish that during their occupation, others operated under restrictions in relation to the land in question while the controlling Nation exercised intermittent rights.[31] Taken together, it can be argued that a Nation needed to show some exercise of self-government over lands in question. If we apply a different lens to the findings in *Tsilhqot'in*, one can draw clear parallels between traditional practices, Aboriginal rights and the current trends of off-reserve members. It is often stated that policy or circumstance has created a disconnection from their territories, however, if we apply the above rationale, that disconnection is arguably artificial. Disconnection from one's territory and rights becomes even more difficult to comprehend once we apply a Treaty interpretation to residency, and consider how enforcing a confine clause may be in violation of our sacred arrangements.

XIII. *Treaty No. 8 Land in Severalty*

During the negotiations of Treaty no. 8 in June of 1899, it is stated that the First Nation leaders came prepared. Novel requests and concessions were expected from the Crown informed by decades of lived experience and fractured relationships. One particular request in Treaty No. 8

[29] There must be evidence of a strong presence on or over the land claimed, manifesting itself in acts of occupation that could reasonably be interpreted as demonstrating that the land in question belonged to, was controlled by, or was under the exclusive stewardship of the claimant group. Ibid. para. 38
[30] Ibid. para. 46
[31] Exclusivity can be established by proof that others were excluded from the land, or by proof that others were only allowed access to the land with the permission of the claimant group. Ibid. para. 48

was the establishment of Land in Severalty. Due to the actions of the government, and the fact that Treaty no. 7 had been negotiated some twenty-two years earlier, First Nations side tangible evidence of how the reserve system was failing. It was understood and feared that if they accepted the Treaty, their way of life would be threatened. An additional cause for concern was the reality of being confined to a reserve. This concern was clearly outlined through oral history of the Fort Chipewyan Band via Elder John Kaskamin who stated, “Chiefs did not select land at the time of treaty as they did not want their people to be confined”.[32]

To alleviate these concerns, the Crown accepted a proposal from Commissioner A.E. Forget to allow for First Nations to take their land “in severalty”.[33] This meant, in practice, that if a family did not wish to reside on a reserve, they would be provided with land apart from an established reserve. In their reports back to the Crown, the Treaty Commissioners informed their superiors that the conclusion on Treaty no. 8 would not have been possible if assurances around confinement were not made.[34] With this understanding, it is clear that confining members, or enforcing policies which are analogous to confinement may violate Treaty no. 8. Terms of confinement, and required residency, are contrary to the intention of treaty negotiators to ensure members of First Nations would retain freedom of movement throughout their territories and traditional way of life. Unfortunately, throughout the years, the origin of these policies regarding residency have been lost, and the legal discourse has strayed to self-government and sovereignty.

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[32] *Summary of Elders' Interviews: Land and Land Surrenders*, Office of Specific Claims & Research, April 1974. pg. 3

[33] They are averse to living on reserves; and as that country is not one that will ever be settled extensively for agricultural purposes it is questionable whether it would be good policy to even suggest grouping them in the future. The reserve idea is inconsistent with the life of a hunter, and is only applicable to an agricultural country. *Treaty Research Report,* Treaty Eight (1899), Dennis F.K. Madill, Treaties and Historical Research Center, Indian and Northern Affairs Canada, 1986, p. 21-22

[34] It would have been impossible to have made a treaty if we had not assured them that there was no intention of confining them to reserves.We had to very clearly explain to them that the provisions for reserves and allotments of land were made for their protection, and to secure to them in perpetuity a fair portion of the land ceded, in the event of settlement advancing. Supra. 33, p. 25

XIV. *Residency and Self-Government*

The repeated emergence of residency issues has become so pressing that, at present, the Supreme Court of Canada has elected to hear arguments from the parties of *Cindy Dickson v. Vuntut Gwitchin First Nation* 2022.[35] While the *Dickson* case may have ventured into a larger discussion around s.25 of the *Charter,*[36] the power of self government and a conflict of laws in Canada; one must not forget that the primer of the issue was the enforcement of a residency clause in the Vuntut Gwitchin Constitution and Self-Government Agreement.[37] Although uniquely placed in Canadian jurisprudence given their executed and ratified self-government arrangement, the Vuntut Gwitchin government has undoubtedly encountered some of the problems First Nations operating under custom codes have. Through adoption of similar processes established through legislation like the *Indian Advancement Act* [1884], with some minor alterations, it can be difficult to argue these policies are traditional in nature. Upon analysis, some of these policies may also have difficulty overcoming self-government benchmarks established through cases like *R. v. Pamajewon* 1996 CarswellOnt 3987, 1996 CarswellOnt 3988, [1996] 2 S.C.R. 821, [1996] 4 C.N.L.R. 164, [1996] S.C.J. No. 20, 109 C.C.C. (3d) 275, 138 D.L.R. (4th) 204, 199 N.R. 321, 27 O.R. (3d) 95, 31 W.C.B. (2d) 517, 50 C.R. (4th) 216, 92 O.A.C. 241, EYB 1996-67707.

XV. *Considering Pamajewon*

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[35] *Dickson v. Vuntut Gwitchin First Nation* 2021 CarswellYukon 56, 2021 YKCA 5, 495 C.R.R. (2d) 98

[36] Aboriginal rights and freedoms not affected by Charter

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

(a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and

(b) any rights or freedoms that now exist by way of land claims agreements or may be so acquired.End note(95), Supra. 1

[37] Supra. 35, para. 24

In 1996, the Court expanded upon the *Vanderpeet Test*[38] when determining whether a claimed practice was part of an Aboriginal right to Self-government in *Pamajewon.* The right being argued applied to the regulation and benefit from gambling activities on reserve lands. The Appellants provided testimony that attempted to connect gaming activities to traditional practices. Leadership then enshrined these practices through passage of the Shawanaga First Nation lottery law. Although supported by leadership and the Nation, the Court was obliged to clarify that the lottery law was not a recognized by-law under s. 81 of the *Indian Act.*[39] Seeming to simultaneously question the validity and procedure around the impugned law. In further arguments, the Nation attempted to "shield" the lottery law as being part of a broad Aboriginal self-government right to manage reserve lands accordingly, or subsequently an inherent right to regulate gaming on reserve land.

Turning to *Vanderpeet,* the Court determined that these claims fail due to the broadness of the claim, a lack of a community defining character in large-scale gaming and an absent evidentiary record connecting the gaming activities to a pre-contact occurrence.[40] The Court rejected a self-government claim to regulate gaming on reserve lands and that there existed an inherent right to gamble. Once again, the Court has made it clear that if a stated claim does not fulfil *Vanderpeet,* it must fail. Turning to the relationship between residency, election codes and traditional practices. Once one applies a *Vanderpeet* lens to the issue, some similarities to *Pamajewon* begin to emerge. As outlined previously, leadership bodies, election codes and residency requirements are a purely post-contact phenomena. Further, a restriction to a specific

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[38] *R. v. Van der Peet* 1996 CarswellBC 2309, 1996 CarswellBC 2310, [1996] 2 S.C.R. 507, [1996] 4 C.N.L.R. 177, [1996] 9 W.W.R. 1, [1996] B.C.W.L.D. 2398, [1996] S.C.J. No. 77, 109 C.C.C. (3d) 1, 130 W.A.C. 81, 137 D.L.R. (4th) 289, 200 N.R. 1, 23 B.C.L.R. (3d) 1, 31 W.C.B. (2d) 518, 50 C.R. (4th) 1, 80 B.C.A.C. 81, EYB 1996-67132. paras. 48-75

[39] *R. v. Pamajewon 1996* CarswellOnt 3987, 1996 CarswellOnt 3988, [1996] 2 S.C.R. 821, [1996] 4 C.N.L.R. 164, [1996] S.C.J. No. 20, 109 C.C.C. (3d) 275, 138 D.L.R. (4th) 204, 199 N.R. 321, 27 O.R. (3d) 95, 31 W.C.B. (2d) 517, 50 C.R. (4th) 216, 92 O.A.C. 241, EYB 1996-67707. Para. 5

[40] Ibid. paras. 23-30

place for a period of time directly conflicts with the traditional practices of nomadic and semi-nomadic peoples. Finally, when we consider traditional practices of collectivism, it would appear that processes granting limited participatory rights are also non-traditional in nature. Regardless of these realities, residency conflicts have once again made their way to the Supreme Court of Canada.

XVI. *Dickson v Vuntut Gwitchin*

The Vuntut Gwitchin is a Dene speaking Nation in the northern part of the Yukon territory. As such, their population remains spread throughout their traditional lands with over sixty percent residing outside of their main community of Old Crow. Regardless of this fact, during the establishment of their Constitution and Self-Government Agreement, the community decided to enact a residency requirement for those seeking leadership roles. This provision required candidates, upon election, to relocate to Old Crow within fourteen days of the results and reside there for the totality of their term. Due to mitigating family circumstances, Cindy Dickson declined to relocate and provided an argument that the residency requirement was discriminatory under s. 15(1) of the *Charter*.[41] In their defence, the Vuntut Gwitchin put forward to the Court that any violations under the *Charter* are inconsequential given the Nation operates under its own Constitution, the residency requirement is a reasonable limit under s. 1[42] and that s. 25 of the *Charter* "shields" the decision as part of a self-government right. To date, there has been little jurisprudence regarding an alleged infringement of *Charter* or *Charter* like rights pertaining to First Nations executing self-government rights.

In his analysis, Justice Newbury of the Yukon Court of Appeal was tasked with ruling on the complex issue of s. 15 and s. 25 intersections in Indigenous and Canadian law. While noting

[41] Supra. 35, paras. 2-4
[42] Supra. 1, s. 1

that the *Charter* is the supreme law of the land, and that government abrogation of individual rights are allowed via s.1 of the *Charter*, the Court placed Aboriginal rights into a distinct category.[43] This application may be appropriate given the state of Aboriginal rights in relation to Canadian incursion, however, in this instance, the incursion was perpetrated by an Indigenous government. Viewing the powers of the Vuntut Gwitchin government through the lens of s. 32(2) was accurate in our assessment. If this interpretation was not applicable, then it would have the effect of enshrining the powers of the Vuntut Gwitchin in an unalienable state. This has the equal effect of placing powers exerted under s. 25 above the *Charter*, and outside the confines of present jurisprudence in Canada. As previously alluded to, if upheld, it places the collective rights to participate in Vuntut Gwitchin elections into a legal void. No longer is full participation in elections a collective right, but rather an individual right exercised by only those who can adhere to the residency requirement, sometimes at great cost and disadvantage.

Also, while some scholars have stated that s. 25 "makes clear that the equality guarantee in s. 15 of the *Charter* does not invalidate Aboriginal or treaty rights,"[44] it becomes much less clear when it is First Nation people seeking equality. The use of s. 25 against non-First Nations members, as seen in *Kapp,*[45] is a correct application, however the same interpretation should not apply to First Nations members seeking recourse. If there is no historical anchor for the "shielded" action to be drawn from, and it has the potential to fail the *Vanderpeet test*, then it should not be afforded "shielding". The issue at hand fits this scenario. Early in the overview of the case, the Court provided the comment that populations frequent between "both in and away from Vuntut Gwitchin territories at differing times". These traditional and contemporary

[43] Supra. 35, para. 143
[44] Supra. 35, para. 131
[45] *R. v. Kapp*, [2008] 2 S.C.R. 483, 2008 SCC 41

practices create a pressing question in need of clarity; What weight did Vuntut Gwitchin place on residency prior to contact, and subsequently, following contact?[46]

In contrast to the above inference by the Court, they subsequently argue that it was a Vuntut Gwitchin custom and practice that leaders reside on Vuntut Gwitchin Territory. This inference appears to be an overreach, and a departure from the previous fact that "citizens [did] not typically define themselves by their residency". To draw upon the effect of colonial policy as a matter of displacement and alienation, while simultaneously utilising said colonial policy as a justification for *Charter* infringements is problematic. This rationale opens the door to ongoing denial of First Nation member rights in the face of contradictory historical and legal facts. This creates a sense of ambiguity in terms of how Indigenous, collective, individual and *Charter* rights will interact in the future, and whether the Court can provide the ground rules.

XVII. *Problematic Application of Residency*

Lastly, one cannot help but consider the fact that much of the language in the Vuntut Gwitchin Constitution is similar in origin and application as that of the *Constitution Act 1982*.[47] While it may be understandable that some overlap and similarity may exist, it also allows for similar interpretations and remedies. We can point back to the *Janvier*[48] and the words of Justice Grammond for guidance on necessary approaches when provisions are close enough in substance that it is "difficult to draw a distinction". In *Dickson*, while the residency requirement is not necessary for nomination, it is required upon successful election. This ostensibly places the successful candidate in a position to be "confined" to the reserve within a finite period. When paralleled to the realities of First Nations communities in regards to lack of housing and

[46] Given the fluidity of residency, Vuntut Gwitchin citizens do not typically define themselves by their residency at a place in time; rather their primary identity is that of a Vuntut Gwitchin citizen. Supra. 35, para. 8
[47] *Constitution Act*, 1982, being Schedule B of the Canada Act 1982 (U.K.), 1982, c. 11
[48] Supra. 8

infrastructure, without appropriate mechanisms to provide housing within that allotted time frame, the onus is placed solely on the elected individual. Compounding these difficult realities is the health needs of Ms. Dickson's child.[49]

It must be argued that forcing relocation, without appropriate health guarantees or flexibility, places undue hardships and increases unnecessary risk. In traditionally collective and egalitarian societies like the Vuntut Gwitchin, it cannot be the intention of voters and leaders to enforce such colonial black and white outcomes. For this reason, the interpretation of the residency clause as an act of self-government seems misplaced and troublesome. Self-government, in practice, is intended to move communities away from the oppression of the *Indian Act*, not create situations where First Nations governments enact *Indian Act* policies as their own.

XVIII. *Conclusion*

In any event, if this analysis misses the mark, and the residency provision is shielded by s. 25 as an expression of self-government, it creates an avenue in which leaders can uphold discriminatory practices. Although infringement of individual rights is justified to a degree in Canada, having large swaths of a communities membership excluded, numbers which sometimes exceed those of on-reserve populations, does not seem like the appropriate outcome in a "just and democratic society". It also does not allow members within communities to exert their most fundamental democratic right, which is to select the leaders they see as the most fit, and relegates them to selecting from a handful of candidates that meet a discriminatory criteria. As a decision looms, the Court will have to wrestle with these issues, and ultimately conclude what true self-government looks like and whether that power shares the same limits established through a fair and equitable application of the *Charter*.

[49] Supra. 35, para. 3

XIX. Recommendations for Communities:

1. To avoid further conflicts, First Nations should enact regulations that strike residency clauses until a fulsome community analysis can take place, and the true origin of residency requirements determined. This may include applying an adjusted *Vanderpeet Test.*
2. Governance reviews should take place which determine how necessary "confinement" to a reserve is to leadership positions, and whether the majority of work takes place within community or other locales.
3. Budgets and infrastructure plans should be reviewed. Measures should be enacted that, it deemed necessary, allow for elected leaders to return to communities within a finite period without encountering discriminatory economic or personal barriers.
4. With the aid of the Court and Canadian government, First Nations leaders should push for a national approach to election processes, with successes drawn from similar systems which can be tailored to First Nation realities. (ie: election dates, fixed terms and procedures)

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