BANISHMENT IN ABORIGINAL LAW: RULES, RIGHTS, PRACTICE AND LIMITATIONS

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1. Introduction

It is not unusual for First Nations to assert the power to banish members and resident non-members from their reserves. News reports regularly discuss communities which take such initiatives,[1] but the form which banishment takes varies, as do the grounds. Subject to the exceptions discussed below, members and other residents have rarely challenged banishment in court. Banishment is thus a widespread phenomenon whose legality has largely gone unexamined. Analyzing the possible basis for such a power and the limits imposed on it draws on almost every area of Canadian law: criminal law, administrative law, human rights, the *Charter*, Aboriginal rights and international law.

It should be noted that support for banishment is far from unanimous in Aboriginal communities. The former Crown prosecutor Harold Johnson, who is also a member of the Montreal Lake Cree Nation in Saskatchewan, has eloquently expressed his view that banishment is punitive in nature and therefore unlikely to produce results because it does not promote healing among community members:

> First Nations leadership, needing to do something in the face of a crisis, have sometimes turned to banishment of those selling drugs in our communities.
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> The problem with banishing a drug dealer, or locking them up, is that as soon as they are removed from the community, someone takes their place.
>
> We do not have a drug dealer problem. We have a substance use problem.
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> …
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> The fundamental reason community members demand substances is to self-medicate their trauma. As First Nations people we have a lot of trauma to

[1] For a recent example at Poundmaker Cree Nation, see Jacob Cardinal, "Saskatchewan First Nation creates its own police force to enforce a war on drugs," *Toronto Star* (29 March 2021), online: <https://www.thestar.com/news/canada/2021/03/29/saskatchewan-first-nation-creates-its-own-police-force-to-enforce-a-war-on-drugs.html>.

> heal from. Residential schools, the Sixties Scoop, loss of traditional lifestyles, the over-incarceration of our people and the resultant ongoing intergenerational violence all add to the trauma load.[2]

It is therefore important to point out that this article is about the legality of banishment, not its advisability or effectiveness, which are questions that Aboriginal communities can best answer themselves.

In addition, the legality of banishment that this article addresses refers to Euro-Canadian law, not to the criteria of any Indigenous legal order that applies of its own force. This limitation has two reasons, the first of which is methodological: the dozens of distinct Aboriginal nations in Canada have varying legal traditions, each of which would require its own analysis. The second reason is practical: to the extent that an Aboriginal nation or community's decision to impose banishment on a member is accepted by that member, the legality of his or her banishment is not an issue. However, when a banishment is challenged in court, the legal issues surveyed below are those most likely to arise.

2. The practice

In many First Nations,[3] band councils impose banishment on members or residents engaged in drug trafficking or violent behaviour and is often imposed on those who refuse treatment for addiction.[4] For instance, the Tsawout First Nation north of Victoria, British Columbia, banned five individuals from Tsawout lands for a period of two years in 2009 and required that:

> Before they can return they must demonstrate sobriety, drug free and have successfully completed counselling and anger management treatment. The RCMP have been alerted to this situation and they are willing to pick up and escort these people out of the Community upon receiving a telephone request from [members].[5]

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[2] Harold Johnson, "'Banishment doesn't promote healing': You can't fight addiction with punishment," *CBC SK Opinion* (4 February 2020), online: <https://www.cbc.ca/news/canada/saskatchewan/harold-johnson-banishment-opinion-1.5446777>.

[3] No example of formal banishment by elected bodies was found among the Inuit, who are not subject to the *Indian Act*, RSC 1985, c. I-5, s 4(1) [*Indian Act*]. However, Inuit justices of the peace in Spence Bay (now Taloyoak) in what is now Nunavut did order an Inuk from another community who was convicted of theft "not to return"; the appeal court held that the condition had to be understood to last only as long as his one-year probation: *R v Saila*, [1984] NWTR 176 (SC), [1983] NWTJ No 46 (QL). Tribal councils of Yupik communities in the State of Alaska have recently banished resident non-members engaged in bootlegging or drug-dealing: Halley Petersen, "Banishment of Non-Natives by Alaska Native Tribes: A Response to Alcoholism and Drug Addiction" (2018) 35 Alaska L Rev 267 at 267–68. Banishment of a violent member from an Alutiiq (Aleut) community was upheld in *Native Village of Perryville v Tague*, 2003 WL 25446105, (Alaska Superior Court) (Trial Order).

[4] See Ken MacQueen, "Tough love among the Ahousaht", *Macleans* (30 August 2010), online: < https://www.macleans.ca/news/canada/get-clean-or-get-out/>.

[5] "5 Tsawout Members Banned", *Tsawout First Nation Newsletter*, August 2009 at 8.

This is similar to a recent case in a Nisga'a community in British Columbia. After a resident who was a member of another nation had been convicted on charges including assaulting his Nisga'a wife in front of an elementary school and assaulting a police officer,[6] the village government advised the probation officer at his correctional facility that he was banished until he had fulfilled the following requirements:

> a) He enters a treatment centre to address is challenges with addictions;
> b) He enters a treatment program, for anger and violence with a weapon; and
> c) He prepares himself for a "retribution feast" [omitted for publication] to his partner's family, the staff members involved, and the children impacted by his actions.[7]

The controversial nature of such decisions is revealed by the fact that subsequently, a new chief in the same Nisga'a village commenced an inquiry into the banishment, which had apparently not been sanctioned by the Council. Others in the community expressed "concerns about expelling troubled citizens from the community rather than reaching out and helping them deal with the hardships they may be experiencing."[8] For some offenders, the consequences of banishment are real: the executive director of a halfway house in Vancouver for Aboriginal men released from prison told a reporter in 2016 that many of the sex offenders residing at the facility were banned by their communities from returning home, even after they had finished serving parole.[9]

On the other hand, at the Grand Rapid First Nation in Manitoba, an administrator admitted in 2006 that some "just sneak back onto the reserve."[10] Similarly, a recent case reveals that a resident of an Ontario First Nation simply returned after a year to the reserve from which he had been banished, though its social assistance administrator subsequently refused to pay him any benefits.[11] In addition, while the stereotype of a reserve is a remote community that is difficult to reach, many reserves are actually in urban or semi-urban locations where banishment could leave individuals residing only a few blocks or a few kilometers from where they previously

[6] *R v LR*, 2020 BCPC 80.

[7] *R v LR,* 2021 BCPC 7 at para 71.

[8] *Ibid* at para 74.

[9] Wawmeesh G. Hamilton, "Aboriginal man found not guilty of sex offence but banished from home: Robert Hopkins hopes to return to his community, despite the obstacles", *CBC News* (21 May 2016) online: <https://www.cbc.ca/news/indigenous/aboriginal-man-found-not-guilty-of-sex-offence-banished-from-home-1.3568057>.

[10] Katherine Harding & Dawn Walton, "Natives try 'banishment' to fight crime: Faced with modern ills of gangs and drugs, bands turn to the past for an antidote", *Globe and Mail* (8 February 2006), online: <https://www.theglobeandmail.com/news/national/natives-try-banishment-to-fight-crime/article1094479/>.

[11] *1905-03649 (Re)*, 2020 ONSBT 1489 (CanLII) at paras 10–12.

lived. For instance, in 2010, a non-member was banished from the Squamish Nation reserves in North Vancouver and West Vancouver, where his mother and girlfriend resided, but continued to live on the street in Vancouver.[12]

Banishment is also used as a political measure. Thus, the Council of the Gull Bay First Nation, in north-western Ontario, banned two off-reserve members from attending the community's powwow on reserve, allegedly because of a petition they wanted to circulate concerning health services.[13] More recently, Rainy River First Nation in northwestern Ontario informed a non-member who lived in the community with a member who was her common-law husband that her "continued attacks against our Rainy River First Nation Community Care Program will no longer be tolerated and [will] result in the issuance of a Band Council Resolution authorizing your immediate removal from our properties and lands of Rainy River First Nation."[14]

The record in the United States indicates federally-recognized tribes impose "disenrollment" or loss of membership—with resulting banishment from the reservation—more often for political reasons than for community protection:

> In a few cases, especially those centered around criminal activity, it appears that tribes have reluctantly determined that disenrollment is one mechanism they may sometimes have to employ in order to maintain community stability and they have carefully constructed clear guidelines and procedures to carry out this most difficult process.
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> In a majority of disenrollment cases, however, some tribal officials are, without any concern for human rights, tribal traditions or due process, arbitrarily and capriciously disenrolling tribal members as a means to solidify their own economic and political bases and to winnow out opposition families who disapprove of the direction the tribal leadership is headed.[15]

3. Banishment as a sentencing measure

a. Historically

Banishment exists in Canadian criminal law as a sentencing measure, but the courts are reluctant to recognize it, let alone impose it. A judge of the Provincial Court in

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[12] *R v RHGM*, 2010 BCPC 434 at paras 27, 52 [*RHGM*].

[13] Carl Clutchey, "Gull Bay Chief's sisters banned from reserve", (2010) Thunder Bay *Chronicle Journal*.

[14] Kenneth Jackson & Todd Lamirande, "APTN News source threatened with banishment from community in northwestern Ontario" *APTN News* (4 March 2021), online: <https://www.aptnnews.ca/nation-to-nation/aptn-news-source-threatened-with-banishment-from-community-in-northwestern-ontario/>. The same First Nation had adopted such BCRs in the past: *Hazel v Rainy River First Nations*, 2014 ONSC 3632 at para 3.

[15] David Wilkins, "Self-determination or Self-Decimation?: Banishment and Disenrollment in *Indian Country*", *Indian Country Today* (30 August 2006).

Newfoundland wrote as follows before prohibiting an offender from entering the municipality where his victim resided:

> Banishment, as a form of sentencing, has a long and dreadful history in our common law. The *Transportation Act* of 1784, 24 Geo. III, c. 56, [by which the British Parliament authorized convicts to be sent to any place designated by the King in Council, such as Australia] is a notorious example. In more modern times, this is a sanction that has fallen into disuse. […][16]

It is clear American courts will only impose "a sentence of banishment" when there is "affirmative legislative authority to do so."[17] Nevertheless, the United States Court of Appeals noted—while ruling on the issue of banishment among the Seneca—that banishment had been imposed since the earliest times of the Republic and was held to form part of any sovereign government's legislative authority:

> Early in American history, the punishment of banishment was imposed upon British loyalists, and was even celebrated as a matter of sound policy in dictum by a Justice of the Supreme Court. See *Cooper v Telfair*, 4 U.S. (4 Dall) 14, 20, 1 LEd. 721 (1800) ("The right to confiscate and banish, in the case of an offending citizen, must belong to every government.") (Cushing, J.).[18]

b. In contemporary criminal law

i. An exceptional measure authorized by the *Criminal Code*

The courts have held that the power to impose a banishment condition can be found in s. 732.1(3) of the *Criminal Code*,[19] which provides that a court may, as an additional condition of a probation order, require that the offender:

> (h) comply with such other reasonable conditions as the court considers desirable, subject to any regulations made under subsection 738(2), for protecting society and for facilitating the offender's successful reintegration into the community.

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[16] *R v Skinner*, 2002 CanLII 23568 (NL PC) at para 57, aff'd 2002 NLCA 44. See also *Kennedy v Mendoza-Martinez*, 372 US 144 (1963), 170, n 23 ("Banishment was a weapon in the English legal arsenal for centuries, but it was always adjudged a harsh punishment even by men who were accustomed to brutality in the administration of criminal justice").

[17] Michael F Armstrong, "Banishment: Cruel and Unusual Punishment" (1963) 111 U Pa L Rev 758 at 762.

[18] *Poodry v Tonawanda Band of Seneca Indians*, 85 F (3d) 874 (CA2 1996) at 896; cert. denied, 519 US 1041, 1996 [*Poodry*].

[19] *R v Felix*, 2002 NWTSC 63 at para 25 [*Felix*].

Banishment also appears to be an allowable condition for bail, presumably under para. 515(4.2) (a.1) of the *Criminal Code*, or for common law peace bonds.[20]

However, the Saskatchewan Court of Appeal summed up the state of the law by stating that banishment "should very much be considered the exception rather than the rule" in sentencing.[21] In another case, the same court held that while "judicial banishment decrees should not be encouraged" because they resemble dumping one community's problem on another, such orders could nevertheless be appropriate in certain cases.[22]

The Ontario Court of Appeal agreed and noted that "orders banishing an offender from a specific community have been made against estranged spouses with a view to protecting the victim or to assisting with the offender's rehabilitation" but that "the larger the ambit of the banishment, the more difficult the order will be to justify."[23] Summing up recent appellate case law, the Nunavut Court of Appeal noted that "[e]xceptional circumstances include the offender having consented to be banished" or "cases where banishment is necessary to protect a victim of a campaign of violence and the offender has somewhere else to live and banishment serves some rehabilitative purpose."[24]

Another court rejected even the offender's consent as sufficient grounds and held that "the unease of certain members of the community and their having to tolerate seeing these offenders within their community" are insufficient; they have instead required sufficient "connection of such an order to the objectives of protecting the public or securing the good conduct of the accused."[25] Banishment orders have also been set aside on procedural fairness grounds where the offender had no opportunity to be heard before the measure was imposed because s. 723 of the *Criminal Code* requires a court to give "the offender an opportunity to make submissions with respect to any facts relevant to the sentence to be imposed."[26]

ii. Community banishment versus individualized probation

Reviewing a variety of sentencing cases from Aboriginal communities, the courts have distinguished between "community banishment cases" and individualized probation orders:

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[20] *R v NJS*, 2012 ABQB 479 at para 24; *R v Siemens*, 2012 ABPC 116 at para 29.

[21] *R v Kehijekonaham*, 2008 SKCA 105 at para 10 [*Kehijekonaham*].

[22] *Ibid* at para 11, citing *R v Malboeuf*, [1982] 4 WWR 573 (SKCA) at 576, 1982 CanLII 2540 (SK CA). See also *R v Serafino*, 2021 SKCA 29 at para 23.

[23] *R v Rowe* (2006), 212 CCC (3d) 254, 2006 CanLII 32312 (ONCA) at paras 6–7 [*Rowe*]. See also *R v Bishop*, 2017 CanLII 45561 (NLSC) at para 30.

[24] *R v GN*, 2019 NUCA 5 at para 17.

[25] *R v L et al*, 2012 BCPC 503 at para 76 [*R v L*].

> [A] probation condition that restricts or prohibits the accused's presence in a certain community, where its purpose is to protect certain individuals and there is a logical connection between the offence and the condition, is not really "banishment". It is instead a form of restraining order, albeit one which applies to a much larger geographic area than is normally the case. It does not give rise to the concerns noted about one community foisting its problem members off on another community. It seeks instead to protect certain members of the community in an effective way.[27]

Moreover, even an individual banishment requires some tie to the community in question, without which it is simply an order not to go where the offender has no business:

> The notion of banishment has inherent within it the idea of requiring a person to *leave* or *remove* himself or herself from a particular place where he or she might have otherwise been. It assumes some sort of personal connection by virtue of residence, employment or educational activities, family heritage or cultural affiliation. For example, the banishment legislation in colonial Newfoundland spoke of "removal" of offenders from the colony by requiring them to "leave" the colony and to "remain away" from it (*Removal of Criminal Offenders from this Colony*, CSN 1872, c 44).[28]

By contrast, community banishment cases "involve an accused who is considered to be a nuisance or an undesirable in the community where he committed his crime" and where "banishment is considered a means of protecting the community as a whole," rather than individual victims.[29]

The most noteworthy case of community banishment is surely *R v Taylor*, in which the Saskatchewan Court of Appeal upheld an order that a violent rapist live alone for a year in a cabin on an island near the Lac La Ronge reserve. The Chief Justice noted "that First Nations people, including the Plains Cree and Dene, have for centuries used banishment in one form or another as a method of redress for a wrongdoing, particularly serious wrongdoing such as murder." His own research revealed that banishment took many forms—from outright expulsion to simply being ostracized—and that, "whatever form it took, was never for life, but could be 'for many years' and could be commuted."[30] He wrote:

> [B]anishment, generally speaking, tends to be more an individualized measure having as its central purpose the influencing of the offender's future behaviour – securing his "good conduct" – than a punitive measure

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[27] *Felix*, *supra* note 19 at para 27. See also *R v Banks* (1991), 3 CRR (2d) 366, 1991 CanLII 1879 (BC CA) [*Banks*].

[28] *R v Deering*, 2019 NLCA 31 at para 13 [emphasis in original].

[29] *Felix*, *supra* note 19 at para 18.

[30] *R v Taylor*, [1998] 2 CNLR 140, 1997 CanLII 9813 (SKCA) at para 35.

> having denunciation, punishment and the like as the dominant purpose. Speaking more particularly, the type of banishment directed in the present case, isolation, has as its central feature an imperative — at the very least, an opportunity, — for self-discipline, self-treatment, introspection, self-examination of one's goals, one's place in the scheme of life, and such other notions designed to produce a better person. True, there is present a strong element of deprivation with the attendant curtailment of the freedom of mobility, Spartan amenities, lack of intimate personal contact, all of which translate into punishment, but the deprivation does not vitiate, displace or dilute the central purpose of influencing the offender's future conduct and securing his good behaviour.[31]

On the Mohawk territory at Kanesatake, however, the Québec Superior Court set aside a bail condition forbidding a member from returning: Justice Fraser Martin declined what he described as the Crown's invitation for his court "to maintain the 'banishment' so as to ostensibly relieve those who have the responsibility for ensuring the peace and security of the community from doing that job which, for reasons that I need not speculate upon, they appear to be either unable, unwilling or incapable of doing."[32]

In another case, the court declined to use its sentencing jurisdiction to effectively enforce the First Nation's banishment order, yet still relied on that order as evidence of the community's views on where the offender should be allowed to reside. The result was an order forbidding the offender to be found on the reserve.[33] Where a First Nation imposes banishment on an offender, some courts have also taken that fact into account as a mitigating factor that can reduce the sentence.[34]

4. Banishment under the *Indian Act*

a. Sources of jurisdiction

i. Membership

A number of First Nations adopted restrictive membership codes between 1985 and 1987, the period when they were allowed to exclude from membership those who acquired status under the 1985 *Indian Act* amendments known as Bill C-31.[35] Some of these First Nations also included in their codes a right to "banish" and remove from their membership lists "any member [who] has shown a lifestyle that would cause his or her continued membership in the First Nation to be seriously harmful to the future

[31] *Ibid* at para 37.

[32] *R v Gabriel*, 2004 CanLII 41362 (QC CS) at paras 6–7 [*Gabriel*].

[33] *RHGM, supra* note 12 at paras 46–48.

[34] *R v RRM*, 2009 BCCA 578 at para 26.

[35] *Indian Act*, supra note 3, s 11(2).

welfare and advancement of the… First Nation," though a majority vote of the members is required.[36]

The legality of these provisions has not been tested in court but the guidance from the Department of Indian Affairs and Northern Development at the time was that "Parliament did not intend the new residency by-law powers to be used to displace existing residents,"[37] referring to the power in para. 81(1) (p.1) of the *Indian Act* over "the residence of band members and other persons on the reserve."

ii. Trespass

When challenged in 2000 on a banishment decision, as discussed below, the Norway House Cree Nation in Manitoba defended itself based on a Band Council's power under para. 81(1)(c) and (d) to regulate "law and order" and "disorderly conduct."[38] It could presumably also have relied on the powers under s. 81(1) concerning "(p) the removal and punishment of persons trespassing on the reserve or frequenting the reserve for prohibited purposes."

According to the leading case, however, trespass on reserve is not a notion that a band council can define as it chooses and then prohibit. In 1958, the Alberta Court of Appeal ruled on the prosecution of a missionary who had been refused a permit by the Band Council to enter the Blood reserve but had nonetheless gone to the home of a member and held a service there. The Court held that to constitute trespass under the *Indian Act*, the *actus reus* had to meet the common law definition of the tort of trespass to land, which consists of entering upon another's land without lawful justification. A person who entered upon a reserve for a lawful purpose at the invitation of a member, even without Council's permission, was therefore not trespassing.[39]

In 2018, the Council of Garden River First Nation in Ontario adopted a resolution to banish both a member and also a non-member who was a long-time resident and common-law spouse to another member; it relied on an existing by-law that it described as being meant "to provide for the removal and punishment of persons trespassing on the reserve or frequenting the reserve for prohibited purposes." A month later, council adopted a new by-law to replace the first, authorizing council to banish

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[36] See e.g. "Berens River First Nation Membership Code", online: *Exploring Section 10* <https://exploringsection10.com/codes/> at s 15; "Buffalo Point First Nation Membership Code", online: *Exploring Section 10* <https://exploringsection10.com/codes/> at s 16; "Little Black River First Nation Membership Code", online: *Exploring Section 10* <https://exploringsection10.com/codes/> at s 14.

[37] Indian and Northern Affairs Canada, *Indian Band Membership: An Information Booklet Concerning New Indian Band Membership Laws and the Preparation of Indian Band Membership Codes* (Ottawa: Minister of Supply and Services Canada, 1990) at 26.

[38] *Gamblin v Norway House Cree Nation Band*, [2001] 2 CNLR 57, 2000 CanLII 16761 (FC) at para 25 [*Gamblin*], aff'd 2002 FCA 385.

[39] *R v Gingrich* (1958), 122 CCC 279, 1958 CanLII 415 (AB CA). Followed in *R v Bernard*, [1991] NBJ No 201, [1992] 3 CNLR 33; *R v Pinay*, [1990] 4 CNLR 71, 1990 CanLII 7435 (SK QB).

members and others deemed to be threats to the peace and safety of the Band or residents of the reserve and to declare banished band members and their spouses and children to be trespassers. The council subsequently issued another decision under the new bylaw to banish the same individuals.[40] While the two individuals sought to have much of the second by-law quashed, the Federal Court did not consider the validity of either by-law: the Court ruled only on whether the second banishment decision was fair and ruled that it was not.[41] The question of whether by-laws can define and punish trespass so as to expel members or residents therefore remains open.

iii. Observance of order and prevention of nuisance

Norway House Cree Nation defended a banishment decision in 2000 based on a band council's power under s. 81(1) of the *Indian Act* to adopt by-laws for purposes such as "(c) the observance of law and order" and "(d) the prevention of disorderly conduct and nuisances." In the event, however, the decision had been reached through a band council resolution ("BCR") and without the existence of a validly adopted by-law. As a result, the Federal Court concluded "the BCR does not wield the authority of the Act" and was "not a lawful and enforceable policy."[42]

If a by-law had been in force, the Court indicated it would have shown deference for "the Band Council's decision to impose a banishment sanction in an attempt to prevent intoxicant abuse on the reserve."[43] Later, Norway House Cree Nation in Manitoba did adopt an Illegal Drug Control Bylaw allowing for expulsions and even loss of band membership.[44] However, a Department of Indian Affairs and Northern Development spokeswoman said the by-law attempted "to regulate activities that are outside the bylaw-making powers of the *Indian Act*," referring specifically to regulation of "criminal activity such as the drug trafficking, gangs and violence within the community."[45]

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[40] *Solomon v Garden River First Nation*, 2019 FC 1505 at paras 7, 40, 44 [*Solomon*]. Before the court, however, Garden River argued the by-law was adopted "pursuant to s. 81(1)(c) and (d) of the *Indian Act* to enact by-laws for the observance of law and order and for the prevention of disorderly conduct" (para 32).

[41] *Ibid* at paras 19, 34.

[42] *Gamblin*, *supra* note 38 at para 58.

[43] *Ibid*.

[44] See "Norway House reserve aims to banish offenders", *CBC News* (26 August 2009), online: <https://www.cbc.ca/news/canada/manitoba/norway-house-reserve-aims-to-banish-offenders-1.837922>.

[45] Lindsey Wiebe, "Get help or get off reserve, bylaw says; But banishment not enforceable: feds", *Winnipeg Free Press* (27 August 2009) online: <https://www.winnipegfreepress.com/breakingnews/2009/08/27/get-help-or-get-off-reserve-bylaw-says>. At the time, the opinion of the Minister of Indian and Northern Affairs was particularly important because he had a power under s 82(2) of the *Indian Act* (since repealed) to disallow a by-law within 40 days under, even though that power was not exercised in the case of Norway House.

The only by-law that refers to banishment and resulted in a reported judgment that was adopted by an Aboriginal community that is a party to a modern treaty or land claims agreement—and therefore not subject to the *Indian Act*—was that of the Chisasibi Eeyouch (Cree). In 2008, their council adopted a by-law prohibiting the sale of alcoholic beverages, with penalties that included permanent banishment for repeat offenders.[46] Chisasibi is one of the Cree communities that entered into the James Bay and Northern Quebec Agreement in 1975, after which its local government was conducted pursuant to the *Cree-Naskapi (of Quebec) Act*. Its alcohol by-law was adopted under a provision of that statute allowing for by-laws respecting "public order and safety" in general—language very similar to the *Indian Act*'s para 81(1)(c) —and "the prohibition of the sale or exchange of alcoholic beverages" in particular.[47] However, no final decision on the validity of Chisasibi's by-law was rendered.

In 2016, the Council of the Atikamekw of Opitciwan in Québec adopted *By-law no. CAO-RA-2016-01 concerning the expulsion of persons found guilty of trafficking certain drugs and other substances*, after a community referendum with 86 per cent of voters in favour. Anyone found guilty of trafficking certain drugs and who resided on the reserve could be expelled by council for a set period of 60 months from conviction; any violation of the by-law constituted a punishable offence, and a court of competent jurisdiction could order that the offence not be repeated. The by-law's preamble relied on most possible sources in the *Indian Act*, even its powers under para. 81(1) to regulate "(b) the regulation of traffic" and "(q) with respect to any matter arising out of or ancillary to the exercise of powers under this section."[48]

Eight months later, the by-law was applied to a member who had been found guilty of drug trafficking but who avoided being served with notices of expulsion by hiding in other people's homes on the reserve. After its attempts at service, Opticiwan obtained an *ex parte* order from the Québec Superior Court authorizing Council to proceed with the offender's expulsion. The Court cited in the grounds for its order that Council had decided by its by-law to ensure "the observance of law and order and the prevention of disorderly conduct and nuisances" and the court's view that drug trafficking was "contrary to the observance of law and order and to orderly conduct."[49]

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[46] *Band (Eeyouch) c Napash*, 2014 QCCQ 10367 at paras 11–12.

[47] *Cree-Naskapi (of Quebec) Act*, SC 1984, c 18, s 45(1)(d)(v). Since 2018, the statute is referred to as the *Naskapi and the Cree-Naskapi Commission Act*, while the same power is now found in the *Agreement on Cree Nation Governance between the Crees of Eeyou Istchee and the Government of Canada*, 2017, enacted by the *Cree Nation of Eeyou Istchee Governance Agreement Act*, SC 2018 c 4, at s 6.2(g)(v) of the Agreement.

[48] *Règlement admistratif numéro CAO-RA-2016-01 concernant l'expulsion des personnes reconnues coupables de trafic de certaines drogues et autres substances du conseil des Atikamekw d'Opitciwan*, CAO-RA-2016-01 (12 December 2016), First Nations Gaz 11, online: <https://partii-partiii.fng.ca/fng-gpn-II-III/pii/en/item/492830/index.do> [*CAO-RA-2016-01*].

[49] *Conseil des Atikamekw d'Opitciwan c Weizineau*, 2018 QCCS 4170 at paras 9, 10 [*Weizineau*].

This would appear to be consistent with criminal courts' description of "community banishment" as "a means of protecting the community as a whole."[50]

The judgment in *Opitciwan c Weizineau* judgment can therefore be taken to endorse at least the power under para. 81(1)(c) and (d) of the *Indian Act* to expel those found guilty of offences that threaten law and order, for fixed periods of time. The fact that the by-law allowed for expulsion based on the same conduct that had been punished as drug trafficking under federal criminal law did not appear to trouble the court, though it appears to have been the federal government's objection to the Norway House by-law. This concern seems groundless given that Canadian law allows different statutes adopted by different levels of government to attach separate consequences to the same conduct: for instance, the *Criminal Code* can punish dangerous driving as criminal negligence while provincial legislation prohibits careless driving as part of the regulation and control of highways.[51]

iv. Eviction

While Band Councils have seen their banishment decisions successfully challenged in court, they have had much less trouble defending eviction orders to tenants, despite the severe consequences. In the *Gamblin* case, the tenant and his family were physically removed from the Norway House reserve, while in a later case concerning Curve Lake First Nation, the member's eviction during treatment at a hospital left him homeless and transient.[52] The Norway House Cree Nation member subject to a banishment order was living in Band-allocated housing; even though no residency agreement was produced, the Federal Court held it was "apparent from Gamblin's affidavit that he knew of, and accepted, the implied term that continuing residency was contingent on no illegal activity occurring on the premises."[53]

The Federal Court held that no duty of fairness attached to the Band Council's decision to evict the tenant-member for using illegal drugs on the leased premises: "[a]t the most basic level, the agreement between the Band Council and Mr. Gamblin regarding the allocation of housing is a private law contract" and "a duty of fairness is not owed in a private law matter and, therefore, is not a consideration."[54] More recently, the Nova Scotia Supreme Court held that evicting an on-reserve tenant for allowing a "banished individual" onto the premises, in contravention of the lease, was a "straight forward tenancy matter."[55]

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[50] *Felix*, *supra* note 19 at para 18.

[51] *Mann v The Queen*, [1966] SCR 238 at 250, 1966 CanLII 5 (SCC); *O'Grady v Sparling*, [1960] SCR 804 at 811, 128 CCC 1.

[52] *Gamblin*, *supra* note 38 at para 9; *Cottrell v Chippewas of Rama Mnjikaning First Nation*, 2009 FC 261 at para 2 [*Cottrell*].

[53] *Gamblin*, *supra* note 38 at para 11.

[54] *Ibid* at paras 41, 43. See also *Cottrell*, *supra* note 52 at para 95.

[55] *Membertou Band v Paul*, 2021 NSSC 286 at para 28 [*Paul*].

b. Statutory and common law limitations on banishment

i. Members' right to reside in their communities

It is important to recall that under the *Indian Act*, the first definition of a "band" is "a body of Indians (a) for whose use and benefit in common, lands, the legal title to which is vested in Her Majesty, have been set apart." The definition of a "reserve" is "a tract of land, the legal title to which is vested in Her Majesty, that has been set apart by Her Majesty for the use and benefit of a band."[56] Similarly, even before Confederation and the *Indian Act*, the Robinson-Huron Treaty signed in Upper Canada (present-day Ontario) for instance provided that "the reservations set forth in the schedule hereunto annexed… shall be held and occupied by the said Chiefs and their Tribes in common, for their own use and benefit."[57]

Without ruling on the merits, the Federal Court considered an application for judicial review by members of the Skidegate Band on Haida Gwaii in British Columbia concerning a BCR that "expressly banishes each of the Moving Parties from entering any Skidegate Reserves, which form part of the territories of the Haida Nation." The Court accepted that the BCR thereby prejudicially affected the members because it contradicted the *Constitution of the Haida Nation* of which Skidegate is a part and that stated: "Every Haida citizen has the freedom to remain in, enter, or leave the territories of the Haida Nation."[58]

Presumptively, band members therefore have a right to reside or frequent the reserve for the simple reason that its lands were set aside for their use and benefit, in common with all the other members. While a band may well have the power under the *Indian Act* to exclude non-members, it is less certain that it has the power to expel members from the reserve permanently because such a decision could conflict with the very definition of a reserve as lands set aside for the use and benefit of the band's members.

Even if banishment were imposed on a member for the welfare of the band as a whole, it seems necessary for the exercise of that power to be justified as a reasonable limit on the member's implicit statutory rights, particularly through limits on its scope in time or geography. If banishment were irreversible, it is difficult to see how the measure could fail to impair the reserve's definition as lands held for all the members in common.

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[56] *Indian Act*, *supra* note 3, s 2(1).

[57] Canada, *Copy of the Robinson Treaty Made in the Year 1850 with the Ojibewa Indians of Lake Huron Conveying Certain Lands to the Crown* (Ottawa: Queen's Printer, 1964).

[58] *Russ v Skidegate First Nation*, 2018 CanLII 123505 (FC) at paras 19, 21.

ii. Duty of fairness

The basic rule is that a public body "is bound by a duty of procedural fairness when it makes an administrative decision affecting individual rights, privileges or interests."[59] The content of that duty will vary with the circumstances but would generally "include the requirement that the interested parties be given prior notice," their right to be heard concerning the proposed decision (either orally or through written submissions) and could include the requirement "that reasons must be given in support of the decision."[60] In addition, a federal body such as a Band Council is probably bound by the *Canadian Bill of Rights*, which explicitly guarantees the right not to be deprived of liberty or property "except by due process of law" and also provides that "every law of Canada" is to be interpreted so that it does not "deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations."[61]

The courts have held that banishment decisions impose a heavy duty of procedural fairness on band councils, due the potential consequences. More particularly, the Federal Court noted the harm which banishment of a member could cause due to "the forced separation from her loved ones and the exclusion from her community, with the attendant psychological and emotional stress." In face of serious allegations of unfairness—the member was banished without being heard by the Band Council—the Court granted an injunction and allowed her to stay on the reserve pending a full hearing of her case (which does not seem to have taken place).[62]

In another case, Curve Lake First Nation's Council adopted a BCR to expel a member's common-law husband on 12 hours' notice and after it learned he had pleaded guilty to possession of marijuana for the purpose of trafficking.[63] His lawyers challenged the decision on the grounds he had been given no notice and because no by-law had been adopted allowing for the expulsion.[64] Even before hearing his motion for an interlocutory injunction against the decision, the Federal Court issued an order allowing him to stay on the reserve till the motion was heard.[65] In the event, the Council decided to rescind the expulsion, so that the case did not proceed.[66]

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[59] *May v Ferndale Institution*, 2005 SCC 82 at para 3.

[60] *Société de l'assurance automobile du Québec v Cyr*, 2008 SCC 13 at para 32.

[61] *Canadian Bill of Rights*, SC 1960, c 44, ss 1(a), 2(e). The statute applies to by-laws under the *Indian Act* because it extends to "an Act of the Parliament of Canada" and "any order, rule or regulation thereunder" (*ibid*, s 5(2)).

[62] *Edgar v Kitasoo Band Council*, [2003] 2 CNLR 124, 2003 FCT 166 (CanLII) at paras 35, 41 [*Kitasoo*].

[63] *R v Hayes*, 2007 ONCA 816 at para 7.

[64] *Ibid* at para 3.

[65] *Shilling v Curve Lake First Nation*, 2007 CanLII 51814 (FC) [*Shilling*].

[66] Lindsey Cole, "Curve Lake rescinds eviction of Rick Hayes", *MyKawartha* (6 December 2007) online: <https://www.mykawartha.com/news-story/3695392-curve-lake-rescinds-eviction-of-rick-hayes/>.

iii. Prohibited discrimination

In 2012, the Council of Sandy Lake First Nation in Ontario relied on legal traditions and customary laws to adopt a BCR that ordered a member's common-law spouse and her child by a previous relationship to leave the reserve. Angele Kamalatisit filed a complaint with the Canadian Human Rights Commission that alleged discrimination based on her "marital/family status, race, national ethnic, origin and/or sex," contrary to the *Canadian Human Rights Act*,[67] which the Commission brought before the Canadian Human Rights Tribunal. The Commission subsequently amended the complaint also to allege denial of occupancy of her residential accommodation based on family status, which is the grounds on which the Tribunal ultimately ruled in Ms. Kamalatisit's favour.[68]

In fact, Ms. Kamalatisit and her son were members of another Cree First Nation in Ontario and she had lived in Sandy Lake with her common-law spouse for a decade, her son for a year. Letters about the BCRs were delivered to her home by a large group, including the Chief, most councillors and a police officer. She was told to leave the remote fly-in community on the next flight and not to return, failing which she would be charged with trespass. The grounds were that Ms. Kamalatisit "continue[d] to cause social unrest by inciting negative remarks and public commentary"; her common-law husband had been an outspoken opponent of the Chief and she was alleged to have joined in the criticism. Ultimately, Ms. Kamalatisit was medically evacuated as a result of complications from the stress caused by the expulsion and never returned.[69]

The Tribunal held it was obvious "the Complainant has been victimized as a result of her relationship with Ringo [her husband] and the Band's request that she leaves [sic] Sandy Lake was based on Ringo's involvement in local politics." It therefore concluded that she had been denied occupancy of a residential accommodation based on grounds of discrimination prohibited under the *Canadian Human Rights Act*, namely, marital and family status.[70]

Ms. Kamalatisit benefitted from the rule under *Canadian Human Rights Act* case law that a complainant need not demonstrate that the discriminatory grounds were the sole reason she was denied goods, services, facilities, or accommodation: it is enough that the discriminatory grounds were a factor in the Respondent's actions.[71] A more complex issue was the definition of "accommodation" but the Tribunal relied on

[67] *Canadian Human Rights Act*, RSC 1985, c H-6 [*Canadian Human Rights Act*].

[68] *Kamalatisit v Sandy Lake First Nation*, 2019 CHRT 20 at paras 3, 4, 31, 65 [*Kamalatisit*].

[69] *Ibid* at paras 15–32.

[70] *Ibid* at paras 67–68.

[71] *Ibid* at para 54.

one of its earlier decisions that denial of accommodation can include denying someone occupancy of his own house.[72]

While the *Kamalatisit* judgment does not use the term banishment (and even uses the term "eviction" though the First Nation does not seem to have alleged any rights as a landlord), it signals that the *Canadian Human Rights Act* can impose a limit more severe than procedural fairness on the decision-making. Banishment that is motivated even in part by one of the prohibited grounds[73] will constitute illegal discrimination if it deprives the individual of "goods, services, facilities or accommodation customarily available to the general public," including "the provision of commercial premises or residential accommodation," or employment.[74]

The Tribunal not only granted Ms. Kamalatisit financial compensation, but ordered that she "and her children and grandchildren be allowed back to live with [her common-law spouse] Ringo in the house allocated to him on the Sandy Lake First Nation subject to her obeying all of the obligations as a guest."[75] The *Canadian Human Rights Act* therefore gives the Tribunal the power to undo what is effectively a banishment if the grounds constitute prohibited discrimination. On the other hand, expulsion from the community, even if procedurally unfair, will not be reviewed by the Tribunal if the grounds were not discriminatory.[76]

5. The *Charter* as a restraint on banishment generally

a. Legal context

Limitations on banishment also arise from the Constitution: not just for First Nations, but for all governments, a measure that formally or effectively banished an individual from a given community could be invalidated if it was contrary to the *Canadian Charter of Rights and Freedoms*.

b. Mobility rights

Section 6 of the *Canadian Charter of Rights and Freedoms* provides that every citizen has "the right to enter, remain in and leave Canada," while "every permanent resident has the right "to move to and take up residence in any province" and "to pursue the gaining of a livelihood in any province." The Supreme Court of Canada has held that

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[72] *Ibid* at para 55, citing *Ledoux v Gambler First Nation*, 2018 CHRT 26 at para 96.

[73] The prohibited grounds are found in *Canadian Human Rights Act*, *supra* note 67, s 3(1) ("race, national or ethnic origin, colour, religion, age, sex [including pregnancy or childbirth], sexual orientation, gender identity or expression, marital status, family status, genetic characteristics, disability and conviction for an offence for which a pardon has been granted").

[74] *Ibid*, ss 5-7.

[75] *Kamalatisit*, *supra* note 68 at para 90.

[76] *Polhill v Keeseekoowenin First Nation*, 2019 CHRT 42 at para 134.

"the central thrust of s. 6(1) is against exile and banishment, the purpose of which is the exclusion of membership in the national community."[77]

However, the British Columbia Court of Appeal held "that s. 6 does not extend to provide specific rights of movement which would render unconstitutional a sentence that is so nicely gauged for the protection of threatened members of society" that it prohibited the offender from living in the same province as his victims, where needed to ensure their protection.[78] In another case, the Supreme Court held that while the right to enter and remain Canada extends even beyond protection "from being expelled, banished or exiled," nevertheless the extradition of an accused is nevertheless a reasonable limitation on that right and is justified under s. 1 of the *Charter*.[79]

Mobility rights within Canada are therefore a potential limitation on any banishment power, but personal and public safety and the enforcement of criminal law are justifiable infringements of the right.

c. The right to liberty and fundamental justice

Section 7 of the *Charter* protects "the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice." While s. 7 generally applies to prosecution in the criminal and quasi-criminal context, it is concerned with any state action that could have "a serious and profound effect" on a person's psychological or physical integrity. As a result, for instance, removing "an individual's status as a parent" through a child-custody hearing will attract the requirements of fundamental justice because parenthood "is often fundamental to personal identity, [and] the stigma and distress resulting from a loss of parental status is a particularly serious consequence of the state's conduct."[80] The principles of fundamental justice always require "a fair procedure for making this determination."[81]

In *R v Heywood*, a case involving freedom of movement, the Supreme Court of Canada relied on s. 7 to strike down a *Criminal Code* provision allowing those with earlier convictions for sexual assault involving children to be convicted of vagrancy merely because they were found near playgrounds, school yards or public parks. The high court held the provision was "overly broad to an extent that it violates the right to liberty proclaimed by s. 7 of the *Charter*." More particularly, its geographical scope was too broad for "embracing as it does all public parks and beaches no matter how

[77] *United States of America v Cotroni*, [1989] 1 SCR 1469 at 1482, 1989 CanLII 106 (SCC) [*Cotroni*].

[78] *Banks*, *supra* note 27, Lambert JA.

[79] *Cotroni*, *supra* note 77 at 1482.

[80] *New Brunswick (Minister of Health and Community Services) v G (J)*, [1999] 3 SCR 46, [1999] SCJ No 47 at paras 60–61 [*JG*].

[81] *Ibid* at para 70.

remote and devoid of children they may be," too broad in time because it applied "for life without any process for review" and because "the prohibitions are put in place and may be enforced without any notice to the accused."[82]

On the other hand, the Supreme Court refused to strike down powers under the *Immigration Act* providing for the deportation of a permanent resident on conviction of a serious criminal offence. The high court held in *Chiarelli* that there was no violation of the principles of fundamental justice protected by s. 7 of the *Charter* because: "The most fundamental principle of immigration law is that non-citizens do not have an unqualified right to enter or remain in the country."[83]

The liberty that s. 7 seeks to protect, according to the Supreme Court, includes "freedom of movement" or "the liberty of movement and locomotion to go where other citizens are entitled to go and in the same manner as they are entitled to do."[84] Any banishment measure that limited these rights without notice or possibility of review and without a rational connection to preventing harm could be struck down.

d. The guarantee against cruel and unusual punishment

Section 12 of the *Charter* protects against "cruel and unusual treatment or punishment"; the test is "'whether the punishment prescribed is so excessive as to outrage standards of decency.'"[85] In the *Chiarelli* immigration case cited above, the Supreme Court held that deportation did not violate s. 12 because the permanent residents had "deliberately violated an essential condition of his or her being permitted to remain in Canada by committing a criminal offence punishable by imprisonment of five years or more," so that their removal "cannot be said to outrage standards of decency."[86]

e. International law aspects

i. Freedom of movement

The Supreme Court of Canada has held that the principles of fundamental justice protected by the *Charter* are "informed not only by Canadian experience and jurisprudence, but also by international law," including Canada's obligations under international human rights law.[87] International law protects freedom of movement both

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[82] *R v Heywood*, [1994] 3 SCR 761, [1994] SCJ No 101 at 794–96 [*Heywood*].

[83] *Canada (Minister of Employment and Immigration) v Chiarelli*, [1992] 1 SCR 711 at para 733, [1992] SCJ No 27 [*Chiarelli*].

[84] *Heywood*, *supra* note 82 at 796, citing *R v Graf* (1988), 42 CRR 146 (BC PC) at 150.

[85] *R v Smith*, [1987] 1 SCR 1045, [1987] SCJ No 36 at 1072.

[86] *Chiarelli*, *supra* note 83 at 736.

[87] *Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1 at para 46.

within a state and with respect to the right to leave and return to the country where one is a citizen.

Canada is bound by the *Universal Declaration of Human Rights*, which guarantees "the right to freedom of movement and residence within the borders of each state."[88] It is also bound by the *American Declaration of the Rights and Duties of Man*,[89] which provides at art. 8 that: "Every person has the right to fix his residence within the territory of the state of which he is a national, to move about freely within such territory, and not to leave it except by his own will."

Finally, Canada is bound by the *International Covenant on Civil and Political Rights* (*ICCPR*), which provides that: "Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence." This is a right that "shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant"[90]

The position of the United Nations Human Rights Committee is that "liberty of movement is an indispensable condition for the free development of a person."[91] A citizen of Togo brought a complaint after the government placed him under a prohibition against entering a particular district of the country, which included his native village. The UN Human Rights Committee held that he had suffered a restriction of his freedom of movement and residence in violation of art. 12(1) of the *ICCPR*, was entitled to immediate restoration of his freedom of movement and residence, "as well as appropriate compensation."[92]

ii. The *United Nations Declaration on the Rights of Indigenous Peoples*

International law recognizes that Indigenous peoples have a right to autonomy and self-government or self-determination according to the *United Nations Declaration on the Rights of Indigenous Peoples* (*UNDRIP*): to manage "their internal and local affairs," to follow "their own procedures, as well as to maintain and develop their own indigenous decision-making institutions," and "to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions,

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[88] *Universal Declaration of Human Rights*, GA Res 217 A (III), UN Doc A/810, at 71 (1948), art 13(1).

[89] Adopted by the *Ninth International Conference of American States*, 30 April 1948, Bogotá, Colombia,

[90] *International Covenant on Civil and Political Rights,* 19 December 1966, 999 UNTS 171, Can TS 1976 No 47 (entered into force 23 March 1976) arts 12(1), (3) [*ICCPR*].

[91] United Nations Human Rights Committee, *General Comment No. 27: Freedom of movement (Art. 12)*, UNHCR, 67th Sess, UN Doc CCPR/C/21/ Rev 1/ Add 9, (2 November 1999) at para 1[*General Comment No 27*].

[92] *Kéténguéré Ackla v Togo*, Communication No. 505/1992, UN Doc. CCPR/C/56/D/505/1992 (1996) at paras 10, 13.

procedures, practices."[93] More particularly, *UNDRIP* provides that Indigenous peoples have both "the right to determine their own identity or membership in accordance with their customs and traditions" and "the right to determine the responsibilities of individuals to their communities."[94]

Nevertheless, *UNDRIP* specifies that the right to self-determination must be exercised "in accordance with international human rights standards." Its provisions are to "be interpreted in accordance with the principles of justice, democracy, respect for human rights, equality, non-discrimination, good governance and good faith." Indigenous peoples therefore have the right both as collectives and as individuals to enjoy "all human rights and fundamental freedoms as recognized in… the *Universal Declaration of Human Rights* and international human rights law."[95]

These rules suggest that under Indigenous government, banishment has the same limits as under international law generally. If art. 12(1) of the *ICCPR* recognizes the right to choose one's residence, subject only to the reasonable limits set out in art. 12(3), then banishment by Indigenous governments must also be as provided for by law, necessary to protect public order, public health or morals or the rights and freedoms of others, and it must be consistent with the other human rights recognized in by international law.

6. Banishment as an Aboriginal right

a. Introduction

To the extent that a First Nation is exercising an Aboriginal or treaty right recognized and affirmed by s. 35 of the *Constitution Act, 1982*, its imposition of banishment measures would not require a statutory basis, such as the *Indian Act* power to adopt by-laws. Moreover, the measure would be protected against other statutory rules that would infringe upon the First Nation's exercise of that right, subject to the justification test discussed below.

While the test for proving "site specific" Aboriginal rights is set out below, recent case law has held that Aboriginal peoples also have a generic right to self-government that "pertains to Aboriginal peoples as peoples[,] …a right which is intimately tied to the cultural survival of Aboriginal peoples, but is not necessarily based on the practice of distinctive cultural activities in the strict sense."[96] The self-

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[93] *United Nations Declaration on the Rights of Indigenous Peoples* GA Res 61/295, UNGAOR, 61st Sess, Supp No 49, Vol III, UN Doc A/61/49 (2008) at arts 4, 18, 34 [*UNDRIP*]. Parliament has affirmed the Declaration "as a source for the interpretation of Canadian law": *United Nations Declaration on the Rights of Indigenous Peoples Act*, SC 2021, c 14 at preamble.

[94] *Ibid* at arts 33(2), 35.

[95] *Ibid* at arts 1, 34, 46(2)–(3).

[96] *Renvoi à la Cour d'appel du Québec relatif à la Loi concernant les enfants, les jeunes et les familles des Premières Nations, des Inuits et des Métis*, 2022 QCCA 185 at para 486 [*Renvoi à la Cour d'appel du*

government right would include an Aboriginal people's right "to enjoy a customary legal system" and "to govern itself under the Crown's protection."[97] If this case law is upheld by the Supreme Court of Canada, it may be that Aboriginal rules allowing for banishment apply simply because a competent authority has adopted them.

b. The test for proving a constitutionally protected right

The test for proving an Aboriginal right is referred to as the "integral to a distinctive culture" test. As set out by the Supreme Court of Canada, those claiming an Aboriginal right protected by s. 35 must prove: the existence of a practice, custom or tradition that underpins the claimed right; that the practice, custom or tradition was "integral to the distinctive culture" of the claimant's community in the time before contact with European colonists occurred; and finally, continuity between the pre-contact practice and the practice as it exists today.[98]

The test for proving a treaty right is different, but several historic treaties have been held to preserve practices that an Aboriginal people had engaged in before agreeing to relinquish control over its lands.[99] Modern treaties (or land claims agreements) increasingly provide that only the rights referred to in their provisions are modified and allow for an interpretation that any unrelated Aboriginal rights continue to be in force "and enforceable as recognized by the common law."[100] As a result, if banishment by an Aboriginal people meets the test for proving a pre-existing Aboriginal right, it may continue even under a historic or modern treaty, depending on the circumstances.

c. Evidence in support of the right

Accounts of banishment in pre-contact Aboriginal societies are common.[101] George Harris, an elder of the Stz'uminus First Nation on central Vancouver Island, British Columbia, told a reporter in 2016 that under the traditional law of his people known as Snuy-ulth, men were considered protectors of all women because women were life-

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Québec] [emphasis in the original]; appeal as of right pending, Supreme Court of Canada docket no 40061.

[97] Brian Slattery, "A Taxonomy of Aboriginal Rights" in Hamar Foster, Heather Raven & Jeremy Webber, eds, *Let Right Be Done: Aboriginal Title, the Calder Case, and the Future of Indigenous Rights* (Vancouver: University of British Columbia Press, 2007) 111 at 123, as cited in *Renvoi à la Cour d'appel du Québec, supra* note 96 at para 488.

[98] *R v Van der Peet*, [1996] 2 SCR 507, [1996] SCJ No 77 at paras 46, 60-65 [*Van der Peet*].

[99] *R v Morris*, 2006 SCC 59 at para 34.

[100] John Helis, "Achieving Certainty in Treaties with Indigenous Peoples: Small Steps Towards Adopting Elements of Recognition" (2019), 28:2 Constitutional Forum constitutionnel 1 at 2.

[101] Manitoba, *Report of the Aboriginal Justice Inquiry of Manitoba*, vol 1(Winnipeg: Queen's Printer, 1991), at chapter 2, "Aboriginal Concepts of Justice" footnote 13 [*Aboriginal Justice Inquiry*]. See also *Penosway c R*, 2019 QCCS 4016 at para 41.

givers. As a result, he said: "We have stories of people who were banished for sexually abusing women, and it was an offence even punishable by death."[102]

The following description by Zebedee Nungak of traditional justice among the Inuit of Nunavik (northern Québec) mentions the existence and function of banishment:

> In the pre-contact period, Inuit lived in camps dictated according to seasons and availability of life-sustaining wildlife. Their leadership consisted of elders of the camp, as well as hunters who were the best providers and were followed for their ability to decide for the clan or group where the best areas were to spend the seasons. The overriding concern was the sustenance of the collective. Any dispute among the people was settled by the elders and/or leaders, who always had the respect and high regard of the group....
>
> The bulk of disputes handled by the traditional ways pre-contact mostly involved provision of practical advice and persuasive exhortation for correct and proper behaviour, which was generally accepted and abided by. In more serious cases, offenders were ostracized or banished from the clan or group. In these cases, the ostracized or banished individuals were given no choice except to the leave the security and company of the group which imposed this sentence. The social stigma of having such a sentence imposed was often enough to reform or alter behaviour which was the original cause of this measure, and people who suffered this indignity once often became useful members of society, albeit with another clan in another camp. […][103]

Perhaps more conveniently, the Nunavut Court of Justice has held that a prison sentence can be "consistent with traditional norms of Inuit justice" because those norms provided that: "When a person threatened the traditional group's safety and security, that person could be, and sometimes was, banished. In other words, he was separated from the community. Many were welcomed later back into the group."[104] In a penetrating essay, however, former Justice Murray Sinclair pointed out that after a period of banishment through incarceration, the accused is deemed to have "paid the price" for the offence in Euro-Canadian law but that in most Aboriginal societies, "reconciliation and atonement are issues that still apply when the Aboriginal community banishes someone and decides to let him or her return."[105]

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[102] Wawmeesh G Hamilton, "Aboriginal man found not guilty of sex offence but banished from home: Robert Hopkins hopes to return to his community, despite the obstacles", *CBC News* (21 May 2016), online: <https://www.cbc.ca/news/indigenous/aboriginal-man-found-not-guilty-of-sex-offence-banished-from-home-1.3568057>.

[103] Canada, *Report on Aboriginal People and Criminal Justice in Canada: Bridging the cultural divide* (Ottawa: Minister of Supply and Services Canada 1996) at 22 [*Bridging the Cultural Divide*].

[104] *R v Iqalukjuaq*, 2020 NUCJ 15 at para 39. See also *R v Arnaquq*, 2020 NUCJ 14 at para 55.

[105] Murray Sinclair, "Aboriginal Peoples, Justice and the Law," in Richard Gosse, James Youngblood Henderson & Roger Carter, comp, *Continuing Poundmaker and Riel's Quest: Presentations made at a Conference on Aboriginal Peoples and Justice* (Saskatoon: Purich Publishing, 1994) 173 at 179.

Banishment also existed in the Iroquois or Haudenosaunee Confederacy, which included the Mohawk or Kanienkehaka. Its Great Law of Peace could be applied even to a chief who committed murder, as well as to adopted members of a Nation if they caused "disturbance or injury."[106] A scholar in criminology described the practice among the Haudenosaunee before contact as follows:

> For those offenders who continued to engage in anti-social acts or hurtful behaviour, banishment or elimination of their name would be used as a last resort. The point of banishment or elimination of a name was firstly to protect the community, but secondly to attempt to return the offender to a spiritual state of social interconnection. When one attempted to survive alone or was forced to live with other communities in shame, intense personal reflection that often led to a spiritual reawakening was thought to take place. Consequently, the offender would make the character changes necessary to interact positively within their community. Banishment rarely occurred for life, and the individual often returned home after a prescribed period of exile and would be allowed to remain if they had fully embraced the principles of peace and unity. The Great Law decrees that individuals acting in disruptive manners be given three opportunities to change. This dictate also applied to most defined sentences including banishment.[107]

Evidence exists for post-contact continuity in the practice of this custom. One example is very old and occurred under the guidance of the missionaries and among the Wendat (who are Iroquoian but were not part of the Iroquois Confederacy). Describing life at the Wendat mission near Quebec City in 1672 and 1673, the Jesuits mentioned "a Huron who with his wife was greatly addicted to drunkenness, had caused so much scandal and trouble to the whole village of Nostre Dame de Foy, that they were forced to expel him, and forbid him to make his appearance in future among the Christians." It was the intercession of visiting "Christian Iroquois women" and their gift of three porcelain collars in his name which convinced "the Elders… in Council" to allow the "drunkard" and his wife to return.[108] A much more recent example is from 1988, when three young people from the Mohawk community of Kahnawake near Montreal were charged with arson and other criminal offences; they asked that their case be decided by the Longhouse. The Longhouse was convened and ordered that for the offence of falsely informing the community that the Sûreté du Québec was trying to frame them, the young people were to be given their first of three warnings and that after the third warning, they would be banished from the community.[109]

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[106] David E Wilkins, "Exiling Ones Kin: Banishment and Disenrollment in Indian Country" (2004) 17:2 Western L History 235 at 239–42.

[107] Michael R Cousins, *The Inherent Right of the Haudenosaunee to Criminal Justice* (MA thesis (Criminology), Simon Fraser University, 2004) at 64–65 [emphasis added; footnotes omitted] [unpublished].

[108] Reuben Gold Thwaites, ed, *The Jesuit Relations and Allied Documents*, vol 57, (Cleveland: Burrows Brothers, 1899) at 54–60.

[109] *Bridging the Cultural Divide*, *supra* note 103 at 259. See also *ibid* at 252 ("the Quebec Crown acknowledged that the sentences the young people received in the Longhouse were not only more

Note that it might therefore be possible to base a right to impose banishment on historic treaties that promise the protection of certain lands. For instance, "the quiet & peaceable Possession of the Lands we lived upon" was promised by the British in the Treaty of Swegatchy of 1760[110] to the Seven Nations living in the Saint Lawrence River Valley, who had been allied to the French, including Kahnawake and Wendake.[111] The banishment recorded in Wendake in the 1670s might therefore have formed part of the Wendat right to "quiet & peaceable Possession" of the same lands recognized by the British a century later and the sentence imposed by the Longhouse in Kahnawake could be its modern expression.

7. Justifying an Aboriginal right to banishment or justifying its infringement

a. Requirements to justify a breach of an Aboriginal right of banishment

i. The justification test

Even after an Aboriginal party has proven an unextinguished Aboriginal or treaty right protected by the Constitution, a court is still entitled to conclude that infringement by federal or provincial law is justified, though the burden of proving the justification rests with the Crown. The justification test involves two steps. First, the government will try to show that it was pursuing a valid legislative objective, namely, one that is "compelling and substantial." At the second stage in the justification test, the Crown must demonstrate that the structure of the law is consistent with the fiduciary duty it owes to Aboriginal people. Based on this test, a court will consider, among other things, whether Aboriginal rights were given adequate priority, whether they have been minimally impaired, whether Aboriginal groups have received compensation and whether they have been consulted.[112]

The Supreme Court has held that:

> Because, however, distinctive aboriginal societies exist within, and are a part of, a broader social, political and economic community, over which the Crown is sovereign, there are circumstances in which, in order to pursue objectives of compelling and substantial importance to that community as a whole (taking into account the fact that aboriginal societies are a part of that community), some limitation of those rights will be justifiable.[113]

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culturally appropriate, but also tougher than what they might have expected in Quebec courts" yet "nevertheless insisted that the young people be tried in the Quebec courts.…").

[110] *R v Côté*, [1993] RJQ 1350, [1994] 3 CNLR 98 (QC CA) at 113–114, rev'd on other grounds [1996] 3 SCR 139, [1996] SCJ No 93.

[111] They were also referred to as the Eight Nations: *R v Sioui*, [1990] 1 SCR 1025, [1990] SCJ No 48 at 1058–59.

[112] *R v Sparrow*, [1990] 1 SCR 1075, [1990] SCJ No 49 at 1113, 1119 [*Sparrow*].

[113] *R v Gladstone*, [1996] 2 SCR 723, [1996] SCJ No 79 at para 73 [*Gladstone*].

More particularly, "limits placed on those rights…, where the objectives furthered by those limits are of sufficient importance to the broader community as a whole," can be "a necessary part" of "reconciliation of aboriginal societies with the broader political community of which they are part."[114]

ii. Interaction between Aboriginal rights and the *Charter*

As mentioned above, the *Charter* presumptively applies to an Aboriginal government that exercises authority within the sphere of federal jurisdiction over "Indians" under s. 91(24) of the *Constitution Act, 1867*.[115] Many modern treaties (land claims agreements) in British Columbia specify that the *Charter* will apply to Aboriginal governments,[116] while in other cases courts have assumed that the *Charter* applies to orders of government created under the *Umbrella Final Agreement* in the Yukon[117] or the *James Bay and Northern Québec Agreement*.[118] (Whether the *Charter* would apply equally to a purely traditional Aboriginal order of government remains an open question.[119])

Even if banishment could be shown to be a specific Aboriginal or treaty right protected by s. 35 of the *Constitution Act, 1982*, the severe consequences of banishment might lead a court to conclude that the individual rights protected by the *Charter* constitute limits on the Aboriginal right which "are of sufficient importance to the broader community as a whole" so as to make them "a necessary part" of "reconciliation of aboriginal societies with the broader political community of which they are part."[120] Alternatively, the case law that has found a generic Aboriginal right to self-government also held that when acting as governing bodies, Aboriginal peoples must exercise their authority with "respect [for] the rights of individuals, whether Aboriginal or non-Aboriginal, as Canadian citizens." The application of the *Charter* is a limit on self-government inherent in the constitutional order and not an abrogation or derogation from a generic right, though limits imposed by statute will have to be justified based on the test established by the Supreme Court of Canada pursuant to s. 35 of the *Constitution Act, 1982*.[121]

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[114] *Ibid*.

[115] *Taypotat v Taypotat*, 2013 FCA 192 at para 36.

[116] *Nisqa'a Final Agreement*, 27 April 1999, Ch 2 at para 9; *Tsawwassen First Nation Final Agreement*, 6 December 2007, (entered into force 3 April 2009), Ch 2, clause 9; *Tla'amin Final Agreement*, 11 April 2014 (entered into force 5 April 2016), Ch 2, at para 8.

[117] *Dickson v Vuntut Gwitchin First Nation*, 2021 YKCA 5 at para 98 [*Dickson*]; leave to appeal granted, 2022 CanLII 32895.

[118] *Band (Eeyouch) c Napash*, 2014 QCCQ 10367 at para 181.

[119] The court declined to rule on Haudenosaunee traditional governance in a case concerning an assault committed with the aim of removing a member from the Six Nations reserve because in any case, "the traditional means of discerning consensus was not followed": *R v Green*, 2017 ONCJ 705 at para 87.

[120] *Gladstone*, *supra* note 113 at para 73.

[121] *Renvoi à la Cour d'appel du Québec*, *supra* note 96 at paras 527–28.

The burden could therefore shift to an Aboriginal community to justify the infringement of *Charter* caused by banishment. However, it would be possible to argue that no justification for breaching a *Charter* right is needed when adjudicating an Aboriginal right because s. 25 of the *Charter* provides

> 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….

Writing as a single judge of the Supreme Court of Canada in a concurring judgment, Bastarache J. held that "s. 25 serves the purpose of protecting the rights of aboriginal peoples where the application of the *Charter* protections for individuals would diminish the distinctive, collective and cultural identity of an aboriginal group.".[122] The majority in the *Kapp* decision preferred to leave interpretation of s. 25 of the *Charter* for another day.[123]

The issue will be before the Supreme Court of Canada again in the *Vuntut Gwitchin* case concerning residency restrictions on the right to take up elected office in a First Nation whose powers of self-government stemmed from a land claims agreement recognized as a modern treaty. The Yukon Court of Appeal agreed with Bastarache J. and held that while the *Charter* applies to Vuntut Gwitchin government and the residency requirement breached a member's equality rights under s. 15(1), nevertheless s. 25 is a "shield" for the exercise of their collective rights against the requirement to justify infringement of individual rights.

b. *Charter* issues in the exercise of the right

i. Consequences of banishment

If members or other residents were banished from their First Nation's reserve, they would presumably face no impediment to their right to live elsewhere in Canada or even elsewhere on the Nation's traditional territory, which is rarely if ever subject to the First Nation's exclusive control. Nevertheless, members would be banished from the heart of their community and banishment might therefore be analogous to a national citizen's banishment from his country, in violation of s. 6(1) of the *Charter* or article 12(4) of the *ICCPR*.

Like a banished citizen, banished band members would suffer "exclusion of membership in the national community" and an interference with their "special relationship" to that community.[124] Banishment constitutes, in the words of an American court, "the coerced and peremptory deprivation of the petitioners'

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[122] *R v Kapp*, 2008 SCC 41 at para 89 [*Kapp*].

[123] *Ibid* at paras 62–65.

[124] *Cotroni*, *supra* note 77 at 1482; *General Comment No. 27*, *supra* note 92 at para 19.

membership in the tribe and their social and cultural affiliation."[125] The consequences would be similar to those which Aboriginal legal scholars have noted for the traditional punishment: banishment was a severe punishment because "it involved 'the end of social and cultural life with one's community.'"[126]

The pre-1985 rule in the *Indian Act* that deprived women of status upon marriage to men who were not registered Indians was described by the Supreme Court of Canada as "statutory banishment."[127] The United Nations Human Rights Committee held that when Canada prohibited Sandra Lovelace, a Wolastoqiyik (Maliseet) woman, from returning to the Tobique reserve in New Brunswick where she was raised after her marriage to a non-Indian man ended, Canada had violated the right for members of an ethnic minority "in community with the other members of their group, to enjoy their own culture," as protected by art. 27 of the *ICCPR*.[128] However, her original complaint also alleged violations of the right to freedom of movement protected by article 12, as well as the guarantees against discrimination in articles 2, 3 and 26 of the *Covenant*.

ii. Characterization of banishment's consequences under the *Charter*

The right to liberty under s. 7 of the *Charter*, according to the Supreme Court of Canada, includes "freedom of movement."[129] The principles of fundamental justice require "a fair procedure" before taking away a status that is "fundamental to personal identity."[130]

The banishment of members from their First Nation's reserve would:

- combine "stigmatization... and disruption of family life;[131]
- deprive them of the freedom "to go where other [members] are entitled to go and in the same manner as they are entitled to do";[132]
- interfere with their "special relationship" with their own community and its territory;[133]

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[125] *Poodry*, *supra* note 18 at 897.

[126] Mary Ellen Turpel-Lafond & Patricia Monture-Angus, "Aboriginal Peoples and Canadian Criminal Law: Rethinking Justice" (1992) 26 UBC L Rev 239 at 248.

[127] *Attorney General of Canada v Lavell*, [1974] SCR 1349, 7 CNLC 236 at 1386.

[128] United Nations Human Rights Committee, *Sandra Lovelace v Canada, Communication No 24/1977*, UN Doc. CCPR/C/13/D/24/1977 (7 July 1981) [*Lovelace*].

[129] *Heywood*, *supra* note 82 at 795.

[130] *JG*, *supra* note 80 at paras 70, 61.

[131] *Ibid* at paras 70, 61.

[132] *Heywood*, *supra* note 82 at 796, citing *R v Graf*, (1988), 42 CRR 146 at 150, [1988] BCJ No 3203 [*Graf*].

[133] *General Comment No. 27*, *supra* note 91 at para 19.

- exclude them from "the social and cultural life" of their community;[134]
- deprive them of access to their "native culture and language 'in community with the other members' of [their] group."[135]

The cumulative effect would, on its face, constitute a violation of members' right to liberty and to freedom of movement under s. 7 of the *Charter*, based on the analogy to their rights under s. 6 of the *Charter* and articles 12 and 27 of the *ICCPR*.

c. Requirements to justify a breach of the *Charter* right

i. Generally

A breach of a *Charter* right does not always invalidate legislation because the *Charter* is subject to "to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society" under s. 1. The first requirement is that a limitation must actually be "prescribed by law": according to the Supreme Court, this means that it must provide "an intelligible standard according to which the judiciary must do its work" and cannot grant "a plenary discretion to do whatever seems best in a wide set of circumstances."[136]

The Supreme Court of Canada's case law also requires that, in order to justify the infringement of a *Charter* right, the government objective must be "of sufficient importance to warrant overriding a constitutionally protected right or freedom" and that the means chosen must be reasonable and demonstrably justifiable in a free and democratic society.[137] Reasonable and justifiable means must: be carefully designed to achieve the objective in question—that is, not arbitrary or unfair or based on irrational considerations; they must impair as little as possible the right or freedom in question, even if rationally connected to the objective in the first sense; and they must demonstrate a proportionality between the effects of the measures and the objective.

ii. The effect of section 25

If banishment measures that did not rely on Aboriginal or treaty rights, such as *Indian Act* by-laws adopted or defended without reference to constitutional rights to self-government, were found to breach an individual's *Charter* rights, the measures would need to be justified under s. 1.

However, as discussed above, the Yukon Court of Appeal held that s. 25 is a "shield" for the exercise of the Vuntut Gwichin's collective rights under their modern treaty (land claims agreement). The First Nation is party to a self-government

[134] Turpel-Lafond & Monture-Angus, *supra* note 126 at 248.

[135] *Lovelace*, *supra* note 128 at para 13.2.

[136] *Irwin Toy Ltd v Quebec (Attorney General)*, [1989] 1 SCR 927 at 983, [1989] SCJ No 36.

[137] *R v Oakes*, [1986] 1 SCR 103 at para 76, [1986] SCJ No 7 [*Oakes*].

agreement (SGA) entered into pursuant to the treaty and adopted its own constitution pursuant to the SGA, which allowed non-residents to stand for election but prohibited them from remaining in office if they did not reside on the territory within a specified period of time. The Yukon Court of Appeal held that this residency requirement violated the right to equality under s. 15(1) of the *Charter* but that s. 25 shielded the election rules from further review.[138]

The Court of Appeal held that to apply the s. 15(1) equality rights of non-resident members so as to invalidate the residency requirement for election "would indeed derogate from the Vuntut Gwitchin's rights to govern themselves in accordance with their own particular values and traditions *and* in accordance with the 'self-government' arrangements entered into in 1993 with Canada and Yukon."[139] More particularly, the assessment of "the rationality, proportionality and minimal impairment of the Residency Requirement" that would ordinarily be required under s. 1 to justify breach of a *Charter* right need not take place.[140]

However, the categorical interpretation of s. 25 of the *Charter* applied in *Vuntut Gwichin* may not prevail. The Royal Commission on Aboriginal Peoples adopted a more nuanced view "that although section 25 shields the Aboriginal right of self-government from *Charter* review, individuals subject to the actions of Aboriginal governments enjoy the protection of the *Charter*." This would mean that the validity of the self-government measures themselves could not be challenged but the way they operate could be reviewed by the courts if the result violated an individual's rights under the *Charter*. At the same time, the Royal Commission saw s. 25 as additional means for Aboriginal governments to justify "actions that might otherwise run afoul of the *Charter*" on the grounds that those actions were culturally appropriate, taking into account "the distinctive philosophies, traditions and cultural practices that animate the inherent right of self-government."[141]

Under this less categorical approach, the court's task would be to arrive at "[i]nterpretations of the *Charter* which are consistent with Aboriginal cultures and traditions," which might give those legal rights provisions a new interpretation.[142] Another scholar has proposed that s. 25 may require a special proportionality test because it applies where constitutionally-protected *Charter* rights and Aboriginal or treaty rights come into conflict. Rather than applying the s. 1 test that insists on minimal impairment of the *Charter* right, the competing Aboriginal or treaty right would call for an analysis of whether the "salutary effects" of the Aboriginal

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[138] *Dickson*, *supra* note 117 at paras 14–25, 107–12, 143–46.

[139] *Ibid* at para 149 [emphasis in original].

[140] *Ibid* at para 146.

[141] *Bridging the cultural divide*, *supra* note 103 at 265.

[142] Peter W Hogg & Mary Ellen Turpel, "Implementing Aboriginal Self-Government: Constitutional and Jurisdictional Issues" (1995) 74:2 Can Bar Rev 187 at 215.

government's action outweighed the deleterious effects on the individual's *Charter* right.[143]

iii. The *Charter* test for justifying banishment

Under the *Charter*, decisions that would take away a status that is "fundamental to personal identity" require "a fair procedure for making this determination" before taking.[144] Therefore, restrictions an individual's freedom of movement may not: be excessively broad, either in time or place, apply "without any process for review", nor be "put in place [or] enforced without any notice."[145]

Legislation which interferes with an individual's freedom to "to go where other citizens are entitled to go and in the same manner as they are entitled to do"[146] must: serve an objective sufficiently important to justify overriding a constitutionally-protected right;[147] avoid arbitrariness, for instance, by providing for notice, a hearing and the possibility of review;[148] limit the scope of the restrictions as much as possible, both in time and place, to impair freedom of movement as little as possible and to demonstrate proportionality.[149]

The effect is markedly similar to the requirement that the freedom of movement protected by the *ICCPR* can only be subject to restrictions "which are provided by law, are necessary to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant."[150] The UN Human Rights Committee has interpreted this to mean that limitations on freedom of movement may not be arbitrary and "even interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances."[151]

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[143] David Milward, *Aboriginal Justice and the Charter: Realizing a Culturally Sensitive Interpretation of Legal Rights in Canada* (Vancouver: UBC Press, 2012) at 70–71.

[144] *JG*, *supra* note 80 at paras 61, 70.

[145] *Heywood*, *supra* note 82 at 794–96.

[146] *Ibid* at 796, citing *Graf*, *supra* note 133 at 150.

[147] *Oakes*, *supra* note 137 at para 69.

[148] *Heywood*, *supra* note 82 at 790, 796, 800.

[149] *Ibid* at 794–96; *Oakes*, *supra* note 137 at para 70.

[150] *ICCPR*, *supra* note 90, art 12(3).

[151] *General Comment No. 27*, *supra* note 91 at para 21.

iv. Banishment as a breach of an individual's ability to exercise collective rights

Significantly for our purposes, in the *Vuntut Gwichin* case, the Yukon Court of Appeal noted that "the 'real conflict' found by the court below was between an individual's *personal* right of equality under s. 15(1) of the *Charter* and a *collective* right—perhaps a "constitutional" one—being exercised by a *self-governing* first nation."[152] However it is not at all clear the same conflict between personal and collective rights would be at issue in a challenge to banishment measures. The plaintiff in *Vuntut Gwitchin* was not deprived of her individual right to run for office but wanted to be able to serve without residing on the First Nation's territory, effectively asking for a right to hold office without living together with the rest of her community. By contrast, if a community banished one of its members, the Aboriginal right claimed would be to deprive an individual of the ability to share in probably the most important benefit of the nation or community's collective rights, namely, the right to live together.

Recognizing the individual's *Charter* rights in a case of banishment might therefore not so much "diminish the distinctive, collective and cultural identity of an aboriginal group" as determine the terms on which individuals could participate in that group and the exercise of its Aboriginal and treaty rights. Expressed another way, banishing a member raises the question of whether the collective right extends even to the point of eliminating an individual member's participation in the group and the exercise of its rights.

Professor David Milward has written that life in Aboriginal societies is a social contract under which harmful behaviour that departs from the terms of that contract "is implicitly an acceptance of collective sanction."[153] On those terms, however, banishment is not a sanction like any other: it implies that individual members may commit such a fundamental breach that they can be deprived of the most important benefit of the social contract, either temporarily or permanently.

v. The example of the *Lovelace* case

As noted above, the UN Human Rights Committee held that when Sandra Lovelace lost her status under the *Indian Act* due to marriage, she was deprived of the right under s. 27 of the *ICCPR* for members of an ethnic minority "in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language." She had lost "access to her native culture and language 'in community with the other members' of her group… because there is no place outside the Tobique Reserve where such a community exists."[154]

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[152] *Dickson*, *supra* note 117 at para 144 [emphasis in original].

[153] Milward, *supra* note 143 at 197.

[154] *Lovelace*, *supra* note 128 at paras 13.2, 15.

The UN Human Rights Committee's decision held that the federal government was entitled to define those entitled to live on reserve with resulting restrictions for the "protection of its resources and preservation of the identity of its people." Nevertheless, those restrictions had to serve "reasonable and objective purposes" and had to do so in a manner consistent with all other rights guaranteed by the *ICCPR*, such as the right to choose one's residence, the rights aimed at protecting family life and children and the provisions against discrimination. The Committee could not conclude that "to deny Sandra Lovelace the right to reside on the reserve is reasonable, or necessary to preserve the identity of the tribe" and therefore concluded that "to prevent her recognition as belonging to the band is an unjustifiable denial of her rights under article 27 of the Covenant, read in the context of the other provisions referred to."[155]

The example of the *Lovelace* case demonstrates that international law would demand that any limitations a First Nation placed on the right for a member to live on a reserve would have to serve reasonable and objective goals, such as the "protection of its resources and preservation of the identity of its people," and be consistent with other rights, including access to native culture and language, protection from discrimination and preservation of family life. As set out above, this would be consistent with the right to self-determination under *UNDRIP*, which is subject to the right of Indigenous peoples both as collectives and through their individual members to enjoy "all human rights and fundamental freedoms" recognized in international human rights law.[156] These principles could apply by analogy for the purpose of determining whether any infringement of rights protected by the *Charter* would be justified either under s. 1 or s. 25.

8. Conclusion

Only one judgment has clearly answered the question posed by the Federal Court over two decades ago as to whether banishment is included when "sections 81 and 85.1 of the [*Indian*] Act grant band councils the authority to make by-laws for the protection of the community."[157] While the position of the Department of Indian and Northern Affairs in 2000 had been that the *Indian Act* did not allow Norway House Cree Nation to adopt a banishment by-law, the Québec Superior Court ruled in 2018 that jurisdiction under para. 81(1)(c) and (d) over "the observance of law and order" and "the prevention of disorderly conduct" did allow the Atikamekw of Opitciwan to banish a convicted drug dealer from the reserve for a period of five years.[158]

Several aspects of the Atikamekw of Opitciwan's by-law probably lent themselves to endorsement by the Court. The first is that the rules for banishment were

[155] *Ibid* at paras 16–17.

[156] *UNDRIP*, *supra* note 93, arts 1, 34, 46(2)–(3).

[157] *Gamblin*, *supra* note 38 at para 53.

[158] *Weizineau*, *supra* note 49 at paras 9, 10.

clearly set out, recalling the Federal Court's decision in 2000 that only a by-law constitutes an enforceable use of s. 81's authority, rather than a simple Band Council resolution.[159] The second is that the grounds for banishment were a conviction by a criminal court on certain drug-trafficking offences, rather than on subjective grounds. Third, the conviction arguably already gave the person notice but moreover, in the particular case brought before the Superior Court, the offender had been served with a notice of expulsion. Finally, the banishment was for a finite term of five years; in fact, the by-law even allows for a temporary return (not exceeding five days in a calendar year) if an immediate family member dies or upon a decision of the community justice committee.[160]

The Federal Court has not been as generous to Band Councils whose banishment decisions did not show respect for the rules of procedural fairness: several interlocutory decisions have allowed members and resident non-members who were banished without a hearing to stay on the reserve pending a full hearing.[161] In another case, the decision was set aside for breach of procedural fairness without a ruling on the validity of the by-law itself.[162] The Canadian Human Rights Tribunal, though without jurisdiction over the fairness of banishment decisions, has set aside the banishment of a non-member on the grounds that she had been denied occupancy of a residential accommodation based on prohibited grounds of discrimination, namely, marital and family status.[163] The courts have been much kinder to Band Councils that evict tenants on the same grounds they would have relied on for banishment: they have held that no duty of fairness governs the decision to evict a tenant which is a private-law contract matter.[164]

At the same time, banishment has become an exceptional though recognized part of criminal sentencing in parole orders and sometimes release orders (bail) and even peace bonds. Grounds for orders banishing an offender from a specific community include "protecting the victim or assisting with the offender's rehabilitation."[165] The offender's consent is a controversial criterion, but the better view is probably that a real connection "to the objectives of protecting the public or securing the good conduct of the accused" is required.[166]

The courts have distinguished between "community banishment cases" and individualized probation orders: protection of a particular individual is really "a form

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[159] *Gamblin*, *supra* note 38 at para 58.

[160] *CAO-RA-2016-01, supra* note 48, ss 5-8.

[161] *Kitasoo*, *supra* note 62; *Shilling*, *supra* note 65.

[162] *Solomon*, *supra* note 40.

[163] *Kamalatisit*, *supra* note 68 at paras 67–68.

[164] *Gamblin*, *supra* note 38 at paras 41, 43; *Paul*, *supra* note 45 at para 28.

[165] *Rowe*, *supra* note 23 at para 6.

[166] *R v L*, *supra* note 25 at para 76.

of restraining order, albeit one which applies to a much larger geographic area than is normally the case."[167] By contrast, community banishment cases "involve an accused who is considered to be a nuisance or an undesirable in the community where he committed his crime" and where "banishment is considered a means of protecting the community as a whole."[168] Such orders are more common with respect to Aboriginal communities, but the results are varied: some courts have declined to take into account the level of policing available as grounds for banishment,[169] while others have used Band Council banishment orders as evidence of the community's views on where the offender should be allowed to reside.[170]

The exercise of purely statutory powers, such as under the *Indian Act* or the *Criminal Code*, is subject to justifiable infringement where government is pursuing a valid legislative objective, namely, one that is "compelling and substantial."[171] Banishment should not be inconsistent with the right to liberty and fundamental justice (s. 7), to protection from cruel and unusual punishment (s. 12) or to protection from discrimination (s. 15). In particular, the right to liberty under s. 7 includes "freedom of movement,"[172] while the principles of fundamental justice require "a fair procedure" before taking away a status that is "fundamental to personal identity."[173]

Whatever the consequences for non-members, banishing members of a First Nation from their reserve would disrupt their family life, deprive them of the freedom to go where other members are entitled to go, and interfere with their special relationship with their community and its territory. The consequences would recall those suffered by registered Indian women before 1985 when they lost their status under the *Indian Act* by marrying non-Indian men and could no longer live on their reserves: the United Nations Human Rights Committee held this deprived a woman of "access to her native culture and language 'in community with the other members' of her group" and therefore violated the right of members of an ethnic minority "in community with the other members of their group, to enjoy their own culture," as protected by art. 27 of the *ICCPR*.[174]

The consequences of banishment for members' participation in community life also seem to contradict the definition of a band and a reserve under the *Indian Act*: "a body of Indians… for whose use and benefit in common, lands… have been set apart" and "a tract of land… that has been set apart by Her Majesty for the use and

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[167] *Felix*, *supra* note 19 at para 27.

[168] *Ibid* at para 18.

[169] *Gabriel*, *supra* note 32 at paras 6–7.

[170] *RHGM*, *supra* note 12 at paras 46–48.

[171] *Sparrow*, *supra* note 112 at 1113.

[172] *Heywood*, *supra* note 82 at 795.

[173] *JG*, *supra* note 80 at paras 70, 61.

[174] *Lovelace*, *supra* note 128 at paras 15–17.

benefit of a band."[175] Presumptively, band members have a right to reside or frequent the reserve for the simple reason that its lands were set aside for their use and benefit, in common with all the others. While a First Nation may well have the power to exclude non-members, it is less certain that it has the power permanently to expel members from the reserve because they would cease to benefit from membership in a band by its very definition.

The deeper question is whether—separately from statutory powers such as under the *Indian Act* or the *Criminal Code*—a banishment power exists as an Aboriginal or treaty right protected by s. 35 of the *Constitution Act, 1982*. There is no doubt that in pre-contact Aboriginal societies, banishment was common[176] and "integral to the distinctive culture" of those communities as a means of social control; the widespread modern resort to banishment among First Nations would appear to show continuity between the pre-contact practice and a modern exercise of the right.[177] Some historic treaties may also have incorporated the right to the extent that they promised protection of a First Nation's lands; a separate question is whether the right to impose banishment is incorporated in modern treaties, also known as land claims agreements. Finally, recent case law has recognized that Aboriginal peoples also have a generic right to self-government that "is not necessarily based on the practice of distinctive cultural activities in the strict sense."[178] If upheld by the Supreme Court of Canada, it may be that Aboriginal rules allowing for banishment apply simply because a competent authority has adopted them.

It is true that s. 25 of the *Charter* provides that it "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…." This may protect Aboriginal and treaty rights from an application of the *Charter* that would otherwise diminish them.[179] However, in the case a community banishing one of its members, the Aboriginal right claimed would be specifically aimed at depriving an individual of the ability to participate in the exercise of the nation's collective rights, namely, to live together; in other words, the First Nation would claim a right to diminish its member's exercise of an Aboriginal or treaty right and to that extent, s. 25 of the *Charter* would be wielded as a sword, not a shield.

It is therefore difficult to see how a First Nation could avoid having to justify the infringement of the member's rights arising from banishment. Under s. 1 of the *Charter*, justification for "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society" would require an Aboriginal government to show that banishment fulfilled objectives "of sufficient importance to

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[175] *Indian Act*, *supra* note 3, s 2(1).

[176] *Aboriginal Justice Inquiry*, *supra* note 101, chapter 2, text corresponding to footnote 13.

[177] *Van der Peet*, *supra* note 98 at paras 46, 63.

[178] *Renvoi à la Cour d'appel du Québec*, *supra* note 96 at para 486.

[179] *Kapp*, *supra* note 122, at para 89; *Dickson*, *supra* note 117 at para 146.

warrant overriding a constitutionally protected right or freedom" and that the means chosen were fair, proportional and impaired the right of its members as little as possible.[180] , In particular, a law banishing members would need to include notice and a process for review and it would need to limit the scope of banishment as much as possible, both in time and place.[181]

Alternatively, as the Royal Commission on Aboriginal Peoples concluded, s. 25 may be an additional means for Aboriginal governments to justify "actions that might otherwise run afoul of the *Charter*" on the grounds that those actions were culturally appropriate, taking into account "the distinctive philosophies, traditions and cultural practices that animate the inherent right of self-government."[182]

The UN Human Rights Committee's decision in the *Lovelace* case based on the *ICCPR* suggests that any limitations an Aboriginal people placed on its members' right for a member to live in their own community would have to serve reasonable and objective goals, such as the "protection of its resources and preservation of the identity of its people," and be consistent with other rights, including access to native culture and language, protection from discrimination and preservation of family life.[183] As set out above, this would be consistent with the right to self-determination under *UNDRIP*, including "to determine the responsibilities of individuals to their communities," which must be exercised "in accordance with the principles of justice, democracy, respect for human rights, equality, non-discrimination, good governance and good faith," so that Indigenous peoples have the right both as collectives and through their individual members to enjoy all the human rights and fundamental freedoms recognized in international law.[184]

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[180] *Oakes*, *supra* note 137 at para 76.

[181] *Heywood*, *supra* note 82 at 794–96; *Oakes*, *supra* note 137 at para 70.

[182] *Bridging the Cultural Divide*, *supra* note 103 at 265.

[183] *Lovelace, supra* note 128 at paras 15–17.

[184] *UNDRIP*, *supra* note 93, arts 1, 3, 35, 46(2)–(3).