SCC Court File No. 39856

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL OF YUKON)

BETWEEN:

CINDY DICKSON

Appellant/Cross-Respondent
(Appellant)

AND

VUNTUT GWITCHIN FIRST NATION

Respondent/Cross-Appellant
(Respondent)

(Title of Proceedings continued on next page)

FACTUM OF THE INTERVENER, ATTORNEY GENERAL OF CANADA

(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

Attorney General of Canada
Department of Justice Canada
National Litigation Sector
50 O'Connor Street, Suite 500
Ottawa, ON K1A 0H8
Fax: (613) 954-1920

Anne M. Turley
Marlaine Anderson-Lindsay
Tel: (613) 670-6291
Email: anne.turley@justice.gc.ca
Email: marlaine.anderson-lindsay@justice.gc.ca

Counsel for the Intervener, Attorney General of Canada

Deputy Attorney General of Canada
Department of Justice Canada
National Litigation Sector
50 O'Connor Street, Suite 500
Ottawa, ON K1A 0H8
Fax: (613) 954-1920

Christopher Rupar
Tel: (613) 670-6290
E-mail: christopher.rupar@justice.gc.ca

Agent for the Intervener, Attorney General of Canada

AND

GOVERNMENT OF YUKON, ATTORNEY GENERAL OF CANADA, ATTORNEY GENERAL OF QUEBEC, ATTORNEY GENERAL OF ALBERTA, BRITISH COLUMBIA TREATY COMMISSION, MÉTIS NATION OF ONTARIO and MÉTIS NATION OF ALBERTA (jointly), CARCROSS/TAGISH FIRST NATION, TESLIN TLINGIT COUNCIL, SHISHÁLH NATION, CONGRESS OF ABORIGINAL PEOPLES, COUNCIL OF YUKON FIRST NATIONS, PAN-CANADIAN FORUM ON INDIGENOUS RIGHTS AND THE CONSTITUTION, CANADIAN CONSTITUTION FOUNDATION, BAND MEMBERS ALLIANCE AND ADVOCACY ASSOCIATION OF CANADA, SWAN RIVER FIRST NATION, SUCKER CREEK FIRST NATION, WHITEFISH LAKE FIRST NATION #128, DRIFTPILE CREE NATION AND HORSE LAKE FIRST NATION (jointly), TE'MEXW TREATY ASSOCIATION, FEDERATION OF SOVEREIGN INDIGENOUS NATIONS and BRUCE CHARLIE, MARILYN CHARLIE, EMILY KELLY, NETA ARNOLD, MARGARET NJOOTLI, GARRY NJOOTLI, TRACY BRUCE, TERESA LEVESQUE and KIMBERLY BLAKE (jointly)

Interveners

ORIGINAL TO: THE REGISTRAR

COPIES TO:

Fasken Martineau DuMoulin LLP
Barristers & Solicitors
Suite 2900-550 Burrard Street
Vancouver, BC V6C 0A3

Bridget Gilbride
Tel: (604) 631-4891
Email: bgilbride@fasken.com

Ruby Shiller Enenajor Digiuseppe
Barristers
101-171 Jon Street
Toronto, ON M5T 1X3

Harshi Mann
Tel: (416) 964-9664
Email: hmann@rubyshiller.com

Counsel for the Appellant/Cross-Respondent, Cindy Dickson

Fasken Martin DuMoulin LLP
Barristers & Solicitors
Suite 1300-55 Metcalfe Street
Ottawa, ON K1P 6L5
Fax: (613) 288-2896

Sophie Arsenault
Tel: (613) 696-6904
Email: sarsenault@fasken.com

Agent for the Appellant/Cross-Respondent, Cindy Dickson

Mandell Pinder LLP
Barristers & Solicitors
422-1080 Mainland Street
Vancouver, BC V6B 2T4

Krista Robertson
Elin Sigurdson
Kris Statnyk
Tel: (604) 681-4146
Email: krista@manellpinder.com
Email: elin@mandellpinder.com
Email: kris@statnyk.com

Counsel for the Respondent/Cross-Appellant, Vuntut Gwitchin First Nation

Gowling WLG (Canada) LLP
Suite 2600- 160 Elgin Street
Ottawa, ON K2P 0J8
Fax: (613) 788-3573

Jeff Beedell
Tel: (613) 786-0171
Email: jeff.beedell@gowlingwlg.com

Agent for the Respondent/Cross-Appellant, Vuntut Gwitchin First Nation

Department of Justice
Legal Services Branch (J-2E)
2134 Second Avenue, 2nd Floor
Whitehorse, Yukon Y1A 2C6

Ian H. Fraser
Katie Mercier
Tel: (867) 667-5142
Fax: (867) 393-6379
Email: i.h.fraser@yukon.ca
Email: katie.mercier@yukon.ca

Counsel for the Intervener,
Government of Yukon

Supreme Advocacy LLP
Suite 100-340 Gilmour Street
Ottawa, ON K2P 0R3

Marie-France Major
Tel: (613) 695-8855
Fax: (613) 695-8580
Email: mfmajor@supremeadvocacy.ca

Agent for the Intervener,
Government of Yukon

Procureur Général Du Québec
Direction Du Droit Constitutionnel Et Autochtone
1200, route de l'Église, 4e étage
Québec, Quebec
G1V 4M1

Hubert Noreau-Simpson
Catheryne Bélanger
Sylvie Boulay
Tel: (418) 643-1477
Fax: (418) 644-7030
Email: hubert.noreau-simpson@justice.gouv.qc.ca

Counsel for the Intervener,
Attorney General of Quebec

Noël Et Associés, S.E.N.C.R.L
225, montée Paiement, 2e étage
Gatineau, Quebec
J8P 6M7

Pierre Landry
Tel: (819) 503-2178
Fax: (819) 771-5397
Email: p.landry@noelassocies.com

Agent for the Intervener,
Attorney General of Quebec

Attorney General of Alberta
Constitutional and Aboriginal Law
Legal Services Division
10025 - 102A Avenue, 10th Floor, 102A Tower
Edmonton, Alberta
T5J 2Z2
Michele Annich, K.C.
Leah M. McDaniel
Tel: (780) 422-0258
Fax: (780) 643-0852
Email: michele.annich@gov.ab.ca

Counsel for the Intervener,
Attorney General of Alberta

Gowling WLG (Canada) LLP
160 Elgin Street
Suite 2600
Ottawa, Ontario
K1P 1C3

D. Lynne Watt
Tel: (613) 786-8695
Fax: (613) 788-3509
Email: lynne.watt@gowlingwlg.com

Agent for the Intervener,
Attorney General of Alberta

Lalonde & Mack Law Group
7297 West Saanich Road
Saanichton, BC V8M 1R7

Mary Ellen Turpel-Lafond
Gavin Gardiner
Tel: (250) 213-2904
Email: metl@lmlawgroup.ca

Counsel for the Intervener,
Carcross/Tagish First Nation

Supreme Court Advocacy
100-340 Gilmour Street
Ottawa, ON K2P 0R3

Marie-France Major
Tel: (613) 695-8855
Fax: (613) 695-8580
Email: mfmajor@supremeadvocacy.ca

Agent for the Intervener,
Carcross/Tagish First Nation

Boughton Law Corporation
595 Bourrard Street, Suite 700
Vancouver, BC V7X 1S8

James M. Coady, K.C.
Daryn Leas
Tammy Shoranick
Tel: (604) 687-6789
Fax: (604) 683-5317
Email: jcoady@boughtonlaw.com

Counsel for the Intervener,
Council of Yukon First Nations

Borden Ladner Gervaid LLP
100 Queen Street, Suite 1300
Ottawa, ON K1P 1J9

Nadia Effendi
Tel: (613) 787-3562
Fax: (613) 230-8842
Email: neffendi@blg.com

Agent for the Intervener,
Council of Yukon First Nations

Ratcliff LLP
500 - 221 West Esplanade
North Vancouver, BC V7M 3J3

Kate Blomfield
Jeffrey Nicholls
Grace Hermansen
Tel: (604) 988-5201
Fax: (604) 988-1452
Email: kblomfield@ratcliff.com

Counsel for the Intervener,
Teslin Tlingit Council

Champ and Associates
43 Florence Street
Ottawa, ON K2P 0W6

Bijon Roy
Tel: (613) 237-4740
Fax**:** (613) 232-2680
Email: broy@champlaw.ca

Agent for the Intervener,
Teslin Tlingit Council

Blake, Cassels & Graydon LLP
595 Burrard Street, P.O. Box 49314
Suite 2600, Three Bentall Centre
Vancouver, BC V7X 1L3

Roy W. Millen
Joshua Hutchinson
Alison Burns
Tel: (604) 631-4220
Fax: (604) 631-3309
Email: roy.millen@blakes.com

Counsel for the Intervener,
British Columbia Treaty Commission

Pape Salter Teillet LLP
546 Euclid Avenue
Toronto, ON M6G 2T2

Jason T. Madden
Alexander Winterburn
Alexander DeParde
Tel: (416) 916-3853
Fax: (416) 916-3726
Email: jmadden@pstlaw.ca

Counsel for the Intervener,
Métis Nation of Ontario
and Métis Nation of Alberta

Paliare Roland Rosenberg Rothstein LLP
155 Wellington Street West
35th Floor
Toronto, ON M5V 3H1

Andrew Lokan
Tel: (416) 646-4324
Fax: (416) 646-4301
Email: andrew.lokan@paliareroland.com

Counsel for the Intervener,
Congress of Aboriginal Peoples

Gowling WLG (Canada) LLP
2600-160 Elgin Street
Ottawa, ON K1P 1C3

Matthew Estabrooks
Tel: (613) 786-0211
Fax**:** (613) 788-3573
Email: matthew.estabrooks@gowlingwlg.com

Agent for the Intervener,
Métis Nation of Ontario
and Métis Nation of Alberta

Dentons Canada LLP
99 Bank Street
Suite 1420
Ottawa, ON K1P 1H4

David R. Elliott
Tel: (613) 783-9699
Fax: (613) 783-9690
Email: david.elliott@dentons.com

Agent for the Intervener,
Congress of Aboriginal Peoples

Université de Moncton
Pavillon Léopold-Taillon
18, avenue Antonine-Maillet
Moncton, New Brunswick
E1A 3E9

Bruno Gélinas-Faucher
Tel: (438) 530-7144
Fax: (506) 858-4534
Email: bruno.gelinas-faucher@umoncton.ca

Counsel for the Intervener,
Pan-Canadian Forum on Indigenous Rights and the Constitution

McCarthy Tétrault LLP
Suite 5300, TD Bank Tower
Toronto, ON M5K 1E6

Bryn Gray
Jesse Hartery
Tel: (416) 362-1812
Fax: (416) 868-0673
Email: begray@mccarthy.ca

Counsel for the Intervener,
Canadian Constitution Foundation

MacKenzie Fujisawa LLP
1600 - 1095 West Pender Street
Vancouver, BC V6E 2M6

Ian Knapp
Tel: (604) 443-1203
Fax: (604) 685-6494
Email: iknapp@macfuj.com

Counsel for the Intervener,
Band Members Alliance and
Advocacy Association of Canada

Supreme Advocay LLP
100- 340 Gilmour Street
Ottawa, ON K2P 0R3

Marie-France Major
Tel: (613) 695-8855
Fax: (613) 695-8580
Email: mfmajor@supremeadvocacy.ca

Agent for the Intervener,
Band Members Alliance and
Advocay Association of Canada

Bruce J. Slusar Law Office
Suite 200-316 6th Avenue North
Saskatoon, Saskatchewan
S7K 2S5

Bruce J. Slusar
Tel: (306) 931-3737
Fax: (306) 931-6741
Email: slusar@shaw.ca

Counsel for the Intervener, Federation of Sovereign Indigenous Nations

Power Law
99 Bank Street, Suite 701
Ottawa, ON K1P 6B9

Jonathan Laxer
Tel: (613) 907-5652
Fax: (613) 907-5652
Email: jlaxer@powerlaw.ca

Agent for the Intervener, Federation of Sovereign Indigenous Nations

TABLE OF CONTENTS

PART I - OVERVIEW AND STATEMENT OF FACTS

A. Overview

1. Reconciliation is furthered by ensuring that the different parts of Canada's constitutional "fabric" fit together, including Indigenous law-making and the rights and freedoms guaranteed by the *Charter*. To advance reconciliation, the *Charter* must be interpreted and applied both purposively and flexibly.

2. This case raises two significant issues of *Charter* interpretation and application in the context of Indigenous governance: the *Charter's* application under s.32(1) to Indigenous governing bodies,[1] and the scope of the protection that s.25 affords in relation to the collective rights and freedoms of the aboriginal peoples of Canada. The Court's guidance is required in relation to these issues, both for future courts and to support the negotiation and implementation of current and future treaties and self-government agreements with Indigenous peoples.

3. This Court's purposive and inclusive approach to s.32(1) confirms that the *Charter* applies to all "governments" within Canada's constitutional framework, including Indigenous governing bodies. This is so whether a governing body's source of authority is an aboriginal right, a treaty right, a self-government agreement, federal or provincial legislation, or some combination of these. The proper focus of the inquiry is whether the body exercises quintessentially governmental functions.

4. A purposive and flexible approach to s.25 should be adopted: one that is capable of broad application. Relying on the "shield approach" endorsed by the minority in *R v Kapp*, the lower courts failed to engage in a contextually-informed interpretive exercise to determine whether there was a "true conflict" between the rights at stake that could not be reconciled. The Attorney General of Canada (Canada) proposes a framework for the interpretation and application of s.25, drawing on this Court's general approach to the reconciliation of conflicting rights. Under this framework, if the rights cannot be reconciled, the scope of the protection afforded by s.25 is

[1] The term "Indigenous governing body" is used in this factum in a generic manner and not in reference to a defined term in any legislation.

understood in terms of the necessity of the impugned exercise of the collective right to the maintenance of the Indigenous group's distinctive culture. If the rights cannot be reconciled, and necessity is established, the interpretation of the individual *Charter* right must be modified (or construed) so as not to "abrogate or derogate" from the implicated collective right or freedom.

B. Summary of Facts

5. This appeal and cross-appeal arise from the appellant Cindy Dickson's s.15 *Charter* challenge to the "Residency Requirement" in the respondent Vuntut Gwitchin First Nation's (VGFN) Constitution mandating that a Chief or Councillor relocate to VGFN Settlement Land within 14 days after their election.[2] Otherwise, Canada takes no position on the facts in this case.

PART II – QUESTIONS IN ISSUE

6. The constitutional questions in this appeal and cross-appeal raise the following issues:

(a) The application of the *Charter* to Indigenous governing bodies; and

(b) The scope of the protection afforded by s.25 to "aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada".

PART III – STATEMENT OF ARGUMENT

A. Section 32 – The *Charter* Applies to Indigenous Governing Bodies

7. Applying this Court's purposive and inclusive approach to the interpretation of s.32(1), the lower courts appropriately rejected the argument that the *Charter* only applies to the entities listed in s.32, finding that the provision is "not an exhaustive list of governments subject to the *Charter*".[3] Similarly, in *Reference re An Act respecting First Nations, Inuit and Metis children,*

---

[2] Reasons for Judgment of the Supreme Court of Yukon, June 8, 2020 [YKSC Reasons] at para 1, **Appellant's Record, Vol 1, Tab 1.1 at pp 1-2**; Reasons for Judgment of the Court of Appeal of Yukon, July 21, 2021 [YKCA Reasons] at paras 3-4, **Appellant's Record, Vol 1, Tab 1.3 at pp 87-88**.

[3] YKCA Reasons at para 84, **Appellant's Record, Vol 1, Tab 1.3 at pp 123-124**. See also YKSC Reasons at para 123, **Appellant's Record, Vol 1, Tab 1.1 at p 40**; *Quebec (Attorney General) v 9147-0732 Quebec inc*, 2020 SCC 32 [*9147-0732 Quebec inc*] at para 12.

youth and families, the Quebec Court of Appeal dismissed the argument that the *Charter* does not apply to Indigenous governing bodies because "they are not directly contemplated in s.32".[4]

8. The scope of the *Charter's* application is set out in s.32(1):

Application of Charter	**Application de la charte**
32 (1) This Charter applies	**32 (1)** La présente charte s'applique :
(a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and	**a)** au Parlement et au gouvernement du Canada, pour tous les domaines relevant du Parlement, y compris ceux qui concernent le territoire du Yukon et les territoires du Nord-Ouest;
(b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.	**b)** à la législature et au gouvernement de chaque province, pour tous les domaines relevant de cette législature.

9. The *Charter's* application to Indigenous governing bodies is a matter of constitutional law,[5] and not a matter determined by way of consent or negotiation, as suggested by the respondent.[6] All parts of the *Charter* must be interpreted in light of the Constitution as a whole. The provisions cannot be read in isolation, but rather must work coherently with other parts of, and respect the internal architecture of, the Constitution of Canada.[7] The inclusion of s.25 in the *Charter*, which expressly provides for the interpretation of rights and freedoms in a way that respects the distinctive cultures of Indigenous groups, supports the *Charter's* application to Indigenous governing bodies. All of these provisions must also be read in light of s.52(1) of the *Constitution Act, 1982*.[8]

---

[4] *Reference re An Act respecting First Nations, Inuit and Metis children, youth and families*, 2022 QCCA 185 at para 527.
[5] *Beckman v Little Salmon/Carmacks First Nation*, 2010 SCC 53 [*Beckman*] at paras 45, 69.
[6] Respondent's factum at paras 3, 38, 62.
[7] *Health Services and Support - Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27 at para 80; *Reference re Secession of Quebec*, [1998] 2 SCR 217 [*Reference re Secession of Quebec*] at para 50; *R v Ferguson*, 2008 SCC 6 at para 63.
[8] Macklem, Patrick, *Indigenous Difference and the Constitution of Canada* (Toronto: University of Toronto Press, 2001) [Macklem] at p 203; Canada, *Report of the Royal Commission on Aboriginal Peoples: Restructuring the Relationship*, vol 2 (Ottawa: Supply and Services Canada, 1996) [RCAP Report] at pp 231-232.

1. A purposive and inclusive approach to *Charter* application fosters reconciliation

10. A purposive and inclusive approach to the *Charter's* application furthers the goal of meaningful reconciliation.[9] Sovereignty in Canada is the shared sovereignty identified by the Royal Commission on Aboriginal Peoples: "a central feature of the three-cornered relations that link Aboriginal governments, provincial governments and the federal government".[10]

11. Canada's constitutional framework includes the *Constitution Act, 1982*, the *Charter*, and modern treaties, which are described by this Court as "constitutional documents"[11] that "play a critical role in fostering reconciliation".[12] This is further reflected in the jurisprudence relating to s.35(1), including this Court's statement that: "The fundamental objective of the modern law of aboriginal and treaty rights is the reconciliation of aboriginal peoples and non-aboriginal peoples and their respective claims, interests and ambitions".[13]

12. This inclusive approach is supported by the *United Nations Declaration on the Rights of Indigenous Peoples* (*UNDRIP*), which refers to the obligations of states – in cooperation with Indigenous peoples – to realize a range of rights, and also recognizes that Indigenous governance is promoted, developed and maintained in accordance with international human rights standards, which are in turn reflected in the *Charter*.[14]

13. The respondent's proposed interpretation, however, is inconsistent with an inclusive approach to *Charter* applicability and, as such, does not advance reconciliation. Rather, it creates an arbitrary distinction between Indigenous governing bodies: those exercising inherent rights of

---

[9] RCAP Report at pp 216, 219; *Reference re Secession of Quebec* at para 50; Macklem at p 202; Watson, Matt, "Reconciling Sovereignities, Reconciling Peoples: Should the Canadian Charter of Rights and Freedoms Apply to Inherent-right Aboriginal Governments?" (2019) 2 Inter Gentes 75 [Watson] at pp 75, 105.
[10] RCAP Report at p 228; *Mitchell v. MNR*, 2001 SCC 33 at para 130 (per Binnie J); YKCA Reasons at para 88, **Appellant's Record, Vol 1, Tab 1.3 at pp 125-126**.
[11] *First Nation of Nacho Nyak Dun v Yukon*, 2017 SCC 58 at para 34.
[12] *Ibid*, at para 1.
[13] *Mikisew Cree First Nations v Canada (Minister of Canadian Heritage)*, 2005 SCC 69 at para 1.
[14] *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 295 (CVII), UN GAOR, 61st Sess, Supp No 49, UN Doc A/61/49 (2007) [*UNDRIP*], article 34. See also: RCAP Report at p 216; *Reference Re Public Service Employee Relations Act (Alta)*, [1987] 1 SCR 313 at para 59 (per Dickson CJ).

self-government under s.35 of the *Constitution Act, 1982* and those otherwise exercising powers to similar effect.[15] Under the respondent's approach, the exercise of an inherent right of self-government would be exempt from *Charter* application. This would be an illogical and incongruous result. The chambers judge properly determined that both an inherent right of self-government and self-government agreements are "parts of Canada's constitutional fabric".[16]

2. *Eldridge* - a flexible approach in the context of Indigenous governance

14. This Court's purposive approach to determining *Charter* applicability, in *Eldridge* and subsequent cases, is sufficiently flexible to allow courts to take into account considerations relevant to the specific governance context, including Indigenous perspectives and the distinct nature of Indigenous governing bodies.

(a) Applying Eldridge – a staged approach

15. The *Charter* may apply to an entity on one of two bases.[17] First, the entity itself may be "government" for the purposes of s.32, "by its very nature or in virtue of the degree of governmental control exercised over it".[18] In that case, the *Charter* applies to all of the entity's actions. Second, a particular activity of an entity may attract *Charter* scrutiny if the activity is truly "governmental" in nature. The entity will only be subject to the *Charter* in respect of that particular activity.[19] These two bases are referred to as the two "branches" of *Eldridge*.

16. As a matter of logic and efficiency, courts should take a staged approach and first engage with the larger question of whether an entity is a "government" under the first branch of *Eldridge* and make a definitive determination. If it is determined that an entity is "government" within the

---

[15] Respondent's factum at para 38.
[16] YKSC Reasons at para 130, **Appellant's Record, Vol 1, Tab 1.1 at p 43**. See also YKCA Reasons at para 93, **Appellant's Record, Vol 1, Tab 1.3 at pp 127-128**; *Sga'nism Sim'augit (Chief Mountain) v Canada (Attorney General)*, 2013 BCCA 49 at paras 99-101, application for leave to appeal dismissed, 2013 CanLII 53406 (SCC).
[17] *Eldridge v British Columbia (Attorney General)*, [1997] 3 SCR 624 [*Eldridge*] at para 44; *Godbout v Longueuil (City)*, [1997] 3 SCR 844 [*Godbout*] at para 47 (per La Forest J); *Greater Vancouver Transportation Authority v Canadian Federation of Students – British Columbia Component*, 2009 SCC 31 [*Greater Vancouver Transport Authority*] at paras 15-16.
[18] *Eldridge* at para 44; *Greater Vancouver Transport Authority* at para 16.
[19] *Ibid*.

meaning of s.32(1), "it is not necessary to enquire into the nature of individual activities, because all its activities are subject to the *Charter*".[20] In applying *Eldridge*, courts must be clear as to which branch applies in a given case.

17. In this case, it is not entirely clear how the Court of Appeal applied *Eldridge*: there was a blurring of the lines between the two branches in the Court's decision. Ultimately, it is unclear under which branch the Court found that the Residency Requirement was subject to *Charter* scrutiny, particularly because its reasons are inconsistent in the application of the two branches.[21] At the outset of its reasons, the Court concluded that the chambers judge's decision was "overbroad" in holding that the *Charter* applies to the VGFN as a "government", and thus it restricted its analysis to the Residency Requirement.[22] Later in its reasons, the Court, however, held that the judge "did not err" in concluding that VGFN was "by its very nature exercising governmental powers within the meaning of s.32".[23] The end result is a lack of clarity in, and therefore a lack of utility arising from, the Court's judgment on the application of the *Charter*.[24]

(b) Indigenous governing bodies as "governments" within the meaning of s.32(1)

18. Applying this Court's reasoning, the *Charter* applies to an Indigenous governing body that exercises quintessentially governmental functions.[25] This Court has made clear that the relevant considerations are not closed: "the factors that might serve to ground a finding that an institution is performing "governmental functions" do not readily admit of any *a priori* elucidation".[26]

---

[20] *Greater Vancouver Transport Authority* at para 24. See also *Godbout* at para 56 (per La Forest J); *Eldridge* at para 44.
[21] YKCA Reasons at paras 74, 83, 97, 98, 162(1), **Appellant's Record, Vol 1, Tab 1.3 at pp 119, 123, 130, 158**.
[22] *Ibid* at para 74, **Appellant's Record, Vol 1, Tab 1.3 at p 119**.
[23] *Ibid* at para 98, **Appellant's Record, Vol 1, Tab 1.3 at p 130**.
[24] Beaton, Ryan, "Doctrine Calling: Inherent Indigenous Jurisdiction in Vuntut Gwitchin", (2022) 31:2 *Const Forum* 39 at pp 48-51.
[25] *Eldridge* at paras 42-44; *Godbout* at paras 47-51 (per La Forest J); *Greater Vancouver Transport Authority* at paras 14-16.
[26] *Godbout* at para 49 (per La Forest J). See also *Eldridge* at para 42.

19. The factors previously relied upon by the courts to support a finding that an entity is "government" provide useful guidance: governing officials' democratic election and accountability to constituents; the power to make, administer and enforce laws within a defined jurisdiction; taxation powers; and the management of programs and services.[27] Notably, in concluding that a First Nation council was a government entity under s.32(1), the Federal Court of Appeal referred to the council's role in managing reserve land, band assets and monies, and its extensive law-making powers and the management of government programs.[28]

20. Relying on *Eldridge*, courts in other cases have found that the *Charter* applies in the context of Indigenous governance. First Nations have been found to be "government" for the purposes of the *Charter* where, for example, they have exercised governmental authority recognized, but not necessarily delegated, under the *Indian Act*[29] or legislation implementing a modern treaty.[30] In each case, the court found that the First Nation government was part of Canada's constitutional framework, in which the *Charter* applies.[31]

21. Importantly, the precise source of an Indigenous governing body's authority – an aboriginal right, a treaty right, a self-government agreement, federal or provincial legislation, or some combination of these – is not relevant to determining whether the body is a "government" under s.32.[32] Rather, the proper focus of the inquiry under s.32(1) is on the body's powers: whether it performs "governmental" functions.[33]

22. The respondent's argument that a connection to or degree of control by Parliament or a legislature is required for the *Charter* to apply to an Indigenous governing body is misplaced.[34]

---

[27] *Godbout* at para 51 (per La Forest J); *Greater Vancouver Transport Authority* at paras 17-21; *Eldridge* at paras 49-51.
[28] *Taypotat v Taypotat*, 2013 FCA 192 [*Taypotat*] at paras 36-37, rev'd on other grounds, *Kahkewistahaw First Nation v. Taypotat*, [2015] 2 SCR 548.
[29] *Taypotat* at paras 38-39; *Linklater v Thunderchild First Nation*, 2020 FC 1065 at para 32.
[30] *Band (Eeyouch) v Napash*, 2014 QCCQ 10367 at paras 103-106.
[31] *Taypotat* at paras 38-39.
[32] *Reference re Secession of Quebec* at para 72; YKSC Reasons at para 130, **Appellant's Record, Vol 1, Tab 1.1 at pp 42-43**; YKCA Reasons at paras 91, 93, 98, **Appellant's Record, Vol 1, Tab 1.3 at pp 126-128, 130**.
[33] *Godbout* at para 51 (per La Forest J).
[34] Respondent's factum, paras 47-51.

This Court's jurisprudence does not support such a restrictive interpretation. As stated in *Eldridge*, an entity is properly characterized as "government" itself "either by its very nature or in virtue of the degree of control exercised over it".[35] Insofar as *Godbout* refers to municipalities being creations of and deriving their powers from provinces, that is based on the particular fact situation and does not otherwise limit the *Charter's* application.[36] Indeed, in *Godbout*, the La Forest J. minority emphasized the wide ambit of s.32 that "includes all entities that are essentially governmental in nature", not just those that have been delegated.[37]

23. The second branch of *Eldridge* is engaged where the entity itself is not a government. The focus of the analysis is on the nature of the activity: the "quality of the act".[38] Here, the Court of Appeal purported to inquire only into the *Charter's* applicability to the Residency Requirement. This approach, however, is misguided and underscores the Court's flawed interpretation and application of s.32(1). The enactment of a law, such as the Residency Requirement, can only be undertaken by a government exercising its legislative capacity and thus as a government in its own right under the first branch of *Eldridge*.

B. Section 25 – In Need of a Flexible Framework

24. As recognized by a majority of this Court in *Kapp*, the interpretation and application of s.25 raises "complex questions of the utmost importance to the peaceful reconciliation of aboriginal entitlements with the interests of all Canadians".[39] While the majority in *Kapp* determined that it was unnecessary to decide the s.25 issues,[40] the interpretation and application of s.25 are now squarely raised in this appeal and cross-appeal.

---

[35] *Eldridge* at para 44 (emphasis added). See also *Greater Vancouver Transport Authority* at para 16.
[36] *Godbout* at paras 50-51 (per La Forest J).
[37] *Ibid* at para 47.
[38] *Eldridge* at para 44.
[39] *R v Kapp*, 2008 SCC 41 [*Kapp*] at para 65.
[40] *Ibid*.

25. Section 25 of the *Charter* provides that:

Aboriginal rights and freedoms not affected by Charter	**Maintien des droits et libertés des autochtones**
25 The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including	**25** Le fait que la présente charte garantit certains droits et libertés ne porte pas atteinte aux droits ou libertés — ancestraux, issus de traités ou autres — des peuples autochtones du Canada, notamment :
(a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and	**a)** aux droits ou libertés reconnus par la proclamation royale du 7 octobre 1763;
(b) any rights or freedoms that now exist by way of land claims agreements or may be so acquired.	**b)** aux droits ou libertés existants issus d'accords sur des revendications territoriales ou ceux susceptibles d'être ainsi acquis.

26. Canada proposes a s.25 framework that is flexible and capable of application in different contexts. Two threshold questions must be determined to trigger the application of that framework: (i) whether the claimant has established a *prima facie* engagement of a *Charter* right or freedom; and (ii) whether the party relying on s.25 of the *Charter* has established that an aboriginal, treaty or "other right or freedom" is *prima facie* engaged.

27. If the answer to both questions is in the affirmative, then the court should undertake a contextual interpretive exercise to determine whether there is a "true conflict" between the rights at stake that cannot be reconciled through the interpretive exercise. In the context of s.25, where the rights are irreconcilable, the necessity of the particular exercise of the implicated collective right or freedom to the maintenance of the Indigenous group's distinctive culture should be considered.[41] Necessity is key to determining whether there is abrogation or derogation of the implicated collective right or freedom under s.25 such that the interpretation of the *Charter* right

[41] "Implicated collective right or freedom" is used in this factum as short-hand to refer to the "aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada" as set out in s.25 of the *Charter*.

should be modified. This approach is in keeping with this Court's reconciliation of rights in other contexts.

1. Purposive approach – protecting the collective rights and freedoms of aboriginal peoples where the application of the *Charter* protections would diminish the distinctive culture of the Indigenous group

28. A s.25 framework must reflect the purpose of s.25 and its significant role in the reconciliation of the guarantee of individual rights and freedoms of all Canadians with the distinctive collective and cultural identities of Indigenous groups.[42] This is consistent with the recognition of distinctive Indigenous collective and individual rights reflected in *UNDRIP*.[43]

29. The purpose of s.25 is to maintain the distinctive cultures of Indigenous peoples within the larger Canadian society: "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".[44]

30. In accordance with the principles of constitutional interpretation, the interpretation of a *Charter* provision must not "overshoot" its underlying purpose and objective.[45] The scope of protection afforded by s.25 is not absolute and must be "delimited by the purpose it serves".[46] In light of its purpose, as stated above, the protective effect of s.25 will be triggered where the

---

[42] *9147-0732 Quebec inc* at paras 8-13; *Kapp* at para 121 (per Bastarache J); *Beckman* at para 33. See also YKSC Reasons at para 193, **Appellant's Record, Vol 1, Tab 1.1 at p 66**.
[43] *UNDRIP*, particularly article 34.
[44] *Kapp* at para 89 (per Bastarache J). See also *Campbell et al v AG BC/AG Cda & Nisga'a Nation et al*, 2000 BCSC 1123 at para 158; Arbour, Jane M, "The Protection of Aboriginal Rights Within a Human Rights Regime: In Search of an Analytical Framework for Section 25 of the Canadian Charter of Rights and Freedoms" (2003), 21 *SCLR* (2d) 3 [Arbour] at para 180.
[45] *9147-0732 Quebec inc* at para 10; *R v Stillman*, 2019 SCC 40 at paras 21-22, 126.
[46] *Chagnon v SFPQ*, 2018 SCC 39 [*Chagnon*] at para 27; *R v Poulin*, 2019 SCC 47 at paras 54-55. See also Dickson, Timothy, "Section 25 and Intercultural Judgment" (2003), 61:2 *Univ Tor Fac Law Rev* 141 [Dickson] at pp 152-153; Isaac, Thomas, "Canadian Charter of Rights and Freedoms: The Challenge of the Individual and Collective Rights of Aboriginal People" (2002), 21 *Windsor YB Access Just* 431 [Isaac] at p 432.

application of individual *Charter* rights or freedoms would diminish the distinctive, collective and cultural identity of an Indigenous group. It is of necessity a highly contextual exercise.[47]

2. Doing the work that section 25 requires – looking past the label

31. The fundamental error in the lower courts' decisions is their reliance on the "shield approach" as articulated in the *Kapp* minority reasons. Seizing on the concept of a "shield", the courts asked the wrong question: "whether the residency requirement ….is shielded by s.25".[48] This is a faulty starting premise that unduly coloured the courts' approach: the "protective" function of s.25 was assumed, without undertaking the appropriate contextually-informed interpretive exercise.

32. Jane Arbour aptly stated in her 2003 article that "assigning a label to section 25 without more is essentially a sterile exercise"[49] and results in limiting the discussion and obscuring the analysis.[50] In particular, she predicted that a "true shield would block, in courts of law, a dialogue on the competing and, at times, conflicting interests".[51] This is precisely what occurred in this case. The chambers judge erroneously reasoned that an interpretive exercise would divert the proper "focus of shielding a right or freedom to requiring the First Nation to establish that it involves a 'distinctive' aboriginal culture, practice or tradition".[52] Similarly, the Court of Appeal was preoccupied with the label, preferring the characterization of s.25 as a "shield" because otherwise "the promise of self-government would surely 'ring hollow'".[53]

---

[47] *R v Fitzpatrick*, [1995] 4 SCR 154 at paras 25, 30.
[48] YKSC Reasons at para 172, **Appellant's Record, Vol 1, Tab 1.1 at p 60**. See also YKCA Reasons at p 60, **Appellant's Record, Vol 1, Tab 1.3 at p 140**.
[49] Arbour at para 220.
[50] *Ibid* at para 31.
[51] *Ibid* at para 26. See also para 128.
[52] YKSC Reasons at para 203, **Appellant's Record, Vol 1, Tab 1.1 at p 69**.
[53] YKCA Reasons at para 148, **Appellant's Record, Vol 1, Tab 1.3 at p 154**.

33. Ultimately, where s.25 is invoked, the end result may be the protection or primacy of the implicated collective right or freedom, if the rights at stake are irreconcilable,[54] but courts cannot reach that conclusion without first undertaking a proper interpretive exercise. An absolutist approach to s.25 and its application is inconsistent with this Court's flexible, non-hierarchical approach to *Charter* rights.[55] It is also difficult to reconcile with the fact that s.35 rights, which are among the rights that s.25 seeks to protect, are themselves subject to justifiable infringement by ordinary legislation.[56] A non-absolutist approach is further supported by *UNDRIP* which confirms that rights referred to therein are subject to "limitations", to ensure respect for human rights.[57]

3. Moving beyond the minority "shield approach" in *Kapp*

34. The "shield approach" grounded in the minority opinion in *Kapp* is flawed and should not be adopted by this Court as the way forward. That opinion, with respect, suffers from critical internal inconsistencies and blind spots that do not advance a workable framework.

35. First, the *Kapp* minority recognized the "need for purposeful interpretations"[58] but then failed to engage in the requisite purposive analysis. While the underlying purpose of s.25 was properly articulated (as set out in paragraph 29 above), it did not address when giving effect to a *Charter* right or freedom would actually diminish the Indigneous group's distinctive culture such that it amounts to abrogation or derogation under s.25.

36. Second, it was acknowledged that: "The framework of reconciliation is consistent with the need for flexibility in the application of s.25".[59] But an interpretation of s.25 as a "trump" or

---

[54] Arbour at para 184; Swiffen, Amy, "Constitutional Reconciliation and the *Canadian Charter of Rights and Freedoms*" (2019), 24:1 *Rev Const Stud* 85 [Swiffen, "Constitutional Reconciliation"] at p 99; Hutchinson, Celeste, "Case Comment on *R v Kapp*: An Analytical Framework for Section 25 of the Charter" (2007), 52 *McGill LJ* 173 [Hutchinson] at p 185.
[55] *Reference re Same-Sex Marriage*, 2004 SCC 79 [*Reference re Same-Sex Marriage*] at para 50; *Dagenais v Canadian Broadcasting Corp*, [1994] 3 SCR 835 at p 877; Isaac at p 453.
[56] *R v Sparrow*, [1990] 1 SCR 1075 at pp 1109, 1113-1120; *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 at para 152.
[57] *UNDRIP*, articles 34, 46.
[58] *Kapp* at para 82 (per Bastarache J).
[59] *Ibid* at para 99.

"shield" is inflexible to the point of being blunt.[60] Notably, it was recognized that the "shield approach" may not be a good fit in all contexts, specifically a potential *Charter* challenge made by a member of an Indigenous group (as in this case): "It is not at all obvious in my view that it is necessary to constrain the individual rights of Aboriginals in order to recognize collective rights under s.25".[61] But the "shield approach" adopted by the *Kapp* minority amounts to an "either/or" exercise that oversimplifies the discussion about the interaction of collective and individual rights.[62] It is not conducive to advancing reconciliation. Indeed, a "shield approach" to s.25, which would automatically protect collective rights at the expense of individual rights, is inconsistent with international human rights standards, including those reflected in *UNDRIP*.[63]

37. Finally, despite acknowledging that there must be a "real"[64] or "true"[65] conflict between the rights at issue under s.25, the *Kapp* minority opinion provides no guidance or direction regarding the basis for finding such a conflict. Indeed, the application of s.25 in that opinion only consisted of a categorical statement that: "The right to equality afforded to every individual under s.15 is not capable of application consistently with the rights of aboriginal fishers holding licences under the *Pilot Sales Program*. There is real conflict".[66]

38. In adopting the "shield approach" in this case, the lower courts also failed to engage in an analysis of the conflict between the rights at issue. The Court of Appeal simply stated that, "Where a conflict is encountered, the language of s.25 is clear: derogation from the Aboriginal right is not permitted".[67] While the Court of Appeal refers to the chambers judge's finding of a "true conflict",[68] a close reading of his reasons reveals no conflict analysis, nor even mention of conflict.

---

[60] Arbour at para 128. See also Isaac at p 453.
[61] *Kapp* at para 99 (per Bastarache J).
[62] Isaac at p 453. See also Arbour at para 222.
[63] *UNDRIP*, articles 34 and 46.
[64] *Kapp* at para 108 (per Bastarache J).
[65] *Ibid* at para 111.
[66] *Ibid* at para 122.
[67] YKCA Reasons at para 148, **Appellant's Record, Vol 1, Tab 1.3 at p 154**.
[68] *Ibid* at para 144, **Appellant's Record, Vol 1, Tab 1.3 at p 152.**

4. Proposed analytical framework – a flexible exercise capable of broad application

39. A flexible analytical framework that is capable of broad application is required to usefully guide courts in the interpretation and application of s.25 in different contexts. The distinct circumstances in *Kapp* and this case highlight that s.25 may be invoked in various scenarios. For example, those differences may relate to the identity of the claimant (Indigenous or non-Indigenous), the party seeking to rely on s.25 as a defence against an alleged *Charter* breach (federal, provincial or territorial government or an Indigenous governing body), the nature of the individual *Charter* right or freedom (to date the jurisprudence has been restricted to s.15 claims), and the nature of the implicated collective right or freedom.

(a) Threshold issues – proving prima facie engagement of the Charter right and s.25

40. Two threshold issues must be considered under the proposed s.25 framework before undertaking a contextual interpretive exercise. This threshold approach is consistent with this Court's approach to identifying and resolving conflicts between *Charter* rights.[69]

41. First, the claimant must establish that a *Charter* right or freedom is *prima facie* engaged. For instance, where the claimant alleges a s.15 breach, the claimant must meet the first part of the s.15(1) test by showing that there is a distinction based on an enumerated or analogous ground.[70] There is no need for the claimant to establish an actual breach of the right or freedom at this stage.

42. The second threshold issue concerns the *prima facie* engagement of s.25. The focus of this threshold question should be on the implicated collective right or freedom itself; not on the particular exercise of that right or freedom (the Residency Requirement in this case), as suggested by the appellant.[71]

43. Where the party relying on s.25 establishes that the aboriginal or treaty right at stake has been recognized and affirmed by s.35 of the *Constitution Act, 1982*, s.25 is *prima facie* engaged.

---

[69] *R v NS*, 2012 SCC 72 [*R v NS*] at paras 7, 30, 32, citing the *Dagenais/Mentuck* framework.
[70] *Kahkewistahaw First Nation v Taypotat*, 2015 SCC 30 at para 19; *Fraser v Canada (Attorney General)*, 2020 SCC 28 at para 27; *Alberta (Aboriginal Affairs and Northern Development) v Cunningham*, 2011 SCC 37 [*Cunningham*] at para 43.
[71] Appellant's factum at paras 69-91.

Where the collective right or freedom being relied on is not an aboriginal or treaty right, the court must determine whether it is an "other right or freedom that pertains to the aboriginal peoples of Canada" within the meaning of s.25.

(i) Other right or freedom should be of "constitutional character"

44. To engage s.25, the "other right or freedom" relied upon should be of a "constitutional character", as suggested by the *Kapp* majority in *obiter*.[72] This "constitutional character" requirement is appropriate given that the aboriginal and treaty rights specifically enumerated in s.25 are clearly of a "constitutional character" because they have constitutional status under s.35.

45. The appellant, however, erroneously equates "constitutional character" with constitutional status.[73] The text and context of s.25 does not support that restrictive interpretation. Had the intention been to limit the protection afforded by s.25 to those rights and freedoms that have constitutional status, the provision would presumably have referred to a right or freeedom guaranteed by the Constitution of Canada, as was done in s.29 of the *Charter*. Furthermore, in *obiter* in *Corbiere*, L'Heureux-Dubé, J. suggested that the scope of s.25 was likely greater than s.35.[74]

46. If s.25 is *prima facie* engaged, the next stage in the proposed framework is a contextual interpretive exercise. However, if a court determines that the party relying on s.25 failed to establish *prima facie* engagement of s.25 then the *Charter* claim will be considered through application of the traditional *Charter* analysis, outside the s.25 framework. In such a case, the claimant would have to establish a *Charter* breach and the government would have the opportunity to justify any breach under s.1.

---

[72] *Kapp* at para 63.
[73] Appellant's factum at para 75.
[74] *Corbiere v Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203 [*Corbiere*] at para 52 (per L'Heureux-Dubé J).

(b) Contextual interpretive exercise

47. At this stage, a court must attempt to reconcile the rights through a contextual interpretive exercise that "will preserve both rights".[75] As this Court has stated, a "true conflict" between rights only arises where the rights cannot be reconciled.[76] This interpretive exercise must examine the rights at stake in context, with close attention to the facts,[77] as informed by the distinctive Indigenous culture at issue and Indigenous perspectives.[78]

48. If, after examining the rights in context, a court determines there is no way to accommodate both rights and avoid the conflict, the analysis under the proposed framework moves to consideration of the necessity of the exercise of the implicated collective right or freedom to the maintenance of the Indigenous group's distinctive culture, As such, necessity informs the assessment of abrogation or derogation in s.25.[79] Absent abrogation or derogation of the implicated collective right or freedom there will be no need to modify (or construe differently) the interpretation of the individual *Charter* right within the context of the case.

(i) Necessary to the maintenance of the Indigenous group's distinctive culture

49. The scope of the protection afforded by s.25 is appropriately understood in terms of the necessity of the impugned exercise of the collective right to the maintenance of the Indigenous group's distinctive culture. "Necessity" is a flexible concept capable of application according to the specific circumstances of each case. It has recently been articulated by this Court as "a close and direct connection".[80]

50. Indigenous perspectives are a key contextual consideration in assessing the "necessity" of the exercise of the implicated collective right or freedom and its connection to maintaining the

---

[75] *R v NS* at para 32.
[76] *Ibid* at paras 30-33; *Multani v Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6 at para 28.
[77] *Mills v The Queen*, [1986] 1 SCR 863 at paras 63-65; *Reference re Same-Sex Marriage* at paras 50-52; *MacKay v Manitoba*, [1989] 2 SCR 357 at pp 361-362.
[78] RCAP Report at pp 219-220; Dickson at p 169. See also *Corbiere* at paras 54 and 67 (per L'Heureux-Dubé J).
[79] *Chagnon* at para 46.
[80] *Ibid* at paras 29, 33, 41, 43.

Indigenous group's distinctive culture. This reflects the fact that s.25 is intended to give protection to those rights or freedoms that belong to "aboriginal peoples as aboriginal peoples".[81] In terms of the nature of the *Charter* challenge, a relevant consideration may be whether the challenge is brought by a member of the Indigenous group (as in this case) or by a non-member (as in *Kapp*).[82]

51. Applying a necessity test is consistent with this Court's approach to determining the proper scope of protections in other contexts: (a) Parliamentary privilege;[83] (b) s.15(2) of the *Charter*;[84] and (c) s.93 denominational schools.[85]

(a) The necessity test has been applied to Parliamentary privilege to ensure that the privilege does not "unjustifiably trump other parts of the Constitution", including the *Charter*.[86] This Court has held that the scope of the inherent privilege is "only as broad as is necessary for the proper functioning of our constitutional democracy" (emphasis added).[87]

(b) The focus on necessity is also in keeping with this Court's approach to the scope of s.15(2) protection.[88] In *Cunningham*, it was determined that s.15(2) "protects all

---

[81] *Batchewana Indian Band (Non-resident members) v Batchewana Indian Band*, [1997] 1 FC 689 (FCA) at p 136; with no comment on this point on appeal: *Corbiere*.
[82] *Kapp* at para 99 (per Bastarache J); Swiffen, Amy, "Dickson v Vuntut Gwitchin First Nation, Section 25 and a Plurinational Charter" (2022) 31:2 *Const Forum* 27 at pp 30-36; Swiffen, "Constitutional Reconciliation" at pp 103-106; Arbour at paras 215-218.
[83] *Chagnon* at paras 2, 25, 27-30, 41, 42, 44, 45, 56; *Canada (House of Commons) v Vaid*, 2005 SCC 30 [*Vaid*] at paras 4, 5, 13, 40, 41, 74.
[84] *Cunningham* at paras 43-46; *Kapp* at paras 52, 60.
[85] *Ontario Home Builders' Association v. York Region Board of Education*, [1996] 2 SCR 929 [*Ontario Home Builders' Association*] at para 77; *Adler v Ontario*, [1996] 3 SCR 609 [*Adler*] at para 49; *Greater Montreal Protestant School Board v Quebec (AG)*, [1989] 1 SCR 377 [*Greater Montreal Protestant School Board*], pp. 414-416.
[86] *Chagnon* at para 27. See also paras 28, 56; *Vaid* at para 41.
[87] *Chagnon* at para 28.
[88] It has been suggested that "the purpose of section 25 was to supplement and extend explicitly to the aboriginal people of Canada section 15(2) of the *Charter*": *R v Nicholas*, (1989) 91 NBR (2d) 248 (NBQB) at para 10. See also Isaac at p 445.

distinctions drawn on enumerated or analogous grounds that 'serve and are necessary' to the ameliorative purpose" (emphasis added).[89]

(c) The scope of protection afforded to s.93 denominational school rights has also been determined with reference to "the protection…necessary to maintain the denominational character of schools" (emphasis added).[90]

52. The necessity test is equally apposite in the interpretation and application of s.25, given the potential to give primacy to collective rights or freedoms over individual *Charter* rights in the event of conflict. Not every exercise of a collective right or freedom can be said to be "necessary" to the maintenance of an Indigenous group's distinctive culture.

53. Addressing Canada's proposal that necessity is a relevant consideration in reconciling conflicting rights under s.25, the chambers judge questioned its appropriateness, stating that it unfairly places the "onus" on the First Nation to "establish that it involves a 'distinctive' aboriginal, culture, practice or tradition".[91] However, in light of this Court's consistent approach to reconciling rights purposively, it would be incongruous to read s.25 as absolving the party invoking its protection of the requirement to demonstrate the "necessity" of the exercise of the collective right when enaged in the interpretive exercise.[92]

(ii) Modification of the interpretation of the Charter right

54. If necessity is established under the s.25 framework, the interpretation of the individual *Charter* right must be modified (or construed) so as not to "abrogate or derogate" from the implicated collective right or freedom. Practically speaking, the result is the "primacy" of the collective right, though the interpretation of the individual *Charter* right should only be modified, in the particular circumstances, to the extent required to avoid undermining the

---

[89] *Cunningham* at para 45. See also *Kapp* at para 52.
[90] *Greater Montreal Protestant School Board* at p 416. See also *Adler* at para 49; *Ontario Home Builders' Association* at para 77; *Reference re Bill 30, An Act to Amend the Education Act (Ont),* [1987] 1 SCR 1148 at pp 1197-1198.
[91] YKSC Reasons at paras 202-203, **Appellant's Record, Vol 1, Tab 1.1 at p 69**.
[92] *Chagnon* at para 32.

distinctive culture of the Indigenous group. In contrast, under the "shield approach" the protection or primacy of the collective implicated right or freedom is unlimited.

5. Order of analysis matters

55. Guidance is required from the Court concerning the relationship between s.25 and s.1 of the *Charter* in light of the contradictory and divergent approaches in the case law and the academic literature.[93] The Court of Appeal was reluctant "to pronounce any general rule that a court must or must not consider the applicability of s.25 until it has carried out a full analysis of the *Charter* right in question".[94] However, the order of analysis matters and is precisely the type of issue that requires certainty and clarity: it cannot be left to a case-by-case approach. While the s.25 framework must be flexible, there should be consistency in judicial approaches. The order of analysis is a fundamental question that directly impacts how the s.25 framework functions.

56. Under Canada's proposed approach, s.25 can provide a complete framework to address a *Charter* challenge, including a contextual analysis of the conflicting rights at issue. The proposed framework, including the necessity test, performs the work or function required to determine whether there is abrogation or derogation for purposes of s.25 and, as such, there is no need to resort to s.1 in such cases.

57. If, however, s.25 is not *prima facie* engaged as a threshold issue, or the contextual interpretive exercise reveals either no "true conflict" or no abrogation or derogation of a collective right or freedom, then a full *Charter* analysis, including justification under s.1, is appropriate. Similarly, if the s.25 analysis is completed and does not fully resolve the issue, s.1 remains available. For example, applying the proposed framework in this case, if the Residency Requirement is considered necessary to the maintenance of the Indigenous group's distinctive

---

[93] *Kapp* at paras 109-110 (per Bastarache J); YKSC Reasons at para 176, **Appellant's Record, Vol 1, Tab 1.1 at pp 60-61**; YKCA Reasons at paras 150-153, 162(4), **Appellant's Record, Vol 1, Tab 1.3 at pp 155-156, 159**; Arbour at paras 131-132, 199-202; Isaac at p 439; Hutchinson at p 182; Watson at pp 105-110.

[94] YKCA Reasons at para 151, **Appellant's Record, Vol 1, Tab 1.3 at p 155**.

culture, except for the 14 day relocation requirement, that particular requirement could be otherwise considered under the *Charter*.

58. This is consistent with this Court's approach under s.15(2). If a court determines that s.15(2) "does not protect the impugned distinction, the analysis returns to s.15(1)",[95] and if discrimination is then established, the *Charter* infringement could still be justified under s.1.[96] As such, an Indigenous governing body could, like any other government in Canada, rely on s.1 of the *Charter* to justify any measures otherwise found to have infringed a *Charter* right.

PART IV – SUBMISSIONS ON COSTS

59. Canada does not seek costs and submits that no costs should be awarded against him.

PART V – NATURE OF ORDER SOUGHT

60. Canada submits that the appeal and cross-appeal should be determined based on the foregoing principles.

ALL OF WHICH IS RESPECTFULLY SUBMITTED
Dated at Ottawa, Ontario this 17th day of October 2022.

_____

Anne M. Turley
Marlaine Anderson-Lindsay

Counsel for the Intervener Attorney General of Canada

[95] *Cunningham* at para 47.
[96] *Ibid* at para 48.

PART VI - TABLE OF AUTHORITIES

Cases		Paragraph Cited
1.	*Adler v Ontario*, [1996] 3 SCR 609	51
2.	*Alberta (Aboriginal Affairs and Northern Development) v Cunningham*, 2011 SCC 37	41, 51, 58
3.	*Band (Eeyouch) v Napash*, 2014 QCCQ 10367	20
4.	*Batchewana Indian Band (Non-resident members) v Batchewana Indian Band,* [1997] 1 FC 689	50
5.	*Beckman v Little Salmon/Carmacks First Nation*, 2010 SCC 53	9, 28
6.	*Campbell et al v AG BC/AG Cda & Nisga'a Nation et al*, 2000 BCSC 1123	29
7.	*Canada (House of Commons) v Vaid*, 2005 SCC 30	51
8.	*Chagnon v SFPQ*, 2018 SCC 39	30, 48, 49, 51, 53
9.	*Corbiere v Canada (Minister of Indian and Northern Affairs),* [1999] 2 SCR 203	45, 47, 50
10.	*Dagenais v Canadian Broadcasting Corp*, [1994] 3 SCR 835	33
11.	*Eldridge v British Columbia (Attorney General),* [1997] 3 SCR 624	14, 15, 16, 17, 18, 19, 20, 22, 23
12.	*First Nation of Nacho Nyak Dun v Yukon*, 2017 SCC 58	11
13.	*Fraser v Canada (Attorney General),* 2020 SCC 28	41
14.	*Godbout v Longueuil (City),* [1997] 3 SCR 844	15, 16, 18, 19, 21, 22
15.	*Greater Montreal Protestant School Board v Quebec (AG)*, [1989] 1 SCR 377	51
16.	*Greater Vancouver Transportation Authority v Canadian Federation of Students – British Columbia Component,* 2009 SCC 31	15, 16, 18, 19, 22

Cases		Paragraph Cited
17.	*Health Services and Support - Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27	9
18.	*Kahkewistahaw First Nation v Taypotat*, 2015 SCC 30	41
19.	*Linklater v Thunderchild First Nation*, 2020 FC 1065	20
20.	*MacKay v Manitoba*, [1989] 2 SCR 357	47
21.	*Mikisew Cree First Nations v Canada (Minister of Canadian Heritage),* 2005 SCC 69	11
22.	*Mills v The Queen*, [1986] 1 SCR 863	47
23.	*Mitchell v MNR*, 2001 SCC 33	10
24.	*Multani v Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6.	47
25.	*Ontario Home Builders' Association v York Region Board of Education*, [1996] 2 SCR 929	51
26.	*Quebec (Attorney General) v 9147-0732 Quebec inc*, 2020 SCC 32	7, 28, 30
27.	*R v Ferguson*, 2008 SCC 6	9
28.	*R v Fitzpatrick*, [1995] 4 SCR 154	30
29.	*R v Kapp*, 2008 SCC 41	4, 24, 28, 29, 31, 34, 35, 36, 37, 39, 44, 50, 51, 55
30.	*R v Nicholas*, (1989) 91 NBR (2d) 248 (NBQB)	51
31.	*R v NS,* 2012 SCC 72	40, 47
32.	*R v Poulin*, 2019 SCC 47	30
33.	*R v Sparrow,* [1990] 1 SCR 1075	33
34.	*R v Stillman*, 2019 SCC 40	30

Cases		Paragraph Cited
35.	*Reference re An Act respecting First Nations, Inuit and Metis children, youth and families*, 2022 QCCA 185	7
36.	*Reference re Bill 30, An Act to Amend the Education Act (Ont),* [1987] 1 SCR 1148	51
37.	*Reference Re Public Service Employee Relations Act (Alta)*, [1987] 1 SCR 313	12
38.	*Reference re Same-Sex Marriage*, 2004 SCC 79	33, 47
39.	*Reference re Secession of Quebec*, [1998] 2 SCR 217	9, 10, 21
40.	*Sga'nism Sim'augit (Chief Mountain) v Canada (Attorney General)*, 2013 BCCA 49	13
41.	*Taypotat v Taypotat*, 2013 FCA 192	19, 20
42.	*Tsilhqot'in Nation v British Columbia*, 2014 SCC 44	33

Secondary Sources		Paragraph Cited
43.	Arbour, Jane M "The Protection of Aboriginal Rights Within a Human Rights Regime: In Search of an Analytical Framework for Section 25 of the Canadian Charter of Rights and Freedoms" (2003), 21 *SCLR* (2d) 3	29, 32, 33, 36, 50, 55
44.	Beaton, Ryan, "Doctrine Calling: Inherent Indigenous Jurisdiction in Vuntut Gwitchin", (2022) 31:2 *Const Forum* 39	17
45.	Canada, *Report of the Royal Commission on Aboriginal Peoples: Restructuring the Relationship*, vol 2, (Ottawa: Supply and Services Canada, 1996)	9, 10, 12, 47
46.	Dickson, Timothy "Section 25 and Intercultural Judgment" (2003), 61:2 *Univ Tor Fac Law Rev* 141	30, 47
47.	Hutchinson, Celeste, "Case Comment on *R v Kapp*: An Analytical Framework for Section 25 of the *Charter*" (2007), 52 *McGill LJ* 173	33, 55

Secondary Sources		**Paragraph Cited**
48.	Isaac, Thomas, "Canadian Charter of Rights and Freedoms: The Challenge of the Individual and Collective Rights of Aboriginal People" (2002), 21 *Windsor YB Access Just* 431	30, 33, 36, 51, 55
49.	Macklem, Patrick, *Indigenous Difference and the Constitution of Canada* (Toronto: University of Toronto Press, 2001)	9, 10
50.	Swiffen, Amy, "Constitutional Reconciliation and the Canadian Charter of Rights and Freedoms" (2019), 24:1 *Rev Const Stud* 85	33, 50
51.	Swiffen, Amy, "Dickson v Vuntut Gwitchin First Nation, Section 25 and a Plurinational Charter" (2022) 31:2 *Const Forum* 27	50
52.	United Nations *Declaration on the Rights of Indigenous Peoples*, GA Res 295 (CVII), UN GAOR, 61st Sess, Supp No 49, UN Doc A/61/49 (2007)	12, 28, 33, 36
53.	Watson, Matt, "Reconciling Sovereignities, Reconciling Peoples: Should the Canadian Charter of Rights and Freedoms Apply to Inherent-right Aboriginal Governments?" (2019) 2 *Inter Gentes* 75	10, 55

Statutory Provisions			**Paragraph Cited**
54.	*Canadian Charter of Rights and Freedoms*, ss 1, 15, 25, 29, 32	*Charte canadienne des droits et libertés*, ss 1, 15, 25, 29, 32,	1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58
55.	*Constitution Act, 1982* s 35, 52	*Loi constitutionnelle de 1867* ss 35, 52	9, 11, 13, 33, 43, 44, 45
56.	*Constitution Act, 1867* s 93	*Loi constitutionnelle de 1867* s 93	51