SCC Court File No.: 39856

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

BETWEEN:

CINDY DICKSON

APPELLANT
(Appellant)

AND:

VUNTUT GWITCHIN FIRST NATION

RESPONDENT
(Respondent)

AND:

ATTORNEY GENERAL OF CANADA, ATTORNEY GENERAL OF QUEBEC, ATTORNEY GENERAL OF ALBERTA, GOVERNMENT OF YUKON, BRITISH COLUMBIA TREATY COMMISSION, MÉTIS NATION OF ONTARIO AND MÉTIS NATION OF ALBERTA, CARCROSS/TAGISH FIRST NATION, TESLIN TLINGIT COUNCIL, 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, FEDERATION OF SOVEREIGN INDIGENOUS NATIONS

INTERVENERS
(Interveners)

FACTUM OF THE INTERVENER GOVERNMENT OF YUKON

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

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PART I – OVERVIEW OF POSITION AND STATEMENT OF FACTS

OVERVIEW

1. The intervener Government of Yukon ("Yukon") takes the position that the *Charter* applies to the Vuntut Gwitchin First Nation ("VGFN") Residency Requirement. It takes no position on any of the other issues on the appeal and cross-appeal.

2. Whatever the source of VGFN's law-making powers may be, the Residency Requirement enacted by VGFN is a law within the meaning of s. 52(1) of the *Constitution Act, 1982* (*infra*, paras 12-23).

3. Section 32 is not required to make the *Charter* applicable to a law, from whatever source. That work is done by s. 52(1) (*infra*, paras 24-29 and 46-47).

4. The purpose of s. 32(1) is to extend the application of the *Charter* in relation to governments, not limit it (*infra*, paras 42-45).

5. Neither s. 25 nor s. 32(1) of the *Constitution Act, 1982* exclude VGFN laws from the application of the *Charter* (*infra*, paras 30-45 and 48-64).

6. Section 25 should be understood as an interpretive "lens" for *Charter* analysis, rather than as a preclusive "shield" against the application of the *Charter* to a law (*infra*, paras 56-64).

7. A preclusive reading of s. 25 would effectively extend the legislative powers of VGFN by enabling it to enact laws that were inconsistent with the *Charter*, and therefore otherwise beyond VGFN's legislative authority[1] by virtue of s. 52(1) (*infra*, paras 48-64).

8. A reading of s. 25 that extends the legislative powers of VGFN is prohibited by s. 31 (*infra*, paras 48-64).

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1. The terms "legislative authority", "legislative power", and "law-making power" are used interchangeably.

PART II – POSITION ON THE ISSUES ON APPEAL

9. The Notice of Constitutional Questions filed jointly by the appellant and the cross-appellant identifies the following constitutional questions:

1. Does the Canadian Charter of Rights and Freedoms (the "Charter") apply to the Residency Requirement contained in section 2, Article XI of the Vuntut Gwitchin First Nation Constitution (the "Residency Requirement")? [**Cross Appeal**]

2. If so,

   (a) Does the Residency Requirement infringe s. 15(1) of the Charter, and if so, is such infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under s. 1 of the Charter? [**Cross Appeal**]

   (b) Is the Residency Requirement an exercise of an aboriginal, treaty or other right or freedom that pertains to the aboriginal peoples of Canada pursuant to s. 25 of the Charter, and if so, does the Charter's guarantee of rights under s. 15(1) abrogate or derogate from such aboriginal, treaty or other right or freedom? [**Appeal**]

10. Yukon respectfully urges this court to answer the first question in the affirmative.

11. Yukon takes no position on questions 2(a) and 2(b) (paraphrased in the Factum of the cross-appellant as paras. 36(c) and (b), respectively), except to the extent that question 2(b) relates to question 1 (the application of the *Charter* to the Residency Requirement).

PART III – STATEMENT OF ARGUMENT

1. THE RESIDENCY REQUIREMENT IS A LAW

12. Yukon's position is that the Residency Requirement challenged in this litigation is a law within the meaning of s. 52(1)—irrespective of whether it was made in the exercise of a legislative authority delegated to VGFN from Canada, or in the exercise of a legislative power arising out of an inherent right to self-government.

13. In some cases, there may be some doubt as to whether or not the product of a "body or authority" (to use the language of s. 31) should be considered a "law" within the meaning of that term in ss. 1 and 52(1),[2] but neither Ms. Dickson nor VGFN has suggested that there is any dispute on this point here.

14. VGFN does not take issue with the proposition that the Residency Requirement is a law, not only in the ordinary meaning of that term, but also in the context of the VGFN Final Agreement and the VGFN Self-Government Agreement ("SGA"), including the VGFN Constitution. In VGFN's Factum, there are numerous references to VGFN "law" or "laws", as well as to VGFN's "law-making power".[3]

15. It is common ground that if the Residency Requirement were made under a law-making power delegated to VGFN from Parliament, then it would be a "law" in the constitutional sense. VGFN disputes the existence of a delegation, of course, but it does not dispute the legal conclusion that would result if the Residency Requirement were enacted under a delegated authority.

16. Therefore, the only potential objection to a conclusion that the Residency Requirement is a law within the meaning of that term in s. 52(1) is that an exercise of law-making power based on an inherent right of self-government is fundamentally so foreign to, or incompatible with, the Canadian constitutional structure that a law made in the exercise of that right is in some way so "extraconstitutional" as to be beyond the scope of s. 52(1).

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2. *E.g.*, *Greater Vancouver Transportation Authority v Canadian Federation of Students — British Columbia Component*, 2009 SCC 31 at paras 50-56.
3. *E.g.*, VGFN Factum, paras 16 and 20-21. The numerous references in the Final Agreement include ss. 24.1.2 and 24.1.2.1 and, in the SGA, include ss. 1.0, 10.1.5, and Part III.

17. Such an assertion would be at variance with the settled doctrine of the incorporation of Aboriginal rights (including any right of self-government) into the Constitution of Canada by virtue of s. 35(1) of the *Constitution Act, 1982*.

18. The Supreme Court has repeatedly emphasized that s. 35(1) has the dual purpose of: (i) recognizing the legal rights arising out of prior Indigenous occupation; and (ii) providing a constitutional basis for reconciling those rights (including any inherent rights to self-government) with Canadian sovereignty.[4]

19. As VGFN acknowledges in its Factum, "VGFN's pre-existing legal traditions survived, were received into the Canadian common law, and continued as aboriginal rights".[5]

20. For the purpose of *Charter* analysis, common law rules may be considered as "law" and, if inconsistent with the Constitution of Canada, rendered inoperative by s.52(1).[6]

21. Treating the Residency Requirement as the product of some extra-constitutional process—and therefore not a "law" within the meaning of s. 52(1)—is entirely antithetical to the concept of a constitutional structure in which the Aboriginal right of self-government is reconciled with, and incorporated into, the rest of the Canadian constitutional structure through the medium of the common law.

22. In relation to s. 52(1), some academic commentators have suggested that interpretations that "privilege one constitutional provision" (or even an entire section of the Constitution) over others are "suspect".[7]

23. There may be some force in that contention where the provisions in question are of an equivalent character. However, the essential purpose of a constitutional supremacy clause such as s. 52(1) is faithfully reflected in its category label. The raison d'être of a constitutional supremacy

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4. *R v Desautel*, 2021 SCC 17 at para 31; *Mitchell v MNR*, 2001 SCC 33 at paras 9-13.
5. VGFN Factum, para 75, citing *R v Desautel*, 2021 SCC 17 at para 68; *Mitchell v MNR*, at paras 62-64; *Calder v Attorney-General of British Columbia*, [1973] SCR 313 at paras 328 and 402.
6. *R v Swain*, 1991 CanLII 104, [1991] 1 SCR 933 at 977-979.
7. *See* N. Metallic, *Checking our Attachment to the Charter and Respecting Indigenous Legal Orders: A Framework for Charter Application to Indigenous Governments*, (2022) 31:2 Constitutional Forum 3 at 11, Book of Authorities ("BOA"), Tab 3.

clause is to privilege some constitutional provisions over others, some (or all) constitutional provisions over some (or all) other laws, some laws over others, and even some rights over others.[8]

2. RELEVANCE OF S. 32(1)

24. Here and in the courts below, much argument has been directed to the question of whether s. 32(1) of the *Charter* should be read as implicitly applying the *Charter* to the Residency Requirement enacted by the VGFN General Assembly.

25. The Court of Appeal largely accepted the conclusion reached by the Supreme Court of Yukon (and argued for by Ms. Dickson) that the operative principle for implicit inclusion under s. 32(1) was that when the VGFN General Assembly enacted the Residency Requirement it "was, 'by its very nature' exercising 'governmental powers' within the meaning of s. 32(1).[9]

26. For VGFN, the operative principle under s. 32(1) is whether the legislating body is an entity that is controlled by government or that performs truly governmental functions within the authority of the particular legislative body that created it, whether Parliament or a Provincial legislature.[10] VGFN argues vigorously that s. 32(1) does not make the *Charter* applicable to "Indigenous peoples exercising inherent rights to self-government".[11]

(a) Challenge to Law v. Challenge to Actions

27. If the issue in this case were the application of the *Charter* to a VGFN action, activity, or even policy, then these arguments on s. 32(1) would have to be addressed. However, what is challenged in this case is none of these. It is a VGFN *law*. For that reason, Yukon suggests that choosing between the competing arguments on s. 32(1) is not necessary to answer the question of whether the *Charter* applies to the Residency Requirement.

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8. *See R v Albashir*, 2021 SCC 48 at paras 26-33, and the cases cited there.
9. *Dickson v Vuntut Gwitchin First Nation*, 2021 YKCA 5 at para 98.
10. VGFN Factum at paras 48-49.
11. VGFN Factum at para 43.

28. The distinction between a challenge to a law and a challenge to a governmental action runs throughout the case law on s. 32(1), and is reflected in the different remedial options for *Charter* violations: (i) s. 52(1) for unconstitutional laws; and (ii) s. 24(1) for unconstitutional acts.[12]

29. Because the Residency Requirement is a law within the meaning of s. 52(1), the principle of constitutional supremacy set out in that section presumptively applies, and dictates that the Residency Requirement (being a law) is, to the extent it is inconsistent with the provisions of the Constitution of Canada (which includes the *Charter*), of no force or effect.[13]

(b) Yukon's Position

30. Because Yukon sees the application of the *Charter* as stemming from s. 52(1), and not dependent on s. 32(1), Yukon sees the s. 32(1) issue in this case from a different perspective. Yukon would frame the issue not in terms of inclusion, but in terms of exclusion.

31. Yukon's analysis on the applicability of the *Charter* therefore is:

(i) The Residency Requirement is a law within the meaning of that term in s. 52(1);

(ii) Section 52(1) makes the validity of a law dependent on the law being consistent with the Constitution of Canada, which includes the *Charter*;

(iii) Nothing in s. 32(1) excludes the application of s. 52(1) to a law made by the VGFN General Assembly; and

(iv) Nothing in s. 32(1) excludes the application of the *Charter* to a law made by the VGFN General Assembly; therefore

(v) To be a valid law, the Residency Requirement must be consistent with the *Charter* (leaving aside the effect of s. 25 for the moment).

(c) No Exclusion of s. 52(1)

32. Nothing in s. 32(1) excludes the application of s. 52(1) to a law made by the VGFN General Assembly because: (i) s. 32(1) is addressed to the application of the *Charter* and s. 52 is not, of course, part of the *Charter*; and, (ii) no exclusion is otherwise explicitly expressed.

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12. *R v Ferguson*, 2008 SCC 6 at paras 59-60; and see *Greater Vancouver Transportation Authority v Canadian Federation of Students — British Columbia Component*, 2009 SCC 31 at para 50.
13. *Slaight Communications Inc v Davidson*, 1989 CanLII 92, [1989] 1 SCR 1038 at 1078.

(d) No Exclusion of *Charter*

33. Nothing in s. 32(1) excludes—explicitly or implicitly—the application of the *Charter* to the law made by the VGFN General Assembly (the Residency Requirement).

(i) No Explicit Exclusion

34. The structure of s. 32(1) does not explicitly exclude the application of the *Charter* to laws made by bodies other than Parliament or the Provincial/Territorial legislatures. The section does not say, for example, "The Charter applies only to", or use any other explicitly limiting language.

(ii) No Implicit Exclusion

35. The argument for exclusion must therefore rest on an implicit basis, relying on the principle of statutory interpretation sometimes expressed in Latin as the maxim *expressio unius est exclusio alterius*. Applying that maxim, the failure to expressly mention First Nations governments in s. 32(1) indicates an intention to exclude them from the application of the *Charter*.

36. Courts have long viewed expressio unius with some caution, even in the context of the interpretation of ordinary legislation.

> It is often a valuable servant, but a dangerous master to follow in the construction of statutes or documents.[14]

37. This court has been even less enthusiastic about the utility of the principle in interpreting constitutional texts. Justice Wilson's comment in dissent in *Thomson Newspapers* that expressio unius "is ill-suited to meet the needs of *Charter* interpretation" has been echoed in a number of subsequent cases.[15]

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14. *Literary Recreations Limited v Sauve* (1932), 1932 CanLII 364, 58 CCC 385 at 401 (BCCA) [citing *Colquhoun v Brooks* (1888), 21 QBD 52 (CA)].
15. *Thomson Newspapers Ltd v Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, [1990] 1 SCR 425 at 470*; e.g., R v S (RJ)*, [1995] 1 SCR 451 at para 112.

38. This is consistent with a long line of authority on the proper approach to constitutional construction and interpretation.[16]

39. To be sure, starting with *Dolphin Delivery*,[17] there are passages in a number of cases that can fairly be raised to support a reading of s. 32(1) as implicitly restricting the application of the *Charter* to federal or Provincial/Territorial legislatures and the executive branches of their governments. However, these cases were primarily concerned with drawing a line between "government action" and "private activity", distinguishing between the actions of foreign and Canadian governments, or wrestling with the extra-territorial application of the *Charter*.[18]

40. None of these decisions considered the position of a law made by a First Nation government with constitutional status as a law-making body—especially one that did not conclude a self-government agreement until well after 1982.

41. Furthermore, the reasoning in some of the later cases on s. 32(1)—which focus on the nature of the activity under challenge, rather than on the identity of the actor—is consistent with the proposition that some of the more restrictive language in earlier discussions of this issue might perhaps now be taken more as obiter dicta than as ratio decidendi.[19]

(e) Purposive Reading of s. 32(1)

42. The purpose of s. 32(1) is not to limit the reach of the *Charter*, but to broaden the ambit of the *Charter*'s protections in a manner consistent with the *Charter*'s underlying objectives.[20]

43. There would be no need to have s. 32(1) in the Constitution of Canada if its purpose were simply to ensure that laws enacted by Parliament and the Provincial/Territorial legislatures that

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16. *E.g.*, *Hunter v Southam Inc*, [1984] 2 SCR 145 at 155; *Reference Re Prov Electoral Boundaries (Sask.)*, [1991] 2 SCR 158 at 179-181.
17. *RWDSU v Dolphin Delivery Ltd*, [1986] 2 SCR at 598.
18. *McKinney v University of Guelph*, [1990] 3 SCR 229 at 261-262; *Schreiber v Canada (AG)*, [1998] 1 SCR 841 at paras 27, 31; *R v Hape*, 2007 SCC 26 at paras 32, 93-94.
19. *Eldridge v British Columbia (AG)*, [1997] 3 SCR 624 at paras 37-47 [commenting on *McKinney v University of Guelph*, [1990] 3 SCR 229*; Douglas/Kwantlen Faculty Assn v Douglas College*, [1990] 3 SCR 570; and *Lavigne v Ontario Public Service Employees Union*, [1991] 2 SCR 211].
20. *Hunter v Southam Inc*, [1984] 2 SCR 145 at 156.

were inconsistent with the *Charter* were of no force or effect. That work is already done in s. 52(1), which captures "any law that is inconsistent with the Constitution".

44. Indeed, as the Supreme Court of Canada has made clear, the main task of s. 32(1) is to extend the reach of the *Charter* into areas that the supremacy clause in s. 52(1) cannot reach. Because s. 32(1) applies not only to Parliament, the legislatures and the government themselves, but also to all matters within the authority of those entities, its effect is twofold:

(i) It extends the reach of the *Charter* to encompass actions, activities, and policies that might not be considered law within the meaning of s. 52, including the non-legislative actions of Parliament or Provincial/Territorial legislatures; and

(ii) It prevents legislatures and governments from "avoid[ing] the constraints imposed on their activities through the operation of the *Charter* by conferring certain of their powers on other entities and having those entities carry out what are, in reality, governmental activities or policies".[21]

45. There is therefore nothing in the explicit text or underlying purpose of s. 32(1) that would support a reading that it was intended to exclude the application of the *Charter* to a law such as the Residency Requirement.

(f) Legislative v. Non-Legislative Activity

46. Yukon is not suggesting that s. 32(1) deals *only* with the application of the *Charter* to the non-legislative activity of legislatures, governments, and quasi-governmental actors and that s. 52(1) alone deals with the application of the *Charter* to the product of any legislative activity (*i.e.*, a law). An approach that confines s. 32(1) to non-legislative activity alone is likely no longer viable proposition,[22] but this approach is not necessary to Yukon's argument here.

47. In relation to s. 52(1), Yukon is asserting that s. 52(1) deals with the application of the *Charter* to the product of any legislative activity (a law), regardless of the identity of the enacting

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21. *Greater Vancouver Transportation Authority v Canadian Federation of Students — British Columbia Component*, 2009 SCC 31 at paras14-16, 50; *Godbout v Longueuil (City)*, [1997] 3 SCR 844 at paras 47-48.
22. *See*: *Chagnon v Syndicat de la fonction publique et parapublique du Québec*, 2018 SCC 39; *Canada (House of Commons) v Vaid*, 2005 SCC 30; *New Brunswick Broadcasting Co v Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 SCR 319.

legislative body. Whether or not s. 32(1) might also serve to make the *Charter* applicable to that law is not a relevant consideration in the logic of Yukon's argument.

3. SECTION 25 AND SECTION 31

48. Yukon takes no position on the issue of s. 25 beyond rejecting a preclusive reading of the provision. In particular, Yukon takes no position on how s. 25 might impact an analysis of whether the Residency Requirement infringes any *Charter* rights and, if it does, the extent to which an infringement might be justified under s. 1.

49. Yukon's analysis of the proper reading of s. 25 is founded on the operation of s. 31 in the context of a regime of constitutional, rather than parliamentary, sovereignty.

(a) Parliamentary Sovereignty

50. At least since the *Statute of Westminster*,[23] the traditional understanding of parliamentary sovereignty[24] in the Canadian context has been that although the *Constitution Act, 1867* had divided legislative authority for Canada between the federal and Provincial levels of government, the sum total of legislative authority for Canada remained plenary and untrammelled.

51. In Justice Riddell's colourful formulation, a Canadian legislature acting within its jurisdiction could do everything that was not naturally impossible, and was restrained by no rule, human or divine.[25] Therefore, between 1933 and 1982, there was no law that was beyond the combined legislative authority of Parliament and the Provincial/Territorial legislatures.

(b) Constitutional Supremacy

52. In 1982, that changed. As reflected in s. 52(1), a constitutional regime of parliamentary supremacy was replaced with a regime of constitutional supremacy.[26]

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23. *Statute of Westminster, 1931*, 22 Geo 5, c 4.
24. "Parliamentary sovereignty" and parliamentary supremacy" will be used interchangeably.
25. *Florence Mining Co v Cobalt Lake Mining Co*, 18 OLR 275 at 279 (ONHC), BOA Tab 1, quoted with approval in *Authorson v Canada (AG)*, 2003 SCC 39 at para 53. *See also Mikisew Cree First Nation v Canada (Governor General in Council)*, 2018 SCC 40 at para 36.
26. *Vriend v Alberta*, [1998] 1 SCR 493 at para 131.

53. When s. 52(1) is combined with the *Charter*, it is now no longer true that there is no law that is beyond the combined legislative authority of Parliament and the Provincial/Territorial legislatures. Neither Parliament nor any Provincial/Territorial legislature may now enact a law that places a limit on a right guaranteed by the *Charter* unless that law is a reasonable limit on the right, demonstrably justified in a free and democratic society (or, with respect to some *Charter* rights, the notwithstanding clause has been invoked).

54. The operation of s. 52(1) means that a law that is inconsistent with the *Charter* "is invalid from the moment it is enacted",[27] in the same way as a law that is *ultra vires* a legislative body because of the jurisdictional limits set by ss. 91 and 92 of the Constitution Act, 1867 is invalid.

55. Taken together, s. 52(1) and the *Charter* effectively nullify, eliminate, or excise a portion of the previous legislative authority of lawmaking bodies in Canada. Legislative authority in Canada is no longer plenary and untrammelled. It is restricted. There are now, to borrow a term from another context, "no fly" zones, where no law-making body in Canada may go.

(c) Preclusive Reading of s. 25

56. VGFN argued, and the Court of Appeal accepted, that s. 25 is better characterized as a preclusive "shield" than as an interpretive "lens".[28]

57. A necessary corollary of the argument that s. 25 precludes the application of the *Charter* to the Residency Requirement (and to other laws enacted by the VGFN General Assembly) is the proposition that without s. 25 the *Charter* **would** apply to the Residency Requirement (and to other laws enacted by the VGFN General Assembly).

58. It follows that to read s. 25 as precluding the application of the *Charter* to laws enacted by the VGFN General Assembly is to read s. 25 as giving the VGFN General Assembly the power to make laws that it could not otherwise validly make (*i.e.*, in the absence of s. 25) because they would conflict with the *Charter*. With a preclusive s. 25, VGFN has the legislative power to enact laws in the "no fly" zone. Without a preclusive s. 25, it does not.

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27. *Nova Scotia (Workers' Compensation Board) v Martin; Nova Scotia (Workers' Compensation Board) v Laseur*, 2003 SCC 54 at para 28.
28. *Dickson v Vuntut Gwitchin First Nation*, 2021 YKCA 5 at para 143.

59. Put another way, to read s. 25 as preclusive means that s. 25 extends the legislative powers of the VGFN General Assembly beyond what they would be in the absence of s. 25.

(d) Section 31

60. However, that is precisely what s. 31 of the *Constitution Act, 1982* says s. 25 cannot do.

> 31. Nothing in this Charter extends the legislative powers of any body or authority.

61. It is neither accidental nor unimportant that the language of s. 31 is directed to the legislative authority of "any body or authority".

62. According to the testimony of the Rt. Hon. Jean Chrétien (Minister of Justice at the time), those terms were selected expressly so as not to limit the ambit of s. 31 to Parliament and the legislatures of the Provinces and Territories. Then-Minister Chrétien was explicit that the possible emergence of additional centres of legislative power was very much in the contemplation of the drafters when they framed s. 31.

> **Le sénateur Tremblay:** Cependant, lorsqu'une telle délégation se produit, cela ne donne pas de pouvoirs législatifs dans le sens strict aux instances auxquelles on délègue ainsi un pouvoir de délégation.
>
> Si tel est le cas, pourquoi ne pas le dire tout simplement? Comme vous nous l'avez dit, d'ailleurs, la présente charte n'élargit pas les compétences législatives du Parlement et des assemblées législatives. Expliquez-moi donc pourquoi vous employez cette formule vague qui laisse entendre qu'il pourrait peut-être y avoir d'autres organismes législatifs dotés de compétences législatives strictes, dans notre Constitution, que le Parlement et les législatures.
>
> **M. Chrétien:** Monsieur Tremblay, c'est qu'on veut couvrir tous les organismes qui, juridiquement, comme vous le dites, et je le reconnais, ont une autorité déléguée, mais en ayant cette phrase-là cela ne crée aucun doute tandis que c'est, dans notre esprit, en tous cas, une façon d'éviter que quelque personne pourrait prétendre que l'autorité législative qu'elle aurait serait indépendante d'un parlement ou d'une assemblée, et cela élimine toute possibilité d'argumentation.
>
> Vous pourriez le dire, et peut-être que c'est inutile de le faire, dans votre esprit c'est clair, je pense que dans le mien c'est clair aussi, mais en le faisant de cette manière-là, nous sommes sous l'impression que nous bloquons toutes possibilités que des gens prétendent ne pas être couverts parce qu'ils ne sont pas un parlement ou une assemblée législative.
>
> **Le sénateur Tremblay:** …Je reviens donc sur ma suggestion. Les choses clairement dites, c'est qu'il y a deux types d'institutions qui ont des compétences

> législatives dans le sens strict, le Parlement et les assemblées législatives. Nommez-les et la question est réglée.
>
> **M. Chrétien:** Nous avons cette charte qui sera dans la Constitution canadienne pour très, très longtemps et supposons, improbable à ce moment-ci, mais supposons que pour des raisons d'ordre sociologique ou autres, ou d'organisation gouvernementales, ils en venaient à une entente, le gouvernement national et les gouvernements provinciaux, que dans un domaine que je ne vois pas à ce moment-ci on donne une autorité législative constitutionnelle aux municipalités, à ce moment-là 28 [s. 31], tel qu'écrit aujourd'hui est nécessaire.[29]

63. It is certainly true that the initial impetus for s. 31 was concern about the potential for some parts of the *Charter* to be interpreted as the functional equivalents of s. 5 of the 14th Amendment to the U.S. Constitution (the "enforcement clause"), thereby enlarging federal legislative jurisdiction at the expense of Provincial legislatures.[30]

64. However, it is equally clear that the provision, as framed, was intended to be forward-looking as well, contemplating precisely the situation that VGFN and others assert is now before the court in this case—a law made by a "body or authority" whose legislative powers are not delegated from Parliament or a Provincial/Territorial legislature.

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29. *Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada*, 32-1, No 49 (30 January 1981) ("*Special Joint Committee*") at 30-31; *and see* A. Schutten and T. Ewert, *Section 31 and the Charter's unexplored constraints on state power* (2022), 105 Supreme Court Law Review (2d) 1.
30. *Special Joint Committee* at 27; and see P. Hogg, *Constitutional Law of Canada* (5th ed Supp), at 5-27, BOA Tab 2, note 10 and 40-87 to 40-88.

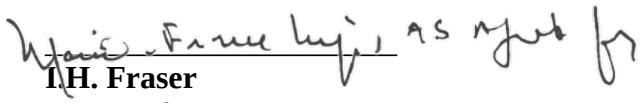
PART IV – SUBMISSIONS CONCERNING COSTS

65. Yukon does not seek costs.

PART V – ORDER SOUGHT

66. Yukon takes no position on the disposition of the appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED October 13, 2022



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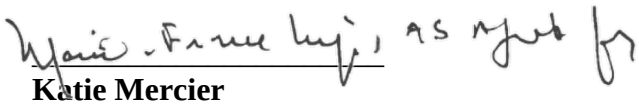

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PART VI – TABLE OF AUTHORITIES

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