SCC File No. 39856

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

BETWEEN:

CINDY DICKSON

APPELLANT
(Respondent on Cross-Appeal)

- and -

VUNTUT GWITCHIN FIRST NATION

RESPONDENT
(Appellant on Cross-Appeal)

- and -

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FACTUM OF THE INTERVENER, ATTORNEY GENERAL OF ALBERTA

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

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PART I – OVERVIEW AND STATEMENT OF FACTS

1. This appeal provides the Court with its first opportunity to fulsomely address the proper interpretation of s. 25 of the *Charter*,[1] including how s. 25 applies within Canada's broader constitutional architecture in the context of a claimed right to Indigenous self-government.

2. The Attorney General of Alberta ("**Alberta**") respectfully submits:

   (a) All entities (both Indigenous and non-Indigenous) which are governmental in nature and exercising a law-making function must comply with the *Charter*;

   (b) Section 25 of the *Charter* must be interpreted in accordance with its purpose, to protect constitutional rights pertaining to the Aboriginal peoples of Canada from abrogation or derogation in situations of conflict with *Charter* rights; and

   (c) Section 25 rights must be defined with precision and specificity, and proven using the existing legal framework for the analysis of Aboriginal and treaty rights.

3. The context of this case, which involves a claim to an inherent right to self-government, provides a clear example of the importance of precision and purposiveness in defining s. 25-protected rights.

4. Alberta takes no position on the outcome of this case. Alberta accepts the facts as set out by the parties and takes no position on any factual dispute raised.

PART II – ISSUES

5. Alberta's submissions focus on the following issues raised in this appeal and cross-appeal: (1) whether an Indigenous government must comply with the *Charter* when enacting laws; and (2) the proper interpretation and scope of s. 25 of the *Charter*.

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[1] *Canadian Charter of Rights and Freedoms,* Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), c 11, s 25 [***Charter***].

PART III – ARGUMENT

A. All governments (Indigenous and non-Indigenous) must comply with the *Charter*

6. A threshold question in this appeal asks whether an Indigenous government such as the Vuntut Gwitchin First Nation ("**VGFN**") has a legal obligation to comply with the *Charter* when exercising its law-making powers for its community of citizens. In Alberta's submission, all entities (Indigenous and non-Indigenous alike) undertaking a governmental role by exercising a law-making power have an obligation to comply with the *Charter*.

7. Indigenous governmental authority can manifest in a variety of ways: through delegated legislative power (such as statutory powers exercised by band councils under the *Indian Act*); through treaties or other agreements; or through an alleged right to self-government protected by s. 35(1) of the *Constitution Act, 1982*.[2] In each of these circumstances, s. 32 of the *Charter* dictates that Indigenous governments must comply with the *Charter* in law-making activities.[3]

8. The same conclusion can also be reached through an examination of the law enacted by an Indigenous government, regardless of the characterization of the Indigenous governing entity itself. Section 52(1) of the *Constitution Act, 1982* is clear that all laws must be consistent with the Constitution.[4] A law passed by an Indigenous government, binding on the persons subject to the authority of that government, is a "law" as described in s. 52(1), and therefore must comply with the Constitution.

9. Put simply, regardless of the source of the authority to impose the law, all laws must comply with the Constitution.

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[2] *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s 35(1) [***Constitution Act, 1982***]; Patrick Macklem, *Indigenous Difference and the Constitution of Canada* (Toronto: University of Toronto Press, 2001) at 199 [**Macklem**] [**Book of Authorities, TAB 6**].

[3] *Charter,* s 32; *Godbout v Longueuil (City)*, [1997] 3 SCR 844 at paras 47, 51; *Greater Vancouver Transportation Authority v Canadian Federation of Students – British Columbia Component*, 2009 SCC 31, [2009] 2 SCR 295 at para 16.

[4] *Constitution Act, 1982*, s 52(1); *RWDSU v Dolphin Delivery Ltd*, [1986] 2 SCR 573 at 592-93.

10. This conclusion is not varied by consideration of international instruments such as the United Nations Declaration on the Rights of Indigenous Peoples ("**UNDRIP**").[5] UNDRIP is (and only purports to be) non-binding and aspirational.[6] It does not override our Constitution, the constitutional common law, or either federal or provincial domestic legislation.[7]

B. Section 25 of the *Charter* protects rights that pertain to the Aboriginal peoples of Canada from abrogation or derogation by the *Charter* in situations of conflict

11. The resolution of this appeal turns on the proper interpretation of s. 25 of the *Charter*. Section 25 stands at the intersection of two highly contextual sets of rights: individual *Charter* rights and collective Aboriginal rights.[8]

12. Prior judicial consideration of s. 25 is scant. The little case law there is on s. 25 confirms the provision does not recognize or create any **new** rights, but rather protects certain existing rights from abrogation or derogation.[9] This Court has described s. 25 as a "non-derogation clause in favour of the rights of aboriginal peoples,"[10] and a provision that "shields the rights and freedoms that pertain to Aboriginal peoples of Canada from being abrogated" by the *Charter*.[11]

13. A constitutional provision such as s. 25 of the *Charter* must always be understood "in the light of the interests it was meant to protect."[12] In Alberta's submission, purposively interpreted in light of its text and context, the aim of s. 25 is to maintain the constitutional protection of

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[5] A/RES/61/295 (September 13, 2007) [**UNDRIP**].

[6] UNDRIP, preamble; see also *Quebec (Attorney General) v 9147-0732 Québec inc.*, 2020 SCC 32 at paras 22, 28, and 37. UNDRIP was adopted as an Annex to a General Assembly resolution, and such resolutions, including declarations, are non-binding.

[7] The federal government's *United Nations Declaration on the Rights of Indigenous Peoples Act,* SC 2021, c 14 similarly does not alter Canada's constitutional law: ss. 5, 6.

[8] Jane M Arbour, "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 – 69 [**Arbour**] at para 3 [**Book of Authorities, TAB 5**].

[9] See *e.g. Rice c Agence du revenu du Québec*, 2016 QCCA 666 at para 50 [***Rice c Quebec***].

[10] *Reference re Secession of Quebec*, [1998] 2 SCR 217 at para 82.

[11] *R v Desautel*, 2021 SCC 17 at para 39 [***Desautel***].

[12] *R v Van der Peet*, [1996] 2 SCR 507 at para 3 [***Van der Peet***], citing *R v Big M Drug Mart Ltd*, [1985] 1 SCR 295 at 344.

traditions, customs, and practices that are integral to distinctive Aboriginal collectives from being impaired by the *Charter*.[13] Where there is a true irreconcilable conflict between an Aboriginal, treaty, or other right or freedom pertaining to the Aboriginal peoples of Canada and an individual *Charter* right, s. 25 directs that the former shall prevail.

14. The purpose of s. 25 is aligned with the intent of s. 35(1) of the *Constitution Act, 1982*,[14] a provision which constitutionally recognizes and affirms Aboriginal and treaty rights.[15] As this Court set out in ***Van der Peet*** and recently confirmed in ***Desautel***, s. 35(1) provides the constitutional framework to acknowledge and reconcile the sovereignty of the Crown with the fact that Aboriginal peoples already lived on the land in distinctive societies, with their own practices, traditions, and cultures prior to European contact.[16]

15. Section 25 is aimed at a similar recognition, and affirms that the *Charter* does not impair this process of reconciliation.

16. The provision reflects the unique and distinctive nature of Aboriginal collectivities, and the need to protect collective Aboriginality within the constitutional framework. In ***Van der Peet,*** this Court noted that Aboriginal rights are equal in importance and significance to the rights enshrined in the *Charter*, but must be viewed differently from *Charter* rights because they are "rights held only by aboriginal members of Canadian society. They arise from the fact that aboriginal people are aboriginal."[17]

17. The commentator Jane Arbour put the point cogently, suggesting that the overarching purpose of s. 25 is designed to ensure:

> … **that the protection of individual rights does not diminish the collective nature of Aboriginal groups or the distinctive nature of Aboriginal collectivities**. That is, the provision acts as a directive that the *Charter* operates within a Constitution that provides space for the Aboriginal peoples of Canada to

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[13] See *e.g.* B.H. Wildsmith, *Aboriginal Peoples and Section 25 of the Canadian Charter of Rights and Freedoms* (Saskatoon: University of Saskatchewan, Native Law Centre, 1988) at 2, 23 [**Wildsmith**] [**Book of Authorities, TAB 2**].

[14] *R v Kapp*, 2008 SCC 41, [2008] 2 SCR 483 at para 121 [***Kapp***], per Bastarache J, concurring.

[15] *Constitution Act, 1982*, s 35(1).

[16] *Van der Peet* at para 31; *Desautel* at para 26.

[17] *Van der Peet* at para 19 [emphasis in original].

> be Aboriginal. **Section 25 ultimately serves the purpose of protecting the rights of Aboriginal peoples where the application of the *Charter* protections for individuals would diminish the distinctive, collective, cultural identity of an Aboriginal group**."[18]

18. Section 25 is unique in that it **proactively** recognizes that there may be areas of conflict between collective rights held by the Aboriginal peoples of Canada, and the individualized rights memorialized in the *Charter*. It therefore explicitly acknowledges a situation that Canadian constitutional law otherwise attempts to avoid: conflicts between equally important rights.

19. General principles of constitutional law dictate that wherever possible, conflicts between rights should be avoided through a contextually sensitive interpretive process.[19] As this Court made clear in ***Gosselin***, "[a]ll parts of the Constitution must be read together," and "there is no hierarchy amongst constitutional provisions."[20]

20. However, in times of true irreconcilable conflict, the plain language of s. 25 directs a particular result: the *Charter* right must yield to the extent of the conflict. The commentator Patrick Macklem put the point this way: "... section 25 is a non-derogation clause; it shields certain rights that pertain to Aboriginal people from Charter scrutiny by **requiring the judiciary to interpret constitutional guarantees in a manner that ensures this result**."[21] It enables an approach that protects interests associated with Indigenous difference from erosion by individual *Charter* rights.[22]

21. This conclusion is made clear by the plain language of the provision and its legislative historical context.

22. The language used in s. 25 of the *Charter* is directive and mandatory. It provides that *Charter* guarantees "**shall not** be construed so as to abrogate or derogate" from certain stipulated

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[18] Arbour at para 180 [emphasis added] [**Book of Authorities, TAB 5**]; see also *Kapp* at para 89, per Bastarache J.

[19] *R v NS*, 2012 SCC 72, [2012] 3 SCR 726 at para 32 [***R v NS***].

[20] *Gosselin (Tutor of) v Quebec (Attorney General)*, 2005 SCC 15, [2005] 1 SCR 238 at para 2 [***Gosselin***].

[21] Macklem at 222-23 [emphasis added] [**Book of Authorities, TAB 6**]; see also *Kapp* at paras 81 and 89, per Bastarache J.

[22] Macklem at 209, 223 [**Book of Authorities, TAB 6**].

rights pertaining to the Aboriginal peoples of Canada. While it sends a signal about the interpretation of both *Charter* rights and rights pertaining to the Aboriginal peoples, its use of the mandatory "shall" must be given meaning, and indicates a directive that goes beyond a mere canon of interpretation.

23. Justice Bastarache reached the same conclusion in his separate concurring reasons in ***Kapp***: s. 25 resolves conflicts between s. 25 interests and other *Charter* rights through "giving primacy" to the rights set out in s. 25.[23]

24. This articulation of the purpose and role of s. 25 is also supported by the provision's legislative history. Historically speaking, the initial version of what is now s. 25 of the *Charter* was developed before the entrenchment of Aboriginal and treaty rights was on the constitutional agenda.[24] Statements by individuals involved in drafting the *Charter* suggest that the provision was meant to reflect a "preservation of rights approach" – aimed to assure Canadians that the *Charter* would not lessen other existing rights – including specifically Aboriginal rights.[25]

25. In the debates over the *Charter*, then-Minister of Justice Jean Chrétien clarified: "What we are trying to do in [s. 25] we want to protect all the rights of the natives… the rights of all the native Canadians, either flowing from Treaties or the Royal Proclamation, are assured to remain as they are, and not being changed by the adoption of this Charter of Rights..."[26]

26. As commentators have pointed out, it is likely that one of the drafters' concerns reflected in s. 25 was the notion that s. 15 of the *Charter* (the equality guarantee, including equality based

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[23] *Kapp* at paras 80-81, per Bastarache J. Justice Bastarache was the only member of this Court to comment comprehensively on s. 25. The majority in *Kapp* preferred to leave these "complex questions of the utmost importance" to another day: *Kapp* at para 65.

[24] Arbour at paras 80-81 [**Book of Authorities, TAB 5**]. For a historical legislative overview, see *e.g.* Arbour at paras 79-104 [**Book of Authorities, TAB 5**]; Wildsmith at 5-8 and 12-14 [**Book of Authorities, TAB 2**].

[25] See *e.g.* discussion in Arbour at paras 82-85 [**Book of Authorities, TAB 5**].

[26] *Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada*, Issue No. 3, November 12, 1980 [excerpted at **Appellant's Book of Authorities, TAB 6, 028 & 030**], cited in part in *Kapp* at para 93.

on race) could be used to undermine Aboriginal rights, which by their very nature are rights possessed by a class of people defined by culture or race.[27] However, the language of s. 25 does not restrict its ambit merely to s. 15, but extends to all *Charter* claims.

27. Section 25 was thus placed in the *Charter* to address the broader concern that the *Charter* could be used to take away from the rights of Aboriginal peoples. This intention is met by ensuring that where there is real conflict between an individual *Charter* right and a s. 25-protected right, the s. 25 interest will be given priority, and the *Charter* right will be "construed" so as to ensure that the s. 25 interest is not abrogated or derogated.

C. The analytical framework for s. 25 issues considers whether s. 25 is engaged, and whether the situation presents a true irreconcilable conflict of rights

28. There is little judicial guidance on the proper **analytical approach** to s. 25 issues. A number of different approaches to s. 25 have been proposed in the academic literature (and discussed in a limited manner in the case law), including: as an interpretive lens;[28] or a "shield" rendering s. 25-protected interests immune from any *Charter* review, with varying degrees of strength.[29]

29. In Alberta's view, the approach to s. 25 should be guided by the purpose and role of s. 25 in Canada's constitutional architecture. The key overarching question is a purposive one: will the

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[27] Peter Hogg, *Constitutional Law of Canada*, 5th ed Supp, looseleaf (Toronto: Thomson Reuters Canada Limited, 2019) at §28:41 [**Book of Authorities, TAB 7**].

[28] See *e.g. Beckman v Little Salmon/Carmacks First Nation*, 2010 SCC 53, [2010] 3 SCR 103 at para 98 [***Little Salmon***]; *Rice c Quebec* at para 50; William Pentney, "Part I: The Interpretive Prism of Section 25" (1988) 22:1 U Brit Colum L Rev 21 at 27-28, 57 [**Pentney**] [**Book of Authorities, TAB 9**]; David Milward, *Aboriginal Justice and the Charter: Realizing a Culturally Sensitive Interpretation of Legal Rights* (Vancouver: UBC Press, 2012) at 69-72 [**Book of Authorities, TAB 4**].

[29] See *e.g. Kapp* at para 81, per Bastarache J; *Corbiere v Canada (Minister of Indian & Northern Affairs)*, *sub nom Batchewana Indian Band (Non-resident members) v Batchewana Indian Band,* 1996 CanLII 3885, 142 DLR (4th) 122 (FCA) [***Corbiere (FCA)***], rev'd in part on other grounds [1999] 2 SCR 203 [***Corbiere***]; *Campbell et al v AG BC/AG Cda & Nisga'a Nation et al*, 2000 BCSC 1123 at para 156; Thomas Isaac, "Canadian Charter of Rights and Freedoms: The Challenge of the Individual and Collective Rights of Aboriginal People" (2002) 21 Windsor YB Access Just 431 at 432, 452 [**Isaac**] [**Book of Authorities, TAB 8**]; Brian Slattery, "The Constitutional Guarantee of Aboriginal and Treaty Rights" (1982) 8:1-2 Queen's L J 232 at 239-40 [**Book of Authorities, TAB 3**]; Arbour at paras 16-29 [**Book of Authorities, TAB 5**].

effect of applying a substantive *Charter* right, interpreted in context, diminish an Aboriginal group's ability to exercise its collective rights? This inquiry permits an exploration into whether there is true conflict, considered in context. True conflict occurs where a *Charter* right would have more than a merely incidental negative effect on a s. 25-protected right.

30. The first stage of the analysis in the application of s. 25 should involve an assessment and analysis of the rights:

(a) Does a challenged law/program/policy/rule constitute a limit on a *Charter* right?

(b) Is an Aboriginal right, treaty right or other right or freedom pertaining to the Aboriginal peoples of Canada engaged in the circumstances?

31. The second stage of the analysis asks: would vindicating the *Charter* right abrogate or derogate from an Aboriginal right, treaty right or other right or freedom that pertains to the Aboriginal peoples of Canada? In other words, would such s. 25 interests be diminished or eroded in a non-incidental negative manner? If so, the s. 25 right must be given priority.

32. At all stages, courts should be mindful of the purpose of s. 25, permitting a consideration of Indigenous perspectives into the analysis at each step, and aiming to reconcile conflicting rights and avoid hierarchies wherever possible. Every effort should be made to interpret the rights engaged in context, so as to accommodate both rights and avoid conflict between them. It is only at the point of irreconcilable conflict that the s. 25-protected interest should prevail over *Charter* rights.[30]

33. This framework is consistent with and draws upon this Court's guidance regarding conflicting constitutional rights generally, as articulated in ***R v NS***.[31] The distinction arises primarily at the final stage: whereas interpretive principles suggest a balancing of salutary and deleterious effects at the final stage in the ***R v NS*** articulation, the express wording of s. 25 directs that the balance be tipped in favour of the s. 25-protected right at the final stage.

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[30] Arbour at paras 5, 184 [**Book of Authorities, TAB 5**].

[31] *R v NS* at paras 7-9.

34. As pointed out by Bastarache J in his separate concurring reasons in ***Kapp***, this approach to s. 25 is also consistent with case law interpreting similar language in the *Canadian Bill of Rights*: if a law cannot be sensibly interpreted without infringing the *Canadian Bill of Rights*, it must be declared inoperative.[32] Such is the case as well with s. 25: if a *Charter* right cannot be sensibly interpreted without abrogating or derogating s. 25 interests, the s. 25 interest will prevail.

35. The potentially dramatic effect of s. 25 is tempered by a number of factors:

- As will be outlined in argument below, s. 25-protected rights must be proven and defined with precision;
- Section 25-protected rights will be restricted to maintain the assurance of protection of gender equality, pursuant to s. 28 of the *Charter* (and as reflected in s. 35(4) of the *Constitution Act, 1982*); and
- Section 25 will not be engaged where *Charter* rights have merely incidental effects on s. 25 interests, but rather will only be triggered where a s. 25 interest is actually impaired or otherwise impacted in a non-incidental way.[33]

36. Section 25 can be invoked by a respondent to **any** constitutional challenge: nothing in its text, purpose, or context suggests that it can only be invoked by Indigenous persons, or that it cannot be invoked to defend against a challenge **from** an Indigenous person. Practical realities mean that it will most likely be invoked by an Indigenous government, group, or person to prevent against an abrogation or derogation of rights, but context will dictate. The approach to s. 25 should remain always contextual, and promote dialogue between collective rights and individual rights.[34]

37. Further, any defending government (Indigenous or non-Indigenous alike) should be able to resort to s. 1 of the *Charter* to defend against *Charter* challenges where appropriate, either in

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[32] *Kapp* at para 88, per Bastarache J, citing *R v Drybones*, [1970] SCR 282 at 294.
[33] See *e.g. Kapp* at para 97, per Bastarache J.
[34] Arbour at paras 25-26, 66 [**Book of Authorities, TAB 5**].

addition to (or instead of) a s. 25 response.[35] While there may be overlap between s. 25-protected interests and s. 1 justification arguments in a particular case, both are distinct *Charter* provisions giving rise to unique considerations.[36]

38. It would similarly not be appropriate to dictate that s. 25 should **always** be considered before analyzing the *Charter* right engaged. As the Yukon Court of Appeal recognized in its decision below, constitutional cases are best decided on a case-by-case, contextual basis.[37]

D. Section 25 rights must be defined with precision and supported by the law on Aboriginal and treaty rights

39. In situations where s. 25 of the *Charter* is raised, the s. 25-protected interest must be defined with precision, lest irreconcilable conflict between rights be too easily found:

(a) Only rights of a constitutional character that "pertain to" the Aboriginal peoples of Canada as Aboriginal peoples – protecting Aboriginality and Aboriginal difference – should fall under the purview of s. 25; and

(b) The scope of a s. 25-protected interest must be defined precisely and with specificity, supported by the law on Aboriginal and treaty rights.

40. There is no question that the language used in the text of s. 25 is broader than that used in the s. 35(1) protection of Aboriginal and treaty rights generally in the *Constitution Act, 1982*. On its plain wording, s. 25 protects three categories of rights and freedoms from abrogation or derogation: (1) Aboriginal rights; (2) treaty rights; and (3) "other rights and freedoms pertaining to the aboriginal peoples of Canada."

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[35] As pointed out by Arbour, an Indigenous government may have objectives that it prefers to justify under the s. 1 test, without reliance on s. 25 as a determining factor: Arbour at para 200 [**Book of Authorities, TAB 5**].

[36] See *e.g. Kapp* at para 110, per Bastarache J.

[37] *Dickson v Vuntut Gwitchin First Nation,* 2021 YKCA 5 at para 151 [***Dickson (YKCA)***].

41. In Alberta's submission, the phrase "aboriginal rights, treaty rights and other rights and freedoms pertaining to the aboriginal peoples of Canada" should be read as a united, mutually reinforcing whole, protecting those categories of rights of a **constitutional character** that pertain to Aboriginal peoples **as Aboriginal peoples**. The phrase is therefore intended to capture only those rights of a constitutional nature that are necessary for the protection of traditions, customs, and practices that are integral to distinctive Aboriginal collectives.

42. In this way, s. 25 protects those lofty constitutional rights that are necessary to "accommodate and affirm Aboriginal difference."[38]

a. Section 25 is triggered by rights with a constitutional character that "pertain to" the Aboriginal peoples of Canada as Aboriginal peoples

43. In order to receive protection and trigger the potential application of s. 25, the protected interest must either be an Aboriginal right, a treaty right, or an "other right or freedom that pertains to" the Aboriginal peoples of Canada in that it has the following characteristics:

- Claimed by an "**Aboriginal peoples of Canada**," as a collective right held by a s. 35 rights-holding group;
- Be of a "**constitutional character**," in that it is of the same character and stature as s. 35(1)-protected Aboriginal and treaty rights, or is so closely connected and inextricably bound with s. 35(1) rights so as to be of the same nature;
- Pertain to **Aboriginal peoples *qua* Aboriginal peoples**, consistent with this Court's guidance in ***Van der Peet*** that Aboriginal rights "arise from the fact that aboriginal people are **aboriginal**"[39] – the right must be intimately related to the protection and affirmation of Aboriginal distinctiveness; and
- **Integral to the distinctive culture** of an Aboriginal people of Canada.

[38] *Corbiere (FCA)* at para 25.

[39] *Van der Peet* at para 19 [emphasis in original].

44. The key question is whether the rights or freedoms are constitutional in nature and vital to maintaining the distinctiveness of Aboriginal cultures within the larger Canadian polity.

45. Some commentators and courts (including L'Heureux-Dubé J in ***Corbiere***[40] and Bastarache J in ***Kapp***[41]) have suggested that some statutory rights could qualify as "other rights or freedoms" under s. 25. However, neither the text of s. 25 nor the context surrounding it suggest that it was intended to extend priority protection to "rights and freedoms" that are merely statutory in nature, or otherwise non-constitutionally grounded.

46. The two specific examples of rights listed in the text of s. 25 both have a constitutional character: the *Royal Proclamation, 1763*[42] and land claims agreements. The *Royal Proclamation, 1763* has been described as being "of high constitutional importance"[43] and "a fundamental document upon which any just determination of original rights rests,"[44] notwithstanding that it is not explicitly incorporated into the Constitution itself.[45] Similarly, land claims agreements are properly characterized as "treaties" and constitutionally recognized pursuant to s. 35(1) – a point made clear by s. 35(3) of the *Constitution Act, 1982*.

47. The inclusion of the phrase "other rights and freedoms" could simply have been meant for greater certainty, to ensure that any constitutional rights or freedoms pertaining to Aboriginal peoples which may not fit into the tight compartment of an "aboriginal right" or a "treaty right" would nonetheless be protected.[46]

48. Accordingly, the majority of this Court was correct when it commented in ***Kapp*** that "the wording of s. 25 and the examples given therein… suggest that not every aboriginal interest or

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[40] *Corbiere* at para 52, per L'Heureux-Dubé J, concurring.

[41] *Kapp* at para 106, per Bastarache J.

[42] *Royal Proclamation, 1763* (GB), 3 Geo 3 (reproduced in RSC 1985, App II, No 1) [**Book of Authorities, TAB 10**].

[43] *R v Secretary of State for Foreign and Commonwealth Affairs, ex parte Indian Association of Alberta and Others*, [1982] 2 All ER 118 (CA) [**Book of Authorities, TAB 1**].

[44] *Calder v Attorney General of British Columbia*, [1973] SCR 313 at 395.

[45] *Constitution Act, 1982,* s 52(2).

[46] See *e.g.* Isaac at 438 [**Book of Authorities, TAB 8**].

program falls within the provision's scope. Rather, only rights of a **constitutional character** are likely to benefit from s. 25."[47]

49. This conclusion is reasonable in light of the purpose and effect of s. 25 of the *Charter*. It is a remarkable provision in the Canadian constitutional framework: contrary to the general approach to resolving questions of competing rights without conflict, s. 25 proactively identifies areas of potential conflict and dictates prioritization. It would be surprising indeed if the framers of the *Charter* intended to allow for statutory rights, rights which have no constitutional force, to take priority over constitutionally-protected *Charter* rights. This would mean a "profound exception to the overall application of the *Charter*."[48]

50. Such an interpretation would mean that certain statutory rights applicable to Aboriginal peoples would be exempt from scrutiny under the s. 15 equality guarantee of the *Charter,* and such statutory rights would also not be required to adhere to other fundamental *Charter* rights such as freedom of religion (s. 2(a)), the right to vote (s. 3), mobility rights (s. 6), and the right to life, liberty and security of the person (s. 7). This cannot be what was intended by s. 25.

51. Similarly, where rights are alleged to stem from an agreement, only those rights arising from a "treaty" or other constitutionally-protected agreement should trigger the application of s. 25, for the same reason that statutory rights should not trigger s. 25. Treaties are unique, sacred agreements, representing an exchange of solemn promises between the Crown and an Aboriginal group.[49] A treaty is intended to create binding, constitutionally recognized legal obligations.[50]

52. Not all agreements between the Crown and Indigenous groups are properly recognized as treaties, giving rise to constitutional entrenchment.[51] There is an enormous range of potential outcomes to any process of consultation and negotiation, many of which may have little

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[47] *Kapp* at para 63 [emphasis added].

[48] Isaac at 437 [**Book of Authorities, TAB 8**]; see also *Cunningham v Alberta (Aboriginal Affairs and Northern Development)*, 2009 ABCA 239 at para 73, rev'd on other grounds 2011 SCC 37, [2011] 2 SCR 670.

[49] *R v Badger*, [1996] 1 SCR 771 at para 41 [***Badger***].

[50] *Badger* at para 41.

[51] For example, the Agreement at issue in this case: *Dickson (YKCA)* at paras 11, 15-17.

connection to the purposes of s. 25 of the *Charter* and s. 35 of the *Constitution Act, 1982*. Only negotiated arrangements that are constitutional in nature should trigger the application of s. 25.

53. This is particularly the case, given that nothing in s. 25 or elsewhere suggests Aboriginal peoples are not entitled to the full benefit of the individual rights and freedoms set out in the *Charter*. The content of what is protected and given priority under s. 25 must therefore be construed purposively, and narrowly. It would be contrary to our constitutional framework to interpret the scope of "other rights or freedoms" so as to subordinate constitutional rights and freedoms to rights that lack a connection to the protection of distinctive Aboriginal societies.

54. The reasons of the Federal Court of Appeal in ***Taypotat*** are instructive on this point: "[a]s citizens of Canada, aboriginal peoples are as much entitled to the protections and benefits of the rights and freedoms set out in the *Charter* as all other citizens."[52] Further: "[t]o decide otherwise would be to create a jurisdictional ghetto in which aboriginal peoples would be entitled to lesser fundamental constitutional rights and freedoms than those available to and recognized for all other Canadian citizens."[53]

55. Section 25-protected rights must also "**pertain to** the aboriginal peoples of Canada." As the purpose of s. 25 works in concert with s. 35 of the *Constitution Act, 1982* and provides constitutional protection to interests associated with Indigenous difference, the interests protected by s. 25 must be consistent with this goal and "pertain to" Aboriginal peoples by virtue of being Aboriginal.[54]

56. The case law recognizes Aboriginal distinctiveness as an essential feature of s. 25-protected rights. For example, in her separate concurring reasons in ***Corbiere***, L'Heureux-Dubé J posited that "the fact that legislation relates to Aboriginal people cannot alone bring it within the scope of the 'other rights or freedoms' included in s. 25."[55] A similar view was expressed by Bastarache J in ***Kapp***, who stated that "other rights or freedoms" should only be those that are

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[52] *Taypotat v Taypotat,* 2013 FCA 192 at para 38 [***Taypotat***], rev'd on other grounds 2015 SCC 30, [2015] 2 SCR 548.

[53] *Taypotat* at para 39.

[54] See *e.g.* Pentney at 55 [**Book of Authorities, TAB 9**].

[55] *Corbiere* at para 52, per L'Heureux-Dubé J.

particular ("pertain") to the Aboriginal peoples of Canada: "the rights protected are those that are unique to [Aboriginal peoples] because of their special status."[56]

57. An analogous approach was also taken by Kirkpatrick JA at the British Columbia Court of Appeal in ***Kapp (BCCA)***, who opined that "other rights or freedoms" under s. 25 must be those rights and freedoms that "relate to a significant aspect of aboriginal life, culture or heritage, and relate to aboriginals as aboriginals."[57]

58. In this way, the approach to s. 25 of the *Charter* remains consistent with its purpose, read holistically and aligned with the purpose of s. 35 of the *Constitution Act, 1982.* As the Alberta Court of Appeal has noted, there is "nothing ironic or improper about jealously guarding entrenched constitutional rights, and ensuring that only those truly entitled are allowed to assert those rights."[58]

59. Both s. 25 of the *Charter* and s. 35(1) of the *Constitution Act, 1982* give effect to the unique constitutional relationship between Aboriginal peoples and the Canadian constitutional state.[59] While s. 35(1) protects against governmental action that may threaten interests associated with Indigenous difference, s. 25 protects initiatives that seek to further constitutional interests associated with Indigenous difference from *Charter* scrutiny.[60]

b. Aboriginal, treaty and other rights and freedoms must be proven using existing legal frameworks

60. In order to engage the operation of s. 25 and potentially prioritize Aboriginal, treaty, or other rights and freedoms pertaining to the Aboriginal peoples of Canada over conflicting *Charter* rights, the s. 25-protected interest must be articulated with precision and specificity, and must be proven using existing legal frameworks. This approach is necessary in order to avoid overshooting the purpose of s. 25.

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[56] *Kapp* at paras 101 and 103, per Bastarache J.
[57] *R v Kapp*, 2006 BCCA 277 at para 138 [***Kapp (BCCA)***].
[58] *L'Hirondelle v Alberta (Sustainable Resource Development)*, 2013 ABCA 12 at para 39, leave to appeal to SCC refused, 35273 (June 20, 2013).
[59] Macklem at 224 [**Book of Authorities, TAB 6**].
[60] Macklem at 225 [**Book of Authorities, TAB 6**].

61. Where s. 25 is alleged to be triggered on the basis of an alleged **Aboriginal right** (such as a right to self-government), the existence of that Aboriginal right must be proven in accordance with the legal test set out in ***Van der Peet*** in order to engage s. 25. The activity must be "an element of a practice, custom or tradition **integral to the distinctive culture of the aboriginal group** asserting the right."[61]

62. The ***Van der Peet*** examination is "directed at identifying the crucial elements of those pre-existing distinctive societies," and thus at "identifying the practices, traditions and customs central to the aboriginal societies that existed in North America prior to contact with the Europeans."[62] Where an Aboriginal right is claimed by a Métis group, the focus will not be on practices before European **contact**, but rather on practices prior "to the time of effective European **control**."[63]

63. Courts must identify precisely the nature of the claim being made to determine whether a claimant has demonstrated the existence of an Aboriginal right.[64] Aboriginal rights are not universal, and their scope and content must be determined on a case-by-case basis.[65] Only those rights that "existed" when s. 35 of the *Constitution Act, 1982* came into force receive constitutional status.[66] Facts and evidence regarding the practices, customs, and traditions of the particular Aboriginal group claiming the right are of central significance, assessed in light of the special evidentiary rules for adjudicating Aboriginal rights claims.[67]

64. Where s. 25 is alleged to be triggered by an existing **treaty right**, the manner of proving the right involves a different inquiry. Where a treaty right is at issue, proof of treaty rights will derive from an interpretation of the treaty.

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[61] *Van der Peet* at para 46 [emphasis added].
[62] *Van der Peet* at para 44.
[63] *R v Powley*, 2003 SCC 43, [2003] 2 SCR 207 at para 18.
[64] *Van der Peet* at paras 51-54.
[65] *Van der Peet* at para 69.
[66] *Mitchell v MNR*, 2001 SCC 33, [2001] 1 SCR 911 at para 11 [***Mitchell***].
[67] *Van der Peet* at para 68; *Mitchell* at paras 27-39.

65. The key principles applicable to treaty interpretation were set out by this Court in ***Badger*** and ***Marshall***.[68] In accordance with these principles, courts must give effect to the common intention of the parties at the time of signing. Treaties will be liberally construed, with any ambiguities resolved in favour of the Aboriginal peoples.

66. The same principles apply for the interpretation of modern treaties, albeit with a recognition that modern treaties are meticulously negotiated and drafted with significantly more precision and sophistication.[69] Courts must therefore pay close attention to the modern treaty's terms, viewed in light of the intention to renew the relationship between Indigenous peoples and the Crown to one of equal partnership.[70]

67. While this Court has not yet recognized an "other right or freedom pertaining to the aboriginal peoples of Canada," in accordance with the principles set out above, proof of such a right should be commensurate with the context and consistent with legal principles relating to proof of other constitutional Aboriginal and treaty rights generally.

68. It is not unnecessarily onerous to require proof of an Aboriginal or treaty right (or other constitutional right) under existing legal frameworks, such as the ***Van der Peet*** test. Where s. 25 operates, it is accomplishing a remarkable task generally unknown to Canadian constitutional law – causing the exercise of one type of right to yield to another type of right. In light of the significant and monumental impact that s. 25 may have on individual *Charter* rights, it is entirely appropriate to require specific, precise proof that an Aboriginal, treaty, or other right or freedom exists, and will truly be abrogated or derogated from by a *Charter* right.

E. The self-government context provides a clear example of the importance of precision and proof in defining s. 25-protected interests

69. This case is uniquely complex, not only because of the novelty of arguments raised relating to s. 25 of the *Charter*, but also because the claim alleges a s. 25-protected **inherent Aboriginal right to self-government**.

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[68] *R v Marshall*, [1999] 3 SCR 456 at paras 5, 9-14, 41, 49-51 [***Marshall***].

[69] *Little Salmon* at paras 12, 54 and 67; *First Nation of Nacho Nyak Dun v Yukon*, 2017 SCC 58, [2017] 2 SCR 576 at para 36 [***Nacho Nyak Dun***].

[70] *Nacho Nyak Dun* at paras 33, 37-38.

70. Whether characterized as an Aboriginal right or a treaty right, a right to self-government must be proven in accordance with the established legal principles set out above, in the same manner as any other claims to Aboriginal or treaty rights.[71] The bar of proof is not lowered for claims to constitutionally-protected rights that are self-governmental in nature.

71. Indeed, this Court confirmed in ***Pamajewon*** that any claims to an Aboriginal right to self-government must be specific and particularized: a right to "self-government" is too broad and cast at a "level of excessive generality."[72] This Court confirmed that Aboriginal rights must be examined in light of the particular circumstances of each case, reflecting the specific history and culture of the Aboriginal group making the claim – otherwise, nearly every Aboriginal right could fall within the so-called right to "self-government."[73]

72. The same can be said about determining whether s. 25 of the *Charter* is engaged. An Aboriginal practice, tradition, or custom which is governmental in nature must be defined with sufficient precision and particularity – the inquiry must be into the precise nature of the right claimed itself, not into the excessively inclusive concept of "self-government" broadly.

73. The right must therefore be articulated with specificity as a right to impose a **specific rule/law**, grounded on being integral to a distinctive culture, rather than a right to govern or regulate **in general**. Otherwise, an alleged constitutionally-protected Aboriginal right to "self-government" could have significant implications in light of s. 25 of the *Charter*.

74. If every aspect of "governance" writ large could be broadly recognized as a s. 25-protected interest, s. 25 will require that all *Charter* rights must yield to this exercise of governance. This could lead to the creation of a *Charter*-free enclave, depriving citizens of the protections of the *Charter* in all circumstances, regardless of whether the specific rule or law derives from the exercise of a custom, practice, or tradition integral to the distinctive culture of a particular Aboriginal group. This is unsupportable under the Canadian constitutional

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[71] *R v Pamajewon*, [1996] 2 SCR 821 at para 24 [***Pamajewon***].

[72] *Pamajewon* at para 27.

[73] *Pamajewon* at para 27; *Buffalo v Canada*, 2005 FC 1622 at para 736, aff'd on other grounds 2006 FCA 415, aff'd 2009 SCC 9, [2009] 1 SCR 222.

architecture, inconsistent with guidance from this Court in ***Van der Peet*** and ***Pamajewon***, and unsupported by the purpose of s. 25 of the *Charter* itself.

75. For example, a self-governing Aboriginal group could impose a rule that individuals in common law marriages are disqualified from sitting on a Band Council.[74] Such a rule is, on its face, discriminatory. However, if the broad concept of self-government could be said to extend to all governance of an Aboriginal group, s. 25 may require *Charter* rights to yield. This would be the case notwithstanding the lack of investigation into the connection between such a disqualification rule and the distinctive culture of the Aboriginal group. It would be the case even if there was evidence suggesting the rule derives from the teachings of a post-contact religious order. Such a conclusion would not promote reconciliation; it promotes *Charter*-free zones disconnected from the purpose of s. 25 and the protection of Aboriginal distinctiveness.

76. Further, in the specific context of a claim to a right of self-government involving law-making, the question of compatibility with sovereignty looms large. Under Canadian constitutional law, pre-contact Aboriginal rights are presumed to have survived unless incompatible with the Crown's assertion of sovereignty, voluntarily surrendered via the treaty process, or validly extinguished.[75]

77. Any surviving Aboriginal right of self-government must operate in the context of, and be compatible with, the sovereignty of the Crown. It must find definition for its nature and scope in the customs, practices, and traditions that were integral to the distinctive culture of a particular Aboriginal group.

78. It is clear that there are some aspects of self-government that are incompatible with and therefore did not survive the assertion of Crown sovereignty. For example, an Indigenous group

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[74] This example is loosely based on materials filed in support of the Motion to Intervene in this case from Swan River First Nation et al: see Saddle Lake Tribal Customs Election Regulations, section 1(c), Exh "1" to the Affidavit of Chief Stan Houle [**Motion Record of the Swan River First Nation**, p 149] and Memorandum of Argument at paras 7-8, Exh "2" to the Affidavit of Chief Stan Houle [**Motion Record of the Swan River First Nation**, p 155-57].

[75] *Mitchell* at para 10.

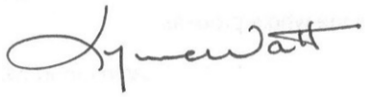
cannot have an existing self-government right to establish its own military force, or control over the mobility of persons into Canada, or jurisdiction to prosecute crimes, regardless of whether the group may have undertaken these practices historically pre-contact.[76] There may be numerous other examples where the question of sovereignty is relevant. As this Court confirmed in ***Van der Peet***, Aboriginal rights exist and must be reconciled within the general legal system of Canada.[77]

79. Alberta does not suggest that all Aboriginal self-government is incompatible with sovereignty. However, the concept is another key reason why an Aboriginal practice, tradition or custom which is governmental in nature must be defined with sufficient precision and particularity – the inquiry must be into the precise nature of the activity itself, not into the nebulous concept of "self-government" broadly. It is likely impossible, or at least imprudent, to determine whether a right of self-government is incompatible with sovereignty in the abstract.

PART IV – COSTS

80. Alberta does not seeks costs and submits that the ordinary rule that costs are not awarded against an Intervener should apply.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 17th day of October, 2022.



for:

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Attorney General of Alberta

[76] See *e.g. Mitchell* at paras 153-60; *R v Moody*, 2004 MBQB 247 at para 14; *R v Williams*, 52 BCAC 296, 1994 CanLII 3301 at paras 16-17.

[77] *Van der Peet* at para 49.

PART VII – TABLE OF AUTHORITIES & LEGISLATION

Case Law:	**Paragraph References (to Factum)**
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Corbiere v Canada (Minister of Indian & Northern Affairs), sub nom Batchewana Indian Band (Non-resident members) v Batchewana Indian Band, 1996 CanLII 3885, 142 DLR (4th) 122 (FCA)	28, 42
Corbiere v Canada (Minister of Indian & Northern Affairs), [1999] 2 SCR 203	28, 45, 56
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Godbout v Longueuil (City), [1997] 3 SCR 844	7
Gosselin (Tutor of) v Quebec (Attorney General), 2005 SCC 15, [2005] 1 SCR 238	19
Greater Vancouver Transportation Authority v Canadian Federation of Students – British Columbia Component, 2009 SCC 31, [2009] 2 SCR 295	7
L'Hirondelle v Alberta (Sustainable Resource Development), 2013 ABCA 12, leave to appeal to SCC refused, 35273 (June 20, 2013)	58
Mitchell v MNR, 2001 SCC 33, [2001] 1 SCR 911	63, 76, 78
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