SCC Court File No.: 39856

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

BETWEEN:

CINDY DICKSON

APPELLANT

AND:

VUNTUT GWITCHIN FIRST NATION

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

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FACTUM OF THE INTERVENER, CARCROSS/TAGISH FIRST NATION

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

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PART I – OVERVIEW

1. In its decision below, the Yukon Court of Appeal considered how s. 25 of the Canadian *Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982* (the "*Charter*") shields Indigenous self-government, and the rights of Indigenous peoples protected in s. 35 of Part II of the *Constitution Act, 1982*. Whether and how the *Charter* applies to the governmental authority of eleven Yukon First Nations that have signed final and self-government agreements pursuant to the Yukon Umbrella Final Agreement ("SGYFN's") will determine if Indigenous legal orders, which are the systems of law essential to the continuity of Indigenous peoples in their territory, are encouraged or stifled within the Canadian constitutional fabric.

2. This appeal raises the application and interpretation of the *Charter* in relation to SGYFN's. Given the limited jurisprudence on application of s. 25 to cases involving self-government, and the relevance of the application of the *United Nations Declaration on the Rights of Indigenous Peoples* ("UNDRIP")[1], there is room for development of the law so that First Nations governments and rights can be upheld and protected, rather than disrupting governance traditions that have been integral to the survival and identity of First Nations. The courts below acknowledged the importance of protecting practices linked to the survival, dignity and well-being of SGYFNs, such as ensuring that leadership is resident in their territories and deliberating and making decisions while connected to locale of their identity which is their traditional territory.

3. Carcross/Tagish First Nation ("C/TFN") is governed by the C/TFN Constitution which is a dynamic continuation and revitalization of its inherent Indigenous legal order. The C/TFN Constitution is reflective of the six customary Tlingit and Tagish clans ("C/TFN Clans") which form the basis of political representation through the C/TFN government, rather than representation solely based on the individual C/TFN citizen. C/TFN Clans are a structural mechanism to balance individual and collective rights central to all aspects of C/TFN government and society.

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[1] UN General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples, resolution /adopted by the General Assembly*, 2 October 2007, A/RES/61/295 [UNDRIP].

PART II – QUESTIONS IN ISSUE

4. What is the legal status of the application of the *Charter* to Indigenous self-governing nations, and how does s. 25 operate to shield SGYFN's rights and governance traditions protected in s. 35 of the *Constitution Act?*

PART III – STATEMENT OF ARGUMENT

5. C/TFN's Constitution, governance structure, approach to legislative development and internal dispute resolution processes are rooted in Indigenous legal orders. On this basis, C/TFN submits that their Indigenous legal order must be saved by virtue of s. 25 of the *Charter*.

6. We submit that the appellant court was correct in their analysis and application of s. 25 and the effect of the Appellant's submissions would be to irreparably stifle the very foundation of C/TFN's government structure. In the context of C/TFN—a self-governing nation with rights recognized through a modern land claims agreement protecting an Indigenous legal order—an application of *Charter* infringements as proposed by the Appellant would serve to obliterate the ability for C/TFN to structure themselves in a way that is reflective of their traditional, clan-based methods of governance, as they express their Indigenous legal orders.

I. Considerations for applying section 25 of the *Charter*.

7. The scope of s. 25 has been considered in Canadian jurisprudence, albeit in a limited fashion, and there are valid questions about whether every "Aboriginal interest" or program benefits from s. 25 protections.[2] Interests not anchored in Indigenous governments and legal orders may very well attract *Charter* scrutiny for good reasons, but this appeal and any future hypothetical challenge to C/TFN's governance structure or C/TFN Laws must be distinguished from such cases, such as those involving discrimination in the application of the *Indian Act*, which is a product of dispute over colonial law, not self-determination.

8. C/TFN is proposing the following critical considerations for a court in analysing s. 25 matters including the one at issue in this appeal.

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[2] *R v. Kapp*, 2008 SCC 41 [*Kapp*] at para. 63.

a. First Consideration – Identify if the dispute involves Customs, Practices and Traditions rooted in Indigenous Legal Orders.

9. The first consideration in analyzing if s. 25 has been engaged, is to look at the nature of the Indigenous law or practice being challenged. If the challenged action clearly flows from unique institutions, norms and government practices rooted in the Indigenous legal order of a s. 35 rights holding group, then s. 25 is engaged and is a strong shield, protecting Indigenous legal orders and governments. This explains why the Court has characterized s. 25 as a "necessary partner to s. 35(1)."[3]

10. Canadian Aboriginal law and Indigenous legal orders should be understood as different, and this is relevant to the application of s. 25. Aboriginal law refers to Canadian law as it applies to the lives and situations of Indigenous peoples. For many Indigenous legal theorists, the core purpose of Canadian Aboriginal law has been to "remove the last vestiges of Indigenous self-determination from the Canadian landscape."[4]

11. Indigenous legal orders are derived from Indigenous practices, customs, laws and beliefs and are an independent source of law, applicable to and used in resolving conflicts within Indigenous societies and governments.[5]

12. Section 25 must vigorously protect Indigenous legal orders – versus the more narrowly defined Aboriginal law rights – from the imposition of a set of beliefs and liberal Western values (i.e., litigation procedures, remedies and adversarialism) that would disrupt those systems and practices and result in the assimilation of Indigenous peoples. The Canadian legal system cannot simply impose its practices on Indigenous legal orders, as the Canadian system must respect those orders and protect them through, among other measures, the shield of s. 25.

13. As Anishinaabe Professor John Borrows suggests:

> Fortunately we have a choice about how we will respond to our multi-juridical heritage. We can choose to recognize, affirm and apply Indigenous legal traditions alongside the common law and civil law, or we can choose to deny their historic reality and contemporary force. The consequences of this choice will mark our

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[3] *Kapp* at para. 121.
[4] Gordon Christie, *Canadian Law and Indigenous Self-Determination: A Naturalist Analysis*, 1st ed (Toronto: University of Toronto Press, 2019) at 5, Book of Authorities, ("BOA") Tab 1.
[5] Val Napoleon, "Thinking About Indigenous Legal Orders" (2007) National Centre for First Nations Governance at 19, BOA Tab 10.

> country as progressive and open to legal guidance from the best of our traditions, or as oppressively fundamentalist and frozen in our orientation to law. There should be no doubt about my choice between these alternatives. I choose openness and freedom. Legal cultures are fluid. Law is in the process of continual transformation, and legal peoples must participate in its changes…Our [Indigenous] legal traditions have great wisdom, durability and flexibility in their ability to generate stability and order across this land.[6]

14. To give scope to the intended effect of s. 25, particularly in reciprocity with s. 35, Indigenous governments require the constitutional protective shield to ensure space for their customs, practices and laws which, for legitimate cultural reasons, may differ from Western liberal legal understandings.[7] In other words, the goal of s. 25 should be to facilitate the protection, further development and promotion of Indigenous identity as represented through a nation's unique institutions, legal order, norms and government practices.[8]

15. In this matter, provisions were intended to be shielded from challenges arising from the *Charter,* especially because they reflect the agreement of Indigenous governments and Canada to structure the relationship to affirm the existence of a separate Indigenous legal order based on continuity with long-standing practices and traditions.[9] Thus, in the context of self-governing nations establishing their own constitutionally protected laws, with a source in pre-existing Indigenous legal orders, these rights fall squarely within the scope of s. 25, and should be provided a total shield from *Charter* scrutiny.

16. For instance, as an established institution of C/TFN, *Charter* challenges related to the C/TFN Clan system are protected by s. 25. The C/TFN Clans are a continuation of the precontact governance practices of the Inland Tlingit and Tagish people, and their modern expression must not be stifled by potential conflicts between that traditional system and the *Charter*. The Court need not look past the fact that the C/TFN Clan system is an established institution of the Indigenous government to engage s. 25.

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[6] John Borrows, *Canada's Indigenous Constitution*, 1st ed (Toronto: University of Toronto Press, 2010) at 283, BOA Tab 2.
[7] Peter W. Hogg and Mary Ellen Turpel, "Implementing Aboriginal Self-Government: Constitution and Jurisdictional Issues" (1995) 74:2 Canada Bar Review 187 [Hogg and Turpel] at 215, BOA Tab 5.
[8] Hogg and Turpel at 215.
[9] *Kapp* at para. 103.

17. Because the challenged action in this case, which is the legislative and governance powers of the Respondent, clearly flows from unique institutions, norms and government practices rooted in the Indigenous legal order of the Respondent, as a s. 35 rights holding group, C/TFN submits there is very little ambiguity in whether s. 25 is engaged as a full shield in this case nor the application of s. 25 to C/TFN Laws or governance practices.

b. Second Consideration - Deference to Self Determination

18. The second consideration is to determine if the court should engage in the matter at all or defer to self-determination. This is not a matter of jurisdiction or competency of the court. But as a matter of deference, the court of competent jurisdiction should consider whether the matter is best determined within the community regardless of whether the s. 25 saving provision is engaged or not. This consideration recognizes that courts play a necessary role in reconciliation and protecting the space for Indigenous legal orders.

19. A court's decision to defer to self-determination is assisted by consideration of UNDRIP. UNDRIP articles assist in the interpretation and application of s. 25, as Canada has expressly committed to implementing UNDRIP in "Canadian law" through the *United Nations Declaration on the Rights of Indigenous Peoples Act*.[10] UNDRIP includes rights of Indigenous peoples that are already part of customary international law, including self-determination, the prohibition against genocide, and related matters.

20. UNDRIP is an international human rights instrument. Parliament has affirmed the truth of this proposition, calling UNDRIP "a universal international human rights instrument with application in Canadian law."[11] Canadian law includes the body of constitutional provisions and norms. Article 3 of UNDRIP confirms Indigenous nations' right to self-determination which

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[10] UNDRIP; See e.g. *Canada (Human Rights Commission) v Canada (Attorney General)* 2012 FC 445 at paras. 348-356*; Nunatukavut Community Council Inc. v Canada (Attorney General),* 2015 FC 981 at paras. 103-106; *First Nations Child and Family Caring Society of Canada et al v Attorney General of Canada (Ministry of Indigenous and Northern Affairs Canada),* 2018 CHRT 4 at paras. 72-76, 81; *First Nations Child and Family Caring Society of Canada et al v Attorney General of Canada (Ministry of Indigenous and Northern Affairs Canada),* 2020 CHRT 20 at paras. 136-157.

[11] *United Nations Declaration on the Rights of Indigenous Peoples Act*, SC 2021, c 14 at s. 4(a) [UNDA].

inherently requires deference in some circumstances by courts and the Crown to unique institutions, norms and government practices rooted in Indigenous legal orders.

21. Canadian institutions have been advised to tread lightly around the inherent rights that Indigenous peoples have to their own governance and justice systems.[12] These calls have included long-standing recommendations that the distinctive philosophies, traditions, and cultural practices of Indigenous peoples should not only be recognized, but specifically shielded from intrusion by the *Charter*.[13]

22. This approach has been highlighted by Professor Naiomi Metallic who has written of the decision below:

> Further, and most damagingly, the intense *Charter* scrutiny to which the VGFN residency requirement was subjected unwittingly feeds into stereotypes of Indigenous governments as backwards, prone to violate human rights and unable to govern themselves. But this is an unfair comparison; different nations can have different norms. Our courts realize that it is both misleading and disrespectful to subject other governments to such scrutiny under Canadian norms and so refrain from doing so as much as possible through the doctrine of sovereign immunity and the principle of comity (barring breaches of international law). Yet we don't question the propriety of doing this when it comes to Indigenous governments, which suggest a double-standard.[14]

23. The primary mechanism for the court to achieve the goal of respecting Indigenous legal orders is to acknowledge and defer to the Indigenous Nation's internal dispute mechanism. This mechanism may not look like an adversarial court or tribunal. In the case of C/TFN, it is a community-based peacemaking process. When a court determines an internal dispute mechanism exists within the Indigenous government, reconciliation is advanced by deferring to that internal

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[12] *Truth and Reconciliation Commission of Canada: Calls to Action* (Winnipeg: Truth and Reconciliation Commission of Canada, 2015) at Call 42, BOA Tab 9; Royal Commission on Aboriginal Peoples, *Volume 5: Renewal: A Twenty-Year Commitment* (Ottawa: Canada Communication Group, 1996) at 151, BOA Tab 6.

[13] M.E. Turpel, "Aboriginal Peoples and the Canadian Charter: Interpretive Monopolies, Cultural Differences" in R. Devlin, ed., Canadian Perspectives on Legal Theory (Toronto: Emond Montgomery, 1991) 503 at 514, BOA Tab 3.

[14] Naiomi 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 39 at 9, BOA Tab 4.

mechanism.[15] Restraint is required to uphold Indigenous legal orders and to promote reconciliation. Such deference reflects an Indigenous human-rights based approach that draws upon international human rights concepts and standards to lift up domestic practices.

II. Implications for C/TFN

24. The detrimental effect of subjecting C/TFN and other SGYFN's to an interpretation and application of s. 25 that does not protect a unique approach to governance cannot be overstated. It will not just dampen but likely extinguish systems of governance that are finally being revived and revitalized after centuries of colonization.

a. Narrow and late application of s. 25 will lead to a proliferation of expensive and unnecessary litigation.

25. The application of s. 25 as set out by the Appellant will have a detrimental impact on C/TFN's internal affairs. If s. 25 is not engaged until after an unjustified *Charter* breach or only engaged on proven "constitutional" rights, what we refer to as a narrow and late application of s.25, C/TFN and other SGYFN's can expect to spend significant resources defending moot challenges ultimately prohibited by s. 25.

26. If s. 25 is interpreted narrow and late, SGYFN's can expect a flood of internal grievances containing a *Charter* component - whether or not the *Charter* may be relevant to the specific grievance. Unlike the respondent's constitution, the C/TFN Constitution does not make the Yukon Supreme Court or any outside non-Indigenous court a court of competent jurisdiction for adjudicating disputes under the C/TFN Constitution and legal order. The C/TFN Constitution is deliberate in that it does not contemplate involvement of the Yukon courts. A narrow and late application of s.25 will lead to matters going to courts that never should. For example, a complainant may vexatiously claim that a custom, practice or decision rooted in C/TFN's Indigenous legal order breaches their *Charter* right. The vexation complainant could commence a proceeding in the Yukon Supreme Court which would be required to make a number of findings of fact before ultimately dismissing the moot dispute. This would result in the expenditure of

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[15] The Honourable Chief Justice Lance S.G. Finch, "The Duty to Learn: Taking Account of Indigenous Legal Orders in Practice" (Paper 2.1 prepared for the Continuing Legal Education Society of British Columbia, Vancouver, November 2012), *CLEBC* at 5 and 43-44, BOA Tab 8.

significant resources by C/TFN for a moot dispute which, in accordance with C/TFN's Constitution, should never have gone to the court in the first place.

27. In short, a narrow and late application of s.25 is likely to lead to a proliferation of unnecessary *Charter* challenges against SGYFN's like C/TFN. Defending these unnecessary *Charter* challenges is expensive, time-consuming, and will chip away at the capacity of the Indigenous government to carry out its primary duties and responsibilities.

b. Narrow and late application of s. 25 will diminish the prospect of reconciliation.

28. Applying s. 25 in a narrow or late manner will force Indigenous nations to consider how their laws may be interpreted through a *Charter* lens. This creates a situation in which a nation may shift their laws to avoid conflict between their legal orders and western values. This outcome directly contradicts both the promise made to SGYFN's that self-government would provide a means to revitalize and restore Indigenous legal orders as well as the goals of reconciliation.

29. Over the last thirty years, C/TFN has begun to codify its legal order and governance structures into laws formally passed by the First Nation. While C/TFN Laws have been enacted in some areas, other C/TFN Laws remain under development. However, the development of these laws has only occurred because it has become safer and more appropriate to do so within the context of self-government and the understanding that the revitalization of Indigenous legal orders was finally protected.

30. If the protective effect of s. 25 is only engaged after a full *Charter* analysis and/or only on specific components of western governance deemed to be "constitutional" in nature, C/TFN is likely to undertake a fundamentally different approach to law making. This is an approach that would be based upon mitigating risk and conforming to western liberal principles in order to avoid legal conflict rather than focusing on the revitalization of Indigenous legal orders.

31. Thus, it is critical that s. 25 is applied in a way that does not impose colonial values but rather defers to Indigenous nations to "define themselves and to choose by what means to make their decisions, according to their own laws, customs and practices."[16] This is an approach that must recognize that at times, the "western, liberal lifeworld must be supplemented—and maybe in some

[16] *R v. Desautel*, 2021 SCC 17 at para. 86.

circumstances supplanted" in order to actualize the goal of reconciliation for Indigenous nations.[17] Ultimately, this means that when and how s. 25 is applied can determine whether Indigenous legal orders are encouraged or stifled within the Canadian constitutional fabric.

PART IV – COSTS

32. The Carcross/Tagish First Nation does not seek costs and asks that no costs be awarded against them.

PART V – ORDER SOUGHT

33. The Carcross/Tagish First Nation takes no position on the outcome of the appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 28th of October, 2022.

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PART VI – TABLE OF AUTHORITIES

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