SCC File No: 39856

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

BETWEEN:

CINDY DICKSON

APPELLANT/CROSS-RESPONDENT
(Appellant)

and

VUNTUT GWITCHIN FIRST NATION

RESPONDENT/CROSS-APPELLANT
(Respondent**)**

and

GOVERNMENT OF YUKON, ATTORNEY GENERAL OF CANADA, ATTORNEY GENERAL OF QUEBEC, ATTORNEY GENERAL OF ALBERTA, BRITISH COLUMBIA TREATY COMMISSION, MÉTIS NATION OF ONTARIO AND MÉTIS NATION OF ALBERTA, CARCROSS/TAGISH FIRST NATION, TESLIN TLINGIT COUNCIL; CONGRESS OF ABORIGINAL PEOPLES, COUNCIL OF YUKON FIRST NATIONS, PAN-CANADIAN FORUM ON INDIGENOUS RIGHTS AND THE CONSITUTION;, CANADIAN CONSITUTION FOUNDATION, BAND MEMBERS ALLIANCE AND ADVOCACY ASSOCIATION OF CANADA, AND FEDERATION OF SOVEREIGN INDIGENOUS NATIONS

INTERVENERS

FACTUM OF THE INTERVENER BRITISH COLUMBIA TREATY COMMISSION

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

BLAKE, CASSELS & GRAYDON LLP
2600 - 595 Burrard Street
Vancouver, BC V7X 1L3

Roy W. Millen
Joshua Hutchinson
Alison Burns

Tel: (604) 631-4220
Fax: (604) 631-3309
Email: roy.millen@blakes.com
joshua.hutchinson@blakes.com
alison.burns@blakes.com

Counsel for the Intervener,
British Columbia Treaty Commission

ORIGINAL TO:

SUPREME COURT OF CANADA
The Registrar
301 Wellington Street
Ottawa, ON K1A 0J1

COPIES TO:

FASKEN MARTINEAU DUMOULIN LLP
Barristers and Solicitors
Suite 2900 - 550 Burrard Street,
Vancouver, BC V6C 0A3

Bridget Gilbride
Tel: (604) 631-4891
Fax: (604) 631-3232
Email: bgilbride@fasken.com

FASKEN MARTINEAU DUMOULIN LLP
Barristers and Solicitors
Suite 1300 - 55 Metcalfe Street
Ottawa, ON K1P 6L5

Sophie Arseneault
Tel: (613) 696-6904
Fax: (613) 230-6423
Email: sarseneault@fasken.com

RUBY SHILLER ENENAJOR
DIGIUSEPPE BARRISTERS
Barristers & Solicitors
101 – 171 John Street
Toronto, ON M5T 1X3

Harshi Mann
Tel: (416) 964-9664
Fax: (416) 964-8305
Email: hmann@rubyshiller.com

Counsel for the Appellant, Cindy Dickson

Agent for the Appellant, Cindy Dickson

MANDELL PINDER LLP
Barristers & Solicitors
422-1080 Mainland Street
Vancouver, BC V6B 2T4

Kris Statnyk (c/o Mandell Pinder LLP)
Krista Robertson
Elin Sigurdson
Tel: (604) 681-4146
Fax: (604) 681-0959
Email: kris@statnyk.com
krista@mandellpinder.com
elin@mandellpinder.com

Counsel for the Respondent, Vuntut Gwitchin First Nation

GOWLING WLG (CANADA) LLP
Barristers and Solicitors
Suite 2600, 160 Elgin Street
Ottawa, ON K1P 1C3

Jeffrey W. Beedell
Tel: (613) 786-8695
Fax: (613) 788-3509
Email: jeff.beedell@gowlingwlg.com

Agent for the Respondent, Vuntut Gwitchin First Nation

DEPARTMENT OF JUSTICE
Legal Services Branch (J-2E)
2134 Second Avenue, 2nd Floor
Whitehorse, YT Y1A 5H6

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

Counsel for the Intervener, Government of Yukon

SUPREME ADVOCACY LLP
Suite 100 – 340 Gilmour Street
Ottawa, ON K2P 0R3

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

Agent for the Intervener, Government of Yukon

DEPARTMENT OF JUSTICE
Attorney General of Canada
50 O'Connor Street, Suite 500
Ottawa, ON K1P 6L2

Anne M. Turley
Marlaine Anderson-Lindsay
Telephone: (613) 670-6291
Fax: (613) 954-1920
Email: anne.turley@justice.gc.ca
Marlaine.Anderson-Lindsay@justice.gc.ca

Counsel for the Intervener, Attorney General of Canada

DEPARTMENT OF JUSTICE
Attorney General of Canada
50 O'Connor Street, 5th Floor
Ottawa, ON K1A 0H8

Christopher Rupar
Telephone: (613) 670-6290
Fax: (613) 954-1920
Email: Christopher.Rupar@justice.gc.ca

Agent for the Intervener, Attorney General of Canada

PROCUREUR GÉNÉRAL DU QUÉBEC
Direction du droit constitutionnel et autochtone
1200, route de l'Église, 4e étage
Québec, QB G1V 4M1

Hubert Noreau-Simpson
Catheryne Bélanger
Sylvie Boulay
Telephone: (418) 643-1477
Fax: (418) 644-7030
Email:
hubert.noreausimpson@justice.gouv.qc.ca
catheryne.belanger@justice.gouv.qc.ca
sylvie.boulay@justice.gouv.qc.ca

Counsel for the Intervener, Attorney General of Quebec

NOËL ET ASSOCIÉS, S.E.N.C.R.L.
225, montée Paiement, 2e étage
Gatineau, QB J8P 6M7

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

Agent for the Intervener, Attorney General of Quebec

ATTORNEY GENERAL OF ALBERTA
Constitutional and Aboriginal Law Legal Services Division
10025 - 102A Avenue, 10th Floor, 102A Tower
Edmonton, AB T5J 2Z2

Michele Annich, Q.C.
Leah M. McDaniel
Telephone: (780) 422-0258
Fax: (780) 643-0852
Email: michele.annich@gov.ab.ca
leah.mcdaniel@gov.ab.ca

Counsel for the Intervener, Attorney General of Alberta

GOWLING WLG (CANADA) LLP
160 Elgin Street, Suite 2600
Ottawa, ON K1P 1C3

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

Agent for the Intervener, Attorney General of Alberta

PAPE SALTER TEILLET LLP
546 Euclid Avenue
Toronto, ON M6G 2T2

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

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

GOWLING WLG (CANADA) LLP
160 Elgin Street, Suite 2600
Ottawa, ON K1P 1C3

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

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

METL LAW CO.
Box PO 52029
Sidney RPO, Beacon Ave
Sidney, BC V8L5V9

Mary Ellen Turpel-Lafond
Tel: (250) 213-2904
Fax: (250) 380-6560
Email: metl@metllaw.ca

Counsel for the Intervener, Carcross/Tagish First Nation

SUPREME ADVOCACY LLP
100 – 340 Gilmour Street
Ottawa, ON K2P 0R3

Marie-France Major
Telephone: (613) 695-8855 Ext: 102
Fax: (613) 695-8580
Email: mfmajor@supremeadvocacy.ca

Agent for the Intervener, Carcross/Tagish First Nation

RATCLIFF LLP
500 – 221 West Esplanade
North Vancouver, BC V7M 3J3

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

Counsel for the Intervener, Teslin Tlingit Council

CHAMP AND ASSOCIATES
43 Florence Street
Ottawa, ON K2P 0W6

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

Agent for the Intervener, Teslin Tlingit Council

PALIARE ROLAND ROSENBERG ROTHSTEIN LLP
155 Wellington Street West
35th Floor
Toronto, ON M5V 3H1

Andrew Lokan
Telephone: (416) 646-4324)
Fax: (416) 646-4301
Email: andrew.lokan@paliareroland.com
Counsel for the Intervener, Congress of Aboriginal Peoples

DENTON CANADA LLP
99 Bank Street, Suite 1420
Ottawa, ON K1P 1H4

David R. Elliott/Corey Villeneuve (Law Clerk)
Telephone: (613-783-9699
Fax: (613) 783-9690
Email: corey.villeneuve@dentons.com

Agent to Counsel for the Intervener, Congress of Aboriginal Peoples

BOUGHTON LAW CORPORAATION
595 Burrard Street
Suite 700
Vancouver, BC V7X 1S8

James M. Coady, Q.C.
Daryn Leas
Tammy Shoranick

Telephone: (604) 687-6789
Fax: (604) 683-5317
Email: jcoady@boughtonlaw.com
dleas@boughtonlaw.com
tshoranick@boughtonlaw.com

Counsel for the Intervener, Council of Yukon First Nations

BORDEN LADNER GERVAIS LLP
World Exchange Plaza
100 Queen Street, Suite 1300
Ottawa, ON K1P 1J9

Nadia Effendi

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

Agent for the Intervener, Council of Yukon First Nations

UNIVERSITÉ DE MONCTON
Pavillon Léopold-Taillon
18, avenue Antonine-Maillet
Moncton, NB E1A 3E9

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

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

MCCARTHY TÉTRAULT LLP
Suite 5300, TD Bank Tower
66 Wellington Street West
Toronto, ON M5K 1E6

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

Counsel for the Intervener, Canadian Constitution Foundation

MACKENZIE FUJISAWA LLP
1600 – 1095 West Pender Street
Vancouver, BC V6E 2M6

Ian Knapp
Telephone: (6040 443-1203
Fax: (604) 685-6494
Email: iknapp@macfuj.com

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

SUPREME ADVOCACY LLP
100 – 340 Gilmour Street
Ottawa, ON K2P 0R3

Marie-France Major
Telephone: (613) 695-8855 Ext: 102
Fax: (613) 695-8580
Email: mfmajor@supremeadvocacy.ca

BRUCE J. SLUSAR
Suite 200 – 316 – 6th Avenue North
Saskatoon, SK S7K 2S5

Telephone: (306) 931-3737
Fax: (306) 931-6741
Email: slusar@shaw.ca

Counsel for the Intervener, Federation of Sovereign Indigenous Nations

POWER LAW
99 Bank Street
Suite 701
Ottawa, ON K1P 6B9

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

Agent for the Intervener, Federation of Sovereign Indigenous Nations

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PART I: OVERVIEW OF ARGUMENT AND STATEMENT OF FACTS

1. The distinct rights of Indigenous peoples in Canada have been recognized since the Royal Proclamation of 1763, and were protected via two separate provisions of the *Constitution Act, 1982*. The vast majority of Indigenous rights jurisprudence and debate has focused on section 35's protection of "[t]he existing aboriginal and treaty rights of the aboriginal peoples of Canada". This case represents the next step in the evolution of this Court's protection of Indigenous rights.

2. Unlike most prior Indigenous rights cases, this is not a case between the Crown and Indigenous peoples. But there are strong Crown interventions here, which tend to align with the claimant's arguments. Those arguments could, if accepted, minimize the protection of collective Indigenous rights. They would diminish the constitutional differences promised to Canada's Indigenous peoples in 1982, in favour of a "we are all Canadian" approach. While perhaps superficially attractive, that approach would narrow the realm within which Indigenous peoples can exercise the fundamental right of self-determination; it would push Indigenous peoples to conform with other Canadians' expectations of governance principles; and it would, inherently and fundamentally, undermine the intended protection of Indigenous uniqueness and the special place in the Constitution offered by sections 25 and 35. Such an approach is at odds with this Court's long history of protecting the distinctness of Indigenous collective rights.

3. That is not to say that any collective exercise of will by Indigenous peoples should be immune to challenge. Section 28 is one limitation on section 25. This Court may also find that, in the circumstances of this case, Ms. Dickson's section 15 challenge is meritorious and ought to be accepted—a matter on which the intervener B.C. Treaty Commission ("**Treaty Commission**") takes no position. Nor do we need to consider all possible scenarios and future challenges—those will develop over time, if needed. Regardless of the outcome of this case, the Treaty Commission urges the Court to affirm the importance of respecting and protecting the unique aboriginal, treaty and other rights of Indigenous peoples, in a manner that advances reconciliation and is consistent with the *United Nations Declaration on the Rights of Indigenous Peoples* ("**UNDRIP**").

PART II: POSITION ON THE QUESTIONS IN ISSUE

4. Section 25 of the *Charter* should be invoked where applying individual *Charter* rights would impair a core aspect of the distinctive, collective, and cultural identity of an Indigenous

people by abrogating or derogating from the exercise of an aboriginal, treaty, or other Indigenous right or freedom. The term "other rights or freedoms" in section 25 should be interpreted to include Indigenous constitutions, particularly where they are consistent with a treaty or other agreement with the Crown. Choices of self-government as expressed in constitutions go to the core of Indigenous peoples' identities. If there is a *prima facie* infringement of an individual Charter right and section 25 is found to apply, then the analysis need go no further. This interpretation would be consistent with UNDRIP, promote the successful negotiation and implementation of treaties and other government-to-government arrangements, and advance reconciliation.

PART III: STATEMENT OF ARGUMENT

A. The Purpose of Section 25 is to Protect the Distinctive, Collective, and Cultural Identities of Indigenous Peoples

5. Section 25 must be interpreted purposively and generously. This Court has long recognized that a *Charter* right or freedom must be understood "in the light of the interests it was meant to protect".[1] Just as this principle applies to section 35(1), so too must it apply to section 25.[2] As part of the legal relationship between the Crown and Indigenous peoples, section 25 must be given a generous and liberal interpretation, favouring the interests of Indigenous peoples.[3]

6. The fundamental purpose of section 25 is to protect the distinctive, collective, and cultural group identities of Indigenous peoples.[4] This purpose is grounded by the reasons of Mr. Justice Bastarache in *R. v. Kapp*, in which he identified this protective function as section 25's rationale.[5]

7. Similarly, in the 1996 *Report of the Royal Commission on Aboriginal Peoples*, the Royal Commission stated that section 25 "prevents distinctive Aboriginal understandings and approaches from being washed away in a flood of undifferentiated Charter interpretation."[6] The Royal Commission continued that section 25 is intended to rule out *Charter* interpretations that "attack

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[1] *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 at p. 344.
[2] *R. v. Van der Peet*, [1996] 2 S.C.R. 507 at paras. 3, 21-22 [*Van der Peet*].
[3] *Van der Peet* at paras. 23-24.
[4] *R. v. Kapp*, 2008 SCC 41 at para. 89 [*Kapp*].
[5] *Kapp* at para. 89.
[6] Canada, *Report of the Royal Commission on Aboriginal Peoples: Restructuring the Relationship*, vol. 2, (Ottawa: Supply and Services Canada, 1996) at 220 [*Report of the Royal Commission*].

the existence of Aboriginal governments or undermine their basic powers," and to ensure that the *Charter* "takes account of the distinctive philosophies, traditions and cultural practices that animate the inherent right of self-government."[7] These comments ought to be given significant weight in this Court's application of section 25.

8. Constitutional experts such as Peter Hogg have similarly described section 25's purpose:

> The point here is that the application of the *Charter*, when viewed with section 25, should not mean that Aboriginal governments must follow the policies and emulate the style of government of the federal and provincial governments. Section 25 allows an Aboriginal government to design programs and laws which are different, for legitimate cultural reasons, and have these reasons considered as relevant should such differences invite judicial review under the *Charter*. Section 25 would allow Aboriginal governments to protect, preserve and promote the identity of their citizens through unique institutions, norms and government practices.[8]

B. Section 25 Protects Indigenous Group Rights from Being Abrogated or Derogated from by Individual *Charter* Rights

9. Section 25 serves its purpose by protecting unique and collective rights belonging to Indigenous peoples. It shields "aboriginal, treaty or other [Indigenous] rights or freedoms" from the application of individual *Charter* rights in certain circumstances.[9] Section 25 should be invoked where applying individual *Charter* rights—such as section 15—would impair a core aspect of the distinctive, collective, and cultural identity of an Indigenous people by abrogating or derogating from the exercise of an aboriginal, treaty, or other Indigenous right or freedom.[10]

10. Protecting collective Indigenous rights in this manner advances reconciliation and rightfully gives section 25 the same "meaningful content" that this Court has stated must be given to section 35.[11] Section 35 provides a "constitutional framework through which the fact that

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[7] *Report of the Royal Commission*, vol. 2 at 220.
[8] Peter W. Hogg & Mary Ellen Turpel, "Implementing Aboriginal Self-Government: Constitutional and Jurisdictional Issues" (1995) 74:2 Can B Rev 187 at 215. See also *Report of the Royal Commission*, vol. 2, at 221.
[9] *Kapp* at para. 89; *R. v. Desautel*, 2021 SCC 17 at para. 39 [*Desautel*].
[10] *Kapp* at para. 89, citing 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 Sup Ct L Rev 3 at 180.
[11] *Newfoundland and Labrador (Attorney General) v. Uashaunnuat (Innu of Uashat and of Mani-Utenam)*, 2020 SCC 4 at para. 21.

aboriginals lived on the land in distinctive societies, with their own practices, traditions and cultures, is acknowledged and reconciled with the sovereignty of the Crown."[12] Moreover, it signals a "commitment by Canada's political leaders to protect and preserve constitutional space for Aboriginal peoples to be Aboriginal."[13] So too must section 25.

11. Utilizing section 25 as merely another factor in analyzing section 1 or another provision of the *Charter* would not fulfill this commitment. As noted by Bastarache J. in *Kapp*, section 25 was not intended to provide for a balancing of individual *Charter* rights against aboriginal rights.[14] It is protective.[15] Blending section 25 with another *Charter* provision would result in "reading down" section 25's protections, contrary to the scheme of the *Charter* and contrary to jurisprudence requiring that collective Indigenous rights be given a broad and generous application.[16]

12. Accordingly, the application of section 25 set out above should be considered after a *prima facie* infringement of an individual *Charter* right is identified, but before any analysis of section 1. If section 25 applies, then the analysis is at an end; the aboriginal, treaty, or other Indigenous right or freedom is constitutionally protected and there is no need to go on.

C. Section 25 is Not Unlimited in Scope

13. To be clear, while section 25 must be given meaningful content through a purposive and generous interpretation, the scope of its protection is not unlimited. First, its application must relate to an "aboriginal", "treaty", or "other" Indigenous right or freedom. Second, its application must protect against impairing a core aspect of the distinctive, collective, and cultural identity of an Indigenous people. Third, its application must be consistent with the remainder of the *Charter*.

(1) Section 25 Protects Aboriginal, Treaty, and Other Rights or Freedoms

14. By its plain language, section 25 only protects "aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada". This Court has extensively considered the concept of aboriginal rights in cases such as *R. v. Van der Peet* and *Lax Kw'alaams Indian*

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[12] *Van der Peet* at para. 31.
[13] *Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53 at para. 33 [*Little Salmon*].
[14] *Kapp* at para. 110.
[15] *Kapp* at para. 110.
[16] *Kapp* at para. 110.

Band v. Canada.[17] It considered the concept of treaty rights in *R. v. Badger* and other cases.[18] But it has not definitively considered the phrase "other rights or freedoms" in section 25.

15. Four principles ought to guide the breadth of "other rights and freedoms". First, the overarching purpose of protecting Indigenous peoples' distinctive, collective, and cultural identities must be at the forefront.[19] Second, the interpretation must be generous and liberal.[20] Third, it must be recognized that this phrase, with the rest of the provision and with section 35, provides part of the constitutional framework for reconciliation.[21] Finally, the phrase should be interpreted consistently with the *ejusdem generis* rule, with the content of "other rights or freedoms" comprising the same class as the enumerated terms "aboriginal" and "treaty" rights (but not meaning precisely the same thing as those enumerated terms).[22]

16. The Treaty Commission does not intend to comprehensively define the possible scope of "other rights or freedoms". At a minimum, however, the phrase is sufficiently broad to include the constitutions of self-governing Indigenous nations where those constitutions are consistent with a Crown-Indigenous treaty or agreement. Self-government is a fundamental means through which Indigenous peoples express their "distinctive, collective, and cultural" identities. An essential element of self-government is the constitution by which the government operates. Constitutions, which are intended to provide for transparency and accountability, typically result from votes by the members in a community engagement and ratification process. Including Indigenous constitutions within the phrase is consistent with the purpose of section 25. The inclusion becomes clearer when the constitution is specifically contemplated and addressed in an Indigenous treaty or agreement, bringing it within the same class as the other enumerated terms in section 25.

17. This interpretation is supported by *Kapp*, where Bastarache J. described the reference to aboriginal and treaty rights in section 25 as suggesting that "the focus of the provision is the uniqueness of those persons or communities mentioned in the Constitution; the rights protected

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[17] *Lax Kw'alaams Indian Band v. Canada (Attorney General)*, 2011 SCC 56 at para. 46. See also *Desautel* at para. 51.
[18] *R. v. Badger*, [1996] 1 S.C.R. 771 at paras. 37, 41, 47.
[19] *Kapp* at para. 89.
[20] *Van der Peet* at paras. 23-24.
[21] *Van der Peet* at paras. 31, 36, 42, 44, 49.
[22] *Kapp* at paras. 102-103.

are those that are unique to them because of their special status."[23] An Indigenous nation's constitution goes to the heart of its uniqueness and special status. The principles of self-government and self-determination would be hollow if the chosen manner of governance lacked constitutional protection even after entering into a treaty or other agreement with the Crown.

(2) Section 25 Protects Against Impairing a Core Aspect of an Indigenous Group's Distinctive, Collective, and Cultural Identity

18. The appropriate framework for applying section 25 must reconcile group and individual rights to the greatest extent possible. All Canadians—including Indigenous Canadians—benefit from the rights and freedoms granted to individuals by the *Charter*. Upholding limitations on those rights, such as through section 25, should be undertaken cautiously, and with due respect for both the individual and collective rights at issue.

19. Section 25 should therefore only apply when it is necessary to protect against impairing a core aspect of an Indigenous people's distinctive, collective, and cultural identity. This limitation would be consistent with *Kapp*, in which Bastarache J. stated that "only laws that actually impair native rights will be considered, not those that simply have incidental effects on natives."[24] It would be consistent with aboriginal rights under section 35(1), which involve identifying the "defining and central attributes of the aboriginal society", not merely incidental or occasional aspects of Indigenous societies.[25] It would also be consistent with the doctrine of interjurisdictional immunity—to which a parallel can be drawn when an Indigenous nation's powers of self-government are at issue—which considers whether there has been an impairment of a core power.[26]

20. Certain elements lie at the core of a self-governing Indigenous nation's identity. Generally, these include the form or nature of the nation's internal governance bodies, and the manner in which those bodies are selected. These governance bodies may look very different to the Canadian parliamentary system or any other Indigenous nation's; but that is the point. Indigenous nations have distinctive identities. Self-governance choices, including rules that are rationally connected to the implementation of the nation's chosen form of governance, should rarely be interfered with

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[23] *Kapp* at para. 103.
[24] *Kapp* at para. 97.
[25] *Van der Peet* at para. 56.
[26] *Marine Services International Ltd. v. Ryan Estate*, 2013 SCC 44 at paras. 50, 56.

when they are made pursuant to aboriginal, treaty, or other Indigenous rights or freedoms. The closer the issue gets to the core of Indigenous self-governance, the more wary the court should be of imposing non-Indigenous concepts of government.

21. These principles are supported by The Report of the British Columbia Claims Task Force (the "**Task Force**"), a tripartite body created by an agreement between representatives of First Nations in British Columbia, the Government of British Columbia and the Government of Canada on December 3, 1990, to advance treaty negotiations among the parties. In its report issued on June 28, 1991, the Task Force concluded that "[t]he manner in which First Nations organize and structure themselves for treaty negotiations must be left to them to decide" [emphasis added].[27] This principle is still more compelling once a treaty (or other agreement) is concluded. So long as the Indigenous governance structure is broadly consistent with the terms of the concluded treaty or agreement, the ongoing organization of the Indigenous nation should be left to them to decide. The Task Force concluded that "it will be important to the successful outcome of negotiations that the people of the First Nations have made their own choice."[28] So too, it will be important that Indigenous peoples have been empowered to make their own choices about their own government.

D. This Interpretation of Section 25 is Consistent with the *United Nations Declaration on the Rights of Indigenous Peoples*

22. The interpretation of section 25 offered by the Treaty Commission is consistent with UNDRIP, which has been affirmed as a universal international human rights instrument and endorsed through the enactment of federal and provincial legislation.[29]

23. Articles 3 and 4 of UNDRIP recognize the importance Indigenous self-government and self-determination. Article 3 states that "Indigenous peoples have the right to self-determination" and continues that "[b]y virtue of that right they freely determine their political status". Article 4 states that "Indigenous peoples, in exercising their right to self-determination, have the right to

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[27] Canada, British Columbia, and the First Nations of British Columbia, The Report of the British Columbia Claims Task Force (1991) at 19 [*The Report of the British Columbia Claims Task Force*].
[28] The Report of the British Columbia Claims Task Force at 19.
[29] *United Nations Declaration on the Rights of Indigenous Peoples Act*, S.C. 2021, c. 14; *Declaration on the Rights of Indigenous Peoples Act*, S.B.C. 2019, c. 44.

autonomy or self-government in matters relating to their internal and local affairs". The constitution of an Indigenous nation falls squarely within the category of "matters relating to their internal and local affairs". If the "other rights" in section 25 are to have any value to Indigenous peoples, they must include these matters.

24. Article 5 of UNDRIP recognizes the importance of preserving distinctive Indigenous identities. It states that "Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State."

25. The Treaty Commission's interpretation of section 25 advances the principles of UNDRIP by giving the provision meaning while respecting the importance of individual *Charter* rights belonging to Indigenous and non-Indigenous Canadians alike. As recognized in Articles 3 and 4, self-government and self-determination are important; but consistent with Article 5, while maintaining their distinct culture, Indigenous Canadians should also be able to participate in the political life of the state by accessing their individual *Charter* rights.

E. This Interpretation of Section 25 will Facilitate the Negotiation and Implementation of Treaties, Agreements, and other Government-to-Government Arrangements

26. This Court has acknowledged the complexity of negotiating modern treaties; the same applies to other agreements and substantive government-to-government arrangements. In *Quebec (Attorney General) v. Moses*, this Court noted that "[t]he text of modern comprehensive treaties is meticulously negotiated by well-resourced parties," and the "importance and complexity of the actual text" mean we should pay close attention to the terms.[30] Similarly, in *Beckman v. Little Salmon/Carmacks First Nation*, this Court stated that we should strive to respect the hard work of adequately resourced and professionally represented parties in these types of negotiations.[31]

27. These principles promote certainty in the negotiation process. Through often prolonged negotiations, the Crown and Indigenous nations collaboratively design treaties and agreements. Without the necessary confidence that the terms will be given effect by the courts, uncertainty

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[30] *Quebec (Attorney General) v. Moses*, 2010 SCC 17 at para. 7. See also *Little Salmon* at para. 9.

[31] *Little Salmon* at para. 54.

hinders negotiations, potentially stymies resolution, and delays reconciliation.

28. To properly facilitate negotiations, the parties need more than confidence that courts will respect the express terms of a treaty or agreement. The parties need confidence that courts will respect the manner in which the parties implement those terms, so long as the implementation generally accords with the treaty or agreement. Otherwise, the parties would be required to be so prescriptive as to make negotiations unworkable. For example, the value of negotiating a self-government agreement would be severely debased if the Indigenous nation could not decide matters such as how to govern itself. If the parties felt they needed to set out all conceivable matters of governance in detail in advance, then self-government agreements could become impossible to negotiate, and would undercut the point: it would be negotiated and Crown-endorsed government, rather than self-government.

29. A constitutional order that protects the flexible implementation of treaties and agreements is therefore necessary. As stated by this Court in *Little Salmon*, it would be misguided to take the position that what Indigenous peoples "negotiated as terms of the treaty is what they get. Period".[32] There must be capacity for development and evolution, as these documents cannot be comprehensive or static. The notion of a treaty or agreement as a "complete code" is "misconceived" and "untenable".[33] Current treaty negotiations often expressly incorporate flexibility through "periodic renewal" provisions, based on the parties' recognition of the importance of evolution. As stated by Her Excellency the Right Honourable Mary Simon in her first Speech from the Throne, "reconciliation is not a single act, nor does it have an end date."[34] The "living tree" doctrine should apply no less to Indigenous self-government than it does to the Canadian Constitution.[35]

30. The interpretation of section 25 urged by the Treaty Commission serves these ends. It would contribute to a constitutional framework in which the Crown and Indigenous peoples can enter into agreements confident in their ability to implement the terms. Agreements, constitutions,

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[32] *Little Salmon* at para. 50.
[33] *Little Salmon* at paras. 52, 62.
[34] *House of Commons Debates*, 44-1, No. 2 (23 November, 2021) at 15 (Hon Anthony Rota).
[35] *Keewatin v. Ontario (Minister of Natural Resources)*, 2013 ONCA 158 at paras. 137-138, aff'd *Grassy Narrows First Nation v. Ontario (Natural Resources)*, 2014 SCC 48.

and their interpretation by courts ought to foster self-determination—essential for Indigenous peoples to prosper, along with surrounding communities and Canada as a whole.

F. This Interpretation of Section 25 will Advance Reconciliation

31. Finally, giving effect to modern treaties and agreements—and the subsequent self-governance choices—would advance reconciliation, which is "found in the respectful fulfillment of a modern treaty's terms".[36] Modern treaties (and agreements) express partnership between nations, play a critical role in advancing reconciliation, and have assumed a vital place in our constitutional fabric.[37] They are critical to forging a renewed relationship between the Crown and Indigenous peoples.[38]

PART IV: SUBMISSIONS REGARDING COSTS

32. The Treaty Commission seeks no costs and requests that none be awarded against it.

PART V: REQUEST FOR ORAL ARGUMENT AND POSITION

33. By Order dated September 20, 2022, the Court granted the Treaty Commission leave to present oral argument not exceeding five minutes at the hearing of this appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 31st day of October 2022.

Blake, Cassels & Graydon ~~LLP~~
Roy W. Millen
Joshua Hutchinson
Alison Burns

Counsel for the Intervener,
British Columbia Treaty Commission

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[36] *First Nation of Nacho Nyak Dun v. Yukon*, 2017 SCC 58 at para. 38 [*First Nation of Nacho Nyak Dun*].
[37] *First Nation of Nacho Nyak Dun* at para. 1.
[38] *First Nation of Nacho Nyak Dun* at para. 1. See also *Little Salmon* at para. 10.

PART VI: TABLE OF AUTHORITIES

	AUTHORITIES – SECONDARY SOURCES	**Paragraph(s) Cited**
18.	Canada, *Report of the Royal Commission on Aboriginal Peoples: Restructuring the Relationship*, vol. 2, (Ottawa: Supply and Services Canada, 1996)	7-8
19.	Canada, British Columbia, and the First Nations of British Columbia, *The Report of the British Columbia Claims Task Force* (1991)	21
20.	*House of Commons Debates*, 44-1, No. 2 (23 November, 2021)	29
21.	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 Sup Ct L Rev 3	9
22.	Peter W. Hogg & Mary Ellen Turpel, "Implementing Aboriginal Self-Government: Constitutional and Jurisdictional Issues" (1995) 74:2 Can B Rev 187	8
23.	*United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 295, UNGAOR, 61st Sess., Supp. No. 49, UN Doc A/61/49 (2007)	3-4, 22-25