S.C.C. File No. 39856

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

B E T W E E N :

CINDY DICKSON

Appellant/Cross-Respondent

- and -

VUNTUT GWITCHIN FIRST NATION

Respondent/Cross-Appellant

- and -

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(Pursuant to Rules 37 and 42 of the *Rules of the Supreme Court of Canada,* S.O.R./2002-156)

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PART I—OVERVIEW AND STATEMENT OF POSITION

1. Section 25 of the *Canadian Charter of Rights and Freedoms* is a guarantee to Indigenous peoples that the *Charter* will not be used as a sword by non-Indigenous persons to undermine specific and distinct collective rights of Indigenous peoples. It recognizes that, in addition to the rights entrenched in the *Charter*, Indigenous peoples have *other* rights and seeks to protect them. In that sense, s. 25 can be conceived of as a shield in part. The section does not, however, deprive an Indigenous person from making a *Charter* claim as against an Indigenous government or shield all decision-making of Indigenous governments from *Charter* review.

2. Accordingly, the text of the Constitution read in context does not permit the conclusion reached by the court below that s. 25 is an absolute shield to *Charter* scrutiny. While this cannot be determinative, such a result would *also* be inconsistent with the *United Nations Declaration on the Rights of Indigenous Peoples*, which recognizes the importance of preserving the individual rights and freedoms of Indigenous peoples including equality rights.

3. If this Court accepts the interpretation offered by the court below, it has the potential to create *Charter*-free zones on reserve, treaty, and Aboriginal title lands throughout Canada, particularly when read in conjunction with another case that is also being heard by this Court from Quebec. This could deprive Indigenous Canadians of the rights and freedoms constitutionally guaranteed to them under the *Charter* and would effectively reverse key cases from this Court, such as *Corbiere v. Canada (Minister of Indian and Northern Affairs),* [1999] 2 S.C.R. 203. It could also have significant implications for the *Charter* rights of non-Indigenous Canadians that are subject to the jurisdiction of Indigenous governments in ways that are not consistent with the purpose of s. 25.

4. Collective rights and interests, including the Indigenous perspective, can still be accounted for under s. 1, as this Court has done to promote pluralism and maintain Canada's federal structure. These considerations are relevant in assessing *Charter* compliance, not as a bar to the *Charter*'s application. However, the Canadian Constitution Foundation ("**CCF**") takes no position on the question of whether a limit of the *Charter* is made out in this case, nor does it take a position on the application of the s. 1 analysis.

PART II—STATEMENT OF ARGUMENT

A. Section 25 is Not an Absolute Shield to *Charter* Review

5. The purpose of constitutional provisions must be ascertained by examining the text in its proper context.[1] As this Court explained in *Quebec (Attorney General) v. 9147-0732 Québec inc.*, constitutional analysis "must first and foremost have reference to, and be constrained by, th[e] text".[2] The text must be understood in its proper context because "[t]he language, structure, and history of the constitutional text" all constrain the scope of a provision.[3]

6. Section 25 of the *Charter* provides as follows:

> The guarantee in this *Charter* of **certain** rights and freedoms shall not be construed so as to **abrogate or derogate from** any aboriginal, treaty or **other rights or freedoms** that pertain to the aboriginal peoples of Canada including . . .[4]

7. The text of s. 25 evinces two purposes: (i) to recognize that Indigenous peoples have rights or freedoms that are not mentioned in the *Charter* – the *Charter* only includes "certain" rights and freedoms; and (ii) to ensure those other rights or freedoms are not abrogated or derogated from.

8. The first purpose of this provision is much like s. 26 of the *Charter* because it confirms that the *Charter* is not the only source of rights.[5] These other rights do not necessarily have constitutional status but the Constitution recognizes that they exist, either at common law or by statute. Similarly, s. 25 of the *Charter* is a recognition that Indigenous peoples have other collective rights, including but not limited to those protected by s. 35 of the *Constitution Act, 1982*.

9. The second purpose of this provision is like s. 29 of the *Charter*, which is similarly worded. It protects the special status of certain collective rights.[6] In the *Reference re Bill 30*, this Court

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[1] **See, e.g.,** *Quebec (Attorney General) v. 9147-0732 Québec inc.*, 2020 SCC 32, ¶13-14, 16-17; *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 at 344; *Caron v. Alberta*, 2015 SCC 56, ¶36-38.

[2] *Quebec (Attorney General)* (S.C.C.), *supra* note 1, ¶9.

[3] *Reference Re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313 at 394, per McIntyre J. **See also:** *R. v. Stillman*, 2019 SCC 40, ¶21; *R. v. Sullivan*, 2022 SCC 19, ¶61-62.

[4] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, s. 25, *emphasis added*.

[5] *Annapolis Group Inc. v. Halifax Regional Municipality*, 2022 SCC 36, ¶24.

[6] *Reference re Bill 30, An Act to Amend the Education Act (Ont.)*, [1987] 1 S.C.R. 1148.

observed that s. 29 was a textual confirmation of the principle that one part of the Constitution cannot be used to make another part invalid. Both Wilson and Estey JJ. explained that the *Charter* cannot be used to render "unconstitutional **distinctions** that are expressly permitted by the [Constitution]".[7] Section 25 also expresses the idea that the *Charter* cannot render unconstitutional distinctions that are constitutionally permitted but its scope is broader because it also serves to protect collective rights and freedoms that do not necessarily have constitutional status.

10. As discussed further below, this does not, however, prevent the exercise of a power from being subject to review. As Estey J. observed in the *Reference re Bill 30*, "[t]he role of the *Charter* is not envisaged … as providing for the automatic repeal of any provisions of the Constitution … Action taken under the *Constitution Act, 1867* is of course subject to *Charter* review. That is a far different thing from saying that a specific power … has been **entirely removed**".[8] This approach recognizes the function of s. 25 as preserving the distinctiveness of Indigenous rights and cultures from external encroachment, while also recognizing the interest in protecting the rights and freedoms of all Canadians. It acts as a shield in certain circumstances but it does not shield all decision-making of Indigenous governments from *Charter* scrutiny or deprive an Indigenous person from bringing a *Charter* claim against an Indigenous government.

11. The context confirms that s. 25 of the *Charter* is meant to protect the "distinctive, collective and cultural identity of an aboriginal group" from external encroachment.[9] The historical context demonstrates that s. 25 was primarily added to the Constitution in order to protect Indigenous rights and freedoms from s. 15 of the *Charter*. The concern was that a strict application of the equality guarantee found in the *Charter* would permit non-Indigenous Canadians to use the *Charter* as a sword to dismantle the special status of Indigenous peoples in the Canadian constitutional order by arguing that these rights or freedoms are impermissible racial discrimination.[10]

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[7] *Ibid* at 1207, *emphasis added*; **see also** at 1197.

[8] *Ibid* at 1207, *emphasis added*. **See also:** *Adler v. Ontario*, [1996] 3 S.C.R. 609 at 649; *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44, ¶82.

[9] *R. v. Kapp*, 2008 SCC 41, ¶89.

[10] **See:** D. Sanders, "Prior Claims: Aboriginal People in the Constitution of Canada", in S. M. Beck and I. Bernier, eds., *Canada and the New Constitution: The Unfinished Agenda* (Institute for Research on Public Policy, 1983), vol. 1, 225 at 231, Book of Authorities ("**BOA**") Tab 4; P. Macklem, *Indigenous Difference and the Constitution of Canada* (University of Toronto Press, 2001) at 225, BOA Tab 7; C. Hutchinson, "Case Comment on *R. v. Kapp*" (2007), 52

12. This concern was highlighted by Roy Romanow, then Attorney General of Saskatchewan, at the 1978 Federal-Provincial Conference of First Ministers on the Constitution:

> …In Saskatchewan, for example, for some years now I believe the government has in effect discriminated if I could put it that way, against our Indians in a number of areas, granting of fishing licenses, trapping permits in Northern Saskatchewan and so on and so forth … Recently we signed an agreement…and part of that agreement requires that by 1982 fifty per cent of the employees would be northerners…most of whom would be by definition Indian status or non-status. Now with an entrenched Bill of Rights, and if you judge by the American experience, **policies like those might be struck down by the courts as being discriminatory** and yet I think they are probably the correct policies …[11]

In response, both the then Minister of Justice and Prime Minister Pierre Trudeau observed that rights and affirmative action could be shielded from what would become s. 15(1) through careful drafting. Prime Minister Trudeau stated:

> The second point I make is as to the argument that when we codify rights we restrict them. Here again I think it is a question of drafting. We can, as Mr. Lang said in answer to Saskatchewan's Mr. Romanow, we can include affirmative action as permissible. **We can make it clear, as we attempted to do in Section 26 of our Bill C-60 that we are not abridging or abrogating from any rights or freedoms not declared that might have existed or might exist**.[12]

A modified s. 26 of Bill C-60 later became s. 25 of the *Charter*.[13] The same purpose is reflected in the Indigenous perspectives on the clause in the proceedings of the 1980-1981 Special Joint Committee on the Constitution.[14] Therefore, it is evident that s. 25 has a partial shielding function and cannot be "read[] down" to provide otherwise.[15]

McGill L.J. 173 at 178; K. McNeil, "The Constitutional Rights of the Aboriginal Peoples of Canada" (1982), 4 *S.C.L.R.* 255 at 262, BOA Tab 6.

11 Federal-Provincial Conference of First Ministers on the Constitution, Verbatim Transcript, Doc 800-8/067 (Ottawa: 30 October-1 November 1978) at 157, *emphasis added*.

12 *Ibid* at 166; see also at 158, *emphasis added*.

13 **See, e.g.,** Bill C-60, *An Act to amend the Constitution of Canada with respect to matters coming within the legislative authority of the Parliament of Canada, and to approve and authorize the taking of measures necessary for the amendment of the Constitution with respect to certain other matters*, 3rd Sess, 30th Parl, SC, 1978, cl. 26.

14 **See, e.g.,** Canada, Parliament, *Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada*, 32nd Parl, 1st Sess, No 27 (16 December 1980) at 85-86 and 132.

15 *Kapp* (S.C.C.), *supra* note 9, ¶110.

13. However, the purpose of s. 25 is to protect *other* rights, *not* to deny Indigenous peoples the protections found in the *Charter*. Accordingly, one of the limits of s. 25 requires that a distinction be made between internal and external restrictions.[16] It is appropriate to use s. 25 as a shield in cases in which non-Indigenous persons may attempt to use s. 15 as a sword to deny the special status of or a benefit for Indigenous peoples. In the context of this case, s. 25 prevents a non-Indigenous person from using s. 15 to abrogate the right to Indigenous self-government itself.[17] However, it is inappropriate to use s. 25 as a shield when an Indigenous person makes a claim as against an Indigenous government or any other level of government, as in *Corbiere*.[18] As Bastarache J. explained in *Kapp*, "[t]here is no reason to believe that s. 25 has taken Aboriginals out of the *Charter* protection scheme".[19]

14. Section 25 must also be understood in the context of the broader structure of the Constitution. Like the other constitutional protections for collective rights, it is a provision that advances the interests of minorities.[20] However, recognizing and protecting collective rights, including any right to self-government, does not oust individual rights and freedoms. For instance, this Court has long recognized that both the federal and provincial orders of government are sovereign *within the Canadian constitutional framework*.[21] The right of the provinces and the federal government to govern within their spheres of jurisdiction does not completely shield them from the application of the *Charter*.[22] While Canada's federal structure is an important protection

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16 **See:** Macklem, *supra* note 10 at 225-227, BOA Tab 7; W. Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Clarendon Press, 1995) at 35, BOA Tab 10.

17 **See:** B. Slattery, "First Nations and the Constitution: A Question of Trust" (1992), 71 *Can. Bar Rev.* 261 at 286-87, BOA Tab 2; Royal Commission on Aboriginal Peoples, *Partners in Confederation: Aboriginal Peoples, Self-Government and the Constitution* (Minister of Supply and Services, 1993) at 39, BOA Tab 8.

18 **See:** *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203, ¶51, per L'Heureux-Dubé J.

19 *Kapp* (S.C.C.), *supra* note 9, ¶99. **See also:** *Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53, ¶98, per Deschamps J. concurring.

20 *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, ¶79-82; *R. v. Desautel*, 2021 SCC 17, ¶39.

21 *Secession Reference* (S.C.C.), *supra* note 20, ¶47, 56.

22 *PHS Community Services* (S.C.C.), *supra* note 8, ¶82; *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44, ¶142-143.

for minorities,[23] it does not prevent *Charter* review. Significantly, in the *Secession Reference*, despite recognizing the importance of provincial autonomy for a province like Quebec, which has its own language, culture and legal tradition,[24] this Court did not suggest that Quebec could be completely immune from *Charter* scrutiny. Instead, the right to self-government is maintained and that right is subject to the *Charter*.

15. Interpreting s. 25 as a complete shield would lead to the result that all the other orders of government in Canada are subject to the *Charter* but not Indigenous governments. The Aboriginal right to self-government must be exercised within the Canadian constitutional framework. It is not a right to absolute sovereignty and it must be exercised in a manner consistent with individual rights and freedoms,[25] which would be an inherent limitation on any Aboriginal right of self-government under s. 35. Indeed, as the Court has explained in other contexts, no Aboriginal rights are absolute and they are subject to justifiable limitations, including limitations relating to ensuring public safety and conservation of resources.[26] Collective or societal interests, while relevant to the *Charter* analysis in appropriate cases, can notably be accounted for under s. 1, as discussed below.

16. While it cannot be determinative in the analysis,[27] it is noteworthy that art. 1 of the *United Nations Declaration on the Rights of Indigenous Peoples* expressly provides that Indigenous peoples have "the right to the full enjoyment … of all human rights and fundamental freedoms as recognized in the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights law".[28] Art. 46 also recognizes that rights in the *Declaration*, which includes the right to self-government under art. 4, may be subject to "such limitations as are determined by law and in accordance with international human rights obligations".[29] Since the

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[23] *Secession Reference* (S.C.C.), *supra* note 20, ¶81.

[24] *Secession Reference* (S.C.C.), *supra* note 20, ¶58-59, 136.

[25] *Secession Reference* (S.C.C.), *supra* note 20, ¶72.

[26] **See, e.g.,** *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69, ¶58; *Mikisew Cree First Nation v. Canada (Governor General in Council)*, 2018 SCC 40, ¶153, per Rowe J. concurring.

[27] *Quebec (Attorney General)* (S.C.C.), *supra* note 1, ¶41.

[28] *United Nations Declaration on the Rights of Indigenous Peoples*, 13 September 2007, A/RES/61/295, art. 1; *United Nations Declaration on the Rights of Indigenous Peoples Act*, SC 2021, c 14, Schedule.

[29] *Ibid*, art. 4 and 46.

Charter is the means by which Canada implemented *some* of its international human rights law obligations in 1982, the interpretation of s. 25 offered above is *also* consistent with international law by ensuring that the exercise of a right to Aboriginal self-government is consistent with other rights and freedoms of Indigenous peoples, including the guarantee of equality.[30]

17. Finally, the fact that an Indigenous government may adopt a constitution which includes rights and freedoms – as is the case here – has no impact on the interpretation of the scope of s. 25. The answer to this legal question would be the same whether the Indigenous government at issue has a rights-entrenching constitution or not. Relatedly, the fact that the provinces can adopt human rights norms or, as is the case in Quebec, a *Charter of Human Rights and Freedoms* that pre-dates and overlaps in part with the *Charter*, does not give them immunity from scrutiny for constitutional compliance. The provinces are free to adopt human rights norms similar to those found in the *Charter* or not. They are also free to expand on its guarantees if they so choose. The same can be said of Indigenous governments. This does not, however, immunize them from the rights and freedoms floor established in the *Charter*.

B. Interpreting s. 25 as an Absolute Shield Would Have Significant Consequences

18. Interpreting s. 25 as an absolute shield to *Charter* review would have significant consequences. It would effectively reverse important precedents of this Court, such as *Corbiere.*[31] As mentioned above, this holding will not be limited to the Vuntut Gwitchin First Nation. It could potentially extend to all Indigenous groups exercising a right to self-government.[32]

19. In *Corbiere,* this Court declared a provision of the *Indian Act* which required band members to be "ordinarily resident on the reserve" in order to vote in band elections to be unconstitutional as it limited s. 15(1) of the *Charter* and could not be saved by s. 1. In that case, members of the Batchewana First Nation residing off reserve challenged the constitutional validity of s. 77(1) of the *Indian Act*, which required members to be resident on the reserve to be eligible to vote in Band

30 *Quebec (Attorney General)* (S.C.C.), *supra* note 1, ¶23. See also *R. v. Bissonnette*, 2022 SCC 23, ¶98.

31 *Corbiere* (S.C.C.), *supra* note 18.

32 *Renvoi à la Cour d'appel du Québec relatif à la Loi concernant les enfants, les jeunes et les familles des Premières Nations, des Inuits et des Métis*, 2022 QCCA 185.

elections. In 1991, only 32.8 percent of its 1,426 registered members lived on the reserve.[33]

20. In discussing the situation faced by Indigenous peoples who live on or off reserve, this Court acknowledged that "the reality of their situation is unique and complex".[34] In answering whether or not the distinction at issue constituted discrimination, this Court held:

> The impugned distinction perpetuates the historic disadvantage experienced by off-reserve band members by denying them the right to vote and participate in the band's governance. Off-reserve band members have important interests in band governance which the distinction denies. They are co-owners of the band's assets. The reserve, whether they live on or off it, is their and their children's land.[35]

21. If this Court were to accept the conclusion of the court below on the scope of s. 25, an Indigenous government could adopt a similar restriction that limited voting to members that reside on reserve or treaty lands and this would be shielded from *Charter* review under s. 25, notwithstanding that such a result is clearly inconsistent with *Corbiere*.[36]

22. Further, the outcome of this decision will have repercussions on the application of the *Charter* to the decisions of Indigenous governments across the country. This is especially true when read along with the reasons in *Renvoi à la Cour d'appel du Québec relatif à la Loi concernant les enfants, les jeunes et les familles des Premières Nations, des Inuits et des Métis*, which held that there is an Aboriginal right to self-government relating to child and family services under s. 35 of the *Constitution Act, 1982* and that this is a generic right that extends to all Indigenous peoples.[37] If this Court were to affirm that decision as well as the case at bar, the *Charter* could be rendered inapplicable in any area where an Aboriginal right of self-government is being exercised.

23. Interpreting s. 25 as an absolute shield could also deprive certain Canadians of protections in the event of infringements of their basic civil liberties. For instance, in reference to the school of thought which views s. 25 as a "complete shield to *Charter* challenges", Dickson has noted that such an approach "allows for the possibility of serious violations of the basic civil liberties of group

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33 *Corbiere* (S.C.C.)*, supra* note 18*,* ¶30

34 *Ibid*, ¶15.

35 *Ibid*, ¶17

36 **See also:** Jack Woodward, Q.C., *Aboriginal Law in Canada* (Carswell, 1989) at §6:13, 6:15, 6:18, BOA Tab 5.

37 *Renvoi à la Cour d'appel du Québec* (Q.C.C.A.), *supra* note 32, ¶364-5, 471, 485, 486-494.

members."[38] While this does not mean Indigenous governments would do so, this absolutist approach could potentially result in Indigenous Canadians being deprived of their constitutionally guaranteed rights and freedoms and leave them without a remedy. For example, if the Aboriginal right to self-government includes the establishment and creation of an Indigenous police force that can enforce laws enacted by the Indigenous government, Indigenous peoples (and non-Indigenous peoples resident or present on reserve, treaty, or Aboriginal title lands) could, in theory, be deprived of various *Charter* protections, including the right against unreasonable search and seizure. This result does not accord with the purpose of s. 25 or the scheme of the Constitution.

C. Collective or Societal Interests Remain Relevant Under s. 1

24. Finally, the collective or societal interests of Indigenous peoples can notably be accounted for under s. 1 in appropriate cases.[39]

25. It must be noted that some of the concerns advanced by the respondent and other interveners in this case illustrate the importance of a rigorous approach to purposive *Charter* interpretation. The exercise of a right to self-government of any order of government should be subject to the *Charter* rights and freedoms that were constitutionalized in 1982.[40] The Court recently emphasized this point in a number of cases, including *R. v. Poulin*, in which it noted that a "purposive" approach to constitutional analysis must be distinguished from a "generous" approach.[41]

26. In addition, this Court has held that compliance with the *Charter* must be assessed contextually, not mechanically.[42] As Professor Webber explains, "[e]very reasonable limit is a further limitation, a further specification, a further demarcation of the scope and content of rights and freedoms begun but left incomplete in the Charter itself".[43] In keeping with this approach, this

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[38] T. Dickson, "Section 25 and Intercultural Judgement" (2003), 61:2 *U.T. Fac. L. Rev*. 141 at 157-58, BOA Tab 9.

[39] **See:** *R. v. Brown*, 2022 SCC 18, ¶166.

[40] *Toronto (City) v. Ontario (Attorney General)*, 2021 SCC 34, ¶58-61, 81-82.

[41] *R. v. Poulin*, 2019 SCC 47, ¶53-57. **See also:** *Stillman* (S.C.C.), *supra* note 3, ¶21-22; *Quebec (Attorney General)* (S.C.C.), *supra* note 1, ¶10; *Caron*, *supra* note 1, ¶36-38; G. Webber, "What Oakes should have said" (2023) *S.C.L.R.* (forthcoming) at 12.

[42] **See:** *R. v. K.R.J.*, 2016 SCC 31, ¶134-136, per Brown J., dissenting in part; B.W. Miller, "Justification and Rights Limitations", in G. Huscroft, ed., *Expounding the Constitution* (Cambridge University Press, 2008) at 96, BOA Tab 3.

[43] Webber, *supra* note 41 at 12. **See also:** *Brown* (S.C.C.), *supra* note 39, ¶126.

Court has previously explained that a certain "margin of appreciation" must be afforded to the provinces under s. 1 in order to account for the legal and cultural pluralism that flows from Canada's federal structure.[44] Indeed, courts around the world routinely assess state conduct for compliance with rights and freedoms in pluralistic contexts.[45] This suggests that a "sound understanding of our rights and freedoms" does not situate the individual in "opposition to the community and its pursuit of collective goals".[46]

27. Consequently, Bastarache J. was correct to note in *Kapp* that s. 1 of the *Charter* "already takes into account the aboriginal perspective in the right case".[47] Indeed, scholars have noted that approaches like the one developed in this Court's jurisprudence accounting for Canada's federal structure are equally relevant when assessing whether the limits on *Charter* rights and freedoms are justified in this context.[48] It is possible to recognize the importance of upholding both the collective and individual interests of Indigenous peoples. They are not mutually exclusive.

PART III—SUBMISSIONS CONCERNING COSTS

28. The CCF requests that no costs be awarded either for or against it.

PART IV—ORDER REQUESTED

29. The CCF takes no position with respect to the disposition of the appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 1st day of November, 2022.

Bryn Gray / Jesse Hartery / Sherry Ghaly

[44] **See, e.g.,** *R. v. Advance Cutting & Coring Ltd.*, 2001 SCC 70, ¶274-276; *Quebec (Attorney General) v. A*, 2013 SCC 5, ¶440, 449, per McLachlin C.J., concurring; *Frank v. Canada (Attorney General)*, 2019 SCC 1, ¶61, per Wagner C.J., ¶91, 107, 110, per Rowe J., concurring, ¶162-163, per Côté and Brown JJ., dissenting.

[45] **See:** A. Legg, *The Margin of Appreciation in International Human Rights Law* (Oxford University Press, 2012) at 40-50, BOA Tab 1.

[46] Webber, *supra* note 41 at 2, 5.

[47] *Kapp* (S.C.C.), *supra* note 9, ¶110, per Bastarache J., concurring.

[48] **See, e.g.,** Hutchinson, *supra* note 10 at 189; Macklem, *supra* note 10 at 226-227, BOA Tab 7.

PART V—TABLE OF AUTHORITIES

Tab No.	AUTHORITIES	Paragraph(s) Referenced in Factum
	CASE LAW	
1.	*Adler v. Ontario*, [1996] 3 S.C.R. 609	10
2.	*Annapolis Group Inc. v. Halifax Regional Municipality*, 2022 SCC 36	8
3.	*Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53	13
4.	*Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44	10, 14
5.	*Caron v. Alberta*, 2015 SCC 56	5, 25
6.	*Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203	3, 13, 18, 19, 21
7.	*Frank v. Canada (Attorney General)*, 2019 SCC 1	26
8.	*Mikisew Cree First Nation v. Canada (Governor General in Council)*, 2018 SCC 40	15
9.	*Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69	15
10.	*Quebec (Attorney General) v. 9147-0732 Québec inc.*, 2020 SCC 32	5, 16, 25
11.	*Quebec (Attorney General) v. A*, 2013 SCC 5	26
12.	*R. v. Advance Cutting & Coring Ltd.*, 2001 SCC 70	26
13.	*R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295	5
14.	*R. v. Bissonnette*, 2022 SCC 23	16
15.	*R. v. Brown*, 2022 SCC 18	24, 26
16.	*R. v. Desautel*, 2021 SCC 17	14
17.	*R. v. K.R.J.*, 2016 SCC 31	26
18.	*R. v. Kapp*, 2008 SCC 41	11, 12, 13, 27
19.	*R. v. Poulin*, 2019 SCC 47	25
20.	*R. v. Stillman*, 2019 SCC 40	5, 25
21.	*R. v. Sullivan*, 2022 SCC 19	5
22.	*Reference re Bill 30, An Act to Amend the Education Act (Ont.)*, [1987] 1 S.C.R. 1148	9, 10
23.	*Reference Re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313	5
24.	*Reference re Secession of Quebec*, [1998] 2 S.C.R. 217	14, 15
25.	*Renvoi à la Cour d'appel du Québec relatif à la Loi concernant les enfants, les jeunes et les familles des Premières Nations, des Inuits et des Métis*, 2022 QCCA 185	18, 22
26.	*Toronto (City) v. Ontario (Attorney General)*, 2021 SCC 34	25
27.	*Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44	14
	SECONDARY SOURCES	
28.	A. Legg, *The Margin of Appreciation in International Human Rights Law* (Oxford: Oxford University Press, 2012) at 40-50	26
29.	B. Slattery, "First Nations and the Constitution: A Question of Trust" (1992), 71 *Can. Bar Rev.* 261 at 286-87	13

Tab No.	AUTHORITIES	Paragraph(s) Referenced in Factum
30.	B.W. Miller, "Justification and Rights Limitations", in G. Huscroft, ed., *Expounding the Constitution: Essays in Constitutional Theory* (Cambridge University Press, 2008), at 96	26
31.	Bill C-60, *An Act to amend the Constitution of Canada with respect to matters coming within the legislative authority of the Parliament of Canada, and to approve and authorize the taking of measures necessary for the amendment of the Constitution with respect to certain other matters*, 3rd Sess, 30th Parl, SC, 1978, cl. 26	12
32.	C. Hutchinson, "Case Comment on *R. v. Kapp*: An Analytical Framework for Section 25 of the Charter" (2007), 52 *McGill L.J.* 173 at 178, 189	11
33.	Canada, Parliament, *Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada*, 32nd Parl, 1st Sess, No 27 (16 December 1980) at 85-86 and 132	12
34.	D. Sanders, "Prior Claims: Aboriginal People in the Constitution of Canada", in S. M. Beck and I. Bernier, eds., *Canada and the New Constitution: The Unfinished Agenda* (Montreal: Institute for Research on Public Policy, 1983), vol. 1, 225 at 231	11
35.	Federal-Provincial Conference of First Ministers on the Constitution, Verbatim Transcript, Doc 800-8/067 (Ottawa: 30 October-1 November 1978) at 157, 158, 166	12
36.	G. Webber, "What Oakes should have said (or how to read a limitations clause)" (2023) *S.C.L.R.* at 2, 5, 12	25, 26
37.	Jack Woodward, Q.C., *Aboriginal Law in Canada* (Toronto, Carswell, 1989) at §6:13, 6:15, 6:18	21
38.	K. McNeil, "The Constitutional Rights of the Aboriginal Peoples of Canada" (1982), 4 *S.C.L.R.* 255 at 262	11
39.	P. Macklem, *Indigenous Difference and the Constitution of Canada* (Toronto: University of Toronto Press, 2001) at 225-227	11, 13, 27
40.	Royal Commission on Aboriginal Peoples, *Partners in Confederation: Aboriginal Peoples, Self-Government and the Constitution* (Minister of Supply and Services, 1993) at 39	13
41.	T. Dickson, "Section 25 and Intercultural Judgement" (2003), 61:2 *U.T. Fac. L. Rev*. 141 at 157-58	23
42.	*United Nations Declaration on the Rights of Indigenous Peoples*, 13 September 2007, A/RES/61/295, art. 1, 4 and 46	2, 16
43.	W. Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford: Clarendon Press, 1995) at 35	13
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44.	*Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, s. 25	1, 6, 17, 25

Tab No.	AUTHORITIES	Paragraph(s) Referenced in Factum
45.	*United Nations Declaration on the Rights of Indigenous Peoples Act*, SC 2021, c 14, Schedule	16