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:

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FACTUM OF THE INTERVENER, BAND MEMBERS ALLIANCE AND ADVOCACY ASSOCIATION OF CANADA ("BMAAAC")

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Part I – Overview of Position

1. Since 2019, The Band Members Alliance and Advocacy Association of Canada ("BMAAAC") has been a voice for those band members that have lost their voice, as a result of lateral violence, fear of retribution by band councils, and discriminatory practices, often under the veneer of aboriginal custom and governance.

2. In this appeal, this court will be determining what *Charter* rights, if any, indigenous peoples in Canada enjoy. Some parties and interveners urge this Court deny the application of the *Canadian Charter of Rights and Freedoms* ("the Charter"), saying that requiring indigenous governments to respect basic individual rights and freedoms would be an unfair and unjust imposition of "western" and colonial law.

3. However BMAAAC submits that the Charter and aboriginal self-government pursuant are not in tension. It is a false dilemma to suggest that obliging indigenous governments to observe certain basic rights and freedoms guaranteed in the *Charter* is unwarranted interference in the right to self-determination. Indigenous governments are perfectly capable of "being aboriginal"[1] while at the same time respecting basic human rights guaranteed in the Canadian constitution. The result of this false choice would to leave a segment of already vulnerable Canadians with even fewer legal protections against an order of government with significant power over them.

4. BMAAAC submits that indigenous self-government is an integral part of Canadian governance, but a part of Canadian governance nonetheless and thus should, like any other head of government, be required to respect constitutional constraints, including the rights and freedoms guaranteed under the *Charter*.

5. The only exception to this is found in Section 25, for which this Intervener proposes a legal test to harmonize the *Charter* with the existence of aboriginal rights, particularly that of self-government.

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[1] See *Beckman v. Little Salmon/Carmacks First Nation*, [2010] 3 S.C.R. 103, at para. 33

Part II – Questions in Issue

6. There are two questions raised in this appeal which BMAAAC wishes to address:

   a. Firstly, does the *Charter of Rights* apply to the VGFN's residency requirement contained within its constitution, and

   b. Secondly, how should section 25 of the *Charter* apply to indigenous laws and rights?

Part III – Statement of Argument

7. BMAAAC's submissions on both points raised are guided by the principle that the *Charter* should be interpreted from the perspective of and in light of the interests that it means to protect, in this case the rights and freedoms of the individual against government conduct.[2]

1. The *Charter* Applies to all Indigenous Governments in Canada

8. The application of the *Charter* to indigenous governments turns on the interpretation of Section 32. While that section makes explicit reference to only provincial and federal orders of government, this court has consistently affirmed that the *Charter*'s application extends beyond and to the "fabric" of Canadian government.[3]

9. Whether these governments are constituted pursuant to inherent rights arising from pre-existing occupation of the lands which are now Canada, treaties with the Crown, or legislation empowering them is thus of no moment. BMAAAC submits that the jurisdiction exercised by any aboriginal government within Canada now flows from Canadian sovereignty which is vested in the Crown and subject to our constitution, and are inherently government bodies within Canada, and thus captured by the *Charter*.

(a) Indigenous Communities and Governments are Part of Canada's Modern Constitutional Structure

10. In a purely legal sense, BMAAAC submits that Indigenous governments, whether constituted pursuant to inherent rights and recognized by treaty, or formed under the *Indian Act*, do not

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[2] see *R v. Big M Drug Mart*, [1985] 1 S.C.R. 295, at para. 116

[3] *Lavgine v. Ontario Public Service Employees Union*, [1991] 2 S.C.R. 211 at p. 312, *per* La Forest J.

operate outside of Canadian law. Rather, they exercise a component of Canadian sovereignty under the Canadian constitution and thus are part of Canada's structure of government.

11. This court has recognized conclusively that Canadian sovereignty and legislative jurisdiction is vested in the Crown and, as noted by Hogg and Turpel, exhaustively distributed amongst Parliament the legislatures.[4] However, as further noted by those learned authors, the principles of our law relating to this point were developed in a context which did not consider aboriginal self-government.[5]

12. BMAAAC submits that the most appropriate way to reconcile the sovereignty of the Crown with the pre-existing occupation of Canada by indigenous peoples and a right to self-government is to understand sovereignty in Canada as recommended by the Royal Commission on Aboriginal Peoples: A modern partnership between indigenous and non-indigenous communities, with the sovereignty of the various indigenous peoples and settlers having been merged within the Crown.[6] From this, the right to self-government is best viewed as having been absorbed into our constitution, particularly upon the entrenchment of Aboriginal rights in Section 35 of the *Canada Act, 1982*. One must remember that the Canadian constitution is not a single, authoritative document, but a collection of laws which are "the supreme law of the land."

13. Indigenous governments are thus part of the "fabric" of Canadian governance and derive their right to govern from the Canadian constitution. They are not separate legal islands which exist outside of Canadian law, but are special places *within* and recognized by Canadian law. In this respect, indigenous governments, whatever their form, must be viewed as subject to the *Charter* as they are government entities within Canada, deriving their jurisdiction from the constitution itself. On this basis, Section 32 should apply.

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[4] See, *R v. Sparrow*, [1990] 1 S.C.R. 1075, at pp. 1102 to 1104; and see P. Hogg & M. E. Turpel, "Implementing Aboriginal Self-Government: Constitutional and Jurisdictional Issues" 1995, 74:2 *Canadian Bar Review*, 189 at 192 and 214

[5] P. Hogg & M. E. Turpel, "Implementing Aboriginal Self-Government: Constitutional and Jurisdictional Issues" 1995, 74:2 *Canadian Bar Review*, 189 at 192 and 214

[6] *Mitchell v.M.N.R.*, [2001] 1 S.C.R. 911, at paras. 128 to 130

(b) Indigenous Governments Exercise Public Functions and are Inherently "Government"

14. In addition to their legal status as an order of government within Canada, Indigenous Governments also perform functions within Canada which are essential, public, and inherently "governmental" over their members. As the court below correctly noted,[7] it has been recognized by this court that the text of Section 32 does not contain an exhaustive list of governmental authorities subject to the *Charter*.[8] Section 32, rather, is meant to draw the line of application between inherently private and public relationships.

15. Indigenous governments in Canada are very much public bodies in two respects. Firstly, they exercise inherently "public" functions over their members and, secondly, their relationship with their members is defined by the traditional power dynamic between governor and governed.

16. The powers and responsibilities exercised by Indigenous governments in Canada include allocating housing, providing basic services and utilities, determining criteria for membership of the nation, and distributing of financial benefits accruing to the community. These governments make core decisions on behalf of the community respecting allocation of basic needs and promotion of well-being. These are highly political and public powers, which are held over a nation's membership.

17. Indigenous governments also often make fundamental decisions about the exercise of aboriginal rights held by the community. This includes negotiations with other orders of government, decisions about land-use planning over traditional territory and title lands, and decisions about the exercise of aboriginal rights which our courts historically referred to as "usufructuary rights", such as the rights to fish, hunt, and gather. For example, communal fishing licenses issued by the Minister of Fisheries and Oceans under the *Aboriginal Communal Fishing Licences Regulations*,[9] often leave to the receiving nation's government the decision of who is entitled to fish and under what circumstances. These rights are of utmost important to the individual members of the communities and lie at the core of the individual's

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[7] 2020 YKCA 22, at paras. 123 to 124
[8] *Godbout v. Longueuil (City)*, [1997] 3 S.C.R. 844, at para. 48
[9] S.O.R. 93-332

identity. They are the means by which they express, connect with, and develop their culture, and they often provide opportunity for the individual to provide sustenance and economic well-being to their families.

18. Individual aboriginal people, for their part, live in a state of heightened dependency on their governments because their unique vulnerability occasioned by Canada's shameful treatment of them. These individuals have been victims of residential schools, displacement, and racist colonial policy. They are people who, as this court has noted, have suffered "lower educational attainment, lower incomes, higher unemployment, higher rates of substance abuse and suicide, and of course higher levels of incarceration" as a result of historic discrimination and abuse.[10] For those who live on-reserve (or treaty lands), their needs are high and provided almost entirely by indigenous governments. For those who live outside of their traditional territory, members still maintain connections to their people and are affected by decisions, including the allocation of benefits and resources.

19. This vulnerability creates a relationship of natural dependency which is not voluntary. Membership in a community is not defined by voluntary association. A first nation is not a social club or a university. Aboriginal ancestry and membership in a nation goes to the core of one's identity and human dignity. It is usually defined by ancestry and shared culture and (in some cases) language. While the term "membership" is commonly used to denote association, BMAAAC suggests the more accurate term to capture the relationship is that of "nationality" or "citizenship".

20. The power indigenous governments wield over the lives of their members is thus considerable, as they exercise direct power over fundamental and integral aspects of the lives of their people, whose connection to the community goes to the root of their identity, and which people are especially dependant on government help because of the historic wrongs our country has perpetrated against them. This relationship is one of a power imbalance, which provides ripe opportunity for abuse, something which is sadly documented to occur.[11]

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[10] *R v. Ipeelee*, [2012] 1 S.C.R. 433, at para. 60; *R v. Gladue*, [1999] 1 S.C.R. 688, at p. 427

[11] See K. Wilkins, "Take your Time and Do it Right: *Delgamuukw*, Self-Government Rights and the Pragmatics of Advocacy" 2000, 27:2, *Manitoba Law Review*, 241, at 254 to 258

21. This relationship and the powers vested in indigenous governments should all be considered in determining that they are governments for the purposes of Section 32 of the *Charter*.

(c) Reconciliation Favours Application of the *Charter*

22. If reconciliation is about reconciling the pre-existence aboriginal societies and legal orders with sovereignty of the Crown, then it is submitted that the law must find ways forward which merges both "colonial" law and indigenous social and legal orders, adapting each to coexist with the other. An example of this is found in the context of fishing, where this court determined that Aboriginal rights to fish exist *within* the context of, rather than *apart from*, the common law public right.[12]

23. Reconciliation should not be viewed as achieved by simply reverting Canada's legal order back to pre-sovereignty. Such a position does not account for the historic trauma visited upon indigenous peoples by colonial policies and practices which systematically destroyed pre-existing social bonds and structures, the fact that indigenous communities now live together with the descendants of settlers to this land in a modern country, or modern views about human rights and freedoms. Individual indigenous peoples live in a modern world with modern challenges and modern understandings of rights and freedoms. While this court must make space in our constitution for indigenous peoples to develop their cultures and societies in the way they see fit, the court must also be mindful that Indigenous people are *already* disadvantaged and suffer from systemic discrimination. Reconciliation should not be a means by which they are *further* deprived of legal rights in their own country.

24. The rights in the *Charter* are not even necessarily inconsistent with indigenous self-government[13] and are flexible enough to create space for indigenous perspectives.[14] Indeed, multiple articles of the United Nations Declaration on Indigenous Peoples ("UNDRIP")

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[12] *R v. Gladstone*, [1996] 2 S.C.R. 723, at para 67
[13] Matt Watson, "Reconciling Sovereignties, Reconciling Peoples: Should the Canadian Charter of Rights and Freedoms Apply to Inherent-right Aboriginal Governments?" 2019, 2:1, *Inter Gentes*, 75 at 86 to 93, Book of Authorities ("BOA") Tab 2
[14] *Supra* note 15, at 110 to 110

expressly acknowledge that the rights guaranteed within are subject to individual rights and freedoms such as those guaranteed by the *Charter*.[15]

25. Should an aboriginal government be permitted, for example, to strip certain members of their status, and with it a host of important financial benefits and cultural opportunities, on the basis of gender[16] or sexual orientation? Or should the government be allowed to abduct, and assault, humiliate members against their consent?[17] BMAAAC submits that permitting these sorts of results and leaving the most disadvantaged Canadians to fend for themselves does nothing to promote reconciliation.

26. BMAAAC submits that reconciliation calls for the recognition that aboriginal peoples now live in a blended, modern society that has formed over the past centuries. For better or for worse, their societies have, *in fact*, been impacted by colonization and settlement, leaving indigenous people disadvantaged and vulnerable to governments, *including their own*.

27. Reconciliation should be a pathway towards finding a place *within* the Canadian community, whereby indigenous people may enjoy the same basic legal rights as their fellow citizens while at the same time enjoying the legal space to develop their communities and culture.

28. Our constitution should be understood as providing a space for indigenous people to maintain and develop their cultures and communities, *within* modern constitutional constraints, such as the respect for certain basic and fundamental rights and freedoms. Our constitution should not be interpreted as creating or even permitting division and separation through different legal orders and asymmetric rights, where some members of our country enjoy basic legal protections against government while others do not. To do so would create "jurisdictional ghettos" where an already disadvantaged group of people would be entitled to lesser

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[15] *United Nations Declaration on the Rights of Individuals Peoples Act*, S.C. 2021, c. 14, Annex, see, *inter alia*, articles 1, 7, 46, and 47

[16] See, for example, *Scrimbitt v. Sakimay Indian Band Council*, 1999 CanLII 9381 (FC), [2000] 1 F.C. 513, in particular paras. 26 to 31, and 38 to 53, and *Dumais (Estate) v. Canada (Indigenous and Northern Affairs)*, 2020 FC 25, in particular paras. 10 to 28

[17] See, for example, *Thomas v. Norris*, [1992] 2 C.N.L.R. 139 (B.C.S.C.), BOA Tab 1

constitutional rights and freedoms than other Canadians.[18] Such a result should be intolerable in the law.

29. The promise of the *Charter* is that *everyone* in Canada should enjoy the same basic rights and freedoms against government. Reconciliation is best promoted by ensuring that is the case.

2. Section 25 Should Protect only the Core of Aboriginal Rights

30. With the *Charter* applying to Indigenous governments, this raises the question of to what extent indigenous governments are exempt from respecting *Charter* rights pursuant to Section 25. BMAAAC submits that it is Section 25 that is the appropriate place for this court to make space for aboriginal self-determination, *within reasonable limits*. After all, the same concerns about the vulnerability of individuals continue to exist.

31. The *Charter* plainly was never meant to extinguish rights. It did not extinguish pre-existing common law and statutory rights[19] and the text of Section 25 makes it clear that the *Charter* was not meant to extinguish existing aboriginal rights either. This should not be contentious among any party on this appeal. The question on this appeal is more focused and asks whether an aboriginal government, in deciding how aboriginal rights[20] should be exercised, may infringe or limit individual rights and freedoms guaranteed under the *Charter*.

32. BMAAAC agrees broadly that the core of indigenous rights should be preserved. As urged by Kerry Wilkins, this court must be careful to make constitutional space for aboriginal peoples to find and develop aboriginal difference in Canada.[21] Aboriginal individuals are best served by having the opportunity to experience and develop their culture, communities, and rights. However, as Wilkins further notes, the boundaries of this space for difference should be delineated by "fundamental institutions and rights,"[22] which BMAAAC submits necessarily include *Charter* rights which are an important and necessary check on government power.

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[18] *Taypotat v. Taypotat et al.*, 2013 FCA 192, at para. 39 rev'd on other grounds [2015] 2 S.C.R. 548

[19] *Canadian Charter of Rights and Freedoms*, s. 26, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act* (UK), 1982, c. 11

[20] As defined in Section 25, being aboriginal, treaty, or other rights

[21] see K. Wilkins, "Take your Time and Do it Right: *Delgamuukw*, Self-Government Rights and the Pragmatics of Advocacy" 2000, 27:2, *Manitoba Law Review*, 241 at 271

[22] *ibid*

33. A balance must thus be struck and, in doing, so the court must be mindful of the vulnerability of aboriginal individuals. Discrimination and abuse can have profound consequences to the individual, unjustifiably depriving them of financial resources, basic needs, opportunities to participate in cultural development, and, at worst, membership in their own community. While Section 25 is the vessel through which this balance should be achieved, the provision necessarily limits individual rights and freedoms of aboriginal people, depriving them of recourse under the *Charter* against oppressive government conduct in potentially a large number of contexts. It should thus, in accordance with principles of constitutional interpretation, be read narrowly and in a manner which respects individual rights as much as possible.[23]

34. Firstly, the court should assume that *Charter* rights apply to constrain the exercise of aboriginal rights. It must be remembered that aboriginal rights recognized under the constitution have always been flexible, and evolve over time to afford aboriginal individual the ability to exercise them in a modern context.[24] Surely this also must mean within the context of *Charter* rights, widely seen as universal and fundamental in international instruments.[25] The court's operating assumption should be that aboriginal rights are capable of evolution to be expressed in accordance with modern values and individual rights and freedoms.

35. From that assumption, BMAAAC agrees that S. 25 provides that aboriginal rights should be paramount to *Charter* rights, but only where the two are entirely inconsistent. BMAAAC submits that, where it is asserted that an aboriginal right is being exercised in breach of the *Charter*, the application of Section 25 can and should be determined by apply the following three-part test.

    a. Firstly, the court must define and delineate the aboriginal right being exercised. The focus of this inquiry should be in understanding the specific right claimed and the elements of that right essential to its effective exercise as defined by the traditions of those people, where appropriate;

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[23] *B. (R.) v. Children's Aid Society of Metroplitan Toronto*, [1995] 1 S.C.R. 315, at 384
[24] *R v. Sparrow*, [1990] 1 S.C.R. 1075, at 1093
[25] Rights in our *Charter* are largely consistent with, for example, the International Covenant on Civil and Political Rights

b. Secondly, the court must then assess whether rights guaranteed under the *Charter* impede or infringe upon that right in the manner alleged. This should be assessed on the basis of a traditional *Charter* analysis;

c. Finally, and most critically, the court should assess the degree of infringement occasioned in the instant case, and ask whether application of the *Charter* has prevented the meaningful exercise of the aboriginal right at issue, giving regard to the internal exceptions within the *Charter* and the claimed right's constituent necessary elements.

36. The focus of this test is on asking whether the application of the aboriginal right is *incapable* of being exercised in a modern way and consistent with *Charter* values, or whether the right can be understood as having evolved to be exercised in a manner consistent with certain individual rights and freedoms.

37. If the result of applying this test is that an aboriginal right cannot be meaningfully exercised because of the *Charter*, then it has been effectively abrogated or derogated from and Section 25 will operate to shield the right from application of the *Charter*. What is meaningful in any case should be defined by the context of the case and the evidence led. In the context of this case, this would require an analysis of whether the residency requirement at issue is required to meaningfully exercise the VGFN's aboriginal right to self government, understood in a modern context.

38. By adopting this test, the court will strike a balance. On the one hand, it will provide constitutional space for aboriginal societies to grow and develop in the manner they see fit and "be aboriginal". However on the other hand, it will establish reasonable boundaries to ensure that aboriginal people continue to enjoy and are protected by the individual rights and freedoms guaranteed to *everyone*. This is true reconciliation.

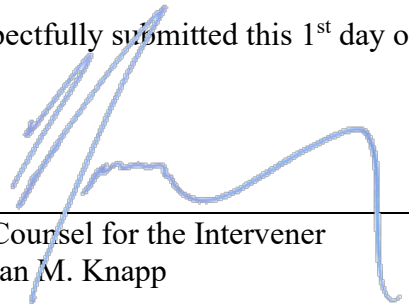
Part IV – Costs

39. As an intervener, BMAAAC does not seek costs and asks that no costs be awarded against it.

Part V – Order Sought

40. As an intervener, BMAAAC takes no position on the ultimate resolution of this appeal.

Respectfully submitted this 1st day of November, 2022



Counsel for the Intervener
Ian M. Knapp

Part VI – Table of Authorities

Caselaw:	**Paragraph References**
B. (R.) v. Children's Aid Society of Metroplitan Toronto, [1995] 1 S.C.R. 315	33
Beckman v. Little Salmon/Carmacks First Nation, [2010] 3 S.C.R. 103	3
Dickson v Vuntut Gwitchin First Nation, 2020 YKCA 22	14
Dumais (Estate) v. Canada (Indigenous and Northern Affairs), 2020 FC 25	25
Godbout v. Longueuil (City), [1997] 3 S.C.R. 844	14
Lavgine v. Ontario Public Service Employees Union, [1991] 2 S.C.R. 211	8
Mitchell v.M.N.R., [2001] 1 S.C.R. 911	12
R v. Big M Drug Mart, [1985] 1 S.C.R. 295	7
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R v. Ipeelee, [2012] 1 S.C.R. 433	18
R v. Sparrow, [1990] 1 S.C.R. 1075	11, 34
Scrimbitt v. Sakimay Indian Band Council, 1999 CanLII 9381 (FC), [2000] 1 F.C. 513	25
Taypotat v. Taypotat et al., 2013 FCA 192, rev'd on other grounds [2015] 2 S.C.R. 548	28
Thomas v. Norris, [1992] 2 C.N.L.R. 139 (B.C.S.C.)	25
Secondary Sources:	
International Covenant on Civil and Political Rights	34
K. Wilkins, "Take your Time and Do it Right: *Delgamuukw*, Self-Government Rights and the Pragmatics of Advocacy" 2000, 27:2, *Manitoba Law Review*, 241	20, 32
Matt Watson, "Reconciling Sovereignties, Reconciling Peoples: Should the Canadian Charter of Rights and Freedoms Apply to Inherent-right Aboriginal Governments?" 2019, 2:1, *Inter Gentes*, 75 at 86 to 93	24
P. Hogg & M. E. Turpel, "Implementing Aboriginal Self-Government: Constitutional and Jurisdictional Issues" 1995, 74:2 *Canadian Bar Review*, 189	11

Statues, Regulations, Legislations:	**Section(s)**
Aboriginal Communal Fishing Licences Regulations S.O.R. 93-332 *Règlement sur les permis de pêche communautaires des Autochtones*, DORS/93-332	
Canadian Charter of Rights and Freedoms, s. 26, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act* (UK), 1982, c. 11 *Loi constitutionnelle de 1982, Annexe B de la Loi de 1982 sur le Canada (R-U)*, 1982, c 11	25, 32, 35 25, 32, 35
United Nations Declaration on the Rights of Individuals Peoples Act, S.C. 2021, c. 14 *Loi sur la Déclaration des Nations Unies sur les droits des peuples autochtones*, LC 2021, c 14	Articles 1, 7, 46, 47