S.C.C. File No.: 39856

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

B E T W E E N:

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, GOVERNMENT OF YUKON, BRITISH COLUMBIA TREATY COMMISSION, MĖTIS NATION OF ONTARIO and MĖTIS NATION OF ALBERTA (jointly), CARCROSS/TAGISH FIRST NATION, TESLIN TLINGIT COUNCIL, CONGRESS OF ABORIGINAL PEOPLES, COUNCIL OF YUKON FIRST NATIONS, PAN-CANADIAN FORUM ON INDIGENOUS RIGHTS AND THE CONSTITUTION, CANADIAN CONSTITUTION FOUNDATION, BAND MEMBERS ALLIANCE AND ADVOCACY ASSOCIATION OF CANADA, FEDERATION OF SOVEREIGN INDIGENOUS NATIONS

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PART I. OVERVIEW AND FACTS

1. The Congress of Aboriginal Peoples ("CAP") intervenes in this appeal to provide the Court with its perspective as a national organization representing the interests of off-reserve Indigenous people.

A. CAP and its mandate

2. CAP is a national Indigenous representative organization with a mandate to protect the aboriginal, constitutional and treaty rights of off-reserve Indigenous people, including their rights protected by s. 35 of the *Constitution Act, 1982* ("s.35"),[1] the *Charter*, and the *United Nations Declaration on the Rights of Indigenous Peoples* ("*UNDRIP*").[2] CAP has been at the forefront of cases protecting the rights of off-reserve Indigenous people, including *Daniels v. Canada (Min. Indian and Northern Affairs)*,[3] *Corbiere v. Canada (Min. Indian and Northern Affairs)*,[4] and *McIvor v. Canada (Registrar, Indian & Northern Affairs)*.[5]

B. CAP's position on this appeal

3. CAP asks that the appeal be decided in accordance with the principles set out below, in a manner that does not perpetuate or incorporate the legacy of colonialism and discrimination against members of First Nations living off reserve or outside of their First Nations' home communities. CAP takes no position on any contested issue of fact.

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[1] *The Constitution Act, 1982*, Sched B to the Canada Act 1982 (UK), 1981, c 11 ["*Constitution Act, 1982*"], s. 35(1).
[2] *United Nations Declaration on the Rights of Indigenous Peoples*, GA RES 295 (CVII), UNGAOR, 61st Sess, Supp No 49, UN Doc A/RES/61/295 (2007) ["*UNDRIP"*].
[3] 2016 SCC 12 ("*Daniels*").
[4] 1999 CanLII 687 (SCC) ("*Corbiere*").
[5] 2009 BCCA 153 ("*McIvor*").

PART II. CAP'S POSITION ON CONSTITUTIONAL QUESTIONS

4. CAP's position is that:

(a) The *Charter* applies to the Residency Requirement;

(b) The Residency Requirement *prima facie* violates s.15 of the *Charter*; and

(c) Section 25, read purposively, does not immunize the Residency Requirement from *Charter* Review

PART III. ARGUMENT

A. The Charter applies to the Residency Requirement

5. CAP submits that the *Charter* applies to the laws of the Vuntut Gwitchin First Nation ("VGFN") Council, including the Residency Requirement.[6] The VGFN Council performs essential government functions for VGFN members living on and off-reserve.

6. La Forest J. found in *Godbout* that municipalities perform "governmental" functions, and are therefore subject to the *Charter*,[7] because: (i) municipal councils are democratically elected by members of the general public and are accountable to their constituents; (ii) municipalities possess a general taxation power; (iii) municipalities are empowered to make laws, to administer them and to enforce them within a defined territorial jurisdiction; and (iv) municipalities derive their existence and law-making authority from the provinces.[8]

7. While none of these individual factors are either necessary or determinative, they provide *indicia* of an institution that performs governmental functions and is subject to the *Charter*.[9] The

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[6] Reasons of Yukon Court of Appeal, 2021 YKCA 5 ("YKCA Reasons") at para. 91, 93; *Charter*, s.32.

[7] *Godbout v. Longueuil (City)*, 1997 CanLII 335 (SCC) ("*Godbout*"), *per* La Forest J. (concurring).

[8] *Godbout*, 1997 CanLII 335 (SCC) at para. 51, *per* La Forest J. (concurring).

[9] "[T]he factors that might serve to ground a finding that an institution is performing "governmental functions" do not readily admit of any *a priori* elucidation.": *Godbout* at para 49 *per* La Forest J.; see also *Eldridge v. British Columbia (Attorney General)*, 1997 CanLII 327 (SCC) at paras. 42-44 ("*Eldridge*").

VGFN Council exercises many of these same functions: it is democratically elected, possesses a general taxation power[10], and is empowered to make, administer, and enforce its laws. Whether viewed as exercising delegated authority or inherent self-government powers,[11] First Nations governments such as the VGFN Council may also control other important aspects of their members' lives, including access to benefits such as on-reserve housing, the ability to live on-reserve, post-secondary education benefits,[12] collective hunting, fishing, and harvesting rights, and social support services such as child and family services[13] and access to "Jordan's Principle" benefits.[14] This list can be expected to grow as self-government initiatives gather steam.

8. Many of these benefits and services are provided by provincial and municipal governments in the case of non-Indigenous peoples. The VGFN Council is therefore "by its very nature" properly characterized as a "government" within the meaning of s. 32(1) of the *Charter*.[15] This conclusion is reinforced by the requirements that VGFN's self-government be "in conformity with the Constitution of Canada" and not affect "the rights of Yukon Indian People as Canadian Citizens".[16] Given First Nations' important and expanding role in reconciliation, they should not be found to operate as "*Charter*-free zones". Like non-Indigenous

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[10] Vuntut Gwitchin Self-Government Agreement, s. 14, Exhibit F to the Affidavit of Cindy Dickson filed February 15, 2019, Record of the Appellant, Volume V, Tab 5F, p. 95.

[11] Sébastien Grammond, Recognizing Indigenous Law: A Conceptual Framework, 2022 100-1 *Canadian Bar Review* 1, 2022 CanLIIDocs 1198.

[12] Indigenous Services Canada, "Post-Secondary Student Support Program", https://www.sac-isc.gc.ca/eng/1100100033682/1531933580211. "Funding for this program is provided to First Nations… First Nations are responsible for determining the selection criteria and funding allocations in accordance with the provisions of their funding agreement and national program guidelines."

[13] The *Act Respecting First Nations, Inuit and Métis Children, Youth and Families*, SC 2019, c.24, s.8 recognizes Indigenous jurisdiction over child and family services as an aspect of the inherent right of self-government.

[14] This refers to provision of culturally appropriate and safe health-related services to First Nations children, to overcome barriers they face in accessing services because of jurisdictional disputes. Funding is provided by the federal government. Eligibility is determined in part by whether a First Nations child is "recognized by their Nation for the purposes of Jordan's Principle": *First Nations Child & Family Caring Society of Canada v. Canada (A.G.)*, 2020 CHRT 36, para. 41.

[15] *Eldridge,* 1997 CanLII 327 (SCC) at para. 44.

[16] Final Agreement, quoted in YKCA Reasons, para. 15; see also para. 97.

Canadians, members of First Nations should be able to hold their elected representative bodies to account under the *Charter*.

B. The vulnerability of off-reserve/remote members of First Nations

9. Discrimination against off-reserve or remote members of First Nations is a serious concern that must be seen in its historical context. As of 2021, a majority of Registered or Treaty Indians (60% or approximately 520,000) reside off-reserve.[17] However, many members of First Nations who do not live on-reserve (or in the First Nation's home community, as the case may be) have little or no connection to their governments.[18] They are vulnerable to being viewed as "less aboriginal" than [First Nation] members living on reserve.[19] This is the direct legacy of colonial and assimilationist policies and practices.

10. Examples include the residential school system, which systematically removed Indigenous children from their homes with the central goal of eliminating Indigenous identity; the Federal Government's physical relocation of the Inuit to the High Arctic in the 1950s; and the involuntary loss of status by Indigenous women who married non-Indigenous men, beginning as early as 1857.[20] The unequal rights afforded to on and off-reserve Indians under the *Indian Act*, such as the exclusion of off-reserve band members from voting on band governance, splintered relations between those groups, in many cases permanently alienated off-reserve members from their communities.

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[17] Statistics Canada, *Indigenous identity by Registered or Treaty Indian status and residence by Indigenous geography: Canada, provinces and territories*, Table No. 98-10-0264-01 (Ottawa: Statistics Canada, 2021). Statistics Canada reports that in total, 82% of Indigenous people reside off-reserve.

[18] Royal Commission on Aboriginal Peoples, *Final Report* (Queen's Printer, 1996), Vol. 4, p.446; Vol. 2, p.120.

[19] *Lovelace v. Ontario*, 2000 SCC 37, paras. 71-72; *Corbiere*, 1999 CanLII 687 (SCC), paras. 18 (*per* McLachlin & Bastarache JJ.), 71 and 92 (*per* L'Heureux-Dubé J.).

[20] *Corbière*, 1999 CanLII 687 (SCC) at para 86.

11. The increase in the off-reserve status Indian population is intricately tied to a legacy of past discrimination, including the "marrying out" rule that applied differently to women and men prior to 1985. These rules were explicitly designed to encourage Indigenous people to renounce their identities.[21] Bill C-31, passed in 1985, altered this rule so that women who had lost status by marrying out, and their first-generation descendants, could become entitled for registration. Further amendments in 2010 (Bill C-10) following *McIvor v. Canada (Registrar of Indian and Northern Affairs)*[22] and 2017 (Bill S-3) following *Descheneaux v. Canada (A.G.)*,[23] led to further substantial increases in the off-reserve population. In addition to these legislative changes, many Indigenous children left reserves as a result of residential schools and the Sixties Scoop.

12. As a result of this history, a large number of off-reserve status Indians who are nominally members of First Nations have little or no connection to the reserves or to "home" communities. Yet, they are subject to the decisions of First Nations governments that control access to benefits, opportunities, and services for them, but do not always prioritize their interests.

13. In *Corbiere*, this Court held that a provision in the *Indian Act* restricting voting rights for band elections to members ordinarily living on-reserve impermissibly discriminated on the ground of "aboriginality-residence", in part because it "implie[d] that off-reserve band members are lesser members of their bands or persons who have chosen to be assimilated by the mainstream society".[24] That holding is no less applicable to the VGFN's Residency Requirement. Off-reserve or remote members are just as vulnerable to discrimination by a First Nations government as they are to a federal or provincial government.

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[21] *Corbière*, 1999 CanLII 687 (SCC) at para. 88.
[22] 2009 BCCA 153.
[23] 2015 QCCS 3555.
[24] 1999 CanLII 687 (SCC) at para. 19.

14. CAP has already had to advocate for the rights of Indigenous women who lost status through marriage prior to 1985, and sought reinstatement to the Sawridge First Nation after Bill C-31 was passed. The First Nation, which controlled substantial oil reserves, fought for 23 years against the reinstatement of these women, claiming a s.35 right to govern their own membership. Eventually the First Nation's case collapsed when they chose to adduce no evidence in support of the claim.[25] This case illustrates that "self-government" can be invoked as an oppressive tool.

15. In this context, it is vitally important that off-reserve or remote members be fully able to participate in First Nations governance. The right to vote in elections is necessary, but not sufficient, to safeguard their interests. Full access to all aspects of governance is required. The Residency Requirement acted as a barrier to the Appellant, preventing her from running for Council. Such requirements could similarly prevent a large number of other off-reserve members from fully participating in the governance of their First Nations. This discriminatory impact *prima facie* violates s.15(1) of the *Charter*.

C. A purposive interpretation of s. 25 does not immunize the Residency Requirement from Charter review

16. Self-government, though protected as a s.35 "right", does not exist in the abstract, nor is it absolute.[26] Indigenous communities have suffered centuries of displacement, fragmentation, and economic marginalization. Their current structures reflect the legacy of massive interference by colonial and Canadian governments - forces tied to the growth of a largely disenfranchised off-reserve or remote population. This context is important in understanding and delineating the scope of s. 35 rights.

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[25] *Sawridge First Nation v. Canada*, 2009 FCA 123, leave to appeal dismissed 2009 CanLII 69744 (SCC).
[26] *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44 (CanLII) at para. 119.

17. Recognition of a s. 35 right to self-government should not mean that one form of discrimination (at the hands of the federal government) can simply be replaced by another (at the hands of an Indigenous government). Rather, the right should be carefully delineated to avoid conflict with other rights, as far as possible.

18. In *R. v. Kapp*, Bastarache J., drawing on scholarship from Prof. Patrick Macklem, opined that s. 25 "protects federal, provincial and Aboriginal initiatives that seek to further interests associated with *indigenous difference* from *Charter* scrutiny."[27] The application of s. 25 must reflect its purpose. Macklem suggests that where, as in this case, the restriction at issue is "internal" (including a law or measure that creates distinctions *between* First Nations members), applying s. 25 as a complete bar to *Charter* scrutiny "may entail serious deleterious consequences to certain members and may bear only a loose relation to interests associated with indigenous difference."[28] In such cases, if the issues cannot readily be resolved through interpretation, Macklem argues that the First Nation government should be required to justify the restriction "in the name of indigenous difference by demonstrating its relevance to the community's past and future".[29]

19. In *R. v. Sparrow*, this Court held that s. 35(1) rights contain limitations such that they can be subject to government infringements meeting certain justificatory criteria.[30] Further, in *Daniels*, this Court held that federal jurisdiction under s.91(24) includes "Parliament's protective

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[27] *R. v. Kapp*, 2008 SCC 41 (CanLII) at para. 103, *per* Bastarache J. (concurring) ("*Kapp*"), citing Patrick Macklem, *Indigenous Difference and the Constitution of Canada* (Toronto: University of Toronto Press, 2001) at 225 [emphasis added].

[28] Patrick Macklem, *Indigenous Difference and the Constitution of Canada* (Toronto: University of Toronto Press, 2001) at 226.

[29] Patrick Macklem, *Indigenous Difference and the Constitution of Canada* (Toronto: University of Toronto Press, 2001) at 226.

[30] *R. v. Sparrow*, 1990 CanLII 104 (SCC).

authority" to assist Indigenous people "who may no longer be accepted by their communities".[31] There is no doubt that Parliament could invoke this authority to protect the right of off-reserve or remote Indigenous people to participate fully in Indigenous self-government, subject to meeting the *Sparrow* test (if applicable). Determining whether such a federal law is constitutional would call for a careful balancing of rights – not a one-sided analysis that asks only whether the Indigenous government is exercising a s. 35 right or other right "of a constitutional character"[32], and if so, inevitably leads to the conclusion that the Indigenous collective must prevail.

20. The courts should not be in any different position. When evaluating Aboriginal rights, the courts should gauge the extent to which the Indigenous law preserves or promotes Indigenous difference, and weigh that against the harm caused to the interests of off-reserve or remote members. The focus should be on the purposes underlying the entrenchment Aboriginal rights in the *Constitution*: the recognition of the prior occupation of North America by Indigenous people, and reconciliation of their prior occupation with the assertion of Crown sovereignty.[33]

21. In this way, the courts can carefully delineate s. 35 rights, or other rights of a constitutional character, to avoid a conflict that requires resort to s. 25. Self-government rights, for example, could be found to be internally limited such that they do not work to disenfranchise members who live outside of the home community.[34]

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[31] *Daniels*, 2016 SCC 12, at para. 49. Section 35 rights have also been held to be subject to the internal limitation that they cannot cause tortious harm, or compel an Indigenous person to participate in the exercise of collective rights against their will: *Thomas v. Norris*, 1992 CanLII 354 (BCSC) (defendants forcibly made plaintiff go through initiation ceremonies required to become a "spirit dancer".)

[32] *R. v. Kapp*, 2008 SCC 41 (CanLII) at para. 63, *per* McLachlin C.J. and Abella J.

[33] *R. v. Adams*, 1996 CanLII 169 (SCC), para. 57; *R. v. Desautel*, 2021 SCC 17, paras. 27-29.

[34] There may be other situations that require careful balancing. For example, traditional Haudenosaunee (Six Nations) governance reportedly assigns gender-specific roles to "Clan Mothers" and (male) Chiefs: *Logan v. Styres*, 1959 CanLII 406 (ON SC), 20 DLR (2d) 416, at p.417 (DLR). The logical consequence of the Respondent's argument would be that this situation is immune from *Charter* review.

22. This approach does not disregard or devalue Indigenous legal orders. Depending on the facts of the case, there may be considerations that link an Indigenous law to interests relating to Indigenous difference, so as to justify its application in an internal context. Conversely, a proper interpretation of internal limits on s.35 must always consider the purpose of entrenching aboriginal rights. *Charter* and s.35 analysis is flexible enough to accommodate these considerations.

23. The Respondents, however, overstate their case when they situate VGFN laws as the "Indigenous legal order" that must prevail over "Canadian laws" reflected in the *Charter*, to make self-government meaningful. Indigenous legal orders do not stand separate and apart from Canadian law; they form an integral part of it.[35] The *Charter* and *Constitution Act, 1982* (including s. 35) are pluralist documents, that incorporate and reflect Indigenous and non-Indigenous perspectives alike.

24. All other Canadians can hold their governments accountable for *Charter* breaches, and it would create a profound inequality if members of First Nations, alone, could not. Section 25 therefore requires a justificatory approach that considers both the context of the alleged violation and the internal limits to aboriginal rights.

25. Carefully delineating the scope of rights claimed by VGFN also aligns with international law. *UNDRIP* and the federal *UNDRIP Act*[36], affirm rights to self-determination (Art. 3) and self-government (Art. 4), but *UNDRIP* also provides:

> Article 2: Indigenous peoples and individuals are free and equal to all other peoples and individuals and **have the right to be free from any kind of discrimination, in the exercise of their rights**, in particular that based on their indigenous origin or identity.

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[35] *Mitchell v. M.N.R.*, 2001 SCC 33, paras. 10-11 *per* McLachlin C.J.; *Pastion v. Dene Tha' First Nation*, 2018 FC 648, para. 8.

[36] *United Nations Declaration on the Rights of Indigenous Peoples Act*, SC 2021, c 14; See also *UNDRIP*, Art. 1.

> Article 9: Indigenous peoples and individuals have the right to belong to an indigenous community or nation, in accordance with the traditions and customs of the community or nation concerned. **No discrimination of any kind may arise from the exercise of such a right.**
>
> Article 34: Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs, **in accordance with international human rights standards.**
>
> Article 46.3: The provisions set forth in this Declaration shall be interpreted in accordance with the principles of justice, **democracy, respect for human rights, equality, non-discrimination, good governance** and good faith. [emphasis added].

26. These articles make clear that the rights to self-determination and self-government should not operate to discriminate and further alienate off-reserve or remote members of First Nations from their Indigenous communities.

PART IV. COSTS

27. CAP does not seek costs, and asks that it not be liable for costs as an Intervenor.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

November 1, 2022

Andrew Lokan / Emma Wall

Paliare Roland Rosenberg Rothstein LLP

Counsel for the Intervener,
Congress of Aboriginal Peoples

PART V. TABLE OF AUTHORITIES

Authority	Paragraph(s) Referenced in Factum
Jurisprudence	
Corbiere v. Canada (Minister of Indian and Northern Affairs, 1999 CanLII 687 (SCC)	2, 9, 10, 11, 13
Daniels v. Canada, 2016 SCC 12	2, 19
Descheneaux v. Canada (A.G.), 2015 QCCS 3555	11
Dickson v. Vuntut Gwitchin First Nation, 2021 YKCA 5	5
Eldridge v. British Columbia (Attorney General), 1997 CanLII 327 (SCC)	7, 8
First Nations Child & Family Caring Society of Canada v. Canada (A.G.), 2020 CHRT 36	7
Godbout v. Longueuil (City), 1997 CanLII 335 (SCC)	6, 7
Logan v. Styres, 1959 CanLII 406 (ON SC), 20 DLR (2d) 416	21
Lovelace v. Ontario, 2000 SCC 37	9
McIvor v. Canada (Registrar of Indian and Northern Affairs), 2009 BCCA 153	2, 11
Mitchell v. M.N.R., 2001 SCC 33	23
Pastion v. Dene Tha' First Nation, 2018 FC 648	23
R. v. Adams, 1996 CanLII 169 (SCC)	20
R. v. Desautel, 2021 SCC 17	20
R. v. Kapp, 2008 SCC 41 (CanLII)	18, 19
Thomas v. Norris, 1992 CanLII 354 (BCSC)	19
R. v. Sparrow, 1990 CanLII 104 (SCC)	19
Sawridge First Nation v. Canada, 2009 FCA 123; leave to appeal dismissed 2009 CanLII 69744 (SCC)	14
Tsilhqot'in Nation v. British Columbia, 2014 SCC 44 (CanLII)	16
Legislation	
Act Respecting First Nations, Inuit and Métis Children, Youth and Families, SC 2019, c.24, s.8	7
The Constitution Act, 1982, Sched B to the Canada Act 1982 (UK), 1981, c 11 ["*Constitution Act*"], s. 32, s. 35(1)	8, 16, 17, 19, 21, 23