SCC Court File No. 39856

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

BETWEEN:

CINDY DICKSON

APPELLANT
(Appellant)

-and-

VUNTUT GWITCHIN FIRST NATION

RESPONDENT
(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 CONSTITUTION, CANADIAN CONSTITUTION FOUNDATION, BAND MEMBERS ALLIANCE AND ADVOCACY ASSOCIATION OF CANADA, FEDERATION OF SOVEREIGN INDIGENOUS NATIONS

INTERVENERS
(Interveners)

FACTUM OF THE INTERVENER
FEDERATION OF SOVEREIGN INDIGENOUS NATIONS

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

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PART I – OVERVIEW

1. The 74 Indigenous Nations of the FSIN are concerned with the potential application of the *Canadian Charter of Rights and Freedoms*[1] ("***Charter***") to their inherent right to sovereign self-determination and to govern themselves as an existing right of self-government affirmed by s. 35(1) of the *Constitution Act*, 1982[2] and protected by s. 25(1) of the *Charter*. Canada's passing of the *United Nations Declaration on the Rights of Indigenous Peoples Act*[3] ("***UNDRIP***") further emphasizes the importance of shielding the legislative actions of Indigenous governments, leaving them to define their respective government structures and processes integral to their unique requirements and supported by their respective values, traditions and culture.

2. The importance of legislative protection to the Indigenous Nations of the FSIN is clearly articulated by the Court of Appeal of Yukon and its view of the Residency Requirement of the Vuntut Gwitchen First Nation ("**VGFN**") Constitution in holding that this requirement is a "constitutional law" clearly intended by the VGFN government to protect its unique culture, traditions and customs in relation to governance and leadership.

3. The FSIN is further concerned that despite the plain and clear wording that s. 32(1) of the *Charter* which applies to the Parliament and the government of Canada, and to the legislature and government of each province, that an Indigenous government collectively exercising valid government law-making power may be subject to the *Charter* pursuant to a broad interpretation of s. 32(1) such that a Residency Requirement is considered infringing upon a s. 15(1) individual right, notwithstanding the Indigenous government being shielded by s. 25(1) of the *Charter* and further protected as exercising an Aboriginal or Treaty right to govern under s. 35 Part II of the *Constitution Act*, 1982.

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[1] Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, ss 1, 15(1), 25, 35.
[2] *Constitution Act*, 1982, s 35(1), being Schedule B to the *Canada Act* 1982 (UK), 1982, c 11.
[3] United Nations Declaration on the Rights of Indigenous Peoples Act, SC 2021, c 14 [***UNDRIP***]; *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UNGAOR, 61st sess, UN Doc A/RES/61/295 (2007), being the Schedule to *UNDRIP*, s 4, 5.

4. The FSIN respectfully submits that any decision made by this Court concerning the applicability of the *Charter* on Indigenous Nation governments will impact the capacity, jurisdiction and rights of law-making powers of all Indigenous Nations, whether with or without Treaty or self-government arrangements.

PART II – QUESTIONS IN ISSUE ON APPEAL

5. The FSIN submits the following questions are in issue on appeal:

I. Whether the right of self-government and self-determination is an existing Aboriginal or Treaty right under s. 35(1) of the *Constitution Act*, 1982?

II. Whether s. 32(1) of the *Charter* applies, and whether s. 25 of the *Charter* is a shield?

III. What is a key to reconciling the right of the collective Indigenous Nation protected by s. 25**,** and the individual member right described in s. 15(1) of the *Charter*?

IV. What are the implications of the applicability of the *Charter* for Indigenous Nation governments in pursuing reconciliation?

PART III – STATEMENT OF ARGUMENT

I. The right of self-government is an existing Aboriginal right affirmed by s. 35(1)

6. Historically, Indigenous peoples engaged with European powers including England and France as well as their successor Nations, Canada and the United States, which recognized the Indigenous Nation's sovereignty through acts such as the Royal Proclamation, October 7, 1763[4] of the British Crown, making of Treaties recognized in the context of international law, by constitutional acts of successor colonial states, by legislative action, and by court ruling.[5]

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[4] George R, Proclamation, 7 October 1763 (3 Geo III), reprinted in RSC 1985, App II, No 1, referring to "[...] the several Nations or Tribes of Indians with whom We are connected [...]."

[5] See Joanne Barker, ed, *Sovereignty Matters Locations of Contestation and Possibility in Indigenous Struggles for Self-Determination* (Nebraska: University of Nebraska Press, 2005) at 5. See also US Const art I, § 8, "The Congress shall have power to... regulate Commerce with

7. The Supreme Court of Canada has cited the trilogy of decisions the United States Chief Justice Marshall in defining Tribes as "domestic dependent nations"[6] thus both recognizing and limiting their sovereignty. In contrast, Chief Justice McLachlin in *Minister of National Revenue v Grand Chief Michael Mitchell* recognizes the sources of sovereignty and explains the rationale of s. 35(1) of the *Constitution Act*, 1982 by stating clearly that "[l]ong before Europeans explored and settled North America, Aboriginal peoples were occupying and using most of the this vast expansive land in organized, distinctive societies with their own social and political structures…"[7]

8. Justice Binnie in *Mitchell, supra* further contrasts the US doctrine of domestic dependent Nations stating it "... differs in material respects from the proposals of our Royal Commission on Aboriginal Peoples" and points out that "The concepts of merged sovereignty and shared sovereignty, which are said to be essential to the achievement of reconciliation as well as to the maintenance of diversity, are not reflected in the American jurisprudence." He also acknowledges First Nations in Canada claim a "much larger and more complex claim... to internal self-governing institutions" and states these are not to be prejudiced by referencing United States law. Justice Binnie finally confirms that contrary to the plenary power of the United States government to override the powers of a tribal government, Canada has, by its Constitution, intentionally limited its exercise of such a governmental power and that by s. 35 of the *Constitution Act*, 1982 "now guarantees existing Aboriginal rights not previously extinguished, and this carries the corollary that no agency of the state can, after 1982, extinguish those rights."[8]

9. More recently, the Federal Court of Canada in *Pastion v Dene Tha' First Nation* considering the standard for reviewing an Indigenous Nation's Appeal Board decision pursuant to Custom Election Regulations, states Canadian Courts recognize "the existence of Indigenous

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foreign Nations, and among the several States, and with the Indian tribes." See also US Const art II, § 2 providing the President with the "Power by and with the Advice and Consent of the Senate, to make Treaties […]."

[6] *Johnson v McIntosh*, 21 US (8 Wheat) 543 (1823); *The Cherokee Nation v The State of Georgia*, 30 US (5 Pet) 1 (1831); *Worcester v The State of Georgia*, 31 US (6 Pet) 515 (1832).
[7] *Mitchell v MNR*, 2001 SCC 33 at para 9.
[8] *Ibid* at para 167, 169–70.

legal traditions and have given effect to situations created by an Indigenous law..." [9] In relation to reconciliation, Grammond, FCJ states, "[t]he Truth and Reconciliation Commission of Canada pointed out that the recognition of Indigenous peoples' power to make laws is central to reconciliation" and "... the United Nations' *Declaration on the Rights of Indigenous Peoples* (UN GA Res 61/295, 61st Sess, Supp No 53 (2007) echoes these aspirations in article 34."[10]

10. The Federal Court cites Justice Mandamin in relation to the source of Indigenous government law-making power by stating:

> The capacity of [the First Nation] to make laws concerning matters of leadership and governance are not derived from the *Indian Act* or other statutory power. Rather it is a result of the exercise of the First Nation's aboriginal right to make its own laws concerning governance (*Gamblin v Norway House Cree Nation Band Council*, 2012 FC 1536 at para 34 [*Gamblin*]; see also *Canadian Pacific Ltd v Matsqui Indian Band*, [2000] 1 FC 325 (CA) at para 29).[11]

11. The FSIN and its member Indigenous Nation governments have consistently relied upon the Government of Canada's *Inherent Right of Self-Government Policy*, 1995 and its latest expression on August 25, 2020 which states:

> The Government of Canada recognizes the inherent right of self-government as an existing Aboriginal right under s. 35 of the *Constitution Act, 1982*. It recognizes, as well, that the inherent right may find expression in treaties and in the context of the Crown relationship with treaty First Nations... Indigenous people's practiced their own forms of government for thousands of years before the arrival of the European and other settlors in what is today Canada... The goal is to renew the nation-to-nation, government-to-government, and Inuit-Crown relationships with Indigenous peoples. [12]

12. The FSIN submits that the historical recognition of its member Indigenous Nations provides the foundation for their governments to pass laws in the best interest of their collective membership. Such laws may include residency provisions and standards by which their elected

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[9] *Pastion v Dene Tha' First Nation*, 2018 FC 648 at para 8 [***Pastion***].
[10] *Ibid* at para 10. For a definition of reconciliation, see Department of Justice Canada, *Principles: Respecting the Government of Canada's Relationship with Indigenous Peoples* (Ottawa: Department of Justice Canada, 2018) at 7.

[11] *Pastion* at para 12.
[12] *The Government of Canada's Approach to Implementation of the Government of Canada, Inherent Right and the Negotiation of Aboriginal Self-Government* (1995).

leaders must adhere, and that this existing right is consistent with the goals of reconciliation and the renewal of the Nation-to-Nation relationship with Canada.

II. Whether s. 32(1) of the *Charter* applies, and whether s. 25 of the *Charter* is a shield

13. The FSIN submits that the laws passed by a self-governing Indigenous Nation are not laws within the authority of the Parliament of Canada or the legislature of the province, and thus clearly not referenced in s. 32 of the *Charter*. Upon a plain reading, the application of the *Charter* to Federal and Provincial governments should not be construed to include Indigenous governments which would be inconsistent with s. 35(1). The overarching affirmation of Aboriginal and Treaty rights in s. 35(1) of the *Constitution Act*, 1982 and the guarantee of s. 25(1) of the *Charter* operate to emphasize the stand-alone priority provided to Indigenous governments and their right to pass laws in the best interest of their Nation.

14. In *R v Desautel*, Rowe, SCJ reviewed the jurisprudence and concluded that:

Section 35(1) serves to recognize the prior occupation of Canada by Aboriginal societies and to reconcile their contemporary existence with Crown sovereignty. These purposes are expressed in the doctrinal structure of Aboriginal law which gives effect to rights and relationships arising from the prior occupation of Canada by Aboriginal societies. [13]

15. We submit the special status of prior occupation recognized in s. 35(1) of the *Constitution Act*, 1982 implicitly affirms the Aboriginal right to self-government and self-determination. In addition, s. 25(1) of the *Charter* guarantees that no other rights will be interpreted in such a way as to abrogate or derogate from the priority to be given to the Aboriginal, Treaty or other rights or freedoms pertaining to the Aboriginal peoples of Canada, particularly the collective right to be self-determining and self-governing. As a result, s. 25(1) of the *Charter* "would prevent s. 15 which guarantees every individual equality before and under the law... from being used to override the special status and rights of the Aboriginal peoples." [14] Thus, s. 25(1) would operate to shield legislative actions of Indigenous governments.

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[13] *R v Desautel*, 2021 SCC 17 at para 31.
[14] Kent McNeil, "The Constitutional Rights of the Aboriginal Peoples of Canada" (1982) 4:1 SCLR 225 at 262.

16. The FSIN submits that for the guarantee provided in s. 25 to be effective, a Court must be sensitive to the culture, traditions, practices and values of an Indigenous Nation and its government.[15] In addition, the focus of s. 25 is to protect the opportunity for an Indigenous Nation government representing the collective rights of the majority to achieve "the objective of protecting Indigenous difference" externally or internally.[16]

17. The FSIN submits the *Charter* should not apply to Indigenous governments so as to avoid the imposition of a Eurocentric government's perspective or paradigm, which is not relevant to the Indigenous Nations' world view, is contrary to the objective of self-determination, and would undermine Indigenous rights and reconciliation of Crown and Indigenous interests.[17]

III. What is a key to reconciling the right of the collective Indigenous Nation protected by s. 25 and the individual member right described in s. 15(1) of the *Charter*?

18. The Supreme Court of Canada recognizes that Indigenous Nations have been subjected to imposed laws of the dominant society which emanate from the culture and perspective of that society which, in the case of Canada, has its origins in Europe.[18]

19. European laws and customs have developed over centuries and evolved historically from the peculiar complexities of the particular European culture which migrated to its perception of a "new world" which it "discovered." European culture of land ownership and exploitation of natural resources continues to this day. Similarly, Indigenous Nations and their societies governed themselves by forming Tribes, Nations, confederacies and alliances for the purpose of military alliance, commerce or trade as described in the *Royal Proclamation*, 1763. As referenced by legal scholar Val Napoleon, "Since our legal orders in law are entirely created within our cultures, it is difficult to see and understand law in other cultures. In other words, law

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[15] David Milward, *Aboriginal Justice and the Charter: Realizing a Culturally Sensitive Interpretation of Legal Rights* (Vancouver: University of British Columbia Press, 2012) at 55.
[16] Amy Swiffen, "Dickson v Vuntut Gwitchin First Nation, *Section 25 and a Plurinational* Charter" (2022) 31:2 Const Forum Const 27 at 33. Swiffen also includes various approaches to s 25(1) suggested by legal scholars Patrick Macklem, Brian Slattery, and Jane Arbour at 32–34.
[17] *Ibid* at 34, referring to Youngblood Henderson, "Empowering Treaty Federalism" (1994) 58:2 Sask L Rev 241 at 286.
[18] *Manitoba Metis Federation Inc v Canada (Attorney General)*, 2013 SCC 14 at para 67, per McLachlin CJ and Karakatsanis J.

is culturally bound – it is only law within the culture that created it."[19] Napoleon observes that Canadian society is vertically centralized as a Nation state in contrast with Indigenous Nations society which is largely decentralized and horizontal in character.[20]

20. The FSIN submits that Indigenous Nations are strongly connected through kinship ties and collective or group rights. The concept of Indigenous connectivity is at odds with the western or Euro-American notions of liberty and individual freedoms. The tension between protecting the collective group rights of the Indigenous Nation, upon which it has relied and evolved for its existence, and the freedom and liberty of self-expression and choice by an individual is central to this dispute and highlights that Indigenous peoples have a very different view of the nature of their rights and legal relationships within their community.

21. The importance of the collective or group rights relative to individual rights in Indigenous society is explained by Professor Robert N. Clinton as follows:

> Such notions of group and communal relationship rights derive from basic principles of mutual respect and respectful behavior within and between kinship and tribal groups. Thus, an individual's right to autonomy is not a right *against* organized society, as it is in western thought, but a right one has *because* of one's membership in the family, kinship and associational webs of the society. To Native Americans ... group and individual rights are not antithetical concepts, they are complementary concepts. Group rights go hand in hand with group membership and individual rights are unthinkable except in contemplation of how those rights relate to the larger political group.[21]

22. By way of analogy, Clinton explains that preserving the French language and culture in Quebec and throughout Canada "does not constitute a separate individual guarantee to all Canadians of their individual right to speak and learn in either English or French. Rather, it is an effort to assure the Francophone community, as a group, of their rights to linguistic, educational, and cultural autonomy. One cannot easily exercise one's individual right to speak French if there are no other French speakers around with whom to converse. The right is a group, collective, or societal right of the French community.[22]

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[19] Val Napoleon, "Thinking About Indigenous Legal Orders" (2007) National Centre for First Nations Governance at 3–4.
[20] *Ibid* at 5.
[21] Robert Clinton, "The Rights of Indigenous Peoples as Collective Group Rights" (1990) 32:4 Ariz L Rev 739 at 742.
[22] *Ibid* at 743.

23. Similarly for these reasons, the *United Nations Declaration of Rights of Indigenous Peoples* and Canada's corresponding UNDRIP law is important for the purpose of recognizing and protecting the Indigenous Nations as collectives or groups and in that sense protecting their difference within the larger Canadian society.[23]

24. Professor Naiomi Metallic argues there is no need to apply s. 15(1) of the *Charter* to Indigenous government action when the Indigenous Nation has itself established alternative measures or dispute resolution processes.[24] She suggests that imposing the *Charter* on Indigenous governments is "assimilative because it imposes the *Charter* . . . without their consent and feeds into dangerous stereotypes about Indigenous governments."[25] Metallic questions the application of the *Charter* to Indigenous governments in favour of allowing Indigenous governments to establish their own individual rights protection regimes within their own constitutions which "should be given priority."[26]

IV. What are the implications of the applicability of the *Charter* for Indigenous Nation governments in pursuing reconciliation?

25. The FSIN maintains governance is an inherent and pre-existing right which has not been extinguished, abrogated or derogated by reason of entering into an historic or modern Treaty relationship with the Crown in Right of Canada. Exercising the right to determine Indigenous government structures unfettered by imposition and scrutiny of another Nation's constitutional provisions is critical to the opportunity to of the Indigenous government to reconcile its interest with that of the Crown. Application of the *Charter* except as a shield would foreclose the opportunity of an Indigenous Nation to exercise its prerogative and right of self-determination and self-government in its best interest.[27]

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[23] *Ibid* at 739.
[24] Naiomi Metallic, "Checking our Attachment to the Charter and Respecting Indigenous Legal Orders: A Framework for Charter Application to Indigenous Governments" (2022) 31:2 Const Forum Const 3 at 14.
[25] *Ibid* at 15.
[26] *Ibid* at pp 15-16.
[27] Ryan Beaton, "Doctrine Calling: Inherent Indigenous Jurisdiction in Vuntut Gwitchen" (2022) 31:2 Const Forum Const 39 at 51.

PART IV – SUBMISSION CONCERNING COSTS

26. The FSIN does not seek costs and asks that no costs be awarded against it.

PART V – ORDER SOUGHT

27. The FSIN takes no position on the outcome of the appeal.

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

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PART VI – TABLE OF AUTHORITIES

A. Jurisprudence	PARA CITED
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