SCC Court File No: 39856

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM A JUDGMENT OF THE COURT OF APPEAL OF 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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Interveners

FACTUM OF THE INTERVENER, THE PAN-CANADIAN FORUM ON INDIGENOUS RIGHTS AND THE CONSTITUTION

(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 and II – OVERVIEW AND ISSUES

1. Considering the historic adoption of the *United Nations Declaration on the Rights of Indigenous Peoples Act* ("**UNDRIP Act**")[1] on June 21, 2021, this Court should adopt a principled approach that would clarify UNDRIP's key role in the constitutional interpretative process and provide guidance to lower courts and litigants. This approach should recognize that the UNDRIP Act gives rise to a robust presumption of conformity. In other words, s. 25 of the *Canadian Charter of Rights and Freedoms* ("***Charter***") should be presumed to provide protection at least as great as that afforded by UNDRIP which Parliament has explicitly acknowledged constitute the minimum standards for the survival, dignity and well-being of Indigenous peoples.

2. Applying this robust presumption necessarily requires a detailed and serious engagement with the substance of the relevant rights provided in the Declaration. The exercise requires looking at the totality of UNDRIP to uphold the purpose of the Declaration and avoid contradictory reading of certain provisions. Overall, UNDRIP Articles 3, 4, 18, 20, 34, and 35 all support an interpretation of s. 25 that shields the exercise of protected Indigenous rights.

PART III – ARGUMENT

A. A principled Approach is Required to Reflect UNDRIP's Key Role in Constitutional Interpretation

3. The United Nation's adoption of UNDRIP in 2007 was a historic achievement for millions of Indigenous peoples worldwide. The Declaration is the most comprehensive international instrument on the rights of indigenous peoples. It establishes a universal framework of minimum standards for the survival, dignity and well-being of the indigenous peoples of the world.[2] Parliament's adoption of the UNDRIP Act was an equally historic milestone. The Act advances the implementation of UNDRIP as a key step in renewing the Government of Canada's relationship with Indigenous peoples.

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[1] SC 2021, c 14 [UNDRIP Act]. The schedule sets out the *United Nations Declaration on the Rights of Indigenous Peoples* that was adopted by the General Assembly of the United Nations as General Assembly Resolution 61/295 on September 13, 2007 [UNDRIP].

[2] UNDRIP, art 43.

4. Since the UNDRIP Act's recent enactment, lower courts have pondered on its specific interpretative effect on Canadian law.[3] Judge Kent in the Supreme Court of British Columbia highlighted the importance of this Court's eventual direction on the matter. The Quebec Court of Appeal recently engaged with the question and made great use of UNDRIP in its interpretation of s. 35 of the *Constitution Act, 1982* – a case now before this Court.[4] In a similar way, the UNDRIP Act's interpretative relevance is acutely reflected in the current appeal, where both parties and interveners have made extensive reference to it.[5] This Court is thus presented with an opportunity to confirm the importance of the UNDRIP Act in relation to both s. 25 and s. 35, providing at once the foundation and impetus for the broader use of this historic instrument in the Canadian legal system.

5. This question calls for a principled engagement with the significance of the UNDRIP Act. Parties and interveners have relied on UNDRIP in their respective submissions to support opposing conclusions on the question of the *Charter*'s application to Indigenous governing bodies pursuant to s. 32[6], as well as the interpretation of s. 25.[7] However, they did not engage the issue of the specific role that should be ascribed to UNDRIP and/or the UNDRIP Act in the interpretative process. In contrast, PFIRC urges this Court to adopt a principled approach that would clarify UNDRIP's key role in the *Charter* interpretative process and provide guidance to lower courts in future cases where the UNDRIP Act will be invoked. It would avoid the duplication of debates already raised before the enactment of the UNDRIP Act concerning the relevance of the Declaration in Canadian law.[8]

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[3] *Thomas and Saik'uz First Nation v. Rio Tinto Alcan Inc.*, 2022 BCSC 15 at para. 212; *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 at paras. 506-513.
[4] *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 at paras. 506-513.
[5] Appellant's Factum, paras. 100-101, 105-107; Respondent's Factum, paras 91-95, 123; Factum of the Intervener Attorney General of Canada, paras 12, 28, 33, 36; Factum of the Intervener Attorney General of Alberta, para. 10.
[6] Respondent's Factum, paras 91-95, Factum of the Intervener Attorney General of Canada, para 12; Factum of the Intervener Attorney General of Alberta, para. 10.
[7] Appellant's Factum, para. 100-101, 105-107; Respondent's Factum, para 123; Factum of the Intervener Attorney General of Canada, paras 28, 33, 36.
[8] See eg *Taku River Tlingit First Nation v Canada* (AG), 2016 YKSC 7; *Ross River Dena Council v Canada*, 2017 YKSC 59.

6. This Court has recently set out the importance of methodological rigour regarding the use of international sources in *Charter* interpretation.[9] This was prompted by the lack of clarity and confusion that had characterized some of the Court's prior case law relying on international authorities.[10] In response, Justices Brown and Rowe developed a "principled framework" for considering international and comparative sources in constitutional interpretation.[11] The clear methodology was necessary both to properly recognize Canada's international obligations and to provide consistent and clear guidance to courts and litigants.[12] Courts relying upon international norms should explain why they are doing so, and how they are being used.[13]

7. This principled framework developed in *9147-0732 Québec inc.* constitutes the starting point when delineating UNDRIP Act's scope of application in constitutional interpretation. PFIRC submits that a careful consideration of the Act under this framework confirms that constitutional norms should be presumed to provide protection at least as great as that afforded under UNDRIP. This presumption applies to the protective function of s. 25 which might limit the exercise of certain individual rights to protect Indigenous peoples' collective rights.

1) The UNDRIP Act Gives Rise to the Presumption of Conformity

8. The framework established by Brown and Rowe JJ. focuses on "the nature of the source and its relationship to our Constitution".[14] The nature of the source is analyzed through the dichotomy between binding and non-binding international norms. Binding instruments carry more weight in the analysis than non-binding instruments, and the two types of instruments result in different interpretative approach. International human rights documents which Canada has ratified – and are thus binding – give rise to the presumption that the *Charter* provides protection at least as great as that afforded by similar provisions in those documents. By contrast, non-binding instruments should be treated as relevant and persuasive but not determinative interpretive tools, and courts drawing from those non-binding norms should be careful to explain why they are drawing on a particular source and how it is being used.[15] Temporality is another factor impacting the interpretative weight

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[9] *Quebec (Attorney General) v. 9147-0732 Québec inc.*, 2020 SCC 32 [*9147-0732 Québec inc.*].
[10] *9147-0732 Québec inc.* at para. 24.
[11] *9147-0732 Québec inc.* at para. 27.
[12] *9147-0732 Québec inc.* at para. 27.
[13] *9147-0732 Québec inc.* at para. 40.
[14] *9147-0732 Québec inc.* at para. 23.
[15] *9147-0732 Québec inc.* at para. 30-38.

of international authorities. International instruments that pre-date the *Charter* can also clearly form part of the historical context of a *Charter* right regardless of whether Canada is a party to such instruments. As for instruments that post-date the Charter, those that do not bind Canada carry much less interpretive weight than those that do.[16]

9. UNDRIP itself was adopted as an Annex to a General Assembly resolution.[17] While many of UNDRIP's provision must be understood to be reflective of customary international law, the resolution itself remains, formally speaking, a legally non-binding instrument in the sense envisaged by this Court in *9147-0732 Québec inc.* It is also an instrument that post-dates the *Charter*. While it might have normally been categorized under the "relevant and persuasive" approach, the unique interpretative effect of the Declaration through the UNDRIP Act calls instead for a robust presumption of conformity.

10. Parliament's clear intention provides the rationale to extend the presumption of conformity within the framework developed by this Court. The very purpose of the UNDRIP Act is to affirm UNDRIP as a universal international human rights instrument whose values, principles and rights are a source for the interpretation of Canadian law. The preamble and s. 4(a) of the Act state this clearly:

Preamble	**Préambule**
[…] Whereas the Declaration is affirmed as a source for the interpretation of Canadian law; […]	Attendu : […] qu'il y a lieu de confirmer que la Déclaration est une source d'interprétation du droit canadien; […]
4 The purposes of this Act are to **(a)** affirm the Declaration as a universal international human rights instrument with application in Canadian law; and **(b)** provide a framework for the Government of Canada's implementation of the Declaration.	**4** La présente loi a pour objet : **a)** de confirmer que la Déclaration constitue un instrument international universel en matière de droits de la personne qui trouve application en droit canadien; **b)** d'encadrer la mise en œuvre de la Déclaration par le gouvernement du Canada.

[16] *9147-0732 Québec inc.* at para. 41-42.

[17] UN General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples*, resolution /adopted by the General Assembly, 2 October 2007, A/RES/61/295.

11. The weigh and persuasiveness of international norms depends on their respective nature and source[18]. Parliament's enactment of the UNDRIP Act and its explicit pronouncement on the application of UNDRIP in Canadian law sets it in a unique category; it provides an even stronger basis to apply the presumption when compared to ratification of international instruments. Ratification is controlled by the executive branch of Government.[19] The executive branch acting as the Crown's representative has the authority to negotiate, sign and ratify international conventions and treaties.[20] The presumption of conformity applies to international norms to which the executive has expressed its willingness to be bound.[21] The same logic should *a fortiori* apply when Parliament also expresses in clear terms its intention to grant interpretative force to certain international norms. Just as the Government has obliged itself to ensure certain fundamental rights, so can Parliament determine with binding force the interpretative sources of its laws.

12. The presumption should, in fact, be even more robust when legislation is adopted by Parliament. For once, in the words of Dickson C.J., the ratification process leading to binding international obligations is "an important indicia" of the protections afforded by the *Charter*.[22] In contrast, the UNDRIP Act is not an implicit indicia, it is a clear and express direction. What is more, the executive branch has made clear that they consider this direction applies specifically to the Constitution:

> The Act also affirms that the UN Declaration can be used to interpret and apply all Canadian laws, including the Constitution.[23]

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[18] *9147-0732 Québec inc.* at para. 23.

[19] In January 2008, the federal government adopted the Policy on Tabling of Treaties in Parliament (later updated in in November 2020). The Policy provides for *limited* parliamentary involvement in the ratification process by tabling all treaties between Canada and other states or entities in the House of Commons before ratification. The House of Commons has the power to debate the treaty and to pass a motion recommending action, including ratification; however, such a vote has no legal force. Tabling treaties in the House of Commons remains a courtesy on the part of the executive, which retains full authority to decide whether to ratify the treaty after the parliamentary review. See Laura Barnett, *Canada's Approach to the Treaty-Making Process*, Library of Parliament Publication No. 2008-45-E, 2021, Ottawa, Canada, 2021.

[20] See *Capital Cities Comm. v. C.R.T.C.*, [1978] 2 S.C.R. 141; *Canada (Attorney General) / Ontario (Attorney General)*, 1937 CanLII 362 (UK JCPC).

[21] *Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. at p. 349 (Dickson J) [*Re PSERA*].

[22] *Re PSERA* at p. 349

[23] Annual progress report on the implementation of the United Nations Declaration on the Rights of Indigenous Peoples Act, Department of Justice Canada, June 2022, at p. 26.

13. Finally, a robust presumption of conformity is also particularly apt given the language of the UNDRIP Act. The preamble highlights that "the rights and principles affirmed in the Declaration constitute the minimum standards for the survival, dignity and well-being of Indigenous peoples of the world, and must be implemented in Canada", an assertion also found in UNDRIP art. 43. As Dickson C.J. originally framed it, "the *Charter* should generally be presumed to provide protection at least as great as that afforded by similar provisions in international human rights documents which Canada has ratified"[24] With greater reason, the *Charter* should be presumed to provide protection at least as great as that afforded by similar provisions in international human rights documents which Parliament has explicitly acknowledged constitute the minimum standards for the survival, dignity and well-being of Indigenous peoples.

2) The Presumption of Conformity Applies to Section 25

14. In *9147-0732 Québec inc.*, the Court stated that the presumption of conformity "operates principally as an interpretive tool in assisting the courts in delineating the breadth and scope of Charter rights".[25] This formulation, however, should not conceal the fact that the presumption can also operate with relation to a provision such as s. 25 that may result in restrictions upon the exercise of certain *Charter* rights. This finds its most direct expression in Dickson C.J.'s confirmation of the presumption in *Slaight Communications Inc*.[26] Right after recalling his dicta from *Reference re Public Service Employee Relations Act (Alta.)*[27], he also added this important observation:

> Canada's international human rights obligations should inform not only the interpretation of the content of the rights guaranteed by the Charter but also the interpretation of what can constitute pressing and substantial s. 1 objectives **which may justify restrictions upon those rights**.[28]

15. In fact, international sources have played an important role with respect to every facet of the s. 1 analysis. A wide range of limitations found in international sources have been cited as examples in determining what constitutes a sufficiently important objective to warrant overriding a

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[24] *Re PSERA* at p. 349
[25] *9147-0732 Québec inc.* at para. 34.
[26] *Slaight Communications Inc. v. Davidson*, [1989] 1 SCR 1038 [*Slaight Communications Inc.*].
[27] *Re PSERA* at pp. 348-49.
[28] *Slaight Communications Inc*, at pp.1056–57 [emphasis added].

constitutionally protected right.[29] Similarly, courts have turned to international human rights law in assessing the 'proportionality' of the means chosen to achieve the state's objective.[30]

16. Just as is the case with s. 1, the nature of s. 25 might result in restrictions upon the exercise of *Charter* rights. This does not negate the relevance of international sources in the interpretative process. Section 25 is a non-derogation clause that serves a protective function. As outlined by the Court of Appeal below, "the purpose of the provision is to protect certain Aboriginal rights from being abrogated or diminished by the judicial interpretation of personal rights and freedoms guaranteed by the Charter."[31] As such, contrary to s. 1, its purpose is not solely the limitations of *Charter* rights; its primary focus is the protection of certain Aboriginal rights, which incidentally might result in the limitation of individual Charter rights. In this context, the relevance of the presumption of conformity is even more apparent. Section 25 indicates that any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada are not to be abrogated or derogated from. UNDRIP should be presumed to provide a collection of these said rights.

B. The Presumption of Conformity Supports an Interpretation of Section 25 that Shields the Exercise of Protected Indigenous rights

17. Applying a robust presumption of conformity to UNDRIP necessarily requires a detailed and serious engagement with the substance of the relevant rights provided in the Declaration. The exercise requires looking at the totality of UNDRIP to uphold the purpose of the Declaration and avoid contradictory reading of certain provisions.

18. As a preliminary matter, PFIRC submits that UNDRIP arguments raised by the Appellant Cindy Dickson and the Attorney General of Canada are defective in this regard. They highlight the passing references to "respect for human rights" found in UNDRIP Articles 1, 34, and 46 as an indicia that collective rights must give way or be balanced against individual human rights within

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[29] See eg *R v Keegstra*, [1990] 3 SCR 697 at p. 749-55; *Canada (Human rights commission) v Taylor*, [1990] 3 SCR 892 at p. 919-20; *Ross v. New Brunswick School District No. 15*, [1996] 1 SCR 82 at paras. 97-98; *R. v Lucas*, [1998] 1 SCR 439 at para. 50; *R. v Sharpe*, 2001 SCC 2, [2001] 1 SCR 45, paras. 175–179 (L'Heureux-Dubé, Gonthier and Bastarache JJ); *R. v Butler*, [1992] 1 SCR 452 at pp. 498, 522 (Sopinka J), 498 (Gonthier J).

[30] See eg *Saskatchewan Federation of Labour v Saskatchewan*, 2015 SCC 4 at para 88; *Alberta Reference*, at pp. 374–75 (Dickson CJ dissenting).

[31] YKCA, para. 148.

the framework of s. 25.[32] This argument does not take account of UNDRIP's strong focus on Indigenous peoples' rights as 'peoples', ie the purposeful emphasis on collective rights. More fundamentally, these submissions seem to ignore UNDRIP Article 45, which effectively serves a similar protective purpose to s. 25:

> Nothing in this Declaration may be construed as diminishing or extinguishing the rights indigenous peoples have now or may acquire in the future.

19. Using UNDRIP's references to general human rights standards to diminish the scope of collective indigenous rights constitutionally protected by s. 25 is precisely the type of scenario that art. 45 was designed to avoid. Accepting this argument would flip UNDRIP's logic on its head.

20. Looking at UNDRIP's substantive provisions, several important rights should play a relevant role in the interpretation of s. 25 through the presumption of conformity. Along with the right to self-determination, Indigenous peoples equally have the right to self-government as outlined in UNDRIP Articles 3 and 4. The ways in which representatives are chosen for this self-government are to be in accordance with their own procedures.[33] As the courts have already outlined, a major part of Indigenous governmental decision-making is ensuring a broad consensus of the band members.[34]

21. UNDRIP Article 20 also provides that "Indigenous peoples have the right to maintain and develop their political […] systems or institutions, to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities." Indigenous peoples have a right to protect said systems and institutions in accordance with international human rights standards.[35] Lastly, Indigenous people have the right to determine the responsibilities of individuals to their communities.[36]

22. UNDRIP Articles 3, 4, 18, 20, 34, and 35 all support an interpretation of s. 25 that would shield VGFN's exercise of its protected Indigenous rights. This Court has indicated that "the fundamental objective of the modern law of aboriginal and treaty rights is the reconciliation of aboriginal peoples and non-aboriginal peoples and their respective claims, interests and

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[32] See eg Factum of the Intervener Attorney General of Canada, para. 33 ("A non-absolutist approach is further supported by UNDRIP which confirms that rights referred to therein are subject to "limitations", to ensure respect for human rights.")
[33] UNDRIP, art. 18.
[34] See eg *Bigstone v Big Eagle*, [1992] F.C.J. No. 16.
[35] UNDRIP, art. 34.
[36] UNDRIP, art. 35.

ambitions".[37] Through the presumption of conformity, the rights set out in UNDRIP must be given effect as the "minimum standard"[38] in order to achieve this "fundamental objective" of reconciliation. Indigenous peoples have been living in a way that does not respect their own traditions and culture. By giving proper interpretative weight to UNDRIP, this Court can effectively set out how this minimum standard of well-being of Indigenous peoples will be met in Canadian courts.

PART IV – COSTS

23. The Pan-Canadian Forum on Indigenous Rights and the Constitution does not seek costs and asks that no costs be awarded against it.

PART V – ORDER SOUGHT

24. The Pan-Canadian Forum on Indigenous Rights and the Constitution 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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Bruno Gélinas-Faucher
Counsel for the Pan-Canadian Forum
on Indigenous Rights and the Constitution

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[37] *Mikisew Cree First Nations v Canada (Minister of Canadian Heritage)*, 2005 SCC 69 at para 1.

[38] UNDRIP art. 43; see also UNDRIP Act preamble.

PART VI – TABLE OF AUTHORITIES

A. Case Law

Case	Paragraph(s)
Bigstone v Big Eagle, [1992] F.C.J. No. 16	20
Capital Cities Comm. v C.R.T.C., [1978] 2 S.C.R. 141	11
Canada (Human rights commission) v Taylor, [1990] 3 SCR 892	15
Mikisew Cree First Nations v Canada (Minister of Canadian Heritage), 2005 SCC 69.	22
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R. v. Keegstra, [1990] 3 SCR 697	15
R. v. Lucas, [1998] 1 SCR 439	15
R. v. Sharpe, 2001 SCC 2	15
R. v. Butler, [1992] 1 SCR 452	15
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	4
Reference re Public Service Employee Relations Act (Alta.), [1987] 1 S.C.R. 313	11, 13, 14
Ross v. New Brunswick School District No. 15, [1996] 1 SCR 82	15
Ross River Dena Council v Canada, 2017 YKSC 59.	5
Saskatchewan Federation of Labour v Saskatchewan, 2015 SCC 4	15
Slaight Communications Inc. v. Davidson, [1989] 1 SCR 1038	14
Taku River Tlingit First Nation v Canada (AG), 2016 YKSC 7.	5
Thomas and Saik'uz First Nation v Rio Tinto Alcan Inc., 2022 BCSC 15.	4

B. Legislation

Legislation	Paragraph(s)
Canadian Charter of Rights and Freedom, The Constitution Act, 1982, Schedule B to the Canada Act 1982 (UK), 1982, c 11.	1, 5, 6, 8, 9, 12, 13, 14, 15, 16
United Nations Declaration on the Rights of Indigenous Peoples Act, SC 2021, c 14.	1, 3, 4, 5, 7, 9, 10, 11, 12, 13,

C. Secondary Sources

Source	Paragraph(s)
Annual progress report on the implementation of the United Nations Declaration on the Rights of Indigenous Peoples Act, Department of Justice Canada, June 2022	12
Laura Barnett, Canada's Approach to the Treaty-Making Process, Library of Parliament Publication No. 2008-45-E, 2021, Ottawa, Canada, 2021	11
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)	9