SCC Court File No. 39856

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

BETWEEN:

CINDY DICKSON

Appellant/Cross-Respondent
(Appellant)

\- and -

VUNTUT GWITCHIN FIRST NATION

Respondent/Cross-Appellant
(Respondent)

\- and -

ATTORNEY GENERAL OF CANADA, ATTORNEY GENERAL OF QUEBEC, ATTORNEY GENERAL OF ALBERTA, GOVERNMENT OF YUKON, 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, AND FEDERATION OF SOVEREIGN INDIGENOUS NATIONS

Interveners

REPLY FACTUM OF THE APPELLANT, CINDY DICKSON, TO ALL INTERVENTIONS

(Pursuant to the Order of Côté J. dated September 20, 2022
permitting a five page reply factum and Rule 42 of the *Rules of the Supreme Court of Canada*)

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PART I – STATEMENT OF ARGUMENT

A. UNDRIP provides for the protection of collective and individual rights of Indigenous peoples and does not shield laws of Indigenous governments from *Charter* challenges

1. In response to a number of interveners,[1] the *United Nations Declaration on the Rights of Indigenous Peoples* ("UNDRIP") does not support an argument that s. 25 operates as an absolute or automatic shield for laws enacted by an Indigenous government. These interveners rely on reading certain provisions of UNDRIP in isolation, without regard to the whole of the Declaration and the other international instruments referenced therein. The Declaration provides that the rights it espouses — including self-determination — must be exercised in accordance with international human rights law, and subject to internal balancing. UNDRIP does not support the proposition that collective self-determination comes at the expense of the individual human rights of the members of the collective.

2. It would be inconsistent with this Court's approach to international law to interpret and apply UNDRIP in a manner that conflicts with other international law instruments which Canada has ratified, and which trigger the presumption of conformity when interpreting Canadian laws. This includes the *International Covenant on Civil and Political Rights* ("ICCPR")[2] and the *International Covenant on Economic, Social and Cultural Rights* ("ICESCR")[3] which are referred to in UNDRIP and have been applied by this Court when interpreting *Charter* provisions.[4] ICCPR and ICESCR, unlike UNDRIP, pre-date the *Charter* and contributed to its development.[5] Rather than a view that UNDRIP overrides rights within ICCPR and ICESCR, a harmonious interpretation is available and clearly preferred, that collective self-determination is to be exercised in conformity

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[1] Carcross/Tagish First Nation Factum, at paras. 19-20; Pan-Canadian Forum on Indigenous Rights and the Constitution Factum, at paras. 2, 22; Federation of Sovereign Indigenous Nations Factum, at para. 1; Teslin Tlingit Council Factum, para. 20 relating to applicability of *Charter*.
[2] *International Covenant on Civil and Political Rights*, Can. T.S. 1976 No. 47 ("**ICCPR**").
[3] *International Covenant on Economic, Social and Cultural Rights*, Can. T.S. 1976 No. 46.
[4] See *Quebec (Attorney General) v. 9147-0732 Québec inc.*, 2020 SCC 32, ("***9147-0732 Québec inc.***"), at para. 39; *R. v. Bissonnette*, 2022 SCC 23, at paras. 98-100; *Divito v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 47 ("***Divito***"), at paras. 24-27; *Reference Re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313, at paras. 59-62.
[5] *9147-0732 Québec inc.*, at paras. 39-42; *Divito,* at paras. 24-25.

with international human rights law and it does not grant Indigenous governments authority to infringe their citizens basic human rights without justification.

3. This interpretation is supported both by examining UNDRIP in the context of international law and by the text of UNDRIP itself. The preamble of UNDRIP states that Indigenous individuals are entitled to all human rights without discrimination, and that the right to self-determination must be exercised in conformity with international law:

> *Acknowledging* that the Charter of the United Nations, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights, as well as the Vienna Declaration and Programme of Action, affirm the fundamental importance of the right to self-determination of all peoples, by virtue of which they freely determine their political status and freely pursue their economic, social and cultural development,
>
> *Bearing* in mind that nothing in this Declaration may be used to deny any peoples their right to self-determination, exercised in conformity with international law…
>
> *Recognizing and reaffirming* that indigenous individuals are entitled without discrimination to all human rights recognized in international law, and that indigenous peoples possess collective rights which are indispensable for their existence, well-being and integral development as peoples[6] [Emphasis added]

4. Article 1 of UNDRIP explicitly provides that Indigenous peoples have the right to all collective and individual rights as recognized under international human rights law, and Article 34 provides that they have the right to promote, develop and maintain their institutional structures and customs in accordance with international human rights standards. The provisions of UNDRIP are also limited by Article 46 which provides the rights within UNDRIP must be exercised in a manner that respects human rights and fundamental freedoms, and are subject to limitations as "determined by law" and "in accordance with international human rights obligations".

5. UNDRIP must therefore be read in conjunction with other international human rights instruments including the ICCPR*,* which protects an individual's right to be elected at genuine periodic elections (Article 25) and to choose their own residence (Article 12). Each provision in

[6] *United Nations Declaration on the Rights of Indigenous Peoples,* G.A. Res. 61/295, UNGAOR, 61st Sess., Supp. No. 49, Vol. III, UN Doc A/61/49 (2007) ("**UNDRIP**"), Preamble.

UNDRIP must be interpreted in accordance with the principles of justice, democracy, respect for human rights, equality, non-discrimination, good governance, and good faith.[7]

6. In response to Carcross/Tagish First Nation and Federation of Sovereign Indigenous Nations, the ICCPR and the other international human rights instruments listed in the preamble to UNDRIP are not encapsulations of "western" or "Eurocentric" ideologies, nor is the *Charter*.[8] They arose following the atrocities of World War II.[9] ICCPR has been ratified by 173 countries and the ICESCR has been ratified by 171 countries, covering six continents.[10] These international human rights instruments inform this Court's interpretation of *Charter* rights, and guarantee a baseline protection of rights and freedoms for all persons.[11] It is not accurate to characterize the *Charter* as a document that espouses western or colonial values, and there is no reason why the *Charter* should not provide protection to Indigenous citizens within Canada when Indigenous governments have enacted laws that infringe their rights.

B. Bastarache J.'s minority opinion in *Kapp* does not support an interpretation of s. 25 that automatically shields laws of Indigenous governments from *Charter* challenges

7. Several interveners rely on the minority reasons of Bastarache J. in *Kapp* to support their position that s. 25 of the *Charter* shields all laws of Indigenous governments, even against their own citizens.[12] However, this interpretation is not consistent with the opinion of Bastarache J. who was of the view s. 25 protects "Indigenous difference" within Canada,[13] and that "[t]here is no reason to believe that s. 25 has taken [Indigenous peoples] out of the *Charter* protection scheme".[14] In his view, when an Indigenous government enacts an "internal restriction", it "should be required

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[7] UNDRIP, Article 46.
[8] Carcross/Tagish First Nation Factum, at paras. 12, 14, 28-31; Federation of Sovereign Indigenous Nations Factum, at para. 17.
[9] *Nevsun Resources Ltd. v. Araya*, 2020 SCC 5, at para. 1.
[10] United Nations, United Nations Treaty Collection, "International Covenant on Civil and Political Rights"; United Nations, United Nations Treaty Collection, "International Covenant on Economic, Social and Cultural Rights".
[11] *Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313, at para. 59; *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038, at p. 1056; *9147-0732 Québec inc.*, at para. 31.
[12] Carcross/Tagish First Nation Factum, at para. 15; Council of Yukon First Nations Factum, at para. 24; British Columbia Treaty Commission Factum, at paras. 6, 12.
[13] *R. v. Kapp*, 2008 SCC 41 ("***Kapp***"), at paras. 103, 121, per Bastarache J.
[14] *Kapp*, at para. 99, per Bastarache J.

to satisfy the *Oakes* test to resist a challenge".[15] The reasons of Bastarache J. therefore support the appellant's position that s. 25 offers protection to the special status of Indigenous collective rights — beneficially held and exercised by all members of the collective — as against external challenges to those rights under the *Charter*. Extending such protection to laws which create *intra*-group divisions within Indigenous nations is contrary to this purpose.[16]

C. Section 25 is intended to protect constitutional rights

8. The Attorney General of Canada asserts at paragraph 45 of its factum that "constitutional character"[17] does not mean "constitutional status". This is not correct. This Court has used the terms "constitutional character"[18] and "constitutional status"[19] to describe statutes or other instruments that are part of the Constitution of Canada. The term "constitutional character" has also been used to describe constitutional duties such as the duty to consult.[20] This does not mean, as Canada appears to suggest, that it is the appellant's position that Indigenous rights of a constitutional character are limited to s. 35 rights.[21] To read s. 25 as allowing *Charter* rights to be overridden by rights or freedoms that do not have a constitutional character or status would be inconsistent with the purpose of the *Charter* as a whole, which provides "unremitting" constitutional protection of individual rights and liberties.[22] It would also be inconsistent with s. 52 of the *Constitution Act, 1982* which recognizes the supremacy of the Constitution, and would be a surprising result if the Constitution was interpreted to allow a constitutional right to be overridden by a non-constitutional right.

D. Giving effect to the individual rights and freedoms of Indigenous citizens will not harm or deteriorate self-determination or self-governance

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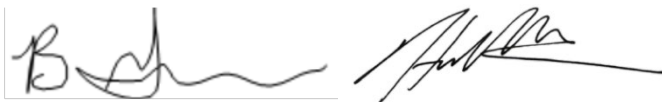
[15] *Kapp*, at para. 99, per Bastarache J.
[16] See Factum of the Appellant, at paras. 86-91.
[17] *Kapp,* at para 63.
[18] *Re: Authority of Parliament in relation to the Upper House,* [1980] 1 S.C.R. 54, at p. 60; *Re: Resolution to amend the Constitution,* [1981] 1 S.C.R. 753, at pp. 862, 890.
[19] *Jack et al. v. The Queen,* [1980] 1 S.C.R. 294, at p. 298.
[20] *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council,* 2010 SCC 43, at para. 34, citing *Kapp,* at para 6.
[21] See Factum of the Appellant, at para. 78; See also discussion of the Terms of Union with BC in *Jack et al. v. The Queen,* [1980] 1 S.C.R. 294, at pp. 298-299, 301, 312-313, referred to in *R. v. Sparrow,* [1990] 1 S.C.R. 1075, at pp. 1115-6.
[22] *Hunter et al. v. Southam Inc.*, [1984] 2 S.C.R. 145, at p. 155; *R. v. Big M Drug Mart Ltd.,* [1985] 1 S.C.R. 295, at para. 121.

9. In response to the Council of Yukon First Nations' submissions, ensuring Indigenous citizens can access their *Charter* rights in relation to laws enacted by their Indigenous governments does not invalidate or undermine self-government arrangements, or alter the jurisdiction of VGFN.[23] In this case, a finding that VGFN laws are subject to the *Charter* gives effect to the terms of the Final Agreement and Self-Government Agreement. *Charter* rights are held by citizens as against government, and do not threaten VGFN's jurisdiction to enact laws and determine its governance structure — it simply requires that the authority be exercised in a manner upholding their citizens' fundamental rights.

10. Council of Yukon First Nations submits at paragraph 10 of its factum that the "Crown was generally aware of the legal scope and nature of the self-governing Yukon First Nations' constitutions prior to their coming into force" in 1993 and cites that it was the general practice for government negotiation officials to review Yukon First Nations' constitutions before each Final Agreement and Self-Government Agreement was brought into legal effect. However, in 1993, VGFN's constitution did not contain any residency requirement for Council members. This requirement was first introduced into the VGFN constitution in 2006.[24] The appellant does not agree that Canada's awareness is relevant to resolving the issues in the case, but if it is relevant, it would support the appellant's position, not the position of the Council of Yukon First Nations.

11. The interveners representing Yukon First Nations warn of the harm to their ability to govern if their laws are subject to the *Charter*. The *Charter*, however, is flexible and embraces difference, multiculturalism and minority rights. The foundation of democracies are its individuals and ensuring Indigenous individuals basic human rights does not harm Indigenous self-determination, but enhances it.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 24th DAY OF NOVEMBER 2022.



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[23] Council of Yukon First Nations Factum, at paras. 1, 19, 28.
[24] *Dickson v. Vuntut Gwitchin First Nation*, [2021 YKCA 5](), at para. 29.

PART II – TABLE OF AUTHORITIES

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