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

RESPONDENT'S REPLY FACTUM TO INTERVENERS
(VUNTUT GWITCHIN FIRST NATION)
(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada* and the Order of Justice Côté made September 20, 2022)

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PART I - OVERVIEW

1. VGFN responds herein to submissions made by the interveners Canadian Constitution Foundation (CCF), Band Members Alliance and Advocacy Association of Canada (BMAAAC), Congress of Aboriginal Peoples (CAP), and British Columbia Treaty Commission (BCTC).

PART II - SUBMISSIONS ON REPLY TO INTERVENERS

A. Canadian Constitution Foundation (CCF)

2. CCF argues that s. 25 must be understood in the context of the broader structure of Canada's constitution, and that a shield for certain rights is inconsistent with that structure.[1] To the contrary, it is consistent with this Court's constitutional jurisprudence (in the context of s. 29 of the *Charter* and denominational schools) that certain rights are indeed shielded from *Charter* review.[2] CCF also makes a straw man argument that if the Court were to accept the conclusion that s. 25 acts as a shield for self-government rights, Indigenous governments could restrict voting to members residing on reserve, and this would not be consistent with *Corbiere*.[3] On/off reserve status and denial of the right to vote are not issues in this case. Here, the self-government right that is protected is VGFN's right to choose how their leaders are selected, by way of their own Constitution as agreed to in their modern land claim agreements. Their Constitution does not restrict voting to Citizens on VGFN settlement land.

3. CCF suggests that collective interests may be left for consideration under the justification standard of s. 1 of the *Charter*.[4] While collective interests may factor into questions respecting the proportionality of a provision, the existence of justification possibilities must not erase the protection promised to Indigenous peoples by s. 25. As this Court has noted before, that provision is a shield, and it must be an available and a meaningful one, not one undermined because of the possibility of justification at a different stage of analysis.

B. Band Members Alliance and Advocacy Association of Canada (BMAAAC)

4. BMAAAC's submissions mischaracterize the nature of the appeal and the issues between the parties. The question before the Court is not "what *Charter* rights, if any, indigenous peoples

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[1] Canadian Constitution Foundation [**CCF**] Factum, para 14.
[2] *Reference re Bill 30*, *An Act to Amend the Education Act (Ont.)*, [1987] 1 SCR 1148, paras 62, 81; *Adler v Ontario*, [1996] 3 SCR 609, paras 38-39.
[3] CCF Factum, paras 20-21.
[4] CCF Factum, paras 24-26.

in Canada enjoy."[5] Whether Indigenous people enjoy the protection of the *Charter* that all Canadians enjoy in respect of governments or bodies which are subject to it, is simply not in issue. It is misleading to suggest any party argues otherwise.

5. BMAAAC incorrectly states that VGFN argues that Indigenous governments are not required to respect basic individual rights and freedoms.[6] In doing so it ignores the existence of VGFN's Constitution and legal order. CCF similarly suggests that the question on appeal is whether collective rights can "oust individual rights and freedoms", drawing a false dichotomy between giving s. 25 its intended effect (by protecting indigenous self government) and the protection of individual rights and freedoms.[7] CCF appears on this point to reject a contextual approach to *Charter* interpretation, stating that the fact that a self-governing First Nation provides constitutional protection for individual rights and freedoms has "no impact".[8] This is not a helpful approach: the fact and context of VGFN's legal order is central to this case. The protection of individual rights and freedoms *by VGFN* was central to the negotiated outcome between VGFN, Yukon and Canada. Giving the Constitution the force it was intended to have, protected by s. 25, does not oust individual rights protections; it guarantees them through VGFN's Constitution in a manner that reflects the distinctive VGFN society.

6. Here, the question is not whether a First Nation should protect basic rights and freedoms. It is whether a self-governing First Nation's constitution containing robust human rights protections, should be subjugated to an external set of laws, not agreed to and not part of the Indigenous legal order. It is notable that the Constitution enacted by VGFN contains a *more* robust set of human rights protections than the *Charter*, being as it does not include an override provision such as the "notwithstanding" clause contained in s. 33. Unlike the VGFN Constitution, the *Charter* provides an opportunity for Parliament or a legislature to declare an act of that body to operate *notwithstanding* its inconsistency with the *Charter*. Accordingly, *Charter* protection is subject to the political will of the current government. By contrast, under the VGFN Constitution, Citizens' individual rights are subject only to limit upon justification.

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[5] Band Members Alliance and Advocacy Association of Canada [**BMAAAC**] Factum, para 2.
[6] BMAAAC Factum, paras 2-3.
[7] CCF Factum, para 14.
[8] CCF Factum, para 17, see para 26 by contrast.

7. BMAAAC's submission that the jurisdiction exercised by "any aboriginal government within Canada *now flows from Canadian sovereignty*" should be rejected as inconsistent with this Court's confirmation that the "legal source of Aboriginal rights and title is not state recognition, but rather the realities of prior occupation, sovereignty and control."[9] A principled or effective notion of reconciliation does not require a "merger" and "adaptation" of Indigenous legal orders[10] within Canadian legal orders. This is not called for by the shared sovereignty described in RCAP and relied on by BMAAAC.[11] Reconciliation does not demand sameness; instead it requires respect for the existence of distinct sovereignties, including their differences. Such differences must not presumptively be 'adapted'; they may need to be accommodated. To the extent that BMAAAC's argument is that VGFN's Constitution is not worthy of accommodation because it does not respect basic rights and freedoms, that is a patent misrepresentation of the VGFN constitutional rights protections that are in place.[12]

8. BMAAAC suggests that reconciliation calls for application of the *Charter* to Indigenous self-government. To the contrary, asking the Court to read into s. 32 and s. 52 an intention to include all Indigenous governments within the purview of the *Charter* does not present a process for reconciliation founded on dialogue, trust and mutual respect. The central concern expressed by BMAAAC, the protection of basic individual rights, does not necessitate the imposition of the *Charter* in this case, where VGFN's Constitution protects individual rights, as intended by the self-government arrangements agreed to with Canada and Yukon. This Court should not alter the scope of *Charter* application in a case that simply does not require it.

C. Congress of Aboriginal Peoples (CAP)

9. The submissions of CAP are in contravention of the requirement that an intervener not take a position on the outcome of an appeal.[13] In taking positions respecting the application of the *Charter*, CAP's submissions duplicate the Appellant's and should only be considered to the extent they provide a distinct perspective on a legal issue before the Court.

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[9] BMAAAC Factum, para 9; *Newfoundland and Labrador (Attorney General) v Uashaunnuat (Innu of Uashat and of Mani-Utenam)*, 2020 SCC 4, para 49.
[10] BMAAAC Factum, para 22.
[11] BMAAAC Factum, para 12.
[12] BMAAAC Factum, para 28.
[13] Coalition of Aboriginal Peoples [**CAP**] Factum, paras 4, 5, 8, 15; *Rules of the Supreme Court of Canada*, r 42(3).

10. CAP submits that vulnerability of off-reserve members of First Nations should be understood in context. BMAAAC also submits that Aboriginal people, as a result of Canada's shameful treatment of them, are vulnerable and experience a power imbalance in relation to their governments. VGFN agrees that as a result of discrimination and oppression in Canadian society, Aboriginal people experience disadvantage. This reality of disenfranchisement at Canadian society's hand – particularly the alienation of VGFN Citizens from their homelands – animates both VGFN's agreements with Canada and Yukon and VGFN's purpose in making the Residency Requirement.

11. However, CAP makes a conclusory argument that "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."[14] On the evidence, the Appellant (nor CAP) has not demonstrated that in relation to VGFN government, VGFN Citizens face power imbalance subject to abuse, nor that VGFN self-government is defined (as suggested by BMAAAC) by a "traditional power dynamic between governor and governed."[15] To the contrary, and in contrast to most other governments in Canada, VGFN's Citizens have opportunities for direct participation and control in relation to governance through the General Assembly, including in the making and amendment of the Constitution itself. This does not suggest a power imbalance subjecting Citizens to exploitation. The Appellant has also not demonstrated that VGFN Citizens who do not reside on settlement land are vulnerable to being viewed within VGFN society as "less aboriginal" than those living in the seat of government at Old Crow. CAP also suggests incorrectly that a power of VGFN Council exercised in relation to VGFN Citizens is in issue: the Residency Requirement was made by Citizens at the General Assembly, not by Council.

D. Limits to s. 25 proposed by interveners

12. VGFN submits that limits on s. 25 of the *Charter* that are not consistent with a purposive interpretation should be rejected. CCF argues that the use of s. 25 should be reserved to cases involving *Charter* claims by non-Indigenous individuals.[16] This restriction is without any basis in the text, purpose or context of s. 25.[17] Section 25 requires that Aboriginal, Treaty and other

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[14] CAP Factum, paras 13-15.
[15] BMAAAC Factum, para 15.
[16] CCF Factum, para 13.
[17] See also: Attorney General of Alberta Factum, para 36.

rights of Aboriginal peoples shall not be abrogated or derogated by interpretation of the *Charter*. The *Charter* may be relied on (where it applies) by anyone in Canada. Restricting the protection of s. 25 to cases where the *Charter* is raised by non-Indigenous individuals does not accord with the plain meaning of its purpose. Indigenous individuals do not have identical views or experiences. Being citizens or members of a First Nation does not guarantee that their views will align with outcomes of collective decisions, even those reached through community deliberation and consensus. This does not mean that such decisions are not expressions of rights meriting protection by s. 25.

13. CAP argues that s. 25 should involve a weighing and balancing of rights.[18] This approach, echoed by BMAAAC,[19] would create arbitrary and uncertain limits to the rights protected by s. 25. A balancing approach risks depriving those rights that form part of an Indigenous group's collective identity of protection. The language, purpose and context of s. 25 do not call for an internal limitation to such rights that would give protection to only aspects described as "core" and such a test is not necessary or desirable.[20] There are numerous examples of rights defined and protected in modern treaties and agreements that may not be characterised as "core" according to that test but are nevertheless guaranteed by s. 35 and protected by s. 25.[21]

14. VGFN agrees with BCTC that Indigenous governance bodies may look different than Canadian governing entities, or one another, but that self-governance being different is the very point of protecting what is part of (and sometimes different) about Indigenous legal orders.[22] This does not mean that s. 25 provides a framework for reconciliation.[23] That is the role of s. 35. Contrary to CAP's submission, the *Charter* is not a 'pluralist' document that reflects Indigenous perspectives.[24] VGFN was not involved in the development of the *Charter* and thus has strived to achieve recognition of its own legal order that addresses both collective and individual rights in a manner that upholds its inherent self-government.

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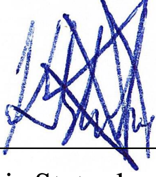
[18] CAP Factum, paras 19-21.
[19] BMAAAC Factum, para 33.
[20] BMAAAC Factum, paras 30-37; British Columbia Treaty Commission [**BCTC**] Factum, para 19.
[21] See e.g. Final Agreement, Chapter 22 (Economic Development), Chapter 21 (Taxation), AR Vol. V, Tab 5.8.
[22] BCTC Factum, para 20.
[23] BCTC Factum, para 18.
[24] CAP Factum, para 23.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED at Vancouver, in the Province of British Columbia, the 24th day of November, 2022.



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