SCC Court File No.: _____

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

BETWEEN:

CINDY DICKSON

Applicant
(Appellant/Petitioner)

-and-

VUNTUT GWITCHIN FIRST NATION

Respondent
(Respondent/Respondent)

-and-

GOVERNMENT OF YUKON, ATTORNEY GENERAL OF CANADA

Interveners
(Intervener/Intervener)

MEMORANDUM OF ARGUMENT OF THE APPLICANT, CINDY DICKSON

Pursuant to Rule 25 of the *Rules of the Supreme Court of Canada)*

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PART I – OVERVIEW AND STATEMENT OF FACTS

I. Overview

1. The applicant Cindy Dickson is an Indigenous person and Canadian citizen. She is a citizen of the Vuntut Gwitchin First Nation ("VGFN"), a modern self-governing Indigenous nation in the Yukon, and seeks to serve on her nation's governing Council. The VGFN requires its Chief and Council to reside on their Settlement Land which effectively means residing in the fly-in, fly-out community of Old Crow located 800 kilometres north of Whitehorse. Ms. Dickson has spent her career advancing and advocating for Indigenous culture in the north, but is denied the right to serve on Council solely because she lives in Whitehorse. Ms. Dickson spent most of her childhood in Old Crow, being raised by her grandfather, and moved away as a young adult to pursue education and employment opportunities. She now lives in Whitehorse with her teenage son, who suffers from hypoglycemia and is prone to seizures. She cannot re-locate to Old Crow so long as her teenage son is under her care.

2. Ms. Dickson sought a declaration that the residency requirement violates her equality rights under s. 15(1) of the *Charter,* and is of no force and effect. The Court of Appeal held the residency requirement violated Ms. Dickson's s. 15(1) rights, it nonetheless found that s. 25 operated as an absolute shield to protect the residency requirement. The Court found that no balancing was appropriate in assessing the conflict between Ms. Dickson's *Charter* rights and the discriminatory character of VGFN's residency requirements for Chief and Council.

3. This Court has recognised the scope of s. 25 as an issue of "utmost importance". Despite this, a majority of this Court has not yet definitively opined on its scope or operation. Since the enactment of the *Constitution Act, 1982,* almost forty years ago, these remain open questions. There are numerous conflicting decisions across the country which have created uncertainty among Indigenous persons and their communities.

4. This appeal squarely raises the question of what rights are protected by s. 25 and how s. 25 interacts with Indigenous self-governments. This Court has not yet decided a case where a *Charter* violation has been shielded by s. 25. This case presents this important opportunity.

5. The Court of Appeal's approach is fundamentally inconsistent with the recognition that our fundamental rights and freedoms are not absolute.[1] Even when *Charter* rights are infringed, they are subject to justification under s. 1 or subject to the legislature's discretion under s. 33 of the *Charter*. Similarly, Aboriginal and treaty rights under s. 35 may be infringed for public purposes, pursuant to the *Sparrow* justification test. Here, the Court of Appeal broadly applied s. 25 to protect Indigenous "governance traditions" of the VGFN, concluding the purpose of s. 25 is to "obviate" the balancing exercise undertaken in all other circumstances. This is a significant and troubling departure from general principles of Canadian constitutional law, and in this case, has upheld the disenfranchisement of Ms. Dickson from fully participating in her own Indigenous government through a violation of her equality rights.

6. As Indigenous self-government is becoming more prevalent across Canada, with the conclusion of modern treaties and the enactment of legislation implementing the *United Nations Declaration on the Rights of Indigenous Peoples*, the ability of Indigenous governments to invoke s. 25 to exclude their own citizens' *Charter* rights, including excluding them from participating in their government, is a pressing issue of national importance. This case is an opportunity for this Court to provide guidance in this regard, so governments can appropriately balance collective rights of Indigenous nations with individual *Charter* rights, and in particular the *Charter* rights of Indigenous persons like Ms. Dickson.

7. The interpretation of s. 25 applied by the Yukon Court of Appeal effectively provides an absolute shield to Indigenous governing bodies at the expense of the individual rights and freedoms of the nation's citizens. Ms. Dickson submits the Court of Appeal erred in its conclusion that s. 25 protects the Councillor eligibility rules enacted by the VGFN, and by applying s. 25 without conducting the balancing exercise required by s. 1 of the *Charter*. The Court of Appeal's interpretation and application of s. 25 is contrary to this Court's jurisprudence on balancing competing constitutional rights as well as balancing infringements with public purposes, and it would leave Indigenous individuals, such as the applicant, without recourse when their fundamental rights and freedoms are infringed by their own nation.

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[1] *R. v. Nikal*, [1996] 1 SCR 1013, para. 92; *R. v. Oakes*, [1986] 1 S.C.R. 103, para. 65.

II. Background

8. In 1993, the Government of Canada, the Government of the Yukon, and thirteen Yukon First Nations, including the Vuntut Gwitchin First Nation ("VGFN"), signed the historic Umbrella Final Agreement. The Umbrella Final Agreement forms the basis for the VGFN Final Agreement and the VGFN Self-Government Agreement, also entered into in 1993 by Canada, Yukon and VGFN.[2] The VGFN Final Agreement and Self-Government Agreement (the "Agreements") were given legal effect by federal and territorial legislation, and ratification by VGFN citizens, after a thorough consultation process.[3]

9. The other Yukon First Nation signatories to the Umbrella Final Agreement have entered substantially similar agreements. These monumental achievements came after decades of negotiations.

10. By express terms in the Final Agreement, the Final Agreement is a treaty under s. 35 of the *Constitution Act, 1982,* and the Self-Government Agreement is not protected by s. 35. Removing the self-government agreement from the Final Agreement, and from "constitutional protection", was an express and deliberate choice of the parties.[4]

11. The Agreements expressly provide VGFN's self-governance must be in "conformity with the Constitution of Canada" and must not "affect the rights of [VGFN citizens] as Canadian citizens".[5] Pursuant to the Self-Government Agreement, Yukon and Canada transferred numerous powers over housing, education, health care, the administration of justice, and other matters from the Yukon and Canada to the VGFN government for all VGFN citizens, regardless of where they live.

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[2] Reasons for Judgment of the Court of Appeal of Yukon, July 21, 2021, 2021 YKCA 5 ("YKCA Reasons"), para. 10.

[3] YKCA Reasons, paras. 11-13; See *Yukon First Nations Self-Government Act*, S.C. 1994, c. 35; *Yukon First Nations Land Claims Settlement Act*, S.C. 1994, c. 34; *An Act Approving Yukon Land Claim Final Agreements*, R.S.Y. 2002; *First Nations (Yukon) Self-Government Act*, R.S.Y. 2002, s. 90.

[4] Vuntut Gwitchin First Nation Final Agreement, section 24.12; YKCA Reasons, para. 11.

[5] YKCA Reasons, para. 15.

12. In 1993, pursuant to s. 10 of the Self-Government Agreement, the VGFN implemented a constitution, which sets out the structure of VGFN government. Thirteen years later, in 2006, the VGFN added in a requirement that to run for Chief and Council, VGFN citizens must reside on VGFN Settlement Land. This requirement was amended in 2019 to allow citizens living away from Settlement Land to run for office, but only if they re-locate within 14 days of being elected (the "Residency Requirement").[6] The Residency Requirement, first enacted in 2006 as amended, is the subject of Ms. Dickson's petition and appeal.

13. More than 50% of VGFN's population lives outside of Settlement Land, with a large contingent living in Whitehorse.[7] A requirement that Chief and Council reside on Settlement Land effectively means living in Old Crow, a small fly-in, fly-out community with no regular road access, located 800 kilometres north of Whitehorse.[8] Resources and opportunities in Old Crow are extremely limited.

14. The applicant, Cindy Dickson, is a VGFN citizen living in Whitehorse with her son. Ms. Dickson grew up in Old Crow but like many other VGFN citizens, she moved away to pursue education and employment opportunities.[9] Ms. Dickson cannot permanently live in Old Crow so long as her son is under her care given his medical needs.[10]

15. For over twenty years, Ms. Dickson has been working and advocating in the field of Indigenous traditional knowledge and scientific research and has extensive experience in the cultural and political life of the VGFN.[11] In October 2018, Ms. Dickson wanted to use this experience to contribute to her Nation and participate in VGFN governance as a VGFN Councillor. She submitted her nomination form to run for one of four Council positions. Despite her impressive resume and her knowledge of, and dedication to, the preservation of Vuntut Gwitchin culture and land, Ms. Dickson was denied the right to serve on Council based solely on her place of residence. Ms. Dickson requested a dispute resolution process from Chief and Council to

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[6] YKCA Reasons, para. 24.
[7] YKCA Reasons, para. 8.
[8] YKCA Reasons, para. 7.
[9] YKCA Reasons, para. 8.
[10] YKCA Reasons, para. 3.
[11] YKSC Reasons, para. 5.

address the impact this residency requirement had on her and on other VGFN citizens living away from Settlement Land. However, Ms. Dickson's request was denied.[12]

16. As a result of being excluded from Council, Ms. Dickson deposed: "…I find it harder to connect with my fellow VGFN members. I want to contribute to my community as a Council member so I can improve the services and opportunities available to VGFN members, both in and outside of Old Crow. I am upset that VGFN does not allow me this opportunity. It is hurtful and makes me feel like less of a citizen."[13]

17. After she was not given a forum to resolve the issue internally, Ms. Dickson challenged the constitutionality of the Residency Requirement at the Supreme Court of Yukon on the basis that it discriminated against her and other non-resident citizens contrary to s. 15 of the *Charter*.

III. Judgment of the Supreme Court of Yukon (2020 YKSC 22)

18. At the Supreme Court of Yukon, Ms. Dickson sought a declaration that the Residency Requirement, in its entirety, discriminates against her rights under s. 15(1) of the *Charter*. At this level, VGFN did not contest that the Residency Requirement violated s. 15(1). They defended the validity of the Residency Requirement on other grounds, including that the *Charter* does not apply to VGFN, and if it does, the Residency Requirement is shielded by s. 25 of the *Charter*.

19. As a threshold issue, the chambers judge rejected VGFN's arguments that the court ought to decline to hear Ms. Dickon's Petition on the ground that it is fundamentally a political question best left to resolution by VGFN. He found that the issues raised in the Petition were not "purely political" questions but questions of law,[14] directly within the expertise and competence of the court.

20. The chambers judge then concluded that the *Charter* applies to the VGFN, its constitution, and its laws. He made this finding on two grounds. First, that the Final Agreement and Self-Government Agreement expressly provide VGFN's self-governance must be in conformity with

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[12] YKCA Reasons, para 35.

[13] YKCA Reasons, para. 35.

[14] Reasons for Judgment of the Supreme Court of Yukon, June 8, 2020, 2020 YKSC 22 ("YKSC Reasons"), para. 99.

the Constitution of Canada and must not affect the rights of VGFN citizens as Canadian citizens. The chambers judge held that the *Charter* is part of the *Constitution Act, 1982*, the supreme law of Canada,[15] and accordingly, a VGFN citizen like Ms. Dickson has the right to bring a *Charter* application challenging a provision of the VGFN Constitution.[16]

21. The second reason the chambers judge found that the *Charter* applies to the VGFN, its Constitution and its law is because the VGFN falls within the scope of s. 32 of the *Charter*, as either a "government" or an entity "exercising inherently government activities".[17]

22. With respect to the argument regarding s. 15(1) of the *Charter*, the chambers judge found that the Residency Requirement, as "a general principle", was not discriminatory under s. 15(1), but that the requirement to relocate to Settlement Land within 14 days "arguably creates a disadvantage in that it imposes an arbitrary disadvantage".

23. After conducting an abridged *Oakes* test only in relation to the 14-day relocation requirement, the chambers judge ultimately found the Residency Requirement contravened s. 15 of the Charter as written, and declared that the words "within 14 days" to be of no force and effect pursuant to s. 52 of the *Constitution Act, 1982*. This remedy was not sought by any party. The chambers judge suspended his declaration for a period of 18 months to give the VGFN General Assembly an opportunity to review the matter before the next election date.

24. Lastly, the chambers judge conducted a full analysis of s. 25 of the *Charter* in the event he was incorrect about his s. 15(1) analysis. The chambers judge found s. 25 shields the Residency Requirement when the words "within 14 days" are severed from the provision. The judge referred to the Supreme Court of Canada's decision *Kapp* but noted the majority's guidance in *Kapp* to be "less than a binding precedent, somewhat speculative".[18]

25. The chambers judge found the purpose of s. 25 is "to ensure First Nation self-government rights be woven into Canada's constitutional fabric" in furtherance of reconciliation.[19] He rejected

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[15] YKSC Reasons, para. 117.
[16] YKSC Reasons, para. 112.
[17] YKSC Reasons, para. 130.
[18] YKSC Reasons, para. 191.
[19] YKSC Reasons, para. 193.

Ms. Dickson's submission that the purpose of s. 25 is to protect Indigenous collective rights from abrogation and derogation by the broader Canadian or territorial state, not for First Nation governments to govern in a manner that discriminates against a portion of their own citizenry.[20]

26. The chambers judge found s. 25 is "a shield to protect, preserve and promote the identity of VGFN citizens on their homeland".[21] He made this finding despite also acknowledging more than 50% of VGFN citizens live away from their Settlement Land and that "Vuntut Gwitchin citizens do not typically define themselves by their residency at a place in time".[22] He also found the Residency Requirement was of a "constitutional character" because it is "based upon hundreds of years of leadership by those who reside on the land, understand the essence of being Vuntut Gwitchin, and that the custom of tradition exists today".[23] He made this finding despite evidence to the contrary. Finally, he appeared to rely on residency requirements imposed on elected members of the Yukon legislature, even though this Court in *Corbiere* specifically stated that "Aboriginality-residence" cannot be equated with the residence status of individuals who are not Indigenous.[24]

27. Ultimately, the chambers judge found that granting Ms. Dickson the right to run for and be elected to the VGFN Council while residing in Whitehorse would derogate or impair the VGFN's right to adopt a residency requirement, even if that residency requirement offends s. 15(1) of the *Charter*.[25] The chambers judge reached this conclusion by first considering if there was a s. 15(1) breach, then moving to s. 1, and ending his analysis with s. 25.

IV. Judgment of the Court of Appeal of Yukon (2021 YKCA 5)

28. Ms. Dickson appealed on the grounds that the chambers judge erred in not finding the Residency Requirement in its entirety violated s. 15 of the *Charter,* and that in any event, it was

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[20] YKSC Reasons, para. 176.
[21] YKSC Reasons, para. 180.
[22] YKSC Reasons, para. 14.
[23] YKSC Reasons, para. 207.
[24] YKSC Reasons, para. 209.
[25] YKSC Reasons, para. 212.

shielded by s. 25 of the *Charter.* VGFN cross-appealed the court's finding that the *Charter* applied at all, and the declaration that the words "within 14 days" were of no force and effect.

29. With respect to the application of the *Charter*, Justice Newbury, writing for herself and Chief Justice Bauman, found that in enacting the Residency Requirement, the VGFN was exercising governmental powers within the meaning of s. 32 of the *Charter*, and therefore the *Charter* applied to the Residency Requirement. The Court of Appeal also observed this conclusion was supported by numerous provisions of the Final Agreement and Self-Government Agreement, and that "… all VGFN citizens remain entitled to their rights under the *Charter* in the same way as other citizens of Canada".[26]

30. With respect to s. 15(1), the majority found "the chambers judge effectively stood *Corbiere* on its head" and that the chambers judge's "turnabout of advantage and disadvantage between residents and non-residents of Settlement Land runs contrary to the approach taken in *Corbiere* and cases following it, and indeed comes perilously close to the notion that the fact a claimant has *chosen* to live away from her Aboriginal community precludes her from invoking her rights under s. 15" (emphasis in original).[27] The Court of Appeal ultimately concluded the Residency Requirement was discriminatory and contrary to s. 15.

31. Instead of conducting a s. 1 analysis, the majority of the Court of Appeal moved directly to s. 25, stating "we must proceed to our consideration of s. 25 *on the assumption* that contrary to the chambers judge's conclusion, the Residency Requirement was discriminatory under existing jurisprudence" (emphasis added). The Court of Appeal failed to consider s. 1 of the *Charter* even though a violation of s. 15 had been found.

32. With respect to s. 25, the majority of the Court of Appeal cited extensively (and selectively) from the concurring judgment of Bastarache J., writing for himself only, in. *Kapp*.[28] The majority also noted "[t]ime and resources do not permit me to delve deeply into the divergent academic commentaries that have been written concerning the scope and operation of s. 25".[29] The majority

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[26] YKCA Reasons, para. 97, 98.

[27] YKCA Reasons, paras. 108, 110.

[28] *R. v Kapp*, 2008 SCC 41; see YKCA Reasons, 119-128, 145, 146, 152.

[29] YKCA Reasons, para. 130

observed "the case at bar raised some issues that have never been dealt with by a Canadian court. This is certainly true of the issues regarding s. 25 and how it relates to personal *Charter* rights held by citizens of self-governing first nations".

33. After reviewing some of the academic commentary and Bastarache J.'s reasons in *Kapp*, Justice Newbury concluded that s. 25 ought to be interpreted as a "shield" rather than a "lens" or interpretative aid to read down or modify rights in the event of a conflict. The majority defined the collective right at issue, not as the right to impose a Residency Requirement as was found by the chambers judge, but more broadly as the right of VGFN to "set its own criteria for leadership positions under its Constitution".[30] The majority concluded "it seems to me that the purpose of s. 25 is to *obviate* the weighing or 'balancing' of those considerations that would be relevant to justification under s. 1 – the rationality, proportionately and minimal impairment of the Residency Requirement – as against those that are engaged by s. 25 – here, the governance traditions of the VGFN, the importance of the land to the concept of leadership in the First Nation, and its legal self-government arrangements generally."[31]

34. With regard to *when* to apply s. 25, the majority declined to pronounce "any general rule that a court must or must not consider the applicability of s. 25 until it has carried out a full analysis of the *Charter* right in question". The majority was of the view "the case at bar could have been resolved by an analysis under s. 25 without a full equality analysis under s. 15(1) and 1; in other cases, the situation might be different", but did not provide further explanation as to how to make this assessment, and conducted its analysis "on the assumption" that the *Charter* right had been infringed.

35. Justice Frankel, in partial dissent, agreed with the reasons of the majority that Ms. Dickson's challenge to the Residency Requirement should be dismissed, but would not have made any declarations. Frankel JA's reasons were based largely on the form of the order in the court below.

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[30] YKCA Reasons, paras. 134, 143.

[31] YKCA Reasons, para. 146.

PART II – ISSUES

36. The applicant submits this case raises the following legal issues of public importance:

(a) What is the scope of "other rights and freedoms" that "pertain to aboriginal peoples of Canada" set out in s. 25 of the *Charter*, and in particular does it include the VGFN Residency Requirement?

(b) When s. 25 is at issue, how should the court apply it? In particular, is the court required to conduct a full analysis of the *Charter* right engaged, including s. 1, or does the application of s. 25 mean collective rights need not be balanced with other interests as occurs in s. 1 for *Charter* rights, and under *Sparrow* for s. 35 rights?

PART III – STATEMENT OF ARGUMENT

I. This case raises issues of national public importance that should be resolved by this Court

37. The applicant in this case has suffered discrimination and been effectively excluded from participating in the governance of her people. Whether Indigenous citizens can require their governments to act in accordance with their *Charter* rights is an issue of law of public importance that raises fundamental issues respecting the interpretation and application of s. 25 of the *Charter*. This Court has not opined on these issues and more generally s. 25 has received minimal judicial consideration. What has been decided in the lower courts has been divergent and is greatly in need of review by this Court. The proposed appeal is of undeniable public importance, raising pressing issues of constitutional law and policy.

38. Guidance is particularly needed at this time as Indigenous self-government is growing more prevalent across the country. More and more modern treaties are being finalized, and self-government arrangements are being negotiated. The issues raised by this case as to the scope of s. 25 and its application to laws enacted by Indigenous governments effective against their own citizens, raises important questions regarding the law-making authority of Indigenous government within Canada, and the fundamental rights of Indigenous persons in relation to exercises of power by their Indigenous nation. These issues are of pressing national importance, and in particular have the potential to affect the livelihood and basic civil and political rights of Indigenous persons. Clarity from this Court is needed.

39. Specifically, whether s. 25 can be invoked by self-governing First Nations to discriminate against a portion of their own citizenry, as occurred here, has the potential to impact all current and future self-governing First Nations, all levels of government in Canada participating in self-government negotiations, and Indigenous peoples across Canada. It also has direct application to VGFN and the 12 other Yukon First Nations who executed the Umbrella Final Agreement with Canada and Yukon in 1993.

40. As of August 2020, the Government of Canada recognized 25 Indigenous self-government agreements across Canada involving 43 Indigenous communities,[32] and identified a further 50 ongoing self-government negotiation tables across the country with First Nation, Métis and Inuit groups.[33] All parties participating in these negotiations, including Indigenous individuals and their representatives, ought to understand how s. 25 will impact individual *Charter* rights and freedoms prior to entering into self-government agreements.

41. This Court ought to seize this opportunity to address the undesirable inconsistency related to s. 25 of the *Charter*. Section 25 raises important questions of the appropriate balance between respecting the collective rights of Indigenous peoples and the fundamental individual rights of all Canadians, including Indigenous persons, and how these rights interact with self-governance. As stated by the majority in *Kapp* regarding s. 25:

> [65] These issues raise complex questions of the utmost importance to the peaceful reconciliation of aboriginal entitlements with the interests of all Canadians. In our view, prudence suggests that these issues are best left for resolution on a case-by-case basis as they arise before the Court.[34]

42. The applicant respectfully submits the issue is now ripe, and this case provides the forum for resolution of these important questions.

II. The Court of Appeal erred in concluding s. 25 shielded the Residency Requirement

A. The Court of Appeal erred in finding the Residency Requirement was an "other right of freedom that pertains to the aboriginal peoples of Canada" under s. 25

43. The Court of Appeal implicitly found the "right to set its own criteria for leadership positions under its Constitution" was an "other right or freedom" within s. 25, but provided no real rationale for this conclusion. In contrast, the right identified by the chambers judge appeared to be the right to require Council members to reside on Settlement Land,[35] but he also found the right constituted an "other right or freedom" under s. 25.

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[32] Government of Canada, "Self-government", last modified August 25, 2020, available at: https://www.rcaanc-cirnac.gc.ca/eng/1100100032275/1529354547314.

[33] *Ibid*.

[34] *Kapp*, para. 65.

[35] See YKSC Reasons, paras. 153, 211.

44. The Court's conclusions were grounded on limited and conflicting evidence, and provide little explanation or guidance as to the scope of rights captured by s. 25, relying heavily on the fact VGFN is exercising an inherent right to self-government. This reasoning appears to immunize all laws of self-governing Indigenous nations from *Charter* compliance so long as they are based on "governance traditions"[36] or "historic practice or custom"[37]. This finding is inconsistent with other judicial commentary[38] as well as the only other decision considering the application of s. 25 to a modern self-governing nation, *Band (Eeyouch) c Napash*.[39]

45. With respect, the Court of Appeal's interpretation is overly broad and out of step with the rigorous tests applied to s. 35 rights, which ought to at least be considered when defining what rights are protected by s. 25, given the significant overlap. It incorrectly presumes that requiring an Indigenous government to respect its citizens' *Charter* rights is an abrogation or derogation from their right "to govern themselves in accordance with their own particular values and traditions and in accordance with the 'self-government' arrangements entered into in 1993 with Canada and the Yukon". The First Nation is free to govern, and the only bounds are those on all governmental conduct in Canada, the *Charter* rights of their own citizens, which are themselves subject to reasonable and proportionate limits.

46. Moreover, while relying heavily on the reasons of Bastarache J. in *Kapp*, the Court of Appeal nonetheless did not refer to his observation that he doubted s. 25 was intended to prevent an Indigenous person from challenging laws of their own nation, observing that "[i]t is not at all obvious in my view that it is necessary to constrain the individual rights of Aboriginals [peoples] in order to recognize collective rights under s. 25. … Aboriginals [peoples] are Canadian," and "[t]here is no reason to believe that s. 25 has taken Aboriginals [peoples] out of the *Charter*

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[36] YKCA Reasons, para. 146

[37] YKSC Reasons, para. 211.

[38] While a decision about Aboriginal rights, this Court in *R. v. Pamajewon*, [1996] 2 SCR 821, found an asserted right to self-government cast the court's inquiry at a level of "excessive generality"; see also *Kapp*, para. 63, in which this Court found that only rights of a "constitutional character" are likely to benefit from s. 25. Both the chambers judge and Court of Appeal found the constitutional character was met as it was found in VGFN's constitution and was based on VGFN's traditions and customs, without any detailed analysis (YKSC Reasons, para. 207; YKCA Reasons, para. 147).

[39] *Band (Eeyouch) c. Napash*, 2014 QCCQ 10367.

protection scheme."[40] Indeed this was the distinction made by Ms. Dickson when she argued that the purpose of s. 25 was to protect against the broader Canadian or territorial state. She did not argue that laws enacted by an Indigenous government could not have the protection of s. 25. As observed by Bastarache J, citing Macklem,[41] it is important to distinguish between "external and internal" Indigenous laws, and it was Macklem's opinion that Indigenous communities ought to satisfy an *Oakes* balancing test for any internal (or intra-group) restrictions.[42]

47. The majority's overly broad interpretation of s. 25 is also contrary to the express terms of the Final Agreement and Self-Government Agreement that self-government agreements "shall not affect the rights of [VGFN] Citizens as Canadian citizens" and the Court's conclusion that "Indeed, all VGFN citizens remain entitled to their rights under the *Charter* in the same way as other citizens of Canada".[43]

B. The Court of Appeal erred in considering s. 25 without conducting a s. 1 analysis, after it found s. 15 had been breached

48. The Court of Appeal stated that the purpose of s. 25 is to "obviate" the balancing exercise conducted under s. 1 of the *Charter*, characterizing s. 25 as a "shield" and that reconciliation is unlikely to be achieved if Indigenous rights are subject to another framework for balancing. The Court does not grapple with how this absolute shield affects Indigenous citizens who by its application are deprived of their *Charter* rights.

49. Moreover, this absolute approach to rights is contrary to the fundamental principle in Canadian constitutional law that no rights in Canada are absolute.[44] *Charter* rights are subject to balancing under s. 1 of the *Charter*, and s. 35 rights are subject to balancing under the *Sparrow* test. Within the Canadian constitutional structure, governments are entitled to infringe rights when its conduct is justified by a broader public interest, whether those rights are individual or collective.

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[40] *Kapp*, per Bastarache J., para. 99.

[41] Macklem, Patrick. *Indigenous Difference and the Constitution of Canada*. Toronto: University of Toronto Press, 2001.

[42] *Kapp*, per Bastarache J., para. 99.

[43] YKCA Reasons, para. 97, 98.

[44] *R. v. Nikal*, [1996] 1 SCR 1013, para. 92; *R. v. Oakes*, [1986] 1 S.C.R. 103, para. 65.

Applying s. 25 to "obviate" a balancing exercise, as found by the Court of Appeal, would be inconsistent with these constitutional principles.

50. The Court of Appeal's approach is also highly prejudicial to individuals whose *Charter* rights are infringed, where no analysis of the harm of that infringement is conducted when applying s. 25.

51. The Court's decision as to how to apply s. 25 is highly unsatisfactory, leaving the path forward entirely uncertain. The Court did not conduct a full *Charter* analysis and instead "assumed" an infringement that could not be justified, and at the same time declined to pronounce "any general rule that a court must or must not consider the applicability of s. 25 until it has carried out a full analysis of the *Charter* right in question".

52. The result is there is still no guidance for reviewing courts. The majority in *Kapp* diverged from Bastarache J. on this point, and left the analysis of s. 25 to another day. With respect, the applicant submits these issues can be, and ought to be, resolved in this case.

III. The jurisprudence relating to s. 25 is in conflict

53. There is limited jurisprudence on s. 25, despite the *Charter* being almost forty years old. The limited jurisprudence that does exist, like the extensive academic commentary, is divergent.

54. The Yukon Court of Appeal's decision conflicts with the Federal Court of Appeal in *Batchewana Indian Band*,[45] *Taypotat*[46] and *Peavine*,[47] as well as the Quebec Court in *Band (Eeyouch) c Napash*.[48] It is also inconsistent with Bastarache J.'s concurring reasons in *Kapp* at paragraph 99, as explained above, in spite of the majority's heavy reliance on other passages from his reasons.

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[45] *Batchewana Indian Band (Non-resident members) v. Batchewana Indian Band*, [1997] 1 FC 689 (FCA)

[46] *Taypotat v. Taypotat*, 2013 FCA 192, see paras. 38-42.

[47] *Peavine Metis Settlement v Alberta (Minister of Aboriginal Affairs & Northern Development)*, 2009 ABCA 239, paras. 71-74

[48] *Band (Eeyouch) c. Napash*, 2014 QCCQ 10367

55. In *Taypotat*, in considering the application of the *Charter*, the Federal Court of Appeal warned of the void created if Indigenous persons could not access their *Charter* rights as against their own government. The Federal Court of Appeal also found s. 25 did not apply given the equality provisions in the First Nations' custom electoral code.[49]

56. In *Peavine*, the Alberta Court of Appeal commented:

> [73] In this case, Elizabeth argues that the MSA and its companion legislation is of a constitutional nature and that ss. 75(1) and 90(1) of the MSA enhance aboriginal self government. Although s. 25 of the *Charter* applies to existing and future constitutional rights acquired by aboriginal people, including Métis, I very much doubt that protection applies to any enactment which purports to set out or enhance existing constitutional practices and rights. If that were the case, it would render sacrosanct any enactment that purports to incorporate constitutional protection for aboriginals, no matter how odious the provision at issue may be. For example, no one could challenge a provision that would restrict membership to able-bodied persons, or men or women only, or persons of a certain age. This point is supported by *Kapp*. Moreover, at para. 99 of *Kapp*, Basterache J. held that s. 25 was not intended to be used as between aboriginal groups.

57. While each of *Batchewana Indian Band, Taypotat* and *Peavine* proceeded to the Supreme Court of Canada, this Court elected not to address s. 25.[50]

58. The jurisprudential conflict regarding s. 25 needs resolution, and it is time for this Court to provide much-needed guidance.

59. In addition to the conflict on the proper interpretation of s. 25, this case stands as the only one, since *Corbiere*, in which a residency requirement imposed on Council members of an Indigenous government, has been upheld. Regardless of the source of the requirement, whether by custom or under the *Indian Act*, all such requirements have been struck down, except in this case.[51]

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[49] Similar provisions are set out in VGFN's Constitution, see YKCA Reasons, para. 156.

[50] In *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203 (the appeal of *Batchewana Indian Band*), this Court declined to provide general principles pertaining to s. 25, at paras. 20, 51-53.

[51] See cases listed at YKCA Reasons, para. 107, as well as *Janvier v. Chipewyan Prairie First Nation*, 2021 FC 539, released after argument in this case. There is a single exception, *Clark v. Abegweit First Nation Band Council*, 2019 FC 719, in which the residency requirement was upheld for the position of Chief only, but in the same case struck down for Council members.

The Court of Appeal does not seriously grapple with this conflict, or explain why s. 25 would not apply to a custom election code of an Indigenous group, but would apply here.

IV. The Court of Appeal's interpretation and application of s. 25 are not consistent with international law

60. In addition to the issues of national importance raised above, the Yukon Court of Appeal's analysis of s. 25 is inconsistent with international law, and in particular with the *International Covenant on Civil and Political Rights* (ICCPR)[52] and *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP)[53]. The right the applicant seeks to access — the opportunity to be elected to government — is protected as a fundamental right within ICCPR, as is the right to choose their own residence.[54] While UNDRIP calls for Indigenous self-determination, it expressly provides it is to be exercised "in conformity with international law" and refers in its recitals to the principles of democracy, human rights, and non-discrimination, and the entitlement of Indigenous individuals to all human rights, without discrimination:

> Convinced that the recognition of the rights of indigenous peoples in this Declaration will enhance harmonious and cooperative relations between the State and indigenous peoples, based on principles of justice, democracy, respect for human rights, non-discrimination and good faith, …
>
> 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 …[55]

61. If leave is granted, the applicant will argue that the Court of Appeal's interpretation of s. 25 is inconsistent with fundamental principles of international law, and in particular with the

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[52] *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171, Can TS 1976 No 47 (entered into force 23 March 1976), available at: https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx (*ICCPR*).

[53] *United Nations Declaration on the Rights of Indigenous Peoples*, 13 September 2007, A/RES/61/295, available at: https://www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples.html (UNDRIP).

[54] ICCPR, *supra*, at Articles 12, 25.

[55] UNDRIP, *supra*, at Recitals

ICCPR and UNDRIP. Section 25 ought not to be used to allow Indigenous governments to enact laws in contravention of international human rights law.

62. An interpretation of s. 25 of the *Charter* that allows the deprivation of a fundamental universal political and civil right cannot be endorsed by this Court.[56] The applicant will argue that the Residency Requirement cannot be shielded by s. 25 of the *Charter* because it does not bear characteristics of an Aboriginal, treaty or other right or freedom that "pertains to the aboriginal peoples of Canada". The Residency Requirement is, at its core, a deprivation of a foundational individual democratic right held by all Canadian citizens and recognized in the ICCPR, by a First Nation who has adopted a democratic government. Article 25 of the ICCPR provides that every citizen shall have the right and the opportunity to vote and to be elected at genuine periodic elections. Article 12 provides everyone has the right to liberty of movement and the freedom to choose their own residence. The types of rights and freedoms recognized under s. 25 of the *Charter* cannot include practices that deprive citizens of the fundamental right and opportunity to run for office.

63. Ms. Dickson's interpretation of s. 25 is also consistent with UNDRIP. The Government of Canada has recognized that UNDRIP provides a road map to advance lasting reconciliation in Canada. In December 2020, the Government of Canada introduced legislation to implement UNDRIP. On June 21, 2021, Bill C-15, the *United Nations Declaration on the Rights of Indigenous Peoples Act* received Royal Assent.[57] The applicant expects to argue that any interpretation of s. 25 endorsed by this Court ought to be consistent with the key tenets of UNDRIP, which include that self-determination must be exercised "in conformity with international law",[58] and that "[I]ndigenous individuals are entitled without discrimination to all human rights recognized in international law".[59] The Declaration explicitly acknowledges that international instruments, such as the ICCPR, "affirm the fundamental importance of the right to self-

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[56] *Quebec (Attorney General) v. 9147-0732 Québec inc.*, 2020 SCC 32

[57] Government of Canada, "Implementing the United Nations Declaration on the Rights of Indigenous Peoples in Canada", last modified August 13, 2021, available at: https://www.justice.gc.ca/eng/declaration/index.html.

[58] UNDRIP, *supra*, p. 6.

[59] UNDRIP, *supra*, p. 7.

determination of all peoples, by virtue of which they freely determine their political status and freely pursue their economic, social and cultural development".[60]

64. The applicant expects to argue that the Court of Appeal's decision, left as is, would allow a broad set of "other" rights and freedoms to be "shielded" under s. 25, including depriving citizens of their right to run for office. In addition to being inconsistent with Canadian jurisprudence, it is inconsistent with international law, including UNDRIP now adopted as domestic law.

PART IV – SUBMISSIONS ON COSTS

65. The applicant seeks no order as to costs.

PART V – ORDERS SOUGHT

66. The applicant seeks an order that the application for leave to appeal be granted.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated: September 29, 2021

Bridget Gilbride and Harshi K. Mann
Counsel for the Applicant, Cindy Dickson

[60] UNDRIP, *supra*, pp. 5-6.

PART VI – TABLE OF AUTHORITIES

	Jurisprudence	**Paragraph**
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An Act Approving Yukon Land Claim Final Agreements, R.S.Y. 2002, c. 240	8
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