Court File No. 39856

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

BETWEEN:

CINDY DICKSON

APPLICANT
(Appellant)

AND:

VUNTUT GWITCHIN FIRST NATION

RESPONDENT
(Respondent)

AND:

GOVERNMENT OF YUKON AND
ATTORNEY GENERAL OF CANADA

INTERVENERS
(Interveners)

RESPONSE TO APPLICATION FOR LEAVE TO APPEAL and CONDITIONAL APPLICATION FOR LEAVE TO CROSS-APPEAL
(VUNTUT GWITCHIN FIRST NATION, RESPONDENT)
(Pursuant to Rules 27 and 29 of the *Rules of the Supreme Court of Canada*)

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PART I - OVERVIEW AND STATEMENT OF FACTS

A. Overview

1. This memorandum of argument of the respondent, Vuntut Gwitchin First Nation ("VGFN") addresses both the response to the application for leave to appeal by the applicant Ms. Dickson and the conditional application for leave to cross-appeal of VGFN.

2. Indigenous legal orders and self-government are grounded in the prior sovereignty of Indigenous peoples and have survived the harmful impacts of colonization perpetuated by Canadian laws since the assertion of Crown sovereignty. The recognition, revitalization and respect for Indigenous legal orders, animated by the right of Indigenous peoples to self-determination, are fundamental to the process of reconciliation between sovereignties. The Yukon Court of Appeal ("YKCA") properly applied s. 25 of the *Charter* as a shield to allow meaningful space within the Canadian constitutional framework for self-government.

3. VGFN is an Indigenous nation with an ongoing and uninterrupted relationship with their homelands in northern Yukon ("Vuntut Gwitchin Territory").[1] Since before colonization and the limits and harms it imposed, VGFN has existed on their lands, governed their communal affairs, and maintained their spiritual and economic relationship to the land. These aspects of VGFN society have always been fundamentally interconnected and are upheld within contemporary VGFN self-government.[2]

4. VGFN's self-government and distinct legal order have been affirmed in a modern context through their accomplishment of replacing the paternalistic *Indian Act* with the VGFN Constitution ("Constitution").[3] This occurred as a culmination of the VGFN Final Agreement and Self-Government Agreement ("SGA") entered into with Canada and Yukon in 1993 under the Umbrella Final Agreement ("UFA") framework following decades of political negotiations.[4]

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[1] Reasons for Judgment of the Supreme Court of Yukon, June 8, 2020 ("YKSC Reasons"), para 8.
[2] YKSC Reasons, para 11.
[3] YKSC Reasons, para 152; the Vuntut Gwitchin First Nation Constitution ("Constitution") is reproduced at Schedule "C" to the Reasons for Judgment of the Yukon Court of Appeal, July 21, 2021 ("YKCA Reasons").
[4] YKCA Reasons, para 10.

5. As an aspect of the Final Agreement and SGA (together the "VGFN Agreements"), VGFN holds defined Settlement Lands within Vuntut Gwitchin Territory over which VGFN has negotiated recognition and respect for their self-government and law, and over which VGFN has jurisdiction and carries out decision-making in relation to various matters.[5] The community of Old Crow, being the only year round settlement within Vuntut Gwitchin Territory, is situated on Settlement Lands. The Constitution prescribes that the seat of VGFN's government be located in Old Crow.[6]

6. VGFN's General Assembly, which is a distinct branch of VGFN self-government representing the collective voice of VGFN citizens, has created and amended the Constitution as the "supreme law" of VGFN. The Constitution provides for, among other things, the means by which VGFN citizens elect representatives to VGFN's Council. Any VGFN citizen who is otherwise eligible as a candidate may be elected to Council regardless of their place of residence. The Constitution includes a requirement that, once elected, a member of Council must reside on the Settlement Lands for the term of their office (the "Residency Requirement").[7]

7. Following Ms. Dickson's challenge to the validity of the Residency Requirement under s. 15(1) of the *Charter*, both the Yukon Supreme Court ("YKSC") and the YKCA concluded the Residency Requirement should be upheld. The YKCA agreed with the YKSC that s. 25 applies as a shield to protect the Residency Requirement as a provision reflecting and promoting VGFN self-government and laws.[8]

8. While the arguments raised in the proposed appeal are of great import to VGFN and the preservation of its self-government practices and laws, it is not of such public importance that this Court should grant leave to appeal in this case. The order of the YKCA was narrowly cast such that the decision is applicable to the specific factual situation before the court. The issues on which the applicant seeks leave to appeal do not in this case reveal a conflict or tension in the law, but an application of the law to the specific facts of the dispute in issue.

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[5] YKSC Reasons, paras 47-53.
[6] YKCA Reasons, para 21; Constitution, Article II, s. 1.
[7] YKCA Reasons, para 55; Constitution, Article XI, s. 2.
[8] YKCA Reasons, paras 146-147.

9. If this Court grants leave to appeal on the interpretation of s. 25, however, VGFN seeks leave to cross-appeal on residual issues that, as a matter of fairness, ought to be addressed by this Court at the same time (but that absent an appeal on s. 25 would not alter the outcome of the decision). In particular, VGFN would seek leave to cross-appeal respecting the orders of the YKCA (a) declaring that s. 32 applies to the Residency Requirement; and (b) declaring that the Residency Requirement breaches s. 15(1).

B. Statement of Facts

10. VGFN is a self-governing Indigenous nation that pre-dates the assertion of Crown sovereignty over Vuntut Gwitchin Territory. Vuntut Gwitchin people have relied upon their Territory and governed themselves in accordance with their own legal and democratic governance practices and traditions since time immemorial.[9] These distinct practices and traditions continue to exist within VGFN society, and to be exercised by VGFN citizens, including through their Constitution and laws.[10]

11. Vuntut Gwitchin Territory encompasses a vast area of approximately 55,000 square miles in the northernmost region of what is now known as the Yukon.[11] Old Crow is the only year-round residential community within Vuntut Gwitchin Territory. It is situated in the heart of the territory at the confluence of the Porcupine and Crow rivers approximately 800 kilometres north of the City of Whitehorse. Old Crow serves as the location of the seat of VGFN's government as prescribed by the Constitution.[12] Most programs and services administered and overseen by the government of VGFN relate to Old Crow and its unique needs as an isolated northern community seeking to overcome a history and legacy of colonization while reclaiming its governance and law.[13]

12. With the tabling of the document "Together Today for Our Children Tomorrow" in 1973, Yukon First Nations, including VGFN, began a decades-long political process to negotiate land

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[9] YKSC Reasons, para 11.
[10] YKCA Reasons, para 9.
[11] YKCA Reasons, para 7.
[12] YKCA Reasons, para 21; Constitution, Article II, s. 1.
[13] YKCA Reasons, para 9.

claim and self-government agreements with the Crown.[14] In 1993, Canada, Yukon and Yukon First Nations initialed the UFA which provided a template for such agreements to be concluded.[15] The arrangements for self-government provided for under the UFA framework are unique to the Yukon and distinct from those made in other regions due in part to their preservation and validation of the inherent right to self-government rather than extinguishment or modification.[16]

13. On May 29, 1993, VGFN, Canada and Yukon signed the VGFN Agreements. As required by the terms of the VGFN Agreements, both Canada and Yukon enacted legislation which approved and brought into effect the SGA.[17] Bringing the SGA into effect meant that the *Indian Act*[18] ceased to apply to VGFN, ending VGFN's status as a federal Indian band, and gave legal recognition to VGFN as a distinct legal entity governing their own affairs under their own Constitution and laws.[19] While VGFN self-government and law is recognized and given practical effect in certain spheres through the VGFN Agreements, it is not extinguished, modified, created, delegated or exhaustively defined by those agreements or their approving Crown legislation.[20] Rather, VGFN self-government and law is inherent in nature, being grounded in their prior sovereignty, occupation, and control over Vuntut Gwitchin Territory.[21]

14. In contrast to the form of governance prescribed by Canada under the *Indian Act*, where power and authority is concentrated exclusively in the elected Indian band council, the Constitution provides that VGFN self-government powers are shared and exercised between four branches: (1) the VGFN Council made up of one Chief and four councillors elected under Vuntut Gwitchin law; (2) the General Assembly consisting of all VGFN citizens; (3) the Elders Council

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[14] *First Nation of Nacho Nyak Dun v. Yukon*, 2017 SCC 58 [*Nacho Nyak Dun*], para 10, fn 1.
[15] YKCA Reasons, para 10.
[16] YKSC Reasons, paras 46, 52; *Nacho Nyak Dun*, para 10; *Beckman v Little Salmon/Carmacks First Nation*, 2010 SCC 53, para 10.
[17] YKCA Reasons, paras 11-12; *First Nations (Yukon) Self-Government Act*, RSY 2002, c 90*; Yukon First Nations Land Claims Settlement Act*, SC 1994, c 34.
[18] *Indian Act*, RSC 1985, c I-5.
[19] YKCA Reasons, paras 11,18.
[20] YKSC Reasons, paras 46, 52.
[21] YKSC Reasons, paras 11-13, 131, 145, 206-212; *Mitchell v MNR*, 2001 SCC 33 [*Mitchell*], para 9; Constitution, Preamble.

consisting of all VGFN citizens 60 years and older; and, (4) the (future) Vuntut Gwitchin Court.[22]

15. The Constitution also provides for the recognition and protection of individual rights and freedoms of VGFN citizens in the exercise of their collective self-government rights, including the guarantee of equality under VGFN law, subject only to such limits as can be reasonably justified in a free and democratic Vuntut Gwitchin society.[23] Any VGFN citizen may challenge the validity of a VGFN law on the basis that it is an unjustified infringement of their rights and freedoms recognized and protected under the Constitution.[24] Until the Vuntut Gwitchin Court is established, the Constitution provides that such challenges will be heard by the Yukon Supreme Court ("YKSC").

16. Ms. Dickson's challenge to the Residency Requirement before the YKSC brought the unresolved negotiation issue of the *Charter*'s application to VGFN self-government and law before the courts. In contrast to other modern treaties and agreements, the application of the *Charter* is not expressly provided for under the UFA Framework and VGFN Agreements. This reflects the fact, supported by uncontradicted evidence, that throughout the negotiations VGFN opposed and never consented to the application of the *Charter*.[25] VGFN intended that their Constitution, and the fundamental values and distinct conceptions of rights and freedoms within VGFN society it upholds, would provide the exclusive foundation for governing their affairs, while preserving the rights that VGFN citizens enjoy as Canadian citizens in relation to the Canadian state.[26]

17. The Residency Requirement is an expression of a core tenet of the Constitution: that the VGFN seat of government shall be located on Settlement Land. This principle was enshrined in the Constitution based upon the advice and direction of VGFN Elders who survived and witnessed the forced removal and displacement of VGFN citizens from the Vuntut Gwitchin

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[22] YKCA Reasons, para 23.
[23] YKCA Reasons, para 22; Constitution, Article IV, ss. 1, 7.
[24] YKCA Reasons, para 25; Constitution, Article II, s. 5.
[25] Affidavit of Dave Joe, affirmed March 27, 2019 ("Joe Affidavit"), paras 5, 7, 8, 9, 11 & 12; YKSC Reasons, paras 81-92.
[26] Joe Affidavit, paras 5, 9.

Territory, which contributed to the erosion of VGFN's land, culture and community.[27] This principle is vital as VGFN continues to govern themselves for the survival, dignity and well-being of their present and future generations. The Residency Requirement is similar to the requirements in election laws for those seeking office in non-Indigenous governments in Canada, which require elected officials to live within the territorial jurisdiction over which they govern.[28]

18. Prior to amendments made in August 2019, the Residency Requirement required that candidates for election to council reside in Old Crow in order to be eligible. After Ms. Dickson filed her petition in 2019, the Residency Requirement was reviewed, deliberated on and approved by consensus decision of the VGFN General Assembly, the branch of government with exclusive authority to amend the Constitution.[29] The consensus decision of the General Assembly was informed by a public process overseen by the VGFN Constitutional Review Committee. This culminated in a proposed amendment to the Residency Requirement for consideration by the General Assembly. Ms. Dickson also presented alternatives to the Committee which were similarly deliberated on by the General Assembly.[30] The General Assembly chose to adopt the Committee's proposal to amend the Residency Requirement so that VGFN citizens who do not live in Old Crow at the time of nomination to Council may stand as candidates, but must relocate to the community within 14 days if elected.[31]

19. Contrary to the applicant's assertion that she was denied a dispute resolution process from Council,[32] Ms. Dickson specifically requested "dispute resolution from a body other than Council"[33] which was ultimately provided to her through the process by which the General Assembly amended the Residency Requirement by consensus decision. Further, Ms. Dickson had (and still has) the option of pursuing a challenge to the validity of the Residency Requirement as an unjustified infringement of her individual right to equality under VGFN law

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[27] YKCA Reasons, paras 27-29.
[28] *Legislative Assembly Act,* RSY 2002, c 136, ss 4, 8, referentially incorporating *Elections Act,* RSY 2002, c 63, ss 3(c), 6(1)(b); *Municipal Act,* RSY 2002, c 154, ss. 48(1)(c), 50(1), 193.04(a)(iii); YKSC Reasons, para 209.
[29] YKCA Reasons, paras 30-31.
[30] YKCA Reasons, paras 30-31.
[31] YKCA Reasons, para 32.
[32] Memorandum of Argument of the Applicant, Cindy Dickson, in Application for Leave to Appeal to the Supreme Court of Canada, para 14.
[33] Affidavit of Dana Tizya-Tramm, affirmed March 13, 2019, para 37, Exhibit C.

as recognized and protected within the Constitution.[34] While Ms. Dickson initially asserted an infringement of her individual right recognized and protected under the Constitution, this position was not advanced below as Ms. Dickson pursued her claim solely through the application of the *Charter*.

[34] YKCA Reasons, para 157.

PART II - POINTS IN ISSUE

20. Whether leave to appeal should be granted to the applicant Ms. Dickson on the proposed questions respecting the application and interpretation of s. 25 of the *Charter*.

21. In the event that leave to appeal is granted, whether leave to cross-appeal should be granted to VGFN on the following questions:

(a) Whether, pursuant to s. 32 of the *Charter*, the *Charter* applies to a provision of a constitution of a self-governing Yukon First Nation, being the Residency Requirement contained in section 2, Article XI of the Vuntut Gwitchin First Nation Constitution; and

(b) Whether the Residency Requirement is inconsistent with s. 15(1) of the *Charter*; in particular, whether the analogous ground of "aboriginality-residence" rigidly applies in all circumstances of Indigenous governance, including the particular circumstances of Vuntut Gwitchin First Nation self-government.

PART III - LEGAL ARGUMENT

A. Leave to appeal should not be granted

22. VGFN submits that leave to appeal should not be granted as the issues raised by the applicant are not of sufficient public importance as to warrant interference by this Court.

1. The issue on the proposed appeal is one of narrow application

23. The YKCA properly narrowed the question before it to address the validity of the Residency Requirement *only*, and not all aspects of VGFN Constitution, government and laws more broadly. The Court considered the application of the *Charter* in respect of the Residency Requirement alone, and concluded that the shielding effect of s. 25 was in relation to that specific provision in its particular social and legal context.[35] As is proper in constitutional cases, the Court took a restrained approach so as to avoid undue effects of an unnecessarily broad decision.[36] Accordingly, while the conclusion is important to the parties to the dispute, the decision respecting s. 25 of the *Charter* should not be understood as leading to broader implications and is not one of broad public importance.

2. The decisions below are fact and context specific

24. The decisions below by the YKCA and YKSC were made in the context of the Constitution, which itself exists in the framework of the VGFN Agreements. These arrangements are specific to VGFN and their ongoing process of reconciliation with Canada and the Yukon, and are not replicated in other provinces or territories. Accordingly, the question of the application of s. 25 raised in the proposed appeal in relation to those arrangements is not of broad national importance meriting review by this Court.

25. This case also involves a narrow and fact specific dispute between a citizen and a First Nation. It is an internal matter that rests on the particular facts and circumstances of the individual and the particular nature of the self-government of the VGFN, with its distinct legal and democratic governance traditions in the unique context of its history, geographic reality and membership characteristics.

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[35] YKCA Reasons, paras 74-76.
[36] YKCA Reasons, para 74.

26. The law under review in the case is furthermore of narrow application. The Residency Requirement is an aspect of the Constitution, made by and for VGFN citizens, applying only to VGFN citizens. It is not a law of broader general application outside of the context of VGFN self-government. It is notable that within the Constitution, the supreme VGFN law, and in accordance with the Final Agreement, VGFN has recognized and protected the individual rights of VGFN citizens within its collective exercise of self-government, which Ms. Dickson has recourse to as noted by the YKCA, and which would be consistent with the imperative of recognizing, revitalizing and respecting VGFN's self-government and legal order in furtherance of reconciliation.

3. No general rule articulated

27. The applicant overstates the breadth of the implications of the decision. The YKCA has not created an absolute shield in every case where s. 25 may be raised. The YKCA concluded in relation to s. 25: "Self-governing first nations are now in a position to use this tool, which in my opinion is better characterized as a 'shield' than a 'lens' or interpretive aid that would 'read down' or 'modify' rights in the event of a conflict."[37] In so finding, the Court did not establish a strict rule but confirmed an interpretation and applied it in this case, where "in the circumstances of this case at least, to apply s. 15(1) would indeed derogate from the Vuntut Gwitchin's rights to govern themselves in accordance with their own particular values and traditions *and* in accordance with the 'self-government' arrangements…"[38] The YKCA expressly notes that it would not be appropriate for that Court to impose a general rule about the application of s. 25 as it relates to a claim of *Charter* rights.[39]

28. Given the specificity of the factual situation, where the Court applied s. 25 as a shield to protect VGFN's right to self-govern in the context of an individual's s. 15(1) claim, the YKCA's decision respecting the application of s. 25 may not squarely apply in other situations. This decision was not announced as a general rule that this Court should seize upon to endorse more broadly. Instead, the YKCA's decision lends itself to a case-by-case consideration of unique factual circumstances, meaning that it may also not be helpful for this Court to impose a general

[37] YKCA Reasons, para 143.
[38] YKCA Reasons, para 149.
[39] YKCA Reasons, paras 150-153.

rule. Such decisions are of a case-by-case nature, and the lower courts can be trusted to carry on applying currently established legal principles in the context of each case unless and until there is evidence of widespread confusion between different courts of appeal.

4. There is no conflict in the law as it has developed

29. This Court's intervention is not required to address conflict or inconsistency in the jurisprudence respecting s. 25. The decisions relied on by the applicant do not reveal tension or conflict in the interpretation of the law, but instead provide examples of the application of the law to distinct factual circumstances. For example, the case of *Re Band (Eeyouch) c Napash*,[40] cited by the applicant does not reveal a divergent legal approach; it reveals a distinct factual scenario. *Re Band (Eeyouch)* involved treaty language distinct from the VGFN Agreements in issue in the present case. *Re Band (Eeyouch)* also raised concerns about entirely different issues: there the concern was limits imposed by the regulation of alcohol through a by-law made by a Council.[41] In the present case the issue is the means of selecting the leaders of a self-governing First Nation as determined by the citizens and enshrined in their supreme law.[42]

30. Indeed, each time the question of the purpose of s. 25 has come before this Court since *Corbière* (at which time this Court determined that it did not need to articulate a general approach)[43] this Court has stated that the purpose of s. 25 is to shield aboriginal, treaty and other rights of aboriginal peoples; or in other words, to provide those rights with protection against derogation.[44] The conclusion of the YKCA was the logical articulation of the law as it has evolved up to this stage and does not suggest conflicting or divergent trends in the case law.

31. The YKCA acknowledged that issues were raised in the case that have not been dealt with by other courts.[45] The fact that there is little s. 25 jurisprudence in the lower courts and courts of appeal does not, however, suggest leave should be granted. To the contrary, there are

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[40] *Band (Eeyouch) c Napash*, 2014 QCCQ 10367 [*Eeyouch*].
[41] *Eeyouch*, paras 8-9.
[42] YKCA Reasons, para 21; Constitution, Article II.
[43] *Corbière v Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203 [*Corbière*], para 53.
[44] *R v Kapp*, 2008 SCC 41 (per Bastarache), para 96*; R v Desautel*, 2021 SCC 17, para 39; *Reference Re Secession of Québec*, [1998] 2 SCR 217, para 82.
[45] YKCA Reasons, para 143.

few decisions, and the decisions that exist do not reveal conflicts or divergence among courts. If the applicant is correct that more cases may arise that require interpretation and application of s. 25, this Court should allow the law to develop in specific factual contexts and step in if the law becomes discordant or inconsistent across the country and there is a need to do so.

32. Further, it is not apparent as alleged by the applicant that there is any confusion about how, why or whether to apply s. 1 in conjunction with s. 25. In this case, the YKCA stated *both* that how the analysis is carried out is a case-by-case consideration,[46] *and* that there are good policy reasons for the approach the Court took in this case. These included that if courts were expected to analyze fully the ss. 15 and 1 implications of a *Charter* claim before considering the applicability of s. 25, it would be difficult, if not impossible, to keep s. 25 considerations separate from the issue of reasonable limits and perhaps from s. 15(1) itself.[47] The Court further found that, practically speaking, it would be more burdensome to put a First Nation to a full s. 1 analysis prior to considering s. 25 and doing so risks eroding the capacity of the First Nation to carry out its self-governing responsibilities.[48] This analysis is flexible and principled, and does not suggest the need for this Court to clarify the application of s. 25.

5. No new dimensions of international law

33. The international law dimensions adverted to by the applicant do not suggest that the case calls for appellate intervention. This case should not be understood as one where domestic courts are enforcing conformity with international law. The principle that international law may be used as an interpretive aid to Canadian law is well understood.[49] Given that recent federal legislation enacted in the *United Nations Declaration on the Rights of Indigenous Peoples Act*, SC 2021, c 14 affirms the *United Nations Declaration on the Rights of Indigenous Peoples* "as a universal international human rights instrument with application in Canadian law" and rights to democratic participation elucidated in the *International Covenant on Civil and Political Rights* are enumerated in the *Charter*, it is not clear that international law plays any independent role. How

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[46] YKCA Reasons, para 151.
[47] YKCA Reasons, para 152.
[48] YKCA Reasons, para 153.
[49] *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, para 70; *R v Hape*, 2007 SCC 26, paras 35-39 [*Hape*]; *114957 Canada Ltée (Spraytech, Société d'arrosage) v Hudson (Town)*, 2001 SCC 40, paras 30-32; *Michel v Graydon*, 2020 SCC 24, para 103.

particular international instruments might inform the interpretation of the legal consequences of particular facts is a question of the merits of the specific case and does not call for leave to appeal in this case as a matter of national public importance.

B. If leave to appeal is granted to the applicant, leave to cross-appeal should also be granted to VGFN as a matter of justice and fairness

34. VGFN opposes the applicant's request for leave. However, in the event that this Court grants leave, VGFN submits that it is in the interests of justice to allow VGFN's application for leave to cross-appeal. The issues in the proposed appeal on the question of the interpretation of s. 25 sought by the applicant are significantly interrelated with and dependent upon the issues VGFN would address on cross-appeal and should also be addressed as a matter of fairness if leave to appeal is allowed. In particular, VGFN would ask for leave to appeal the following questions:

> Issue 1: Whether, pursuant to s. 32 of the *Charter*, the *Charter* applies to a provision of a constitution of a self-governing Yukon First Nation, being the Residency Requirement contained in section 2, Article XI of the Vuntut Gwitchin First Nation Constitution; and
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> Issue 2: Whether the Residency Requirement is inconsistent with s. 15(1) of the Charter; in particular, whether the analogous ground of "aboriginality-residence" applies in the particular circumstances of Vuntut Gwitchin First Nation self-government.

1. Whether the *Charter* applies to the Residency Requirement

35. The courts below concluded that the *Charter* applies to the Residency Requirement in Section 2 of Article XI of the Constitution. Although the YKCA clarified that the decision was about the narrow application of the *Charter* to the Residency Requirement, the decision nevertheless resulted in an expansion of the application of the *Charter*.

36. The novel conclusion of the courts below, applying the *Charter* to a law of VGFN, departs from and extends the reach of prior decisions. The decisions of this Court and lower courts have indicated in interpreting s. 32 that the scope of *Charter* application includes those entities expressly listed in s. 32 (i.e., Parliament and legislatures) as well as those bodies that are empowered by Parliaments and legislatures by way of delegated jurisdiction. Although

municipalities, some universities, and some hospital services have been found to be captured as part of delegated authority, and Indian bands carrying out statutory powers under the *Indian Act* have been subject to the *Charter*,[50] no other court has interpreted s. 32 so as apply the *Charter* to a self-governing First Nation existing outside of the *Indian Act* whose authority is inherent in nature.

37. In VGFN's respectful submission, despite the uncommon circumstances of the case, neither the YKSC or the YKCA clearly articulated how the wording of s. 32 or the existing body of law interpreting it applies to the present situation and the circumstances of VGFN. While it is clear that VGFN is not akin to a hospital or municipality, the decisions do not clearly explain how s. 32 captures a self-governing First Nation that is not acting pursuant to delegated power, and which has not consented to the application of the *Charter*. By contrast, when courts have addressed circumstances of the application of the *Charter* to similar questions of different sources of sovereignty (where addressing extraterritorial application of the *Charter*, or the laws or conduct of another sovereign state) *Charter* application has been addressed differently, more clearly and with an approach of respect for other jurisdictions.[51]

38. The YKCA also did not clearly reason how absent express agreement with the Crown, and absent a delegation of federal, provincial or territorial authority, the *Charter* could nonetheless apply to the Residency Requirement, being part of the supreme law of VGFN adopted by consensus decision of the General Assembly in the collective exercise of their inherent right to self-government. VGFN respectfully differs with the comment made by the YKCA, citing *Sga'nism Sim'augit (Chief Mountain) v Canada (Attorney General)*, 2013 BCCA 49 that the question of the source of self-government authority may be "futile".[52] Although grappling with pre-existing sovereignty may be a challenging aspect of reconciliation, understanding the source of VGFN's governing authority is necessary to rationalize the theory of shared sovereignty that is applied by the YKCA.

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[50] *Greater Vancouver Transportation Authority v Canadian Federation of Students*, 2009 SCC 31, paras 17-24; *Douglas/Kwantlen Faculty Assn. v Douglas College*, [1990] 3 SCR 570; *Eldridge v British Columbia*, [1997] 3 SCR 624, para 43; *Horse Lake First Nation v Horseman*, 2003 ABQB 152, paras 20-29.
[51] *Hape*; *Amnesty International Canada v Canada (Chief of the Defence Staff)*, 2008 FC 336.
[52] YKCA Reasons, paras 92-93.

39. It is difficult to see how the reconciliation of VGFN's prior sovereignty with assumed Crown sovereignty – being the purpose of s. 35(1) of the *Constitution Act, 1982*[53] – can be achieved if addressing legal questions regarding the source and nature of Indigenous sovereignty is deemed futile by the courts. As the Truth and Reconciliation of Commission of Canada reminded Canadians, the process of reconciliation "should not be seen as a means to subjugate Aboriginal peoples to an absolutely sovereign Crown but as a means to establish the kind of relationship that should have flourished since Confederation", and that "[s]o long as the vision of reconciliation…is not being implemented with sufficient strength and vigour, Canadian law will continue to be regarded as deeply adverse to realizing truth and reconciliation for many First Nations, Inuit, and Métis people."[54]

40. The expanded scope of the *Charter* – without clear rationalization – also throws the VGFN self-government arrangements into a state of uncertainty. In negotiating the VGFN Agreements, VGFN clearly and intentionally did not agree to the application of the *Charter*. If it is possible for the Court to impose *Charter* application on VGFN in this situation, then it not only extends the reach of the *Charter* beyond the clear language of s. 32 and its intent, but potentially interferes with the intentions of the parties to the arrangements that have been meticulously negotiated in good faith with the objective of advancing reconciliation and restoring respect for VGFN self-government. The significant concern for VGFN is the potential impairment and enjoyment of their self-determination, which is necessary for a meaningful process of reconciliation of VGFN's prior sovereignty and the assumed sovereignty of the Crown.

41. While the issue of the application of the *Charter* to the Residency Requirement is a narrow one in relation to Ms. Dickson, impacting her as a VGFN citizen in her specific factual situation, for VGFN the issue is more expansive. This is a question with significant implications for VGFN since the lack of clarity raises the spectre of the application of the *Charter* to other aspects of VGFN's inherent legal and democratic governance traditions, maintained both within

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[53] *R v Van der Peet*, [1996] 2 SCR 507, para 31; *Manitoba Métis Federation Inc v Canada (Attorney General)*, 2013 SCC 14, para 66; *Mitchell*, para 9.

[54] Canada's Residential Schools: Reconciliation, The Final Report of the Truth and Reconciliation Commission of Canada, vol 6 (Montreal: Truth and Reconciliation Commission of Canada, 2015), p. 49.

and outside of the Constitution, that would be captured as being 'law' for the purposes of s. 32 (e.g., the requirement for VGFN citizens to be 60 years of age to be eligible to participate in the Elders Council).

42. There is a risk that the *Charter'*s application would subvert the entire purpose of VGFN's self-government by becoming another tool of assimilation requiring abandonment of their own fundamental values and distinct conceptions of freedom to conform to liberal enlightenment values. Instead of allowing space for VGFN's distinct sovereignty and legal order within Canada's constitutional fabric, this approach would create a monolith. Accordingly, this is a question meriting leave to cross-appeal in the event that the applicant is granted leave.

2. Whether the Residency Requirement is inconsistent with s. 15(1)

43. The YKCA made a declaration that "subject to possible justification under s. 1 of the *Charter*, the Residency Requirement does infringe the Petitioner's equality rights under s. 15(1) of the *Charter*." The YKCA did so in strictly applying the decision in *Corbière*, which the YKSC had declined to follow so rigidly, and instead had distinguished.[55] The question of whether *Corbière* may be so strictly applied in the context of the Residency Requirement is a question meriting leave to cross-appeal in the event that leave to appeal is granted.

44. On cross appeal, VGFN would ask the Court to take a step that the YKSC and YKCA did not take: to reconsider the universal and inflexible application of *Corbière*'s "aboriginality-residence" ground, particularly in situations factually distinct from the specific setting the analogous ground arose from, where the basis of the distinction is different, and the meaning and significance of the limitation is different.

45. *Corbière*, and especially its articulation of a new analogous ground of discrimination, arose from a specific factual situation involving a distinction based in a particular discriminatory *Indian Act* policy. The history of the discriminatory policy properly informed the distinction and the decision in *Corbière*, but in VGFN's submission, does not inform the distinction here. In *Corbière*, the establishment of the analogous ground was rooted in the fact that on-off reserve distinctions had been created and exacerbated by the *Indian Act*, used as tools of exclusion and

[55] YKCA Reasons, para 107.

assimilation by Canada.[56] In *Corbière*, the policy in issue was not a self-governing First Nation's own law designed to address and respond to the effects of colonization – rather it was a distinction based in Canada's *Indian Act* policy to disenfranchise anyone not residing on reserve lands, exacerbating a history of intentional displacement and the harmful effects of colonialism. By contrast, the Residency Requirement is part of VGFN's effort to respond to the very displacement that was caused by those *Indian Act* policies as well as the Indian residential school system, sixties scoop and other child welfare policies. The distinction at work here is rooted in a comprehensive set of laws and agreements meant to enhance self-government and reaffirm connection to and governance over VGFN homelands, which was disrupted in the process of colonization.

46. The analogous ground of "aboriginality-residence" identified in *Corbière* has been applied extensively in cases involving residency requirements of federal Indian bands created by and subject to the *Indian Act*. The ground has been treated as being suspect and rigidly applicable in a range of such cases, perhaps as a result of how it was described by the majority of this Court in 1999 as not being a contextually dependent ground.[57] The present case challenges the applicability of that ground as an exceptionless or "constant" marker of discrimination under s. 15. With leave to cross-appeal, VGFN would argue that, in this case, the source of the concern that gave rise to the development of the aboriginality-residence distinction in *Corbière* is absent, and accordingly the discrimination analysis should proceed on the basis that the first stage of the discrimination analysis is not made out.

47. On cross-appeal, the Court would be asked to clarify that the ground of aboriginality-residence should be understood as not applying to the Residency Requirement, where the government is an Indigenous one, but where the specific facts giving rise to the residency requirement at issue are robustly distinguishable. In short, the distinction requiring elected councillors to reside within the seat of government in order to engage in day-to-day leadership within a self-governing First Nation is not reflective of a constant marker of suspect decision making or potential discrimination, or one that universally bears the kind of stigma reflected upon by this Court in *Corbière* as creating the "aboriginality-residence" ground.

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[56] *Corbière*, paras 80-90.
[57] *Corbière*, para 10.

48. The rigid application of *Corbière* has resulted, in VGFN's case in particular, in the application of a s. 15(1) analysis that declines to look seriously at the context of the social circumstances in which *Corbière* arose and whether that specific ground should apply to cases like this one. In the particular circumstances of this case, involving a distinct legal culture and particular history of self-government recognition, VGFN would ask, why is it suspect for VGFN to impose a residency requirement when it is not suspect for other governments? In VGFN's submission, it should not be viewed as suspect when Indigenous people have chosen for themselves that their government be based on their land.

49. *Corbière*'s overbroad application should be addressed if leave to appeal is granted, given that VGFN's self-government, carried out within the Canadian context, is an example of how Indigenous self-government has evolved significantly since *Corbière* and *Indian Act* residency policies. The Court should not be bound to apply case law created in response to *Indian Act* requirements where the requirements are those of a self-governing First Nation. The subject of the dispute must be understood in its actual context, not in a rigid or automatic framework coloured by presumptions that do not apply. VGFN accomplished self-government in the modern context in part by extricating itself from the *Indian Act*. It is not consistent with the spirit of that process of reconciliation to impose case law developed by interpretation of the harms of the *Indian Act* to VGFN.

50. Part of the project of reconciliation involves understanding the truth of the past, not relying on prejudice and stereotype. Actively and meaningfully allowing Indigenous self-government and legal orders to be recognized, revitalized and respected is consistent with resisting discrimination. If leave to appeal the question of whether s. 25 shields VGFN's exercise of self-government is permitted, the interests of justice require that VGFN be given leave to address the interrelated question of whether the Residency Requirement should be understood as inconsistent with the *Charter* in other respects addressed by the courts below.

PART IV - SUBMISSIONS CONCERNING COSTS

51. VGFN seeks no order as to costs on the leave or cross-leave applications.

PART V - ORDER SOUGHT

52. That the applicant Ms. Dickson's application for leave to appeal be dismissed.

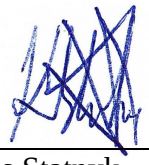
53. In the alternative, if this Court grants leave to appeal, that VGFN's application for leave to cross-appeal is allowed in respect of the following issues:

(a) Whether, pursuant to s. 32 of the *Charter*, the *Charter* applies to a provision of a constitution of a self-governing Yukon First Nation, being the Residency Requirement contained in section 2, Article XI of the Vuntut Gwitchin First Nation Constitution; and

(b) Whether the Residency Requirement is inconsistent with s. 15(1) of the *Charter*; in particular, whether the analogous ground of "aboriginality-residence" rigidly applies in all circumstances of Indigenous governance, including the particular circumstances of Vuntut Gwitchin First Nation self-government.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED at Vancouver, in the Province of British Columbia, the 24th day of November, 2021.



Kris Statnyk

Krista Robertson

Elin Sigurdson

Christina Clement

PART VI - TABLE OF AUTHORITIES AND LEGISLATIVE PROVISIONS