



SUPREME COURT OF CANADA

CITATION: Dickson v. Vuntut
Gwitchin First Nation, 2024 SCC
10

APPEAL HEARD: February 7, 2023
JUDGMENT RENDERED: March
28, 2024
DOCKET: 39856

BETWEEN:

Cindy Dickson

Appellant/Respondent on cross-appeal

and

Vuntut Gwitchin First Nation

Respondent/Appellant on cross-appeal

- and -

Attorney General of Canada, Attorney General of Quebec, Attorney General of Alberta, Government of Yukon, British Columbia Treaty Commission, Métis Nation of Ontario, 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
Intervenors

CORAM: Wagner C.J. and Côté, Rowe, Martin, Kasirer, Jamal and O'Bonsawin JJ.

**JOINT REASONS
FOR JUDGMENT:** Kasirer and Jamal JJ. (Wagner C.J. and Côté J. concurring)
(paras. 1 to 231)

**JOINT REASONS
DISSENTING IN
PART:** Martin and O'Bonsawin JJ.
(paras. 232 to 416)

**REASONS
DISSENTING IN
PART:** Rowe J.
(paras. 417 to 523)

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Cindy Dickson

Appellant/Respondent on cross-appeal

v.

Vuntut Gwitchin First Nation

Respondent/Appellant on cross-appeal

and

**Attorney General of Canada,
Attorney General of Quebec,
Attorney General of Alberta,
Government of Yukon,
British Columbia Treaty Commission,
Métis Nation of Ontario,
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Carcross/Tagish First Nation,
Teslin Tlingit Council,
Congress of Aboriginal Peoples,
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2024 SCC 10

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Present: Wagner C.J. and Côté, Rowe, Martin, Kasirer, Jamal and O'Bonsawin JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR YUKON

Constitutional law — Charter of Rights — Application — Right to equality — Discrimination based on non-resident status in self-governing Indigenous community — Self-governing Indigenous community requiring chief and councillors to reside on settlement land or relocate there within 14 days of election — Citizen of community wishing to stand for election but living away from settlement land — Citizen bringing constitutional challenge to residency requirement on basis of infringement of Charter right to equality — Whether Charter applies to residency requirement — If so, whether residency requirement infringes citizen's right to equality — Canadian Charter of Rights and Freedoms, ss. 15, 32.

Constitutional law — Charter of Rights — Aboriginal peoples — Aboriginal rights — Self-governing Indigenous community requiring chief and councillors to reside on settlement land or relocate there within 14 days of election — Citizen of community wishing to stand for election but living away from settlement land — Citizen bringing constitutional challenge to residency requirement on basis of infringement of Charter right to equality — Whether citizen's right to equality, properly construed, abrogates or derogates from Aboriginal, treaty or other rights or freedoms that pertain to Aboriginal peoples of Canada — Canadian Charter of Rights and Freedoms, s. 25.

In 1993, the Vuntut Gwitchin First Nation (“VGFN”), a self-governing Indigenous community in the Yukon, concluded with the federal and Yukon governments a land claim agreement and a self-government agreement, both of which were approved and given effect by federal and territorial legislation. As contemplated by the self-government agreement, the VGFN adopted its own constitution, which provides for certain rights and freedoms for its citizens, rules for the organization of its government, and electoral rules and standards. Among other things, the VGFN Constitution includes a residency requirement stating that all Chief and Councillors must reside on the VGFN’s settlement land, in the village of Old Crow in the traditional territory of the Vuntut Gwitchin, or relocate there within 14 days of their election.

D, a Canadian citizen and a citizen of the VGFN, currently lives in Whitehorse, the capital of the Yukon, about 800 kilometres south of Old Crow. D wishes to stand for election as a VGFN Councillor but says she cannot move to Old Crow if elected, largely because her son requires access to medical care unavailable there. D challenged the residency requirement, asserting that it unjustifiably infringes her right to equality under s. 15(1) of the *Charter*. The VGFN countered that the residency requirement reflects its longstanding practice that its Chief and Councillors live on the Vuntut Gwitchin’s traditional territory. The VGFN also said the *Charter* does not apply to it as a self-governing First Nation. Alternatively, it argued that, should the *Charter* apply, the residency requirement does not violate D’s right to equality and, even if it did, the requirement is nevertheless valid as it is shielded by s. 25 of the *Charter*, which the VGFN said upholds certain collective rights and freedoms of

Indigenous peoples when those collective rights conflict with an individual's *Charter* rights. Both the trial judge and the Court of Appeal held that the *Charter* applies to the VGFN and to its Constitution, pursuant to s. 32(1) of the *Charter*, and held that if D's s. 15(1) equality right is infringed, the residency requirement is shielded by s. 25 of the *Charter*. D appeals on the question of the constitutional validity of the residency requirement, and the VGFN cross-appeals on the question of the application of the *Charter*.

Held (Rowe J. dissenting on the cross-appeal, Martin and O'Bonsawin JJ. dissenting on the appeal): The appeal and the cross-appeal should be dismissed.

Per Wagner C.J. and Côté, **Kasirer** and **Jamal JJ.**: The *Charter* applies to the VGFN and to its citizens like D, principally because the VGFN is a government by nature pursuant to s. 32(1) of the *Charter*. Furthermore, D has succeeded in showing that the residency requirement constitutes a *prima facie* infringement of her right to equality under s. 15(1) of the *Charter*. However, the residency requirement is an exercise of an "other right or freedom" that pertains to the Aboriginal peoples of Canada under s. 25 of the *Charter*. The residency requirement protects Indigenous difference — understood as interests connected to Aboriginal cultural difference, Aboriginal prior occupancy, Aboriginal prior sovereignty, or Aboriginal participation in the treaty process. D's s. 15(1) claim abrogates or derogates from this right, with which it is in irreconcilable conflict; as a result, pursuant to s. 25, D's s. 15(1) claim cannot be given effect.

The application of the *Charter* is addressed in s. 32(1), which identifies certain entities that are bound by the *Charter*. They include the legislature and government of each province in respect of provincial matters, as well as the federal Parliament and government in respect of federal matters, which includes territorial governments and territorial matters. Section 32(1) also explicitly contemplates that the *Charter* applies to other entities, including those that are controlled by government or that perform truly governmental functions. Such entities may be subject to the *Charter* in one of two ways, as set out in *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624. First, an entity may be found to be “government” for the purpose of s. 32(1) if it can be characterized as government by its very nature or because of the degree of governmental control exercised over it. In such a case, all the entity’s activities are subject to the *Charter*. Second, even if an entity is not itself “government” for s. 32(1) purposes, it will be subject to the *Charter* with respect to particular activities that can be ascribed to a government because they are governmental in nature. Parliament and the provinces cannot avoid their *Charter* obligations by conferring certain of their legislative responsibilities or powers on other entities that are not ordinarily subject to the *Charter*.

In respect of the “by nature” test of the first branch of the *Eldridge* framework, entities may be considered to be government by nature when they typically have the following features, which are neither necessary nor determinative, but which serve as useful indicia of government: (1) they are democratically elected by members of the public and accountable to their constituents; (2) they have a general taxing power

that is indistinguishable from the taxing powers of Parliament or the provinces; (3) they are empowered to make, administer, and enforce laws within a defined territorial jurisdiction; and (4) they derive their existence and lawmaking authority from Parliament or the provinces, and they exercise powers that Parliament or the provinces would otherwise exercise. As for the “control” test of the first branch, the *Charter* will apply to an entity upon which Parliament or the provinces confer governmental powers within their authority, if Parliament or the province in question has substantial control over the entity’s activities. In such circumstances, the entity cannot be said to be operating autonomously from government within the meaning of s. 32(1) of the *Charter*.

Under the second branch of the *Eldridge* framework, the Court has previously recognized an entity’s activities as being subject to the *Charter* where the entity: exercised discretion under government legislation about how to provide services; was created by statute and all of its actions at issue were taken pursuant to statutory authority; or implemented a specific government program and exercised powers of statutory compulsion. In such circumstances, an entity cannot escape *Charter* scrutiny merely because it is not part of government or controlled by government. Even if an entity is otherwise independent from government, the presence of a delegated statutory power of compulsion means that the entity has a coercive power of governance that is not possessed by private individuals, corporations, or organizations. It is this power that makes the *Charter* applicable to bodies exercising statutory authority.

In the instant case, the *Charter* applies to the VGFN Constitution's residency requirement because the VGFN is a government by nature under the first branch of the *Eldridge* framework. While the VGFN does not qualify as government under the "control" test of the first branch because it is not substantially controlled by either the federal or the Yukon government, the VGFN as an Indigenous government illustrates the indicia for government by nature: the VGFN Council consists of members who are elected by eligible voters of the VGFN and are democratically accountable to their constituents, much like members of Parliament or a provincial legislature; the VGFN has general taxing powers that are materially indistinguishable from those of Parliament or the provinces; like Parliament and provincial legislatures, the VGFN is empowered to make, administer, and enforce coercive laws that are binding on VGFN citizens and on the public generally within its settlement land; and at least one source of the VGFN's lawmaking authority flows from Parliament, in that the VGFN exercises powers that Parliament otherwise would have exercised through its legislative jurisdiction.

Additionally, the *Charter* applies to the residency requirement because its enactment and enforcement by the VGFN constitutes a specific governmental activity. The residency requirement under the VGFN's Constitution was adopted at least in part under federal statutory authority (even assuming it also reflects the exercise of an inherent right to self-government). It involves the exercise of a statutory power of compulsion because it imposes legal restrictions on who may serve as a VGFN Chief or Councillor. The requirement has the force of law because it forms part of the VGFN

Constitution, adopted under the VGFN's self-government agreement, which was itself approved and given effect by the federal and territorial implementing legislation.

Since the *Charter* applies to the VGFN's residency requirement, it must be determined whether the residency requirement unjustifiably infringes s. 15(1) of the *Charter* by barring D from serving on the VGFN Council unless she moves from Whitehorse to Old Crow within 14 days of her election. This issue requires a consideration of the framework for analyzing whether D's s. 15(1) *Charter* right, properly construed, abrogates or derogates from "aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada" under s. 25 of the *Charter*. For Indigenous communities, s. 32(1) and s. 25 of the *Charter* are intimately connected. While the application of individual *Charter* rights to a self-governing Indigenous community pursuant to s. 32(1) may be thought to inhibit the pursuit of rules designed to protect minority Indigenous rights and interests, s. 25 acts as a counterweight by providing protection for collective Indigenous interests as a social and constitutional good for all Canadians. Properly understood, s. 25 allows for the assertion of individual *Charter* rights except where they conflict with Aboriginal rights, treaty rights, or other rights or freedoms that are shown to protect Indigenous difference.

Section 25 must be considered in light of its purpose, with due consideration to its text, the *Charter*'s character and larger object, and the provision's history. The purpose of s. 25 is to uphold certain collective rights and freedoms of Indigenous peoples when those collective rights conflict with an individual's *Charter*

rights — i.e., to ensure that the designated rights and freedoms of Indigenous peoples are protected where giving effect to conflicting individual *Charter* rights and freedoms would diminish Indigenous difference. When an individual’s *Charter* right would abrogate or derogate from an Aboriginal, treaty, or other right, s. 25 requires the collective Indigenous right to take precedence, even if the *Charter* claimant is a member of the Indigenous group concerned. This purpose aligns with the broad goals of s. 35 of the *Constitution Act, 1982* and is in step with the need to reconcile the sovereignty of the Crown with the reality that Indigenous peoples lived in North America, in distinct societies with laws, traditions, and customs, long before European contact. Section 25 echoes the aspiration to reconcile the guarantee of individual rights and freedoms in the *Charter* for all Canadians with the distinctive collective rights of Indigenous peoples.

The text of s. 25 refers to “aboriginal, treaty or other rights or freedoms”. Aboriginal and treaty rights are protected by s. 35 of the *Constitution Act, 1982*. By including “other” rights and freedoms among those deserving of constitutional protection, s. 25 speaks to a wider range of rights than s. 35. It is clear from the text and purpose of s. 25 that the provision’s protections are not restricted to rights with constitutional status. However, the text and purpose of s. 25 do suggest another substantive restriction: consonant with the principle of the protection of Indigenous peoples as a distinct minority, and because s. 25 was intended to protect rights associated with Indigenous difference, the “other rights or freedoms” in s. 25 are limited to those that protect Indigenous difference.

The protection of Aboriginal, treaty, and other rights in s. 25 is not, however, absolute. When a right has been shown to come within the scope of s. 25, its protections do not apply automatically. Those protections apply only if it is determined that there is irreconcilable conflict between the claimed *Charter* right and the s. 25 right, such that giving effect to the *Charter* right would undermine the Indigenous difference protected or recognized by the collective right. In any given case, the individual and collective rights referred to in s. 25 may not actually be in conflict. Some individual rights are part of Indigenous law and coexist with collective interests. In addition, s. 25 would not apply if the individual *Charter* right invoked conflicted with an Indigenous right that does not rest on Indigenous difference. And like s. 35 rights, the primacy afforded to the collective rights under s. 25 is subject to the equality guarantee for “male and female persons” under s. 28 of the *Charter* and s. 35(4) of the *Constitution Act, 1982*.

There is broad consensus that s. 25 does not create new substantive rights. However, the details of s. 25’s operation remain largely unsettled. The jurisprudence considers two competing views on the effect of s. 25 — first, as a “shield”, under which a successful invocation of s. 25 would bar a *Charter* claim in circumstances where applying the *Charter* right would abrogate or derogate from a right within the scope of s. 25; or second, as an “interpretative prism” (or “interpretive prism”), or rule of interpretation, under which courts would attempt to construe the relevant *Charter* right to give effect to it without abrogating or derogating from the identified s. 25 right. Under the latter view, if a conflict occurs, the Aboriginal, treaty, or other right would

be afforded no special priority, and the question as to whether the collective Indigenous right should be upheld would be left to judicial discretion, to be determined on a case-by-case basis.

The proper approach to s. 25 includes elements drawn from both approaches. Section 25 can be said to have a shielding effect because it affords primacy to Aboriginal, treaty, or other rights. However, a right within the scope of s. 25 is only prioritized after an interpretative exercise demonstrates that there is an irreconcilable conflict between the collective right and the individual *Charter* right in question. While the provision will sometimes serve as a shield for Aboriginal, treaty, and other rights, to protect the collective minority interest of Indigenous peoples, an absolutist approach to s. 25 is inconsistent with a purposive approach to interpretation. It also stands in opposition to the idea that in Indigenous legal cultures, as in Canadian constitutional law, individual and collective rights are conceived as operating harmoniously.

With respect to the kind of conflict between the collective and individual rights concerned that must be shown for the s. 25 shield to operate, the conflict between the rights must be real and irreconcilable, such that there is no way to give effect to the individual *Charter* right without abrogating or derogating from the right within the scope of s. 25. The conflict cannot be hypothetical. The requirement of an irreconcilable conflict between the two rights best aligns with the purpose and text of s. 25 because if there is a way, through fair and careful interpretation, for courts to give effect to the *Charter* right and to the s. 25 identified right, then both rights are respected,

and the conflict is averted. Determining whether there is an irreconcilable conflict between the rights at issue is an interpretive exercise. It requires courts to interpret the substance of both the *Charter* right and the Aboriginal, treaty, or other right at issue. This interpretive exercise must be informed by, and respectful of, Indigenous perspectives. At the same time, courts must be careful not to depart from the generous interpretation of individual *Charter* rights and freedoms mandated by the applicable jurisprudence.

As such, s. 25 does not serve as a shield whenever a right falling within its scope is at issue. Rather, when a *Charter* right is engaged by the exercise of an Aboriginal, treaty, or other right, courts must consider whether the two rights can be reconciled. If giving effect to the *Charter* right would only affect the s. 25 identified right incidentally or in a non-essential manner — in the sense that it would not undermine Indigenous difference — or if the *Charter* right can be interpreted in a manner consistent with the Aboriginal, treaty, or other right, then it would be inappropriate to give priority to the right within the scope of s. 25. It is only when the s. 25 right is affected in a non-incidental manner, thereby creating an irreconcilable conflict between the two rights, that s. 25 will protect the Indigenous right by rendering the individual right ineffective to the extent of the conflict. In this sense, s. 25 will sometimes function as a shield, and at other times, it will have only an interpretive role.

Because s. 25 is directed at safeguarding Aboriginal, treaty or other rights that aim to protect Indigenous difference, the focus of s. 25 is on collective rights,

irrespective of the identity of the individual or entity bringing the *Charter* challenge. The result is that the same analytical framework applies whether or not the *Charter* claimant is Indigenous, whether s. 25 is being asserted by an Indigenous group, or whether both parties are Indigenous. The s. 25 shield finds immediate application if a claimed *Charter* right abrogates or derogates from a collective s. 25 right, regardless of the parties involved. There is no basis in the text of s. 25 for finding that the protective shield should apply differently based on the parties' identities. There is, however, a need for great caution when the claim is brought by an Indigenous person against their own community; courts should proceed carefully to avoid unnecessarily or unwittingly imposing incompatible ideas or legal principles upon the community's distinctive Indigenous legal system.

Finally, if s. 25 is invoked in the face of a *Charter* claim, courts should consider applying it at the earliest possible stage without unduly prejudicing the individual *Charter* challenge. Given the competing interests that must be reflected in the s. 25 framework, the earliest that s. 25 could be properly considered is once the *Charter* claimant has shown a *prima facie* breach of their *Charter* right. When Aboriginal, treaty, or other rights or freedoms specified in s. 25 are engaged, the limits on a competing individual *Charter* right need not be justified under s. 1 of the *Charter*. Unlike s. 1, s. 25 reflects a constitutional choice to protect the collective rights and freedoms of Indigenous peoples in Canada as a distinct minority. In keeping with a long tradition of respect for minorities, s. 35 of the *Constitution Act, 1982* provides protection for existing Aboriginal and treaty rights, while s. 25 of the *Charter* similarly

sets forth a non-derogation clause in favour of the rights of Indigenous peoples. The protection of s. 25 is allied with the strength of the promise to the Indigenous peoples of Canada in s. 35, which recognized not only the ancient occupation of land by Indigenous peoples, but also their contribution to the building of Canada, and the special commitments made to them by successive governments. Any justification under s. 1 should be required only if the court finds s. 25 inapplicable. This is so when there is no Aboriginal, treaty, or “other right” in play, when the “other right” does not engage Indigenous difference, or when there is no irreconcilable conflict between the rights. In those circumstances, the party defending the impugned action can still seek to justify the limitation under s. 1 of the *Charter*.

The framework under s. 25 therefore has four steps. First, the *Charter* claimant must show that the impugned conduct *prima facie* breaches an individual *Charter* right. If no *prima facie* case is made out, then the *Charter* claim fails and there is no need to proceed to s. 25. Second, the party invoking s. 25 — typically the party relying on a collective minority interest — must satisfy the court that the impugned conduct is a right, or an exercise of a right, protected under s. 25. That party bears the burden of demonstrating that the right for which it claims s. 25 protection is an Aboriginal, treaty, or other right. If the right at issue is an “other right”, then that same party must demonstrate the existence of the asserted right and the fact that the right protects or recognizes Indigenous difference. Third, the party invoking s. 25 must show irreconcilable conflict between the *Charter* right and the Aboriginal, treaty, or other right or its exercise. If the rights are irreconcilably in conflict, s. 25 will act as a shield

to protect Indigenous difference. Fourth, courts must consider whether there are any applicable limits to the collective interest relied on. If s. 25 is found not to apply, the party invoking s. 25 may show that the impugned action is justified under s. 1 of the *Charter*.

Applying this analysis to the present case, first, D's s. 15(1) *Charter* right was *prima facie* breached by the residency requirement, which created a distinction based on the analogous ground of non-resident status in a self-governing Indigenous community, and this distinction reinforced and exacerbated D's existing disadvantage as a non-resident member of the VGFN. With respect to the first step of the s. 15(1) test, D's non-resident status in a self-governing Indigenous community qualifies as an analogous ground. The historical and continuing disadvantage faced by Indigenous people living away from their traditional lands means that distinctions based on such a status will serve as constant markers of suspect decision making or potential discrimination. As for the second stage of the s. 15(1) analysis, the residency requirement, which draws a distinction on the basis of non-resident status in a self-governing Indigenous community, reinforces, perpetuates, or exacerbates D's disadvantage as a non-resident VGFN citizen.

Second, the VGFN has established that the residency requirement in its Constitution is an exercise of an Aboriginal, treaty, or other right under s. 25. It is an exercise of an "other right", namely, the right to set criteria for membership in the VGFN's governing body. In light of the evidence and the factual findings at trial, the

residency requirement is clearly an exercise of a right that protects interests associated with Indigenous difference. The right to impose residency-based restrictions on the membership of its governing bodies enables Vuntut Gwitchin society to preserve the distinctive emphasis it places on its leaders' connection to the land. This is plainly a foundation for the connection between Indigenous difference and the residency requirement. Requiring VGFN leaders to reside on settlement land helps preserve the leaders' connection to the land, which is deeply rooted in the VGFN's distinctive culture and governance practices. It also bolsters the VGFN's ability to resist the outside forces that pull citizens away from its settlement land and prevents erosion of its important connection with the land. Such interests are associated with various aspects of Indigenous difference.

Third, the VGFN has established that, properly interpreted, D's s. 15(1) right and its right within the scope of s. 25 are irreconcilably in conflict. To apply s. 15(1) would abrogate or derogate from the Vuntut Gwitchin's right to govern themselves in accordance with their own particular values and traditions and in accordance with the self-government arrangements entered into with Canada and the Yukon. The Indigenous difference protected by the residency requirement is inextricably tied to the VGFN's connection to the settlement land. Permitting a Councillor to reside in Whitehorse would unacceptably diminish this connection and would undermine, in a non-incidental way, the VGFN's right to decide on the membership of its governing bodies. Giving effect to D's *Charter* right in such a manner would pose a real risk to the continued vitality of Indigenous difference and

would abrogate or derogate from the VGFN's right, contrary to s. 25. This engages s. 25 as a protective shield, insulating the collective right from the individual *Charter* claim.

Fourth, while s. 25 protections may be subject to other limits, no such restrictions are relevant to this dispute. The Court of Appeal found that s. 25's protections extended to the entire residency requirement, including the 14-day relocation rule, and D did not seek any relief regarding that rule, nor did she make arguments on severance. Finally, because s. 25 applies, the VGFN need not justify the residency requirement under s. 1 of the *Charter*.

Per Martin and O'Bonsawin JJ. (dissenting on the appeal): The appeal should be allowed, the cross-appeal should be dismissed, and the residency requirement should be declared to be of no force or effect. There is agreement with the majority that the *Charter* applies to the impugned residency requirement, that the VGFN is a government by its very nature, and that the residency requirement infringes D's right to equality guaranteed by s. 15(1) of the *Charter*. There is disagreement with the majority, however, that the residency requirement falls within the ambit of s. 25 of the *Charter*. Rather, as it is not aimed at recognizing the special status of Indigenous collectives within the broader Canadian state, the residency requirement falls outside the ambit of s. 25 protection. Further, the residency requirement is not demonstrably justified pursuant to s. 1 of the *Charter*.

The *Charter* applies to governmental action taken by self-governing Indigenous nations both because they are governmental in nature and because the purpose of s. 32(1) was to extend the *Charter*'s protections to address the power imbalance between the governed and those who govern. The purpose underlying the scope of the *Charter*'s applicability is to address that power imbalance by subjecting governmental action to constitutional review in order to protect individual rights and freedoms. Section 32(1) captures governmental action in respect of "matters within the authority" of Parliament and the provincial legislatures: any such governmental action is subject to *Charter* scrutiny. All orders of government are captured regardless of their connection to formal federal or provincial government structures. This broad ambit of s. 32(1) is supported by the Court's s. 32(1) jurisprudence, which has consistently affirmed the broad range of entities captured by the provision and recognized the importance of the power imbalance between the governed and those who govern to determining whether an entity is captured by s. 32(1). The broad ambit of s. 32(1) is also supported by other sections of the *Constitution Act, 1982*, for instance, s. 52(1) and s. 25, which provide guidance on how any particular interpretation of s. 32(1) would accord with the internal architecture of the Constitution of Canada.

The *Charter* therefore applies to Indigenous governments because they have lawmaking authority over legislative matters caught by s. 32(1). This recognition of self-governing Indigenous nations as governments in their own right, and not by virtue of delegated power, falls clearly within the purpose and ambit of s. 32(1). The existing s. 32(1) jurisprudence is not directly applicable to Indigenous governments.

Legal tests devised outside the distinct context of Indigenous governments should not be read as a complete answer on the scope of the *Charter*'s applicability to self-governing Indigenous nations. The delegated authority or substantial control approaches used in the s. 32(1) jurisprudence should not be read as imposing a condition that authority be delegated by Parliament or the provincial legislatures for the *Charter* to apply. Consequently, delegation under s. 91(24) of the *Constitution Act, 1867* is not required under the first branch of *Eldridge* when it is being applied to the unique situation of self-governing Indigenous nations. It is not necessary for the impugned action to stem from authority granted by federal, provincial, or territorial legislation for it to be subject to *Charter* scrutiny. To interpret s. 32(1) and the *Eldridge* framework as being limited to situations of delegated authority would prioritize an overly textual approach to s. 32(1) and deprive Indigenous people of the *Charter*'s protections when their rights have been infringed by their own governing bodies. This recognition of self-governing Indigenous nations in their own right also upholds longstanding Indigenous practices of self-governance and advances reconciliation in Canada.

There is agreement with the majority that the VGFN falls within the first branch of *Eldridge* as it is a government by nature and that, accordingly, it is subject to the *Charter*. There is also agreement that the VGFN's enactment of the residency requirement must attract *Charter* scrutiny. Indeed, the VGFN is a government by its very nature because it exercises legislative and executive powers pertaining to matters "within the authority" of Parliament and the provincial legislatures. Its structure and

functions reflect its inherently governmental nature: it creates laws and makes decisions that benefit, order, and restrict the lives of its citizens. There is disagreement with the majority's notion that an essential factor for the *Charter*'s applicability under s. 32(1) is that the source of the VGFN's lawmaking authority flows from Parliament. The VGFN is not a creature of statute, does not derive its lawmaking authority through delegation, and does not need to ground its governmental status by reference to what has been transferred from another level of government.

Section 25 of the *Charter* operates as an interpretive aid to help protect the distinct collective rights Indigenous peoples possess as Aboriginal peoples of Canada by prescribing an interpretive exercise to resolve challenges posed by competing collective Indigenous rights and individual *Charter* rights. It plays a distinct role from other *Charter* provisions, operating to preserve a form of collective rights unique to Indigenous peoples while at the same time recognizing that when Indigenous governments do make distinctions between their citizens, individuals and minorities within the collective should nevertheless benefit from all the constitutionally entrenched protections of the *Charter*. Like other *Charter* provisions, s. 25 must be interpreted purposively. While on a fair textual reading, it is capable of supporting either of the competing approaches on its effect, that is, either a shield or an interpretive prism approach, based on its nature, purpose, and history, it was intended to operate as an interpretive prism.

Section 25 furthers a particular purpose: to ensure that the introduction of a constitutionally entrenched bill of rights in Canada did not have the effect of abrogating or derogating from the unique rights held by Indigenous peoples that stem from their identity as Indigenous peoples. Legislative debates on constitutional reform shed light on its purpose. A review of the *Charter* drafting and negotiation process reveals a preservation of rights approach with respect to s. 25 — aimed at ensuring that the *Charter* would not lessen other existing rights, including unique rights held by Indigenous peoples. Earlier draft provisions of what became s. 25 suggest the government intended for the provision to protect collective Indigenous rights from being erased or excluded by the assertion of individual rights under relevant *Charter* sections. Three important conclusions about the purpose of s. 25 can be discerned from the provision's legislative origins. First, the inclusion of s. 25 was motivated by concerns about how the collective rights and interests of Indigenous peoples might interact with the constitutional entrenchment of individual rights — especially the right to equality under s. 15(1). Second, s. 25 was not intended to create or confer rights but rather was envisaged as an interpretive tool. Third, the provision's aim is to protect the special status of certain collective rights held by Indigenous peoples — rights that pertain uniquely to Indigenous peoples because they are Indigenous.

Many other important principles arising from constitutional jurisprudence, from post-1982 constitutional engagement and from international sources support the conclusion that s. 25 operates as an interpretive prism that ensures both collective and individual rights are respected. These sources support the view that s. 25 should not be

interpreted in a way that prohibits Indigenous claimants from accessing other sections of the *Charter*, including s. 15(1), even if the challenge is to their own communities' laws. The Court's jurisprudence has consistently affirmed that all parts of the Constitution must be read together and that there is no hierarchy among its various provisions. The 1996 Final Report of the Royal Commission on Aboriginal Peoples called for s. 25 to be given a flexible interpretation that takes account of the distinctive philosophies, traditions and cultural practices of Aboriginal peoples. The *United Nations Declaration on the Rights of Indigenous Peoples*, which is binding on Canada, recognizes the need to protect both the collective and individual rights of Indigenous peoples and is illustrative of how one type of right cannot absolutely trump another. Further, Indigenous nations, as governments in their own right, can entrench the rights of their citizens in constitutional documents. These Indigenous legal orders form an integral part of Canadian law and Indigenous governments are not immunized from the responsibility of respecting the individual rights and freedoms articulated in the *Charter*, subject to the interpretive function performed by s. 25 when collective Indigenous rights are implicated.

There is disagreement with the majority as to the scope of protection afforded by s. 25. Rights within the scope of s. 25 are limited to those that are truly unique to Indigenous peoples because they are Indigenous. They do not extend to all matters on which Indigenous governments may act. The majority's formulation that an "other" right will fall within the ambit of s. 25 when the party seeking to rely on it establishes that the "right protects or recognizes Indigenous difference" is too broad

and does not serve a meaningful filtering function at the rights recognition stage. It is not enough for a right to relate to Indigenous peoples to bring it within the scope of s. 25 or, in the context of self-government, for an Indigenous nation to possess broad rights to govern its community. The focus must be on the collective right itself and whether it is unique to an Indigenous community on the basis of Indigeneity. In this context, intra-group distinctions based on a personal characteristic other than Indigeneity will generally fall outside the ambit of s. 25, but s. 25 could capture laws that distinguish between Indigenous people and non-Indigenous people for the purpose of protecting interests associated with Indigenous difference. This conception ensures that s. 25 does not serve to effectively create extensive *Charter*-free zones in the context of Indigenous self-government. Members of Indigenous communities must be able to challenge the actions of their own governments — they must not be denied important *Charter* protections which are intended to apply to every person.

When s. 25 is invoked, the court must consider several issues to decide whether it applies. First, the claimant must demonstrate a breach of a *Charter* right or freedom. Second, the party relying on s. 25 must show that the implicated collective right or freedom at stake is an Aboriginal, treaty or other right or freedom that pertains to the Aboriginal peoples of Canada, such that it is unique to an Indigenous community on the basis of Indigeneity. Third, the court must attempt to reconcile the competing collective and individual rights where possible. Where there is a true conflict between both rights, it is at this point that a form of balancing must occur to reconcile the competing interests at play. In such cases, s. 25 directs the court to construe the

individual *Charter* right so as not to abrogate or derogate from the right protected by s. 25. The court must assess whether giving effect to an individual *Charter* right would impact the collective right in more than a minor or incidental way, and whether the impugned exercise of the collective right is necessary to the maintenance of the Indigenous community's distinctive culture. Interpreting s. 25 purposively means accepting limitations on what constitutes an abrogation or derogation from a s. 25 right in order to avoid situations where an insignificant incursion on a collective right within the scope of s. 25 takes primacy over a potentially significant *Charter* violation. This approach incorporates a balance between collective Indigenous rights and individual *Charter* rights.

In the instant case, as the VGFN relies on s. 25 in relation to its residency requirement, the first question is whether D's right to equality guaranteed by s. 15(1) of the *Charter* is infringed by the VGFN's enactment of the residency requirement. There is agreement with the majority that it is. The residency requirement creates a distinction directly, on its face, based on whether a VGFN citizen lives on or off the VGFN's settlement land and that distinction is on the basis of the analogous ground of Aboriginality-residence. Though the factual circumstances in this case are meaningfully distinct from those in *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203, in that the *Corbiere* context of off-reserve members is not identical to that of VGFN citizens living outside their traditional territory, the legacy of colonialism through the *Indian Act* is a common thread that connects the two groups. The discrimination faced by Indigenous people living away

from their communities as identified in *Corbiere* continues to be experienced by VGFN citizens, such that the analogous ground of Aboriginality-residence remains applicable in the instant case. The place of residence of VGFN citizens goes to the essence of their identities and, as a result, this characteristic is constructively immutable.

Further, the distinction created by the residency requirement is discriminatory because it denies D the benefit of serving in government, which is a form of political exclusion that bars her from a core aspect of democratic participation and the opportunity to affect decision-making processes that impact her. This benefit is denied in a discriminatory manner because the residency requirement reinforces the stereotypes that non-resident VGFN citizens are less worthy and entitled because they live off their traditional territory and that to be truly Aboriginal, one has to live on the reserve or the settlement land. This at the very least perpetuates disadvantage. Requiring a non-resident citizen to relocate to the settlement land to participate in community governance means requiring a person to change a constructively immutable characteristic. Such an illusory choice to move back to the settlement land is not relevant as a matter of law.

The second question is whether this case implicates a collective Indigenous right within the scope of s. 25. The residency requirement does not constitute the exercise of a right falling within the ambit of s. 25 because a self-governing Indigenous nation's right to regulate the composition of its governing bodies cannot be said to be a unique collective right, belonging to Indigenous peoples because they are Indigenous.

Rather, the residency requirement is directed at the internal regulation of the VGFN and is not aimed at recognizing the special status of Indigenous collectives within the broader Canadian state. Alternatively, even if the residency requirement did constitute the exercise of a right within the scope of s. 25, then, applying a balancing to reconcile the competing interests at play would nevertheless lead to the conclusion that s. 25 would not operate to give primacy to the residency requirement over individual *Charter* rights because the residency requirement would not constitute one that is necessary to the maintenance of the VGFN's distinctive culture.

The conclusion that s. 25 does not apply in this case does not mean that Indigenous difference is an irrelevant consideration in assessing the *Charter* claim. On the contrary — it has a significant role to play in the justification analysis under s. 1 of the *Charter*. Courts must respectfully take into account the perspective of the Indigenous community at all analytical stages. In the instant case, the residency requirement is not justified under s. 1. While it serves to advance the pressing and substantial objective of the promotion and maintenance of self-governance and connection to the homelands and it is rationally connected to this objective in that it is critical and logical that elected leaders be connected to the traditional territory by being physically present on those lands, the residency requirement is not minimally impairing of D's s. 15(1) *Charter* right and the VGFN has not shown that the benefits of the residency requirement outweigh the negative effects of the s. 15(1) breach at issue. A minimally impairing measure must make at least some accommodation of the right to participate in community governance for non-resident citizens. There is no evidence

that the VGFN has sought any meaningful alternatives to the residency requirement itself. While the residency requirement does ameliorate the effects of colonial dislocation of Vuntut Gwitchin peoples from control over their traditional territory, it also represents a significant incursion to democratic participation. It is therefore not representative of an appropriate balance between its salutary and deleterious effects.

Per Rowe J. (dissenting on the cross-appeal): D's appeal should be dismissed, the VGFN's cross-appeal should be allowed and the orders of the lower courts should be set aside. On a proper application of s. 32(1) of the *Charter*, the VGFN's enactment of the residency requirement in its Constitution is not subject to the *Charter*. In light of this conclusion, it is not necessary to address arguments concerning ss. 15(1) or 25 of the *Charter*.

The scope of the *Charter*'s application is delineated by s. 32(1) of the *Charter*. Section 32(1) governs who is subject to the burden of *Charter* rights, or, in other words, who is bound by the *Charter*. Relying on other bases for *Charter* applicability — such as s. 52(1) of the *Constitution Act, 1982* — is inconsistent with the jurisprudence. The text of s. 32(1), its history and place within the structure of the *Constitution Act, 1982*, and the jurisprudence on its purpose and scope confirm that the *Charter* applies only to the federal, provincial and territorial governments in respect of matters within their authority. It is a fundamental misconception to claim that the *Charter* applies to any entity that is a government or any activities that appear

governmental, whether or not they have a connection to the federal or a provincial government.

With respect to the text of s. 32(1), the meaning of “government” has been interpreted purposively so as to encompass the numerous manifestations of the federal and provincial governments, but other entities or their activities must exhibit a significant connection to one of those governments to fall within s. 32(1). The clear language used to address to whom and to what the *Charter* applies reflects s. 32(1)’s purpose. No interpretation can be adopted that effectively rewrites s. 32(1) of the *Charter*, and any approach to *Charter* applicability under s. 32(1) cannot ignore the clear boundaries set out within the provision itself.

The history of s. 32(1) and its place within the structure of the *Constitution Act, 1982* also confirm that the *Charter* — including s. 32(1) — was designed by the federal and provincial governments, for those governments, to entrench standards of constitutional behaviour that were tailored to the structures and philosophical underpinnings of federal and provincial governance. In contrast, the relationship between these governments and Indigenous peoples, and the place for Indigenous governance within contemporary Canada, were addressed separately in the *Constitution Act, 1982*. Most significantly, the collective rights of Indigenous peoples were given constitutional protection by means of s. 35 of the *Constitution Act, 1982*. Notably, s. 35 was placed outside of the *Charter*. While the *Charter* primarily concerned federal and provincial actors, the ultimate inclusion of s. 35 represents the

culmination of a long and difficult struggle in both the political forum and the courts for the constitutional recognition of Aboriginal and treaty rights. The federal and provincial governments understood that the scope and limits of Indigenous governance would be addressed under s. 35 rather than through the *Charter*. As such, Indigenous internal governance does not fall within the scope of the *Charter* unless there exists a significant connection to the federal or a provincial government.

As well, the jurisprudence on the purpose and scope of s. 32(1) makes clear that only the federal and provincial governments were intended to fall within the scope of this provision. Consistent with a purposive approach to *Charter* interpretation, the scope of s. 32(1) must be interpreted in a manner that reflects how the federal and provincial governments take form in modern Canadian society. The jurisprudence has recognized that entities within the modern administrative state take on various forms, with varying degrees of autonomy from the federal and provincial governments in their operations. Thus, a significant connection to the federal or a provincial government is required to ensure that those governments cannot evade *Charter* scrutiny, including by acting through entities that are effectively extensions of those governments or by delegating the implementation of particular policies or programs to non-governmental entities. If the federal and provincial governments cannot perform an activity directly without violating the *Charter*, they cannot evade *Charter* scrutiny by delegating the activity to a non-governmental entity. Even if another entity is charged with performing it, the nature of the activity has not changed: it remains that of the federal or a provincial government. The non-governmental entities are merely the vehicles chosen by the

government for the accomplishment of what are, in essence, activities that can be ascribed to that government.

The Court in *Eldridge* set out a two-branch framework to give effect to s. 32(1). Under the first branch, a court may conclude that an entity is itself “government” for the purposes of s. 32(1) either by its very nature or by virtue of the degree of governmental control exercised over it. The level of control must be routine or regular rather than ultimate or extraordinary; this standard entails a significant connection to the federal or a provincial government. Entities found to be within the scope of s. 32(1) have been described in the jurisprudence as part of the apparatus or fabric of government; as subordinate bodies, organs, or an emanation of government; or assimilated to the government itself. In each case, the entity owed both its existence and authority to the federal or a provincial government. A significant connection to the Crown is required. If the entity itself is found to fall under s. 32(1), all of the entity’s activities are subject to the *Charter*. Under the second branch of the framework, a court may conclude that while the entity itself cannot be equated with the federal or a provincial government, some of its particular activities can be ascribed to government, namely where the activity involves the implementation of a specific statutory scheme or a government program. In such a case, only those activities attract *Charter* scrutiny because they are, effectively, the activities of the federal or a provincial government under s. 32(1). A significant connection to the federal or a provincial government is also required under this branch. What is necessary is a direct and precisely-defined connection between the federal or provincial government and the activity.

In the instant case, the various arrangements between the VGFN and the federal and/or Yukon governments — including multiple instruments, such as the VFGN Final Agreement, a treaty protected by s. 35(1) of the *Constitution Act, 1982*, the VGFN Self-Government Agreement, and legislation passed by Parliament and the Yukon legislature to give effect to these agreements — do not satisfy the significant connection necessary to bring the VGFN or its enactment of the residency requirement within the scope of s. 32(1). To imply that because the self-government agreement in this case was authorized by federal legislation, the VGFN is somehow an emanation of federal authority, is fundamentally inconsistent with the nature, status and purpose of Indigenous self-government. The idea of self-government is not that it is an authority that flows from Parliament, but rather involves Indigenous peoples exercising authority that is rightfully theirs. None of the aspects of the VGFN arrangements with the federal and Yukon governments show that either branch of the s. 32(1) framework applies. To the contrary, they reinforce that the VGFN is distinct from the Crown, including in enacting the residency requirement pursuant to its own laws, customs, and practices. To apply the *Charter* would amount to viewing the VGFN as an extension of either the federal or the Yukon government or its enactment of the residency requirement as ascribable to one of them. Such an understanding is not only inconsistent with the VGFN's arrangements with both governments, but is also inconsistent with the special relationship between the federal and territorial governments and the Vuntut Gwitchin. The VGFN's governance structures and internal decisions are rooted in its own legal traditions and choices and do not attract *Charter* scrutiny under s. 32(1).

Moreover, imposing the *Charter* on the VGFN is not consistent with the objective of reconciliation and with the need to respect the ability and the right of the Vuntut Gwitchin to make decisions pursuant to their own laws, customs, and practices. This includes decisions about the adoption and amendment of protections for the rights and freedoms of VGFN citizens. The philosophical underpinnings of the *Charter* may not necessarily be commensurate with some Indigenous worldviews and with the structure of Indigenous governing bodies which seek to maintain traditional structures integrated with contemporary forms of government. There may be tensions between the *Charter's* general focus on rights and Indigenous communities' preference for a more relational, reciprocal understanding of relationships, duties, and responsibilities. And, Indigenous communities may see the balance between individual and collective rights, and between individuals and the state, differently. Even where the value systems and legal traditions of specific Indigenous communities point to the same result as the *Charter*, their mode of reasoning may differ. Rather than a monolithic form of rights analysis, Indigenous communities can craft protections for human rights which integrate their particular and distinct forms of Indigenous law.

While *Charter* protections are not inherently in tension with the desires of Indigenous communities, including the VGFN, and while it should not be assumed that individual rights are necessarily in conflict with collective Indigenous governance, nor that Indigenous communities are static, it is clear that the *Charter* should not be imposed on Indigenous peoples. For the *Charter* to be unilaterally imposed through a questionable interpretation of s. 32(1) would turn the clock back to a time when

Aboriginal peoples were often not given the opportunity to participate when important decisions affecting their constitutional rights were made. The VGFN's choices should not be scrutinized by transposing an instrument designed by and for the federal and provincial governments onto the Vuntut Gwitchin, who did not participate in its creation or agree to its terms. To do so would be to subject the VGFN to the sort of oversight from which it sought to remove itself.

Finally, the VGFN never agreed to adopt the protections set out in the *Charter* or to apply *Charter* protections to its Constitution and laws. Neither the VGFN Final Agreement nor the VGFN Self-Government Agreement refers to the *Charter*. None of their provisions suggest, much less clearly and unambiguously state, that the VGFN agreed to the applicability of the *Charter*. Rather, the VGFN enacted its own protections for the rights of its citizens, many of which mirror the *Charter* but are adjusted to its people's own laws, customs, and practices. Individual rights are respected by the VGFN and VGFN citizens are not deprived of fundamental rights; nor do they exist in a rights-free zone. The VGFN's governance structures include protections for equality rights. As well, the VGFN has constitutionally entrenched rights and freedoms alongside procedures for VGFN citizens to challenge VGFN laws. Any challenge to a provision of the VGFN Constitution must be addressed pursuant to the VGFN's own internal structures and processes. Because D seeks to challenge an internal rule of the VGFN in order to participate in its governance, her claim must therefore be addressed based on the rights enshrined within the VGFN Constitution, pursuant to the VGFN's own governance structures and processes, not the *Charter*.

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By Rowe J. (dissenting in part)

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Communications Inc. v. Davidson, [1989] 1 S.C.R. 1038; *Harrison v. University of British Columbia*, [1990] 3 S.C.R. 451; *Douglas/Kwantlen Faculty Assn. v. Douglas College*, [1990] 3 S.C.R. 570; *First Nation of Nacho Nyak Dun v. Yukon*, 2017 SCC 58, [2017] 2 S.C.R. 576; *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010; *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43, [2010] 2 S.C.R. 650; *Mitchell v. M.N.R.*, 2001 SCC 33, [2001] 1 S.C.R. 911; *R. v. Van der Peet*, [1996] 2 S.C.R. 507; *R. v. Marshall*, 2005 SCC 43, [2005] 2 S.C.R. 220; *Manitoba Metis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 14, [2013] 1 S.C.R. 623; *Public Service Alliance of Canada v. Francis*, [1982] 2 S.C.R. 72; *Ontario Public School Boards' Assn. v. Ontario (Attorney General)* (1997), 151 D.L.R. (4th) 346; *R. v. Morgentaler*, [1988] 1 S.C.R. 30; *In re: Certified Questions II*, 6 Nav. R. 105 (1989); *R. v. Kapp*, 2008 SCC 41, [2008] 2 S.C.R. 483; *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511; *Kruger v. The Queen*, [1978] 1 S.C.R. 104.

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APPEAL and CROSS-APPEAL from a judgment of the Yukon Court of Appeal (Bauman C.J. and Newbury and Frankel JJ.A.), 2021 **YKCA 5**, 495 C.R.R. (2d) 98, [2021] Y.J. No. 54 (Lexis), 2021 CarswellYukon 56 (WL), setting aside the decision of Veale C.J., 2020 YKSC 22, 461 C.R.R. (2d) 230, [2020] Y.J. No. 38

(Lexis), 2020 CarswellYukon 44 (WL). Appeal and cross-appeal dismissed, Rowe J. dissenting on the cross-appeal and Martin and O’Bonsawin JJ. dissenting on the appeal.

Bridget Gilbride and Harshi Mann, for the appellant/respondent on cross-appeal.

Kris Statnyk, Krista Robertson and Elin Sigurdson, for the respondent/appellant on cross-appeal.

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Catheryne Bélanger and Sylvie Boulay, for the intervener the Attorney General of Quebec.

Leah M. McDaniel and Michele Annich, K.C., for the intervener the Attorney General of Alberta.

I. H. Fraser and Katie Mercier, for the intervener the Government of Yukon.

Roy W. Millen, Joshua Hutchinson and Alison Burns, for the intervener the British Columbia Treaty Commission.

Jason T. Madden, Alexandria Winterburn and Alexander DeParde, for the interveners the Métis Nation of Ontario and the Métis Nation of Alberta.

Gavin Gardiner and Caroline Grady, for the intervener the Carcross/Tagish First Nation.

Jeffrey Nicholls and Kate Blomfield, for the intervener the Teslin Tlingit Council.

Andrew Lokan and Emma Wall, for the intervener the Congress of Aboriginal Peoples.

Tammy Shoranick and James M. Coady, K.C., for the intervener the Council of Yukon First Nations.

Bruno Gélinas-Faucher, for the intervener the Pan-Canadian Forum on Indigenous Rights and the Constitution.

Bryn Gray, for the intervener the Canadian Constitution Foundation.

Ian Knapp and Katherine Bellett, for the intervener the Band Members Alliance and Advocacy Association of Canada.

Bruce J. Slusar, for the intervener the Federation of Sovereign Indigenous Nations.

The judgment of Wagner C.J. and Côté, Kasirer and Jamal JJ. was delivered by

KASIRER AND JAMAL JJ. —

I. Overview

[1] As a self-governing Indigenous community in the Yukon, the Vuntut Gwitchin First Nation (or the VGFN) has its own Constitution that provides for certain rights and freedoms for its citizens, rules for the organization of its government, as well as electoral rules and standards. At the heart of this appeal is a requirement in the VGFN Constitution that the elected Chief and Councillors reside on the settlement land of the First Nation, or relocate there within 14 days of the election. The VGFN's seat of government is based in Old Crow, a village located about 800 kilometres north of Whitehorse in the traditional territory of the Vuntut Gwitchin and constituting the VGFN's main community in its settlement land.

[2] Cindy Dickson, a citizen of the VGFN and of Canada, lives in Whitehorse and is constrained, for personal reasons, to stay there. She wishes to stand for election as a VGFN Councillor and says the residency requirement discriminates against her as a non-resident of the settlement land. She brought a petition in the Supreme Court of

Yukon arguing that the requirement violates both her right to equality guaranteed under s. 15(1) of the *Canadian Charter of Rights and Freedoms* and her right to equality guaranteed by Article IV of the VGFN Constitution (in this Court, Ms. Dickson did not pursue her original challenge based on the equality guarantee in the VGFN Constitution).

[3] Here the debate has focused on the application of the *Charter* to the VGFN, the ambit of Ms. Dickson's equality right under s. 15(1), and the proper interpretation of s. 25 of the *Charter*. The VGFN says the *Charter* does not apply to it as a self-governing First Nation. Alternatively, should the *Charter* apply, the residency requirement does not violate Ms. Dickson's right to equality and, even if it did, the requirement is nevertheless valid as it is "shielded" by s. 25 of the *Charter*. Specifically, the VGFN submits that the residency requirement protects collective minority rights relating to its traditional Indigenous modes of government and leadership. As a collective Indigenous right, the provision of the VGFN Constitution cannot be abrogated or derogated from by Ms. Dickson's individual *Charter* right.

[4] This appeal raises two novel issues bearing on the application of the *Charter* to a self-governing Indigenous community. First, it invites the Court to consider whether, pursuant to s. 32(1) of the *Charter*, the VGFN is a government by nature or whether it is exercising a governmental activity so that Ms. Dickson's individual *Charter* right would apply to its residency requirement. Second, if the *Charter* does apply to the VGFN, the Court must determine whether s. 25 can be

invoked by the VGFN to shield the residency requirement from Ms. Dickson's *Charter* challenge. Both the Supreme Court of Yukon and the Court of Appeal held that the *Charter* applied and that if Ms. Dickson's s. 15(1) equality right was infringed, the residency requirement was shielded by s. 25. Ms. Dickson appealed on the question of the constitutional validity of the residency requirement, and the VGFN cross-appealed on the question of the application of the *Charter*.

[5] We would dismiss Ms. Dickson's appeal. The *Charter* applies to the VGFN and to its citizens like Ms. Dickson, principally, but not only, because the VGFN is a government by nature. The circumstances here show that for Indigenous communities, s. 32(1) and s. 25 are intimately connected. It is true that the application of individual *Charter* rights to a self-governing Indigenous community may be thought to inhibit the pursuit of rules designed to protect minority Indigenous rights and interests. But s. 25, by providing protection for collective Indigenous interests as a social and constitutional good for all Canadians, acts as a counterweight. Properly understood, s. 25 allows for the assertion of individual *Charter* rights except where they conflict with Aboriginal rights, treaty rights, or "other rights or freedoms" that are shown to protect Indigenous difference.

[6] While Ms. Dickson has succeeded in showing a *prima facie* infringement of her right to equality under s. 15(1) of the *Charter*, as a non-resident seeking election to the VGFN government, the VGFN has satisfied us that s. 25 protects its residency requirement from abrogation or derogation by her *Charter* right. Tied to ancient

practices of government that connect leadership of the VGFN community to the settlement land, the residency requirement protects Indigenous difference and, pursuant to s. 25, cannot be abrogated or derogated from by Ms. Dickson's individual *Charter* right with which it is in irreconcilable conflict.

II. Background

A. *The Parties*

[7] The appellant, Cindy Dickson, is a Canadian citizen and a citizen of the respondent, the VGFN, whose traditional territory is in northern Yukon. The VGFN's seat of government is in the village of Old Crow, which is located in the VGFN's settlement land. Ms. Dickson currently lives in Whitehorse, the capital of the Yukon, about 800 kilometres south of Old Crow.

[8] Old Crow is the northernmost community in the Yukon and the most northwest in Canada. Because there are no all-season roads to Old Crow, the community is regularly accessible only by plane: it is a "fly in, fly out" community. About 260 VGFN citizens live in Old Crow; about 301 VGFN citizens live elsewhere, primarily in Whitehorse but also in other parts of Canada. The Vuntut Gwitchin were traditionally a nomadic people.

[9] During her lifetime, Ms. Dickson has lived in both Whitehorse and Old Crow, in other Yukon communities, and in Victoria, British Columbia. She was born

in Whitehorse, lived in Old Crow from the age of 9 to 16, and then moved back to Whitehorse to finish high school because Old Crow did not have a full high school program. She visited during the summers and still owns a cabin there. She also has family and friends in Old Crow.

B. *Ms. Dickson's Constitutional Challenge*

[10] Ms. Dickson wishes to stand for election as a VGFN Councillor — a paid full-time position. In her petition before the Supreme Court of Yukon, she asserted that her right to equality under s. 15(1) of the *Charter*, or in the alternative, under the equality guarantee in Article IV of the VGFN Constitution, is unjustifiably infringed by a provision of the VGFN Constitution requiring the elected Chief and Councillors to reside on the VGFN's settlement land at the time of their election or to relocate there within 14 days after their election. She says she cannot move to Old Crow largely because her son requires access to medical care unavailable there, but also because her job and her son's father are in Whitehorse.

[11] The VGFN says the residency requirement reflects the VGFN's longstanding practice that its Chief and Councillors live on its traditional territory. As the trial judge found, the Vuntut Gwitchin have governed themselves according to their traditional practices since well before Confederation. From time immemorial, all VGFN Chiefs and Councillors have lived on the VGFN's traditional territory. In the last 30 years, they have always lived in Old Crow. Under funding arrangements with

the federal and Yukon governments, most programs and services administered by the VGFN government are for VGFN citizens living on the VGFN's settlement land.

C. *Legal Framework for VGFN Self-Government and the Residency Requirement*

[12] Ms. Dickson's challenge to the residency requirement arises in the context of the legal framework established by the modern land claim treaty process and self-government agreements among the VGFN and the federal and Yukon governments. That framework involves an "umbrella agreement" negotiated with all 14 of the Yukon First Nations, as well as specific modern treaties and self-government agreements with 11 individual First Nations, including the VGFN, which have been approved and given effect by federal and territorial legislation.

[13] Ms. Dickson's challenge also arises in the context of the legal framework of self-government cultivated by the Vuntut Gwitchin since time immemorial. Many aspects of that framework are reflected in the VGFN Constitution. The residency requirement is said to be grounded in the culture, law, and values of the Vuntut Gwitchin, and to be an expression of their longstanding land-based governance system.

(1) The Umbrella Agreement

[14] In 1993, after 20 years of negotiation, representatives of all Yukon First Nations and the federal and Yukon governments concluded an "umbrella agreement" to establish a framework for modern comprehensive land claims agreements in the

Yukon. The umbrella agreement contemplated specific agreements between the federal government, the Yukon government, and individual First Nations that would be constitutionally protected as treaties under s. 35 of the *Constitution Act, 1982*.

[15] The umbrella agreement has been described as a “monumental achievement” (*Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53, [2010] 3 S.C.R. 103, at para. 2). It established a framework for Indigenous self-government and the management of land and resources by Yukon First Nations. Under treaties concluded after “lengthy negotiations between well-resourced and sophisticated parties”, the Yukon First Nations “surrendered their Aboriginal rights in almost 484,000 square kilometres, roughly the size of Spain, in exchange for defined treaty rights in respect of land tenure and a quantum of settlement land (41,595 square kilometres), access to Crown lands, fish and wildlife harvesting, heritage resources, financial compensation, and participation in the management of public resources” (para. 9).

[16] The umbrella agreement has also been called a “model for reconciliation” (*First Nation of Nacho Nyak Dun v. Yukon*, 2017 SCC 58, [2017] 2 S.C.R. 576, at para. 10). The 11 specific treaties negotiated under this agreement promote reconciliation “not only by addressing grievances over the land claims but by creating the legal basis to foster a positive long-term relationship” between Indigenous and non-Indigenous communities and by placing that relationship “in the mainstream legal system with its advantages of continuity, transparency, and predictability” (*Beckman*,

at paras. 10 and 12). The Yukon treaties are modern treaties with a “*sui generis* nature” that “set out in precise terms a co-operative governance relationship” (*First Nation of Nacho Nyak Dun*, at para. 33).

(2) The VGFN Final Agreement

[17] In 1993, the VGFN and the federal and Yukon governments concluded the Vuntut Gwitchin First Nation Final Agreement, a land claim agreement under the framework of the umbrella agreement. The Final Agreement provides for the negotiation of a self-government agreement addressing a host of the VGFN’s self-government powers “in conformity with the Constitution of Canada” (s. 24.1.2). It also states that any self-government agreement “shall not affect” the rights of VGFN persons “as Canadian citizens” and, unless otherwise provided under a self-government agreement or legislation enacted thereunder, “their entitlement to all of the services, benefits and protections of other citizens applicable from time to time” (s. 24.1.3). Among other things, the Final Agreement provides that, in order to be tax exempt under s. 149(1) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.), the VGFN would be conferred the status of a “municipality or public body performing the functions of government or a municipal corporation” (s. 24.8.1). Absent agreement to the contrary, the VGFN is restricted “to the provision of government or other public services”, and is not permitted to engage in commercial activities (s. 24.8.2).

[18] Like the other Yukon First Nations land claim agreements, the VGFN’s Final Agreement has been approved and given effect by federal and territorial

legislation. It has also been given the status of a treaty under s. 35 of the *Constitution Act, 1982* (see *Yukon First Nations Land Claims Settlement Act*, S.C. 1994, c. 34, s. 6(1); *An Act Approving Yukon Land Claim Final Agreements*, R.S.Y. 2002, c. 240, s. 2). The federal legislation provides that the *Indian Act*, R.S.C. 1985, c. I-5, no longer applies to the VGFN settlement land, but otherwise federal and territorial laws generally continue to apply to the VGFN and its settlement land (*Yukon First Nations Land Claims Settlement Act*, ss. 12 and 13).

(3) The VGFN Self-Government Agreement, the Self-Government Legislation, and the VGFN Constitution

(a) *The VGFN's Self-Government Agreement*

[19] As contemplated by the Final Agreement, the VGFN and the federal and Yukon governments concluded the Vuntut Gwitchin First Nation Self-Government Agreement (1993), which states that the VGFN “shall have” self-government powers, including, among other things, the power to adopt a VGFN Constitution (s. 10.0), legislative powers (s. 13.0), and taxation powers (s. 14.0).

[20] As required by the Final Agreement, the Self-Government Agreement “shall not affect the rights of [VGFN] Citizens as Canadian citizens”, and, unless otherwise provided pursuant to the Self-Government Agreement or a law enacted by the VGFN, “the entitlement of [VGFN] Citizens to all of the benefits, services, and protections of other Canadian citizens applicable from time to time” (s. 3.6).

[21] The Self-Government Agreement, unlike the Final Agreement, does not have the status of a treaty under s. 35 of the *Constitution Act, 1982* (Final Agreement, at s. 24.12.1). Even so, this does not preclude the VGFN from later acquiring constitutional protection for self-government under future constitutional amendments, if agreed to by the VGFN and the federal government (Final Agreement, at s. 24.12.2).

[22] The VGFN says that the Final Agreement and the Self-Government Agreement are silent regarding the application of the *Charter*, and that during the negotiations it opposed provisions that would have applied the *Charter* to VGFN self-government. The VGFN's position is that the "VGFN did not agree the *Charter* would apply. Instead, [it] enacted [its] own *Constitution*, which provides protection for individual rights of VGFN Citizens within contemporary VGFN self-governance" (R.F., at para. 3).

(b) *The Self-Government Legislation*

[23] The VGFN's Self-Government Agreement has been approved and given effect by federal and territorial legislation (*Yukon First Nations Self-Government Act*, S.C. 1994, c. 35; *First Nations (Yukon) Self-government Act*, R.S.Y. 2002, c. 90). The Yukon legislation approves the various self-government agreements and gives them "the force of law" (s. 2). The federal legislation regulates the exercise of self-government powers by Yukon First Nations in greater detail:

- Yukon First Nation self-government agreements are to be “in accordance with the Constitution of Canada” (preamble).
- Each of the Yukon First Nations is “a legal entity having the capacity, rights, powers and privileges of a natural person” (s. 7). Further, each Yukon First Nation “succeeds to the rights, titles, interests, obligations, assets and liabilities of its predecessor band [which was constituted as a band under the *Indian Act*] and that band ceases to exist” (ss. 2, 6(1) and Sch. I).
- The constitution of a Yukon First Nation “shall”, among other matters, “in a manner consistent with its self-government agreement, provide for . . . the governing bodies of the first nation and their composition, membership, powers, duties and procedures” and “the recognition and protection of the rights and freedoms of citizens” (s. 8(1)(b) and (d)).
- Federal and territorial laws apply to Yukon First Nations (s. 16), except for the *Indian Act*, which no longer applies to Yukon First Nations, other than to register First Nation citizens as “Indians” (s. 17(1)).
- The federal legislation prescribes rules and procedures for a Yukon First Nation’s exercise of lawmaking authority. Yukon First Nations must maintain a register of laws and adopt procedures for the registration of laws, and the federal legislation stipulates rules for the commencement and proof of laws (s. 10). The federal legislation also

lists the specific legislative powers that Yukon First Nations may exercise (s. 11 and Sch. III).

- Each Yukon First Nation is deemed to be “a public body performing a function of government in Canada” in order to be tax exempt under s. 149(1)(c) of the *Income Tax Act* (s. 18(1)).
- For greater certainty, the Yukon First Nation settlement lands are stated to “remain lands reserved for the Indians within the meaning of class 24 of section 91 of the *Constitution Act, 1867*” (s. 22(4)).

(c) *The VGFN Constitution*

[24] In accordance with the federal legislation, the VGFN Constitution details how the VGFN is governed, and it is stated to be the supreme law of the VGFN, subject only to the VGFN’s Self-Government Agreement (Article II(3)). The VGFN Constitution states that “[t]he seat of government for the Vuntut Gwitchin First Nation shall be located within Settlement Land” (Article II(2)). As noted above, the Self-Government Agreement decrees that it “shall not affect the rights of [VGFN] Citizens as Canadian citizens” (s. 3.6.1).

[25] The rights and freedoms set out in the VGFN Constitution are themselves “subject only to such reasonable limits as can be demonstrably justified in a free and democratic Vuntut Gwitchin society” (Article IV(1)). The VGFN Constitution guarantees certain rights of VGFN citizens (Article IV), including the right of

individuals to be equal before and under the laws of the VGFN and the right to the equal protection and benefit of VGFN law without discrimination (Article IV(7)). The Constitution states that every VGFN citizen “has the right to make political choices, to participate in political activities, and to express a view on any public issue” (Article IV(3)). The Constitution also outlines the organization of the VGFN government (Article V), and establishes an elected Council to govern the VGFN consisting of one Chief and four Councillors (Article VIII).

[26] Under the VGFN Constitution, a VGFN citizen who seeks to run for the position of Chief or Councillor must be 18 years or older and have no indictable offence convictions for five years before the election (Article XI(1)). Candidates for office must also meet the residency requirement — they must reside on the VGFN’s settlement land or relocate there “within 14 days after election day” (Article XI(2)). This is the provision challenged by Ms. Dickson.

[27] The validity of a VGFN law (including the VGFN Constitution) may be challenged in the Yukon Supreme Court until the VGFN establishes its own court (Article II(5)). To date, no VGFN court has been established.

III. Judicial History

A. *Supreme Court of Yukon, 2020 YKSC 22, 461 C.R.R. (2d) 230 (Veale C.J.)*

[28] The trial judge rejected Ms. Dickson’s constitutional challenge to the residency requirement in the VGFN Constitution. He accepted that the *Charter* applies to the residency requirement, but ruled that the requirement does not infringe s. 15(1) of the *Charter*, except for the 14-day relocation rule, which he would have severed. In the alternative, the trial judge ruled that even if the residency requirement infringes s. 15(1) of the *Charter*, s. 25 of the *Charter* acts as a shield to prevent *Charter* rights, such as Ms. Dickson’s rights under s. 15(1), from abrogating or derogating from the exercise of self-government rights by the VGFN.

[29] The trial judge accepted that “nothing in the VGFN Final Agreement or VGFN Self-Government Agreement explicitly states that the *Charter* does not apply to the VGFN Government” (para. 118). He noted that the Final Agreement and the Self-Government Agreement “do not expressly refer to the application of the *Charter*” (para. 110). He added that s. 24.1.2 of the Final Agreement provided that the self-government agreement to be negotiated was to be “in conformity with the Constitution of Canada”, which includes the *Charter* (para. 110).

[30] The trial judge held that the *Charter* applies to the residency requirement of the VGFN Constitution, whether the residency requirement is viewed as an exercise of an inherent right of self-government or as an “exercise of the VGFN Self-Government Agreement implemented by federal and territorial legislation” (para. 130). He stated that “[b]oth are parts of Canada’s constitutional fabric” (para. 130). The trial judge also held that “[t]he VGFN government, Constitution and laws are part of

Canada's constitutional fabric" (para. 131). In his view, the *Charter* applies to the VGFN government, Constitution, and laws, and the "rights of VGFN citizens as Canadian citizens includes the exercise of their rights and freedoms guaranteed in the *Charter*" (para. 131). The VGFN acts as a government and performs government activities, and is thus subject to the *Charter* (para. 131).

[31] The trial judge rejected Ms. Dickson's challenge to the residency requirement under s. 15(1) of the *Charter*, and did not address her alternative argument under the equality guarantee of the VGFN Constitution. He ruled that it is not discriminatory to require a salaried lawmaker to reside on the settlement land that will be the focus of the legislative function of Chief and Council (para. 156). Even so, he accepted that the 14-day relocation rule creates a disadvantage and could result in arbitrary disenfranchisement, contrary to s. 15(1) of the *Charter*, and cannot be justified under s. 1 of the *Charter* (paras. 162-65). He severed this aspect of the residency requirement, but suspended the declaration of invalidity for 18 months to allow the VGFN time to review the matter before the next election date (paras. 166-71).

[32] In the alternative, the trial judge added that if the residency requirement breaches s. 15(1) of the *Charter* even with the words "within 14 days after election day" severed, then s. 25 of the *Charter* "shields" the VGFN's right to adopt the requirement as part of the VGFN Constitution. In his view, Ms. Dickson's right to be elected but continue to reside in Whitehorse, some 800 kilometres away from the VGFN's settlement land, would abrogate or derogate from or impair the residency

requirement, which the VGFN has constitutionalized as a self-governing First Nation (para. 210).

B. *Court of Appeal of Yukon, 2021 YKCA 5, 495 C.R.R. (2d) 98 (Bauman C.J. and Newbury J.A., Frankel J.A. Dissenting in Part)*

[33] Ms. Dickson appealed the trial judge's ruling on the basis that he erred in concluding that only the 14-day relocation rule infringes s. 15(1) of the *Charter*, and in the alternative, that s. 25 of the *Charter* shields any infringement. The VGFN cross-appealed the trial judge's rulings that the *Charter* applies to the VGFN and its Constitution, and that the relocation rule infringes s. 15(1) of the *Charter*.

[34] A majority of the Yukon Court of Appeal allowed Ms. Dickson's appeal and allowed the VGFN's cross-appeal, concluding that the residency requirement (including the 14-day relocation rule) does not infringe the *Charter*. The court accepted that the *Charter* applies to the residency requirement and ruled that the residency requirement as a whole infringes s. 15(1) of the *Charter*, but held that s. 25 of the *Charter* shields the residency requirement from abrogation or derogation by individual *Charter* rights. Justice Frankel wrote a partial dissent concerning the precise disposition of the appeal and whether the court should make declarations, but those issues are not before this Court. He agreed with the majority reasons that Ms. Dickson's *Charter* challenge to the residency requirement should fail. He also agreed with the majority's conclusion to set aside the trial judgment and dismiss the petition. He disagreed that the court's order should contain declarations. He would have dismissed Ms. Dickson's

appeal, allowed the VGFN's cross-appeal, and refrained from making the declarations set out in the majority's disposition.

[35] Although the trial judge's order had stated that the *Charter* applies to the VGFN's "Government, Constitution and laws", the Court of Appeal narrowed the issue to whether the *Charter* applies to the residency requirement specifically (paras. 74 and 83). With respect to whether the Final Agreement and Self-Government Agreement expressly addressed the application of the *Charter* to the VGFN, the Court of Appeal noted that "just as the VGFN negotiators did not wish to acknowledge the *Charter* as binding on them, the negotiators for Canada could not be seen to agree to any 'Charter-free zone', given the *Charter*'s status as the 'supreme law' of Canada" (para. 97). The court stated that the Final Agreement and Self-Government Agreement support the view that the *Charter* applies to the residency requirement, and that all VGFN citizens "remain entitled to their rights under the *Charter* in the same way as other citizens of Canada" (para. 97).

[36] The Court of Appeal accepted that the *Charter* applies to the residency requirement, whether the source of the VGFN's authority to impose it is the VGFN's inherent right of self-government or the VGFN's Final Agreement and Self-Government Agreement as ratified by federal and territorial legislation. On either basis, the court held, the VGFN is "by its very nature" exercising governmental powers under s. 32(1) of the *Charter*, such that the *Charter* applies (para. 98).

[37] The Court of Appeal concluded that the residency requirement infringes s. 15(1) of the *Charter* by requiring Ms. Dickson to choose between the right to seek office and the right to remain in Whitehorse (paras. 110 and 112). However, it held the residency requirement is “shielded”, in its entirety, by s. 25 of the *Charter* (paras. 149 and 158). As the court explained, “to apply s. 15(1) would indeed derogate from the Vuntut Gwitchin’s rights to govern themselves” in accordance with their values, traditions, and self-government arrangements (para. 149). As a result, the court ruled that the residency requirement, including the 14-day relocation rule, was valid. The court also noted that although Ms. Dickson had pursued her claim under the *Charter*, she “may elect hereafter to pursue a similar claim under the VGFN Constitution” (para. 157), which she had pleaded in the alternative in her petition but which the trial judge did not address.

IV. Relevant Constitutional Provisions

[38] The relevant provisions of the *Charter* and the VGFN Constitution read as follows:

Canadian Charter of Rights and Freedoms

1 The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

15 (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability

25 The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including

(a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and

(b) any rights or freedoms that now exist by way of land claims agreements or may be so acquired.

32 (1) This Charter applies

(a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and

(b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

Vuntut Gwitchin First Nation Constitution

**ARTICLE II — VUNTUT GWITCHIN FIRST NATION
AUTHORITY/LOCATION**

2. The seat of government for the Vuntut Gwitchin First Nation shall be located within Settlement Land as advised by the General Assembly.

3. This Constitution is the supreme law of the Vuntut Gwitchin First Nation, subject only to the:

(a) Vuntut Gwitchin First Nation Self-Government Agreement; and

(b) rights and freedoms set out in this Constitution.

ARTICLE XI — TERMS OF OFFICE AND QUALIFICATIONS

1. Any person desiring to run for Chief or Councillor must meet the following qualifications:

(a) Be 18 years or older;

(b) Be ordinarily resident in Canada;

(c) No indictable offence convictions for 5 years preceding the election; and

(d) Be a [VGFN] Citizen.

2. If an eligible candidate for Chief or Councillor does not reside on Settlement Land during the election and wins their desired seat they must relocate to Settlement Land within 14 days after election day.

V. Issues

[39] This appeal raises two issues. The first issue is whether the *Charter* applies to the VGFN's residency requirement. If the *Charter* applies, the second issue is whether the residency requirement unjustifiably infringes s. 15(1) of the *Charter* by barring Ms. Dickson from serving on the VGFN Council unless she moves from Whitehorse to Old Crow within 14 days of her election to the VGFN Council. The second issue requires the Court to consider the framework for analyzing whether Ms. Dickson's s. 15(1) *Charter* right, properly construed, abrogates or derogates from an Aboriginal, treaty, or other right or freedom pertaining to the Aboriginal peoples of Canada under s. 25 of the *Charter*, as well as the consequences that follow if it does, and those that follow if it does not.

VI. Analysis

A. *Does the Charter Apply to the VGFN's Residency Requirement?*

(1) Section 32(1) of the Charter: General Principles

[40] The application of the *Charter* is addressed, in particular, in s. 32(1):

32 (1) This Charter applies

(a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and

(b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

[41] Section 32(1) identifies certain entities that are bound by the *Charter*. They include the legislature and government of each province in respect of provincial matters, as well as the federal Parliament and government in respect of federal matters, which include territorial governments and territorial matters. As a result, under s. 32(1), the *Charter* applies broadly to the legislative, executive, and administrative branches of government in respect of all matters within their authority (*Greater Vancouver Transportation Authority v. Canadian Federation of Students — British Columbia Component*, 2009 SCC 31, [2009] 2 S.C.R. 295, at para. 14; *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573, at p. 598).

[42] Section 32(1) also explicitly contemplates that the *Charter* applies to entities other than Parliament, the provincial legislatures, and the federal, provincial, or territorial governments. This is because s. 32(1) applies to “matters within the authority” of “the particular legislative body that created them”, which includes “entities that are controlled by government or that perform truly governmental functions” (*Godbout v. Longueuil (City)*, [1997] 3 S.C.R. 844, at para. 48).

[43] As a result, all exercises of governmental authority by Parliament or the provincial legislatures under the *Constitution Act, 1867* are subject to the *Charter*. The words “within the authority of Parliament” and “within the authority of the legislature of each province” in s. 32(1)(a) and (b) refer to “the division of powers in ss. 91 and 92 of the *Constitution Act, 1867*” (*Operation Dismantle Inc. v. The Queen*, [1985] 1 S.C.R. 441, at pp. 463-64, per Wilson J., and at p. 455, per Dickson J. (as he then was) for the majority). As noted by Professors Peter W. Hogg and Wade K. Wright, the phrase “in respect of all matters within the authority of . . . limits the application of the Charter to laws within the distribution-of-powers authority of the Parliament or the Legislature” (*Constitutional Law of Canada* (5th ed. Supp.), at § 15:2; see also H. Brun, G. Tremblay and E. Brouillet, *Droit constitutionnel* (6th ed. 2014), at pp. 971 et seq.).

[44] The objective of the broad wording employed in s. 32(1) of the *Charter* is to prevent Parliament, the legislatures, and the federal, provincial, and territorial governments from avoiding their *Charter* obligations by conferring certain of their legislative responsibilities or powers on other entities that are not ordinarily subject to the *Charter* (*Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624, at para. 42; *Godbout*, at para. 48; *Greater Vancouver Transportation Authority*, at paras. 14 and 22).

[45] Section 32(1) of the *Charter*, as the entry point for the *Charter*'s application, must be interpreted in a manner that is flexible, purposive, and generous, rather than technical, narrow, or legalistic. Such an approach serves to secure for

individuals and relevant collective minorities the full benefit of the *Charter*'s protections and to constrain government action inconsistent with those protections (*R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at p. 344; *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, at p. 156; Hogg and Wright, at §§ 36:18-36:20). The words of s. 32(1) signal that “the *Charter* is confined to government action” and is “essentially an instrument for checking the powers of government over the individual” (*McKinney v. University of Guelph*, [1990] 3 S.C.R. 229, at p. 261).

(2) Indigenous Self-Government and the *Charter*

[46] Before considering whether the *Charter* applies to the VGFN's residency requirement, it is useful to review the historical and policy context for Indigenous self-government in Canada, including under the Charlottetown Accord of 1992, the federal government's “Inherent Right Policy” since 1995, and the final Report of the Royal Commission on Aboriginal Peoples published in 1996. It is also useful to review how courts have consistently applied the *Charter* to Indigenous governments.

[47] As a preliminary matter, we note that although this Court has yet to recognize an inherent right to Indigenous self-government as an Aboriginal right protected under s. 35 of the *Constitution Act, 1982* (see *R. v. Pamajewon*, [1996] 2 S.C.R. 821, at para. 24; *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, at para. 171), an inherent right to Indigenous self-government has now been affirmed on the international plane by Article 4 of the *United Nations Declaration on the Rights of Indigenous Peoples*, U.N. Doc. A/RES/61/295, October 2, 2007. In 2016, the Canadian

government supported the Declaration and committed to adopt and implement it in accordance with the Canadian Constitution. Recent federal legislation has affirmed the Declaration as “a universal international human rights instrument with application in Canadian law” and provides “a framework for the Government of Canada’s implementation of the Declaration” (*United Nations Declaration on the Rights of Indigenous Peoples Act*, S.C. 2021, c. 14 (“*UNDRIP Act*”), s. 4). For example, the Declaration has been implemented specifically in respect of the provision of Indigenous child and family services under the *Act respecting First Nations, Inuit and Métis children, youth and families*, S.C. 2019, c. 24 (see *Reference re An Act respecting First Nations, Inuit and Métis children, youth and families*, 2024 SCC 5).

(a) *The Charlottetown Accord of 1992*

[48] Section 32(1) of the *Charter* does not expressly provide that the *Charter* applies to Indigenous governments. However, the *Draft Legal Text* of the Charlottetown Accord of 1992 had proposed to amend s. 32 of the *Charter* to recognize, in s. 32(1)(c), that the *Charter* applies “to all legislative bodies and governments of the Aboriginal peoples of Canada in respect of all matters within the authority of their respective legislative bodies” (p. 36). It had also proposed to add a new s. 35.1 of the *Constitution Act, 1982* to provide in part that “[t]he Aboriginal peoples of Canada have the inherent right of self-government within Canada” (p. 37). The Accord was approved by the federal, provincial, and territorial governments and by the Assembly of First Nations, Inuit Tapirisat of Canada, Native Council of Canada,

and Métis National Council, but was not ratified because it did not receive the support of a majority of Canadians in a national referendum (see Hogg and Wright, §§ 4:3 and 28:42). Even so, it is noteworthy that these proposed constitutional amendments saw the inherent right to self-government as compatible with the obligation of Indigenous governments to comply with the *Charter*.

(b) *Federal Government Policy Since 1995*

[49] Despite the failure of the Charlottetown Accord, since 1995 the federal government's policy, first articulated under its "Inherent Right Policy", has been that Indigenous peoples in Canada have an inherent right to self-government guaranteed under s. 35 of the *Constitution Act, 1982*, but also that the *Charter* applies to Indigenous governments. The policy recognizes the historical fact that Indigenous peoples were living in self-governing communities before Europeans arrived, and seeks to ensure that Indigenous governments, like other governments in Canada, comply with the *Charter*. The federal government sees these two policy objectives as compatible. As the Government of Canada explained in its "Inherent Right Policy":

The Government is committed to the principle that the *Canadian Charter of Rights and Freedoms* should bind all governments in Canada, so that Aboriginal peoples and non-Aboriginal Canadians alike may continue to enjoy equally the rights and freedoms guaranteed by the Charter. Self-government agreements, including treaties, will, therefore, have to provide that the *Canadian Charter of Rights and Freedoms* applies to Aboriginal governments and institutions in relation to all matters within their respective jurisdictions and authorities.

The Charter itself already contains a provision (section 25) directing that it must be interpreted in a manner that respects Aboriginal and treaty rights,

which would include, under the federal approach, the inherent right. The Charter is thus designed to ensure a sensitive balance between individual rights and freedoms, and the unique values and traditions of Aboriginal peoples in Canada.

(Crown-Indigenous Relations and Northern Affairs Canada, *The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government*, last updated March 1, 2023 (online); see also Crown-Indigenous Relations and Northern Affairs Canada, *General Briefing Note on Canada's Self-government and Comprehensive Land Claims Policies and the Status of Negotiations*, last updated August 16, 2016 (online).)

[50] Since 1995, the federal government has negotiated many self-government agreements with Indigenous communities across Canada, which have recognized that the *Charter*, the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6, and the *Criminal Code*, R.S.C. 1985, c. C-46, continue to apply to Indigenous peoples (Crown-Indigenous Relations and Northern Affairs Canada, *Self-government*, last updated August 25, 2020 (online); see, e.g., the Tsawwassen First Nation Final Agreement (2007), c. 2, s. 9, which provides that the *Charter* applies to the Tsawwassen government in respect of all matters within its authority; Nisga'a Final Agreement (1999), c. 2, s. 9; Maa-nulth First Nations Final Agreement (2009), s. 1.3.2). The federal government has also affirmed that self-government agreements negotiated before 1995 will, as a general principle, "continue to operate according to their existing terms" (*The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government*). This includes the Self-Government Agreement with the VGFN.

(c) *The Legal Policy Debate About Applying the Charter to Indigenous Governments*

[51] Shortly after the failure to ratify the 1992 Charlottetown Accord, the Royal Commission on Aboriginal Peoples extensively studied whether the *Charter* should apply to Indigenous governments exercising inherent self-government powers. The Royal Commission concluded that the *Charter* applies, but in accordance with s. 25, it should be “given a flexible interpretation that takes account of the distinctive philosophies, traditions and cultural practices of Aboriginal peoples” (*Report of the Royal Commission on Aboriginal Peoples* (“RCAP Final Report”), vol. 2, *Restructuring the Relationship* (1996), at p. 234). We will return later to the Royal Commission’s perspective on the intimate connection between ss. 32 and 25 of the *Charter*. That perspective takes a broad view of the application of the *Charter* to Indigenous governments under s. 32(1), but also interprets the *Charter* under s. 25 with sensitivity to the collective rights of Indigenous peoples, to protect what the Royal Commission referred to as their “distinctive philosophies, traditions and cultural practices” — or what Professor Patrick Macklem has encapsulated in the term “[I]ndigenous difference” (*Indigenous Difference and the Constitution of Canada* (2001)). As we explain below, s. 25 was included in the *Charter* as a protection for the distinctive minority rights of Indigenous peoples that might be abrogated or derogated from by the application of individual *Charter* rights.

[52] The RCAP Final Report, published in 1996, described two approaches to addressing whether the *Charter* applies to Indigenous governments exercising inherent

self-government powers. The first approach claims that Indigenous governments should be bound by the *Charter* as a matter of basic constitutional principle, because “it would be highly anomalous if Canadian citizens enjoyed the protection of the Charter in their relations with every government in Canada except for Aboriginal governments” (vol. 2, at p. 227). This approach does not see the *Charter* as necessarily inconsistent with Indigenous values, because the *Charter* itself is “modelled on international standards with universal application” (p. 228).

[53] The second approach described by the RCAP Final Report asserts that Indigenous governments should not be bound by the *Charter*, because Indigenous peoples did not “consen[t] to the application of the Charter in a binding constitutional instrument, such as a self-government treaty with the Crown” (vol. 2, at p. 228). It also claims that “some Charter provisions reflect individualistic values that are antithetical to many Aboriginal cultures, which place greater emphasis on the responsibilities of individuals to their communities” (p. 230). This approach claims that applying the *Charter* to Indigenous governments “could hamper and even stifle the efforts of Aboriginal nations to revive and strengthen their cultures and traditions” and “might operate as the unwitting servant of the forces of assimilation and domination” (p. 230).

[54] After studying these issues extensively, the Royal Commission settled on an intermediate approach embodying three basic principles. First, all Canadians — Indigenous and non-Indigenous alike — are “entitled to enjoy the protection of the Charter’s general provisions in their relations with governments in Canada, no matter

where in Canada the people are located or which governments are involved” (p. 230). Second, Indigenous governments “occupy the same basic position relative to the Charter as the federal and provincial governments” (p. 230). And third, the *Charter* should apply to Indigenous governments and be “interpreted in a manner that allows considerable scope for distinctive Aboriginal philosophical outlooks, cultures and traditions”, based on the “interpretive rule . . . found in section 25 of the Charter” (p. 230).

[55] The Royal Commission’s final recommendation was thus that the *Charter* applies to Indigenous governments, but under s. 25, the *Charter* must be interpreted flexibly to account for the distinctive philosophies, traditions, and cultural practices of Indigenous peoples (RCAP Final Report, vol. 2, at p. 234; see also Royal Commission on Aboriginal Peoples, *Partners in Confederation: Aboriginal Peoples, Self-Government, and the Constitution* (1993), at pp. 39-41; Royal Commission on Aboriginal Peoples, *Bridging the Cultural Divide: A Report on Aboriginal People and Criminal Justice in Canada* (1996), at pp. 262-64).

[56] The debate on whether the *Charter* should apply to Indigenous governments is complex and has generated a rich academic literature on both sides of the issue, some of which the Royal Commission drew on in reaching its conclusions and making its recommendations (see, e.g., B. Slattery, “First Nations and the Constitution: A Question of Trust” (1992), 71 *Can. Bar Rev.* 261; J. Borrows, “Contemporary Traditional Equality: The Effect of the *Charter* on First Nation

Politics” (1994), 43 *U.N.B.L.J.* 19; P. W. Hogg and M. E. Turpel, “Implementing Aboriginal Self-Government: Constitutional and Jurisdictional Issues”, in Royal Commission on Aboriginal Peoples, *Aboriginal Self-Government: Legal and Constitutional Issues* (1995), 375; K. McNeil, “Aboriginal Governments and the Canadian Charter of Rights and Freedoms” (1996), 34 *Osgoode Hall L.J.* 61; K. Wilkins, “... But We Need the Eggs: The Royal Commission, the Charter of Rights and the Inherent Right of Aboriginal Self-government” (1999), 49 *U.T.L.J.* 53; Macklem, at pp. 194-233; S. Grammond, *Terms of Coexistence: Indigenous Peoples and Canadian Law* (2013), at pp. 428-38; G. Otis, “La gouvernance autochtone avec ou sans la Charte Canadienne?” (2005), 36 *Ottawa L. Rev.* 207; G. Otis, “Gouvernance autochtone et droits ancestraux: une relation nouvelle entre la collectivité et l’individu?”, in A. Lajoie, ed., *Gouvernance autochtone: aspects juridiques, économiques et sociaux* (2007), 40; D. L. Milward, *Aboriginal Justice and the Charter: Realizing a Culturally Sensitive Interpretation of Legal Rights* (2012), at pp. 62-77; M. Watson, “Reconciling Sovereignties, Reconciling Peoples: Should the Canadian Charter of Rights and Freedoms Apply to Inherent-right Aboriginal Governments?” (2019), 2:1 *Inter Gentes* 75; N. Metallic, “Checking our Attachment to the Charter and Respecting Indigenous Legal Orders: A Framework for Charter Application to Indigenous Governments” (2022), 31:2 *Const. Forum* 3; K. Gunn, “Towards a Renewed Relationship: Modern Treaties & the Recognition of Indigenous Law-Making Authority” (2022), 31:2 *Const. Forum* 17; A. Swiffen, “*Dickson v Vuntut Gwitchin First Nation*, Section 25 and a Plurinational Charter” (2022), 31:2 *Const. Forum* 27; R. Beaton, “Doctrine Calling: Inherent Indigenous Jurisdiction in *Vuntut*

Gwitchin” (2022), 31:2 *Const. Forum* 39; R. Hamilton, “Self-Governing Nation or ‘Jurisdictional Ghetto’? Section 25 of the *Charter of Rights and Freedoms* and Self-Governing First Nations in Canada” (2022), 27:1 *Rev. Const. Stud.* 279).

(d) *Courts Have Consistently Applied the Charter to Indigenous Governments*

[57] Against this policy backdrop, courts at all levels have recognized that the *Charter* applies to Indian band councils exercising governmental powers under the *Indian Act*, because such powers have a statutory foundation and are delegated by Parliament (see, e.g., *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203; *Taypotat v. Taypotat*, 2013 FCA 192, 365 D.L.R. (4th) 485, at paras. 36-39, rev’d 2015 SCC 30, [2015] 2 S.C.R. 548; *McCarthy v. Whitefish Lake First Nation No. 128*, 2023 FC 220, 524 C.R.R. (2d) 103, at para. 93; *Linklater v. Thunderchild First Nation*, 2020 FC 1065, 96 Admin. L.R. (6th) 233, at para. 16; *Horse Lake First Nation v. Horseman*, 2003 ABQB 152, 223 D.L.R. (4th) 184, at paras. 14-29; see also G. Régimbald and D. Newman, *The Law of the Canadian Constitution* (2nd ed. 2017), at §18.17; J. Woodward, *Aboriginal Law in Canada* (loose-leaf), at § 6:6; Brun, Tremblay and Brouillet, at p. 972; M. Buist, *Halsbury’s Laws of Canada — Aboriginal* (2020 Reissue), at pp. 110-11).

[58] Courts have also recognized that the *Charter* applies to Indigenous governments operating under legislation outside the framework of the *Indian Act* (see, e.g., *Chisasibi Band v. Napash*, 2014 QCCQ 10367, [2015] 1 C.N.L.R. 16, at paras. 49-106).

[59] We now turn to consider in greater detail the legal framework for applying s. 32(1) of the *Charter*, before applying that framework to the VGFN’s residency requirement.

(3) The *Eldridge* Framework for Applying Section 32(1) of the *Charter*

[60] A significant body of case law has addressed when the *Charter* applies under s. 32(1). The jurisprudence has been described as “both fluid and complex” (A. K. Lokan and M. Fenrick, *Constitutional Litigation in Canada* (loose-leaf), at § 2:21), and as raising the “very vexed question” of what is “government” under s. 32(1) (G. J. Kennedy, *The Charter of Rights in Litigation: Direction from the Supreme Court of Canada* (loose-leaf), at § 2:2).

[61] More than a quarter century ago, La Forest J. for the Court in *Eldridge* distilled the jurisprudence and clarified the law. He held that an entity may be subject to the *Charter* in one of two ways. First, an entity may be found to be “government” for the purpose of s. 32(1) if it can be characterized as government by its very nature or because of the degree of governmental control exercised over it. In such a case, all the entity’s activities are subject to the *Charter*. Second, even if an entity is not itself “government” for s. 32(1) purposes, it will be subject to the *Charter* with respect to particular activities that can be ascribed to government because they are “‘governmental’ in nature” (para. 44; see also *Greater Vancouver Transportation Authority*, at para. 16; Lokan and Fenrick, at §§ 2:21-2:23; Régimbald and Newman, at §18.15).

[62] It is instructive to consider how this Court has applied the two branches of the *Eldridge* framework.

(a) *First Branch: Government “by Nature” or “Control”*

[63] In *Godbout*, decided shortly after *Eldridge*, the Court had to decide whether a municipal residency requirement for employees infringed the Quebec *Charter of Human Rights and Freedoms*, R.S.Q., c. C-12, or the Canadian *Charter*. The majority decided the case under the Quebec *Charter*, while a minority did so under the Canadian *Charter*. Speaking for the minority, La Forest J. (with the concurrence of L’Heureux-Dubé J. and McLachlin J., as she then was) stated that municipalities are governments by nature, and thus bound by the Canadian *Charter*, even though they are “institutionally distinct from the provincial governments that create them” (para. 50). He highlighted that municipal councils (1) are democratically elected by members of the public and accountable to their constituents, like Parliament and provincial legislatures; (2) have a general taxing power that is indistinguishable from the taxing powers of Parliament or the provinces; (3) are empowered to make, administer, and enforce laws within a defined territorial jurisdiction, which is a “quintessentially governmental function” (para. 51 (emphasis deleted), citing *McKinney*, at p. 270); and (4) derive their existence and lawmaking authority from the provinces and exercise powers that the province would otherwise exercise (para. 51). Justice La Forest reasoned that “[s]ince the Canadian *Charter* clearly applies to the provincial legislatures and governments, it must . . . also apply to entities upon which they confer

governmental powers within their authority. Otherwise, provinces could . . . simply avoid the application of the *Charter* by devolving powers on municipal bodies” (para. 51).

[64] Later, in *Greater Vancouver Transportation Authority*, Deschamps J. for the Court held that two transit authorities that prohibited political advertising on public transit vehicles were “governments” and were subject to the *Charter* under the control test of the first branch of *Eldridge*. She found that the province of British Columbia had substantial control over the transit authorities’ activities. One transit authority was a statutory body designated by legislation as an “agent of the government”; its board of directors was appointed by the Lieutenant Governor in Council; and its affairs and operations could be managed by regulations (para. 17). As a result, this transit authority could not “be said to be operating autonomously from the provincial government” (para. 17). The other transit authority was similarly an “apparatus of government”, because it was statutorily controlled by a district government, which itself was “government” within the meaning of s. 32(1) of the *Charter* (para. 18). Further, as Deschamps J. noted, the second transit authority had been created to devolve provincial responsibilities for public transit into the hands of local governments, triggering the principle that “a government should not be able to shirk its *Charter* obligations by simply conferring its powers on another entity” (para. 22). She held that this devolution of provincial responsibilities for public transit could not “be viewed as having created a ‘*Charter*-free’ zone for the public transit” (para. 22). As a result, both transit authorities were subject to the *Charter*.

(b) *Second Branch: “Governmental Activity”*

[65] *Eldridge* itself is an example of the second branch of the *Eldridge* framework, under which the *Charter* applies to a non-governmental entity in respect of governmental activities it performs. Justice La Forest for the Court held that a hospital’s failure to provide sign language interpretation to persons receiving medical services under provincial legislation was subject to review under the *Charter*. In deciding not to provide sign language interpretation, the hospital had exercised discretion under provincial legislation about how to provide medically necessary services (paras. 19 and 51). The hospital’s decision was thus “not simply a matter of internal hospital management”, but rather was “intimately connected to the medical service delivery system instituted by the legislation” (para. 51). As a result, La Forest J. ruled that the hospital was subject to the *Charter* in exercising discretion to provide medical services under legislation.

[66] Similarly, in *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 S.C.R. 307, Bastarache J. for a majority of the Court held that the British Columbia Human Rights Commission was subject to the *Charter* for its delay in processing a human rights complaint. Although the Commission was “autonomous or independent from government”, it had been created by statute and “all of its actions” were “taken pursuant to statutory authority” (paras. 34-35). The Commission’s conduct could not escape *Charter* scrutiny “merely because it is not part of government or controlled by government” (para. 37). Justice Bastarache concluded

that the Commission was bound by the *Charter* because it was “both implementing a specific government program and exercising powers of statutory compulsion” (para. 37).

[67] Professors Hogg and Wright have explained why action taken under statutory authority involving a power of compulsion is a relevant factor when considering the application of the *Charter*. They note that even if an entity is otherwise independent of the federal and provincial governments, the presence of a delegated statutory power of compulsion means that the entity has a “coercive power of governance” that is not possessed by private individuals, corporations, or organizations (§ 37:8). As they explain, “it is the exercise of a power of compulsion that makes the Charter applicable to bodies exercising statutory authority” (§ 37:8). We agree.

[68] As Professors Hogg and Wright note, the presence of a delegated statutory power of compulsion helps explain the Court’s decision that the *Charter* applied to the Human Rights Commission in *Blencoe*, as well as its earlier decisions that the *Charter* applied to an arbitrator exercising powers conferred by statute (*Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038); a municipal by-law made under statutory authority that prohibited postering on public property (*Ramsden v. Peterborough (City)*, [1993] 2 S.C.R.1084); the rules of a law society restricting entry to the legal profession by out-of-province law firms (*Black v. Law Society of Alberta*, [1989] 1 S.C.R. 591); and the terms of an insurance policy stipulated by statute (*Miron v. Trudel*, [1995] 2 S.C.R. 418). See also Brun, Tremblay and Brouillet, at pp. 972-73

([TRANSLATION] “The word ‘government’ in section 32 receives a functional interpretation The Canadian Charter therefore applies to all paragovernmental authorities in the public administration when they perform a government function, that is, when they exercise public authority under the law, by unilaterally compelling human behaviour”).

(c) *Summary*

[69] To summarize, the *Charter* applies broadly to the legislative, executive, and administrative branches of government. The *Charter* applies to Parliament, the provincial legislatures, and the federal, provincial, and territorial governments in respect of all matters within the legislative authority of Parliament and the provinces, which includes entities not specifically listed under s. 32(1). Entities subject to the *Charter* cannot avoid their *Charter* obligations by conferring certain of their legislative responsibilities or powers on other entities that are not ordinarily subject to the *Charter*.

[70] An entity may be subject to the *Charter* in one of two ways. An entity may be government by its very nature or because the federal or a provincial government exercises substantial control over it, in which case all the entity’s activities are subject to the *Charter*. Alternatively, even if an entity is not part of government, it will be subject to the *Charter* in respect of governmental activities it performs.

(4) Application of Section 32(1) to This Case

[71] We now apply these principles to the VGFN's residency requirement.

[72] The Supreme Court of Yukon held that the *Charter* applies to the VGFN's residency requirement under the *Eldridge* framework because the VGFN is "either 'government' [by nature] or [is] exercising inherently 'government' activities" (para. 130). This was so whether the residency requirement is viewed as an exercise of an inherent self-government right or an exercise of the Self-Government Agreement implemented by federal and territorial legislation (para. 130).

[73] The Court of Appeal similarly held that the VGFN Council was "by its very nature" exercising "governmental" powers, whether the source of its authority was an inherent right of self-government or federal or territorial legislation (para. 98). Elsewhere in its reasons, the Court of Appeal seemed to qualify the breadth of this conclusion, stressing that it was dealing *only* with the residency requirement and not with whether the *Charter* applies to the VGFN generally (paras. 74 and 83). But if (as the Court of Appeal accepted) the VGFN is government by nature, it follows that the *Charter* applies to *all* its activities, not just its enactment and enforcement of the residency requirement (*Eldridge*, at para. 44; *Greater Vancouver Transportation Authority*, at para. 16). Respectfully, and as the intervener the Attorney General of Canada submits, at times the Court of Appeal's decision reflected "a blurring of the lines between the two branches" of *Eldridge* (I.F., at para. 17).

[74] The parties and interveners before this Court presented a full spectrum of views on whether the *Charter* applies to the residency requirement on the basis that the

VGFN is “government by nature”. There was also no consensus among those representing the interests of Indigenous peoples on whether the *Charter* applies to Indigenous governments. Some Indigenous organizations urged that the *Charter* applies (or should apply) to Indigenous governments generally, claiming that this is essential to protect the rights and equal citizenship of Indigenous people and to ensure that vulnerable Indigenous individuals (such as off-reserve or remote members of First Nations or Indigenous women) are not discriminated against by their own Indigenous governments (see I.F., Congress of Aboriginal Peoples, at paras. 5-15; I.F., Band Members Alliance and Advocacy Association of Canada, at paras. 10-29). Other Indigenous organizations opposed this view, asserting that the *Charter* does not apply to the exercise of an inherent self-government right unless an Indigenous people expressly consents to this (see I.F., Teslin Tlingit Council, at paras. 2 and 16-29; I.F., Federation of Sovereign Indigenous Nations, at paras. 13-17; I.F., Métis Nation of Ontario and Métis Nation of Alberta, at paras. 14-21).

[75] In what follows, we address this issue by applying the framework this Court established in *Eldridge* for determining when the *Charter* applies under s. 32(1).

- (a) *The Charter Applies to the Residency Requirement Because the VGFN Is “Government” by Nature*

[76] In our view, the VGFN does not qualify as government under the “control” test of the first branch of *Eldridge*, because the VGFN is not substantially controlled by either the federal or the Yukon government. Through the Self-Government

Agreement, the VGFN exercises self-government powers “by and for the first nation” (*Yukon First Nations Self-Government Act*, s. 2, “self-government agreement”). The VGFN is “institutionally distinct” from the federal and territorial governments (*Godbout*, at para. 50). Its essential function is to advance the interests of the Vuntut Gwitchin in accordance with their “traditional decision-making structures” and “to support and promote” their “contemporary and evolving political institutions and processes” (Self-Government Agreement, preamble). To this end, the Self-Government Agreement provides that the VGFN “shall have the exclusive power to enact laws” in relation to an agreed upon list of matters, including the administration of the VGFN’s “affairs and operation and internal management” (Self-Government Agreement, s. 13.1). As a result, the VGFN operates autonomously from, and is not substantially controlled by, either the federal or the Yukon government.

[77] On the other hand, in our view the *Charter* applies to the VGFN’s residency requirement under its Constitution because the VGFN is “government” by nature. Recall that in *Godbout*, La Forest J. stated that although there can be no *a priori* list of factors that determines whether an entity performs “governmental” functions (para. 49), an entity may be considered to be government by nature when it has four features (para. 51). The four features are neither necessary nor determinative for an entity to be found to be government by nature but serve as useful indicia of government (para. 51):

1. The entity has a council that is “democratically elected by members of the general public and [is] accountable to [its] constituents in a manner analogous to that in which Parliament and the provincial legislatures are accountable to the electorates they represent”.
2. It has “a general taxing power that, for the purposes of determining whether [it] can rightfully be described as ‘government’, is indistinguishable from the taxing powers of Parliament or the provinces”.
3. Importantly, it is empowered to make, administer, and enforce coercive laws binding on the public within a defined territorial jurisdiction, which is a quintessentially governmental function.
4. Most significantly, it derives its existence and lawmaking authority from the federal or provincial government; that is, it exercises powers conferred by Parliament or by a provincial legislature, powers and functions that the federal or provincial government would otherwise have to perform itself.

[78] We agree with the submissions of Ms. Dickson and several government and Indigenous interveners that the VGFN as an Indigenous government illustrates indicia for “government by nature” identified by this Court in *Godbout*, and thus the *Charter* applies to the VGFN’s residency requirement (R.F. on cross-appeal, at para. 34; I.F., A.G. Canada, at paras. 18-19; I.F., A.G. Quebec, at para. 6; I.F., A.G.

Alberta, at para. 7; I.F., Congress of Aboriginal Peoples, at paras. 6-7; I.F., Band Members Alliance and Advocacy Association of Canada, at paras. 14-21).

[79] First, the VGFN Council consists of members who are elected by eligible voters of the VGFN and are democratically accountable to their constituents, much like members of Parliament or a provincial legislature (VGFN Constitution, Article VIII). If elected, members swear or affirm loyalty to the VGFN and obedience to the VGFN Constitution as a “sacred responsibility of government” (Sch. II).

[80] Second, the VGFN has general taxing powers that are materially indistinguishable from those of Parliament or the provinces. The VGFN has status as “a municipality or public body performing the functions of government or a municipal corporation” under the *Income Tax Act* (Final Agreement, s. 24.8.1). This status is contingent on the VGFN restricting its activities “to the provision of government or other public services” (s. 24.8.2; see also Self-Government Agreement, ss. 14.0 (Taxation) and 15.0 (Taxation Status); *Yukon First Nations Self-Government Act*, s. 18).

[81] Third, like Parliament and provincial legislatures, the VGFN is empowered to make, administer, and enforce coercive laws that are binding on VGFN citizens and on the public generally within its settlement land (Self-Government Agreement, s. 13.0; *Yukon First Nations Self-Government Act*, ss. 9 to 12). To quote La Forest J. in *Godbout*, this is a “quintessentially governmental function” (para. 51 (emphasis deleted), citing *McKinney*, at p. 270).

[82] Fourth, although (as the trial judge found) the Vuntut Gwitchin have been self-governing since time immemorial, and even if the VGFN has lawmaking authority under an inherent right to self-government, the VGFN is also recognized as a legal entity under the federal implementing legislation. To that extent, it derives *at least some* of its lawmaking authority under federal law. In other words, at least one source of the VGFN's lawmaking authority flows from Parliament, in that the VGFN exercises powers that Parliament otherwise would have exercised through its legislative jurisdiction under s. 91(24) of the *Constitution Act, 1867*. This of course is not to suggest that Indigenous self-government is necessarily an emanation of federal authority. Parliament can, as here, be a source of the self-government authority, and it is this fact that triggers the application of the *Charter* in this case.

[83] In the first place, the federal legislation recognizes the VGFN as “a legal entity having the capacity, rights, powers and privileges of a natural person” (*Yukon First Nations Self-Government Act*, s. 7). It also states that the VGFN succeeds to the “rights, titles, interests, obligations, assets and liabilities” of the predecessor Vuntut Gwitchin Tribal Council that was constituted as a band under the *Indian Act*, and which henceforth is deemed to “ceas[e] to exist” (ss. 2, 6(1) and Sch. I). In highlighting this, we distinguish the VGFN as a legal entity recognized under federal legislation, and the Vuntut Gwitchin as an Indigenous people who do not rely on federal legislation to exercise self-government powers that the trial judge found they have exercised since time immemorial. In our view, in the present context it is sufficient for the VGFN to be recognized as a legal entity and to derive *a source* of its lawmaking authority from

federal legislation, without necessarily deriving *all* of its lawmaking authority, or its existence, from federal legislation. In *Godbout*, La Forest J. spoke of municipalities deriving their “existence” from federal or provincial legislation, but this was because municipalities are entirely creatures of statute, whereas self-governing Indigenous governments manifestly are not. In short, Parliament can recognize the existence of an Indigenous government to which it confers some part of its lawmaking authority under s. 91(24) of the *Constitution Act, 1867*, without creating that Indigenous government and without necessarily being the only source of its lawmaking authority.

[84] In the second place, even if the VGFN has an inherent power of self-government that is not derived from federal legislation, it is undeniable that the VGFN also exercises powers conferred by Parliament under s. 91(24) of the *Constitution Act, 1867* that would otherwise be performed by the federal or territorial government, as indeed they were before the Self-Government Agreement was implemented by federal legislation. The VGFN exercises legislative powers that both the federal government and the VGFN have agreed shall be exercised by the VGFN under the Self-Government Agreement, as approved by the federal and territorial implementing legislation. The federal *Yukon First Nations Self-Government Act* is an exercise of Parliament’s legislative authority under s. 91(24) of the *Constitution Act, 1867* to enact laws in relation to “Indians, and Lands reserved for the Indians”. The legislation imposes rules agreed to by the VGFN, which pertain to the exercise of the VGFN’s self-government powers, and which find their source at least in part under the *Constitution Act, 1867*, even if they also arise from the Vuntut Gwitchin’s inherent self-government authority.

[85] It is also significant that the federal legislation expressly provides that lands transferred to a Yukon First Nation in accordance with a self-government agreement “remain lands reserved for the Indians within the meaning of class 24 of section 91 of the *Constitution Act, 1867*” (s. 22(4)). This reflects the reality that Parliament has not abandoned its legislative jurisdiction in relation to the transferred lands, even though the VGFN exercises self-government powers under the Self-Government Agreement. Indeed, as this Court stated in *R. v. Sparrow*, [1990] 1 S.C.R. 1075, Parliament’s “power” to legislate under s. 91(24) of the *Constitution Act, 1867* must be “reconciled” with its “duty” to Indigenous peoples under s. 35 of the *Constitution Act, 1982* (p. 1109). Parliament cannot abandon its constitutional duty to Indigenous peoples. Parliament’s “power” to legislate under s. 91(24) of the *Constitution Act, 1867* and its “duty” to Indigenous peoples under s. 35 of the *Constitution Act, 1982* both subsist even after entering into a self-government agreement with an Indigenous people.

[86] In addition, whatever the source of the VGFN’s self-government powers — whether it is an inherent right, federal legislation, or both — it is undeniable that the federal *Yukon First Nations Self-Government Act* also regulates the exercise of the VGFN’s self-government powers and makes them binding against third parties. In short, all the VGFN’s self-government powers under the Self-Government Agreement and implemented by the federal and territorial self-government legislation must be exercised in accordance with that legislation. In our view, this constitutes sufficient involvement by Parliament to trigger the application of the *Charter*.

[87] Although not determinative, it bears noting that the view that the *Charter* applies to the VGFN's exercise of self-government powers was also expressed by the Minister of Indian Affairs and Northern Development, the Hon. Ron Irwin, at the second reading of the federal self-government legislation before the House of Commons. He stated that "[t]he principles embodied in the Charter of Rights and Freedoms and the Constitution of Canada as a whole will continue to apply" (*House of Commons Debates*, vol. 133, No. 76, 1st Sess., 35th Parl., June 1, 1994, at p. 4716). He added that "First Nation constitutions will also provide protections for the rights and freedoms of First Nation citizens" (p. 4716). Thus, in the Minister's view, the citizens of self-governing First Nations would be entitled to invoke *Charter* rights alongside their rights under First Nations constitutions, just as Ms. Dickson did in this case. This Court has recognized that, while Hansard evidence has frailties, it may "play a limited role in the interpretation of legislation" (*Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 35). In our view, the Minister's statement before the House of Commons lends some support to the view that Parliament intended the exercise of self-government powers under the federal *Yukon First Nations Self-Government Act* to be subject to the *Charter*.

[88] We hasten to say that in concluding that the VGFN engages each of the four illustrative indicia identified by this Court in *Godbout* for an entity that is government by nature, we do not of course suggest that an Indigenous government such as the VGFN exercising self-government powers is similar to a municipality. Unlike municipalities, which have no independent constitutional status, are entirely creatures

of statute, and exercise only those powers conferred by legislation, Indigenous peoples are expressly recognized under the *Constitution Act, 1867* (s. 91(24)), the *Charter* (s. 25), and the *Constitution Act, 1982* (ss. 35 and 35.1). Indigenous peoples pre-existed the arrival of European settlers and the founding of Canada as a country; they do not depend on federal, provincial, or territorial legislation to exist as autonomous self-governing peoples.

[89] Our reasoning and conclusion that the *Charter* applies to the VGFN's residency requirement are also supported by the analysis of Peter W. Hogg and Mary Ellen Turpel in their important paper "Implementing Aboriginal Self-Government: Constitutional and Jurisdictional Issues", originally prepared for the Royal Commission on Aboriginal Peoples (later published at 74 *Can. Bar Rev.* 187). Professors Hogg and Turpel argued it was "probable" a court would hold that the *Charter* applies to Indigenous governments, either where self-government institutions are created by statute "because the Charter applies to all bodies exercising statutory powers", or because statutes implementing self-government agreements would "probably" constitute "a sufficient involvement by the Parliament of Canada to make the Charter applicable":

Despite the silence of section 32 on Aboriginal governments, it is probable that a court would hold that Aboriginal governments are bound by the Charter. This would be so where self-government institutions have been created by statute, because the Charter applies to all bodies exercising statutory powers. Where self-government institutions have been created by an Aboriginal people and empowered by a self-government agreement, the source of the self-government powers is probably a treaty right (if the self-government agreement has treaty status) or an Aboriginal right (the

inherent right of self-government) or both. Even here, however, as noted earlier, the self-government agreement needs the aid of a statute to make clear that the agreement is binding on third parties. The statute implementing the self-government agreement probably constitutes a sufficient involvement by the Parliament of Canada to make the Charter applicable. [Emphasis added; footnotes omitted; pp. 416-17.]

[90] The RCAP Final Report stated that the Commission had been “assisted” by the analysis of Professors Hogg and Turpel in reaching its own conclusion that the *Charter* applies to Indigenous governments (vol. 2, at p. 232). Hogg and Turpel’s paper is also significant because it made “frequent reference” to the Yukon First Nation self-government agreements specifically, which the authors used as a case study to illustrate their reasoning on how self-government agreements could be implemented “within the existing constitutional framework” of Canada (pp. 388-96, 401-11 and 414).

[91] We would also add that our conclusion that the *Charter* applies to the VGFN’s residency requirement adopted under the framework of the federal self-government legislation differs from — and is narrower than — the conclusions apparently reached by the trial judge and Court of Appeal. The trial judge (at para. 130) and the Court of Appeal (at para. 98) both appeared to decide that the *Charter* applies to the exercise of the VGFN’s self-government powers, whether viewed as an exercise of the VGFN’s inherent right of self-government or under the self-government agreements with the federal and Yukon governments, as implemented by federal and territorial legislation. We conclude that the *Charter* applies to the VGFN’s residency requirement only insofar as that requirement flows from an exercise of statutory power under s. 91(24) of the *Constitution Act, 1867*. We make no comment on whether an

exercise of an inherent right of self-government untethered from federal legislation would be subject to the *Charter*, which in our view need not be decided in this case in view of the self-government arrangements in issue. As this Court has often noted, a “policy [of] restraint in constitutional cases is sound” as it is “based on the realization that unnecessary constitutional pronouncements may prejudice future cases, the implications of which have not been foreseen” (*Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)*, [1995] 2 S.C.R. 97, at para. 9; see also *Canadian Council for Refugees v. Canada (Citizenship and Immigration)*, 2023 SCC 17, at para. 181; *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3, at para. 301, per La Forest J., dissenting in part). This Court in *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 (“*Secession Reference*”), at para. 105, referred to this as “the usual rule of prudence in constitutional cases”. The rule of prudence is especially salutary in this appeal, which in our view can be decided without addressing whether an inherent Indigenous right of self-government operating outside a statutory framework would be subject to the *Charter*.

[92] In our view, therefore, the *Charter* applies to the VGFN’s residency requirement because the VGFN is government by nature.

[93] Although in view of this conclusion it is unnecessary to consider the second branch of *Eldridge*, we will do so briefly for the sake of completeness.

- (b) *The Charter Also Applies to the Residency Requirement as a “Government Activity”*

[94] Apart from our conclusion that the *Charter* applies to the VGFN's residency requirement because the VGFN is government by nature, we also conclude that the *Charter* applies to the enactment and enforcement of the residency requirement as a specific "governmental activity".

[95] The residency requirement under the VGFN's Constitution was adopted at least in part under federal statutory authority (even assuming it also reflects the exercise of an inherent right to self-government). The residency requirement involves the exercise of a statutory power of compulsion because it imposes legal restrictions on who may serve as a VGFN Chief or Councillor. It has the force of law because it forms part of the VGFN Constitution, adopted under the Self-Government Agreement, which was itself approved and given effect by the federal and territorial implementing legislation. As stated succinctly in s. 2 of the *First Nations (Yukon) Self-government Act*: "The Self-Government Agreement is hereby approved and has the force of law" (see also *Yukon First Nations Self-Government Act*, s. 5(1) (bringing into effect the Self-Government Agreement), and s. 8(1)(b) (providing that a Yukon First Nation such as the VGFN "shall, in a manner consistent with its self-government agreement", adopt a constitution that provides for, among other things, "the governing bodies of the first nation and their composition, membership, powers, duties and procedures")). The federal legislation thus gives the VGFN Constitution the force of federal law under the *Constitution Act, 1867*, even if it already had the force of law as an Indigenous law.

[96] As a result, in our view, the enactment and enforcement of the residency requirement is a specific “governmental activity” under the second branch of *Eldridge*. It is therefore subject to review under the *Charter*.

(c) *Other Arguments for Applying the Charter*

[97] In closing, we briefly address two other arguments raised before this Court as to whether the *Charter* applies to the residency requirement.

[98] First, Ms. Dickson and certain interveners submit that the *Charter* applies to the residency requirement because the residency requirement is a “law” under the supremacy clause, s. 52(1) of the *Constitution Act, 1982*, which states that “any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect”. We do not accept this submission. It is settled in this Court’s jurisprudence that “[t]he scope of application of the *Charter* is delineated in s. 32(1)” of the *Charter* (*R. v. McGregor*, 2023 SCC 4, at para. 18; see also *Godbout*, at para. 43; *Blencoe*, at para. 10; *Greater Vancouver Transportation Authority*, at para. 13). Section 52(1) applies as a constitutional remedy only if a law is inconsistent with a provision of the Constitution. It does not delineate the scope of application of the *Charter*.

[99] Second, the VGFN argues that the *Charter* does not apply to the residency requirement because the VGFN did not consent to the application of the *Charter* to its exercise of self-government powers. Ms. Dickson argues that the *Charter* applies

because the Final Agreement itself states that the VGFN’s self-government powers are to be “in conformity with the Constitution of Canada” (s. 24.1.2), which includes the *Charter*, and that any self-government agreement “shall not affect” the rights of VGFN persons “as Canadian citizens” (s. 24.1.3), which similarly includes *Charter* rights. Unlike other self-government agreements concluded after 1995, the agreements with the VGFN do not expressly state that the *Charter* applies.

[100] Since we have concluded that the *Charter* applies through the normal operation of s. 32(1), it is unnecessary to address whether consent could be a proper basis for the application of the *Charter*, or whether it is even constitutionally open for the federal government or Parliament to agree that the *Charter*, as part of the “supreme law of Canada” (*Constitution Act, 1982*, s. 52(1)), does not apply to matters within Parliament’s legislative authority. Even putting aside that legal issue, we emphasize that there is still value in self-government agreements expressly providing that the *Charter* applies to Indigenous governments, because such agreements may “supply enough clarity to keep the issues out of the courts” (Hogg and Wright, § 28:20; see also Watson, at p. 110, fn. 162).

(d) *Conclusion*

[101] We conclude that the *Charter* applies to the residency requirement, either because the VGFN is government by nature, or because the enactment and enforcement of the residency requirement is a “governmental activity” operating under a statutory power of compulsion. We reach this conclusion by applying the *Eldridge* framework

to the specific agreements, implementing legislation, and Indigenous constitution at issue in this case. We expressly refrain from commenting on whether the *Charter* would apply to an Indigenous government exercising an inherent self-government authority untethered from federal, provincial, or territorial legislation.

B. *Sections 15, 25, and 1 of the Charter*

(1) Overview

[102] Section 25 of the *Charter* is central to evaluating Ms. Dickson’s claim that the residency requirement in the VGFN Constitution infringes her right to equality under s. 15(1) of the *Charter*. The VGFN agrees with the courts below that s. 25 operates as a shield to protect the residency requirement from challenge under the s. 15(1) *Charter* right. Ms. Dickson answers that s. 25 is not a bar to her claim. Properly balanced against the protection provided to Indigenous rights in s. 25 and considering s. 1 of the *Charter*, she says the residency requirement violates her right to be free from discrimination and cannot be justified in the circumstances.

[103] Sections 15, 25, and 1 of the *Charter* provide:

15 (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or

groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

25 The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including

(a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and

(b) any rights or freedoms that now exist by way of land claims agreements or may be so acquired.

1 The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

[104] Over the life of the *Charter*, this Court has had relatively few occasions to consider the meaning of s. 25. When the Court has done so — as in *R. v. Kapp*, 2008 SCC 41, [2008] 2 S.C.R. 483, and *Corbiere* — it has addressed the equality right in circumstances different from this case. This case involves a dispute between a First Nation and one of its own members, and invites the Court to interpret s. 25 in connection with a residency requirement that is itself part of the constitutional law of a self-governing First Nation.

[105] *Corbiere* did consider the constitutionality of a voting requirement that might be compared to the rule contested by Ms. Dickson, but the requirement in that case was under the *Indian Act* rather than an Indigenous constitution. *Kapp* involved a discrimination complaint based on s. 15(1) of the *Charter* and the possible relevance of s. 25 as an answer to that challenge, but that case was brought by a non-Indigenous

person and did not concern an Indigenous law. And while *Taypotat* (SCC) involved a challenge under s. 15(1) of the *Charter* to a First Nation's rule on electoral qualifications brought by an Indigenous community member, the appeal was decided without addressing s. 25. Further complicating the relationship between the VGFN's collective right in s. 25 and the individual right invoked by Ms. Dickson is the reality that, ultimately, they are both rooted in Indigeneity (see generally Swiffen, at p. 34).

[106] Elsewhere, the Court has made reference to s. 25, but did not have the opportunity, as it does here, to consider the full application and effect of the provision. The Court's existing jurisprudence thus provides only a modest guide for deciding this appeal. This invites caution. The majority's comment in *Kapp* on the complexities of s. 25 bears repeating: "... prudence suggests that these issues are best left for resolution on a case-by-case basis as they arise before the Court" (para. 65). As a result, our reasons focus on the task at hand: determining how s. 25 applies to the residency requirement in the constitution of a self-governing First Nation challenged by one of its members under s. 15(1) of the *Charter*.

[107] The purpose of s. 25 is to uphold certain collective rights and freedoms of Indigenous peoples when those collective rights conflict with an individual's *Charter* rights. When an individual's *Charter* right would abrogate or derogate from an Aboriginal, treaty, or other right, s. 25 requires the collective Indigenous right to take precedence, even if the *Charter* claimant is a member of the First Nation concerned.

[108] When Aboriginal, treaty, or “other rights or freedoms” specified in s. 25 are engaged, the limits on a competing individual *Charter* right need not be justified as would ordinarily be the case under s. 1 of the *Charter*. Unlike s. 1, s. 25 reflects a constitutional choice to protect the collective rights and freedoms associated with Indigenous peoples in Canada as a distinct minority. “[R]espect for minority rights” was identified by the Court in the *Secession Reference*, at para. 49, as an underlying constitutional principle that infuses the Constitution as a whole. The protection of linguistic and religious minorities are examples of this underlying principle, as is the protection of the rights of Indigenous peoples as a distinctive minority. This Court stated that, in keeping with a long tradition of respect for minorities, s. 35 of the *Constitution Act, 1982* provides protection for existing Aboriginal and treaty rights, while s. 25 similarly set forth a “non-derogation clause in favour of the rights of [A]boriginal peoples” (*Secession Reference*, at para. 82). The Court allied the protection of s. 25 with the “strength [of the] promise” to the Indigenous peoples of Canada in s. 35 that it had explained in *Sparrow*, at p. 1083. That promise “recognized not only the ancient occupation of land by [A]boriginal peoples, but their contribution to the building of Canada, and the special commitments made to them by successive governments” (*Secession Reference*, at para. 82).

[109] Consonant with the principle of the protection of Indigenous peoples as a distinct minority, the “other rights or freedoms” in s. 25 are limited to those that protect Indigenous difference. All the collective Indigenous rights and freedoms referred to in

s. 25 must be upheld, even when they conflict with individual *Charter* rights, in order to ensure respect for minority rights as a constitutional value.

[110] The protection of Aboriginal, treaty, and other rights in s. 25 is not, however, absolute. Priority is given to collective Indigenous rights only when they conflict with an individual's *Charter* right. In any given case, the individual and collective rights referred to in s. 25 may not actually be in conflict. Some individual rights are part of Indigenous law and coexist with collective interests, as both the *UNDRIP Act* and the VGFN Constitution itself make plain (see *Metallic*, at p. 15; G. Otis, "Élection, gouvernance traditionnelle et droits fondamentaux chez les peuples autochtones du Canada" (2004), 49 *McGill L.J.* 393, at pp. 409-11). In addition, s. 25 would not apply if the individual *Charter* right invoked conflicted with an Indigenous right that does not rest on Indigenous difference. In such circumstances, any limit on the individual right must be justified under s. 1 of the *Charter*. And like s. 35 rights, the primacy afforded to the collective rights under s. 25 is subject to the equality guarantee for "male and female persons" under s. 28 of the *Charter* and s. 35(4) of the *Constitution Act, 1982*.

[111] In the reasons that follow, we seek to develop a framework to apply s. 25 to the circumstances of this case. The parties and interveners have described s. 25 as either a "shield" or an "interpretative prism" (or "interpretive prism"), but in our respectful view, neither term offers a full account of the provision. Section 25 mandates that when a *Charter* right abrogates or derogates from an Aboriginal, treaty, or other right

belonging to the Aboriginal peoples of Canada, it can “shield” collective Indigenous rights from certain applications of the *Charter*. But to determine whether the individual *Charter* right conflicts with the collective Indigenous right or freedom, s. 25 directs that the individual *Charter* right must first be “construed”. Similarly, determining whether the residency requirement in the VGFN Constitution is an “other righ[t] or freedo[m] that pertain[s] to the aboriginal peoples of Canada” under s. 25 requires an exercise of interpretation.

[112] In what follows, we first consider s. 25 in light of its purpose, with due consideration to its text, the *Charter*’s character and larger object, and the provision’s history. Second, we address the “other” collective rights and freedoms under s. 25 and their relationship to Indigenous difference. Finally, we discuss the scope of the so-called “shield” and “interpretative” aspects of s. 25, before considering whether the provision protects the residency requirement in the VGFN Constitution from Ms. Dickson’s s. 15(1) challenge, and further, whether the VGFN needs to justify its residency requirement under s. 1 of the *Charter*.

(2) Purpose of Section 25

[113] This Court has long recognized that the *Charter* must be interpreted purposively (see *Hunter*, at pp. 156-57; *R. v. Poulin*, 2019 SCC 47, [2019] 3 S.C.R. 566, at para. 32). A purposive approach engages with the text of the provision in question as a first factor, and then turns to “the character and the larger objects of the *Charter* itself . . . , to the historical origins of the concepts enshrined, and where

applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated” (*Poulin*, at para. 32, citing *Big M Drug Mart*, at p. 344; see also *Quebec (Attorney General) v. 9147-0732 Québec inc.*, 2020 SCC 32, [2020] 3 S.C.R. 426, at para. 10).

[114] Further, as Lamer C.J. wrote in *R. v. Van der Peet*, [1996] 2 S.C.R. 507, the fiduciary relationship between the Crown and Indigenous peoples implies that “treaties, s. 35(1), and other statutory and constitutional provisions protecting the interests of [A]boriginal peoples, must be given a generous and liberal interpretation” (para. 24, citing *R. v. George*, [1966] S.C.R. 267, at p. 279). In our view, the protection of Indigenous minority interests under s. 25 should be interpreted in the same spirit.

[115] Before this Court, Ms. Dickson asserts that the purpose of s. 25, “like s. 35, is the reconciliation of Indigenous peoples of Canada with the broader Canadian state” (A.F., at para. 57). She sees s. 25 as aligned with international instruments that provide a balance in which Indigenous peoples have the right to the “full enjoyment” of collective and individual rights and freedoms, which means that s. 25 is “an interpretative provision aimed at reconciliation” (Appellant’s Condensed Book, at p. 10). The VGFN urges the Court to consider s. 25 and the objective of reconciliation differently. It says the purpose of s. 25 is to “protect space necessary for Indigenous peoples to continue to be Indigenous” as the process of reconciliation unfolds (Respondent’s Condensed Book, at p. 1). The VGFN says that this “space” includes the collective right of self-government, grounded in “pre-existing societies of

Indigenous peoples” (p. 1). In our view, there is merit in both perspectives: s. 25 operates to “reconcile” conflicting individual and collective rights and creates a novel dynamic for resolving any such conflict, but the provision also gives primacy to certain Indigenous rights over conflicting individual *Charter* rights to promote the reconciliation of Indigenous peoples with the Crown’s assertion of sovereignty (see *R. v. Desautel*, 2021 SCC 17, [2021] 1 S.C.R. 533, at para. 22).

[116] Both courts below (see trial reasons, at para. 198; C.A. reasons, at para. 148) relied on Bastarache J.’s purpose statement for s. 25 from his concurring opinion in *Kapp*: “. . . protecting the rights of [A]boriginal peoples where the application of the *Charter* protections for individuals would diminish the distinctive, collective and cultural identity of an [A]boriginal group . . .” (para. 89, citing J. M. Arbour, “The Protection of Aboriginal Rights within a Human Rights Regime: In Search of an Analytical Framework for Section 25 of the Canadian Charter of Rights and Freedoms” (2003), 21 *S.C.L.R.* (2d) 3, at p. 60). A significant body of academic commentary also supports the view that s. 25 has an essentially protective purpose regarding collective Indigenous interests (see, e.g., W. Pentney, “The Rights of the Aboriginal Peoples of Canada and the *Constitution Act, 1982*: Part I — The Interpretive Prism of Section 25” (1988), 22 *U.B.C. L. Rev.* 21, at p. 28); K. McNeil, “The Constitutional Rights of the Aboriginal Peoples of Canada” (1982), 4 *S.C.L.R.* 255, at p. 262; Macklem, at p. 225; C. Hutchinson, “Case Comment on *R. v. Kapp*: An Analytical Framework for Section 25 of the *Charter*” (2007), 52 *McGill L.J.* 173, at p. 179). The VGFN asks this Court to adopt Bastarache J.’s statement of purpose (R.F.,

at para. 104), as do some interveners, including the Attorney General of Canada (I.F., at para. 29).

[117] A majority of this Court has never fully analyzed the purpose of s. 25 of the *Charter*. This appeal requires us to do so. We view the purpose of s. 25 of the *Charter* as ensuring that the designated rights and freedoms of Indigenous peoples are protected where giving effect to conflicting individual *Charter* rights and freedoms would diminish Indigenous difference. This purpose aligns with the broad goals of s. 35 of the *Constitution Act, 1982* and is in step with the framework embraced by this Court to reconcile the sovereignty of the Crown with the reality that Indigenous peoples lived here, in distinct societies with laws, traditions, and customs, long before European contact (see *Van der Peet*, at para. 31). Section 25 echoes the aspiration to reconcile the guarantee of individual rights and freedoms in the *Charter* for all Canadians with the distinctive collective rights of Indigenous peoples. Protecting collective rights and freedoms in this way is also consonant with the *United Nations Declaration on the Rights of Indigenous Peoples*, as brought into Canadian law by the *UNDRIP Act*. We recall in particular Article 34 of the Declaration: “Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs, in accordance with international human rights standards.”

[118] Four interpretative indicators support our view that s. 25’s purpose is to protect Indigenous difference against inappropriate erosion by individual *Charter*

rights: (1) the text of the provision; (2) the character and larger objects of the *Charter*; (3) the origin, meaning, and purpose of the Aboriginal and treaty rights referred to in s. 25; and (4) extrinsic evidence relating to the advent of s. 25.

(a) *Text of Section 25*

[119] First, the text of s. 25 plainly suggests the protective purpose of the provision. Two aspects of the wording are significant. The first is the operative terms used in the English and French texts — “shall not be construed so as to abrogate or derogate” from certain Indigenous rights in English, and “ne porte pas atteinte” to those rights in French — which signal that s. 25 protects against an inappropriate impairment of the collective Indigenous right that would flow from applying the conflicting individual *Charter* right or freedom. This strong language has been seen by some as the surest sign that s. 25 operates as a “bar” or a “shield” against applying a *Charter* right that would diminish a relevant collective Indigenous interest. The second indicium bears on the character of the Indigenous rights that are relevant under s. 25. The phrase “that pertain to the aboriginal peoples of Canada” or “*des peuples autochtones du Canada*” suggests a guide to the proper scope of s. 25’s protection.

[120] For some, the reference to the fact that the individual *Charter* rights “shall not be construed” to abrogate or derogate from the collective Indigenous interest in the English version — absent from the French text — gestures to an interpretative dimension to s. 25. In addition, the words “pertain to” in the English version points to a wide berth for such other rights as they relate to Aboriginal peoples; others see the

reference in the French to “*des peuples autochtones*” as more confining. Given that an understanding of s. 25’s purpose will begin with the text, it is important to examine these two indicia carefully and to dispel any sense that the French and English versions of the provision diverge from a shared meaning around a single purpose of protecting collective Indigenous interests from being diminished by individual *Charter* rights.

[121] The French and English texts are, of course, equally authoritative as expressions of the intent reflected in s. 25 (see s. 57 of the *Constitution Act, 1982*; R. Sullivan, *The Construction of Statutes* (7th ed. 2022), at pp. 114-15). It is a recognized principle of bilingual interpretation, applicable to the *Charter*, that the exercise of discerning legislative intent can properly include the search for a shared meaning between the two linguistic texts, typically identified by reading both versions together (*R. v. Collins*, [1987] 1 S.C.R. 265, at pp. 287-88; *R. v. Lewis*, [1996] 1 S.C.R. 921, at para. 72; see also P.-A. Côté and M. Devinat, *Interprétation des lois* (5th ed. 2021), at No. 1126).

[122] In *Kapp*, Bastarache J. analyzed the text of s. 25 at some length, including possible discordances between the French and English versions as one measure of meaning for the provision. We agree with Bastarache J.’s conclusion that the observable differences in wording between the French and English versions are not decisive as to the meaning of s. 25 and that, read together, they support a view of a single protective purpose (see paras. 86 and 101-3).

[123] The language of “abrogate or derogate” and “*porte . . . atteinte*” (i.e. impairs, or harms) suggests that the purpose of s. 25 is what this Court has called, on occasion, a “non-derogation clause in favour of the rights of [A]boriginal peoples” (*Secession Reference*, at para. 82) or a provision that “shields” Aboriginal rights from being abrogated or derogated from (*Desautel*, at para. 39). The chosen phrases both signal that s. 25 may act as a bar against the abrogation of or derogation from Indigenous collective interests by conflicting individual *Charter* rights. The texts speak to this somewhat differently. Scholar Jane M. Arbour usefully noted that the French text is more “declaratory” of the protective effect of s. 25 that would apply if a claimant’s individual *Charter* right impaired the relevant Indigenous collective interest (p. 27). By comparison, she wrote, the language of “shall not be construed” in the English text refers explicitly to an interpretative exercise (p. 27 (emphasis deleted)). She did not see this difference of emphasis, however, as having any consequence in law.

[124] There is a shared meaning for the central protective purpose conveyed by the two linguistic texts. To determine whether the relevant Indigenous collective interest should take precedence over (or be shielded from) a claimant’s individual *Charter* right, one must discern whether what Bastarache J. called the two “competing rights” are in conflict, which requires that they be interpreted or “construed” (*Kapp*, at para. 87). This interpretative exercise is spoken to explicitly in the English text and is implicit in the more declaratory French text: one would have to interpret the two rights in question in order to conclude that the individual *Charter* right “*porte . . . atteinte*”

(i.e., impairs or harms) the Indigenous collective interest. Similarly, one could only conclude that the effect of the individual *Charter* right is to “abrogate” (i.e., nullify or repeal), or to “derogate” from (i.e., detract or depart from), the collective right after having identified, through an initial exercise of interpretation of the competing interests, whether the collective right is incompatible with the individual *Charter* right or freedom. The French text uses a generic term to describe the effect of a conflict (“*porte . . . atteinte*”). The English text refers to the same idea by specifying how the effect of the conflict manifests itself (“abrogate or derogate”). Thus, the shared meaning in English and French suggests that s. 25 has both interpretative and shield dimensions, both of which are relevant to the purpose of the clause. The difference in expression is best explained by the exigencies of linguistic form.

[125] Yet the mandatory language in the English text (“shall not be construed”) and the declaratory formulation of the French (“*ne porte pas atteinte*”) suggests the compass of interpretation is limited and, in both texts, any judicial discretion in interpreting the competing individual and collective interests is constrained by the direction that the construction of the individual right cannot extend beyond the point of conflict with the protected minority interest. In sum, both linguistic versions of the *Charter* are “not only reconcilable, they are different ways of expressing the same idea” (9147-0732 *Québec inc.*, at para. 65, per Abella J., dissenting, but not on this point).

[126] In a closely related context, the *UNDRIP Act* contains a provision in its division on “Interpretation”, in its English and French texts, that maintains Indigenous

rights in a similar fashion. Section 2(2) provides: “This Act is to be construed as upholding the rights of Indigenous peoples recognized and affirmed by section 35 of the *Constitution Act, 1982*, and not as abrogating or derogating from them” (in French, “*elle n’y porte pas atteinte*”). This supports the view that the “upholding” or “*maintien*” of Indigenous rights under the protective purpose of s. 25 of the *Charter* can involve elements of a shield and of an exercise of construction.

[127] Similarly, the difference in emphasis between “pertain to the aboriginal peoples”, in the English version of s. 25, and “*des peuples autochtones*”, in the French version, is of no legal consequence in light of the clear shared meaning between the two versions. It is true that “pertain to” has a potentially broad meaning extending beyond rights that would belong to Indigenous peoples to include those that might relate to them more incidentally. The use of the French possessive “*des*” is plainly narrower. Professors Pierre-André Côté and Mathieu Devinat explain that, in such instances, [TRANSLATION] “the shared meaning is thus the more narrow of the two” (No. 1131). In this case, the narrower meaning conveyed by the French text is shared with the English text: “*des peuples autochtones*” alludes to rights that belong to or benefit Indigenous peoples *qua* Indigenous peoples or, as Bastarache J. observed in *Kapp*, that “are particular to them” (para. 101). This closer connection between the right or freedom and Indigenous peoples will prove important, as we shall see, in the measure of what scholars have described as the “Indigenous difference” spoken to in the rights or freedoms in s. 25.

[128] We also observe that the marginal notes for s. 25 characterize the provision as “Aboriginal rights and freedoms not affected by Charter” and “*Maintien des droits et libertés des autochtones*”. Marginal notes are of course not an integral part of the text, and thus no definitive weight should be attributed to them when construing *Charter* provisions (see *R. v. Wigglesworth*, [1987] 2 S.C.R. 541, at pp. 556-58). But however limited their interpretative value, these notes support the view that s. 25’s purpose is to guard against certain effects on rights belonging to the Indigenous peoples of Canada that would flow from applying the *Charter*.

[129] Finally, it is noteworthy that the language in s. 25 is also found in ss. 21 and 22 of the *Charter* on the maintenance of certain language rights, and s. 29 on the maintenance of rights regarding certain schools. These provisions use phrasing similar to s. 25: “[n]othing in [the relevant provisions] abrogates or derogates from [pre-existing rights]” along with the French “*n’ont pas pour effet de porter atteinte*”. Section 29, a *Charter* provision found (as is s. 25) in the “General” / “*Dispositions générales*” division of the *Charter*, has been allied with s. 25 as bearing on the underlying constitutional principle of the protection of minority rights (*Secession Reference*, at paras. 79 and 82). Section 29, with this similar vocation to s. 25’s, was interpreted by this Court in *Reference re Bill 30, An Act to amend the Education Act (Ont.)*, [1987] 1 S.C.R. 1148, by Wilson J., who wrote that “s. 29 is there to render immune from *Charter* review rights or privileges which would otherwise, i.e., but for s. 29 be subject to such review. . . . [T]hey are insulated from *Charter* attack” (p. 1198). Commenting on the relevance of these related provisions to the purposive interpretation

of s. 25, prior to his appointment to the bench, Professor Kenneth M. Lysyk has written that the “common feature of all these provisions [(i.e., ss. 21, 25, 26 and 29)] is that they are saving clauses designed to protect rights that exist independently of the Charter itself” (“The Rights and Freedoms of the Aboriginal Peoples of Canada”, in W. S. Tarnopolsky and G.-A. Beaudoin, eds., *The Canadian Charter of Rights and Freedoms: Commentary* (1982), 467, at p. 471). This further supports the view that the text of s. 25 has a protective purpose of safeguarding Indigenous rights from incursions by individual *Charter* rights.

(b) *Character and Larger Objects of the Charter*

[130] The character and larger objects of the *Charter* are consonant with the idea that the purpose of s. 25 is, as the text suggests, the protection of collective Indigenous minority interests from encroachment by conflicting individual *Charter* rights and freedoms. In *R. v. Oakes*, [1986] 1 S.C.R. 103, Dickson C.J. wrote that the “values and principles essential to a free and democratic society” that might justify limitations on *Charter* rights include “respect for cultural and group identity” (p. 136). This latter idea, as we have seen, was identified in the *Secession Reference*, at para. 82, as an “underlying constitutional value” — that of protection for minority rights. It finds expression in the constitutional text through, among other provisions, s. 25 of the *Charter* (see also *Metallic*, at p. 13). Chief Justice Lamer explained in *Van der Peet* that it is Indigenous peoples’ prior occupancy of North America that “separates [them]

from all other minority groups in Canadian society and which mandates their special legal, and now constitutional, status” (para. 30).

[131] These foundational decisions, and this Court’s broader jurisprudence, confirm that while the *Charter* undoubtedly protects individual rights (see *McKinney*, at p. 261), it was not intended to do so at the expense of the collective rights of the Indigenous peoples of Canada as a distinct minority deserving of constitutional protection. The recognition that s. 25 protects certain rights and freedoms from abrogation or derogation that might flow from giving effect to conflicting *Charter* rights and freedoms is, therefore, in keeping with the character and overarching purposes of the *Charter* itself.

(c) *Historical Origins, Meaning and Purpose of Aboriginal and Treaty Rights*

[132] Aboriginal and treaty rights referred to in s. 35 of the *Constitution Act, 1982* shed light on the protection afforded by s. 25, which refers, in part, to the same rights. Section 35 gives those rights constitutional status by protecting them from unjustified infringement by legislative and executive action (see *Sparrow*).

[133] In *Van der Peet*, Lamer C.J. explained that the doctrine of Aboriginal rights and the approach to interpreting those rights liberally in the Constitution is explained by plain historical fact: “. . . when Europeans arrived in North America, [A]boriginal peoples were already here, living in communities on the land, and participating in distinctive cultures, as they had done for centuries” (para. 30 (emphasis in original)).

He therefore stated that s. 35 is designed to “provide the constitutional framework through which the fact that [A]boriginals lived on the land in distinctive societies, with their own practices, traditions and cultures, is acknowledged and reconciled with the sovereignty of the Crown” (para. 31).

[134] Section 35 also constitutionally entrenched treaty rights held by the Aboriginal peoples of Canada, which s. 35(3) states, for greater certainty, “includes rights that now exist by way of land claims agreements or may be so acquired”. This constitutional guarantee is warranted because “a treaty represents an exchange of solemn promises between the Crown and the various [First] [N]ations. It is an agreement whose nature is sacred” (*R. v. Badger*, [1996] 1 S.C.R. 771, at para. 41).

[135] The Court has given full expression to the purposes of s. 35 by recognizing that Aboriginal and treaty rights extend to a wide range of underlying constitutional interests. For instance, constitutional recognition of Indigenous peoples’ relationships with the land can ground the right for an Indigenous people to hold land title that, in some circumstances, rests on s. 35 (see *Delgamuukw; Tsilhqot’in Nation v. British Columbia*, 2014 SCC 44, [2014] 2 S.C.R. 257). Further, treaties may address various interests, including interests related to land or self-government (see, e.g., *First Nation of Nacho Nyak Dun*, at para. 10).

[136] In *Kapp*, Bastarache J. drew upon Professor Macklem’s view that the broad scope of the interests of the Indigenous peoples of Canada that may be recognized as constitutionally entrenched are those related to “[I]ndigenous difference”.

Professor Macklem observed that Indigenous difference reflects “four complex social facts [that] lie at the heart of the relationship between Aboriginal people and the Canadian state” (p. 4). These are: “. . . Aboriginal cultural difference, Aboriginal prior occupancy, Aboriginal prior sovereignty, and Aboriginal participation in a treaty process . . .” (p. 4).

[137] Relying on the Court’s opinion in the *Secession Reference* connecting both s. 35 and s. 25 to a tradition of constitutional protection of minority rights, Ms. Dickson asserts that s. 25 protects initiatives designed to preserve or enhance Indigenous difference. The Attorney General of Alberta intervenes to argue similarly that s. 25 “enables an approach that protects interests associated with Indigenous difference from erosion by individual *Charter* rights” (I.F., at para. 20). The VGFN resists this conclusion, and answers that this characterization would exclude a wide range of self-governance rights and unduly limit s. 25’s protections. Instead, the VGFN ties the impugned residency requirement to Indigenous difference and the continuance of a pre-contact Indigenous legal order.

[138] Indigenous difference is an appropriate criterion for circumscribing the “other rights or freedoms” under s. 25 because it helps identify the contours of the provision’s protective purpose if there is a conflict with an individual *Charter* right. Indigenous difference connects the “other righ[t] or freedo[m]” to the collective minority interest that s. 25 is designed to serve. When Indigenous difference is not shown to underlie the competing collective interest, the ultimate justification for setting

aside the individual *Charter* right falls away. The concept of Indigenous difference connects the “other rights” to the rest of s. 25 and gives content to what it means for a right or freedom to belong to or benefit — to meaningfully “pertain to” — the Aboriginal peoples of Canada.

[139] The clear relationship between ss. 25 and 35 suggests that their purposes must be seen as related. Section 35 speaks to how the Canadian Constitution protects Indigenous difference from unjustified legislative or executive infringement. In the same spirit, s. 25 ensures that the individual rights in the *Charter* do not themselves undermine Indigenous difference where they abrogate or derogate from the measures that protect that difference.

(d) *Extrinsic Evidence*

[140] Finally, the protective purpose of s. 25 is confirmed by the testimony and debates before Parliament in relation to the provision’s genesis. These extrinsic materials suggest that s. 25 was initially viewed, in the words of then Minister of Justice Jean Chrétien, as a means of identifying which Indigenous rights would “not . . . be adversely affected by the Charter” (Senate and House of Commons, *Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada*, No. 36, 1st Sess., 32nd Parl., January 12, 1981, at p. 18; see also No. 38, 1st Sess., 32nd Parl., January 15, 1981, at pp. 67-69 (Hon. Jean Chrétien; Mr. Roger Tassé); Arbour, at pp. 30-37). As noted earlier, the Government of Canada has regularly pursued a policy that the *Charter*

should apply to all Canadians, including self-governing Indigenous peoples, and that s. 25 is a mechanism in the Constitution that directs that the *Charter* must be interpreted in a manner that respects and upholds Aboriginal, treaty, and other like rights (*The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government*; see generally Hogg and Turpel).

[141] In our view, this sustains the generous approach to be taken in interpreting “other rights” in s. 25 and the Indigenous difference criterion, which helps guard against an overzealous application of the *Charter* to self-governing Indigenous peoples. Before his appointment to the bench, Professor Sébastien Grammond described the protection of the collective interest in s. 25 as something of a counterweight to the application of the *Charter* to self-governing Indigenous peoples:

[TRANSLATION] Therein may lie the most elegant way to transcend the debate: a flexible interpretation of section 25 could result in the *Charter* being considered applicable to Indigenous governments in principle, but in an attenuated manner, which seeks to ensure that the central elements of the Indigenous society are not infringed upon.

(*Aménager la coexistence: Les peuples autochtones et le droit canadien* (2003), at p. 342)

[142] Although we would not assign definitive weight to external evidence of the purpose of this *Charter* provision (see *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, at pp. 504-7), it too supports s. 25's protective purpose.

(e) *Conclusion on the Purpose of Section 25*

[143] We thus conclude that the purpose of s. 25 is to protect certain Indigenous collective rights from the application of conflicting individual *Charter* rights or freedoms, when such application would diminish the Indigenous difference protected and recognized by the collective rights. When the application of the individual right would undermine in an essential or non-incidental way the Indigenous difference protected by the collective right, s. 25 directs that the collective right be given primacy. This differs from the process of determining whether the impairment of an individual *Charter* right is justified in a free and democratic society under s. 1 of the *Charter*, which is not solely targeted at protecting the collective minority right as a social and constitutional good.

(3) Rights Within the Scope of Section 25

[144] In light of the purpose of s. 25, what collective minority rights or freedoms fall within its scope? Section 25 refers to “aboriginal, treaty or other rights or freedoms” and provides that these include any rights or freedoms (a) recognized by the *Royal Proclamation, 1763* (G.B.), 3 Geo. 3 (reproduced in R.S.C. 1985, App. II, No. 1), or (b) acquired through land claims agreements. By including “other” rights and freedoms among those deserving of constitutional protection in this context, s. 25 speaks to a wider range of rights than s. 35 (see, e.g., B. Slattery, “The Constitutional Guarantee of Aboriginal and Treaty Rights” (1982), 8 *Queen’s L.J.* 232, at p. 237; Hogg and Wright, at § 28:41). Professor Lysyk notes that the subcategories of rights or freedoms

under s. 25(a) and (b) “exemplify, but do not limit, the full range of rights and freedoms to which the protection of s. 25 extends” (p. 473).

[145] Whether an asserted right is an Aboriginal or treaty right depends of course on the applicable law concerning the recognition of such rights (see, e.g., *Van der Peet*; *Pamajewon*; *R. v. Gladstone*, [1996] 2 S.C.R. 723; *Mitchell v. M.N.R.*, 2001 SCC 33, [2001] 1 S.C.R. 911; *R. v. Sappier*, 2006 SCC 54, [2006] 2 S.C.R. 686; *Lax Kw’alaams Indian Band v. Canada (Attorney General)*, 2011 SCC 56, [2011] 3 S.C.R. 535; *Desautel*; and see, e.g., *R. v. Sioui*, [1990] 1 S.C.R. 1025; *R. v. Sundown*, [1999] 1 S.C.R. 393; *Manitoba Metis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 14, [2013] 1 S.C.R. 623). However, no framework for the recognition of the third category of rights protected by s. 25 — “other rights” — has yet been definitively established.

[146] In *Kapp*, the majority in *obiter* considered the scope of the rights included under s. 25 and wrote that not every Indigenous interest falls within its scope. Rather, “only rights of a constitutional character are likely to benefit from s. 25” (para. 63, per McLachlin C.J. and Abella J.). Justice Bastarache proposed a broader approach, consistent with the idea that s. 25 protects all rights that are “unique to [Indigenous peoples] because of their special status”, that is, rights that protect Indigenous difference (para. 103; see also para. 106).

[147] Before this Court, Ms. Dickson asserts that only rights with “constitutional status”, in the sense that they cannot be repealed or altered by ordinary legislation, are

protected under s. 25 (A.F., at para. 66(a)). The VGFN opposes such a restriction. Alternatively, it submits that even if the rights protected under s. 25 must have a “constitutional character”, this cannot mean that “a court declaration or recognition by the Crown of an ‘existing’ aboriginal right is a pre-condition for s. 25 to apply” (R.F., at para. 112).

[148] It is recognized that *Charter* rights are not absolute (see *Canada (Attorney General) v. JTI-Macdonald Corp.*, 2007 SCC 30, [2007] 2 S.C.R. 610, at para. 36). This is equally true for a provision like s. 25 that protects certain Indigenous rights and freedoms (see *Kapp*, at para. 97, per Bastarache J.). Potential limitations on the scope of “other” rights under s. 25 include limits on sources of the right, which we refer to as “formal” restrictions, and limits on the nature of the right, which we refer to as “substantive” restrictions.

[149] It is clear from the text and purpose of s. 25 that the provision’s protections are not restricted to rights with “constitutional status”, understood as rights that cannot be repealed or altered by ordinary legislation, as argued by Ms. Dickson. The possibility of such a formal restriction is foreclosed, in particular, by the express inclusion of rights recognized by the *Royal Proclamation, 1763*, which is not one of the documents that comprise the Canadian Constitution by virtue of s. 52(2) and is seen as having “force as a statute” in a manner analogous to the status of the Magna Carta (*Calder v. Attorney-General of British Columbia*, [1973] S.C.R. 313, at p. 395, per Hall J.). Further, as the intervener the Attorney General of Canada notes, were s. 25 intended

to only protect rights and freedoms with constitutional status, “the provision would presumably have referred to a right or freedom guaranteed by the Constitution of Canada, as was done in s. 29 of the *Charter*” (I.F., at para. 45). As a result, the rights protected under s. 25 are not limited to those that are constitutionally entrenched and may instead include ordinary statutory rights (see also *Corbiere*, at para. 52, per L’Heureux-Dubé J.).

[150] While we would not give effect to the formal restriction on the source of an “other” right proposed by Ms. Dickson, the text and purpose of s. 25 do suggest a substantive restriction. Since s. 25 was intended to protect rights associated with Indigenous difference — understood as interests connected to cultural difference, prior occupancy, prior sovereignty, or participation in the treaty process — whether a right warrants s. 25 protection on the basis that it is an “other” right will hinge on whether it protects or recognizes those interests. In short, a party seeking the protection of s. 25 for a right alleged to be an “other” right must establish both the existence of the right and the fact that the right protects or recognizes Indigenous difference.

[151] The Attorney General of Canada intervenes to say that a restriction on the scope of “other” rights is that they must have a “constitutional character” in a substantive, rather than a formal, sense (see, e.g., I.F., at para. 44). While Bastarache J. suggested that a “constitutional character” requirement stands in opposition to a broader, minority rights approach focused on protecting rights associated with Indigenous difference (*Kapp*, at paras. 102-3), it may be that the two are compatible if

protecting Indigenous difference has inherent constitutional significance. However, since the asserted right at issue here has a constitutional character, we would leave for another day whether “constitutional character” represents a distinct substantive restriction on “other” rights.

(4) Operation of Section 25

[152] When a right has been shown to be an Aboriginal, treaty, or “other righ[t] or freedo[m]”, s. 25 protections do not apply automatically. Those protections apply only if it is determined that there is irreconcilable conflict between the claimed *Charter* right and the s. 25 right, such that giving effect to the *Charter* right would undermine the Indigenous difference protected or recognized by the collective right. The question becomes what kind of protection the provision affords. There is broad consensus that s. 25 does not create new substantive rights or freedoms (see Hogg and Wright, at § 28:41; see also *R. v. Steinhauer* (1985), 63 A.R. 381 (Q.B.), at para. 19; *R. v. Augustine* (1986), 74 N.B.R. (2d) 156 (C.A.), at para. 50; *R. v. Nicholas* (1988), 91 N.B.R. (2d) 248 (Q.B.), at para. 10; *R. v. Willocks* (1992), 14 C.R.R. (2d) 373 (Ont. C.J. (Prov. Div.)), at p. 383, aff’d (1995), 22 O.R. (3d) 552 (C.J. (Gen. Div.)); *R. v. Redhead* (1995), 99 C.C.C. (3d) 559 (Man. Q.B.), at p. 573; *Kapp*, at para. 79, per Bastarache J.; *Rice v. Agence du revenu du Québec*, 2016 QCCA 666, [2016] 3 C.N.L.R. 311, at para. 50). However, the details of s. 25’s operation remain largely unsettled.

(a) *The Effect of Section 25*

(i) Competing Views on the Effect of Section 25

[153] In *Kapp*, this Court considered two competing views on the effect of s. 25 (para. 64, per McLachlin C.J. and Abella J.; paras. 79-80 and 94-97, per Bastarache J.). The first approach sees s. 25 as a “shield”. On this view, a successful invocation of s. 25 would bar a *Charter* claim in circumstances where applying the *Charter* right would abrogate or derogate from a right within the scope of s. 25 (para. 64; paras. 80 and 94-97).

[154] The second approach sees s. 25 as an “interpretive prism” or rule of interpretation (see Pentney, at pp. 27-29). The majority in *Kapp* wrote that s. 25 serves to “infor[m] the construction of potentially conflicting *Charter* rights”, rather than act as a barrier to the *Charter*’s application (para. 64). On this view, courts would attempt to construe the relevant *Charter* right to give effect to it without abrogating or derogating from the identified s. 25 right. If a conflict occurs, however, the Aboriginal, treaty, or other right would be afforded no special priority; the question as to whether the collective Indigenous right should be upheld would be left to judicial discretion, to be determined on a case-by-case basis (see, e.g., B. H. Wildsmith, *Aboriginal peoples and Section 25 of the Canadian Charter of Rights and Freedoms* (1988), at pp. 10-11).

[155] In *Kapp*, Bastarache J. favoured the “shield” approach over the “interpretative prism” view, noting that s. 25 was intended to give “primacy” to Aboriginal, treaty, or other rights (para. 81; see also paras. 94-97). The *Kapp* majority

resolved the case under s. 15(2) of the *Charter* and declined to decide this point (paras. 62-65).

[156] Before this Court, Ms. Dickson argues that s. 25 should not operate as an “absolute” shield (see A.F., at para. 97; see also paras. 11, 47, 56, 92-93, 96, 100 and 102). Instead, she submits that s. 25 should be considered as part of the s. 1 analysis under a balancing approach that weighs “the harm to the rights of Indigenous communities” against the “harm of the *Charter* infringement” (para. 97; see also paras. 50-52). In contrast, the VGFN contends that s. 25 achieves its purpose of ensuring “that the rights and freedoms of Indigenous peoples and their special position within Canadian society are not eroded by the guarantee of *Charter* rights and freedoms to Canadians” by “providing a ‘shield’ for Indigenous rights and freedoms” (R.F., at para. 104). It styles s. 25 as a “complete shield” to Ms. Dickson’s s. 15(1) claim, not subject to limits, including those associated with s. 1 of the *Charter* (heading of para. 122; see also para. 126).

[157] In the sparse s. 25 jurisprudence, the metaphorical language of a “shield” is sometimes used to describe the protective effect of the provision. Before *Kapp*, L’Heureux-Dubé J. spoke of a “shield” in her concurring reasons in *Corbiere* (paras. 51-53). More recently, Rowe J., writing for the majority in *Desautel*, stated that s. 25 “shields the rights and freedoms that pertain to Aboriginal peoples of Canada from being abrogated by the *Canadian Charter of Rights and Freedoms*” (para. 39). Lower courts have often referred to s. 25 as a “shield” (see, e.g., *Steinhauer*, at para. 19;

Willocks (Ont. C.J. (Prov. Div.)), at p. 383; *Campbell v. British Columbia (Attorney General)*, 2000 BCSC 1123, 79 B.C.L.R. (3d) 122, at paras. 156-58). In the present case, the trial judge and the Court of Appeal both adopted “shield” terminology in their s. 25 analyses (trial reasons, at para. 180; C.A. reasons, at para. 158). Shield-based approaches to s. 25 have also been embraced by some legal academics, although there remains no scholarly consensus (see Swiffen, at pp. 27 and 32-34).

(ii) The Proper Approach to the Effect of Section 25

1. *Section 25 Affords Primacy to Indigenous Rights in Cases of Irreconcilable Conflict*

[158] In our view, the proper approach to s. 25 includes elements drawn from both the “shield” and “interpretative prism” approaches. As we explain, s. 25 can be said to have a “shielding” effect because it affords primacy to Aboriginal, treaty, or other rights. However, a right within the scope of s. 25 is only prioritized after an interpretive exercise demonstrates that there is an irreconcilable conflict between the collective right and the individual *Charter* right in question.

[159] In light of the purposive analysis above, the provision will sometimes serve as a “shield” for Aboriginal, treaty, and other rights to protect the collective minority interest of Indigenous peoples. But we also agree with the Attorney General of Canada that the s. 25 analysis should not rely too heavily on the metaphor of a “shield” (I.F., at paras. 31-33). An absolutist approach to s. 25, which would “block . . . a dialogue on

the competing and, at times, conflicting interests”, is inconsistent with a purposive approach (para. 32, citing *Arbour*, at p. 13). It also stands in opposition to the idea that in Indigenous legal cultures, as in Canadian constitutional law, individual and collective rights are conceived as operating harmoniously. Although the provision is not a mere interpretive lens for *Charter* analysis, discerning the extent of s. 25 protection requires drawing on some aspects of both approaches. This position has been advocated by a segment of the scholarly community: for example, *Arbour* argues that the shielding effect of s. 25 only applies once the court has determined that it is impossible to interpret the s. 25 identified right and the *Charter* right in a way that upholds them both (pp. 61-62).

[160] As we have seen, the text of s. 25 suggests that prioritization is only warranted for Aboriginal, treaty, and other rights if giving effect to the claimed *Charter* right would abrogate or derogate from those collective rights. If there is no conflict between the *Charter* right and the Aboriginal, treaty, or other right, there is no need to protect the collective right from intrusion occasioned by the individual right. The Attorney General of Alberta joins the Attorney General of Canada and other interveners to argue that the effect of s. 25 is that *Charter* rights must yield to the s. 25 identified rights to the extent of the conflict between them. The Métis Nation of Ontario and the Métis Nation of Alberta similarly submit that where there is potential for “real conflict” between the exercise of a s. 25 right and an individual *Charter* right, “the *Charter* rights must give way” (I.F., at para. 29).

[161] The key question, then, is what kind of conflict must be shown between the collective and individual rights concerned for the s. 25 shield to operate. Standards ranging from “potential” to “true” conflict have been suggested. In our view, the conflict between the rights must be real and irreconcilable, such that there is no way to give effect to the individual *Charter* right without abrogating or derogating from the right within the scope of s. 25. To adopt a lesser standard, such as the mere possibility of a conflict, would detract from the seriousness of compromising an individual *Charter* right. Section 25 protects the collective Indigenous interest when the conflict is not hypothetical and cannot be avoided.

[162] The requirement of an irreconcilable conflict between the two rights best aligns with the purpose and text of s. 25 because if there is a way, through fair and careful interpretation, for courts to give effect to the *Charter* right and the s. 25 identified right, then “[b]oth rights are respected, and the conflict is averted” (*R. v. N.S.*, 2012 SCC 72, [2012] 3 S.C.R. 726, at para. 32). In such cases, the individual *Charter* right has been construed to not “abrogate” or “derogate” from the right within the scope of s. 25.

[163] Determining whether there is an irreconcilable conflict between the rights at issue is an interpretive exercise. It requires courts to interpret the substance of both the *Charter* right and the Aboriginal, treaty, or other right at issue (see Hutchinson, at p. 185). This interpretive exercise must be informed by, and respectful of, Indigenous perspectives (see *Corbiere*, at para. 54, per L’Heureux-Dubé J.). At the same time,

courts must be careful not to depart from the generous interpretation of individual *Charter* rights and freedoms mandated by this Court's jurisprudence. Professor Ghislain Otis observes that s. 25 can be understood in light of a fundamental rule of internal coherence of constitutional texts directing that interpretation should be undertaken on the assumption that conflict does not exist: [TRANSLATION] “. . . when two principles or provisions seem to be in conflict, they must nevertheless be able to coexist and each produce an effect . . .” ((2005), at p. 240). Moreover, at this stage of the analysis, consideration should be given to any alternative relief sought by the claimant, as different *Charter* remedies may be more or less intrusive on the relevant Aboriginal, treaty, or other right.

[164] In sum, s. 25 does not serve as a “shield” whenever a right falling within its scope is at issue. Rather, when a *Charter* right is engaged by the exercise of an Aboriginal, treaty, or other right, courts must consider whether the two rights can be reconciled. If giving effect to a *Charter* right would only affect incidentally or in a non-essential manner the s. 25 identified right — in the sense that it would not undermine Indigenous difference — or if the *Charter* right can be interpreted in a manner consistent with the Aboriginal, treaty, or other right, then it would be inappropriate to give priority to the right within the scope of s. 25. It is only when the s. 25 right is affected in a non-incidental manner, thereby creating an irreconcilable conflict between the two rights, that s. 25 will protect the Indigenous right by rendering the individual right ineffective to the extent of the conflict. In this sense, s. 25 will

sometimes function as what author Arbour describes as a “pop up shield” (p. 13). At other times, it will have only an interpretive role.

2. *A Single Framework Applies to Internal and External Conflicts*

[165] Section 25 is directed at safeguarding Aboriginal, treaty, or other rights that aim to protect Indigenous difference. Accordingly, the focus of s. 25 is on collective rights, irrespective of the identity of the individual or entity bringing the *Charter* challenge. The result is that the same analytical framework applies whether or not the *Charter* claimant is Indigenous, whether s. 25 is being asserted by an Indigenous group, or, as in this case, both parties are Indigenous. The s. 25 shield finds immediate application if a claimed *Charter* right abrogates or derogates from a collective s. 25 right, regardless of the parties involved.

[166] We reject creating a distinct analysis for so-called “internal” claims within an Indigenous community for several reasons.

[167] First, the concerns raised by multiple interveners about not holding Indigenous governments accountable for alleged violations of their constituents’ *Charter* rights are addressed by the application of the *Charter* to governmental acts by Indigenous governments, as set out above (see, e.g., I.F., Pan-Canadian Forum on Indigenous Rights and the Constitution, at para. 22; I.F., Band Members Alliance and Advocacy Association of Canada, at paras. 26-27; I.F., Congress of Aboriginal Peoples, at para. 8). An Indigenous government must show, on the basis of an

interpretive exercise, that the *Charter* right, whether claimed by an Indigenous or non-Indigenous person, is in irreconcilable conflict with a collective right recognized by s. 25. Once that has been demonstrated, the collective right will be protected from abrogation or derogation by the effect of s. 25.

[168] Second, s. 25's protection of Indigenous difference seeks to shield a *collective* right. The inquiry into whether the claimed *Charter* right would diminish Indigenous difference is an inquiry into the protection of Indigenous difference *as understood and established by the collective*, rather than by individual Indigenous community members.

[169] Third, there is no basis in the text of s. 25 for finding that the protective shield should apply differently based on the parties' identities. Author Kerry Wilkins notes that "[n]othing in section 25 itself . . . suggests that it applies any differently to some aboriginal rights, or to some Charter rights, than it does to others" (p. 110). Relatedly, in *Kapp*, Bastarache J. observed that an Indigenous claimant may challenge a law under the *Charter* without invoking their own Indigeneity, noting that individuals can have multiple identities that are not all always engaged in the same way (para. 99).

[170] Fourth, it will not always be clear, in a practical sense, when a claim is "internal". There may, for example, be claims from individuals who consider themselves members of the collective, but whose membership is disputed by the Indigenous group, making any distinction between internal and external claims untenable. There may also be a challenge brought by an individual against a rule

resulting from collaboration between an Indigenous government and a non-Indigenous governmental or private actor. In such cases, any distinction between internal and external claims is equally difficult to discern.

[171] And finally, s. 25's protective purpose is not incompatible with the recognition — made plain in both the *UNDRIP Act* and the VGFN Constitution — that individual and collective Indigenous rights can coexist. Fundamentally, the protection of Indigenous difference in s. 25 reflects the central place of Indigenous peoples and their governments in Canada's constitutional fabric. Recognizing constitutional protection under s. 25 allows Indigenous peoples to make decisions about their communities' individual and collective needs.

[172] While we do not endorse separate frameworks for internal and external claims, we recognize the need for great caution when the claim is brought by an Indigenous person against their own community. Such a case is distinct from cases like *Corbiere*, where the impugned provision was found in federal legislation, and *Kapp*, where the *Charter* claimant was not Indigenous. In a claim by an Indigenous person against their own community, courts should proceed cautiously to avoid unnecessarily or unwittingly imposing incompatible ideas or legal principles upon the distinctive Indigenous legal system. As the intervener the Carcross/Tagish First Nation submits, "Canadian institutions have been advised to tread lightly around the inherent rights that Indigenous peoples have to their own governance and justice systems" (I.F., at para. 21,

citing Truth and Reconciliation Commission of Canada, *Truth and Reconciliation Commission of Canada: Calls to Action* (2015), at call 42).

3. *Further Limitations*

[173] Even when s. 25 would otherwise prioritize an Aboriginal, treaty, or other right, there may be other relevant limitations on the application and effect of s. 25. Examples include s. 28 of the *Charter* and s. 35(4) of the *Constitution Act, 1982*. Section 28, embedded like s. 25 in the “General” provisions of the *Charter*, directs that “[n]otwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.” Section 35(4) provides: “Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.” These provisions — which apply notwithstanding any other provision in the *Charter* or the *Constitution Act, 1982*, respectively — ensure that a right protected under s. 25 does not shelter gender-based discrimination (see, e.g., McNeil (1996), at pp. 76-79; Wildsmith, at pp. 23-24; Arbour, at p. 68; Slattery (1982), at pp. 241-42; *Kapp*, at para. 97, per Bastarache J.). This being said, precisely demarcating the limits of s. 25’s protections, including those resulting from other constitutional sources, is best left to cases when they arise on the facts.

(b) *The Order of Analysis*

[174] A final question is at what stage of a *Charter* analysis s. 25 is properly considered. The VGFN submits that “s. 25 is engaged at the outset” before any consideration of the merits of the *Charter* claim (R.F., at para. 109). The Attorney General of Canada and the British Columbia Treaty Commission, following Bastarache J.’s comments in *Kapp*, submit that s. 25 should be considered only after the court is satisfied that the *Charter* is *prima facie* engaged (I.F., A.G. Canada, at para. 41; I.F., British Columbia Treaty Commission, at para. 12; *Kapp*, at paras. 108-9). As Ms. Dickson argues that s. 25 should be incorporated as an interpretative aid in the s. 1 justification analysis, she would see s. 25 considered after a full examination of the relevant *Charter* right.

[175] In light of the approach to s. 25 outlined above, many of the proposed views on ordering can be readily rejected. Because s. 25 does not serve as an impermeable shield, at least some understanding of the *Charter* right at issue will always be needed to determine whether s. 25 protection properly applies. As a result, the VGFN’s position on ordering cannot be accepted. Moreover, since s. 25 prioritizes Aboriginal, treaty, or other rights when there is an irreconcilable conflict with the relevant *Charter* right, s. 25 is more than a mere interpretative aid in a s. 1 analysis. Thus, Ms. Dickson’s view on ordering is also precluded.

[176] The order of analysis must reflect s. 25’s purpose of protecting Indigenous difference as a feature of the constitutional protection of minority rights. An unduly late application of s. 25 would be contrary to this purpose. When s. 25 is ultimately

found to give priority to an Aboriginal, treaty, or other right, requiring a party to defend fully against a *Charter* claim and further justify any breach under s. 1 would be superfluous and serve as a needless drain on the parties' resources. Moreover, the intervener the Carcross/Tagish First Nation argues that such an approach may cause Indigenous communities to prioritize aligning their laws with *Charter* values, potentially at the expense of their own legal orders, to avoid protracted litigation. Such an outcome would thwart, rather than advance, the underlying constitutional value of respect for minority rights, specifically, the protection of Indigenous difference.

[177] When a party seeks to invoke s. 25 in the face of a *Charter* claim, courts should consider applying s. 25 at the earliest possible stage without unduly prejudicing the individual *Charter* challenge. Given the competing interests that must be reflected in the s. 25 framework, the earliest that s. 25 could be properly considered is once the *Charter* claimant has shown a *prima facie* breach of their *Charter* right. Any justification under s. 1 should be required only if the court finds s. 25 inapplicable. This is so when there is no “aboriginal, treaty or other righ[t]” in play, the “other righ[t]” does not engage Indigenous difference, or there is no irreconcilable conflict between the protected collective Indigenous right and the individual *Charter* right. In those circumstances, the party defending the impugned action can still seek to justify the limitation under s. 1 of the *Charter*.

(5) Summary of the Section 25 Framework

[178] The analysis above suggests a four-step framework under s. 25.

[179] First, the *Charter* claimant must show that the impugned conduct *prima facie* breaches an individual *Charter* right. If no *prima facie* case is made out, then the *Charter* claim fails and there is no need to proceed to s. 25.

[180] Second, the party invoking s. 25 — typically the party relying on a collective minority interest — must satisfy the court that the impugned conduct is a right, or an exercise of a right, protected under s. 25. That party bears the burden of demonstrating that the right for which it claims s. 25 protection is an Aboriginal, treaty, or other right. If the right at issue is an “other” right, then the party defending against the *Charter* claim must demonstrate the existence of the asserted right and the fact that the right protects or recognizes Indigenous difference.

[181] Third, the party invoking s. 25 must show irreconcilable conflict between the *Charter* right and the Aboriginal, treaty, or other right or its exercise. If the rights are irreconcilably in conflict, s. 25 will act as a shield to protect Indigenous difference.

[182] Fourth, courts must consider whether there are any applicable limits to the collective interest relied on. When s. 25’s protections apply, for instance, the collective right may yield to limits imposed by s. 28 of the *Charter* or s. 35(4) of the *Constitution Act, 1982*.

[183] Finally, where s. 25 is found not to apply, the party defending against the *Charter* claim may show that the impugned action is justified under s. 1 of the *Charter*.

(6) Application of Sections 15(1) and 25 to This Case

[184] Applying the above analysis, we conclude that Ms. Dickson’s s. 15(1) *Charter* right was *prima facie* breached by the residency requirement, which created a distinction based on non-resident status in a self-governing Indigenous community and reinforced and exacerbated her existing disadvantage as a non-resident member of the VGFN.

[185] Second, the VGFN has established that the residency requirement in the VGFN Constitution is an exercise of an Aboriginal, treaty, or other right under s. 25. It is an exercise of an “other right”, namely, the right to set criteria for membership in its governing body — a right that protects Indigenous difference.

[186] Third, the VGFN has established that, properly interpreted, Ms. Dickson’s s. 15(1) right and its right within the scope of s. 25 are irreconcilably in conflict, such that giving effect to Ms. Dickson’s equality right would abrogate or derogate from the s. 25 identified right. This engages s. 25 as a protective shield, insulating the collective right from the individual *Charter* claim.

[187] Finally, we find that there are no other applicable limits to the application of s. 25 in this case.

(a) *Section 15(1) of the Charter Is Prima Facie Breached*

(i) What Constitutes a *Prima Facie* Section 15(1) Breach?

[188] Under s. 15(1) of the *Charter*, “[e]very individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.” In a s. 15(1) *Charter* challenge, a claimant must demonstrate that the impugned law or state action: (a) on its face or in its impact, creates a distinction based on enumerated or analogous grounds; and (b) imposes a burden or denies a benefit in a manner that has the effect of reinforcing, perpetuating, or exacerbating disadvantage (*R. v. Sharma*, 2022 SCC 39, at para. 28, *R. v. C.P.*, 2021 SCC 19, [2021] 1 S.C.R. 679, at paras. 56 and 141; *Fraser v. Canada (Attorney General)*, 2020 SCC 28, [2020] 3 S.C.R. 113, at para. 27; *Taypotat* (SCC), at paras. 19-20). When s. 25 is invoked, the *Charter* claimant must demonstrate a *prima facie* s. 15(1) breach before a court will consider whether s. 25 applies.

[189] The VGFN and some interveners advocated against undertaking a complete s. 15(1) analysis before considering s. 25. The argument is that making out a distinction based on enumerated or analogous grounds furnishes courts with sufficient information to assess the extent of a potential conflict between the *Charter* right and the relevant Aboriginal, treaty, or other right, while still presenting a low threshold for considering the impact of s. 25. Full consideration of the s. 15(1) claim would thus be logically unnecessary and would also place needless strain on Indigenous communities’ litigation resources — as well as the resources of courts and *Charter* claimants — and

subject Indigenous legal orders to unnecessary scrutiny against non-Indigenous standards (see R.F., at paras. 125-26; I.F., A.G. Canada, at para. 41; I.F., Carcross/Tagish First Nation, at para. 30; see also Wilkins, at pp. 115-17).

[190] In our view, however, limiting the debate to the first branch of the s. 15(1) test does not provide courts with sufficient information to interpret the *Charter* right before determining whether it abrogates or derogates from the right within the scope of s. 25. Enumerated or analogous grounds may be “constant markers of suspect decision making or potential discrimination” (*Corbiere*, at para. 8), but they do not provide information about the particular claim at issue. As this Court noted in *Corbiere*, “distinctions made on analogous grounds may well not be discriminatory” (para. 8). Whether or not the ground is used in a discriminatory manner is fact-specific and is answered by the second stage of the s. 15(1) analysis. To understand the distinction’s effect on the claimant, the court needs to know whether the distinction reinforced, perpetuated, or exacerbated the claimant’s existing disadvantage.

(ii) Ms. Dickson Has Demonstrated a *Prima Facie* Section 15(1) Breach

1. *Aboriginality-Residence Is Insufficient as an Analogous Ground*

[191] With respect to the first step of the s. 15(1) test, Ms. Dickson argues that the residency requirement creates a distinction on the basis of the analogous ground of “Aboriginality-residence”, relying on this Court’s decision in *Corbiere*. The VGFN distinguishes *Corbiere* on the basis that the case was decided in relation to off-reserve

band membership under the *Indian Act*. It submits that any distinction drawn by the residency requirement here is not based on an analogous ground.

[192] We agree that *Corbiere* is not fully dispositive of the question. *Corbiere* dealt with a s. 15(1) claim based on a residency requirement under the *Indian Act* that required band members to reside on reserve to vote in band elections. Contrary to the provision at issue in *Corbiere*, the residency requirement in this case is part of the constitution of a self-governing First Nation. As the VGFN observes, the residency requirement “is not imposed by the Crown, but by VGFN Citizens freely and democratically exercising their inherent right to self-government” (R.F., at para. 143). Since Aboriginality-residence, as set out in *Corbiere*, does not take this into account, we will not rely on it as an analogous ground in this case.

2. *Non-Resident Status in a Self-Governing Indigenous Community Is an Analogous Ground*

[193] The governing principles for identifying analogous grounds relied on by the majority in *Corbiere* remain useful here. Enumerated and analogous grounds serve to screen out those claims “having nothing to do with substantive equality and hel[p] keep the focus on equality for groups that are disadvantaged in the larger social and economic context” (L. Smith and W. Black, “The Equality Rights” (2013), 62 *S.C.L.R.* (2d) 301, at p. 336; see also *Taypotat* (SCC), at para. 19). The common ground shared by enumerated and analogous grounds in s. 15(1) is the “immutability” of personal characteristics, including those that are “constructively immutable”, like religion or

citizenship. Such grounds are “changeable only at unacceptable cost to personal identity” such that “the government has no legitimate interest in expecting us to change [them in order] to receive equal treatment under the law” (*Corbiere*, at para. 13). In *Corbiere*, McLachlin and Bastarache JJ. recognized an Aboriginal person’s off-reserve residence as an analogous ground because this characteristic is constructively immutable. It is essential to a band member’s personal identity and changeable only at great personal cost.

[194] Ms. Dickson submits that “Indigenous persons living in urban areas or otherwise away from their communities are historically disadvantaged as a result of Canada’s colonial policies of assimilation and displacement, directed at all Indigenous peoples and maintained for generations” (R.F. on cross-appeal, at para. 52). She submits that “the historical disadvantages, prejudices and socio-economic conditions experienced by Indigenous persons living away from their communities [were not] automatically extinguish[ed] when their nations entered self-government agreements” (para. 45). Ms. Dickson argues that to exclude the non-resident VGFN members from s. 15(1) protection on the basis that they are no longer subject to the *Indian Act* would “fail to recognize the long-lasting harm of Canada’s policies” (para. 52).

[195] The VGFN, on the other hand, submits that its residency requirement is not based on any enumerated or analogous grounds (R.F., at para. 51). The VGFN submits, correctly on this point, that new analogous grounds are not lightly identified (para. 145, citing *Fraser*, at paras. 114-23). It points to the direction given in *Corbiere* that the

exercise of defining an analogous ground involves identifying “a type of decision making that is suspect because it often leads to discrimination and denial of substantive equality” (para. 146, citing *Corbiere*, at para. 8). The VGFN submits that the distinction at play in the residency requirement is not inherently suspect as it “does not subject a group subject to historic disadvantage to differential treatment, or bear the kind of stigma reflected in *Corbiere*” (para. 147).

[196] We disagree with the VGFN’s position. While *Corbiere* is not directly applicable in the case of an impugned provision enacted by a self-governing First Nation, this Court’s discussion of disadvantage faced by non-resident Indigenous people was not constrained to the context of *Indian Act* provisions and provides helpful guidance. Justice L’Heureux-Dubé’s discussion of Aboriginality-residence, adopted by the majority, outlines the difficulties faced by Indigenous people living away from their communities. She emphasized that, for off-reserve band members, the choice of whether to live on- or off-reserve “is an important one to their identity and personhood”, in terms of relating to a community and to land that have “particular social and cultural significance to many or most band members” (*Corbiere*, at para. 62). Justice L’Heureux-Dubé further observed that “band members living off-reserve have generally experienced disadvantage, stereotyping, and prejudice, and form part of a ‘discrete and insular minority’ defined by race and place of residence” (para. 62).

[197] Intervening on behalf of Indigenous people living away from their traditional lands, the Congress of Aboriginal Peoples submits that discrimination faced

by off-reserve or remote members is a direct legacy of “colonial and assimilationist policies and practices”, including the residential school system and the unequal rights afforded to individuals on- and off-reserve under the *Indian Act* (I.F., at para. 9; see also para. 10). This history has resulted in “a large number of off-reserve status Indians who are nominally members of First Nations hav[ing] little or no connection to the reserves or to ‘home’ communities” (para. 12). Yet these individuals remain “subject to the decisions of First Nations governments that control access to benefits, opportunities, and services for them, but do not always prioritize their interests” (para. 12).

[198] We conclude that recasting Ms. Dickson’s potential analogous ground from “Aboriginality-residence” to “non-resident status in a self-governing Indigenous community” qualifies as an analogous ground under *Corbiere*. The historical and continuing disadvantage faced by Indigenous people living away from their traditional lands means that distinctions based on “non-resident status in a self-governing Indigenous community” will serve as “constant markers of suspect decision making or potential discrimination” (*Corbiere*, at para. 8).

3. *The Residency Requirement Reinforces, Perpetuates, or Exacerbates Disadvantage*

[199] At the second stage of the s. 15(1) analysis, the inquiry is whether the distinction drawn on enumerated or analogous grounds reinforces, perpetuates, or exacerbates disadvantage (*Taypotat* (SCC), at paras. 19-20). Does the residency

requirement, which draws a distinction on the basis of non-resident status in a self-governing First Nation, reinforce, perpetuate, or exacerbate Ms. Dickson's disadvantage as a non-resident VGFN citizen?

[200] Ms. Dickson argues that it does. A central theme in her submissions is that the residency requirement reinforces a stereotype "that non-resident citizens are less knowledgeable of, and less interested in preserving, their nation's Indigenous culture" (A.F., at para. 14). The VGFN counters that "the [r]esidency [r]equirement does not contribute to pre-existing disadvantage experienced by [Ms. Dickson] as part of a group, and does not impose marginalization, stigma and stereotyping, which are the target harms addressed by s. 15" (R.F., at para. 153). Acknowledging that Indigenous people, including Ms. Dickson, have been and remain subject to discrimination in Canadian society, the VGFN submits that there is no evidence of historical disadvantage experienced by VGFN citizens who live away from the traditional territory (paras. 154-55). The VGFN points to the finding by the trial judge that VGFN citizens who reside in urban settings like Whitehorse have access to more opportunities and resources (para. 155; trial reasons, at paras. 151 and 156).

[201] We cannot accept the VGFN's submissions on this point. As the Court of Appeal noted, the trial judge's conclusion that Ms. Dickson had been advantaged by living in Whitehorse stands contrary to *Corbiere*, and the evidence in that case, detailed above, remains applicable to non-resident citizens of Indigenous communities. The Royal Commission on Aboriginal Peoples observed perceptions of incompatibility

between Indigenous cultures and urban life, leading to the “assumption that Aboriginal people living in urban areas must deny their culture and heritage in order to succeed — that they must assimilate into this other world. The corollary is that once Aboriginal people migrate to urban areas, their identity as Aboriginal people becomes irrelevant” (RCAP Final Report, vol. 4, *Perspectives and Realities* (1996), at p. 519). Similarly, the 2019 report issued by the National Inquiry into Missing and Murdered Indigenous Women and Girls found that, because of past government conduct, Indigenous women in urban areas have found themselves “alienated from their home communities, sometimes as single parents and sole providers for their children” and are “often hundreds of kilometres from their homes and social support systems, navigating racist barriers deeply embedded in urban services and experiences” (*Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls*, vol. 1a (2019), at p. 273).

[202] It is helpful to recall Abella J.’s explanation in *Taypotat* of the relevance of discriminatory disadvantage rooted in arbitrariness for the second branch of s. 15(1). A court should consider “whether the impugned law fails to respond to the actual capacities and needs of the members of the group and instead imposes burdens or denies a benefit in a manner that has the effect of reinforcing, perpetuating or exacerbating their disadvantage” (para. 20).

[203] Here, Ms. Dickson is being denied, or at least significantly deterred from, the exercise of a fundamental democratic right — the right to run for Council —

because of her non-resident status. This distinction on the basis of the analogous ground of non-resident status in a self-governing Indigenous community reinforces, perpetuates, and exacerbates her disadvantage as a non-resident. Not allowing her to participate in the electoral politics of her community further distances her from that community, making it difficult “to preserve her identity as a VGFN citizen” (R.F. on cross-appeal, at para. 65). We conclude that Ms. Dickson has made out both branches of a *prima facie* s. 15(1) breach.

(b) *The Residency Requirement Falls Within the Scope of Section 25 as an “Other” Right*

[204] The adoption of the residency requirement is an exercise of an “other” right under s. 25. The VGFN has a right to restrict the membership and composition of its governing bodies. The VGFN’s exercise of this right through the residency requirement protects interests associated with Indigenous difference. Whether or not the residency requirement might also be understood as an exercise of an inherent right to self-government, we conclude that it is an “other” right protected under s. 25.

[205] The trial judge found that the VGFN’s right to adopt the residency requirement is an “other” right that pertains to the Aboriginal peoples of Canada (para. 212). He stated that even if such rights had to be of a “constitutional character”, this criterion would be met since the residency requirement “is not simply a law passed by Chief and Council”, but is rather “the will of the First Nation expressed at its General Assembly as part of its Constitution . . . 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 or tradition exists today” (para. 207).

[206] The Court of Appeal agreed that the residency requirement is protected under s. 25, explaining that the Vuntut Gwitchin have always emphasized “[their] leaders’ connection to the land, their expectation of ongoing personal interaction between leaders and others, and their wish to resist the ‘pull’ of outside influences” (para. 147). The court concluded that the residency requirement reflected the exercise, in modern guise, of an ancient right pertaining to Aboriginal peoples.

[207] The VGFN argues that the residency requirement is an exercise of its inherent right to self-government. It asserts that this right to self-government, which includes its selection of leaders, is an Aboriginal or “other” right within the meaning of s. 25 (R.F., at para. 114). Alternatively, the VGFN submits that its right to adopt the residency requirement is also a right that exists under a land claim agreement, as the parties to the Final Agreement “intended to recognize VGFN’s collective, exclusive right to be self-governing over [its] own lands and internal affairs under [its] own *Constitution* and laws” (para. 117).

[208] By contrast, Ms. Dickson argues that the residency requirement is not an exercise of an Aboriginal, treaty, or other right. She says that it is expressly not a treaty right, nor is it an Aboriginal right proven under the *Van der Peet* test. Ms. Dickson also submits that the right at issue is not an “other” right, because it does not have

constitutional status, it does not pertain to a historical practice of the VGFN, and it is not a collective right since it creates intra-group distinctions between VGFN citizens.

[209] For a party seeking s. 25 protection to show that a collective Indigenous right, or its exercise, constitutes an “other” right or freedom, it must demonstrate the existence of the right and also show that the right, or its exercise, protects interests associated with Indigenous difference. In our view, both requirements are met here:

- (i) The VGFN has a statutory right to provide for the membership and composition of its governing bodies.

- (ii) There is no dispute that the VGFN has the right to enact a constitution providing for the membership and composition of its governing bodies. As we have seen, the Final Agreement, a s. 35 treaty, provides that negotiations regarding First Nation constitutions may include the composition, structure, and powers of the Yukon First Nation government institutions, as well as membership and election procedures (s. 24.5.1 generally, and see especially ss. 24.5.1.1, 24.5.1.2 and 24.5.1.3). The Self-Government Agreement and the federal *Yukon First Nations Self-Government Act* include similar language requiring First Nations like the VGFN to address such matters in their constitution (see Self-Government Agreement, s. 10.1.2, and the *Yukon First Nations Self-Government Act*, s. 8(1)(b), respectively). The Self-Government Agreement stipulates that the “Vuntut Gwitchin First Nation Constitution shall establish governing bodies and provide for their powers, duties, composition,

membership and procedures” (s. 10.1). Finally, s. 8(1)(b) of the federal *Yukon First Nations Self-Government Act* directs that the constitution of a First Nation, consistent with its self-government agreement, shall provide for “the governing bodies of the first nation and their composition, membership, powers, duties and procedures”. Such a right necessarily includes the right to set criteria for membership. It would be impossible to provide for a governing body’s membership without setting out the parameters of such membership. The VGFN therefore has a right to restrict the membership of its governing body. As a result, we turn to the question of whether this right, or its exercise, protects or recognizes Indigenous difference.

(c) *The Residency Requirement Protects and Recognizes Interests Associated With Indigenous Difference*

[210] As the Court of Appeal observed, the right to impose residency-based restrictions on the membership of its governing bodies enables Vuntut Gwitchin society to preserve the distinctive emphasis it places on “its leaders’ connection to the land” (para. 147). This is plainly a foundation for the connection between Indigenous difference and the residency requirement in the VGFN Constitution.

[211] At first instance, the trial judge made key factual findings about the historical and cultural context of residency. He noted that the historical evidence showed that “the Vuntut Gwitchin show a preference for leaders who demonstrate a knowledge of the land and traditions, commitment to community service, effective

communication skills and wealth”, and that “the consistent leadership theme narrated by the Elders is being accountable to the Vuntut citizens on a daily basis in Old Crow and at the annual General Assembly” (para. 7).

[212] The trial judge summarized his factual findings with respect to VGFN leadership and residency (at para. 44), including:

1. The Vuntut Gwitchin people have governed themselves according to their traditional practices pre-dating the creation of Canada in 1867.
2. Since time immemorial to the present day, all VGFN Chiefs and Councillors have been residents in the VGFN Traditional Territory.
3. Even in modern times, post the Final Agreement in 1993, the practice is for elected citizens to reside in Old Crow. Chief Tizya-Tramm, former Chiefs Bruce Charlie and Robert Bruce Jr. all resided in Whitehorse at various times but all returned to reside in Old Crow during their terms as Chiefs.

[213] The Court of Appeal also emphasized the significance of the connection between VGFN leadership and VGFN land, noting the evidence of a former VGFN Chief that “the very identity of the Vuntut Gwitchin has always been deeply rooted in the land itself” and that “Vuntut Gwitchin practices, customs and traditions related to leadership and governance are also rooted in the land itself” (para. 27 (emphasis deleted); A.R., vol. VI, at pp. 136-37). In the Chief’s view, the VGFN’s “decision-making processes are based on reaching consensus and having a Council who does not reside in our community would be wholly incompatible with our traditional governance” (C.A. reasons, at para. 28 (emphasis deleted), quoting A.R., vol. VI, at pp. 139-40).

[214] Before this Court, the VGFN relies on the findings of the courts below regarding the importance of residency to its self-government and identity as a representative body for the Vuntut Gwitchin. The VGFN argues that, by adopting the residency requirement, it “seeks to protect and promote VGFN’s spiritual and economic relationship to the Traditional Territory; the Vuntut Gwitchin way of life including democratic deliberation and consensus-based decision-making among Citizens; and the general welfare of the collective” (R.F., at para. 116). The VGFN argues that the residency requirement “is a provision that seeks to preserve and enhance ‘Indigenous difference’ through the continuation of an inherent Indigenous legal order that survived colonization and for which VGFN has secured space in the fabric of the Canadian legal system” (para. 121).

[215] Ms. Dickson submits that the residency requirement does not protect Indigenous difference. Relying on affidavit evidence from VGFN citizens, she claims that the residency requirement disconnects citizens living away from the community, “making it hard for them to preserve their culture and identity” (A.F., at para. 83). Because the requirement effectively excludes non-resident citizens from Council, she argues that it does not preserve or protect Indigenous difference, “but undermines it, treating [them] as . . . ‘less valuable’ member[s] of VGFN” (para. 90). Ms. Dickson also marshals arguments against the idea that the residency requirement is based on traditional VGFN identity. She submits that the requirement is a modern adoption of a democratic system of governance, “a recent addition . . . enacted in 2006” (para. 82; see also para. 84).

[216] The inquiry at this stage is whether the residency requirement protects Indigenous difference, such that it should be protected from abrogation or derogation by Ms. Dickson's s. 15(1) *Charter* right. We have considered Ms. Dickson's arguments that the residency requirement works to erode Indigenous difference by making non-resident citizens feel like "less valuable" members of the community and distancing them from the community's governance structure, on the one hand, and that the requirement is not based on traditional practices, on the other. However, we cannot accept Ms. Dickson's arguments that there is no evidence that the residency of the Councillors is "demonstrative of their knowledge of the land, or their interest in the land" or that the requirement is based on modern ideas of democracy (para. 83).

[217] In light of the evidence and the factual findings at trial, we are satisfied that the residency requirement *is* an exercise of a right that protects interests associated with Indigenous difference. Requiring VGFN leaders to reside on settlement land helps preserve the leaders' connection to the land, which is deeply rooted in the VGFN's distinctive culture and governance practices. The residency requirement promotes the VGFN's expectation that its leaders will be able to maintain ongoing personal interactions between leaders and other community members. It also bolsters the VGFN's ability to resist the outside forces that pull citizens away from its settlement land and prevents erosion of its important connection with the land. Such interests are associated with various aspects of Indigenous difference, including Vuntut Gwitchin cultural difference and prior sovereignty, as well as their participation in the treaty process that culminated in the enactment of the VGFN Constitution.

[218] Finally, we agree with both courts below that the residency requirement is of a “constitutional character” in a substantive, rather than formal, sense (trial reasons, at para. 207; C.A. reasons, at para. 147). The question of whether a “constitutional character” will always be required for s. 25 protection need not be decided: here it is clear that the residency requirement has a significant constitutional dimension. Beyond the mere fact that the residency requirement is part of the VGFN Constitution, it is an aspect of the First Nation’s law that preserves and enshrines an important dimension of VGFN leadership traditions and practices, and VGFN leaders’ connection to the land. We particularly note the Court of Appeal’s conclusion that the residency requirement “is clearly intended to reflect and promote the VGFN’s particular traditions and customs relating to governance and leadership — a matter of fundamental importance to a small first nation in a vast and remote location” (para. 147). On any reasonable understanding of what it means for a right or its exercise to have a “constitutional character”, the residency requirement meets this standard.

(d) *The VGFN Has Established That the Conflict Between the Two Rights Is Irreconcilable*

[219] The Court must further determine whether the VGFN has established that the conflict between the two rights is irreconcilable, such that the s. 25 right would be protected from the abrogation or derogation that would flow from giving effect to Ms. Dickson’s s. 15(1) right. We conclude that the VGFN has demonstrated that the conflict between the two rights is irreconcilable and that, as a result, s. 25 can be invoked to protect the VGFN residency requirement.

[220] The conflict is plain when the two rights are first properly interpreted, then compared to one another, as required by the s. 25 framework.

[221] With respect to the content of Ms. Dickson's s. 15(1) right, she has made out a *prima facie* case as a result of the distinction drawn on the basis of the analogous ground of non-resident status in a self-governing Indigenous community. She is unable to hold a position on the VGFN Council because she lives away from the settlement land. This distinction on the basis of her non-resident status reinforces and exacerbates the historical and continuing disadvantage faced by Indigenous people living away from their traditional lands.

[222] Turning to the content of the "other" right: at its core, the residency requirement protects and recognizes Indigenous difference by preserving the connection between the members of VGFN leadership and VGFN lands. The other ways the residency requirement protects these interests, such as promoting the VGFN's ability to resist the pull of outside influences, are bound up in this connection.

[223] Ms. Dickson argues that the VGFN could have adopted measures that would "giv[e] effect to both the individual democratic rights at stake, and VGFN's collective rights to govern and set eligibility criteria for their elected leaders" (A.F., at para. 13). For example, at the 2019 General Assembly, Ms. Dickson proposed that a single Councillor be selected from the VGFN citizens living in Whitehorse (para. 119). Ms. Dickson presents this alternative in the context of her argument on minimal impairment under s. 1 of the *Charter*. However, her suggestion that this alternative

would give effect to both her individual *Charter* right and the VGFN's right warrants consideration under s. 25, as it is essentially an argument that the two rights are, in fact, reconcilable.

[224] The VGFN points to the Court of Appeal's holding that "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 entered into in 1993 with Canada and Yukon" (R.F., at para. 122, quoting C.A. reasons, at para. 149 (emphasis in original)).

[225] We agree with the Court of Appeal. Permitting one Councillor to reside in Whitehorse would undermine, in a non-incidental way, the VGFN's right to decide on the membership of its governing bodies. As set out above, the Indigenous difference protected by the residency requirement is inextricably tied to leaders' connection to the settlement land. The Court of Appeal cited evidence from the Executive Director of the VGFN that Ms. Dickson's initial proposal to eliminate the residency requirement was not supported because it conflicted "with the widely held view that Vuntut Gwitchin self-government and the protection of our culture is critically linked to the seat of our government being in Old Crow" (para. 30 (emphasis deleted); A.R., vol. VIII, at p. 158). In our view, for this Court to allow one of the four Councillors to reside in Whitehorse would unacceptably diminish this connection.

[226] As a result, we cannot accept that the effects of such a change to the composition of the VGFN Council on the interests that the residency requirement

advances would be merely incidental. To borrow the words of Professor Macklem, giving effect to Ms. Dickson’s *Charter* right in such a manner would pose “a real risk to the continued vitality of [I]ndigenous difference” (p. 232). Giving effect to Ms. Dickson’s s. 15(1) right would abrogate or derogate from an “other” right that belongs to the VGFN. The two rights are, therefore, irreconcilably in conflict.

(e) *No Other Limits Apply*

[227] While s. 25 protections may be subject to other limits, including those imposed in relation to s. 28 of the *Charter* and s. 35(4) of the *Constitution Act, 1982*, no such restrictions are relevant here. The Court of Appeal found that s. 25’s protections extended to the entire residency requirement, including the 14-day relocation rule. Before this Court, Ms. Dickson has not sought *Charter* relief regarding the 14-day relocation rule (A.R., vol. I, at pp. 209-10) or made arguments on severance. Given the burdens resting on *Charter* claimants under s. 25, we would not limit s. 25’s protection in relation to that rule. Finally, because s. 25 applies to the residency requirement, the VGFN need not justify the residency requirement under s. 1 of the *Charter*.

[228] We conclude that s. 25 operates as a shield to protect the residency requirement from Ms. Dickson’s s. 15(1) claim.

VII. Conclusion and Disposition

[229] We propose to answer the constitutional questions of the appellant, Ms. Dickson, and the cross-appellant, the VGFN, as follows:

1. Does the *Charter* apply to the residency requirement contained in Article XI(2) of the Vuntut Gwitchin First Nation Constitution?

Yes.

2. If so,

- (a) Does the residency requirement infringe s. 15(1) of the *Charter*, and if so, is such infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under s. 1 of the *Charter*?

Yes, in part. The residency requirement infringes, *prima facie*, s. 15(1) of the *Charter*.

It is not necessary to determine whether such infringement is a reasonable limit under s. 1 of the *Charter*.

- (b) Is the residency requirement an exercise of an Aboriginal, treaty or other right or freedom that pertains to the Aboriginal peoples of Canada pursuant to s. 25 of the *Charter*, and if so, does the *Charter*'s guarantee of rights under s. 15(1) abrogate or derogate from such Aboriginal, treaty or other right or freedom?

Yes. The residency requirement is an exercise of an "other right or freedom" that pertains to the Aboriginal peoples of Canada under s. 25 of the *Charter*, and the s. 15(1) claim abrogates or derogates from this right, such that the s. 15(1) claim cannot be given effect.

[230] As for Ms. Dickson's equality claim under Article IV of the VGFN Constitution, which was pleaded in the alternative before the Supreme Court of Yukon, we take due note of Newbury J.A.'s observation in the Court of Appeal reasons that,

having pursued her claim under the *Charter*, Ms. Dickson may elect hereafter to pursue a similar claim under the VGFN Constitution (par. 157). Since the application of Article IV was not addressed in this Court, we refrain from further comment on this issue.

[231] In the result, we would dismiss Ms. Dickson’s appeal. We would also dismiss the VGFN’s cross-appeal in light of our conclusion that the *Charter* applies. We would confirm the order of the majority of the Court of Appeal to set aside the judgment of the Supreme Court and to dismiss Ms. Dickson’s petition. We would make no order as to costs.

The following are the reasons delivered by

MARTIN AND O’BONSAWIN JJ. —

I. Overview

[232] Cindy Dickson is a citizen of the Vuntut Gwitchin First Nation (“VGFN”) who wishes to step forward as a candidate for election as a councillor. Standing in the way of her serving her community in this manner is a provision of the VGFN Constitution, enacted by the VGFN under its self-government powers, that requires councillors to either already live on the VGFN settlement land or move there within 14 days of their election (Article XI(2) (“residency requirement”). The residency requirement excludes and precludes hundreds of VGFN citizens who do not live on the

settlement land — but retain their identity and cultural ties to their community — from a core aspect of democratic participation in the VGFN. This is so despite the history of colonialism and resulting socio-economic imperatives that have pulled many VGFN citizens away from their traditional lands.

[233] Ms. Dickson, as one such citizen, currently lives in Whitehorse, Yukon and has for many years. She left the VGFN settlement land at the age of 16 to complete her high school education and to pursue post-secondary education and employment opportunities. Presently, she cannot take up residence on the settlement land for several reasons including that the limited medical resources available to her there would not meet the special health care needs of her child. Her uncontradicted evidence is that she cannot move to meet the prescribed residency requirement because she cannot leave behind the therapeutic and support services her child requires. She challenges this residency requirement under the *Canadian Charter of Rights and Freedoms* on the basis that preventing non-residents from holding a meaningful role in community governance unjustifiably discriminates against those group members who do not live on traditional lands.

[234] This claim raises numerous issues of fundamental importance concerning the extent to which the *Charter* protects the rights and freedoms of Indigenous people in respect of actions taken by Indigenous governments. In our view, the *Charter* applies to governmental action taken by self-governing Indigenous nations because they are both governmental in nature and because the purpose of s. 32(1) was to extend the

Charter's protections to address the power imbalance between the governed and those who govern in Canada. As the contours of Indigenous self-government evolve, it is essential that no *Charter*-free zones in Canada be created, that everyone be equally protected by its constitutionally entrenched guarantees, and that all forms of government be constrained by its limits.

[235] The inclusion of s. 25 in the *Charter*, which stipulates that individual *Charter* rights “shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada”, was motivated by a specific concern about Indigenous difference and the distinct rights Indigenous peoples possess as “aboriginal peoples of Canada”. Section 25 is a unique provision with a particular purpose, operating as an important interpretive aid to help protect these special collective rights held by Indigenous peoples from abrogation or derogation. Section 25 primarily protects against non-Indigenous people making claims that would have the effect of taking away from Indigenous peoples what is rightly theirs precisely because they are Indigenous peoples.

[236] We do not accept the broader proposition that s. 25 shields the actions of a self-governing Indigenous nation from *Charter* claims brought by members of that community. To interpret s. 25 in such a non-purposive manner would lead to the far-reaching result of creating and affirming *Charter*-free zones, with the consequence that minorities within Indigenous communities would not be protected from the actions of their own governments. All Canadians, including Indigenous people, need

constitutional tools to hold their governments accountable for breaches of their entrenched rights and freedoms. It is against the purposes of the *Charter* and s. 25, as well as being profoundly inequitable, to deny members of self-governing Indigenous nations similar rights, remedies and recourse.

[237] We therefore apply the *Charter*, and the claimed s. 15(1) equality right, to the impugned residency requirement. We conclude that Ms. Dickson's s. 15(1) *Charter* claim must succeed. The residency requirement draws a discriminatory distinction between VGFN citizens that live on the settlement land and those that do not. The analogous ground of "Aboriginality-residence" applies in this context. We are not satisfied that the residency requirement falls within the ambit of s. 25 as the requirement is directed at the internal regulation of the VGFN and is not aimed at recognizing the special status of Indigenous collectives within the broader Canadian state. Even under a contextual and culturally sensitive approach to applying s. 1 of the *Charter* in this case, one grounded in and respectful of Indigenous difference, the residency requirement is not minimally impairing and therefore not demonstrably justified in a free and democratic society.

[238] We would allow the appeal and dismiss the cross-appeal for the reasons that follow.

II. Section 32(1) of the *Charter*

[239] Modern governments are constrained by an array of limitations. Respecting these limitations, including individual rights protections and group-based guarantees, is a cornerstone of responsible and accountable governance. The introduction of constitutionally entrenched rights in the *Charter* was a turning point in the relationship between the governed and those who govern.

[240] Several orders of government in Canada possess the authority to impinge on individual freedoms, including the federal government, provincial and territorial governments, and Indigenous governments (Royal Commission on Aboriginal Peoples, (“Royal Commission”), *Report of the Royal Commission on Aboriginal Peoples*, vol. 2, *Restructuring the Relationship* (1996), at pp. 240-41). Especially since the adoption of the *Constitution Act, 1982*, governments and courts have begun to properly recognize Indigenous communities as law-makers and rights-bearers. An example of this recognition is the Umbrella Final Agreement, concluded in 1993 between representatives of Yukon First Nations, the federal government and the Yukon government, which established a framework for Indigenous self-government in the territory. Self-government agreements followed, including the agreement pertaining to the VGFN at the centre of this case. The VGFN Self-Government Agreement (1993) recognizes extensive lawmaking powers over such matters as the VGFN’s internal affairs, the provision of certain programs and services, and matters of a local or private nature (ss. 13.1, 13.2 and 13.3; see also R.F., at para. 20). The VGFN enacts coercive laws that bind individuals like any other order of government.

[241] In our view, a purposive reading of s. 32(1) of the *Charter* ensures that the VGFN, as a self-governing Indigenous community, is obliged to respect the *Charter* rights of its citizens. We agree with Kasirer and Jamal JJ. that the VGFN’s enactment of the residency requirement is subject to the *Charter* and that the VGFN is “‘government’ by nature”. However, we reach this conclusion through a different set of considerations.

[242] We first explain how s. 32(1) is directed at the relationship between the governed and those who govern. Its purpose is to subject governmental action to constitutional review in order to protect individual rights and freedoms.

[243] Second, we outline how existing s. 32(1) jurisprudence, which deals with other types of entities, is not directly applicable to the unique historical and legal position of Indigenous governments. In our view, the VGFN is not a creature of statute, does not derive its lawmaking authority through delegation, and does not need to ground its governmental status by reference to what has been transferred, bestowed, or granted from another level of government.

[244] Third, we outline how s. 32(1) captures governmental action in respect of “matters within the authority” of Parliament and the provincial legislatures and therefore the *Charter* applies to Indigenous governments because they have lawmaking authority over legislative matters caught by s. 32(1). This is so regardless of whether Indigenous self-government is affirmed or recognized by a statute, is based on a treaty term, or is grounded in an inherent Aboriginal right to self-government. The central

s. 32(1) inquiry concerns whether the entity engages in governmental action that may touch on those matters and may impinge on the rights of the governed. It is not necessary for the impugned action to stem from authority granted by federal, provincial, or territorial legislation for it to be subject to *Charter* scrutiny. The recognition of self-governing Indigenous nations as governments in their own right falls clearly within the purpose and ambit of s. 32(1).

[245] Finally, we conclude that the VGFN is a government by its very nature because it exercises legislative and executive powers pertaining to “matters within the authority” of Parliament and the provincial legislatures, which significantly touch upon individual rights and freedoms protected by the *Charter*. As a result, all of the VGFN’s activities, including its enactment of the residency requirement, are subject to *Charter* scrutiny. This approach reflects the purpose of s. 32(1), aligns with long-standing Indigenous self-governance practices, and advances reconciliation in Canada.

A. *The Charter Is Directed at the Relationship Between the Governed and Those Who Govern*

(1) Determining the Scope of Section 32(1)

[246] Section 32(1) addresses “who is subject to the *burden* of Charter rights, or, in other words, who is bound by the Charter” (P. W. Hogg and W. K. Wright, *Constitutional Law of Canada* (5th ed. Supp.), at § 37:6 (emphasis in original)). It provides as follows:

32 (1) This Charter applies

(a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and

(b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

[247] On its face, the text of s. 32(1) provides that the *Charter* applies to “the Parliament and government of Canada”, and to “the legislature and government of each province”, in respect of all matters within the legislative authority of each level of government. Importantly, this Court’s s. 32(1) jurisprudence has consistently affirmed the broad range of entities captured by the provision. As early as in *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573, McIntyre J. reasoned that, by its terms, s. 32(1) specifies that the *Charter* applies to “the legislative, executive and administrative branches of government” (p. 598).

[248] Under s. 32(1), the *Charter* applies where there has been governmental action; “[t]he rights guaranteed by the Charter take effect only as restrictions on the power of government over the persons entitled to the rights” (Hogg and Wright, at § 37:13). “Government” has been defined by this Court to capture “the body that can enact and enforce rules and authoritatively impinge on individual freedom” (*McKinney v. University of Guelph*, [1990] 3 S.C.R. 229, at p. 262). The need to preserve individual rights in light of this significant authority requires governments to be “constitutionally shackled” (p. 262; see also *Dolphin Delivery*, at p. 593).

[249] The purpose underlying the scope of the *Charter*'s applicability is thus to address the power imbalance between the governed and those who govern. Justice Dickson (as he then was) in *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, acknowledged this purpose explicitly, at p. 156:

The Canadian Charter of Rights and Freedoms is a purposive document. Its purpose is to guarantee and to protect, within the limits of reason, the enjoyment of the rights and freedoms it enshrines. It is intended to constrain governmental action inconsistent with those rights and freedoms; it is not in itself an authorization for governmental action. [Emphasis added.]

Similarly, as noted by Lauwers J.A. in *Spence v. BMO Trust Co.*, 2016 ONCA 196, 129 O.R. (3d) 561, at para. 125, “the *Charter* exists to control the activities of government, as provided in s. 32(1), in order to protect personal autonomy and freedom from governmental activities”. The importance of this power imbalance to determining whether an entity is captured by s. 32(1) is recognized throughout this Court’s jurisprudence (see, e.g., *McKinney*, at pp. 261-62; *Dolphin Delivery*, at pp. 593 and 597; *Stoffman v. Vancouver General Hospital*, [1990] 3 S.C.R. 483, at p. 505).

[250] This purpose motivates a broad understanding of the entities captured by s. 32(1). In light of the significant interests at stake, Wilson J. was clear in *Lavigne v. Ontario Public Service Employees Union*, [1991] 2 S.C.R. 211, that “the *Charter* applies to ‘government’ entities broadly construed” (p. 240 (emphasis added)). This sentiment was echoed by La Forest J. in *Godbout v. Longueuil (City)*, [1997] 3 S.C.R.

844, who cautioned against unduly narrowing the applicability of the *Charter* such that governments could evade their *Charter* obligations (para. 48).

[251] This purpose must underlie any understanding and interpretation of s. 32(1). In assessing to whom the *Charter* applies, there must be a focus on entities that are entitled to exercise governmental power over individuals in a manner that potentially limits their rights and freedoms. Any interpretation of *Charter* applicability that has the effect of creating a *Charter*-free zone in the face of this form of power imbalance would undermine the *Charter*'s objectives and importance.

[252] The point that s. 32(1) should not be given a restrictive interpretation was made clear by La Forest J. in *Godbout*, at para. 47:

. . . where such entities are, in reality, “governmental” in nature — as evidenced by such things as the degree of government control exercised over them, or by the governmental quality of the functions they perform — they cannot escape *Charter* scrutiny. In other words, the ambit of s. 32 is wide enough to include all entities that are essentially governmental in nature and is not restricted merely to those that are formally part of the structure of the federal or provincial governments. [Emphasis added.]

(See also para. 48.)

Under this jurisprudence it would be a mistake to narrowly focus on whether or how an entity fits within the structure of the federal or provincial governments.

[253] Justice La Forest in *Godbout* endorsed a broad understanding of s. 32(1). Specifically, he explained how, in light of the overarching purpose of subjecting

governmental action to constitutional scrutiny, an interpretive approach that limited the *Charter*'s application to entities formally part of federal or provincial government structures would suffer from a fatal flaw:

Moreover, interpreting s. 32 as including governmental entities other than those explicitly listed therein is entirely sensible from a practical perspective. Were the *Charter* to apply only to those bodies that are institutionally part of government but not to those that are — as a simple matter of fact — governmental in nature (or performing a governmental act), the federal government and the provinces could easily shirk their *Charter* obligations by conferring certain of their powers on other entities and having those entities carry out what are, in reality, governmental activities or policies. In other words, Parliament, the provincial legislatures and the federal and provincial executives could simply create bodies distinct from themselves, vest those bodies with the power to perform governmental functions and, thereby, avoid the constraints imposed upon their activities through the operation of the *Charter*. Clearly, this course of action would indirectly narrow the ambit of protection afforded by the *Charter* in a manner that could hardly have been intended and with consequences that are, to say the least, undesirable. Indeed, in view of their fundamental importance, *Charter* rights must be safeguarded from possible attempts to narrow their scope unduly or to circumvent altogether the obligations they engender. [Emphasis added; para. 48.]

(See also *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624, at para. 42.)

[254] This passage from *Godbout* identifies a fundamental concern about institutional arrangements being used as a mechanism to circumvent *Charter* scrutiny of governmental action. To answer this concern, the heart of the inquiry remains focused on safeguarding *Charter* rights, not on the particular entities listed in s. 32(1). For this reason, “the *Charter* applies not only to Parliament, the legislatures and the government themselves, but also to all matters within the authority of those entities” (*Greater Vancouver Transportation Authority v. Canadian Federation of Students* —

British Columbia Component, 2009 SCC 31, [2009] 2 S.C.R. 295, at para. 14 (emphasis added)). Put another way, governmental action directed at “matters within the authority” of Parliament and the provincial legislatures — the heads of power under ss. 91 to 95 of the *Constitution Act, 1867* — is subject to *Charter* scrutiny. This is so regardless of an entity’s connection to formal federal or provincial government structures.

[255] The scope of s. 32(1), while broad, is by no means unlimited. Non-governmental private action is not subject to the *Charter* — s. 32(1) does not capture “relations between private persons and private persons” (Hogg and Wright, at § 37:13; see also *Dolphin Delivery*, at p. 597; *Spence*, at para. 125). Nor is it sufficient that “an entity performs what may loosely be termed a ‘public function’” or that “a particular activity may be described as ‘public’ in nature” (*Eldridge*, at para. 43; see also *McKinney*, at pp. 268-69). Rather, the entity or activity must be governmental in nature.

(2) The *Eldridge* Framework for Identifying *Charter* Applicability

[256] The *Eldridge* framework discusses the applicability of the *Charter* under s. 32(1). Under this framework, an entity may be subject to the *Charter* in two ways (para. 44). First, an entity is subject to the *Charter* if it is “government” within the meaning of s. 32(1) — either by its very nature or due to the degree of governmental control over it. Where this category is fulfilled, all of the entity’s activities will attract *Charter* scrutiny. Second, where an entity is not “government” but is undertaking an

activity that is “‘governmental’ in nature”, the entity is subject to *Charter* review in respect of that activity.

[257] Under the first branch of *Eldridge*, courts ask whether an entity is government “by its very nature” or because government exercises substantial control over it (para. 44; see also *Greater Vancouver Transportation Authority*, at para. 16). In *Godbout*, La Forest J. noted that the “factors that might serve to ground a finding that an institution is performing ‘governmental functions’ do not readily admit of any *a priori* elucidation”, but proceeded to list several non-exhaustive indicia of government by nature (paras. 49-51). Alternatively, entities “wholly controlled by government” and “in essence, emanations of the . . . legislatures that created them” are also government under the first branch (para. 47; see also *Douglas/Kwantlen Faculty Assn. v. Douglas College*, [1990] 3 S.C.R. 570, at p. 584; *Lavigne*, at pp. 241-42).

[258] Under the second branch of *Eldridge*, the focus is on the “quality of the act” and whether it is truly “governmental” (para. 44). Justice La Forest listed “the implementation of a specific statutory scheme or a government program” as examples of governmental activities attracting *Charter* scrutiny (para. 44).

[259] The *Eldridge* framework thus captures two ways in which an entity may be considered governmental. The first branch of *Eldridge* concerns the nature of the entity; the second concerns the nature of the activity (*Greater Vancouver Transportation Authority*, at para. 16). In both cases, the *Charter* applies in respect of governmental action.

(3) The *Eldridge* Framework and Indigenous Governments

[260] Like *Kasirer* and *Jamal JJ.*, we acknowledge that the VGFN falls within the first branch of the *Eldridge* framework as it is a government by nature. However, we question whether existing categories are adequate to deal with self-governing Indigenous nations and reject the idea that VGFN's governmental status is based on the delegation of authority from another level of government.

[261] As noted above, existing jurisprudence provides general and instructive statements about the purpose of s. 32(1). However, these cases did not involve the distinct context of Indigenous governments and instead addressed other unrelated circumstances. Legal tests devised to assess whether municipalities, universities, or hospitals must respect the *Charter* arise from, and necessarily respond to, their particular factual contexts. They should not be read as a complete answer on the scope of the *Charter*'s applicability to self-governing Indigenous nations. Principles articulated for entities wholly created by the federal or provincial governments will be incomplete and ill-suited when assessing the lawmaking authority of the first inhabitants of Canada.

[262] Different considerations arise with respect to Indigenous governments as they are a foundational piece of Canada's constitutional fabric. Over time, governments and courts have learned that legal questions involving Indigenous peoples frequently require different considerations, legal concepts, and perspectives, grounded in the reality that they are the first inhabitants of Canada. Analogies to existing case law that

identify governmental entities will be partial and imperfect when applied to self-governing Indigenous nations. Limiting conditions should not be grafted onto s. 32(1) when to do so would stunt the growth of what was intended to be a living, remedial, and responsive constitution. Although this Court has yet to fully recognize an inherent Aboriginal right to self-government, s. 32(1) should not be interpreted in a manner that would impair the recognition of such a right prior to the issue being adjudicated.

[263] The delegated authority or substantial control approaches used in *Eldridge* and *McKinney* are therefore not particularly helpful for assessing the applicability of the *Charter* to the VGFN. Looking for a form of delegated authority by the federal or a provincial government does not respect the historic and integral role of Indigenous societies in Canada and fails to account for the modern context of self-governing Indigenous nations.

[264] Indigenous peoples were self-governing entities before the arrival of European settlers and continue to govern themselves to this day (S. Grammond, “Treaties as Constitutional Agreements”, in P. Oliver, P. Macklem and N. Des Rosiers, eds., *The Oxford Handbook of the Canadian Constitution* (2017), 305, at p. 314). The long-standing self-governance practices of Indigenous societies are well established in this Court’s jurisprudence: “Long before Europeans explored and settled North America, aboriginal peoples were occupying and using most of this vast expanse of land in organized, distinctive societies with their own social and political structures” (*Mitchell v. M.N.R.*, 2001 SCC 33, [2001] 1 S.C.R. 911, at para. 9; see also *Haida*

Nation v. British Columbia (Minister of Forests), 2004 SCC 73, [2004] 3 S.C.R. 511, at para. 25). The “special relationship” between Indigenous peoples and the Crown is based on these long-standing practices and recognition of Indigenous institutions that existed before the Crown’s assertion of sovereignty (*Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53, [2010] 3 S.C.R. 103, at para. 122, per Deschamps J., concurring; *Manitoba Metis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 14, [2013] 1 S.C.R. 623, at para. 67).

[265] Recognition of self-governing Indigenous nations as governments in their own right, and not by virtue of delegated power, falls clearly within the ambit of s. 32(1) and the purpose of the *Charter*. Importantly, it upholds long-standing Indigenous practices of self-governance and advances reconciliation in Canada. It is not necessary for the impugned action to stem from authority granted by federal, provincial, or territorial legislation for it to be subject to *Charter* scrutiny. The emphasis the majority places on the VGFN deriving at least some of its lawmaking authority from federal law gives insufficient weight to the VGFN’s independent governmental nature.

[266] We thus reject the notion that an essential factor for the *Charter*’s applicability under s. 32(1) is that the source of the VGFN’s lawmaking authority flows from Parliament. We acknowledge that Kasirer and Jamal JJ. take great care to respect the position of self-governing Indigenous nations like the VGFN: noting that the VGFN is not controlled by the federal or Yukon government under the control prong

(para. 76), that the Vuntut Gwitchin have been self-governing since time immemorial (para. 82), that Parliament can recognize an Indigenous government to which it confers lawmaking authority under s. 91(24) of the *Constitution Act, 1867* without creating that Indigenous government (para. 83), and that the reasons should not be taken to suggest that the VGFN is similar to a municipality (para. 88). Nevertheless, they find that “the VGFN exercises powers that Parliament otherwise would have exercised through its legislative jurisdiction under s. 91(24)” (para. 82) and place substantial weight on the *Constitution Act, 1867* and federal legislation as the source of the VGFN’s authority to enact the residency requirement. For example, at para. 91, they state:

We conclude that the *Charter* applies to the VGFN’s residency requirement only insofar as that requirement flows from an exercise of statutory power under s. 91(24) of the *Constitution Act, 1867*. We make no comment on whether an exercise of an inherent right of self-government untethered from federal legislation would be subject to the *Charter*, which in our view need not be decided in this case in view of the self-government arrangements in issue. [Emphasis added.]

[267] The weight placed on delegation under s. 91(24) does not reflect the unique situation of self-governing Indigenous nations and is not required under the first branch of *Eldridge* for an entity like the VGFN to attract *Charter* scrutiny. Self-governing Indigenous nations may not be expressly mentioned in s. 32(1) but they deal with “matters” which are, and this section must receive a purposive, expansive application so that the *Charter* applies to protect all.

- (4) The *Charter* Applies to Governmental Action in Respect of “Matters Within the Authority” of Parliament and the Provincial Legislatures

[268] It is important to underscore that s. 32(1) was enacted when Parliament, provincial legislatures, and their subordinate entities, represented the entire legislative universe. Those bodies were the modalities for the exercise of all legislative power in Canada. Indigenous peoples were not recognized as self-autonomous and were often not consulted in legislative decision-making. References to “delegating” authority (*Eldridge*, at para. 42), the government “apparatus” (*McKinney*, at p. 275), or Parliament and the provincial legislatures having “created” certain entities (*Godbout*, at paras. 47-48) should be understood in this context. Self-government agreements that recognize and affirm the lawmaking authority of Indigenous communities, like the VGFN Self-Government Agreement, came later.

[269] *Eldridge*, *Godbout*, and other related jurisprudence should not be read as imposing a condition that authority be delegated by Parliament or the provincial legislatures for the *Charter* to apply. The reference to these bodies instead signals an intention that the full legislative field — “all matters within the authority” of Parliament and the provincial legislatures — be covered by the *Charter*. Otherwise, individuals would be deprived of critical protections in situations of power imbalance between the governed and those who govern. This would amount to sanctioning *Charter*-free zones.

[270] The broad ambit of s. 32(1) is also supported by other sections of the *Constitution Act, 1982*. For instance, s. 52(1) provides that “[t]he Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force and

effect.” We do not agree with Ms. Dickson, the Attorney General of Alberta, and the Government of Yukon that s. 52(1) speaks to the *Charter*’s scope of application. The provision is remedial and empowers courts to strike down legislation (G. Régimbald and D. Newman, *The Law of the Canadian Constitution* (2nd ed. 2017), at § 29.23). As explained in our colleague Rowe J.’s reasons, s. 52(1) does not allow parties to circumvent the question of whether the *Charter* can be invoked in the first place. However, concluding that the *Charter* only applies to the laws and actions of the federal and provincial governments or their delegates would create an inconsistency with the remedial breadth available under s. 52(1), given that the broad language of s. 52(1) would readily capture the laws enacted by a self-governing Indigenous nation.

[271] Additionally, we agree with the Attorney General of Canada’s submission that the inclusion of s. 25, which instructs courts to interpret *Charter* rights and freedoms in a way that respects the position of Indigenous peoples and their unique rights, is compatible with the *Charter*’s application to self-governing Indigenous nations (see also Royal Commission, vol. 2, at p. 231 (describing the application of the *Charter* to Indigenous governments as being “moulded and tempered by the mandatory provisions of section 25”)). While neither s. 52(1) nor s. 25 directly expand the scope of the *Charter*’s applicability, they helpfully provide guidance on how any particular interpretation of s. 32(1) would accord with the internal architecture of the Constitution of Canada.

[272] To summarize, the *Charter* broadly applies to governmental action in respect of “matters within the authority” of Parliament and the provincial legislatures. All orders of government are captured. This interpretation aligns with and upholds s. 32(1)’s overarching purpose of addressing the power imbalance between the governed and those who govern. To interpret s. 32(1) and the *Eldridge* framework as being limited to situations of delegated authority would unduly prioritize an overly textual approach to s. 32(1) and deprive Indigenous people of the *Charter*’s protections when their rights have been infringed by their own governing bodies.

B. *Application of Section 32(1) to the VGFN*

(1) Delegation Does Not Accurately Describe the Relationship Between the Crown and Self-Governing Indigenous Nations

[273] Recognition and acceptance of the VGFN’s historic and ongoing self-governance is clear. The preamble to the VGFN Self-Government Agreement affirms that the “Vuntut Gwitchin have traditional decision-making structures and are desirous of maintaining these structures”. It specifies that “the Parties wish to support and promote the contemporary and evolving political institutions and processes of the Vuntut Gwitchin First Nation”. The VGFN Constitution preamble notes that the Constitution is adopted in furtherance of a “desir[e] to exercise our inherent right of self-government”.

[274] The VGFN Self-Government Agreement has been recognized and affirmed by federal and territorial legislation (*Yukon First Nations Self-Government Act*, S.C. 1994, c. 35; *First Nations (Yukon) Self-government Act*, R.S.Y. 2002, c. 90). The stated purpose of the federal legislation is to “bring into effect self-government agreements” concluded with Indigenous nations, including the VGFN (ss. 4 and 5(1)). The territorial legislation provides, *inter alia*, for the approval of self-government agreements, including that of the VGFN, and the recognition of such agreements as having “the force of law” (ss. 1 and 2).

[275] Legislative recognition of the VGFN’s self-governance authority does not transform it into delegated authority. The federal and territorial legislation confirms the self-government powers set out in the agreements and, as the VGFN puts it, “create[s] a space for their practical and contemporary exercise through legal recognition by Canada and Yukon” (R.F., at para. 51 (footnote omitted)). We agree with Ms. Dickson’s submission that this statutory recognition “does not undermine the fact that [the] VGFN is a rights-holding Indigenous collective in Canada” that practiced its own legal traditions prior to European settlement and continues to do so (R.F. on cross-appeal, at para. 34). Given the historic and ongoing self-governance practices of Indigenous societies, it would be inapt to characterize Indigenous self-government as a delegated authority.

[276] As we have explained, however, it is not a prerequisite to the applicability of the *Charter* that an entity exercise delegated authority from Parliament or a

provincial legislature. Therefore, we need not go further on the source of Indigenous self-government authority. Rather, under the first branch of *Eldridge*, the *Charter* applies to governmental action in respect of “matters within the authority” of Parliament and the provincial legislatures. The key question is whether the VGFN, as an entity, is a government by its very nature.

(2) The VGFN Is a Government by Its Very Nature

[277] We have no hesitation concluding that the VGFN is subject to the *Charter*. It is inherently governmental. The VGFN’s long-standing history reinforces its governmental nature; as the trial judge noted, “[t]he Vuntut Gwitchin were constituted as a political entity prior to the assertion of British sovereignty and have governed themselves in accordance with their own laws since time immemorial” (2020 YKSC 22, 461 C.R.R. (2d) 230, at para. 11).

[278] An array of relevant factors demonstrate that the VGFN is governmental in nature. For example, the VGFN council is democratically elected, it has the authority to levy taxes, and it possesses extensive lawmaking powers — all of which were described by La Forest J. in *Godbout* as non-exhaustive indicia of government (para. 51; see also VGFN Final Agreement (1993), ch. 24; VGFN Self-Government Agreement, s. 13.0; *Yukon First Nations Self-Government Act*, s. 11 and Sch. III). The VGFN also has the exclusive authority to govern its internal affairs (VGFN Self-Government Agreement, s. 13.1). This includes the enactment of the residency requirement itself — a legislative action that impacts individual members’ rights by

restricting democratic participation. Further, the VGFN can enact laws applicable in the Yukon in relation to a wide array of matters touching the everyday lives of its citizens, such as health care, education, adoption and child welfare, solemnization of marriage, and estate administration (s. 13.2). It is empowered to legislate on matters of a local or private nature on the settlement land, which the VGFN Self-Government Agreement defines as including the administration of justice, land use, expropriation of land, protection of fish, wildlife, and habitat, environmental protection, vehicles, curfews and the prevention of disorderly conduct, public health, public order, and other “matters coming within the good government of Citizens on Settlement Land” (s. 13.3).

[279] The VGFN’s extensive catalogue of lawmaking powers touches on “matters within the authority” of Parliament and the provincial legislatures, as provided by s. 32(1). As the Congress of Aboriginal Peoples points out, many of the services provided by the VGFN as a self-governing Indigenous nation would otherwise be within the purview of other levels of government (I.F., at para. 8). While a different modality for the exercise of legislative power, the VGFN’s authority as a self-governing Indigenous nation is no less impactful or binding on its citizens and no less capable of limiting their *Charter* rights.

[280] The VGFN’s structure and functions reflect its inherently governmental nature: it creates laws and makes decisions that benefit, order, and restrict the lives of its citizens. We accordingly conclude that the VGFN is a government by its very nature. Its enactment of the residency requirement must attract *Charter* scrutiny.

C. *Conclusion on Section 32(1)*

[281] “The *Charter* is a nation-building instrument” (J. Harrington, “Interpreting the *Charter*”, in Oliver, Macklem and Des Rosiers, *The Oxford Handbook of the Canadian Constitution*, 621, at p. 622). It was intended to solidify a national identity and preserve individual rights and freedoms in the face of governmental action. This purpose aligns with its application to self-governing Indigenous nations, including the VGFN. All orders of government in Canada are bound to uphold the *Charter*’s protections as these protections represent an integral feature of the relationship between the governed and those who govern. Any narrower approach to s. 32(1) risks the creation of *Charter*-free zones and would undermine the balance intended to be struck by the introduction of constitutionally entrenched rights in Canada.

[282] Section 32(1) can be read to recognize the political and constitutional evolution that has occurred in respect of Indigenous self-government. Indigenous nations like the VGFN have been self-governing since time immemorial and our reasons affirm that, whatever the source of their self-government authority, self-governing Indigenous nations are subject to the *Charter* pursuant to s. 32(1) and in accordance with a modified *Eldridge* framework when they engage in governmental action.

III. Section 25 of the *Charter*

[283] The constitutional place of Indigenous peoples and the application of the *Charter* to them engages a series of special considerations. While the *Charter* primarily protects individual rights, Indigenous peoples also have collective rights and interests, including group title to land (*Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44, [2014] 2 S.C.R. 257) and the right to self-government recognized in the *United Nations Declaration on the Rights of Indigenous Peoples* (U.N. Doc. A/RES/61/295, October 2, 2007 (“*UNDRIP*”), Articles 3 and 4; see also *United Nations Declaration on the Rights of Indigenous Peoples Act*, S.C. 2021, c. 14). Although the original peoples in Canada, the various nations — even taken together — are presently a minority within the Canadian population and polity. They have been, and continue to be, subjected to the forces of colonialism in ways that distinguish them from other groups protected and recognized by the *Charter*. Section 25 plays a distinct role from other *Charter* provisions, operating to preserve a form of collective rights unique to Indigenous peoples in Canada while at the same time recognizing that when Indigenous governments make distinctions between their citizens, as all governments do, individuals and minorities within the collective should nevertheless benefit from all the constitutionally entrenched protections of the *Charter*.

[284] This case marks the first time a majority of this Court has considered s. 25, which provides as follows:

25 The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including

(a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and

(b) any rights or freedoms that now exist by way of land claims agreements or may be so acquired.

The two main elements of s. 25 that must be interpreted on this appeal pertain to its operation and scope. First, in light of its text, context and purpose, how does s. 25 operate and how should a court resolve a challenge posed by the potentially competing rights the provision contemplates? Second, which rights are included within the scope of “aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada”?

[285] We take a view that is different from what Kasirer and Jamal JJ. propose concerning both the operation of s. 25 and the scope of the rights and freedoms captured by the provision. In our view, a purposive approach to s. 25 leads to the conclusion that this provision is an interpretive tool, not an impenetrable shield. Moreover, the rights within the scope of s. 25 are limited to those that are unique to Indigenous peoples because they are Indigenous and do not extend to all matters on which Indigenous governments may act. This conception ensures that s. 25 does not serve to effectively create extensive *Charter*-free zones in the context of Indigenous self-government, depriving Indigenous peoples of fundamental rights protections and immunizing governments “from the rights and freedoms floor established in the *Charter*” (I.F., Canadian Constitution Foundation, at para. 17). Though our analyses diverge, we understand Canadian constitutionalism as one wherein contending ideas are not a flaw

that must be overcome, but are instead essential to our constitutional democracy (see J. Webber, *The Constitution of Canada: A Contextual Analysis* (2nd ed. 2021), at pp. 7-8).

A. *How Does Section 25 Operate?*

[286] There are competing views on the effect of s. 25 and the question is sometimes posed as whether the provision is a shield or an interpretive prism. The VGFN argues that s. 25 is a complete shield to Ms. Dickson’s *Charter* claim and that the purpose of s. 25 is protection of space for the exercise of Aboriginal, treaty, and other rights — “not balancing or reconciliation” (R.F., at paras. 103-4 and 122). Ms. Dickson, on the other hand, submits that s. 25 does not operate as an automatic shield to *Charter* scrutiny, but rather contemplates some degree of balancing between the individual *Charter* right and the collective Indigenous right (A.F., at paras. 92 and 97).

[287] In our view, interpretation is key to a s. 25 analysis. We agree with the position of Ms. Dickson and some interveners that the “‘shield approach’ . . . amounts to an ‘either/or’ exercise that oversimplifies the discussion about the interaction of collective and individual rights” (I.F., A.G. Canada, at para. 36). For the reasons that follow, we conclude that it is not necessary or desirable, at this early stage in the application of s. 25, to carve out *Charter* “no go” zones that would result from the erection of shields.

(1) A Purposive Interpretation

[288] *Charter* provisions, including s. 25, must be interpreted purposively (*Hunter*, at pp. 156-57). The meaning of a provision is understood in light of the interests it is meant to protect. When ascertaining the purpose of a *Charter* provision, courts look “to the character and the larger objects of the *Charter* itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concepts enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the *Charter*” (*R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at p. 344). A purposive analysis of s. 25 includes an examination of the “language, structure, and history of the constitutional text” (*Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313, at p. 394, per McIntyre J.).

[289] As we explain, the text of s. 25 does not dictate the result or point unequivocally in one direction. Fairly read, it is capable of supporting either an interpretive or shield approach. We are persuaded, however, that s. 25 was intended to operate as an interpretive prism based on its nature, purpose, and history. This approach is most consistent with the way in which competing rights under the *Charter* are balanced and best reflects the needs of all Indigenous people, the final recommendations of the Royal Commission, and the rights enshrined in *UNDRIP*. It provides a respectful and responsive path forward into a future in which *Charter* rights and Indigenous conceptions of rights will be integrated in a variety of legal fora.

(2) The Text

[290] The text of s. 25 says that individual *Charter* rights “shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada”.

[291] We agree with several points that Kasirer and Jamal JJ. make about the text of s. 25, namely that:

- The English and French versions of constitutional texts are “equally authoritative as expressions of the intent reflected in s. 25” (para. 121).
- There is a shared meaning conveyed by the two linguistic texts that speaks to both a protective purpose in relation to the collective Indigenous right and an interpretive exercise in relation to the competing rights that must be undertaken by the court (para. 124).
- A common feature of ss. 21, 25, 26 and 29 of the *Charter* is that they are “designed to protect rights that exist independently of the Charter itself” (para. 129, quoting K. M. Lysyk, “The Rights and Freedoms of the Aboriginal Peoples of Canada”, in W. S. Tarnopolsky and G.-A. Beaudoin, eds., *The Canadian Charter of Rights and Freedoms: Commentary* (1982), 467, at p. 471).

[292] In our view, however, the text of s. 25 offers little assistance on whether an interpretive approach or a shield approach should be preferred. It is plain from the text that the inclusion of s. 25 was an attempt to protect certain collective Indigenous rights from abrogation or derogation, as we explain more fully in our analysis of the provision's purpose and history. As Kasirer and Jamal JJ. note, the words "shall not be construed" and "*ne porte pas atteinte*" speak to the mandatory and declaratory nature of the provision (para. 125). We are in agreement with that observation, but this does not oust the interpretive exercise that s. 25 prescribes in relation to the competing rights at stake. Put another way, it does not end the matter for a court to conclude that a *Charter* claim implicates an Aboriginal, treaty, or other right or freedom that "pertain[s] to the aboriginal peoples of Canada". The court must still consider the *Charter* claim in context and attempt to balance or reconcile the competing interests at stake.

[293] A review of the purpose and legislative history of s. 25, this Court's jurisprudence on interpreting competing constitutional rights, and other sources including the Final Report of the Royal Commission and *UNDRIP* is therefore more instructive on the operation and scope of s. 25. In the sections that follow, we demonstrate why these sources affirm an interpretive approach to the provision.

(3) The Purpose and History of Section 25

[294] The constitutional entrenchment of a bill of rights in Canada in 1982 was a major turning point in the relationship between individuals and the state. The *Charter*

would permit governmental action to be reviewed by courts on the basis of its consistency with individual rights protections. A host of individual interests were to be protected, including fundamental freedoms, democratic rights, legal rights, and — importantly — equality rights.

[295] Concerns were voiced about possible tension arising between the protection and prioritization of individual *Charter* rights and the special position, status, and rights of certain collectives within Canadian society. In particular, many people, including governments, Indigenous communities, and other stakeholders, began to consider how an entrenched bill of rights would impact the unique collective rights of Indigenous peoples and the programs designed to ameliorate their conditions. For example, the Attorney General of Saskatchewan, Roy Romanow, told the Federal-Provincial Conference of First Ministers on the Constitution in 1978 that:

In Saskatchewan, for example, for some years now I believe the government has in effect discriminated if I could put it that way Recently we signed an agreement with a major mining company for a new mining project in Northern Saskatchewan and part of that agreement requires that by 1982 fifty per cent of the employees be northerners . . . most of whom would be by definition Indians status or non-status. Now with an entrenched Bill of Rights, and if you judge by the American experience, policies like those might be struck down by the courts as being discriminatory

In Canada some would argue, Prime Minister, that our greater need is to encourage affirmative action programmes to redress some social injustices and the proposed charter, indeed any Bill of Rights, might make it difficult to pursue that goal.

(Federal-Provincial Conference of First Ministers on the Constitution (afternoon session of October 30, 1978), at p. 157; see also I.F., Canadian Constitution Foundation, at paras. 11-12.)

In other words, would Indigenous difference be undermined by a formalistic conception of equality?

[296] Prime Minister Pierre Trudeau responded that Attorney General Romanow's concern about permitting affirmative action was addressed by cl. 26 of what was then Bill C-60, 3rd Sess., 30th Parl., 1978, which proposed that:

Nothing in this Charter shall be held to abrogate, abridge or derogate from any right or freedom not declared by it that may have existed in Canada at the commencement of this Act, including, without limiting the generality of the foregoing, any right or freedom that may have been acquired by any of the native peoples of Canada by virtue of the Royal Proclamation of October 7, 1763.

(See also B. H. Wildsmith, *Aboriginal peoples and Section 25 of the Canadian Charter of Rights and Freedoms* (1988), at p. 5.)

While Bill C-60 never became law, the essence of cl. 26 was incorporated in subsequent iterations of what is now s. 25 of the *Charter*.

[297] Legislative debates on constitutional reform shed light on the purpose of s. 25. The entrenchment of the rights of Indigenous peoples in what is now s. 35 of the *Constitution Act, 1982* was not on the agenda at the beginning of the patriation process (see J. M. Arbour, "The Protection of Aboriginal Rights within a Human Rights Regime: In Search of an Analytical Framework for Section 25 of the Canadian Charter of Rights and Freedoms" (2003), 21 *S.C.L.R.* (2d) 3, at pp. 30-31). However, by October 1980, Prime Minister Trudeau had made an undertaking to several Indigenous leaders that he would use the Constitution as a tool to better protect their rights (*House*

of *Commons Debates*, vol. IV, 1st Sess., 32nd Parl., October 17, 1980, at p. 3778). Several months after the introduction of the constitutional reform package in Parliament, Minister of Justice Jean Chrétien proposed on January 30, 1981, a new clause, contained in Part II of the *Constitution Act, 1982* and outside the *Charter*, that would recognize and affirm the Aboriginal and treaty rights of Indigenous peoples (Arbour, at pp. 33-34). That clause was removed in November 1981 following further constitutional negotiations, which Minister Chrétien described as the “consequence of a process which required the making of compromises” (*House of Commons Debates*, vol. XII, 1st Sess., 32nd Parl., November 20, 1981, at p. 13045). Later that month, further compromise resulted in the re-insertion of what is now s. 35 to protect “existing aboriginal and treaty rights” of Indigenous peoples (*House of Commons Debates*, vol. XII, 1st Sess., 32nd Parl., November 24, 1981, at pp. 13202-3 (emphasis added); see also Arbour, at p. 35; Wildsmith, at p. 7).

[298] Concurrently, debates surrounding what is now s. 25 were occurring in the context of uncertainty about which Aboriginal rights, if any, would be constitutionally recognized and affirmed. The Department of Justice’s Assistant Deputy Minister, Barry L. Strayer, told the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada that s. 25 stipulates that “if those rights exist, they continue to exist and that the Charter does not affect them. It is not prejudging whether they exist or they do not exist, it is just saying if they do, the Charter does not alter those rights in any way” (*Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and of the House of Commons on the Constitution of*

Canada, No. 38, 1st Sess., 32nd Parl., January 15, 1981, at p. 16 (emphasis added)).

Similarly, the Parliamentary Secretary to the Minister of Indian Affairs and Northern Development, Ray Chénier, explained the intended effect of s. 25:

. . . the existing protection of the native people's way of life by assuring that any rights or freedoms that pertain to the native peoples of Canada shall not be abrogated by the introduction of a guarantee in the Charter of Rights and Freedoms of certain rights and freedoms for all Canadians. This section is purposefully open-ended. There is, as I have said before, the possibility of future entrenchment of additional rights in the constitution such as those demanded by native peoples. [Emphasis added.]

(*House of Commons Debates*, vol. V, 1st Sess., 32nd Parl., November 20, 1980, at p. 4915; see also *Arbour*, at pp. 31-32.)

[299] When Minister Chrétien was questioned at the Special Joint Committee, he explained that in the government's view, the *Charter* should not "affect" those rights or "create any problems in relation to those rights" for Aboriginal peoples (*Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada*, No. 49, 1st Sess., 32nd Parl., January 30, 1981, at p. 94). In this way, Minister Chrétien indicated that the purpose of s. 25 is to ensure the individual rights outlined in the *Charter* do not prevent Indigenous peoples from exercising their collective rights.

[300] A review of the *Charter* drafting and negotiation process thus reveals a "preservation of rights approach" with respect to s. 25 — aimed at ensuring that the *Charter* would not lessen other existing rights, including unique rights held by Indigenous peoples (I.F., A.G. Alberta, at para. 24). In addition, former drafts of s. 25

offer additional insight in support of this approach. In October 1980, a draft of the provision was tabled in the House of Commons and the Senate. It read as follows:

. . . The guarantee in this Charter of certain rights and freedoms shall not be construed as denying the existence of any other rights or freedoms that exist in Canada, including any rights or freedoms that pertain to the native peoples of Canada.

(The Canadian Constitution 1980: Proposed Resolution respecting the Constitution of Canada (1980), at p. 24)

[301] Similarly, Minister Chrétien submitted further draft provisions in January 1981 to the Special Joint Committee, which read:

. . . The guarantee in this Charter of certain rights and freedoms shall not be construed as denying the existence of:

(a) any aboriginal, treaty or other rights or freedoms that may pertain to the aboriginal peoples of Canada including any right or freedom that may have been recognized by the Royal Proclamation of October 7, 1763;

or

(b) any other rights or freedoms

that may exist in Canada.

(Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada, No. 36, 1st Sess., 32nd Parl., January 12, 1981, at p. 18)

[302] Both of these earlier draft provisions suggest the government intended for the provision to protect collective Indigenous rights from being erased or excluded by the assertion of individual rights under relevant *Charter* sections. The drafts do not

suggest it was the government's intent for s. 25 to create an impenetrable shield to encircle Aboriginal rights and freedoms and create *Charter*-free zones in certain parts of the country. Instead, the legal effect of s. 25 is to make clear that the rights and freedoms guaranteed in the *Charter* should not be read as undermining the rights and freedoms afforded to Indigenous peoples.

[303] Three important conclusions about the purpose of s. 25 can be discerned from the provision's legislative origins.

[304] First, the inclusion of s. 25 was motivated by concerns about how the collective rights and interests of Indigenous peoples might interact with the constitutional entrenchment of individual rights — especially the right to equality under s. 15(1). A central motivating concern for s. 25 was about whether, in its absence, protections against racial discrimination contained in s. 15(1) of the *Charter* would adversely impact Aboriginal or treaty rights that are held by Indigenous peoples on the basis of their Indigeneity (Hogg and Wright, at § 28:41; C. Hutchinson, “Case Comment on *R. v. Kapp*: An Analytical Framework for Section 25 of the *Charter*” (2007), 52 *McGill L.J.* 173, at p. 178). While this Court has now repeatedly affirmed that the “animating norm” of s. 15(1) is substantive equality — which entails looking “behind the facade of similarities and differences” in assessing equality claims — this jurisprudential trend was by no means a foregone conclusion at the time of the *Charter*'s adoption (*Fraser v. Canada (Attorney General)*, 2020 SCC 28; [2020] 3 S.C.R. 113, *R. v. Sharma*, 2022 SCC 39, at paras. 37 and 187; *Withler v. Canada*

(*Attorney General*), 2011 SCC 12, [2011] 1 S.C.R. 396, at para. 39). Section 25 was motivated by a real concern that collective Indigenous rights would be undermined by a formalistic interpretation of s. 15(1). For example, s. 25 would prevent non-Indigenous people from claiming identical rights to hunt or fish on traditional lands and would insulate programs and provisions designed to protect the special rights of Indigenous peoples.

[305] Second, s. 25 was not intended to create or confer rights. Section 25 is a “saving provision that does not purport either to create new rights or to amplify or otherwise affect the constitutional or legal status of rights that already exist or that may be brought into existence independently of the Charter” (Lysyk, at p. 472; see also J. Borrows, “Contemporary Traditional Equality: The Effect of the *Charter* on First Nation Politics” (1994), 43 *U.N.B.L.J.* 19, at p. 28; Hogg and Wright, at § 28:41). Justice Bastarache observed in *R. v. Kapp*, 2008 SCC 41, [2008] 2 S.C.R. 483, at para. 93, that, based on the provision’s legislative history, it was “made abundantly clear that s. 25 creates no new rights”. Rather, s. 25 was envisaged as a mechanism to “guide the application of the Charter” and “address the concern that the Charter would be used to take away from the rights” of Indigenous peoples (Arbour, at p. 36). It is an interpretive tool, not a source of rights.

[306] Third, while we accept that protecting Indigenous difference is an objective that motivated the inclusion of s. 25 in the *Charter*, a more precise formulation of the provision’s aim is to protect the special status of certain collective rights held by

Indigenous peoples. These are rights that pertain uniquely to Indigenous peoples *because* they are Indigenous (see *Kapp*, at para. 103, per Bastarache J.). They are intrinsically linked to the “distinctive, collective, [and] cultural identity” of an Indigenous group (see *Arbour*, at p. 60; I.F., A.G. Canada, at para. 29). For example, Aboriginal and treaty rights recognized by s. 35, as well as other laws that confer benefits on the basis of one’s membership in an Indigenous group — such as the “affirmative action” program described by Attorney General Romanow in 1978 — protect collective interests that are unique to Indigenous peoples and stem from their identity. In *R. v. Van der Peet*, [1996] 2 S.C.R. 507, at para. 19, Lamer C.J. explained that:

Aboriginal rights cannot, however, be defined on the basis of the philosophical precepts of the liberal enlightenment. Although equal in importance and significance to the rights enshrined in the *Charter*, aboriginal rights must be viewed differently from *Charter* rights because they are rights held only by aboriginal members of Canadian society. They arise from the fact that aboriginal people are aboriginal. [Emphasis added; emphasis in original deleted.]

While s. 25 does not create rights and stands separate from provisions that create or constitutionally affirm them, it is noteworthy that s. 25 was drafted and adopted in the context of ongoing debates about which types of rights would ultimately be protected by what is now s. 35. We agree with Bastarache J.’s statement from *Kapp* that, given s. 25’s reference to “aboriginal and treaty rights”, “the focus of [s. 25] is the uniqueness of those persons or communities mentioned in the Constitution; the rights protected are those that are unique to them because of their special status” (para. 103).

[307] This understanding of s. 25's purpose is entirely concordant with this Court's jurisprudence on how Indigenous rights are recognized and given effect within the Canadian constitutional framework. In *Van der Peet*, Lamer C.J. stated that "the purpose of s. 35(1) lies in its recognition of the prior occupation of North America by aboriginal peoples" and that s. 35(1) provides "the constitutional framework through which the fact that aboriginals lived on the land in distinctive societies, with their own practices, traditions and cultures, is acknowledged and reconciled with the sovereignty of the Crown" (paras. 31-32). Sections 35 and 25 do not fulfill the same function, nor are the rights within their scope co-extensive. However, both provisions recognize the special status of Indigenous communities and seek to reconcile collective Indigenous rights and interests with those of the broader Canadian state (see, e.g., *Kapp*, at para. 65; I.F., *Congress of Aboriginal Peoples*, at para. 20; A.F., at paras. 61-62; I.F., A.G. Quebec, at para. 19; I.F., A.G. Alberta, at paras. 14-16). Section 25 affirms that the protection of individual *Charter* rights does not impair this process of reconciliation.

[308] To summarize, s. 25 furthers a particular purpose: to ensure that the introduction of a constitutionally entrenched bill of rights in Canada did not have the effect of abrogating or derogating from the unique rights held by Indigenous peoples that stem from their identity as Indigenous peoples.

(4) Jurisprudence on the Interpretation of Constitutional Rights

[309] That s. 25 furthers this purpose and operates as an interpretive prism is supported by many other important principles arising from constitutional

jurisprudence. This Court has consistently affirmed that all parts of the Constitution must be read together and that there is no hierarchy among its various provisions (see *Gosselin (Tutor of) v. Quebec (Attorney General)*, 2005 SCC 15, [2005] 1 S.C.R. 238, at para. 2; *Reference re Same-Sex Marriage*, 2004 SCC 79, [2004] 3 S.C.R. 698, at para. 50; *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, at p. 877). Moreover, constitutional rights are not absolute — they are often limited by the rights of others. This is equally true of Indigenous rights (see *R. v. Badger*, [1996] 1 S.C.R. 771, at paras. 80-82; *R. v. Sparrow*, [1990] 1 S.C.R. 1075, at pp. 1108-9; *R. v. Nikal*, [1996] 1 S.C.R. 1013, at para. 92). Indeed, “limits placed on those rights are, where the objectives furthered by those limits are of sufficient importance to the broader community as a whole, equally a necessary part of [the] reconciliation” between Indigenous communities and the broader community (*R. v. Gladstone*, [1996] 2 S.C.R. 723, at para. 73 (emphasis deleted); see also *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, at paras. 160-61). Put simply, rights do not exist in a vacuum (*Nikal*, at para. 92).

[310] Section 25 acknowledges this. It does not obviate the need for a balancing of competing interests or represent a marked exception to a flexible and contextual approach to constitutional interpretation. As Ms. Dickson notes, interpreting s. 25 as providing for an “automatic and absolute shield would be an outlier in this Court’s jurisprudence” (A.F., at para. 93). Aboriginal and treaty rights affirmed by s. 35 can be limited based on pressing societal interests (see *Sparrow*; *Badger*; *Tsilhqot’in Nation*, at para. 152). It would be highly incongruent to automatically shield those same rights

when their exercise results in *Charter* infringements, no matter how serious or extensive. The *Charter* ushered in a new relationship between the governed and those who govern; there is an important societal interest in reconciling collective and individual rights. We do not accept that the former absolutely trumps the latter. Such an interpretation of s. 25 would be “inflexible to the point of being blunt” (I.F., A.G. Canada, at para. 36).

[311] As s. 25 should not be interpreted in a manner that bestows “blanket immunity” from *Charter* scrutiny, “the issue then becomes one of addressing a conflict between two different sets of constitutional rights” (D. L. Milward, *Aboriginal Justice and the Charter: Realizing a Culturally Sensitive Interpretation of Legal Rights* (2012), at p. 69; see also T. Isaac, “Canadian Charter of Rights and Freedoms: The Challenge of the Individual and Collective Rights of Aboriginal People” (2002), 21 *Windsor Y.B. Access Just.* 431, at p. 437).

(5) Post-1982 Constitutional Engagement

[312] The 1996 Final Report of the Royal Commission is also of significance to the interpretation of s. 25 of the *Charter*. The Royal Commission had an expansive mandate to examine the situation of Aboriginal peoples across Canada and to propose solutions and remedies. The Final Report articulated four important principles as guidelines towards a “renewed relationship” between Aboriginal and non-Aboriginal communities: “. . . mutual recognition, mutual respect, sharing and mutual responsibility” (*Report of the Royal Commission on Aboriginal Peoples*, vol. 1,

Looking Forward, Looking Back (1996), at p. 677). According to the Royal Commission, this involves “equality, co-existence and self-government” (p. 678). Respect for individual rights and self-determination for Indigenous communities does not have to be a zero-sum equation. In fact, equity and accountability through the application of the *Charter* may induce previously estranged individuals to reorient themselves to their communities of origin. In its factum, the Band Members Alliance and Advocacy Association of Canada writes that reconciliation efforts should not further deprive Indigenous people of their legal rights. Instead, reconciliation requires the law to chart a path forward that merges “colonial” law with Indigenous social and legal orders until the two can co-exist (para. 23).

[313] Section 25 “must be given a flexible interpretation that takes account of the distinctive philosophies, traditions and cultural practices of Aboriginal peoples” (Royal Commission, vol. 2, at p. 234). While this Court must make space in the Constitution for Indigenous peoples to develop their cultures and societies in the way they see fit, it must also be mindful that, due to the legacy of colonialism, Indigenous people face existing disadvantages and suffer from systemic discrimination. Reconciliation should not be a means by which they are further deprived of legal rights on their own lands. As such, while Indigenous self-government is an integral part of Canadian governance, it should, like any other head of government, be required to respect constitutional constraints, including the rights and freedoms guaranteed under the *Charter*.

[314] Section 25 should not be interpreted in a way that prohibits Indigenous claimants from accessing other sections of the *Charter*, including s. 15(1), even if the challenge is to their own communities' laws. Since the *Charter*'s enactment, important issues about the construction of and balance between individual and collective interests have been raised (see J. Koshan and J. Watson Hamilton, "*Kahkewistahaw First Nation v Taypotat* — Whither Section 25 of the *Charter*?" (2016), 25:2 *Const. Forum* 39, at p. 42). These include the claim by the Native Women's Association of Canada for an equal role in debating constitutional reforms (*Native Women's Assn. of Canada v. Canada*, [1994] 3 S.C.R. 627), litigation concerning band membership rules that excluded some women and their children (see K. Gover, "When tribalism meets liberalism: Human rights and Indigenous boundary problems in Canada" (2014), 64 *U.T.L.J.* 206, at pp. 230-34), and the allegation that election codes in some Indigenous communities may prevent individuals from running for office on the basis of their gender, marital status or sexual orientation (K. Busby, "*Discussed, reformulated and enriched many times*": *The Supreme Court of Canada's Equality Jurisprudence — Notes for a presentation at the Canadian Bar Association Annual National Constitutional and Human Rights Conference*, June 2014 (online), at pp. 4-5).

[315] The need for a balancing of rights and a reconciliation of interests and peoples was not only central to the final recommendations of Royal Commission, it was at the core of the equality-based submissions made by the Native Women's Association of Canada at the time of the Charlottetown Accord. Its comments about

the discriminatory nature of some Indigenous governance structures and the need to apply the *Charter* to self-governing nations continue to resonate today:

The Native Women's Association of Canada supports individual rights. These rights are so fundamental that, once removed, you no longer have a human being. Aboriginal Women are human beings and we have rights which cannot be denied or removed at the whim of any government. . . . These views are in conflict with many Aboriginal leaders and legal theoreticians who advocate for recognition by Canada of sovereignty, self-government and collective rights. It is their unwavering view of the male Aboriginal leadership that the "collective" comes first, and that it will decide the rights of individuals.

...

The Native Women's Association of Canada recognizes that there is a clash between collective rights of sovereign Aboriginal governments and individual rights of women. Stripped of equality by patriarchal laws which created "male privilege" as the norm on reserve lands, Aboriginal women have a tremendous struggle to regain their social position. We want the Canadian Charter of Rights and Freedoms to apply to Aboriginal governments.

(*Statement on the "Canada Package"* (1992), at pp. 9 and 11; see also Borrows (1994), at p. 44.)

[316] Indigenous women warned that if the *Charter* did not apply to Indigenous governments, they might lose an important tool to assert their right to equality within their communities. It should come as no surprise that the inequalities that exist within the wider Canadian society may also be present or reproduced within Indigenous communities. Professor John Borrows notes that Indigenous governments can be just as dismissive and oppressive when it comes to issues of gender equality as other orders of government (*Freedom and Indigenous Constitutionalism* (2016), at p. 188). There is a similar and common need to protect the rights of all Indigenous citizens if their

governments treat them unfairly, especially if they are part of a minority within the larger Indigenous collective.

(6) International Sources

[317] International human rights law can be a helpful source of information and direction when interpreting *Charter* provisions. The presumption of conformity directs that the *Charter* should be presumed to provide at least as great a protection as that which is afforded by similar provisions in international documents that Canada has ratified (*Reference re Public Service Employee Relations Act*, at p. 349, per Dickson C.J. and Wilson J., dissenting). Binding international instruments carry weight in the *Charter* interpretation exercise (*Quebec (Attorney General) v. 9147-0732 Québec inc.*, 2020 SCC 32, [2020] 3 S.C.R. 426, at para. 38). In this case, *UNDRIP* is binding on Canada and therefore triggers the presumption of conformity.

[318] *UNDRIP* recognizes the need to protect both the collective and individual rights of Indigenous peoples. For example, Articles 4, 5, 20 and 34 affirm Indigenous peoples' right to self-determination, self-government, and the ability to protect their distinct political, legal, economic, social, and cultural institutions. Moreover, Articles 2 and 9 further direct that both Indigenous peoples *and individuals* must be free from all kinds of discrimination and be equal to all other peoples in the exercise of their rights. In this way, Indigenous people both have the right to belong to an Indigenous community or nation and must be protected from discrimination of all kinds in the exercise of this right.

[319] *UNDRIP* is therefore illustrative of how one type of right cannot absolutely trump another. An interpretation of s. 25 that shields collective Indigenous rights and freedoms from incursion but does not uphold individual Indigenous peoples' right to be free from discrimination would be inconsistent with the comprehensive nature of *UNDRIP*'s protections. Instead, a holistic reading of *UNDRIP* supports the view that s. 25 operates as an interpretive prism that ensures both collective and individual rights are respected.

(7) Conclusion on the Operation of Section 25

[320] For the foregoing reasons, s. 25 should serve as an interpretive prism and not operate as a shield. The extent to which this prism refracts and colours the *Charter*'s application will depend on who brings the claim, against whom, and when. Adapting for context can create a "strong hedge" around Aboriginal, treaty, and other rights in challenges brought by external parties, while ensuring that member-initiated challenges based on *Charter* principles can continue to exist (G. Christie, "Aboriginal Citizenship: Sections 35, 25 and 15 of Canada's *Constitution Act, 1982*" (2003), 7 *Citizsh. Stud.* 481, at p. 491).

[321] We add this. While we reject the shield approach to s. 25, we should not be taken as suggesting that the protection of fundamental rights can only occur through the *Charter*, or that self-governing Indigenous nations have no role to play in this regard. As governments in their own right, Indigenous nations can and often do entrench the rights of their citizens in constitutional documents. The VGFN

Constitution, for example, provides that “[e]very individual is equal before and under the laws of the Vuntut Gwitchin First Nation and has the right to the equal protection [and] equal benefit of Vuntut Gwitchin First Nation law without discrimination” (Article IV(7)). The rights and freedoms set out in the VGFN Constitution are subject “only to such reasonable limits as can be demonstrably justified in a free and democratic Vuntut Gwitchin society” (Article IV(1)). The VGFN correctly notes that Ms. Dickson has the ability to bring a claim under Article IV(7) of the VGFN Constitution (R.F., at para. 95; see also 2021 YKCA 5, 495 C.R.R. (2d) 98, at paras. 156-57).

[322] Indigenous legal orders do not stand separate and apart from Canadian law; they form an integral part of it (*Mitchell*, at paras. 10-11; *Pastion v. Dene Tha’ First Nation*, 2018 FC 648, [2018] 4 F.C.R. 467, at para. 8). This does not, however, immunize Indigenous governments from the responsibility of respecting the individual rights and freedoms articulated in the *Charter* (see I.F., Canadian Constitution Foundation). In effect, the *Charter* establishes a “floor” of constitutionally protected rights and freedoms that must be respected by all governments, subject to the interpretive function performed by s. 25 when collective Indigenous rights are implicated.

[323] Nothing prevents Indigenous governments from protecting rights or interpreting them. Indigenous courts — including the Vuntut Gwitchin Court (which has yet to be established) — will have a meaningful role to play (see VGFN

Constitution, Article XV; C.A. reasons, at paras. 23 and 25). The *Constitution Act, 1982*, which includes the *Charter*, is a pluralist document that is capable of incorporating and reflecting Indigenous and non-Indigenous perspectives alike. The living tree interpretive doctrine ensures that these perspectives can be built upon in the future. Professor Borrows writes that the dialectical interaction of traditional Indigenous practices and the *Charter* created a productive cultural exchange during constitutional conferences and invigorated equality movements within Indigenous communities. We agree that “[t]he process of injecting new understandings into customary ancient practices is very much in agreement with the cyclical world-view of many First Nations people and follows the culturally reproductive patterns of oral tradition” ((1994), at pp. 31-33 (footnote omitted)).

[324] The *Charter* and Indigenous peoples’ right to self-determination can peacefully co-exist (I.F., Band Members Alliance and Advocacy Association of Canada). Our understanding of constitutional rights such as equality both consists of universally applicable animating norms and is coloured by relevant context. There is no doubt that the proliferation of Indigenous rights instruments and greater activity by Indigenous courts will shape other courts’ understanding of the context in which *Charter* protections are engaged. Courts must learn from each other to give effect to individual rights, in whatever form, in their proper context.

B. *Rights Within the Scope of Section 25*

[325] Section 25 protects Aboriginal rights, treaty rights and “other rights or freedoms that pertain to the aboriginal peoples of Canada”. We agree with Kasirer and Jamal JJ. that the rights within the scope of s. 25 are not restricted to those that have “constitutional status” (para. 149). However, Kasirer and Jamal JJ. also conclude that an “other” right will fall within the ambit of s. 25 when the party seeking to rely on it establishes that the “right protects or recognizes Indigenous difference” (para. 150). In our view, this formulation is too broad, especially when considered in the context of Indigenous self-government.

[326] The scope of protection afforded by s. 25 is “bounded by [its] purposes” (*R. v. Poulin*, 2019 SCC 47, [2019] 3 S.C.R. 566, at para. 54; see also *Chagnon v. Syndicat de la fonction publique et parapublique du Québec*, 2018 SCC 39, [2018] 2 S.C.R. 687, at para. 27). This Court must be mindful not to overshoot the provision’s underlying objectives (see *9147-0732 Québec inc.*, at para. 10).

[327] While the protection of Indigenous difference is undoubtedly an objective of s. 25, as we have explained, the provision’s purpose is to protect certain collective rights that Indigenous peoples uniquely hold because they are Indigenous (see *Kapp*, at para. 103). There is a parallel in this regard with the rights recognized and affirmed by s. 35 of the *Constitution Act, 1982*; the rights within the scope of both provisions are held only by Indigenous peoples and arise from their Indigenous identity (see *Van der Peet*, at para. 19; *Newfoundland and Labrador (Attorney General) v. Uashaunnuat (Innu of Uashat and of Mani-Utenam)*, 2020 SCC 4, [2020] 1 S.C.R. 15, at para. 207,

per Brown and Rowe JJ., dissenting). These rights are intrinsically linked to the distinctive, collective, and cultural identity of an Indigenous community.

[328] It is not enough, in our view, for a right to *relate* to Indigenous peoples to bring it within the scope of s. 25 (see *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203, at para. 52, per L’Heureux-Dubé J., concurring). We similarly view it as insufficient to attract the protection of s. 25, in the context of self-government, for an Indigenous nation to possess broad rights to govern its community. Not everything that Indigenous governments do represents the exercise of a unique collective right stemming from the community’s distinctive culture. Self-governing Indigenous nations often govern in a manner no different than any other governmental entity.

[329] Accordingly, in the context of Indigenous self-government, intra-group distinctions will generally fall outside the ambit of s. 25, including laws that distinguish between members of the Indigenous community on the basis of personal grounds such as age, gender, gender identity, sexual orientation, or disability, to name a few. Professor Patrick Macklem explains that a broad interpretation of s. 25 “in the context of an internal restriction potentially sacrifices the interests of less powerful members of Aboriginal societies, in cases where the restriction may entail serious deleterious consequences to certain members and may bear only a loose relation to interests associated with indigenous difference” (*Indigenous Difference and the Constitution of Canada* (2001), at p. 226 (emphasis added); see also I.F., Congress of Aboriginal

Peoples, at para. 18). Even though an Indigenous government may seek to justify such laws on cultural grounds, they are usually not aimed at recognizing the special status of Indigenous collectives within the broader Canadian state. Therefore, Indigenous governments that enact legislation drawing internal distinctions on the basis of personal characteristics unrelated to Indigenous identity will generally “be required to satisfy the *Oakes* test to resist a challenge” when an infringement of s. 15(1) of the *Charter* has been made out (*Kapp*, at para. 99, per Bastarache J.; see also Macklem, at pp. 226-27).

[330] Conversely, s. 25 could capture “laws that distinguish between Aboriginal people and non-Aboriginal people for the purpose of protecting interests associated with indigenous difference” (Macklem, at p. 225). Such laws can empower an Indigenous community “against threats posed to its difference by the larger society in which it is located” (p. 225 (footnote omitted)). For example, *Kapp* is precisely the type of case where the implicated collective Indigenous right would fit within the purpose of s. 25. *Kapp* concerned a federal program granting a special communal fishing licence to three Indigenous bands. The licence conferred the exclusive right to fish for salmon in the mouth of the Fraser River for a 24-hour period. A group of mainly non-Indigenous commercial fishers brought a s. 15(1) claim, alleging that the licence discriminated on the basis of race. In his concurring reasons concluding that s. 25 applied, Bastarache J. recognized that the licence was a unique right possessed by the Indigenous peoples to whom it was granted. He noted the unique relationship between the fishery and the British Columbia Indigenous communities (para. 119); in other

words, the right was held by the Indigenous peoples because they were Indigenous. Therefore, in Bastarache J.'s view, s. 25 could be relied upon to resist a *Charter* claim brought by external, non-Indigenous litigants.

[331] Section 25 was not intended to create *Charter*-free zones. As Bastarache J. observed in *Kapp*, at para. 99:

There is no reason to believe that s. 25 has taken Aboriginals out of the *Charter* protection scheme. . . . It is not at all obvious in my view that it is necessary to constrain the individual rights of Aboriginals in order to recognize collective rights under s. 25

We are concerned, however, that Kasirer and Jamal JJ.'s broad interpretation of the rights within the scope of s. 25 may yield or justify this result. Members of Indigenous communities must be able to challenge the actions of their own governments.

[332] Justices Kasirer and Jamal conclude that the VGFN's enactment of the residency requirement is the exercise of a right protected by s. 25. In reaching this conclusion, they explain why they believe the residency requirement in this case is associated with Indigenous difference:

Requiring VGFN leaders to reside on settlement land helps preserve the leaders' connection to the land, which is deeply rooted in the VGFN's distinctive culture and governance practices. The residency requirement promotes the VGFN's expectation that its leaders will be able to maintain ongoing personal interactions between leaders and other community members. It also bolsters the VGFN's ability to resist the outside forces that pull citizens away from its settlement land and prevents erosion of its important connection with the land. Such interests are associated with

various aspects of Indigenous difference, including Vuntut Gwitchin cultural difference and prior sovereignty, as well as their participation in the treaty process that culminated in the enactment of the VGFN Constitution. [para. 217]

We dispute none of these observations, but suggest that such considerations are more appropriately considered as part of a s. 1 analysis, in which an Indigenous government would seek to justify a *prima facie* infringement of an individual *Charter* right on the basis of pressing collective interests, rather than as a reason why *Charter* rights do not apply at all.

[333] Further, and importantly, there is a host of reasons a self-governing Indigenous nation may proffer to justify the enactment of any particular law, and only some of them would relate to or recognize Indigenous difference. It is unremarkable that a government would legislate in a manner attuned to the unique circumstances of its constituency or seek to justify its actions based on its view of the community's history, laws, customs, and practices. However, not all members of the collective may share the government's assessment of the community's history, laws, customs, and practices. Indeed, such matters are often deeply contested and are the subject of the very type of disputes that are likely to give rise to rights-based challenges, whether under the Canadian *Charter* or the nation's own constitutional documents.

[334] In our view, the "Indigenous difference" criterion does not serve a meaningful filtering function here. The focus must be on the collective right itself and whether it is unique to an Indigenous community on the basis of Indigeneity, not the

justification for why an Indigenous nation exercised its self-government powers in a certain way. If all that is required to attract the protective effect of s. 25 is for an Indigenous nation to have broad self-government powers, and exercise those powers in a manner that is expressly linked to some aspect of Indigenous difference, the result will be broad immunity for Indigenous governments from *Charter* compliance. By definition, there will always be a link to Indigeneity when an Indigenous government acts, but that constant cannot meet the standard of an Aboriginal, treaty or other right under s. 25.

[335] We offer two hypothetical examples to make the point that not every act by an Indigenous government should merit exemption from *Charter* scrutiny under s. 25. First, assume a self-governing Indigenous nation was concerned with an unacceptable level of drug and alcohol use in the community — which it tied to the legacy of colonialism and systemic mistreatment by the Canadian state. In the collective interest, it authorized law enforcement to conduct random, warrantless searches of citizens and residences as a proactive measure to ensure the community was “dry” or that the supply of intoxicating substances was limited. Would recourse under s. 8 of the *Charter* be denied on the basis that the state action recognized Indigenous difference — or, more precisely, the unique or different position of that Indigenous community?

[336] Second, what if instead of a residency-based restriction, as in the case at bar, the court were dealing with a similar exclusionary electoral rule which barred 2SLGBTQI+ individuals or persons with disabilities from being eligible to serve on

council. Could such provisions be shielded from *Charter* scrutiny based on evidence of a community's history, laws, traditions, and practices? There is a real risk under this approach of rendering "sacrosanct" — in the sense of not being subject to a justificatory standard when a *prima facie* rights infringement occurs — "any enactment . . . no matter how odious the provision at issue may be" (*Peavine Métis Settlement v. Alberta (Minister of Aboriginal Affairs and Northern Development)*, 2009 ABCA 239, 310 D.L.R. (4th) 519, at para. 73, rev'd on other grounds 2011 SCC 37, [2011] 2 S.C.R. 670). We raise these questions to illustrate that using a broad conception of "Indigenous difference" as a filtering mechanism at the rights recognition stage could be tantamount to sanctioning *Charter*-free zones and denying Indigenous people important *Charter* protections which are intended to apply to every person.

[337] In our view, a more precise conception of the provision's purpose leads to the conclusion that rights within the scope of s. 25 are limited to those that are truly unique to Indigenous peoples because they are Indigenous. In the context of Indigenous self-government, laws creating intra-group distinctions on the basis of a personal characteristic other than Indigeneity will generally not fall within s. 25's ambit.

C. *Summary of the Operation and Scope of Section 25*

[338] When s. 25 is invoked, the court must consider several issues to decide whether it applies. First, the claimant must demonstrate a breach of a *Charter* right or freedom. Second, the party relying on s. 25 must show that the implicated collective right or freedom at stake is an Aboriginal, treaty or other right or freedom "that

pertain[s] to the aboriginal peoples of Canada”, such that it is unique to an Indigenous community on the basis of Indigeneity. Third, the court must attempt to reconcile the competing collective and individual rights where possible. In *R. v. N.S.*, 2012 SCC 72, [2012] 3 S.C.R. 726, at para. 32, the majority considered that in a case involving competing rights, courts should strive to resolve claims “in a way that will preserve both rights”. Ideally, the court would arrive at an interpretation that respects both rights and averts a conflict between them.

[339] Where there is a true conflict, s. 25 directs the court to construe the individual *Charter* right so as to not abrogate or derogate from the right protected by s. 25. In our view, it is at this point that a form of balancing must occur to reconcile the competing interests at play. Not just any incursion into the sphere covered by a s. 25 right will constitute abrogation or derogation within the meaning of the provision. We accept two limitations proposed by interveners that naturally flow from interpreting s. 25 purposively.

[340] First, s. 25 will not afford primacy to the collective Indigenous right when giving effect to an individual *Charter* right would impact the collective right in a minor or incidental way (see *I.F., A.G. Alberta*, at para. 35).

[341] Second, it is appropriate to restrict the application of s. 25 to situations where a party relying on the provision shows that the impugned exercise of the collective Indigenous right is necessary to the maintenance of the Indigenous community’s distinctive culture (see *I.F., A.G. Canada*, at paras. 48-53). This limitation

accords with the purpose of s. 25 of protecting the unique rights held by Indigenous peoples, which are intrinsically linked to their distinctive cultural and collective identities. Moreover, as the Attorney General of Canada points out, a necessity test is consistent with this Court's approach to determining the scope of other protections that can compete with individual *Charter* rights (see *Chagnon*, at paras. 27-28 (parliamentary privilege); *Canada (House of Commons) v. Vaid*, 2005 SCC 30, [2005] 1 S.C.R. 667, at para. 41 (parliamentary privilege); *Alberta (Aboriginal Affairs and Northern Development) v. Cunningham*, 2011 SCC 37, [2011] 2 S.C.R. 670, at para. 45 (ameliorative programs); *Kapp*, at para. 52 (ameliorative programs); *Adler v. Ontario*, [1996] 3 S.C.R. 609, at para. 49 (denominational schools)). It is critical that a necessity assessment be informed by Indigenous perspectives (see *Corbiere*, at paras. 54 and 67, per L'Heureux-Dubé J.). In making this assessment, it may be relevant to consider whether the *Charter* challenge is brought by a member of the Indigenous community or an external party, as this may shed light on the necessity issue.

[342] Both limitations on what constitutes an abrogation or derogation from a s. 25 right incorporate a balance between collective Indigenous rights and individual *Charter* rights. They serve to avoid situations where an insignificant incursion on a collective right within the scope of s. 25 takes primacy over a potentially significant *Charter* violation.

[343] In summary, s. 25 prescribes an interpretive exercise to resolve challenges posed by competing collective Indigenous rights and individual *Charter* rights. The

court must interpret both rights to determine whether both can be preserved. If this is not possible, the court must assess whether giving effect to an individual *Charter* right would impact the collective right in more than a minor or incidental way, and whether the impugned exercise of the collective right is necessary to the maintenance of the Indigenous community's distinctive culture. Only then could the exercise of a collective Indigenous right justify an impact on individual *Charter* rights. It is therefore inapt to characterize s. 25 as a shield that ousts any interpretive role, balancing, or reconciliation of competing interests.

IV. Application of Sections 15(1) and 25 to This Case

[344] As the VGFN relies on s. 25 in relation to the residency requirement, the first question is whether Ms. Dickson's right to equality guaranteed by s. 15(1) of the *Charter* is infringed.

A. *Is There a Section 15(1) Infringement?*

[345] Section 15(1) of the *Charter* provides that "[e]very individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability." Like other rights-conferring *Charter* provisions, it must be read broadly and purposively (*Hunter*, at pp. 155-56).

[346] This Court has consistently characterized the guarantee of equality as substantive. Substantive equality recognizes that “persistent systemic disadvantages have operated to limit the opportunities available to members of certain groups in society and seeks to prevent conduct that perpetuates those disadvantages” (*Kahkewistahaw First Nation v. Taypotat*, 2015 SCC 30, [2015] 2 S.C.R. 548, at para. 17). The current test was developed in *Quebec (Attorney General) v. Alliance du personnel professionnel et technique de la santé et des services sociaux*, 2018 SCC 17, [2018] 1 S.C.R. 464, and reaffirmed in *Fraser and Sharma*.

[347] To succeed under s. 15(1), a claimant must show that the law or state action: (1) on its face or in its impact, creates a distinction based on enumerated or analogous grounds; and (2) imposes burdens or denies a benefit in a manner that has the effect of reinforcing, perpetuating, or exacerbating disadvantage (*Fraser*, at para. 27; *Sharma*, at para. 28).

(1) Step One: Establishing a Distinction Based on a Protected Ground

[348] A law can create a distinction in two ways. When it does so directly, it is an example of direct discrimination. A challenged law can also create a distinction indirectly, in its impact. This is an example of adverse effects discrimination. Rather than creating a distinction on its face, the distinction arises by having a disproportionately adverse impact on a particular group (*Fraser*, at para. 30).

[349] The evidence required to establish a distinction varies with context (*Withler*, at para. 37). When a law creates a facial distinction, the test can be satisfied by simply reading the relevant text. In contrast, claimants in “adverse impact” cases will generally “have more work to do” (*Sharma*, at para. 189, per Karakatsanis J., dissenting, citing *Withler*, at para. 64). Regardless of context, “a court’s focus must ultimately be directed to *the test*” (*Sharma*, at para. 38 (emphasis in original)). The test makes clear that the first step only requires a distinction “based on a protected ground” (*Fraser*, at para. 50 (emphasis added)).

[350] Once the claimant establishes that the challenged law creates a distinction, on its face or in its impact, the claimant must establish that the distinction is on the basis of an enumerated or analogous ground. The *Corbiere* case remains this Court’s most comprehensive assessment of analogous grounds. *Corbiere* articulated that the common feature of the personal characteristics identified in the enumerated grounds, and thus the defining feature to be used in identifying analogous grounds, is immutability. For a personal characteristic to be immutable, and therefore recognized as an analogous ground, it must be either actually immutable or changeable only at an unacceptable cost to personal identity (para. 13). In *Corbiere*, the Court found that s. 77 of the *Indian Act*, R.S.C. 1985, c. I-5, which disqualified off-reserve members from voting in any band election, violated s. 15(1) of the *Charter*. In doing so, it affirmed that being an off-reserve band member is an analogous ground of discrimination.

[351] In *Corbiere*, McLachlin and Bastarache JJ., writing jointly for the majority, also clarified that once a personal characteristic is recognized as an analogous ground, it will serve as an analogous ground in all contexts. Protected grounds do not vary with context; they stand as “constant markers of suspect decision making or potential discrimination” and it is only “whether they amount to discrimination in the particular circumstances of the case” that varies (para. 8).

(a) *Application*

(i) The Residency Requirement Creates a Distinction

[352] The residency requirement creates a distinction directly, on its face, based on whether a VGFN citizen lives on or off the VGFN’s settlement land. The distinction is “apparent and immediate” (*Taypotat*, at para. 33; *Fraser*, at para. 61) and is conceded by the VGFN (R.F., at para. 130).

(ii) The Aboriginality-Residence Ground Applies

[353] The VGFN argues that although a distinction exists, the analogous ground of Aboriginality-residence does not apply outside of the *Indian Act* context. It submits that the residency requirement creates a distinction based on residence only, which is not a protected ground (R.F., at para. 131, referring to *R. v. Turpin*, [1989] 1 S.C.R. 1296, at p. 1333; *Corbiere*, at para. 13; *Siemens v. Manitoba (Attorney General)*, 2003 SCC 3, [2003] 1 S.C.R. 6, at paras. 47-48; *Canadian Snowbirds Association Inc. v.*

Ontario (Attorney General), 2020 ONSC 5652, 152 O.R. (3d) 738 (Div. Ct.), at para. 73). Given that other governments within Canada can impose a residency requirement for their governing bodies, there is no reason why it would be “inherently suspect” for the VGFN to do the same, “based on its own culture and tradition” (R.F., at para. 150). The VGFN is not a “band”, it has never had a reserve, and its citizens are regulated by the VGFN Constitution. The residency requirement is not imposed by the Crown, but by VGFN citizens “freely and democratically exercising their inherent right to self-government” (para. 143). To view the VGFN’s citizens as “band members”, and to treat their settlement land as a “reserve”, is to diminish the unique accomplishment of preserving and carrying out inherent self-government, outside of the “divisive and contradictory” *Indian Act* framework (para. 144).

[354] In response, Ms. Dickson argues that the VGFN’s interpretation of *Corbiere* is overly narrow (R.F. on cross-appeal, at para. 48). It is irrelevant to the Indigenous person experiencing inequality whether the discriminatory distinction at issue was made by the federal government, her provincial or territorial government, or her own Indigenous government — be it an *Indian Act* band or a self-governing nation (para. 46). The root of Aboriginality-residence is the constructively immutable characteristic of having to choose “whether to live with other members of the band to which [one] belong[s], or apart from them”, a choice that “relates to a community and land that have particular social and cultural significance to many or most band members” (para. 49, citing *Corbiere*, at para. 62, per L’Heureux-Dubé J.). To accept the VGFN’s argument that Aboriginality-residence only applies in the *Indian Act*

context would be to endorse the view that this Court intended to provide equality protection to some Indigenous individuals but not others, even though all Indigenous peoples suffer the harmful impacts of Canada's assimilation and displacement policies.

[355] As the factual circumstances in this case are meaningfully distinct from those in *Corbiere*, it is not sufficient for a court to “reflexively assume” that Aboriginality-residence — “a moniker that, on the surface, sounds fitting” — is indeed relevant here (R.F., at para. 136). This Court must seriously consider whether the same “inherently suspicious” discriminatory tendencies that accompany “Aboriginality-residence” apply in this context. The analysis at the analogous grounds stage requires consideration of whether differential treatment of those defined by that characteristic or combination of traits has the potential to violate human dignity in the sense underlying s. 15(1) (*Egan v. Canada*, [1995] 2 S.C.R. 513, at para. 171, per Cory and Iacobucci JJ., dissenting; *Corbiere*, at para. 59, per L’Heureux-Dubé J.).

[356] The reserve system was created by the *Indian Act* and its history is rooted in a particular colonial project that cannot be equated with self-governing Indigenous nations. The creation of reserves served to restrict Indigenous people to specific territories, often on “unproductive” land (see *Jack v. The Queen*, [1980] 1 S.C.R. 294). The *Indian Act* effectively dictated Indigenous identity in Canada. Without Indian status and band membership, Indigenous people were not permitted to live on the reserve land assigned to their community. In this way, the *Indian Act* splintered relations between on- and off-reserve band members and alienated Indigenous people

who could not prove patrilineal relation to members of their community (B. Lawrence, “Gender, Race, and the Regulation of Native Identity in Canada and the United States: An Overview” (2003), 18:2 *Hypatia* 3, at pp. 6 and 20).

[357] By contrast, the VGFN presently operates outside of the *Indian Act*. The VGFN participated in the 20-year negotiation process that led to the Umbrella Final Agreement, entered into in 1993. The Vuntut Gwitchin are a distinct sub-group of the Gwich’in Nation. The Vuntut Gwitchin have governed themselves as a nation since time immemorial, long before British colonization (trial reasons, at para. 11). Their traditional territory includes a large portion of Northern Yukon and archeological evidence indicates this land has been occupied for up to 40,000 years.

[358] Importantly, though the Vuntut Gwitchin way of life survived the imposition of the *Indian Act*, the Vuntut Gwitchin people were profoundly affected by colonial laws and policies, including the imposition of residential schools and resource development within Vuntut Gwitchin territory. Though the Vuntut Gwitchin were able to retain their culture and land-based way of life, “the pressures of cultural assimilation and displacement persist on the Vuntut Gwitchin as a minority group in Canada” (trial reasons, at para. 13).

[359] While this Court has never extended the Aboriginality-residence ground outside of the *Indian Act*, the Federal Court has applied Aboriginality-residence to s. 15(1) cases where councils are chosen in accordance with band customs (R.F. on cross-appeal, at para. 58; see *Cockerill v. Fort McMurray First Nation No. 468*, 2010

FC 337, 218 C.R.R. (2d) 127 (*sub nom. Woodward v. Council of the Fort McMurray*), at paras. 28-29 and 33; *Thompson v. Leq'á:mel First Nation Council*, 2007 FC 707, 284 D.L.R. (4th) 80, at paras. 8 and 13; *Clifton v. Hartley Bay Indian Band*, 2005 FC 1030, [2006] 2 F.C.R. 24, at paras. 44-45 and 50; *Cardinal v. Bigstone Cree Nation*, 2018 FC 822, [2019] 1 F.C.R. 3, at paras. 48 and 51).

[360] Aboriginality-residence is different from other forms of residence because of the unique tie between Indigenous peoples and their land base or ancestral territory. As was explained by the Royal Commission:

Cultural identity for urban Aboriginal people is also tied to a land base or ancestral territory. For many, the two concepts are inseparable. . . .

. . .

Identification with an ancestral place is important to urban people because of the associated ritual, ceremony and traditions, as well as the people who remain there, the sense of belonging, the bond to an ancestral community, and the accessibility of family, community and elders.

(*Report of the Royal Commission on Aboriginal Peoples*, vol. 4, *Perspectives and Realities*, at p. 525; see also vol. 1, ch. 6.)

[361] In *Archibald v. Canada*, [2000] 4 F.C. 479, the Federal Court of Appeal considered whether the compulsory pooling provision of the *Canadian Wheat Board Act*, R.S.C. 1985, c. C-24, which requires wheat producers living in certain areas of Canada to sell all their wheat to the Canadian Wheat Board and prohibits them from selling in another province or outside of Canada, violated the appellants' *Charter*

rights. Justice Rothstein was not persuaded that place of residence was an analogous ground. In applying *Corbiere* to the case before him, he stated, at para. 23:

Corbiere implies that residence must be linked to something else that is fundamental to one's identity, that is immutable, or is at least constructively immutable. Thus, it is insufficient for purposes of identifying an analogous ground that the location of an individual's residence and farm is within the designated area or, indeed, at any place in Canada. Something more is needed. [Emphasis added.]

[362] Unlike the circumstances of *Archibald*, the place of residence of VGFN citizens goes to the essence of their identities (*Chippewas of Nawash First Nation v. Canada (Minister of Fisheries and Oceans)*, 2002 FCA 485, [2003] 3 F.C. 233, at para. 40). The "something else" is the connection VGFN citizens have with their particular traditional territory, which militates against any group member leaving their community for an urban centre. As a result, "this characteristic is no less constructively immutable than religion or citizenship" (*Chippewas*, at para. 40).

[363] Due to the legacy of the *Indian Act*, some VGFN citizens are forced to make the challenging decision of whether to live proximate to other members of their community or jeopardize certain opportunities, including access to appropriate housing, social services, education, and employment. The "choice" to live outside their traditional territory puts them at risk of having their interests overlooked or having their views underrepresented within political spheres of power (see *Corbiere*, at para. 62, per L'Heureux-Dubé J.). While the context of off-reserve band members is not identical to that of Vuntut Gwitchin citizens living outside their traditional territory, the

legacy of colonialism through the *Indian Act* is a common thread that connects the two groups, such that the analogous ground of “Aboriginality-residence” remains applicable in the instant case. Though the VGFN is no longer subject to the *Indian Act*, the discrimination faced by Indigenous people living away from their communities as identified in *Corbiere* continues to be experienced by VGFN citizens and was not erased when the VGFN entered into a self-government agreement (para. 62). We therefore agree with Ms. Dickson that the analogous ground of “Aboriginality-residence” applies here.

(2) Step Two: Establishing Discrimination

[364] Under the second step of s. 15(1), a claimant must establish that the distinction imposes a burden or denies a benefit in a discriminatory manner.

[365] The requirement that a challenged law create a distinction that imposes a burden or denies a benefit operates to weed out s. 15(1) challenges involving distinctions that do not have a negative impact on the claimant. If the distinction created by the law has a “beneficial or benign” impact on the claimant, the s. 15(1) claim will fail (*Quebec (Attorney General) v. A*, 2013 SCC 5, [2013] 1 S.C.R. 61, at para. 151, per LeBel J., citing *Gosselin v. Quebec (Attorney General)*, 2002 SCC 84, [2002] 4 S.C.R. 429, at para. 243, per Bastarache J., dissenting; see also *Withler*, at para. 37).

[366] Further, the distinction is discriminatory only if it reinforces, perpetuates or exacerbates disadvantage. This involves a search for disadvantage that exists

independently of — and that is reinforced, perpetuated or exacerbated by — the impugned distinction. It requires an examination of the historical or systemic disadvantage of the claimant group (*Sharma*, at para. 52; *Fraser*, at para. 76). Disadvantage is not restricted to economic disadvantage, but includes other forms of disadvantage, like social exclusion, physical and psychological harm, and political exclusion (*Sharma*, at para. 52; *Fraser*, at para. 76, citing C. Sheppard, *Inclusive Equality: The Relational Dimensions of Systemic Discrimination in Canada* (2010), at pp. 62-63). While disadvantage is the focus of the discrimination requirement, prejudice and stereotyping can satisfy the disadvantage requirement (*Sharma*, at para. 53; *Fraser*, at para. 78).

(a) *Role of Legislative Context*

[367] *Charter* claims must be examined contextually. However, only context that is relevant and necessary for the s. 15(1) analysis, where the burden of proof falls on the claimant, should be considered at this stage: “The fault line of the division between s. 15(1) and s. 1 is justification, which falls to the state” (*Sharma*, at para. 202, per Karakatsanis J., dissenting). The s. 15(1) test only requires claimants to show that the impugned law or state action has a discriminatory impact on them (*Miron v. Trudel*, [1995] 2 S.C.R. 418, at para. 139; *Fraser*, at para. 79).

[368] Legislative context will sometimes be relevant and necessary to the claimant meeting their burden. “[T]he full context of the claimant group’s situation and the actual impact of the law on that situation” must be considered under s. 15(1)

(*Sharma*, at para. 57, citing *Withler*, at para. 43; see also *Withler*, at para. 40; *Turpin*, at p. 1334; *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497, at para. 30; *Quebec v. A*, at para. 51; *Taypotat*, at para. 18; *Ontario (Attorney General) v. G*, 2020 SCC 38, [2020] 3 S.C.R. 629, at para. 43). In *Corbiere*, the claimant had the burden to establish that “the powers of electors or the chief and council they vote for” affected more than “purely local” issues (para. 74, per L’Heureux-Dubé J.). The Court found that although some of the matters dealt with by the band council, such as law enforcement and traffic control, affected only the residents of the reserve, many other matters affected all band members. Policies and spending on “education, creation of new housing, creation of facilities on reserves, and other matters that may affect off-reserve band members’ economic interest” concerned band members wherever they lived (para. 77). The voting restrictions affected interests unrelated to residence, and thus were ultimately found to be discriminatory (paras. 73-78 and 92). It appropriately fell to the claimants to demonstrate how the band’s policies affected them in a discriminatory manner.

[369] In *Sharma*, a majority of the Court detailed relevant considerations in assessing the legislative context: “. . . the objects of the scheme, whether a policy is designed to benefit a number of different groups, the allocation of resources, particular policy goals sought to be achieved, and whether the lines are drawn mindful as to those factors . . .” (para. 59, referring to *Withler*, at para. 67). However, “context must not be confused with [the] justification” required under s. 1 (*R. v. C.P.*, 2021 SCC 19, [2021] 1 S.C.R. 679, at para. 57, per Abella J.). While some or all of these considerations may

be relevant under s. 15(1), “a court’s focus must ultimately be directed to *the test*” (*Sharma*, at para. 38 (emphasis in original)). A claimant’s burden is to show that “the impugned law or state action has a discriminatory impact on the disadvantaged group” (para. 202, per Karakatsanis J., dissenting, citing *Miron*, at para. 139; see also *Fraser*, at para. 79). Unless these considerations go to “the full context of the claimant group’s situation” or to “the actual impact of the law on that situation” (*Withler*, at para. 43), legislative context is best left to the justification stage. Only the governing body has a deep understanding of its policy choices and legislative goals, and the burden should appropriately fall on it to explain this under s. 1. Keeping rights distinct from their limitations promotes clarity and purposive *Charter* protection.

(b) *Application*

(i) The Distinction Denies a Benefit

[370] First, the claimant must establish that the distinction denies a benefit or imposes a burden. The residency requirement denies Ms. Dickson the benefit of serving in government. This is a form of political exclusion (*Sharma*, at para. 52; *Fraser*, at para. 76, citing Sheppard, at pp. 62-63) that bars Ms. Dickson from a core aspect of democratic participation and the opportunity to affect decision-making processes that impact her.

[371] We agree with Ms. Dickson that “[t]he right to run for, and serve, in office is a defining feature of democracy” and “a pillar of democratic governments, protected

in both s. 3 of the *Charter* and Article 25 of the *International Covenant on Civil and Political Rights*. It is not a ‘narrow’ right but a fundamental political right, and its denial is severe” (R.F. on cross-appeal, at para. 68, citing *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, at para. 65; *Frank v. Canada (Attorney General)*, 2019 SCC 1, [2019] 1 S.C.R. 3, at para. 82; *Sauvé v. Canada (Chief Electoral Officer)*, 2002 SCC 68, [2002] 3 S.C.R. 519, at para. 59; *Harvey v. New Brunswick (Attorney General)*, [1996] 2 S.C.R. 876, at paras. 23-30). The residency requirement satisfies the requirement that the distinction deny a benefit.

(ii) The Benefit Is Denied in a Discriminatory Manner

[372] Second, the claimant must establish that the distinction that imposes the burden or denies the benefit is discriminatory. A benefit is discriminatory if it reinforces, perpetuates or exacerbates the disadvantage. This step involves examining the historical or systemic disadvantage of the claimant group. Evidence of the “situation of the claimant group” and the “physical, social, cultural or other barriers” its members face, and evidence “about the outcomes that the impugned law or policy . . . has produced in practice” is particularly helpful (*Fraser*, at paras. 55-59; *Sharma*, at para. 192, per Karakatsanis J., dissenting).

[373] While a challenged law may satisfy this step by widening a group’s relative disadvantage, the term “perpetuate” indicates that a law may discriminate even if it does not aggravate the disadvantage. “Care must be taken not to disregard how discrimination can result from ‘continuing to do things « the way they have always

been done »” (*Sharma*, at para. 193, per Karakatsanis J., dissenting, citing F. Faraday, “One Step Forward, Two Steps Back? Substantive Equality, Systemic Discrimination and Pay Equity at the Supreme Court of Canada” (2020), 94 *S.C.L.R.* (2d) 301, at p. 310; see also J. Koshan, “Intersections and Roads Untravelled: Sex and Family Status in *Fraser v Canada*” (2021), 30:2 *Const. Forum* 29, at pp. 31-32).

[374] Ms. Dickson argues that the distinction created by the residency requirement “perpetuates and reinforces the stereotype, observed in *Corbiere* and the cases that followed, that Indigenous citizens living outside their community are not interested in maintaining a meaningful connection with their nation and are less interested in the preservation of their land, sending the message they are less deserving members of the nation” (R.F. on cross-appeal, at para. 65). Further, she submits that the residency requirement exacerbates her inability to maintain a connection to her community and to preserve her identity as a citizen of the VGFN.

[375] We agree. For over a century, governments sought to encourage “enfranchisement”, or assimilation of Indigenous people into mainstream Canadian society. The increase in Indigenous people living away from their home territories is intricately tied to a legacy of discrimination. Indigenous people were encouraged to renounce their identity, and it is “[a]s a result of this history [that] a large number of off-reserve status Indians who are nominally members of First Nations have little or no connection to the reserves or to ‘home’ communities” (I.F., Congress of Aboriginal Peoples, at para. 12). The unequal rights afforded to those living on- and off-reserve

under the *Indian Act*, such as the exclusion of off-reserve band members from voting on band governance, splintered relations between those groups and in many cases permanently alienated off-reserve members from their communities. Historically, Canada has also enacted laws that deprived women of Indian status if they married non-status men. In 1985, Bill C-31, which became an *Act to amend the Indian Act*, S.C. 1985, c. 27, reversed this discriminatory policy and restored Indian status to many women and to some of their descendants. However, this led to an abrupt increase in the number of status Indian women living off-reserve (*Corbiere*, at paras. 30 and 85-86, per L’Heureux-Dubé J.).

[376] Indigenous people in urban centres “have experienced racism, culture shock, and difficulty maintaining their identity in particular and serious ways” (R.F. on cross-appeal, at para. 57, citing *Corbiere*, at para. 72, per L’Heureux-Dubé J.; see also Royal Commission, vol. 4, at pp. 519-26). In 2019, the report issued by the National Inquiry into Missing and Murdered Indigenous Women and Girls found that, as a result of past government conduct, Indigenous women in urban areas are “alienated from their home communities, sometimes as single parents and sole providers for their children” and are “often hundreds of kilometres from their homes and social support systems, navigating racist barriers deeply embedded in urban services and experiences” (*Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls*, vol. 1a (2019), at p. 273; see also R.F. on cross-appeal, at para. 61).

[377] Band members living off-reserve are a “discrete and insular minority” (*Corbiere*, at para. 71, per L’Heureux-Dubé J.). The repercussions of colonial and assimilationist policies persist. Just like off-reserve band members, other Indigenous people who live outside of their home community are vulnerable to being viewed as “less aboriginal” than their counterparts living on traditional territories (I.F., Congress of Aboriginal Peoples, at para. 9, citing *Lovelace v. Ontario*, 2000 SCC 37, [2000] 1 S.C.R. 950, at paras. 71-72; *Corbiere*, at para. 18, per McLachlin and Bastarache JJ., and at paras. 71 and 92, per L’Heureux-Dubé J.).

[378] The residency requirement reinforces the stereotype that non-resident VGFN citizens are less worthy and entitled because they live off their traditional territory. The “powers of the band council . . . affect the interests and needs of both [on- and off-settlement land citizens]” (*Corbiere*, at para. 74, per L’Heureux-Dubé J.). By preventing Ms. Dickson and other VGFN citizens that live away from the settlement land from participating in government decision-making, the residency requirement at the very least perpetuates disadvantage. Direct evidence of this can be found in the record. VGFN citizens living outside of Old Crow, the only village on the settlement land, stated feeling as though they were not valued members of their community because of where they lived (A.R., vol. II, at pp. 22, 38 and 42). One citizen mentioned having inadequate access to information or decision-making, rendering it difficult for non-residents to stay connected to the community (p. 22). Another citizen stated feeling “disconnected and forgotten” because of where she lived, and that her views were not represented on council (p. 38). A third citizen stated that she feels it is more difficult

for VGFN citizens who live outside of Old Crow to “participate in the governance of our nation and maintain a connection to the nation” (p. 42). By excluding non-resident citizens from meaningful democratic participation, the residency requirement reinforces the stereotype that to be “truly Aboriginal”, one has to live on the reserve or the settlement land (*Corbiere*, at para. 71, per L’Heureux-Dubé J.; *Cardinal*, at para. 54).

[379] As observed in *Corbiere* (at para. 71 (emphasis added)), the Royal Commission noted that “[d]ecision makers have not always considered the perspectives and needs of Aboriginal people living off reserves, particularly their Aboriginal identity and their desire for connection to their heritage and cultural roots” (vol. 4, at p. 519). The right to vote, without ever being able to vote for someone who represents or understands the perspective of those who live away from the settlement land, is inadequate. Several cases from the Federal Court have similarly concluded that being able to vote is not a replacement for holding office as a council member. In *Esquega v. Canada (Attorney General)*, 2007 FC 878, [2008] 1 F.C.R. 795, rev’d on other grounds by 2008 FCA 182, [2009] 1 F.C.R. 448, the Federal Court found that the residency requirement in s. 75(1) of the *Indian Act* violated s. 15(1) of the *Charter*. Under the terms of this provision, “[n]o person other than an elector who resides in an electoral section may be nominated for the office of councillor to represent that section on the council of the band.” Relying on *Corbiere*, the Federal Court found that “band members who live off-reserve have historically faced disadvantage as a result of legislation and policies designed to deny them the right to participate in band governance” and that

“[s]uch legislation perpetuates the wrongful notion that band members who live off-reserve have no interest in participating in band governance and are therefore less worthy of doing so” (para. 88). The court also found that off-reserve members “hold a fundamental interest in participating in band council and making decisions on behalf of their band” (para. 91). The court concluded that s. 75(1) of the *Indian Act* discriminated “against off-reserve members by prohibiting them from participating in the representative governance of their band through band council on the basis of their ‘Aboriginality-residence’ status” (para. 92).

[380] Similarly, in *Joseph v. Dzawada’enuxw (Tsawataineuk) First Nation Band Council*, 2013 FC 974, [2014] 1 C.N.L.R. 149, the Dzawada’enuxw (Tsawataineuk) First Nation’s 2011 election code provided governing positions for both resident and non-resident band members. However, while three quarters of the band members were non-resident, three out of the four positions on council were not available to them, including the position of the Chair. The court noted that even if the non-resident members were represented in council deliberations by the non-resident councillor, “when push comes to shove, that Councillor can be easily outvoted by the resident Councillors” (para. 57). The court found that the distinction in the code created “a disadvantage by perpetuating the stereotype that non-resident Band members have reduced ability or interest in contributing to Band governance” and concluded that the restriction therefore violated s. 15(1) of the *Charter* (para. 58).

[381] In this case, the residency requirement is not absolute. Non-residents can run for office, so long as they “relocate to Settlement Land within 14 days after election day” (VGFN Constitution, Article XI(2)). Any burden of relocating is mitigated by a four-year paid salary and Vuntut Gwitchin staff housing (R.F., at para. 157, citing trial reasons, at para. 156). The VGFN argues this relocation requirement means that “there is no exclusion from participation generally and there is not a ‘total’ exclusion from candidacy, but instead a limited effect only on those who are ultimately elected” (R.F., at para. 157 (emphasis deleted)).

[382] We agree with Ms. Dickson that requiring a non-resident citizen to relocate to the settlement land to participate in community governance means requiring a person to change a constructively immutable characteristic (R.F. on cross-appeal, at paras. 70-71). “This Court has consistently held that differential treatment can be discriminatory even if it is based on choices made by the affected individual or group” (*Fraser*, at para. 86). Once it is accepted, as we have, that Aboriginality-residence is an analogous ground outside the reserve context, choice is no longer relevant as a matter of law (*Fraser*, at para. 91, citing *Miron*, at para. 153; see also J. Koshan and J. Watson Hamilton, *Tugging at the Strands: Adverse Effects Discrimination and the Supreme Court Decision in Fraser*, November 9, 2020 (online)). In *Cardinal*, the Federal Court struck down a requirement that elected councillors must relocate to the reserve within three months of being elected, finding that it perpetuates “the pre-existing disadvantage of the group it was intended to benefit” and “the stereotype that only members on the reserve are able to decide the affairs of the band” (paras. 58 and 65). Similarly, in the

instant case, having found that there is a discriminatory distinction based on the analogous ground of Aboriginality-residence, Ms. Dickson's illusory choice to move back to the settlement land is no longer relevant under the s. 15(1) analysis. Asking Ms. Dickson to relocate once elected is to ask her to change a constructively immutable characteristic — akin to changing religion or citizenship. Relocating to Old Crow is not simply a matter of cost, and it is not sufficiently mitigated by the fact that VGFN councillors earn a salary or that housing will be arranged. As was recognized in *Corbiere*, claimants live apart from their home communities due to factors that are beyond their control such as “[l]ack of land, what are often scarce job opportunities on reserves, and the need to go far from the community for schooling” (para. 84, per L’Heureux-Dubé J.). In Ms. Dickson’s case, she cannot move primarily due to her son’s medical condition (A.R., vol. II, at p. 63).

[383] The distinction created by the residency requirement imposes a burden and denies a benefit to non-resident citizens like Ms. Dickson in a manner that has the effect of perpetuating the erroneous notion that citizens who do not live on the settlement land have no interest in and a reduced ability to participate in community governance. The distinction also reinforces the stereotype that non-resident citizens are less worthy to serve on the basis of where they live (*Cardinal*, at para. 52).

[384] We therefore conclude that Ms. Dickson’s right to equality guaranteed by s. 15(1) of the *Charter* is infringed by the VGFN’s enactment of the residency requirement.

B. *Does the Residency Requirement Fall Within the Scope of Section 25?*

[385] The second question is whether s. 25 is engaged. Does this case implicate a collective Indigenous right within the scope of s. 25?

[386] As we have explained, the rights within the scope of s. 25 are those that are unique to Indigenous peoples because they are Indigenous. Moreover, as s. 25 was not intended to create *Charter*-free zones, we agree with the Attorney General of Alberta's submission that a s. 25 right relating to self-government must be cast in terms of a "right to impose a specific rule [or] law" rather than a right to govern or regulate in general (I.F., at para. 73 (emphasis in original)). Otherwise, *Charter* protections could be minimized in relation to a broad range of inherently governmental action. Section 25 is narrower than that.

[387] The VGFN has the right to regulate the composition of its governing bodies. Its ability to do so stems from a number of sources, including s. 8(1)(b) of the *Yukon First Nations Self-Government Act* (the constitution shall provide for the "composition" and "membership" of the first nation's governing bodies), s. 24.5.1 of the VGFN Final Agreement (negotiations regarding the constitution may include the composition and structure of government institutions), and s. 10.1.2 of the VGFN Self-Government Agreement (the constitution shall establish governing bodies and provide for their "powers, duties, composition, membership and procedures").

[388] But is a self-governing Indigenous nation's right to regulate the composition of its governing bodies a unique collective right, belonging to Indigenous peoples because they are Indigenous? We cannot say that it is.

[389] There is growing recognition that Indigenous communities are law-makers, in addition to being rights-bearers. Self-government agreements, such as the Umbrella Final Agreement with Yukon First Nations and the VGFN Self-Government Agreement, are examples of this recognition. There is no doubt that Indigenous self-government, which for the VGFN has been a reality since time immemorial, is a means of recognizing and protecting Indigenous difference.

[390] However, not everything that an Indigenous government does can be fairly said to be the exercise of a unique right tied to the community's collective identity. Many laws and actions of a self-governing Indigenous nation will be best characterized as simply governmental. There is nothing unique about governments — whether federal, provincial, territorial, municipal, or Indigenous — enacting laws concerning the composition of their governing bodies. All governments do so. Governments across Canada also impose residency requirements for service in legislatures and other governing bodies (see, e.g., *Legislative Assembly Act*, R.S.Y. 2002, c. 136, ss. 4 and 8, referentially incorporating the *Elections Act*, R.S.Y. 2002, c. 63, ss. 3(c) and 6; *Legislative Assembly Act*, R.S.O. 1990, c. L.10, s. 6; *Local Authorities Election Act*, R.S.A. 2000, c. L-21, s. 21). The VGFN is not unique in this regard. As Ms. Dickson

notes, the residency requirement reflects the VGFN’s “adoption of a democratic system of governance” (A.F., at para. 84).

[391] The residency requirement draws an intra-group distinction on the basis of residency; it has the effect of excluding non-resident VGFN citizens like Ms. Dickson from a core aspect of democratic participation in their community. It is directed at the internal regulation of the VGFN and is not aimed at recognizing the special status of Indigenous collectives within the broader Canadian state. We are therefore not satisfied that the residency requirement constitutes the exercise of a right falling within the ambit of s. 25. As it infringes s. 15(1) of the *Charter*, it should be subject to a justification analysis under s. 1.

C. *In the Alternative, Does Section 25 Operate to Protect the Residency Requirement?*

[392] Alternatively, even if we were to share Kasirer and Jamal JJ.’s view that the residency requirement constitutes the exercise of a right within the scope of s. 25, we would nevertheless conclude that s. 25 would not give primacy to the collective right in this case. Given this conclusion, the VGFN should bear the burden of justifying the residency requirement, which infringes s. 15(1) of the *Charter*, under s. 1.

[393] We are not persuaded that the residency requirement — the impugned exercise of the collective Indigenous right — is necessary to the maintenance of the VGFN’s distinctive culture. Ms. Dickson is an internal claimant seeking vindication of

her individual *Charter* right in an attempt to participate in the collective governance of her community. This is not a case involving external forces seeking to undermine the VGFN's self-government rights broadly or, more specifically, its right to regulate the composition of its governing bodies.

[394] Similarly, any impact on the VGFN's right to regulate the composition of its governing bodies that results from giving effect to Ms. Dickson's equality rights under the *Charter* would be minor. We agree with Ms. Dickson that the VGFN would be well positioned to enact a residency requirement that reflects the community's unique circumstances but does not fully bar the hundreds of citizens that live away from the settlement land from a core aspect of democratic participation. Respect for equality rights can co-exist with robust Indigenous self-government.

[395] Accordingly, interpreting the competing rights in a manner that is respectful of the purpose of s. 25 reveals that giving effect to Ms. Dickson's *Charter* rights would not "abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada". Section 25 does not operate to give primacy to the residency requirement over individual *Charter* rights in this case.

V. Section 1 of the *Charter*

[396] Our conclusion that s. 25 does not apply in this case does not mean that Indigenous difference is an irrelevant consideration in assessing the *Charter* claim. On the contrary — it has a significant role to play in the s. 1 justification analysis. Courts

must respectfully take into account the perspective of the Indigenous community at all analytical stages. Like all s. 1 analyses, the assessment is contextual. As Professor Macklem explains:

Because of the constitutional significance of indigenous difference, the judiciary ought to extend a wide margin of appreciation to Aboriginal forms of social and political organization when assessing the constitutionality of an internal restriction. Most Aboriginal nations in Canada, for example, place great emphasis on the interconnectedness of family and clan. Densely textured forms of social and political organization that reflect . . . the unique identity of an Aboriginal nation should not be dismantled through Charter litigation because they might appear to be foreign to Western norms of individualism. In the event of an infringement, an Aboriginal community should be required to justify the restriction in the name of indigenous difference by demonstrating its relevance to the community's past and future. [Emphasis added; footnote omitted; p. 226.]

[397] Section 1 of the *Charter* permits a government entity to justify an infringement of an individual's *Charter* rights. To establish that the s. 15(1) infringement is justified in this case, the VGFN has the onus of demonstrating that the residency requirement furthers a pressing and substantial objective and that the means chosen to achieve it are proportionate to it (*R. v. Oakes*, [1986] 1 S.C.R. 103, at pp. 138-39).

A. *Pressing and Substantial Objective*

[398] The residency requirement serves to advance the pressing and substantial objective of "the promotion and maintenance of self-governance and connection to the homelands" (R.F., at para. 162). Requiring members of the governing body to reside

on the settlement land fosters a real, substantial and present connection to the community. This facilitates the pursuit of meaningful and effective self-government by and for VGFN citizens, in the context of the cultural erosion that has occurred as a result of Crown policy (see R.F., at para. 169). We accept that the residency requirement was enacted for a pressing and substantial objective.

B. *Proportionality*

(1) Rational Connection

[399] The question at the first step of the proportionality inquiry is whether the measure that has been adopted is rationally connected to the objective it was designed to achieve. Ms. Dickson argues that VGFN culture is enhanced by broad participation of citizens who are knowledgeable about VGFN land and traditions and possess leadership skills, regardless of where they live. As many VGFN citizens do not live on the settlement land, mandating a non-resident councillor would better represent the “needs and issues” of the non-resident community (A.F., at para. 117, citing A.R., vol. VI, at p. 140). As such, the residency requirement is not rationally connected to its objectives.

[400] The VGFN submits that as a self-governing Indigenous community with a legal order rooted in its traditional territory, it is critical and logical that elected leaders be connected to the territory by being physically present on those lands. Currently, non-resident citizens can participate in and influence band governance by voting, but

governance positions are limited to local citizens. This limitation is necessary to maintain traditional place-based decision-making structures, including the VGFN's practice of deliberative assembly (R.F., at para. 170, citing A.R., vol. VI, at pp. 139-40; trial reasons, at para. 12). The Gwitchin traditions encapsulate particular attributes of leadership, including the ability to maintain enduring relationships with their people and with the land (C.A. reasons, at para. 115, citing S. M. Beairsto, *Dinjii Kat Chih Ahaa: Gwich'in Notions of Leadership* (1999)).

[401] We accept the VGFN's statement on the rationale of the residency requirement. Moreover, the requirement for residential connection of an elected representative to the relevant jurisdiction is consistently expressed in non-Indigenous electoral rules (*Legislative Assembly Act* (Yukon), ss. 4 and 8, referentially incorporating the *Elections Act*, ss. 3(c) and 6; *Municipal Act*, R.S.Y. 2002, c. 154, ss. 48(1)(c), 50(1) and 193.04(1)(a)(iii); trial reasons, at para. 209). Such a requirement is no less relevant in the context of Indigenous self-government. We therefore conclude that the residency requirement is rationally connected to its purposes.

(2) Minimal Impairment

[402] At the minimal impairment stage, the VGFN must show that the measure at issue impairs the *Charter* right as little as reasonably possible in furthering the legislative objective (*RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, at para. 160, per McLachlin J.; *Oakes*, at p. 139). To be minimally impairing, a measure must therefore be "carefully tailored" (*RJR-MacDonald*, at

para. 160; *Mounted Police Association of Ontario v. Canada (Attorney General)*, 2015 SCC 1, [2015] 1 S.C.R. 3, at para. 149).

[403] Under s. 1, the means chosen by governments to achieve an objective are accorded a degree of deference (*C.P.*, at para. 179, per Kasirer J., concurring; *Quebec v. A*, at para. 439; *RJR-MacDonald*, at para. 160; *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 S.C.R. 567, at paras. 37 and 53). The need for courts to defer to governmental decision-making is even more acute in the context of a self-governing Indigenous nation such as the VGFN. Indigenous peoples must be given latitude “to develop their cultures and societies in the way they see fit” (see I.F., *Band Members Alliance and Advocacy Association of Canada*, at para. 23).

[404] The residency requirement seeks to balance the legitimate competing social values of preserving the VGFN’s collective identity and maximizing opportunities for VGFN citizens to participate in self-governance (R.F., at para. 172). While we accept that some distinction may be justified in order to protect the collective interests of citizens living on the settlement land, a minimally impairing measure must make at least some accommodation of the right to participate in community governance for non-resident citizens (see *Corbiere*, at para. 21; *Esquega (FC)*, at para. 96; *Clifton*, at para. 17). As the majority noted in *Hutterian Brethren*, at para. 55 (emphasis deleted), at the minimal impairment stage, “the court need not be satisfied that the alternative would satisfy the [pressing and substantial] objective to exactly the same extent or degree as the impugned measure”. The availability of alternative measures that would

“give sufficient protection, in all the circumstances, to the government’s goal” should be considered (para. 55).

[405] A majority of the Court in *Corbiere* found the restriction on voting, while rationally connected to the aim of the legislation, was not minimally impairing (para. 21). The Court could not accept that a complete denial of voting rights of band members living off-reserve was necessary to achieve the objective. A similar conclusion was reached in *Esquega* ((FC), at para. 96). Without any efforts to seek alternatives to an outright ban, the Federal Court found that preventing off-reserve band members from participating in a governing role does not minimally impair their equality rights (para. 95). While the VGFN’s residency requirement is not a form of total political exclusion, as citizens living off-settlement retain their voting rights, it does exclude non-resident citizens from serving on council and therefore precludes them from a core aspect of democratic participation.

[406] We are sensitive to the VGFN’s argument that colonialism and decades of assimilationist policies have eroded the VGFN’s land and culture to the point where the residency requirement is one of the few mechanisms available to preserve what remains. However, it is these same policies that have forced individuals like Ms. Dickson to live away from the settlement land. The residency requirement wholly bars non-resident citizens from serving on the VGFN’s council despite this reality.

[407] We also take account of the fact that successful candidates for a VGFN council position are able to access staff housing in Old Crow (trial reasons, at para. 44).

Moreover, councillors receive a full-time salary during their term of office (paras. 44 and 156). We agree with the VGFN that these factors mitigate to some degree the burden associated with a non-resident having to move to the settlement land if elected (see R.F., at para. 172).

[408] However, while affording a margin of appreciation to the VGFN is important, there is no evidence that the VGFN has sought any meaningful alternatives to the residency requirement itself. As we have explained above, obliging Ms. Dickson to change a constructively immutable characteristic in order to assume a council position is simply too invasive. As a result, we conclude that the residency requirement is not minimally impairing.

[409] In the past, Ms. Dickson has asserted at a VGFN General Assembly gathering that a minimally restrictive rule would reserve one council seat for non-resident citizens (see A.F., at para. 119). While we would defer to the VGFN to modify its residency requirement in a manner it sees fit, some adjustment must be made to ensure that non-resident citizens' rights are impaired no more than is reasonably necessary.

(3) Salutary and Deleterious Effects

[410] Our conclusion that the residency requirement is not minimally impairing of Ms. Dickson's s. 15(1) *Charter* right is sufficient to conclude that it is not justified

under s. 1. However, for the sake of completeness, we turn to the final step of the *Oakes* analysis.

[411] At this stage, the court considers whether there is proportionality between the overall effects of the *Charter*-infringing measure and the legislative objective (*Oakes*, at p. 139; *Hutterian Brethren*, at paras. 72-73). As we note above, we accept the VGFN's position that the residency requirement furthers self-government by maintaining the connection of the VGFN's elected leaders to traditional territory. The rule ameliorates the effects of colonial dislocation of the Vuntut Gwitchin peoples from control over that territory (R.F., at para. 173).

[412] However, the residency requirement mandates the political exclusion of non-resident citizens by denying them the ability to serve as an elected member of government. The ability to move back to the settlement land if elected is not a meaningful option for individuals like Ms. Dickson, who are displaced through no real choice of their own, and thus cannot be a mitigating consideration in these circumstances. As in *Frank*, this type of justification "is based on a misinterpretation of the nature of the choice available to non-resident citizens and also, more fundamentally, distorts the proper approach to the justification of a *Charter* infringement" (para. 81). The infringement of Ms. Dickson's *Charter* rights would not end if she resumed residence in Old Crow after becoming elected, and would not "detract from the harm done by an absolute prohibition" on her ability as a non-resident to hold a position on council if elected (para. 81). While the residency requirement is

not a complete bar to democratic participation given that non-residents retain the right to vote, it nonetheless represents a significant incursion (para. 81).

[413] In our view, the VGFN has not shown that the benefits of the residency requirement outweigh the negative effects of the s. 15(1) breach at issue.

VI. Conclusion

[414] We would allow the appeal and dismiss the cross-appeal. The VGFN is a government by its very nature, and therefore its enactment of the residency requirement attracts *Charter* scrutiny pursuant to s. 32(1). Having undertaken that exercise, we conclude that the residency requirement infringes Ms. Dickson's right to equality guaranteed by s. 15(1) of the *Charter*.

[415] Section 25 does not operate to give primacy to the collective Indigenous right in this case. The residency requirement is not aimed at recognizing the special status of Indigenous collectives within the broader Canadian state and therefore falls outside the ambit of s. 25 protection. Moreover, in any event, giving effect to Ms. Dickson's *Charter* rights would not abrogate or derogate from the VGFN's right to regulate the composition of its governing bodies in the sense contemplated by s. 25.

[416] The residency requirement is not demonstrably justified in a free and democratic society pursuant to s. 1. It represents a total exclusion for VGFN citizens residing away from the settlement land from a core aspect of participation in the

community's self-governance. It is neither minimally impairing of Ms. Dickson's s. 15(1) *Charter* right nor representative of an appropriate balance between its salutary and deleterious effects. We would therefore declare it to be of no force or effect.

The following are the reasons delivered by

ROWE J. —

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I. Overview

[417] Central to these reasons is the foundational premise that it is for Indigenous peoples to “define themselves and to choose by what means to make their decisions, according to their own laws, customs and practices” (*R. v. Desautel*, 2021 SCC 17, [2021] 1 S.C.R. 533, at para. 86).

[418] This case concerns whether the *Canadian Charter of Rights and Freedoms* applies to the internal governance choices of the Vuntut Gwitchin First Nation (“VGFN”), including on matters as fundamental as the residence of their elected leaders. The VGFN is a First Nation in northern Yukon that governs the affairs of the Vuntut Gwitchin pursuant to its own Constitution, which was enacted after agreements were reached with Canada and the Yukon in 1993 concerning Vuntut Gwitchin land claims and self-government. This Constitution sets out the governing bodies for VGFN citizens, including an elected Council. Pursuant to Article XI(2) of the VGFN Constitution, any candidate who is elected to the VGFN Council and does not reside on the VGFN’s “Settlement Land” must relocate there within 14 days after election day (“residency requirement”). Cindy Dickson is a VGFN citizen who resides in

Whitehorse and wishes to run for a position on the VGFN Council but is unable to relocate to the Settlement Land due to caretaking commitments. She challenges the residency requirement on the basis that it violates her equality rights under s. 15(1) of the *Charter*.

[419] In my view, the VGFN's enactment of the residency requirement in its Constitution is not subject to the *Charter*. In light of this conclusion, it is not necessary to address arguments concerning ss. 15(1) or 25 of the *Charter*. My reasons address and reject several arguments relating to the *Charter*'s application.

[420] First, the applicability of the *Charter* is determined under s. 32(1) of the *Charter*. Arguments made before this Court that seek to circumvent s. 32(1) by relying on other bases for *Charter* applicability are inconsistent with this Court's jurisprudence.

[421] Second, arguments that seek to bring the VGFN or its activities within s. 32(1) on the basis that the VGFN is a government are contrary to the text of s. 32(1), its history and place within the structure of the *Constitution Act, 1982*, and this Court's jurisprudence on the provision's purpose and scope. This jurisprudence confirms that the *Charter* applies to the federal and provincial governments. The meaning of "government" under s. 32(1) has been interpreted purposively so as to encompass the numerous manifestations of the federal and provincial governments, but other entities or their activities must exhibit a significant connection to one of those governments to fall within s. 32(1). Importantly, the rights of Indigenous peoples, including those

relating to Indigenous governance, were dealt with separately in the *Constitution Act, 1982*, and their internal governance does not fall within the scope of the *Charter* unless there exists a significant connection to either the federal or a provincial government. While this connection may be present with band council structures imposed by the *Indian Act*, R.S.C. 1985, c. I-5, the same cannot be said for governance structures chosen by the Vuntut Gwitchin themselves, absent particular arrangements with the federal government or a provincial/territorial government.

[422] Third, the various arrangements between the VGFN and the federal and/or Yukon governments do not satisfy the significant connection necessary to bring the VGFN or its enactment of the residency requirement within the scope of s. 32(1). The VGFN's governance structures and internal decisions are rooted in the Vuntut Gwitchin's own legal traditions and choices and do not attract *Charter* scrutiny under s. 32(1).

[423] Fourth, imposing the *Charter* on the VGFN is not consistent with the objective of reconciliation and with the need to respect the ability and the right of the Vuntut Gwitchin to make decisions pursuant to their own laws, customs, and practices. This includes decisions about the adoption and amendment of protections for the rights and freedoms of VGFN citizens.

[424] Finally, contrary to Ms. Dickson's submissions, the VGFN never agreed to adopt the protections set out in the *Charter*. Rather, the VGFN has enacted its own protections for the rights of its citizens, many of which mirror the *Charter* but are

adjusted to its people's own laws, customs, and practices. The protections in the VGFN Constitution include protections for equality rights. Ms. Dickson's challenge to a provision of the VGFN Constitution must be addressed pursuant to the VGFN's own internal structures and processes.

[425] Ultimately, this case is about whether, in crafting their own Constitution, the Vuntut Gwitchin can make their own choices about their affairs — including as to how they wish to protect fundamental rights and freedoms — or whether their choices are subject to judicial scrutiny under the *Charter*. I conclude that the choice is theirs. I would therefore dismiss Ms. Dickson's appeal and allow the VGFN's cross-appeal, on the basis that the *Charter* does not apply to the VGFN's enactment of the residency requirement.

II. The Applicability of the *Charter* Is Determined Under Section 32(1)

[426] The “scope of the *Charter*'s application is delineated by s. 32(1) of the *Charter*” (*Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 S.C.R. 307, at para. 32; see also *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573, at pp. 598-99). Section 32(1) governs “who is subject to the *burden* of Charter rights, or, in other words, who is bound by the Charter” (P. W. Hogg and W. K. Wright, *Constitutional Law of Canada* (5th ed. Supp.), at § 37:6 (emphasis in original)).

[427] Ms. Dickson, the Attorney General of Alberta, and the Government of Yukon submit that, separate from s. 32(1), the *Charter* applies because the residency requirement in the VGFN Constitution is a “law” under s. 52(1) of the *Constitution Act, 1982*, which states that “any law that is inconsistent with the provisions of the Constitution is . . . of no force or effect”. Implicit in their position is the assumption that s. 32(1) is not the only avenue for the *Charter* to apply and that it is enough to characterize the residency requirement as a “law”. This argument is inconsistent with this Court’s jurisprudence.

[428] Only when it has been determined that an entity or their activity is bound by the *Charter* under s. 32(1), and that it has violated the *Charter*, does the analysis turn to ss. 24 and 52(1), which govern the available remedies (*Greater Vancouver Transportation Authority v. Canadian Federation of Students — British Columbia Component*, 2009 SCC 31, [2009] 2 S.C.R. 295 (“*GVTA*”), at paras. 13 and 87). Notably, s. 52(1) “provides a remedy for laws that violate *Charter* rights either in purpose or in effect” (*R. v. Ferguson*, 2008 SCC 6, [2008] 1 S.C.R. 96, at para. 61 (emphasis in original)) by empowering courts to declare “laws” that violate the *Charter* to be of no force and effect (see also *Ontario (Attorney General) v. G*, 2020 SCC 38, [2020] 3 S.C.R. 629, at paras. 84-88). It does not circumvent the question of whether the *Charter* can be invoked in the first place (N. Duplé, *Droit constitutionnel: principes fondamentaux* (5th ed. 2011), at pp. 462-63).

[429] For example, in *Godbout v. Longueuil (City)*, [1997] 3 S.C.R. 844, it was not taken as a given that municipal by-laws were subject to the *Charter* because they are “laws”. Rather, the Court was required to consider s. 32(1), as interpreted by this Court’s jurisprudence, to determine whether the *Charter* applied. Similarly, in *GVTA*, this Court first determined whether the entities in question fell within s. 32(1). Only after answering this question in the affirmative and finding a *Charter* violation did the Court turn to whether the impugned policies were “law” for the purpose of applying the remedy in s. 52(1).

[430] Put another way, it is not “inconsistent with the provisions of the Constitution” under s. 52(1) to abide by the limits of *Charter* applicability set out in s. 32(1). Thus, s. 32(1) must be the focus of the analysis to determine whether the *Charter* applies to the VGFN and its enactment of the residency requirement.

III. The *Charter* Applies to the Federal and Provincial Governments and Entities or Activities With a Significant Connection to Those Governments

[431] There is no dispute that the VGFN is a “government” in the sense that it represents a body by which the Vuntut Gwitchin community is governed (*Concise Oxford English Dictionary* (12th ed. 2011)). However, many of the arguments in support of the *Charter*’s applicability suffer from a fundamental misconception: that the *Charter* applies to any entity that is a government or any activities that appear “governmental”, whether or not they have a connection to the federal or a provincial government. For example, the Attorney General of Canada says that the *Charter*

applies whenever an entity “exercises quintessentially governmental functions” (I.F., at para. 18) and that “a connection to or degree of control by Parliament or a legislature” is therefore not required (para. 22). Similarly, the Attorney General of Alberta says “all entities (Indigenous and non-Indigenous alike) undertaking a governmental role by exercising a law-making power have an obligation to comply with the *Charter*” (I.F., at para. 6). The courts below seemingly adopted this perspective, concluding that “s. 32 does not provide an exhaustive list of governments subject to the *Charter*” (2020 YKSC 22, 461 C.R.R. (2d) 230, at para. 123; see also 2021 YKCA 5, 495 C.R.R. (2d) 98, at paras. 84-85) and that the *Charter* applies to the VGFN because it is “a government” and exercises “government activities” (trial reasons, at para. 131).

[432] These arguments must be rejected. As I will explain, they are contrary to the text of s. 32(1), its history and place within the structure of the *Constitution Act, 1982*, and the jurisprudence concerning its purpose and scope. This jurisprudence confirms that the *Charter* applies only to the federal and provincial governments in respect of matters within their authority. The scope of s. 32(1) of the *Charter* is understood purposively in a manner that encompasses the federal and provincial governments in all their modern forms, so as to prevent those governments from evading *Charter* scrutiny through the stratification of authority in the modern administrative state. However, entities or activities that are not part of the institutions of the federal or a provincial government must exhibit a significant connection to one of those governments in order to fall within s. 32(1).

[433] Before proceeding, I note that in these reasons, I refer to the institutions enumerated in s. 32(1) collectively as the federal and provincial governments. The jurisprudence uses the term “government” both in terms of the *executive branch* of the federal and provincial governments (*Dolphin Delivery*, at pp. 598-99), and more broadly to denote the federal and provincial *levels* of government. I use the term in the latter sense. Moreover, references to the provinces, provincial governments or provincial legislation in these reasons should be understood to include reference to the territories, as the context may require.

A. *Text of Section 32(1)*

[434] The starting point of a purposive approach to *Charter* interpretation remains the text of the provision at issue (*Toronto (City) v. Ontario (Attorney General)*, 2021 SCC 34, at para. 65; *Quebec (Attorney General) v. 9147-0732 Québec inc.*, 2020 SCC 32, [2020] 3 S.C.R. 426, at para. 8; see also *R. v. McGregor*, 2023 SCC 4, at para. 18). In this case, the provision at issue is s. 32(1) of the *Charter*. Section 32(1) reads as follows:

32 (1) This Charter applies

(a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and

(b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

[435] The text of s. 32(1) does not refer to the concept of “government” generally. Rather, the text enumerates distinct institutions under two paragraphs: the “Parliament and government of Canada” (s. 32(1)(a)) and the “legislature and government of each province” (s. 32(1)(b)). In *Dolphin Delivery*, McIntyre J. made clear that “s. 32 of the *Charter* specifies the actors to whom the *Charter* will apply” (p. 598; see also *GVTA*, at para. 13). Section 32(1) also makes clear that the *Charter* applies to the federal and provincial governments “in respect of all matters within their respective authorities” (*Dolphin Delivery*, at p. 598).

[436] The clear language used to address to whom and to what the *Charter* applies reflects s. 32(1)’s purpose. No interpretation can be adopted that effectively rewrites s. 32(1) of the *Charter* (*R. v. Terry*, [1996] 2 S.C.R. 207, at para. 23). Accordingly, any approach to *Charter* applicability under s. 32(1) cannot ignore the clear boundaries set out within the provision itself.

B. *Section 32(1)’s History and Place Within the Structure of the Constitution Act, 1982*

[437] The history of s. 32(1) and its place within the structure of the *Constitution Act, 1982* confirm that the *Charter* was designed *by* the federal and provincial governments, *for* those governments. In contrast, the relationship between these governments and Indigenous peoples, and the place for Indigenous governance within contemporary Canada, were addressed through separate mechanisms such as modern treaties protected by s. 35 of the *Constitution Act, 1982*.

(1) The Charter Was Designed by the Federal and Provincial Governments, for the Federal and Provincial Governments

[438] The *Charter* was, in essence, a binding agreement entered into by the federal government on one side and the provincial governments (with the exception of Quebec) on the other. It was a way to constitutionally affirm individual protections against those governments established by the *British North America Act, 1867* (now the *Constitution Act, 1867*). In parallel to patriation, the federal and provincial governments, as the successors to the Imperial Crown, agreed to a rights document to protect those who were subject to their authority. Thus, the *Charter* mediates the relationship “between the Crown and individuals with respect to the individual’s fundamental rights and freedoms” (*Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53, [2010] 3 S.C.R. 103, at para. 97 (emphasis added), per Deschamps J., concurring).

[439] The negotiations leading to the *Charter* took place over a series of federal-provincial conferences, primarily between First Ministers. Even where discussions took place between other ministers or government officials, the dominant method of negotiation and conflict resolution was the practice of holding a conference between the federal and provincial levels of government (J. R. Mallory, “The Politics of Constitutional Change”, in P. Davenport and R. H. Leach, eds., *Reshaping Confederation: The 1982 Reform of the Canadian Constitution* (1984), 53, at pp. 60 and 66). As drafts were being studied, consultations took place with various stakeholders in order for them to present their perspectives (see Senate and House of

Commons, *Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada*, No. 57, 1st Sess., 32nd Parl., February 13, 1981); however, these groups were petitioners, not participants (D. Sanders, “An Uncertain Path: The Aboriginal Constitutional Conferences”, in J. M. Weiler and R. M. Elliot, eds., *Litigating the Values of a Nation: The Canadian Charter of Rights and Freedoms* (1986), 63, at p. 63). The ultimate negotiations remained between the representatives of the federal and provincial governments (D. Gibson, *The Law of the Charter: General Principles* (1986), at pp. 38-39).

[440] The *Charter* — including s. 32(1) — was designed with these actors in mind. As Professor K. Swinton explains, it is necessary to “keep in mind the concerns of the federal and provincial governments in drafting and agreeing to the Charter. Their focus was its effect on their own governmental operations” (“Application of the Canadian Charter of Rights and Freedoms (ss. 30, 31, 32)”, in W. S. Tarnopolsky and G.-A. Beaudoin, eds., *The Canadian Charter of Rights and Freedoms: Commentary* (1982), 41, at p. 48 (emphasis added)). This explains why the protections enshrined in the *Charter* are replete with references to the federal and provincial levels of government (see, e.g., ss. 3 to 6, 16 to 20, and 23).

[441] This negotiating context also explains why, although many provisions in the *Charter* generated heated debate, the precursor to s. 32(1) did not. The issue of the *Charter*’s applicability was alluded to during the tabling of prior federal drafts (Gibson, at p. 36; see also Federal-Provincial Meeting of the Continuing Committee of Ministers

on the Constitution, *Rights and Freedoms within the Canadian Federation* — *Discussion Draft*, No. 830-81/027, July 4, 1980); however, an express provision concerning the *Charter*'s applicability first appeared in a federal draft placed before Parliament in October 1980 (*The Canadian Constitution 1980: Proposed Resolution respecting the Constitution of Canada* (1980)). It did not generate significant discussion in Parliament or in a subsequent Special Joint Committee. Throughout intense negotiations in pursuit of an agreement on the substance of the *Charter* between the federal government and the provinces, the applicability provision was not the subject of dispute; its only change in wording was made by a drafting committee *after* an agreement had been reached on substantive rights and freedoms (Gibson, at p. 115). It is worth noting that this change had the effect of *emphasizing* the connection between the *Charter* and the federal and provincial levels of government by clarifying that it applied “in respect of” matters within their authority, rather than applying to the aforementioned governments “and” matters within their authority (p. 115).

(2) Indigenous Peoples Were Addressed Separately Within the Constitution Act, 1982

[442] The *Charter* was designed to entrench standards of constitutional behaviour that were tailored to the structures and philosophical underpinnings of federal and provincial governance (see generally Davenport and Leach, eds.; B. L. Strayer, *Canada's Constitutional Revolution* (2013)). Nevertheless, some interveners suggest that because Indigenous peoples are part of Canada's constitutional fabric, their governments should “be required to respect constitutional constraints,

including the rights and freedoms guaranteed under the *Charter*” (I.F., Band Members Alliance and Advocacy Association of Canada, at para. 4). They also point to the presence of s. 25 of the *Charter* as evidence that this is part of the *Charter*’s design. In my view, these submissions are inconsistent with a structural analysis of Canada’s constitutional architecture.

[443] The history and structure of the *Constitution Act, 1982* make clear that the relationship between the federal and provincial governments and Indigenous peoples — and, as a corollary, the place for Indigenous governance within contemporary Canada — was addressed through mechanisms separate from the *Charter*. Most significantly, the collective rights of Indigenous peoples were given constitutional protection by means of s. 35 of the *Constitution Act, 1982*. Notably, s. 35 was placed outside of the *Charter*, in a separate “Part” of the *Constitution Act, 1982*. The presence of s. 35 yields several insights relevant to the scope of s. 32(1).

[444] First, the degree of Indigenous involvement highlights the differences between the bargains found within the *Constitution Act, 1982*. The *Charter* primarily concerned federal and provincial actors: Indigenous peoples were not at the negotiating table, did not agree for the *Charter* to apply to them, and were not included within the constitutional amending formula which was adopted alongside the *Charter*. By contrast, the ultimate inclusion of s. 35 “represents the culmination of a long and difficult struggle in both the political forum and the courts for the constitutional recognition of aboriginal rights” (*R. v. Sparrow*, [1990] 1 S.C.R. 1075, at p. 1105).

Outstanding questions were also discussed in separate, albeit unsuccessful, constitutional conferences, which included direct involvement by Indigenous groups (Gibson, at p. 39; *Constitution Act, 1982*, ss. 35.1(b) and 37.1(3) (repealed on April 18, 1987, by s. 54.1)).

[445] Second, the constitutional entrenchment of modern treaties under s. 35(1) is of particular relevance to understanding why the scope and limits of Indigenous governance are not addressed by the *Charter*. The 1970s had ushered in a new era of treaty-making between Indigenous groups and the federal and provincial governments, and a major topic of those discussions was the implementation and scope of Indigenous self-government (S. Imai, “Indigenous Self-Determination and the State”, in B. J. Richardson, S. Imai and K. McNeil, eds., *Indigenous Peoples and the Law: Comparative and Critical Perspectives* (2009), 285, at p. 295; S. Grammond, *Terms of Coexistence: Indigenous Peoples and Canadian Law* (2013), at pp. 123-25 and 128-29). Such discussions included the negotiations that began in 1973 and culminated two decades later in the agreements concerning self-government for Yukon First Nations, including the VGFN (J. T. S. McCabe, *The Law of Treaties Between the Crown and Aboriginal Peoples* (2010), at pp. 52-59). Cognizant of this ongoing effort, s. 35(3) makes clear that “treaty rights includes rights that now exist by way of land claims agreements or may be so acquired”. Thus, the federal and provincial governments understood that the scope and limits of Indigenous governance would be addressed under s. 35, particularly through the entrenchment of modern treaties, rather than through the *Charter*.

[446] As for s. 25, it serves as the link between Part I and Part II of the *Constitution Act, 1982*. Section 25 is best understood as a protection against *Charter* challenges to federal and provincial measures that protect s. 35 rights, as well as “other rights or freedoms” (H. S. LaForme, with the assistance of C. Truesdale, “Section 25 of the Charter; Section 35 of the *Constitution Act, 1982*: Aboriginal and Treaty Rights — 30 Years of Recognition and Affirmation”, in E. Mendes and S. Beaulac, eds., *Canadian Charter of Rights and Freedoms* (5th ed. 2013), 1337, at p. 1377). The concerns that led to its inclusion are understandable: *Charter* negotiations occurred only a decade after the release of the federal White Paper of 1969 (*Statement of the Government of Canada on Indian Policy, 1969*), which proposed to remove special status for Indigenous peoples in order to promote “equality of rights” (D. Sanders, “The Rights of the Aboriginal Peoples of Canada” (1983), 61 *Can. Bar Rev.* 314, at p. 319; T. J. Courchene, *Indigenous Nationals, Canadian Citizens: From First Contact to Canada 150 and Beyond* (2018), at p. 66). Indigenous concerns also stemmed from jurisprudence concerning prior challenges to the *Indian Act* under the *Canadian Bill of Rights*, S.C. 1960, c. 44 (see, e.g., *The Queen v. Drybones*, [1970] S.C.R. 282; *Attorney General of Canada v. Lavell*, [1974] S.C.R. 1349; R. M. M’Gonigle, “The Bill of Rights and The Indian Act: Either? Or?” (1977), 15 *Alta. L. Rev.* 292).

[447] In this sense, s. 25 reinforces the distinct relationships involved in the *Constitution Act, 1982* — one concerning the interaction between individuals and the Crown, and one concerning the protection of Indigenous peoples from certain forms of interference by the Crown (see, e.g., *Beckman*, at para. 97, per Deschamps J.,

concurring). Section 25 is thus of a similar character to the other “General” provisions of the *Charter* that “form a coherent whole of interpretative provisions that do not grant rights in themselves, but can affect, usually by restricting, the scope of *Charter* review in certain circumstances” (G. J. Kennedy, “They’re All Interpretative: Towards a Consistent Approach to ss 25-31 of the *Charter*” (*U.B.C. L. Rev.*, forthcoming), at p. 2). It ensures that the latter relationship is unaffected by the former (*Ontario (Attorney General) v. Bear Island Foundation*, [1991] 2 S.C.R. 570) by requiring that the *Charter* not be interpreted in a way that would bring the two relationships “into conflict with one another” (*Beckman*, at para. 98, per Deschamps J., concurring). In doing so, it reinforces that the *Charter* is designed to constrain the federal and provincial governments, without affecting their ability to give effect to the collective rights of Indigenous peoples.

[448] Taken together, it is clear that s. 32(1)’s focus on the federal and provincial governments is consistent with the history of the *Charter* and with the distinct relationships that undergird the structure of the *Constitution Act, 1982*.

[449] I cannot leave s. 25 without addressing the meaning given to it in the reasons of my colleagues in the majority and in dissent, a meaning fundamentally different from that which I have just set out and one that will have far-reaching consequences for the relationship between the courts and Indigenous self-government.

[450] By their respective interpretations of s. 25 and s. 32(1), my colleagues apply judicial review for *Charter* compliance to Indigenous self-government. Both

groups of colleagues describe at length a process of judicial review under s. 25; while they diverge as to whether s. 25 is a “shield” or an “interpretative prism”, both descriptions are complex. Whatever the nuances, their approaches amount to a means for courts to apply *Charter* rights (or “values”) to the operation of Indigenous self-government.

[451] Stripped to its essentials, what will result is an analysis that parallels *R. v. Oakes*, [1986] 1 S.C.R. 103, for legislative action and *Doré v. Barreau du Québec*, 2012 SCC 12, [2012] 1 S.C.R. 395, for administrative action. Though not using the language of *Oakes* and *Doré*, in effect, after determining that a *Charter* right is infringed, through the lens of s. 25 courts will conduct a form of “justification” exercise akin to *Oakes* or a “balancing” exercise akin to *Doré*, having regard on the one hand to the *Charter* rights/values infringed and Indigenous rights on the other (Kasirer and Jamal JJ.’s reasons, at paras. 177-82; Martin and O’Bonsawin JJ.’s reasons, at paras. 338-39). Moreover, akin to *Oakes*, the burden of justification will lie with the party whose actions caused the *Charter* infringement, here the Indigenous government, something that has no basis in the text of s. 25.

[452] One needs to reflect as to whether such continued oversight of Indigenous self-government by the courts is what s. 25 is meant to do. There is nothing in s. 25 to suggest it is. Rather, the wording is consonant with my interpretation of s. 25, that courts are directed to avoid interfering with Indigenous rights when they adjudicate the constitutionality of actions by the federal or a provincial government. On the

interpretation of my colleagues, courts are also to do something quite different — that is, to review the actions of Indigenous governments for *Charter* compliance. This will engage the courts in a role of permanent oversight of Indigenous self-government.

[453] In a sense, the two groups of my colleagues have no choice as to their interpretation of s. 25. Once they decide that the *Charter* applies to Indigenous self-government, they need some mechanism for courts to “balance” *Charter* rights/values against Indigenous rights. Section 25 is recruited to that task, even though that is not what s. 25 was meant to do.

C. *Jurisprudence on the Purpose and Scope of Section 32(1)*

[454] The foregoing makes clear that only the federal and provincial governments were intended to fall within the scope of s. 32(1). Accordingly, the *Charter* does not apply, *inter alia*, to purely private litigation (*Dolphin Delivery*, at pp. 597-98; *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130, at para. 95) or to foreign governments (*United States v. Allard*, [1987] 1 S.C.R. 564), as such entities lack a connection to the federal or a provincial government.

[455] Consistent with a purposive approach to *Charter* interpretation, this Court has recognized that the scope of s. 32(1) must be interpreted in a manner that reflects how the federal and provincial governments take form in modern Canadian society. This is necessary to ensure that those governments cannot evade *Charter* scrutiny, including by acting through entities that are effectively extensions of those

governments (*McKinney v. University of Guelph*, [1990] 3 S.C.R. 229, at p. 265; *Godbout*, at para. 51; *GVTA*, at para. 22), or by delegating the implementation of particular policies or programs to non-governmental entities (*Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624, at para. 42). This concern was aptly summarized by La Forest J. in *Godbout*:

Were the *Charter* to apply only to those bodies that are institutionally part of government but not to those that are — as a simple matter of fact — governmental in nature (or performing a governmental act), the federal government and the provinces could easily shirk their *Charter* obligations by conferring certain of their powers on other entities and having those entities carry out what are, in reality, governmental activities or policies. In other words, Parliament, the provincial legislatures and the federal and provincial executives could simply create bodies distinct from themselves, vest those bodies with the power to perform governmental functions and, thereby, avoid the constraints imposed upon their activities through the operation of the *Charter*. Clearly, this course of action would indirectly narrow the ambit of protection afforded by the *Charter* in a manner that could hardly have been intended and with consequences that are, to say the least, undesirable. Indeed, in view of their fundamental importance, *Charter* rights must be safeguarded from possible attempts to narrow their scope unduly or to circumvent altogether the obligations they engender. [Emphasis added; para. 48.]

It is important, however, to note that these comments remain directed to the particular institutions enumerated under s. 32(1) — “Parliament, the provincial legislatures and the federal and provincial executives” — and not to an abstract conception of “governments” more generally.

[456] This Court has sought to give effect to the foregoing by interpreting the boundaries of “government” in a manner that reflects how government takes form in modern Canadian society. Such an approach is supported by the reference in s. 32(1)

to “matters within the authority” of the federal and provincial governments (*GVTA*, at para. 14): entities that are not part of the institutions of the federal and provincial governments, but are “controlled by government or that perform truly governmental functions are themselves ‘matters within the authority’ of the particular legislative body that created them” (*Godbout*, at para. 48 (emphasis added)). This Court has therefore concluded that “government” under s. 32(1) encompasses entities that may not, on their face, fall within the institutions of the federal and provincial governments but are sufficiently connected for all or some of their activities to fall within the authority of those governments (*GVTA*, at para. 16).

[457] In *Eldridge*, La Forest J. reviewed this Court’s jurisprudence and set out a two-branch framework to give effect to s. 32(1). Under the first branch, a court may conclude that “the entity is itself ‘government’ for the purposes of s. 32 . . . either by its very nature or in virtue of the degree of governmental control exercised over it” (para. 44). If the entity itself is found to fall within “government” under s. 32(1), *all* of the entity’s activities are subject to the *Charter* (*GVTA*, at para. 16). Under the second branch, a court may conclude that while the entity itself cannot be equated with the federal or provincial government, some of its particular *activities* can be “ascribed to government”, namely where the activity involves the “implementation of a specific statutory scheme or a government program” (*Eldridge*, at para. 44). In such a case, only *those* activities attract *Charter* scrutiny because they are, effectively, the activities of the federal or provincial government under s. 32(1).

[458] Ms. Dickson, various interveners, and the courts below rely on portions of this Court’s jurisprudence in support of the notion that s. 32(1) encompasses any entity or activity that can be termed *a* government or governmental, even with no connection to the federal or a provincial government. This is not a tenable proposition. As I will explain, this Court has always required — under both branches of *Eldridge* — that an entity or activity have a significant connection to the federal or provincial government before it will fall within the scope of “government” under s. 32(1). The terms “government” or “governmental” in this Court’s s. 32(1) jurisprudence have always referred to the *particular* governments enumerated in s. 32(1). *Eldridge* and its progeny are not a judicially generated expansion of s. 32(1). Rather, this Court has sought to interpret s. 32(1) in a manner which ensures that the federal and provincial governments do not evade their constitutional responsibilities under the *Charter*. Portions of that jurisprudence cannot be taken out of context in order to support an application of s. 32(1) that is divorced from this underlying purpose and the provision’s text, history, and place within the *Constitution Act, 1982*.

(1) The Nature of the Entity

[459] A significant connection to the Crown has always been required under the first branch of *Eldridge*, whereby an entity may be considered “itself ‘government’” and thus subject to the *Charter* in all of its activities. For example, such entities have been described, *inter alia*, as part of the “apparatus” or “fabric” of government (*McKinney*, at p. 275; *Eldridge*, at paras. 37 and 40), as “subordinate bodies” (*Stoffman*

v. Vancouver General Hospital, [1990] 3 S.C.R. 483, at p. 507), “organs” (*McKinney*, at p. 272), or an “emanation” (*Eldridge*, at para. 39; *Godbout*, at para. 47) of government, or “assimilated to the government itself” (*R. v. Buhay*, 2003 SCC 30, [2003] 1 S.C.R. 631, at para. 28). In each of these cases, “government” referred to either the federal or provincial government, and it is apparent from these descriptions that a significant connection to one of those governments is required. This is because such a connection engages the underlying concern that the federal and provincial governments would otherwise be able to evade *Charter* scrutiny through entities that are extensions of those governments.

[460] This Court has recognized that entities within the modern administrative state take on various forms, with varying degrees of autonomy from the federal and provincial governments in their operations. Thus, *Eldridge* recognizes two general ways in which an entity may be considered “itself ‘government’”. In either instance, a significant connection to the federal or provincial government is required.

[461] First, some entities — such as a labour arbitrator (*Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038), a human rights commission (*Blencoe*), and municipalities (*Godbout*) — have been held to be government “by their very nature” (see *Eldridge*, at para. 44) despite operating independently from the federal and provincial governments. This language appears to be the foundation for the arguments resting on the fact that the VGFN is a government. However, an assessment of the nature of the entity under *Eldridge* does not occur by reference to an abstract conception

of “government”. Rather, it is an inquiry into the entity’s connection to the *particular* governments enumerated in s. 32(1), as demonstrated by the entity’s creation, structure, and powers. For example, in each of the aforementioned cases, the entity owed both its existence and authority to either the federal or a provincial government. Thus, the labour arbitrator in *Slaight* and the human rights commission in *Blencoe* “each exercise[d] governmental powers conferred upon them by a legislative body”, and “[t]he ultimate source of authority in each of these cases [was] government” (*Blencoe*, at para. 39). And what was decisive in determining that the *Charter* applies to municipalities in *Godbout* was not that they are *a* government (they clearly are), but rather that they “derive their existence and law-making authority from the provinces” (para. 51).

[462] My colleagues Justices Kasirer and Jamal state that the VGFN engages the illustrative indicia for “government by nature” (para. 78) because,

although (as the trial judge found) the Vuntut Gwitchin have been self-governing since time immemorial, and even if the VGFN has lawmaking authority under an inherent right to self-government, the VGFN is also recognized as a legal entity under the federal implementing legislation. To that extent, it derives *at least some* of its lawmaking authority under federal law. In other words, at least one source of the VGFN’s lawmaking authority flows from Parliament, in that the VGFN exercises powers that Parliament otherwise would have exercised through its legislative jurisdiction under s. 91(24) of the *Constitution Act, 1867*. [Emphasis in original; para. 82.]

This implies that, as the self-government agreement in this case was authorized by federal legislation, Indigenous self-government for the VGFN is somehow an

emanation of federal authority. This is fundamentally inconsistent with the nature, status and purpose of Indigenous self-government. Its purpose is to recognize and give practical effect to an autonomy that is different in status and nature from that exercised by band councils under the *Indian Act*. The idea of self-government is not that it is an “authority [that] flows from Parliament”, but rather Indigenous peoples exercising authority that is rightfully theirs.

[463] Thus, the fact that an entity is *a* government does not automatically lead to the conclusion that the *Charter* applies to its activities. Nor does the conclusion that an entity is not subject to the *Charter* mean that it cannot be *a* government. For example, the government of the United Kingdom is no less a government because it is not subject to the *Charter*. The jurisprudence simply recognizes that the scope of s. 32(1), while capable of embracing extensions of the federal and provincial governments in the modern administrative state, is not so broad as to encompass entities that bear no significant connection to the particular governments enumerated in s. 32(1) itself.

[464] Second, some entities may not be the federal or provincial government by their very nature but may nonetheless be considered “government” for the purposes of *Charter* applicability where they are subject to “substantial control” by those governments (*GVTA*, at para. 16). Government control must be “routine or regular” rather than “ultimate or extraordinary” to bring an entity that is not government by its very nature within the sphere of the controlling government (*Stoffman*, at pp. 513-14; *Harrison v. University of British Columbia*, [1990] 3 S.C.R. 451, at p. 463). Clearly,

this standard entails a significant connection to the federal or a provincial government. Thus, the college in *Douglas/Kwantlen Faculty Assn. v. Douglas College*, [1990] 3 S.C.R. 570, was “part of the apparatus of government” and subject to the *Charter* because the provincial government at all times controlled its operations (p. 584; see also, e.g., *GVTA*, at paras. 17-21). This distinguished the college from the universities considered in *McKinney* and *Harrison* which, despite being subject to provincial regulations and dependent on provincial funds, were not subject to the *Charter* because they were “essentially autonomous bodies” (*Douglas College*, at pp. 584-85; see also *Stoffman*, at pp. 513-14).

[465] The Band Members Alliance and Advocacy Association of Canada suggests that s. 32(1) “is meant to draw the line of application between inherently private and public relationships” (I.F., at para. 14). The term “private” is often used to describe entities that are not themselves “government”, such as individual people (*Dolphin Delivery*, at pp. 599-600), corporations (*Eldridge*, at para. 35), or railroads and airlines (*McKinney*, at p. 269; *Stoffman*, at p. 511). However, this Court has expressly rejected the distinction between “private” and “public” as the test for s. 32(1). The fact that an entity performs public functions — even ones that are similar to those undertaken by the federal or provincial governments — does not determine whether the entity is itself one of those governments. This Court has repeatedly stated that “[a] public purpose test is simply inadequate” and “is simply not the test mandated by s. 32” (*McKinney*, at p. 269; *Eldridge*, at para. 43; *Godbout*, at para. 49; *Buhay*, at para. 28). Conversely, once an entity is considered “itself ‘government’” under the first branch

of *Eldridge*, the *Charter* applies to *all* of its activities, “whether or not those activities may be otherwise characterized as ‘private’” (*Eldridge*, at para. 41). The focus of the s. 32(1) inquiry is always on the entity’s connection to the federal or provincial governments.

(2) The Nature of the Activity

[466] A significant connection to the federal or a provincial government is also required under the second branch of *Eldridge*, whereby a “non-governmental entit[y]” (i.e., an entity that is not “itself ‘government’” under s. 32(1) (see para. 41)) may still be subject to the *Charter* in the performance of *particular activities* that can be “ascribed to government” (para. 44).

[467] As with the first branch, “the fact that a particular activity may be described as ‘public’ in nature, will not be sufficient to bring it within the purview of ‘government’ for the purposes of s. 32 of the *Charter*” (*Eldridge*, at para. 43; see also *Buhay*, at para. 28). Nor is it sufficient to point to any connection, however tenuous, between a non-governmental entity’s activities and the federal or a provincial government. What is necessary is a “direct and . . . precisely-defined connection” between the federal or provincial government and the activity (*Eldridge*, at para. 51, citing *Dolphin Delivery*, at p. 601). Put another way, it must “fairly be said that the decision is that of the government, or that the government sufficiently partakes in the decision as to make it an act of government” (*McKinney*, at p. 274).

[468] Once again, the scope of the second branch of *Eldridge* seeks to give effect to a modern understanding of the mechanisms of government and the express rationale of the *Eldridge* framework. If the federal and provincial governments cannot perform an activity directly without violating the *Charter*, they cannot evade *Charter* scrutiny by delegating the activity to a non-governmental entity (*Eldridge*, at para. 40). Even if another entity is charged with performing it, the nature of the activity has not changed: it remains that of the federal or provincial government. The non-governmental entities are “merely the vehicles” (para. 50) chosen by the government for the accomplishment of what are, in essence, activities that can be ascribed to government. In contrast, no concern about *Charter* evasion arises for entities that act in furtherance of their own policies and objectives, rather than implementing those of the federal or a provincial government. This distinction explains why this Court’s jurisprudence has consistently focused on whether the activity involves the implementation of a specific statutory scheme, government policy, or government program (see, e.g., *Eldridge*, at paras. 43-44; *Blencoe*, at para. 37).

D. *Summary*

[469] It is clear that the *Charter* applies under s. 32(1) to the federal and provincial governments. While the jurisprudence recognizes that “government” takes on various forms in the modern administrative state, an entity or activity must bear a significant connection to the federal or a provincial government in order to fall within the scope of s. 32(1) of the *Charter*. Consequently, to determine whether the *Charter*

applies to an entity such as the VGFN or to its activities, the focus must be on a connection to the federal or provincial government.

IV. The VGFN Arrangements Do Not Establish a Significant Connection to Either the Federal or the Yukon Government

[470] Having examined the scope of s. 32(1) of the *Charter*, I turn to whether the VGFN or its activities — namely, its enactment of the residency requirement — fall within that scope.

[471] In light of their flawed interpretation of this Court’s s. 32(1) jurisprudence, many of the arguments made by the interveners, including the Attorney General of Canada, make no effort to demonstrate a significant connection to either the federal or the Yukon government. However, some of Ms. Dickson’s arguments are directed to the VGFN’s connection to the federal government by virtue of the various arrangements concerning self-government agreed to and adopted around 1993-1994 (“VGFN Arrangements”). She suggests that the VGFN Arrangements are sufficient to connect the VGFN to the federal government in the manner required under s. 32(1). These arguments are the focus of this section of my reasons.

[472] The VGFN Arrangements include multiple instruments. First, the signatories entered into the Vuntut Gwitchin First Nation Final Agreement (1993). It incorporates the terms of the Umbrella Final Agreement signed in 1993 between the federal and Yukon governments and the Council for Yukon Indians, which represented

various Yukon First Nations, including the VGFN. The Final Agreement is a treaty protected by s. 35(1) of the *Constitution Act, 1982*. It implements a framework designed to “establis[h] institutions for self-government and the management of lands and resources” (*First Nation of Nacho Nyak Dun v. Yukon*, 2017 SCC 58, [2017] 2 S.C.R. 576, at para. 10). Further to this framework, the signatories also agreed to the Vuntut Gwitchin First Nation Self-Government Agreement (1993). The Final Agreement stipulates that the Self-Government Agreement is not a treaty under s. 35, although its content and implementation flow directly from the parameters set out by the Final Agreement. Finally, legislation, including the federal *Yukon First Nations Self-Government Act*, S.C. 1994, c. 35 (“Federal Act”), was passed by Parliament and the Yukon legislature to give effect to the aforementioned agreements (see, e.g., Federal Act, s. 4). I note that the adoption of such legislation was expressly contemplated in the Umbrella Final Agreement and the Final Agreement, including a commitment to negotiate with and consult Yukon First Nations.

[473] Ms. Dickson’s submissions relying on the VGFN Arrangements as establishing a significant connection to the federal government are often unclear, both in terms of their underlying assumptions and the branch of the *Eldridge* framework being relied upon. For clarity, I will examine her arguments within the framework set out in *Eldridge* and explain why they must be rejected under both branches.

A. *The Nature of the VGFN*

[474] The question under the first branch of *Eldridge* is whether there exists a significant connection between the VGFN and either the federal or the Yukon government, such that the VGFN is *itself* “government” in the sense required by s. 32(1). As I have explained, this is assessed based on either the nature of the entity or the degree of control exercised by the federal or the Yukon government over the entity. It is not suggested that the VGFN is controlled by the federal or the Yukon government, nor is it suggested that the VGFN is, by its very nature, part of the Yukon government; thus, the only question is whether the VGFN itself falls within the federal “government” by its very nature, as demonstrated by its creation, structure, and powers.

[475] Ms. Dickson suggests that “[t]he VGFN constitution and all VGFN laws” (R.F. on cross-appeal, at para. 29; see also para. 30) are given effect through a statutory delegation or grant of authority by the federal government to the Vuntut Gwitchin through the VGFN Arrangements. For example, she relies on the Federal Act to characterize the VGFN’s “powers” as “creatures of legislation” and suggests that the VGFN’s responsibilities were “transferred” to it by the federal government (para. 34). Taken together, the thrust of her position is that the VGFN Arrangements have the effect of the federal government *creating* and *structuring* VGFN governance and *delegating powers* to the VGFN in a manner sufficient to bring the VGFN within the scope of the federal government under s. 32(1).

[476] This argument fundamentally misconceives the special relationship between the Vuntut Gwitchin on one hand and the federal government as one of the

successors to the Imperial Crown on the other. It also misconceives the restorative effect of the VGFN Arrangements on the Vuntut Gwitchin's internal governance structures.

[477] This Court's jurisprudence has consistently affirmed the special relationship between Indigenous peoples and the Crown (*Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010; *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43, [2010] 2 S.C.R. 650, at paras. 59-60; *Nacho Nyak Dun*, at para. 33). This relationship stems from the prior existence of Indigenous peoples and their occupation of the territory that now encompasses Canada: "Long before Europeans explored and settled North America, aboriginal peoples were occupying and using most of this vast expanse of land in organized, distinctive societies with their own social and political structures" (*Mitchell v. M.N.R.*, 2001 SCC 33, [2001] 1 S.C.R. 911, at para. 9; see also *R. v. Van der Peet*, [1996] 2 S.C.R. 507, at para. 30). This Court has also repeatedly recognized the distinction between Indigenous and non-Indigenous legal traditions (*Delgamuukw*, at paras. 144-47; *R. v. Marshall*, 2005 SCC 43, [2005] 2 S.C.R. 220, at para. 130), which reflects the fact that each tradition was developed by distinct structures of governance. The Vuntut Gwitchin are no exception: they had formed their own society long before the assertion of Crown sovereignty (trial reasons, at para. 11). Within this society, they developed their own laws, rules, and customs, pursuant to their own governance structures (para. 43).

[478] In the early period of Crown-Indigenous relations, the Imperial Crown largely did not interfere in matters of Indigenous peoples' internal governance and instead developed relationships with Indigenous leaders and communities (see, e.g., the *Royal Proclamation, 1763* (G.B.), 3 Geo. 3 (reproduced in R.S.C. 1985, App. II, No. 1), and the *Treaty of Niagara* (1764)). However, Crown respect for Indigenous governance eventually gave way to the “superimposition of European laws and customs” (*Manitoba Metis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 14, [2013] 1 S.C.R. 623, at para. 67, citing *Van der Peet*, at para. 248), particularly through the *Indian Act*'s band council system (trial reasons, at paras. 11-13). Internally, the Vuntut Gwitchin continued to make significant governance decisions collectively (trial reasons, at para. 12); however, their legal traditions were effectively relegated [TRANSLATION] “to a space frequented by members of the community, but not third parties. In this way, [Indigenous] law has become invisible in the public space and in the structures and institutions of the dominant society that do not recognize it as having any validity” (G. Motard, “Regards croisés entre le droit innu et le droit québécois: territorialités en conflit” (2020), 65 *McGill L.J.* 421, at p. 442). As described by the trial judge, “[t]he displacement and alienation of Vuntut Gwitchin people from Vuntut Gwitchin Territory through imposed colonial laws and policies including residential schools, *Indian Act* administration and resource development without Vuntut Gwitchin consent or involvement has caused significant harm to the integrity and health of the Vuntut Gwitchin as a collective” (trial reasons, at para. 13). Such experiences are not unique to the Vuntut Gwitchin.

[479] It is in light of this historical context that modern treaties and similar agreements have sought to undo structures of imposed governance such as the *Indian Act*. To use the vocabulary of Professor Motard, they restore a “space” for Indigenous peoples to govern their own affairs pursuant to their own laws, customs, and practices. These acts of restoration are protected by binding commitments by the Crown to “relinquis[h] the historic control that the Canadian government has exerted”, thereby “creating physical and jurisdictional space for such communities to express and foster cultural difference” (K. Manley-Casimir, “Toward a Bijural Interpretation of the Principle of Respect in Aboriginal Law” (2016), 61 *McGill L.J.* 939, at p. 974). The mutual commitments made within these agreements are necessary to ensure that Indigenous governance structures and traditions are not ignored by federal, provincial, or territorial institutions or rendered invisible in the face of conflicting laws. This is a legitimate concern, since Indigenous governance structures are emerging from a lengthy period in which this was what had occurred.

[480] The ongoing connection entailed by the mutual commitments in a modern treaty or other such agreement does not mean that the Indigenous governance structures *derive* their existence or authority from the federal government. Rather, such agreements are “*sui generis*” in nature (*Nacho Nyak Dun*, at para. 33); they “attempt to further the objective of reconciliation . . . by creating the legal basis to foster a positive long-term relationship between Aboriginal and non-Aboriginal communities” (*Beckman*, at para. 10). As Deschamps J. explained in *Beckman* regarding the various agreements with Yukon First Nations pursuant to the Umbrella Final Agreement, these

agreements are “binding on the parties with respect to the matters they cover” and “[t]hrough these agreements, the First Nations concerned have taken control of their destiny” (para. 91).

[481] The VGFN Self-Government Agreement accomplishes these objectives by removing the band council structure under the *Indian Act*, which “cease[s] to exist” (s. 9.1). Various other components of the *Indian Act* are also rendered inapplicable through the ensuing Federal Act, alongside amendments to other statutes designed to give effect to the Crown’s commitments toward Yukon First Nations (Federal Act, ss. 17(1) and 33 to 39). These developments had the consequence of restoring space for the Vuntut Gwitchin to govern their affairs pursuant to their own governance structures, rather than structures imposed by the Crown. This is an express purpose of the Self-Government Agreement:

2.1 The Vuntut Gwitchin First Nation has traditional decision-making structures and desires to maintain these traditional structures integrated with contemporary forms of government.

This is what occurred. The VGFN enacted its own Constitution, which sets out the VGFN’s governance structures, including four branches of government: the General Assembly, the Elders Council, the Council, and the Vuntut Gwitchin Court (VGFN Constitution, Article V(1)). These structures constitute the “modern expression” of traditional Vuntut Gwitchin governance and were developed by the Vuntut Gwitchin through their traditional “governance practice of making significant decisions collectively through processes of community deliberation and discussion” (trial

reasons, at para. 12). They do not owe their existence or authority to either the federal or the Yukon government.

[482] In spite of the foregoing, Ms. Dickson points to various provisions in the Federal Act to say that the VGFN Constitution and VGFN laws are “given the force of law in Canada” and thus derive their authority “as legislative instruments given force of law by Parliament” (R.F. on cross-appeal, at paras. 30-31; see also para. 29). This misunderstands what the Federal Act does. Statutes like the Federal Act are routinely adopted by the federal and provincial or territorial governments to ratify and implement modern treaties and agreements with Indigenous peoples. Indeed, the signatories to the VGFN Final Agreement and Self-Government Agreement expressly contemplated that Parliament and the Yukon legislature would enact legislation to implement these agreements, and that such legislation would be the product of negotiation and consultation with Yukon First Nations. This is not the sort of statute that would establish a significant connection between the federal government and the VGFN, as required under *Eldridge*. Indeed, the nature of the federal government’s involvement within the VGFN Arrangements has the *opposite* effect of what is required by *Eldridge*, by ensuring that the federal government respects the VGFN’s autonomy pursuant to commitments arrived at by agreement.

[483] Ms. Dickson also misconstrues the effect of particular provisions of the Federal Act. For example, she points to the fact that s. 8 of the Federal Act requires First Nations to enact a constitution. But this provision simply implements what Yukon

First Nations had previously *agreed* to in the Umbrella Final Agreement. A written constitution fits within the restorative purpose of the VGFN Arrangements, because it is “an essential step in bridging the gap between Indigenous legal traditions and the Canadian legal system” (A. Geddes, “Indigenous Constitutionalism Beyond Section 35 and Section 91(24): The Significance of First Nations Constitutions in Canadian Law” (2019), 3 *Lakehead L.J.* 1, at p. 15; Final Agreement, s. 24.5; Self-Government Agreement, s. 10.1; Federal Act, s. 8(1)). It facilitates a transition from Crown-led to Indigenous-led governance by setting out, in a publicly accessible manner, the basic governance structures chosen *by the Vuntut Gwitchin*.

[484] Ms. Dickson also relies on s. 10 of the Federal Act. This is an administrative provision that again merely repeats the procedures agreed to by Yukon First Nations in the Umbrella Final Agreement and by the VGFN in the Self-Government Agreement. For example, s. 10 establishes a register of Yukon First Nation laws to make those laws easy to *access* (Self-Government Agreement, s. 21), a default rule for *when* laws come into force in order to avoid uncertainty (Federal Act, s. 10(4)), and an evidence provision on how the content of Yukon First Nations laws can be *proved* before Canadian legal institutions (s. 10(5)). Nothing in this provision suggests that the underlying exercises of VGFN governance derive their authority from the federal government.

[485] Nor does the fact that the VGFN agreed to a list of subject matters in the Final Agreement that would be the focus of further negotiation, or that the Federal Act

and Self-Government Agreement entrenched VGFN authority in relation to particular subject matters, indicate a *delegation* of power by the federal government. Rather, the enumeration of specific subject matters is an important part of binding the federal government to respect the VGFN's spheres of governance authority. It would be impossible for the VGFN agreements to restore a protected space for Vuntut Gwitchin governance if the signatories did not make the *scope* of that space clear. To avoid this, the VGFN agreements seek to make the scope of the federal and territorial governments' commitments unequivocal. For example, the VGFN agreements recognize the VGFN's *exclusive* authority to regulate certain areas, with the corollary being that the Crown will withdraw from regulating these areas in relation to the VGFN (see, e.g., Final Agreement, s. 13.1; Federal Act, s. 11(1)(a)). This focus on giving practical effect to the restoration of space for VGFN governance explains why significant portions of the VGFN agreements are devoted to the applicability (or inapplicability) of federal laws to VGFN citizens and the resolution of conflicts between federal and VGFN laws.

[486] Of course, the Federal Act is an act of Parliament and is therefore subject to the *Charter*. Thus, Ms. Dickson may challenge the Federal Act or any of its provisions pursuant to the *Charter*. I note that in *Stoffman, McKinney, and Harrison*, there existed a network of provincial legislation concerning the structure and by-laws of hospitals or universities, any of which could be challenged under the *Charter*, yet the *Charter* was found not to apply to those entities' *own* activities. As in those cases, Ms. Dickson is not challenging the Federal Act itself or any of its provisions, but rather

a provision found within the VGFN Constitution concerning the VGFN's internal governance structures.

[487] Finally, the courts below and certain interveners seek to apply the *Charter* by analogizing the VGFN to *Indian Act* band councils or municipalities, which have been viewed as extensions of the federal and provincial governments respectively in the existing jurisprudence (see, e.g., I.F., Attorney General of Quebec, at para. 7; trial reasons, at paras. 124-25; C.A. reasons, at para. 84). These comparisons are misplaced.

[488] Band councils are “a creature of the *Indian Act*” whose powers and constraints arise by virtue of federal legislation (*Public Service Alliance of Canada v. Francis*, [1982] 2 S.C.R. 72, at p. 78; see also pp. 76-77). By contrast, as I have explained, the VGFN Arrangements *remove* the band council layer of Crown-imposed governance and *sever* various connections to the federal government, in order for the Vuntut Gwitchin to restore and carry forward their own governance structures. I therefore disagree with the intervener the Attorney General of Quebec that it is [TRANSLATION] “illogical for *Indian Act* band councils to be subject to the *Charter* but for other Indigenous governance entities not to be” (I.F., at para. 7). To the contrary, to proceed as if the Crown-imposed band council and the present-day VGFN are indistinguishable extensions of the federal government is to disregard the very purpose of the VGFN Arrangements and the “incredible accomplishment of replacing the *Indian Act* with the VGFN Constitution” (trial reasons, at para. 152; C.A. reasons, at para. 51).

[489] Similarly, as I have previously noted, municipalities “derive their existence and law-making authority from the provinces; that is, they exercise powers conferred on them by provincial legislatures” (*Godbout*, at para. 51), and they are subject to the province’s “absolute and unfettered legal power to do with them as it wills” (*Toronto (City)*, at para. 2, citing *Ontario Public School Boards’ Assn. v. Ontario (Attorney General)* (1997), 151 D.L.R. (4th) 346 (Ont. C.J. (Gen. Div.)), at p. 361). This is clearly not the case with the VGFN’s governance structures, whose autonomy the federal and Yukon governments have bound themselves to respect.

[490] It is clear from the foregoing that the VGFN is not, by its nature, part of the apparatus of the federal government in the sense required under s. 32(1). Rather, its internal governance structures are rooted in the VGFN’s own laws, customs, and practices. The VGFN Arrangements give the VGFN’s unique governance structures effect within contemporary Canada through mutually binding commitments between the VGFN and the Crown.

B. *The Nature of the Residency Requirement*

[491] The second branch of the *Eldridge* framework involves an inquiry into the activity itself (*Eldridge*, at para. 44). In this case, the question is whether the residency requirement enacted by the VGFN can be “ascribed” to either the federal or the Yukon government under s. 32(1) based on its nature. It is unclear whether Ms. Dickson relies on the second branch of *Eldridge*. While at times she targets the residency requirement specifically, her arguments extend to the entirety of the VGFN Constitution and all

VGFN laws. She focuses on various provisions within the Federal Act to say that VGFN laws are given external force through the legislation and can therefore be ascribed to the Crown. However, even if one interprets her argument that the “Residency Requirement . . . has the force of law in Canada pursuant to the Federal Act” (R.F. on cross-appeal, at para. 31) as relating to the second branch of *Eldridge*, it must be rejected for the same reasons as those canvassed above. Moreover, as I explain below, there are additional considerations relating to the second branch of *Eldridge* which demonstrate that the *Charter* does not apply.

[492] I note that my analysis under the second branch is confined to the particular activity in question in the present case: the VGFN’s enactment of the residency requirement in its Constitution. I do not foreclose the possibility that other activities may satisfy the second branch of *Eldridge* on account of a significant connection to the federal or the Yukon government. However, each activity of a “non-governmental entit[y]” (see *Eldridge*, at para. 41) must be examined on a case-by-case basis, and the only activity in question in this case is the enactment of the residency requirement.

[493] It is clear that the decision to enact the residency requirement is an autonomous act of Vuntut Gwitchin governance, not a decision “ascribable” to the federal government. The residency requirement is a provision of the VGFN’s *own* Constitution. It was enacted by the VGFN, following a General Assembly with VGFN citizens, in keeping with the consensus-based practices of traditional Vuntut Gwitchin leadership selection (trial reasons, at para. 11). It was enacted to regulate the *internal*

elections of the VGFN Council, which is one of the branches of VGFN government created by the Vuntut Gwitchin. It is clearly not the “implementation of a specific statutory scheme or a government program” (*Eldridge*, at para. 44) of the federal government and does not constitute what is required under the second branch of *Eldridge*. There is no specific, identifiable federal policy akin to what was found in *Eldridge*, where the Court concluded that hospitals “act as agents for the government in providing the specific medical services set out in the [*Hospital Insurance Act*]” (para. 51). That finding was based on the legislation that hospitals operate under and with a clear connection to the mandate of the provincial government. As La Forest J. explained, “it is the government, and not hospitals, that is responsible for defining both the content of the service to be delivered and the persons entitled to receive it” (para. 49). Hospitals were “merely the vehicles the legislature has chosen to deliver this program” (para. 50). Through its enactment of the residency requirement, the VGFN is not “merely the vehicl[e]” for a policy choice of the federal government.

[494] The case for applying the *Charter* to the residency requirement is even less compelling than in *Stoffman*, where the *Charter* was held not to apply to a hospital’s by-laws. Although the by-laws were expressly subject to approval by the government before coming into force, they did not implement a specific governmental policy and were thus not subject to the *Charter*. Indeed, there was considerable variety between the by-laws adopted by different hospitals, which indicated that the policies were “left to the judgment of those entrusted with the responsibility of managing individual hospitals” (p. 508). Not only can there be considerable variety in the constitutions of

various Yukon First Nations, but there is nothing akin to the oversight found in *Stoffman*. This is to be expected for arrangements which are about VGFN *self*-government.

[495] Thus, the VGFN Arrangements do not establish a “direct and . . . precisely-defined connection” between the residency requirement and the federal government (*Eldridge*, at para. 51). As under the first branch of *Eldridge*, nothing in the VGFN Arrangements transform the VGFN’s internal decision to enact the residency requirement into an activity ascribable to the Crown. The residency requirement reflects the VGFN’s *own* decision about its *own* elected leaders. On a proper understanding of the VGFN Arrangements, the enactment of the residency requirement is not an act that can be ascribed to either the federal or the Yukon government in the sense required by s. 32(1).

C. *Summary*

[496] Taken together, none of the aspects of the VGFN Arrangements show that either branch of the *Eldridge* framework applies. To the contrary, they reinforce that the VGFN is distinct from the Crown, including in enacting the residency requirement pursuant to its own laws, customs, and practices. To apply the *Charter* in this case would amount to viewing the VGFN as an extension of the federal or the Yukon government, or its enactment of the residency requirement as ascribable to one of them. Such an understanding is not only inconsistent with the VGFN Arrangements, but is

also inconsistent with the special relationship between the federal and territorial governments and the Vuntut Gwitchin.

V. A Proper Application of Section 32(1) Promotes the Objective of Reconciliation

[497] A faithful application of this Court's jurisprudence leads inexorably to the conclusion that the VGFN and its enactment of the residency requirement do not fall within the scope of s. 32(1) of the *Charter*. Underlying Ms. Dickson and the interveners' arguments on the *Charter*'s applicability are, in reality, policy arguments: that the *Charter*'s protections *should* apply, because the VGFN is *a* government with significant authority over its citizens, and the inapplicability of the *Charter* under s. 32(1) would amount to creating a "'*Charter-free*' zon[e]" (R.F. on cross-appeal, at para. 43). Such policy arguments are not a sound basis in law to impose the *Charter* on the VGFN in a manner that effectively amends s. 32(1). Moreover, for the courts to impose the *Charter* on the VGFN would be contrary to the objective of reconciliation.

[498] Both the *Charter* and the diversity of Indigenous legal traditions are concerned with the protection of human dignity, but the *Charter* represents only one way to achieve this (L. E. Trakman, "Native Cultures in a Rights Empire Ending the Dominion" (1997), 45 *Buff. L. Rev.* 189; M. Boldt and J. A. Long, "Tribal Philosophies and the Canadian Charter of Rights and Freedoms", in M. Boldt and J. A. Long, eds., *The Quest for Justice: Aboriginal Peoples and Aboriginal Rights* (1985), 165; N. Metallic, "Checking our Attachment to the *Charter* and Respecting Indigenous Legal Orders: A Framework for *Charter* Application to Indigenous Governments"

(2022), 31:2 *Const. Forum* 3, at p. 15). The *Charter* exhibits one conception of how the individual interacts with the state, inspired by liberal enlightenment philosophy (*Van der Peet*, at para. 18; T. S. Axworthy, “Colliding Visions: the Debate Over the Charter of Rights and Freedoms 1980-81”, in Weiler and Elliot, *Litigating the Values of a Nation* (1986), 13, at p. 15; Strayer, at p. 219). Thus, it has been suggested that “the rights guaranteed in the *Charter* erect around each individual, metaphorically speaking, an invisible fence over which the state will not be allowed to trespass” (*R. v. Morgentaler*, [1988] 1 S.C.R. 30, at p. 164, per Wilson J., concurring).

[499] These philosophical underpinnings of the *Charter* may not necessarily be commensurate with some Indigenous worldviews (A. Swiffen, “Constitutional Reconciliation and the *Canadian Charter of Rights and Freedoms*” (2019), 24 *Rev. Const. Stud.* 85, at pp. 110-12; K. McNeil, “Aboriginal Governments and the *Canadian Charter of Rights and Freedoms*” (1996), 34 *Osgoode Hall L.J.* 61; J. Y. Henderson, *First Nations Jurisprudence and Aboriginal Rights: Defining the Just Society* (2006)) and with the structure of Indigenous governing bodies which seek to “maintain . . . traditional structures integrated with contemporary forms of government” (Self-Government Agreement, s. 2.1). For example, there may be tensions between the *Charter*’s general focus on negative rights and certain communities’ preference for a more relational, reciprocal understanding of “relationships, duties, and responsibilities” (Henderson, at p. 126; Boldt and Long, at p. 167). Some scholars have noted the potential for cultural disconnect between the *Charter*’s anthropocentric focus on human rights-holders, and a more ecocentric or cosmocentric understanding of rights and

responsibilities (A. Mills, “The Lifeworlds of Law: On Revitalizing Indigenous Legal Orders Today” (2016), 61 *McGill L.J.* 847, at pp. 864-65; Boldt and Long, at p. 166; Manley-Casimir, at p. 953). Finally, depending on the systems upon which Indigenous governance structures are created, Indigenous communities may see the balance between individual and collective rights, and between individuals and the state, differently (Trakman, at pp. 193-94).

[500] Even where the value systems and legal traditions of specific Indigenous communities point to the same result as the *Charter*, their mode of reasoning may differ. For example, Indigenous stories, customs, covenants, ceremonies and deliberative circles can be powerful sources of Indigenous law, including on the limits of government power (see, e.g., *In re: Certified Questions II*, 6 Nav. R. 105 (1989); Henderson, at pp. 127 and 163-77). These can form the basis for Indigenous communities to codify a charter of rights that is adapted to their culture, traditions, and outlook. Rather than a “monolithic form of rights analysis”, Indigenous communities can craft protections for human rights which integrate their particular and distinct forms of Indigenous law (H. P. Glenn, *Legal Traditions of the World: Sustainable Diversity in Law* (5th ed. 2014), at p. 92). These alternative sources of rights and responsibilities can “serve the goal of human dignity as effectively as a western code of human rights” (p. 93). By contrast, the imposition of the *Charter* by the courts risks enabling litigants to “constitutionally interrogate the rich complexity of Aboriginal societies according to a rigid analytic grid of individual right and state obligation” (P. Macklem, *Indigenous Difference and the Constitution of Canada* (2001), at p. 195).

[501] Of course, the foregoing analysis is not to say that *Charter* protections are inherently in tension with the desires of Indigenous communities, including the VGFN. Indigenous value systems and legal traditions should not be treated as monolithic, and it should not be assumed that individual rights are necessarily in conflict with collective Indigenous governance (Metallic, at p. 15). Moreover, Indigenous communities are not static: interaction with other societies over centuries, and the adoption of different systems of governance via treaty, may increase the commensurability of *Charter* protections (G. Otis, “La gouvernance autochtone avec ou sans la *Charte Canadienne?*” (2005), 36 *Ottawa L. Rev.* 207). The *Charter* remains an exceptional achievement, which explains why a variety of Indigenous groups, especially women’s groups, have supported its content (see, e.g., Swiffen, at pp. 110-12; Metallic, at p. 6).

[502] What is clear, however, is that the *Charter* should not be *imposed* on Indigenous communities. As noted by Professor McNeil, “[f]or the *Charter* to be unilaterally imposed on their governments today through a questionable interpretation of section 32(1) would turn the clock back to a time when the Aboriginal peoples were often not given the opportunity to participate when important decisions affecting their constitutional rights were made” (pp. 70-71). It is not for this Court to scrutinize the wisdom or fairness of the VGFN’s choices by transposing an instrument designed by and for the federal and provincial governments onto the Vuntut Gwitchin, who did not participate in its creation or agree to its terms. To do so would be to subject the Vuntut Gwitchin to the sort of federal oversight from which it sought to remove itself through the VGFN Arrangements.

[503] Some scholars suggest that s. 25 can serve as a flexible way to remedy such concerns, without sacrificing *Charter* protection (see, e.g., P. W. Hogg and M. E. Turpel, “Implementing Aboriginal Self-Government: Constitutional and Jurisdictional Issues”, in Royal Commission on Aboriginal Peoples, *Aboriginal Self-Government: Legal and Constitutional Issues* (1995), 375; Otis). This position may have superficial appeal, but it does not withstand closer scrutiny. First, whether s. 25 is used as a shield or an interpretative prism, the VGFN is still “subjected to having its legal order intensely scrutinized by standards foreign to it” (Metallic, at p. 8). For example, on the proposed approach of the Attorney General of Canada, courts would be tasked with evaluating the *prima facie* engagement of a *Charter* right, whether there is a “true conflict” between the *Charter* right and the Aboriginal right, and if so, whether the exercise of the implicated right is necessary “to the maintenance of the Indigenous group’s distinctive culture” (I.F., at para. 27). This is highly intrusive, calling for the VGFN to justify the exercise of its authority by reference to standards not of their own choosing.

[504] Second, many claims may not be shielded by s. 25 at all. On the Attorney General of Canada’s approach, s. 25 would be reserved for Aboriginal and treaty rights, and other rights of a “constitutional character” (I.F., at para. 44, citing *R. v. Kapp*, 2008 SCC 41, [2008] 2 S.C.R. 483, at para. 63). Moreover, Indigenous governments would have the burden of demonstrating the existence of such a right or freedom. Decades of s. 35(1) litigation have shown that this is a lengthy and evidence-heavy process. As McLachlin C.J. noted in *Haida Nation v. British Columbia (Minister of Forests)*, 2004

SCC 73, [2004] 3 S.C.R. 511, “proving rights may take time, sometimes a very long time” (para. 26). Ultimately, the s. 25 analysis would force Indigenous governments to expend significant resources in order to protect their laws from the scrutiny of an instrument which was imposed upon them.

[505] As for policy arguments suggesting that the inapplicability of the *Charter* under s. 32(1) would create a “*Charter*-free zone”, such arguments are dismissive of Indigenous approaches to protecting their members. Indeed, they rest on the erroneous assumption that if the *Charter* is not imposed, Indigenous community members will have no protections.

[506] Indigenous communities can and have enacted protections to regulate the interaction between members and their governments. A number of related approaches have been given effect across Canada. An Indigenous community can choose, on its own initiative, to implement an instrument that incorporates protections for members (as the federal and provincial governments did in enacting the *Charter*). Alternatively, it can commit via agreement or treaty — including through self-government agreements — to enact such an instrument. In either case, however, the Indigenous community plays an active role in deciding *how* it wants to craft such an instrument. Thus, it may enact — or agree to enact — its own protections rooted in its legal traditions; it may adopt an instrument that is inspired by the *Charter*; or it may even agree to the application of *Charter* protections. This may also be a subject of discussion among parties during the negotiation of self-government agreements. I note in passing

that since 1995, Canada's negotiation policy has been to seek the insertion of a provision accepting the application of the *Charter* within self-government agreements (see, e.g., the Nisga'a Final Agreement (1999) and the Tla'amin Final Agreement (2014)). Numerous questions arise concerning the effect of such an agreement (e.g., is the *actual Charter* being applied, or are its protections being incorporated? How are such rights enforced, and by which adjudicative bodies? What happens if the *Charter* is amended pursuant to the amending formula between the federal and provincial governments?), but it is not possible to answer these questions in the present case.

[507] What is crucial, and what the arguments of Ms. Dickson and certain interveners fail to appreciate, is that the foregoing avenues are a product of Indigenous *choice*. Indigenous communities can choose how to implement effective protections — whether on their own initiative or by mutual agreement with federal, provincial, and territorial authorities — rather than being subjected to the *Charter* via a distorted interpretation of s. 32(1). As I explained, taking reconciliation seriously means respecting Indigenous peoples' ability to “define themselves and to choose by what means to make their decisions, according to their own laws, customs and practices” (*Desautel*, at para. 86).

VI. The VGFN Agreed to the Enactment of Its Own Rights Protections, Rather Than the Application of *Charter* Protections

[508] This brings me to the final argument for the *Charter*'s applicability to the VGFN and its enactment of the residency requirement. Ms. Dickson suggests that even

if the *Charter* does not apply pursuant s. 32(1), the VGFN expressly agreed to the applicability of *Charter* protections to its Constitution and laws. This argument is without merit. The VGFN did not agree to the applicability of the *Charter*; to the contrary, it agreed to enact its *own* rights protection instrument that is similar to, but still distinct from, the *Charter*.

A. *The VGFN Arrangements Do Not Contain an Agreement as to the Applicability of the Charter*

[509] Neither the Final Agreement nor the Self-Government Agreement refers to the *Charter*. Ms. Dickson nonetheless relies on a number of provisions from these agreements to say that the VGFN “clearly and unambiguously” agreed to subject its Constitution and laws to the *Charter* (R.F. on cross-appeal, heading of para. 24).

[510] First, Ms. Dickson relies on s. 24.1.2 of the Final Agreement, which provides:

24.1.2 Subject to negotiation of an agreement pursuant to 24.1.1 and in conformity with the Constitution of Canada, the powers of a Yukon First Nation may include the powers to: [Emphasis added.]

Ms. Dickson observes that the *Charter* is, of course, part of the Constitution of Canada — specifically, Part I of the *Constitution Act, 1982*. In her submission, it follows that “the powers of a Yukon First Nation” exercised under s. 24.1.2 must comply with the *Charter*. The trial judge and the Court of Appeal relied on s. 24.1.2 in

concluding that the *Charter* applies to the residency requirement (see, e.g., trial reasons, at paras. 47 and 110-11; C.A. reasons, at para. 97).

[511] This submission falls into many of the same misconceptions of the architecture of the Constitution as those examined above. It is entirely “in conformity with the Constitution of Canada” to abide by the clear language of s. 32(1), its history and place within the *Constitution Act, 1982*, and this Court’s consistent jurisprudence on s. 32(1)’s purpose and scope. As I have explained, it would *not* be in conformity with the Constitution of Canada to extend the application of the *Charter* to the VGFN. Section 24.1.2 of the Final Agreement cannot plausibly be understood as supplanting or altering a proper interpretation of s. 32(1), itself a provision of the Constitution of Canada.

[512] There is much more to the Constitution of Canada than the *Charter*. Properly understood, s. 24.1.2 recognizes that the implementation of VGFN self-government was negotiated with the federal and territorial governments within Canada’s overarching constitutional architecture. These structures include the division of powers under ss. 91 and 92 of the *Constitution Act, 1867*, as well as s. 35 of the *Constitution Act, 1982*. Such constitutional limitations are relevant, for example, to the *negotiation process* for the Self-Government Agreement. Indeed, s. 24.1.2 must be read in light of s. 24.1.1, which it directly follows and expressly references:

24.1.1 Government shall enter into negotiations with each Yukon First Nation which so requests with a view to concluding self-government

agreements appropriate to the circumstances of the affected Yukon First Nation.

Placed in its proper context, s. 24.1.2 confirms that the federal government could not have negotiated for self-government over matters falling within the exclusive authority of the provinces or territories under s. 92 of the *Constitution Act, 1867*, and vice versa. Nor could the federal or territorial government negotiate in a manner contrary to Aboriginal and treaty rights recognized and affirmed under s. 35(1) of the *Constitution Act, 1982*. I note that the VGFN submits that s. 24.1.2 is *limited* to the federal and territorial governments' constitutional limitations in the negotiation process and does not condition the VGFN's own exercise of governance powers (R.F., at paras. 66-69). In my view, it is not necessary in the present case to comment on the interpretation of s. 24.1.2 in such a manner. It suffices to note that compliance with the Constitution of Canada by *any* of the involved signatories does not supplant a jurisprudentially faithful answer to the narrower question of the applicability of the *Charter* to the VGFN.

[513] Second, Ms. Dickson relies on s. 24.1.3.1 of the Final Agreement, which provides:

24.1.3 Self-government agreements shall not affect:

24.1.3.1 the rights of Yukon Indian People as Canadian citizens;

This provision says nothing about the applicability of the *Charter* to the VGFN. VGFN citizens are simultaneously members of an Indigenous community and citizens of

Canada (D. Panagos, *Uncertain Accommodation: Aboriginal Identity and Group Rights in the Supreme Court of Canada* (2016)). As citizens of Canada, they enjoy the same rights and freedoms as others in Canada in relation to the laws and actions of the federal and provincial governments. The federal and provincial governments continue to be burdened by these responsibilities as against VGFN citizens. However, nothing in s. 24.1.3.1 suggests that the VGFN agreed to the application of *Charter* protections beyond the scope provided for under s. 32(1). Section 24.1.3.1 of the Final Agreement is therefore of no assistance to Ms. Dickson.

[514] Finally, Ms. Dickson relies on s. 13.5.1 of the Self-Government Agreement, which provides:

13.5.1 Unless otherwise provided in this Agreement, all laws of General Application shall continue to apply to the Vuntut Gwitchin First Nation, its Citizens and Settlement Land.

The term “laws of general application” has a well-understood meaning in the context of the applicability of provincial laws to Indigenous peoples under s. 88 of the *Indian Act*. It refers to ordinary laws that extend uniformly throughout the territory and are not in relation to one class of citizens in object and purpose (*Kruger v. The Queen*, [1978] 1 S.C.R. 104, at p. 110). The term, as it is used in the Self-Government Agreement, cannot be understood as describing parts of the Constitution of Canada, which itself imposes limits on the scope of federal and provincial laws, including laws of general application.

[515] Properly understood, s. 13.5.1 confirms that ordinary federal and territorial laws that extend uniformly across Canada or the Yukon will continue to apply to VGFN citizens. I observe also that ss. 13.5.2 and 13.5.3 of the Self-Government Agreement provide for processes by which the VGFN can supplant federal and territorial laws of general application with VGFN laws. If the *Charter* did indeed apply as a “la[w] of general application”, it would subvert the principle of constitutional supremacy to subordinate the *Charter* to a form of VGFN override. This could not have been the intention of the signatories when they agreed to s. 13.5.1. Rather, this provision was clearly intended to facilitate a smooth transition to VGFN self-governance without leaving gaps in existing regulatory structures.

[516] In short, none of the provisions of the Final Agreement or the Self-Government Agreement suggest, much less “clearly and unambiguously” state, that the VGFN agreed to the applicability of the *Charter*. However, as I explain below, this does not mean that the VGFN fails to have regard to fundamental rights or freedoms, or that Canada and the Yukon did not, during negotiations, seek to ensure some measure of rights protections.

B. *The VGFN Has Enacted Its Own Rights Protections*

[517] The signatories to the Self-Government Agreement agreed to the following provision concerning the VGFN Constitution:

10.1 The Vuntut Gwitchin First Nation Constitution shall:

...

10.1.4 recognize and protect the rights and freedoms of Citizens;

Furthermore, s. 10.1.6 stipulates that the VGFN Constitution shall “provide for amending the Constitution by the Citizens” — that is, the citizens of the VGFN. Just as the federal and provincial governments have had the authority to amend the Constitution of Canada since patriation in 1982, s. 10.1.6 provides that the VGFN is able to amend its own Constitution, including the instrument stipulated in s. 10.1.4 recognizing and protecting the rights and freedoms of citizens.

[518] Section 10.1.4’s inclusion in the Self-Government Agreement confirms the signatories’ agreed-upon method for protecting the rights and freedoms of VGFN citizens in a manner that is reconcilable with Vuntut Gwitchin laws, customs, and practices. The provision makes no reference to the *Charter*. Instead, the signatories provided more generally for the recognition and protection of the rights and freedoms of citizens, without requiring the adoption of the *exact* rights and freedoms set out in the *Charter*, and while providing for the VGFN to amend those protections through its *own* governance structures.

[519] The VGFN has made good on its commitments by adopting Article IV of its Constitution on the “Rights of Citizens”. Much of Article IV is clearly inspired by the *Charter*, and many of the enumerated rights are nearly identical in wording to *Charter* rights. Despite these similarities, Article IV of the VGFN Constitution is

uniquely tailored to the VGFN's own traditions, values, or priorities. For example, the VGFN has chosen to recognize Gwich'in as its official language and to protect its use (Articles IV(15) to (18)). And the VGFN has enshrined a right to access personal information possessed or controlled by the VGFN government (Article IV(20)(a)) — a right with no analogue in the *Charter*. Crucially, for the purposes of the present case, the right to hold office in Vuntut Gwitchin Government is expressly “[s]ubject to residency and other requirements set out in Vuntut Gwitchin Law” (Article IV(4)). The residency requirement itself is part of the VGFN Constitution under Article XI(2) and was added pursuant to constitutional amendments in 2006. The VGFN has thus elevated its view of the importance of its leaders residing on Settlement Land to constitutional status, pursuant to its own priorities and its own values for community leadership.

[520] Article IV of the VGFN Constitution exemplifies how an Indigenous community can enact protections for fundamental rights and freedoms that are commensurate with its own laws, customs, and practices. Contrary to the suggestions of Ms. Dickson and various interveners, it is not the case that individual rights are not respected by the VGFN or that VGFN citizens are deprived of fundamental rights and exist in a rights-free zone. The VGFN has constitutionally entrenched rights and freedoms — many of which mirror those in the *Charter* — alongside procedures for VGFN citizens to challenge VGFN laws.

[521] Indeed, Ms. Dickson's own petition pursued an alternative claim that the residency requirement was invalid under the VGFN Constitution. This claim under the VGFN Constitution was mentioned briefly by the trial judge, but the courts below did not decide the claim on the merits, preferring to resolve the case under the *Charter*. The VGFN argues that Ms. Dickson's claim is properly addressed under the VGFN Constitution, rather than under the *Charter*. I agree. Ms. Dickson seeks to challenge an internal rule of the VGFN in order to participate in its governance; her claim must be addressed based on the rights enshrined within the VGFN Constitution, pursuant to the VGFN's own governance structures and processes.

VII. Conclusion

[522] The VGFN governs the affairs of the Vuntut Gwitchin pursuant to its own governance structures and processes. This fulfills the goal of self-government enshrined in the VGFN Arrangements: to restore the Vuntut Gwitchin to a place wherein they make and implement decisions according to their own laws, customs, and practices. Having regard to the architecture of the *Constitution Act, 1982*, the relationship between Indigenous peoples and the federal and provincial governments, and the jurisprudence of this Court, it is my view that decisions about how to implement protections for the fundamental rights and freedoms of its citizens also rest with the VGFN. This in no way lessens the rights and freedoms that they enjoy vis-à-vis the federal and provincial governments under the *Charter* as citizens of Canada. Giving effect to Vuntut Gwitchin self-government is a critical part of the promise of

reconciliation. This necessarily entails the right for the Vuntut Gwitchin themselves to decide what is fair and just in accordance with those rights and freedoms that they choose to enshrine in their own Constitution.

[523] I would dismiss Ms. Dickson's appeal and allow the VGFN's cross-appeal, on the basis that the *Charter* does not apply to the VGFN's enactment of the residency requirement, and set aside the orders of the lower courts.

Appeal and cross-appeal dismissed, ROWE J. dissenting on the cross-appeal and MARTIN and O'BONSAWIN JJ. dissenting on the appeal.

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