SECTION 25 AND INDIGENOUS LEGALITIES: EXPLORING PLURINATIONAL FEDERALISM IN CANADA

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This paper concerns the relationship between the Charter of Rights and Freedoms and Aboriginal self-government rights. In Canada, most cases concerning Aboriginal rights have come in the context of section 35. There have been fewer cases involving Aboriginal rights and Charter issues. However, this is changing as the jurisdiction of Indigenous legalities, which has always existed, begins to be constructed in Canadian law. This paper takes the case of Dickson v Vuntut Gwitchin First Nation as a starting point to explore unresolved questions about the relationship between Indigenous jurisdiction and the Charter. It critically assesses the relevant jurisprudence and scholarly commentary. It points out issues relevant for the courts to consider in deciding such cases, including how section 25 of the Charter may be engaged, the implication of concepts of treaty federalism, Canada's endorsement of UNDRIP and scholarly discussions of self-determination that incorporate individual and collective dimensions. It also suggests a possible approach to section 25 that does not instantiate a hierarchy of rights but offers the possibility of weaving legal cultures in a plurinational understanding of federalism.

Cet article porte sur les liens entre la Charte des droits et libertés et les droits des Autochtones à l'autonomie gouvernementale. Au Canada, la plupart des affaires relatives aux droits ancestraux se sont inscrites dans le contexte de l'article 35. Les rencontres judiciaires entre la Charte et les droits ancestraux étaient plus rares par le passé, mais c'est moins vrai à l'heure où le droit autochtone, qui a toujours été présent, commence à être interprété dans les termes du droit canadien. Partant de l'affaire Cindy Dickson c. Vuntut Gwitchin First Nation, l'auteure analyse des questions non résolues ayant trait aux liens entre la Charte et la compétence autochtone. Évaluant d'un œil critique la jurisprudence et les sources savantes pertinentes, elle met en relief les facteurs dont les tribunaux devraient tenir compte au moment de rendre une décision dans ce type d'affaires, notamment la question des possibles applications de l'article 25 de la Charte, les implications liées aux notions de fédéralisme par des traités, l'approbation de la DNUDPA par le Canada, et les ouvrages savants sur l'autodétermination dans ses dimensions individuelles et collectives. Elle y propose une manière d'appliquer l'article 25 qui évite d'instaurer une hiérarchie exemplifiée des droits, mais ouvre

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plutôt la possibilité d'entremêler les différentes cultures juridiques dans une vision plurinationale du fédéralisme.

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1. Introduction

The topic of this paper is the meaning of the *Charter of Rights and Freedoms* in the context of the Aboriginal right to self-government. In Canada, most cases concerning Aboriginal rights have come in the context of section 35.[1] There have been fewer cases involving Aboriginal rights and *Charter* issues. However, this is changing as the jurisdiction of Indigenous legalities, which has always existed, begins to be constructed in Canadian law. So far, in approaching cases involving Aboriginal rights and *Charter* issues, the courts have taken the application of the *Charter* as a starting point. However, the relationship between Aboriginal self-government rights and the *Charter* can be framed differently. For instance, one way is using a minority rights paradigm. This approach is evident when analogies are made to minority language rights, focusing on trade-offs between collective and individual rights. This framing assumes Aboriginal rights are a form of political right within the body politic.

In contrast, this paper starts by recognizing the inherent right of Indigenous peoples to self-govern and the constitutional jurisdiction of Indigenous legalities independent of a settler rights paradigm. In this sense, it is inspired by the idea of Treaty Federalism, which will be elaborated below.[2] The analysis will take as a starting point the case of *Dickson v*

[1] *Constitution Act, 1982*, s 35, being Schedule B to the Canada Act 1982 (UK), 1982, c 11 [*Constitution Act, 1982*].

[2] For a discussion of treaty federalism, see Michael Asch, "*UNDRIP*, Treaty federalism, and Self-determination" (2019) 24:1 Rev Const Stud 1 [Asch]; Russel Lawrence Barsh & James (Sa'ke'j) Youngblood Henderson, *The Road: Indian Tribes and Political Liberty* (Berkley, CA: University of California Press, 1980); John Borrows, *Freedom and*

Vuntut Gwitchin First Nation, recently heard by the Court of Appeal for the Yukon Territory and currently on appeal before the Supreme Court.[3] The *Dickson* case is the most recent in a growing field of case law that puts the question of the relationship between the *Charter* and Indigenous governments on the table.

2. Legacies of Internal Colonization

However, before turning to that case law, it is worth considering some of the social and political contexts that can play into conflicts in some cases involving Aboriginal rights and *Charter* issues. Much of the broader sociological complexity that can underlie litigation surrounding governance in Indigenous communities in Canada originates in colonization. All First Nations were political entities before the assertion of British sovereignty and governed themselves under their own laws. However, as part of the colonization process, the *Indian Act*[4] was imposed on many communities. The Canadian courts reinforced this settler colonial process through the rule of law, which caused irreparable harm to Indigenous peoples still experienced today.[5] For example, The *Indian Act's* band council system attempted to supplant traditional governance structures.[6] Part of the goal of the band council system was to divide First Nations into smaller entities in a way that did not reflect the political structures of Indigenous peoples prior to the colonial government's interference.[7] Over time, some First Nations individuals came to identify strongly with the smaller units created by *Indian Act* interference.[8] Thus, tension and conflict can exist in some communities between the band council structure and its legacies and traditional forms of governance. An example of such conflict can be seen surrounding the development of the Coast GasLink pipeline in the

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Indigenous Constitutionalism (Toronto: University of Toronto Press, 2016); James (Sa'ke'j) Youngblood Henderson, "Creating Inclusive Canadian Federalism," in Amy Swiffen & Joshua Nichols, eds, *Indigenous Peoples and the Future of Federalism*, (Toronto: University of Toronto Press, 2024) [Henderson]; James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge, UK: Cambridge University Press, 1995).

3 *Dickson v Vuntut Gwitchin First Nation*, 2021 YKCA 5 [*Dickson*].

4 *Indian Act*, RSC 1985, c I–5.

5 "Transition to First Nations Control of Citizenship" (March 2020) at 4, online (pdf): *Assembly of First Nation* <https://tinyurl.com/37m6cet4> [perma.cc/NEF8-KQMW] [AFN].

6 The *Indian Act* failed in completely erasing traditional forms of governance. For instance, the YKCA noted in *Dickson* that "[d]espite the imposition of the *Indian Act*, the Vuntut Gwitchin have continued their governance practice of making significant decisions collectively," *Dickson*, *supra* note 3 at para 9.

7 Val Napoleon, "Extinction by Number: Colonialism Made Easy" (2001) 16:1 CJLS 113 at 126; see also Larry Gilbert, *Entitlement to Indian Status and Membership Codes in Canada* (Scarborough: Carswell, 1996).

8 *Ibid*.

traditional land of the Wet'suwet'en. There are tensions between the band council, which was consulted in the planning process and supported the project, and the hereditary chiefs with jurisdiction over traditional lands who were not part of the consultation and were not in support.[9]

Another area where the *Indian Act's* legacy of undermining Indigenous forms of governance has led to tensions is evident in case law regarding conflicts over community membership. Prior to the arrival of Europeans, the question of membership in First Nation communities was determined by the various nations. However, colonial governments created laws to regulate which individuals belonged to a particular First Nation community.[10] These laws were eventually consolidated into the *Indian Act* and had little to nothing to do with First Nations peoples' own membership and kinship structures. For instance, the *Indian Act* contained sexist provisions that disenfranchised female persons and their descendants and entrenched inequality in some communities. In 1869, legislation titled *An Act for the gradual enfranchisement of Indians, the better management of Indian Affairs, and to extend the provisions of the Act*[11] included the first version of the infamous marrying out rule that would later be incorporated into the *Indian Act.* In this legislation, Indigenous women who lost Indian status through marriage could continue to collect annuities and be affiliated with their band.[12] In 1951, the *Indian Act* was amended with section 12(1)(b), which updated the marry-out rule. Under this new section, a woman who married outside her community lost access to any rights associated with Indian status.[13] Some band council governments did not oppose the disenfranchisement, and several joined the government of Canada in supporting it in court.[14]

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9 For some discussion, see Aidan Macnab, "Indigenous law experts weigh in on Wet'suwet'en protests," *Canadian Lawyer Magazine*, (25 February 2020) online: <https://tinyurl.com/yeyv9n8h> [perma.cc/8JFB-ARP3].

10 AFN, *supra* note 5; See also Amy Swiffen & Shoshana Paget, "The Biopolitics of Settler Colonialism and the Limits of Foucault's Historical Method" in Austin Sarat, George Pavlich & Richard Mailey, eds, *Interrupting the Legal Person: Vol 87*, (Bingley, UK: Emerald Publishing Limited, 2022) 89.

11 *An Act for the gradual enfranchisement of Indians, the better management of Indian affairs, and to extend the provisions of the Act 31st Victoria, Chapter 42*, SC 1869, c 6.

12 *Ibid*, art 16.

13 Bonita Lawrence, "Regulating Native Identity by Gender", *"Real" Indians and Others: Mixed-Blood Urban Native Peoples and Indigenous Nationhood* (Lincoln: University of Nebraska Press, 2004) 45 at 50–53.

14 Joyce Green & Val Napoleon, "Seeking Measures of Justice: Aboriginal Women's Rights Claims, Legal Orders, and Politics" (2007) [unpublished, delivered at the Meeting of the Canadian Political Science Association] at 4. See also Lilianne Krosenbrink-Gelissen, "*The Canadian Constitution*, the *Charter* and Aboriginal Women's Rights: Conflicts and Dilemmas" (1993) 7–8:1 Intl J Can Studies 207 at 208; Bill Rafoss, "The Application of the *Canadian Charter of Rights and Freedoms* to First Nations' Jurisdiction: An Analysis of the

As Indigenous peoples move into an era where communities and nations once again decide their own membership, internal conflicts and tensions can arise among traditional understandings of belonging and some of those initially imposed by colonial structures that may have become more recently entrenched. Such conflicts sometimes play out in the Canadian courts in various ways. Some of these conflicts may have been at play in the cases discussed in this paper. However, as an outsider to the communities in question, I cannot assess if or to what extent this may be the case. Nonetheless, the historical backdrop of internal colonization remains essential in understanding how some of these cases could have ended up before the courts as part of an ongoing process of Indigenous peoples undoing the legacies of colonial structures that impact their communities.

3. Case Law on Section 25

The full array of legal issues arising in cases involving Indigenous governments and the *Charter* is beyond the scope of this paper. However, it will focus on one of the most central, the application of Section 25 of the *Charter*.[15] Section 25 is the only explicit reference to Aboriginal rights in the *Charter*. It states that nothing in the *Charter* will "abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada."[16] It is generally understood that section 25 was intended to serve as a direction for the judiciary

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Debate" (2005) [unpublished, archived at University of Saskatchewan]. Eventually, after multiple legal challenges by women who lost Indian status under these provisions, those women were reinstated under Bill C–31 in 1985, *An Act to Amend the Indian Act*, RSC 1985 (1st Sess).

[15] For an early discussion of the applicability of section 32 of the *Charter* to Aboriginal governments, see Kent McNeil, "Aboriginal Governments and the *Canadian Charter of Rights and Freedoms*" (1996) 34:1 Osgoode Hall LJ 61. For a discussion of how the courts in *Dickson* assessed the applicability of section 32, see Robert 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 [Hamilton].

[16] *Canadian Charter of Rights and Freedoms*, s 25, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*]. The section reads in full:

> 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.

not to apply the *Charter*'s provisions in ways that undermine the rights of Indigenous peoples.[17] However, it has proven difficult for courts to determine how to do this in practice, and they have yet to articulate a general approach.[18] The case law and jurisprudence on the provision's meaning and application remain inconclusive. In what follows, the paper briefly explores case law related to section 25 and how the *Dickson* case presents a new scenario that had yet to come before the courts, specifically, a *Charter* challenge to the action of a self-governing Indigenous nation from a citizen of the group.[19] It also highlights how the issues that emerge from the constitutional jurisdiction of Indigenous nations and ongoing processes of decolonization could factor into the application of section 25 moving forward.

Despite the lack of doctrinal development, it is possible to discern some trends in judicial reasoning in section 25. One of these is broad agreement on the idea that the purpose of section 25 is ensuring that the application of the *Charter* does not diminish the rights of Indigenous peoples that exist apart from the *Charter*. For instance, in the *Quebec Secession Reference*, the Supreme Court of Canada cites section 25 as an example underscoring the constitutional principle of protection for minority rights. In *R v Redhead*, Justice Oliphant states, "section [25] does not confer new rights upon [A]boriginal people. It merely confirms certain rights held by [A]boriginal people."[20] At the same time, different views have been expressed on how this principle translates into legal protection. For example, in *Campbell v British Columbia*, the Court stated, "the section is meant to be a 'shield' which protects [A]boriginal, treaty, and other rights from being adversely

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17 For more discussion of the intent behind section 25, see Amy Swiffen, "Constitutional Reconciliation and the *Canadian Charter of Rights and Freedoms*" (2019) 24:1 Rev Const Stud 85 [Swiffen].

18 For another overview of the treatment of section 25, see Hamilton, *supra* note 15. For a more detailed overview, see Swiffen, *supra* note 17.

19 The YKSC referred to this in the context of whether it should decline to hear Dickson's application based on the precedent that implementing modern treaties is a political question that should be left to negotiation, *Dickson v Vuntut Gwitchin First Nation*, 2020 YKSC 22 at para 95 [*Dickson* YKSC]. The YKSC distinguishes the *Dickson* case from "the classic case of *VGFN v Canada*" in that it is a case where "a VGFN and Canadian citizen [is] seeking to apply the *Charter*, the supreme law of Canada, to her First Nation," *Ibid* at para 96. The YKCA did not address the distinction specifically but summarized the chamber's judge as finding that extensive political discussions and negotiations led to the Final Agreement, the SGA, and the *Constitution*, which implied that the "time had come for judicial resolution of the issue," *Dickson*, *supra* note 3 at para 40.

20 *R v Redhead*, 1995, 103 Man R (2d) 269, [1995] MJ No 243 at para 82. The current wording of section 25(b) includes reference to rights that exist from land claim agreements and those that may be so acquired. Thus, Oliphant's statement should be understood as meaning only that new Aboriginal rights are not recognized by section 25.

affected by the *Charter*."[21] In *Shubenacadie*, however, the Court added that section 25 "can only be invoked as a defence if it had been found that government conduct has violated the *Charter*."[22] The latter comment suggests that section 25 is not a shield but a justificatory provision that becomes relevant once a *Charter* infringement has been found.

The most recent Supreme Court case to comment on section 25 was *R v Kapp* in 2008, where a majority of the Court found that federal Aboriginal fishing license regulations contained in *The Aboriginal Fisheries Strategy* violated section 15(1) of the *Charter* but were saved by section 15(2).[23] As a result, the Court found it unnecessary to analyze the meaning of section 25 in the context of the case—though Justice Bastarache's concurrence did address it, which is discussed below. In *Kapp*, the majority did not turn to section 25, perhaps because it found it could decide the appeal by more ordinary means and did not need to consider the relatively uncharted provision. However, it did make some comments that respond to Bastarache's concurrence, specifically suggesting a narrower scope of application for section 25 that would be limited only to "rights of a constitutional character" and questioning whether the section should operate as a shield or as "an interpretive provision informing the construction of potentially conflicting *Charter* rights."[24] Thus, questions about section 25 remain unresolved, including what ultimately falls within its scope, how it could work outside of the section 15 context and whether it should be applied as a shield, a justificatory provision or even possibly as an interpretive provision for characterizing *Charter* rights.

Dickson v Vuntut Gwitchin First Nation is the most recent case to deal with these issues and is the first to speak to section 25 since *Kapp*. The issue in the case is that the VGFN government rejected Dickson's nomination to run for council because she would not commit to leaving Whitehorse if she won the election. The reasons cited in the court documents are her employment and her son's health needs. The Vuntut Gwitchin First Nation is part of the Gwitchin Nation, whose territory covers an area of northern Yukon, Alaska and Northwest Territories. The VGFN government is

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21 *Campbell v British Columbia (AG)*, 2000 BCSC 1123 at para 156 [*Campbell*]. Another point of variance is the breadth of what is included in the protection, with some cases suggesting only Indigenous/Aboriginal rights of a constitutional nature are protected. In contrast, others argue that the protection is broader and extends to other rights and interests.

22 *Shubenacadie Indian Band v Canada (Human Rights Commission)*, 2000, 187 DLR (4th) 741, [2000] FCJ No 702 (QL) at para 43.

23 *R v Kapp*, 2008 SCC 41 [*Kapp*]. See also Celeste Hutchison, "Case Comment on *R v Kapp*: An Analytic framework for Section 25 of the *Charter*" (2007) 52 McGill LJ 173 at 176.

24 *Kapp*, *supra* note 23 at para 63–64.

based in Old Crow, a fly-in community in the Yukon with 260 VGFN citizens. About 300 additional VGFN citizens live elsewhere, including Dickson, who lives in Whitehorse. In 1993, the VGFN, Yukon and Canada signed the Vuntut Gwitchin First Nation Final Agreement and the Vuntut Gwitchin Self-Government Agreement (SGA). The Final Agreement is equivalent to a modern treaty for the purposes of section 35, but the SGA is not.[25] In 1995, in line with VGFN SGA, the *Indian Act* ceased to apply to the VGFN and the band council was replaced with a council and management committee. Under the Self-Government Agreement, the VGFN enacted its own constitution, which provides that candidates for Chief or Councillor who win an election must relocate to Old Crow within 14 days.[26] Dickson argued that the Residency Requirement violated her equality rights in section 15(1) of the *Charter*. She lost the case at trial, with the Supreme Court for the Yukon Territory finding that, apart from the "within 14 days" time limit, the Residency Requirement did not infringe section 15(1). Dickson appealed the decision, as did the VGFN.

The Court of Appeal for the Yukon Territory disagreed with the Supreme Court of the Yukon Territory, instead finding that the Residency Requirement did infringe on section 15(1). However, before doing an infringement analysis to assess if it was justified, it turned to section 25. In reaching its decision, the YKCA drew on the concurrence of *Kapp*. In concurring reasons, Bastarache J. agreed with the majority that the fisheries provisions were saved. However, he arrived at this conclusion differently. Instead of section 15(2), he made recourse to section 25. Bastarache found that in cases involving Aboriginal rights, there is only a need to do a *prima facie* section 15(1) analysis before section 25 is triggered. In other words, section 25 can be engaged before a complete infringement analysis occurs. In this sense, he did not say section 25 completely shields Aboriginal rights from the application of the *Charter*. Instead, he places section 25 at the halfway point in the *Charter* analysis after an infringement is found but before arriving at a section 1 or a section 15(2) analysis (in the case of equality

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[25] This point is something that the YKCA stresses (see e.g. *Dickson*, *supra* note 3 at para 11). In 1994, Canada enacted the *Yukon First Nations Land Claims Settlement Act*, which gave effect to the final arrangements made with Canada, Yukon and First Nations, including the Vuntut Gwitchin. Each final agreement was a "land claims agreement," and as a result; the VGFN Final Agreement constitutes a "treaty" for purposes of section 35. In addition, the *Yukon First Nations Self Government Act*, SC 1994, c 35 came into force on February 14, 1995, to bring into effect the VGFN's SGA. See *Dickson*, *supra* note 3 at para 10–13.

[26] *Vuntut Gwitch First Nation Constitution*, (1992), art 6.2(a), online (pdf): <https://tinyurl.com/39hcuwas> [perma.cc/LK6Q-87YR].

rights).[27] Bastarache explicitly links this application to jurisprudence on minority language rights where "collective rights are clearly prioritized in terms of protection … [and] individual equality rights have typically given way."[28]

Similarly, the YKCA also characterizes section 25 as a shield for collective rights that pertain to Aboriginal persons. Speaking to the context, "[w]here the 'collective' is a first nation that has survived years of paternalism and the suppression of its culture," the Court found that section 25 means that the collective right should prevail undiminished by section 15.[29] It states, "in the circumstances, to apply 15(1) would impermissibly derogate from VGFN's right to govern themselves in accordance with their particular values and traditions."[30] The Court determined that section 25 may shield an action only after being subjected to a 15(1) *prima facie* analysis.[31] Thus, the *Charter* applies to the actions of the VGFN government but section 25 shields the Residency Requirement from the need to justify itself. Dickson applied for leave to appeal to the Supreme Court of Canada. The VGFN opposed this. On April 28, 2022, the SCC granted leave.[32]

In some senses, the *Dickson* and *Kapp* cases are similar. What is at stake is a section 15 challenge to a government action designed to protect Aboriginal rights. However, the cases are different in at least two connected ways. First, unlike in *Kapp*, where the challenge came from a non-Aboriginal individual, the appellant in *Dickson* is a member of the community and a citizen of the VGFN. Second, the government action in question is not that of the Crown but of an Indigenous government. Thus, the Residency Requirement represents an internal restriction,

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27 Naiomi 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 Const 3 at 8.

28 *Kapp*, *supra* note 23 at para 89.

29 *Dickson*, *supra* note 3 at para 144.

30 *Dickson*, *supra* note 3 at para 149. The YKCA said that the self-government agreement that gave rise to the VGFN Constitution is not a Treaty. Thus, section 25 will apply to the VGFN self-government right as an "aboriginal" right under section 35 or an "other" right.

31 The YKSC did not apply section 25 because it found no infringement of section 15(1). However, it stated that if section 25 did apply to 'shield' the residency requirement, it would be relevant after determining a breach that cannot be saved by section 1, *Dickson* YKSC, *supra* note 19 at para 177.

32 For a more detailed discussion of the reasoning of the YKSC and YKCA in *Dickson*, see Hamilton, *supra* note 15.

not an external protection, as in *Kapp*.[33] On this point, a comparison of the *Campbell* and *Dickson* cases is also illuminating. Campbell was involved in a *Charter* challenge to an election code created by the Nisga'a Government. One of the arguments raised in the case revolved around provisions that prevented non-Nisga'a from voting in Nisga'a elections and whether this violated section 3 of the *Charter*. The Court determined that the *Charter* applied to the actions of the Nisga'a government because it operates under the authority of the Nisga'a Treaty, which specifies that the *Charter* applies to the Nisga'a Government.[34] However, it found that section 25 protected the limited right of self-government enshrined in the Nisga'a Final Agreement and implementing legislation. Thus, it rejected the argument that the voting restriction had to be struck down for violating the *Charter*. This finding is similar to the determination of the YKCA in *Dickson*. *Campbell,* however, differs from *Dickson* in that the challenge is by a non-member of the Nisga'a community, and it is made primarily under section 3.[35] In contrast, *Dickson* involves a challenge by a VGFN citizen, and it is made in light of the equality rights in section 15.

Another relevant case is *Kahkewistahaw First Nation v Taypotat*, decided by the Supreme Court in 2015.[36] This case bears some notable similarities to *Dickson.* It also involved a challenge to an internal restriction of an Indigenous government by a citizen of the First Nation in question. The conflict in *Taypotat* centered on a community election code adopted in 2011 by the Kahkewistahaw First Nation in Saskatchewan to govern elections for the positions of Chief and Band Councillor. The *Kahkewistahaw Election Act*[37] stipulated that individuals who hold those positions must have at least a Grade 12 education or equivalent. Louis Taypotat had previously served as Chief for a total of 27 years between the years 1973 and 2007. However, under the new community election code, he was disqualified from standing for election because he did not

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[33] The *Corbiere* case may have represented an earlier example. However, it involved membership restrictions created by a band council, which is a creature of the *Indian Act* and was understood by the Court as a delegated federal authority. In this sense, the membership restrictions in *Corbiere* derive from the authority of the *Indian Act*. In contrast, the claim by the VGFN is based on the inherent/constitutional right to self-government, *Corbiere v Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203, 173 DLR (4th) 1 at para 52 [*Corbiere*].

[34] *Campbell*, *supra* note 21 at para 41.

[35] *Campbell* notes that the plaintiffs also based their challenge on sections 7 and 15(1) but "did not press these submissions in oral argument," *supra* note 21 at para 163–164.

[36] *Kahkewistahaw First Nation v Taypotat*, 2015 SCC 30 [*Taypotat*].

[37] *Kahkewistahaw Election Act* [en. pursuant to the *Order Amending the Indian Bands Council Elections Order* (*Kahkewistahaw*), SOR/2011–49], ss 9.03(c), 9.04, 9.05, 10.01(d).

meet the minimum education requirement. Taypotat attended residential school until he was 14, and his education was assessed as being at a Grade 10 level. In an application for judicial review, Taypotat challenged the *Kahkewistahaw Election Act* educational requirement under section 15(1) of the *Charter*. He was unsuccessful at the Federal Court level. On appeal, Taypotat framed his claim around the argument that "residential school survivors without a Grade 12 education" were an analogous group under section 15(1).[38] The Federal Court of Appeal allowed his appeal and found the educational requirement discriminatory. However, the Supreme Court of Canada overturned the Federal Court of Appeal's decision. It determined that the impugned provisions did not *prima facie* violate section 15. This assessment was based mainly on evidentiary deficiencies.[39] In determining discrimination, the Court also emphasized the objectives behind the community's adoption of the *Kahkewistahaw Election Act*. However, the Court did not invoke section 25.[40]

The *Taypotat* case also differs from *Dickson* in at least one important way. The *Indian Act* governs the community election code in *Taypotat*, and the government entity in question was a band council.[41] In contrast, the election rules in *Dickson* rely on the Vuntut Gwitchin First Nation's jurisdiction under the Vuntut Gwitchin First Nation Constitution and Self-Government Agreement.[42] This distinction was signalled by the YKCA when it stated there is a difference between Indigenous

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38 *Taypotat*, *supra* note 36 at para 12.

39 Jonnette Watson Hamilton and Jennifer Koshan, "*Kahkewistahaw First Nation v Taypotat*: An Arbitrary Approach to Discrimination" (2016) 76 SCLR 243 at 259 [Hamilton & Koshan].

40 Hamilton & Koshan argue that the Court's focus on the government's objective behind the education requirement "raises the possibility that the educational requirement in *Taypotat* could have been seen as a matter to be shielded from scrutiny under section 25," *supra* note 39 at 247.

41 In commenting on the applicability of section 32(1) of the *Charter* in *Taypotat v Kahkewistahaw First Nation*, the Federal Court stated that the Kahkewistahaw Band Council was "clearly a *sui generis* government entity" that acted as a "government" under federal legislation and in matters within the authority of Parliament, *Taypotat v Kahkewistahaw First Nation*, 2013 FCA 192 at para 36 [*Taypotat* FCA]. It also noted that Indigenous peoples are entitled to protection under the *Charter*, which "includes protection for aboriginal peoples from violations to these rights and freedoms by their own governments acting pursuant to federal legislation and in matters falling in the sphere of federal jurisdiction," *Taypotat* FCA at para 36.

42 The YKCA stated that the VGFN's situation differs from bands that create community election codes and operate under the *Indian Act*. This difference could be, in part, why arguments under section 25 were not presented by counsel for the Kahkewistahaw First Nation. Hamilton & Koshan also suggest the reason section 25 arguments were not presented could be "because the Court has not provided any guidance on its interpretation since *Kapp* in 2008," *supra* note 39 at 247.

governments "relying on customs allowed under the *Indian Act* or any other federal law" and those that operate based on inherent jurisdiction.[43] Nonetheless, the Court of Appeal declined to determine the source of the First Nation's power to self-govern.[44] It held that the *Charter* applied to VGFN government actions regardless of whether its governmental authority stems from an inherent right, treaty, section 35 or federal statute.

The Court's reasoning in *Dickson* drew on the broader view of section 25 articulated by Bastarache in *Kapp* as protecting collective Aboriginal, Treaty, and "other rights" above personal *Charter* rights by potentially shielding them from section 1 considerations.[45] In *Kapp*, the majority of the Supreme Court said in *obiter* that section 25 likely only protects rights of "constitutional character."[46] In contrast, Justice Bastarache held in concurring reasons that section 25 protects rights beyond this to include "statutory rights that seek to protect interests associated with aboriginal culture, territory, self-government," "sovereignty," and "the treaty process."[47] He argued that section 25 is engaged whenever "*Charter* protections for individuals would diminish the distinctive, collective and cultural identity of an aboriginal group."[48] Thus, while the Court in *Dickson* did not determine the implications of this difference for section 25, the case law suggests courts have approached the section differently depending on whether the Indigenous government in question could be framed as delegated from federal authority.

In concluding its decision in *Dickson*, the YKCA stated that it "would not be appropriate to suggest any general rule" about the application of section 25 based on its decision.[49] This statement echoes the Supreme Court majority's last words on the matter in *Kapp*, stating that the questions raised by the application of section 25 "are best left for resolution on a

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43 It noted, "[t]he VGFN says it is not relying on customs allowed under the *Indian Act* or any other federal law, but on its *inherent and historic* rights and practices, which have now been *recognized* in (as opposed to *granted by*) the Final and Self-Government Agreements," *Dickson*, *supra* note 3 at para 90.

44 The Court in *Dickson* characterized it as "perhaps futile" for courts to engage in the debate regarding inherent Aboriginal rights and the source of the authority to self-govern, *Dickson*, *supra* note 3 at para 93.

45 *Dickson*, *supra* note 3 at paras 143–144, 146.

46 *Kapp*, *supra* note 23 at para 102.

47 *Dickson*, *supra* note 3 at para 124.

48 *Dickson*, *supra* note 3 at para 89.

49 The Court states that while "the case at bar could have been resolved by an analysis of section 25 without a full equality analysis under section 15(1) … It would not be appropriate to suggest any general rule to the effect that section 25 should be considered and applied only after a court has determined that a *Charter* right or freedom has been breached," *Dickson*, *supra* note 3 at para 162.

case-by-case basis as they arise before the Court."[50] What the Supreme Court will determine when applying section 25 in a scenario of an internal restriction by an Indigenous government deriving from inherent authority remains to be seen. Addressed below are general issues relevant for the Supreme Court to consider regarding how section 25 may be engaged by challenges to internal restrictions of an Indigenous government based on inherent authority/jurisdiction.

4. Which Governments Engage Section 25?

An important question to consider was signalled by the YKCA's distinction in *Dickson* between Indigenous governments that operate under the *Indian Act* and those that operate based on some form of inherent jurisdiction. The VGFN maintained its right to govern itself under an inherent jurisdiction that existed before the *Indian Act,* section 35 or any treaty. It argued that its governmental actions are immune from the *Charter*. The Court rejected this argument. It accepted the lower court assessment that "the *Charter* applies to the residency requirement of the VGFN Constitution whether viewed from an exercise of an inherent right or an exercise of the VGFN Self-Government Agreement implemented by federal and territorial legislation."[51] The reasoning is not that the *Charter* applies to Indigenous self-governments solely by their nature as governmental institutions. Instead, the Court of Appeal cites various intersections of Indigenous and Crown jurisdiction as what makes Indigenous jurisdiction part of "Canada's constitutional fabric."[52] Regardless of the source of VGFN's authority, the "exercise of its legislative capacity and Constitution" were sufficient to bring it within the scope of s 32(1)[53] of the *Charter* — either as 'government' or an entity exercising inherently 'government' activities.[54]

However, the case law suggests multiple sources of Aboriginal rights could be engaged by section 25. Clear candidates for section 25 protection include those based on negotiated treaties and self-government agreements, such as the Nisga'a Government. In addition to treaty governments,

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50 *Kapp*, *supra* note 23 at 65.

51 *Dickson* YKSC, *supra* note 19 at para 130.

52 *Ibid*.

53 *Charter*, *supra* note 16 at s 32(1). This section reads:

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.

54 *Dickson*, *supra* note 3 at para 91.

Indigenous communities that have negotiated partial sectoral self-government arrangements could also fall under the protection of section 25, at least in some contexts.[55] One theoretical possibility is an Indigenous government based on an Aboriginal self-government right recognized under section 35. However, such a right would unlikely arise given the Court's tendency to read down self-government claims to particular rights and activities historically integral to a distinctive Indigenous culture.[56] Thus, while asserting a constitutional right to self-government under section 35 might be theoretically possible, it would take much work to enact under the current framework.[57]

Another possibility is self-government rights claimed as incidental to an Aboriginal title recognized under section 35. Aboriginal title is held communally and cannot be held by individual Aboriginal persons. As the Supreme Court in *Delgamuukw* explained and affirmed in *Campbell*,[58] "[Aboriginal title] is a collective right to land held by all members of an aboriginal nation. Decisions with respect to that land are also made by that community."[59] The collective nature of Aboriginal title implies collective mechanisms for management and decision-making regarding the land. Thus, self-government rights are incidental to Aboriginal title by virtue of its collective character. Unlike the self-government rights under section 35, however, self-government rights incidental to Aboriginal title would include uses of the land beyond traditional uses. As McNeil explains, "any use of the land that is encompassed by Aboriginal titleholders' 'right to exclusive use and occupation' should […] be subject to their decision-making authority."[60] This includes uses of the land involving extraction of natural resources, as was held in *Delgamuukw*, as well as other direct uses such as hunting, fishing, farming, building, etc. However, as noted by McNeil, "[n]ot all activities that take place on land are necessarily a use of

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55 An example of this is the *First Nations Land Management Act* in 1999. See *First Nations Land Management Act*, SC 1999, c 24.

56 In the case of a right to self-government, these aspects of the test are especially problematic. See John Borrows, "Frozen Rights in Canada: Constitutional Interpretation and the Trickster" (1997–1998) 22:1 Am Indian L Rev 37; See also Russel Lawrence Barsh & James (Sa'ke'j) Youngblood Henderson, "The Supreme Court's *Van der Peet* Trilogy: Naïve Imperialism and Ropes of Sand" (1997) 42:4 McGill LJ 993; See also Catherine Bell, "New Directions in the Law of Aboriginal Rights" (1998) 77:1&2 Can Bar Rev 36 at 44–50.

57 Kent McNeil, "Judicial Approaches to Self-Government since *Calder*: Searching for Doctrinal Coherence" in Hamar Foster, Heather Raven & Jeremy Webber, eds, *Let Right Be Done: Aboriginal Title, the Calder Case, and the Future of Indigenous Rights* (Vancouver: UBC Press, 2007) 129 [McNeil].

58 *Campbell*, *supra* note 21.

59 *Delgamuukw v British Columbia*, [1997] 3 SCR 1010, 153 DLR (4th) 193 at para 115 [*Delgamuukw*].

60 McNeil, *supra* note 57 at 138.

the land;" thus, the right "would probably be limited to activities that can properly be classified as uses of the land, rather than as encompassing all activities that might take place on the land."[61] In this sense, the possibility of Aboriginal self-government rights as incidental to Aboriginal title could be more expansive than as articulated in the section 35 framework and would draw protection from section 25. However, it would still be limited.

Another possibility is Aboriginal self-government falling under the "other rights and freedoms" being protected by section 25. In *Corbiere*, Justice L'Heureux-Dubé suggested that statutorily-created rights could qualify under section 25.[62] Bastarache's concurrence in *Kapp* is consistent with this idea, arguing that federal fisheries licence regulations were shielded by section 25. One question is whether the *Indian Act* could be such a statute. As mentioned, some band councils continue to operate under procedures created by the *Act*. Thus, could the custom election and membership codes created by band councils constitute Aboriginal rights for the purposes of section 25? The answer so far has been no, and actions of band councils are treated as a form of delegated federal authority. The case where this question could have been addressed was *Taypotat*, but as noted above, no arguments regarding section 25 were presented, and the Court did not address the section in its decision.[63]

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61 McNeil, *supra* note 57 at 138–143; McNeil points out, "in municipal law, authority to make by-laws regulating use of land does not include authority to regulate business operations on the land. See *Jensen v Corporation of Surrey* (1989), 47 MPLR 192 (BCSC); *Texaco Canada v Corporation of Vanier*, [1981] 1 SCR 254, 120 DLR (3d) 193; and *Re Cities Service Oil Co. and the City of Kingston* (1956), 5 DLR (2d) 126 (Ont HC), [1956] OWN 804," McNeil, *supra* note 57 at 279 n 88. In addition, Aboriginal title is subject to an internal limit that prevents the land from being used in ways that are irreconcilable with the collective interest in the land that forms the basis of the title, *Delgamuukw*, *supra* note 59 at paras 125–132. See also Kent McNeil, "The Post-*Delgamuukw* Nature and Content of Aboriginal Title," in Kent McNeil, ed, *Emerging Justice? Essays on Indigenous Rights in Canada and Australia*, (Saskatoon: Native Law Centre, University of Saskatchewan, 2001) 102 at 116–122.

62 *Corbiere*, *supra* note 33 at para 53. L'Heureux-Dubé: "mere reference to aboriginal people in a statute, on its own, is not sufficient to bring the statute or the reference within the scope of section 25".

63 For more on the question of whether section 25 would have been a more appropriate lens for the Court to assess the claim in *Taypotat* and whether the case presented an opportunity to explore whether the approach articulated by Justice Bastarache in *Kapp* applies to actions of a band council to which one of its members brings a challenge, see Jennifer Koshan and Jonnette Watson Hamilton, "*Kahkewistahaw First Nation v Taypotat—Whither Section 25 of the Charter?*" (2016) 25:3 Const Forum Const 39, online (pdf): <https://tinyurl.com/y5spk7tz> [perma.cc/R9LN-Y7V3].

Another source of 'other' Aboriginal rights under section 25 could be inherency.[64] Patricia Monture-Angus makes the point that the application of the *Indian Act* has been taken by courts to have extinguished any Indigenous rights that may have preceded it. However, the concept of extinguishment implies the existence of something that can be extinguished. Thus, subjecting band councils to the *Charter* assumes the prior existence of Indigenous jurisdiction. For this reason, she argues that groups who did not come under the jurisdiction of the *Indian A ct* continue to have self-government rights, and those who have come under the *Indian Act* are understood to have possessed such rights at one time.[65] Moreover, the process by which Indigenous communities came under the *Indian Act* cannot be said to entail 'voluntary consent, mutually given' to abdicate the capacity for self-government.[66] These arguments have an affinity with the treaty federalist approach that Indigenous peoples have an inherent constitutional jurisdiction outside the settler rights paradigm.

Thanks to the current framework, the courts have avoided explicitly exploring how the concept of 'Indigenous governments' is a diverse set of legal entities matters for understanding how courts have applied (or avoided applying) section 25 in contexts involving Indigenous governments so far. The Court of Appeal in *Dickson* refused to resolve the fundamental question of the source of Indigenous jurisdiction in favour of finding a nexus with Crown authority to bring Indigenous governments within the authority of the *Canadian Constitution* and the scope of subsection 32(1). Arguably, this becomes a route to a similar destination as the old approach of interpreting the *Indian Act* as extinguishing the sovereignty of Indigenous nations: Indigenous legalities are subjected to the authority of a constitutional arrangement without their consent. This problem is reflected in the arguments from the VGFN in *Dickson* that the *Charter* does not apply because their inherent jurisdiction exists independent of the Canadian constitutional framework. Despite accepting the first part of the premise, the Court of Appeal rejected its implication regarding the *Charter*. For this reason, it is questionable whether the court's insistence that the source of the authority of Indigenous governments is not important in *Charter* cases is sustainable. Considering this complexity (and arguably inconsistency), the Supreme Court will need to address

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64 See Darlene Johnston, "The Quest of the Six Nations: Confederacy for Self-Determination" (1986) 44:1 UT Fac L Rev 1.

65 Patricia Monture-Angus, "Lessons In Rights Discourse: *Charter* Challenges And Aboriginal Sovereignty," *Journeying Forward: Dreaming of First Nations' Independence*, (Halifax: Fernwood Publishing, 1999) 134 at 150.

66 Michael Asch, "Consent and the Resolution of Political Relations between Indigenous Peoples and the Canadian State" in Amy Swiffen & Joshua Nichols, eds, *Indigenous Peoples and the Future of Federalism*, (Toronto: University of Toronto Press, 2024) [forthcoming in 2024] .

the question left open by *Kapp* of whether only Aboriginal rights of a constitutional character are protected by s 25 (as the majority suggests and as implied by the *Taypotat* decision) or whether the scope could be broader to include 'other rights' (as Bastarache suggests).

5. Scholarly Commentary on s 25

Turning to scholarly commentary on section 25 is also illuminating, even if it offers no straightforward approach, as varied interpretations have been put forward that somewhat mirror the case law but also articulate different possibilities. Some describe section 25 as a rule of construction, which is engaged when courts characterize *Charter* rights. William Pentney was possibly the first to argue that section 25 should be seen as "an interpretive guide" that directs courts to interpret *Charter* rights in ways that do not undermine Aboriginal rights.[67] This idea implies that section 25 is relevant at the outset of a *Charter* analysis before any infringement analysis occurs. It directs the courts to develop interpretations of *Charter* rights "that [are] the least intrusive on [A]boriginal rights."[68] However, Pentney also stipulates that in the case of irreconcilable conflict where a court cannot reconcile an Aboriginal right and a *Charter* right, the *Charter* right should prevail. Thus, he proposes that section 25 is a rule of construction to reconcile the two sets of rights with a hierarchy prioritizing *Charter* rights over Aboriginal rights in the last instance.

David Milward has tried to develop a contextual approach to an analysis of *Charter* infringements that draws on section 25 as requiring balancing rights instead of trading them off.[69] He draws on the Supreme Court decision in *Dagenais v Canadian Broadcasting Corp*[70] and precedents in administrative law to suggest that section 25 directs courts to use culturally sensitive modes of interpretation to accomplish this balancing. Section 25 would protect Aboriginal rights by requiring the courts to interpret the *Charter* in ways compatible with Indigenous cultural meanings. Milward suggests that such a culturally sensitive interpretation would mean that *Charter* rights would apply to the actions of Indigenous

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67 William Pentney, "The Rights of the Aboriginal Peoples of Canada and the *Constitution Act, 1982*: Part I The Interpretive Prism of Section 25" (1988) 22:2 UBC L Rev 21 at 28.

68 Thomas Isaac, "*Canadian Charter of Rights and Freedoms*: The Challenge of the Individual and Collective Rights of Aboriginal People" (2002) 21:1 Windsor YB Access Just 431 at 436.

69 David Milward, "Realizing a Culturally Sensitive Interpretation of Legal Rights," *Aboriginal Justice and the Charter: Realizing a Culturally Sensitive Interpretation of Legal Rights* (Vancouver: UBC Press, 2012) 62 at 71 [Milward].

70 *Dagenais v Canadian Broadcasting Corp*, [1994] 3 SCR 835, 120 DLR (4th) 12.

governments in a "limited" or "modified" form.[71] However, the onus in a proportionality analysis remains on the Indigenous government. In cases like those discussed above, a lesser form of hierarchy remains in that the burden would be on the self-governing First Nation to justify its action, as opposed to the Crown showing that the *Charter* justifies an infringement of Aboriginal rights.

Patrick Macklem has offered one of the most elaborate approaches to section 25. He argues that the provision protects all "federal, provincial and Aboriginal initiatives" that make a distinction between Aboriginal and non-Aboriginal people with the goal "to protect [Indigenous] interests associated with culture, territory, sovereignty and the treaty process."[72] This idea means laws that infringe on the *Charter* could be justified under section 25 with the objective of protecting Indigenous differences. Significantly, however, he distinguishes between "external protections," which are government actions that impact non-community members, and "internal restrictions," which restrict citizens/community members. Examples of external protections would be the provisions in the *Fisheries Act* in *Kapp* and the Nisga'a government's restriction on the voting rights of non-Nisga'a citizens. Macklem argues that in external protections cases, section 25 directs the judiciary to characterize *Charter* rights so that "the restriction does not violate the *Charter*."[73] However, if this is not possible, the Aboriginal right should prevail.

However, Macklem suggests a different approach in a case of an internal restriction, which is closer to what is at stake in *Dickson*. The first step would be the same as with external protections. The judiciary must try to adopt interpretations of a *Charter* right such that the restriction does not violate the *Charter*. In this sense, Macklem echoes Pentney in suggesting that section 25 plays an interpretive role. If there are multiple possible interpretations of a *Charter* right—one in which the restriction violates the *Charter* and one in which it does not—"the judiciary ought to adopt the latter interpretation."[74] When this is not possible, however, Macklem suggests that section 25 becomes more of a justificatory provision than a shield, such that the purpose of protecting Indigenous differences must justify an internal restriction. Thus, in the case of an internal restriction with no plausible interpretation of a *Charter* right other than one that results in an infringement, "section 25 should give way, and

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71 Milward, *supra* note 69.

72 This is a broad reading of the scope of section 25. See Patrick Macklem, "Indigenous Difference and the *Charter*," *Indigenous Difference and the Constitution of Canada*, (Toronto: University of Toronto Press, 2018) 194 at 225.

73 *Ibid* at 226.

74 *Ibid*.

the restriction should be regarded as a violation and require justification under section 1."[75] In this scenario, however, instead of assessing the infringement with a traditional section 1 analysis, it is evaluated with regard to the objective of protecting Indigenous difference and whether the deleterious consequences for some community members are closely related to interests associated with Indigenous difference.

Others have suggested that the colonial legal hierarchy could be entirely reversed through section 25. For example, Bruce Wildsmith argues that the purpose of section 25 is "to maintain the special position of Canada's aboriginal peoples unimpaired by the *Charter*," meaning Aboriginal rights must be completely unabridged by the *Charter*. In a situation of "irreconcilable conflict between *Charter* rights and section 25 rights, [it is the] section 25 rights must [that] prevail."[76] Brian Slattery agrees, arguing that section 25 means "[w]here a *Charter* right impinges on a section 25 right, the latter must prevail."[77] Jane Arbour also agrees, arguing that section 25 means Aboriginal rights must be prioritized in the last instance. However, she contends there is one exception, which is sex-based equality. This idea is grounded in section 28 of the *Charter,* which is a standalone "directive to the courts to interpret *Charter* rights in a manner consistent with the equality of the sexes;" she argues this along with subsection 35(4) of the *Constitution Act*[78] "stand as clear indicators" that the interpretation and application of section 25 "must be consistent with the constitutional value of the equality of men and women."[79]

Kent McNeil has developed a robust version of the shield approach. He argues the purpose of section 25 "is to prevent the *Charter* from being interpreted in a way that infringes on any rights or freedoms that aboriginal peoples may have," and to accomplish this it must shield the actions of Indigenous governments without exception, and not only in cases of constitutional rights or irreconcilable conflict.[80] This argument

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75 *Ibid*.

76 Bruce Wildsmith, *Aboriginal Peoples and Section 25 of the Canadian Charter of Rights and Freedoms* (Saskatoon: Native Law Centre, University of Saskatchewan, 1988) 1 at 2, 23.

77 Brian Slattery, "The Constitutional Guarantee of Aboriginal and Treaty Rights" (1982) 8:1 Queen's LJ 232 at 239.

78 *Constitution Act, 1982*, *supra* note 1, s 35(4). Section 35(4) reads: "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".

79 Jane Arbour, "The Protection of Aboriginal Rights Within a Human Rights Regime: In Search of an Analytical Framework for Section 25 of *The Charter of Rights and Freedoms*" (2003) 21:1 SCLR 3 at 62.

80 Kent McNeil, "The Constitutional Rights of the Aboriginal Peoples of Canada" (1982) 4:1 SCLR 225 at 262.

starts to approach Bastarache's concurrence in *Kapp*, which suggests that it is unnecessary to find an "irreconcilable conflict" for section 25 to be engaged. It is enough to find a *prima facie* infringement without moving to the justification stage of the analysis. Sa'ke'j Henderson's conception of treaty federalism implies perhaps the strongest shield. It is grounded in the idea that the jurisdiction of Indigenous governments exists outside and independent of the settler colonial legal system, forming part of the unwritten foundation of Canadian constitutionalism and embodied in treaty-making practices.[81] The idea of a "treaty" may be understood in this context as "a set of relations between Canada and Indigenous peoples memorialized at the time of Canadian Confederation principally in the oral accounts of the negotiations provided by the Indigenous parties."[82] Henderson argues that from the perspective of the original treaties, the *Charter* represents a settler rights paradigm that never legitimately applied to Indigenous peoples since they never consented to such a constitutional arrangement.[83] Instead, the purpose of the *Charter* was to impose the rule of law on provincial and federal governments, i.e. Crown sovereignty. From a treaty federalism perspective, the *Charter* is only relevant to Indigenous peoples if they meaningfully engage with the settler rights paradigm. Henderson argues that section 25 merely articulates the immunity this pre-existing Indigenous jurisdiction implies.[84]

Overall, the scholarly commentary settles on the idea that section 25 shields Aboriginal rights in the context of "external" protections and "internal" restrictions. However, there is disagreement about how much protection should be given and how to hierarchize the relationship between Aboriginal and *Charter* rights in a conflict situation. Section 25 is seen as either shielding the action of Indigenous governments to varying degrees or as a form of a justificatory framework designed to

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81 Henderson, *supra* note 2. This acknowledgment of the legacies of treaty federalism is not limited to instances where formal treaties exist, as the presumption of inherent sovereignty remains in place, and the assertion of Crown sovereignty in the absence of a treaty lacks legal legitimacy.

82 Asch, *supra* note 2 at 4. Asch continues, "in addition, I include the evidence provided by Commissioner Morris in his published account of the promises he made on behalf of the Crown during negotiations. Specifically excluded, based on the evidence that these matters were not addressed adequately during negotiations, are the terms memorialized in the written versions, and the so-called cede and surrender clause in particular." For more discussion on this idea of treaty, see Michael Asch, *On Being Here to Stay: Treaties and Aboriginal Rights in Canada* (Toronto: University of Toronto Press, 2014).

83 James (Sa'ke'j) Youngblood Henderson, "Empowering Treaty Federalism" (1994) 58:2 Sask L Rev 242 at 286.

84 *Ibid.* Henderson writes that section 25 marks "a protective zone from the colonialists' rights paradigm" that flows from the inherent jurisdiction of Indigenous nations.

balance Aboriginal and *Charter* rights or allowing one or the other to take precedence in the last instance. Notably, most shield interpretations still presume a hierarchical relationship, even if they differ on which term in the relationship is to be prioritized. Milward's reading is one of the least hierarchical in that he articulates an application of section 25 that calls for balancing. However, a hierarchy of a lesser sort remains in the direction of the onus in the balancing exercise. Only Henderson's treaty federalism does not posit a hierarchy of rights because Aboriginal rights are based on the inherent jurisdiction of Indigenous nations outside and independent of the *Charter*.[85]

Returning briefly to the case law, we can now consider how these approaches could play out practically. The YKCA decision in *Dickson* draws on the minority reasoning in *Kapp*, but the case differs because the challenge in *Dickson* pertains to an internal restriction, not an external protection. It remains to be seen what the SCC will determine in a case that involves a *Charter* challenge to an internal restriction of a self-governing First Nation by a community member when the authority of the Indigenous government cannot be reduced to a delegated authority. It also remains to be seen what significance it will make of the distinction between delegated and inherent authority more generally. Moreover, the treaty federalism approach complicates the matter further since when citizens of a self-governing first nation use the equality rights in the *Charter* to challenge an action of their government, this could arguably be seen as a case of Indigenous people choosing to engage with the settler rights paradigm meaningfully. In this case, there may be better approaches than shielding government action, no matter how the Court perceives the source of its authority. Moreover, none of the cases so far deeply interrogate the difference between an internal restriction and an external protection.[86] The possibility that section 25 is the rule of construction for characterizing *Charter* rights is also an idea in the scholarship that the courts have yet to take up.

6. Section 25 as a Duty of Reverse Cognizability

One way of structuring such a relationship could be to understand section 25 as imposing a duty of cognizability on the courts that flows from Crown sovereignty's nation-to-nation relationship with Indigenous peoples.[87] This idea could be part of a framework for a reimagined federalism that acknowledges the independent constitutional jurisdiction of Indigenous

85 For more discussion of treaty federalism, see n 2.

86 The YKCA stated that "the fundamental question of the source of the rights and authority of the VGFN set forth in the self-government arrangements … will remain an unresolved question, at least at this level [of court]," *Dickson*, *supra* note 3 at para 91.

87 For more on the idea of reverse cognizability, see Swiffen, *supra* note 17.

sovereignty. From this perspective, section 25 would direct courts to arrive at constitutional interpretations that are cognizable with Indigenous legalities and not vice versa. For example, in *Dickson*, this could mean the courts must consider the equality provision in the VGFN Constitution and reconcile section 15(1) of the *Charter* with it. The direction of the duty is centered on undoing the settler colonial hierarchy that underpins the current jurisprudence by acknowledging the inherent jurisdiction of Indigenous peoples within federalism. This idea gives more substance to section 25 as a rule of construction. It also addresses one of the concerns with such an idea: it would create separate 'silos' of *Charter* rights. For example, one possible concern with Milward's idea of culturally sensitive interpretation is that it would create two sets of *Charter* rights—those that are limited or modified and apply to Indigenous governments and those that apply to Crown governments. Under the proposal of reversed cognizability, the courts would turn to the constitutions of self-governing first nations as a reference point. Thus, in a section 25 case, they would be required to reconcile constitutional interpretations with those of Indigenous legalities.

It is essential to distinguish this idea of reversed cognizability from the concept of "translation" proposed in *R v Marshall* and *R v Bernard*,[88] which has been critiqued as an exercise of hierarchical extinguishment (i.e. if the common law cannot understand it, then it does not exist). Instead, interpreted as a rule of construction with a duty of reversed cognizability, section 25 could allow for dialogue across legal cultures and make weaving interpretations based on mutual consent possible. This idea assumes that sovereignty is not a unitary power localized in the Crown but relational and plural. Section 25 supports a plurinational understanding of the *Charter* if it acknowledges the jurisdiction of Indigenous legalities. Rather than a form of translation, I propose something more in line with Article 27 of the *UNDRIP*, which calls on states to engage in processes with Indigenous peoples to recognize and adjudicate their Indigenous and treaty rights.[89]

On this point, it is worth noting that the VGFN Constitution foresees the establishment of a VGFN Court, though this has yet to happen. It is also relevant that the applicant in the *Dickson* case had been prepared to make alternative arguments under the VGFN Constitution, as Article IV sets out rights similar to section 15 of the *Charter*.[90] Article 7, the equality clause states:

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88 *R v Marshall*, [1999] 3 SCR 456, 177 DLR (4th) 513; *R v Bernard*, 2005 SCC 43.

89 *United Nations Declaration on the Rights of Indigenous Peoples*, UNGAOR, 61st Sess, Supp No 49, UN Doc A/RES/61/295 (2007) art 27.

90 *Dickson* YKSC, *supra* note 19 at para 104, YKSC states "Ms. Dickson can have her application addressed under the VGFN Constitution, which incidentally she pled as an alternative remedy".

> Every individual is equal before and under the laws of the Vuntut Gwitchin First Nation and has the right to equal protection and [d] equal benefits of Vuntut Gwitchin First Nation law without discrimination.

However, the Canadian courts dismissed this possibility.[91] The YKSC found that the VGFN Constitution "did not oust the *Charter*" and was more like a provincial charter of rights than a constitutional document.[92] The YKCA agreed. However, what if the Court did take the VGFN Constitution seriously as having constitutional jurisdiction? In *Harpe v Massie and Ta'an Kwäch'än Council* (2005), the Supreme Court for the Yukon Territory found that the Constitution of the Ta'an Kwäch'än Council should be interpreted as a constitutional document rather than a statute.[93] It argued that the result is that there are principles of interpretation that could apply to the interpretation of a First Nations Constitution that would not necessarily apply to the interpretation of statutes. The Court mentions the living tree doctrine and the ambiguity principle articulated in *Nowegijick* as two examples.[94] The latter principle states that ambiguous provisions should be resolved in favour of Indigenous people. However, *Nowegijick* was a case of an Indigenous group against the Crown. *Harpe* is more similar to *Dickson* in that the dispute was between members of the same First Nation. In *Harpe*, the YKSC held that in such circumstances, the *Nowegijick* principle should "result in an interpretation that is the least intrusive into the affairs of the First Nation."[95] The duty of reverse cognizability is arguably consistent with this finding in *Harpe*. Applied to the facts in *Dickson*, it would mean taking the VGFN as a constitutional document and deciding the case with reference to Article 7 with the duty of making section 15(1) of the *Charter* cognizable within that framework.

7. Conclusion

There is a legitimate objection to the idea of section 25 as a duty of reverse cognizability that the Canadian judiciary needs to be equipped

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91 In *Dickson*, *supra* note 3 at para 157, YKCA states, "the chambers judge's order made no reference to the claim under Article IV having been pursued before him," but as mentioned in n 90, the YKSC did note that Dickson had pleaded it as an alternate remedy. *Dickson*, *supra* note 3 at para 104 also notes, "the pleadings of both parties also addressed the VGFN counterpart to section 15(1) of the *Charter*, Article IV(7) of the First Nation's Constitution, which guarantees equality rights to VGFN citizens. However, that part of the pleadings was not addressed by the court below and remains outside the scope of this appeal".

92 *Dickson* YKSC, *supra* note 19 at para 119–120.

93 *Harpe v Massie and the Ta'an Kwäch'än Council*, 2005 YKSC 54 at para 37 [*Harpe*].

94 *Nowegijick v The Queen*, 1983, 144 DLR (3d) 193, [1983] SCJ No 5 (QL) at 36.

95 *Harpe*, *supra* note 93 at para 43.

to interpret and apply Indigenous legalities as the proposal requires. However, a strict shield application of section 25 may limit possibilities for the constitutional expression of Indigenous legalities if the courts opt to resolve conflicts using familiar routes rather than venturing down relatively uncharted paths that could allow for bridging or weaving legal cultures in a plurinational understanding of federalism. Sa'ke'j Henderson argues there is an obligation on the legal profession in Canada to recognize Indigenous languages and, through these languages, Indigenous legal meanings.[96] Admittedly, considerable expertise in relevant Indigenous legal traditions is needed; only some currently have it. However, such expertise exists and is developing and will grow over time. Thus, while doubts about the ability of the Canadian Courts to integrate Indigenous legalities are justified, section 25 could play a role in developing that capacity and nurturing plurination federalism. As cases like *Dickson* put the question of the relationship between Indigenous governments and the *Charter* on the table, the SCC is in a position to take some first, even tentative, steps in this direction.

[96] James (Sa'ke'j) Youngblood Henderson, "Postcolonial Indigenous Legal Consciousness" (2002) 1:1 Indigenous LJ 1 at 54.