



ONLINE CHARTER SERIES

Section 25 of the *Charter*: Indigenous Laws in Canadian Courts

Which prevails, the *Charter* or the Vuntut Gwitchin Constitution? The Vuntut Gwitchin First Nation enacted their own Constitution providing for the selection of political leaders based on their traditional laws, and their right to self-government. In a recent case, that Constitution was challenged using the *Charter of Rights and Freedoms*.

Join lawyer and PhD candidate **Ryan Beaton, University of Victoria**, as he reviews the recent *Vuntut Gwitchin* decision from the Yukon Supreme Court, and addresses the complexities of considering Indigenous Law, and section 25 of the *Charter*.

Webinar

Thursday, October 22, 2020

12:00 p.m. to 1:00 p.m. (MDT)

Register here: <https://bit.ly/33Zp8hx>



CENTRE for CONSTITUTIONAL STUDIES
Centre d'études constitutionnelles



UNIVERSITY OF ALBERTA
FACULTY OF LAW

Alberta **LAW**
FOUNDATION

Charter v. Vuntut Gwitchin Constitution

- Is this the right way to think about the case?
- The parties did frame it this way (not surprising given that opposing parties often stake out maximal positions).
- The Supreme Court of Yukon rejected this way of framing the case in its decision: *Dickson v Vuntut Gwitchin First Nation*, 2020 YKSC 22

Road Map for this Talk

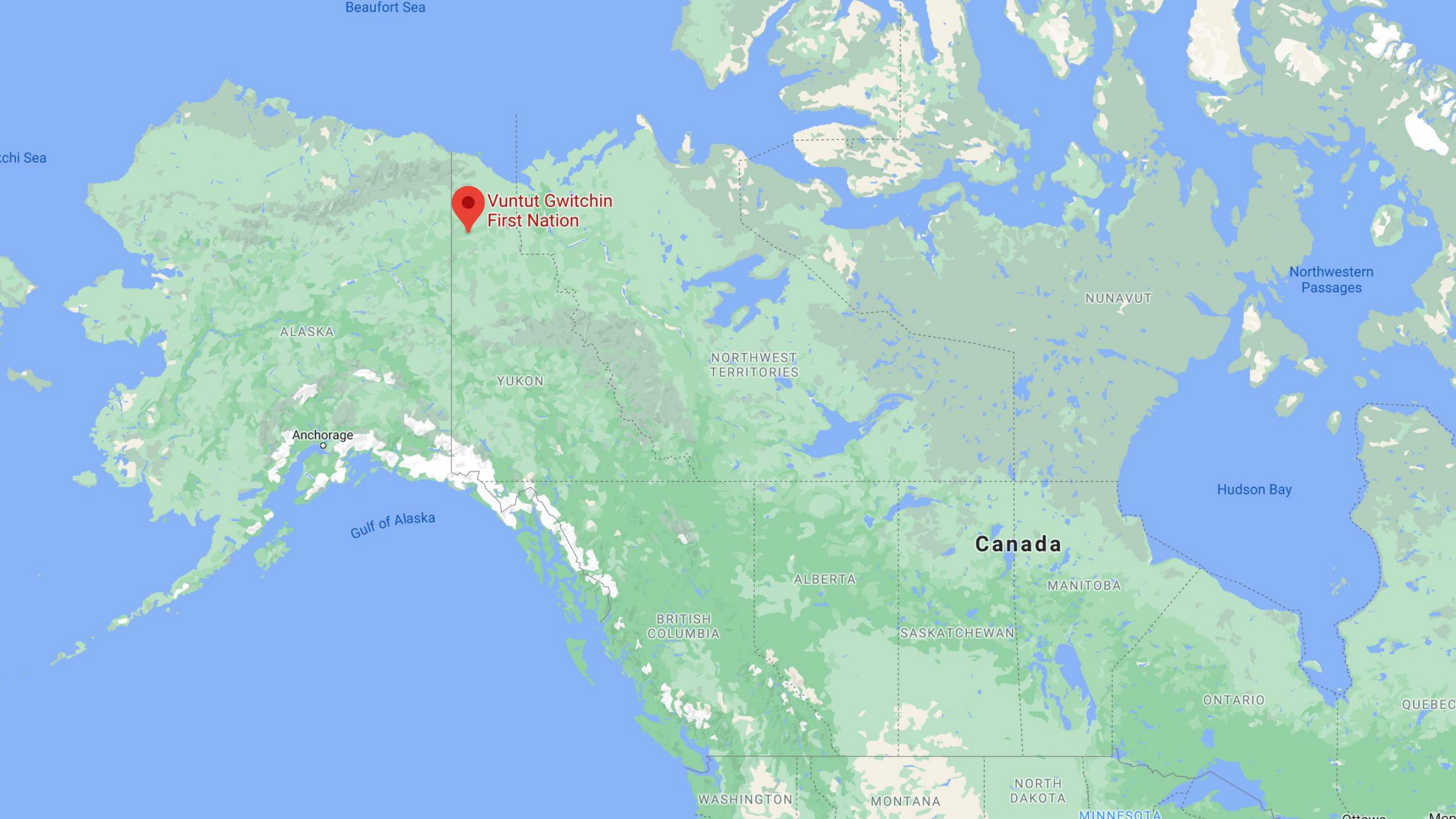
1. Background to the *Vuntut Gwitchin Case*
 - a) *Who were the parties?*
 - b) *What did they argue?*
2. Overview of key legal issues in play
 - a) *Charter ss 15, 25, 32, and CA Act, 1982 s 35*
 - b) *Inherent Indigenous Sovereignty / Self-Government*
3. Resolution of these issues in *Vuntut Gwitchin*

Vuntut Gwitchin First Nation (VGFN)

- VGFN is the respondent in *Vuntut Gwitchin*
- A First Nation in northern Yukon, part of family of Gwich'in First Nations, Athapaskan-speaking peoples whose traditional territory covers parts of Alaska, Yukon, and the Northwest Territories
- VGFN have concluded comprehensive land claims and self-government agreements with Yukon and Canada
- VGFN has adopted the Vuntut Gwitchin Constitution (VG Constitution) as a modern expression of its self-government

Vuntut Gwitchin (“People of the Lakes”)

- The Vuntut Gwitchin Traditional Territory encompasses a vast area of North Yukon approximately 55,000 square miles [...] situated in and around the present day community of Old Crow, Yukon [...] The Vuntut Gwitchin Territory was unglaciated during the last ice age and archeological evidence suggests its human use and occupation dates back as far as 40,000 years. [2020 YKSC 22, para 8.]



Vuntut Gwitchin
First Nation

ALASKA

YUKON

NORTHWEST
TERRITORIES

NUNAVUT

Northwestern
Passages

Anchorage

Gulf of Alaska

Hudson Bay

Canada

ALBERTA

MANITOBA

BRITISH
COLUMBIA

SASKATCHEWAN

ONTARIO

QUEBEC

WASHINGTON

MONTANA

NORTH
DAKOTA

MINNESOTA

Ottawa

Mon



Cindy Dickson

- Petitioner in *Vuntut Gwitchin*
- A Vuntut Gwitchin citizen
- Living in Whitehorse; would find it difficult to relocate to Old Crow, in part because of the medical care required by her 15-year-old son
- Wanted to run for a position on VGFN Council and to serve in that capacity while continuing to live in Whitehorse

VGFN Constitution Residency Requirement

- But her nomination papers to run for VGFN Council were rejected in 2018, because the VGFN Constitution “required VGFN citizens to be ‘resident on settlement land’ to be eligible to be elected as Chief or Councillor”: 2020 YKSC 22, para 34.

VGFN Constitution Residency Requirement

- An amendment to the residency requirement was adopted by the VGFN General Assembly in 2019:
 - If an eligible candidate for Chief and/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.

[2020 YKSC 22, para 43]

The Positions of VGFN and Ms Dickson

- The primary argument advanced by Ms Dickson was that the residency requirement violated her equality rights under section 15 of the Canadian *Charter* (see *Corbiere* [1999] 2 S.C.R. 203)
- VGFN argued that the *Charter* did not apply to VGFN laws or bodies of government, as these were expressions of inherent Indigenous powers of self-government and nothing in the self-government agreement between VGFN, Canada, and Yukon expressly stated that the *Charter* applied to VGFN
- VGFN also pointed to section 25 of the *Charter* as a shield

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Canadian Charter section 15(1)

- **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.
- (In *Corbiere*, the SCC recognized “Aboriginality-residence” (living off-reserve with Indian status) as an analogous ground.)

Canadian Charter section 25

- **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.

Constitution Act, 1982 section 35(1) and 35(3)

- **35.** (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

[...]

- (3) For greater certainty, in subsection (1) “treaty rights” includes rights that now exist by way of land claims agreements or may be so acquired.

(Note the self-government agreement between VGFN and Canada explicitly states that it does not fall under s 35.)

Canadian Charter section 32

- **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.

Indigenous Sovereignty / Self-Government

- The obvious reality on the ground when Europeans arrived in “North America”
- This reality was recognized and accepted by European treaty negotiators:

“Europeans found no difficulty adapting to Aboriginal protocols in North America. They learned to make condolence before a conference with the Six Nations, to give and receive wampum, to smoke the pipe of peace on the prairies, to speak in terms of ‘brothers’ (kinship relations), not ‘terms and conditions’ (contract relations).” [RCAP Report, vol. 1 at 122; see also e.g. *Restoule v Canada*, 2018 ONSC 7701 at para 214]

Indigenous Sovereignty / Self-Government

- The Supreme Court of Canada has itself stated: “Treaties serve to reconcile pre-existing Aboriginal sovereignty with assumed Crown sovereignty” (*Haida Nation v British Columbia*, 2004 SCC 73, at para 20)
- In sum, Indigenous sovereignty is the default setting and “Indigenous legal traditions are among Canada’s legal traditions. They form part of the law of the land.” (*Pastion v Dene Tha’ First Nation*, 2018 FC 648, at para 8)

Indigenous Sovereignty / Self-Government

- “Despite the occasional recognition of Indigenous law by Canadian courts, the overall tendency was, for a long period, one of denial and suppression.” (*Pastion*, 2018 FC 648, at para 9)
- In para 10, Justice Grammond cites UN Declaration on the Rights of Indigenous Peoples, Article 34:
 - 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.

Indigenous Sovereignty / Self-Government

- Canada's 2018 "Principles Respecting the Government of Canada's Relationship with Indigenous Peoples" includes (as Principle 4):

"The Government of Canada recognizes that Indigenous self-government is part of Canada's evolving system of cooperative federalism and distinct orders of government."

(available: <https://www.justice.gc.ca/eng/csj-sjc/principles.pdf>)

- BC has adopted a *Declaration on the Right Indigenous Peoples Act*
- Question is not whether Indigenous self-government is to be recognized in Canadian law, but what shape it will take

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3. **Resolution of these issues in *Vuntut Gwitchin***

Canadian Charter section 32

- **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.

Does section 32 include VGFN government?

- The Court found that “there is merit” (para 129) in both the view (1) that the authority of VGFN laws is grounded in inherent VGFN self-government (sovereignty) *and* the view (2) that this authority is derived from enacting legislation by Canada and Yukon.
- Notably, the Court explained that federal legislation is required to make VGFN laws binding against third parties (or at least to bind with state powers of enforcement).

Does section 32 include VGFN government?

- The Court concluded at para 130 that
“the *Charter* applies to the residency requirement of the VGFN Constitution whether viewed from an exercise of inherent right or an exercise of the VGFN Self-Government Agreement implemented by federal and territorial legislation. Both are parts of Canada’s constitutional fabric.”
- So, according to the Court, yes, section 32 in principle makes the *Charter* applicable to VGFN government, including its Constitution.

YKSC: No violation of section 15(1)

- The Court at para 145 distinguished *Corbiere*, on several bases, notably that
- “it is not the federal government that imposes the residency requirement in the *Indian Act* but the VGFN citizens present and voting at the VGFN General Assembly, exercising their inherent right of self-government” and
- “Unlike *Corbiere*, the VGFN citizens have the right to vote regardless of residency. So no one is deprived of voting in the Chief and Council elections regardless of where they reside in Canada.”

YKSC: No violation of section 15(1)

- The Court found, at para 153: “The purpose and effect of the residency requirement is to enhance the homeland and preserve it for all VGFN citizens.”
- The Court concluded, at para 156: “it cannot be discriminatory to require a legislator to reside in the Settlement Lands which will be the focus of the legislative function of Chief and Council.”
- Thus the Court found that the VGFN residency requirement did not infringe Ms Dickson’s rights under section 15 of the *Charter*.

But if there was a violation ...

- The Court said that it would in that case have to consider whether the *Charter* applied to the VGFN Constitution, and to the residency requirement in particular.
- Two issues:
 - (1) whether section 25 shields VGFN government and laws from *Charter* review, and to what extent; and
 - (2) whether section 25 ought to preclude *Charter* review in the first place.
- (Bonus issue: VGFN and invocation of Notwithstanding Clause)

Does section 25 shield VGFN Constitution?

- **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.

Indigenous self-government as s 35 right

- **35.** (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
- If self-government is an existing Aboriginal right under s 35 and the adoption of the VGFN Constitution is an expression of this right, does section 25 therefore shield the VGFN Constitution from the application of *Charter* rights and freedoms?

A qualified “yes” from the YKSC

- The Court explained at para 175 that counsel for Ms Dickson argued that “the purpose of s. 25 is to protect aboriginal collective rights from abrogation or derogation by the Canadian state, not the First Nation governments to use as a shield from *Charter* scrutiny while infringing the *Charter* rights of their own citizens.”
- The Court, para 176: “I reject this position because it completely emasculates s. 25 from a First Nation government perspective. Such an interpretation would result in treating First Nation governments exactly like non-First Nation governments”

A qualified “yes” from the YKSC

- The Court thus agreed that section 25 provides a degree of protection to Indigenous self-government: “The purpose of s. 25 is to ensure First Nation self-government rights be woven into Canada’s constitutional fabric and protected as courts seek to reconcile aboriginal rights, treaties or other rights or freedoms with the interests of all Canadians.” (para 193; see also para 180)

A qualified “yes” from the YKSC

- The residency requirement here ought to be protected: “In my view, the constitutional character of the residency requirement is established, in any event, by the fact it is not simply a law passed by Chief and Council but is the will of the First Nation expressed at its General Assembly as part of its Constitution. [...] Its constitutional character is established by that fact that it is based upon hundreds of years of leadership by those who reside on the land, understand the essence of being Vuntut Gwitchin and that the custom or tradition exists today.” (para 207)

Should section 25 preclude *Charter* review?

- In other words, should a Court first conduct a full analysis of the alleged *Charter* right / freedom violation, then move to section 25 if necessary? Or begin with section 25 analysis whenever there is a potential conflict between a *Charter* right / freedom and a right / freedom shielded by section 25?
- This issue split the Supreme Court of Canada in *R v Kapp* (2008)
- The Court in *Vuntut Gwitchin* adopts the majority approach from *Kapp*: “In my view, there must first be a determination that there is a s. 15 breach that cannot be saved by s. 1 and then proceed to a s. 25 analysis.” (para 176)

Does *Vuntut Gwitchin* signal a new approach?

- The case brings to the fore issues that have been gaining traction in Canadian case law, notably issues relating to the space of inherent Indigenous jurisdiction / sovereignty in the Canadian constitutional landscape.
- The Court offers a clear recognition of inherent Indigenous self-government, while adopting a nuanced approach to the interplay between the exercise of Indigenous self-government and the invocation of *Charter* rights.