Constitutional Reconciliation and the *Canadian Charter of Rights and Freedoms*[1]

*Amy Swiffen**

This paper considers the relationship between the Charter of Rights and Freedoms *and Indigenous self-determination in the context of constitutional reconciliation in Canada. It begins by reviewing case law and legal scholarship on the application of the* Charter *to Aboriginal governments, with a particular focus on the debates over the interpretation of section 25, which stipulates that* Charter *rights cannot "abrogate or derogate" from Aboriginal and treaty rights. I show that, while different options have been suggested for how the* Charter *could be interpreted in the case of a conflict between* Charter *rights and Aboriginal rights, each of these possibilities creates problems of its own. Fundamentally, the seemingly irresolvable tensions that emerge between the various interpretations of section 25 reflect a deeper problem that it is necessary for a project of constitutional reconciliation to address: the underlying assumptions of Crown sovereignty and the place of Indigenous legal cultures in Canadian federalism. Ultimately, the paper argues that the* Charter *does have a role in the articulation of a nation-to-nation relationship between Canada and Indigenous peoples because it imposes a duty on courts to develop interpretations that are cognizable within Indigenous legal traditions.*

Ce document examine la relation entre la Charte des droits et libertés *et l'autodétermination autochtone dans le contexte de la réconciliation constitutionnelle au Canada. Il commence par examiner la jurisprudence ainsi que les connaissances juridiques relatives à l'application de la* Charte *aux gouvernements autochtones, en accordant une attention particulière aux débats sur l'interprétation de l'article 25, qui stipule que les droits garantis par la* Charte *ne peuvent " abroger " les droits ancestraux et issus de traités ou " déroger " à ceux-ci. Je démontre que, bien que différentes options aient été suggérées quant à la manière dont la* Charte *pourrait être interprétée dans le cas d'un conflit entre les droits de la* Charte *et les droits des Autochtones, chacune de ces possibilités crée des problèmes qui lui sont propres. Essentiellement, les tensions apparemment insolubles qui se dessinent entre les diverses interprétations de l'article 25 reflètent un problème plus profond qu'un projet de réconciliation constitutionnelle doit résoudre : les hypothèses sous-jacentes de la souveraineté de la Couronne et la place des cultures juridiques autochtones au sein du fédéralisme canadien. Finalement, le document soutient que la* Charte *joue un rôle dans la formulation d'une relation de nation à nation entre le Canada et les peuples autochtones, car elle oblige les tribunaux à élaborer des interprétations compatibles avec les traditions juridiques autochtones.*

* Associate Professor, Department of Sociology and Anthropology, Concordia University, Montréal, Canada.

1 I would like to thank Kerry Wilkins, Joshua Nichols, Sakej Henderson, Gordon Christie and Michael Asch, for their comments on earlier versions of this paper. I would also like to thank the anonymous reviewers whose comments improved the paper substantially.

Introduction: Constitutional Reconciliation and Section 25

This paper considers the meaning of section 25 of the *Charter of Rights and Freedoms*[2] in the context of constitutional reconciliation. It begins by reviewing case law and legal scholarship on the application of section 25, with a focus on the 2008 case *R v Kapp,*[3] in which the Supreme Court of Canada heard a *Charter* challenge to federal fishing regulations that gave priority to the Aboriginal rights of Indigenous fishers. While the case is most well-known for its equality reasoning related to section 15 of the *Charter*, the concurring minority reasons drew instead on section 25. However, there is little academic analysis of this aspect of the *Kapp* decision. This paper identifies several problems with the application. If we turn to legal scholarship on section 25, the situation does not improve. Different options have been suggested for how section 25 could be interpreted to avoid the kinds of problems that emerge in *Kapp*. Yet, each of these possibilities creates new problems. I suggest not that one or another of the current interpretations on offer is correct, but rather that the tensions that emerge among them reflect a deeper problem necessary for a project of legal reconciliation to address, which is the status of Indigenous legal cultures in Canadian federalism.

Most of the existing case law pertaining to section 25 involves situations where the *Charter* has been used by non-Indigenous individuals to challenge the non-derogation clauses found in statutes in the *Indian Act*,[4] the *Fisheries Act*[5], etc., which grant priority to Aboriginal rights in certain contexts. These cases involve challenges to "external protections" for Aboriginal rights that otherwise would conflict with the *Charter*.[6] In this paper, I ask how section 25 would work in challenge to "internal restrictions" by a law or action of an Indigenous government.[7]

2 *Canadian Charter of Rights and Freedoms,* Part I of the *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (UK), 1982**,** c 11 [*Charter*].

3 *R v Kapp*, 2008 SCC 41 [*Kapp*].

4 *Indian Act*, RSC 1985, c I-5.

5 *Fisheries Act,* RSC 1985, c F-14.

6 Patrick Macklem, *Indigenous Difference and the Constitution of Canada*, (Toronto, Ontario: University of Toronto Press, 2001) at 231.

7 "Indigenous government" is a deceptively simple term as discussed below there are various types of entities that fall within this category and at this stage they do not all have the same legal status in Canada's settler colonial legal system.

This type of scenario has yet to come before the courts and legal commentary fails to adequately address it.[8] With this in mind, the objective of the paper is threefold. First, to identify the limits of the current section 25 framework in the context of Indigenous governments. Second, to draw on the sociological distinction between governments and peoples to help shed light on the source of some of the difficulties encountered by the current legal approaches. Third, to develop an application of section 25 that can provide an anchor point for understanding the *Charter* in relation to the jurisdiction of Indigenous nations through the creation of a system of Aboriginal Charter Courts with jurisdiction over *Charter* matters. Ultimately, I argue that section 25 has a role in constitutional reconciliation in Canada because it imposes a duty on *Charter* reasoning to be cognizable with Indigenous legal cultures and reflects a post-colonial legal consciousness.[9]

Judicial Interpretation of Section 25: So far, A Shield for Aboriginal Rights

Since the enactment of the *Constitution Act, 1982,*[10] most Aboriginal rights claims have been brought before the courts within the context of section 35.[11] Yet, while there have been fewer cases involving section 25, it is still an important provision. It is the only explicit reference to Aboriginal rights in the *Charter of Rights and Freedoms*. Section 25 reads:

> 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.[12]

8 As discussed below, the Supreme Court of Canada also seems reluctant to tackle the question, at least for the times being. It gave limited treatment of s. 25 in *Kapp* and *R v Taypotat* (2015).

9 "Constitutional reconciliation" is understood to mean the incorporation of indigenous law within Canadian constitutional law. It is similar to what Brenda Gunn describes a "post-colonial legal consciousness," which involves "incorporating Indigenous legal values within the Canadian legal system." See Brenda Gunn, "Protecting Indigenous Peoples' Lands: Making Room for the Application of Indigenous Peoples' Laws Within the Canadian Legal System" (2007) 6:1 Indigenous LJ 31 at 38.

10 *Constitution Act, 1982,* s 35, being schedule B to the Canada Act 1982 (UK), 1982 c 11.

11 Celeste Hutchison, "Case Comment on *R. v. Kapp*: An Analytical Framework for Section 25 of the *Charter*" (2007) 52:1 McGill LJ 173.

12 *Charter*, *supra* note 2, s 25.

Scholars have pointed out that at the time the *Charter* was being drafted, the biggest perceived threat to Aboriginal rights, including treaty and other rights, was the equality provisions in section 15.[13] According to Hutchison, the legislative record suggests that section 25 was inserted to serve as direction for the judiciary to not interpret the *Charter* in ways that undermine the rights of Indigenous communities or peoples.[14] Similarly, Jane Arbour argues,

> [T]he original and sustained intent of the drafters … was to ensure that the protection of rights by the *Charter* would not affect the rights of Aboriginal peoples in Canada. … … [The] purpose for section 25 can be stated: to prevent *Charter* rights and freedoms from diminishing other rights and freedoms of Aboriginal peoples in Canada, whether those rights are in the nature of Aboriginal, treaty, or "other" rights.[15]

Arbour points to other sections of the *Charter* to bolster this view, such as the corresponding provisions in sections 26 to 29. These sections coincide with the purpose of section 25, as they indicate the legislature intended to increase and protect rights and freedoms with the provisions, rather than restrict them.[16] This legislative intent seems to be reflected in the words of Roger Tassé, Deputy Minister of Justice at the time, who stated the provision was "a rule of construction for the *Charter* in its application to the rights of Aboriginal peoples."[17]

However, former Justice Minister Jean Chrétien framed the provision in a slightly different manner, emphasising that section 25 would not create rights but merely protect Aboriginal rights by preventing other provisions of the *Charter* from infringing upon them.[18] Chrétien's formulation suggests the provision was intended as more of a shield to protect Aboriginal rights that are already recognised elsewhere, not as a rule of construction. In Tasse's formulation of the provision as a rule of construction, however, the provision is relevant at the outset of a *Charter* analysis, at least when Aboriginal rights are involved. In contrast, Chrétien's formulation implies its relevance lies not in the interpretation of *Charter* rights and *prima facia* infringement, but at the justification stage only after an infringement is found. The difference is seemingly subtle,

13 Jane Arbour, "The Protection of Aboriginal Rights Within a Human Rights Regime: In Search of an Analytical Framework for Section 25 of the The Charter of Rights and Freedoms" (2003) 21:1 SCLR 3 at 43; See also Hutchinson, *supra* note 11.

14 Hutchison, *ibid* at 148.

15 Arbour, *supra* note 13 at 36.

16 *Ibid* at 37.

17 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*, 32-1, vol 4 No 49 (30 January 1981) at 93 cited in Hutchison, *supra* note 11 at 178.

18 Hutchison, *supra* note 11 at 178.

but turns out to be an important signpost for mapping out how the legal and scholarly debate over the meaning of section 25 has unfolded.

The Supreme Court of Canada has commented on section 25 only a handful of times. The *Quebec Secession Reference*[19] indicates in passing that section 25 was included in the *Charter* to protect minority rights. This idea has lead lower courts to find that section 25 is less a rule of construction, and more of a shield to ensure that Aboriginal rights — understood as minority rights defined in treaties, section 35, statute, and case law — are not diminished by the application of the *Charter*.[20] For example, in *R v Redhead*, Oliphant J. states "the section does not confer new rights upon aboriginal people. It merely confirms certain rights held by aboriginal people."[21] Similarly, the court stated in *Campbell v British Columbia*, "the section is meant to be a 'shield' which protects aboriginal, treaty, and other rights from being adversely affected by provisions of the *Charter*."[22] Williamson J. continues, "the purpose of this section is to shield the distinctive position of aboriginal peoples in Canada from being eroded or undermined by provisions of the *Charter*."[23] The Federal Court of Appeal came to this conclusion in *Shubenacadie Indian Band v. Canada* as well, writing "section 25 of the *Charter* has been held to be a shield which protects the rights mentioned therein from being adversely affected by other *Charter* rights."[24] Most recently, in *Kapp*, Bastarache J.'s minority reasoning reaffirmed this idea, stating the fundamental purpose of section 25 is "protecting the rights of aboriginal peoples where the application of the *Charter* protections for individuals would diminish the distinctive, collective and cultural identity of an aboriginal group."[25]

This case law reflects an understanding that section 25 is relevant only in cases where Aboriginal rights infringe the *Charter*, thus implying it is triggered only after finding an infringement, not at the outset of the analysis when the

19 *Reference Re Secession of Quebec*, [1998] 2 SCR 217 at para 82, 161 DLR (4th) 385 [*Quebec Secession Reference*].

20 See Hutchison, *supra* note 11 at 180; See e.g. *R v Steinhauer* (1985), 63 AR 381 at paras 19, 58, 15 CRR 175 (Alta QB) [*Steinhauer*].

21 *R v Redhead* (1995), 103 Man R (2d) 269 at para 83, 99 CCC (3d) 559 (Man QB). It is worth noting the current wording of section 25(b) includes reference to rights that exist from land claim agreements *and those that may be so acquired*. This means Oliphant's statement must be understood to mean only that new Aboriginal rights are not recognized by section 25.

22 *Campbell v British Columbia (AG)/Canada (AG) & Nisga'a Nation,* 2000 BCSC 1123 at para 156.

23 *Ibid* at para 158.

24 *Shubenacadie Indian Band v. Canada (Human Rights Commission)* (2000), 187 DLR (4th) 741 at para 43, 184 FTR 10 (FCA) [*Shubenacadie*].

25 *Kapp*, *supra* note 3 at para 89.

violation is merely claimed.[26] In *Shubenacadie*, for example, the court held that "section [25] can only be invoked as a defence if it had been found that the appellant's conduct had violated subsection 15(1) of the *Charter*."[27] Similarly, in *Grismer v Squamish Indian Band* the court proceeded with a *Charter* analysis first and, upon determining that there was a justifiable infringement of subsection 15(1), held that there was no need to consider the section 25 arguments.[28] These cases reflect an approach whereby section 25 is seen as a possible justification for a *Charter* infringement.[29] Overall, the courts see section 25 not as a rule of construction so much as a shield for Aboriginal rights that infringe the *Charter*.[30] In this sense, section 25 could be likened to an alternative or secondary justificatory provision in addition to section 1 in *Charter* cases where Aboriginal rights are engaged.

Scholarly Debate Over Section 25: Shield Provision, Justificatory Framework or Interpretive Prism?

On the surface, the scholarly commentary on section 25 can be roughly categorized into two perspectives. On the one hand, there are scholars who see section 25 as calling on the courts to construct *Charter* rights in culturally sensitive ways that do not undermine Aboriginal rights.[31] The first articulation of this position was offered by William Pentney shortly after the *Charter* came into force. Pentney developed an application of section 25 "intended only as an interpretive guide and not as an independently enforceable guarantee of aboriginal and treaty rights."[32] As Thomas Isaac points out, he argued section

26 See *Steinhauer supra* note 20; See also *Thomas v. Norris*, [1992] 2 CNLR 139 at para 31, 1992 CanLII 354 (BCSC).

27 *Shubenacadie, supra* note 24 at para 43.

28 *Grismer v. Squamish Indian Band,* 2006 FC 1088 [*Grismer*].

29 It is possible the court in *Grismer* was deferring the trouble of ascertaining whether there were any relevant "aboriginal, treaty or other rights" to which s. 25 might apply in that context. The court may have preferred just to leave those worms in that can. Nonetheless, the fact that section 25 was not addressed until after an infringement was found suggests the courts did not regard it as a rule of construction.

30 Hutchison, *supra* note 11 at 180.

31 See Royal Commission on Aboriginal Peoples, *Bridging the Cultural Divide: A Report on Aboriginal People and Criminal Justice in Canada* (Ottawa, Ontario: Canada Communication Group Publishing, 1996) at 467-8; See also David Milward, *Aboriginal Justice and the Charter: Realising a Culturally Sensitive Interpretation of Legal Rights* (Vancouver, British Columbia: UBC Press, 2012) at 66-9; See also Timothy Dickson, "Section 25 and Intercultural Judgement" (2003) 61:2 UT Fac L Rev 141 at 157-8.

32 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.

25 is triggered at the first stage of a *Charter* analysis and functions as an "interpretive prism" throughout the analysis that permits the courts "to choose the interpretation of a *Charter* right that is "the least intrusive on aboriginal rights."[33] As such, the provision has a role to play before it has been determined if an infringement has occurred. However, Pentney also stipulates in the case of actual conflict where an Aboriginal right and a *Charter* right or freedom cannot be reconciled using interpretive flexibility, the *Charter* right should be given effect. This reflects a hierarchy that prioritises *Charter* rights over Aboriginal rights in the sense that the latter can be justifiably infringed by the former, but not the other way around. Pentney does not explain how this can be reconciled with the "shall not abrogate or derogate from" language in section 25 in the last instance.

Another perspective that has emerged in the scholarly literature suggests that section 25 is not a rule of construction, but a shield that protects Aboriginal rights that infringe the *Charter*. The function of the provision from this perspective is to justify the infringement of *Charter* rights or grant immunity from the *Charter* to ensure Aboriginal rights are not derogated or abrogated.[34] For example, Bruce Wildsmith argues that section 25 should play a shielding role when Aboriginal rights come into conflict with individual *Charter* rights and freedoms.[35] He writes, the "purpose and effect" of section 25 is "to maintain the special position of Canada's aboriginal peoples unimpaired by the *Charter*."[36] His view is that Aboriginal rights must be completely unabridged by the *Charter*. In a situation of "irreconcilable conflict between *Charter* rights or freedoms and section 25 rights or freedoms, section 25 rights or freedoms prevail."[37] Brian Slattery agrees with this interpretation, writing section 25 is more than simply a canon of interpretation; rather, it means "[w]here a *Charter* right impinges on a section 25 right, the latter must prevail."[38] From these perspectives, there is no role for section 25 in the construction of *Charter* rights

33 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.

34 See Kent McNeil, "Aboriginal Governments and the *Canadian Charter of Rights and Freedoms*" (1996) 34:1 Osgoode Hall LJ 61; See also Kerry Wilkins, "… But We Need the Eggs: The Royal Commission, the Charter of Rights, and the Inherent Right of Aboriginal Self-Government" (1999), 49:1 UTLJ 53.

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

36 *Ibid* at 2.

37 *Ibid* at 23.

38 Brian Slattery, "The Constitutional Guarantee of Aboriginal and Treaty Rights" (1982) 8:1 Queen's L J 232 at 239. It is interesting to note that Slattery was a key constitutional adviser to RCAP and RCAP took a different view.

and their infringement. Rather, it is a mechanism to adjudicate conflicts between two potentially incompatible sets of rights.

A stronger version of the shield approach has been articulated by Kent McNeil, who argues the "obvious" purpose of section 25, read in the context of sections 35 and 32 of the *Constitution Act*, "is to prevent the *Charter* from being interpreted in a way that infringes on any rights or freedoms the aboriginal peoples may have."[39] McNeil concludes that section 25 completely shields all Aboriginal rights — including the right to self-government — from *Charter* scrutiny.[40] This goes further than Wildsmith's version in that it is not only in cases of irreconcilable conflict that *Charter* rights would give way. In McNeil's view, the only way to ensure Aboriginal rights are not abrogated or derogated is to understand section 25 as a grant of immunity for Indigenous governments from the *Charter*. This position takes note of the fact that Indigenous governments already operate outside the scope of the *Charter*, and that "Aboriginal peoples should not only be consulted, but their consent should be a prerequisite to the application of the *Charter* to their governments."[41] Several other authors agree with McNeil. For example, Kerry Wilkins writes, "from a legal standpoint…the *Charter* has no application to inherent-right communities in the exercise of their self-government right."[42] James Sakej Henderson also finds section 25 creates judicial and legislative immunity for Aboriginal governments within the *Charter*, arguing it carves out "a protective zone from the colonialists' rights paradigm" within the *Charter* itself.[43]

Compared to Pentney's interpretative application of section 25, the shield approaches have received more support among legal scholars. However, not all have embraced the idea that section 25 grants immunity to Indigenous governments from *Charter* challenge. Several have argued instead that it offers a potential justification for infringing *Charter* rights or freedoms. Patrick Macklem has articulated such an interpretation, describing section 25 as a shield that functions as a justificatory provision. He agrees section 25 "protects federal, provincial and Aboriginal initiatives" that make a distinction between Aboriginal and non-Aboriginal people "to protect interests associated with culture, territory, sovereignty, and the treaty process."[44] This means laws that

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

40 McNeil, *supra* note 34 at 77.

41 *Ibid* at 72.

42 Wilkins, supra note 34 at 119.

43 James Youngblood Henderson, "Empowering Treaty Federalism" (1994) 58:2 Sask L Rev 242 at 286.

44 Macklem, *supra* note 6 at 225.

make a distinction between Aboriginal and non-Aboriginal people found to be infringing the *Charter* would have to be justified under section 25 by the objective of protecting Indigenous difference.

However, Macklem makes a further distinction between "external protections" of Indigenous difference and laws of Aboriginal governments that place "internal restrictions" on the rights of some community members. External protections would include provisions in the *Fisheries Act* and the *Indian Act* that infringe section 15 (1) of the *Charter* with the goal of protecting Indigenous difference. So too would some actions of Indigenous governments — for example, an election code that limits the right to vote to recognized community members. Macklem argues these types of laws are external protections of Indigenous difference and should be shielded from *Charter* scrutiny by section 25. In contrast, internal restrictions — laws of an Indigenous government that infringe the *Charter* rights of some community members — would garner a different response. In this type of case, Macklem suggests section 25 should apply differently. In contrast to external protections that are simply shielded from *Charter* scrutiny, internal restrictions must be justified in relation to the purpose of protecting Indigenous difference.

Thus, Macklem's approach involves a court first assessing whether Aboriginal rights are engaged in a *Charter* challenge. If so, it would then assess whether the government action in question is an external or internal protection. If an internal restriction is found to violate the *Charter*, Macklem echoes Pentney in suggesting that section 25 plays an interpretive role. If there are two plausible interpretations of a *Charter* right — one in which the internal restriction violates the *Charter* and one in which it does not — "the judiciary ought to adopt the latter interpretation."[45] If there is no plausible interpretation other than one that results in a *Charter* violation, "section 25 should give way and the restriction should be regarded as a violation and require justification under section 1."[46] At this point, the usual test for justification under section 1 would proceed with the stipulation that instead of assessing infringement in relation to principles of fundamental justice, an Indigenous government's objective is assessed in relation to protecting Indigenous difference. An internal restriction that infringes a *Charter* right would be valid, therefore, if it had the compelling and substantial objective of protecting Indigenous difference and if the deleterious consequences for

45 *Ibid* at 225.
46 *Ibid* at 232.

some members of the community bore a close relation to interests associated with Indigenous difference.[47]

In assessing Macklem's proposal, it is important to note how the hierarchy of rights pointed out in Pentney's interpretation is also at work. In the last instance, the onus is on Indigenous governments to justify their actions and potentially have them rendered void by the courts. Wilkins captures this problem in his characterization of section 25 advanced by the Royal Commission on Aboriginal Peoples, which states that section 25 protects Aboriginal rights — including self-government — "from 'unreasonable' or 'disproportionate' derogation at the hands of the *Charter*," but, as Wilkins points out, "the burden rests on the communities having such rights to show that any derogation would be disproportionate or unreasonable."[48] Wilkins describes this as the most defensible interpretation of RCAP's view of section 25. It might also be the most defensible view of Macklem's. In both, *Charter* rights and freedoms take precedence of Aboriginal rights in the last instance.

More recently, Jane Arbour has attempted to bridge the gap between the interpretive, and shield understandings of section 25, though in a different way than Macklem. Arbour argues the provision should play an interpretive function starting at the outset of a *Charter* analysis. When Aboriginal or treaty rights are engaged, the section imposes a duty on the courts to find interpretations that uphold both types of rights. In cases where this is not possible, i.e. of actual conflict, section 25 operates as a shield to protect the Aboriginal right, which means the *Charter* right or freedom gives way.[49] Arbour suggests if section 25 is triggered and it is not possible for the Court to arrive at interpretations that uphold both Aboriginal and *Charter* rights, the Court should protect the Aboriginal right. Thus, like Macklem, Arbour suggests in cases of irreconcilable conflict a hierarchy of rights is necessary. Unlike Macklem, Arbour argues it is the protection of Aboriginal rights that must take precedence.[50] Yet, a question remains: if section 25 truly imposes a duty to develop interpretations

47 *Ibid* at 231.

48 Wilkins, *supra* note 34 at 114.

49 Arbour, *supra* note 13.

50 Except in cases of where sex-based equality rights are at stake. See Arbour, *supra* note 13 at 62. Arbour notes section 28 of the *Charter* is "a directive to the courts to interpret the scope of *Charter* rights in a manner consistent with the equality of the sexes" and that, "subsection 35(4) and section 28 of the *Charter* (and indeed section 15 of the *Charter*) stand as clear indicators that the interpretation and application of the *Charter* (including section 25) and the determination of the existence and scope of Aboriginal and treaty rights must be consistent with the important constitutional value of the equality of men and women."

that bridge legal cultures, why is there a need to also create a hierarchy between them?[51] If the latter is possible, why is the former necessary?

Most recently, David Milward has attempted to avoid this problem by proposing another version of the interpretive application of section 25; one that he characterizes as non-hierarchical in that it aims to balance the two sets of rights by using culturally sensitive modes of interpretation.[52] As Milward writes, the goal is to not sacrifice one set of rights for another while at the same time "[enabling] Aboriginal communities to pursue what they may decide for themselves to be their own collective goals."[53] He refers to the Supreme Court decision in *Dagenais v Canadian Broadcasting Corp*[54] to suggest section 25 means that the rights must be balanced in the section 1 proportionality analysis. Crucially, however, this analysis must proceed in culturally sensitive ways. Thus, Milward's focus is on Aboriginal rights as shaping the interpretation of *Charter* infringements.[55] To exemplify this, he proposes culturally sensitive interpretations of various *Charter* rights inspired by case law in Canada, the USA, and Australia.

One issue with Milward's proposal is that it does not fully resolve the hierarchy of rights issue it intends to address. While this approach is non-hierarchical, Milward acknowledges that it still means *Charter* rights would be applied to Indigenous governments, just in "limited" and "modified" forms.[56] The burden of proof in a section 1 analysis remains on the government seeking to justify a *Charter* infringement. In Milward's proposal, this means that in a section 25 case involving an internal restriction of an Indigenous government the burden would be on the Indigenous government to justify infringing *Charter* rights. The onus is not to show the infringement of an Aboriginal right is justified by the *Charter*. Thus, Milward's approach succeeds only in creating a lesser sort of hierarchy, since it requires that infringements of *Charter* rights by Aboriginal governments be justified and not the other way around.

Overall, legal scholarship on section 25 reads the provision as either granting immunity to Aboriginal governments (McNeil, Henderson, Wilkins), or as some form of justificatory framework designed to balance Aboriginal rights

51 Presumptions about sovereignty. Ultimately, most commentary assumes that law requires a single locus of sovereignty — some ultimate point of highest authority.

52 Milward, *supra* note 31 at 71.

53 *Ibid*.

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

55 The implicit hierarchy created between settler state and indigenous is not addressed. Rather, the legal relationship between them is assumed to be subject to sovereign, as opposed to nation to nation.

56 Milward, *supra* note 31 at 71.

and *Charter* rights, while allowing one or the other to take precedence in the last instance (Macklem, Arbour). Milward's reading is the least hierarchical in that he articulates an interpretive application of section 25 that calls for culturally sensitive interpretation of *Charter* rights to ensure the protection of Aboriginal rights.[57] In this approach, *Charter* rights would be limited and modified by Aboriginal rights, but there remains a hierarchy of a lesser sort. In this sense, none of the proposals fully address the settler-colonial power relationship that subtends the question of the application of section 25.

R v Kapp: Section 25 as a Shield and a Justificatory Framework

The legal commentary discussed above, developed after the implementation of the *Charter* and Milward's reading of section 25 seems to be the only one that has emerged since the 2008 Supreme Court of Canada decision in *R v Kapp*, in which Bastarache J., writing for a concurring minority, discusses the application of section 25.[58] *Kapp* is much more well-known for the majority discussion of section 15 of the *Charter*, and in particular section 15(2). However, the reasoning offered by Bastarache J. is relevant to consider in light of the preceding discussion in that it deals with the jurisdiction of the *Charter*. Kapp was one of ten non-Aboriginal individuals who were accused of salmon fishing with a gillnet in an area of British Columbia contrary to Aboriginal communal fishing licence regulations in the *Pacific Fishery Regulations*. The regulations were created by the federal government pursuant to its Aboriginal Fisheries Strategy and under its power in the *Fisheries Act*.[59] The area in which Kapp et al. were fishing was closed for a twenty-four-hour period during which only members of three First Nation bands (the Musqueam, Burrard, and Tsawwassen) could fish.[60] The accused individuals challenged these regulations on the grounds they violated their equality rights under section 15 of the *Charter*.

The trial judge agreed the communal fishing licence regulations discriminated on the basis of race. However, the British Columbia Court of Appeal dismissed the challenge (majority reasons and minority reasons that concurred in result), finding the provisions were saved by section 15(2). In the course

57 *Ibid*; See also Dickson, *supra* note 31 at 141.

58 *Kapp, supra* note 3. The only post-2008 academic discussion of section 25 that I could find was in David Milward's book *Aboriginal Justice and the Charter*, but he does not address *Kapp*.

59 Hutchison, *supra* note 11 at 176.

60 *Ibid* at 175-6. The licenses were created pursuant to the *Aboriginal Communal Fishing Licenses Regulations*, SOR/1993-332.

of its decision, the majority of the BC Court of Appeal commented on section 25, finding it is not applicable unless a *Charter* violation is established in the context of Aboriginal rights. In other words, it is relevant at the justificatory stage after an infringement has been found. In the case at issue, the Court found there was no infringement of section 15 by drawing on subsection 15(2). Because the Court found that section 15(2) saved the communal fishing licence provisions, it concluded section 25 was inapplicable and not necessary to analyse within the facts of the case.[61]

However, the BCCA did present two scenarios in which section 25 may be invoked. They interestingly mirror the scholarly debate mentioned above. First, Low J., writing for the majority, notes section 25 could be viewed as a threshold provision, triggered any time a *Charter* breach is claimed and an Aboriginal right engaged. This implies section 25 could be relevant at the first stage of *Charter* analysis when characterizing a right and its *prima facie* infringement. Second, Low J. suggests that the provision's wording could also be taken to mean it is to be applied only after a *Charter* breach has been proven, rather than merely claimed.[62] This possible application suggests section 25 would become relevant at the justification stage of *Charter* analysis *after* an infringement is found. At that point, it could function as a justificatory provision. The majority in *Kapp* preferred the latter application, stating that section 25 should not be triggered unless a *Charter* violation has been found.[63]

However, Kirkpatrick J.'s concurring minority opinion had a different view. It concluded the appeal should be dismissed on the grounds that section 25 protects the Aboriginal right to fish commercially, finding such statutorily created rights are among the "other rights and freedoms" mentioned by section 25(b) and therefore should be completely shielded from *Charter* challenge.[64] In other words, the appeal could be dismissed immediately by virtue of section 25, without making recourse to section 15 and assessing if an infringement has occurred. Kirkpatrick J's approach thus represents a strong version of the shield application of section 25 in that it protects Aboriginal rights from scrutiny, not simply in cases of actual conflict, but in any case of conflict. Unlike the majority of the BCCA, therefore, which stated section 25 provided a possible justification for *Charter* infringement, Kirkpatrick J. saw the provision func-

61 The appellants also argued the licenses created exclusive fisheries, which was not within the power of Parliament, and was therefore *ultra vires*. This was dismissed by the BC Court of Appeal.

62 *R v Kapp,* 2006 BCCA 227 at para 87 [*Kapp*].

63 It is not clear whether Low J. means that s 25 is triggered when infringement of a *Charter* right is established or only after it has been determined that the breach is not saved by section 1.

64 *Kapp, supra* note 62 at para 138.

tioning as a shield at the outset, not only after establishing a *Charter* violation, but in characterizing what counts as a breach in the first place.

When *Kapp* reached the Supreme Court, the appeal was decided on the basis of section 15 and dismissed without recourse to section 25. The majority agreed with the BCCA's finding that the communal fishing licences were protected by subsection 15(2). However, the minority reasons, while concurring with the majority in result, had a different way of getting there. Like Kirkpatrick J., Bastarache J. reasoned the appellants' constitutional challenge was barred at the outset by section 25 and there was no need to consider section 15(2). Citing legal commentary and case law on the role of section 25 in protecting Aboriginal rights, Bastarache J. frames its purpose as "shield[ing] the distinctive position of Aboriginal peoples in Canada from being eroded or undermined by provisions of the *Charter*."[65] This is taken to mean not that section 25 can be used to justify a *Charter* infringement to protect Aboriginal rights, but that in a true conflict the Aboriginal right is protected — no justification required. Bastarache J. offers a three-step approach to applying the section in this way:

> The first step requires an evaluation of the claim in order to establish the nature of the substantive *Charter right* and whether the claim is made out, *prima facie*. The second step requires an evaluation of the native right to establish whether it falls under s. 25. The third step requires a determination of the existence of a true conflict between the *Charter* right and the native right.[66]

Note, Bastarache J. is not saying section 25 grants immunity to Indigenous governments from *Charter* scrutiny. Rather, in cases of true conflict between government actions and Aboriginal rights, the Aboriginal rights will be protected. Bastarache J. links this interpretation to jurisprudence on minority language rights where, in certain contexts, "collective rights are clearly prioritized in terms of protection … [and] individual equality rights have typically given way."[67] This makes the approach closer to Arbour's position discussed above, as it suggests the need for flexibility in interpreting *Charter* rights when section 25

65 *Campbell*, *supra* note 22 at para 158 cited in *Kapp*, *supra* note 3 at para 96.

66 *Kapp*, *supra* note 3 at para 111.

67 *Ibid* at para 89. Bastarache J continues:

> "In *Reference re Bill 30*, Wilson J. stated at p. 1197, that although the special minority religion education rights conferred by s. 93 of the *Constitution Act, 1867* "si[t] uncomfortably with the concept of equality embodied in the *Charter*", s. 15 can be used neither to nullify the specific rights of the protected group nor to extend those rights to other religious groups. It is also instructive to read the reasons of former Chief Justice Dickson in *Mahe v. Alberta*, [1990] 1 S.C.R. 342, at p. 369, where, speaking of the application of s. 15 in the context of minority language rights in education, he said: "[I]t would be totally incongruous to invoke in aid of

is engaged, but in a case of actual conflict the Aboriginal right must be prioritised over *Charter* rights.

The Self-Government Stymie

It is important to appreciate that all of the case law discussed above pertains to challenges to laws and actions of the Canadian state in one form or another. However, it is interesting to explore the implications of the current thinking around section 25 in the context of an action of an Indigenous government when it is not interpreted as derived from or delegated by the Canadian state. Once we try to apply the current framework to such a case, we see it quickly breaks down.

Which Indigenous Governments Are Engaged by Section 25?

The first issue to clear up is which Indigenous governments would be understood as falling within the scope of section 25. So far in the discussion this category has been assumed, but it is actually highly complex and contested in ways relevant to a comprehensive analysis of section 25. One scenario would be an Indigenous government based on an Aboriginal self-government right under section 35. Other candidates for section 25 protection are Indigenous communities that have negotiated treaties and self-government agreements, such as the Nisga'a. In addition to treaty-based governments, it is also likely that Indigenous communities that have negotiated partial "sectoral" self-government arrangements would also fall under the protection of section 25, at least in some contexts.[68]

However, the scenario of a section 35 right to self-government is far from likely, given the current constitutional framework. At present, there are two precedents that pertain to a right to self-government. One is

the interpretation of a provision which grants special rights to a select group of individuals, the principle of equality intended to be universally applicable to 'every individual'".

68 A notable example is the First Nations Land Management Initiative (FNLMI). The FNLMI was launched by fourteen First Nations and led to the enactment of the *First Nations Land Management Act* in 1999. See *First Nations Land Management Act*, SC 1999, c 24 [*FNLMA*]. The initiative has since grown to include 26 First Nations that are "operational" under the *First Nations Land Management Act*. To become operational under the *FNLMA*, a First Nation land code and an individual agreement with Canada must be ratified by the community through a referendum. Each First Nation land code must provide for a community process to develop and consult on the required matrimonial property law. Through the development of a land code, First Nations can decide what specific individual interests in reserve land can be recognized and registered in the First Nations Land Registry. This registry is maintained by the Department of Indian Affairs and Northern Development under the authority of the land codes of the participating First Nations and the authority of federal regulations.

Pajamewon,[69] which concerned criminal charges brought against members of the Shawanaga and Eagle Lake First Nations in Ontario for illegal gambling. Both First Nations had enacted a lottery law authorizing and regulating gambling on their reserves pursuant to an asserted right of self-government.[70] They contended that a right of self-government over land use, including gambling, was incidental to their Aboriginal title. Justice Lamer, writing for a majority, argued this characterization of the right in question was too broad: "aboriginal rights, including any asserted right to self-government, must be looked at in light of the specific circumstances of each case and, in particular, in light of the specific history and culture of the aboriginal group claiming the right."[71]

Justice Lamer then characterized the claim in question much more narrowly as an asserted right "to participate in, and to regulate, gambling activities on their respective reserve lands."[72] The Court proceeded to apply the "integral to the distinctive culture" test formulated in *Van der Peet*,[73] which places the onus on Aboriginal claimants to prove the activity, in relation to which they assert an Aboriginal right was "an element of a practice, custom or tradition integral to [their] distinctive culture" at the time of first contact with Europeans.[74] The *Van der Peet* framework has been criticized for 'freezing' Aboriginal rights with the requirement for historical evidence and continuity. Thus, the assertion of a right to self-government under the current Aboriginal rights framework of section 35 might be possible, but it would be difficult, and it would exclude some communities and only encompass activities demonstrated to have been integral to a distinctive Indigenous culture.[75]

69 *R v Pajamewon*, [1996] 2 SCR 821, 138 DLR (4th) 204 [*Pajamewon*].

70 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, British Columbia: UBC Press, 2007) 129.

71 *Pajamewon, supra* note 69 at para 27.

72 *Ibid* at para 26.

73 *R v Van der Peet*, [1996] 2 SCR 507, 137 DLR (4th) 289 [*Van der Peet*].

74 *Ibid* at para 46.

75 In the case of a right to self-government, these aspects of the test seem especially problematic. The nature of government is to be forward-looking and responsive to citizens' changing needs and interests. Indigenous governments are responsive to their present-day cultural, political, and economic contexts and pursue the collective goals that their various communities choose. Why must a historical continuity be demonstrated with pre-contact governance in order to advance indigenous self-determination today? Furthermore, considering the precedent surrounding the application of the *Charter* to band council governments (discussed below), it is possible that the application of the *Indian Act* could be taken by the courts as a marker of the assertion of sovereignty over internal governance and leadership selection and/or disrupting the 'continuity' required for an Aboriginal right under section 35. See John Borrows, "Frozen Rights in Canada: Constitutional Interpretation

Another possibility is self-government rights that are claimed as incidental to an Aboriginal title recognized under section 35. Such rights would not have to be directly proven but would naturally flow from the so-called *sui generis* nature of Aboriginal title. Aboriginal title is held communally. It cannot be held by individual Aboriginal persons. As explained by the Supreme Court in *Delgamuukw* and affirmed in *Campbell*,[76] "[i]t 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."[77] The fact that decisions regarding the use of land must happen collectively implies a governmental power. Thus, self-government rights are incidental to Aboriginal title simply by virtue of its collective character. Unlike the self-government rights conceived in *Pajamewon*, this right includes 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."[78] 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.

In this sense, the possibility of Aboriginal self-government rights as incidental to Aboriginal title represents a more expansive view than articulated in *Pajameon*. However, it is still limited. As noted by McNeil, "[n]ot all activities that take place on land are necessarily a use of the land."[79] McNeil emphasizes that despite Chief Justice Lamer's description of Aboriginal title as a communal right that includes authority to make decisions respecting the land not limited to traditional uses of the land, "it 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."[80]

---

and the Trickster" (1997-1998) 22:1 Am Indian L Rev 37; See also Russel Lawrence Barsh & James (Sákéj) Youngblood Henderson, "The Supreme Court's *Van der Peet* Trilogy: Naïve Imperialism and Ropes of Sand" (1997) 42:1 McGill LJ 993; See also Catherine Bell, "New Directions in the Law of Aboriginal Rights" (1998) 77:1 Can Bar Rev 36 at 44-50.

76 *Campbell, supra* note 22.

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

78 McNeil, *supra* note 70 at 138.

79 *Ibid* at 143.

80 *Ibid*; *Supra* note 70 at 279, n 88 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 M.P.L.R. 192 (B.C.S.C.); *Texaco Canada v. Corporation of Vanier*, [1981] 1 S.C.R. 254; and *Re Cities Service Oil Co. and the City of Kingston* (1956), 5 D.L.R. (2d) 126 (Ont. H.C.)". In addition, Aboriginal title is also subject to an inherent limit that prevents the land from being used in ways that are irreconcilable with the collective attachment to the land that forms the basis of the title (Delgamuukw, SCC at paras. 125-32). See also Kent McNeil, "The Post-Delgamuukw Nature and Content of Aboriginal Title," in Kent McNeil, ed, *Emerging Justice?*

The final possibility are Aboriginal self-government rights that fall under the "other rights and freedoms" protected by section 25. Currently, there are two sources for these: statute and inherency. In *Corbiere*, L'Heureux-Dubé J. suggested that statutorily-created rights could qualify as "other rights and freedoms" under section 25.[81] One question is whether the *Indian Act* could be one such statute. Many Indigenous governments were disregarded by the Canadian state, and the *Indian Act* imposed the band council regime. Some band councils continue to operate under procedures created by the *Act*. Could the custom election and membership codes created by band councils constitute Aboriginal rights for the purposes of section 25? As discussed below, so far the answer has been no, and actions of band councils are treated by the courts as forms of delegated federal authority.

The second source of 'other' Aboriginal rights under section 25 could be inherency.[82] Patricia Monture-Angus makes the point that the reasoning for subjecting band councils to the *Charter* implies that pre-existing self-government rights were extinguished. The concept of extinguishment implies the existence of something that can be extinguished; it means groups who did come under the jurisdiction of the *Indian Act* also possessed such rights at one time. This is consistent with *Calder*, which reasoned that prior to contact with European settlers Indigenous peoples lived "organised in societies"[83] — a structure which necessarily involves collective decision-making and normative world-building.[84] Thus, all Indigenous communities have an inherent right to self-government, and this is already acknowledged by the legal framework, just in a negative way. Moreover, Indigenous communities that came under the *Indian Act* cannot be said to have meaningfully chosen to abdicate their capacity for self-government. Monture-Angus argues even band council governments should elicit section 25 protection.[85] This idea is discussed more below, but understanding how, within the current constitutional framework, the concept

Essays on Indigenous Rights in Canada and Australia (Saskatoon, Saskatchewan: Native Law Centre, University of Saskatchewan, 2001), 102 at 116-22.

81 *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203 at para 52, 173 DLR (4th) 1 [*Corbiere*]. L'Heureux-Dubé goes on to say a "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."

82 See Darlene Johnston, "The Quest of the Six Nations: Confederacy for Self-Determination" (1986) 44:1 UT Fac L Rev 1. Johnston chronicles how Six Nations Confederacy never surrendered its sovereignty.

83 *Calder v British Columbia (AG),* [1973] SCR 313 at 328, 34 DLR (3d) 145.

84 See Joshua Nichols, *Reconciliation and the Foundations of Aboriginal Law in Canada* (PhD Dissertation, University of Victoria, 2016) [unpublished].

85 Patricia Monture-Angus, *Journeying Forward: Dreaming of First Nations' Independence*, (Halifax, Nova Scotia: Fernwood Publishing, 1999) at 150.

of "aboriginal governments" is actually a diverse set of legal entities is useful for thinking about how courts have applied (or avoided applying) section 25 in contexts involving Indigenous governments so far.

External Protections vs. Internal Restrictions

At this stage, I want to address the question of how the legal framework developed thus far would play out if a court did take an action of an Indigenous government as engaging section 25, in both the context of an "external" and "internal" restriction.[86] The scholarly commentary so far seems to have settled on the idea section 25 provides protection in both cases, though there is disagreement as to how much protection should be given and how to hierarchize the relationship between Aboriginal rights and *Charter* rights and freedoms in an actual conflict situation.[87] The *Kapp* case involved the federal government's creation of an external protection. Indeed, most of the existing case law on section 25 pertains to external protections deriving from federal authority or delegated federal authority. Thus, it largely remains to be seen what would happen in a *Charter* challenge to an internal restriction of an Indigenous government if the courts could not characterize it as delegated federal authority. In other words, how the courts would interpret section 25 if there was no other option in the case of a community member claiming an infringement by an action of their government.

As described below, neither of the conflict rules proposed by Arbour or Macklem would seem to work in such a scenario, as both put the individual in the position of having to trade one level of self-determination for another. Either individual *Charter* rights are not protected in cases where one imagines they might be most relevant — when government actions truly conflict with individual rights, which is the outcome under Arbour's proposal; or, the colonial assumption of sovereignty and diminishing collective self-determination are expended in the vindication of individual rights, which is the outcome under Macklem's proposal. It is not clear if there is a third way, as there is no discussion in the case law, including *Kapp,* of a scenario involving an internal restriction. Bastarache J. only mentions the distinction in passing as one of the many contextual factors that should be considered in applying section 25.[88]

The complexity of the question lies in part with the complexity of political and social life, which can be summed up by noting that governments are not

86 See Macklem, *supra* note 6 at 226.
87 See Thomas Isaac, *supra* note 33 at 437.
88 *Kapp*, *supra* note 3 at para 99.

synonymous with peoples. While we can conceptually separate *Charter* rights and Aboriginal rights for the purposes of a legal analysis, pragmatically, they are not separate but linked organically in the people they belong to. *Charter* rights and freedoms, and Aboriginal rights cannot be traded off without forcing someone to trade off one dimension of self-determination for another. Thomas Isaac provides an analysis of *Campbell* that is illuminating in this regard. The case involved a *Charter* challenge to an election code created by the Nisga'a Government. One of the arguments raised by the plaintiffs was that the provisions of the Treaty that prevented non-Nisga'a from voting in Nisga'a elections violated section 3 of the *Charter*. The Court determined the Nisga'a government falls within the scope of section 25 because it operates under the authority of the Nisga'a Treaty, which states *inter alia* that the Nisga'a Nation has the "right to self-government."[89] The reasoning of Williamson J. of the BCSC in dismissing the challenge reflects may of the themes in the scholarly debate discussed above:

> One must keep in mind that the *communal* nature of aboriginal rights is on the face of it at odds with the European/North American concept of *individual* rights articulated in the *Charter.* **[…]** the purpose of [section 25] is to shield the distinctive position of Aboriginal peoples in Canada from being eroded or undermined by provisions of the *Charter*.[90]

Williamson J. continued that section 25 offers protection to the Nisga'a Treaty in its entirety from limitations imposed by the *Charter*.[91] In other words, section 25 means the Treaty has immunity, beyond just the power to make election codes that is outlines. All valid laws enacted by the Nisga'a Government should be shielded from *Charter* scrutiny.[92]

Thus, in the *Campbell* case, it seems as if the Court adopted a strong shield application of section 25, and this might be a predictor for how the courts would deal with a claim against a government based on inherency rights. However, as Joshua Nichols points out, in the *Chief Mountain*[93] case the BCCA decided that the governance provisions in the Nisga'a Treaty amount to delegated authority.[94] Thus, the same logic underpins this decision as *Delgamuukw*: Aboriginal claims to land are based in a right of occupancy and a diminished

89 *Campbell, supra* note 22.
90 *Ibid* at paras 155, 158.
91 See Isaac, *supra* note 33 at 444.
92 *Ibid* at 450.
93 *Sga'nism Sim'augit (Chief Mountain) v Canada (AG),* 2013 BCCA 49 [*Chief Mountain*].
94 Joshua Nichols, "A Reconciliation without Recollection? *Chief Mountain* and the Sources of Sovereignty" (2015) 48:2 UBC L Rev 515.

right of self-government, not true jurisdiction.[95] External protection was at stake in *Campbell*. There is still no judicial pronouncement on how section 25 would function in the case of a true internal restriction.[96]

What if, under terms similar to those in the Nisga'a Treaty, an Indigenous government enacted a statute that violated the individual rights of a member of the community, who then brought a challenge against the law under the *Charter*? This fact scenario arose to some degree in *Thomas v Norris*.[97] The case involved an initiation ceremony that allegedly saw the assault of a community member. As the case was between private parties, the *Charter* was not applicable. However, there is potential conflict if the initiation ceremony was authorized by a law of a governmental entity falling within the scope of section 25, which also clearly authorized those responsible for the ceremony to induct others into it against their will.[98] A challenge could then be launched under section 7 and section 25 would be triggered. Would a court apply section 25 as a shield provision in the same way as in *Campbell* and suggested in *Kapp*?[99]

Alternately, if section 25 were applied as favoured by Milward the result could be a culturally sensitive interpretation of *Charter* rights and freedoms — an option that some find unacceptable because it implies the creation of two sets of *Charter* rights and/or because it repeats the colonial gesture of imposing legal structures. Under the shield application advanced by Arbour, however, the community member's *Charter* right would be protected only to the extent that it does not abrogate or derogate from the right of the Nisga'a government to make laws within its jurisdiction. If a court determined the scenario presented above actually conflicts with individual rights, would that court feel comfortable disregarding the section 7 rights of community members in this way? At the same time, to interpret section 25 merely as justificatory provision once again reproduces a settler-colonial legal hierarchy where sovereignty is presumed to adhere in the crown. These issues show how the current section

95 *Ibid*.

96 One might think of the *Corbiere* case as potentially representing a challenge to an internal restriction by an indigenous government, but that case involved a band council that was understood by the Court as a form of delegated authority (akin to an administrative body) and in this sense the membership restrictions at stake in the case are properly understood as external protections because they derive from the authority of the *Indian Act*.

97 *Thomas v Norris*, *supra* note 26.

98 In the absence of clear language authorizing the action, a Canadian court would likely seek to interpret the hypothetical law (that simply authorized the ceremony but did not specify it could be conducted without consent) in accordance with *Charter* values.

99 See Isaac, *supra* note 33 at 432. Isaac warns, "Caution, however, must be exercised in treaty negotiations and other judicial interpretation of section 25, so as not to allow the individual rights and freedoms of aboriginal people to become overshadowed by their collective rights."

25 framework is incoherent when considered in the context of Indigenous governments conceived as having jurisdiction, not just delegated authority. What is to be done?

Aboriginal and Indigenous Governments as Delegated Authority

Before attempting to answer the question above, it is important to understand a distinction made by the courts in cases involving *Charter* challenges and Indigenous governments, which is whether the government entity can be regarded as a delegated federal authority stemming from the *Indian Act* and section 91(24) of the *Constitution Act*. Above, it was noted the distinction is relevant as it determines whether the *Charter* will apply without having to make recourse to section 25. Now I wish to address how it also represents two very different types of constitutional status. Understood as administrative entities, Indigenous governments (e.g. band councils) have no constitutional status or inherent jurisdiction. Legally speaking, they are creatures of the federal power.

For example, in *Orr v Peerless Trout First Nation*,[100] the Alberta Court of Queen's Bench dismissed a claim by a member of the Peerless Trout First Nation (PTFN) alleging that the Nation's *Customary Election Regulations* were unconstitutional. The court described PTFN as "a self-governed First Nation" in the Treaty 8 Territory of Northern Alberta that operates under section 74(1) of the *Indian Act*.[101] The court assumed without deciding the *Charter* applied to the actions of the PTFN by virtue of the fact the PTFN's government was constituted under the *Indian Act*.[102] Section 25 was not addressed because there were no Aboriginal or treaty rights at issue. The Indigenous government involved was an *Indian Act* band council, and therefore a delegated federal power. In its decision, the Court noted *Taypotat v Taypotat*, a Federal Court of Appeal decision that held that while a First Nation is "clearly a *sui generis* government

100 *Orr v Peerless Trout First Nation*, 2015 ABQB 5 [*Orr*].

101 *Ibid* at 4.

102 Other cases involving judicial review of band council actions have followed the same logic. See *Lafond v Muskeg Lake First Nation,* 2008 FC 726 at para 17. In *Lafond v Muskeg First Nation*, the Muskeg Lake Cree Nation Band Council had been removed from conducting its election under s. 74(1) of the *Indian Act* and reverted to a local customary electoral system. The court held even if elections for a band council are carried out pursuant to an election code created outside the Indian Act, it still amounts to a form of federal authority. The court cited jurisprudence that "has consistently found Councils to be acting as a "federal board[s], commission[s] or other tribunal[s], and thus subject to judicial review" pursuant to s. 2 of the *Federal Courts Act*; *See also Minde v Ermineskin Cree Nation,* 2006 FC 1311*; See also ibid*.

entity," it "exercises government authority within the sphere of federal jurisdiction under the *Indian Act* and other federal legislation."[103]

In the factual matrix of the *Orr* case, the court did not review the reasons for applying the *Charter*, instead assuming the holding from *Taypotat*. *Taypotat* concerns the Kahkewistahaw First Nation in Saskatchewan and a community election code for the positions of Chief and Band Councillor adopted by the band council under section 74(1) of the *Indian Act*. In the code, eligibility for the positions was restricted to persons who had at least a Grade 12 education or equivalent. This excluded 74-year-old Louis Taypotat, who had only attended residential school until grade 10, though he had previously served as Chief for a total of 27 years.

Taypotat challenged the eligibility provision and recent election results under section 15(1) of the *Charter*. At the Federal Court hearing, *Taypotat* argued the election code discriminated on the basis of education, which it held to be analogous to race and age.[104] He argued the education requirement adversely impacted older band members and residential school survivors. The Federal Court rejected these arguments, finding education requirements to relate to "merit and capacities" and "deal with personal attributes rather than characteristics based on association with a group."[105] However, the Federal Court of Appeal applied the test for discrimination from *Kapp* and found while the education requirement did not directly engage a protected ground under section 15(1), it resulted in adverse effects that were discriminatory based on age and Aboriginality-residence.[106] The Court of Appeal declared the eligibility provision was unconstitutional, and ordered new elections without the education requirement.[107] The Supreme Court reversed this decision, however, in a unanimous judgment that held that the adverse effects claim in *Taypotat* was not established by the evidence.[108]

Though the Supreme Court did not comment on section 25 in *Taypotat*, the Federal Court and Court of Appeal did. Once again, the courts applied the *Charter* without deciding the question based on the facts of the cases before them. In *Taypotat,* the courts referred to *Crow v Blood Band*, a case from 1996 in which the federal court was asked to decide whether section 3 applied to cus-

103 *Taypotat v Taypotat*, 2013 FCA 192 at para 36 [*Taypotat*].
104 *Taypotat v Taypotat* 2012 FC 1036 at para 54 [*Taypotat*].
105 *Ibid* at para 59.
106 *Taypotat*, *supra* note 103 at para 45.
107 *Ibid* at para 66.
108 *Kahkewistahaw First Nation v Taypotat*, 2015 SCC 30 [*Taypotat*].

tomary band election procedures that were implemented outside of the *Indian Act*. Heald D.J. avoided directly deciding by resolving the complaint without recourse to section 25:

> This is a complex matter which involves, *inter alia*, the application of section 32 of the *Charter* as well as the interpretation and possible application of section25 the *Charter*. However, given the conclusion that I have reached with respect to the infringement of the Plaintiff's *Charter* rights in this case, it is unnecessary for me to reach a conclusion on this issue. Accordingly, for the purposes of the ensuing discussion, I have assumed, without deciding, that the *Charter* does apply to the Band's Custom Election Bylaw.[109]

This is *Taypotat*'s earliest cited decision on the issue of the application of the *Charter* to Indigenous governments. It also assumes without deciding that the *Charter* applies to the government in question. Thus, all of the case law has assumed that since band councils are created by federal legislation, the Indigenous government authority within that framework is merely delegated federal authority falling within the domain of administrative law. It would seem that, so far, no Canadian court has actually broached the question of the application of the *Charter* to Indigenous governments as "*sui generis*" government entities, in any context.[110] Connectedly, if a law or action of an Indigenous government can be interpreted as a form of delegated federal authority, the *Charter* can be applied without the need to consider section 25.[111]

Here, it is useful to consider the Government of Canada's current policy regarding Indigenous governments, which is framed in terms of the existence an inherent right to self-government.[112] This sounds consistent with the 1983 report of the Penner Committee on Indian Self-Government, which interprets the *Royal Proclamation of 1763* as acknowledging that Aboriginal societies were self-governing.[113] The Penner Report found that the *Royal Proclamation* established a nation-to-nation relationship between the Crown and First Nations,

109 *Crow v Blood Band*, 1996 CarswellNat 53 at para 20, FCJ No 119 (FCTD).

110 Kent McNeil has argued that the *Charter* would not apply even to *Indian Act* bands that choose their councils in accordance with band custom.

111 While it is possible that *Indian Act* bands have other section 35 rights that could attract the protection of section 25, if the only relevant kind of aboriginal right in a given instance is a self-government right, this is likely the outcome.

112 See Senate, *First Nations Elections: The Choice is Entirely Theirs: Report of the Standing Senate Committee on Aboriginal Peoples* (May 2010) at 39 (Chair: Gerry St. Germain).This is defined practically as the "establishment of governing structures, internal constitutions, elections, [and] leadership selection processes."

113 House of Commons, *Minutes of Proceedings of the Special committee on Indian Self-Government*, 32-1 No 40 (20 October 1983) (Chair: Keith Penner).

and recommended the acknowledgement of Indigenous governments as a distinct order of government within the federation.[114] Similarly, the Charlottetown Accord of the early 1990s proposed a constitutional amendment to acknowledge an inherent right of self-government of Indigenous peoples in Canada. In the wake of the failure of that Accord, the federal government began to take various measures to move from direct administration of 'Aboriginal affairs' to a more indirect and hands-off approach. This involves creating delegated self-government arrangements and agreements with Indigenous communities. For example, section 74 of the *Indian Act* provides the Minister of Indigenous and Northern Affairs the discretion to impose an election system on band council governments.

However, under section 74(1), this order can be rescinded so that a band government may "revert" to a custom code for electing its Chief and members of the Council. Even so, it is not as though the band council can just choose to opt out of section 74. They do not have that unilateral discretion; it is the within the Minister's power to order the alternative after imposing section 74.[115] Moreover, federal policy controls the process through the "Conversion to Community Election System Policy,"[116] which sets a basic framework for acceptable "custom" election and leadership selection processes. This arrangement clearly falls short of the true constitutional jurisdiction the Penner Report envisioned. At best, these governments are regarded as forms of delegated federal authority and have a constitutional status akin to municipal governments, which is effectively none.[117]

The legal status of Indigenous governments as delegated federal authority, akin to administrative bodies, is reflected in case law where courts have deliberated on whether the *Charter* applies to band council decisions and custom

114 *Ibid* at 3.

115 Canadian Human Rights Commission, *Section 1.2 of the* Canadian Human Rights Act: *Balancing Collective and Individual Rights and the Principle of Gender Equality*, (Prepared by the Native Women's Association of Canada, July 2010) at 14; See also Wayne Daughtery & Dennis Madill, *Indian Government Under* Indian Act *Legislation, 1868-1951* (Ottawa: Research Branch, Department of Indian Affairs and Northern Development, 1980); See also Canada, Royal Commission on Aboriginal Peoples, *Looking Forward, Looking Back: Report of the Royal Commission on Aboriginal Peoples*, vol 1 (Ottawa: Communication Group, 1996) at ch 9 (Chairs: René Dussault & Georges Erasmus); See also Vic Satzewich & Linda Mahood, "Indian Affairs and Band Governance: Deposing Indian Chiefs in Western Canada, 1896-1911" (1994) 26:1 Can Ethn Stud 40.

116 Indigenous Services Canada, "Conversion to Community Election System Policy" (last modified 1 June 2015), online: *Government of Canada* <www.sac-isc.gc.ca/eng/1433166668652/1565371689997>.

117 For an analysis of how the right to self-government has been "read down" to a municipal model see Nichols, *supra* note 84.

election codes created under section 74(1). For instance, in *Corbière,* the Court was asked to review section 77(1) of the *Indian Act*, which denies voting rights to members who live off-reserve.[118] The criteria requires electors to be "ordinarily resident of the band." The Court determined that this provision discriminated against non-residents under section 15 of the *Charter*, and ordered the Government of Canada to rectify the situation by amending the *Indian Act*. No arguments were presented regarding whether the provision was saved by section 25, and the Court did not rule on whether the *Charter* applied to the Batchewana band as a *sui generis* government entity.

This logic is apparent in several other cases. In *Scrimbitt v Sakimay Indian Band Council,*[119] Scrimbitt was denied the right to vote in a band election because she was a Bill C-31 Indian and not considered a member of the community according to the election code. A Federal Court found the actions of the band violated section 15 of the *Charter*. However, it did so on the basis of the link to the *Indian Act* and did not consider if the *Charter* would apply if the government was an expression of an inherent right. Similarly, in *Horse Lake First Nation v Horseman,*[120] when a group of women occupied a local band office and the band applied for a court order to evict them, the Alberta Queen's Bench held the *Charter* should apply to the decision of the band because it was a creature of federal statute. In these lower court decisions, the bands did not argue their actions were protected by section 25 and the courts did not comment on the matter.

The reason? Despite Patricia Monture-Angus' arguments about inherency discussed above, once it is accepted that an entity is exercising statutory or delegated federal authority, it follows almost necessarily that the courts are going to find its authority is subject to the *Charter*. This administrative law end route means there is no case law on the question of the relationship between the *Charter* and Indigenous governments as *sui generis* governments exercising jurisdiction. From a certain perspective, this is not all bad. While the absence is a symptom of the settler-colonial foundations of law in Canada, it also means there is space to articulate a new approach.

Governments and Peoples

It is argued that if the *Charter* is unilaterally applied to Indigenous governments as *sui generis* entities it would continue the settler colonial power rela-

118 *Corbiere, supra* note 81.

119 *Scrimbitt v Sakimay Indian Band Council,* 1999 CarswellNat 2176, FCJ No 1606 (FCTD).

120 *Horse Lake First Nation v Horseman,* 2003 ABQB 152.

tionship, thus compromising the principles of equity and fairness upon which the *Charter* is based.[121] Several authors have also pointed to the potential of *Charter* challenges to undermine Indigenous difference, such as challenges to clan-based leadership selection practices,[122] limitations on mobility rights, and limits on the individual right to sell land.[123] Some critics frame *Charter* rights and values as inherently culturally incompatible with Indigenous legal cultures. Mary-Ellen Turpel argues the text of the *Charter* and surrounding case law embody cultural values that are "too individualistic and European"[124] to deliver responses that reflect the needs of Indigenous peoples.[125] The discourse of *Charter* right can be "elitist and culturally-specific" and the court system "adversarial and impersonal;" these legal and political structures are "unknown among Aboriginal peoples."[126]

Patricia Monture-Angus shares Turpel's sentiments, calling the *Charter* a "narrow instrument" that is incapable of addressing the "discrimination within discrimination" faced by Indigenous women.[127] She argues for a set of legal rights like those found in the *Charter* "may actually result in harm and reinforce injustice and inequality when applied to a system, which operates on different assumptions."[128] Scholars such as Henderson, McNeil, and Wilkins also emphasize the normative incommensurability at stake. The basic problem with settler colonialism is the foundational yet illegitimate assertion of sover-

121 See Will Kymlicka, *Liberalism Community and Culture,* (New York: Oxford University Press, 1989) at 152.

122 See Dan Russell, *A People's Dream: Aboriginal Self-Government in Canada,* (Vancouver, British Columbia: UBC Press, 2000) at 104. Section 3 of the *Charter* provides that every individual has a right to vote or stand for public office. Although embodying a basic democratic right from a western perspective, it is possible that if section 3 were applied to an Aboriginal government it would constitute "an attack on the clan system."

123 Kymlicka, *supra* note 121 at 149-50.

124 Mary Ellen Turpel, "Aboriginal Peoples and the Canadian *Charter*: Interpretive Monopolies, Cultural Differences" (1989-90) 6:1 Can Hum Rts YB 3.

125 Mary Ellen Turpel, "Patriarchy and Paternalism: The Legacy of the Canadian State for First Nations Women" in Caroline Andrew & Sandra Rodgers, eds, *Women and the Canadian State*, (Montréal & Kingston: McGill-Queen's University Press, 1997) 64; See also Mary Ellen Turpel, "Aboriginal Peoples and the Canadian Charter of Rights and Freedoms: Contradictions and Challenges" (1989) 10:2 Can Woman Stud 149.

126 The *Charter* operates within a "conceptual framework of rights derived from the theory of a natural right to private property." Mary Ellen Turpel, "Aboriginal Peoples and the Canadian *Charter*: Interpretive Monopolies, Cultural Difference" in Richard Devlin, ed, *Canadian Perspectives on Legal Theory* (Toronto, Ontario: Emond Montgomery Publications, 1991) 503 at 513.

127 Monture-Angus, *supra* note 85; See also Patricia Monture-Angus, *Thunder in my Soul - A Mohawk Woman Speaks,* (Halifax, Nova Scotia: Fernwood Publishing, 1995) at 142-145.

128 Patricia Monture-Angus, *Community Governance and Nation (Re)Building: Centering Indigenous Learning and Research,* (Vancouver, British Columbia: National Centre for First Nations Governance, 2004) at 35.

eignty over territory based on the assumption of Indigenous inferiority. While Indigenous peoples never consented to being subjects of the Crown in this sense, this led to a government policy towards Indigenous peoples that assumed them as such. If the courts were to impose the *Charter* on Indigenous governments today, it would represent a similar colonial gesture.

My question is: Is there another way to think of the relationship between Indigenous governments and the *Charter*, and can section 25 help us to do so? To answer, it is necessary to take a step outside of the realm of legal discourse and draw on some relevant sociological concepts. For instance, one question that comes to mind is whether it is fair to say applying the *Charter* to contemporary Indigenous governments is the same as imposing it on Indigenous peoples. Governments and peoples are not the same and at times might be quite distinct and in tension. Arguably, such distance is at its greatest when the actions of a government infringe the rights of some community members.

For instance, Green and Napoleon discuss how Indigenous women's interests tend to be invisible to male political leadership. This exclusion stems from "the difference between male and female experience in relation to oppression."[129] In other words, there are some differences in how settler colonialism in Canada affects Indigenous people depending on their sex. As Joanne Barker writes, "although there was certainly much violence and discrimination directed at Indian men within Canada," Indigenous women suffered additional sex-specific harm in that "the social roles and responsibilities of heterosexual Indian men within bands and on the reserves was systematically elevated over that of women and nonheterosexuals by the institutions of Christianity, capitalism, sexism, and homophobia."[130] For example, the assimilationist goals of the *Indian Act* involved sexist provisions that targeted female persons and their descendants over generations in ways that established and entrenched sex-based inequality within some communities.

129 Joyce Green & Val Napoleon, "Seeking Measures of Justice: Aboriginal Women's Rights Claims, Legal Orders, and Politics" (Paper delivered at the Meeting of the Canadian Political Science Association, 2007), [unpublished] at 3.

130 Joanne Barker, "Gender, Sovereignty, and the Discourse of Rights in Native Women's Activism" (2006) 7:1 Meridians 127 at 133; See Kim Anderson, *A Recognition of Being: Reconstructing Native Womanhood,* (Toronto,: Sumach Press, 2000); See also Joyce Green, ed, *Making Space for Indigenous Feminism,* (Black Point, Nova Scotia: Fernwood Publishing, 2007); See also Renya Ramirez, "Race, Tribal Nation, and Gender: A Native Feminist Approach to Belonging" (2007) 7:2 Meridians 22; See also Sylvia Van Kirk, "Toward a Feminist Perspective in Native History" (Papers of the Eighteenth Algonquian Conference delivered at Carleton University, Ottawa, 1986) 377.

The differences in how the colonial legal regime positioned male and female bodies has meant the interests of Indigenous women are not always front and centre in the agendas of some contemporary Indigenous governments. Green and Napoleon point out that many band council governments did not oppose the disenfranchisement of women by the *Indian Act*,[131] and various forms of internal restriction continue today.[132] They criticize the final report of the Royal Commission on Aboriginal Peoples for its failure to incorporate how both external *and* internal restrictions have shaped Indigenous women's experiences of colonization. They note the discussion of indigenous women's issues focuses "on women as survivors of subordination through the *Indian Act*," but does not address:

> the powerful and important interventions by individuals and organisations who spoke of the vicious reprisals inflicted on Aboriginal women who are politically active as women, or who contest male power, or who identify as feminist.[133]

They continue:

> This is unfortunate, as it avoids documenting or critiquing the extent to which patriarchal power is used to subordinate contemporary indigenous women, and the ways in which Aboriginal organisations, governments, and the colonial state support these processes. It suggests rather that the existing power relations in Aboriginal politics are unconflicted; are about resistance to the oppressor state and responsiveness to the consequences of colonialism. This avoids looking at the fundamentalist and oppressive practices that subordinate women as women, and further dignifies these practices as beyond critique because they are expressions of Aboriginal traditions.[134]

These quotes convey the sense that some Indigenous women face internal restrictions within their communities. Some have also used the *Charter* (and

131 Green & Napoleon, *supra* note 129 at 4; See also Lilianne Krosenbrink-Gelissen, "The Canadian Constitution, the *Charter* and Aboriginal Women's Rights: Conflicts and Dilemmas" (1993) 7-8:1 207 at 208. Liliane Krosenbrink-Gelissen writes: "The Canadian Constitution and the *Charter* have vitally affected aboriginal women as a group. However, aboriginal women's experiences as well as their political concerns have been largely neglected in academic and political discourse on both aboriginal rights and women's rights. Aboriginal rights demands largely reflect the interests of aboriginal men, while women's rights demands, until very recently, have largely reflected the interests of white, middle-class women. In both cases, aboriginal women's distinct perceptions are ignored."

132 Bill Rafoss, *The Application of the Canadian Charter of Rights and Freedoms to First Nations' Jurisdiction: An Analysis of the Debate* (MA Thesis, University of Saskatchewan, 2005) [unpublished], n 119. Based on national consultations and a study of Aboriginal women in British Columbia, the Native Women's Association of Canada found continuing "evidence of Band discrimination against Bill C-31 reinstatees and their families, including exclusion from membership, not permitting residency on reserve, discrimination in housing and in education and health funding."

133 Green & Napoleon, *supra* note 129 at 10.

134 *Ibid* at 10-11.

human rights legislation) to try to advance their equality rights, both when they are violated by the settler state and by band council governments. The Native Women's Association of Canada (NWAC)'s use of the *Charter* are cases in point.[135] During the Charlottetown Accord discussions, NWAC initiated two court cases using section 15 to try to gain what it saw as equal participation in the negotiations. One case sought funding and equal participation in the constitutional talks, and the other to stop the referendum on the Accord until a guarantee of equality for Aboriginal women was secured.[136] The controversy surrounding NWAC's action continues to echo in the contemporary debate within Indigenous communities about how they wish to relate to the Canadian government.[137] NWAC has called for the *Charter* to apply to all forms of Indigenous governments, including those based on treaties and inherency.[138] More recently, it lobbied to have provisions in the *Human Rights Act* that exempted Indigenous governments repealed for similar reasons.

NWAC's legal actions did not receive support in parts of the Indigenous political community. Yet, John Borrows has argued its actions had a positive role in helping to highlight the sex-based inequality Indigenous women may face within their communities.[139] Furthermore, Borrows suggests the case

135 Canadian Human Rights Comission, *supra* note 115. NWAC supported the repeal of the exemption for Band governments from the *Canadian Human Rights Act*.

136 See Kerry Wilkins, "Take Your Time And Do It Right: *Delgamuukw,* Self-Government Rights And The Pragmatics of Advocacy" (1999-2000) 27:2 Man LJ 241 at 236-7. Kerry Wilkins describes how this conflict played out: "it became clear that many aboriginal women simply did not believe that male aboriginal leaders, armed with constitutionally protected rights of self- government, could be trusted, left to their own devices, to respond fairly and respectfully to the women's interests or to give sufficient priority to their need for protection from abuse. The Native Women's Association of Canada ("NWAC") has insisted that mainstream human rights standards, and mainstream courts, remain available for the protection of aboriginal women in communities acting pursuant to rights of self- government. It considered these protections so crucial to the safety and well-being of Canada's aboriginal women, and so different from the positions being taken by the four aboriginal organizations participating officially in the Charlottetown negotiations, that it brought legal proceedings seeking independent representation at those negotiations."

137 See Barker, *supra* note 130 at 138. Joanne Barker explains: "If bands did indeed possess "sacred rights," then Canada dared not play, even in jest, with the only law that preserved them. Indian women, by implication, were likewise put on notice. By challenging the Indian Act, they were undermining not only the rights of bands but also the sacred character of bands as sovereigns."

138 Native Women's Association of Canada, *Statement on the Canada Package* (Ottawa, Ontario: Native Women's Association of Canada, 1992); See also Canadian Human Rights Commission, *supra* note 115; See also Quebec Native Women's Association, "Brief Presented by the Quebec Native Women's Association to the Royal commission on Aboriginal Peoples: Taking Our Rightful Place" (May 1993), online (pdf): <data2.archives.ca/rcap/pdf/rcap-539.pdf>. The Quebec Native Women's Association also rejected the availability of section 33 to Aboriginal governments.

139 John Borrows, "Contemporary Traditional Equality: The Effect of the *Charter* on First Nations Politics" (1994) 43:1 UNBLJ 19 at 44. Borrows writes: "While I am aware that NWAC was not representative of all Aboriginal women, and their tactics pose significant challenges to the consensus

shows the *Charter* may be a useful tool in partially enhancing Indigenous freedom. Sharon McIvor agrees, arguing the strategic use of *Charter* litigation by Indigenous women has led to limited positive changes, even when they lost in court.[140] For McIvor, this is linked to self-determination in that any form of self-government requires as a precondition that ability of all people to participate equally in the political and social life of the community. According to Teressa Nahanee, Indigenous women have benefited from the *Charter,* as its enactment led to reduced sexual discrimination in band membership entitlement provisions through the 1985 amendments to the *Indian Act*.[141] For Borrows, this shows there can be "intersections" between the *Charter* and Indigenous self-determination, and that the *Charter* may at times provide a mechanism for Indigenous communities to recapture the strength of legal principles past colonial government interference had eroded.[142] My point in discussing these debates is to show how the meaning of section 25 is not only a legal question, but an example of the intersection of law and politics. I think taking notice of this is important for the topic at hand because it reflects the fact that governments are not immediate representations of peoples.[143]

---

and public support needed to facilitate self-government, at the bottom of my assessment of their actions is an appreciation that a discrete and specific group of people were suffering and that their leaders were being ignored by those with greater access to power and resources. While it would have been my wish that "rights" discourse could have had a more political, rather than legal, impact, as was the case with the Constitutional and *Indian Act* amendments, I cannot dispute with these people for pressing their claims in the courts. Again, it is no different than what other First Nations have done in combatting Crown failures to consider and protect their lands and culture. Why should this group of First Nations women be prevented from exercising the same liberties that other First Nations organizations regularly utilize?"

140 Sharon McIvor, "Aboriginal Women Unmasked: Using Equality Litigation to Advance Women's Rights" (2004) 16:1 CJWL 106 at 111.

141 Teressa Nahanee, "Indian Women, Sex Equality and the *Charter*" in Andrew & Rodgers, *supra* note 125 at 89.

142 John Borrows, *Freedom and Indigenous Constitutionalism*, (Toronto, Ontario: University of Toronto Press, 2016).

143 At the Charlottetown Accord, NWAC stated:

> 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 Aboriginal male leadership that the "collective" comes first, and that it will decide the rights of individuals…. 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. Karena Shaw, *Indigeneity and Political Theory: Sovereignty and The Limits of the Political* (New York, New York: Routledge, 2008) at 94.

Given this reality, what can be said about the role of section 25? One thing is certain — given the current constitutional framework it seems hard to imagine a way of applying section 25 that does not create a hierarchy between legal cultures. I think part of the reason for this is the underlying assumption that imposing the *Charter* on Indigenous governments means an oppression of Indigenous peoples. This assumption collapses the category of governments and peoples, and in so doing reduces self-determination to the concept of self-government. The reality of the equation is not so tidy. Can it be said the *Charter* is being imposed on Indigenous nations when there is case law of Indigenous women using the *Charter* to fight for their rights within their communities?

Moreover, as Green and Napoleon point out, international human rights law has evolved with the understanding that self-determination is expressed through collective and individual rights in tandem — most recently articulated in the *United Nations Declaration on the Rights of Indigenous Peoples*.[144] Collective self-determination requires individual community members be able to fully participate in the social and political life of their community. Thus, contemporary political discourses of Aboriginal self-government in Canada must involve a developed perspective of individual self-determination. Drawing on this idea makes it possible to integrate the difference between a government and a people(s) into the current legal debate over section 25. The goal is to contribute to developing a framework that does not instantiate a hierarchy, but instead allows for communication between legal cultures. In this sense, the gap in the jurisprudence on the application of section 25 to the Indigenous governments identified above means there is room for the courts to use a different application of section 25 in light of *UNDRIP*. The next section begins to develop such an approach.

Section 25 as a Reversed Cognizability Requirement

The goal of the rest of the paper is to contribute to developing a section 25 framework that does not instantiate a hierarchy of rights, but instead allows for communication between legal cultures. So far, this paper analysed section 25 with a focus on situations involving challenges to internal restrictions of Indigenous governments. It found the jurisprudence provides little guidance on how the *Charter* would operate in such a scenario. The limits of the current framework coincide with a view of Indigenous "government authority" that is delegated by the federal crown. Through defining an Indigenous government as

144 Val Napoleon, "Aboriginal Self Determination: Individual Self and Collective Selves" (2005) 29:2 Atlantis 31 at 31.

a form of delegated authority, the courts are able to apply the *Charter* without truly deciding if it applies. There is a tendency in scholarship to criticize this juridical approach, but this work tends to collapse the concepts of government and peoples. The controversy over the use of the *Charter* by some Indigenous women shows the relationship is not as straightforward as some of this legal scholarship has assumed.

I suggest all of these issues can be addressed by developing *Charter* interpretations that are cognizable with Indigenous legal cultures and Canada's nation-to-nation relationship with Indigenous peoples. This requires a structure for communication across and within legal cultures. I believe section 25 can be an anchor for Indigenous jurisdiction in the *Charter*. Thus, sections 25, 35 and 91(24) should be understood together as offering the possibility for a basic framework of a reimagined federation. In this sense, section 25 puts the foundation of the settler state on the table and offers some potential for constitutional reconciliation.

I would like to conclude by exploring an approach I think fits the purpose of section 25 as articulated above. I suggest section 25 can be understood as a reversed duty of cognizability, which means the courts would be required to arrive at constitutional interpretations cognizable within Indigenous legal cultures. This duty would redress the hierarchy forced on Indigenous people that haunts the current jurisprudence, while also acknowledging the jurisdiction of Indigenous nations.[145] Under this interpretation, section 25 intervenes at the level of jurisdiction.

What I am proposing is different from the idea of "translation" McLaughlin C.J. proposed in *R v Marshall; R v Bernard* and that Brian Slattery rejected as being an exercise of hierarchical extinguishment — i.e. if the common law cannot understand it, then it does not exist. Nor am I am suggesting there needs to be a kind of unitary constitutional Esperanto. Rather, section 25 could be understood as an occasion to develop a framework for communication across legal cultures. This is consistent with the approaches of some legal scholars who have argued for a federal or treaty paradigm of constitutionalism in which sover-

145 See John Borrows, *Canada's Indigenous Constitution*, (Toronto, Ontario: University of Toronto Press, 2010) at 152-3. "[T]he failure to recognize the existence of Indigenous legal traditions as a part of Canadian law is in itself discriminatory. Indigenous peoples have constantly adjusted their laws to take into account the common law or civil law, but Canadian judges and lawmakers have rarely done the same when it comes to Indigenous legal traditions. With one side resisting adjustment to their legal relationships, and thus preventing further harmonization, it might be said that the resistant party is the one who is engaging in discrimination. Equality is not well served by denying Indigenous societies equal participation in the ongoing formulation of Canada's legal system."

eignty is not absolute or unitary, but relational and divided between a plurality of jurisdictions.[146] A section 25 requirement of cognizability within Indigenous legal orders would direct courts according to the context of *Charter*. This jurisdiction is not the same as the immunity interpretations discussed above, which argue for a limit to the *Charter*. Rather, under my proposal the jurisdiction would not occupy a separate space but would be woven into the entire framework, effectively creating a plurinational *Charter*.

Aboriginal Charter Courts

One could ask: is it safe to assume that all *Charter* rights are cognizable in terms of Indigenous legal traditions? And if certain ones turn out not to be, what then? Can the Canadian courts ever be trusted to truly engage with Indigenous legal traditions in a way that makes them truly on par with Canadian *Charter* precedents? Admittedly, what I describe below is underdeveloped, but I hope to show that Indigenous justice systems are consistent with Canadian federalism. While others have argued for Aboriginal legal jurisdiction in different areas, for instance over (at least some) criminal matters,[147] I think, fundamentally, to focus on an area law without addressing the root of the jurisdiction's anchoring in the constitution can only carve out a piece of the settler legal system and tentatively clear a delimited space. It remains, in essence, a form of delegated authority.[148] My contribution to this conversation is to suggest section 25 means a plurinational understanding of the *Charter*.

The plurinational *Charter* would involve the creation of a system of Aboriginal Charter Courts with jurisdiction in all *Charter* matters. Practically speaking, the system of Aboriginal Charter Courts (ACCs) would be regionally-based. The territory covered by an ACC could be linked to territories of Indigenous nations. Each individual nation could create an individual ACC and have jurisdiction over their land. Since courts are not proportionally representative political institutions, the fact different nations encompass different sized land areas and populations is not a problem, unlike when thinking about possible self-government arrangements. A fused ACC could be created in cases

146 See Bruce Clark, *Native Liberty, Crown Sovereignty: The Existing Aboriginal Right of Self-Government in Canada* (Montreal & Kingston: McGill-Queen's University Press, 1990); See also Borrows, *ibid*; See also James Tully, *Strange Multiplicity*: *Constitutionalism in an Age of Diversity* (Cambridge: Cambridge University Press, 1995); See also Nichols, *supra* note 84.

147 See John Borrows, "Aboriginal and Treaty Rights and Violence Against Women" (2013) 50:3 Osgoode Hall LJ 699; See also Milward, *supra* note 31.

148 See McNeil, *supra* note 80. Scholars have also looked to the United States and its model of internal sovereignty and system of tribal courts and assessed the strengths and weaknesses of such a system for Canada.

of contested jurisdiction, or there could the option to have a case heard in an ACC of either nation. Not all nations would need to establish courts at the same time or establish courts with the same scope. A more patchwork development process could be available where nations who are equipped can move ahead, and those that need time to develop capacity can access resources and move to occupy their jurisdiction more slowly.

Sex-based discrimination would be the only exception to the jurisdiction of the ACCs. This exception is tied to section 34 of the *Constitution Act*, which states that Aboriginal rights cannot undermine sex-based equality. Thus, Indigenous women have recourse to possible self-government arrangements that remain consistent with section 28 of the *Charter* and section 35(4) of the *Constitution Act, 1982,* which specifies that "the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons."[149] As Kent McNeil suggests "[t]his provision, which was added by an amendment agreed to by four national Aboriginal organizations in 1983,[150] complements section 28 of the *Charter* which provides that, '[n]otwithstanding anything in this *Charter,* the rights and freedoms referred to in it are guaranteed equally to male and female persons.'"[151] On the question of what Indigenous laws the ACCs would apply, I think it makes sense to base it on the jurisdictions involved, similar to how provincial law may vary depending on which territory one is in. When hearing cases, the ACCs could look at the legal traditions of the Indigenous nation(s) on whose territory the court has jurisdiction — in addition to precedent from Navajo Courts in the USA, international law including *UNDRIP*, as well as existing *Charter* jurisprudence. The decisions of these courts could be appealed to appeal courts based on larger regional units comprising multiple national ACCs.

Part of my idea involves adjusting the Supreme Court of Canada so it would be in a position to hear cases coming from an ACC system. There are various options to be explored. One idea is drawing four justices from the ACC system for addition to the Supreme Court, for a total of 13 members of the

149 See Kent McNeil, "Aboriginal Governments and the *Charter*: Lessons from the United States" (2002) 17:2 CJLS 73 at 103. This is consistent with Kent McNeil's arguments that legal sex equality would not be threatened if the *Charter* did not apply to Aboriginal governments under section 35 because of subsection 35(4).

150 *Ibid*. McNeil is referring to the *Constitutional Amendment Proclamation,* 1983, SI/84-102. The four organizations were the Assembly of First Nations, the Inuit Committee on National Issues, the Metis National Council, and the Native Council of Canada.

151 *Ibid*. Scholars have cited this section to argue that indigenous nations should be able to claim jurisdiction over the issue of violence against women (Borrows) and well as to argue that Aboriginal self-government rights are subject to sex equality mandated by section 35(4) (McNeil).

Supreme Court of Canada. Cases coming through the ACC system and the traditional Canadian courts could be heard by this plurinational Supreme Court of Canada. The idea of a fused Supreme Court avoids the production of two sets of *Charter* rights and ensures precedent-setting decisions will represent reasoning cognizable with Indigenous legal cultures. These decisions would carry weight for lower courts in Canadian and Aboriginal courts. Courts in both jurisdictions would draw on these decisions as precedents.

Conclusion

The idea of creating Aboriginal Charter Courts might seem far-fetched, and I can hear the objection that the judiciary is not at all equipped to interpret and apply Indigenous laws in the way my proposal would require. Admittedly, it would require considerable expertise in relevant Indigenous legal traditions not many current benchers have. This would be a challenge institutionally, at least for a while. However, I think it is overly pessimistic to discount the idea on this basis alone. There are individuals right now who could serve on ACCs, including Sakej Henderson, John Borrows, and Val Napoleon, as well as many more junior lawyers and legal scholars who are now being trained and joining law faculties.

In addition, law schools in Canada will have to intensify the efforts already underway to develop local Indigenous legal traditions. There is already a growing number of scholars in Canada doing this, and capacity and expertise will develop over time. The University of Victoria now offers a joint law degree in common law and Indigenous legal orders.[152] The Wahkohtowin Law and Governance Lodge[153] is an interdisciplinary initiative in the Faculty of Law at the University of Alberta supporting community-led research of Indigenous laws and governance principles. There are examples from other jurisdictions that we can look to for guidance as well, including the USA and New Zealand.[154] Thus, while I share the pessimism about the ability of the Canadian Courts at this moment in history to integrate Indigenous jurisdiction at the

152 University of Victoria, "Joint Degree Program in Canadian Common Law and Indigenous Legal Orders JD/JID" (2019), online: *University of Victoria Law* <www.uvic.ca/law/about/indigenous/jid/index.php>.

153 University of Alberta, "Wahkohtowin Law and Governance Lodge" (2019), online: *University of Alberta Faculty of Law* <www.ualberta.ca/law/faculty-and-research/wahkohtowin-law-and-governance-lodge>.

154 See Raymond Austin, *Navajo Courts and Navajo Common Law: A Tradition of Tribal Self-Governance*, (Minneapolis, Minnesota: University of Minnesota Press, 2009); See also Carwyn Jones, *New Treaty, New Tradition: Reconciling New Zealand and Maori Law* (Vancouver, British Columbia: UBC Press, 2016).

constitutional level, I also believe the creation of Aboriginal Charter Courts is practical over time and occasioned by the *Charter* itself in section 25. It also fits a broader change in the orientation of law schools, the judiciary, and the legal profession in Canada.