Self-Governing Nation or "Jurisdictional Ghetto"? Section 25 of the *Charter of Rights and Freedoms* and Self-Governing First Nations in Canada

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Forty years after the Charter of Rights and Freedoms *came into effect, section 25 of the* Charter *has been the subject of remarkably little litigation and analysis. In* Dickson, *the Yukon courts were asked to determine whether the section could shield the laws of a self-governing First Nation from a* Charter *claim by one of its citizens. In addressing this issue, the Yukon Supreme Court and Court of Appeal considered for the first time what role section 25 plays in the context of Indigenous self-government agreements and, in doing so, provided substantive analysis of basic features of the section that have to date been only occasionally explored. This article outlines the trial and appellate level decisions in* Dickson *to clarify how the decisions nuance and develop the doctrinal framework for section 25 and what the court's analysis suggests about the relationship between section 25 and Indigenous political agency and self-determination.*

Quarante ans après l'entrée en vigueur de la Charte canadienne des droits et libertés, *l'article 25 de la* Charte *a fait l'objet de très peu de litiges et d'analyses. Dans l'affaire* Dickson, *on a demandé aux tribunaux du Yukon de déterminer si l'article pouvait protéger les lois d'une Première nation contre une revendication fondée sur la* Charte *par l'un de ses citoyens. En se penchant sur cette question, la Cour suprême et la Cour d'appel du Yukon ont examiné pour la première fois le rôle que joue l'article 25 dans le contexte des ententes d'autonomie gouvernementale des Autochtones et, ce faisant, ont fourni une analyse de fond des caractéristiques fondamentales de l'article qui, jusqu'à présent, n'avaient été qu'occasionnellement explorées. Cet article décrit les décisions de première instance et d'appel dans l'affaire* Dickson *afin de clarifier la façon dont ces décisions nuancent et développent le cadre doctrinal de l'article 25 et ce que l'analyse des tribunaux suggère quant à la relation entre l'article 25 et l'agentivité politique et l'autodétermination des Autochtones.*

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> *"The right of self-determination is vested in all the Aboriginal peoples of Canada, including First Nations, Inuit and Métis peoples … By virtue of this right, Aboriginal peoples are entitled to negotiate freely the terms of their relationship with Canada and to establish governmental structures that they consider appropriate for their needs."*
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> Report of the Royal Commission on Aboriginal Peoples, 1996

> *"We say that there is nothing in this* Charter *that will infringe upon the rights of the Natives … [T]he rights of all the native Canadians, either flowing from Treaties or the Royal Proclamation, are assured to remain as they are, and not being changed by the adoption of this* Charter of Rights*."*
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> Jean Chrétien, November 12, 1980, *Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada*

I. Introduction

The village of Old Crow sits some eight-hundred kilometers north of Whitehorse. It is the main village of the Vuntut Gwitchin and the seat of the Vuntut Gwitchin First Nation Government (VGFN). Cindy Dickson is a Vuntut Gwitchin citizen. Though she lived in Old Crow as a youth, she moved to Whitehorse when she was 16. She maintained close personal relationships and professional connections in Old Crow, however, and sought to run for a seat on the nation's governing council in 2018. The VGFN, though, has a residency requirement for those wishing to sit on council: they must live on settlement lands or move to such lands within 14 days of being elected. Ms Dickson was unwilling to do so, in large measure because she wanted to keep her son in Whitehorse, close to medical care that he regularly required. Thus, Ms Dickson brought an action alleging that the residency requirement violated her rights under section 15 of the *Charter of Rights and Freedoms* (*Charter*)[1]. The residency requirement, she argued, was discriminatory. In response, the VGFN argued that the *Charter* does not apply to the residency law and, if it does apply, section 25 of the *Charter* — which holds that *Charter* rights "shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada"[2] — fully answers Ms Dickson's claim.[3]

1 *Canadian Charter of Rights and Freedoms*, s 15, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

2 *Charter*, *supra* note 1, s 25.

3 For facts, see *Dickson v Vuntut Gwitchin First Nation*, 2020 YKSC 22 [*Dickson* SC] at paras 1-44 and *Dickson v Vuntut Gwitchin First Nation*, 2021 YKCA 5 [*Dickson* CA] at paras 1-36. The parties have

While an immense amount of litigation has flowed from the inclusion of Aboriginal and treaty rights in the *Constitution Act, 1982*, the vast majority of this has dealt with section 35, which sits outside the *Charter* and states that the "aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed."[4] Section 25 has only occasionally been dealt with by the courts, with the Supreme Court providing little guidance on its interpretation.[5] This is not to say that Ms Dickson's claim was entirely without precedent. Residency requirements like the one at issue here — requiring a person to be a resident of a First Nation either to vote or to hold an elected position — have been held to violate section 15 on several occasions.[6] *Dickson*, however, is the first case to consider in depth whether, or to what extent, the *Charter* is applicable to the decisions of a self-governing Indigenous nation and, more specifically, to consider the relationship between sections 15 and 25 of the *Charter* in this context. It therefore engages the "internal" aspect of section 25, considering the relationship between the political rights of Indigenous *peoples* and the rights of individual Indigenous persons in relation to their own governments.

In this, *Dickson* highlights the fundamental tension in section 25 between the individual rights protected in the *Charter* and the communal rights held by Indigenous peoples and protected in sections 25 and 35 of the *Constitution Act, 1982*.[7] Courts have considered this to date only in relation to *Indian Act*

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been granted leave to appeal the decision of the Court of Appeal to the Supreme Court of Canada: see *Dickson v Vuntut Gwitchin First Nation,* 2021 YKCA 5, leave to appeal to SCC granted, 39856 (28 April 2022). For extensive discussion of the case, see the special issue of Constitutional Forum: Amy Swiffen, ed, *Special Issue on* Dickson v Vuntut Gwichin First Nation, 2021 YKCA 5 (2022) 31:2 Const Forum Const [Swiffen, *Special Issue*].

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

5 As the Yukon Court of Appeal wrote in *Dickson* CA*, supra* note 3 at para 143: "[T]he case at bar raised some issues that have never been dealt with by a Canadian court. This is certainly true of the issues regarding [section] 25 and how it relates to personal *Charter* rights held by citizens of self-governing first nations."

6 See *Corbiere v Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203, 173 DLR (4th) 1 [*Corbiere*].

7 The tension between collective and individual rights in section 25 was noted by Bastarache J in *R v Kapp*, 2008 SCC 41 at para 78 [*Kapp*]: "The enactment of the *Charter* undoubtedly heralded a new era for individual rights in Canada. Nevertheless, the document also expressly recognizes rights more aptly described as collective or group rights. The manner in which collective rights can exist with the liberal paradigm otherwise established by the *Charter* remains a source of ongoing tension within the jurisprudence and the literature. This tension comes to a head in the aboriginal context in [section] 25." *Dickson* also revisits an issue that was much discussed in the early to mid 1990s, when the question of an Aboriginal right of self-government was very much alive (such a right was included in the proposed amendments of the Charlottetown Accord and recognition of that right became government policy in 1995). The question of whether the *Charter* would, or *ought to,* apply to self-governing nations was therefore discussed at length at that time, including by the Royal Commission on Aboriginal Peoples.

governments. In *Taypotat*, the Federal Court of Appeal held that a refusal to apply the *Charter* to laws created by an *Indian Act* government would "create a jurisdictional ghetto in which aboriginal peoples would be entitled to lesser fundamental constitutional rights and freedoms than those available to and recognized for all other Canadian citizens."[8] The connotations of this framing are important to parse: the term "ghetto" is used pejoratively, as is made explicit in the argument that Indigenous peoples who could not avail themselves of the *Charter against their own governments* would be entitled to "lesser" rights. The idea that an absence of *Canadian* law in Indigenous nations would render them lawless, and that any rights protected only through Indigenous law would be "lesser," draws on stereotypes and narratives that have long supported the imposition of colonial rule.[9] That said, nuance is important. *Indian Act* band councils are creatures of the Canadian state. Their connection to traditional forms of governance and the extent of their internal legitimacy varies considerably from nation to nation. Many Indigenous people have accordingly argued for the application of the *Charter* to band councils, giving support to the conclusions reached in cases like *Taypotat*, troublesome language aside.[10] Whether or not such a position holds where *Indian Act* governments are concerned, however, self-governing Indigenous nations exercising legal and political authority based on their inherent rights of self-government and their own legal traditions give rise to different considerations.

Dickson raised these issues directly. Ms Dickson sought a judicial declaration that the residency requirement in the VGFN Constitution was discriminatory and violated section 15 of the *Charter*. The VGFN countered with several arguments concerning the applicability of the *Charter* and the proper interpretation of section 25. The trial judge identified four issues requiring resolution: 1) Is the application of the *Charter* a purely political question that ought to be determined through negotiation between the VGFN and the federal and territorial governments? 2) Does section 15 of the *Charter* apply to the residency law

For a review, see 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.

8 *Taypotat v Taypotat*, 2013 FCA 192 at para 39.

9 Along similar lines, then Chief Justice of the Supreme Court Brian Dickson said in 1992 that "explicit constitutional entrenchment of self-government rights would be 'chaotic' and a 'disaster' unless aboriginal governments were subject, at a minimum, to the *Charter*." Wilkins, *supra* note 7 at 56.

10 See e.g. discussion in Mary-Ellen Turpel, "The Charlottetown Discord and Aboriginal Peoples' Struggle for Fundamental Political Change" in Kenneth McRoberts & Patrick J Monahan, eds, *The Charlottetown Accord, the Referendum, and the Future of Canada* (Toronto: University of Toronto Press, 1993) 117 and Naiomi Metallic, "Checking our Attachment to the *Charter* and Respecting Indigenous Legal Orders: A Framework for *Charter* Application to Indigenous Governments" (2022) 31:2 Const Forum Const 3 at 6-7.

in question? 3) Did the residency requirement infringe Ms Dickson's equality rights under section 15? And 4) what is the proper interpretation of section 25 of the *Charter* and what is its impact in this case?[11]

The trial judge rejected the argument, presented by the VGFN as a threshold issue, that the applicability of the *Charter* is a political question that should not be subject to judicial determination.[12] He held that the *Charter* applies to the VGFN Constitution's residency law, that the residency requirement was not inconsistent with section 15 except for the 14-day limitation, and that, in the alternative, section 25 operated as a shield to prevent *Charter* rights from derogating from the exercise of VGFN rights of self-government. The Court of Appeal largely agreed with this conclusion, though it disposed of the case through section 25 alone and did not sever the 14-day requirement. The *Charter* applies to the actions of the VGFN, the Court of Appeal held, yet section 25 is a full answer, shielding the residency requirement, including the 14-day requirement, from the application of other *Charter* rights. The remainder of this article tracks the Yukon courts' reasoning on the question of the applicability of the *Charter* and the proper interpretation of section 25. It begins in Part II by outlining the judicial approach to section 25 prior to *Dickson* and identifying important interpretive issues that have not been clearly answered by the courts. Parts III and IV then consider the reasoning in the trial and Court of Appeal decisions in depth, focusing in particular on how the courts dealt with the applicability of the *Charter* to self-governing Indigenous nations and the proper interpretation and application of section 25.

II. Section 25: A Brief Account of the Theory and Doctrine

Section 25 has received little judicial treatment. Whereas a substantial body of common law doctrine has developed concerning Aboriginal and treaty rights under section 35, the basic doctrinal framework associated with section 25 cannot be easily defined and authoritative judicial definitions of its key terms remain elusive.[13] Many Indigenous claimants testing the waters in the years fol-

11 See *Dickson* CA, *supra* note 3 at 38-71.

12 For further analysis of this aspect of the decision, see Robert Hamilton, "The Paradox of Political Questions in Canadian Aboriginal Law: Why *Dickson v Vuntut Gwitchin First Nation* Requires Reconsideration of the Political Questions Doctrine in Canada" (2022) 31:2 Const Forum Const 53.

13 By contrast, most of the terms in section 35 (e.g. "Aboriginal rights," "existing," "recognized and affirmed") were defined in the early 1990s. Interestingly, the phrase "Aboriginal peoples of Canada" was the last to be considered in 2021 (*R v Desautel*, 2021 SCC 17 [*Desautel*]). For another recent overview of the treatment of section 25 to date, see Amy Swiffen, "Constitutional Reconciliation and the *Canadian Charter of Rights and Freedoms*" (2019) 24:1 Rev Const Stud 85 [Swiffen, "Constitutional

lowing the enactment of the *Constitution Act, 1982* claimed rights under both sections 25 and 35.[14] The courts themselves took some time to begin to develop some conceptual coherence around the two sections. Bastarache J provided the most comprehensive analysis to date in his concurring opinion in *R v Kapp*.[15] *Kapp* considered the "external" application of section 25: non-Indigenous commercial fishers who were excluded from a fishery by a government program intending to give effect to an Aboriginal right to fish "argued that the communal fishing licence discriminated against them on the basis of race."[16] The majority disposed of the issue through section 15 alone, holding that the government action was permitted under section 15(2) and that there was no violation of the claimants' equality rights.[17] The majority considered section 25 only in *obiter*, expressing doubt that section 25 would apply to the issue before them and holding that further consideration of section 25 should take place on a case-by-case basis.[18] Bastarache J, by contrast, held that section 25 was a bar to the appellant's section 15 claim. In his view, a full analysis of the *Charter* claim was not required — if a conflict exists between an Aboriginal right and a *Charter* right, the Aboriginal right prevails. In this, Bastarache adopted a "shield" approach to section 25.[19]

The idea of a shield is one of the two dominant interpretive approaches to section 25 that emerged in the academic literature and, to an extent, the case law. In *Kapp*, Bastarache J identified these two possible modes of interpretation. The first would give primacy to *Charter* rights, seeking to construe *Charter* rights in a manner that does not derogate from Aboriginal rights but prioritizing the *Charter* right when reconciling the two is not possible. The

Reconciliation"]. Part of the challenge with identifying authoritative statements on section 25 is not only that this has been dealt with infrequently by the Supreme Court, but also that even when the Court has considered it, the bulk of the analysis has come in concurring minority judgements. See *Corbiere*, *supra* note 6 and *Kapp*, *supra* note 7.

14 See e.g. *R v Paul and Polchies*, (1984) 58 NBR (2d) 297, [1984] NBJ No 336 (NB Prov Ct) at para 6; *R v Steinhauer*, (1985), 63 AR 381, 15 CRR 175 (AB QB); *R v Barnaby*, *Ward*, *Patles*, *McKay*, *and Augustine* (1986), 68 NBR (2d) 71, [1987] 2 CNLR 125 (NB QB (TD)); *R v Ward*, (1987), 85 NBR (2d) 26, 217 APR 26 (NB QB (TC)); *Saanichton Marina Ltd. v Claxton*, (1987), 43 DLR (4th) 481, [1988] 1 WWR 540 (BC SC); *Born-With-A-Tooth v Canada (Attorney General)*, (1988), 83 AR 137, [1989] 2 CNLR 16 (AB CA).

15 *Kapp*, *supra* note 7.

16 *Ibid.*

17 *Ibid* at paras 57-59, 61.

18 *Ibid* at paras 63-65.

19 The idea that the section creates a "shield" seems to have first been articulated in *R v Steinhauer*, 1985 CanLII 1891 (AB QB) at para 19: "Section 25 of the *Constitution Act, 1982* is a shield and does not add to aboriginal rights. There is no aspect of the *Charter* from which the appellant needs shielding in this particular case."

second prioritizes the rights protected under section 25, leaving them intact in the event of conflict.[20] As Bastarache J notes, "[t]he first mode has been described in the literature as an interpretative prism or a mere canon of interpretation. The second method is most commonly referred to as a shield."[21] In his view the latter approach reflects the intention of the provision and is consistent with government statements as to its purpose.[22] Further, he held that section 25 creates *priority*, not a mandate for judicial balancing. The idea of priority "is inconsistent with the idea of weighing one right against another."[23] Thus, "if a law cannot be 'sensibly construed and applied' . . . without infringing the right, it must be declared inoperative."[24] This "shield" approach is supported by much of the academic writing on section 25, and several lower court cases have adopted it.[25] Most notable among these cases for current purposes is *Campbell*, the only case (to this author's knowledge) considering section 25 in the context of a self-government agreement. There, in response to a claim that section 3 rights were violated by provisions of the Nisga'a self-government agreement, the Supreme Court of British Columbia held that "[s]ection 25 of the *Charter* is a complete answer to this argument."[26]

While these statements are primarily from lower courts and concurring opinions, the idea of section 25 as a shield has been reasonably well articulated. The Supreme Court has also emphasized the role section 25 plays in balancing interests in the Canadian Constitution, not in the sense that Bastarache J rejected (balancing *Charter* rights against Aboriginal rights), but in providing

20 *Kapp*, *supra* note 7 at para 79 citing Bruce H Wildsmith, *Aboriginal Peoples & Section 25 of the Canadian Charter of Rights and Freedoms* (Saskatoon: University of Saskatchewan Native Law Centre, 1988).

21 *Kapp*, *supra* note 7 at para 80.

22 *Ibid* at para 81.

23 *Kapp*, *supra* note 7 at para 88.

24 *Kapp, supra* note 7 at para 88, citing Ritchie J in *The Queen v Drybones* (1969), [1970] SCR 282, 9 DLR (3d) 473 at 294.

25 For academic work examining the approaches, see Jane M Arbour, "The Protection of Aboriginal Rights Within a Human Rights Regime: In Search of an Analytical Framework for Section 25 of the *Canadian Charter of Rights and Freedoms*" (2003) 21 SCLR (2d) 3; Brian Slattery, "The Constitutional Guarantee of Aboriginal and Treaty Rights" (1982-1983) 8:1-2 Queen's LJ 232; Kent McNeil, "The Constitutional Rights of the Aboriginal Peoples of Canada" (1982) 4 SCLR 255; Wilkins, *supra* note 7; Thomas Isaac, "Canadian Charter of Rights and Freedoms: The Challenge of the Individual and Collective Rights of Aboriginal People" (2002) 21 Windsor YB Access Just 431; Celeste Hutchinson, "Case Comment on *R. v. Kapp*: An Analytical Framework for Section 25 of the Charter" (2007), 52:1 McGill LJ 173; William Pentney, "The Rights of the Aboriginal Peoples of Canada and the *Constitution Act, 1982*: Part I The Interpretive Prism of Section 25" (1988) 22:1 UBC L Rev 21; Swiffen, "Constitutional Reconciliation", *supra* note 13; essays in Swiffen, *Special Issue*, *supra* note 3. For caselaw see *Shubenacadie Indian Band v Canada (Human Rights Commission)* (2000), 187 DLR (4th) 741, 184 FTR 10 (FCA).

26 *Campbell et al v AG BC/AG Cda & Nisga'a Nation et al*, 2000 BCSC 1123 at para 153 [*Campbell*]. See Swiffen, "Constitutional Reconciliation", *supra* note 13.

a counter-majoritarian balance in the constitutional order.[27] As Deschamps J wrote in *Beckman* (dissenting on another point):

> The Aboriginal and treaty rights of the Aboriginal peoples of Canada are recognized and affirmed in s[ection] 35(1) of the *Constitution Act, 1982*. The framers of the Constitution also considered it advisable to specify in s[ection] 25. . . that the guarantee of fundamental rights and freedoms to persons and citizens must not be considered to be inherently incompatible with the recognition of special rights for Aboriginal peoples. In other words, the first and second compacts should be interpreted not in a way that brings them into conflict with one another, but rather as being complementary.[28]

In the existing jurisprudence on section 25, several important issues have been left unaddressed to date. First, the difference between the internal and external dimensions of section 25 has not yet been articulated with sufficient clarity, leaving a number of questions unanswered. For example, what is the effect of section 25 when non-Indigenous individuals claim that the recognition of Aboriginal or treaty rights violates their *Charter* rights (the external dimension)? What is the effect when Indigenous individuals claim that their own governments are violating their *Charter* rights (the internal dimension)? And when dealing with the internal dimension, does the *Charter* apply at all?[29] The case law to date has not been clear on the significance of these distinctions and on whether different rules or justifications prevail in these quite distinct circumstances. Other important doctrinal questions also remain. If section 25 indeed operates as a shield, what is the effect of the shield? And when is it triggered? The idea of a shield begins to answer this question — it arises when there is a conflict between a *Charter* right and a right described in section 25. But from this, two further questions arise: 1) what type or degree of impact is required, and 2) what rights does section 25 protect?

In considering what degree of impact is required to trigger section 25, Justice Bastarache's conclusion that the protections the section affords are not absolute must be kept in mind.[30] As he writes, "only laws that actually impair

27 This has been taken by the Supreme Court as evidence of respect for minorities: "In *Reference re Secession of Quebec*, 1998 CanLII 793 (SCC), [1998] 2 SCR 217, the protection of minorities was also identified as a key principle, manifested in part in minority language education rights ([section] 23 of the *Canadian Charter*), denominational school rights ([section] 93 of the *Constitution Act, 1867*) and aboriginal and treaty rights ([sections] 25 of the *Canadian Charter* and 35 of the *Constitution Act, 1982*)." *Gosselin (Tutor of) v Quebec (Attorney General)*, 2005 SCC 15 at para 27.

28 *Beckman v Little Salmon/Carmacks First Nation*, 2010 SCC 53 at para 98.

29 Naiomi Metallic similarly argues that this ought to be the foremost consideration and must be resolved before any discussion of whether the section is an "interpretive lens" or a "shield" can be considered. See Metallic, *supra* note 10 at 4-5.

30 *Kapp*, *supra* note 7 at para 97.

native rights will be considered, not those that simply have incidental effects on natives."[31] The provision is also restricted by the gender equality provision of section 28 of the *Charter*. Not every impact, then, would trigger section 25 and shield the section 25 right from impact. Actual impairment or "true conflict," to follow Bastarache J, would be the standard. Thus, an impairment of a section 25 right by application of the *Charter* triggers section 25 protection. How does this relate to infringement of the *Charter* right? For Bastarache J "s[ection] 25 is a threshold issue … This does not mean that there is no need to properly define the *Charter* claim; it simply means that there is no need to go through a full s[ection] 15 analysis, for instance in this case, before considering whether s[ection] 25 applies. What has to be determined is whether there is a real conflict."[32] In other words, it is the conflict between the two, not whether a *Charter* right has been unjustifiably infringed, that matters when considering the trigger and the steps in the analysis.

The second difficulty mentioned above is the determination of what rights are protected in section 25. Several courts have held that the "Aboriginal and treaty rights" referred to in section 25 are the same as those in section 35.[33] These include rights under modern treaties or settlement agreements.[34] The more difficult question is what is captured by the phrase "other rights and freedoms." In *Corbière*, the concurring minority opinion held that "the rights included in s[ection] 25 are broader than those in s[ection] 35, and may include statutory rights. However, the fact that legislation relates to Aboriginal people cannot alone bring it within the scope of the 'other rights or freedoms' included in s[ection] 25."[35] The majority in *Kapp* held that it refers to rights of a "constitutional character." Bastarache J, however, argued that "a broader approach is merited."[36] This broader approach would include statutory rights of the type identified in the concurring reasons in *Corbiere* and legislation dealing with the "uniqueness" of Indigenous peoples. Thus, "legislation that distinguishes between aboriginal and non-aboriginal people in order to protect interests associated with aboriginal culture, territory, sovereignty or the treaty process deserves to be shielded from *Charter* scrutiny."[37] It remains

31 *Ibid.*

32 *Ibid* at para 108.

33 As detailed below, this has at times caused problems for First Nations seeking to rely on section 25 to protect governance — some courts have said they have to prove they have a right of self-government under section 35 first.

34 *Kapp*, *supra* note 7 at para 105; *Campbell*, *supra* note 26 at paras 152-153.

35 *Corbiere*, *supra* note 6 at para 53.

36 *Kapp*, *supra* note 7 at para 102.

37 *Ibid* at paras 102-107. From this, Bastarache laid out a three-step analysis: "[t]he first step requires an evaluation of the claim in order to establish the nature of the substantive *Charter* right and whether the

unclear, however, whether this applies in both internal and external contexts. That is, when Bastarache J refers to "legislation," does that include legislation passed by Indigenous communities or nations themselves? Put differently, does section 25 function in the same way to protect Aboriginal rights from external impact by the *Charter* rights of non-Indigenous Canadians *and* to prevent application of the *Charter* to Indigenous governments in claims by their own citizens? In order to apply in this latter sense, a right of self-government — either as an Aboriginal or treaty right or as an "other right or freedom" — would have to be recognized: it is this right which section 25 would be protecting from impairment. The internal dimension of section 25 only arises, then, where there is a right of self-government; indeed, at least one lower court case has refused to apply section 25 to the decision of a band council on the rationale that the First Nation had no recognized right of self-government.

It is not clear where Bastarache J lands on this issue in *Kapp*. Interestingly, he states that most concerns to date have been associated with self-government. What he refers to, though, are challenges to *Indian Act* governments — indeed, most of the activity around section 25 in the lower courts has involved challenges to *Indian Act* governments, usually on the basis of section 15 claims. Bastarache J cites academic commentary speaking to the issue, highlighting the distinction between internal and external applications of the section, yet refrains from many conclusive statements.[38] It appears, though, that he would allow band councils to be subject to the *Charter.* He writes: "It could also be argued that it would be contrary to the purpose of s[ection] 25 to prevent an Aboriginal from invoking those sections to attack an Act passed by a band council. It is not at all obvious in my view that it is necessary to constrain the individual rights of Aboriginals in order to recognize collective rights under s[ection] 25."[39] On this view, section 25 would protect collectively held rights from diminution by the *Charter* rights of non-Indigenous Canadians, while individual Indigenous persons would maintain their full suite of *Charter* rights in relation to their own governments. This would be in line with the many decisions since *Corbiere* that have applied the *Charter* to residency requirements passed by *Indian Act* band councils.[40] However, Bastarache J did not consider whether, or to what extent, this would apply to other Indigenous governments,

claim is made out, *prima facie*. The second step requires an evaluation of the native right to establish whether it falls under s[ection] 25. The third step requires a determination of the existence of a true conflict between the *Charter* right and the native right" (*ibid* at para 111).

38 *Kapp*, *supra* note 7 at para 99.

39 *Ibid.*

40 See e.g. *Linklater v Thunderchild First Nation*, 2020 FC 1065 at para 16 [*Linklater*].

or whether the same analytical approach should apply in internal and external applications.[41]

While the most basic of doctrinal contours have been provided by the Supreme Court in *Corbiere* and *Kapp*, and while lower courts have provided analysis on certain issues, there remain a host of outstanding questions. Although the idea that section 25 operates as a shield has broad support in the case law and academic commentary, there are still no settled answers on whether section 25 is a threshold issue or one to be dealt with after a *Charter* infringement, what level of harm or conflict triggers it, and what is included in the category of "other rights and freedoms." Further, the question of whether the same analysis pertains to external and internal considerations requires further analysis. Indeed, whether the section applies, or ought to apply, to Indigenous governments at all requires clear discussion. A first step in addressing this issue is defining "Indigenous governments," a phrase which can include *Indian Act* band councils, governments recognized in modern treaties or self-government agreements, and various forms of government given partial or no formal recognition by the Canadian state. Consideration of this initial question gives rise to related questions: if the *Charter* applies to some or all Indigenous governments, what is the legal basis for its application and does it apply only to the exercise of delegated powers of governance, or equally to inherent powers?

Canadian courts have consistently held that the *Charter* applies to *Indian Act* governments. The issue has come up most frequently in the context of limitations on the ability of individuals to vote or stand for office, usually based on residency. In *Corbiere*, for example, a residency requirement preventing non-residents from voting was challenged on the basis that it was inconsistent with section 15. While *Corbiere* dealt with provisions of the *Indian Act* rather than the laws of Indigenous governments, its reasoning was extended to the laws of *Indian Act* band councils, including those operating with custom elections codes, in a number of subsequent cases.[42] The extension of this reasoning to First Nations working under custom elections codes is worth considering. The reasoning seems to be that *Indian Act* councils are a delegated form of govern-

41 For a comprehensive treatment of the issue of *Charter* rights and Indigenous self-determination, see Swiffen, "Constitutional Reconciliation", *supra* note 13.

42 As the Federal Court has written: "Since *Corbiere*, this Court has rendered a number of decisions invalidating provisions of election laws setting out various forms of residency requirements: *Clifton v Hartley Bay Indian Band*, 2005 FC 1030, [2006] 2 FCR 24; *Thompson v Leq'á:mel First Nation*, 2007 FC 707; *Joseph v Dzawada'enuxw First Nation (Tsawataineuk)*, 2013 FC 974; *Cardinal v Bigstone Cree Nation*, 2018 FC 822, [2019] 1 FCR 3 [*Cardinal*]. In *Clark v Abegweit First Nation Band Council*, 2019 FC 721 [*Clark*], my colleague Justice Paul Favel held that a residency requirement was invalid with respect to councillors, but valid with respect to the chief." *Linklater*, *supra* note 40 at para 16.

ment. Yet, as Kent McNeil has argued, even where government structures are established through federal statute, councils may nonetheless exercise inherent rather than delegated authority in some areas.[43] Custom elections are one example. The application of the *Charter* in this context, then, foreshadows a problem that was crucial to the YGFN's arguments, even if dealt with only briefly by the courts: does the applicability of the *Charter* depend on whether the Indigenous government is exercising delegated or inherent authority and, if not, is that because the same justification applies to both types, or because different justifications lead to the same conclusion? In either event, as a starting point, there is clear precedent for the application of the *Charter* to *Indian Act* governments. It is an outstanding question whether it applies to other forms of Indigenous government, particularly ones operating under self-government agreements and modern treaties.[44]

III. Application of the *Charter* in *Dickson*

The above questions were raised in *Dickson* and are particularly relevant in the circumstances of that case because the VGFN has entered into a self-government agreement and passed a written constitution encoding laws and customs, and because the VGFN Final Agreement and self-government agreement do not state explicitly that the *Charter* applies (as many such agreements do).[45] The general legal question regarding applicability of the *Charter* to Indigenous governments, however, was framed more narrowly in *Dickson* as whether the impugned residency requirement is a "law" for the purposes of section 32 of the *Charter.* Section 32(1) reads:

> This Charter applies
>
> (a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and
>
> (b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.[46]

The Supreme Court has interpreted this section flexibly, looking first to the nature of the actor (are they part of "government") and second to the nature of

43 Kent McNeil, "Aboriginal Governments and the *Canadian Charter of Rights and Freedoms*" (1996) 34:1 Osgoode Hall LJ 61.

44 See commentary cited in note 25 for consideration of the issue from multiple angles.

45 *Dickson* SC, *supra* note 3 at para 118. The Nisga'a agreement, for example, explicitly states that the *Charter* applies: see *Campbell*, *supra* note 26.

46 *Charter*, *supra* note 1, s 32.

the action (is an actor carrying out a government program or policy such that its actions ought to be subject to the *Charter*?).[47] As a consequence of this flexible approach, the *Charter* has been held to apply to a range of actors beyond the Parliament and legislatures. The decisions of municipal governments, for example, are subject to the *Charter* on the reasoning that "entities that are controlled by government or that perform truly governmental functions are themselves 'matters within the authority' of the particular legislative body that created them."[48] Hospitals exercising statutory authority and provincial human rights commissions have also been held to be subject to the *Charter.*[49]

Should this same flexible approach extend application of the *Charter* to the VGFN residency requirement at issue here? While many self-government agreements explicitly state that the *Charter* applies, this is not the case for all. In cases where the agreement itself is silent, the question of *Charter* application is both unsettled and contentious, particularly where the powers of self-government being exercised are not delegated, but inherent.[50] As Jack Woodward writes:

> There may be situations where a First Nation government makes a decision or adopts a law by exercising what it asserts to be an inherent law-making power, or a treaty-based law-making power, rather than any power derived from the *Indian Act* or any other statute. If the First Nation is acting pursuant only to an inherent self-government power (*i.e.*, an aboriginal right) or a treaty right, and not any delegated statutory authority, the exercise of this power should not be subject to the *Charter*.[51]

This rationale would apply not only in the context of self-government, but to *Indian Act* governments as well. It relies on a principled distinction between delegated and inherent authority and would determine the applicability of the *Charter* on this basis. This distinction animated the issues raised by counsel for the VGFN in *Dickson,* who made four arguments at trial against the application of the *Charter*: 1) the VGFN Constitution protects equality rights; 2) the

47 *Eldridge v British Columbia (Attorney General)*, [1997] 3 SCR 624, 151 DLR (4th) 577 [*Eldridge*]; *Greater Vancouver Transportation Authority v Canadian Federation of Students — British Columbia Component*, 2009 SCC 31.

48 *Godbout v Longueuil (City)*, [1997] 3 SCR 844, 152 DLR (4th) 577 at para 48, cited in *Dickson* CA, *supra* note 3 at para 84.

49 *Eldridge*, *supra* note 47; *Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44.

50 As Kerry Wilkins writes: "Our concern here, though, is not with the *Charter*'s application to self-government powers that originate from federal, provincial or territorial governments, but with its application to aboriginal communities exercising *inherent* self-government rights or powers." Wilkins, *supra* note 7 at 62 [emphasis in original].

51 Jack Woodward, *Native Law*, vol 1 (Toronto: Carswell, up to date 2013) at 6§270, cited in *Band (Eeyouch) c Napash*, 2014 QCCQ 10367.

VGFN did not agree to unconditional application of the *Charter* in self-government negotiations; 3) the *Charter* was developed without consideration for VGFN legal, political, or governance systems; and 4) the principle of judicial deference should be adopted.[52]

Veale J rejected these arguments at trial. First, while acknowledging that the VGFN did not agree to application of the *Charter*, Veale J pointed out that it was agreed that the self-government agreement was to be "in conformity with the Constitution of Canada."[53] The commitment to conformity, he held, "cannot be narrowly read as applying only to the division of powers."[54] Further, the final agreement states that Yukon self-government agreements "shall not affect the rights of Yukon Indian People as Canadian Citizens," suggesting that "a Vuntut Gwitchin citizen like Ms Dickson should have the right to make a *Charter* application on equality rights grounds to challenge the VGFN Constitution."[55]

For Veale J, the source of the VGFN governing authority was irrelevant. In his words, "[t]he VGFN exercise of its legislative capacity and the VGFN Constitution bring it within the scope of s[ection] 32(1) of the *Charter* pursuant to the principles set out in *Eldridge* as being either 'government' or exercising inherently 'governmental activities.'"[56] As a result, the *Charter* applies to the actions of the VGFN whether those actions are considered exercises of an inherent right of self-government or exercises of authority flowing from the VGFN self-government agreement and federal and provincial implementing legislation. Both, the court held, "are parts of Canada's constitutional fabric."[57]

Having concluded that the *Charter* applies to the VGFN, Veale J assessed whether the residency requirement violates section 15 of the *Charter* as Ms

52 *Dickson* SC, *supra* note 3 at paras 103-109. In this, the emphasis on the inherent nature of Indigenous authority is related to principles of consent and self-determination.

53 *Ibid* at para 110.

54 *Ibid* at para 111.

55 *Ibid* at para 112.

56 *Ibid* at para 130.

57 *Ibid*. Veale J summarized his findings this way: "1. The *Charter of Rights and Freedoms* is part of the *Constitution Act, 1982*, and hence applies to the VGFN Constitution and laws[;] 2. The rights of VGFN citizens as Canadian citizens includes the exercise of their rights and freedoms guaranteed in the *Charter*[;] 3. The VGFN right of self-government is both inherent and validated by Canada and Yukon legislation and thus part of the *Constitution Act, 1982*[;] 4. The *Charter* applies to the VGFN Constitution, and laws pursuant to [section] 32 of the *Charter* as the VGFN acts as a government and exercises government activities[;] 5. The VGFN government, Constitution and laws are part of Canada's constitutional fabric[;] 6. Article IV — Rights of Citizens remains in effect in the VGFN Constitution and the *Charter of Rights and Freedoms* in the *Constitution Act, 1982*, also applies" (*ibid* at para 131).

Dickson alleged, concluding that the residency requirement itself was not discriminatory, but that the 14-day requirement was. He therefore severed the 14-day requirement and held that the residency requirement was otherwise constitutional. In the alternative, he held that section 25 shielded the residency requirement from invalidation.[58]

At the Court of Appeal, counsel for the VGFN again argued that the *Charter* did not apply to the VGFN's Constitution.[59] The Court of Appeal noted, as the trial judge had, the VGFN argument that the inherent nature of VGFN governance rights was the basis for a principled distinction in considering *Charter* application. As the Court of Appeal wrote, "[t]he VGFN says it is not relying on customs allowed under the *Indian Act* or any other federal law, but on its *inherent and historic* rights and practices, which have now been *recognized* in (as opposed to *granted by*) the Final and Self-Government Agreements."[60] Ms Dickson argued that the VGFN's governing authority is derived from the agreements and enacting legislation — that is, that it is delegated — and that it is therefore subject to the *Charter*.[61] However, the Court of Appeal went even further than the trial judge in claiming that the source of Indigenous authority is not relevant. To quote the Court: "rather than engage in the perhaps futile debate regarding inherent Aboriginal rights and the source of the authority to self-govern, courts should recognize the *sui generis* nature of modern treaties (and, I would suggest, self-government agreements) and interpret them in a manner consistent with the 'national commitment' to reconciliation."[62] Having concluded that the distinction between delegated and inherent authority played no role in determining the applicability of the *Charter*, the Court of Appeal upheld the trial judge's conclusion that the VGFN residency requirement constituted an exercise of "governmental powers" under section 32 and was therefore subject to the *Charter*.[63]

58 *Dickson* SC, *supra* note 3.

59 *Dickson* CA, *supra* note 3 at para 5.

60 *Dickson* CA, *supra* note 3 at para 90 [emphasis in original].

61 *Ibid.*

62 *Ibid* at para 93.

63 *Ibid* at para 98. This follows a similar move in *Sga'nism Sim'augit (Chief Mountain) v Canada (Attorney General)*, 2013 BCCA 49 [*Chief Mountain*], where the British Columbia Court of Appeal sidestepped the question of whether the governance powers recognized in the Nisga'a treaty and final agreement were delegated or inherent. There, the Court held that the dispositive question was not whether powers were inherent or delegated but whether any powers were delegated to the extent required under Canadian constitutional law. The Court of Appeal held that they were and that the agreement was constitutional. There is a logic to this — it allowed the Court to decide the issue on narrow grounds rather than making more sweeping or general claims. It also allowed the Court to get around potentially troublesome questions about whether the treaty amended the Constitution by way of regular legislation (which, of course, would be impermissible and potentially fatal to self-government agreements in Canada). Yet,

IV. The Interpretation of Section 25 in *Dickson*

Having concluded that the *Charter* applies, the proper interpretation and application of section 25 was the next issue. Above, I flagged three issues with section 25 that require further clarification: 1) What is its purpose? 2) What is its scope (or what are the rights that it protects)? And 3) what is the proper interpretive approach to the provision?

In considering the purpose of section 25, the primary question is whether it ought to operate as an interpretive lens that balances *Charter* and Aboriginal rights in some manner or as a shield that gives section 25 rights priority over inconsistent *Charter* rights. This, of course, overlaps with the questions of scope and legal application, but at a higher level the debate has been over whether the section should be viewed as a lens through which the conflict between *Charter* and Aboriginal rights ought to be interpreted or as a shield that protects "any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada" from being impacted by *Charter* rights. As detailed above, the dominant judicial approach and balance of academic opinion suggests a shield approach.[64] In *Dickson*, the intervening Council of Yukon First Nations and Carcross/Tagish First Nation argued in favour of such an approach.[65] The Court of Appeal offered the following summary of the VGFN argument:

> As for the purpose of s[ection] 25, the First Nation argues in favour of the full recognition of the "special position" of Indigenous peoples within the "constitutional fabric" of Canada and the "inherent differences between the liberal enlightenment concept of individual rights and the collective nature of Indigenous rights." We are asked to depart from the usual approach taken to Indigenous matters under the *Indian Act* and use an "interpretive lens" of reconciliation rather than competing collective and personal interests. This means taking a "generous and liberal" view of s[ection] 25 as intended to protect the content of Indigenous rights from being weakened or undermined by *Charter* rights and freedoms; and reflects respect for the underlying constitutional value of protecting the rights of Indigenous peoples as distinct minority groups within Canadian society.[66]

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this approach is not without problems. It relies on the potentially problematic assumption that inherent and delegated powers of governance would be dealt with equally at Canadian law or, at the very least, that once any powers are recognized in a treaty they are thereafter dealt with as if they were delegated. As discussed in more detail below, the former would seem to limit considerably the nature of any inherent authority, while the latter would seem to militate against entering into self-government agreements. For consideration of the approach the *Chief Mountain* Court took to this issue, see Joshua Nichols, "A Reconciliation without Recollection: Chief Mountain and the Sources of Sovereignty" (2015) 48:2 UBC L Rev 515.

64 *Kapp*, *supra* note 7.

65 *Dickson* CA, *supra* note 3 at paras 140-142.

66 *Ibid* at para 137.

Note, the VGFN position is not that section 25 itself ought to be conceived of as an interpretive lens; rather, the VGFN argues that the lens brought to the interpretation of the section ought to be shaped by the notion of reconciliation rather than against the backdrop of individual rights that characterizes the liberal constitutional tradition. The explicit reference to the *Indian Act* seeks to distinguish the line of cases flowing from *Corbiere* and encourage the Court to adopt a different rule where self-government agreements that are silent on the application of the *Charter* are at issue. The effect of adopting this approach in this case, the VGFN argued, would be to preclude an individual Vuntut Gwitchin citizen from challenging a VGFN law on the grounds that it violates the *Charter.* This is consistent with the trial judge's conclusion that "s[ection] 25 provides space for the Vuntut Gwitchin First Nation to protect, preserve and promote the identity of their citizens through unique institutions, norms and government practices."[67] There, Veale J noted the imperative language used in section 25, which states that *Charter* rights "*shall* not be construed" in a manner that derogates from the Indigenous rights the section protects.[68] That is, courts have little discretion in the matter: they *must* construe *Charter* rights in a way that protects section 25 rights from intrusion. The Court of Appeal followed a similar logic in favouring a "shield" approach, holding that section 25 "is better characterized as a 'shield' than a 'lens' or interpretive aid that would 'read down' or 'modify' rights in the event of a conflict."[69]

The question of the scope of section 25 concerns interpretation of the phrase, "other rights pertaining to the [A]boriginal peoples of Canada." Ms Dickson argued that the right to determine who could be on council was not a right protected by section 25. While accepting that section 25 protects rights additional to those protected under section 35, she argued that the rights must be of a "constitutional character" (following the majority in *Kapp*) and "that s[ection] 25 was intended to protect rights belonging to Aboriginal peoples *by virtue of being Aboriginal*" (as with section 35).[70] The right to be on council is not an Aboriginal right, she argued, but a universal political and civil right.[71] She further argued that section 25 applies only to the state; without raising the internal-external distinction, that is, she argued that section 25 is effectively without internal purchase: it cannot be used to shield Indigenous governments from claims by their citizens. By contrast, the VGFN argued that "the exclusion of VGFN's Aboriginal claims, rights and interests from s[ection] 25 would

67 *Dickson* SC, *supra* note 3 at para 199.
68 *Ibid* at para 200.
69 *Dickson* CA, *supra* note 3 at para 143.
70 *Ibid* at para 133.
71 *Ibid* at para 134.

'unfairly treat the constitutional imperative of reconciliation as a distant legalistic goal devoid of meaningful content.'"[72] The Court of Appeal agreed with the trial judge and VGFN on this point, rejecting the narrower approach advocated by Ms Dickson and holding that where "a first nation … has survived years of paternalism and the suppression of its culture, the better view seems to be that under s[ection] 25, the collective right should prevail undiminished."[73] Though Bastarache J did not comment on this issue specifically in *Kapp*, and *did* seem to hold that the *Charter* applies to *Indian Act* governments (and perhaps all Indigenous governments), this argument has resonance with his statement that section 25 ought to be interpreted in a manner that "protects interests associated with aboriginal culture, territory, sovereignty or the treaty process … from *Charter* scrutiny."[74] A residency requirement passed under the authority of a constitution crafted by an Indigenous nation that has signed a modern treaty and self-government agreement clearly raises a number of the issues that Bastarache J highlighted as coming within the provision's protection.

Finally, there is the doctrinal question of when the section 25 analysis should be undertaken. Should section 25 be invoked only *after* determining that there is a *Charter* violation that cannot survive section 1? In *Kapp,* Bastarache would have triggered section 25 before consideration of the *Charter* issue, which is to say that he viewed the application of section 25 as a threshold question.[75] This builds on the considerations outlined above. The framing of section 25 as protective in nature — as a "shield" — shapes the legal test and suggests that section 25 should be applied *before* a determination of whether there was a *Charter* violation.[76] Most importantly, the protective nature of the clause precludes a "balancing" of Aboriginal and *Charter* rights. As the Court of Appeal wrote:

> … the purpose of s[ection] 25 is to *obviate* the weighing or "balancing" of those considerations that would be relevant to justification under s[ection] 1 — the rationality, proportionality and minimal impairment of the Residency Requirement — as against those that are engaged by s[ection] 25 — here, the governance traditions of the VGFN, the importance of the land to the concept of leadership in the First Nation, and its legal self-government arrangements generally. The characterization of [section] 25 as a "shield" (a term used recently in *Desautel* to describe the provision) permits a court to consider the *Charter* validity of the impugned law without performing a second "balancing exercise." On this point, I note the submission of

72 *Ibid* at para 138.
73 *Ibid* at para 144.
74 *Kapp*, *supra* note 7 at para 103.
75 *Dickson* CA, *supra* note 3 at para 125.
76 *Ibid* at para 145; *Kapp*, *supra* note 7 at para 109.

> counsel for the VGFN to the effect that reconciliation is unlikely to be achieved if historic Aboriginal rights are subjected to "another framework" for balancing, "reading down," or modification. It is difficult to disagree with that submission.[77]

For both the trial judge and Court of Appeal, then, section 25 is a hard shield: "the purpose of the provision is to protect certain Aboriginal rights from being abrogated or diminished by the judicial interpretation of personal rights and freedoms guaranteed by the *Charter*."[78] The rights protected by section 25 are not to be balanced against the individual rights protected in the *Charter*. This is an important clarification. While it may seem consistent with the shield approach outlined by Bastarache J in *Kapp*, those reasons consider primarily the *external* aspect and provide little guidance about the *internal* application of the *Charter*. This is crucial to keep in mind, as the rationales supporting doctrinal approaches may differ in each circumstance. For example, Bastarache J notes that section 25 should shield legislation dealing with "aboriginal culture, territory, sovereignty or the treaty process."[79] Yet, he holds that application of the *Charter* to Indigenous governments would deal with *individual*, rather than collective, rights. He appears not to have considered that issues such as culture, sovereignty, and territory are impacted by the application of the *Charter* to Indigenous governments. But, as the Quebec Court of Appeal recently recognized, self-government is a "right which is intimately tied to the cultural survival of Aboriginal peoples."[80] Considering Indigenous sovereignty as implicated only by the external dimensions of section 25, Bastarache J lends passing support to Patrick Macklem's argument that when considered internally section 25 ought to be subject to an *Oakes*-style test rather than operating as a shield.[81] The Court of Appeal in *Dickson* rejected this argument, holding that an additional "balancing" would not serve the purpose of reconciliation as it would dilute the protections afforded to Aboriginal rights.

V. Concluding Thoughts

The decisions in *Dickson* can be construed in two very different ways. Both the trial and appellate courts implicitly challenged the troublesome notion that an Indigenous nation could be considered a "jurisdictional ghetto" if aspects of Canadian law did not apply there. They were prepared to interpret section

77 *Dickson* CA, *supra* note 3 at para 146.
78 *Ibid* at para 148.
79 *Kapp, supra* note 7 at para 103.
80 *Reference to the Court of Appeal of Quebec in relation with the Act respecting First Nations, Inuit and Métis children, youth and families*, 2022 QCCA 185 at para 486.
81 *Kapp*, *supra* note 7 at para 99.

25 in a way that preserves the self-governing authority of Indigenous nations operating under self-government agreements by preventing *Charter* rights from undermining their laws. Yet, the courts also found that the *Charter* does apply to Indigenous nations who have never agreed to such application. In doing so, they elided the distinction between inherent and delegated authority, holding that the result would be the same regardless of the source of the authority recognized in the treaty. Going forward, this needs to be interrogated further. Though the courts' reasoning on this issue is left implicit, the logic of this position depends on one of two things being true: either the *Charter* applies to all Indigenous governments, regardless of the source of their governing authority, or, the *Charter* applies because the rights of governance are recognized in a treaty, and the source of the rights recognized therein is immaterial. Neither position is without problems.

In the first case, applying the *Charter* to "inherent right" Indigenous governments raises questions of both legality and legitimacy.[82] On the legal side, this stretches the flexible approach to section 32 well beyond its current applications, to include not only bodies exercising delegated authority and those carrying out "government functions," but to any institution that acts as a government, regardless of their relation to the federal and provincial governments.[83] On the question of legitimacy, an application of the *Charter* to governments that pre-date the Canadian Constitution and did not consent to being bound by it is difficult to sustain. If, as the Supreme Court held in *Desautel*, the purposes of section 35 are to recognize "the prior occupation of Canada by organized, autonomous societies and to reconcile their modern-day existence with the Crown's assertion of sovereignty over them,"[84] it is difficult to see how such a purpose can be met through the imposition of rules in violation of the principles of consent and self-determination, except in the most extreme circumstances.[85] If it is accepted that there is a meaningful distinction between

82 See Wilkins, *supra* note 7 and Metallic, *supra* note 10.

83 For consideration of the scope of section 32, especially as it pertains to Indigenous governments, see Kerry Wilkins, "With a Little Help from the Feds: Incorporation by Reference and Bill C-92" (May 17, 2022), online (blog): *ABlawg* <ablawg.ca/2022/05/17/with-a-little-help-from-the-feds-incorporation-by-reference-and-bill-c-92/> [perma.cc/UT3G-LP26]. For further context and analysis of the reach of section 32, see Linda McKay-Panos, "Universities and Freedom of Expression: When Should the *Charter* Apply?" (2016) 5:1 Can J of Human Rights 59; Ian Peach, "'This Charter Applies…': The Supreme Court of Canada's Fundamental Error in the Trinity Western University Decisions" (2021) 30:1 Const Forum Const 29.

84 *Desautel*, *supra* note 13 at para 22.

85 Principles of democracy, federalism, and respect for minorities also suggest a deferential approach to the decisions of inherent right governments, including whether or not they desire to be subject to the *Charter.*

delegated and inherent governance where *Charter* application is concerned, this may require courts to revisit the application of the *Charter* in the context of custom elections codes insofar as those represent exercises of inherent authority. And, as Naiomi Metallic has argued, the imposition of the *Charter* absent consent may need to be revisited in respect of all Indigenous governments.[86]

The second case — where the *Charter* applies because the rights of governance are recognized in a treaty — seems closer to the position held by the courts in *Dickson.* The problem here might be framed as a practical one. What is the incentive for Indigenous nations to enter into complex modern treaty and self-government agreements if they thereby find themselves subject to constitutional principles or rules that they did not agree to? It is the application absent consent, however, that the VGFN objected to strongly. An argument that they put forward, which was only dealt with briefly by the courts, illustrates the stakes here and the potential missed opportunity. The VGFN argued that the application of the *Charter* was a political question that needed to be resolved through negotiation. The courts rejected this, favouring instead the analysis outlined above. It might be argued that doing so allowed them to get to the result the VGFN wanted — upholding their laws in the face of *Charter*-based challenges — without engaging more complex questions about the applicability of the *Charter* to Indigenous governments exercising inherent authority. Yet in doing so, the courts missed the opportunity to push the parties to a negotiated solution of complex jurisdictional and constitutional issues. If Canadian courts hope to facilitate the development of consent-based, rather than unilaterally imposed, forms of constitutionalism in Canada, they must be open to allowing disputed constitutional issues to be resolved through negotiation. Nonetheless, in *Dickson* both levels of court provided a reading of section 25 that allows for considerable protection for Indigenous laws — at least those passed under self-government agreements — and, in so doing, provided helpful analysis of under analyzed aspects of section 25. Whether these interpretations will ultimately hold and what their impact might be on the role of section 25 in other contexts is yet to be seen.

86 See Metallic, *supra* note 10.