

Checking our Attachment to the Charter and Respecting Indigenous Legal Orders: A Framework for Charter Application to Indigenous Governments

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The *Canadian Charter of Rights and Freedom* looms large in our national identity. As a constitutional law professor at a Canadian law school, my experience is that most students and lawyers see the *Charter* as intrinsically tied to fundamental notions of justice and fairness in our country. Because of this, Canadian lawyers and judges, who believe the *Charter* to be inherently good, may find it hard to understand why Indigenous peoples resist application of the *Charter* to their own institutions. But Canadian jurists' attachment to the *Charter*, if not kept in check, can easily lead to dismissing important objections to its application to Indigenous peoples. I believe both the Yukon Supreme Court ("YKSC") and the Court of Appeal ("YKCA") fell prey to this trap in their reasons in *Dickson v Vuntut Gwitchin*.¹

Ms. Dickson's *Charter* challenge has been summarized in the introduction to this special issue. What I wish to emphasize about the facts, however, is how the Vuntut Gwitchin First Nation ("VGFN") resisted Ms. Dickson's Canadian *Charter* challenge, maintaining they had painstakingly developed their own Constitution with individual rights protections and that recourse to the Canadian *Charter* was unnecessary.² While Ms. Dickson had been prepared to make alternative arguments under the VGFN Constitution, both the YKSC and YKCA did not consider this argument. Instead, the Yukon courts decided the case exclusively on

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1 *Dickson v Vuntut Gwitchin First Nation*, 2020 YKSC 22 [*Dickson SC*]; *Dickson v Vuntut Gwitchin First Nation*, 2021 YKCA 5 [*Dickson CA*].

2 *Dickson SC*, *supra* note 1 at paras 61-68, 103-105; *Dickson CA*, *supra* note 1 at paras 17-32.

the Canadian *Charter*, ignoring VGFN's plea for respect and deference to their legal order. Both courts easily concluded that the *Charter* applied to Ms. Dickson, but that section 25 of the *Charter* operated to shield the residency requirement from *Charter* scrutiny to some extent.

To many, this case represents the opportunity to clarify, as between the 'shield' versus the 'interpretive' interpretation of section 25, which is the correct approach. However, both approaches take *Charter* application as their starting point.³ Instead of simply tinkering with the details of the 'shield' and 'interpretive' approaches to section 25, we need to step back and interrogate our impulse to impose the *Charter* on Indigenous governments and then ask what constitutional principles should inform our discussion on this issue. Imposing the *Charter* upon the VGFN without their consent and impervious to their Indigenous legal order in fact runs afoul of several *Charter* values and other constitutional principles. Developing a principled framework for considering the *Charter's* application to Indigenous governments not only allows Canadian lawyers and judges to keep their attachment to the *Charter* in check but presents a more just and flexible approach to considering *Charter* application to Indigenous governments that is truer to our constitutional aspirations than an approach that blindly imposes the *Charter* on Indigenous governments.

The leading problem with automatic *Charter* application: assimilation

The Final Report of the Truth and Reconciliation Commission ("TRC") underscored the importance of the revitalization of Indigenous legal orders for meaningful reconciliation. According to the TRC, for Canadian law to cease being a means to subjugate Indigenous people to an absolute sovereign Crown, it is critical for Indigenous people "to recover, learn, and practice their own, distinct, legal traditions."⁴

From the perspective of reconciliation between Canadian and Indigenous legal orders, the fundamental question at the heart of this case is: why should the Canadian *Charter* apply in this case in the face of VGFN's objections and their own legal order that includes an individual rights protection regime? Unfortunately, neither the YKSC nor YKCA made any real attempt to grapple with this question. Neither seemed to seriously entertain the idea that they could use the provisions in the VGFN's Constitution to resolve Ms. Dickson's complaint, even though this prospect was clearly contemplated within the VGFN Constitution.⁵

Both courts' reasons on whether the *Charter* applied to VGFN's residency requirement were brief and based on the proposition that 'to exist within the Canadian constitutional order is to accept application of the *Charter*.'⁶ Accordingly, ambiguous provisions in the VGFN

3 The 'shield' approach does not necessitate automatic *Charter* application, but the approach to it, applied in the courts below, does. For more on this, see Amy Swiffen's article in this special issue.

4 *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of Truth and Reconciliation Commission of Canada* (Ottawa: Truth and Reconciliation Commission of Canada, 2015) at 203, 206, 213 [TRC Report].

5 *Dickson SC, supra* note 1 at paras 63, 112-113 (this is Article IV s 7 of the VFGN Constitution); *Dickson CA, supra* note 1 at paras 156-157; *Vuntut Gwitchin First Nation Constitution*, (2019), online (pdf): <<http://www.vgfn.ca/pdf/constitution%202019.pdf#>> [perma.cc/5393-HC6Q].

6 *Dickson SC, supra* note 1 at paras 110-120, 131; *Dickson CA, supra* note 1 at paras 88, 97.

Self-Government Agreement (“SGA”) that were capable of conflicting interpretations on the point, were read as plainly implying *Charter* application.⁷ For example, references in the SGA about VGFN self-governance respecting and co-existing within the Canadian constitutional order were circularly taken as implied acceptance of automatic *Charter* application.⁸ As I will develop further below, automatic *Charter* application does not necessarily flow from VGFN’s self-governance co-existing within the Canadian constitutional order. Moreover, VGFN’s refusal to consent to the *Charter* was viewed as irrelevant; instead, the fact that VGFN did not explicitly oust the *Charter* in the SGA was deemed tacit acceptance.⁹ Next, Supreme Court of Canada (“SCC”) case law on section 32 of the *Charter*, taking a broad approach to “government,” was easily extended to include VGFN even though those precedents had never previously been applied to a self-governing First Nation.¹⁰ There was no questioning of whether the context of an Indigenous government exercising inherent self-government, with their own legal order, changed anything.

Both lower courts approached the *Charter* application analysis purely as an interpretive exercise (can/does the *Charter* apply?) instead of as a normative one (should the *Charter* apply?). I believe they did so because their attachment to the *Charter* prevented them from seeing the problems with applying it to Indigenous governments.

There is no getting around the fact that applying the *Charter* to the VGFN without their consent and heedless of their established legal order,¹¹ is a form of assimilation. While the lower courts may not have intended it as such, the decision to automatically impose the *Charter* on VGFN in the circumstances is reminiscent of darker chapters of our history where Canadian decision-makers forced Euro-Canadian ideas, processes, and institutions on Indigenous peoples.¹² While some of the law-makers who imposed these policies might have done so out of hatred towards Indigenous peoples, the vast majority likely did so out of paternalistic and misguided beliefs that they were ‘helping’ Indigenous peoples. While well-intentioned, what lies behind such intentions, nonetheless, are racist assumptions that Indigenous ideas, processes, and institutions are somehow backwards or inferior and incapable of sustaining the well-being of Indigenous communities. Reports like that of the TRC and many others teach us that such beliefs couldn’t have been more wrong. The imposition of Western ideas, processes and institutions on Indigenous peoples has had disastrous consequences for Indigenous identities, cultures and well-being.¹³ To avoid repeating the mistakes of the past, Canadian judges must be alive to the fact that forcing Canadian ideas on Indigenous peoples cannot continue, even those in our beloved *Charter*.

7 *Dickson SC, supra* note 1 at paras 110-113.

8 *Ibid.*

9 *Ibid* at paras 118-119.

10 *Ibid* at paras 121-128; *Dickson CA, supra* note 1 at para 98.

11 *Dickson SC, supra* note 1 at paras 112, 131 (YKSC does hold that VGFN Constitution remains in effect and concurrent, however, the court’s approach is to effectively give the *Charter* paramountcy in the circumstances with little explanation or justification).

12 There are too many examples to list, but among the more notorious are the imposition of the *Indian Act*, residential schools, and Canadian child welfare laws on Indigenous peoples.

13 See, in general, *TRC Report, supra* note 4.

Learning from past mistakes

Discussions about how imposing the *Charter* on Indigenous government is assimilative are not new. The question of whether the *Charter* ought to automatically apply to exercises of Indigenous self-government was a major source of contention during the Charlottetown negotiations. In her article on events surrounding the Charlottetown Accord, Mary-Ellen Turpel effectively summarizes the reasons for Indigenous opposition to the *Charter*:

Aboriginal organizations, and especially First Nations leaders, had argued for some time that the *Charter* does not represent their value systems because it does not embrace social and economic justice, nor does the litigation style of rights redress suit their history and traditions. The *Charter*, with its preface recognizing the supremacy of God and its emphasis on individual rights instead of individual responsibilities (a First Nations approach) was always rejected by First Nations. It was developed without First Nations input in 1981 and over objections to concepts and principles that were either too limited for Aboriginal communities or just outside their traditions and cultures (for instance, the model of taking human-rights disputes to court instead of to Elders or using other dispute-resolution processes that are traditional part of an Aboriginal community.)¹⁴

Turpel describes the various problematic threads of public reaction to Indigenous resistance to the *Charter*. Some reflected paternalistic beliefs that “they knew what was best for Aboriginal peoples.”¹⁵ Some were affronted at the very idea that Indigenous people rejected ideas they saw to be of universal appeal. Others rejected the proposition that Indigenous people should be allowed to operate under standards different from other Canadians.

As recounted by Turpel, during the Charlottetown negotiations, some (but not all) Indigenous women’s organizations raised alarms that having Indigenous governments operating outside the *Charter* would be licence to undermine the rights of Indigenous women.¹⁶ While recognizing the legitimacy of this concern, due in no small part to gender discrimination imposed on First Nations by the *Indian Act*, Turpel also explains how the issue was oversimplified as a basis to resist Indigenous self-government:

Gender-equality concerns are legitimate, but they are interwoven with cultural and racial oppression that has been imposed upon Aboriginal people. To see only the gender aspect is, unfortunately, to miss the bigger picture of how we get out of this oppression that has been the legacy of Canadian dominance of Aboriginal peoples. Also, to insist on the same ideas of gender equality in Aboriginal society as may pertain in Canadian society is another form of dominance, in my view, when many Aboriginal systems demand a much more central role for women than in the mainstream government.¹⁷

Turpel further explains how some non-Indigenous groups seemed to use gender discrimination concerns as a pretext to mask racist beliefs about Indigenous inferiority and double standards in relation to Indigenous governments:

... the extent to which gender-equality concerns were focused upon by non-Aboriginal people during the campaign raises a different point for me. The level of scrutiny of Aboriginal governments and the expectations of perfection by non-Aboriginals in all aspects of governance is so outrageous that no

14 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 at 135 [Turpel].

15 *Ibid.*

16 *Ibid* at 132-135.

17 *Ibid* at 134.

Aboriginal government would ever satisfy these expectations ... This is a clear double standard, since Canadian governments govern despite the fact that the ideals of gender equality, *Charter* protection, and social justice for all are far from realized in dominant society. Underlying this opposition to self-government is an expectation that Aboriginal peoples must perfect their societies before they will be 'permitted' to govern and that, prior to that point, the far-from-perfect dominant society is entitled to control Aboriginal communities.¹⁸

Ultimately, the conflict over the *Charter* led the Indigenous negotiators to compromise by accepting *Charter* application to self-government within the Charlottetown Accord, but this came with some concessions from First Ministers as well. The *Charter* would be amended to "apply immediately to governments of Aboriginal people," but section 25 would be strengthened to state that "nothing in the *Charter* abrogates or derogates from Aboriginal, treaty or other rights of Aboriginal peoples, and in particular any rights or freedoms relating to the exercise or protection of their languages, cultures or traditions." Finally, section 33 would be amended to clarify that Aboriginal governments could also invoke the notwithstanding clause.¹⁹

Returning now to the Yukon courts' decisions, having just revisited the controversy and trade-offs negotiated around *Charter* application in the Charlottetown Accord negotiations, it is difficult not to dwell on the lack of discussion around this controversy in the courts' reasons, or what to do in the absence of the negotiated trade-offs (e.g., *if finding the VGFN is within section 32, do we read them into section 33 as well?*). Some thirty years since, this history ought to inspire circumspection over *Charter* application to Indigenous governments, yet the courts below reached their conclusion readily.

Why the Yukon courts' approach to section 25 is a problem

I could be accused of overstating my point about assimilation, given that both lower courts used section 25 of the *Charter* as the means to attempt to resolve VGFN's concerns about the *Charter's* impact on their culture and governance system.²⁰ While I believe the courts were well-intentioned in this regard, the way section 25 was applied in the case did little to demonstrate genuine respect for VGFN as a government. In fact, this approach risks perpetuating exactly the kinds of stereotypes and double standards about Indigenous governments identified by Turpel.

With minor variations, the approach of both the YKSC and YKCA seemed to be premised on the *Charter* applying to Indigenous governments in all cases, but, for certain exercises of Indigenous jurisdiction, at some point in the *Charter* analysis, section 25 will shield the exercise of Indigenous jurisdiction from further *Charter* scrutiny. Both courts held that section 25 was triggered because the residency requirement had a 'constitutional character' (although both questioned whether 'constitutional character' was an appropriate or even binding threshold²¹). Despite finding that section 25 shielded the residency requirement, the

18 *Ibid* at 134-135.

19 Canada, Privy Council, *Consensus Report on the Constitution: Final Text*, Catalogue No CP22-45/1992E (Charlottetown: PC, 28 August 1992).

20 Dickson SC, *supra* note 1 at paras 114, 176, 193, 199; Dickson CA, *supra* note 1 at paras 143-161.

21 Dickson SC, *supra* note 1 at paras at 191, 194, 207; Dickson CA, *supra* note 1 at para 147.

YKSC nonetheless conducted a full section 15 *Charter* analysis (finding the residency requirement was not a *prima facie* violation of Ms. Dickson's equality rights except for the 14-day time period to move), followed by an *Oakes* inquiry and "reading down" the 14-day residency requirement.²² Likewise, despite finding that section 25 shielded the residency requirement, the YKCA engaged in a deep *Charter* analysis, concluding, contrary to the YKSC, that the residency requirement constituted a *prima facie* infringement of Ms. Dickson's equality rights.²³ Further, while stating that an *Oakes* analysis was unnecessary because of the finding that the residency requirement was 'shielded' the YKCA nonetheless hinted that, but for the shield, the infringement might not pass *Oakes*.²⁴

On both approaches to section 25, VGFN was subjected to having its legal order intensely scrutinized by standards foreign to it. Imagine the laws of Canada scrutinized under the legal standards of Bahrain or vice versa. This does not happen to other governments. In customary international law, sovereign states are immune from the jurisdiction of foreign courts, except where the state consents to jurisdiction or has breached international law.²⁵ Alongside this, Canadian courts have adopted an interpretive principle known as 'comity' and it has been described as "the deference and respect due by other states to the actions of a state legitimately taken within its territory."²⁶ In *R v Hape*, a majority of the SCC was unwilling to undertake *Charter* scrutiny of the activities of RCMP officers conducting an investigation of a Canadian in the Turks and Caicos Islands as this would indirectly entail scrutinizing that country's laws and processes under Canadian *Charter* standards, which would run afoul of the principle of comity. Unless there was evidence that the investigation violated international law, Canadian courts "must respect the way in which the other state chooses to provide the assistance within its borders."²⁷

While Indigenous governments are not seen as foreign sovereigns in Canada,²⁸ nor are they simply subordinate, or even analogous, to Canadian governments. They are *sui generis* governments and, as such, entitled to respect and deference in the exercise of their jurisdiction.²⁹ In the United States, the status of tribes as 'domestic dependent sovereigns,' with their jurisdiction predating the formation of the country, has resulted in court rulings that tribal governments are outside the scope of the American Constitution and its individual rights protections provisions.³⁰ However, the Yukon courts gave little consideration how the nature of VGFN, as a formally self-governing nation, influenced the level of respect shown to its legal order.³¹

22 *Dickson SC*, *supra* note 1 at paras 132-171.

23 *Dickson CA*, *supra* note 1 at paras 107-113.

24 *Ibid* at para 116.

25 *R v Hape*, 2007 SCC 26 at paras 41, 43 [*Hape*].

26 *Morguard Investments Ltd v De Savoye*, [1990] 3 SCR 1077 at 1095, 52 BCLR (2d) 160.

27 *Hape*, *supra* note 25 at para 52.

28 See *Beaver v Hill*, 2018 ONCA 816 at para 17.

29 *Canadian Pacific Ltd v Matsqui Indian Band*, [2000] 1 FC 325 at paras 29, 44, 176 DLR (4th) 35 [*Canadian Pacific Ltd*]; *Taypotat v Taypotat*, 2013 FCA 192 at para 36 [*Taypotat*]; *Pastion v. Dene Tha' First Nation*, 2018 FC 648 at paras 21-29 [*Pastion*]; *Ontario Lottery and Gaming Corporation v Mississaugas of Scugog Island First Nation*, 2019 FC 813 at paras 49-51 [*Ontario Lottery and Gaming*]; *Anderson v Alberta*, 2022 SCC 6 at para 28 [*Anderson*].

30 See Kent McNeil, "Aboriginal Governments and the Charter: Lessons from the United States" (2002) 17:2 CJLS 73.

31 For more on this see Kate Gunn, "Towards a Renewed Relationship: Modern Treaties & the Recognition of Indigenous Law-Making Authority" (2022) 31.2 Const Forum Const 17.

Further, and most damagingly, the intense *Charter* scrutiny to which the VGFN residency requirement was subjected unwittingly feeds into the stereotypes of Indigenous governments as backwards, prone to violate human rights and unable to govern themselves. But this is an unfair comparison; different nations can have different norms. Our courts realize that it is both misleading and disrespectful to subject other governments to such scrutiny under Canadian norms and so refrain from doing so as much as possible through the doctrine of sovereign immunity and the principle of comity (barring breaches of international law). Yet we don't question the propriety of doing this when it comes to Indigenous governments, which suggest a double-standard.

Automatic *Charter* imposition as an infringement of Aboriginal rights

An alternative lens that also underscores the problem here is analyzing the issue under section 35 of the *Constitution Act, 1982*, through the *Sparrow* framework.³² Under this framework, a government action or law infringes an Aboriginal right where it imposes an unreasonable limitation upon the right, imposes undue hardship on the Indigenous group or denies them of their preferred means of exercising the right.³³ In a recent reference decision, the Quebec Court of Appeal suggested that federal legislation subjecting the inherent Aboriginal right to self-government to automatic *Charter* applications is a clear infringement, which would have to be justified on the *Sparrow* framework in future challenges in specific cases.³⁴

To justify an infringement of an Aboriginal right, in addition to consulting, a government must demonstrate that it pursued a valid objective that reconciles the Aboriginal group's interests with society's broader interest, and that it tried to achieve this objective respectful of the fiduciary obligations of the Crown. To prove the latter, governments must satisfy an *Oakes*-like proportionality framework that is also imbued with specific considerations for the Indigenous context, including not only proving as little infringement as possible, but having given priority to the Aboriginal right and not adopting unstructured regulatory regimes.³⁵

I believe this a helpful framework for considering *Charter* application to the VGFN in a more principled way than how it was approached in the lower courts. First and foremost, this requires seeing the automatic imposition of the *Charter* on the VGFN as an infringement of their inherent right to self-government. VGFN steadfastly resisted agreeing to *Charter* application in their negotiations, thus automatic *Charter* imposition denied them their preferred means of exercising their right. Forcing the *Charter* on the VGFN, even with section 25 operating as a shield, imposes undue hardship on VGFN as its application is assimilative, dismissive of VGFN's individual rights protection regime within its Constitution. It also subjects VGFN's legal order to unfair comparisons to the Canadian legal order that feed into stereotypes about Indigenous inferiority and inability to govern themselves. For all of these reasons, automatic

32 See *R v Sparrow*, [1990] 1 SCR 1075, 46 BCLR (2d) 1.

33 *Ibid* at 1111-1113.

34 *Renvoi à la Cour d'appel du Québec relatif à la Loi concernant les enfants, les jeunes et les familles des Premières Nations, des Inuits et des Métis*, 2022 QCCA 185 at paras 518, 520, 528-529.

35 For a summary of the law here, see Peter W Hogg & Daniel Styler, "Statutory Limitation of Aboriginal or Treaty Rights: What Counts as Justification" (2015) 1:1 Lakehead LJ 3. On unstructured discretionary regimes, see *R v Adams*, [1996] 3 SCR 101 at para 51, 138 DLR (4th) 657 [*Adams*]; *R v Marshall*, [1999] 3 SCR 456 at paras 62-64, 177 DLR (4th) 513 [*Marshall*].

Charter application is an unreasonable limitation on VGFN's right to self-government. Thus, justification becomes necessary.

Here we are dealing with judge-made law rather than legislation or executive action. Nonetheless, since the Yukon courts' decisions infringe an Aboriginal right, the judges' (discretionary) decisions here ought not to be left unstructured — a framework for exercising such discretion is needed.³⁶ In the administrative law context, *Baker* holds that discretionary decisions ought to be exercised considering, among other things, the fundamental values of Canadian society, the principles of the *Charter*, and international law.³⁷ In the *Charter* context, judge-made decisions must account for 'Charter values.' This calls on courts to identify the objectives or underlying values behind a potentially *Charter*-infringing decision and then engage in a proportionate weighing of these objectives and values against the *Charter* protections at play.³⁸ This has been called the 'Charter values' or *Doré* framework. The SCC has emphasized that this analysis is a "robust one" and "works the same justificatory muscles" as the *Oakes* test.³⁹

I am proposing the development of a similar analytical framework to be used here but adapted to the *Sparrow* framework. This requires judges faced with imposing the *Charter* on Indigenous governments to identify the objectives or values in favour of applying the *Charter* and weighing them against competing objectives and values at play.⁴⁰ Consistent with *Baker*, these objectives can also be based on fundamental values of Canadian society, the principles of the *Charter* and section 35, and international law. These competing objectives would have to be weighed with an eye to proportionality as well the fiduciary nature of the relationship between Canada and Indigenous peoples.

Applying the adapted *Sparrow* framework to the VGFN

I will start by identifying the principles in favour of applying the *Charter*. From my reading of the Yukon cases, as well as the concerns canvassed by Turpel, these are: 1) section 52 of the *Constitution Act, 1982* necessitates *Charter* application; 2) fear of a legal vacuum; and 3) specific equality concerns. I will discuss each in turn and simultaneously identify and weigh the competing objectives and principles at play.

36 *Ibid.*

37 *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, 174 DLR (4th) 193.

38 See discussion in *Doré v Barreau du Québec*, 2012 SCC 12 at paras 25-58 [*Doré*].

39 *Ibid* at para 5; *Loyola High School v Quebec (Attorney General)*, 2015 SCC 12 at para 40.

40 While I am proposing this analysis for the VGFN, a formally self-governing First Nation, this framework could apply to all Indigenous governments. Across the board, this provides a more just and flexible approach than imposing the *Charter* automatically. Distinctions between inherent and delegated jurisdiction, for these purposes, are arbitrary. Our courts have been clear that exercises of self-government, including both delegated or inherent are worthy of respect and deference: see *Canadian Pacific Ltd*, *supra* note 29 at paras 29, 44; *Taypotat*, *supra* note 29 at para 36; *Pastion*, *supra* note 29 at 21-29; *Ontario Lottery and Gaming*, *supra* note 29 at paras 49-51; *Anderson*, *supra* note 29 at para 38. Under a reconciliation lens, it must be recalled that 'delegated' forms of jurisdiction have, for much of our history, been the only type of self-government on offer from governments and the courts, with Indigenous governments having little say in the matter. To limit this framework to inherent exercises of jurisdiction, would operate to stifle the exercise and development of Indigenous legal orders.

1) Section 52 of the Constitution Act, 1982 necessitates Charter application

Section 52 of the *Constitution Act, 1982* says that the Constitution is the supreme law of Canada. Ms. Dickson emphasized this provision in her submissions,⁴¹ and the Yukon courts emphasized section 52 in finding that the *Charter* applied to VGFN.⁴² While not expressly explained in the cases below, I assume the reasoning to be that because the Constitution is the supreme law of Canada, this necessitates *Charter* application to VGFN.

In interpreting section 52, it bears recalling that our written Constitutional documents are drafted at the level of principle, not as prescriptive rules. Further, the various principles in the Constitution can sometimes be in tension with each other and the role of the courts is to attempt to harmonize these tensions so that each provision can be interpreted to the fullest extent possible while coexisting with the rest of the Constitution. Interpretations that privilege one constitutional provision (or even an entire section of the Constitution) while disregarding another are suspect.⁴³ Section 52 does not prescribe that the *Charter* (Part 1 of the *Constitution Act, 1982*) must apply in full force; that is only a possible interpretation — and one that is suspect. To read it as such, in the case of a self-governing Indigenous nation with a legal order that includes an individual rights protection mechanism, privileges the *Charter* over Part II of the *Constitution Act* (Aboriginal rights), disregards the plain wording of section 25 of the *Charter*, and is in tension with section 15 of the *Charter*, as well as several unwritten constitutional principles, including the rule of law, federalism and protection of minorities, as I will discuss below.

A variant of this first argument is the ‘equality-for-all argument’ — that the *Charter* ought to apply to everyone in Canada equally. This was an argument that some members of the public found persuasive at the time of the referendum on the Charlottetown Accord in 1992.⁴⁴ The problem with this argument, however, is that it relies on an outdated notion of equality — formal equality — which has long been discarded in favour of substantive equality.⁴⁵ The principle of substantive equality respects and celebrates difference, recognizing that all human beings are equally deserving of concern, respect and consideration. In cases involving services provided to Anglophone and Francophone communities, the SCC has affirmed that substantive equality can mean distinctive content in the provision of similar services, depending on the nature and purpose of the services in issue, and the population served.⁴⁶ In *Ewert v. Canada*, about corrections services to Indigenous peoples, the SCC held that it is a “long-standing principle of Canadian law that substantive equality requires more than simply equal treatment.”⁴⁷

41 *Dickson SC*, *supra* note 1 at para 52.

42 *Ibid* at para 131; *Dickson CA*, *supra* note 1 at para 98 (reasoning adopted by YKCA).

43 This is known as the doctrine of mutual modification: see *Citizens Insurance Company v Parsons* (1881), 7 AC 96 (PC), *aff’d* (1880), 4 SCR 215. See Peter W Hogg & Wade Wright, *Constitutional Law of Canada*, 5th ed (Canada: Carswell, 2007) at 36-23.

44 *Turpel*, *supra* note 14 at 138.

45 See *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143 at 166, 56 DLR (4th) 1; *R v Kapp*, 2008 SCC 41 at paras 15-16; *Fraser v Canada (Attorney General)*, 2020 SCC 28 at paras 25-50.

46 See *DesRochers v Canada (Industry)*, 2009 SCC 8; *Association des parents de l’école Rose-des-vents v British Columbia (Education)*, 2015 SCC 21.

47 *Ewert v Canada*, 2018 SCC 30 at para 54.

In a human rights decision about the chronic underfunding of child and family services provided to First Nations by Canada, the Canadian Human Rights Tribunal maintained that substantive equality means that First Nations children and families are not simply entitled to funding and services mirroring provincial standards, but are entitled to funding and services that “consider the distinct needs and circumstances of First Nations children and families ... including their cultural, historical and geographical needs and circumstances.”⁴⁸ The Tribunal also made findings about the imposition of laws on First Nations as assimilative. Commenting on how the federal government imposed provincial child welfare laws upon First Nations people, the Tribunal compared Canada’s approach to child welfare to its approach to residential schools: “[s]imilar to the Residential Schools era, today, *the fate and future of many First Nations children is still being determined by the government. . .*”⁴⁹ The Tribunal made it clear that systems that perpetuate historic disadvantage and assimilation endured by Indigenous peoples, including the imposition of laws and standards that do not meet their needs and circumstances, are discriminatory and have no place in Canada. I have argued that, without going so far as explicitly saying so, the Tribunal suggested a strong connection between First Nations’ substantive equality rights and their right to self-government.⁵⁰ Stated otherwise, “autonomy means the right of being different.”⁵¹

The above discussion reveals that appeals to formal equality to support the imposition of the *Charter* on VGFN are unpersuasive and outdated. Respecting Indigenous peoples’ right to substantive equality means respecting their governments’ right to be different from the rest of Canada, including to have different laws and institutions from the Canadian legal system if they so choose.

Likewise, appeals to the ‘rule of law’ as meaning ‘identical rules for everyone’ suffers similar problems. ‘Rule of law’ has many varied, textured meanings.⁵² However, one interpretation our courts have cautioned against is construing it to mean that the Canadian legal order is the *only* legal order in the country, excluding or minimizing the existence of Indigenous legal orders.⁵³ Canada is a legally pluralistic nation, recognizing both common and civil law with the growing resurgence of Indigenous legal orders. As argued by John Borrows, “[t]he culture of law is weakened in the country as a whole if Indigenous peoples’ legal traditions are excluded from its matrix.”⁵⁴

48 *First Nations Child and Family Caring Society of Canada v Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada)*, [2016] 2 CNLR 270 at para 465, 83 CHRR 207 (CHRT).

49 *Ibid* at para 426 [emphasis added].

50 Naomi Metallic, “A Human Right to Self-Government over First Nations Child and Family Services and Beyond: Implications of the Caring Society Case” (2018) 28:2 J L Soc Pol’y 4 at 30-34.

51 Bruce Ryder, “The Demise and Rise of the Classical Paradigm in Canadian Federalism: Promoting Autonomy for the Provinces and First Nations” (1991) McGill LJ 308 at 341 citing Louis-Phillippe Pigeon, “The Meaning of Provincial Autonomy” (1951) 29:10 Can Bar Rev 1126 at 1133.

52 *Reference re Secession of Quebec*, [1998] 2 SCR 217 at paras 70-78, 161 DLR (4th) 385 [*Reference re Secession*].

53 See *Henco Industries Limited v Haudenosaunee Six Nations Confederacy Council*, (2006) 277 DLR (4th) 274 at paras 140-142, 2006 CarswellOnt 7812 (Ont CA); *Frontenac Ventures Corporation v Ardoch Algonquin First Nation*, 2008 ONCA 534 at paras 41-47.

54 John Borrows, *Canada’s Indigenous Constitution* (Toronto: University of Toronto Press, 2010) at 122. See also Kent McNeil, “Indigenous Law, the Common Law, and the Pipelines,” (8 April 2021), online (blog): ABlawg <<https://ablawg.ca/2021/04/08/indigenous-law-the-common-law-and-pipelines/>> [perma.cc/54M5-FPT9].

Further, interpretation of the rule of law as privileging one legal order to the exclusion of another is in tension with our constitutional principles of federalism. In *Reference re Secession of Quebec*, the SCC linked the principle of federalism with respect to the protection of distinct cultural and political traditions. While the Court's discussion was specifically in relation to our common and civil law traditions, scholars have argued that Indigenous groups have a similar claim that federalism supports their autonomy in governance given the important goal of protecting their distinctive cultural and political traditions.⁵⁵ In support of this, the federal government recognizes that Indigenous self-government is part of Canada's evolving system of cooperative federalism.⁵⁶ Moreover, the rights to Indigenous self-determination and self-government are also recognized in the *United Nations Declaration on the Rights of Indigenous Peoples*, which has now been affirmed "as a universal international human rights instrument with application in Canadian law."⁵⁷

Finally, interpretation of the rule of law as privileging one legal order also runs afoul of the constitutional principle of respect for minorities. Building on their findings in relation to federalism, the SCC in *Ref re Secession* observed that the protection of minority rights was an essential consideration in the constitutional structure at the time of Confederation, and that principle was further reflected in provisions in the *Constitution Act, 1982*, including section 25 and section 35.⁵⁸ Thus, in interpreting the meaning of section 52, these provisions must be taken seriously. Respecting them, and balancing them with the provisions in the *Charter*, may mean not applying provisions in the *Charter* to an Indigenous government.

From the foregoing, it is easy to see that this first principle supporting *Charter* application to the VGFN is outweighed by a lengthy list of competing objectives and values.

2) Fear of a legal vacuum

Another objective that may weigh in favour of imposing the *Charter* over an Indigenous government is the fear that failing to do so would create a legal vacuum. There is SCC precedent for the desire not to create a legal vacuum being a judicial objective.⁵⁹ Further, in a case about a First Nation exercising jurisdiction under the *Indian Act*, the Federal Court of Appeal cited concerns about creating "jurisdictional ghetto[s]" if the *Charter* was not applied.⁶⁰ This reasoning is a problem, however, if it simply assumes Indigenous groups are lawless. Each Indigenous nation has its own legal traditions.⁶¹ However, owing to the impacts of colonialism, different groups are at different stages of revitalizing and implementing their legal orders. Thus, the fear of a 'legal vacuum' is valid only if the group in question is not currently drawing on its own legal order. Further, evidence of an Indigenous legal order does not consist merely of statutes or regulations. Indigenous laws can take forms with which Canadian judges may

55 Ryder, *supra* note 51 at 319-230; Borrows, *supra* note 54 at 125-128.

56 Canada, Department of Justice, *Principles Respecting the Government of Canada's Relationship with Indigenous Peoples*, (monograph), Catalogue No J2-476/2018E-PDF (Ottawa: Department of Justice, 2018), principle 4.

57 *United Nations Declaration on the Rights of Indigenous Peoples Act*, SC 2021, c 14, s 4(a).

58 *Reference re Secession*, *supra* note 52 at paras 79-82.

59 See, for example, *Canadian Western Bank v Alberta*, 2007 SCC 22 at para 44.

60 *Taypotat*, *supra* note 29 at para 39; *Dickson CA*, *supra* note 1 at para 86 (this was cited with approval by the CA).

61 See, in general, Borrows, *supra* note 54.

not be familiar. Mistaking these for ‘legal vacuums’ would be privileging those Indigenous legal orders that resemble the Canadian legal order, which once again risks imposing Euro-Canadian legal norms on Indigenous peoples.⁶²

Judges in Canada are becoming increasingly attuned to the fact that they have a ‘duty to learn’ and a ‘duty to act’ in relation to Indigenous legal orders, and this should aid in preventing such mistakes.⁶³ Moreover, there are a variety of different ways that information and evidence about Indigenous legal orders can be brought before a court to aid their understanding.⁶⁴ Of course, where an Indigenous group has designated a court, tribunal or other alternative dispute resolution process that can hear an individual’s complaint, adjudication through these bodies ought to be prioritized over hearings in Canadian courts congruent with the priority/minimality impairment considerations pursuant under the *Doré*-adapted *Sparrow* framework.⁶⁵

In the case of the VGFN, there is no issue of a legal vacuum since the nation is clearly drawing on its own legal order. Therefore, this is not a legitimate basis for imposing the *Charter* in the circumstances.

3) Individual equality concerns

Like other governments in Canada, Indigenous governments can discriminate against their citizens. Much of that discrimination can be linked to the imposition of the *Indian Act*, however, and the resource-scarcity brought on by the provision of inadequate land bases and chronic underfunding of essential services to First Nations by the Canadian government. Given the patriarchal and racist roots of the *Indian Act*, this has often manifested as intersectional discrimination against Indigenous women.⁶⁶ While this issue bubbled to the surface in the early 1990s due to amendments to the *Indian Act* in 1985 to address long-standing gender-discrimination in the *Act*, problems of discrimination within Indigenous communities remains today.⁶⁷

62 See Borrows, *ibid* at 142-149, 178-179.

63 Former CJC McLachlin has called for “all members of the judiciary” to have access to education and materials about Indigenous legal traditions: see Former CJC Beverley McLachlin, Address (delivered at the CIAJ Annual Conference: Aboriginal Peoples and Law: “We Are All Here to Stay”, Saskatoon, 16 October 2015), online: CIAJ <<https://ciaj-icaj.ca/wp-content/uploads/documents/2015/10/916.pdf?id=472&1642525341>> [perma.cc/9246-AKML]; see also Lance Finch, “The Duty to Learn: Taking Account of Indigenous Legal Orders in Practice” (2012) online: *CLE BC Materials* <https://www.cerp.gouv.qc.ca/fileadmin/Fichiers_clients/Documents_deposes_a_la_Commission/P-253.pdf>, [perma.cc/E7KV-69XH]; see also Robert J Bauman, “A Duty to Act” (delivered at CIAJ Annual Conference: Indigenous Peoples and the Law, 17 November 2021), online: *Court of Appeal for British Columbia* <https://1juibf12bq823l3a7515u1i5-wpengine.netdna-ssl.com/wp-content/uploads/2021/11/A_Duty_to_Act_-CJ-BAUMAN_-_Indigenous_Peoples_and_the_Law.pdf> [http://perma.cc/H6H9-U5WC].

64 Naomi Metallic, “Six Examples Applying the Meta-Principle Linguistic Method: Lessons for Indigenous Law Implementation,” (2021) UNBLJ Working Paper.

65 See *Linklater v Thunderchild First Nation*, 2020 FC 1065 at paras 48-55.

66 Canada, *Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls*, vol 1a (Ottawa, 2019) (Chief Commissioner: Marion Buller) [“MMIWG Final Report”].

67 *Ibid*.

This concern is likely the strongest argument for the application of the *Charter* to Indigenous governments, and it rests in the principle of protection of individual *Charter* equality rights, which is a legitimate objective. However, this objective faces the same competing objectives and principles discussed in previous sections, not least of which is the competing substantive equality rights of Indigenous peoples to be different and not have another government's legal order imposed on them. But it is misleading and unhelpful (and treading into dangerous stereotypes about Indigenous governments), to assume the protection of individual rights is necessarily in conflict with the protection of Indigenous peoples' collective equality right to self-govern through their own legal orders. As highlighted in Chapter 2 of the Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls, Indigenous legal orders have always had concepts of both individual and collective rights, roles and responsibilities.⁶⁸ The Report emphasizes that the revitalization of Indigenous legal orders informed by these concepts will go a long way towards rebuilding and strengthening conditions of peace, safety, dignity and justice in Indigenous communities.⁶⁹

In the case of VGFN, there is no evidence to suggest Ms. Dickson's individual rights complaint could not be effectively addressed within the VGFN's legal order. Indeed, the evidence was quite the opposite: through extensive community discussion, VGFN had painstakingly created an individual rights protection regime that aimed to balance individual protections with communal rights. However, for reasons unsaid in the judgements, the Yukon courts were unwilling to give priority to the VGFN's legal order. Returning to the *Doré*-adapted *Sparrow* framework, there is a proportionality problem here. The fiduciary relationship between Indigenous peoples and the Crown mandates that priority be given to the Aboriginal right in issue. As here, when there is no credible evidence to suggest that the Indigenous nation is not capable of addressing individual rights complaints within its legal order, its legal order ought to be privileged over the *Charter*. We can alternatively frame this in minimal impairment terms: privileging the *Charter* over the VGFN Constitution when VGFN have an established individual rights protection regime within their legal order is not minimally impairing.

Conclusion

In this article, I have proposed an alternative framework for considering the application of the *Charter* to VGFN. I propose this because the approach of the Yukon courts, which quickly accepted *Charter* application to VGFN but sought to attenuate this through reading section 25 as partly 'shielding' the VGFN's residency requirement from full section 15(1) *Charter* scrutiny, is problematic. It unnecessarily subjected the VGFN's legal order to *Charter* scrutiny, which is assimilative because it imposes the *Charter* on the VGFN without their consent and feeds into dangerous stereotypes about Indigenous governments. A more rigorous framework is needed to assess questions of *Charter* application to Indigenous governments, particularly because Canadian jurists tend to privilege the *Charter* given that many see it as a prized part of our legal system.

My proposal draws on the section 35 *Sparrow* framework, first identifying the imposition of the *Charter* on VGFN as a *prima facie* infringement of their right to self-government.

68 *Ibid* at 129.

69 *Ibid* at 139-180.

Next, adapting the *Sparrow* framework to apply to judge-made decisions, I propose that a court would need to identify the objectives or principles in favour of applying the *Charter* and engage in a proportional weighing of these against the competing objectives and principles at play.

In the circumstances, the competing reasons for not applying the *Charter* outweigh the reasons for applying the *Charter*. It is not necessary to apply the *Charter* to VGFN to respect section 52 of the *Constitution Act*. Far from contravening section 52, privileging VGFN's legal order in the circumstances aligns with substantive equality, the principles of federalism, the protection of minorities, the rule of law and the *United Nations Declaration on the Rights of Indigenous Peoples*. Concerns of creating a 'legal vacuum' here, or that VGFN's legal order cannot address human rights complaints are equally unsupported. As VGFN has an established individual rights protection regime within their Constitution, this should be given priority. Practically speaking, respecting the VGFN Constitution here would see the Yukon courts applying Part IV of the VGFN Constitution to Ms. Dickson's complaint instead of the *Charter*. While this prospect might feel strange or perhaps even uncomfortable to Canadian judges, this is part of reconciliation. This is part of Canadian judges' duty to learn and duty to act.