

## *Towards a Renewed Relationship: Modern Treaties & the Recognition of Indigenous Law-Making Authority*

Kate Gunn\*

In recent years there has been a resurgence of efforts to renew and revitalize Indigenous law across Canada, along with a growing demand for meaningful recognition and respect for Indigenous rights under Canadian law.<sup>1</sup> As a consequence, Canadian courts are increasingly called to grapple with challenges presented by the continued existence of Indigenous Peoples' inherent laws and the Crown's ongoing assertion of jurisdiction over Indigenous Peoples and lands.<sup>2</sup>

The *Dickson v. Vuntut Gwitchin First Nation*<sup>3</sup> proceeding exemplifies the complexities associated with the realization and implementation of Indigenous laws within and alongside the Canadian common law. This paper considers the relationship between Indigenous laws,

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\* Partner, First Peoples Law.

1 LLB, LLM, Partner with First Peoples Law. This paper draws on public education papers materials prepared by the First Peoples Law LLP team, including Angela D'Elia Decembrini & Kate Gunn, "Diminishing Indigenous Jurisdiction: Case Comment on Dickson v. Vuntut Gwitchin First Nation" (2 July 2020) online (blog): *First Peoples Law* <[www.firstpeopleslaw.com/public-education/blog/diminishing-indigenous-jurisdiction](http://www.firstpeopleslaw.com/public-education/blog/diminishing-indigenous-jurisdiction)> [http://perma.cc/8N7Z-DJLV] Kate Gunn & Cody O'Neil "Indigenous Law and Canadian Courts" (20 January 2021) online (blog): *First Peoples Law* <[www.firstpeopleslaw.com/public-education/blog/indigenous-law-canadian-courts](http://www.firstpeopleslaw.com/public-education/blog/indigenous-law-canadian-courts)> [http://perma.cc/ZB3Y-XHC7]. Thanks to Jenna Jeffrey for her valuable research assistance and to Bruce McIvor, Robert Hamilton, Naoimi Metallic and Ryan Beaton for their helpful comments and feedback on drafts of this paper.

2 Throughout this paper I use the term "Indigenous law" in relation to the multiple laws and legal processes developed and practiced by Indigenous Peoples since prior to the arrival of Europeans. I use the term "modern treaties" to describe treaties negotiated between Indigenous Nations and the Crown between the 1973 Supreme Court of Canada's decision in *Calder et al. v Attorney-General of British Columbia*, [1973] SCR 313, 34 DLR (3d) 145 and the present day. I use the term "historic treaties" to describe treaties negotiated between Indigenous Nations and the Crown from the early 1700s to the 1920s.

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

modern treaties and the *Constitution Act, 1982*<sup>4</sup>, including the *Canadian Charter of Rights and Freedoms*, in respect of the *Dickson* proceeding.<sup>5</sup> Part I provides an overview of principles which guide Canadian courts' approach to the interpretation and implementation of modern treaties and self-government agreements. Part II sets out how these principles could be applied to address the issues in *Dickson*. I argue that modern treaties, and self-government agreements negotiated pursuant to such treaties, can play an important role in advancing the objective of reconciliation which lies at the heart of section 35 of the *Constitution Act, 1982*. However, this objective can be realized only if treaties and related agreements are interpreted in a way that recognizes and makes space for the exercise of Indigenous laws.

I further argue that in *Dickson*, the Yukon Supreme Court and Yukon Court of Appeal failed to adequately engage with the underlying source of Indigenous law-making authority and established treaty interpretation principles in respect of the Vuntut Gwichin First Nation Final Agreement and Self-Government Agreement. Consequently, the lower courts missed a critical opportunity to further the process of reconciliation. It will now be for the Supreme Court of Canada to clarify and confirm how modern treaties and self-government agreements, including those at issue in *Dickson*, can be used to advance the purpose of section 35 based on respect for Indigenous Peoples' own laws and jurisdiction.

## I. Indigenous Jurisdiction & Modern Treaties

The following section provides a summary of key principles which should be taken into account by courts when considering the interpretation and implementation of modern treaties and self-government agreements between Indigenous Peoples and the Crown.

### i. The interpretation of modern treaties must advance the purpose of section 35

Section 35 exists to protect the rights of Indigenous Peoples and facilitate the reconciliation of those rights with the assertion of Crown sovereignty.<sup>6</sup> This objective flows from “the tension between the Crown’s assertion of sovereignty and the pre-existing sovereignty, rights and occupation of Aboriginal peoples.”<sup>7</sup> As the Supreme Court explained in *R. v. Desautel*,<sup>8</sup> the dual 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.”<sup>9</sup>

The Crown’s duty to act honourably, and the attendant goal of reconciliation, is an “ongoing project” which informs the making and the implementation of treaties between the Crown and Indigenous Peoples.<sup>10</sup> Reconciliation underlies both the “legal approach to treaty

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

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

6 *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 at para 32 [*Haida*].

7 *Mikisew Cree First Nation v Canada (Governor General in Council)*, 2018 SCC 40 at para 21.

8 *R v Desautel*, 2021 SCC 17 [*Desautel*].

9 *Ibid* at para 22.

10 *Southwind v Canada*, 2021 SCC 28 at para 55, citing *Beckman v Little Salmon/Carmacks First Nation*, 2010 SCC 53 at para 10 [*Beckman*]; *Haida*, *supra* note 6 at para 17.

rights”<sup>11</sup> and the “ ‘overarching purpose’ of treaty making and, perforce, treaty promises.”<sup>12</sup> In all cases, the overriding question is “what is required to maintain the honour of the Crown and to effect reconciliation between the Crown and the Aboriginal peoples with respect to the interests at stake.”<sup>13</sup>

Like their historic counterparts, modern treaties are constitutional documents within the meaning of the *Constitution Act, 1982*.<sup>14</sup> As such, rights protected under modern treaties must be interpreted and implemented in accordance with the purpose of section 35 and the objective of reconciling the assertion of Crown sovereignty with Indigenous Peoples’ prior existence as organized, autonomous societies. This in turn requires that modern treaties, and self-government agreements which flow from them, be interpreted in a manner based on recognition of Indigenous Peoples’ inherent law-making authority and which takes into account the intentions of the treaty parties, the text of the treaty, and the perspective of the Indigenous treaty parties.<sup>15</sup> Each of these principles are discussed further below.

## **ii. The interpretation of modern treaties must be based on recognition of Indigenous law-making authority**

Interpreting modern treaties in a manner which advances section 35 requires acknowledging the underlying tensions and unresolved questions which necessitate constitutional protections for Aboriginal and Treaty rights, including the relationship between the Crown’s assumed jurisdiction over Indigenous Peoples and lands and the continued existence of Indigenous Peoples’ own legal systems.

Indigenous Peoples have always governed themselves in accordance with their own inherent laws and decision-making processes. These laws survived colonization and decades-long efforts on the part of Canadian governments to suppress, criminalize and deny their existence. Canadian courts have affirmed that the assertion of Crown sovereignty and the division of federal and provincial powers pursuant to the *Constitution Act, 1867*<sup>16</sup> did not extinguish the continued existence of Indigenous powers of self-government, and that this right exists and is protected today by section 35 of the *Constitution Act, 1982*.<sup>17</sup>

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11 *Restoule v Canada (Attorney General)*, 2021 ONCA 779 at para 113 [*Restoule CA*], citing *Manitoba Metis Federation Inc. v Canada (Attorney General)*, 2013 SCC 14 at para 71 [*Manitoba Metis*].

12 *Ibid.*

13 *Ibid.*

14 *First Nation of Nacho Nyak Dun v Yukon*, 2017 SCC 58 at paras 8, 34 [*Nacho Nyak Dun*].

15 For consideration of the relationship between modern treaties, self-government agreements and section 35 of the *Constitution Act*. See, for example, *Teslin Tlingit Council v Canada (Attorney General)*, 2019 YKSC 3 at paras 42-45, in which the Court held that Canada’s position that the Teslin Tlingit Council Self-Government Agreement did not attract constitutional protections failed to take into account the obligations under section 35 which flowed from the Teslin Tlingit Council Final Agreement.

16 *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3

17 *Campbell et al v AG BC/AG Cda & Nisga’a Nation et al*, 2000 BCSC 1123; *R v Pamajewon*, [1996] 2 SCR 821, 138 DLR (4th) 204. However, with limited exceptions, Canadian courts and governments remain reluctant to recognize and give effect to Indigenous Peoples’ inherent law-making authority where doing so would conflict with the exercise of Crown jurisdiction. See, for example, *Coastal GasLink Pipeline Ltd. v Huson*, 2019 BCSC 2264 at para 127.

The continued existence and implementation of Indigenous law-making authority is part of the foundation of modern treaties between Indigenous Peoples and the Crown. The fundamental source of authority for Indigenous Nations to enter into treaties lies in the group's historic and ongoing authority to govern itself pursuant to its own processes and traditions. Consequently, both modern-day treaties and self-government agreements are expressions of Indigenous law. Recognizing and respecting the source of this authority — regardless of whether a self-government agreement is considered a 'treaty' within the meaning of section 35 of the *Constitution Act, 1982* - is a cornerstone of advancing reconciliation.

By definition, treaties exist to facilitate the process of reconciliation between Indigenous Nations and the Crown by establishing a framework for the co-existence of Indigenous legal orders and the common law. The very existence of such treaties constitutes implicit recognition on the part of federal, provincial and territorial governments of the need to establish a process to resolve the tensions which exist as a consequence of the Crown's assertion of jurisdiction and control over Indigenous Peoples. An approach to treaty interpretation which disregards the inherent law-making authority on which the treaty is based is contrary to the purpose of the treaties and undermine their ability to act as a vehicle to advance reconciliation.

Interpreting modern treaties in accordance with the purpose of section 35 further requires courts to defer to the perspective of the Indigenous treaty party as a distinct government with its own laws and decision-making processes. Deference to Indigenous governing bodies has been a consistent theme in recent jurisprudence of the Supreme Court. For example, in the 2021 decision in *Desautel*, Justice Rowe emphasized that while the Court retains authority with respect to the scope of section 35, it is for Indigenous Peoples to “define themselves and to choose by what means to make their decisions, according to their own laws, customs and practices.”<sup>18</sup> Similarly, in *Anderson v Alberta*,<sup>19</sup> the Supreme Court held affirmed that “[p]romoting institutions and processes of Indigenous self-governance fosters a positive, mutually respectful long-term relationship between Indigenous and non-Indigenous communities, thereby furthering the objective of reconciliation.”<sup>20</sup>

Recent decisions of Canadian courts in other jurisdictions evidence a similar approach. In 2019, the Federal Court confirmed in relation to a dispute regarding customary election regulations that it was prepared to “recognize the existence of a rule of Indigenous law when it is shown to reflect the broad consensus of the membership of a First Nation.”<sup>21</sup> In a separate decision related to a First Nation's selection of leadership, the Court confirmed that a First Nation's custom leadership selection processes constituted a form of Indigenous law, and that the First Nation's election appeal board was an Indigenous decision-making body entitled to deference from the courts.<sup>22</sup> The Ontario Court of Appeal in 2021 further emphasized that in

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18 *Desautel*, *supra* note 8 at para 86 (emphasis added).

19 *Anderson v Alberta*, 2022 SCC 6 [*Anderson*].

20 *Ibid* at para 27, citing *Nacho Nyak Dun*, *supra* note 14 at para 10 & *Beckman*, *supra* note 10 at paras 9-10.

21 *Whalen v Fort McMurray No. 468 First Nation*, 2019 FC 732 at para 32, citing *Bigstone v Big Eagle*, [1993] 1 CNLR 25, 1992 CarswellNat 721 (FCTD). See also *Beaver v Hill*, 2018 ONCA 816 at para 63, in which the Ontario Court of Appeal held that the “recognition of separate spheres of jurisdiction” (in that case, Haudenosaunee and Ontario laws pertaining to familial disputes) constituted a “form of reconciliation.”

22 *Pastion v Dene Tha' First Nation*, 2018 FC 648.

the context of Crown-Indigenous treaties, the “Indigenous perspective is to be considered and given due weight.”<sup>23</sup>

The principles reflected in these decisions are equally applicable to modern treaties and their accompanying laws and governance processes. Like custom election codes and other expressions of Indigenous law, modern treaties should be interpreted in a manner that respects Indigenous laws in their own right, and recognizes Indigenous governments are best positioned to understand and implement the treaty and related processes in accordance with its own customs and traditions.

### **iii. Modern treaties should be interpreted in accordance with principles of treaty interpretation**

Lastly, modern treaties should be interpreted and applied consistent with the principles established by the Supreme Court for the interpretation of treaties between Indigenous Peoples and the Crown. As the Supreme Court noted in *R. v. Badger*,<sup>24</sup> the treaties are sacred agreements which represent an “exchange of solemn promises between the Crown and the various Indian nations.”<sup>25</sup> Each of the treaties are “a part of the process of reconciliation, and each promise made and enshrined in section 35 is to be given meaning.”<sup>26</sup> As such, treaties are to be interpreted consistent with section 35 of the *Constitution Act, 1982*, taking into account the overarching purpose of Crown-Indigenous treaties, being “the reconciliation of the pre-existence of Indigenous sovereignty with assumed Crown sovereignty.”<sup>27</sup>

In interpreting Crown-Indigenous treaties, courts must understand and give effect to the agreement as whole, including the underlying purpose intended by the parties and the context in which it was negotiated.<sup>28</sup> In all cases, treaty interpretation must be approached “in a manner which maintains the integrity of the Crown.”<sup>29</sup> The court’s overriding objective is to choose from among the various possible interpretations of the parties’ common intention the one which best reconciles the interests of both parties at the time the treaty was signed.<sup>30</sup>

The above principles, while developed primarily in reference to historic treaties, are directly applicable to the interpretation of treaties negotiated in recent decades. In the years prior to and immediately following Confederation, many treaties “formed the basis for peace and the expansion of European settlement.”<sup>31</sup> Similarly, modern treaties are “intended to renew the

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23 *Restoule CA*, *supra* note 11 at para 115, citing *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2005 SCC 69 at para 28 [*Mikisew*]; *R v Sioui*, [1990] 1 SCR 1025 at 1035, 70 DLR (4th) 427 [*Sioui*].

24 *R v Badger*, [1996] 1 SCR 771, 133 DLR (4th) 324 [*Badger*].

25 *Ibid* at para 41. See also *Restoule v. Canada (Attorney General)*, 2020 ONSC 3932 at para 151 in which the Court described the Robinson Huron and Robinson Superior Treaties as “unique agreements by the Crown and the First Nations of the Lake Huron Territory and the Lake Superior Territory whose long-term goal was peaceful and respectful co-existence in a shared territory.”

26 *Watson v Canada*, 2020 FC 129 at para 502.

27 *Restoule v Canada (Attorney General)*, 2018 ONSC 7701 at para 337, citing *Haida*, *supra* note 6 at para 20; *Manitoba Metis*, *supra* note 11 at para 71.

28 *Mikisew*, *supra* note 23 at para 29; *Badger*, *supra* note 24 at para 52.

29 *Badger*, *supra* note 24 at para 41.

30 *R v Marshall*, [1999] 3 SCR 456 at para 78, 177 DLR (4th) 513 citing *Sioui*, *supra* note 23 at 1068-1069.

31 *R v Sundown*, [1999] 1 SCR 393 at para 24, 170 DLR (4th) 385.

relationship between Indigenous peoples and the Crown to one of equal partnership.”<sup>32</sup> As Justice Binnie noted in *Beckman v. Little Salmon/Carmacks First Nation* “[t]oday’s modern treaty will become tomorrow’s historic treaty.”<sup>33</sup> As such, applying principles of treaty interpretation to modern treaties supports reconciliation, including by recognizing and giving effect to including the co-existence of Canadian and Indigenous legal systems.

The specific context of modern-day treaties gives rise to a heightened obligation on courts to defer to the text of the treaty itself. As the Supreme Court noted in *First Nation of Nacho Nyak Dun v. Yukon*, treaties negotiated between the Crown and Indigenous Nations in the present-day are detailed agreements which are the product of years of negotiation.<sup>34</sup> Consequently, in interpreting modern treaties, courts should seek to interpret the provision at issue in accordance with both the objective of the treaty and with the treaty text as a whole.<sup>35</sup>

## II. Application to the *Dickson* Proceeding

In April 2022, the Supreme Court confirmed that it will hear the appeal of the Yukon Court of Appeal’s 2021 decision in *Dickson*. The appeal represents the first time the Supreme Court has been called upon to address the interplay between Indigenous laws and the Canadian *Charter of Rights and Freedoms* in the context of Indigenous self-government agreements and modern treaties. The following section provides background and context for the issues in *Dickson*, and explores how the principles described above could be applied to resolve issues in the appeal.

### i. Background

The *Dickson* proceeding relates to the laws and leadership selection processes of Vuntut Gwitchin First Nation (“VGFN”) as set out in the Vuntut Gwitchin First Nation Constitution (“Constitution”). In 1993, after decades of negotiations, VGFN, Canada and Yukon entered into a Final Agreement, including a framework for a comprehensive self-government agreement. On the same date, VGFN’s Self-Government Agreement came into effect. A year later, Canada and Yukon enacted legislation validating and giving effect to the Final Agreement and Self-Government Agreement under federal and territorial laws.<sup>36</sup>

The Final Agreement is a land claim agreement and treaty within the meaning of section 35 of the *Constitution Act, 1982*. As the trial judge noted in *Dickson*, the text of the Final Agreement includes provides for the extinguishment of VGFN rights to lands outside the settlement agreement, but does not provide for the extinguishment of other rights, including rights to self-government.<sup>37</sup> The Self-Government Agreement sets out the respective spheres of

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32 *Nacho Nyak Dun*, *supra* note 14 at para 33.

33 *Beckman*, *supra* note 10 at para 54.

34 *Nacho Nyak Dun*, *supra* note 14 at para 36, citing *Beckman*, *supra* note 10 at para 12 & Julie Jai, “The Interpretation of Modern Treaties and the Honour of the Crown: Why Modern Treaties Deserve Judicial Deference” (2009), 26 NJCL 25, at 41.

35 *Nacho Nyak Dun*, *supra* note 14 at para 37; *Beckman*, *supra* note 14 at para 10; *Quebec (Attorney General) v Moses*, 2010 SCC 17 at para 7. See also *Makivik Corporation v Canada (Attorney General)*, 2021 FCA 184.

36 *Yukon First Nations Land Claims Settlement Act*, SC 1994, c 34; *Yukon First Nations Self-Government Act*, SC 1994, c 35.

37 *Dickson* SC, *supra* note 3 at para 45.

jurisdiction exercised by Canada, Yukon and VGFN in respect of VGFN citizens and lands.<sup>38</sup> Its purposes include “maintaining traditional Vuntut Gwitchin decision-making structures within contemporary Vuntut Gwitchin society, protecting Vuntut Gwitchin’s land-based way of life and achieving certainty in the relationship between Vuntut Gwitchin, Canada and Yukon.”<sup>39</sup> While the Self-Government Agreement is not a treaty under section 35, its provisions reflect and give effect to the framework agreement agreed to by the parties pursuant to the Final Agreement, which itself is a modern treaty.

VGFN’s Constitution, enacted in accordance with the Final Agreement, came into effect on the same date as the Final Agreement and Self-Government Agreement. The Constitution, described as the “supreme law” of VGFN, provides that VGFN’s objectives as including to “have authority in respect of communities and lands of the Vuntut Gwitchin First Nation” and to “promote, enhance and protect the history, culture, values, traditions and rights” of VGFN.<sup>40</sup> In furtherance of this objective, the Constitution sets out requirements for the selection of VGFN leadership, including that VGFN councillors reside in VGFN’s main community and centre of government, the village of Old Crow, or relocate there within 14 days of being elected.

The *Dickson* proceeding arose after Cindy Dickson, a citizen of VGFN residing in Whitehorse, challenged the residency requirement in the Constitution on the basis that it infringed her equality rights under section 15 of the *Charter*. At the Yukon Supreme Court, VGFN argued the *Charter* did not reflect its legal and political traditions, and that its power to determine its own leadership selection processes existed by virtue of its inherent law-making authority, not federal or territorial legislation.<sup>41</sup>

The Yukon Supreme Court held that the *Charter*, as part of the *Constitution Act, 1982*, was the “supreme law of Canada” and that VGFN’s right of self-government was part of the *Constitution Act, 1982* because it was “both inherent and validated by Canada and Yukon legislation.”<sup>42</sup> In the result, the Court held that the *Charter* applied to the residency requirement, and that the requirement that councillors relocate to Old Crown within 14 days of being elected infringed Ms. Dickson’s equality rights under the *Charter* such that the words “within 14 days” were of no force or effect.<sup>43</sup>

On appeal, the Yukon Court of Appeal again held that the *Charter* applied to the residency requirements, and that, subject to possible justification under section 1 of the *Charter*, the residency requirements infringed Ms. Dickson’s equality rights under section 15 of the *Charter*.<sup>44</sup> However, the Court held that even if the residency requirements did breach Ms. Dickson’s equality rights, section 25 of the *Charter*, which states that the *Charter* shall not be construed so as to abrogate or derogate from Aboriginal or Treaty rights, would apply as a

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38 *Ibid* at para 47.

39 *Ibid* at para 54.

40 *Dickson CA, supra* note 3 at para 21.

41 *Dickson SC, supra* note 3 at para 129.

42 *Ibid* at para 131.

43 *Ibid* at paras 215-216.

44 *Dickson CA, supra* note 3 at para 163.

'shield' in order to make meaningful space for VGFN to exercise its self-government powers in accordance with its Constitution.<sup>45</sup>

## ii. Considerations

At its heart, *Dickson* relates to whether Canadian courts and governments are prepared to make meaningful space for the exercise of Indigenous legal orders, even when doing so runs counter to Canadian laws and values, including the *Charter*. Below, I outline how the principles discussed in Part I can be used to assist with the resolution of the issues before the Supreme Court in *Dickson*.

First, the VGFN Constitution should be interpreted and implemented in accordance with the purpose of section 35 of the *Constitution Act, 1982*, including recognition of VGFN's inherent law-making authority separate and apart from federal and territorial enabling legislation. As the chambers judge affirmed, VGFN "have governed themselves in accordance with their own laws since time immemorial"<sup>46</sup> despite the imposition of the *Indian Act* and the impacts of colonization.<sup>47</sup> The chambers judge expressly confirmed that the Self-Government Agreement "preserved [VGFN's] inherent right to self-government" and that VGFN's decision to include the residency requirement in its Constitution constituted an exercise of that inherent right.<sup>48</sup>

The Court of Appeal similarly recognized that Indigenous self-government is an "essential part of the process of reconciliation."<sup>49</sup> However, the Court went on to find that the lower court "did not purport to resolve the fundamental question of the source of the rights and authority of the VGFN set forth in the self-government arrangements,"<sup>50</sup> notwithstanding the fact that the chambers judge had expressly concluded that the residency requirement existed as the result of VGFN's exercise of its inherent law-making authority. The Court of Appeal concluded that courts should recognize the "*sui generis* nature" of modern treaties and self-government agreements rather than engage in a "futile debate" about the source of Indigenous Nations' ability to govern themselves.<sup>51</sup>

The Court of Appeal's reluctance to address the source of VGFN's legal authority represents a missed opportunity to affirm the continued existence and applicability of Indigenous laws. If the promise of section 35 is to be fulfilled, treaties — and the self-government agreements which flow from them -- must be interpreted in a way that advances reconciliation by making space for the expression of Indigenous peoples' own law-making authority. This necessarily includes acknowledging the inherent source of those laws. Avoiding or disregarding the source of Indigenous law-making authority risks perpetuating the tensions that section 35 seeks to resolve.

In addition, the Final Agreement, Self-Government Agreement and Constitution should be interpreted consistent with the principles of treaty interpretation and with deference to

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45 *Ibid* at paras 146, 163.

46 *Dickson* SC, *supra* note 3 at para 11.

47 *Ibid* at para 205.

48 *Ibid* at para 144, 206.

49 *Dickson* CA, *supra* note 3 at para 1.

50 *Ibid* at para 91.

51 *Ibid* at para 93.



VGFN's understanding of its own laws and governance processes. These points were acknowledged by the Court of Appeal, which noted the issues in the proceeding required it to "apply principles of interpretation to arrangements that have aspects both of treaties and constitutions, and do so in a way that recognizes their unique and historic context"<sup>52</sup> and that "serious consideration [should be] given to the First Nation's point of view."<sup>53</sup> However, the Court went on to hold that the *Charter* applied to the residency requirement in the Constitution, notwithstanding the fact that the Final Agreement and Self-Government Agreement made no reference to the *Charter* or to the parties' intentions with respect to its application, and despite VGFN's unequivocal position that the imposition of the *Charter* was contrary to its own legal processes. In doing so, the Court failed to give effect to VGFN's understanding of the purpose and effect of the Final Agreement and Self-Government Agreement. The Court further failed to apply established principles of treaty interpretation, including the requirement that it seek to determine the common intention of the treaty parties at the time the treaty was signed.

Ultimately, the Court of Appeal was able to preserve VGFN's ability to determine its own leadership selection processes through the application of section 25 of the *Charter* as a 'shield.' The Court's decision highlights the potential for section 25 to protect the exercise of Indigenous law-making authority. However, by applying the *Charter* to the residency requirement — regardless of whether the provision in question was protected by section 25 — the Court failed to recognize and give effect to the text of the Final Agreement and Self-Government Agreement and VGFN's clearly articulated position that the *Charter* should not be used to override the laws and governance practices enshrined in its Constitution. This approach is contrary to principles established by the Supreme Court, including the principle that deference to the Indigenous Nation's perspective is warranted on matters which concern the application of treaties and Indigenous laws.

### iii. Looking Ahead

The Court of Appeal's decision in *Dickson*, including its application of section 25 of the *Charter*, provides important protections for the exercise of Indigenous laws. It also leaves unresolved critical questions regarding the source of Indigenous law-making authority where such authority is exercised in the context of a modern treaty or self-government agreement. The upcoming appeal provides an opportunity for the Supreme Court to advance the ongoing project of reconciliation by affirming that modern treaties, and self-government agreements negotiated pursuant to such treaties, are constitutional documents which are grounded in both Canadian and Indigenous law.

The complex and uncomfortable issues in *Dickson* flow directly from the process of colonization and the Canadian state's longstanding suppression of Indigenous law. These issues must be addressed. Ultimately, their resolution cannot be predicated on the Court's willingness unilaterally to apply the *Charter* to override Indigenous law-making authority where personal rights and freedoms are at issue. Rather, it will require trusting that Indigenous governments will take the steps necessary to safeguard the rights of their citizens, as they have always done, based on their own laws and processes.

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52 *Ibid* at para 2.

53 *Ibid* at para 149.

