

## Dickson v Vuntut Gwitchin First Nation, *Section 25 and a Plurinational Charter*

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This paper looks at the decision by the Court of Appeal of the Yukon in *Dickson v Gwitchin First Nation*<sup>1</sup> in the context of the discussion of the meaning section 25 of the *Charter of Rights and Freedoms*.<sup>2</sup> The *Dickson* case engages many important legal issues, some of which are explored by papers in this collection. One of these includes the application of Section 25 in the context of a self-governing First Nation. Section 25 states that nothing in the *Charter* will “abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada.”<sup>3</sup> Despite the seeming simplicity of the statement, case law and jurisprudence on the provision’s meaning and application, especially in the context of Indigenous/Aboriginal self-government rights, remain quite inconclusive. As discussed below, various applications of section 25 have been put forward but no general approach has been articulated by the courts. The paper then explores how the *Dickson* case presents a new scenario that the courts have yet to address, specifically, a *Charter* challenge to the action of

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1 *Dickson v Vuntut Gwitchin First Nation*, 2021 YKCA 5 [*Dickson CA*].

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

3 *Charter*, supra note 2, s 25. The section reads in full:

The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including

- (a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and
- (b) any rights or freedoms that now exist by way of land claims agreements or may be so acquired.

the government of a self-governing Indigenous/Aboriginal group from a citizen of the group.<sup>4</sup> It concludes by drawing attention to how the issues that emerge from the *Dickson* case relate to the constitutional jurisdiction of Indigenous nations and how the ongoing process of decolonisation should factor into applying section 25.

## Case Law on Section 25 is Inconclusive

To reflect on section 25, some brief background regarding the case law is useful, as it shows how and why it is still so limited in many respects.<sup>5</sup> Section 25 is the only explicit reference to Indigenous/Aboriginal rights in the *Charter of Rights and Freedoms*, and at the time the *Charter* was drafted among the perceived threats to collective Aboriginal rights were the individual equality provisions contained in section 15.<sup>6</sup> In particular, the concern was that a guarantee of individual equality could undermine government actions that distinguish between Aboriginal and non-Aboriginal persons with the purpose of protecting/actualising collective Aboriginal rights.<sup>7</sup> Thus, it is generally understood that section 25 was incorporated in the *Charter* to serve as direction for the judiciary not to apply the latter's provisions in ways that undermine the rights of Indigenous peoples.<sup>8</sup> However, it has proven difficult for courts to figure out what this means in practice. One reason is the nature of Aboriginal law in Canada, which is a complex and incoherent field based on the inheritance of flawed precedents grounded historically in empirically inaccurate and racist assumptions about Indigenous peoples.<sup>9</sup>

Nonetheless, it is possible to discern a few trends in the judicial reasoning. One of these is the idea that the purpose of section 25 lies in ensuring that the rights of Indigenous/Aboriginal peoples exist apart from the *Charter* and are not diminished by its application. For instance,

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4 *Dickson v Vuntut Gwitchin First Nation*, 2020 SKSC 22 at paras 95-96 [*Dickson* SC] (the Yukon Supreme Court referred to this in the context of whether it should decline to hear Dickson's application based on precedent that the implementation of modern treaties is a political question that should be left to negotiation. The YKSC distinguishes the *Dickson* case from "the classic case of VGFN v Canada" in that it is a case where "a VGFN and Canadian citizen [is] seeking to apply the *Charter*, the supreme law of Canada, to her First Nation"); *Dickson* CA, *supra* note 1 at para 40 [*Dickson* CA] (the YKCA did not address the distinction specifically but summarized the chambers judge as finding that extensive political discussions and negotiations had taken place leading to the Final Agreement, the SGA, and the Constitution, which implied that "time had come for judicial resolution of the issue").

5 For a fuller account see Amy Swiffen, "Constitutional Reconciliation and the *Canadian Charter of Rights and Freedoms*" (2019) 24:1 *Rev Const Stud* 85.

6 Section 15(1) of the *Charter* reads:

Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

7 Jane 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* 3 at 43; Celeste Hutchison, "Case Comment on R. v. Kapp: An Analytical Framework for Section 25 of the Charter" (2007) 52:1 *McGill LJ* 173.

8 Arbour, *supra* note 7 at 43; Hutchison, *supra* note 7.

9 Kent McNeil shows how biological anthropology and racism of the 19th Century influenced judicial interpretations of fact in the area of Aboriginal law. See Kent McNeil, *Flawed Precedent: The St. Catherine's Case and Aboriginal Title* (Vancouver: UBC Press, 2019); Joshua Nichols gives similar treatment to section 91(24) of the Constitution Act, 1867. See Joshua Nichols, *A Reconciliation without Recollection? An Investigation of the Foundations of Aboriginal Law in Canada* (Toronto: University of Toronto Press, 2019).

in the *Quebec Secession Reference*, the Supreme Court of Canada cites section 25 as an example underscoring the constitutional principle of protection for minority rights.<sup>10</sup> In *R v Redhead*, Oliphant J. states the “section does not confer new rights upon [A]boriginal people. It merely confirms certain rights held by [A]boriginal people. . .”<sup>11</sup> Different views have been expressed in relation to how this principle translates into legal protection. For example, in *Campbell v British Columbia*, the Court stated “the section is meant to be a ‘shield’ which protects [A]boriginal, treaty, and other rights from being adversely affected by provisions of the *Charter*.”<sup>12</sup> In *Shubenacadie*, however, the Court added that section 25 “can only be invoked as a defence if it had been found that the appellant’s conduct had violated subsection 15(1) of the *Charter*.”<sup>13</sup> This suggests it may not be a solid shield so much as a justificatory provision that is relevant once an infringement has been found. Furthermore, *Shubenacadie* is a case about section 15 and the context of the discussion was the impact of equality rights, which suggests the Court was likely thinking of how section 25 would work in the case of section 15(1) specifically and not necessarily in relation to other *Charter* rights.

The most recent Supreme Court case to comment on section 25 was *R v Kapp* in 2008, where a majority of the Court found that federal Aboriginal fishing license regulations — *The Aboriginal Fisheries Strategy* — violated section 15(1) of the *Charter* but were saved by section 15(2).<sup>14</sup> As a result of the section 15(2) save, the Court found it unnecessary to analyse the meaning of section 25 in the context of the case (though Bastarache J.’s concurrence did address it, which is discussed below). In this case, the majority of the Court did not analyse the meaning of section 25 because it found it could decide the appeal by more ordinary means and did not need to consider a controversial and relatively uncharted provision. Thus, many questions pertaining to section 25 remain unresolved, including what ultimately falls within its scope, how it could work outside of the section 15 context and whether it should be applied as a shield, a justificatory provision or even possibly as “an interpretive provision informing the construction of potentially conflicting *Charter* rights.”<sup>15</sup>

## How *Dickson* puts section 25 on the table

*Dickson v. Vuntut Gwitchin First Nation* is the most recent case to deal with these issues and is the first to speak to section 25 since *Kapp*. In some senses, the cases are similar. What is at stake is a section 15 challenge to a government action that makes a distinction based on Aboriginal status with the objective of protecting Indigenous/Aboriginal rights. However, the

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

11 *R v Redhead*, [1995] 103 Man R (2d) 269 at paras 83, 99 CCC (3d) 559 (Man QB) (the current wording of section 25(b) includes reference to rights that exist from land claim agreements and those that may be so acquired. Thus, Oliphant’s statement should be understood as meaning only that new Aboriginal rights are not recognized by section 25).

12 *Campbell v British Columbia (Attorney General)*, 2000 BCSC 1123 at para 156 [*Campbell*] (another point of variance is the breadth of what is included in the protection, with some cases suggesting only Indigenous/Aboriginal rights of a constitutional nature are protected while others argue the protection is more broad and extends to other rights and interests as well).

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

14 *R v Kapp*, 2008 SCC 41 [*Kapp*]. See also Hutchison, *supra* note 7 at 176.

15 *Kapp*, *supra* note 14 at paras 63-64.

cases are different in at least two connected ways. First, unlike in *Kapp* where the challenge came from a non-Aboriginal individual the appellant in *Dickson* is a member of the community and a citizen of the VGFN. Second, the Residency Requirement represents an internal restriction and not an external restriction as is the case in *Kapp*.<sup>16</sup> In this sense, the latter does not offer a clear precedent.

On this point, a comparison of the *Campbell* and *Dickson* cases is also illuminating. *Campbell* involved a *Charter* challenge to an election code created by the Nisga'a Government. One of the arguments raised in the case revolved around the provisions that prevented non-Nisga'a from voting in Nisga'a elections. The Court determined that the *Charter* applied to the actions of the Nisga'a government because it operates under the authority of the Nisga'a Treaty.<sup>17</sup> However, it found that section 25 protected the limited right of self-government enshrined in the Nisga'a Final Agreement and in implementing legislation. Thus, it rejected the argument that the self-government provisions of the Final Agreement/implementing legislation had to be struck down for violating *Charter* rights. This is similar to the finding of the YKCA. *Campbell*, however, differs from *Gwitchin* in two senses. In the former, the challenge is by a non-member of the Nisga'a community and it is made primarily under section 3.<sup>18</sup> In contrast, *Dickson* involves a challenge to an internal restriction by a VGFN citizen and it is made in light of the equality rights in section 15. Thus, *Campbell* also does not offer a clear precedent.

In reaching its decision, the YKCA drew on the concurrence in *Kapp*'s approach to section 25 more than the majority decision. In concurring reasons, Bastarache J. found that the *Aboriginal Fisheries Strategy* was saved but arrived at the conclusion differently from the majority. He stated that the purpose of section 25 is "protecting the rights of aboriginal peoples where the application of the *Charter* protections for individuals would diminish the distinctive, collective and cultural identity of an aboriginal group."<sup>19</sup> Bastarache found this means that there is only a need to do a *prima facie* section 15(1) analysis before section 25 is engaged. This places section 25 at a halfway point through the *Charter* analysis after an infringement is found but before arriving at the Oakes test.<sup>20</sup>

This application of section 25 is linked to jurisprudence on minority language rights where, "collective rights are clearly prioritized in terms of protection . . . [and] individual equality rights have typically given way."<sup>21</sup> The YKCA also characterizes section 25 as a shield

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16 *Corbiere v Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203 at para 52, 173 DLR (4th) 1 [Corbiere] (one might think the *Corbiere* case represented an earlier example but it involved membership restrictions created by a band council, which is a creature of the *Indian Act* and was understood by the Court as delegated federal authority. In this sense, the membership restrictions in *Corbiere* derive from the authority of the *Indian Act*, whereas the claim by the VGFN are based on the inherent/constitutional right to self-government).

17 *Campbell*, *supra* note 12 (as per s 9 of the Nisga'a Final Agreement, "The Canadian Charter of Right and Freedoms applies to Nisga'a Government in respect of all matters within its authority, bearing in mind the free and democratic nature of Nisga'a Government as set out in this Agreement").

18 *Campbell*, *supra* note 12 at paras 163-164 (the plaintiffs also based their challenge on section 7 and 15(1), but they "did not press these submissions in oral argument").

19 *Kapp*, *supra* note 14 at para 89.

20 Naomi 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.

21 *Kapp*, *supra* note 14 at para 89.

for rights that pertain to Aboriginal persons.<sup>22</sup> Speaking specifically to the context “[w]here the ‘collective’ is a first nation that has survived years of paternalism and the suppression of its culture,” the Court found that section 25 means that the collective right should prevail undiminished by other rights in the *Charter*.<sup>23</sup> As the Court states, “in the circumstances, to apply 15(1) would impermissibly derogate from VGFN’s right to govern themselves in accordance with their own particular values and traditions.”<sup>24</sup> However, as Naomi Metallic discusses, the Court determined that section 25 may shield an action from the Oakes test only after being subjected to a 15(1) *prima facie* analysis. Thus, the *Charter* still applies to the actions of the VGFN government as section 25 shields the Residency Requirement from *some* scrutiny under section 15.

The Supreme Court has not been tasked with applying section 25 in a scenario like that in *Dickson*.<sup>25</sup> So far, the courts have alternately suggested that section 25 becomes relevant only if an infringement cannot be saved by section 1 or that it may shield a provision from the Oakes test after a *prima facie* infringement is found.<sup>26</sup> The YKCA made the point that it “would not be appropriate to suggest any general rule” about the application of section 25 based on its decision.<sup>27</sup> This echoes the Supreme Court’s last words on the matter in *Kapp* where it stated the questions raised by the application of section 25 are of such complexity that they “are best left for resolution on a case-by-case basis as they arise before the Court.”<sup>28</sup>

The SCC’s approach to the *Dickson* case may depend on the type of government entity that is involved — a Treaty/inherent right-based Indigenous government. However, such distinctions between delegated vs inherent governments on the question of *Charter* application could also be seen as formalistic and not be determinative. The question of whether a challenged action restricts non-members or if it is an internal restriction may also be important. While the full complexity of the issues are beyond the scope of this paper, addressed below are elements that I believe are relevant for the Supreme Court to consider in relation to the *Dickson* case in regards to how internal restrictions may be engaged by section 25.

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22 *Dickson CA*, *supra* note 1 at paras 143-144.

23 *Dickson CA*, *supra* note 1 at para 144.

24 *Dickson CA*, *supra* note 1 at para 4 (the YKCA made a point of saying the self-government agreement that gave rise to the VGFN constitution is not a Treaty. Thus, section 25 will be applicable to the VGFN self-government right as an “aboriginal” right under s 35 or an “other” right).

25 Jennifer Koshan & Jonnette Watson Hamilton, “Kahkewistahaw First Nation v Taypotat: Whither Section 25 of the Charter?” (2016) 25:2 *Const Forum Const* 39 (Jennifer Koshan and Jonnette Watson Hamilton argue the Court missed an opportunity to consider section 25 in *Kahkewistahaw First Nation v Taypotat*, 2015 SCC 30. Louis Taypotat challenged his community’s election code that stipulates members running for election as Chief or Councillor must have a Grade 12 education or equivalent. The Court resolved the case without recourse to section 25, but Koshan and Hamilton argue it presented an opportunity to explore whether the approach articulated by Bastarache J in *Kapp* applies to actions of an Indigenous self-government to which one of its members brings a challenge).

26 *Dickson SC*, *supra* note 4 at para 177 (the YKSC did not apply section 25 because it found no infringement of section 15(1). However, it stated that if section 25 did apply to ‘shield’ the Residency Requirement it would be relevant after a determination of a breach that cannot be saved by s 1).

27 *Dickson CA*, *supra* note 1 at para 151; 4 (the Court states that while “[t]he case at bar could have been resolved by an analysis of s. 25 without a full equality analysis under ss. 15(1)” . . . “It would not be appropriate to suggest at this point any general rule that s. 25 should be considered and applied only after a court has determined that a *Charter* right or freedom has been breached.”

28 *Kapp*, *supra* note 14 at para 65.

## Colonial Legal Hierarchies

The scholarly commentary on Section 25 can roughly be categorized into two perspectives, which mirror the case law to some extent but also articulate different possibilities. There are those who describe section 25 as a rule of construction that directs courts to characterize *Charter* rights in ways that do not undermine Aboriginal rights/Indigenous difference.<sup>29</sup> William Pentney was possibly the first to argue section 25 should be seen as “an interpretive guide and not as an independently enforceable guarantee of [A]boriginal and treaty rights.”<sup>30</sup> This implies section 25 is relevant at the outset of a *Charter* analysis in characterizing the right before an infringement analysis has taken place. This directs the courts to protect Indigenous/Aboriginal rights by choosing the interpretation of a *Charter* right “that is the least intrusive on [A]boriginal rights.”<sup>31</sup> However, Pentney also stipulates that in the case of actual conflict where an Aboriginal right and a *Charter* right cannot be reconciled, the *Charter* right should be given effect. Thus, he proposes that section 25 is a rule of construction with a hierarchy prioritizing *Charter* rights over Aboriginal rights in the last instance.

David Milward has tried to develop a contextual approach to section 1 that draws on section 25 as requiring balancing rights instead of trading them off.<sup>32</sup> He draws on the Supreme Court decision in *Dagenais v Canadian Broadcasting Corp*<sup>33</sup> and precedents in administrative law to suggest section 25 directs courts to use culturally sensitive modes of interpretation in order to accomplish this balancing in the context of Indigenous/Aboriginal rights and *Charter* rights. From this perspective, section 25 would protect Indigenous/Aboriginal rights by directing the courts to interpret the *Charter* in ways that are compatible with Indigenous cultural meanings. Such culturally sensitive interpretation would mean that *Charter* rights would apply to the actions of Indigenous governments in “limited” or “modified” form.<sup>34</sup> With this formulation, however, the onus in a proportionality analysis remains on the Aboriginal government. This means that in a section 25 case, the burden is on the Indigenous government to justify its action, as opposed to the state having to show its infringement of Aboriginal rights is justified by the *Charter*.

Patrick Macklem has offered an elaborate approach to section 25 that argues that the language of the provision means that it protects all “federal, provincial and Aboriginal initiatives” that make a distinction between Aboriginal and non-Aboriginal people with the goal “to protect [Indigenous] interests associated with culture, territory, sovereignty, and the treaty

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29 See Royal Commission on Aboriginal Peoples, *Bridging the Cultural Divide: A Report on Aboriginal People and Criminal Justice in Canada* (Ottawa: Canada Communication Group Publishing, 1996) at 467-468; see also David Milward, *Aboriginal Justice and the Charter: Realizing a Culturally Sensitive Interpretation of Legal Rights* (Vancouver: UBC Press, 2012) at 66-69; see also Timothy Dickson, “Section 25 and Intercultural Judgement” (2003) 61:2 UT Fac L Rev 141 at 157-158.

30 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 at 28.

31 Thomas Isaac, “Canadian Charter of Rights and Freedoms: The Challenge of the Individual and Collective Rights of Aboriginal People” (2002) 21:1 Windsor YB Access Just 431 at 436.

32 Milward, *supra* note 29 at 71.

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

34 Milward, *supra* note 29 at 71.

process.”<sup>35</sup> This means laws that make a distinction between Aboriginal and non-Aboriginal people and infringe the *Charter* would have to be justified under section 25 by the objective of protecting Indigenous difference. Importantly, he makes a distinction between “external protections,” which are government actions that impact non-community members, and “internal restrictions,” which are actions that place restrictions on citizens/community members. Examples of external protections would be the provisions in the *Fisheries Act* in *Kapp* and the Nisga’a government’s restriction on the voting rights of residents who are non-Nisga’a citizens. Macklem argues section 25 means such external protections should be shielded from scrutiny under section 15 of the *Charter*.

However, Macklem suggests the courts use a different approach in a case of an internal restriction. This is closer to what is at stake in *Dickson*. The first step is the same as with an external restriction, which is for the judiciary to adopt interpretations of a *Charter* right “in which the restriction does not violate the *Charter*.”<sup>36</sup> When this is not possible, however, an internal restriction must be justified under section 25 by the purpose of protecting Indigenous difference. This involves first assessing whether Aboriginal rights are engaged and whether the government action in question is an external or internal protection. If an internal restriction is involved, Macklem echoes Pentney in suggesting that section 25 plays an interpretive role. If there are multiple possible interpretations of a *Charter* right — one in which the internal restriction violates the *Charter* and one in which it does not — “the judiciary ought to adopt the latter interpretation.”<sup>37</sup> However, if there is no plausible interpretation other than one that results in a *Charter* violation, “section 25 should give way and the restriction should be regarded as a violation and require justification under section 1.”<sup>38</sup> In this scenario, however, instead of assessing infringement in relation to a section 1 analysis, it is assessed in relation to protecting Indigenous difference and whether the deleterious consequences for some community members bear a close relation to interests associated with Indigenous difference.<sup>39</sup>

Others have suggested the colonial legal hierarchy could be entirely reversed in the last instance. For example, Slattery argues that section 25 means “[w]here a *Charter* right impinges on a section 25 right, the latter must prevail.”<sup>40</sup> Arbour agrees, arguing that section 25 means Indigenous/Aboriginal rights must be prioritized in the last instance.<sup>41</sup> However, she contends there is one exception, which is sex-based equality. This is grounded in section 28 of the *Charter*, which is standalone “directive to the courts to interpret the scope of *Charter* rights in a manner consistent with the equality of the sexes,” which along with subsection 35(4) of the *Constitution Act*<sup>42</sup> “stand as clear indicators that the interpretation and application of the

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35 This is a broad reading of the scope of section 25. See Patrick Macklem, *Indigenous Difference and the Constitution of Canada* (Toronto: University of Toronto Press, 2001) at 225.

36 *Ibid* at 225.

37 *Ibid* at 225.

38 *Ibid* at 232.

39 *Ibid* at 231.

40 Brian Slattery, “The Constitutional Guarantee of Aboriginal and Treaty Rights” (1982) 8:1-2 *Queen’s L J* 232 at 239.

41 See Arbour, *supra* note 7 at 62.

42 *Constitution Act*, 1982, s 35, being Schedule B to the Canada Act 1982 (UK), 1982, c 11 (section 35(4) reads: “Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons”).

*Charter* (including section 25) and the determination of the existence and scope of Aboriginal and treaty rights must be consistent with the important constitutional value of the equality of men and women.”<sup>43</sup>

Kent McNeil has developed a strong version of a shield approach. He argues the purpose of section 25 “is to prevent the *Charter* from being interpreted in a way that infringes on any rights or freedoms that aboriginal peoples may have,” and to accomplish this it must shield the actions of Indigenous/Aboriginal governments without exception.<sup>44</sup> Sa’ke’j Henderson’s conception of treaty federalism implies perhaps the strongest shield of all. It is grounded in the idea that the jurisdiction of Indigenous governments exists outside and independent of the settler colonial Constitution. As part of that Constitution, the *Charter* represents a settler rights paradigm that never legitimately applied to Indigenous peoples.<sup>45</sup> Henderson’s approach to section 25 is that it articulates the immunity this pre-existing Indigenous jurisdiction implies.<sup>46</sup> From this perspective, section 25 — or any section of the *Charter* — is not relevant to Indigenous peoples unless they meaningfully choose to engage with the settler rights paradigm.

## Towards a Plurinational *Charter*

The YKCA decision draws on the minority reasoning in *Kapp* but the case differs in that the challenge in *Dickson* pertains to an internal restriction. The difference is not interrogated by the YKCA, however, if the SCC hears the case it will perhaps do so. In taking into account the context since *Kapp*, it is worth considering the idea of self-determination as it has developed in international law, which incorporates both individual and collective dimensions. Val Napoleon argues such an understanding is reflected in the *United Nations Declaration on the Rights of Indigenous Peoples*, which articulates a conception of self-determination that includes among other things that peoples and individuals being able to freely participate in the social and political life of their communities, as well as the capacity of Indigenous peoples to collectively self-govern their territories.<sup>47</sup> Internal oppression and discrimination are not comparable with self-determination. However, the issue remains that what may look from the outside like discrimination might mean something else from an internal point of view. For example, a group could have traditional rule that only men can be chiefs, but it is the women who decide who is qualified to be chief and, after enough warnings, when it is time for a chief to be recalled.<sup>48</sup> In such a scenario, it is not clear the approaches to section 25 developed so far are attuned to discerning between discrimination and cultural difference.

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43 Arbour, *supra* note 7 at 62.

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

45 James Youngblood Henderson, “Empowering Treaty Federalism” (1994) 58:2 Sask L Rev 241 at 286.

46 James Youngblood Henderson, “Inclusive Canadian Federalism” in *Indigenous Peoples and the Futures of Federalism*, edited by Amy Swiffen and Joshua Nichols (University of Toronto Press, 2023) [forthcoming] (Henderson writes that section 25 marks out “a protective zone from the colonialists’ rights paradigm” that flows from the inherent jurisdiction of Indigenous nations).

47 See Val Napoleon, “Aboriginal Self Determination: Individual Self and Collective Selves” (2005) 29:2 Atlantis 31.

48 See Darlene M Johnston, “The Quest of the Six Nations Confederacy for Self-Determination” (1986) 44:1 U T Fac L Rev 1 at 8-9. Johnston cites chapter one of Bruce Johansen, *Forgotten Founders: Benjamin Franklin, the Iroquois and the Rationale for the American Revolution*, (Ipswich: Gambit Publishers, 1982).

It is also useful to consider the Native Women's Association of Canada's intervention in the *Corbiere* case. It argued that section 25 should shield external protections but that *Charter* challenges to actions of Indigenous/Aboriginal governments should be allowed when launched by citizens, as this provides a means for individual women to address oppression by male-dominated leadership.<sup>49</sup> Building on this idea, Teresa Nahanee argues Indigenous women have benefited from the *Charter*, as its strategic use has led to reduced sex discrimination in areas such as membership entitlement provisions.<sup>50</sup> Sharon McIvor discusses the strategic use of *Charter* litigation by Indigenous women when their challenges were opposed by male leadership within their communities.<sup>51</sup> These thinkers argue the *Charter* can be used by Indigenous people as a mechanism to undo patriarchal systems and structures associated with colonization and recapture the strength of legal principles that past colonial governments had eroded.<sup>52</sup>

These are important points, but as seen in *Dickson*, the question of the application of section 25 is relevant in circumstances outside of sex discrimination, and will involve sections other than section 15. One possible idea inspired by Arbour's proposal is that the shielding function of section 25 in the context of sex-based discrimination must be taken together with section 28 of the *Charter* and section 35(4) of the *Constitution Act*, which means that sex-based equality cannot be abridged by section 25. Another way of thinking of this is that taken together 25 and 35(4) suggest that sex-based discrimination could potentially be addressed via section 28 instead of section 15 when section 25 is engaged.

Gordon Christie also makes an interesting argument in this regard, which is that section 25 should be seen as a tool for decolonisation, and as decolonisation is a process that unfolds in time, he argues the application of section 25 should adapt and change as well. This is something that can be conceptualised in two phases. First, section 25 could be a tool for Indigenous peoples in removing unjust power structures within their communities. In this sense, Christie agrees with NWAC that section 25 must be a "strong hedge" around Indigenous/Aboriginal rights, but "in the absence of viable community-based alternative governing structures grounded in traditional principles and values, it would not protect Aboriginal governments from member-initiated challenges based on *Charter* principles."<sup>53</sup> In other words, internal restrictions would not be shielded by section 25 unless there are "internally determined institutions [that] are operational" to address such challenges.<sup>54</sup> This is the second

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49 *Corbiere*, *supra* note 16 at para 51.

50 Teresa Nahanee, "Indian Women, Sex Equality and the Charter" in Caroline Andrew & Sanda Rodgers, eds, *Women and the Canadian State*, (Montreal: McGill-Queen's University Press, 1997) at 89.

51 Sharon McIvor, "Aboriginal Women Unmasked: Using Equality Litigation to Advance Women's Rights" (2004) 16:1 CJWL 106 at 128 (see McIvor's article at 111 for an account of how Indigenous women were discriminated against by Canadian Governments and Indigenous men's groups during the Charlottetown Accord negotiations. She writes, "[f]or the women, to stand up in court is to be subject to the harshest treatment from their own communities locally, regionally, and nationally — be they Indian, Inuit, or Metis").

52 See also John Borrows, *Freedom and Indigenous Constitutionalism* (Toronto: University of Toronto Press, 2016).

53 See Gordon Christie, "Aboriginal Citizenship: Sections 35, 25 and 15 of Canada's *Constitution Act*, 1982" (2003) 7:4 Citizenship Studies 481 at 491.

54 *Ibid* at 491; 495 (Christie suggests that as communities reconstruct governing institutions that reflect their identities, they should be able to opt for an extended application of section 25 that would "protect

phase of decolonisation, which Christie describes as Indigenous communities reconstructing governing institutions that reflect their identities. In this phase, section 25 could be extended to “protect traditional ways of living from identity-challenging intrusions (both externally and internally).”<sup>55</sup> The two-fold approach is interesting in that it could allow for *Charter* challenges by community members, while keeping open the possibility of section 25 becoming a shield around reinvigorated internally-determined governing structures capable of addressing challenges themselves.

However, the idea also begs the question of who decides on the “viability” of community-based alternatives? Given the current composition and structure of the Canadian courts it would most likely be non-Indigenous judges making the determination. And who bears the burden of proof while the inquiry is happening? The VGFN Constitution foresees the establishment of a VGFN Court, though this has not happened yet. It is worth noting that Ms. Dickson had been prepared to make alternative arguments under the VGFN Constitution, as article IV sets out rights that are similar to section 15 of the *Charter*.<sup>56</sup> Section 7, the equality clause states:

Every individual is equal before and under the laws of the Vuntut Gwitchin First Nation and has the right to the equal protection and[d] equal benefit of Vuntut Gwitchin First Nation law without discrimination.

However, neither court considers this possibility.<sup>57</sup> As Ryan Beaton’s paper discusses, perhaps once the VGFN Court is established, a Canadian Court would make a different determination.<sup>58</sup> However, the YKSC has found that the VGFN Constitution “did not oust the *Charter*” and was more similar to a provincial charter of rights than a constitutional document and the YKCA agreed.<sup>59</sup> This highlights a final issue. A strict shield application of section 25 may limit possibilities for the constitutional expression of Indigenous legalities if the courts opt to resolve conflicts using familiar routes rather than venturing down relatively uncharted paths.

## Conclusion

This paper is interested in clearing the conceptual ground regarding section 25, and in so doing helping to open up the possibilities for the inherent Indigenous right to self-government, to be constructed in Canadian law. The *Dickson* case presents the chance for the SCC to develop the

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traditional ways of living from identity-challenging intrusions (both externally and internally”).

55 *Ibid* at 495.

56 *Dickson SC*, *supra* note 4 at para 104 states that “Ms. Dickson can have her application addressed under the VGFN Constitution, which incidentally she pled as an alternative remedy.”

57 *Dickson CA*, *supra* note 1 at para 157 states “the chambers judge’s order made no reference to the claim under Article IV having been pursued before him,” but as mentioned in *Dickson SC*, *supra* note 4 at para 104, the YKSC did note that Dickson had plead it as alternate remedy. *Dickson CA*, *supra* note 1 at para 5 also notes, “the pleadings of both parties also addressed the VGFN counterpart to s. 15(1) of the *Charter*, Article IV(7) of the First Nation’s constitution, which guarantees equality rights to VGFN citizens. However, that part of the pleadings was not addressed by the court below and remains outside the scope of this appeal.”

58 Ryan Beaton, “*Doctrine Calling: Inherent Indigenous Jurisdiction in Vuntut Gwitchin*” (2022) 31.2 Const Forum Const 39. If the superior courts maintain some jurisdiction for judicial review/appeal, it would be on a very deferential standard for the reasons given in *Pastion v Dene Tha’ First Nation*, 2018 FC 64.

59 *Dickson SC*, *supra* note 4 at paras 119-120.

relationship between the *Charter* and Indigenous/Aboriginal governments in a way that takes into account the constitutional status of Indigenous laws and rejects unilateral applications of a settler rights paradigm on Indigenous peoples without their meaningful consent.

