

## *Doctrine Calling: Inherent Indigenous Jurisdiction in Vuntut Gwitchin*

Ryan Beaton\*

“Conquest gives a title which the courts of the conqueror cannot deny.”  
Chief Justice Marshall, *Johnson v M’Intosh* 1823<sup>1</sup>

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Chief Justice McLachlin, *Haida Nation v British Columbia (Minister of Forests)* 2004<sup>2</sup>

### Introduction

The final report of the Royal Commission on Aboriginal Peoples (“*RCAP Report*”) divides the post-contact relations between Indigenous and non-Indigenous peoples in Canada into three broad phases: “Contact and Co-operation” (from contact until roughly 1830); “Displacement and Assimilation” (from roughly 1830 until after World War II); and “Negotiation and Renewal” (the past half-century or so).<sup>3</sup> The transitions from one phase to the next involved transformations in the political, social, economic, and legal relations between Indigenous and non-Indigenous peoples. Such major transitions call for, or provoke, big-picture stories to explain or to try justifying the transformations. These are the grand narratives a political

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1 *Johnson v M’Intosh*, 21 US (8 Wheat) 543 (1823) at 588 [*M’Intosh*].

2 *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 at para 25 [*Haida*].

3 *Report of the Royal Commission on Aboriginal Peoples: Looking Forward, Looking Back*, vol 1 (Ottawa: Canada Communication Group Publishing, 1996) at 94-227 [*RCAP Report*].

community tells itself to fix (however unsteadily and impermanently) a sense of direction for where it has come from, where it is heading, and how it might guide itself along that path.

How does Canadian law tell the story of these transitions? When it comes to the first transition — from contact and cooperation to displacement and assimilation — the courts have accepted the Marshall trilogy as canonical texts.<sup>4</sup> Canadian courts have consistently looked to these three judgments by Chief Justice John Marshall of the US Supreme Court as laying the foundation of Canadian Aboriginal law, just as US courts have looked to the trilogy as foundational for US federal Indian law. In particular, the Supreme Court of Canada (“SCC”) has repeatedly cited<sup>5</sup> *M’Intosh*, the first case of the Marshall trilogy, as establishing — at least for purposes of US and Canadian domestic courts — that the British Crown acquired sovereignty and underlying title to Indigenous territory through “discovery” and “conquest.” In *M’Intosh*’s memorable phrase: “Conquest gives a title which the courts of the conqueror cannot deny.”<sup>6</sup>

What about the second transition from displacement and assimilation to negotiation and renewal? How does Canadian law tell this story? Key themes and formulations have emerged in the case law over the past few decades — *reconciliation*, the *honour of the Crown*, perhaps some notion of *shared sovereignty*. Major elements of the *M’Intosh* story of discovery and conquest have also fallen out of favour or been plainly repudiated, though the SCC continues to affirm the central upshot of the case, the Crown’s acquisition of sovereignty and underlying title to Indigenous territory.<sup>7</sup> On the whole, Canadian law does not yet have a coherent or compelling story of the transition to negotiation and renewal. We are in a period of ideological transition in Indigenous-state relations, still searching for a compelling constitutional account of the corresponding transformation and destination.

The core challenge is not hard to find: any adequate account must grapple with the need “to reconcile pre-existing Aboriginal sovereignty with assumed Crown sovereignty.”<sup>8</sup> This formula for reconciliation, expressed by the SCC in *Haida* in 2004, is a noticeable departure from the Court’s more typical call for “the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown.”<sup>9</sup> Similarly striking is the Court’s reference in *Taku River*

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4 The Marshall trilogy consists of *M’Intosh*, *supra* note 1; *Cherokee Nation v Georgia*, 30 US (5 Pet) 1 (1831); and *Worcester v the State of Georgia*, 31 US (6 Pet) 515 (1832).

5 E.g. *Calder v Attorney-General of British Columbia*, [1973] SCR 313 at 380, 34 DLR (3d) 145; *Guerin v The Queen*, [1984] 2 SCR 335 at 380, 13 DLR (4th) 321; *R v Sparrow*, [1990] 1 SCR 1075 at 1103, 70 DLR (4th) 385 [*Sparrow*]; *Wewaykum Indian Band v Canada*, 2002 SCC 79 at para 75.

6 *M’Intosh*, *supra* note 1 at 588.

7 See e.g. *Tsilhqot’in Nation v British Columbia*, 2014 SCC 44 at para 69 [*Tsilhqot’in*]: “The starting point in characterizing the legal nature of Aboriginal title is Justice Dickson’s concurring judgment in *Guerin*, discussed earlier. At the time of assertion of European sovereignty, the Crown acquired radical or underlying title to all the land in the province.” While the Court does not directly cite *M’Intosh* here, it relies on *Guerin*’s appeal to *M’Intosh*. In the very same paragraph of *Tsilhqot’in*, the Court repudiates the doctrine of *terra nullius*, the more brutally consistent cousin of the doctrine of discovery: “The doctrine of *terra nullius* (that no one owned the land prior to European assertion of sovereignty) never applied in Canada, as confirmed by the *Royal Proclamation of 1763*.”

8 *Haida*, *supra* note 2 at para 20.

9 *Haida*, *supra* note 2 at para 17, quoting from the Court’s own prior judgments in *Delgamuukw v British Columbia*, [1997] 3 SCR 1010, 153 DLR (4th) 193 at para 186 and *R v Van der Peet*, [1996] 2 SCR 507, 137 DLR (4th) 289 at para 31.

*Tlingit First Nation v British Columbia (Project Assessment Director)* — decided at the same time as *Haida* — to “*de facto* Crown sovereignty.”<sup>10</sup> The Court’s choice of words in *Haida* and *Taku River Tlingit* signals that the *M’Intosh* story of discovery and conquest no longer provides a compelling *de jure* account of Crown sovereignty, even from the perspective of domestic courts. Indeed, the formulation in *Haida* plainly suggests a priority for *pre-existing* Aboriginal sovereignty over *assumed* Crown sovereignty.

Yet the statements in *Haida* and *Taku River Tlingit* are pitched at a very broad level of principle. The SCC and other Canadian courts have largely shied away from concretely addressing the legal form that such reconciliation of sovereignties should take. That is, the courts have not developed any substantial body of legal doctrine to govern or manage the relationship between pre-existing Indigenous sovereignty and assumed Crown sovereignty. A compelling legal story must, certainly in a common law tradition, include *both* broad themes — reconciliation, honour of the Crown, pre-existing Indigenous sovereignty — *and* specific chapters in which the themes come to life. That means developing legal doctrine to put flesh on the bones of abstract principle and resolve particular disputes that come to the courts.

The reasons of the YKSC and YKCA in *Dickson v Vuntut Gwitchin First Nation* speak directly to this need. At a broad level, Chief Justice Veale of the YKSC stated plainly that the modern Constitution adopted by the Vuntut Gwitchin First Nation (“VGFN”) is an expression of the Nation’s inherent right of self-government.<sup>11</sup> Both levels of court then grappled with how this inherent Indigenous lawmaking authority is embedded in the Canadian legal landscape today through, among other things, modern treaty and self-government agreements between VGFN, Yukon, and Canada, and through territorial and federal legislation implementing these agreements. In this way, the Yukon courts offered detailed doctrinal answers to the key questions raised by the case: does the *Charter* apply to the Residency Requirement enshrined in the VGFN Constitution; and, if so, does section 25 of the *Charter* shield the Residency Requirement, as an exercise of the VGFN’s inherent right of self-government, from any conflict or potential conflict with the rights asserted by Cindy Dickson under section 15 of the *Charter*? According to the Residency Requirement, anyone elected to serve on the VGFN Council must relocate within 14 days to VGFN settlement lands. Ms. Dickson, a VGFN citizen, asked the courts to declare that the Residency Requirement violated her section 15 rights and was therefore of no force or effect.

The willingness of the courts to engage doctrinally is a step forward. If modern Canadian Aboriginal law is going to help “reconcile pre-existing Aboriginal sovereignty with assumed Crown sovereignty”, then a body of legal doctrine is needed to address and provide some structure to the interaction between Indigenous legal orders and the state legal order. Canadian courts undoubtedly have a role to play in developing that doctrine, and this article focuses on the performance of the Yukon courts in *Vuntut Gwitchin*. At the same time, the limitations of Canadian courts should be kept in mind, notably their general lack of institutional competence in Indigenous law. Other institutions and processes are needed to complement the work of Canadian courts. The VGFN Constitution foresees the establishment of a Vuntut Gwitchin

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10 *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)*, 2004 SCC 74 at para 42 [*Taku River Tlingit*].

11 *Dickson v Vuntut Gwitchin First Nation*, 2020 YKSC 22 at paras 145, 206 [*Vuntut Gwitchin SC*].

Court, though it has not yet come into existence.<sup>12</sup> Article 27 of the *United Nations Declaration on the Rights of Indigenous Peoples* calls on states to establish processes in conjunction with Indigenous peoples to recognize and adjudicate their Indigenous and treaty rights.<sup>13</sup> Indigenous courts, as well as co-management and co-adjudicatory bodies that might implement article 27 of *UNDRIP*, undoubtedly also have a role to play in developing legal doctrine to coordinate Indigenous and state lawmaking powers.

For the moment, however, Canadian courts remain the primary forum for litigation. In *Vuntut Gwitchin*, while the Yukon courts did engage in detailed doctrinal analysis, they also flinched at fully addressing the significance of the Residency Requirement being an exercise of inherent Indigenous jurisdiction. The YKCA notably stated that “the fundamental question of the source of the rights and authority of the VGFN set forth in the self-government arrangements . . . will remain an unresolved question, at least at this level [of court].”<sup>14</sup> As the VGFN writes in its response to Ms. Dickson’s application for leave to appeal to the SCC: “Although grappling with pre-existing sovereignty may be a challenging aspect of reconciliation, understanding the source of VGFN’s governing authority is necessary to rationalize the theory of shared sovereignty that is applied by the YKCA.”<sup>15</sup> In other words, the courts must bring greater precision to their analysis of the doctrinal significance of Indigenous sovereignty and self-government.

The following sections of this article: (1) offer some notes of caution on the historical periodization in the *RCAP Report* and on the role of the courts in developing a legal narrative of reconciliation and of the transition to “negotiation and renewal”; (2) provide further context for reading *Vuntut Gwitchin* as an attempt to flesh out such a narrative; and (3) highlight specific doctrinal puzzles left unsolved in the reasons of the YKSC and YKCA.

### **I. A Restrained but not Insignificant Role for the Courts**

The *RCAP Report’s* division of post-contact relations between Indigenous and non-Indigenous peoples into three broad historical phases is obviously a schematic simplification of a tremendously complex set of relations. Yet it provides a helpful touchstone for gaining some sense of the broad trends in Canadian Aboriginal law, by which I mean that dimension of British colonial and later Canadian law that purports to govern legal relations between Indigenous peoples and the Canadian state. The *RCAP Report* has often been cited by the SCC and thus, at a minimum, provides an important reference point for the Court’s own understanding of broad historical relations between Indigenous and non-Indigenous peoples.<sup>16</sup>

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12 See VGFN Constitution, Article II, section 5, reproduced in *Dickson SC*, *supra* note 11 at para 62; *Vuntut Gwitchin First Nation Constitution*, (2019), online (pdf): <[13 \*United Nations Declaration on the Rights of Indigenous Peoples\*, GA Res 61/295, UNGAOR, 61st Sess, Supp No 49, UN Doc A/RES/61/295 \(2007\) art 27 \[\*UNDRIP\*\].](http://www.vgfn.ca/pdf/constitution%202019.pdf#>[perma.cc/5393-HC6Q]</a>.</p></div><div data-bbox=)

14 *Dickson v Vuntut Gwitchin First Nation*, 2021 YKCA 5 at para 91 [*Vuntut Gwitchin CA*].

15 See *Dickson v Vuntut Gwitchin First Nation*, 2021 YKCA 5, leave to appeal to SCC granted, 39856 (28 April 2022) (Memorandum of Argument for the Vuntut Gwitchin First Nation in response to Application for leave to appeal and conditional application for leave to cross-appeal) at para 38 [*VGFN Memorandum*].

16 See e.g. *Williams Lake Indian Band v Canada (Aboriginal Affairs and Northern Development)*, 2018 SCC 4; *R v Powley*, 2003 SCC 43; *Ross River Dena Council Band v Canada*, 2002 SCC 54.

This issue of the Court's historical understanding brings us to the role of the courts themselves. The courts respond to legal disputes brought before them. In the Aboriginal law context, as in other areas of constitutional law, they tend to frame their response in terms of broad themes, values, and principles, which sometimes cohere into a relatively clear narrative that expresses (and perhaps also stabilizes and shapes) a dominant or consensus view within the broader political community. The following section will take a closer look at the Marshall trilogy account of discovery and conquest as an illustration of such a narrative. This does not mean, however, that the courts can or should play the lead role in developing such a broader narrative. Generally, they will give legal expression to existing social and political realities and norms, as they perceive them. The courts are largely responsive to evolving realities and norms that they have only a limited capacity to shape.

Yet, even in this responsive role, the courts may play a significant part in consolidating and articulating the country's constitutional self-understanding of Indigenous-state relations. In resolving the disputes brought before them, the courts frame their work of legal interpretation with broad principles and narratives of the relations between Indigenous peoples and the state. These principles and narratives — drawing on themes of *reconciliation*, *honour of the Crown*, *shared or competing sovereignty assertions* — partially structure the legal doctrine that courts develop to resolve cases. The legal doctrine in turn fills in the meaning of the broader themes. This judicial process of interpretation has become — particularly since the adoption of section 35 of the *Constitution Act, 1982* and the failure of constitutional negotiations to define the contents of the Aboriginal rights it affirms and recognizes — an important site for expressing, contesting, evaluating, reconsidering the norms and realities of Indigenous-state relations in Canada.

But *should* the courts play such a central role? Are they well placed “to reconcile pre-existing Aboriginal sovereignty with assumed Crown sovereignty”? Is that task consistent with their institutional mandate and limitations, as domestic courts established through *de facto* Crown sovereignty? *M'Intosh* seems to answer with an emphatic *no*, insisting that domestic courts cannot question the “title” or sovereignty of the state. As already noted, the SCC has long cited *M'Intosh* as authority on this point, which seems to foreclose the possibility that domestic courts can do justice to claims of pre-existing Aboriginal sovereignty in the face of assumed Crown sovereignty. *M'Intosh*, in at least some passages, insists that the institutional role of domestic courts bars them from making any distinction between *de facto* and *de jure* sovereignty as far as their own state is concerned. Moreover, the SCC has long stressed the need for the Crown and Indigenous peoples to resolve outstanding claims through negotiation, rather than litigation.

In practice, however, the courts often find it difficult if not impossible to simply ignore issues of sovereign legitimacy. In *Haida*, for instance, while insisting on the need for treaty negotiations to reconcile competing Indigenous and Crown sovereignty claims, the Court also felt compelled to develop legal doctrine to structure the Crown's obligations in the current (*de facto*) context of competing, not-yet-reconciled claims. The Haida Nation asked the Court to affirm that their asserted Aboriginal rights and title impose legal obligations on the Crown, even where those assertions have not yet been confirmed through judicial declaration or treaty. The Court responded by laying the doctrinal foundations of the Crown duty to consult and accommodate Aboriginal rights-claimants. The Court also stated that the Crown

has a duty to pursue negotiations where Indigenous claims are unresolved.<sup>17</sup> The judiciary, as “guardian of the [C]onstitution,”<sup>18</sup> inevitably has a stake not only in affirming *the fact* of state sovereignty, but also in explaining or working towards *the legitimacy* of state sovereignty assertions.

*Haida* thus (i) recognized that the core issue for modern Aboriginal law is the coordination or reconciliation of Indigenous sources of law (“pre-existing Aboriginal sovereignty”) with state sources of law (“assumed Crown sovereignty”), and (ii) developed legal doctrine intended to bring greater balance of power into treaty negotiations to address that core issue and thereby to bring greater legitimacy to state sovereignty, perhaps through forms of shared sovereignty. Yet the legal doctrine developed in *Haida* does not itself incorporate or account for Indigenous sovereignty in any meaningful way. Nothing in the Court’s doctrine of the Crown duty to consult directly recognizes Indigenous sources of law.

Even in the context of Aboriginal title — which would seem inescapably to include a jurisdictional component grounded in the Indigenous legal order of the title-holders<sup>19</sup> — the SCC has carefully avoided explicit mention of Indigenous jurisdiction. The Court has stated that the existence of Indigenous legal orders at the time of Crown sovereignty assertion may constitute evidence in support of Aboriginal title claims today, and that these legal orders may inform the content of Aboriginal title. However, the Court’s own characterizations of Aboriginal title have been resolutely ambiguous, at best, about any jurisdictional component.

In *Tsilhqot’in*, the SCC’s most recent in-depth treatment of Aboriginal title, the Court adopted the firmly non-committal statement that Aboriginal title included the “right to proactively . . . manage the land.”<sup>20</sup> Since the Tsilhqot’in Nation surely applies Tsilhqot’in law when pro-actively managing its Aboriginal title lands, perhaps we can at least *infer* the jurisdictional dimension of Aboriginal title in this formulation? Yet in the same decision, the Court drew an analogy between section 35 rights — including Aboriginal title — and *Charter* rights, in particular the right to a fair criminal process, which hardly suggests a jurisdictional dimension.<sup>21</sup> (Imagine the Court’s response if a defendant purported to adopt laws and regulations to “pro-actively manage” the right to a fair criminal process.) Moreover, the Court developed this analogy in the context of its worry that legislative vacuums would arise if provincial laws did not generally apply to Aboriginal title lands. If the Court in *Tsilhqot’in* intended to recognize a jurisdictional component of Aboriginal title, grounded in inherent Indigenous sources of law, this would certainly have been the place to say something about it and its relation to provincial and federal law. Instead, the Court stressed the analogy between section 35 rights and the *Charter* right to a fair criminal process. That’s a clear signal of the Court’s unwilling-

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17 *Haida*, *supra* note 2 at para 25; see also *Tsilhqot’in*, *supra* note 7 at para 17.

18 See e.g. *Reference re Supreme Court Act, ss 5 and 6*, 2014 SCC 21 at para 89.

19 See e.g. *Campbell v British Columbia (Attorney General)*, 2000 BCSC 1123 at para 114: “On the face of it, it seems that a right to aboriginal title, a communal right which includes occupation and use, must of necessity include the right of the communal ownership to make decisions about that occupation and use, matters commonly described as governmental functions.”

20 *Tsilhqot’in*, *supra* note 7 at para 73.

21 *Ibid* at para 143; *Constitution Act, 1982*, s 35, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11; *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*].

ness, at least at the time of *Tsilhqot'in*, to engage doctrinally with questions of the relationship between Indigenous sources of law and state sources of law.

In sum, the broad statements of principle recognizing “pre-existing Aboriginal sovereignty” have, by and large, not yet translated into legal doctrines that would meaningfully acknowledge and accommodate Indigenous jurisdiction in the resolution of concrete legal disputes. This situation is partly explained (though perhaps not justified) by the SCC’s insistence that reconciling Indigenous and Crown sovereignties is properly a matter for negotiation, not litigation.

It is worth noting, then, that *Vuntut Gwitchin* arises in the wake of successful negotiations of the kind urged by the SCC. The VGFN, Yukon, and Canada have reached a Final Agreement, recognized as a treaty within the meaning of section 35 of the *Constitution Act, 1982*, and a Self-Government Agreement, which is not a section 35 treaty.<sup>22</sup> The VGFN and Ms. Dickson disagree as to whether these agreements and the adoption of implementing legislation by Yukon and Canada make the *Charter* applicable to the Residency Requirement in the VGFN Constitution. While the VGFN rightly points out that the *Charter*’s applicability was not clearly settled in the negotiations, there is also merit in the YKSC’s response that the context of the concluded agreements, the implementing legislation, and the VGFN Constitution nonetheless create a justiciable issue about the *Charter*’s applicability.<sup>23</sup> Doctrinal engagement is needed.

Of course, the need for doctrinal engagement does not necessarily mean that Canadian courts are best positioned to provide it. As noted earlier, the work of Canadian courts will have to be complemented by Indigenous bodies and processes, along with co-management and co-adjudicatory mechanisms. I return to this point briefly in conclusion below.

## II. The Story of the *Marshall* Trilogy: Discovery and Conquest

Before turning to the doctrinal details of *Vuntut Gwitchin*, let us briefly consider the legal narrative of state supremacy told in the Marshall trilogy. The legal story told in *M’Intosh* is based on civilizational hierarchy:

On the discovery of this immense continent, the great nations of Europe were eager to appropriate to themselves so much of it as they could respectively acquire. Its vast extent offered an ample field to the ambition and enterprise of all; and the character and religion of its inhabitants afforded an apology for considering them as a people over whom the superior genius of Europe might claim an ascendancy. The potentates of the old world found no difficulty in convincing themselves that they made ample compensation to the inhabitants of the new, by bestowing on them civilization and Christianity, in exchange for unlimited independence.<sup>24</sup>

“Civilization and Christianity” to Indigenous peoples, “unlimited independence” to “the great nations of Europe:” those are the basic terms of the civilizational exchange that *M’Intosh* narrates and explains with “an apology” grounded in the “superior genius of Europe.”

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22 *Vuntut Gwitchin First Nation Final Agreement* (1993); *Vuntut Gwitchin First Nation Self-Government Agreement* (1993).

23 *Vuntut Gwitchin SC*, *supra* note 11 at paras 93-101.

24 *M’Intosh*, *supra* note 1 at 572-73.

The SCC's citations to *M'Intosh* draw a legal positivist strand from the case. They suggest that domestic courts must simply accept the assertions of Crown sovereignty on which rest the establishment and authority of state institutions. In *Sparrow*, for instance, the Court states:

It is worth recalling that while British policy towards the native population was based on respect for their right to occupy their traditional lands, a proposition to which the Royal Proclamation of 1763 bears witness, there was from the outset never any doubt that sovereignty and legislative power, and indeed the underlying title, to such lands vested in the Crown; see *Johnson v. M'Intosh* (1823) . . .<sup>25</sup>

This “starting point” is reaffirmed in *Tsilhqot'in*, though without explicitly citing *M'Intosh*: “At the time of assertion of European sovereignty, the Crown acquired radical or underlying title to all the land in the province.”<sup>26</sup> These statements are reminiscent of, if less memorable than, Chief Justice Marshall's line, quoted above: “Conquest gives a title which the courts of the conqueror cannot deny.”

Yet when we read *M'Intosh* as a whole, we see that Chief Justice Marshall felt the need to explain his use of “conquest” and that his explanation is grounded in the social and political realities of the US at the time, as perceived by the Chief Justice. He explains, in fact, that he is using “conquest” here *even though* it strikes him as “opposed to natural right, and to the usages of civilized nations”:

However extravagant the pretension of converting the discovery of an inhabited country into conquest may appear; if the principle has been asserted in the first instance, and afterwards sustained; if a country has been acquired and held under it; if the property of the great mass of the community originates in it, it becomes the law of the land, and cannot be questioned. So, too, with respect to the concomitant principle, that the Indian inhabitants are to be considered merely as occupants, to be protected, indeed, while in peace, in the possession of their lands, but to be deemed incapable of transferring the absolute title to others. *However this restriction may be opposed to natural right, and to the usages of civilized nations, yet, if it be indispensable to that system under which the country has been settled, and be adapted to the actual condition of the two people, it may, perhaps, be supported by reason, and certainly cannot be rejected by Courts of Justice.*<sup>27</sup>

In this passage, Chief Justice Marshall offers a startling critique of the principle he feels compelled to adopt as the “law of the land” — the principle, namely, that British discovery of territory inhabited and governed by Indigenous peoples has been converted to conquest, at least in the eyes of US courts. The Chief Justice paints a picture of the young republic expanding with irresistible force, carried on the ideological tides of civilizational hierarchy. Domestic courts — and the legal doctrines they develop — must acquiesce to this overwhelming historical movement and give it voice in a legal narrative that at least coheres with the ideological current. Chief Justice Marshall does not get swept along in a celebratory or even justificatory vein; he practically denounces this narrative of conquest even as he articulates it. But he does bow to social and political realities as he perceives them.

All of this indicates that the narrative of conquest as “law of the land” is sustained only by the force of these social and political realities and the ideological current of civilizational hierarchy running through them. What happens, then, if that ideological current runs dry?

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25 *Sparrow*, *supra* note 5 at 1103.

26 *Tsilhqot'in*, *supra* note 7 at para 69.

27 *M'Intosh*, *supra* note 1 at 591-92 (emphasis added).

What do we make of the fact that the SCC has specifically repudiated the narrative of conquest: “Put simply, Canada’s Aboriginal peoples were here when Europeans came, and were never conquered.”<sup>28</sup> What is left to prop up *M’Intosh’s* doctrinal conclusions on acquisition of Crown sovereignty and displacement or disregard of Indigenous sovereignty? Do social and political norms, realities, and ideological current not push, now, in the direction of developing a legal narrative and legal doctrine that incorporate clear recognition of pre-existing Indigenous sovereignty?

### III. Still Puzzling: Inherent VGFN Authority and the (Future) VGFN Court

*Vuntut Gwitchin* takes a significant step into this breach. Both the YKSC and the YKCA engaged doctrinally with issues arising from the interaction of Indigenous sources of law, on the one hand, with territorial and federal legislation and the Canadian Constitution, on the other. As Chief Justice Veale stated, in a passage quoted by the YKCA:

The Vuntut Gwitchin were constituted as a political entity prior to the assertion of British sovereignty and have governed themselves in accordance with their own laws since time immemorial. These laws included rules and customs to determine how their leaders are to be selected. . . .

Despite the imposition of the *Indian Act*, the Vuntut Gwitchin have continued their governance practice of making significant decisions collectively through processes of community deliberation and discussion. This method of decision-making was and remains the foundation of Vuntut Gwitchin community self-sufficiency, culture and survival on the land. The governance bodies and processes established by the Vuntut Gwitchin in their contemporary self-government are the modern expression of this tradition.

The displacement and alienation of Vuntut Gwitchin people from Vuntut Gwitchin Territory through imposed colonial laws and policies including residential schools, *Indian Act* administration and resource development without Vuntut Gwitchin consent or involvement has caused significant harm to the integrity and health of the Vuntut Gwitchin as a collective. The Vuntut Gwitchin continue to address and recover from these harms as they implement self-government.<sup>29</sup>

Chief Justice Veale finds that the adoption of the Residency Requirement in a modern VGFN Constitution is an exercise of the VGFN’s “inherent right of self-government.”<sup>30</sup> In describing the “context in which [the] residency requirement must be understood,” he adds: “In a monumental achievement, the Vuntut Gwitchin First Nation reached a self-government agreement that preserved their inherent right to self-government and at the same time brought the VGFN Constitution into the constitutional fabric of Canada.”<sup>31</sup> The case was thus squarely framed as a matter of locating the inherent Indigenous right of self-government within the constitutional fabric of Canada.

To this end, the YKCA drew on the conception of “shared sovereignty” outlined in the *RCAP Report* and quoted approvingly by Justice Binnie in *Mitchell v MNR*:

Shared sovereignty, in our view, is a hallmark of the Canadian federation and a central feature of the three-cornered relations that link Aboriginal governments, provincial governments and the federal government. These governments are sovereign within their respective spheres and hold their powers

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28 *Haida*, *supra* note 2 at para 25.

29 *Vuntut Gwitchin SC*, *supra* note 11 at paras 11-12, quoted in *Vuntut Gwitchin CA*, *supra* note 14 at para 9.

30 *Vuntut Gwitchin SC*, *supra* note 11 at para 145.

31 *Ibid* at para 206.

by virtue of their constitutional status rather than by delegation. Nevertheless, many of their powers are shared in practice and may be exercised by more than one order of government.<sup>32</sup>

In these ways, the Yukon courts (i) recognized that the VGFN's adoption of a modern Constitution was an expression of its inherent right of self-government, not delegated from any state power; (ii) understood that the legal dispute in the case turned on the relations embedding this inherent right and sources of state law — notably, the *Charter* and the territorial and federal legislation implementing the self-government agreement with VGFN — “within the constitutional fabric of Canada;” and (iii) at least minimally sketched a notion of “shared sovereignty” as the broad framework and narrative that might reconcile pre-existing Indigenous sovereignty and assumed Crown sovereignty, and might in time allow the courts to shake free from the story of discovery and conquest that continues to haunt the case law.

That said, as the VGFN fairly points out, the YKCA does not go very far “to rationalize the theory of shared sovereignty” it evokes. The connection in the YKCA majority reasons between this theory (or sketch of a story) of shared sovereignty, on the one hand, and the doctrinal analysis that purports to resolve the case, on the other, is tenuous at best. This is perhaps not surprising, as *Vuntut Gwitchin* raises issues in a minimally developed area of Canadian law. That does not, however, undermine the force of the VGFN's criticism.

I will highlight two parts of the doctrinal analysis that remain murky in the reasons of the Yukon courts. Whether the SCC clarifies them in this case or their resolution is left for later cases, they are the kinds of issues that must be addressed to link the broad notion of shared sovereignty (or some alternate vision of Indigenous-state reconciliation) with the more detailed doctrinal analysis needed to translate this broad notion into practice, to bring it to life. First, it is not entirely clear from the reasons of either the YKSC or YKCA how precisely they conclude that the *Charter* applies to the Residency Requirement. Second, the Yukon courts did not address — understandably, as it was not directly at issue in this case — how the establishment of a Vuntut Gwitchin Court would change the doctrinal analysis. This latter issue will be interesting to follow if VGFN, or a similarly situated First Nation, opts to establish its own court. I address these two issues in turn.

### *i. The grounds for applying the Charter to the VGFN Residency Requirement*

Before the Yukon courts, the VGFN argued that its right to self-government was inherent, not delegated through any federal or territorial statute, while Canada and Yukon argued that it was through their enacting legislation that VGFN self-government derived its power.<sup>33</sup> Chief Justice Veale found merit in both submissions.<sup>34</sup> He concluded that, in either case, the *Charter* applied to the Residency Requirement: “the *Charter* applies to the residency requirement of the VGFN Constitution whether viewed from an exercise of inherent right or an exercise of the VGFN Self-Government Agreement implemented by federal and territorial legislation. Both are parts of Canada's constitutional fabric.”<sup>35</sup> Chief Justice Veale relied on the reasoning in this passage from Peter Hogg and Mary Ellen Turpel:

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32 *Mitchell v MNR*, 2001 SCC 33 at para 130, citing *Report of the Royal Commission on Aboriginal Peoples: Restructuring the Relationship*, vol 2 (Ottawa: Canada Communication Group Publishing, 1996) at 228.

33 *Vuntut Gwitchin SC*, *supra* note 11 at para 129.

34 *Ibid.*

35 *Ibid* at para 130.

Despite the silence of section 32 on Aboriginal governments, it is probable that a court would hold that Aboriginal governments are bound by the *Charter*. This would be so where self-government institutions have been created by statute, because the *Charter* applies to all bodies exercising statutory powers. Where self-government institutions have been created by an Aboriginal people and empowered by a self-government agreement, the source of the self-government powers is probably a treaty right (if the self-government agreement has treaty status) or an aboriginal right (the inherent right of self-government) or both. Even here, the self-government agreement requires the aid of a statute to make clear that the agreement is binding on third parties. The statute implementing the self-government probably constitute a sufficient involvement by the Parliament of Canada to make the *Charter* applicable.<sup>36</sup>

The reasoning quoted here is *not* that the *Charter* applies to Indigenous self-government institutions by their very nature as governmental institutions in Canada. The reasoning is rather that self-government agreements with territorial, provincial, and / or federal governments, along with implementing legislation, would be necessary to give the Indigenous self-government broader recognition in Canadian law. Stated so generally, this point is debatable, as Indigenous laws and customs may be recognized at common law without the need for any implementing legislation or other formal recognition by the state.<sup>37</sup> However, the authors' point in the passage quoted is surely that modern institutions of Indigenous self-government will generally be accompanied by some form of self-government agreements and by territorial, provincial, and / or federal implementing legislation. Hogg and Turpel conclude that such "involvement by the Parliament of Canada" (or provincial legislature) is likely sufficient to make the *Charter* applicable to such institutions of Indigenous self-government.

Yet, immediately after quoting this passage, Chief Justice Veale holds: "The VGFN exercise of its legislative capacity and the VGFN Constitution bring it within the scope of s. 32(1) of the *Charter*, pursuant to the principles set out in *Eldridge* as being either 'government' or exercising inherently 'government' activities."<sup>38</sup> That conclusion is different from the one drawn by Hogg and Turpel. The Chief Justice apparently concludes that, in the very exercise of its inherent Indigenous jurisdiction and its adoption of a constitution, the VGFN is subject to the *Charter* either as itself government or as performing inherently governmental activities within the meaning of applicable case law.

Moreover, Chief Justice Veale then offers a summary statement of six reasons — seemingly independent from each other — for concluding that the *Charter* "applies to the VGFN government, Constitution, and laws."<sup>39</sup> This summary creates further confusion. For instance, the second reason listed reads: "The rights of VGFN citizens as Canadian citizens includes the exercise of their rights and freedoms guaranteed in the *Charter*."<sup>40</sup> This "reason" simply begs the question whether the rights and freedoms guaranteed to Canadian citizens (Indigenous or not) in the *Charter* apply to exercises of the inherent right of Indigenous self-government.

These sections of the YKSC reasons are not a model of clarity. The YKCA majority reasons seem to muddle the analysis further by stating: "The chambers judge did not purport to resolve

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36 *Vuntut Gwitchin SC*, *supra* note 11 at para 129 [footnotes omitted, emphasis added by Veale CJ], citing Peter W Hogg & Mary Ellen Turpel, "Implementing Aboriginal Self-Government: Constitutional and Jurisdictional Issues" (1994) 74:2 Can Bar Rev 187 at 214.

37 See e.g. *Pastion v Dene Tha' First Nation*, 2018 FC 648 at para 8.

38 *Vuntut Gwitchin SC*, *supra* note 11 at para 130.

39 *Ibid* at para 131.

40 *Ibid*.

the fundamental question of the source of the rights and authority of the VGFN set forth in the self-government arrangements, and this will remain an unresolved question, at least at this level.”<sup>41</sup> It would be more accurate to say that Chief Justice Veale *was* clear that the source and authority of the VGFN’s self-government arrangements are found in the VGFN’s inherent right of Indigenous self-government. What is *not* entirely clear in his reasons is whether application of the *Charter* to the Residency Requirement follows simply from the nature or exercise of that right, or rather from the territorial and federal implementing legislation that gives the VGFN exercise of that right broader recognition in Canadian law. If only the latter holds, it may be possible for Indigenous governments to negotiate, through self-government agreements, the extent and manner of the *Charter’s* applicability to Indigenous self-government. If the former holds, then courts would not give effect to any “negotiating out” of the *Charter’s* applicability.

The VGFN understandably asks the SCC to clarify the lower courts’ reasons on this issue.<sup>42</sup>

## *ii. The (future) VGFN court*

Chief Justice Veale emphasized that Article II, section 5 of the VGFN Constitution states: “The validity of a Vuntut Gwitchin Law may be challenged in the Supreme Court of Yukon Territory until the Vuntut Gwitchin Court is established.”<sup>43</sup> The Vuntut Gwitchin Court has not yet been established. The Yukon courts in this case therefore did not have to address how the establishment of the Vuntut Gwitchin Court might alter their legal analysis.

But the establishment of the Vuntut Gwitchin Court may be of central importance to the *Charter’s* applicability. Consider the issues flagged above about the reasoning of the YKSC and YKCA for concluding that the *Charter* applies to the Residency Requirement. If the VGFN government and its laws attract *Charter* scrutiny by their very nature as exercises of the inherent right of self-government, then arguably the Vuntut Gwitchin Court would itself have to apply the *Charter* when reviewing VGFN laws and government action. If it failed to do so, that would presumably constitute reversible error on review by the YKSC. But if the VGFN government and its laws only attract *Charter* scrutiny in Canadian courts on account of the territorial and federal legislation implementing self-government agreements, then why should the *Charter* apply in internal review of VGFN laws or government action by the Vuntut Gwitchin Court?

More generally, would Vuntut Gwitchin Court decisions be subject to review by the YKSC? If so, by way of appeal or judicial review? I assume the latter, and on a very deferential standard *per Pastion*. Even if this issue is addressed in a self-government agreement or implementing legislation, the extent to which such issues can be negotiated may depend on the source and authority for the right of Indigenous self-government and on the precise reasons for which the courts find (or do not find) that the *Charter* applies to its exercise.

There is certainly no lack of fundamental issues for the SCC to clarify in this appeal.

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41 *Vuntut Gwitchin CA*, *supra* note 14 at para 91.

42 *VGFN Memorandum*, *supra* note 15 at paras 35-42.

43 *Vuntut Gwitchin SC*, *supra* note 11 at para 62; *Vuntut Gwitchin First Nation Constitution*, *supra* note 12 art 2, s 5.

## Conclusion

The reasons of the YKSC and YKCA in *Vuntut Gwitchin* are significant for their doctrinal engagement with the inherent right of Indigenous self-government and its relation to state sources of law. Such doctrinal engagement is needed to translate broadly stated commitments to reconciliation, Crown honour, and shared sovereignty into a compelling account of Indigenous-state relations that has practical purchase in resolving legal disputes. Canadian law stands on the cusp of deep doctrinal engagement with these issues. The Yukon courts took meaningful steps into this new doctrinal field. On crucial points, however, their analysis calls out for greater clarity. The SCC's intervention is an opportunity to clarify whether the *Charter* necessarily applies — as the Yukon courts indicate — to the VGFN Constitution and government by their very nature as exercises of the inherent right of Indigenous self-government. If that conclusion stands, it will significantly impact, perhaps entirely foreclose, the possibility for Indigenous governments to negotiate the applicability of the *Charter* to Indigenous self-government and Indigenous laws. It may also significantly shape the applicability of the *Charter* in litigation before Indigenous courts reviewing Indigenous laws and acts of Indigenous governments.

*Vuntut Gwitchin* thus raises, if somewhat indirectly, the important role that Indigenous courts may soon begin to play in the Canadian legal landscape. In deciding the appeal, the SCC would do well to acknowledge this reality, even if that is not strictly necessary to resolve the legal dispute before the Court. The SCC should acknowledge, that is, that the judicial and doctrinal work of coordinating Indigenous jurisdiction with federal, provincial, and territorial jurisdiction cannot fall solely to Canadian courts. Indigenous courts and co-management, co-adjudicatory processes as called for in Article 27 of *UNDRIP* must also find their place in the Canadian constitutional fabric. Even a brief and broadly stated acknowledgment of the need for such courts and processes could help establish more stable doctrinal ground for their future development.

