

The Paradox of Political Questions in Canadian Aboriginal Law: Why Dickson v Vuntut Gwitchin First Nation Requires Reconsideration of the Political Questions Doctrine in Canada

Robert Hamilton*

On May 3rd, 1842, a gala procession wound its way through the streets of Providence, Rhode Island. Thousands filled the streets as a brass band and an armed contingent accompanied artists, shopkeepers, and mechanics through the narrow streets celebrating the inauguration of Thomas Dorr as People's Governor.¹ Two weeks earlier, a significant majority of voting aged men in Rhode Island had elected Dorr as Governor in elections that state officials deemed illegal. The procession led to an unfinished foundry building near the State House that acted as the home of the first sitting of the People's Legislature.²

Thomas Dorr delivered an inauguration address outlining the cause that those in attendance had fought for; suffrage, he said, would be extended to Rhode Islanders to whom it had been denied. The People's Constitution, which a majority of voting age Rhode Island men had ratified in December 1841, would become the law of the land, ending decades of disenfranchisement and aristocratic rule, replacing the antiquated and aristocratic Charter issued by King Charles II in 1663 with a modern Constitution granting full political and democratic rights to the people of Rhode Island. The heady optimism of the day was short lived. Within months

* Associate Professor University of Calgary Faculty of Law.

1 Marvin Gettleman, *The Dorr Rebellion: A Study in American Radicalism, 1833-1849* (New York: Random House, 1973) at 101.

2 *Ibid* at 102.

Thomas Dorr was in exile, wanted on charges of treason and a pariah to many of those who only months before had considered his success as central to their deepest aspirations.³ The Dorr Rebellion had come to an end.

Martin Luther was among those arrested during the Dorr rebellion. During the dispute, Luther's property had been searched by a state official, Mr. Borden. Luther alleged that the Charter government Borden acted under was illegitimate, that its authority had been displaced by the acts of popular sovereignty that culminated in the adoption of the People's Constitution and Thomas Dorr's election as People's Governor. At the level of constitutional doctrine, he argued that the popular government was protected by Clause 4 of the US Constitution, which guarantees a "republican government"; that is, Clause 4 provides a textual basis for courts to intervene to ensure American citizens were represented by a republican form of government.⁴ The resulting decision, *Luther v Borden*,⁵ famously articulated the "political questions doctrine," holding that inherently political questions are beyond judicial competence. American courts have applied the doctrine in many situations since.⁶

Whether such a doctrine has purchase in Canada is a matter of some debate. While Canadian courts have never explicitly adopted a political questions doctrine, and in at least one notable Supreme Court decision seem to have explicitly rejected it, in practice Canadian courts have frequently relied on variations of the doctrine. This is no surprise. At its most basic, the doctrine is about the proper institutional role of the judiciary. It raises fundamental issues of legitimacy and democratic rule that arise in any system of constitutional rule and judicial review. The Canadian courts' lack of explicit engagement, however, leaves us without clear guidance on the parameters or application of the doctrine; commentators have argued for a clearer and more explicit approach for many years.⁷ *Dickson v Vuntut Gwitchin First Nation* ("*Dickson*") provides an opportunity to consider the issue anew, particularly the role that the doctrine might play in Aboriginal law, a field in which courts are often drawn into what are, in effect, disputes about jurisdiction and constitutional authority.

The question in *Dickson* was whether a citizen of the Vuntut Gwich'in First Nation (VGFN) could rely on the *Charter* to strike down a law of the VGFN government.⁸ This raised the more general questions of whether the *Charter* applies to Indigenous nations who have entered into self-government agreements with the Crown or Indigenous governments exercising inherent, rather than delegated, authority. While courts have held that the *Charter* applies to *Indian Act* governments, many have argued that the same is not, or ought not, be true of Indigenous governments exercising inherent authority who have not consented to its

3 George Dennison, *The Dorr War: Republicanism on Trial, 1831-1861* (Louisville: The University Press of Kentucky, 1976) at 13; Arthur May Mowry, *The Dorr War — or — The Constitutional Struggle in Rhode Island* (Providence: Preston & Rounds, 1968) at 133; John S Schuchman, "The Political Background of the Political-Question Doctrine: The Judges and the Dorr War" (1972) 16:2 Am J Leg Hist 111.

4 US Const art 4 § 4.

5 *Luther v Borden*, 48 US 1 (1849).

6 Tara Leigh Grove, "The Lost History of the Political Question Doctrine" (2015) 90:6 NYUL Rev 1908.

7 See e.g. D Geoffrey Cowper & Lorne Sossin, "Does Canada Need a Political Questions Doctrine?" (2002) 16 SCLR (2d) 343.

8 *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*].

application.⁹ *Dickson* raises these issues because the VGFN is operating under a self-government agreement, rather than the *Indian Act*, and because, unlike many such agreements, the VGFN final agreement and treaty are silent on the application of the *Charter*.¹⁰ As outlined elsewhere in this collection, the trial and appellate level courts held that the *Charter* did indeed apply and relied on section 25 of the *Charter* to protect a sphere of Indigenous autonomy and uphold the challenged VGFN law. In doing so, the courts rejected the VGFN's argument that the application of the *Charter* was a political question that needed to be resolved through negotiation rather than litigation.¹¹ In essence, the VGFN asked the court to rely on the political questions doctrine and to treat the complex political issues raised by the dispute as non-justiciable.

What is the political questions doctrine?

Put simply, the political questions doctrine is the idea that courts ought to decline to answer a question that they consider too “political” for judicial determination. Prevalent in American law, the doctrine has been justified in several ways by American courts. D. Geoffrey Cowper and Lorne Sossin summarize three primary rationales that have been advanced: “express textual assignment, appropriateness of judicial methodology, and, finally, deference to other branches of government.”¹² The doctrine is justified by maintaining that there is a textual basis to hold that authority in a given area has been assigned to a different branch of government, that judicial method is ill-suited to resolve the dispute, or out of deference to the role of other branches. The parameters, application, and wisdom of the doctrine have been debated at length, but the doctrine has a firm foothold in American law.¹³

There is, formally, no “political questions doctrine” in Canadian law.¹⁴ Canadian courts have declined to exercise jurisdiction on the basis of ripeness, mootness, or non-justiciability, but they have rarely explicitly considered doing so on the basis of a political questions doctrine.¹⁵ The contemporary starting point for analysis of the doctrine in Canadian law is Justice Wilson's concurring opinion in *Operation Dismantle v The Queen*.¹⁶ At issue was a claim that a cabinet decision to allow US testing of cruise missiles in Canada violated

9 See e.g. Jack Woodward, *Native law Reporter*, 6§270 cited in *Band (Eeyouch) c Napash*, 2014 QCCQ 10367 at para 80; Kent McNeil, “Aboriginal Governments and the Canadian Charter of Rights and Freedoms” (1996) 34:1 Osgoode Hall LJ 61. On the application of the *Charter* to *Indian Act*, RSC 1985, c I-5 governments, see *Taypotat v Taypotat*, 2013 FCA 192 at para 39. There, the FCA held that a refusal to apply the *Charter* to laws created by an *Indian Act* government would “create a jurisdictional ghetto in which aboriginal peoples would be entitled to lesser fundamental constitutional rights and freedoms than those available to and recognized for all other Canadian citizens.”

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

11 *Ibid.*

12 Cowper & Sossin, *supra* note 7 at 347.

13 See Grove, *supra* note 6.

14 Commentators have, of course, long wondered whether the doctrine may be applicable of advisable: Geoffrey Sawyer, “Political Questions” (1963) 15:1 UTLJ 49; Cowper & Sossin, *supra* note 7.

15 *Ibid.*

16 [1985] 1 SCR 441, 18 DLR (4th) 481 [*Operation Dismantle* cited to SCR].

section 7 of the *Charter* by increasing the risk of nuclear war.¹⁷ While the majority held that cabinet decisions were indeed reviewable to ensure conformity with the *Charter*, they held that there was insufficient evidence to support the claim.¹⁸ Justice Wilson addressed the political questions doctrine explicitly. Reviewing the American approach, Justice Wilson noted that, while some categories of political question in the US have dealt with “judicial or institutional competence,” most have concerned “the separation of powers in the sense of the proper role of the courts *vis-à-vis* the other branches of government.”¹⁹ Justice Wilson concluded, however, that the justifications provided by American courts do not provide much guidance on when or how those principles should be applied. The separation of powers, for example, has been relied on to justify invocation of the doctrine in some instances while in many others it has not impeded American courts from ruling on highly sensitive political issues.²⁰ Thus, while many justifications have been proffered, they have been applied inconsistently and do not support a coherent doctrine. Justice Wilson therefore concluded that the Court ought not “relinquish its jurisdiction either on the basis that the issue is inherently non-justiciable or that it raises a so-called ‘political question.’”²¹

While Canadian courts have largely followed this advice and avoided an explicit political questions doctrine, they have often considered and relied on the rationales supporting the doctrine in the US. As a result, the justiciability of political issues has been dealt with “in piecemeal fashion, without being recognized as elements of a coherent doctrine.”²² Most frequently, Canadian courts have embraced a version of the “classical doctrine.” That is, courts have refused to resolve issues where such a resolution is assigned to another branch of government by the constitution: the separation of powers has been central.²³ When pressed to explicitly consider whether political questions should be subject to judicial treatment, Canadian courts have “appeared content to address the suitability of political questions for decision by the general test of whether the controversy has a sufficient legal element.”²⁴ The *Reference re Secession of Quebec*, which could be considered the Supreme Court’s most notable embrace of the political questions doctrine, illustrates this approach. Facing the contentious issue of whether a province can unilaterally secede from Canada, the Court carefully confined its analysis to the “legal” issues at play, framing its decision as an analysis of the legality of secession as a matter of domestic and international law.²⁵ So confined, the Court held that it was ultimately unable to resolve the political question of secession while maintaining the legitimacy of the constitutional order. Legitimacy required political, rather than legal, solutions. Yet, all cases have not been treated equally.²⁶ For example:

in *Reference re Canada Assistance Plan (British Columbia)* the Court addressed the terms of federal-provincial agreements on the basis that a form of contract had an adequate legal component to

17 *Ibid* at 467.

18 *Ibid*.

19 *Ibid*.

20 *Ibid* at 468-69.

21 *Ibid* at 472.

22 Cowper & Sossin, *supra* note 7 at 347.

23 *Ibid* at 351.

24 *Ibid* at 354.

25 *Reference re Secession of Quebec*, [1998] 2 SCR 217, 161 DLR (4th) 385 [*Secession Reference*].

26 Cowper & Sossin, *supra* note 7 at 367.

justify intervention by the “judicial branch” of government. This was contrasted to questions of inter-governmental negotiations or disagreements over funding levels, which would be characterized as “purely political” and, on this basis, would be non-justiciable.²⁷

Whether an issue has a sufficiently “legal” character to be fit for judicial determination is a highly malleable standard and can be a difficult basis to provide a predictable or principled analysis. Thus, while Canadian courts have resisted an explicit “political questions doctrine,” they have declined to exercise jurisdiction or expressed deference to other branches in ways that are analogous to, and justified on the same grounds as, the US doctrine.

Where it concerns Indigenous peoples, courts have also implicitly adopted something like a political questions doctrine in the way they have acceded to Crown claims, treating the Crown’s sovereign claim as non-justiciable. The rationale is understandable at first glance: how can a court challenge the sovereignty of the state or government from which its own authority is derived? This concern was given its most famous articulation by Chief Justice Marshall in 1823 when he wrote that “[c]onquest gives a title which the courts of the conqueror cannot deny.”²⁸ Canadian courts have relied on this formulation to support a deferential approach to the Crown’s sovereign claims — a significant, yet implicit, embrace of the political questions doctrine. Yet, the Courts may have been too deferential on this point, conflating the *existence* of Crown sovereignty with its *specific attributes* (the latter of which ought to be justiciable) and, as a result, allowing the Crown to exercise excessive authority in relation Indigenous peoples.²⁹ I return to this below in considering the complexity of a political questions doctrine in the context of Aboriginal law.

Canadian courts’ hesitation about the political questions doctrine is not surprising. Many contemporary commentators in the US and Canada see the doctrine as inimical to modern constitutional values.³⁰ Certainly Justice Wilson’s rejection of the doctrine seemed motivated by a conception of constitutional supremacy under the *Charter* that minimizes separation of powers and brings most matters within the purview of judicial review.³¹ Yet, it is also clear that Canadian courts are cognizant of the need not to exceed their institutional role, that there are a category of political questions, or issues of a political character, which they believe ought not be subject to judicial intrusion. *Dickson* illustrates clearly how these issues arise in the Aboriginal law context and how an explicit consideration of the political questions doctrine may help the courts resolve Crown-Indigenous disputes.

Considering the political questions doctrine in *Dickson*

The trial court dealt only briefly with what the counsel for the VGFN had argued was a threshold issue: whether the *Charter* applies, the VGFN argued, is a political question that needs to

27 *Ibid* at 354.

28 *Johnson v M’Intosh*, 21 US 543 (1823) at 588.

29 For development of this argument see Robert Hamilton & Joshua Nichols, “Reconciliation and the Straitjacket: A Comparative Analysis of the *Secession Reference* and *R v Sparrow*” (2021) 52:2 Ottawa L Rev 403.

30 J Peter Mulhern, “In Defense of the Political Question Doctrine” (1988) 137:1 U Pa L Rev 97 at 99.

31 Robert E Hawkins & Robert Martin, “Democracy, Judging and Bertha Wilson” (1995) 41:1 McGill LJ 1 at 18-19.

be resolved through negotiation rather than litigation.³² In this, the VGFN effectively asked the court to apply the political questions doctrine, arguing:

The question of whether the Vuntut Gwitchin Constitution is inferior or subordinate to the *Charter* under the Final Agreement and Self-Government Agreement has significant extralegal implications involving political, moral and ideological considerations which are better suited to be addressed through Vuntut Gwitchin governance processes and negotiations between Vuntut Gwitchin and the Crown, rather than through adjudication by the Courts.³³

As support for this position, the VGFN argued that in the *Secession Reference* the Supreme Court considered “the intersection between the democratic principle and non-justiciability” and concluded that it may be proper for the Court to decline to resolve an issue on the basis of non-justiciability where doing so “would take the Court beyond its own assessment of its proper role in the constitutional framework of our democratic form of government.”³⁴ This reasoning concerning non-justiciability, the VGFN argued, ought to be applied when considering the application of the *Charter* to Indigenous governments: determining the issue in the courtroom rather than the negotiating table would undermine democratic principles. The VGFN advanced four additional arguments against the application of the *Charter* at trial: 1) the VGFN Constitution protects equality rights; 2) the VGFN did not agree to unconditional application of the *Charter* in self-government negotiations; 3) the *Charter* was developed without consideration for VGFN legal, political, or governance systems; and 4) the principle of judicial deference should be adopted.³⁵ These arguments support the more general logic that the application of the *Charter* cannot be presumed and must be negotiated between the parties. Where negotiations had failed to yield a result, it would be improper for the court to step in and effectively resolve the issue, particularly in light of the specific arguments just outlined.

The trial judge was not convinced. Justice Veale concluded: “I do not view the residency requirement as a ‘purely political’ question to be determined in another forum, but rather a question of the interpretation of law.”³⁶ The question was not a political one about the terms under which a political community would be party to a constitutional arrangement, but a matter of legal interpretation: “[t]his dispute is brought by Ms. Dickson, a Vuntut Gwitchin citizen who seeks a declaration that the residency requirement in the VGFN Constitution is invalid primarily under the *Charter*, or alternatively under the VGFN Constitution. Thus, she presents a question of interpretation at the outset as to which constitution applies.”³⁷ Justice Veale concluded that “the Court should not decline to hear this question of interpretation of law.”³⁸ What was presented by counsel as a threshold issue with significant legal, normative, and practical implications, was thus dealt with only briefly at trial on the basis that it was foremost a matter of legal interpretation.

32 *Dickson SC*, *supra* note 10 at paras 1-44; *Dickson CA*, *supra* note 10 at paras 1-36.

33 *Dickson SC*, *supra* note 10 (Factum of the VGFN at para 20).

34 *Secession Reference*, *supra* note 25 at para 26.

35 *Dickson SC*, *supra* note 10 at paras 103-09.

36 *Ibid* at para 99.

37 *Ibid* at para 100.

38 *Ibid* at para 101.

The issue was dealt with even more briefly on appeal. The YKCA simply held that “nobody has taken much issue with the trial judge’s findings on this issue on appeal.”³⁹ This may overstate the case. While the VGFN did not argue the “political issues” question quite as explicitly as they did at trial, they did put forward arguments supported by a similar rationale. They argued, for example, that the VGFN government is not a government under section 32 of the *Charter* (a position that both levels of court rejected) and that the *Charter* could therefore only apply with explicit agreement.⁴⁰ The VGFN’s other arguments against application of the *Charter* were much the same at trial and, similarly, were animated by the conviction that the *Charter* ought not apply to Indigenous governments without their consent. While the arguments on appeal thus focused on more “legal” aspects of the overall argument, they asked the court to do something very similar as it would under the political questions doctrine: allow political questions to be resolved through political mechanisms. The section 32 arguments raise a foundational political question about whether the *Charter* applies to Indigenous governments exercising inherent, rather than delegated, authority. The Court of Appeal preferred not to venture into this issue, holding that courts should refrain from engaging “in the perhaps futile debate regarding inherent Aboriginal rights and the source of the authority to self-govern”⁴¹ when interpreting modern treaties. The effect of doing so, however, is to hold that inherent and delegated authority will be treated in the same way (hence the futility of the inquiry) and to bring into the judicial realm political questions about the relationship between Indigenous and state legal orders and the scope of Crown and Indigenous authority under the Constitution. In this, *Dickson* is merely the clearest example of a problem at the heart of Canadian Aboriginal law: Indigenous peoples have consistently brought forward what are in effect jurisdictional claims that require significant political engagement for resolution. Yet, courts have developed a set of doctrines dealing with section 35 that do not compel the negotiation of outstanding claims and instead allow governments to continue to act in the face of disagreement about fundamental constitutional questions. *Dickson* provided an opportunity for an explicit engagement with the political aspects of Aboriginal law and a consideration of whether something like the political questions doctrine could facilitate the negotiation of contested claims.

The paradox of political questions in Canadian Aboriginal law

A political questions doctrine in the context of Crown-Indigenous relations is not only fraught doctrinally, but also beset by ironies and paradoxes. The scope of Aboriginal and Treaty and rights under the Constitution were never intended to be resolved by the judiciary.⁴² The phrasing of section 35 of the *Constitution Act, 1982* was a compromise and the scope and content of the provision was to be determined by subsequent negotiations.⁴³ The failure of those negotiations has pressed the judiciary to resolve complex political questions. As a result, the Supreme Court has at times implicitly relied on something like a political questions doctrine.

39 *Dickson CA, supra* note 10 at 40.

40 *Dickson CA, supra* note 10 (Factum of the VGFN at para 59).

41 *Dickson CA, supra* note 10 at para 93.

42 Ovide Mercredi & Mary Ellen Turpel, *In the Rapids: Navigating the Future of First Nations* (Toronto: Viking Publishing, 1993) at 207-28; Jeremy Webber, *The Constitution of Canada: A Contextual Analysis* (Oxford: Hart Publishing, 2015) at 44-48.

43 *Ibid.*

In *Delgamuukw*, for example, the Court effectively followed the same approach as it did in the *Secession Reference*, articulating the legal framework to guide the parties, encouraging negotiation, and giving neither party a clear legal victory. Thus, a court that was not meant to define a constitutional provision has reluctantly done so while applying a doctrine it has explicitly rejected. All the while, the Court has consistently pushed the parties to negotiation while developing a doctrine that unevenly distributes bargaining power and leads to near constant litigation.

What role could an explicit political questions doctrine play in such a situation? This is where the paradox emerges. In *Dickson*, the VGFN argued that judicial deference to the political nature of the problem would respect principles of democratic rule and self-determination. They argued that the *Charter* could only apply with the consent of Indigenous governments.⁴⁴ This recalls one of the classic American judicial justifications for the doctrine: “[i]t is hostile to a democratic system to involve the judiciary in the politics of the people. And it is not less pernicious if such judicial intervention in an essentially political contest be dressed up in the abstract phrases of the law.”⁴⁵ The VGFN claim adds to this the crucial element that it is not only democratic self-rule that is at issue, but the colonial imposition of authority on an unwilling population. It is the American justification with a more substantial legal and normative basis; not sovereignty of *the* people, but of a *politically distinct* people. As noted above, at trial Justice Veale rejected the idea that this was a political question, relying on the rationale common in Canadian courts: that there was a sufficiently legal basis for resolving the issue. While Justice Veale noted that the parties to the treaty had divergent views about the application of the *Charter*, his resolution was consistent only with the position of the Crown negotiators. From this perspective, it seems that the argument about political questions rings true: were the court to simply withhold judgment, “stay their hand,” the problem could be resolved through negotiation. This would respect Indigenous autonomy and political agency and provide a basis for legitimate negotiated forms of constitutionalism.⁴⁶

It must be noted, however, that precisely the inverse argument has been made in the American context. As Michalyn Steele writes, “the political question doctrine in federal Indian law has been roundly, and rightly, criticized by a generation of Indian law scholars who view the doctrine as depriving tribes of meaningful judicial review and leaving tribes vulnerable to unchecked political whim.”⁴⁷ American courts have taken a deferential approach to congressional power in relation to Indigenous peoples, providing little oversight or meaningful constraint. Rather than providing a basis for negotiated political outcomes, the political questions doctrine marginalizes Indigenous peoples and subjects them to the whims of majoritarian rule as Indigenous interests are construed as non-justiciable in deference to the legislative and executive branches. Judicial review can be essential to protecting vulnerable and minority populations from the capricious nature of majority rule. Yet, judicial intrusion into the politi-

44 *Dickson CA*, *supra* note 10 (Factum of the VGFN).

45 *Colegrove v Green*, 328 US 549 (1946) at 553-54.

46 As Cowper and Sossin argue, “This discussion of the Court’s decision making on its own place in the separation of powers shows how the Court’s unique role as interpreter of Canada’s constitutional system shelters prudential and often strategic political decision-making behind a veneer of legal reasoning.” Cowper & Sossin, *supra* note 7 at 368.

47 Michalyn Steele, “Plenary Power, Political Questions, and Sovereignty in Indian Affairs” (2016) 63 *UCLA L Rev* 666 at 669-70. Sawyer, *supra* note 14 at 52.

cal realm cannot only be undemocratic, it can also undermine the self-government and self-determination of those populations who theoretically are protected from state overreach by judicial review. The political questions doctrine in Indigenous contexts can be seen as a way to shield Indigenous authority, as argued in *Dickson*, or as a way to facilitate the oppression of that authority, as drawn out in the American context. In the US, the doctrine is used to support deference to legislative and executive authority to the detriment of Indigenous peoples, while in *Dickson* it is the refusal to apply the doctrine that allows for the unilateral imposition of colonial rule. This kind of ambiguity can lead to, as Steele writes, “a kind of ‘heads I win; tails you lose’ approach to questions of inherent tribal sovereignty.”⁴⁸ In this, the Constitution can become a “straitjacket,” to use the Supreme Court’s phrase.

What distinguishes the two situations? Why can the political questions doctrine be seen as autonomy-limiting in the US and autonomy-enhancing in *Dickson*? Is the difference in the greater level of protection afforded to Aboriginal rights at Canadian law? Certainly, in the post-1982 context, the Canadian courts have been willing to supervise exercises of Crown and legislative action to ensure constitutional compliance. The Court in *R v Sparrow*, for example, supportively cited Noel Lyon’s claim that “[section 35] renounces the old rules of the game under which the Crown established courts of law and denied those courts the authority to question sovereign claims made by the Crown.”⁴⁹ Yet, Canadian courts have arguably been even more deferential than their US counterparts where the question of sovereignty is concerned, as US doctrine recognizes a more robust form of tribal sovereignty than its Canadian counterpart.⁵⁰ While Canadian courts are comfortable supervising exercises of Crown sovereignty to ensure constitutional compliance, they start from a presumption that many questions of a political nature are off the table and, in so doing, constrain the shared development of constitutional norms. It is not clear whether the greater weight given to Aboriginal rights makes the autonomy-enhancing application of the political questions doctrine possible in *Dickson*. Certainly, the courts have placed *some* restraint on the Crown, and it is possible that this has levelled the playing field enough that political outcomes could be achieved without concerns about majoritarian rule. Yet, the failure of the VGFN argument on this point highlights the need to consider the role of another institutional actor, the court itself. In both the US and Canadian examples, we see the court in a tenuous position of developing legal doctrine that is either emancipatory or oppressive: the courts are, by turn, part of the machinery of colonial rule and one of the primary means to resist it. An explicit engagement with the political questions doctrine may help bring transparency to the paradoxical roles legal doctrine and the courts play in mediating Crown-Indigenous relations and lead to the development of a doctrine that has greater legitimacy and that more effectively leads to negotiated outcomes. Existing principles of Aboriginal rights can provide a stepping stone in this regard if approached strategically and not in a way that obscures the true nature of the disputes.

48 Steele, *ibid* at 670.

49 *R v Sparrow*, [1990] 1 SCR 1075 at 1106, citing Noel Lyon, “An Essay on Constitutional Interpretation” (1988) 26:1 Osgoode Hall LJ 95 at 100.

50 See e.g. The Honourable Ada Deer, “Tribal Sovereignty in the Twenty-First Century” (1997) 10:1 St Thomas L Rev 17; David Matheson, “Tribal Sovereignty: Preserving Our Way of Life” (2002) 34:1 Ariz St LJ 15. It should be noted, however, that American courts have frequently undermined tribal sovereignty: see Michalyn Steele, “Breaking Faith with the Tribal Sovereignty Doctrine” (2017) 64:3 Federal Lawyer 48; Philip P Frickey, “A Common Law for Our Age of Colonialism: The Judicial Divestiture of Indian Tribal Authority over Nonmembers” (1999) 109:1 Yale LJ 1.

Aboriginal rights and political questions: concluding thoughts

Several principles suggest adopting an autonomy-enhancing version of the political questions doctrine is desirable. Principles of consent as grounding the legitimacy of legal and political authority suggest that courts should avoid, where possible, resolving unsettled matters of constitutional authority.⁵¹ While there will always be a role for courts in determining division of powers issues, initial questions of allocation should be subject to political determination. Respect for the universal human rights of Indigenous peoples, including principles of self-determination, suggest that courts should strive to ensure that states limit the autonomy of substate peoples as little as possible. Existing doctrine can help move in the direction that these general principles suggest.

In *First Nation of Nacho Nyak Dun v Yukon*, for example, the Supreme Court held that courts ought to be deferential to the text of modern treaties.⁵² The Court held that “courts should generally leave space for the parties to govern together and work out their differences. Indeed, reconciliation often demands judicial forbearance.”⁵³ Tying the idea of reconciliation — that is, that section 35 requires the reconciliation of Crown sovereignty with pre-existing societies — to judicial forbearance is notable. It nods to the issues at the heart of the political questions doctrine, accepting that political agreements are required to “renew the relationship between Indigenous peoples and the Crown to one of equal partnership.”⁵⁴ Further, the honour of the Crown is a constitutional principle requiring the diligent implementation of treaty promises and the negotiation of outstanding claims, principles which the Court sees as playing a role in legitimizing the constitutional order.⁵⁵ Taken together, these principles suggest that the Crown has an obligation to negotiate constitutional authority and that courts ought to be deferential to the agreements that are reached. The proper role of the courts, following *Nacho*, seems to be to supervise Crown conduct to maintain the integrity and honour of the Crown while deferring to established agreements. This should be read alongside other principles of treaty interpretation — in particular, treaties must be read in a way that reflect the common intention of the parties at the time it was signed. The common intention of the parties must be assessed with reference to both common law and Indigenous law perspectives, allowing the legal order of the Indigenous signatories to inform the context for ascertaining their intention on entering into the treaty.⁵⁶ In *Dickson*, the VGFN argued against application of the *Charter* partly on the basis that “the *Charter* was developed [without] consideration for VGFN legal, political, or governance systems.”⁵⁷ These legal, political, and governance systems ought to inform the analysis of the intention of the VGFN upon entering into the treaty. Clearly this latter principle conflicts with the approach in *Dickson*: the Crown negotiators wanted the *Charter* to apply and believed they had achieved that outcome, while the VGFN

51 For nuanced analysis of the roles and limitation of consent as a grounding political principle, see generally the essays in Jeremy Webber and Colin M Macleod, eds, *Between Consenting Peoples: Political Community and the Meaning of Consent* (Vancouver: UBC Press, 2010).

52 *First Nation of Nacho Nyak Dun v Yukon*, 2017 SCC 58 at para 33.

53 *Ibid.*

54 *Ibid.*

55 Ryan Beaton, “De Facto and de Jure Crown Sovereignty: Reconciliation and Legitimation at the Supreme Court of Canada” (2018) 27:1 Const Forum Const 25.

56 *Restoule v. Canada (Attorney General)*, 2018 ONSC 7701 at paras 411-23.

57 *Dickson SC*, *supra* note 10 at paras 103-09.

signatories resisted *Charter* application and believed the agreement's silence on this point secured their position.⁵⁸ It is difficult to square the result in the case with principles of deference to the text of the agreement and the common intention of the parties at the time it was signed. What might it look like for courts to “stay their hand” in this respect? One example is the result in the *Secession Reference*, where the Supreme Court articulated the legal principles governing the dispute while holding that the parties would have a duty to negotiate remaining outstanding issues.⁵⁹ More squarely in the Aboriginal law context, Justice Burke's decision in *Yahey* provides a compelling example.⁶⁰ In the face of ongoing infringements of the Blueberry River First Nation's treaty right caused by the cumulative effects of industrial development projects in their traditional territory, Justice Burke held that “[t]he Province may not continue to authorize activities that breach the promises included in the Treaty” and “[t]he parties must act with diligence to consult and negotiate for the purpose of establishing timely enforceable mechanisms to assess and manage the cumulative impact of industrial development on Blueberry's treaty rights, and to ensure these constitutional rights are respected.”⁶¹ In crafting these declarations, Justice Burke subtly, but crucially, shifted the balance of power that typically resides in the background of Aboriginal law cases. By requiring negotiated solutions be reached *before* the Crown could continue to act in ways that impacted Aboriginal rights, Justice Burke cut the possibility for unilateral Crown action from the equation and did much to even the bargaining power between the parties. While this may not seem like an example of judicial forbearance and embrace of the political questions doctrine, it does provide a model of how courts can structure the negotiation of contested constitutional issues.

As the US example shows, a political questions doctrine is not a comprehensive solution, and judicial deference to executive and legislative claims can often work to the detriment of Indigenous peoples. Yet, a judiciary that is cognizant of its proper constitutional role must also allow the terms of the constitutional relationship to be based on consensual negotiation rather than judicial resolution alone. As Justice Wilson wrote in *Operation Dismantle*,

the courts should not be too eager to relinquish their judicial review function simply because they are called upon to exercise it in relation to weighty matters of state. Equally, however, it is important to realize that judicial review is not the same thing as substitution of the court's opinion on the merits for the opinion of the person or body to whom a discretionary decision-making power has been committed.⁶²

This is even more true where the “decision-making power” is not a power that has been “committed” or delegated, but the inherent political authority of an Indigenous nation.

58 *Dickson SC, supra* note 10.

59 For a development of this argument see Hamilton & Nichols, *supra* note 29.

60 *Yahey v British Columbia*, 2021 BCSC 1287.

61 *Ibid* at para 1894.

62 *Operation Dismantle, supra* note 14 at para 62.