# MISSED OPPORTUNITIES FOR MEANINGFUL SELF-GOVERNMENT: A CASE COMMENT ON *DICKSON V VUNTUT GWITCHIN FIRST NATION*

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## CONTENTS



*Abstract*

Despite Indigenous Peoples having been the first practitioners of law in the land we now call Canada, Indigenous laws have largely been ignored and overruled by state law since the time of Crown sovereignty. Even with growing recognition of Indigenous laws and pathways to recognizing self-government, Indigenous laws still largely remain embedded in state systems, subject to state approval, challenge, and review. Given the connection between self-government and the well-being of Indigenous Peoples, enabling meaningful self-government should be a priority for all state institutions, especially Canadian courts. In practice, enabling meaningful self-government means treating the sole source of self-government as organic (i.e., arising only from inherent rights) and trusting Indigenous laws as equals, capable of standing alone without the oversight of state law and courts. This case comment analyzes the majority reasons in the recent Supreme Court of Canada decision of *Dickson v Vuntut Gwitchin,* which had serious implications for self-government. The crux of the argument is that the majority's application of the Charter missed an opportunity to enable meaningful self-government, first by tethering authority for self-government to state action, and then by failing to defer to an available Indigenous-created rights-protection mechanism, showing a lack of trust in Indigenous laws.

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# I INTRODUCTION

The inherent right of Indigenous Peoples to self-govern is "grossly underdeveloped" in Canada.[1] Unquestionably, Indigenous Peoples have had vibrant legal systems since time immemorial.[2] From laws regulating trade between nations to the governance of internal relations to systems of dispute resolution, Indigenous Peoples were the earliest practitioners of law within the country.[3] Yet since the time of assertion of Crown sovereignty, Indigenous laws have largely been ignored or overruled by state law.[4] Today, despite emerging pathways for self-government and growing recognition of Indigenous laws, state legal systems continue to have significant purview over Indigenous governments.[5] In other words, instead of being treated as external to the state by nature of inherent rights, Indigenous laws and exercises of self-government are still commonly treated as existing under the state's umbrella, open to challenge and review by state law and dependent on the state's approval.[6]

With a clear connection between governance under Indigenous laws and the well-being of Indigenous Peoples, enabling meaningful self-government should be a key priority for all state institutions.[7] In practice, enabling meaningful self-government means two things. First, state institutions must treat Indigenous laws as purely organic, recognizing their sole source as historical occupation as opposed to state grants of authority or approval processes.[8] Second, state institutions must trust Indigenous laws as equals instead of subordinating them to state law.[9] In other words, Indigenous laws should be allowed to stand alone, eliminating state

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1. Sarah Morales, "A'lha'tham: The Re-Transformation of s. 35 through a Coast Salish Legal Methodology" (2017) 37:2 NJCL 145 at 167 [Morales].

2. *Ibid* at 146.

3. *Ibid* at 162–63.

4. *Ibid* at 163.

5. Kerry Wilkins, "Take Your Time and Do It Right: *Delgamuukw,* Self-Government Rights and the Pragmatics of Advocacy" (2000) 27:2 Man LJ 241 at 250–51 [Wilkins, "Take Your Time"]; Jorge Luis Fabro-Zamora, "The Conceptual Problems Arising from Legal Pluralism" (2022) 37:1 CJLS 155 at 161, DOI: <10.1017/cls.2021.39>; Brenda L Gunn, "Protecting Indigenous Peoples' Lands: Making Room for the Application of Indigenous Peoples' Laws within the Canadian Legal System" (2007) 6:1 Indigenous LJ 31 at 33; Darcy Lindberg, "*UNDRIP* and the Renewed Application of Indigenous Laws in the Common Law" (2022) 55:1 UBC L Rev 51 at 54; Kelty McKerracher, "Relational Legal Pluralism and Indigenous Legal Orders in Canada" (2023) 12:1 Global Constitutionalism 133 at 141, DOI: <10.1017/S2045381722000193>.

6. McKerracher, *ibid*; Kenji Tokawa, "Indigenous Legal Traditions and Canadian *Bhinneka Tunggal Ika:* Indonesian Lessons for Legal Pluralism in Canada" (2016) 48:1 J Leg Pluralism & Unofficial L 17 at 35, DOI: <07329113.2015.1072387> [Tokawa].

7. Mary Ellen Turpel, "The Charlottetown Discord and Aboriginal Peoples' Struggle for Fundamental Political Change" in Kenneth McRoberts & Patrick Monahan, eds, *The Charlottetown Accord, the Referendum, and the Future of Canada* (Toronto: University of Toronto Press, 1993) 117 at 120 [Turpel]; Naiomi Walqwan Metallic, "Ending Piecemeal Recognition of Indigenous Nationhood and Jurisdiction: Returning to RCAP's *Aboriginal Nation Recognition and Government Act*" in Karen Drake & Brenda L Gunn, eds, *Renewing Relationships: Indigenous Peoples and Canada* (Saskatoon: Native Law Centre, 2019) 243 at 264–65 [Metallic, "Ending Piecemeal Recognition"].

8. Matthew VW Moulton, "Framing Aboriginal Title as the (Mis)Recognition of Indigenous Law" (2016) 67 UBC L Rev 336 at 341 [Moulton]; Tokawa, *supra* note 6 at 27, 33.

9. Moulton, *ibid* at 352.

power to oversee their application and accepting that self-governing Nations are bound to make mistakes, which are not the state's business to correct without invitation.[10]

Treating Indigenous laws as organic and capable of standing alone does not mean treating Indigenous and Canadian legal systems as entirely separate. In a multi-juridical place like Canada, legal systems are intertwined—and will continue to be as the state considers what it means to reconcile with Indigenous Peoples through law. If state institutions are going to meaningfully engage in reconciliatory efforts, a body of legal doctrine is needed to provide structure to the interaction between legal systems.[11] Courts play a key role in creating this structure because they are empowered to interpret pathways to self-government and set boundaries on state law's purview over Indigenous laws. I am merely suggesting that, as this body of legal doctrine develops, enabling meaningful self-government requires that courts prioritize treating Indigenous laws as organic and capable of standing alone. As Canada's highest court, decisions of the Supreme Court of Canada (SCC) related to self-government are particularly impactful and should be carefully scrutinized for their impact on Indigenous Peoples.

This case comment analyzes the SCC's decision in an important recent case that had significant implications for self-government. The case, *Dickson v Vuntut Gwitchin First Nation,* was the first to address whether the laws of a self-governing Indigenous Nation can be challenged under the Canadian *Charter of Rights and Freedoms* (the Charter), presenting a ripe opportunity for the SCC to rule on the source(s) of self-government and the role of state laws and courts in overseeing Indigenous laws.[12] In turn, the *Dickson* decision is highly revealing of the extent to which the SCC is enabling meaningful self-government. Focusing on the majority reasons in *Dickson,* as they are now the law in Canada, this case comment argues that the SCC missed an important opportunity to put meaningful self-government into practice, both in terms of treating Indigenous laws as organic and trusting Indigenous laws to stand alone without state oversight.

To achieve this purpose, the comment is divided into four parts. Section II provides a brief overview of the case facts and history. Section III assesses the majority's reasons for applying the Charter, arguing that their careful but determined finding of state mechanisms as a source of authority for self-government is a failure to treat Indigenous laws as purely organic. In effect, the decision transforms negotiated self-government agreements, one of the most attractive methods of inherent rights recognition on its face, into another form of delegated authority, leaving Indigenous Nations with few viable options for meaningful self-government. The third part of the commentary, Section IV, examines what the majority could have done instead of applying the Charter, arguing that the SCC missed an opportunity to reflect on its role in reviewing Indigenous laws and set a new precedent of deference to Indigenous laws. The effect of Charter application instead of deferring to an available Indigenous rights-protection mechanism is an exhibition of lack of trust in Indigenous laws and continued privileging of state legal systems. The fourth and final part of the case comment, Section V, addresses the counterargument that applying the Charter was the only way to guarantee protection for

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10. Turpel, *supra* note 7 at 135–36; Wilkins, "Take Your Time," *supra* note 5 at 251–52.

11. Ryan Beaton, "Doctrine Calling: Inherent Indigenous Jurisdiction in Vuntut Gwitchin" (2022) 31:2 Const Forum Const 39 at 41, DOI: <10.21991/cf29444>.

12. *Dickson v Vuntut Gwitchin First Nation,* 2024 SCC 10 [*Dickson*].

vulnerable peoples, highlighting other options available to the SCC that would have exhibited greater respect for Indigenous laws.

## II CASE SUMMARY

In 1993, the Vuntut Gwitchin First Nation (VGFN) concluded a land claim Final Agreement and Self-Government Agreement with the federal and Yukon governments.[13] The agreements were "approved and given effect by federal and territorial" implementing legislation.[14] Importantly, the text of the agreements and implementing legislation were silent regarding the application of the Charter.[15] Instead, the VGFN "enacted [its] own *Constitution*, which" included rights-protection provisions in line with the Self-Government Agreement's requirement that some such protection be provided.[16] Article IV of the VGFN Constitution, for example, established the right of all citizens "to be equal before and under the laws of the VGFN."[17] Mirroring the language of the Canadian Charter, the constitution further set out that VGFN rights can only be limited by what can be "demonstrably justified in a free and democratic Vuntut Gwitchin society."[18] Notably, the VGFN Constitution also established that the validity of a VGFN law can be challenged in the Yukon Supreme Court for violating other VGFN laws, including article IV.[19]

The *Dickson* case came about because of a provision in the VGFN Constitution that required all chiefs and councillors to reside on settlement land in the village of Old Crow ("the residency requirement").[20] The VGFN described this residency requirement as an "expression of their longstanding land-based governance system."[21] For VGFN citizen Cindy Dickson, however, the residency requirement meant moving away from Whitehorse, where her son was receiving medical care.[22] Wanting to stand for office, Ms. Dickson challenged the requirement as an infringement on her equality rights under section 15 of the Charter, and in the alternative under article IV of the VGFN Constitution.[23] Despite the VGFN urging the Yukon Supreme Court to resolve the issue through their own constitution, the court decided the case solely under the Charter, refusing to entertain the idea of using Indigenous law to resolve the complaint.[24] The decision required answering three questions: (1) Does the Charter apply to the

13. *Ibid* at paras 17, 19.
14. *Ibid* at para 23.
15. *Ibid* at para 22.
16. *Ibid* at paras 22, 517.
17. *Ibid* at para 24.
18. *Ibid* at para 25.
19. *Ibid* at para 27.
20. *Ibid* at para 26.
21. *Ibid* at para 13.
22. *Ibid* at paras 2, 10.
23. *Ibid* at para 10.
24. Kerry Wilkins, "I Can't See Clearly Now: Standing in the Shadow of *Dickson*" (2024) [unpublished draft, archived with author] [Wilkins, "I Can't See"]; Naiomi 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 at 3–4 [Metallic, "Checking Our Attachment"].

VGFN? (2) If so, is the residency requirement an infringement of section 15? (3) If there is an infringement, does section 25 of the Charter, which requires that the Charter not be construed to "abrogate or derogate" from Aboriginal, treaty, or other rights pertaining to Aboriginal Peoples, shield the claim from Charter application? [25]

The Yukon Supreme Court and Yukon Court of Appeal held that the Charter applies to the VGFN but found the claim to be shielded by section 25.[26] Ms. Dickson appealed to the SCC on the application of section 25, while the VGFN cross-appealed on the question of Charter application. In a split decision, the SCC dismissed both the appeal and cross-appeal. The majority (Justices Wagner, Coté, Kasirer, and Jamal) agreed that the Charter applies but found the claim to be shielded by section 25. The dissent on appeal (Justices Martin and O'Bonsawin) also applied the Charter, though for different reasons than the majority, but held that section 25 did not shield the claim. The dissent on cross-appeal (Justice Rowe) disagreed with all of his colleagues, ultimately finding that the Charter does not apply to the VGFN.

## III MISSED OPPORTUNITY TO TREAT INDIGENOUS LAWS AS PURELY ORGANIC

*Dickson* presented the SCC with an opportunity to give effect to meaningful self-government by ruling that the only source of Indigenous law-making authority is inherent, even when recognized through negotiations with the state. Unfortunately, the majority failed to treat VGFN law in this way. Despite their careful word choice, the majority ultimately "tethered" the VGFN's exercise of self-government to state mechanisms instead of finding its only source to be inherent.[27] In finding that the Charter applies, the majority held that the VGFN is both government by nature and carrying out a specific government activity.[28] While acknowledging that the VGFN has inherent rights, the majority reached their conclusion by relying on the fact that the VGFN's self-government powers came about through an exercise of Parliament's legislative authority under section 91(24) of Canada's Constitution, enabled by state implementing legislation.[29] Regardless of the majority's acknowledgement that the VGFN has "been self-governing since time immemorial," the ultimate holding was that at least some of the VGFN's law-making powers come from state authority.[30] In the majority's view, this was sufficient for the Charter to apply.[31]

The troubling effect of the majority's reasoning is that it takes the self-government negotiation process, one of the most promising methods of recognizing self-government, and transforms it into a form of subjugation, detracting from the inherency of the right. Negotiations for self-government are guided by the Inherent Right Policy (IRP). The IRP was

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25. *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, s 25,.

26. *Dickson v Vuntut Gwitchin First Nation,* 2020 YKSC 22 at paras 131, 212; *Dickson v Vuntut Gwitchin First Nation,* 2021 YKCA 5.

27. *Dickson*, *supra* note 12 at para 101.

28. *Ibid* at para 94.

29. *Ibid* at para 84.

30. *Ibid* at para 82.

31. *Ibid* at para 86.

released by the Liberal government in the 1990s after a nationwide referendum shot down the Charlottetown Accord, which would have recognized an inherent right to self-government as part of section 35 of Canada's constitution.[32] Following the Charlottetown Accord's failure, the IRP set out a framework for tripartite self-government negotiations between Indigenous Nations and relevant provincial and federal governments.[33] Importantly, the IRP was the first time the Canadian government explicitly acknowledged Indigenous Peoples' inherent right to self-government.[34] The text of the IRP clearly states this recognition, calling self-government an "existing Aboriginal right under section 35 of the *Constitution Act, 1982*."[35] This statement was particularly important in light of the courts' hesitancy to recognize such a right.[36]As such, the IRP was seen as a step forward, aimed at recognizing inherent rights through a process that leaves Indigenous Nations with law-making jurisdiction over their own lands and peoples.[37]

Unfortunately, the majority's decision in *Dickson* detracts from the progressive language of the IRP. By focusing their reasons on the authority flowing from state powers, the majority overshadows the history and marketing of the process as recognizing inherent rights. The focus on state involvement puts the need to treat Indigenous laws as purely organic in deep trouble, drawing a straight line between state authority and one of the most meaningful ways of achieving self-government currently available. The resulting precedent leaves Indigenous communities with very few promising avenues to exercise their rights outside of the state's umbrella.

To act on inherent rights to self-government, Indigenous Nations essentially have three choices: negotiate a self-government agreement, prove self-government over a specific activity under the *Pamajewon* framework,[38] or, as Naiomi Metallic calls it, "just do it" (i.e., exercise sovereignty without any recognition from other governments).[39] Satisfying *Pamajewon* requires an Indigenous group to show that self-government over a particular activity was "integral to the[ir] distinctive culture" prior to European contact.[40] Notably, under the *Pamajewon* test, self-government cannot be claimed generally; it must be tied to a specific practice.[41] Not only is the *Pamajewon* approach piecemeal in this way, the steps required to prove the right are themselves a form of subordination of Indigenous laws. Proving that a practice is "integral to [a] distinctive culture" requires forcing traditions that may not comport with Western ideas

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32. Jennifer E Dalton, "Aboriginal Self-Determination in Canada: Protections Afforded by the Judiciary and Government" (2006) 21:1 CJLS 11 at 23–24 [Dalton, "Aboriginal Self-Determination"]; Sari Graben, "The Nisga'a Final Agreement: Negotiating Federalism" (2007) 6:2 Indigenous LJ 63 at 71; Morales, *supra* note 1 at 160.

33. Dalton, "Aboriginal Self-Determination," *ibid* at 29.

34. Jennifer E Dalton, "Aboriginal Title and Self-Government in Canada: What Is the True Scope of Comprehensive Land Claims Agreements?" (2006) 22 Windsor Rev Legal Soc Issues 29 at 64.

35. Government of Canada, "The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government" (last modified March 1, 2023), online: <rcaanc-cirnac.gc.ca> [perma.cc/X87M-6FZP].

36. Dalton, "Aboriginal Self-Determination," *supra* note 32 at 25–26.

37. Alan Hanna, "Spaces for Sharing: Searching for Indigenous Law on the Canadian Legal Landscape" (2018) 51:1 UBC L Rev 105 at 143.

38. *R v Pamajewon,* 1996 CanLII 161 (SCC) [*Pamajewon*].

39. Metallic, "Ending Piecemeal Recognition," *supra* note 7 at 272.

40. *Pamajewon, supra* note 38 at para 25.

41. *Ibid* at para 27.

into boxes that are digestible to the Canadian common law and ultimately approved by state-appointed judges.[42] The *Pamajewon* process is thus a prime example of how Indigenous law-making powers are subjected to state approval instead of being recognized as organic.

On the other hand, the "just do it" option, while truly organic, is highly risky. Though some scholars argue that any need for recognition from the state is problematic for inherent rights, it is hard to deny that some form of recognition is of practical importance.[43] Ultimately, a state cannot operate effectively unless it is recognized by others.[44] Without external recognition, "just doing it" would expose Indigenous Nations to the risk of litigation from state institutions and close them off from funding and resources that enable effective self-governance, as well as any established recourse if the state infringes on their inherent rights.[45]

The problems with these other two pathways for recognizing self-government highlight the appeal of IRP negotiations. Much of that appeal, however, is now lost in the majority's decision in *Dickson*. While negotiating self-government still requires agreement with the state, the result pre-*Dickson* appeared to be jurisdiction to make laws outside the state's purview, alongside resources and respect to give effect to that jurisdiction. In some ways, negotiating self-government seemed to be as inherent as it gets without being exposed to the risks of "just doing it." The *Dickson* majority now makes clear, however, that even after negotiations conclude, exercises of self-government remain tied to state laws. By applying the Charter, the majority decision transforms an imperfect, yet seemingly meaningful, self-government process into the continued subjugation of Indigenous laws. This statement may seem alarmist, but it is not. If all it takes is federal legislation that recognizes a right to self-government to trigger Charter application, how will the state ever truly see Indigenous laws as purely organic? Knowing, as described above, that recognition is important to give practical effect to self-government, most ways of achieving self-government could create this "tethering" effect. Based on the majority's reasons, the only way to truly detach from the tether would be to take the risky "just do it" approach or the problematic and piecemeal *Pamajewon* approach, neither of which are easy roads. While the majority explicitly "make[s] no comment on whether" the Charter applies to exercises of "untethered" inherent rights, these exercises have been made all the more rare by their decision.[46] The result is a Canadian society in which most exercises of self-government will be subject to state law, at least in terms of rights protection.

Notably, the majority's decision was not inevitable. Nothing about the process of negotiating self-government necessarily required viewing state involvement as a *source* of authority for self-government. To illustrate this point, consider the dissenting decisions. Closely aligned with the central arguments in this paper, Justice Rowe's dissent makes clear that the instruments used by the majority to "tether" VGFN law to the Canadian state do not

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42. Moulton, *supra* note 8 at 346–347.

43. John Griffiths, "What Is Legal Pluralism?" (1986) 18:24 J Leg Pluralism & Unofficial L 1 at 8, DOI: <10.1080/07329113.1986.10756387> [Griffiths]; Ralf Michaels, "Law and Recognition—Towards a Relational Concept of Law" in Nicole Roughan & Andrew Halpin, eds, *In Pursuit of Pluralist Jurisprudence* (Cambridge: Cambridge University Press, 2017) 90 at 98 [Michaels].

44. Michaels, ibid at 106–08.

45. Metallic, "Ending Piecemeal Recognition," *supra* note 7 at 272; Nicole Spadotto, "Jurisdiction Devolution: An Interim Transitional Arrangement on the Road to Indigenous Self-Government" (2024) 47:2 Dal LJ 682 at 689.

46. *Dickson, supra* note 12 at para 91.

establish the kind of connection needed for Charter application.[47] In Justice Rowe's analysis, these instruments merely confirm powers that exist inherently, ensuring that state governments respect the promises they make in their negotiations with Indigenous Peoples.[48] While the dissent on appeal is arguably even more hostile to Indigenous laws than the majority in its analysis of the scope of Charter application and the framework for section 25, Justices Martin and O'Bonsawin at least align with Justice Rowe in holding that VGFN law does not derive its authority through delegation or transfers of power from other levels of government.[49] Looking at these dissents, it is evident that the majority's decision on the source of authority for self-government is not how it had to be. There were ways of reasoning, embedded in the text and jurisprudence of section 32 and alive to the realities of state involvement, that would have respected Indigenous laws as entirely organic. Unfortunately, these reasons were not the majority's.

## IV MISSED OPPORTUNITY TO TRUST INDIGENOUS LAWS TO STAND ALONE

In addition to presenting an opportunity for the SCC to rule that the sole source of self-government is inherent rights, the *Dickson* case also presented an opportunity for the SCC to trust Indigenous laws to stand alone by setting boundaries on state law's purview. By applying the *Charter* instead of giving deference to article IV of the VGFN Constitution, the majority reasons imply a reluctance to fully trust Indigenous laws. Admittedly, the application of article IV was not strictly before the court, as the majority explained:

> As for Ms. Dickson's equality claim under Article IV of the VGFN Constitution, which was pleaded in the alternative before the Supreme Court of Yukon, we take due note of Newbury J.A.'s observation in the Court of Appeal reasons that, having pursued her claim under the *Charter*, *Ms. Dickson may elect hereafter to pursue a similar claim under the VGFN Constitution. Since the application of Article IV was not addressed in this Court, we refrain from further comment on this issue.*[50]

Although article IV was not strictly before the court, the facts of the *Dickson* case posed an opportunity for the SCC to establish new precedent by exercising its discretion to defer to the jurisdiction of an Indigenous governing body whose own constitution provided recourse. Such a finding could have come about through deep reflection on what gives the SCC power to assess an Indigenous law through state law. After all, a commitment to decolonizing law requires confronting the difficult question of where state law gets its authority to be invoked.[51] Had this question been asked, it is hard to imagine an answer that would not have been grounded in problematic doctrines like the presumption of Crown sovereignty and the doctrine of discovery. Indigenous Peoples exercised law-making powers long before

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47. *Ibid* at para 496.

48. *Ibid* at para 482.

49. *Ibid* at para 243.

50. *Dickson, supra* note 12 at para 230 [references omitted; emphasis added].

51. Shiri Pasternak, "Jurisdiction and Settler Colonialism: Where Do Laws Meet?" (2014) 29:2 CJLS 145 at 146, DOI: <10.1017/cls.2014.5>.

European contact; what other than problematic doctrines can explain why state law applies to assess their validity? *Dickson* provided the SCC with an opportunity to engage in this kind of reflection. Had they done so, the majority could have refused to apply the Charter as an act of respect for inherent rights, deferring instead to article IV as an Indigenous-made rights-protection mechanism.

Notably, reflecting on the court's purview over Indigenous laws would not have been novel in the context of Canadian courts.[52] Take for example, the recent Federal Court case of *George v Heiltsuk First Nation*.[53] In that case, Justice Grammond dismissed an application for judicial review on the basis that the court lacked jurisdiction because the decision under review was made exclusively pursuant to Indigenous law.[54] In sharp contrast to the Federal Court's jurisdiction to review decisions of councils acting pursuant to delegated powers (particularly through the *Indian Act*), Justice Grammond found that the council in question derived its authority solely from Indigenous laws, with nothing in the enforcement of the council's decision relying on Canadian law for assistance.[55] Justice Grammond further held that state recognition of Indigenous laws is not enough to give the Federal Court jurisdiction over the matter, commenting that he "fail[s] to see why th[e] Court should assume jurisdiction based on Canadian law's recognition of Indigenous law where the Council is not seeking such recognition."[56] In other words, recognition of Indigenous laws by the state is not enough to give a Canadian court jurisdiction over a matter internal to a First Nation made pursuant to their laws.

Although the SCC's purview over Indigenous laws is more a matter of discretion than jurisdiction as compared to the Federal Court, their approach to cases centring on Indigenous laws should involve the same first step of grappling with their relationship to such laws. Where Indigenous laws provide recourse and state law merely recognizes inherent rights, courts should exercise their discretion by refusing to apply state legal frameworks. In the *Dickson* case, the majority could have refused to apply the Charter, interpreting the implementing legislation as a mere act of recognition and considering that article IV provided alternative recourse. As Kerry Wilkins questions: Why consider the Charter issue at all when Ms. Dickson had recourse under the VGFN Constitution and when the VGFN was asking for its own law to be applied?[57]

Unlike in *George,* refusing to apply the Charter would not have removed the case from the Canadian courts entirely. Because the VGFN Constitution sets out the right of the Yukon Supreme Court to review VGFN laws in light of their own constitution, the case could have been remitted back to the lower court to be decided under article IV. Such a decision would have demonstrated significantly more trust in Indigenous laws.

Instead, the majority applied the Charter, implying distrust in VGFN law that cannot be smoothed over by their suggestion that article IV exists as another avenue for Ms. Dickson's claim. While it could be argued that the majority repeating Justice Newbury's comments at the court of appeal about article IV is a demonstration of trust in VGFN law as an alternative

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52. *George v Heiltsuk First Nation*, 2023 FC 1705 at para 26–27.

53. *Ibid.*

54. *Ibid* at paras 22, 74.

55. *Ibid* at paras 37–40, 60, 67.

56. *Ibid* at para 73.

57. Wilkins, "I Can't See," *supra* note 24 at 13.

rights-protection mechanism, their finding on Charter application negates this trust. If the majority truly believed article IV could protect rights, why would the Charter route need to be left open? A court that had full confidence in VGFN law should have held that article IV is the only appropriate avenue for the claim. The hesitancy of the court to find as such sends the message that the Charter is a necessary fall-back, ready to swoop in when Indigenous laws fail. Such a decision, regardless of its intention, is incompatible with full trust in Indigenous laws because it perpetuates the stereotype that Indigenous societies are lawless or have inferior legal systems.[58]

Further, the implication of distrust underlying the majority's decision cannot be saved by the application of section 25. Despite Ms. Dickson's claim ultimately being shielded by section 25, the damage to trust in Indigenous laws was done when the majority applied the Charter, as it is Charter application that gives state law continued purview over Indigenous laws. Everything that comes after Charter application, including section 25, requires Indigenous laws to justify their existence to state law. In Justice Rowe's dissenting words, citing Naiomi Metallic, section 25 makes a Nation like the Vuntut Gwitchin "subject to having its legal order intensely scrutinized by standards foreign to it."[59] Framed this way, section 25 is not a mechanism of genuine trust and empowerment; it is another legal framework that subjects Indigenous laws to state oversight, preventing a reality in which Indigenous laws are trusted to stand on their own and, in turn, perpetuating a history of Canadian decision makers forcing Canadian ideas, processes, and institutions on Indigenous Peoples.[60] As such, the only way to truly demonstrate trust in Indigenous laws in this case was to defer to VGFN law. By declining to do so, the majority further solidified state law's purview over exercises of self-government.

## V SQUARING TRUST IN INDIGENOUS LAWS WITH CONCERNS ABOUT RIGHTS PROTECTION

In arguing that the court should have deferred to article IV of the VGFN Constitution instead of applying the Charter, I recognize that many Indigenous Peoples advocate for the Charter to apply to their governments, particularly in light of concerns about sexism and violence against women. I share their concerns about the treatment of women and other vulnerable peoples. At the same time, I agree with scholars like Mary Ellen Turpel that the answer does not lie in the continued oversight and oppression of Indigenous Peoples by state institutions, who created many of the patriarchal systems that exist today.[61] There are other ways of protecting rights beyond the Charter that show greater trust in Indigenous laws and nationhood.

As article IV of the VGFN Constitution demonstrates, Indigenous laws, when given the trust they deserve, are capable of building workable rights-protection mechanisms. While some Indigenous groups may choose to opt into Charter application or use it as a model, non-Charter rights-protection mechanisms can be equally effective. It is important to remember that the Charter is a value-laden document that was designed to meet the needs of mainstream

58. Metallic, "Checking Our Attachment," *supra* note 24 at 9.

59. *Dickson, supra* note 12 at para 503.

60. Metallic, "Checking Our Attachment," *supra* note 24 at 5.

61. Turpel, *supra* note 7 at 134.

Canadian society.[62] As Turpel argues, "[t]o say that the Charter accepts or reinforces individual dignity and is the only way this principle is assured is hardly supportable, and is indeed ignorant of the customs, traditions, and approaches that Aboriginal peoples bring to self-governance."[63] Thus, where Indigenous rights-protection mechanisms exist, courts should show them deference.

In the United States, for example, the US Supreme Court and lower courts have consistently held that the Bill of Rights, which functions like our Charter, has no application to tribal governments.[64] On issues of gender-based violence, US tribes have successfully enacted domestic violence codes and created tribal courts that address violence against women without causing the breaking up of the country.[65] This state of affairs in the United States highlights what could have been possible in *Dickson*, further rebutting the Charter's necessity.

Even where Indigenous rights-protection mechanisms have yet to develop in Canada, the answer need not be the application of state law. If Indigenous Nations are to be respected as distinct entities, then why not subject their laws to international human rights standards, just as we do with all other recognized nations? Although international law is itself an imperfect system, it is more justifiable than applying domestic law given its respect for Indigenous nationhood.[66] Importantly, the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP), which sets out the right to self-government, anticipates the application of international human rights norms. Built on the understanding that self-determination is not absolute, UNDRIP is premised on being exercised "in conformity with international law."[67] Solidifying this notion, article 46(2) sets out that self-government must respect the "human rights and fundamental freedoms of all," allowing for limits on Indigenous rights where "strictly necessary solely for the purpose of securing due recognition and respect for the rights and freedoms of others."[68] Moreover, many Indigenous leaders were proponents of UNDRIP, creating even greater responsibility to align their laws with its principles.[69]

Looking at international law and UNDRIP specifically makes clear that the majority in *Dickson* could have addressed concerns about rights protection without subsuming Indigenous laws within state legal frameworks. By failing to give deference to VGFN law or engage with international law, the majority declined the opportunity to reflect on the limits of state law and show full trust in Indigenous laws.

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62. Kerry Wilkins, "...But We Need the Eggs: The Royal Commission, the Charter of Rights and the Inherent Right of Aboriginal Self-Government" (1999) 49:1 UTLJ 53 at 78, DOI: <10.2307/826053> [Wilkins, "The Eggs"].

63. Turpel, *supra* note 7 at 136.

64. Wilkins, "The Eggs," *supra* note 62 at 120.

65. John Borrows, "Creating an Indigenous Legal Community" (2005) 50:1 McGill LJ 153 at 160; Griffiths, *supra* note 43 at 169; Emily Snyder, Val Napoleon & John Borrows, "Gender and Violence: Drawing on Indigenous Legal Resources" (2015) 48:2 UBC L Rev 593 at 624.

66. Sam Grey, "Self-Determination, Subordination, and Semantics: Rhetorical and Real-World Conflicts over the Human Rights of Indigenous Women" (2014) 47:2 UBC L Rev 495 at 514–15 [Grey].

67. *Ibid* at 526–527; *United Nations Declaration on the Rights of Indigenous Peoples*, UNGA, 107th Mtg, UN Doc A/res/61/295 (2007) GA Res 61/295, Annex agenda item 68 at 3 [*UNDRIP*].

68. *UNDRIP*, *ibid* at art 46(2).

69. Grey, *supra* note 66 at 528.

# VI CONCLUSION

This case comment analyzes the majority reasons in *Dickson* to understand the extent to which the SCC is enabling meaningful self-government through their decision making. Looking at two specific ways to enable meaningful self-government in practice, the comment argues that the *Dickson* majority fails on both accounts. With regard to treating Indigenous laws as purely organic instead of finding their source in state grants of authority, the comment argues that the majority's "tethering" of self-government to the state is highly problematic. The effect of this tethering is the transformation of a negotiation process that was touted as recognizing inherent rights into another method of subsuming Indigenous laws within state systems. Given the problems with proving self-government through any other means, the majority's decision in *Dickson* creates a reality in which most exercises of self-government will be subject to the Charter, detracting from their true inherency.

The majority's decision is equally disappointing with regard to the second means of enabling meaningful self-government: allowing Indigenous laws to stand alone without state oversight. Though article IV of the VGFN Constitution was not strictly before the SCC, it was open to the court to reflect on their role and exercise discretion to defer to VGFN law. By instead applying the Charter, even while commenting that article IV remains available and shielding the claim under section 25, the majority signalled a reluctance to fully trust Indigenous legal systems and continued their subjection to state oversight.

While refusing to apply the Charter would have been a significant move for the SCC, relinquishing the power to oversee Indigenous laws without explicit permission is the hallmark of trust, reconciliation, and meaningful legal pluralism. Though some judges and law makers may subconsciously believe that no other legal order could possibly step in to make effective laws when the state leaves a gap, Indigenous legal systems can and have governed effectively for centuries.[70] What Indigenous laws need now is the space to revitalize, unconstrained by state law. If given that space, with international law as a fall-back, rights protection will not be in jeopardy; on the contrary, it will be strengthened. Restricting the autonomy of Indigenous laws not only harms Indigenous Peoples but also deprives Canadian society of alternative methods of governance. Perhaps, if allowed to flourish, Indigenous laws could spark even better ways of achieving "peace, justice, and fairness."[71] Is the humility it would take the courts to exercise discretion not to apply state law worth the price of repressing that potential?

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70. Tokawa, *supra* note 6 at 27.

71. Kirsten Manley-Casimir, "Incommensurable Legal Cultures: Indigenous Legal Traditions and the Colonial Narrative" (2012) 30:2 Windsor YB Access Just 137 at 151.