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The Dissent in *Dickson v Vuntut Gwitchin First Nation*: Failing to Accommodate Legal Pluralism

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Cases Commented On: *Dickson v Vuntut Gwitchin First Nation*, [2024 SCC 10 \(CanLII\)](#); *Houle v Swan River First Nation*, [2025 FC 267 \(CanLII\)](#); *Donald-Potskin v Sawridge First Nation*, [2025 FC 648 \(CanLII\)](#); *Cunningham v Sucker Creek First Nation 150A*, [2025 FC 1174 \(CanLII\)](#)

This is the fourth and final post in our series on the Supreme Court of Canada’s decision in *Dickson v Vuntut Gwitchin First Nation*, [2024 SCC 10 \(CanLII\)](#). Our [last post](#) examined the majority judgment of Justices Nicholas Kasirer and Mahmud Jamal (Richard Wagner CJ and Suzanne Cote J concurring) on the interplay between sections 15(1) and 25 of the *Charter*. This post focuses on the dissenting judgment of Justices Sheilah Martin and Michelle O’Bonsawin on the section 15/25 issues. As we discuss, the two opinions contrast significantly in the way they prioritize the protection of collective Indigenous rights and the claims based on individual *Charter* rights and freedoms. We describe and critique the dissent’s analysis and we return to the three recent decisions introduced in our third post to think through how the approach of Martin and O’Bonsawin JJ would have played out in those cases (see *Houle v Swan River First Nation*, [2025 FC 267 \(CanLII\)](#); *Donald-Potskin v Sawridge First Nation*, [2025 FC 648 \(CanLII\)](#); *Cunningham v Sucker Creek First Nation 150A*, [2025 FC 1174 \(CanLII\)](#)).

Recap of the Facts and Issues in *Dickson*

The facts of *Dickson* are described in [this post](#). To review them here briefly, Vuntut Gwitchin First Nation (VGFN) member Cindy Dickson challenged the constitutionality of her First Nation’s residency requirement for those elected to the VGFN Council. The residency requirement was found in the VGFN’s Constitution, enacted under the 1993 VGFN Self Government Agreement (SGA). Ms. Dickson argued that the residency requirement – which required her to move 800 km within 14 days of her election from Whitehorse to Old Crow – violated her equality rights under section 15(1) of the *Charter*. The VGFN argued that the *Charter* did not apply, but if it did (which the majority and dissent found to be the case, with Justice Malcolm Rowe alone finding that the *Charter* did not apply), section 25 shielded the residency requirement from a section 15(1) challenge. These sections provide:

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

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

(a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and

(b) any rights or freedoms that now exist by way of land claims agreements or may be so acquired.

Dissenting Reasons on Sections 25/15

Overall Approach

The dissenting judgment of Martin and O’Bonsawin JJ generally agreed with the majority that there should be a multi-stage analysis for addressing disputes raising section 25 (plus a subsequent section 1 *Charter* analysis if necessary) (at para 338). Recall that the majority’s framework was articulated as follows:

First, the *Charter* claimant must show that the impugned conduct *prima facie* breaches an individual *Charter* right....

Second, the party invoking s. 25 ... must satisfy the court that the impugned conduct is a right, or an exercise of a right, protected under s. 25.... If the right at issue is an “other” right, then the party defending against the *Charter* claim must demonstrate the existence of the asserted right and the fact that the right protects or recognizes Indigenous difference.

Third, the party invoking s. 25 must show irreconcilable conflict between the *Charter* right and the Aboriginal, treaty, or other right or its exercise. If the rights are irreconcilably in conflict, s. 25 will act as a shield to protect Indigenous difference.

Fourth, courts must consider whether there are any applicable limits to the collective interest relied on. When s. 25’s protections apply, for instance, the collective right may yield to limits imposed by s. 28 of the *Charter* or s. 35(4) of the *Constitution Act, 1982*. (at paras 179-182)

While agreeing on the general framework of the first three stages, the dissent approached each of these stages differently than the majority and left a much narrower scope for the application of section 25. Their methodology for constitutional interpretation made much of historical sources and perspectives, echoing their concerns on the section 32(1) *Charter* application issue about creating “*Charter*-free zones” (for discussion, see [here](#)). The dissent’s concerns appear to have been motivated in large part by the rights of Indigenous women, although ironically, their interpretation of section 25 could have unintended consequences for women’s equality rights. Their approach also seems to gloss over the collective rights of Indigenous women involved in governance of their nations, including the VGFN. The dissent did not adopt the majority’s fourth stage of analysis where sections 28 and 35(4) – guarantees of gender equality in the context of

Charter and Indigenous rights – were recognized as possible limits on the exercise of section 25 rights. Instead, Martin and O’Bonsawin JJ relied on section 15 to do the all the work of protecting gender equality. Overall, their approach would have made it more challenging for Indigenous groups to rely on section 25 to protect their collective rights, especially in the case of intragroup disputes. While purporting to take an approach that promotes reconciliation (see e.g. para 245), the dissent’s opinion downplays the sui generis nature of Indigenous peoples’ claims, both culturally and in terms of consent (see, e.g., James Tully, “The Practice of Law-making and the Problem of Difference: One View of the Field,” in O.P. Shabani, ed, *Multiculturalism and the Law: A Critical Debate* (Cardiff: University of Wales Press, 2006) at 286). The next sections of this post trace their reasons for decision in more detail.

Operation/Interpretation of Section 25

The dissent’s first section following their introductory remarks was concerned with what they called the “operation” of section 25, which maps on to the third stage of the majority’s framework for analysis. In essence, this section of the judgment focused on Martin and O’Bonsawin JJ’s approach to the interpretation of section 25.

The dissent claimed to ground their interpretive approach in a purposive and historical analysis, noting that the text of section 25 was “capable of supporting either an interpretive or shield approach” (at para 289). However, the sources they relied on were invoked to support more of an originalist approach to *Charter* interpretation – including heavy reliance on the intervenor factum of the Canadian Constitution Foundation (CCF, factum available [here](#)) (see paras 285, 295, 322).

The dissent’s consideration of history began with the debates surrounding the entrenchment of the *Constitution Act, 1982*, including the *Charter*. Statements of various government officials about the role of section 25, as well as previous drafts of this section, were taken to indicate that it was intended as a “preservation of rights” from being “lessened”, “erased” or “excluded” by the guarantee of individual *Charter* rights (at paras 300, 302). This led Martin and O’Bonsawin JJ to conclude that section 25 was not intended “to create an impenetrable shield” that would “encircle Aboriginal rights and freedoms and create *Charter*-free zones in certain parts of the country” (at para 302). Rather, section 25 has the effect of clarifying that individual *Charter* rights “should not be read as undermining the rights and freedoms afforded to Indigenous peoples” (at para 302). This conclusion was supported by three main points.

First, Martin and O’Bonsawin JJ stated that section 25 was animated by concerns about the interplay between collective Indigenous rights and individual *Charter* rights, particularly section 15(1) equality rights (at para 304). More specifically, a concern was raised by some academic commentators and government leaders at the time of drafting the *Charter* that “affirmative action” programs put in place to support Indigenous peoples could be “undermined by a formalistic conception of equality” (at para 295) that would see these programs as “racial discrimination” (at para 304). This concern regarding affirmative action programs aimed at Indigenous people has arisen in previous *Charter* cases, but until now it has been resolved under section 15(2)’s general protection of affirmative action programs rather than under section 25 (see e.g. *R v Kapp*, [2008 SCC 41 \(Can LII\)](#), a challenge by mostly non-Indigenous fishers to a federal program providing exclusive fishing rights to members of the Musqueam First Nation). The dissent did not mention

section 15(2) as an alternative vehicle for protecting such programs and their substantive equality objectives, which was the focus of the *Kapp* majority. Martin and O’Bonsawin JJ did note that the Supreme Court has “repeatedly affirmed” a substantive rather than formal approach to equality, but this “was by no means a foregone conclusion at the time of the *Charter*’s adoption” – one example of what we see as their overreliance on history (at para 304). In highlighting concerns about challenges to affirmative action programs, the dissent also foreshadowed their later comment that section 25 should generally apply only in the case of *Charter* claims brought by non-members of the Indigenous group in question.

The dissent’s second and related point was that section 25 “was not intended to create or confer rights” (at para 305), rather to preserve existing rights. This assertion was based on earlier drafts of section 25, academic literature, and Justice Michel Bastarache’s concurring reasons in *Kapp*, which focused on section 25 rather than section 15(2) (at para 305). Section 25 was thus, for the dissent, “an interpretive tool, not a source of rights” (at para 305).

Third, and touching on the scope of section 25, the dissent also relied on Bastarache J for the view that section 25 rights “are rights that pertain uniquely to Indigenous peoples *because* they are Indigenous” (at para 306, their emphasis, citing *Kapp* at para 103 (and note that Bastarache J used the word “unique” only once and in a different context, while also describing “interests associated with aboriginal culture, territory, sovereignty or the treaty process” as the rights protected)). The dissent argued that the Court’s overall approach to section 35 also supported the view that Aboriginal rights are those that recognize the distinctive cultures, practices and traditions of Indigenous peoples and “reconcile” these rights (as well as limits on those rights) with Crown sovereignty (at paras 306-307, 309; citing *R v Van der Peet*, [1996 CanLII 216 \(SCC\)](#), [1996] 2 SCR 507 at paras 19, 31-32; *R v Gladstone*, [1996 CanLII 160 \(SCC\)](#), [1996] 2 SCR 723 at para 73). Their standard of “uniqueness” is reinforced later in their judgment and is a more onerous standard than that of “Indigenous difference” adopted by the majority.

The dissent finally turned to jurisprudence on constitutional interpretation more generally. They stated that their approach to section 25 was consistent with the principle that “all parts of the Constitution must be read together and that there is no hierarchy among its various provisions,” even though they declined to mention section 15(2) as part of the constitutional protection of affirmative action programs (at para 309). They also noted the principle that constitutional rights are not absolute, including section 35 Aboriginal and treaty rights (at para 309). It followed that allowing section 25 to act as an automatic shield, trump, or blanket immunity would be “highly incongruent” (at paras 310-311). However, it was not the majority – whose interpretation of section 25 was far from an “automatic” shield – who characterized section 25 in these terms. This is a point we will come back to in the commentary.

Constitutional reports and negotiations subsequent to 1982 also informed Martin and O’Bonsawin JJ’s analysis. They noted the view of the Royal Commission on Aboriginal Peoples (RCAP) that the relations between Indigenous and non-Indigenous peoples in Canada should be governed by “equality, co-existence, and self-government”, and extrapolated this to support principles of “equity and accountability” and the protection of individual *Charter* rights for Indigenous peoples (at para 312). Such protection was also justified by the legacies of colonialism and systemic discrimination faced by Indigenous peoples, including in their own communities (at paras 313-

314). It was here that the rights of Indigenous women were raised, including efforts by the Native Women’s Association of Canada (NWAC) to participate in the negotiations that led to the 1992 Charlottetown Accord to ensure the continued application of *Charter* equality rights under Indigenous governments (at paras 314-316). The dissent also noted academic literature that raised the issue of ongoing challenges to band membership and election codes that exclude some women and children, as well as others, on the basis of gender, marital status, and sexual orientation (at para 314).

Justices Martin and O’Bonsawin later acknowledged that many Indigenous nations, including the VGFN, have their own constitutions that protect equality rights, but stated that this does not “immunize Indigenous governments from the responsibility of respecting the individual rights and freedoms articulated in the *Charter*” (at paras 321-322, citing the factum of the CCF). The dissent thus viewed Indigenous legal orders as forming “an integral part” of Canadian law, with the *Charter* providing a “floor” of rights and freedoms binding on all governments (at para 322). This is an example of how their reasons on section 25 were strongly influenced by their earlier reasons on the application of the *Charter* to Indigenous governments under section 32(1). While referencing the pluralistic nature of the *Charter*, the future role of Indigenous courts, and the “living tree” doctrine, the *Charter* would continue to trump Indigenous laws for the dissent.

Lastly, Martin and O’Bonsawin JJ relied on the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP) to support their conclusion that section 25 should be read as an interpretive provision rather than a shield. As noted in this [earlier post](#), they argued that UNDRIP is binding on Canada even though it is a declaration rather than a treaty, presumably because of the *United Nations Declaration on the Rights of Indigenous Peoples Act*, [SC 2021, c14](#) (*UNDRIP Act*). As such, they found that the principle of conformity applies, under which the *Charter* is presumed to offer protection at least as strong as that under international law (at para 317). UNDRIP was noted to protect both individual and collective rights, including the right to equality, and was thus said to be “illustrative of how one type of right cannot absolutely trump another” (at para 319). Here again, the source relied on by the dissent is parsed in favour of individual rights (and is a different parsing than that of the majority, as discussed in the first post on this case). Curiously, the dissent did not reference article 22 of UNDRIP to buttress their concerns about gender equality, which provides that “States shall take measures, in conjunction with indigenous peoples, to ensure that indigenous women and children enjoy the full protection and guarantees against all forms of violence and discrimination.”

Having found section 25 to be an “interpretive prism”, Martin and O’Bonsawin JJ continued that “the extent to which this prism refracts and colours the *Charter*’s application will depend on who brings the claim, against whom, and when” (at para 320). In their view, section 25 provided a “strong hedge” around Indigenous rights in *Charter* challenges mounted by external parties, whereas internal challenges brought by a member of the Indigenous group “can continue to exist” (i.e. not subject to section 25) (at para 320, citing Gordon Christie, “Aboriginal Citizenship: Sections 35, 25 and 15 of Canada’s Constitution Act, 1982” (2003) 7 *Citizenship Studies* 481). Justices Martin and O’Bonsawin did not engage with the majority’s five reasons for rejecting a different approach for external versus internal challenges in this section of their judgment or when this point came up again later (see majority discussion at paras 165-172).

The next question addressed by the dissent was what rights fell within the scope of section 25, which mapped on to the majority's second stage of analysis. This question turned on the interpretation to be given to the phrase "other rights or freedoms that pertain to the aboriginal peoples of Canada."

Scope of Section 25 Rights

The dissent agreed with the majority that section 25's "other rights" are not limited to those with constitutional status, but they were of the view that "Indigenous difference" was too broad a lens for defining such rights (at para 325). As noted above, the dissent chose to limit section 25 rights to those that are "unique" to Indigenous peoples *because they are Indigenous* (at para 327, emphasis added). Once again Martin and O'Bonsawin JJ purported to take a purposive approach, noting however that courts "must be mindful not to overshoot the provision's underlying objectives" (at para 326, citing *Quebec (Attorney General) v. 9147-0732 Québec inc.*, [2020 SCC 32 \(CanLII\)](#) at para 10 (per Brown and Rowe JJ)). They drew another parallel here with section 35 rights – and their interpretation in *Van der Peet* – as rights that arise only for Indigenous peoples and only because of their Indigenous identity (at para 327). In terms of what might qualify as "unique," the dissent found that "broad rights to govern its community" pursuant to self-government are not enough for an Indigenous group to rely on section 25 (at para 328). Stated differently, "[n]ot everything that Indigenous governments do represents the exercise of a unique collective right stemming from the community's distinctive culture" (at para 328). They did not give any examples of what might meet their test of "unique."

Justices Martin and O'Bonsawin then reiterated that intragroup distinctions should fall outside of section 25's protection, although here they qualified this exclusion with the word "generally" (at para 329). Their exclusion would preclude an Indigenous group's reliance on section 25 to protect laws "that distinguish between members of the Indigenous community on the basis of personal grounds such as age, gender, gender identity, sexual orientation, or disability" (at para 329). The dissent found further support for this stance in Patrick Macklem's argument that restricting the interests of community members who are less powerful may have severe individual consequences yet "only a loose relation to interests associated with indigenous difference" (at para 329). Yet there was no consideration of the idea that what they called "personal grounds" might intersect with Indigenous identities in unique ways (for example in the case of two-spirit people whose gender identity is interconnected with their Indigeneity. For a discussion see Val Napoleon, "Raven's garden: A discussion about aboriginal sexual orientation and transgender issues" (2002) 17:2 Can J Law & Society 149). The dissent added that it would still be open to Indigenous governments to attempt to justify laws implicated in intra-group disputes under section 1 of the *Charter*, and at this stage collective interests beyond those related to Indigenous difference and Indigenous perspectives must be considered (at paras 329, 332).

More specific to the dispute at hand, Martin and O'Bonsawin JJ stated that they agreed with the majority about the possible importance of residency requirements for Indigenous elections, but for them, this was a matter for section 1 and not section 25 (at para 332). Oddly, given the dissent's focus on Indigenous individuals lacking power within their own communities, there was again no mention of sections 28 and 35(4) as another source of potential limits on the exercise of collective rights.

For the dissent, section 25's clear purpose was to apply in cases where non-Indigenous individuals challenge government laws or programs, such as *Kapp* (at para 330). While Martin and O'Bonsawin JJ repeated that the focus here should be on "unique" collective rights and not merely "Indigenous difference", they still did not clarify the meaning of "unique." At times they suggested that "unique" meant "unique to an Indigenous community" and not to Indigenous peoples or Indigenous communities more broadly (see paras 334 and 338 in contrast to para 337). Later, they suggested that "unique" means "necessary to the maintenance of the Indigenous community's distinctive culture" (at para 341) – a necessity test. The dissent justified their "uniqueness" standard based on their concerns that the majority's broader "Indigenous difference" approach might create *Charter*-free zones (at paras 330-331, 334). But it bears mention that for the majority, it is not Indigenous difference that section 25 protects, rather a two-steps-removed "*right that protected interests associated with Indigenous difference*" (at para 217, emphasis added).

Justices Martin and O'Bonsawin agreed with the majority that at the third stage of analysis the court should attempt to reconcile the applicable individual and collective rights in a manner that respects both rights and avoids a conflict (at para 338). If this is not possible and a true conflict exists, the court must "construe the individual *Charter* right so as to not abrogate or derogate from the right protected by s. 25" subject to two qualifications (at para 339). First, if the collective right would only be impacted in a minor or incidental way by the individual right, the collective right need not be given primacy (at para 340, accepting the argument of the Alberta government on this point). Second, section 25 should only be applied where the exercise of the Indigenous right meets the necessity test noted above (at para 341, relying on the federal government's *intervener factum*). The necessity test must be "informed by Indigenous perspectives," and it may be relevant whether the claim is external or internal (at para 341) – a confusing point given the dissent's earlier statement that section 25 generally will not apply to internal disputes. The "necessity" requirement was also seen to fit with the approach to some other *Charter* provisions such as section 15(2) (finally mentioned at para 341). Given their concern with Indigenous women's equality interests, we note again that it is puzzling that the dissent did not list sections 28 and 35(4) amongst the qualifications on section 25 – qualifications that the majority did enumerate at the fourth stage of their framework.

Martin and O'Bonsawin JJ did leave open the possibility that there may be cases where "the exercise of a collective Indigenous right" would "justify an impact on individual *Charter* rights" (at para 343), suggesting that section 25 may in fact serve as a shield in some (more narrowly defined) cases. Emmett MacFarlane also interprets the *Dickson* dissent this way – see "Not Merely Interpretative: The Supreme Court's Application of Section 25 of the *Charter of Rights and Freedoms* and its Implications for Section 28" (2024) [33:2 Const Forum Const](#) 17 at 24.

If section 25 does not apply, consideration of section 1 of the *Charter* would be required at the dissent's fourth stage of analysis.

Application

Applying their approach, at the first stage of the framework Martin and O’Bonsawin JJ concurred with the majority that the VGFN residency requirement resulted in a breach of Ms. Dickson’s section 15(1) rights. One difference between the judgments at this stage was that the dissent undertook a full analysis of section 15(1) whereas the majority only assessed whether there was a *prima facie* breach. But they were agreed that the test for section 15(1) is governed by the decisions in *Fraser v Canada (Attorney General)*, [2020 SCC 28 \(CanLII\)](#) and *R v Sharma*, [2022 SCC 39 \(CanLII\)](#), and that section 15(1) analysis should be animated by substantive equality and recognition of systemic disadvantage (at para 346).

Another point of disagreement concerned analogous grounds at step 1 of the test for section 15(1). The dissent did not believe the majority’s affirmation of a new analogous ground based on the modern treaty context was necessary. Instead, the recognition of “Aboriginality residence” as a protected ground in *Corbiere v Canada (Minister of Indian and Northern Affairs)*, [1999 CanLII 687 \(SCC\)](#), [1999] 2 SCR 203, applied in this case. Although the VGFN was not an *Indian Act* band, the dissent noted that “the Vuntut Gwitchin people were profoundly affected by colonial laws and policies” and that the legacy of the *Indian Act* affected them and their “choice” of residence, similar to the impact on the *Corbiere* claimants (at paras 358, 363). They appeared to implicitly accept Ms. Dickson’s argument that “[i]t is irrelevant to the Indigenous person experiencing inequality whether the discriminatory distinction at issue was made by the federal government, her provincial or territorial government, or her own Indigenous government” (at para 354), despite having earlier drawn a distinction themselves between internal and external challenges. The ground of Aboriginality residence therefore applied, and it was clear that there was a distinction on this basis, satisfying step 1 of the test for section 15(1).

At step 2 of the section 15(1) test, Martin and O’Bonsawin JJ found that the distinction was discriminatory in denying the benefit of democratic participation to Ms. Dickson in a manner that reinforced the stereotype that non-resident members of the VGFN are less worthy of such participation. One notable element of their reasons on this issue is that the dissent avoided the majority’s language of “arbitrary” disadvantage (see para 202). Relatedly, the dissent indicated that “legislative context” should not be used to introduce justificatory considerations into the section 15(1) analysis, clarifying an ongoing debate under section 15(1) (at paras 367-369). They also clarified that it was sufficient if the challenged law or policy merely “perpetuates” pre-existing or historical disadvantage, a question left open by *Sharma* (at para 373). Equality claimants will welcome these three clarifications of elements of equality law if they are adopted by a subsequent majority of the Court.

In this case, it was important to recognize that Canadian governments had encouraged Indigenous peoples to leave their home communities and assimilate into mainstream society, with particular attention to how the *Indian Act* removed status from Indian women when they married non-status men, leading large numbers of women and children to leave their communities (at paras 375-376). This part of the dissent’s reasons makes clear that they saw section 15(1) as the appropriate vehicle for responding to gender inequality rather than sections 28 and 35(4). Justices Martin and O’Bonsawin also referenced evidence from members of the VGFN who lived outside Old Crow and felt that “they were not valued members of their community because of where they lived” (at para 378). In this overall context, the dissent found the residency requirement “at the very least perpetuates disadvantage” (at para 378). This was the case even though the requirement gave non-

resident citizens 14 days after the election to relocate to Old Crow and the elected position included a four-year paid salary and Vuntut Gwitchin staff housing. It was still seen as asking persons in the position of Ms. Dickson “to change a constructively immutable characteristic – akin to changing religion or citizenship” (at para 382).

Turning to the applicability of section 25 of the *Charter*, Martin and O’Bonsawin JJ framed the issue at the second stage as whether “a self-governing Indigenous nation’s right to regulate the composition of its governing bodies [is] a unique collective right, belonging to Indigenous peoples because they are Indigenous?” (at para 388). They answered this question in the negative. Their reasons harkened back to their stance on section 32 and the idea that the VGFN was a governmental actor similar to other governments, at least in the case of “enacting laws concerning the composition of their governing bodies” (at para 390). This comparison between what the dissent saw as similarly situated entities led to the conclusion that the VGFN was not unique in imposing a residency requirement for democratic participation (at para 390). The dissent did not consider the VGFN’s reasons for adopting a residency requirement, simply citing Ms. Dickson’s argument that the requirement “reflects the VGFN’s ‘adoption of a democratic system of governance’” (at para 390), which begs the question. In addition, the residency requirement created an intragroup distinction and thus fell outside what the dissent saw as the intended scope of section 25 (at para 391). This reasoning was enough for the dissent to conclude that section 25 did not apply, but they did go on to consider the next stage of the framework in the alternative.

At the third stage, Martin and O’Bonsawin JJ found that even if the VGFN was exercising a right within the scope of section 25, their interpretive approach would not result in giving primacy to the collective right in this case. This was because, for the dissent, the residency requirement was not “necessary to the maintenance of the VGFN’s distinctive culture” (at para 393). This was not a case where “external forces [were] seeking to undermine the VGFN’s self-government rights broadly or, more specifically, its right to regulate the composition of its governing bodies” (at para 393). Giving effect to Ms. Dickson’s equality rights would also have a minor impact on the VGFN, they said (at para 394). Justices Martin and O’Bonsawin dismissed the application of section 25 in a matter of 10 paragraphs, with no clear examples of what types of section 25 rights might possibly meet the high standard of “uniqueness” they set. Indeed, Indigenous governments were seen as largely akin to other governments, and Indigenous members of those communities were seen as experiencing similar impacts of colonialism and internalized discrimination across nations regardless of their particular histories. There is a pan-Indigeneity aspect to the dissent as well as a contradictory demand for Indigenous governments to demonstrate uniqueness.

Justices Martin and O’Bonsawin went on to consider whether the violation of section 15(1) could be justified under section 1 of the *Charter*. They also answered this question in the negative. Here, they indicated that section 1 should be interpreted while keeping Indigenous difference in mind as a “significant” consideration (at para 396) and that the deference provided to governments under section 1 is particularly important when assessing the arguments of self-governing Indigenous nations (at para 403). The dissent found that the residency requirement fulfilled the pressing and substantial objective of promoting and maintaining “self-governance and connection to the homelands” (at para 398), and the requirement was rationally connected to its goals (at para 401). However, the requirement was not minimally impairing because the VGFN did not provide evidence that it had “sought any meaningful alternatives to the residency requirement” (at para

408). Ms. Dickson had suggested that one Council seat could be reserved for a non-resident citizen of the VGFN, and the dissent seemed to suggest that this was a reasonable alternative that could still satisfy the VGFN's goal of preserving a connection between governance, lands, and culture (at para 409). While unnecessary to consider the final balancing stage of the *Oakes* test, the dissent also found that the residency requirement was a "significant incursion" on the rights of individuals such as Ms. Dickson, who – through no real choice of their own – had been displaced from their community (at para 412). In other words, the exercise of collective rights was seen to intrude on individual rights (see also paras 319, 339, 342) rather than the focus being on whether individual rights "abrogate or derogate" from collective rights as set out in the text of section 25. Given the dissent's overall approach in giving primacy to individual rights, it is not surprising that the impact on equality rights was seen as outweighing the collective interests of the VGFN in this case.

Discussion

We have already noted several gaps and inconsistencies in the dissent's analysis and have critiqued some of their comparisons, assumptions, and sources. This section of our post builds on those points.

One major source of unease is that Martin and O'Bonsawin JJ's purportedly "purposive" approach to the interpretation of section 25 of the *Charter* relies on the originalist approach taken by more conservative judges in recent cases (see e.g. their citation at para 326 of the reasons of Brown and Rowe JJ in *9147*). They also relied heavily on the factum of the CCF, as noted earlier. The CCF's arguments appear to have been the source of the term "*Charter-free*," a term which the dissent deploys 10 times in their reasons. These are strange bedfellows, for Justice Martin in particular, given her typically robust and progressive approach to *Charter* interpretation (it is too early to make the same comment regarding Justice O'Bonsawin given the recency of her appointment). This is not to say that an originalist approach need be a conservative one – see for example the [work of Kerri Froc](#) on modern originalism and women's equality. In *Dickson*, however, the dissent's fears about *Charter-free* zones are tinged with a formal equality lens that treats Indigenous governments the same as non-Indigenous governments. This lens also simultaneously erases *and* reifies the differences between specific Indigenous nations and peoples. The concept of substantive equality is not extended to Indigenous collective rights unless they are "unique". To the extent that these fears are based on the spectre of "*Charter-free* zones," the dissent raised the possibility of section 25 as an "impenetrable shield" (at para 302), "automatic and absolute shield" (at para 310, citing Ms. Dickson's factum), or "immunity" from *Charter* rights and freedoms (at paras 285, citing the CCF factum at para 17; see also paras 311, 322). Yet the majority did not characterize section 25 in these terms, finding that section 25 has both interpretive and shielding aspects, and recognizing limits on the application of section 25 such as guarantees of gender equality. The dissent's reasons have a strawman quality because they do not respond directly to the majority.

Another strawman in the dissent's analysis is their location of section 25's purpose in concerns about a formalistic approach to section 15 that would undercut Indigenous ameliorative programs on the basis of individual rights claims. As we noted above, the Supreme Court has adopted a substantive equality approach to section 15 and has used section 15(2) as a vehicle for ensuring that these types of "reverse discrimination" claims do not undermine collective rights (see e.g.

Kapp). Although substantive equality is not always realized by courts in the ways we might hope, this 40-year-old concern does not provide a compelling reason to narrow the interpretation of section 25 today, as opposed to continuing to fight to enlarge the substantive meaning of section 15 (which Martin J has done in other cases, such as *Sharma*).

We have also noted our concerns with the dissent's requirement that section 25 rights be "unique." In addition to the lack of definitional clarity provided for this standard, it does not align with section 35 jurisprudence in the way that Martin and O'Bonsawin JJ suggested. In *Van der Peet*, the majority held that Aboriginal rights are those practices, customs and traditions that are *distinctive*, and that claimants need not prove that they are *distinct* or unique (at para 71, emphasis in original). Indeed, after much (in our view, justified) criticism was levelled at the *Van der Peet* test, the Supreme Court took pains in *Sappier/Gray (R v Sappier; R v Gray)*, [2006 SCC 54 \(CanLII\)](#)) distance itself from the language of "distinct" and "unique." The Court held, for example:

I think it necessary to discard the notion that the pre-contact practice upon which the right is based must go to the core of the society's identity, i.e. its single most important defining character. This has never been the test for establishing an aboriginal right. This Court has clearly held that a claimant need only show that the practice was integral to the aboriginal society's pre-contact distinctive culture (*Sappier/Gray*, at para 40).

They also clarified that "[w]hat is meant by 'culture' is really an inquiry into the pre-contact way of life of a particular aboriginal community" (at para 45). That way of life included "their means of survival, their socialization methods, their legal systems, and, potentially, their trading habits." They also explained that the test for Aboriginal rights "incorporated an element of aboriginal specificity," but that "'distinctive' does not mean 'distinct', and the notion of aboriginality must not be reduced to 'racialized stereotypes of Aboriginal peoples'" (at para 45).

To the extent that the dissent in *Dickson* characterized uniqueness as pertaining to a specific Indigenous community – that is, as protecting only unique features of a given people, as they seem to suggest – this standard is much more onerous than the section 35 jurisprudence on Aboriginal rights. Nowhere in section 35 doctrine has the Supreme Court articulated a test as restrictive as that outlined for section 25 by the dissent. It is difficult to think of a scenario that would meet this standard and its "necessity test" counterpart.

Turning to section 15(1), there are some aspects of the dissent's decision that we applaud, particularly their adherence to the clarifications the majority provided in *Fraser*. However, we find it puzzling that Martin and O'Bonsawin JJ relied entirely on section 15(1) for the protection of the rights of Indigenous women, not engaging at all with the majority's proposition that sections 28 and 35(4) are limits on section 25. The lack of attention to these sections is unfortunately common in the Supreme Court's jurisprudence (see e.g. Kerri Froc, "Is Originalism Bad for Women? The Curious Case of Canada's 'Equal Rights Amendment'" [\(2015\) 19:2 Rev Const Stud 237](#)), although it is harder to understand here because of the majority's consideration of these provisions. The Supreme Court has another opportunity to address the significance of section 28 in the [appeal](#) in *Organisation mondiale sikhe du Canada c. Procureur général du Québec*, [2024 QCCA 254 \(CanLII\)](#), involving the adverse impact of Quebec's secularity law on Muslim women.

Dickson was not framed by Ms. Dickson or the Court as a case involving gender equality. Nevertheless, the dissent comes close to saying that the residency requirement has an adverse impact on Indigenous women and their descendants because of the legacy of the marrying out provisions of the *Indian Act* (at paras 375-376). When the dissent was assessing whether the section 15(1) violation was justified under section 1, they suggested that Ms. Dickson was “displaced” through no choice of her own, but we question whether there was evidence to that effect in her case, as opposed to more generally (at para 412). In fact, Ms. Dickson was actually [elected to the VGFN Council in 2025](#), presumably having met the residency requirement. A historical context of displacement was not enough for the claimants in *Donald-Potskin* or *Cunningham* to successfully challenge residency requirements, as we noted in our last post, but this issue is likely to arise again in future litigation. A major issue going forward is what type of evidence courts will require to find that sections 28 or 35(4) apply to limit section 25’s shield under the majority approach.

Ironically, the *Dickson* dissent’s view that section 25 is an interpretive prism only and that rights must be approached as non-hierarchical and non-absolute may undercut the argument that protection of gender equality in sections 28 and 35(4) – which apply “notwithstanding” other provisions of the *Charter* and *Constitution Act, 1982* – cannot be derogated from. This possibility is reinforced by the dissent’s complete lack of engagement with sections 28 and 35(4). On the other hand, section 28 and 35(4) only provide limitations on section 25 in cases of gender inequality, and the rights of other disadvantaged groups within Indigenous communities was also seen as a concern by Martin and O’Bonsawin JJ. The majority did not address this possible limitation on section 25 rights.

It is unfortunate that none of the interventions in *Dickson* appear to have come from Indigenous women’s perspectives, such that the dissent relied on sources that may be dated in this regard. Particularly notable is the fact that NWAC did not seek to intervene in *Dickson*, given their historical role advocating for the rights of Indigenous women and their more recent involvement in *Sharma*. The only intervener that raised gender issues in any detail was the Congress of Aboriginal Peoples (CAP), which emphasized the disenfranchisement of First Nations people living off reserve and the involuntary loss of status by Indigenous women and their descendants (at paras 10-11 of their [intervener factum](#); see also the [factum](#) of the Band Members Alliance and Advocacy Association of Canada at para 25, which outlined concerns with respect to the rights of vulnerable Indigenous persons more broadly). CAP was one of the groups arguing that section 25 should not be interpreted so as to “immunize” internal Indigenous laws from *Charter* scrutiny where they clash with individual rights, especially equality rights (at paras 16-24; cited by the dissent at para 329). NWAC made a similar argument in *Corbiere* more than 25 years ago (see para 51), but the Court did not focus on section 25 in that case, nor was their argument referenced by the dissent in *Dickson*.

Although NWAC took this position at the time of *Corbiere*, we return to our point that the dissent’s approach in *Dickson* fails to consider the evolving role of Indigenous women in their communities’ exercise of powers flowing from collectively held rights, as well as the fact that Indigenous women were not united in their historical advocacy for application of the *Charter* to their governments (see Naomi Metallic, “Checking our Attachment to the *Charter* and Respecting Indigenous Legal

Orders: A Framework for *Charter* Application to Indigenous Governments” (2022) [31:2 Constitutional Forum 3](#) at 6-7). In the case of the VGFN, the current chief is Pauline Frost and before being elected to this role she worked for VGFN as the nation’s negotiator and intergovernmental coordinator ([Vuntut Gwitchin First Nation Council Welcome](#)). This is not to say that all Indigenous communities or governments have the same gender inclusive approach, as evidenced by the decades long litigation involving Indigenous women’s claims against the Sawridge First Nation (see, e.g., *Sawridge Band v Canada (T.D.)*, [1995 CanLII 3521 \(FC\)](#); *Sawridge Band v Canada (T.D.)*, [2003 FCT 347 \(CanLII\)](#); *Sawridge Band v Canada*, [2008 FC 322 \(CanLII\)](#)). But there can also be a false dichotomy between individual and collective rights, which should be approached as more relational in keeping with certain Indigenous norms (see Napoleon, *supra* at 164-5). What Indigenous women, including NWAC, have largely claimed over the past decades is the equal right to participate in the collective governance of their communities. And the tool for that argument is section 35(4) more so than an approach to sections 15 and 25 that prioritizes individual rights.

As for the dissent’s acceptance of the argument that section 25 should generally not apply to intragroup conflicts, they relied on Gordon Christie as support for this point. It must be noted, however, that Christie’s article advanced a nuanced argument that does not seem to support this conclusion. Christie’s overarching argument, which was made in 2003 and centered on the development of notions of “Aboriginal citizenship”, was that section 25 should be “interpreted as a tool of decolonization” (at 491). He advocated that it should not *currently* shield internal challenges that are “necessary to break down colonial structures, to begin the work of clearing away non-Aboriginal power structures imposed on Aboriginal communities.” This was only a preliminary approach, “a first step on the way to the reconstruction of institutions which reflect the identities of the communities in question.” Following the implementation of “internally-determined institutions”, section 25 “would become the ‘strong hedge’ about Aboriginal rights to self-determination required if notions of Aboriginal citizenship are to find expression within a nation defined by a liberal ideology which emphasizes the rights of individuals” (at 491).

Crucially, Christie argued that the application of the *Charter* within Indigenous nations ought to be *determined by those nations themselves*. Where communities in the process of re-invigorating and reclaiming their own traditions and laws do not wish for the *Charter* to apply, it should not. As he wrote:

Aboriginal communities may see in present circumstances a rare (and perhaps singular) opportunity, a chance to push toward meaningful reinvigoration of deeper senses of distinct and unique self-identities. These communities may find glowing embers of traditional systems of thought and feeling in their elders, may see value in using these embers to rekindle traditional fires, may see this value outweighing costs they will incur along the road to rebuilding, and may wish to have Section 25 available as more than a mere shield from external *Charter* challenge. Their wish to have Section 25 protect traditional ways of living from identity-challenging intrusions (both externally and internally) should be ... respected (at 493).

Christie’s article was written 10 years after the VGFN SGA, and another 20 years later the VGFN and its members must still rely on Canadian courts to resolve their disputes. But the VGFN

Constitution and the General Assembly which created it may well be considered the type of “internally-determined institutions” Christie envisioned as the key to advancing Indigenous self-determination. In crafting a constitution and outlining parameters for participation in government, the VGFN have sought to re-invigorate systems of governance grounded in their unique traditions and in the service of maintaining and strengthening their self-identity as Vuntut Gwitchin. They have expressly stated that this is incompatible with the individual rights framework of the *Charter*. In failing to attend to this context, the dissent displayed what Naomi Metallic has more recently critiqued as a judicial “attachment to the *Charter*” (see *supra* at 3).

While UNDRIP was dealt with at length in an earlier post, it bears repeating that the dissent’s arguments on this point are cursory; they do little to show how UNDRIP supports their conclusions on section 25. It is at least plausible that an instrument whose foremost goal is the advancement of Indigenous self-determination, as UNDRIP’s is, would support the balancing of the collective and individual rights through *Indigenous* legal and political institutions and would resist the imposition of a colonial law that an Indigenous nation had explicitly argued should not apply to their domestic affairs (as the VGFN had done in both the negotiation of their final agreement and the course of the *Dickson* litigation). The individual rights of Indigenous peoples, as against their own governments, might be better protected through international human rights law or Indigenous laws than through instruments of colonial states which they had no part in shaping. At the very least, the plausibility of these and similar arguments requires that those advocating readings of UNDRIP that minimize Indigenous self-determination, as the dissent’s does, sufficiently justify and explain their arguments with reference to core texts and supporting literature. We do note, however, that the majority’s analysis of UNDRIP was wanting as well, as discussed in the first post on *Dickson*. Finally, we return to the cases recently decided by the Federal Court applying the majority’s approach in *Dickson*. If the dissent’s approach had governed instead, these cases are ones where section 25 would not have applied, as they also involved intragroup disputes. Furthermore, these challenges were to governance provisions of residency requirements for elections similar to the one at issue in *Dickson*, which would not have met the dissent’s tests of uniqueness or necessity even if they were not excluded as part of an intragroup conflict. These tests are very onerous, much more so than the test that non-Indigenous governments must prove to uphold laws and programs under section 15(2), even though that was an analogy used by Martin and O’Bonsawin JJ (at para 341).

Nothing in the facts or law in *Houle*, *Donald-Potskin*, or *Cunningham* suggest that the dissent would have approached those cases differently than they did *Dickson*. In each case, the rights of Indigenous nations to decide matters central to their internal governance were pitted against individual *Charter* rights. In each, the Federal Court (correctly, in our view) determined that the majority’s interpretation of section 25 in *Dickson* supported protection of the former.

One interesting point to consider is the role that the concept of *wāhkōhtowin* played in *Cunningham*. There the Court held that:

the Residency Requirement in the Election Regulations is an exercise of a right that protects interests associated with Indigenous difference as it relates to cultural difference. Requiring SCFN leaders to live in and amongst their membership is a manifestation of a longstanding custom pre-dating Treaty No. 8, and also reflects

wâhkôhtowin, which finds its basis in, among other things, values of kinship, respect and reciprocity and the relationship with the land (at para 107).

In other words, the residency requirement was understood as protecting Indigenous difference, in part, because it was an expression of customary Indigenous law. This may come closer to satisfying the “uniqueness” test that Martin and O’Bonsawin JJ devised, though it would have been open to them to conclude that the residency requirement was not in fact required to maintain and protect *wâhkôhtowin*, even if it was an expression of it. Their repeated concern that “*Charter*-free zones” be avoided suggests that they would find a way to support the individual *Charter* right if remotely plausible arguments were available to do so.

Similarly, the facts in these cases may have led Martin and O’Bonsawin JJ to hold that there was not an “irreconcilable conflict” between the section 25 right and the *Charter* right, as required at the third stage of the *Dickson* analysis. For example, in *Houle* the applicant lived off-reserve in St Albert but visited frequently (at para 20, citing the agreed statement of facts at paras 5-6). In *Cunningham*, the applicant lived only 12 kilometers from the reserve and maintained strong community ties (at para 145), and in *Donald-Potskin* the applicant had recently served as a non-resident councillor (at para 40). The Federal Court in each case nonetheless concluded that there was an irreconcilable conflict because giving effect to the *Charter* right would undermine the Indigenous law in question. Further, the Court in *Cunningham* emphasized that the inquiry into whether a *Charter* right diminished Indigenous difference is an inquiry into that difference “as understood and established by the collective,” not by individual members (at para 145, citing *Dickson* at para 168). This meant the specific circumstances of the applicant, living in proximity to the reserve, were not determinative. It is not clear, given their less deferential approach to Indigenous laws, that Martin and O’Bonsawin JJ would see such a conflict or interpret its effect the same way, or that they would give the same weight to the collective understanding of Indigenous difference.

This hints at another likely difference. The Federal Court in *Cunningham* was clearly concerned with the role of the court in relation to Indigenous law makers, explicitly stating “it is neither necessary nor prudent for this Court to engage in a balancing of *wâhkôhtowin*” (at para 137). Justice Strickland also noted that, “[w]hen drafting the Election Regulations, SCFN could have elected to take a different approach to the six-month on-reserve nomination eligibility requirement ... But, SCFN did not chose [sic] to do so and it is not the role of this Court to effect changes to the Election Regulations” (at para 147). Again, this deferential approach, prioritizing Indigenous law and jurisdiction, would be unlikely under the dissent’s analysis. Recall that in *Dickson* the dissent held that the residency requirement was not “necessary to the maintenance of the VGFN’s distinctive culture” in part because it was not a situation where “external forces [were] seeking to undermine the VGFN’s self-government rights broadly or, more specifically, its right to regulate the composition of its governing bodies” (at para 393). The majority in *Dickson* and the Federal Court seemed to understand Canadian courts and the *Charter* as examples of such “external forces”, while the dissent did not.

The bottom line for the dissent is that the *Charter* should apply under section 32(1), and section 25 should not be applicable to internal disputes, at least not “generally.” If this was the prevailing approach, it would amount to a double whammy against Indigenous communities and their

constitutions: they would be subject to the *Charter* regardless of whether they consented to be, and section 25 would provide little protection for their laws. We might even see the dissent as creating a triple whammy if we add their lack of attention to sections 28 and 35(4). As we noted above, these rights – especially section 35(4) – guarantee gender equality within the context of collective rights, meaning that failure to acknowledge them is to the detriment of whole communities, not just Indigenous women.

As Gordon Christie argues in the article cited by the dissent, Canadian courts must trust that Indigenous nations have the capacity to govern themselves:

Canadian society—and in particular Canadian governments and courts—must come to trust that reinvigorated Aboriginal communities will be built around institutions defined and constructed by Aboriginal people which—while reflecting these communities’ sense of who they are—will protect members of the communities. The protection may not reflect that provided by way of the *Charter of Rights and Freedoms* (and may not include the sorts of mechanisms for implementation of protection one sees in liberal democracies), but to assume healthy Aboriginal communities would oppress their own people reflects in the least ignorance and potentially racism, while denying Aboriginal peoples the space within which to determine and follow the path they dream is to reaffirm Canada’s status as a colonial power (at 492).

In *Houle, Donald-Potskin, and Cunningham*, the Federal Court showed that it is prepared to extend this trust and to tread lightly in supervising the conduct of Indigenous governments. We hope that other courts will extend this same level of trust moving forward, while attending to the dissent’s concerns about gender equality using a fulsome approach to sections 25 and 35(4).

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