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Supreme Court of Canada applies the Charter to Indigenous government

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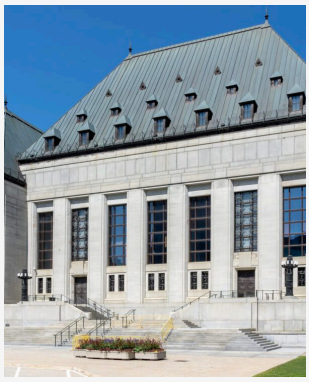

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In *Dickson v. Vuntut Gwitchin First Nation*, 2024 SCC 10, the Supreme Court of Canada recently settled important questions regarding the interplay between the collective rights of Indigenous peoples and individual rights under the *Canadian Charter of Rights and Freedoms*. Significantly, the majority confirmed that the *Charter* may apply directly to First Nation governments. The majority also articulated, for the first time, a framework under section 25 of the *Charter* for determining when Indigenous collective rights take precedence over — or are "shielded" from — individual *Charter* rights.

Background and facts

In 1993, Vuntut Gwitchin First Nation (VGFN) reached a land claim agreement and a self-government agreement with the federal and Yukon governments. As part of the self-government agreement, VGFN adopted its own constitution, providing for certain rights and freedoms for its citizens, rules for the organization of its government, and electoral rules and standards (the VGFN constitution). Among other things, the VGFN constitution includes a residency requirement pursuant to which all Chiefs and Councillors are required to reside on VGFN's settlement land (the seat of government being at Old Crow in the traditional territory of Vuntut Gwitchin) or to relocate there within 14 days of their election. This residency requirement reflects the First Nation's longstanding practice since time immemorial.

The claimant, Cindy Dickson, sought to stand for election as a VGFN Councillor. She is a citizen of VGFN and Canada but resides in Whitehorse, roughly 800 km south of Old Crow, for personal reasons. Ms. Dickson challenged the residency requirement in the VGFN constitution, arguing that it violated her right to equality under section 15(1) of the *Charter.*

VGFN argued that the *Charter* does not apply to it as a self-governing First Nation. In the alternative, VGFN argued that if the *Charter* applies, the residency requirement does not violate the right to equality and, if it did, the requirement is shielded by section 25 of the *Charter*, which upholds certain collective rights and freedoms of Indigenous peoples when in conflict with an individual's *Charter* rights.

Both the trial and appellate courts held that the *Charter* applies to VGFN and to the VGFN constitution, pursuant to section 32(1) of the *Charter*, and held that if Ms. Dickson's section

15(1) equality right is infringed, section 25 of the *Charter* shields the residency requirement. Ms. Dickson and VGFN appealed to the Supreme Court of Canada. Ms. Dickson appealed on the question of the constitutional validity of the residency requirement, while VGFN cross-appealed on the question of the application of the *Charter*.

The Supreme Court of Canada's decision

The majority

The majority of the SCC dismissed Ms. Dickson's appeal and VGFN's cross-appeal.

Writing for the majority, Justices Kasirer and Jamal held that the *Charter* applies to VGFN and its citizens. There are two ways that an entity can be a "government" subject to the *Charter*. First, an entity can be found to be a "government" by its very "nature" or because of the degree of "government control" exercised over it. In such a case, all the entity's activities will be subject to the *Charter*. Second, even if an entity is not a "government", it may be subject to the *Charter* with respect to particular activities if those activities are governmental in nature.[1]

In the case of VGFN, it is a government "by nature". VGFN Council consists of members who are elected by eligible VGFN voters and are democratically accountable to their constituents like members of Parliament and of provincial legislatures; VGFN has general taxation powers like Parliament and the provinces; VGFN has the ability to make, administer and enforce binding coercive laws on VGFN citizens and others within its settlement land; and VGFN exercises powers that Parliament otherwise would have exercised through its legislative jurisdiction.

The majority thus concluded that the *Charter* applies to the residency requirement, but only to the extent that it flows from an exercise of statutory power. Federal and territorial legislation gives effect to VGFN's self-government agreement with the federal and Yukon governments. The majority left open whether the *Charter* would apply to Indigenous governments exercising inherent self-government authority untethered from federal, provincial or territorial legislation.

Applying the *Charter*, the majority found that the residency requirement constituted a *prima face* infringement of Ms. Dickson's right to equality under section 15(1). However, the majority ultimately dismissed the *Charter* claim as a result of section 25 of the *Charter*, which provides that 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...."

Justices Kasirer and Jamal explained that the purpose of section 25 is to uphold certain collective rights and freedoms of Indigenous peoples when those collective rights conflict with an individual's *Charter* rights. Section 25 ensures that collective Indigenous rights are protected and take precedence where giving effect to conflicting individual *Charter* rights and freedoms would diminish "Indigenous difference". However, the protection of Aboriginal, treaty and other rights in section 25 is not absolute, and section 25 does not create new substantive rights.

Section 25 operates between a "shield" and "interpretive prism". It has a shielding effect in that it affords primacy to Aboriginal, treaty or other rights. However, a right under section 25 is only prioritized after an interpretive exercise demonstrates an irreconcilable conflict between the collective right and individual *Charter* right in question.

As a result, the majority developed a four-step framework under section 25 of the *Charter*:

1. First, the *Charter* claimant must demonstrate that the impugned conduct *prima facie* breaches an individual *Charter* right. If no *prima facie* case is made out, the *Charter* claim fails and there is no need to proceed to section 25.
2. Second, the party invoking section 25 must satisfy the court that the impugned conduct is an Aboriginal, treaty or other right or an exercise of an Aboriginal, treaty or other right protected by section 25. If the right at issue is an "other" right, then the party must demonstrate the existence of the asserted right and the fact that the right protects or recognizes Indigenous difference.
3. Third, the party invoking section 25 must show an irreconcilable conflict between the *Charter* right and the Aboriginal, treaty or other right or its exercise. If the rights are irreconcilably in conflict, then section 25 will act as a shield to protect Indigenous difference.
4. Fourth, courts must consider whether there are any applicable limits to the relied-upon collective interest. If section 25 is found not to apply, the party defending against the *Charter* claim may show that the impugned action is nonetheless justified under section 1 of the *Charter*.

Applying this framework, the majority found the following:

1. Ms. Dickson's section 15(1) *Charter* right was *prima facie* breached because the residency requirement created a distinction based on non-resident status and this distinction reinforced and exacerbated Ms. Dickson's existing disadvantage as a non-resident member of VGFN.
2. VGFN established that the residency requirement is an exercise of an "other right" under section 25 that protects interests associated with Indigenous difference. The residency requirement reflects VGFN's longstanding practice that its Chief and Councillors live on the First Nation's traditional territory, and this practice protects Indigenous difference by enabling Vuntut Gwitchin society to preserve the distinctive emphasis placed on leaders' connection to the land.
3. VGFN also established that, properly interpreted, Ms. Dickson's section 15(1) right irreconcilably conflicted with the scope of section 25. Permitting a Councillor to reside in Whitehorse would unacceptably diminish this connection and would undermine VGFN's right to decide on the membership of its governing bodies. As a result, the majority concluded this engages section 25 as a protective shield, insulating the collective right from the individual *Charter* claim.
4. Under the last step, the majority found no applicable limitations, and section 1 was not relevant because section 25 was found to apply.

Dissenting on the appeal

Justices Martin and O'Bonsawin would have declared the residency requirement to be of no force or effect. Like the majority, they concluded that the *Charter* applies to the impugned residency requirement, that VGFN is a government and that the residency requirement infringes Ms. Dickson's right to equality guaranteed by section 15(1) of the *Charter*. In their

reasons, they emphasized that section 32(1) of the *Charter* can be read to recognize the political and constitutional evolution that has occurred in respect of Indigenous self-government and, therefore, self-governing Indigenous nations are subject to the *Charter*. However, they disagreed that the residency requirement falls within the ambit of section 25 of the *Charter*. They held that the residency requirement is not aimed at recognizing the special status of Indigenous collectives within the broader Canadian state, and therefore it falls outside the ambit of section 25 protection. They also concluded that the residency requirement is not demonstrably justified pursuant to section 1 of the *Charter*.

Justices Martin and O'Bonsawin recommended a different approach from that of the majority regarding the operation of section 25 of the *Charter*. They opined that section 25 should serve as an "interpretive prism" rather than operating as a shield. On this view, section 25 prescribes an interpretive exercise to resolve challenges posed by competing collective Indigenous rights and individual *Charter* rights and should not prohibit Indigenous claimants from accessing other sections of the *Charter*, including section 15(1). Justices Martin and O'Bonsawin would have limited the scope of section 25 to rights that are truly unique to Indigenous peoples because they are Indigenous, and not to all matters on which Indigenous governments may act.

Dissenting on the cross-appeal

Justice Rowe would not have applied the *Charter* to VGFN's residency requirement. He emphasized that self-governing First Nations have the autonomy to decide to adopt protections for the rights and freedoms of their citizens distinct from the protections in the *Charter.* In his view, imposing the *Charter* is not consistent with the objective of reconciliation and with the need to respect the ability and the right of the Vuntut Gwitchin people to make decisions pursuant to their own laws, customs and practices.

Takeaways

The Supreme Court of Canada's judgment is significant for at least two reasons.

First, the Court's decision recognizes the importance of Indigenous governance within the fabric of Canada's governing structure. The majority concluded that VGFN is a government "by nature" under section 32 of the *Charter*. As a result, all activities of VGFN and, by extension, any other Indigenous government exercising similar powers will now be subject to *Charter* scrutiny (at least to the extent tethered to a statutory power).

Notably, the majority held that even though VGFN is a government by nature, it is not similar to a municipality: "[u]nlike municipalities, which have no independent constitutional status, are entirely creatures of statute, and exercise only those powers conferred by legislation, Indigenous peoples are expressly recognized under the *Constitution Act, 1867* (s. 91(24)), the *Charter* (s. 25), and the *Constitution Act, 1982* (ss. 35 and 35.1). Indigenous peoples pre-existed the arrival of European settlers and the founding of Canada as a country; they do not depend on federal, provincial, or territorial legislation to exist as autonomous self-governing peoples."

Second, the majority's decision provides a novel framework for when collective Indigenous rights may take priority over individual *Charter* rights. The decision offers guidance both for Indigenous governments on how the *Charter* applies to their activities and to members of Indigenous communities who wish to challenge the decisions of their governments. Given this is the first time a majority of the Court fully analyzed the purpose of section 25, and given the strong dissenting opinions on the application of sections 25 and 32(1), this may not be the last word from the Court on the tension between individual *Charter* rights and

collective rights of Indigenous peoples. However, we expect that the concepts introduced in the judgment — such as "Indigenous difference", and the debate between section 25 as a "shield to protect *Charter* rights" and an "interpretive prism" — will frame future discussion on these issues.

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[1] *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624 (*Eldridge*).