"Interpretative Prism or Pop Up Shield?"

Deciphering the Supreme Court of Canada's Decision in Dickson v Vuntut Gwitchin First Nation

This is a summary of the Supreme Court of Canada's (the "**Court**") decision in *Dickson v Vuntut Gwitchin First Nation*, 2024 SCC 10 (the "**Decision**"). It has been prepared by Jason Madden, Alexandria Winterburn and Erika Voaklander of Aird & Berlis LLP. This summary is not legal advice.

Jason Madden, Alexandria Winterburn, and Alex DeParde acted as counsel for the Métis Nation of Ontario and the Métis Nation of Alberta who jointly intervened to ensure that the Métis Nation's unique perspective was before the Court.

Key Takeaways from the Decision

1. **The *Charter* Applies To Recognized Indigenous Governments, Including Those With Self-Government Agreements and Modern-Day Treaties, As They Are "By Their Very Nature" Governments:** A majority of the Court relied on the federal legislation implementing Vuntut Gwitchin First Nation's ("VGFN") modern-day treaty and self-government agreement with the Crown to find the *Charter* applied. They did not answer the question whether the inherent right of Indigenous self-government or a s. 35 self-government right—"untethered from federal legislation"—would also be subject to the *Charter*.
2. **Indigenous Governments "Do Not Depend On Federal, Provincial, or Territorial Legislation To Exist As Autonomous Self-Governing Peoples":** The Court rejected the argument that by virtue of entering into a modern-day treaty or self-government agreement that was implemented through legislation, the VGFN became under the "control" of federal or territorial governments or was entirely dependent on those governments for its authority.
3. **Indigenous Governments Can—And Have—Enacted Laws Aimed At Protecting Their Citizens' Fundamental Rights and Freedoms:** The Court recognized that the VGFN Constitution included a section on its citizens' rights that mirrored the protections in the *Charter*. While the Court did not use this section to determine the issues before it, they noted that it was open to Ms. Dickson to pursue her claim under the equality rights provision in VGFN Constitution, rather than s. 15(1) of the *Charter*.
4. **Section 25 of the *Charter* Can Operate To "Shield" Choices of Indigenous Governments, In Certain Circumstances, Based On Indigenous Difference:** A majority of the Court held that this shield is not absolute. Rather, it is a "pop up shield" to protect rights related to "Indigenous difference" when "the conflict between the rights is real and irreconcilable, such that there is no way to give effect to the individual *Charter* right without abrogating or derogating from the right within the scope of s. 25."

5. **The "Other" Rights and Freedoms Protected By s. 25 Are Broader Than Those Rights Within s. 35 of the *Constitution Act, 1982***: A majority of the Court confirmed that these "other" rights include statutory rights as well as rights related to "Indigenous difference" (e.g., "interests connected to cultural difference, prior occupancy, prior sovereignty, or participation in the treaty process"). Notably, "other" rights do not necessarily have to be of a "constitutional character" in order to fall within the scope of s. 25.
6. **Courts Are Now Placed In A Role of "Continued Oversight of Indigenous Self-Government" for *Charter* Compliance:** This will likely result in increased litigation and costly court processes for Indigenous governments trying to justify choices based on "Indigenous difference" and balance the rights of their citizens under both Canadian and Indigenous law. As Justice Rowe noted in his dissent, this "will have far-reaching consequences for the relationship between the courts and Indigenous self-government."
7. **Going Forward, Indigenous Courts Will Have "A Meaningful Role To Play" In Interpreting and Balancing The Rights and Freedoms of Citizens Vis-à-Vis Their Governments:** As Indigenous governments increasingly enact legislation governing the relationship with their citizens, it will be important for decisions interpreting, applying, and balancing these decisions to be made by Indigenous peoples themselves. This is an important part of reconciliation and respecting Indigenous self-government.

Background and Context: Vuntut Gwitchin Self-Government

This Decision arises in the context of the ongoing "national project" of reconciliation between Indigenous peoples and the Crown, and the negotiation and implementation of modern-day treaties and land claim agreements.

In the Yukon, this process included the 1993 Yukon Umbrella Final Agreement ("**UFA**") as a road map for the negotiation of subsequent modern-day treaties and self-government agreements between Canada, the Yukon government, and 14 Yukon First Nations, including VGFN.

VGFN reached a treaty (protected by s. 35 of the *Constitution Act, 1982*) with Canada and the Yukon government in 1993, and a self-government agreement that same year. These agreements were approved and given effect by federal and territorial implementation legislation.

> "[M]odern treaties and similar agreements have sought to undo structures of imposed governance such as the *Indian Act*. . . they restore a "space" for Indigenous peoples to govern their own affairs pursuant to their own laws, customs, and practices. . . .
>
> The mutual commitments made within these agreements are necessary to ensure that Indigenous governance structures and traditions are not ignored by federal, provincial, or territorial institutions or rendered invisible in the face of conflicting laws. This is a legitimate concern, since Indigenous governance structures are emerging from a lengthy period in which this was what had occurred."
>
> Decision, para. 479

In addition to their arrangements with the Crown, VGFN has enacted its own Constitution and laws that reflect Vuntut Gwitchin legal orders, customs, and land-based governance system. Their treaty and self-government agreement expressly include that VGFN's Constitution will provide for the recognition of its citizens' rights and freedoms and the composition and duties of its government, including elected leaders.

Ms. Dickson's Challenge to the VGFN Constitution

Ms. Dickson, a VGFN citizen, brought a challenge to the section of the VGFN Constitution that required the elected Chief and Councillors to reside on VGFN's settlement lands or relocate there within 14 days of the election (the "Residency Requirement"). Ms. Dickson resided in Whitehorse and could not relocate to Old Crow: the remote, fly-in only community which is the seat of VGFN's government on settlement lands. She argued that the Residency Requirement breached her equality rights under s. 15(1) of the *Charter*, by discriminating against her based on her residence.

VGFN argued that the *Charter* does not apply to their government. As a self-governing Indigenous government, the VGFN Constitution sets out the fundamental rights and freedoms of its citizens, and its processes, not the *Charter*, should be used to resolve any internal citizen concerns. Furthermore, they argued that even if the *Charter* did apply, their community's collective choice to enact the Residency Requirement is shielded by s. 25 of the *Charter* (discussed further below).

The Decision was fundamentally about two issues:

1) Does the *Charter* apply to VGFN and the Residency Requirement?
2) If so, does the Residency Requirement breach Ms. Dickson's equality rights under s. 15(1) of the *Charter* or is it shielded by s. 25?

Understanding the Charter & Indigenous Self-Government

The *Canadian Charter of Rights and Freedoms* was enacted in 1982 and forms Part I of the *Constitution Act, 1982*. It sets out certain fundamental rights and freedoms of all people in Canada and provides limits on the ability of Canadian governments, including federal and provincial legislatures, to interfere with those rights.

Importantly, not all entities are subject to the *Charter*. As the text of s. 32(1) makes clear: "This *Charter* applies:

a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and

b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province."

Notably, s. 32(1) does not list the legislatures and governments of Indigenous peoples, or matters within Indigenous peoples' legislative authority. These rights instead are addressed within Part II of the *Constitution Act, 1982*, under s. 35, that recognizes "the existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed."

The only place that Indigenous rights are referenced in the *Charter* is in s. 25, which states that the rights and freedoms in the *Charter* "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." Section 25 expressly states that these "other rights or freedoms" include (a) any rights or freedoms recognized by the *Royal Proclamation of 1763* and (b) "any rights or freedoms that now exist by way of land claims agreements or may be so acquired."

This Decision was the first opportunity for the Court to consider the application of sections 32(1) and 25 of the *Charter* to a constitutionally recognized self-governing Indigenous government with its own Constitution, and which was not operating under the *Indian Act*.

Does the *Charter* Apply to VGFN or the Residency Requirement?

The Two Branch Test for Whether An Entity is Subject to the Charter

In 1997, in *Eldridge v. British Columbia*, the Court set out the following two branch test for whether an entity is subject to the *Charter*:

First, an entity may be found to be "government" for the purpose of s. 32(1) if it can be characterized as government "by its very nature" or "because of the degree of governmental control exercised over it."

Second, even if an entity is not itself "government" for the purpose of s. 32(1), it can still be subject to the *Charter* with respect to specific activities when those activities are "governmental in nature."

Under this framework, the courts have found that various entities that are not listed in the text of s. 32(1) are subject to the *Charter*, including municipalities, transit authorities, and First Nation band councils "exercising governmental powers under the *Indian Act*." (paras. 63-64 & 57)

VGFN Is A Government "By Its Very Nature"

A majority of the Court concluded that the *Charter* applies to the Residency Requirement because VGFN "is a 'government' by nature" under the first branch of the *Eldridge* test (paras. 101 & 241).

In reaching this conclusion, they considered following non-determinative factors:

- VGFN's democratically elected Council that was "accountable to [its] constituents in a manner analogous to that in which Parliament and the provincial legislatures are accountable to the electorates they represent" (paras. 79 & 278);
- VGFN's general taxation power that, "for the purposes of determining whether [it] can rightfully be described as 'government', is indistinguishable from the taxing powers of Parliament or the province" (paras. 80 & 278);
- VGFN's powers to make, administer, and enforce laws which are binding on the public within its settlement lands, which was "a quintessentially governmental function" (paras. 81 & 278);
- Whether VGFN exercised powers "conferred by Parliament or by a provincial legislature" or "that the federal or provincial government would otherwise have to perform itself." (paras. 77 & 278-279)

Regarding the fourth factor, a majority of the Court (4 of the 7 judges) focused on the role of the federal implementation legislation, which in their view meant that "VGFN exercises power that Parliament otherwise would have exercised through its legislative jurisdiction under s. 91(24) of the *Constitution Act, 1867*." The majority relied on this to find that the *Charter* applied to VGFN, stating that "[t]o that extent, it derives *at least some* of its lawmaking authority under federal law [and] it is this fact that triggers the application of the *Charter* in this case." (para. 82)

The rest of the Court (3 of the 7 judges) rejected this approach, and held that "the idea of self-government is not that it is an "authority [that] flows from Parliament", but rather Indigenous peoples exercising authority that is rightfully theirs." (paras. 244 & 465)

Significantly, the Court unanimously rejected arguments that VGFN was under the "control" of other governments and held that Indigenous peoples "do not depend on federal, provincial, or territorial legislation to exist as autonomous self-governing peoples." (paras. 88, 76, 243 & 462)

While the finding that VGFN is "by its very nature" a government under the first branch of the *Eldridge* test was a full answer, the Court also addressed other arguments before it as to whether the *Charter* applied to VGFN:

- A majority of the Court (4 of the 7 judges) held that *Charter* would also apply to VGFN's enactment of the Residency Requirement under the second branch of the *Eldridge* test (focused on specific activities). (paras. 94 & 101)
- The Court unanimously agreed that while the Residency Requirement was contained in the VGFN Constitution, which is a "law", this does not mean that the *Charter* would apply to VGFN by virtue of s. 52 of the *Constitution Act, 1982*, which provides that "laws" inconsistent with the Constitution (including the *Charter*) are of no force and effect. (paras. 98, 270 & 427-230)
- A majority of the Court (4 of the 7 judges) left unanswered whether an Indigenous governments' consent to the *Charter's* application was required or if the federal government could agree in a modern-day treaty or agreement that the *Charter* did not apply. (para. 100)

Did the Residency Requirement Breach Ms. Dickson's *Charter* Rights?

A majority of the Court – including all of the judges who found that the *Charter* applied to VGFN— found that the Residency Requirement breached Ms. Dickson's equality rights under s. 15(1) of the *Charter*.

They drew on the long history of decisions recognizing "Aboriginality-residence" as a potential marker for discrimination, and stated that "distinctions based on "non-resident status in a self-governing Indigenous community" will serve as "constant markers of suspect decision making or potential discrimination". (paras. 198 & 353-365)

> "Ms. Dickson is being denied, or at least significantly deterred from, the exercise of a fundamental democratic right — the right to run for Council — because of her non-resident status."
>
> Decision, para. 203

Did Section 25 Shield the Breach of Ms. Dickson's *Charter* Rights?

The Test for Section 25 of the Charter

As noted above, this Decision was the first time the Court had the opportunity to fully consider the purpose, role, and scope of s. 25 for self-governing Indigenous governments. A majority of the Court (4 of the 7 judges) observed that "[t]he purpose of s. 25 is to uphold certain collective rights and freedoms of Indigenous peoples when those collective rights conflict with an individual's *Charter* rights." (para. 107)

> "Fundamentally, the protection of Indigenous difference in s. 25 reflects the central place of Indigenous peoples and their governments in Canada's constitutional fabric. Recognizing constitutional protection under s. 25 allows Indigenous peoples to make decisions about their communities' individual and collective needs."
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> Decision, para. 171

Section 25 therefore provides a protective "shield" for aboriginal, treaty or other rights and freedoms: "When an individual's *Charter* right would abrogate or derogate from an Aboriginal, treaty, or other right, s. 25 requires the collective Indigenous right to take precedence, even if the *Charter* claimant is a member of the First Nation concerned." (para. 107)

This "shield", however, is not absolute. Not all individual and collective rights will be in conflict, and a majority of the Court described s. 25 as being a "pop up shield" that gave "[p]riority . . .to collective Indigenous rights only when they conflict with an individual's *Charter* right." (para. 110)

In determining if there is an irreconcilable conflict, courts are tasked to "interpret the substance of both the *Charter* right and the Aboriginal, treaty, or other right at issue. This interpretive exercise must be informed by, and respective of, Indigenous perspectives." (paras. 163-164)

A minority of the Court (2 of the 7 judges) disagreed with the role of s. 25 as a shield and instead outlined a framework where s. 25 was an interpretative aid or "prism" used in balancing the individual *Charter* rights with the collective rights and freedoms under s. 25. (paras 289 & 320)

Notably, a majority of the Court also found that the scope of s. 25 is broader than the rights recognized under s. 35 of the *Constitution Act, 1982*, and that "other" rights under s. 25 can include statutory rights and rights that are not necessarily of "constitutional status." (paras. 149, 218 & 325) The majority focused on the concept of "Indigenous difference" as the key factor for determining "[w]hether a right warrants s. 25 protection on the basis that it is an "other" right."

While the Court did not define "Indigenous difference" with precision, they did note that it is "understood as interests connected to:

- cultural difference,
- prior occupancy,
- prior sovereignty, or
- participation in the treaty process."

Protection under s. 25 will "hinge on whether it [the right] protects or recognizes those interests." (para. 150). What an "other" right or freedom is under s. 25 will continue to depend on context.

Based on the above, the majority of the Court set out the following four-part framework for when and how s. 25 is engaged:

1) The claimant must show that the impugned conduct *prima facie* (i.e., on its face) breaches an individual's *Charter* right. (para. 179)
2) The party invoking s. 25 must demonstrate that the impugned conduct is an Aboriginal, treaty, or "other right or freedom," or an exercise of such right or freedom, protected under s. 25. (para. 180)
3) The party invoking s. 25 must demonstrate an irreconcilable conflict between the *Charter* right and the Aboriginal, treaty, or "other right or freedom." "If the rights are irreconcilably in conflict, s. 25 will act as a shield to protect Indigenous difference." (para. 181)
4) The courts must consider if there are any applicable limits to the collective interest (e.g., the equality guarantee for male and female persons under s. 28 of the *Charter*). (para. 182)

Finally, if s. 25 is not engaged through the above framework, the party defending against the *Charter* claim may still argue that their action is justified under s. 1 of the *Charter*. (para. 183)

Section 25 "Shields" the Residency Requirement

A majority of the Court (4 of the 7 judges) applied the above framework and concluded that s. 25 operated as "a shield to protect the residency requirement" from Ms. Dickson's claim:

- Ms. Dickson's s. 15(1) *Charter* right was "*prima facie* breached." (para. 184)
- VGFN's Residency Requirement—the "right to set criteria for membership in its governing body"—was an exercise of an "other right" under s. 25. It is both a statutory right, by virtue of the federal implementation legislation, and a "right that protects Indigenous difference" based on VGFN's prior sovereignty and participation in the treaty process. (paras. 185, 209 & 217)
- VGFN demonstrated that Ms. Dickson's s. 15(1) right and its s. 25 "other" right "are irreconcilably in conflict" which "engages s. 25 as a protective shield, insulating the collective right from the individual *Charter* claim." (para. 186)
- There were no other applicable limits in this case. (para. 187)

A minority of the Court (2 of the 7 judges) employed a framework for s. 25 where it was an "interpretative aid" or "prism" rather than a shield and found that the Residency Requirement was not protected by s. 25, nor was it saved by s. 1 of the *Charter*. (paras. 391 & 408)

Conclusion

As Justice Rowe observed in dissent, "[b]oth the *Charter* and the diversity of Indigenous legal traditions are concerned with the protection of human dignity, but the *Charter* represents only one way to achieve this." (para. 498) As Indigenous peoples increasingly enact their own laws for the recognition of their citizens' fundamental rights and freedoms or the protection of their collective rights, Indigenous governments will be called upon to balance these rights in ways that respect their own distinct legal orders, customs, and requirements.

While a majority of the Court found that VGFN's choice in enacting the Residency Requirement was protected by s. 25 – and set out a four-part test for how courts apply s. 25 of the *Charter* in the future – the autonomy of Indigenous peoples in making these choices for how to protect their "Indigenous difference" was unanimously highlighted.

> "Nothing prevents Indigenous governments from protecting rights or interpreting them. Indigenous courts – including the Vuntut Gwitchin Court (which has yet to be established) – will have a meaningful role to play."
>
> Decision, para. 323

Time will tell if Canadian courts respect Indigenous governments' (and eventually, Indigenous courts) balancing of their citizens and communities individual and collective rights, or if illusionary fears of "*Charter*-free zones" will continue to drive judicial intervention.

About Us

Aird & Berlis LLP's Indigenous Practice Group includes First Nations, Métis, and non-Indigenous lawyers with extensive experience in Aboriginal law as well as supporting Indigenous peoples in advancing their own jurisdiction, law, and legal orders (i.e., Indigenous law). For more information about our firm or this summary, please feel free to contact:

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