Individual Charter Rights vs Collective Indigenous Rights

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The Supreme Court's decision in Dickson v. Vuntut Gwitchin

Overview

On March 28, 2024, the SCC released its highly anticipated decision in *Dickson v. Vuntut Gwitchin First Nation*[1] (*Dickson*). In short, a majority of the Court held that s. 15(1) of the *Charter* (equality rights) applied to an electoral residency requirement enacted by a self-governing First Nation. However, the majority upheld the residency requirement under s. 25 of the *Charter* – a separate provision that shields Indigenous governments from individual *Charter* right infringements when such rights irreconcilably conflict with certain collective Indigenous rights.

Dickson is a landmark ruling of major significance to First Nations exercising self-government powers. The Court confirmed, for the first time, that the *Charter* applies to self-governing First Nations, by virtue of s. 32 of the *Charter*. The decision also offers insight into the nature and scope of collective Indigenous rights under s. 25 of the *Charter*, and how those rights are to be reconciled with individual *Charter* rights. The majority's decision culminates in a new four-part test informing when s. 25 will "shield" Indigenous governments from *Charter* infringement claims.

The decision also has broader implications beyond Indigenous self-government. The Court's broad application of the *Eldridge* framework – used to determine what government entities are bound by the *Charter* by virtue of s. 32 – is relevant for entities who have traditionally sought to avoid *Charter* scrutiny on the basis that they are not "governments" within the meaning of s. 32. This issue may see renewed prominence in litigation as a result of the SCC's decision.

Background & Judicial history

Vuntut Gwitchin First Nation (VGFN) adopted a self-government agreement and constitution in 1993. The constitution included a residency requirement permitting members to run for Chief and Council if they resided or were willing to relocate to Old Crow, the VGFN's seat of government. The requirement barred Cindy Dickson, a VGFN

member residing in Whitehorse, 800 km south of Old Crow, from running as Councillor. Ms. Dickson testified that she could not move to Old Crow largely because her son required access to medical care unavailable there.

Ms. Dickson sought relief in the Supreme Court of Yukon, claiming the requirement violated her right to equality under s. 15(1) of the *Charter*. The trial court accepted the *Charter*'s application to VGFN, but held that the residency requirement did not infringe s. 15(1) right.[2] The trial judge also held that even if the requirement infringed s. 15(1), s. 25 of the *Charter* shielded VGFN from *Charter* rights.[3] The Yukon Court of Appeal[4] agreed that the *Charter* applied to VGFN and held that the residency requirement infringed Ms. Dickson's equality rights. The majority ultimately concluded that the residency requirement was "shielded" by virtue of s. 25 of the *Charter.*[5]

The SCC's majority and dissenting opinions

Majority decision

The majority, under the pen of Justices Kasirer and Jamal, held that the *Charter* applied to VGFN by virtue s. 32 of the *Charter*. This section functions as a gateway into the *Charter* by expressly identifying which government entities are subject to its scrutiny. These include the legislature and government of each province in respect of provincial matters, as well as Parliament and the federal government in respect of federal matters (which include territorial governments and territorial matters). As a result, under s. 32(1), the *Charter* applies broadly to the legislative, executive, and administrative branches of government in respect of all matters within their authority.[6]

In many *Charter* cases, the interpretation of s. 32(1) is a live and contentious issue – particularly so for entities, such as VGFN, that do fit neatly within its formal parameters. In such case, courts seek interpretive guidance from the SCC's seminal decision in *Eldridge v. British Columbia (Attorney General*),[7] which holds an entity is a "government" for the purposes s. 25: (1) "either by its very nature or in virtue of the degree of governmental control exercised over it"; or (2) even if an entity is not part of government, it nonetheless performs governmental activities.[8]

Notwithstanding that VGFN is a self-governing First Nation, the majority held that the *Charter* applied to the requirement, "either because the VGFN is a government by nature, or because the enactment and enforcement of the residency requirement is a 'governmental activity'".[9] The majority qualified this finding by stating that s. 32 was engaged in this case, only insofar as the requirement "flows from an exercise of statutory power" by Parliament under s. 91(24) of the *Constitution Act.*[10]The majority left for another day the question of whether an exercise of inherent self government "untethered from federal legislation" would be subject to the *Charter.*[11] As discussed further below, the majority's broad application of s. 32 may have implications for non-Indigenous entities who have traditionally sought to avoid Charter scrutiny on the basis that they are not "governments" within the meaning of s. 32.

Having established that the *Charter* in fact applies to VGFN, the majority engaged in a comprehensive interpretation of s. 25 and its interaction with individual equality rights under s. 15(1) of the *Charter.* The majority noted that s. 25 was designed to protect "aboriginal, treaty or **other rights** or freedoms that pertain to the aboriginal peoples of

Canada" where a competing individual *Charter* right is claimed.[12] The Court focused on the "other right" aspect of s. 25, which it interpreted as including rights associated with "Indigenous difference" (*i.e.*, interests "connected to cultural difference, prior occupancy, prior sovereignty, or participation in the treaty process").[14]

Flowing from this purposive analysis, the majority concluded that s. 25 protects against *Charter* claims only if "there is **irreconcilable conflict** between the claimed *Charter* right and the s. 25 Indigenous right, **such that** giving effect to the *Charter* right would **undermine the Indigenous difference** protected or recognized by the collective right".[14] In the majority's view, the shielding effect of s. 25 is limited by the "real and irreconcilable" requirement, which is intended to set a high bar and afford courts a degree of flexibility to reconcile the two competing rights. The majority contemplated other potential limitations to s. 25, including protections against gender discrimination under ss. 28 and 25(4) of the *Charter*, but left that issue for future cases.[15]

In summary, the majority articulated a new four-part test for when s. 25 can be invoked as a shield against *Charter* claims: (1) the claimant must demonstrate a *prima facie* breach of a *Charter* right; (2) the party invoking s. 25 must demonstrate the existence of a right protected by s. 25; (3) that party must show an irreconcilable conflict between the individual *Charter* right and the collective s. 25 right; and (4) the Court must consider whether there are any limits on the collective right.

In applying this framework, the majority found that Ms. Dickson had demonstrated a *prima facie* breach of her individual s. 15(1) equality right. However, the majority nevertheless shielded VGFN from this *Charter* claim, holding that the residency requirement reflected a collective right designed to protect Indigenous difference, which, in turn, created a real and irreconcilable conflict between the individual right and the collective right. The residency requirement was upheld.

The dissenting opinions

Martin and O'Bonsawin JJ. agreed with that the *Charter* applied to the residency requirement by virtue of s. 32, and that the residency requirement represented a *prima facie* infringement on Ms. Dickson's s. 15(1) rights. However, interpreted s. 25 more narrowly, holding that the requirement fell outside of the scope of s. 25 and was thus of no force and effect. This opinion was, at least in part, fueled by concerns that an unrestrained s. 25 "shield" could create "*Charter*-free zones", thereby undermining accountability between members and their governments.[16]

Rowe J., in a separate dissent, found that VGFN and the residency requirement should not attract *Charter* scrutiny at all. A textual reading of s. 32(1), according to Rowe J., leads to the inescapable conclusion that the *Charter* only applies to federal, provincial, and territorial governments, or other entities exhibiting a "significant connection" to them. Rowe J. notes that while such a connection may be present with "band council structures imposed by the *Indian Act*", the same cannot be said for self-governments like VGFN. Accordingly, applying the *Charter* to VGFN would represent a unilateral transposition of the *Charter* – "an instrument designed by and for the federal and provincial governments" – on a group that did not "participate in its creation or agree to its terms". This would undermine the "objective of reconciliation" and "need to respect the ability and the right" of VGFN "to make decisions pursuant to their own laws, customs, and practices."[17]

Key takeaways

Dickson is an important decision respecting the Charter's application to self-governing First Nations - particularly so where a First Nation law, designed to protect a "collective Indigenous right", is faced with a Charter right infringement claim. This case confirms that s. 25 of the Charter may "shield" a self-governing First Nation from such Charter claims if there is an "irreconcilable conflict" between the claimed Charter right and the collective Indigenous right. The majority's new four-part legal test for adjudicating such disputes brings much needed clarity to the purpose and effect of s. 25 and its potential shielding effect for individual Charter claims.

Notwithstanding this clarity, the decision leaves some residual uncertainty with respect to the outer limits of the s. 25 shield. For example, the majority left for another day the question of whether a s. 25 collective right requires a "constitutional character" or can be established through a First Nation's assertion of inherent jurisdiction, in a manner untethered from Parliament's jurisdiction. As noted by the dissent, an overly broad s. 25 shield, without clear limits, runs the risk of creating "Charter free zones", which may undermine accountability between Indigenous members and their councils.

The decision also has broader implications beyond Indigenous self-government. The Court's broad application of the Eldridge framework – used to determine what government entities are bound by the Charter by virtue of s. 32 – is relevant for entities who have traditionally sought to avoid Charter scrutiny on the basis that they are not "governments" within the meaning of s. 32. This issue may see renewed prominence in litigation as a result of the SCC's decision.

Footnotes

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

[2] *Dickson v. Vuntut Gwitchin First Nation*, 2020 YKSC 22.

[3] *Ibid* at para 28.

[4] *Dickson v. Vuntut Gwitchin First Nation*, 2021 YKCA 5

[5] *Ibid* at para 37.

[6] *Dickson, supra* at para 41.

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

[8] *Ibid* at paras 44 and 66-69.

[9] *Dickson, supra* at para 101.

[10] *Ibid* at para 91.

[11] *Ibid* at para 101.

[12] *Ibid* at para 107.

[13] Beyond this, the Majority refrained from imposing other formal or substantive requirements on a s. 25 "other right", leaving for another day the question of whether such a right must have a "constitutional character".

[14] *Ibid* at para 139.

[15] *Ibid* at para 173.

[16] *Ibid* at para 331.

[17] *Ibid* at para 502.

[18] *Ibid.*

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