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Supreme Court of Canada rules Charter applies to First Nation government and its citizens

By **Cristin Schmitz**

Law360 Canada (March 28, 2024, 5:16 PM EDT) -- The Supreme Court of Canada has ruled 6-1 that the Charter applies to a First Nation government and its citizens in Yukon, as well as ruling 4-3 that the Charter's s. 25 shields from a community member's s. 15 equality rights challenge the self-governing Vuntut Gwitchin's constitutional requirement that its elected leadership must live on the First Nation's traditional territory.

On March 28, 2024, the top court's four-judge majority dismissed (with three judges dissenting in two separate opinions) the appeal of Cindy Dickson, as well as the cross-appeal of the respondent Vuntut Gwitchin First Nation, of which Dickson is a member: *Dickson v. Vuntut Gwitchin First Nation*, 2024 SCC 10.

The court's seminal 316-page ruling addresses the interplay between Charter individual rights and freedoms and the collective and Aboriginal rights of Indigenous Peoples and their governments under ss. 35 of the *Constitution Act, 1982*.

Justice Nicholas Kasirer

The court decided for the first time the key issue: whether under Charter s. 32(1), titled the "Application of the Charter," the Charter applies to a First Nation governing body and its citizens.

The high court went on to address for the first time in depth the nature, scope and operation of s. 25 of the Charter, a non-derogation provision that states 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 ... (emphasis added)."

The four-judge majority judgment, co-written by Justices Nicholas Kasirer and Mahmud Jamal and backed by Chief Justice Richard Wagner and Justice Suzanne Côté, concluded that the Charter does apply to the Vuntut Gwitchin First Nation (VGFN) government and its citizens and also sets out a four-step analytical framework under s. 25.

Justice Mahmud Jamal

The majority's conclusion on the threshold question of the Charter's applicability to the VGFN was accepted by dissenting judges Sheilah Martin and Michelle O'Bonsawin, but not by dissenter Malcolm Rowe, who held that the residency rule in the VGFN's constitution is not subject to the Charter because Indigenous internal governance doesn't fall within the scope of Charter 32(1) (as properly interpreted) in the absence of a significant connection to the federal or a provincial government.

For the majority, Justices Kasirer and Jamal held that "the Charter applies to the VGFN and to its citizens like Ms. Dickson, principally, but not only, because the VGFN is a government by nature."

The majority said that the circumstances in the case at bar "show that for Indigenous communities, s.32(1) and s.25 are intimately connected. It is true that the application of individual Charter rights to a self-governing Indigenous community may be thought to inhibit the pursuit of rules designed to protect minority Indigenous rights and interests. But s.25, by providing protection for collective Indigenous interests as a social and constitutional good for all Canadians, acts as a counterweight. Properly understood, s.25 allows for the assertion of individual Charter rights except where they conflict with Aboriginal rights, treaty rights, or 'other rights or freedoms' that are shown to protect Indigenous difference."

The majority said that Dickson, who resides in Whitehorse for family and medical reasons but was barred by the VGFN's residency requirement from running as a counsellor in the First Nation's government, had demonstrated a prima facie infringement of her right to equality, protected by s. 15(1) of the Charter — a conclusion endorsed also by Justices Martin and O'Bonsawin in their joint dissent.

However, the two dissenters disagreed with the four judge-majority's determination that "s. 25 protects the residency requirement from abrogation or derogation by her Charter right. Tied to ancient practices of government that connect leadership of the VGFN community to the settlement

land, the residency requirement protects Indigenous difference and, pursuant to s. 25, cannot be abrogated or derogated from by Ms.Dickson's individual right with which it is in irreconcilable conflict."

In making that determination, Justices Jamal and Kasirer set out and applied a four-step analytical framework for how s. 25 operates. First, a Charter claimant "must show that the impugned conduct *prima facie* breaches an individual Charter right. If no *prima facie* case is made out, then the Charter claim fails and there is no need to proceed to s. 25. Second, the party invoking s. 25 — typically the party relying on a collective minority interest — must satisfy the court that the impugned conduct is a right, or an exercise of a right, protected under s. 25. That party bears the burden of demonstrating that the right for which it claims s. 25 protection is an Aboriginal, treaty, or other right. If the right at issue is an 'other right', then that same party 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," the majority said. "Fourth, courts must consider whether there are any applicable limits to the collective interest relied on. If s. 25 is found not to apply, the party invoking s.25 may show that the impugned action is justified under s.1 of the Charter."

Reasoned the majority, "the VGFN has established that, properly interpreted, Dickson's.15(1) right and [VGFN's] right within the scope of s.25 are irreconcilably in conflict."

Justices Kasirer and Jamal explained that "to apply s.15(1) would abrogate or derogate from the Vuntut Gwitchin's right to govern themselves in accordance with their own particular values and traditions and in accordance with the self-government arrangements entered into with Canada and the Yukon. The Indigenous difference protected by the residency requirement is inextricably tied to the VGFN's connection to the settlement land. Permitting a councillor to reside in Whitehorse would unacceptably diminish this connection and would undermine, in a non-incidental way, the VGFN's right to decide on the membership of its governing bodies. Giving effect to Dickson's Charter right in such a manner would pose a real risk to the continued vitality of Indigenous difference and would abrogate or derogate from the VGFN's right, contrary to s. 25. This engages s. 25 as a protective shield, insulating the collective right from the individual Charter claim."

Dissenting, Justices Martin and O'Bonsawin would have allowed Dickson's appeal and dismissed the Vuntut Gwitchin's cross-appeal. The pair agreed with the majority that the VGFN is a government by nature and, thus, subject to the Charter and that the VGFN's enactment of the residency requirement attracted Charter scrutiny. However, they disagreed with the majority's view of s. 25's scope of protection.

"Rights within the scope of s. 25 are limited to those that are truly unique to Indigenous Peoples because they are Indigenous," they wrote. "They do not extend to all matters on which Indigenous governments may act. The majority's formulation that an 'other' right will fall within the ambit of s. 25 when the party seeking to rely on it establishes that the 'right protects or recognizes Indigenous difference' is too broad and does not serve a meaningful filtering function at the rights recognition stage."

Justices Martin and O'Bonsawin reasoned that "it is not enough for a right to relate to Indigenous Peoples to bring it within the scope of s. 25 or, in the context of self-government, for an Indigenous nation to possess broad rights to govern its community. The focus must be on the collective right itself and whether it is unique to an Indigenous community on the basis of Indigeneity. In this context, intra-group distinctions based on a personal characteristic other than Indigeneity will generally fall outside the ambit of s. 25, but s. 25 could capture laws that distinguish between Indigenous people and non-Indigenous people for the purpose of protecting interests associated with Indigenous difference. This conception ensures that s. 25 does not serve to effectively create extensive Charter-free zones in the context of Indigenous self-government. Members of Indigenous communities must be able to challenge the actions of their own governments — they must not be denied important Charter protections which are intended to apply to every person."

Justices Marin and O'Bonsawin ruled that s. 25 did not apply to shield the residency requirement as the requirement did not implicate a collective Indigenous right within the scope of s. 25 "because a self-governing Indigenous nation's right to regulate the composition of its governing bodies cannot be

said to be a unique collective right, belonging to Indigenous peoples because they are Indigenous."

"Rather, the residency requirement is directed at the internal regulation of the VGFN and is not aimed at recognizing the special status of Indigenous collectives within the broader Canadian state," they explained. "Alternatively, even if the residency requirement did constitute the exercise of a right within the scope of s. 25, then applying a balancing to reconcile the competing interests at play would nevertheless lead to the conclusion that s. 25 would not operate to give primacy to the residency requirement over individual Charter rights because the residency requirement would not constitute one that is necessary to the maintenance of the VGFN's distinctive culture."

Turning to the analysis of whether the residence requirement's breach of Dickson's equality rights was justified under s. 1 of the Charter as "reasonable and demonstrably justified in a free and democratic society," Justices Martin and O'Bonsawin concluded it was not justified as it was not minimally impairing of Dickson's Charter rights "and the VGFN has not shown that the benefits of the residency requirement outweigh the negative effects of the s. 15(1) breach at issue. There is no evidence that the VGFN has sought any meaningful alternatives to the residency requirement itself. While the residency requirement does ameliorate the effects of colonial dislocation of Vuntut Gwitchin peoples from control over their traditional territory, it also represents a significant incursion to democratic participation. It is therefore not representative of an appropriate balance between its salutary and deleterious effects."

Bridget Gilbride, Fasken Martineau DuMoulin LLP

Bridget Gilbride of Vancouver's Fasken Martineau DuMoulin LLP, who with Harshi Mann represented Dickson, told Law360 Canada, "There are many positive findings in the decision, and we are very pleased the decision confirms that the Vuntut Gwitchin people hold Charter rights in relation to their Indigenous government. We are also happy that the decision recognizes that s. 25 does not operate as an absolute shield to those Charter rights, which was the effect of the [Yukon courts'] decisions below. That is a big success."

"Of course, we are disappointed with the result in this case and agree with the reasons of Justice Martin and Justice O'Bonsawin and their view that individual Charter rights must be balanced against collective rights," Gilbride added. Yet "the recognition that Indigenous self-governments can be governments under s. 32, and the affirmation of Indigenous citizens' Charter rights, is an advancement for Indigenous Peoples in Canada."

Gilbride said "the court agreed with our arguments that the Charter applied to the VGFN government and that s. 25 does not completely immunize the First Nation from Charter review. Ultimately, the justices held different views on the appropriate balance in this case, and we think the minority decision of Justice Martin and Justice O'Bonsawin got that balance right."

The VGFN welcomed the judgment, stating in a media release that the residency requirement was established "by the deliberation and consensus decision of our general assembly and was based on the guidance of our elders and their knowledge."

The VGFN highlighted the majority's statements that "requiring VGFN leaders to reside on settlement land helps preserve the leaders' connection to the land, which is deeply rooted in the VGFN's distinctive culture and governance practices. The residency requirement promotes the VGFN's expectation that its leaders will be able to maintain ongoing personal interactions between leaders and other community members. It also bolsters the VGFN's ability to resist the outside forces that pull citizens away from its settlement land and prevents erosion of its important connection with the land. Such interests are associated with various aspects of Indigenous difference, including Vuntut Gwitchin cultural difference and prior sovereignty, as well as their participation in the treaty process that culminated in the enactment of the VGFN Constitution."

"While today's long overdue recognition and affirmation of Indigenous self-government by the court is monumental, we acknowledge and look to the past generations of our leadership who guided us throughout our history and ensured our continued survival, well-being and dignity together on our land as Vuntut Gwitchin," the First Nation said. "As our late Vuntut Gwitchin First Nation leader Robert Bruce Jr. said in reference to this case, "The Elders knew that the outside world was unpredictable and worried about hardships coming in the future. They wanted future generations to remember that we can rely on our land and traditions."

VGFN Chief Pauline Frost said, "Today's Supreme Court decision demonstrates respect for and deference to our First Nation's inherent right to govern ourselves collectively in accordance with our Constitution, laws, values and our special relationship to our traditional territory. This inherent right is affirmed in our modern treaty and self-government agreements with the governments of Canada and Yukon, and we will continue to implement this together to meet evolving circumstances and needs of our citizens."

Andrew Lokan, Paliare Roland Rosenberg Rothstein LLP

Andrew Lokan of Toronto's Paliare Roland Rosenberg Rothstein LLP, counsel for the intervener Congress of Aboriginal Peoples, which represents off-reserve Indigenous people, called the *Dickson* judgment "a long and complex landmark decision that is very important, both to the scope of the Charter and the manner in which it will apply to Indigenous governments."

Lokan said the court has brought clarity to the issue of whether the Charter applies to Indigenous governments. "It does," he said, "though not necessarily in everything they do. However, there is clearly an ongoing debate within the court as to whether s. 35 of the *Constitution Act, 1982* protects the inherent right to self-government. The majority ducked that question, holding that the Charter applies because the VGFN was in part exercising powers delegated by federal legislation. By contrast, Justices O'Bonsawin and Martin held that even when an Indigenous government is exercising entirely self-government powers, it is still bound by the Charter."

Commenting on the court's division over the effect of s. 25, Lokan noted that both the majority and dissent sought to balance collective and individual rights but drew the line in different places. "The majority set out a test that would protect rights rooted in 'Indigenous difference' from being abrogated or derogated from in many cases, even when the person claiming Charter protection is a member of an Indigenous community," Lokan observed. "The dissent, however — notably including Justice O'Bonsawin, the court's only Indigenous judge — would have taken a narrower approach to s. 25, holding that it was engaged only when needed to protect the special status of certain collective rights held by Indigenous peoples."

Lokan said the majority held that the "Indigenous difference" test favoured the collective rights of the First Nation while the dissent would have found that s. 25 did not prevent the residency requirement from being struck down as discriminatory, since it did not relate to the special status of collective rights held by Indigenous Peoples because they are Indigenous.

"Crucially, both the majority and dissent recognized the vulnerability of Canada's Indigenous Peoples who live off-reserve or away from their traditional lands, who often have little or no connection to their home communities and the discrimination they face as a direct legacy of colonial and assimilationist policies and practices, including the residential school system and the *Indian Act*," he said. "This point was strongly emphasized by the Congress of Aboriginal Peoples. We hope that lower courts, governments and policy-makers take note."

Law360 Canada reached out to counsel for all the parties and many of the 13 interveners, but there were no other comments by press time.

The case came before the top court when Cindy Dickson, a member of the VGFN, was granted leave to appeal a 2021 decision of the Yukon Court of Appeal, which rejected her s. 15 Charter equality rights challenge to the residency requirement in her First Nation's election code.

Dickson had wanted to stand for election as a councillor in 2018, but the VGFN's council rejected her candidacy based on its modern constitution — established as part of a self-government and final land claim agreement and treaty with Canada — that requires that council members must live in, or relocate within 14 days of election to, the fly-in village of Old Crow on the First Nation's settlement lands.

Dickson grew up in Old Crow for a number of years but lives and works in Whitehorse (800 kilometres south of Old Crow), where she needed to live near the hospital due to the medical needs of her son, who was 15 when the Vuntut Gwitchin council rejected the single mother's candidacy, based on the residency provision in the First Nation's constitution. The Yukon Court of Appeal below accepted that the Charter does apply to the First Nation's residency requirement as a "law" under s. 32 and that Dickson was discriminated against contrary to Charter s. 15(1) on the basis of the analogous ground of "aboriginality-residence" — even though the residency requirement "was obviously not intended to" perpetuate disadvantage and stereotyping: *Dickson v. Vuntut Gwitchin First Nation* 2021 YKCA 5.

Photos of Justices Nicholas Kasirer and Mahmud Jamal: SCC collection

If you have any information, story ideas or news tips for Law360 Canada, please contact Cristin Schmitz at cristin.schmitz@lexisnexis.ca or call 613-820-2794.