A Supremely Complex Decision

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On March 28, 2024, a majority decision of the Supreme Court of Canada in *Dickson v. Vuntut Gwitchin First Nation* held that Canada's constitutional bill of rights, the *Canadian Charter of Rights and Freedoms* ("the *Charter*"), applied against an Indigenous government's residency requirements for election to the government's Council. However, the majority also held that a section of the *Charter* that offers some protective effect for Indigenous governments would protect this residency requirement from a challenge under the *Charter*. It thus sought to establish a nuanced framework on some challenging questions.

The Court's 317-page decision will warrant much more analysis in the time ahead, but it is worth getting an initial sense of what it contains.

The case reaches significant determinations but with some messy splits amongst the seven justices who sat on the case. One justice splits off more significantly, and the six who agree on general points on application of the *Charter* to Indigenous governments end up splitting 4-to-2 on how to work with the section of the *Charter,* section 25, that offers a partial shielding effect from the *Charter* for Indigenous governments. The case is significant in offering more interpretation of that section than ever before (the Supreme Court of Canada has famously resisted interpreting that section in past judgments, notably in a major decision in 2008 that gave a clear opportunity to do so but saw only one separate opinion engage with it). But there is, in effect, a disagreement on a more fundamental question of when collective and individual rights are in conflict or not, thus speaking to a broader set of challenging questions for ongoing discussion.

The latest decision is lengthy and complex, so it is necessary to unpack some background and then to turn to what the Court has said.

Background

The case involves two sections of the *Charter*. Section 32 is an application clause providing for application of the *Charter* to the federal, provincial, and territorial governments (and, implicitly, for vertical application only and not horizontal application between citizens). That clause has been read in larger ways over the years to apply to entities not explicitly listed but that are governmental in nature or performing inherently governmental functions, partly so that governments could not move various activities outside the application of the *Canadian Charter*. There had not yet been explicit consideration of how these principles applied in the context of Indigenous governments.

The context of Indigenous governments draws in another section as well, section 25 of the *Charter*, which provides that "[t]he 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".

Recent decades have seen the explicit recognition by non-Indigenous governments of an increasing number of Indigenous governments in Canada, often through modern treaty agreements (with this being a technical term referring to treaties negotiated since the 1960/70s, as opposed to "historic" treaties negotiated prior to 1921). The Vuntut Gwitchin First Nation in Yukon in the northwesternmost part of Canada has such a modern treaty agreement, finalized in 1993, the Vuntut Gwitchin First Nation Self-Government Agreement.

In accordance with this treaty, the Vuntut Gwitchin established a Vuntut Gwitchin First Nation Constitution, which in Article IV includes a set of individual rights with significant overlaps with the *Charter* while nonetheless varying these rights in some ways. It guarantees the right to vote in Vuntut Gwitchin elections and to hold office in Vuntut Gwitchin Government, although with a specific qualification that this right is "[s]ubject to residency and other requirements set out in Vuntut Gwitchin Law".

Vuntut Gwitchin election laws have in fact required that someone elected to the Vuntut Gwitchin Council establish residency within 14 days on the area of Vuntut Gwitchin Settlement Land. This means that someone must be resident in the area near Old Crow in northern Yukon and precludes residency in Whitehorse, Yukon's capital and largest city. Cindy Dickson used the *Charter* to challenge this requirement, claiming medical needs to live in Whitehorse, which could give rise to certain arguments based on the equality rights clause in the *Charter*, although the main novel parts of the case concern the application of the *Charter*.

What Has the Court Said?

The decision is highly complex. One justice, Justice Rowe, offers a separate dissenting opinion based on careful textualist reading that would actually offer the Vuntut Gwitchin the most scope for self-determination without being subject to the *Charter* (paras 417ff). That judgment warrants more attention in how it actually uses what some would think of as relatively conservative approaches to legal interpretation in arriving at a result the most protective of Indigenous nations as collective entities making their own decisions about the application of their values in self-government contexts. However, within time and space limits, and given that the other six justices to sit on the case disagreed, those interesting discussions will need to be for another day.

The four-justice majority decision authored by Kasirer and Jamal JJ reads *Charter* application seemingly widely, albeit with somewhat less clarity than one might have hoped, and then goes on to offer an approach to the partially protective effects of section 25 of the *Charter*, arriving at a reasonably clear legal test.

First, then, this decision is slightly less clear than it could be on what it has actually concluded about what type of government action is at stake that makes the residency requirement subject to the *Charter*. In parts of the reasoning, Kasirer and Jamal JJ seem to suggest that there is a need for consistency across different types of Indigenous governments with different sources of authority (paras 57ff). At other places, they emphasize the role of federal and provincial governments in giving statutory force to the treaty with the Vuntut Gwitchin and even suggest that their conclusion might be limited to those statutory contexts (paras 86, 91). They thus reach a conclusion on a somewhat ambiguous basis: " We conclude that the *Charter* applies to the residency requirement, either because the VGFN is government by nature, or because the enactment and enforcement of the residency requirement is a "governmental activity" operating under a statutory power of compulsion." (para 101). The inability to decide which branch of the legal test applies is of some concern because it makes it more challenging for other courts bound by the Supreme Court of Canada to discuss the law cohesively if the Supreme Court of Canada itself is not sure how to apply aspects of it.

Nonetheless, they are then able to proceed to a careful, nuanced analysis of section 25 of the *Charter*, whose purpose they now determine to be "to protect Indigenous difference against inappropriate erosion by individual *Charter* rights" (para 118). They do so based on careful reading of the bilingual text and other pertinent materials. Their approach becomes oriented to seeing section 25 apply to offer protection from *Charter* rights only when there is an "irreconcilable" conflict between collective and individual rights (paras 161-62). They arrive ultimately at a reasonably clear, four-step framework for using section 25 (paras 178-83).

By contrast, the partly dissenting opinion of Martin and O'Bonsawin JJ would take up very different forms of reasoning and arrive at some different approaches. They agree that the *Charter* applies, but they do so after some wider-ranging reasoning. And their conclusion seems to embody points in some tension with each other. They cite scholarly work on the *Charter* as a "nation-building instrument" (para 281) but then apply that to Indigenous nations while missing that the history of the "nation-building" aspect of the *Charter* was to limit difference within Canada. They refer to Indigenous governments existing from time immemorial but then assert that they are subject to application tests under section 32 of the *Charter* (para 282).

The reasoning of the partial dissent of Martin and O'Bonsawin on section 25 is also wide-ranging, from a longer discussion of drafting history than in the majority (paras 294-308) to a surprising and relatively unexplained reference at para 317 to the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) being "binding" on Canada in a manner that triggers a presumption of conformity of legislation with international instruments (that principle, I would note, is normally in reference to international treaties that are fully binding at international law, whereas UNDRIP is a significant normative instrument but not such a treaty). Their reasoning throughout the section 25 discussion leaves some loose ends for future discussion.

However, they would arrive at a more constrained picture of section 25: "rights within the scope of s. 25 are limited to those that are truly unique to Indigenous peoples

because they are Indigenous" (Para 337). They have a concern about a creation of "*Charter*-free zones" (para 331) and want to ensure that Indigenous individuals can challenge their own Indigenous governments using the (Canadian) *Charter*. So, like the majority, they want application of section 25 only in the case of a true conflict, but they then offer an approach oriented to whether there is more than a minor impact on a collective right and the necessity of the collective right to distinctiveness of an Indigenous culture (para 343). Parts of this approach do not seem self-defining, and there would be many more questions ahead.

Conclusion

This case is highly complex, and I offer today's post just as a quick initial take. Most of the Court does see the *Canadian Charter* as applying to Indigenous governments, effectively seeing it as a rights instrument that takes priority in all Canadian governmental contexts, though with some complications on that to be analyzed further in future. They also look for a constrained application of section 25's potential protection of Indigenous governments from the *Charter*. But there is much work ahead in understanding interactions of collective and individual rights in ways that can operationalize these approaches. (I have expressed views on related points in some of my theory work on collective rights, and I will seek in future work to develop some of how that helps operationalize approaches within Canadian law.)
