Interpretive Prism or Shield? A Primer on Section 25 of the *Charter*

The *Dickson v Vuntut Gwitchin* case ("*Dickson*"),[1] which is now before the Supreme Court of Canada, provides us with an opportunity to reconsider the role of section 25 of the *Charter* — an oft-neglected provision that deals with the interplay between Indigenous peoples' rights and other sections of the *Charter*. Section 25 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 including: a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and b) any rights or freedoms that now exist by way of land claim agreements or may be so acquired.[2]

Broadly speaking, *Dickson* concerns the relationship that this provision establishes between the self-government rights of First Nations and the *Charter* rights of their members. In short, the case originated when Cindy Dickson, a member of the Vuntut Gwitchin First Nation ("VGFN"), was prevented from taking up a VGFN Council seat because of a residency requirement in the VGFN Constitution that she was unable to comply with. While the Yukon Court of Appeal held that this residency requirement infringed section 15 of the *Charter* (the equality rights section) it concluded that section 25 effectively shields the requirement from challenge, since allowing the challenge would limit the self-government rights of the VGFN.

In anticipation of the Supreme Court's consideration of this case, this article offers a brief primer on section 25. While there has been a relative dearth of litigation on section 25, the Supreme Court (and one Justice in particular) has dropped a number of breadcrumbs that provide some sense, at least, of its meaning and scope. This article aims to follow those breadcrumbs.

What's the Purpose of Section 25?

There are basically *two* competing interpretations of the purpose of section 25.

The first interpretation is that section 25 serves as an *interpretative prism*. According to this view, section 25 requires that other sections of the *Charter* should, if possible, be understood in such a way as to avoid a negative impact on Aboriginal rights. However, if such an interpretation is not possible, section 25 will not save the impugned law or government action, even if invalidating or discontinuing that law/action will have a detrimental impact on Aboriginal rights.[3]

The second interpretation, by contrast, is that section 25 acts as a *shield*. According to this view, if Aboriginal rights would be limited by a *Charter* claim, section 25 would be engaged and would bar that *Charter* claim.[4] This is the approach that the Yukon Court of Appeal adopted in *Dickson*: Ms Dickson's equality rights claim could not proceed because of the detrimental impact that this would have on the collective, self-government rights of her First Nation. This interpretation of section 25 was also the one favoured by the concurring opinion of Justice Bastarache in *R v Kapp* ("*Kapp*"), a landmark Supreme Court decision on constitutional equality rights.[5]

A Note on *Kapp*

Kapp is a seminal case on Aboriginal rights and section 15 (equality rights) of the *Charter*. In it, the Supreme Court held that a communal fishing license granted exclusively to several Indigenous groups did not constitute a violation of section 15 of the *Charter*, as had been claimed by a group of non-Indigenous commercial fishers. This was because section 15(2) explicitly allows governments to take measures to ameliorate the circumstances of disadvantaged groups, even if this means granting them preferential treatment over others.[6] While the majority of the Supreme Court held the government licensing scheme to be valid due to section 15(2),[7] one judge, Justice Bastarache, wrote a concurring opinion based on section 25 of the *Charter*, arguing that this provision shielded the government scheme from the *Charter* challenge.[8]

What Rights Are Covered?

Although they did not decide the case based on section 25, the majority in *R v Kapp* suggested in passing that only rights which are of "a constitutional character" are likely to fall within its scope.[9] In contrast, Justice Bastarache's concurrence argues for a broader reading of section 25 which protects all Aboriginal rights that are unique to Aboriginal communities because of "their special status."[10] Following from this more expansive reading, Justice Bastarache suggested that any "legislation that distinguishes between aboriginal and non-aboriginal people in order to protect interests associated with aboriginal culture, territory, sovereignty or the treaty process deserves to be shielded from Charter scrutiny."[11] In *Dickson*, the Yukon Court of Appeal affirmed this approach.[12]

Following from this, another question which arises around section 25 is whether it can be invoked by Indigenous *governments* in response to *Charter* claims by their own members. While this question wasn't at issue in *Kapp*, Justice Bastarache tentatively suggested that such usage would be contrary to the spirit of section 25, since it would partially remove Indigenous people from "the *Charter* protection scheme"[13] (rather than bolstering and protecting their rights).

On a related note, some scholars have wondered if the *Charter* actually applies to laws passed by self-governing Indigenous nations, since section 32 of the *Charter* limits its application to federal and provincial governments.[14] However, in *Dickson*, the Yukon Court of Appeal rejected this argument, holding that the *Charter* applies to Indigenous

governments when they are, by their very nature, exercising governmental power (although after finding that the *Charter* applied to the VGFN, the Court of Appeal then held that section 25 effectively blocked Ms Dickson's *Charter* claim).[15]

How (and When) Should Section 25 Be Applied?

Another complicated question relating to section 25 concerns the point at which it should be factored into legal analysis. While there are a number of ways of approaching this question, in *Kapp*, Justice Bastarache offered a potential roadmap for future courts by articulating a three-step approach. To quote Justice Bastarache:

"The first step requires an evaluation of the claim in order to establish the nature of the substantive *Charter* right and whether the claim is made out, *prima facie*. The second step requires an evaluation of the native right to establish whether it falls under s[ection] 25. The third step requires a determination of the existence of a true conflict between the *Charter* right and the native right."[16]

The key point here is that, for Bastarache, section 25 should be applied *before* there has been a full analysis of whether the *Charter* has been violated.[17] Although this three-step process has not (yet) been affirmed by the Supreme Court, the Yukon Court of Appeal did use it in *Dickson v Vuntut Gwitchin First Nation*.[18] That said, it must be noted that the Yukon Court did not use, nor comment upon, Justice Bastarache's suggestion that section 25 *might* apply differently in the case of a restriction placed on an Indigenous person by an Indigenous government (i.e. precisely the type of "internal restriction" that is at issue in the *Dickson* case).[19]

Conclusion: The Tension Between Individual and Collective Rights

The issue of balancing the rights of individuals against the collective rights of a political community or nation is a difficult one, especially when one considers the historical context of Crown-Indigenous relations in Canada. On the one hand, a key premise of the *Charter* regime in Canada is that all individuals will be protected against problematic exercises of governmental power. On the other hand, a key dimension of reconciliation between the Canadian state and Indigenous communities is the recognition of Indigenous peoples right to collectively manage their own affairs — even (and perhaps especially) when this means deviating from the *Charter*. The fact that the Supreme Court is soon going to be weighing in on this tension has the potential to provide much needed clarity on the relationship between Indigenous individuals, Indigenous governments, and the Canadian Constitution.

[1] The case is on appeal from the Yukon Court of Appeal. See *Dickson v Vuntut Gwitchin First Nation*, 2021 YKCA 5 [*Dickson*].

[2] *Canadian Charter of Rights and Freedoms,* s 25, Part I of the *Constitution Act, 1982*,

being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

[3] *R v Kapp,* 2008 SCC 41 at para 79 [*Kapp*].

[4] *Ibid* at para 79.

[5] *Ibid* at para 81.

[6] *Charter*, *supra* note 2, s 15(2).

[7] *Kapp*, *supra* note 3 at para 61.

[8] *Ibid* at paras 76-77.

[9] *Ibid* at paras 63, 65.

[10] *Ibid* at para 103.

[11] *Ibid* at para 103.

[12] *Dickson*, *supra* note 1 at paras 145-146 [*Dickson*].

[13] *Kapp*, *supra* note 3 at para 99.

[14] *Ibid* at para 100.

[15] *Dickson*, *supra* note 1 at para 98. See also *Eldridge v British Columbia (Attorney General)*, [1998] 2 SCR 624 at para 44.

[16] *Ibid* at para 111.

[17] On Justice Bastarache's reasoning on this point, see *Kapp*, *supra* note 3 at para 109.

[18] See *Dickson*, *supra* note 1, e.g. at para 146.

[19] See *Kapp*, *supra* note 3 at para 99.