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Special Issue on Dickson v. Vuntut Gwitchin First Nation, *2021 YKCA 5*

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To date in Canada, most of the cases concerning Indigenous/Aboriginal self-government rights have come in the context of section 35 of the *Constitution Act, 1982*.[1] There have been relatively fewer cases involving Indigenous/Aboriginal rights and *Charter* issues. However, this is changing as the Indigenous right to self-government that has always existed begins to be constructed in Canadian law. The decision of the Court of Appeal of the Yukon in *Dickson v Vuntut Gwitchin First Nation*[2] is the most recent proceeding to put the question of the application of the *Charter* to Indigenous/Aboriginal governments on the table. *Dickson* involves a challenge by a citizen of the community to a provision contained in the constitution of a self-governing First Nation, on the grounds that it violates individual equality rights in section 15(1) of the *Charter of Rights and Freedoms*. As the papers in this issue discuss, the case is significant as it could shape the relationship between Indigenous/Aboriginal governments and the *Charter,* and has implications for the exercise of Indigenous self-government rights within the federalist framework more broadly.

The Vuntut Gwitchin First Nation (VGFN) is part of the Gwitchin Nation, whose territory covers an area of northern Yukon, Alaska and Northwest Territories. The VGFN government is based in a settlement called Old Crow, which is a small community in the Yukon composed of 260 VGFN citizens. About 300 additional VGFN citizens live elsewhere, including the applicant, who lives in Whitehorse. In 1993, the VGFN, Yukon and Canada signed the *Vuntut Gwitchin First Nation Final Agreement* and the *Vuntut Gwitchin Self-Government Agreement* (SGA). The Final Agreement is equivalent to a modern treaty for the purposes of section 35,

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1 *Constitution Act, 1982,* s 35, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

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

but the SGA is not.[3] Under the SGA, the VGFN enacted its own Constitution, which provides that a candidate for Chief or Councillor who wins an election must relocate to the Old Crow settlement within 14 days.[4] The VGFN had rejected Dickson's nomination to run for council because she would not commit to leaving Whitehorse if she won the election. The reasons cited in the court documents are her employment and her son's health needs. Dickson argued the Residency Requirement was in violation of her equality rights in section 15(1) of the *Charter*. She lost the case at trial with the chambers judge finding that, apart from the "within 14 days" time limit, the Residency Requirement did not infringe section 15(1). Dickson appealed the decision, as did the VGFN.

The Court of Appeal of the Yukon heard the case and it disagreed with the chambers judge finding that the Residency Requirement did infringe section 15(1), but before looking to section 1 and an infringement analysis, it turned to section 25. Section 25 states that 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."[5] The YKCA characterized the purpose of section 25 as protecting collective Indigenous/Aboriginal rights from being diminished by the rights and freedoms in the *Charter.* It found that in the context of a self-governing First Nation, a residency requirement for elected officials can be an expression of the community/group's self-government rights, and as such is shielded from *Charter* scrutiny by section 25. Connected to this is the broader idea that the *Charter* applies to self-governing Indigenous groups, but when the exercise of self-government rights conflict with *Charter* rights, the government power may be shielded from the Oakes test by section 25. Dickson applied for leave to appeal the YKCA's decision to the Supreme Court of Canada and this was opposed by the VGFN. On April 28th, 2022, the SCC granted leave.

As discussed in this collection, so far in approaching the case, the courts have taken the application of the *Charter* as a starting point but the question of the relationship between Indigenous/Aboriginal self-government rights and the *Charter* can be framed in different ways. For instance, one way is using a minority rights paradigm, which is evident when analogies are made to minority language rights and a focus put on trade offs between collective and individual rights. This framing assumes Indigenous/Aboriginal rights are a form of political right within the body politic. In contrast, the papers in this collection start from a recognition of the inherent right of Indigenous peoples to self-govern and the existence of the jurisdiction of Indigenous legalities independent of a settler rights paradigm.

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3 *Ibid* at para 11 (this is something that the YKCA stresses).

4 *Vuntut Gwitchin First Nation Constitution*, (2019) at 12, online (pdf): <www.vgfn.ca/pdf/constitution%202019.pdf> [perma.cc/5393-HC6Q].

5 *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 (the section reads in full:

> 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:
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> (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 claims agreements or may be so acquired).