Q&A with Dr Ryan Beaton: Indigenous Rights and the Charter (Dickson v Vuntut Gwitchin First Nation)

In this Q&A, CCS Summer Student Juliana Quan talks to Dr Ryan Beaton (Power Law, Vancouver) about the case of *Dickson v Vuntut Gwitchin*, a major case that is currently before the Supreme Court of Canada on the application of the *Charter of Rights and Freedoms* to self-governing First Nations, and on the role that section 25 of the *Charter* might play in shielding First Nations from *Charter* claims.

Q: We are currently awaiting the Supreme Court of Canada's decision in the case of *Dickson v VGFN*. Could you briefly summarize the legal dispute that the Court will be addressing?

A: Cindy Dickson, a citizen of the Vuntut Gwitchin First Nation (VGFN), wanted to run for election to the VGFN Council. VGFN has concluded a comprehensive land claims agreement and a self-government agreement with both Canada and Yukon. As envisioned by the self-government agreement, VGFN has adopted a VGFN Constitution, which includes a provision requiring that VGFN councillors reside on VGFN settlement lands in Yukon's far north. Ms Dickson lives in Whitehorse in part because her son needs access to medical treatment not readily available in VGFN settlement lands hundreds of kilometres to the north. She wants to be able to serve on VGFN Council without having to relocate to VGFN settlement lands.

Ms Dickson asked the Yukon Supreme Court (YKSC) to invalidate the councillor residency requirement in the VGFN Constitution, arguing that the requirement violated her equality rights under section 15 of the *Canadian Charter of Rights and Freedoms*. VGFN argued that the *Charter* does not apply to the residency requirement because adopting that requirement — and indeed, adopting the entire VGFN Constitution of which it is a part — is an exercise of inherent Indigenous self-government or jurisdiction.

Section 32 of the *Charter* governs the scope of its application, stating that the *Charter* applies to Parliament and the federal government and to provincial legislatures and

governments, as well as to all matters within the authority of Parliament (including all matters relating to the Yukon territory) and within the authority of provincial legislatures. A major questioned raised in this case is whether section 32 should be interpreted as making the *Charter* applicable to Indigenous legislatures and governments, even though section 32 does not mention them explicitly.

VGFN also argued in the alternative that, if the *Charter* does apply to the residency requirement, then section 25 of the *Charter* prevents the application of section 15 to invalidate the residency requirement. Section 25 states that the guarantee of 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." Here it is important to note that, while the VGFN land claims agreement with Canada and Yukon states that it is a treaty within the meaning of section 35 of the *Constitution Act, 1982*, the self-government agreement is not a treaty in that sense. But even if the self-government agreement is understood not to be a section 35 treaty and the adoption of the residency requirement in the VGFN Constitution not the exercise of section 35 treaty rights, the adoption of the residency requirement is still arguably the exercise of "other rights and freedoms that pertain to the aboriginal peoples of Canada" within the meaning of section 25. The Supreme Court of Canada (SCC) has said very little about section 25 to date, and *Dickson* is likely to give us its most extensive treatment yet.

Both the YKSC and the Yukon Court of Appeal (YKCA), while differing in some details of their respective analyses and conclusions, found in essence that the *Charter* did apply to the residency requirement in the VGFN Constitution, but that section 25 shielded the requirement from invalidation under section 15.

The SCC will now have its say on whether the *Charter* applies to the residency requirement and, if so, whether section 25 shields the residency requirement from the application of section 15 or otherwise influences the interpretation of Ms Dickson's section 15 rights on the facts of this case. Ultimately, the SCC will have to decide whether the residency requirement violates Ms Dickson's equality rights under section 15. Whatever conclusion the SCC reaches on that final legal outcome, the reasoning it uses to get there will likely set an important landmark orienting the judiciary's view of Indigenous law and its place in the Canadian constitutional landscape. The case also provides the SCC with a chance to finally develop a framework for the interpretation and application of section 25 of the *Charter*.

Q: Do you believe the Court will take this opportunity to develop a principled framework for the interpretation of section 25 of the *Charter*? How would you suggest this be achieved?

A: As noted above, I expect the Court to offer its most extensive treatment to date of section 25. The Court cannot hope to anticipate, let alone answer, all the questions that might arise about section 25, but I think it will have to address at least two major points:

1) What are the "other rights and freedoms that pertain to the aboriginal peoples of Canada" mentioned in section 25, and is the VGFN adoption of the residency requirement an exercise of one of these other rights or freedoms?

2) If the VGFN adoption of the residency requirement is an exercise of one of these other rights or freedoms, does section 25 render section 15 entirely inapplicable to the residency requirement or does it merely inform the interpretation of how section 15 applies to the residency requirement, for instance, by requiring the courts to adopt, where reasonably possible, an interpretation of section 15 that avoids concluding that the residency requirement violates it?

I expect the SCC to take a relatively cautious approach, given how little it has said to date on section 25. That is, I expect the Court will answer these questions on the facts of this case, deciding whether the adoption of the residency requirement is an exercise of a right or freedom within the meaning of section 25, offering some discussion of the relevant characteristics of the residency requirement but without trying to give any comprehensive definition of what qualifies as a section 25 right or freedom. Even a cautious approach should, however, yield significant answers about the Court's approach to section 25.

The second question I note above is important: in this case, the YKSC and the YKCA essentially decided that section 25 acted as a full shield against the application of section 15 to the residency requirement, rather than as a factor shaping the interpretation of section 15. Ms Dickson argues that section 25 was never intended to shield Indigenous laws and governments against the appeal to *Charter* rights and freedoms by their own Indigenous citizens. On her argument, section 25 may in principle shield elements of the VGFN Constitution from *Charter* challenges by non-Indigenous individuals or governments, but it has no application to her appeal, as a VGFN citizen, to her rights under the *Charter*.

There is thus a major gap between the visions advanced by VGFN and Ms Dickson, respectively, as to how section 25 applies to the facts of this case. That gap squarely raises the question: can citizens of a First Nation invoke the *Charter* to challenge the laws and conduct adopted by that First Nation in exercising its inherent powers of self-government? The SCC will have to give at least some answer to that question in this case, even if the Court wants to avoid a broad discussion of section 25 that would take it far beyond the facts of the case.

Q: You have expressed doubts about the risk that the Court's decision could create "*Charter*-free zones" — zones in which governmental power can be lawfully wielded in ways that contravene the *Charter*. Could you elaborate on this?

A: Technically, if the *Charter* did not apply to Indigenous laws and governments, then nothing they did would contravene the *Charter* — the *Charter* would simply not apply and the question of contravention would not arise. But precisely this result, a situation where members of Indigenous nations would be "denied" their *Charter* rights and freedoms in relation to their own Indigenous governments, is a result the Court will, I suspect, strongly want to avoid. Even if the Court concludes that Indigenous laws and governments should be shielded from the *Charter* in many contexts, the Court will almost certainly express this in terms of the balance that needs to be struck between individuals' *Charter* rights and freedoms, on the one hand, and collective rights or powers of self-government, on the other.

This balancing approach likely holds much greater appeal for the Court than an approach that could be said to deny *Charter* rights to individuals like Ms Dickson in their interactions with their own Indigenous governments. The SCC often prides itself on a modern and nuanced understanding of the need to balance collective rights (e.g. linguistic, denominational, or Aboriginal rights) and individual rights, or even collective and individual aspects of specific rights themselves.

Given the Court's consistent preference for such balancing between collective and individual rights, I think the Court will view the situation raised in *Dickson* as one calling for a proper balance to be struck, case-by-case, between the *Charter* rights of individuals like Ms Dickson and collective Indigenous rights of self-government.

Q: Section 25 refers to "other rights and freedoms that pertain to the Aboriginal peoples of Canada." What might be included in this category?

A: Excellent question! VGFN argues that this case provides a prime example: its adoption of the residency requirement as an expression of its inherent Indigenous right of self-government, which is recognized in the self-government agreement with Canada and Yukon

(and in federal and territorial implementation legislation), even though it is not formally recognized in treaty or by judicial declaration.

As already noted, the self-government agreement reached between VGFN, Canada, and Yukon explicitly states that it is not a section 35 agreement and so not a treaty within the meaning of that section. VGFN also has never obtained a judicial declaration that they have an Aboriginal right to adopt the residency requirement (or the VGFN Constitution more generally) as an aspect of self-government. But, even if adoption of the residency requirement is thus not an exercise either of a treaty right or of an Aboriginal right in this sense, section 25 specifically refers to "aboriginal, treaty *or other rights or freedoms* that pertain to the aboriginal peoples of Canada" (emphasis added). VGFN argues that these words must have been included in section 25 for some purpose, and must therefore cover rights and freedoms that are not (or not yet established as) Aboriginal or treaty rights.

VGFN argues that this category of "other rights or freedoms" surely includes their inherent power of self-government to adopt the residency requirement, a power recognized by Canada and Yukon in the self-government agreement with VGFN and in federal and territorial implementing legislation. To my mind, VGFN's argument on this point is very persuasive.

Q: In your opinion, what should be the guiding constitutional principles and considerations that inform the discussion around the application of the *Charter* to Indigenous governments exercising inherent self-government rights?

A: I think the courts (as well as federal, provincial, and territorial governments) should be extremely cautious about imposing solutions on Indigenous governments and communities as to the proper interaction between the *Charter* and Indigenous self-government. Note, for instance, that the VGFN Constitution states that disputes arising under it may be brought to the Yukon Supreme Court so long as the Vuntut Gwitchin's own Court has not been established. The VGFN Constitution thus contemplates the establishment of a VGFN Court, although that has not yet occurred.

The SCC should be careful not to issue a judgment that unnecessarily pre-determines whether or how any future Vuntut Gwitchin Court would be expected to apply the *Charter* to VGFN laws and government conduct. Even if the superior courts exercise some supervisory jurisdiction over such Indigenous courts, this should be done with great deference, allowing Indigenous peoples to develop their own distinctive approaches to legal issues arising under

their own laws and governments. At the same time, I do not think the SCC should (or will) entirely rule out the supervisory jurisdiction of superior courts — it could well be appropriate at times for individuals like Ms Dickson to continue to have access to superior courts to argue that they have been denied their rights in some fundamental way. While black-and-white answers to many of these questions might initially be satisfying (to those on the winning side of an argument), I think it wiser for the SCC to establish that courts need to be deferential towards Indigenous governments and courts working out their own solutions, but not rule out the possibility that individuals might in some circumstances properly have recourse to provincial and territorial superior courts. The principles and considerations governing such circumstances will have to be worked out as situations arise, not (one hopes) through judicial reflection in the abstract.

Q: Considering the issues at stake, do you believe it is appropriate for the Supreme Court of Canada to be the ultimate arbiter on whether the *Charter* applies to self-governing First Nations? Could you discuss why multilateral negotiations might or might not be a better approach?

A: The lower courts in this case reasonably pointed out that extensive multilateral negotiations have already taken place and led to historic self-government and land claims agreements between VGFN, Canada, and Yukon. It is not surprising that legal disputes then arise in the implementation of those agreements and the subsequent adoption of the VGFN Constitution. The VGFN Constitution itself provides that disputes arising under it may be brought to the Yukon Supreme Court and, of course, the Yukon Supreme Court is subject to appellate review by the Yukon Court of Appeal and, ultimately, the SCC. So, in the circumstances of this case, yes, I do believe it is appropriate for the SCC to decide the appeal that has been brought before it.

More generally, the SCC will inevitably have some role to play in determining whether and how appeal can be made to the *Charter* in the context of Indigenous laws and self-government. As Ms Dickson argues in the present case, while she is a citizen of VGFN, she is also a Canadian citizen and she can ask the courts, including the SCC, for an interpretation of her *Charter* rights. That said, it remains crucial that the courts show appropriate deference to the choices made by Indigenous governments and other decision-makers. There is no easy formula for how the courts should do that; it’s principally a matter of adopting an orientation of adequate respect and deference that will shape the legal doctrine developed case-by-case. It’s important also to keep in mind that the disputes that

arise will often not oppose state power to Indigenous rights in any simple way. *Dickson* is at its heart a challenge by a VGFN citizen, appealing to her *Charter* rights, to a law adopted in the VGFN Constitution.

Q: If the *Charter* is found or presumed to apply, what consequences might that have for the future of Indigenous self-government and self-determination in Canada?

A: A lot depends on how the *Charter* is found to apply. For instance, the lower courts in this case found that the *Charter* applies whether the courts give effect to the residency requirement understood solely as an exercise of inherent Indigenous self-government or whether they give it effect through (or partially on account of) the federal and territorial legislation designed to implement the self-government agreement with VGFN. The reasoning of the lower courts is much stronger on the latter alternative than the former. One possibility is that the SCC will decide that the *Charter* applies in this case based on the specific terms of the self-government agreement and implementing legislation and that it does not need to decide whether the *Charter* would necessarily apply to the residency requirement viewed simply as an exercise of Indigenous self-government.

If the SCC takes this tack, that arguably leaves Indigenous peoples (and Canada, the provinces, and the territories) greater discretion to negotiate the exact manner in which the *Charter* will apply to Indigenous laws and governments. Again, it's doubtful that the courts would uphold any agreement that flatly denied the application of the *Charter* to Indigenous laws and governments, something that Canada, the provinces, and territories seem unlikely to agree to in the first place anyway. But that still leaves many questions about the *Charter*'s application unanswered. For instance, how is the *Charter* to be applied in Indigenous courts like the Vuntut Gwitchin Court contemplated in the VGFN Constitution? How would the decisions of Indigenous courts on *Charter* issues be reviewed, if at all, by superior courts? On matters such as these, the SCC's decision in *Dickson* could leave narrower or wider room for negotiation, depending on how exactly it determines that the *Charter* applies.

That wider discretion could have pros and cons. It could add a further layer of complexity to negotiations that are already typically long and costly. It could lead to a patchwork of approaches across the country. But it could also allow for a variety of approaches to be tried, with Indigenous peoples pursuing paths they consider most appropriate for their own communities and practices of self-government. This might prove empowering for Indigenous peoples rebuilding their own forms of self-government, allowing them to shape the

application of the *Charter* within their own communities in accordance with their own traditions, legal principles, and norms.