Section 25

What is Section 25?

Section 25 of the *Canadian Charter of Rights and Freedoms*[1] is a provision that sets out how the *Charter* affects the rights and freedoms of Indigenous peoples in Canada. It is potentially engaged where there is an apparent conflict between an Indigenous right and another, generally applicable right listed in the *Canadian Charter*.

The text of Section 25's text reads:

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]

Section 25 at the Supreme Court of Canada

In the first forty years of the *Charter*'s lifespan, section 25 was rarely considered by the Supreme Court of Canada (SCC).[3] One exception to this was in *Corbiere* (1999),[4] when the SCC stated that section 25 protects "broader" rights and freedoms than section 35 of the *Constitution Act, 1982*, and can extend to protect statutory rights in some cases.[5] *Corbiere* also marked the first reference to the "shielding" function of section 25,[6] which was then explored further in *Kapp*,[7] and ultimately became one of the two dominant interpretations of section 25. The gist of this interpretation is that it treats section 25 as a "shield" against *Charter* challenges. On this view, invoking section 25 will defeat a *Charter* challenge that would result in a violation of certain protected Indigenous rights (those that are within the "scope" of section 25).[8] This interpretation was favoured by Justice Bastarache of the SCC in *Kapp* and has been endorsed by lower courts, too.[9]

By contrast, the interpretive prism approach is the second of the two dominant interpretations of section 25. This interpretation depicts section 25 as an interpretive provision that requires courts to read *Charter* rights and Indigenous rights to give as much effect as possible to both but affording "no special priority" to the Indigenous right.[10] While this approach was rejected by Justice Bastarache in *Kapp*, it has subsequently been partially accepted, as explained below.

The Section 25 Framework Today: The *Dickson* Case

In *Dickson*, the SCC provided a long-awaited, comprehensive interpretation of section 25. They clarified the section's function and provided the test for its application, moving forward. Considering the two interpretations from *Kapp*, the Dickson Court held that *both* interpretations should be used to understand section 25.[11] Section 25 has a "shielding" effect as "it affords primacy to Aboriginal, treaty, or other rights."[12] However, it is not

enough to prove that an Aboriginal, treaty, or "other right or freedom" is engaged; rather, there must also be an *irreconcilable conflict* between the *Charter* right and the section 25 right, and this must be demonstrated by the party invoking section 25.[13]

To reach this conclusion on the meaning of section 25, the Court looked closely at the language of section 25's text, suggesting that the words "abrogate and derogate" indicate that the individual *Charter* right must not nullify, repeal, detract or depart from the collective Indigenous rights at stake (and hence, that the "shield" approach is at least partly correct).[14]

The *Dickson* Court also took the opportunity to clarify what section 25's category of "other" rights.[15] Here, the Court found that section 25 claimants must "establish both the existence of the right and the fact that the right protects or recognizes Indigenous difference," and that this difference would encompass interests connected to "cultural difference, prior occupancy, prior sovereignty, or participation in the treaty process."[16]

The Court proceeded to lay out the following step-by-step framework for section 25.

1. The *Charter* claimant shows that there has been a *prima facie* breach of their individual *Charter* right;
2. The party relying on section 25 to block the *Charter* challenge must show that the alleged right in question falls within the scope of section 25;
3. The party relying on section 25 must prove an *irreconcilable conflict* between the section 25 right and the individual *Charter* If there is a proven irreconcilable difference, section 25 will act as a shield protecting Indigenous difference;
4. The courts must then determine if other provisions of the *Charter* or the *Constitution Act, 1982* place limits on the protection of the section 25 right.[17]

Notably, the SCC added that this framework will apply regardless of a claimant's identity, meaning that the same process applies for *Charter* claims from Indigenous and non-Indigenous persons that risk limiting (collective) Indigenous rights.[18] And even if section 25 is not engaged, the collective right may still be prioritized via the section 1 justification stage of the *Charter* analysis, which will play out if the section 25 claim fails.

[1] *Canadian Charter of Rights and Freedoms*, s 15(1) Part I of the *Constitution Act, 1982*, being Schedule B to the Canada Act 1982 (UK), 1982, c 11 [*Charter*].

[2] *Ibid*, s 25.

[3] *Dickson v Vuntut Gwitchin First Nation*, 2024 SCC 10 [*Dickson*].

[4] *Corbiere v Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203.

[5] *Ibid* at para 52.

[6] *Ibid* at paras 51-53

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

[8] *Dickson*, *supra* note 3 at para 153.

[9] *Ibid* at paras 155 and 157.

[10] *Ibid* at para 154.

[11] *Ibid* at para 158.

[12] *Ibid* at paras 150-152.

[13] *Ibid* at paras 150, 152, 167.

[14] *Ibid* at para 124.

[15] *Ibid* at para 150.

[16] *Ibid* at para 150.

[17] *Ibid* at paras 179-183.

[18] *Ibid* at para 166.