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The *Dickson* Decision, UNDRIP, and the Federal *UNDRIP Act*

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Decision Commented On: *Dickson v Vuntut Gwitchin First Nation*, 2024 SCC 10 (CanLII)

This post is part of continuing ABlawg commentary on the approach of the courts to legislation implementing the *UN Declaration on the Rights of Indigenous Peoples* (UNDRIP). That commentary includes the decision of the Supreme Court of British Columbia in *Gitxaala v British Columbia (Chief Gold Commissioner)*, 2023 BCSC 1680 (CanLII) (ABlawg post here) and, most importantly, the Supreme Court of Canada's decision in *Reference re An Act respecting First Nations, Inuit and Métis children, youth and families*, 2024 SCC 5 (CanLII) (*FNIM Reference*) (ABlawg post here). This post is also the first of multiple posts that ABlawg anticipates on the *Dickson* decision.

Dickson concerned the Constitution of the Vuntut Gwitchin First Nation (VGFN) and a challenge brought by a member of the VGFN under the *Canadian Charter of Rights and Freedoms* to the VGFN residency requirement for participation in elections. The case raised several issues for the Court's determination, including whether the *Charter* applies to the VGFN Constitution, and if so, what was the proper approach to reconciling collective and individual rights under the *Charter.*

There are nearly twenty references to UNDRIP or the *United Nations Declaration on the Rights of Indigenous Peoples Act*, SC 2021, c 14 (the federal *UNDRIP Act*) in the three judgments in the *Dickson* case. Apart from a preliminary and general statement in the majority opinion (at para 47), most of the references to UNDRIP are in the joint dissenting (in part) reasons of Justices Sheilah Martin and Michelle O'Bonsawin. There are also four references in the majority opinion of Justices Nicholas Kasirer and Mahmud Jamal (Chief Justice Richard Wagner and Justice Suzanne Côté concurring). There are no references in Justice Malcolm Rowe's (dissenting in part) judgment. In the case of the first two judgments, we are interested in the question of what work UNDRIP, or the federal *UNDRIP Act*, does to support the judgment's reasoning. In the case of Justice Rowe, the question must be why did he not support his reasons by reference to these instruments.

The Majority Opinion

As noted above, the majority first references the Declaration and the federal *UNDRIP Act* in a preliminary part of its analysis addressing "Indigenous Self-Government and the *Charter*" (Heading to para 46):

> As a preliminary matter, we note that although this Court has yet to recognize an inherent right to Indigenous self-government as an Aboriginal right protected under s. 35 of the *Constitution Act, 1982* … an inherent right to Indigenous self-government has now been affirmed on the international plane by Article 4 of the *United Nations Declaration on*

> *the Rights of Indigenous Peoples*. In 2016, the Canadian government supported the Declaration and committed to adopt and implement it in accordance with the Canadian Constitution. Recent federal legislation has affirmed the Declaration as "a universal international human rights instrument with application in Canadian law" and provides "a framework for the Government of Canada's implementation of the Declaration" (Federal *UNDRIP Act*), s. 4). For example, the Declaration has been implemented specifically in respect of the provision of Indigenous child and family services under the *Act respecting First Nations, Inuit and Métis children, youth and families*, S.C. 2019, c. 24 (see *FNIM Reference)*. (at para 47, some references omitted)

While this is an important general statement which, perhaps surprisingly, contains the only reference to the *FNIM Reference* in any of the judgments, it seems clear that at this point in the judgment the Declaration is not doing any interpretive or normative work in relation to the specific questions that the Court needed to resolve.

The majority becomes more specific in its use of the Declaration and the federal *UNDRIP Act* as part of its discussion of the purpose of s 25 of the *Charter*. The majority concluded that the *Charter* did apply to the residency requirement of the VGFN Constitution, and it was therefore necessary to consider whether that requirement unjustifiably infringed the equality guarantee in s 15(1) of the *Charter*. That, in turn, required consideration of the role of s 25 of the *Charter*, which provides that:

> 25 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 claims agreements or may be so acquired.

According to the majority in its "overview" of this issue (at paras 102 – 112), s 25 "reflects a constitutional choice to protect the collective rights and freedoms associated with Indigenous peoples in Canada as a distinct minority" (at para 108). However, the "other rights or freedoms" referred to and protected by s 25 "are limited to those that protect Indigenous difference" (at para 109). Once that is established, those protected rights and freedoms "must be upheld, even when they conflict with individual *Charter* rights, in order to ensure respect for minority rights as a constitutional value" (at para 109, and see also para 171). The reference to "constitutional value" is a reference to "respect for minority rights" as noted in *Reference re Secession of Quebec*, 1998 CanLII 793 (SCC), [1998] 2 SCR 217 at para 49). But the courts should not assume conflict between individual and collective rights. In support of that proposition, the majority referenced not only academic writing and the VGFN Constitution but also the *UNDRIP Act*:

> In any given case, the individual and collective rights referred to in s. 25 may not actually be in conflict. Some individual rights are part of Indigenous law and coexist with collective

> interests, as both the *UNDRIP Act* and the VGFN Constitution itself make plain … (at para 110)

In its more detailed assessment of the purpose of s 25, the majority went on to note that the protection of collective rights achieved by the section "is also consonant with [UNDRIP] as brought into Canadian law by the *UNDRIP Act*" (at para 117). And to that end, the majority specifically recalled Article 34 of the Declaration, to the effect that:

> Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs, in accordance with international human rights standards.

The majority also found it pertinent to refer to the federal *UNDRIP Act* as part of its textual interpretation of s 25 and in support of the assertion that the purpose of s 25 is "is to protect Indigenous difference against inappropriate erosion by individual *Charter* rights" (at para 118). In particular, the majority wished to discern "a shared meaning for the central protective purpose conveyed by the two linguistic texts" of s 25 (at para 124), as serving both an interpretive as well as a shielding function for collective rights. In this case, the majority referred specifically to the similar function served by s 2(2) of the federal *UNDRIP Act*:

> In a closely related context, the UNDRIP Act contains a provision in its division on "Interpretation", in its English and French texts, that maintains Indigenous rights in a similar fashion. Section 2(2) provides: "This Act is to be construed as upholding the rights of Indigenous peoples recognized and affirmed by section 35 of the Constitution Act, 1982, and not as abrogating or derogating from them" (in French, "*elle n'y porte pas atteinte*"). This supports the view that the "upholding" or "*maintien*" of Indigenous rights under the protective purpose of s. 25 of the *Charter* can involve elements of a shield and of an exercise of construction. (at para 126)

While supporting a dual function for s 25, the majority held that s 25 rights will be shielded where "it is determined that there is irreconcilable conflict between the claimed *Charter* right and the s. 25 right, such that giving effect to the *Charter* right would undermine the Indigenous difference protected or recognized by the collective right" (at para 152). An irreconcilable conflict was found to exist in this case. This will be the subject of a future ABlawg post.

In sum, the majority judgment uses the Declaration to support its interpretation of the role of s 25 of the *Charter* but, with respect, its approach could be described as one of "pick and choose". It seeks to identify articles in the Declaration and sections of the federal *UNDRIP Act* that support its view of the relationship between ss 15(1) and 25 of the *Charter*. But it does not provide a more holistic assessment of the balance that the Declaration strikes between respect for individual and collective rights. Furthermore, while the judgment refers to the federal implementing legislation, it does not discuss the international legal status of the Declaration, including the possible status of important elements of the Declaration as customary international law.

The Opinion of Justices Martin and O'Bonsawin

Justices Martin and O'Bonsawin ("joint opinion") agreed with the majority that the residence requirement in VGFN's Constitution was subject to the *Charter*. However, they concluded that the provision breached s 15(1) of the *Charter* and was not protected by s 25 since they did not accept the "proposition that s 25 shields the actions of a self-governing Indigenous nation from *Charter* claims brought by members of that community" (at para 236). Neither was the provision saved by s 1 of the *Charter*. For Justices Martin and O'Bonsawin, s 25 primarily operates as an interpretive prism, consistent with the manner in which competing rights are balanced under both the *Charter* "and the rights enshrined in UNDRIP" and thus "provides a respectful and responsive path forward into a future in which *Charter* rights and Indigenous conceptions of rights will be integrated in a variety of legal fora" (at para 289).

The joint opinion, much like the majority opinion, first references the Declaration as part of an acknowledgement that Articles 3 and 4 recognize the right to self-government (at para 283). But it principally uses UNDRIP and other international instruments (specifically the *International Covenant on Civil and Political Rights* (ICCPR) as affirmative support for an interpretive rather than shielding approach to s 25 (at para 293). (As an aside, it is curious that they reference Article 25 of the ICCPR, which protects voting rights, but not Articles 1 and 27, which protect the right to self-determination and the rights of minorities).

The key discussion occurs under the overall heading of "How Does Section 25 Operate" and the subheading "International Sources" (at paras 317-319). Justices Martin and O'Bonsawin begin this section by noting that:

> International human rights law can be a helpful source of information and direction when interpreting *Charter* provisions. The presumption of conformity directs that the *Charter* should be presumed to provide at least as great a protection as that which is afforded by similar provisions in international documents that Canada has ratified … Binding international instruments carry weight in the *Charter* interpretation exercise …. [and] [i]n this case, *UNDRIP* is binding on Canada and therefore triggers the presumption of conformity. (at para 317, references omitted)

Implicitly, Justices Martin and O'Bonsawin appear to be saying that even though the Declaration is not a treaty that is amenable to ratification, the federal *UNDRIP Act* achieves the same result for the purposes of the presumption of conformity. The joint opinion does not reference the specific language of the *UNDRIP Act* as the support for that conclusion, but that must be a necessary element of the chain of reasoning. As such, they must be taken to be relying on paragraph 47 of the majority opinion (quoted near the outset of this blog, above) citing the Court's *FNIM Reference* decision. Even though one of us has previously suggested that the reasoning in the *Reference* is hardly rigorous on this point (see ABlawg post on the *Reference*), we wholeheartedly support the conclusion that the *UNDRIP Act* and its "with application in Canadian law" provision (s 4(a)) must ensure that the Declaration has interpretive weight as a matter of federal law.

Having established the interpretive relevance of the Declaration and the applicability of the presumption of conformity, the joint opinion then seems to suggest, albeit more implicitly than explicitly, that the Declaration supports an interpretive prism (rather than a shield) approach to s 25:

> *UNDRIP* recognizes the need to protect both the collective and individual rights of Indigenous peoples. For example, Articles 4, 5, 20 and 34 affirm Indigenous peoples' right to self-determination, self-government, and the ability to protect their distinct political, legal, economic, social, and cultural institutions. Moreover, Articles 2 and 9 further direct that both Indigenous peoples *and individuals* must be free from all kinds of discrimination and be equal to all other peoples in the exercise of their rights. In this way, Indigenous people both have the right to belong to an Indigenous community or nation and must be protected from discrimination of all kinds in the exercise of this right. (at para 319, emphasis in original)

It is certainly true that the Declaration speaks to the rights of individuals as well as the rights of Indigenous peoples. Indeed, in addition to Articles 2 and 9 that the joint opinion points to, we see references to the rights of Indigenous individuals in 19 places in the Declaration, including the preamble and Articles 6, 7, 8, 14, 17, 24, 33, 35, 40, and 44. Perhaps particularly pertinent is the 22nd paragraph of the Preamble:

> Recognizing and reaffirming that indigenous individuals are entitled without discrimination to all human rights recognized in international law, and that indigenous peoples possess collective rights which are indispensable for their existence, well-being and integral development as peoples…

But the joint opinion fails to demonstrate how these references to both collective and individual rights support their preferred interpretation of s 25; neither do they support the statement that follows to the effect that "*UNDRIP* is *therefore* illustrative of how one type of right cannot absolutely trump another" (at para 319, emphasis added). The joint opinion may be able to make that case, but the "therefore" does not follow from the mere recitation of articles that refer to the rights of Indigenous individuals and the rights of Indigenous peoples. Neither do these references on their own support the following assertion:

> An interpretation of s. 25 that shields collective Indigenous rights and freedoms from incursion but does not uphold individual Indigenous peoples' right to be free from discrimination would be inconsistent with the comprehensive nature of *UNDRIP*'s protections. Instead, a holistic reading of *UNDRIP* supports the view that s. 25 operates as an interpretive prism that ensures both collective and individual rights are respected. (at para 319)

Perhaps more pertinent to a holistic approach to the Declaration would have been some reference to Articles 46(2) and (3), which serve in part as the functional equivalent of s 1 of the *Charter* and the justifiable infringement test associated with s 35, the Aboriginal rights provision of the *Constitution Act, 1982*:

> 46.2. In the exercise of the rights enunciated in the present Declaration, human rights and fundamental freedoms of all shall be respected. The exercise of the rights set forth in this Declaration shall be subject only to such limitations as are determined by law and in accordance with international human rights obligations. Any such limitations shall be non-discriminatory and strictly necessary solely for the purpose of securing due recognition and

> respect for the rights and freedoms of others and for meeting the just and most compelling requirements of a democratic society.
>
> 3. The provisions set forth in this Declaration shall be interpreted in accordance with the principles of justice, democracy, respect for human rights, equality, non-discrimination, good governance and good faith.

In sum, both the majority and the joint opinion use the Declaration in a similar manner by cherry picking particular provisions that seem to offer interpretive support for their preferred interpretation of ss 15 and 25 of the *Charter*. Neither is intellectually satisfying or doctrinally rigorous.

The Opinion of Justice Rowe

In the shortest of the three judgments, Justice Rowe dissented on the clear basis that the *Charter* simply does not apply to the internal governance rules of the VGFN. The *Charter* applies (as per s 32) to federal and provincial governments and entities or activities with a significant connection to those governments. For Justice Rowe, "[t]he *Charter* was designed to entrench standards of constitutional behaviour that were tailored to the structures and philosophical underpinnings of federal and provincial governance" (at para 442) while the relationship between settler governments and Indigenous peoples was dealt with outside the *Charter*, in Part 2 of the *Constitution Act, 1982* (at para 443). Furthermore, "the federal and provincial governments understood that the scope and limits of Indigenous governance would be addressed under s. 35, particularly through the entrenchment of modern treaties, rather than through the *Charter*" (at para 445). Section 25 serves to connect Parts 1 and 2 of the *Constitution Act, 1982*, and for Justice Rowe is "best understood as a protection against *Charter* challenges to federal and provincial measures that protect s. 35 rights, as well as 'other rights or freedoms' …" (at para 446) rather than as a mechanism for "continued oversight of Indigenous self-government by the courts" (at para 452).

Justice Rowe was particularly concerned to distance himself from any suggestion that the VGFN was a creation of the federal government. According to him, the majority opinion:

> … implies that, as the self-government agreement in this case was authorized by federal legislation, Indigenous self-government for the VGFN is somehow an emanation of federal authority. This is fundamentally inconsistent with the nature, status and purpose of Indigenous self-government. Its purpose is to recognize and give practical effect to an autonomy that is different in status and nature from that exercised by band councils under the Indian Act. The idea of self-government is not that it is an "authority [that] flows from Parliament", but rather Indigenous peoples exercising authority that is rightfully theirs. (at para 442)

Justice Rowe supported his highly textual reading of s 32 with further observations emphasising the autonomy of Indigenous nations and the importance of consent (i.e. consent by Nations to be bound by the terms of the *Charter*). For example, drawing on some of the early literature on the *Charter*, he maintained that the *Charter* "should not be *imposed* on Indigenous communities" (at para 502, emphasis in original) and that:

> It is not for this Court to scrutinize the wisdom or fairness of the VGFN's choices by transposing an instrument designed by and for the federal and provincial governments onto the Vuntut Gwitchin, who did not participate in its creation or agree to its terms. To do so would be to subject the Vuntut Gwitchin to the sort of federal oversight from which it sought to remove itself through the VGFN Arrangements. (at para 502)

Instead, Justice Rowe emphasised the importance of "Indigenous *choice*" (at para 507, emphasis in original) and Indigenous law making according to "their own laws customs and practices" (at para 507, quoting ***R v Desautel***, 2021 SCC 17 (CanLII) at para 86).

In sum, Justice Rowe's judgment takes seriously the independent normative source of Indigenous self-government and self-determination and the principles of autonomy and consent. Arguably, these are the very principles that underpin the Declaration, and yet this is the only judgment of the three that makes not a single reference to the Declaration or to other international human rights instruments.

Conclusion

In the conclusions to their ABlawg post on the use of UNDRIP in the *FNIM Reference* decision, Hamilton and Bankes observed that the decision "mainstreams" UNDRIP within the Canadian legal system. As a result, arguments and judgments dealing with Indigenous rights will need to grapple with the terms of the Declaration. But the *Dickson* decision makes it clear that mainstreaming is a work in progress. Two of the judgments use the Declaration, but in a profoundly unsatisfying way. And the judgment that is perhaps most in tune with the values underlying the Declaration makes no mention of it. This may in part hearken back to the Court's divided opinion on the relevance of international law to constitutional interpretation in *Quebec (Attorney General) v 9147-0732 Québec inc*, 2020 SCC 32 (CanLII). But the composition of the Court has significantly changed since that decision, and it is incumbent on the Court to provide more clarity on the significance of UNDRIP – both as supported by the federal *UNDRIP Act*, but also on its own terms insofar as only three jurisdictions (federal, British Columbia, and Northwest Territories) have, to this point, enacted implementing legislation.

Postscript

As we were finalizing this post, the Supreme Court of Canada issued its decision in *Shot Both Sides v Canada*, 2024 SCC 12 (CanLII) (April 12, 2024). The case involves a claim for breach of treaty (Treaty 7 – we are privileged to live on Treaty 7 lands). The Court, in a unanimous judgment authored by Justice O'Bonsawin, concluded that the claim was statute barred, but nevertheless concluded that this was an appropriate case in which to grant a declaration. The Court framed the declaration as follows:

> Under the treaty land entitlement provisions of Treaty No. 7, the Blood Tribe was entitled to a reserve equal to 710 square miles in area;
>
> The Blood Tribe's current reserve is 162.5 square miles smaller in area than what was promised in Treaty No. 7; and

> Canada, having provided the Blood Tribe with a reserve of 547.5 square miles in area, dishonourably breached the treaty land entitlement provisions of Treaty No. 7. (at para 83)

We will not engage with the substance of this decision, instead we simply observe that, as with Justice Rowe's dissent in the case that is the subject of this post, Justice O'Bonsawin makes no reference to UNDRIP or the federal *UNDRIP Act*. If the Court is serious about UNDRIP as part of the positive law of Canada, then it needs to be more consistent in using the Declaration as an ordinary part of its reasoning. And in this case, there was a fairly obvious point of reference in the Declaration that the Court might have recited to support its decision to grant a Declaration:

> Article 37
>
> 1. Indigenous peoples have the right to the recognition, observance and enforcement of treaties, agreements and other constructive arrangements concluded with States or their successors and to have States honour and respect such treaties, agreements and other constructive arrangements.
>
> 2. Nothing in this Declaration may be interpreted as diminishing or eliminating the rights of indigenous peoples contained in treaties, agreements and other constructive arrangements.

It is of course possible that counsel for the appellants did not refer to the Declaration. But given the Court's recent engagement with the Declaration and the federal UNDRIP Act in two important decisions, it is surprising, even if that were the case, that the Court did not refer to this text of its own motion in this case.

This post may be cited as: Nigel Bankes and Jennifer Koshan, "The Dickson Decision, UNDRIP, and the Federal UNDRIP Act" (18 April 2024), online: ABlawg, http://ablawg.ca/wp-content/uploads/2024/04/Blog_NB_JK_Dickson.pdf