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Teaching *Dickson v Vuntut Gwitchin First Nation*

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

It has been a year since the Supreme Court of Canada released its landmark decision in *Dickson v Vuntut Gwitchin First Nation*, 2024 SCC 10 (CanLII), and many of us are still grappling with how to include *Dickson* in our teaching materials. For those teaching international law, or the interplay between Canadian law, Indigenous law, and international law, this previous post might be a useful summary of *Dickson*'s commentary (or lack thereof) on the legal significance of Canada's adoption and implementation of the UN Declaration on the Rights of Indigenous Peoples. In this post, we deal with another important issue – whether the Canadian Charter of Rights and Freedoms applies in the context of modern treaties, or at least in the context of the treaty and surrounding documents that governed the dispute between Cindy Dickson and the Vuntut Gwitchin First Nation (VGFN). We provide a summary and critique of the judgments of the Supreme Court on this issue, which concern the interpretation and application of section 32(1) of the *Charter* in light of constitutional text, history, and precedents as applied to the facts at hand. The majority judgment of Justices Nicolas Kasirer and Mahmud Jamal provide an excellent summary of previous jurisprudence on section 32(1) and could replace a swath of case law on the constitutional law syllabus. But the concurring judgment of Justices Sheilah Martin and Michelle O'Bonsawin, and the dissenting judgment of Justice Malcolm Rowe, are also worthy of discussion given their insights on the complexities of debates surrounding the issue of *Charter* application. We hope that this summary of the various judgments and our commentary on those judgments will be helpful for those teaching constitutional law and adjacent subjects. We also plan to write a second post focusing on the section 15(1) and section 25 *Charter* issues in *Dickson*.

Facts, Context, and Issues

The Vuntut Gwitchin First Nation (VGFN) is a self-governing community with its traditional territory in northern Yukon and its seat of government in Old Crow. Ms. Dickson is a citizen of the VGFN who, for family reasons, resided in Whitehorse, 800 kilometers south of Old Crow. She wished to run for election as a Councillor of the VGFN, but its Constitution requires that those elected Chief or Councillor must reside on the settlement land of the VGFN or relocate there within 14 days of the election. The evidence at trial established that "from time immemorial, all VGFN Chiefs and Councillors have lived on the VGFN's traditional territory" (at para 11).

Ms. Dickson argued that the residency requirement discriminated against her based on her non-resident status on the VGFN's traditional territory, contrary to section 15(1) of the *Charter*. The VGFN countered that the *Charter* did not apply to it or its Constitution, or, if it did apply, the

residency requirement did not violate section 15(1) and was in any case protected by its collective rights recognized under section 25 of the *Charter*.

The VGFN's settlement land was determined through a modern land claim treaty process that in 1993 led to an "umbrella agreement" between representatives of all Yukon First Nations and the federal and Yukon governments. The First Nations surrendered their rights in their traditional territories in exchange for defined treaty rights to smaller parcels of settlement land, amongst other treaty rights. The 1993 VGFN Final Agreement (VGFNFA) falls under this umbrella and it is explicitly recognized as a treaty under section 35 of the *Constitution Act, 1982*. The 1993 VGFN Self Government Agreement (SGA) recognized certain powers of self-government, including the power to adopt the VGFN Constitution. The VGFN Constitution includes protection of equality rights (article IV(7)) as well as the residency requirement (article XI(2)).

VGFN laws, including the Constitution, are challengeable in the Yukon Supreme Court until such time as the VGFN establishes its own court (article II(5)). In the Yukon Supreme Court, Veale CJ held that the *Charter* applied to the residency requirement and also to the VGFN Constitution and government (*Dickson v Vuntut Gwitchin First Nation*, 2020 YKSC 22 (CanLII) at paras 122-131). The Yukon Court of Appeal stated they were narrowing the section 32(1) issue to the *Charter*'s applicability to the residency requirement alone, and determined that the VGFN government "was 'by its very nature' exercising 'governmental' powers within the meaning of s 32" (*Dickson v Vuntut Gwitchin First Nation*, 2021 YKCA 5 (CanLII) at paras 73, 84, 98).

Although holding that the *Charter* applied, the YKCA majority held that Ms. Dickson's section 15(1) claim could not succeed in light of section 25(1) of the *Charter*. Ms. Dickson appealed to the Supreme Court of Canada and the VGFN cross-appealed on whether the *Charter* applied at all.

Relevant *Charter* Provisions

> 15 (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
>
> 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.
>
> 32(1) This Charter applies

> (a) to the Parliament and government of Canada in respect to all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and
>
> (b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

Majority Judgment at the Supreme Court of Canada

Justices Kasirer and Jamal (Chief Justice Richard Wagner and Justice Suzanne Côté concurring) held that the *Charter* applied to the VGFN Constitution's residency requirement. They began their judgment by noting that while certain entities are explicitly bound by the *Charter* under section 32(1) – namely the federal, provincial, and territorial legislatures and governments – the inclusion of "in respect of all matters within the authority" of these governments suggests that the *Charter* applies to other entities as well (at paras 41-42). They considered this to be broad wording that was intended "to prevent Parliament, the legislatures, and the federal, provincial, and territorial governments from avoiding their *Charter* obligations by conferring certain of their legislative responsibilities or powers on other entities that are not ordinarily subject to the *Charter*" (at para 44). The majority also expressed the view that section 32(1) "must be interpreted in a manner that is flexible, purposive, and generous, rather than technical, narrow, or legalistic" so as to "secure for individuals and relevant collective minorities the full benefit of the *Charter*'s protections and to constrain government action inconsistent with those protections" (at para 45).This generous approach is aimed at benefitting individual *Charter* claimants rather than collective rights holders such as Indigenous nations, given the majority's view that the *Charter* is "essentially an instrument for checking the powers of government over the individual" (at para 45).

The majority then embarked on a discussion of constitutional and political history pertaining to Indigenous self-government and the application of the *Charter*. A key point in this section is Canada's affirmation of an inherent right to Indigenous self-government through its adoption of an "Inherent Right Policy" in 1995 and unqualified endorsement of UNDRIP in 2016, even if the Supreme Court has not yet recognized this right (at paras 47, 49). The majority also noted that the Charlottetown Accord would have amended the *Constitution Act 1982* to recognize this right of self-government, while also amending section 32(1) such that the *Charter* would have explicitly applied to Indigenous governments. This proposal was accepted by representatives of Indigenous peoples in Canada as well as the federal and provincial governments, but was voted down in a national referendum (at para 48). Nevertheless, the majority noted the federal government's continued stance that the *Charter* applies to Indigenous governments, which it has taken in negotiating modern treaties and self-government agreements since 1995 (at paras 49-50). The majority acknowledged that the SGA, concluded in 1993, did not expressly provide for the application of the *Charter* (at para 98), but this was not conclusive in its later analysis of section 32(1).

The majority also pointed to the 1996 report of the Royal Commission on Aboriginal Peoples as having taken the view that the *Charter* applies to Indigenous governments and that section 25 was the appropriate vehicle for protecting collective Indigenous rights (at paras 51-55). They noted that

courts have applied the *Charter* to Indigenous governments as well, although the examples they provided were delegated powers under the *Indian Act* and other legislation (at paras 57-58).

This section of the judgment foreshadowed the majority's ultimate conclusion on the application of the *Charter*. It relied heavily on a dated political history that seemed more persuasive to the majority than contemporary sources such as the SGA with its silence on the *Charter* and the recognition of UNDRIP (see e.g. *Reference re An Act respecting First Nations, Inuit and Métis children, youth and families*, 2024 SCC 5 (CanLII), which is cited at para 47 of *Dickson* only for its implementation of UNDRIP's family law provisions). In many respects, this part of the majority's reasons aligned with the constitutional and political context discussed by Martin and O'Bonsawin JJ in their concurring reasons on the section 32(1) issue, which – as we note below – raised historical (and more modern) concerns about "Charter-free zones." Rowe J's dissenting reasons on section 32(1) also reviewed the relevant constitutional history, but came to a much different conclusion, as we will also describe below.

With this context in mind, the majority turned next to the framework for section 32(1) of the *Charter*. This is the section of their judgment that is most useful for teaching section 32(1) doctrine, summarizing previous jurisprudence on the two ways that the *Charter* can apply to other entities:

- to government actors – those entities that are government in their very nature, such as municipalities, or that are under the substantial control of government, such as transit authorities (at paras 63-64, citing *Godbout v Longueuil (City)*, 1997 CanLII 335 (SCC) and *Greater Vancouver Transportation Authority v Canadian Federation of Students — British Columbia Component*, 2009 SCC 31 (CanLII)), and
- to government actions – those actions that are governmental in nature, such as hospitals implementing government policy on health care and human rights commissions exercising statutory powers of coercion and compulsion (at paras 65-68, citing *Eldridge v British Columbia (Attorney General)*, 1997 CanLII 327 (SCC) and *Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44 (CanLII)).

For the first category, the *Charter* will apply to all of the actions of entities found to be government actors, while for the second, broader category, the *Charter* will only apply to those actions of the entities that are governmental in nature (at para 70).

How did these categories apply to the case at hand?

Justices Kasirer and Jamal held that, although the federal and territorial governments do not substantially control the VGFN, the First Nation is a government actor by its very nature. For the substantial control category, their reasoning was that the SGA provides the VGFN with self-government powers "by and for the first nation" such that the VGFN is "institutionally distinct" from the federal and territorial governments (at para 76). The SGA also gives the VGFN exclusive powers to enact laws related to its internal affairs and management, suggesting the autonomous operation of the VGFN (at para 76).

For the "government by nature" category, the first three of four factors, taken from the *Godbout* decision, supported this characterization: the VGFN has a democratically elected Council, taxation

powers, and powers to make, administer, and enforce coercive laws binding on VGFN citizens and others on their settlement lands (at paras 77, 79-81). Most significant for the majority, though, was the application of the fourth *Godbout* factor, whether the VGFN "derives its existence and lawmaking authority from the federal or provincial government; that is, it exercises powers conferred by Parliament or by a provincial legislature, powers and functions that the federal or provincial government would otherwise have to perform itself" (at para 77). The majority answered this question in the affirmative. Even though the VGFN has been "self-governing since time immemorial" and even if it has inherent powers of self-government, the majority stated that it also "derives *at least some* of its lawmaking authority" from the federal legislation implementing the VGFNFA and SGA (at para 82, emphasis in original). More specifically, section 91(24) of the *Constitution Act, 1867* was seen as both the source of the federal government's authority to enact the *Yukon First Nations Self-Government Act,* as well as a source of the VGFN's self-government powers (at paras 84-85). The majority buttressed its conclusion with references to Hansard and commentary from academics and the RCAP (at paras 87, 89-90, citing Peter Hogg and Mary Ellen Turpel, "Implementing Aboriginal Self-Government: Constitutional and Jurisdictional Issues" (1995) 74:2 Can Bar Rev 187 at 214; *Report of the Royal Commission on Aboriginal Peoples: Restructuring the Relationship*, vol 2 (Ottawa: Supply and Services Canada,1996)).

There is a jarring connection in the majority's analysis of the two categories of "government actors." In concluding that the VGFN was not substantially controlled by the federal or territorial governments, all of the VGFN's autonomy was credited to the SGA. Their basis for autonomous self-government was thus primarily seen as that which was "recognized" by the federal government under the SGA (at paras 82, 83). This recognition was in turn approved by federal implementing legislation, and this became the main hook for the application of the *Charter* to a purportedly self-governing entity. The majority's approach effectively held that, by entering into an agreement with the federal government to recognize their inherent rights, the VGFN's governance powers become subject to constitutional rules to which they did not assent. This seems like a troubling way to construe modern treaties.

The majority emphasized that their holding was narrower than that of the courts below, as "the *Charter* applies to the VGFN's residency requirement only insofar as that requirement flows from an exercise of statutory power under s. 91(24) of the *Constitution Act, 1867*" (at para 91). But in framing their holding this way, the majority blurred the line between the two categories of government actors and government actions. If the VGFN is a government actor by its nature, the *Charter* should apply to it in relation to all of its activities, based on the *Eldridge* framework. That the VGFN is only a government actor for section 32(1) purposes where it is acting pursuant to section 91(24) powers sounds more like the government action category rather than the government actor category. Justices Kasirer and Jamal did go on to say that the VGFN's residency requirement also fell within the second branch of the *Eldridge* framework as an exercise of statutory powers of compulsion (at paras 94-96), but this aspect of their judgment leaves uncertainty about future applications of the *Charter* to the VGFN and other Indigenous governments. It may reflect the majority's attempt to narrow the application of the *Charter* in recognition of the VGFN's self-government powers, but the line is blurred nevertheless.

Although Kasirer and Jamal JJ clarified that their approach was "of course … not to suggest that Indigenous self-government is necessarily an emanation of federal authority" (at para 82), it is

difficult not to see this as the most important source of the VGFN's powers for the purposes of *Charter* application under section 32(1), at least for the majority. Particularly when read next to the dissenting reasons of Rowe J, the majority's focus on the federal government's legislative actions implementing an agreement under which it was one of two parties is very narrow. It is also troubling when one considers that this is the same basis for holding that the *Charter* applies to First Nations exercising powers under the *Indian Act*. Surely the recognition of the VGFN as "self-governing since time immemorial" (at para 82) demanded a different analysis.

The majority's interpretation of the demands of "reconciliation" is also narrow. Here, they cited *R v Sparrow*, 1990 CanLII 104 (SCC), for the point that "Parliament's "power" to legislate under s 91(24) of the *Constitution Act, 1867* must be "reconciled" with its "duty" to Indigenous peoples under s 35 of the *Constitution Act, 1982*" (at para 85). Parliament's duty to Indigenous peoples is framed as correlative to individual rather than collective rights (at para 85). This is an outdated approach to reconciliation that focuses on the sovereignty of the Crown, and it has been superseded by recent legal developments such as the Court's decision in *Reference re An Act respecting First Nations, Inuit and Métis children, youth and families* (see e.g. para 3) and the federal government's adoption of legislation implementing UNDRIP.

However, Kasirer and Jamal JJ did state that they were "expressly refrain[ing] from commenting on whether the *Charter* would apply to an Indigenous government exercising an inherent self-government authority untethered from federal, provincial, or territorial legislation" (at para 101). According to the majority, it was also "unnecessary to address whether consent could be a proper basis for the application of the *Charter*, or whether it is even constitutionally open for the federal government or Parliament to agree that the *Charter*, as part of the "supreme law of Canada" (Constitution Act, 1982, s. 52(1)), does not apply to matters within Parliament's legislative authority" (at para 100). We are left with the unsatisfactory situation where the majority saw consent to the SGA as relevant for the purpose of construing the VGFN as a government actor, but irrelevant to the extent that the VGFN did not agree to be bound by the *Charter*.

The Other Judgments

Justices Martin and O'Bonsawin (dissenting in part) and Justice Rowe (dissenting) came to opposing conclusions about whether section 32(1) applies to Indigenous governments. Both judgments, however, are supported by the same ostensible rationale: recognition of and respect for Indigenous self-government. As Rowe J stated, "[c]entral to these reasons is the foundational premise that it is for Indigenous peoples to 'define themselves and to choose by what means to make their decisions, according to their own laws, customs and practices'" (at para 413, citing *R v Desautel*, 2021 SCC 17 (CanLII), at para 86).

For Martin and O'Bonsawin JJ, the reality of Indigenous self-government meant that Indigenous governments ought to be subject to the same restraints as all others because of the "relationship between the governed and those who govern" (at paras 242, 281) – and so they should be subject to the same constitutional restraints as other governments. For Rowe J, the reality of Indigenous self-government meant that Indigenous governments should not be subjected to the *Charter* when they did not consent to its application.

Partial Dissent of Martin and O'Bonsawin JJ

Justices Martin and O'Bonsawin concurred with the majority that the *Charter* applied in this case, and their dissent related to the application of sections 15 and 25 of the *Charter*. On the *Charter* application issue, they offered two primary reasons supporting their conclusion: self-governing Indigenous nations are "governmental in nature" and "the purpose of s. 32(1) was to extend the *Charter*'s protections to address the power imbalance between the governed and those who govern in Canada" (at para 234). For them, a purposive reading of section 32(1) supported the conclusion that the *Charter* should apply to the actions of self-governing Indigenous nations. This purpose dovetailed with Martin and O'Bonsawin JJ's overriding concern, that section 32 (1) not be interpreted in a manner that permits "*Charter*-free zones" in Canada.

There were four main points in their analysis.

First, they argued for the purposive interpretation of section 32(1) just mentioned. The purpose of section 32(1), in their view, was "to subject governmental action to constitutional review in order to protect individual rights and freedoms" (at para 242). The *Charter* changed the relationship and addressed the power imbalance between the governed and those who govern (at paras 239, 249): all "modern governments" which have authority to impinge on rights must be constrained by the *Charter*. Their purposive approach goes well beyond ensuring that federal and provincial governments respect individual rights. In Martin and O'Bonsawin JJ's view, the *Charter* must apply to all situations in which an entity exercises governmental authority, including self-governing Indigenous nations. For them, this is supported by the fact of Indigenous self-government itself. Because "governments and courts have begun to properly recognize Indigenous communities as law-makers" (at para 240), Indigenous governments ought to be subject to the *Charter*.

Thus, "a purposive reading of s. 32(1) of the *Charter* ensures that the VGFN, as a self-governing Indigenous community, is obliged to respect the *Charter* rights of its citizens" (at para 241). This leads to the "no *Charter*-free zones" theme of Martin and O'Bonsawin's judgment: "As the contours of Indigenous self-government evolve, it is essential that no *Charter*-free zones in Canada be created, that everyone be equally protected by its constitutionally entrenched guarantees, and that all forms of government be constrained by its limits" (at para 234).

Justices Martin and O'Bonsawin's focus on avoiding the creation of *Charter*-free zones that undermine the *Charter*'s objective of addressing the power imbalance between the governed and those who govern meant that, for them, despite the wording of section 32(1), "it would be a mistake to narrowly focus on whether or how an entity fits within the structure of the federal or provincial governments" (at para 251). This marks one of the most significant points of departure between the reasons of Martin and O'Bonsawin JJ and those of the majority and of Rowe J, as well as departure from prior precedents, which require a minimum level of connection to those governments and take a more deferential approach to the text of section 32(1) itself. This distinction is why Martin and O'Bonsawin JJ referred to their approach as a "modified *Eldridge* framework" (at para 282).

Justices Martin and O'Bonsawin supported their approach by arguing that the existing precedents on section 32(1) are "not directly applicable to the unique historical and legal position of Indigenous governments" (at para 243). While they found that the VGFN satisfies the first branch of the *Eldridge* framework (government by nature, see para 260), unlike the majority they emphasized that the VGFN "is not a creature of statute, does not derive its lawmaking authority through delegation, and does not need to ground its governmental status by reference to what has been transferred, bestowed, or granted from another level of government" (at para 243; see also paras 260-261). For them, existing legal tests considering section 32(1) arose in "particular factual contexts" and should not be determinative when considering self-governing Indigenous nations. Thus, they concluded that "[p]rinciples articulated for entities wholly created by the federal or provincial governments will be incomplete and ill-suited when assessing the lawmaking authority of the first inhabitants of Canada" (at para 261).

The difficulty with this conclusion is that section 32(1) was designed to apply to federal or provincial entities or others carrying out their obligations and has only ever been interpreted to be applicable in these circumstances. Martin and O'Bonsawin JJ overcame this perceived constitutional deficiency through living tree constitutionalism: "Limiting conditions should not be grafted onto s. 32(1) when to do so would stunt the growth of what was intended to be a living, remedial, and responsive constitution" (at para 262). This has implications for Indigenous self-government. Justices Martin and O'Bonsawin stated that "although this Court has yet to fully recognize an inherent Aboriginal right to self-government, s. 32(1) should not be interpreted in a manner that would impair the recognition of such a right prior to the issue being adjudicated" (at para 262).

This is troubling for two reasons. First, the living tree doctrine is applied here to support a contingent result favoured by the justices, not a necessary or logical outcome. For example, one might ask, would not a "living, remedial, and responsive constitution" be one that could hold space open for Indigenous governments to make their own choices about the applicability of the *Charter?* If such a conclusion is plausible, then one must ask what are the unstated assumptions that lead instead to Martin and O'Bonsawin JJ's favoured conclusion?

Second, their suggestion that a conclusion that section 32(1) does not apply to Indigenous governments would preclude recognition of the right of self-government is difficult to understand. Whether section 35 protects a right of self-government is a matter to be determined through application of the legal tests that guide the interpretation of that provision and nothing that may be determined about section 32(1) should "impair" that in any way. This leads one to wonder if they in fact meant something like: "if section 32(1) is interpreted as not including self-governing Indigenous nations, we would not subsequently recognize rights of self-government." In other words, Martin and O'Bonsawin JJ seem to be suggesting that their support for a right of self-government in subsequent litigation will depend upon *Charter* application to Indigenous governments or, perhaps, that subsequent courts *ought* not recognize rights of self-government without first concluding that section 32(1) applies to its exercise. This would add an additional hurdle to the already difficult-to-satisfy *Pamajewon* test for establishing self-government (see *R v Pamajewon*, 1996 CanLII 161 (SCC)).

Once again, the support for this view appears to be the government's recognition of Indigenous self-government itself: "Looking for a form of delegated authority by the federal or a provincial government does not respect the historic and integral role of Indigenous societies in Canada and fails to account for the modern context of self-governing Indigenous nations" (at para 263). Further, "[r]ecognition of self-governing Indigenous nations as governments in their own right, and not by virtue of delegated power, falls clearly within the ambit of s. 32(1) and the purpose of the *Charter*. Importantly, it upholds long-standing Indigenous practices of self-governance and advances reconciliation in Canada" (at para 265). The suggestion that it is within the ambit of section 32(1) to recognize self-government is difficult to make sense of; section 32(1) does not direct courts to recognize rights but is rather a constraint on government powers.

Also confusing is the idea that the purpose of the *Charter* is related to Indigenous self-government. As Rowe J pointed out, some Indigenous peoples voiced considerable concern that the *Charter* would undermine their collective rights. Given that Martin and O'Bonsawin JJ adopted an interpretation of section 32(1) and section 25 which explicitly undermined collective rights in order to prioritize individual *Charter* rights, it is somewhat confounding that they also suggested it is within the ambit of the *Charter* to recognize self-government. Perhaps more significantly, there is a problematic conflation here. Justices Martin and O'Bonsawin are correct that construing self-government as delegated fails to properly account for self-government. But they conflated this with the application of the *Charter*, which is a distinct issue. In essence, Martin and O'Bonsawin JJ seem to have argued that it enhances Indigenous self-government to subject those governments to the *Charter*. This supports their conclusion that it is not "an essential factor for the *Charter*'s applicability under s. 32(1) … that the source of the VGFN's lawmaking authority flows from Parliament" (at para 266).

The interpretive framework they used to get to this conclusion is unfettered judicial discretion: "[s]elf-governing Indigenous nations may not be expressly mentioned in s. 32(1) but they deal with "matters" which are, and this section must receive a purposive, expansive application so that the *Charter* applies to protect all" (at para 267). In further support of this approach, Martin and O'Bonsawin JJ highlighted that "s. 32(1) captures governmental action in respect of 'matters within the authority' of Parliament and the provincial legislatures and therefore the *Charter* applies to Indigenous governments because they have lawmaking authority over legislative matters caught by s. 32(1)" (at para 244). The question for them was not the type of government, the source of its authority, or the degree of its connection to the federal or provincial governments, which again strays from the design of section 32(1).

Having developed this novel interpretation of section 32(1) as untethered to any attachment to the federal or provincial governments, Martin and O'Bonsawin JJ considered this explicitly in the context of the VGFN. They determined that "the VGFN is a government by its very nature because it exercises legislative and executive powers pertaining to 'matters within the authority' of Parliament and the provincial legislatures, which significantly touch upon individual rights and freedoms protected by the *Charter*" (at para 245). This, they concluded, "aligns with long-standing Indigenous self-governance practices, and advances reconciliation in Canada" (at para 245). With respect, it is difficult to understand how the imposition of the *Charter* on an unwilling First Nation exercising its own laws supports either conclusion.

By way of a partial justification for this approach, Martin and O'Bonsawin JJ argued that "s. 32(1) was enacted when Parliament, provincial legislatures, and their subordinate entities, represented the entire legislative universe. Those bodies were the modalities for the exercise of all legislative power in Canada. Indigenous peoples were not recognized as self-autonomous and were often not consulted in legislative decision-making" (at para 268). In other words, the drafters of section 32(1) intended for it to include all bodies with legislative authority in Canada, and the only reason Indigenous peoples were not included is that they were not understood as having any rights of governance. This dramatically understates the discourse around Indigenous self-government at the time. The Penner Report, for example, recommended in 1983 that self-government be included in the constitution (Indian Self-Government in Canada: Report of the Special Committee (Ottawa: Canadian Government Publishing Centre, Supply and Services Canada, 1983). The Union of BC Indian Chiefs argued against the patriation of the constitution in 1981 on the basis that Indigenous rights of governance would not be recognized, and the *Charter* was understood as a threat to Indigenous rights as notions of formal equality would preclude recognition of the special status of Indigenous peoples. Justices Martin and O'Bonsawin seem to have implicitly acknowledged this discourse, albeit in their reasons on section 25, where their focus was on the concerns expressed by those who advocated that individual *Charter* rights should apply to Indigenous governments (at paras 295-302). Ultimately, sections 25 and 35 of the *Constitution Act, 1982* were included in response to Indigenous concerns about the impact of the *Charter* on their collective rights, including rights of governance. To hold forty years later that the imposition of the *Charter* on unwilling nations can be justified on the basis that their rights of governance were not recognized at the time of patriation is therefore difficult to understand and appears to revive the problematic approach, which sections 25 and 35 were intended to mitigate, of imposing constitutional changes on Indigenous peoples without their consent. In the result, the refusal of a colonial government to recognize self-government in 1982 is used as a basis for minimizing inherent jurisdiction in the present day.

Justices Martin and O'Bonsawin JJ appear to understand the balance of constitutional protections differently. They argued that an interpretation of section 32(1) which excludes self-governing Indigenous nations "risks the creation of *Charter*-free zones and would undermine the balance intended to be struck by the introduction of constitutionally entrenched rights in Canada" (at para 281). Further, section 32(1) "can be read to recognize the political and constitutional evolution that has occurred in respect of Indigenous self-government" (at para 282). It appears, then, that as Indigenous peoples' rights of governance have expanded, they have become subject to the *Charter*. They were not subject to it in 1982, on Martin and O'Bonsawin JJ's account, because their rights of governance were not recognized. At some point thereafter, as the "evolution" of their rights occurred, they became subject to the *Charter*. Yet, we also understand that "Indigenous nations like the VGFN have been self-governing since time immemorial" (at para 282). Thus, it is not self-government *per se* that triggers application of the *Charter,* but recognition of that right by Canada. It appears then, that on Martin and O'Bonsawin JJ's view, the recognition of self-government brings with it application of the *Charter* – when the government or the courts recognize self-government, they are recognizing a form of self-government always already subjected to the *Charter*. Further, unlike the majority who declined to address the issue, holding that it was not raised by the facts of the case, Martin and

O'Bonsawin JJ found that this applies "whatever the source of their self-government authority" (at para 282).

Rowe J's Partial Dissent

Justice Rowe's dissent focused solely on the section 32(1) issue. Like Martin and O'Bonsawin JJ, he framed his reasons for decision with respect for the VGFN as a self-governing nation (at para 417). He was also concerned with providing a textual interpretation of the *Charter* which was faithful to established precedent. As a result, he concluded that "the VGFN's enactment of the residency requirement in its Constitution is not subject to the *Charter*" (at para 419).

Rowe J offered five reasons for this conclusion: 1) the applicability of the *Charter* is determined under section 32(1); 2) the *Charter* applies to the federal and provincial governments and entities or activities with a significant connection to those governments; 3) the VGFN arrangements do not establish a significant connection to either the federal or the Yukon government; 4) a proper application of section 32(1) promotes the objective of reconciliation; and 5) the VGFN agreed to the enactment of its own rights protections.

Regarding the first point, Rowe J emphasized that the applicability of the *Charter* is determined only with reference to section 32(1) (at para 428). To hold otherwise would be to accept that all "laws" are subject to the *Charter* merely because of their status as laws, a conclusion that Rowe J found would be inconsistent with the language of the constitution and previous case law interpreting section 32(1).

Second, Rowe concluded that the *Charter* applies only to the federal and provincial governments and entities or activities with a significant connection to those governments. Arguments seeking to "to bring the VGFN or its activities within s. 32(1) on the basis that the VGFN is *a* government are contrary to the text of s. 32(1), its history and place within the structure of the *Constitution Act, 1982*, and this Court's jurisprudence on the provision's purpose and scope" (at para 421, emphasis in original). While Rowe J acknowledged that section 32(1) has been interpreted purposively, he argued that the expansion beyond the text of section 32(1) itself must be limited to the "the numerous manifestations of the federal and provincial governments" or "other entities or their activities [which] exhibit a significant connection to one of those governments" (at para 421). The purpose of section 32(1), on this view, is to ensure that federal and provincial governments respect the rights outlined in the *Charter*. In order to ensure those governments cannot evade *Charter* scrutiny, the various manifestations of those governments through delegated bodies and government programs must also be caught by section 32(1) (at para 469).

However, Rowe J argued, Indigenous rights, including rights to governance, were dealt with under section 35 and "their internal governance does not fall within the scope of the *Charter* unless there exists a significant connection to either the federal or a provincial government" (at para 421). While such a connection may exist for *Indian Act* band councils, it did not exist, in Rowe's view, for the VGFN.

The extension of section 32(1) to non-*Indian Act* Indigenous governments is based on what Rowe J saw as a misconception that "the *Charter* applies to any entity that is *a* government or

any activities that appear "governmental", whether or not they have a connection to the federal or a provincial government" (at para 431, emphasis in original). On this point, Rowe J was closer to the majority than to Martin and O'Bonsawin JJ, despite coming to the opposite conclusion of the majority. As outlined above, for them the nature of the self-government arrangements and legislation supporting those are sufficiently tied to federal and territorial authority to trigger section 32(1). Justice Rowe disagreed, as noted below, but agreed with the majority that a connection to those levels of government is a prerequisite for the application of section 32(1).

In this way, he rejected what Martin and O'Bonsawin JJ referred to as the "modified *Eldridge* framework" that they relied on in holding that all Indigenous governments ought to be subject to the *Charter*. Rowe J argued that this conclusion is "contrary to the text of s. 32(1), its history and place within the structure of the *Constitution Act, 1982*, and the jurisprudence concerning its purpose and scope" (at para 432).

The text and history of section 32(1) both suggest that "the *Charter* was designed *by* the federal and provincial governments, *for* those governments" (at para 437, emphasis in original). Justice Rowe offered a defense of a more textual approach to constitutional interpretation, arguing that "[n]o interpretation can be adopted that effectively rewrites s. 32(1) of the *Charter*" (at para 436). Though he did not say it explicitly, it seems likely that his reply to a claim that the section does not capture all the governments that it *should* capture would be that the section should be re-written through political means rather than judicial ones.

Further, the history and structure of the *Constitution Act, 1982*, Rowe J argued, demonstrate that the "the relationship between the federal and provincial governments and Indigenous peoples—and, as a corollary, the place for Indigenous governance within contemporary Canada — was addressed through mechanisms separate from the *Charter*" (at para 443). As outlined above, section 35 deals with the collective rights of Indigenous peoples and, as Rowe J noted, "was placed outside of the *Charter*, in a separate "Part" of the *Constitution Act, 1982*" (at para 443). Importantly, Indigenous peoples were not part of the negotiations concerning the *Charter* and it was understood that Indigenous governance would be dealt with under section 35 and through constitutional conferences and modern treaty agreements (at paras 444-445). Section 25 of the *Charter* links the two parts and was, in Rowe J.'s view, designed primarily to protect section 35 rights from *Charter* "challenges to federal and provincial measures that protect s. 35 rights" (at para 446).

For these reasons, Rowe J rejected the conclusion that Indigenous governments can be caught under section 32(1) merely by the fact that they are governments: the section plainly states, and was designed to, apply to particular governments. In further support of this position, Rowe J.'s third argument was that the VGFN arrangements do not establish a significant connection to either the federal or the Yukon government (at para 422). On this point, Rowe agreed with Martin and O'Bonsawin JJ. For the majority, this was the bridge they needed to be able to conclude that the VGFN residency requirement was subject to section 32(1). Justices Martin and O'Bonsawin rejected this rationale on the basis that it undermined Indigenous self-government. Further, for them it was not required to trigger section 32(1). Rowe agreed with their first point, but went on to find that "[t]he VGFN's governance structures and internal decisions are rooted in the Vuntut Gwitchin's own legal traditions and choices and do not attract *Charter* scrutiny under

s. 32(1)" (at para 422). There was not a sufficient connection between the VGFN and the federal or territorial government to conclude that that the VGFN is a *government* for the purposes of section 32(1) (at para 474).

The argument in favour of such a connection, for Rowe J as for Martin and O'Bonsawin JJ, ignored the fact and salience of Indigenous self-government and the "special relationship between Indigenous peoples and the Crown" (at para 447). Further, it ignored the achievement of modern treaties and self-government agreements, their "restorative effect", which "sought to undo structures of imposed governance such as the *Indian Act*" (at para 479) and sought to "ensure that Indigenous governance structures and traditions are not ignored by federal, provincial, or territorial institutions or rendered invisible in the face of conflicting laws" (at para 479). Both Rowe J and Martin and O'Bonsawin JJ seemed to agree on this point insofar as it concerns the question of whether the agreements between the VGFN and the federal and territorial governments are sufficient to trigger section 32(1). Where they differ is that Rowe J understood the imposition of the *Charter* as another instance of this same erasure whereas Martin and O'Bonsawin JJ did not. Rowe argued against the majority by insisting that "the nature of the federal government's involvement within the VGFN Arrangements has the *opposite* effect of what is required by *Eldridge*, by ensuring that the federal government respects the VGFN's autonomy pursuant to commitments arrived at by agreement" (at para 482, emphasis added). On the other hand, Martin and O'Bonsawin JJ argued that while VGFN agreements cannot in themselves trigger section 32(1), the VGFN's "autonomy pursuant to commitments arrived at by agreement"– to use Rowe J's phrase (at para 482) – was nonetheless undermined because those agreements recognized rights of self-government.

The fourth branch of Rowe J's argument was that a proper application of section 32(1) promotes the objective of reconciliation. Here, Rowe J addressed the argument that section 32(1) cannot be interpreted in a manner that would create "*Charter*-free zones." This argument and those that support it, Rowe J stated, are "in reality, policy arguments" (at para 497); they are based on a prior conclusion that that the *Charter ought* to apply and are therefore arguments supporting a desired normative assessment of the constitution, not legal arguments.

Rowe J responded with a policy- or perhaps principle-based argument of his own: "imposing the *Charter* on the VGFN is not consistent with the objective of reconciliation and with the need to respect the ability and the right of the Vuntut Gwitchin to make decisions pursuant to their own laws, customs, and practices" (at para 423). Thus, "for the courts to impose the *Charter* on the VGFN would be contrary to the objective of reconciliation" (at para 488). Rowe J recognized that Indigenous worldviews and the philosophy underpinning the *Charter* may not be compatible, pointing to different ways to balance individual and collective rights (at para 499). Even if they were in accord, the reasons and sources supporting the results might differ (at para 500). For Rowe J, the result of these realities was that "the *Charter* should not be imposed on Indigenous communities. … 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 (at para 502).

This approach is in sharp contrast to that of Martin and O'Bonsawin JJ, who understood the *Charter* as articulating universal, non-negotiable rights and who would give priority to individual over collective rights. The error in such a view, Rowe J concluded, is that "such arguments are dismissive of Indigenous approaches to protecting their members. Indeed, they rest on the erroneous assumption that if the *Charter* is not imposed, Indigenous community members will have no protections" (at para 505). Further, "Indigenous communities can choose how to implement effective protections — whether on their own initiative or by mutual agreement with federal, provincial, and territorial authorities — rather than being subjected to the *Charter* via a distorted interpretation of s. 32(1). … [T]aking reconciliation seriously means respecting Indigenous peoples' ability to 'define themselves and to choose by what means to make their decisions, according to their own laws, customs and practices'" (at para 507, citing *Desautel*, at para 86).

Finally, Rowe J emphasized that the VGFN agreed to the enactment of its own rights protections, rather than the application of *Charter* protections. That is, "the VGFN has enacted its own protections for the rights of its citizens, many of which mirror the *Charter* but are adjusted to its people's own laws, customs, and practices" (at para 424). As a result, Ms. Dickson's challenge should have been "addressed pursuant to the VGFN's own internal structures and processes" (at paras 424, 521). He concluded, "this case is about whether, in crafting their own Constitution, the Vuntut Gwitchin can make their own choices about their affairs — including as to how they wish to protect fundamental rights and freedoms — or whether their choices are subject to judicial scrutiny under the *Charter*. I conclude that the choice is theirs" (at para 425).

Further Thoughts on Teaching Dickson

The majority accepted that the question of what constitutes "government" under section 32(1) is a "very vexed" one (at para 60, quoting G. J. Kennedy, *The Charter of Rights in Litigation: Direction from the Supreme Court of Canada* (loose-leaf), at s 2:2). With three detailed sets of reasons about a novel application of this question to Indigenous governments in the modern treaty context, *Dickson* provides a rich teaching text. The decision raises complex normative and political questions about the application of the *Charter*, seeming to set individual and collective rights at odds (though admittedly these are only in conflict if the ability of the VGFN to protect individual rights is not accepted), and illustrating complicated ways that colonialism and patriarchy can shape constitutional discourses and rules. *Dickson* illustrates how a constitution can both emancipate and subjugate and how difficult it can be to remove entrenched power relations such as colonialism and gender-based discrimination from laws and constitutional rules. In this respect, *Dickson* can often pull readers in multiple directions, challenge their assumptions, and require them to re-think matters they would have taken for granted. The case thus provides an excellent opportunity for students and professors alike to think about the implications of modern treaties, the facts, contextual factors, and sources of law and reasoning that influence judicial reasoning, and the difficult legal issues that arise in the context of an unsettled area of constitutional law. In this final section we discuss four issues in this regard.

The most illustrative distinction in the decision is the different modes of constitutional interpretation adopted by Rowe J and Martin and O'Bonsawin JJ. While allowing for a purposive reading of section 32(1) that would expand it beyond a strict reading of the text (which would

include only Parliament and the provincial legislatures and preclude other institutions caught under the *Eldridge* test), Rowe J nonetheless had much greater fealty to the text than Martin and O'Bonsawin JJ. The latter adopted a living tree conception of the constitution to justify an expansive reading of section 32 – not unlike the majority's approach that was "generous" to individual *Charter* claimants. In teaching the case, there are a few issues here. One, how do the different reasons differ in terms of their understanding of the role of the judiciary? Two, how did their understanding of the "purpose" of section 32 differ and how did that shape their conclusions? Three, what types of sources, legal and otherwise, did they rely on, and how did that shape their reasoning?

Another important difference is in the models of reconciliation the different justices adopted and the sources they relied on for their approaches. As noted, the majority in particular relied on an outdated *Sparrow/Van der Peet* definition of reconciliation that problematically focuses on the Crown's sovereignty. Justices Martin and O'Bonsawin departed from this model in their decision that self-government is not tethered to delegated powers from the sovereign, but their conclusion on *Charter* application belies a more modern approach to reconciliation and self-government in spite of their comments to the contrary (see e.g. para 285). These justices also postponed consideration of UNDRIP to their reasons on sections 15 and 25, rather than grappling with its implications for the section 32(1) issue. Justice Rowe's dissent displays an understanding of reconciliation in line with UNDRIP, although he did not cite the Declaration. Students may be interested in thinking about Rowe J's approach to international human rights law in *Quebec (Attorney General) v 9147-0732 Québec inc.*, 2020 SCC 32 (CanLII) and whether this precedent influenced his approach to UNDRIP in *Dickson*.

The role of consent in shaping constitutional rights and obligations arose in all three judgments, but in contradictory ways. In partially sourcing VGFN's self-government in Parliament's actions, the majority relied on the fact that the VGFN agreed to the rules in the SGA (at para 84). Justices Kasirer and Jamal effectively found that, by entering into an agreement with the federal government to recognize their inherent rights, the VGFN's rights became subject to the *Charter* to which they did not assent. The fact that the VGFN agreed to the SGA also appears to be highly relevant in Martin and O'Bonsawin JJ's reasons, but, unlike the majority, they also made it clear that consent was not required for the *Charter* to apply. In Rowe J's opinion, the VGFN was not subject to the *Charter* precisely because they did not participate in its creation or consent to its application. What role, if any, should consent play in the application of the *Charter* to an Indigenous peoples who have been self-governing since time immemorial? To what extent can an imposed constitutional rule have legal or normative validity?

The majority left open the question of whether Indigenous governments exercising strictly inherent authority would be caught by section 32. From a teaching and learning perspective, the approaches in the three different sets of reasons for decision provide ample material for students to consider what the correct legal answer might be. More than that, it provides them an opportunity to reframe the question as "what are plausible correct legal answers?" This inquiry moves beyond the 1L search for "right answers" toward a more realistic approach of assessing the relative strengths and weaknesses of competing plausible answers. Finally, it also forces students to think about what *ought* to be the answer, whether or to what extent such normative

assessments are relevant to legal reasoning (or ought to be relevant), and in what ways normative and legal considerations were intertwined in the reasons for decision in *Dickson.*

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