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***Charter* Sections 15 and 25: The Majority Judgment in *Dickson v Vuntut Gwitchin First Nation* and its Application in the Federal Court**

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Cases Commented On: *Dickson v Vuntut Gwitchin First Nation*, [2024 SCC 10 \(CanLII\)](#); *Houle v Swan River First Nation*, [2025 FC 267 \(CanLII\)](#); *Donald-Potskin v Sawridge First Nation*, [2025 FC 648 \(CanLII\)](#); *Cunningham v Sucker Creek First Nation 150A*, [2025 FC 1174 \(CanLII\)](#)

This is the third in a series of four ABlawg posts on the Supreme Court of Canada’s complex decision in *Dickson v Vuntut Gwitchin First Nation*, [2024 SCC 10 \(CanLII\)](#). The [first post](#) examined the extent to which various factions of the Court referenced the UN Declaration on the Rights of Indigenous Peoples, and [the second post](#) analyzed their handling of whether the *Canadian Charter of Rights and Freedoms* applied in this context. In this post, we explore another issue on which there was serious disagreement amongst members of the Court. Having found that the *Charter* applied to the Vuntut Gwitchin First Nation’s (VGFN) residency requirement for Council elections, the majority (Justices Nicolas Kasirer and Mahmud Jamal, with Chief Justice Richard Wagner and Justice Suzanne Côté concurring) and dissenting justices (Justices Sheilah Martin and Michelle O’Bonsawin) ruled on how to approach the interplay between sections 15(1) and 25 of the *Charter*. We look at the majority judgment and three recent decisions applying the majority’s approach to section 25, also in cases involving First Nations elections: *Houle v Swan River First Nation*, [2025 FC 267 \(CanLII\)](#) (*Houle*), *Donald-Potskin v Sawridge First Nation*, [2025 FC 648 \(CanLII\)](#) (*Donald-Potskin*), and *Cunningham v Sucker Creek First Nation 150A*, [2025 FC 1174 \(CanLII\)](#). The fourth post in this series will focus on the dissenting judgment of Martin and O’Bonsawin JJ on the interplay between sections 15(1) and 25.

Dickson involved the constitutionality of the VGFN’s residency requirement to run for election to the VGFN Council. The residency requirement was part of the VGFN’s Constitution, which was enacted under the 1993 VGFN Self Government Agreement (SGA), recognizing powers of self-government including the power to adopt a constitution. The Constitution required that an elected Chief or Councillor must reside on the settlement land of the VGFN or relocate there within 14 days of the election. Cindy Dickson, a citizen of the VGFN who wished to run for election as a Councillor, resided in Whitehorse, 800 kilometers south of the seat of government in Old Crow. Ms. Dickson challenged the residency requirement as violating her equality rights under section 15(1) of the *Charter*. The VGFN argued that the *Charter* did not apply or, alternatively, that section 25 of the *Charter* shielded the residency requirement from a section 15 challenge.

After finding that the *Charter* applied to the VGFN’s residency requirement, Kasirer and Jamal JJ turned to the parties’ arguments on sections 15(1) and 25, which provide:

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.

Overview

The *Dickson* decision is a novel one, as the majority notes (at para 4). Unlike earlier cases that considered (or could have considered) section 25 in the context of challenges brought by primarily non-Indigenous persons (*R v Kapp*, [2008 SCC 41 \(CanLII\)](#)) or challenges to election rules enacted through federal laws (*Corbiere v Canada (Minister of Indian and Northern Affairs)*, [\[1999\] 2 SCR 203 \(CanLII\)](#); *Kahkewistahaw First Nation v Taypotat*, [2015 SCC 30 \(CanLII\)](#)), *Dickson* required the Court to decide whether the *Charter* applied to a self-governing First Nation and whether section 25 could shield that First Nation from a section 15 claim brought by one of its members.

The novelty of the case and the Court's purported lack of opportunities to address section 25 previously were used by the majority to justify a cautious approach, with "issues ... best left for resolution on a case-by-case basis as they arise before the Court" (at para 106, quoting *Kapp* at para 65 (per McLachlin CJ and Abella J)). The issues they left unresolved included whether a substantive constitutional character was required of the "other rights and freedoms" protected by section 25 and, most importantly when we compare the majority to the dissent, the limits on section 25's protection when the gender equality provisions of section 28 of the *Charter* and section 35(4) of the *Constitution Act, 1982* were issues raised by the facts.

Purpose of Section 25

Kasirer and Jamal JJ began their analysis of the interaction between section 15(1) and 25 with the purpose of section 25, relying on the four indicia first introduced in *Hunter v Southern*, [1984] 2 SCR 14, [1984 CanLII 33 \(SCC\)](#), and *Big M Drug Mart*, [1985] 1 SCR 29, [1985 CanLII 69 \(SCC\)](#) (at para 113). First, approaching the text of section 25 in a way that ensures a generous and liberal interpretation, the majority focused on its strong language insisting that *Charter* rights and freedoms "shall not be construed so as to abrogate or derogate"/"ne porte pas atteinte" from certain Indigenous rights, which was seen as supporting the operation of section 25 as a "shield" (at para 119). They held that the English and French texts shared a "central protective purpose" that required interpreting the competing collective and individual rights to see if the enforcement of the individual right would impair, harm, nullify or detract from the collective right (at para 124).

This shared meaning suggested section 25 had both interpretive and shield dimensions, but the scope for interpretation for the individual right at stake was limited by the mandatory language of “shall not be construed” and “*ne porte pas atteinte*” (at para 125, emphasis in the original). The shielded rights – rights “that pertain to the aboriginal peoples of Canada”/“*des peuples autochtones du Canada*” – were “rights that belong to or benefit Indigenous peoples *qua* Indigenous peoples” (at paras 126, 127), an idea picked up in their later discussion of “Indigenous difference.”

Second, Kasirer and Jamal JJ considered the character and larger objects of the *Charter*, finding them in decisions promoting respect for cultural and group identities: *R v Oakes*, [1986] 1 SCR 103, [1986 CanLII 46 \(SCC\)](#) at 136; *Reference re Secession of Quebec*, [1998] 2 SCR 217, [1998 CanLII 793 \(SCC\)](#) at para 82) and, perhaps most importantly in this case, in *R v Van der Peet*, [1996] 2 SCR 507, [1996 CanLII 216 \(SCC\)](#), which identified Indigenous peoples’ prior occupancy of North America as what “separates [them] from all other minority groups in Canadian society and ... mandates their special legal, and now constitutional, status” (at para 130, quoting *Van der Peet* at para 30). These cases were consistent with the idea that the protection of individual rights was not to come at the expense of Indigenous people’s collective rights (at para 131).

Their third interpretive point relied upon “the historical origins of the concepts enshrined” (*Big M Drug Mart Ltd* at para 117), i.e., the concepts of Aboriginal and treaty rights, and not the origins of section 25 itself. The majority returned to *Van der Peet* here for the idea that Aboriginal rights relied on the fact that “when Europeans arrived in North America, [A]boriginal peoples were already here, living in communities on the land, and participating in distinctive cultures, as they had done for centuries” (at para 133, citing *Van Der Peet* at para 30, emphasis in original).

It is in their discussion of the historical origins of Aboriginal and treaty rights (at para 136), that Kasirer and Jamal JJ adopted the concept of “Indigenous difference” described in the concurring judgment of Bastarache J in *Kapp*, who drew on the work of Professor Patrick Macklem in *Indigenous Difference and the Constitution of Canada* (Toronto: University of Toronto Press, 2001). Bastarache J noted that section 25 applies to “any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada” and argued that “pertain” meant those rights “particular to” Indigenous peoples within Canada (*Kapp* at para 101). He read the phrase as focusing on the “uniqueness” of Indigenous peoples – uniqueness in the sense of their collective special constitutional status (*Kapp* at para 103). As we will see, this is a very different idea of uniqueness than that relied on by the dissent in *Dickson*. For Bastarache J – and the majority in *Dickson* – Indigenous difference was the appropriate concept to limit what could be included in “other rights and freedoms” (*Dickson* at para 138).

Fourth and finally, in interpreting section 25, the majority considered “extrinsic evidence” (at paras 140-141). This was a brief look at the historical impetus for section 25, to which they assigned little weight, in contrast to the weight assigned to the “framers’ intent” by the dissent. The majority noted that section 25 was seen as a way to ensure that Indigenous rights would not be adversely affected by the *Charter*, even though the policy of the federal government of the day was that the *Charter* should apply to self-governing Indigenous peoples (at para 140).

In the end, Kasirer and Jamal JJ determined that the purpose of section 25 was:

to protect certain Indigenous collective rights from the application of conflicting individual *Charter* rights or freedoms, when such application would diminish the Indigenous difference protected and recognized by the collective rights. When the application of the individual right would undermine in an essential or non-incidental way the Indigenous difference protected by the collective right, s. 25 directs that the collective right be given primacy (at para 143).

Rights Within the Scope of Section 25

To answer the question of which rights are within the scope of section 25, Kasirer and Jamal JJ relied upon their articulation of the purpose of section 25 as the protection of rights and freedoms associated with Indigenous difference. Therefore, the rights within the scope of section 25 were rights that existed to protect or recognize “interests connected to cultural difference, prior occupancy, prior sovereignty, or participation in the treaty process” (at para 150).

Unfortunately, they left unanswered the issue of whether “other rights and freedoms” were limited to those of a constitutional character, as had been suggested by the majority in *Kapp* in *obiter* (*Kapp* at para 63). The majority in *Dickson* held they did not need to decide this question because the collective right at issue in this case had a substantive constitutional character and because such a restriction on the scope of included rights might be compatible with a broad approach to minority rights if Indigenous difference has inherent constitutional significance (*Dickson* at paras 151, 218).

Operation of Section 25

The majority reiterated that section 25’s protections only applied if there was an “irreconcilable conflict” between the individual *Charter* right and the section 25 collective right so that, if the *Charter* right was given effect, the Indigenous difference protected by the collective right would be undermined (at paras 6, 152). The reason given for this constraint was a “broad consensus that section 25 does not create new substantive rights or freedoms” (at para 152).

Kasirer and Jamal JJ discussed two competing views on the operation of section 25 (at paras 153-154). The “shield” approach gives primacy to Aboriginal, treaty and other rights and freedoms and was preferred by Bastarache J in *Kapp* (at paras 81, 94-97), and suggested by L’Heureux-Dubé J’s language in her concurring judgment in *Corbiere* (at paras 51-53) and Rowe J’s word choice in the majority judgement in *R v Desautel*, [2021 SCC 17 \(CanLII\)](#) (at para 39). The “interpretive prism” approach, put forward in *obiter* by the majority in *Kapp* (at para 64), simply informs the construction of the potentially conflicting rights.

In Kasirer and Jamal JJ’s view, the proper approach to section 25 includes elements of both views (at para 158). They required a court to begin with the assumption that conflict between the two rights does not exist and to interpret the substance of both rights at issue, informed by and respectful of Indigenous perspectives while also according individual *Charter* rights the generous interpretation they are due (at para 163). There is an interpretive aspect because section 25 only operates as a shield when the conflict is “real and irreconcilable,” i.e., when the court has determined that it was not possible to interpret both rights in a way that allowed them to operate harmoniously (at paras 159, 162). If they can operate harmoniously, then section 25 has only an interpretive role (at para 164). However, if the conflict is irreconcilable and its impact on the

collective rights protecting Indigenous difference not just incidental, then the *Charter* right must yield to the section 25 right to the extent of that conflict (at paras 160, 164).

The majority also decided that a single framework for analysis should be applied to conflicts between *Charter* rights and Aboriginal, treaty and other rights and freedoms, regardless of whether the conflict was internal to the Indigenous group or external (at para 165). Separate frameworks were rejected for five reasons. First, the Court’s decision on the section 32(1) issue that the *Charter* applied to Indigenous governments addressed the concerns of some intervenors about holding Indigenous governments accountable (at para 167). Second, section 25 protects Indigenous difference as established by the collective (at para 168). Third, the text of section 25 did not provide a foundation for distinguishing claims based on claimants’ identities (at para 169). Fourth, it would not always be clear whether a claim was internal or external (at para 170). Finally, the purpose of section 25 was not incompatible with the idea that individual and collective rights can co-exist (at para 171).

However, while not endorsing separate frameworks, the majority did speak of the need for “great caution” when an individual brings a *Charter* claim against their own nation, as Ms. Dickson had done. In such cases, Kasirer and Jamal JJ stated that “courts should proceed cautiously to avoid unnecessarily or unwittingly imposing incompatible ideas or legal principles upon the distinctive Indigenous legal system” (at para 172). This vague statement was clarified to some extent when they adopted the words of one intervenor, the Carcross/Tagish First Nation, quoting call 42 of the [Truth and Reconciliation Commission of Canada: Calls to Action \(2015\)](#): “Canadian institutions have been advised to tread lightly around the inherent rights that Indigenous governments have to their own governance and justice systems” (at para 172).

Finally, the majority acknowledged that there might be other limitations on the application of section 25 in future cases (at para 173). Here Kasirer and Jamal JJ singled out section 28 of the *Charter* and section 35(4) of the *Constitution Act, 1982*. These provisions guarantee rights – *Charter* rights and freedoms in the former and Aboriginal and treaty rights in the latter – “equally to male and female persons” and apply “notwithstanding any other provision” of the *Charter* and *Constitution Act, 1982*, respectively. The majority stated that their purpose was to ensure that a right or freedom shielded by section 25 “does not shelter gender-based discrimination” (at para 173). They left the details of the limitations on section 25’s protection for cases where gender-based discrimination arose on the facts.

Order of Analysis

Kasirer and Jamal JJ set out a four-stage framework for analyzing the interaction between *Charter* sections 25 and 15 (at paras 179-182):

First, the *Charter* claimant must show that the impugned conduct *prima facie* breaches an individual *Charter* right. If no *prima facie* case is made out, then the *Charter* claim fails and there is no need to proceed to s. 25.

Second, the party invoking s. 25 — typically the party relying on a collective minority interest — must satisfy the court that the impugned conduct is a right, or an exercise of a

right, protected under s. 25. That party bears the burden of demonstrating that the right for which it claims s. 25 protection is an Aboriginal, treaty, or other right. If the right at issue is an “other” right, then the party defending against the *Charter* claim must demonstrate the existence of the asserted right and the fact that the right protects or recognizes Indigenous difference.

Third, the party invoking s. 25 must show irreconcilable conflict between the *Charter* right and the Aboriginal, treaty, or other right or its exercise. If the rights are irreconcilably in conflict, s. 25 will act as a shield to protect Indigenous difference.

Fourth, courts must consider whether there are any applicable limits to the collective interest relied on. When s. 25’s protections apply, for instance, the collective right may yield to limits imposed by s. 28 of the *Charter* or s. 35(4) of the *Constitution Act, 1982*.

In addition, if section 25’s protections do not apply, the challenged provision may be justified under section 1 of the *Charter*.

The majority considered the order of analysis important. The interpretation of the *Charter* right at issue had to precede the application of section 25 because it had to first be determined whether that right and those protected by section 25 were in irreconcilable conflict (at para 175). However, it would be a needless drain on parties’ resources to require an Indigenous group to fully defend against a *Charter* claim, including the justification of any breach under section 1, if section 25 gave priority to the collective rights. In addition, the majority recognized the potential danger that Indigenous groups would align their laws with *Charter* values rather than Indigenous legal norms to avoid the time and expense of litigating a case such as this one through three levels of court (at para 176).

Application to this Case

The majority used their framework to conclude, first, that Ms. Dickson had established a *prima facie* breach of section 15(1) of the *Charter*.

In discussing the first step in a section 15(1) analysis, the majority focused on the need to find a distinction based on an enumerated or analogous ground. While Ms. Dickson had relied on the analogous ground of “Aboriginality-residence” first recognized in *Corbiere*, the majority found that ground to be insufficient because there was a substantive difference between the *Indian Act* residency requirement for voters in *Corbiere*, and one that was part of the constitution of a self-governing First Nation (at para 192). Nevertheless, L’Heureux-Dubé J’s discussion in *Corbiere* of the historical and continuing disadvantages, stereotyping, and prejudices faced by non-resident Indigenous people was helpful to determining the new analogous ground: “non-resident status in a self-governing Indigenous community” (at paras 196-197). That new ground met the *Corbiere* test for recognizing analogous grounds: it was constructively immutable (at para 193), described a discrete and insular minority (at para 195), and served as a “constant marker of suspect decision-making or potential discrimination” (at para 198).

In the second step in the section 15(1) analysis, the issue was whether the distinction based on non-resident status in a self-governing Indigenous community reinforced, perpetuated or exacerbated Ms. Dickson’s disadvantage as a non-resident VGFN citizen. The majority held it did, drawing on the observations of the Royal Commission on Aboriginal Peoples (*Final Report*, vol. 4, [Perspectives and Realities](#) (1996) at 519), and the National Inquiry into Missing and Murdered Indigenous Women and Girls ([Reclaiming Power and Place](#), vol. 1a (2019) at 273), about assumptions made regarding the incompatibility of Indigenous cultures and urban life, the presumed need for Indigenous individuals to assimilate, and their alienation from home communities (at para 201).

Having determined that Ms. Dickson had established a *prima facie* breach of her section 15(1) right to equality, the majority turned to the second stage in their framework and concluded that the VGFN had shown that its residency requirement was an exercise of an “other right” under section 25, i.e., “the right to set criteria for membership in its governing body – a right that protects Indigenous difference” (at para 185). The VGFN had a “statutory right to provide for the membership and composition of its governing bodies” (at para 209). The exercise of this statutory right was found in the VGFN constitution, and the VGFN had a right to enact a constitution with membership criteria because these rights were provided for in their Final Agreement, a section 35 treaty. The Self-Government Agreement and federal *Yukon First Nations Self-Government Act* also included language requiring provisions for the composition and membership of their governing bodies, which “necessarily includes the right to set criteria for membership” (at para 209).

Kasirer and Jamal JJ also held that the VGFN had proven that the right to restrict the membership of its governing body protected or recognized Indigenous difference, relying on the trial judge’s findings of fact about the historical and cultural significance of residency (at para 212). They also relied on the Court of Appeal’s emphasis on the significance of the connection between VGFN leadership and VGFN land “a connection deeply rooted in the VGFN’s distinctive culture and governance practices” (at paras 213, 217). They also noted that residency on traditional territory was, “a matter of fundamental importance to a small first nation in a vast and remote location” (at para 218), helping to make personal interactions and resistance to outside forces easier (at paras 218, 222).

As noted above, the majority also found that the residency requirement had a “constitutional character” in the substantive sense (at para 218). They indicated that the question of whether a “constitutional character” would “always be required” for section 25 protection did not have to be decided because it was clear the residency requirement in this case did have an important constitutional dimension.

At the third stage, the VGFN had to prove that the conflict between the two rights was irreconcilable. Kasirer and Jamal JJ concluded that the conflict was plain to see because the two rights had first been properly interpreted and then compared (at paras 185-186, 204, 220). The focus of discussion at this stage was Ms. Dickson’s suggestion that one of the four Councillors be selected from VGFN citizens living in Whitehorse – a suggestion that the two rights could be reconciled (at para 223). However, the majority concluded that allowing one councillor to live in Whitehorse would undermine the VGFN’s right to decide on the membership of its governing

bodies in a non-incidental way (at para 225). Ms. Dickson’s suggested accommodation would “unacceptably diminish” the connection between Vuntut Gwitchen self-government and the seat of government location in Old Crow (at para 225).

At the fourth stage of the framework, the majority concluded that no other limits applied in this case. They reiterated that the limitations imposed by section 28 of the *Charter* and section 35(4) of the *Constitution Act, 1982* might apply to section 25 protections in other cases but were not relevant in this case (at para 227).

The application of section 1 was also not relevant, with section 25 serving as a shield of collective rights in this case.

The last point that Kasirer and Jamal JJ made was that Ms. Dickson’s equality claim under the VGFN Constitution – pled in the alternative but not argued in the Supreme Court – could still be pursued (at para 230). However, as any such challenge would be heard by Canadian courts until the VGFN establishes its own dispute resolution system, it is difficult to see how the outcome would be different than a *Charter* claim.

Application of the Majority’s Decision

Three recent Federal Court decisions – *Houle, Donald-Potskin*, and *Cunningham* – applied the framework set out in *Dickson* to adjudicate conflicts between individual equality rights and collective Indigenous governance under sections 15(1) and 25 of the *Charter*. While *Dickson* involved a nation operating under a modern treaty and self-government agreement, *Houle, Donald-Potskin*, and *Cunningham* dealt with First Nations operating under the *Indian Act*. Thus, these cases not only provide the first judicial interpretations of *Dickson*’s section 25 framework, they also provide an answer, should they be upheld on possible appeals, to the question of whether *Dickson*’s section 25 analysis can apply to nations still operating under the *Indian Act*.

In short, the Federal Court held that this difference does not limit the application of *Dickson*. In each of the three cases, the Court found that residency-based candidacy restrictions for Chief or Council infringed section 15(1) equality rights but were shielded by section 25.

Houle v Swan River First Nation

Robert Houle, an off-reserve member of Swan River First Nation (SRFN), was barred from candidacy in elections for chief because the SRFN custom election code required one year of on-reserve residence prior to nomination (*Houle*, paras 1 and 20). Mr. Houle argued that the residency requirement “discriminates against those SRFN members, like him, who do not live on the Reserve” (at para 1).

The SRFN argued that “even if the Residency Requirement breaches s.15, it is shielded by s. 25 of the Charter” (at para 2). They contended that their residency requirement was an “other right” under section 25 because “the SRFN possesses rights of self-government, including a right to select its leaders in a manner determined pursuant to its customs and traditions (at para 21). This argument required Justice Cecily Y. Strickland to apply the four-stage analysis developed by the

majority in *Dickson*, the first stage of which requires the claimant to show a *prima facie* breach of a *Charter* right.

Houle argued the restriction infringed his section 15(1) right on the analogous ground of “Aboriginality-residence,” relying on *Corbiere* (at para 33). He distinguished *Dickson* on the basis that the residency requirement in that case was included in the constitution of a self-governing First Nation whereas the SFRN residency requirement was passed under a custom election code given effect under the *Indian Act* (*Houle* at para 34). The SFRN, in turn, cited *Dickson* as supporting the idea that the analogous ground of “Aboriginality-residence,” as recognized in *Corbiere*, did not apply where the residency requirement was not imposed by the Crown but arises from a First Nation’s exercise of its inherent right of self-government (*Houle* at para 39). The Supreme Court majority instead relied on “non-resident status in a self-governing indigenous community” as the ground of discrimination (*Houle* at para 39). However, the SFRN acknowledged that even using the ground of “non-resident status in a self-governing indigenous community” recognized in *Dickson*, the residency requirement infringed section 15.

Justice Strickland held that the rule created a distinction, basing her decision on a different analogous ground to those argued by the parties: off-reserve band member status (at para 55). She chose the ground articulated in *Corbiere* because:

... similar to *Corbiere*, the Residency Requirement in this case draws such a distinction between on- and off-reserve members. Although the circumstances in *Corbiere* concerned a requirement imposed by s. 77 of the *Indian Act* that band members ordinarily reside on-reserve in order to vote in band elections, while in this matter the Residency Requirement requires band members to be ordinarily resident on the Reserve for at least one year in order to be eligible to be nominated to run for office, this factual difference does not affect the required analysis. It is the distinction between on- and off-reserve that is relevant (at para 54).

Accordingly, the first step of the section 15 *prima facie* breach analysis was satisfied (at para 55).

Justice Strickland also held that the second step in determining a *prima facie* breach, i.e., whether the residency requirement “reinforces, perpetuates or exacerbates Mr. Houle’s disadvantage as an off-reserve SFRN member” was met (at para 41). Thus, at the first stage of the *Dickson* analysis, the Federal Court found there had been a *prima facie* infringement.

The second stage – where the party relying on section 25 must show that the challenged provision is an “other right” that protects Indigenous difference – is important because First Nations under the *Indian Act* have often found it difficult to avail themselves of the protections afforded by section 25. Indeed, Houle distinguished *Dickson* on this basis (at paras 34, 83).

The SFRN argued that the “other right” at issue here was the “the right to set criteria for election to its governing party”, which it argued was “part of its inherent right of self-government” (at para 81). The right is also recognized, they argued, through the *Indian Act*, which acknowledges the right of First Nations to establish elections laws based on their customary law.

Justice Strickland agreed that the SFRN’s right to determine its election criteria was an “other right” protected by section 25 (at para 126), noting that the Supreme Court in *Dickson* had held that “the rights protected under s. 25 are not limited to those that are constitutionally entrenched and may instead include ordinary statutory rights (*Houle* at para 84). Because of this, Strickland J held that she did not need to determine whether the right at issue arose from an inherent right of self-government. This finding is crucial to extending the protections of section 25 to First Nations operating under the *Indian Act*, as it means they do not have to prove a right of self-government before they can gain its protection. As Strickland J held, “the right to restrict the membership and composition of its governing bodies, arises by way of the *Election Regulations*, which codify SRFN election customs. This is a statutory right as the exercise of SRFN’s authority to govern via the *Election Regulations* stems from the *Indian Act*” (at para 96).

The third stage in the *Dickson* framework required consideration of whether “an irreconcilable conflict exists between the Residency Requirement and the Applicant’s s. 15 Charter rights” (*Houle* at para 144). Justice Strickland found that there was such a conflict because “removing the Residency Requirement would undermine, in a non-incidental way, SRFN’s right to effect and impose the Residency Requirement. That is, to decide on the membership of its governing body” (at para 153). This rule protected Indigenous difference by ensuring leaders remain connected to land and tradition (at para 138). Notably, the Court rejected a remedy proposed by Mr. Houle, suggesting that a residency requirement while holding office - which the Elections Regulations also contained - could remain, while the more onerous requirement that a person be resident *before* they could *run for office* be struck. Justice Strickland held that even this would undermine the right to determine the selection criteria for government of the nation and would irreconcilably conflict with that right (at para 156).

In making this finding, Strickland J clearly prioritized the collective right under section 25. As she wrote:

I appreciate the Applicant’s view that a one-year pre-election Residency Requirement is onerous. However, the analysis required is a comparison of an individual’s right not to be discriminated against with the collective right of SRFN to preserve Indigenous difference. To apply s. 15(1) would derogate from the SRFN right to effect and impose the Residency Requirement, which restricts the eligibility of SRFN members to be nominated to run for office, that is, to govern itself in accordance with its own particular values and traditions. (at para 154)

This brought the Court to the fourth stage, determining whether there were any limits on the section 25 right in this instance. Justice Strickland noted the *Dickson* Court’s conclusion that sections 35(4) and 28 of the *Constitution Act, 1982* limited section 25 and that the latter section could not “shelter gender-based discrimination.” She held, however, that no such discrimination was at issue in this case (at para 164). Further, no section 1 analysis was required (at para 166).

Donald-Potskin v Sawridge First Nation

Gina Donald-Potskin, an off-reserve Sawridge First Nation member, challenged a residency provision in the Sawridge Constitution requiring candidates for Chief to live on reserve or within

a 10-kilometre radius (*Donald-Potskin* at paras 1-3). She sought judicial review of a decision made by the nation's electoral officer, refusing to accept her nomination on account of her failing to meet the residency requirement (at para 47).

As in *Houle*, Donald-Potskin alleged “a *prima facie* breach of section 15 on the basis of the analogous ground of Aboriginal residency” (at para 50). Alternatively, she argued that the court should recognize a new analogous ground of “non-resident status in an Indigenous community governed by a customary election code” (at para 50). Sawridge conceded a *prima facie* section 15(1) breach (at para 57) and the Court accepted that the rule created a distinction on the basis of non-residence.

Sawridge argued, however, that “the residency requirement is ‘shielded’ by section 25 of the *Charter* because it is an exercise of its collective self-government right to regulate the composition of its Council” and that “the exercise of its right to regulate its governing body is an ‘other’ right, related to its right to self-government” (at para 58).

Justice Thomas Heneghan applied *Dickson*'s four-stage section 25 analysis. He did so “despite the different sources of the authority in question” in the cases (at para 82). Like Strickland J in *Houle*, Heneghan J found that the residency requirement qualified as an “other right.” However, he was less formal in his analysis of each stage of the *Dickson* “test.” He noted that the residency requirement has a “constitutional character” (at para 85). Further, the residency requirement “preserves an important element of Sawridge's leadership traditions and practices, that is the Chief's connection to the land” (at para 86). Without much analysis, Heneghan J also concluded that the requirement protects Indigenous difference: “at a minimum, the residency requirement is connected to preserving cultural difference, as addressed in the affidavit of Ms. Twinn” (at para 89). It did so in part by maintaining a strong link between leadership and the community's traditional territory.

Next, Heneghan J found an irreconcilable conflict between the individual and collective rights at issue, holding “that enforcing Ms. Donald-Potskin's individual right would derogate from the collective right in a manner Section 25 was meant to shield” (at paras 95-97).

The *Donald-Potskin* decision raised the possibility of a gender-based limit on the section 25 right at the fourth stage of analysis. Indeed, Donald-Potskin made arguments under section 28 of the *Charter* and section 35(4) of the *Constitution Act, 1982*, citing the gendered history of Indigenous status loss and its ongoing effects on women's political participation. Justice Heneghan acknowledged that section 25 cannot shield collective rights that perpetuate gender discrimination. But he held that Donald-Potskin had not established sufficient evidence of a gender-based nexus (*Donald-Potskin* at paras 104-106). The First Nation's expanded definition of “resident” to include those within 10 km of reserve lands was taken as a sign of inclusion, not exclusion (at para 109). The *Charter* application was dismissed, with no section 1 analysis required.

Cunningham v Sucker Creek First Nation 150A

The *Cunningham* litigation was dealt with in two parts. In Part One, the Court found that the Sucker Creek First Nation's (SCFN) residency rule requiring candidates for Chief or Council to have lived

on the reserve for six consecutive months before nomination discriminated against Wayne Cunningham, a band member who lived off-reserve, contrary to section 15(1) of the *Charter* (*Cunningham* at para 2).

In the second part of the litigation, SCFN argued that section 25 of the *Charter* shielded the election regulation. As in *Houle*, Strickland J applied the four-step framework set out in *Dickson*.

At the first step, the Court reaffirmed its earlier finding: the residency rule bars off-reserve members from seeking elected office and therefore infringes equality rights under section 15 (at para 22). At the second step, Strickland J concluded that SCFN's right to set eligibility criteria for leadership, here through the impugned Election Regulations, qualifies as an "other right" under section 25. Although not constitutionally entrenched, the right arises from band custom codified under section 2(1)(d) of the *Indian Act* (at para 23). Justice Strickland affirmed that the protection of section 25 is not limited to rights that have been constitutionally entrenched; it may extend to statutory rights that protect Indigenous difference (at paras 46-47).

On the question of whether the Elections Regulations protect Indigenous difference, the Court held that they do. Justice Strickland accepted evidence that the regulations had been designed in contemplation of the possibility that remote off-reserve members with no knowledge of the community may seek to run for office (at para 89). She concluded: "the Residency Requirement in the Election Regulations ... enshrines an aspect of SCFN's Indigenous difference, being the importance of its leadership having familiarity and physical proximity with its members – where they are congregated as a community – which occurs from living in and amongst their people" (at para 104). Further, and notably, the Court relied in part on Indigenous law to support this conclusion, holding that "[r]equiring SCFN leaders to live in and amongst their membership is a manifestation of a longstanding custom pre-dating Treaty No. 8, and also reflects [the Cree legal principle of] *wâhkôhtowin*, which finds its basis in, among other things, values of kinship, respect and reciprocity and the relationship with the land" (at para 107, discussion at paras 108-126).

At the third stage of the analysis, the Court found an irreconcilable conflict between Mr. Cunningham's section 15 rights and SCFN's collective right to regulate eligibility for office. Striking down the residency requirement would "undermine in a non-incidental way" SCFN's ability to ensure leaders maintain the desired connection to land and community (at para 144). Allowing off-reserve members to run without meeting the residency requirement would undermine the community's capacity to safeguard its governance traditions.

Here the Court elaborated on the fundamental tension between individual and collective rights and stressed that section 25 does not balance the two interests but gives precedence to the collective right once irreconcilable conflict is shown (at paras 144-147). Notably, this reasoning was also couched in language of judicial deference to Indigenous governments. As Strickland J wrote, "the decision as to where to draw the Residency Requirement boundary – whether geographical and/or based on interaction with the on-reserve community – must lie with SCFN" (at para 124). Further, "[w]hen drafting the Election Regulations, SCFN could have elected to take a different approach to the six-month on-reserve nomination eligibility requirement. For example, they could have chosen to apply this only to SCFN members who live beyond a 10, 50 or 100 kilometre radius from the reserve lands and/or who have demonstrated a clear connection to the on-reserve

community. But, SCFN did not chose [sic] to do so and it is not the role of this Court to effect changes to the Election Regulations” (at para 147). In other words, Indigenous communities must retain authority to define the character of their leadership.

At the fourth stage, neither party pointed to applicable limits such as those in section 28 of the *Charter* or section 35(4) of the *Constitution Act, 1982*. As in *Houle* and *Donald-Potskin*, no section 1 analysis was necessary.

Discussion

Overall, the majority’s decision in *Dickson* maintained the Canadian state’s supervisory role over Indigenous governance with its section 32(1) holding that the *Charter* applies to the VGFN. However, as we will discuss in our next post, Kasirer and Jamal JJ took a more hands-off approach in their reconciliation of section 25 and section 15 of the *Charter* than the dissent, while still maintaining a supervisory role for the Court. It appears that the majority wanted to protect a sphere of Indigenous jurisdiction but believed that the protection of that sphere should be the role of section 25 rather than section 32(1).

The majority used the Court’s traditional purposive, liberal, and generous approach to constitutional interpretation, with a reliance on *Hunter* and *Big M* and a focus on the interests the *Charter* is meant to protect. This approach is notable after the division on the bench that began with *Quebec (Attorney General) v 9147-0732 Quebec Inc*, [2020 SCC 32 \(CanLII\)](#) and Justices Russell Brown, Malcolm Rowe, Suzanne Coté and sometimes Chief Justice Richard Wagner relying on a more textualist and originalist approach (see Vanessa MacDonnell’s “Enduring Wisdom: The Purposive Approach to Charter Interpretation,” in *Canada’s Surprising Constitution: Unexpected Interpretations of the Constitution Act, 1982*, Howard Kislowicz, Kerri A. Froc and Richard Moon, eds (Vancouver: UBC Press, 2025) 369). Narrowing constitutional interpretation to the “framers’ intent” as found in official government statements and other documents risks freezing Indigenous rights – again. Surprisingly, it is the dissent of Martin and O’Bonsawin JJ that limited the discussion of the purpose of section 25 to what was said by some of the politicians and civil servants who negotiated, drafted, or enacted that provision, as we will elaborate on in our next post (*Dickson* at paras 294-308).

In their approach to the conflicting rights, the *Dickson* majority prioritized collective rights over individual *Charter* rights. They found an irreconcilable conflict between the VGFN’s collective right to determine the composition and membership of their governing bodies and Ms. Dickson’s right to be free from discrimination on the basis of her non-resident status in a self-governing Indigenous community that created “a real risk to the continued vitality of Indigenous difference” (at para 226). The collective right therefore prevailed and the individual right was rendered ineffective (at para 164). As we will note in our next post, the dissent came to the opposite conclusion.

One factor that helped assure the primacy of section 25 for the majority was their requirement that only a *prima facie* case be made out by the claimant under section 15(1), unlike the dissent’s insistence on a full section 15(1) analysis at stage 1. A *prima facie* case is more abstract and removed from the context of the claimant’s life. We also note that the majority maintained a role

for “arbitrariness” in the section 15(1) analysis, which has been a major point of debate in recent section 15(1) jurisprudence (at para 202). Any requirement that the impugned provision arbitrarily limits the claimant’s equality rights could – in future cases – narrow the scope of section 15(1) rights, although that was not the case here. Second, Kasirer and Jamal JJ did not exclude internal *Charter* challenges from the scope of section 25 – again, unlike the dissent who thought that intragroup disputes should generally be dealt with under section 1 (at para 329). The scope of section 25’s primacy over individual *Charter* rights is not just larger in the majority decision; it includes the type of affirmative action measures that cannot be dealt with under section 15(2), which was how *Kapp* was resolved by the majority in that case. Third, when demarcating the scope of section 25, the majority chose “Indigenous difference” as the limit on “other rights and freedoms,” whereas the dissent limited section 25’s protection to rights that are “unique” to Indigenous peoples, as we will discuss (at para 285).

Dickson, *Houle*, *Donald-Potskin*, and *Cunningham* all involved statutory rights and freedoms enacted with the cooperation of the federal government. How would the *Dickson* majority’s approach fit with inherent Indigenous self-government that is not entwined with state legal processes? This is primarily a question of the application of section 32(1) and whether the *Charter* applied in these cases. The majority in *Dickson* expressly refrained from commenting on whether the *Charter* would apply to a First Nation exercising an inherent self-government authority “untethered from federal, provincial, or territorial legislation” (at para 101). It had only a minor role in the section 25 issues as far as the majority was concerned, as they concluded that, “[w]hether or not the residency requirement might also be understood as an exercise of an inherent right to self-government, we conclude that it is an ‘other’ right protected under s. 25” (at para 204). This is despite the fact the VGFN argued that its residency requirement was an exercise of its inherent right to self-government (at para 207) and “a provision that seeks to preserve and enhance ‘Indigenous difference’ through the continuation of an inherent Indigenous legal order that survived colonization and for which VGFN has secured space in the fabric of the Canadian legal system” (at para 214).

The Federal Court decisions in *Houle*, *Donald-Potskin*, and *Cunningham* decisively and explicitly prioritized collective rights over the individual rights. The judgments understood the majority in *Dickson* as adopting a very deferential stance towards the decisions of Indigenous governments in shaping rules pertaining to their own internal governance, a stance given effect by emphasizing the “shielding” effect of section 25 (reflecting as well the deferential approach taken on judicial review of the decisions of Indigenous decision-makers adopted in cases such as *Pastion v. Dene Tha’ First Nation*, [2018 FC 648 \(CanLII\)](#)). It is difficult to quibble with the courts’ legal analysis on the effect of section 25; while prioritizing the collective governance rights of Indigenous nations over the *Charter* rights of individuals, the decisions read as faithful applications of the *Dickson* majority’s reasons for decision. What is most notable in this respect is the Federal Court’s determination that section 25 could be invoked by an *Indian Act* government without needing to first prove the existence of the right of self-government.

Despite the Federal Court’s easy embrace of the *Dickson* majority in *Houle*, *Donald-Potskin*, and *Cunningham*, it is doubtful that future *Charter* challenges in which the question of section 25’s protection arises will be as straight-forward. Kasirer and Jamal JJ did not decide whether a challenged provision must have a substantive “constitutional character” to receive section 25’s

protection in some or all cases (*Dickson* at paras 151, 218). They did give some indication of how “constitutional character” might be recognized when they stated that it was clear that the VGFN residency requirement had a significant constitutional dimension because it was part of the VGFN Constitution, “an aspect of the First Nation’s law that preserves and enshrines an important dimension of VGFN leadership traditions and practices, and VGFN leaders’ connection to the land,” and “clearly intended to reflect and promote the VGFN’s particular traditions and customs relating to governance and leadership” (at para 218). The three Federal Court decisions reviewed here found that election rules established under the *Indian Act* met these criteria, but future cases involving other types of collective rights await another day.

Also left up in the air, if not explicitly reserved for future cases, is the difference it makes to the analysis when an individual brings a *Charter* claim against their own nation, as Mr. Houle, Ms. Donald-Potskin, and Mr. Cunningham did. In such cases, Kasirer and Jamal JJ stated that “courts should proceed cautiously to avoid unnecessarily or unwittingly imposing incompatible ideas or legal principles upon the distinctive Indigenous legal system” (*Dickson* at para 172) but offered no direction on what a cautious approach might entail. Nevertheless, this concern seemed important to the outcomes in *Houle*, *Donald-Potskin* and *Cunningham*. It is also noteworthy that in *Cunningham*, Strickland J applied Cree law in the section 25 analysis, perhaps attentive to this concern.

Another factor that may arise in future cases involves a point made by Kasirer and Jamal JJ at stage three of the *Dickson* analysis, when determining if there is an irreconcilable conflict between the collective and individual rights at issue. They indicated that “at this stage of the analysis, consideration should be given to any alternate relief sought by the claimant, as different *Charter* remedies may be more or less intrusive on the relevant Aboriginal, treaty or other right” (at para 163). If a First Nation could accommodate a claimant, then perhaps the impact on the collective right would be seen as incidental under the section 25 analysis. However, *Houle* and *Cunningham* suggest that any diminishing of the protection of Indigenous difference “as understood and established by the collective” would amount to a serious breach of section 25. Governance and rule-making around elections seem to be perceived by courts as very strong collective rights.

More importantly – and this bears repeating – the Supreme Court majority acknowledged, as a limit on section 25’s protection, the requirement to ensure that a right or freedom protected by section 25 does not “shelter gender-based discrimination” (at para 173). First, they acknowledged a limiting role for section 28 of the *Charter* which guarantees the *Charter*’s rights and freedoms “equally to male and female persons” and applies “[n]otwithstanding anything in this *Charter*.” Second, they recognized the relevance of section 35(4) of the *Constitution Act, 1982*, which provides that, “notwithstanding any other provision” in the *Constitution Act, 1982*, section 35’s Aboriginal and treaty rights are “guaranteed equally to male and female persons.” The scope of these limitations was left to be dealt with by cases where the sex equality issues arose on the facts.

The *Dickson* majority’s recognition of the over-riding role of equality between “male and female persons” is in sharp contrast to the dissent’s unwillingness to discuss any role for either of these provisions, notwithstanding their text and history. As we will discuss, gender equality concerns featured in a different way in the dissenting reasons. The *Donald-Potskin* case raised this issue, with the Federal Court acknowledging that section 25 cannot shield collective rights that perpetuate gender-based discrimination. That court determined, however, that Ms. Donald-Potskin

had not established a factual basis to show that women were more likely to be non-resident than men – it was not enough that the claimant’s mother had lost status and the right to reside on the reserve as a result of the marrying-out provisions of the *Indian Act* and gained it back following amendments to that Act in the 1980s (*Donald-Potskin* at paras 39, 104-106). In *Cunningham*, the applicant also presented evidence that their maternal ancestors and their descendants had lost status and residency rights due to the *Indian Act*, although they did not argue that sections 28 or 35(4) applied (*Cunningham* at para 6). The courts in both cases declined to draw a connection between the off-reserve residency of the claimants and the historical loss of status of their families (*Donald-Potskin* at paras 108-109, *Cunningham* at paras 148-149). It appears that more evidence than this historical legacy of patriarchal colonialism will be required to engage the gender equality limits to section 25.

Before the Supreme Court of Canada decision in *Dickson*, Indigenous groups negotiated self-government with the federal and other governments for four decades after the *Constitution Act, 1982* came into effect. Because the Court had always side-stepped opportunities to rule on the meaning of section 25, the parties to the negotiations had to make certain assumptions. Now that those assumptions have been proved right or wrong, what happens? What happens to ongoing negotiations, given the issues deliberately not adjudicated by the majority in *Dickson*? Will it be another forty years before we all find out whether the exercise of an inherent right to self-government, recognized by UNDRIP, also attracts the *Charter*? Or will Indigenous constitutions be implemented in such a way that disputes can finally be resolved according to the norms and decision-making processes of Indigenous communities, rather than the Canadian government and courts?

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