First Nations Child &
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Loving Our Children: Finding What Works for First Nations Families
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Information Sheet #7

Dickson v. Vuntut Gwitchin First Nation: What First Nations Should Know

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This information sheet elaborates on the Supreme Court decision in *Dickson v. Vuntut Gwitchin First Nation* ("Dickson"), delivered in March 2024.[2] It discusses the circumstances under which the *Canadian Charter of Rights and Freedoms* ("the Charter") applies to First Nations, the consequences of application of the Charter and how First Nations can seek to protect their laws from Charter challenges.

The Dickson Decision Context

The Charter imposes obligations on the Parliament of Canada, provincial legislatures and the federal, provincial and territorial governments.[3] It extends to entities that are controlled by the federal, provincial or territorial governments or that perform governmental functions.[4] Governments cannot avoid their Charter obligations by delegating their powers.[5] For example, the Charter applies to municipalities and government-controlled transit authorities.[6]

Canadian courts had ruled that the Charter applies to certain Indigenous governance entities, including Indian band councils exercising governmental powers under the *Indian Act*[7] and Indigenous governments operating under federal laws similar to the *Indian Act*.[8] In Dickson, the Supreme Court of Canada provided new lessons about when the Charter applies to Indigenous governance entities. The term "Indigenous governance entity" refers to the various governance structures of First Nations, which

In 2016, the Canadian Human Rights Tribunal ordered Canada to cease its discriminatory practices and to reform the First Nations Child and Family Services (FNCFS) program. Indigenous Services Canada will fund "prevention/least disruptive measures" at the rate of $2,500 (adjusted for inflation) per person living on reserve and in the Yukon until the FNCFS program reform is completed. Concerns have been raised about the adequacy and implementation of this per capita funding approach.

This information sheet is **one in a series**[1] developed in collaboration with the McGill University's Faculty of Law to provide basic legal information relevant to self-government and the provision of child welfare services. This is not legal advice. Legal counsel should be consulted for guidance on your situation.

extend beyond the Crown-imposed band councils. In short, the Charter will apply to Indigenous governance entities recognized under federal legislation or exercising powers that Parliament would otherwise exercise under the Constitution of Canada.

When Does the Charter Apply to Indigenous Governance Entities Other Than Band Councils Exercising Governmental Powers Under the *Indian Act*?

The Charter applies to the conduct—whether laws or governmental actions—of an Indigenous governance entity if the entity is considered to be *government by nature*[9] or if its conduct constitutes governmental activity.[10] *Governmental actions* refer to the activities performed by government employees by authority of law, while laws are enacted by legislative bodies or recognized by the courts. This section does not pertain to band councils exercising governmental powers under the *Indian Act*; it was already established that they are subject to the Charter.

Charter application: The Indigenous governance entity is government by nature

Several criteria help to indicate that an Indigenous governance entity is a government by nature. Not all criteria need be satisfied to arrive at such a conclusion. But a court may more easily determine that an entity is government by nature if the following criteria are met:

- The entity has a council that is democratically elected and accountable to its constituents,
- The entity has a general taxing power,
- The entity is empowered to make, administer and enforce coercive laws,
- The entity derives its existence and lawmaking authority from the federal government.[11]

This last criterion is satisfied as long as an Indigenous government is recognized as a legal entity under federal legislation or exercises powers that Parliament would otherwise exercise under the Constitution of Canada, such as through a self-government agreement.[12]

Charter application: The Indigenous governance entity's conduct is government activity

The conduct of an Indigenous government is likely to amount to government activity if it is given the force of law by federal legislation and if it exercises a *power of compulsion*.[13] It is given the force of law under federal legislation if it is approved and given effect at least in part by a federal statute. The exercise of a power of compulsion is involved if legal restrictions are imposed on members of the population.[14] For example, if the federal government passes legislation allowing a First Nation to implement its constitution and the provisions of that constitution impose legal restrictions on its members, the enactment and enforcement of these provisions would be regarded as government activity.[15]

The Court declined to address whether the Charter would apply to the exercise of an inherent right of self-government that is entirely independent of federal legislation.[16]

What Are the Consequences of the Charter Applying to Indigenous Governance Entities?

If the Charter applies to an Indigenous governance entity and that entity violates the Charter, two types of consequences could follow:

- Under section 52 of the *Constitution Act, 1982*, if a law of the entity is found to be inconsistent with the Charter, that law can be struck down, partly or wholly, or it could be modified or reinterpreted to make it respect the Charter.[17]
- Under section 24(1) of the Charter, if a government action of the Indigenous governance entity other than a law (for example, police abuse) is found to be inconsistent with the Charter, an individual whose rights are thereby violated may receive a

remedy. Possible remedies include a declaration that the government breached the Charter, an award of damages award to the individual wronged or the payment of judicial costs.[18]

What Are Indigenous Governments' Safeguards Against Application of the Charter?

If a law of an Indigenous government limits a right protected by the Charter, there are two ways to ensure the law's ongoing operation:

- Like a settler government, an Indigenous government might show in court that the challenged law is justified under section 1 of the Charter (reasonable limits to rights and freedoms).[19] To do so, it must prove that the limit on the Charter right is justified in a free and democratic society.
- An Indigenous government might protect its law by invoking section 25 of the Charter, which protects Indigenous collective rights from the application of the Charter.[20]

Understanding How to Invoke Section 25

Invoking section 25 requires two steps. If both are satisfied and the case does not fall into the exceptions (called *applicable limits*), then the Indigenous collective right is prioritized over the Charter right.

- **Step 1:** The Indigenous government must show that the conduct under challenge is a collective right or the exercise of a right protected under section 25 of the Charter. To so qualify, the right must be an Aboriginal, treaty or other right. If the right at issue is not an Aboriginal or treaty right but an other right, the Indigenous government must demonstrate the existence of that right and that it protects or recognizes *Indigenous difference*.[21] Indigenous difference refers to "interests connected to cultural difference, prior occupancy, prior sovereignty or participation in the treaty process."[22] For example, the requirement to have leaders reside on their traditional territory is deemed to protect Indigenous difference because it preserves their connection to the land.[23]
- **Step 2:** The Indigenous government must show an irreconcilable conflict between the Charter right and the collective right. There is irreconcilable conflict if there is no way to give effect to the individual Charter right without hindering the Indigenous collective right.[24]
- **Exceptions:** Courts will consider whether there are any applicable limits to the collective right.[25] As recognized in Dickson, one such limit is that section 25 cannot be invoked to allow for gender discrimination.[26] No other such limits have yet been recognized.

In conclusion, if steps 1 and 2 are satisfied and the case does not fall under an exception, section 25 shields the Indigenous collective right and the Charter will not apply to it.

Key Takeaways

- The Charter is likely to impose legal obligations on First Nations after they conclude self-government agreements, as these agreements could be affirmed and given effect by federal legislation or confer authority on groups over an otherwise federal area of competence. The application of the Charter could lead to Indigenous laws being struck down or otherwise altered to bring them in line with the Charter. It could also lead to individual remedies, such as damages awards, when the actions of employees of an Indigenous government violate the Charter.
- For Indigenous governance entities whose authority derives only from an inherent right of self-government or whose authority is unconnected to federal legislation, it remains unclear whether the Charter will apply.

- Indigenous groups subject to the Charter should be mindful of the ways for their laws to operate despite limiting a Charter right. They should especially be aware of Dickson's novel approach to section 25. This approach provides a shield against application of the Charter where a Charter right is in irreconcilable conflict with an Indigenous collective right.

If you would like to share information about a First Nations child and family support initiative in your community, the Loving Our Children project researchers would like to hear from you. **LOCwhatworks@gmail.com**

Endnotes

1 https://cwrp.ca/indigenous-child-welfare
2 *Dickson v. Vuntut Gwitchin First Nation*, 2024 SCC 10. https://www.scc-csc.ca/case-dossier/cb/2024/39856-eng.aspx
3 Dickson at para 41.
4 Dickson at para 42.
5 Dickson at para 44.
6 *Godbout v. Longueuil (City)*, 1997 3 SCR 844; *Greater Vancouver Transportation Authority v. Canadian Federation of Students – British Columbia Component*, 2009 SCC 31.
7 Dickson at para 57.
8 Dickson at para 58; *Chisasibi Band (Chisasibi Eeyouch) v. Napash*, 2014 QCCQ 10367 at paras 100–106.
9 Dickson at para 77.
10 Dickson at para 94.
11 Dickson at para 77.
12 Dickson at paras 83–4.
13 Dickson at para 95.
14 Dickson at para 95.
15 Dickson at paras 95–6.
16 Dickson at para 91.
17 Henri Brun, Guy Tremblay & Eugénie Brouillet, *Droit constitutionnel*, 6th ed., Cowansville, QC: Yvon Blais, 2014, at paras XII-4.29 to XII-4.39; Peter W. Hogg & Wade K. Wright. *Constitutional Law of Canada*, 5th ed., Supp. (Toronto: Thomson Reuters, 2023) at paras 40:1 to 40:7.
18 Hogg & Wright, at paras 40:13, 40:18, 40:19, 40:20.
19 Dickson at para 183.
20 Dickson at para 117.
21 Dickson at para 180.
22 Dickson at para 150.
23 Dickson at para 150.
24 Dickson at para 161.
25 Dickson at para 180.
26 Dickson at para 173.