Charter: A Course S4E7 – Section 25 of the Charter and Dickson v VGFN Full Transcript

***Transcripts are auto-generated**

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Kris Statnyk (pull quote):

00:00

I think one of the challenging parts of the case was from my client's perspective and from the Vuntut Gwitchin perspective. The case was never really about the Charter. It was never really about Section 25 or Section 15. For them, this was a case about Section 32, the application of the Charter, the interpretation of modern treaties, the existence of the inherent right of self-government and...

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you know, the interpretation of, you know, Vuntut Gwitchin law as distinct from, you know, an interpretation of Canadian law or the Charter. So, there was, I guess, much more at stake for my client than just simply the specific residency law that was at issue. And you know, we're still trying to make sense of what that means for a variety of things.

Intro Music:

Charter a course, I will Charter a course. If we can just get the country to trust us.

00:55

Charter a course, southeast, west and north, and along the way we may find justice. Charter a course, I will Charter a course, if we can just get the country to trust us. Charter a course, southeast, west and north, and along the way we may find justice.

Cheryl Milne:

Hello and welcome to the fourth season of Charter of Course, a podcast created by the

01:25

at the University of Toronto. I'm Cheryl Milne, your host and the Executive Director of the Asper Centre. We focus on current Canadian constitutional law issues, highlighting aspects of constitutional litigation and exploring the meaning of our rights under the Canadian Charter of

Rights and Freedoms. Whether you are a law student, a lawyer or a curious person, we hope you'll learn about an aspect of Canadian constitutional law and litigation that interests you.

01:51

First, I'd like to acknowledge the land from which our podcast emanates. For thousands of years, it has been the traditional land of the Huron-Wendat, the Seneca, and the Mississaugas of the Credit River. Today, this meeting place is still home to many Indigenous people from across Turtle Island, and we are grateful to have the opportunity to work here. This episode marks the second of a two-part series on Indigenous self-determination and its intersections with the Canadian Charter of Rights and Freedoms. Our conversation today focuses on the recent

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Supreme Court decision, Dickson v Vuntut Gwich'in First Nation, the significance of Section 25 and what it means to recognize an Indigenous governing body as a government under the Charter. For the first part of this episode, I'll be speaking with Professor Kerry Wilkins to learn all about Section 25 of the Charter, its history, its recent application, and its intersection with the implementation of UNDRIP, the UN Declaration on the Rights of Indigenous Peoples.

02:51

During the practice corner, I'll be chatting with lawyer Kris Statnyk, on his experience representing the Vuntut Gwich'in First Nation in the Dickon Appeal. So, we're very lucky to have with us Professor Kerry Wilkins to speak about the Dickson case. Professor Wilkins has taught an in-depth seminar that tracks the Dickson litigation as it developed. He's worked as an adjunct professor at U of T and Osgoode, served as a government lawyer, and has written about central cases and issues in Indigenous and Aboriginal law.

03:21

especially in regard to their intersections with the Constitution. Professor Wilkins is the author of Essentials of Canadian Aboriginal Law and the editor of the anthology, Advancing Aboriginal Claims, Visions, Strategies, and Directions. Thank you so much for joining us today.

Kerry Wilkins:

Hello.

Cheryl Milne:

Hello, so let's begin. Would you mind starting off with some background information about Section 25 and why it was included in the Charter?

Kerry Wilkins:

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Well, I will start by talking about what the Supreme Court in Dickson said about that. The Charter of the Constitution Act 1982 had a long convoluted negotiating history, and I haven't looked through all of it to form an independent view about that. But I can talk a bit about what the

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judgments in Dickson said about that. One thing that the majority judgment and the joint dissent, Justices Martin and O'Bonsawin agreed about is that Section 25 is there to give some cushion to collective rights that belong to indigenous people from the application of the individual rights in the Charter.

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Now, the two judgments differed significantly about the scope of that cushion and the nature of the protection that it provided to the collective rights to which it pertained from the individual rights in the Charter. But they seemed to agree that it was there to give some sort of recognition that collective rights should not be allowed

05:14

to erode when they belong to Indigenous people as a result of the application or the enforcement of the rights in the Charter.

Cheryl Milne:

So how was it distinct from section 35 of the Constitution Act, 1982, and what is its particular function?

Kerry Wilkins:

Ok, section 35 exists to recognize and affirm the existing Aboriginal and treaty rights.

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of the Aboriginal peoples of Canada, Indian, Inuit, and Métis. So, but for Section 35, those existing Aboriginal and treaty rights would have no constitutional protection from interference by federal, provincial, or territorial orders of government. Section 35 does not in and of itself have much to do with the Charter.

06:14

It exists independent of the Charter, and Section 35 could exist and be there, even if there were no Charter. Section 25 exists, again, to provide some sort of cushion or protection to collective Aboriginal treaty or other rights of the Aboriginal peoples of Canada from the operation and the enforcement of the Charter. So...

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Section 35 is outside the Charter. Section 25 is within the Charter and operates within the Charter to give some, again, cushion to the rights to which it pertains, a somewhat broader category of rights than those to which section 35 pertained in respect of the Charter specifically.

Cheryl Milne:

07:07

So, let's do a bit more of a deep dive into Section 25. Why do you think besides mentioning Aboriginal and treaty rights, the section highlights the Royal Proclamation of 1763 and land claim agreements in particular?

Kerry Wilkins:

I think it highlights land claim agreements because in the original 1982 version, we didn't know, the Constitution didn't tell us what...

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legal or Constitutional status land claim agreements had. The 1983 amendments to Section 35 added Section 35 sub 3, which said that treaty rights mentioned in Section 35 sub 1 include rights acquired by way of land claim agreements, either existing or future. But they didn't know that in 1982.

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So, I suspect it seemed prudent to them to identify land claim agreements as sources of rights, whether or not they qualified as Aboriginal or treaty rights, that would be entitled to such protection as Section 25 provides from the intrusion of Charter rights.

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Today, it's probably no longer necessary that Section 25 mention land claim agreements or the rights in land claim agreements because they're sources of treaty rights. Section 35 itself now tells us that. But that was not the case in 1982. As for the Royal Proclamation, I find myself puzzled, frankly, because if you read the Royal Proclamation,

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it doesn't say much of anything about rights or freedoms. So, it's not a right-conferring document. That's not what it's there to do. But if I were speculating, I would say the Royal Proclamation is there because it's the instrument by which the Crown reserved for Indigenous people lands that were not already occupied by settlers and...

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protected them from settler encroachment by prohibiting anyone else from acquiring an interest in those lands, except by way of the crown. And the indigenous interest in land can't be alienated except by surrender to the crown. And that's a matter of the honor of the crown between

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the indigenous peoples themselves and the crown. So, I suspect that notion of preserving this notion of lands reserved for indigenous peoples is probably why the Royal Proclamation is there. But I've seen no jurisprudence involving Section 25 that made any mention of the Royal Proclamation, except when quoting Section 25 itself.

Cheryl Milne:

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And section 25 is really not litigated that often. I mean, it's, it has been recently engaged in the Dickson-Vuntut Gwitchin First Nation decision and so, you know, people were very interested in what the court was going to say about Section 25 just because there hasn't been that much litigation. So could you provide us with a bit of background on the case?

Kerry Wilkins:

Okay. In 1992 or 1993,

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the federal crown, the Yukon government, and I think 13 Yukon First Nations signed something called the Umbrella Final Agreement, which served as a template for the negotiation and conclusion of individual final agreements with those 13 Yukon First Nations. And it set out some guidelines...

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for the design of federal and Yukon legislation that would give statutory effect to the various final agreements. So, the Umbrella Final Agreement was an agreement in principle, had no particular force of its own, but again, it operated as a template. In 1993, the Vuntut Gwitchin First Nation, Canada and Yukon signed...

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the Vuntut Gwitchin Final Agreement based on that template. The Vuntut Gwitchin Final Agreement is itself a treaty, a land claimed agreement for purposes of Section 35 sub three of the Constitution Act, 1982. The Vuntut Gwitchin Final Agreement identifies certain lands as settlement lands belonging to the Vuntut Gwitchin First Nation.

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certain of their traditional lands are now theirs and recognized constitutionally as theirs. The final agreement also required the parties to negotiate a self-government agreement for the Vuntut Gwitchin First Nation, but said specifically that the self-government agreement would not be a treaty for purposes of the Constitution Act, 1982. So, at about the same time,

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Canada, Yukon, and the Vuntut Gwitchin First Nation signed the Self-Government Agreement, which constituted the Vuntut Gwitchin First Nation as an entity having legal personality, the successor of the previous Indian Act ban. And it provided for the creation of a Vuntut Gwitchin Constitution, and it set out certain specified governance powers

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that it agreed that the governing body of the Vuntut Gwitchin First Nation would have. Pursuant to the self-government agreement, the Vuntut Gwitchin themselves established their own constitution in accordance with the self-government agreement, and the Vuntut Gwitchin constitution provided for the rules that would govern who would be eligible to serve on the Vuntut Gwitchin Council.

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Now, for the first 13 years that the Vuntut Gwitchin Council operated, there was no residency requirement. Any member of the Vuntut Gwitchin, no matter where they lived, could serve on the council. But in about 2005, 2006, the Vuntut Gwitchin decided that it would be appropriate to require that people running for and serving on their council live on settlement lands.

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which practically speaking meant living in Old Crow, which is the northernmost settlement anywhere in the Yukon.

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In 2019, they amended the residency requirements to say that anybody anywhere could run for council, but that if they were elected, they had to move onto settlement lands, move to Old Crow within two weeks. Cindy Dickson is a member of the Vuntut Gwitchin First Nation who lives in Whitehorse and has an important job there. Everyone agreed that she was...

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in every relevant respect, competent to serve on the Vuntut Gwitchin Council, but for the fact that she lived in Whitehorse. The reason she said that she lived in Whitehorse was because she had custody of a teenage son who had hypoglycemia and required fairly constant medical care of a sort that simply was not available in Old Crow. So, she challenged...

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the requirement that she move to Old Crow as a condition for serving on council. First, under the Vuntut Gwitchin Constitution itself, which has an equality rights provision somewhat similar to Section 15 of the Charter, but also challenged the provision of the residency requirement in the Vuntut Gwitchin Constitution on the basis that it was an unjustified infringement...

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of her rights under Section 15 of the Charter, the Equality Rights Provision. So that's the background of the case. The Vuntut Gwitchin responded to the litigation, first of all, by saying you shouldn't be considering the Charter issue at all, because Ms. Dickson has an adequate alternative remedy under the Vuntut Gwitchin Constitution, and we should resolve the matter on that basis, if we can...

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without resorting to the Charter. But in any event, the Vuntut Gwitchin argued, the Charter has no application to them because they do not come within Section 32 of the Charter, as the Vuntut Gwitchin understood. The court below agreed with Miss Dickson that the Charter applied to the Vuntut Gwitchin First Nation. One of the two agreed...

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that there was a Section 15 breach, but both courts below agreed with the VGFN that Section 25 of the Charter shielded the residency requirement from the operation of Section 15 so that even if there were a Section 15 breach, it was not necessary for the breach to be justified as would be required normally under Section 1 of the Charter.

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Ms. Dickson appealed to the Supreme Court of Canada, claiming that the courts below had been wrong about the operation of Section 25 of the Charter. The Vuntut Gwitchin cross-appealed to the Supreme Court of Canada on the basis of the holding that the Charter applied at all to the VGFN. And the Supreme Court gave leave to appeal and leave to cross-appeal, which brought us to the Supreme Court decision.

Cheryl Milne:

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So, the interesting things about this to sort of bring life to it is that there are sort of many layers to this. And one of them is just the vast distances of the North and the distance between where Ms. Dickson lived and where the central government for the Vuntut Gwitchin First Nation, I mean, where she was required to reside. It wasn't, it's not a place that could be easily traversed.

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The other aspect is the reality of the lack of services in some of these smaller communities. So that one can be sympathetic to both sides of the case in terms of just the reality of First Nations living in

these very remote places in Canada. But back to the legal piece, I mean, in Dickson, the Supreme Court held that the Vuntut Gwitchin First Nation ought to be regarded as a government...

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under Section 32 of the Charter, since it is composed of democratically elected members who are accountable to their constituents, exercising powers unique to a governmental body. And so what is the impact of that particular recognition of a First Nation status as government? I believe it's the first time the court has really done that.

Kerry Wilkins:

I guess that's right, though, in the earlier case, Kahkewistahaw First Nation against Taypotat...

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The Supreme Court dealt with a Section 15 issue and simply assumed that the Charter applied to Indian Act First Nations, choosing their counsel in accordance with banned custom, rather than in accordance with the rules that the minister could impose under the Indian Act. But apart from that, you're right, this is the first time

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The courts have had to think about whether a self-governing, indigenous nation that wasn't operating under the Indian Act was subject to the Charter. And the Supreme Court split three ways on that. Lurking in the background of Dickson was the Vuntut Gwitchin's contention that they have an inherent right of self-government that warrants constitutional protection...

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as an aboriginal right under Section 35-1 of the Constitution Act 1982. So, the majority looked at the Section 32 issue. Section 32 is the provision of the Charter that specifies those to whom the Charter applies. And they relied on previous case law, principally the Eldridge case and the Godbout case.

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According to Eldridge, the Charter will apply to an entity that isn't a nominate federal, provincial or territorial government if it meets one of two criteria. If it is operating as a government by nature, or even if it's not operating as a government by nature, if it is carrying out—

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some governmental program at the behest of a Section 32 government. So, in Eldridge, for example, the challenge was to a public hospital that was carrying out a provincial government program, providing services to people with deafness, and the Supreme Court held that even though they'd already said that public hospitals are not as such subject to the Charter...

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In this instance, the program that the hospital was administering was subject to the Charter because it was a government program. But interestingly, the remedy in Eldridge was not against the hospital. It was against the provincial government. So, in Dickson, the Supreme Court held that the deliverance of government and government services pursuant to the...

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self-government agreement and the federal legislation implementing the self-government agreement was a government program that attracted the application of the Charter, irrespective of what we say about whether the VGFN is a government in and of itself. They did that for greater certainty because they also held that the VGFN was a government by nature. To be a government by nature...

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you have to be either under sufficient federal, provincial or territorial government control, or you have to meet the criteria for a government by nature. Now, the Supreme Court, the majority in Dickson held that there was not sufficient federal or territorial control over the VGFN to meet the control part of the government by nature test,

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But they held that the VGFN qualified as a government for purposes of Section 32 because it was democratically elected, it had taxing authority, it could make laws and enforce them, and most importantly, the majority said, it was exercising power that derived from federal and Yukon legislation.

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Now, the majority was careful in Dickson to say that the Charter applied to the Vuntut Gwitchin First Nation because at least some of its authority derives from federal or territorial legislation and from

the self-government agreement. They acknowledged that the VGFN or the Vuntut Gwitchin might well have inherent authority too.

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but because at least some of the authority they exercised in their communities derived from the self-government agreement, that was sufficient to bring the Vuntut Gwitchin's operations under the Charter. But they specifically said, we are taking no position in this litigation on whether the Charter would apply to a different indigenous community exercising inherent rights of self-government...

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untethered by federal, provincial, or territorial legislation. So, if there are communities out there that have inherent rights for self-government, free and independent of any arrangements with federal, provincial, or territorial governments, the jury, so to speak, is still out about whether the Charter applies. Now, the two dissenting judgments disagreed with the majority about the source of the Vuntut Gwitchin's authority. They...

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both suggested that the Vuntut Gwitchin is operating under inherent authority that might be structured by the self-government agreement. But the self-government agreement isn't the source of the authority. They would have authority even if there were no self-government agreement. And they reached contrary conclusions about the Charter's application or lack thereof.

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The joint dissent, Justice Martin and Justice O'Bonsawin, said the Charter applied regardless because the governance powers of the Vuntut Gwitchin pertained to matters that were within the authority of parliament, and that was all that mattered. Justice Rowe, dissenting on the cross-appeal, said the Charter did not apply to the Vuntut Gwitchin because...

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The force of the self-government agreement was to structure things so that the federal and the Yukon government would get out of the way and allow the Vuntut Gwitchin to exercise governance powers they had had all along. And there was no role in this arrangement for either the federal, provincial, or territorial orders of government, so there was no basis on which to conclude that the Charter applied.

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to the VGFN. So bottom line, the majority held, the Charter applies to the Vuntut Gwitchin First Nation because it is exercising governance authority, at least some of which derives from federal or territorial legislation.

Cheryl Milne:

So. there are a lot of layers to it and a lot of interesting competing opinions then. One of the things that...

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seemed to be an agreement between all three levels of the Dickson decisions from the trial up to the Supreme Court of Canada was that it was open to the appellant to seek a remedy under the Vuntut Gwitchin First Nation Constitution itself. And you made reference to that earlier. However, the Supreme Court of Canada just pressed forward and addressed the Charter issues without really determining or first determining whether the First Nation's Constitution could provide an adequate...

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alternative remedy or an answer to the question. What do you make of this? Does it take away from the recognition as government, as we've just discussed?

Kerry Wilkins:

Well, it's puzzling in a way. Ms. Dickson, in her pleadings, argued that the residency requirement violated her equality rights under the VGFN Constitution, and also her equality rights under section 15 of the Charter.

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But then she never mentioned the VGFN Constitution equality rights again. The Vuntut Gwitchin argued, especially at first instance, but again higher up, that the court should begin by considering the VGFN Constitution issue and not address the Charter issue if Ms. Dickson had an adequate remedy under the VGFN Constitution. But as you say,

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The courts all went ahead, including the Supreme Court, and decided the Charter issue. Now, the interesting thing is that the majority at the Supreme Court in Dickson, in specifically refraining from deciding whether the Charter applied to indigenous communities, exercising inherent rights of self-government, untethered from federal, provincial,

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or territorial legislation, took that position because there is a constitutional principle that courts should not decide constitutional matters in circumstances where it's not necessary to do so. So, applying that principle consistently, you would have thought they would have looked first at the VGFN constitution equality rights issue...

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and decided whether there was an adequate remedy there before even considering the Charter issue, or they could have sent the issue back to trial on the VGFN Constitution issue instead of deciding at first instance the Charter issue. So, there's a bit of inconsistency in the majority judgment between what they did and what they said about deferring consideration of constitutional issues until it's necessary to do so.

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And I mean, we'll have to see what subsequent litigants and subsequent courts make of that.

Cheryl Milne:

An interesting aspect of all of this is, and we talked a little bit about it in our episode with Professor John Borrows, but also this potential for a conflict between the individualized rights and equality that we see in terms of a liberal approach, as embodied in the Charter, and communitarian rights...

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enshrined in Section 35, but also what we see in UNDRIP, the UN Declaration of this protection of community rights that are separate or slightly different than individual rights. So, if there is a tension, how does Section 25 contribute towards this reconciliation between these or the application of those community rights? In particular, I know the court talks about it in the Dickson case, just...

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How do we reconcile those particular competing interests?

Kerry Wilkins:

Well, it's interesting first Aboriginal and treaty rights being constitutionally recognized and affirmed in section 35 which isn't part of the Charter the significance of it not being part of the Charter is at least twofold first of all Section one of the Charter doesn't apply so the section just...

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Section 1 justification regime is not or not necessarily applicable to Section 35 rights. The Supreme Court had to conjure an alternative justification regime to deal with circumstances where Section 35 rights have been infringed. Second, and potentially I think more significant, Section 35 rights are not subject to the notwithstanding clause.

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So, federal and provincial legislatures don't have the option of saying, notwithstanding any Aboriginal or treaty rights, blah, blah, blah, blah, blah. So, they have to justify any infringement of Aboriginal or treaty rights that results from the legislation. So that's part of the significance of dealing with those collective rights under Section 35 and Section 35 being outside of the Charter. But...

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The whole sense of that and of Section 25 is that collective indigenous rights have a different character from the kinds of individual rights that are enumerated in the Charter. And therefore, it's necessary to think about the interface between them. And the purpose of Section 25 on pretty much anyone's reckoning is to manage...

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the potential conflict between the enforcement of Charter rights and the existence and preservation of the collective rights to which Section 25 pertains. Now it's important to recognize that Section 25 operates in respect of a wider range of collective indigenous rights than those that Section 35 protects.

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Both of them pertain to Aboriginal or treaty rights of indigenous peoples. But section 25 specifically says the Aboriginal treaty or other rights or freedoms of the Aboriginal peoples of Canada. And the majority and the joint dissent in Dickson differed significantly about what deserved to qualify as an other right...

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for purposes of Section 25. They also differed significantly about the nature of the protection Section 25 provides to the aboriginal treaty or other rights to which it pertains. If you want, I can get into the difference between those two views of Section 25, or we can go on.

Cheryl Milne:

I'm interested in hearing that. So please give us that explanation.

Kerry Wilkins:

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Okay, the majority said, in essence, we already know what Aboriginal or treaty rights are. We don't yet know what qualify as other rights. So other rights, according to the majority, have to be rights that belong to Indigenous peoples that promote or protect what the court calls Indigenous difference. Now, Indigenous difference is a term that...

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Patrick Macklem, for a long time, was a member of U of T Faculty of Law, discussed in his book, Indigenous Difference in the Constitution of Canada. And Macklem said, and the majority agreed, that indigenous difference comprises one or more of prior indigenous sovereignty, prior indigenous occupation, treaty relationships with the rest of us, or matters relating to cultural difference.

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So, an other right, according to the majority, is going to be any right that preserves or protects or promotes indigenous difference understood in one or more of those four ways, including an ordinary statutory right that indigenous peoples have. So, for example, there are several federal statutes now that confer...

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legislative authority on Indigenous governing bodies in respect of certain subject matters. It is arguable that they do that either because or in a way that has the effect of preserving or promoting Indigenous difference. And an unresolved question in the majority judgment is, does that mean that all those statutory powers...

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that Indigenous governing bodies have under that legislation operates free of the Charter to the extent that Section 25 provides protection? Now the joint dissent would have taken a narrower view of what qualifies as an other right. They would have said, unless it is unique and specific to Indigenous peoples as Indigenous people, not the kind of thing, for example,

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that they might have, that others who are not indigenous might have as well. Unless it meets that narrow categorization, it doesn't qualify as an other right, and Section 25 has nothing to do with it. At the other end of Section 25 is the question of what protection Section 25 provides. So, in the end, the majority held that the residency requirement in the VGFN Constitution...

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is protected by Section 25. The joint dissent disagreed. So, the reason the majority said the residency requirement is protected is because Section 25 can act as a shield to protect Section 25 rights, Aboriginal treaty or other rights, from the enforcement of Charter rights when there is what the court called irreconcilable conflict...

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between the relevant Charter right and the relevant section 25 right. So, what you're supposed to do in identifying whether there is irreconcilable conflict is interpret the Charter right and the section 25 right together and see if there's a way of reading them so that they can operate simultaneously. And if they can, they do. But if there is going to be irreconcilable conflict such that...

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there is no way of enforcing the relevant Charter right that does not undermine indigenous difference than the Section 25 right wins to the extent of the conflict and the Charter right loses. And the residency requirement was thought to be within the category of other rights because it was an exercise of a right that preserved or protected indigenous difference.

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And enforcing Section 15 against it meant that in the majority's view, you were undermining Indigenous difference because of the centrality of the residency requirement to the VGFN culture. As a result, although the residency requirement in the court's view infringed Section 15 of the Charter, it was not necessary...

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for the VGFN to justify the requirement under Section 1 of the Charter, because Section 25 in that instance operated as a shield. The joint dissent would have said, first of all, the residency requirement doesn't qualify for any protection under Section 25 because all governments specify who is eligible to participate in governing,

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And, most, if not all of them, specify some kind of residency requirement. So, there's nothing unique to Indigenous difference about a residency requirement. And even if there were, the joint dissent said, that would not be enough in this instance because the only circumstance in which a Section 25 right deserves to prevail over a Charter right...

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that infringes some individual's right, is where the Section 25 right is essential to preserving the distinctive culture of the indigenous community to whom it belonged. And in the view of the joint dissent, it wasn't the case that the residency requirement met that high bar, because for one thing, the VGFN...

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had operated under their constitution for 13 years without having any residency requirement at all. So clearly it wasn't essential. Therefore, it should have been necessary for the VGFN to justify the Section 15 infringement under Section 1. And in the view of the joint dissent, they had not succeeded in doing so.

Cheryl Milne:

So, my next question is looking at it from a slightly different angle, because you've mentioned that

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The Supreme Court's decision, to some extent with this one, in Dickson, is really rooted in this arrangement with the territorial and federal government to, in a sense, bestow self-government on the First Nation. And we talked on our last episode about that sort of legislative granting of power with the reference regarding the child welfare legislation that the federal government had passed as well...

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So what do you think Dickson is telling us as to how reviewing courts will respond to claims that indigenous self-determination, when it comes into conflict with those policy objectives under the Canadian legislation, like that is actually bestowed these kinds of rights, whether that's, I mean, I think that's one way to describe it. It's not necessarily the way the First Nation would like to see it, but it is part of that colonial sort of structure, in a sense. But how do you, how...

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might courts respond to that kind of conflict?

Kerry Wilkins:

Well, if you're talking about policy objectives under Canadian legislation, you're not necessarily talking about the Charter unless someone challenges that Canadian legislation under the Charter. So, if an Indigenous community has an Aboriginal or a treaty right in relation to self-government, what we know from the Section 35 Jurisprudence...

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is that the Aboriginal or the treaty right is protected from infringement by Canadian legislation unless the federal order of government, or as it may be, the provincial order of government, can justify the infringement. If the self-government regime is not constitutionally protected, doesn't have the protection of a treaty, isn't an Aboriginal right, then ordinary...

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federal legislation will prevail over it, or there will be a statutory interpretation issue about the relationship between the other federal legislation and the statutory framework that gives rights to the indigenous powers of self-government. So, the Charter doesn't seem to have a lot to do with that. An interesting thing, and I think the joint dissent picked up on this in Dickson, is that it's odd that...

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Indigenous rights of self-government, even constitutionally protected one, can be susceptible to justified infringement by ordinary federal or provincial legislation, but might somehow be immune from the operation of the Charter, justified or not, because of Section 25. That was an anomaly that I think prompted the joint dissent to take...

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a more limited view of the operation of Section 25 than the majority did. So given that Dickson is a case about the relationship between the Charter and Indigenous governments, I'm not sure it tells us very much that we didn't know already about the relationship between Indigenous self-government and the policy objectives under Canadian legislation more generally...

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in a situation to which the Charter doesn't apply. You do have hints in Dickson, and you have hints in the Bill C-92 reference that the court may be somewhat more sympathetic now than it was earlier to the notion that the Constitution protects Aboriginal rights of self-government, that they were careful to say in both cases that they weren't deciding that...

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and that we'd have to wait until that issue was before them to see what they actually decided. But there are hints there inviting a proper case asserting Aboriginal rights as self-government to be brought before them. And ideally, that would be a case on facts sufficiently sympathetic that the court would take the issue seriously.

Cheryl Milne:

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And I'm sure we're going to see that. I mean, it may take a while, but I'm sure we're going to see that eventually make its way up to the Supreme Court. In Dickson, the Supreme Court held that Section 25's protection of collective rights and freedoms complies with the UN Declaration on the Rights of Indigenous Peoples, UNDRIP, and in particular Article 34, which provides Indigenous Peoples have the right to promote, develop,

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and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices, and in the cases where they exist, juridical systems or customs. How do you

see our domestic constitutional system, the international human rights system, and indigenous legal systems interacting? And can there be consistency, or will it lead to further jurisdictional conflict?

Kerry Wilkins:

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I think the short answer is going to be stay tuned. So, let's start with the domestic constitutional system, the international human rights system. Generally speaking, the rights contained in international human rights instruments, even binding ones, are not enforceable domestically in Canada unless there is some domestic legislation giving them...

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legal effect as Canadian law. So, we have federal and BC legislation acknowledging and seeking to work with or promote implementation of the UN Declaration on the Rights of Indigenous Peoples. But the usual view is that neither the federal nor the BC legislation goes quite so far as to give domestic legal effect to UNDRIP yet. That could happen.

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So, in the absence of domestic legal effect, international human rights instruments are generally thought to be available as interpretive aids in construing domestic legislation, including the Constitution. There's a presumption in respect of binding international human rights instruments that domestic legislatures intend to conduct themselves in a manner consistent with...

47:17

the binding international human rights norms. It's rebuttable. Parliament could, for example, say, notwithstanding the international covenant on civil and political rights, blah, blah, blah. But in the absence of that, courts will read domestic legislation where they can in a matter consistent with international human rights instruments. And the federal UNDRIP legislation invites courts to do that with UNDRIP.

47:44

There's also the Supreme Court's decision in Nevsun Resources, which says that norms of customary international law are enforceable domestically without the need for legislative confirmation. So, a question that would need further thought is whether rights of self-determination, including arguably those of indigenous people, now qualify as norms.

48:12

of customary international law such that Indigenous people could enforce them domestically. There isn't law on that yet, but the question is there to be answered. There's also a distinction in a recent Supreme Court case called 91470732 Quebec Limited.

Cheryl Milne:

I just call that one the Quebec Inc case.

Kerry Wilkins:

48:41

Between international human rights instruments that are binding and those that are not binding. The ones that are not binding have less impact as a general rule, as interpretive aids in construing domestic legislation than the binding ones do. And because UNDRIP is a declaration, it would ordinarily, under the usual international law rules, be considered to be non-binding rather than binding. So it would be up to Canadian legislation...

49:11

to make it binding, if it wants to. And you can argue about the effect of the Federal UNDRIP Act or the BC one. But if rights of self-government and self-determination turn out on inspection to be norms of customary international law, they would be enforceable as such domestically regardless. Now, what does that leave indigenous legal system? The answer to that may depend on...

49:40

what the answers turn out to be about the relationship between UNDRIP, for example, and domestic law more generally, or the domestic constitutional law. A related question has to do with the manner in which mainstream courts can take account of Indigenous legal systems. So, when someone goes to a Canadian court and pleads some feature of Indigenous law,

50:08

How are courts supposed to respond to that? I mean, the question I wonder about a lot is, is indigenous law, domestic law, or is it foreign law? If it's domestic law, courts in principle can take judicial notice of it. If it's foreign law, the usual rule is that it has to be proved affirmatively each time

by expert evidence, and we don't yet know how to think about indigenous legal system. There is some law...

50:38

about what qualifies as First Nation custom for the purposes of choosing counselors in Indian Act First Nations. And I mean, the federal court has said to qualify as a custom, something has to have the broad consensus of the community for which it's said to be a custom, and you have to prove that. But there's a lot here that we just don't know yet. And frankly, not a lot of this...

51:08

has much to do with the decision in Dickson.

Cheryl Milne:

So, I want to end off on sort of a last kind of big question, which is, what does the future look like after the Dickson decision? What are its challenges and promises?

Kerry Wilkins:

Hmm. Well, we talked about one. Given the hints in the Dickson decision and in the Bill C-92 Reference, you might see some Indigenous communities emboldened once again...

51:37

to claim Aboriginal rights of self-government in Canadian courts and seek constitutional protection for them. One of the sleeper features, so to speak, of the Bill C-92 Reference is the Supreme Court said that because Bill C-92 affirms Parliament's position that inherent rights of self-government exist in respect of regulation of child and family services and because that binds the crown...

52:06

It is not open to Canada, while that legislation is in force, to challenge the existence of inherent rights of self-government in respect of child and family services. There may well be renewed interest in bringing claims before Canadian courts to have inherent rights of self-government in respect, at least, of particular subject matters that are of interest to the Indigenous communities...

52:34

claiming those rights. As to the future of such rights and the relationship to the Charter, I think, frankly, all bets are off. I mean, the weird thing about the Dickson decision after 523 paragraphs, is the court has left itself with enough room to decide almost anything it wants, any time it wants, about Charter issues,

53:04

and Indigenous communities exercising self-government rights or powers. We know that the Vuntut Gwitchin First Nation is subject to the Charter because of the reasoning in the majority judgment. But the majority judgment in applying the Eldridge on the Godbout factors said these are neither necessary nor determinative. So, they could, in a different case,

53:32

reach a different decision on different grounds about whether the Charter applies at all. Inherent right communities aren't necessarily going to fit the mold that Eldridge had in mind. They might or might not traditionally have elected their governors democratically or elected them at all. There might have been traditional governance forums that relied on heredity. They might or might not have had enforcement procedures or needed to resort to taxation.

54:02

So, what courts will do with that? I mean, the court suggested some guidelines, but it said, you don't need to follow these guidelines. You can do what seems appropriate in the circumstance. And we just don't know what they'll do. And within section 25, even on the majority view, there is a fair bit of room to wonder what's going to qualify as an other right, and even as something qualifies as a section 25 right...

54:30

what the court will say about irreconcilable conflict. They suggest that there be an interpretive exercise that take place after you've determined that there's a Charter breach. But by the time you've determined there's a Charter breach, you've already interpreted the relevant Charter provision sufficiently to establish that there was a breach. So, there's not much more interpretive work left to do of the Charter provision.

54:59

So maybe if you're going to engage in the interpretive exercise, you should do that before you decide whether there's been a Charter breach, because that's the stage at which you can take the relevant Section 25 right into account in deciding what you want the relevant Charter section to mean. So,

and what counts as an irreconcilable conflict? What level of generality are we looking at here? In Dickson...

55:27

the court held that the residency requirement was an irreconcilable conflict with Section 15. The residency requirement was an exercise of a VGFN right to determine the membership of its governing body, which in turn was derived from a VGFN self-government right. So is the VGFN self-government right itself now immune from Section 15, or is it the right to determine...

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membership in your governing body that's now immune to Section 15? Or do we have to decide each time the VGFN exercises its right to determine the membership of its governing body, whether in respect of residents or not, whether it's in irreconcilable conflict with Section 15 or some other Charter right? All of that is still open to interpretation. And the court has room...

56:26

in any given subsequent case that involves section 25 and indigenous governance, to reach pretty much any decision it wants. So, I think the shorter answer is wait and see. On the one hand, it is handy that there is so much interpretive latitude in the Dickson decision, so much doctrinal flexibility. But on the other hand, there is relatively little certainty...

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about what is going to happen next as a result of the Dickson decision because of the latitude the court has given itself in a subsequent case to deal with that subsequent case, either in the same way or different way. I wish I could be more helpful about that.

Cheryl Milne:

Well, thank you very much, Kerry, for joining us today and providing us your perspectives on this.

Kerry Wilkins:

Thank you for having me.

Cheryl Milne:

We've been talking to Kerry Wilkins about the impact of Section 25 of the Charter...

57:23

and the recent Dickson decision on what may be coming further. The bottom line was to be determined as we watch for more cases that interpret these sections of the Charter and these decisions. And as Canada comes to grips with our need to reconcile with Indigenous peoples,

Cheryl Milne:

57:47

Welcome back to today's Practice Corner. For this part of the episode, I'm speaking with Kris Statnyk on his experience as counsel for the Vuntut Gwitchin First Nation on the Dickson and Vuntut Gwitchin First Nation appeal that we were just speaking with Professor Kerry Wilkins about. Kris is a citizen of the Vuntut Gwitchin First Nation. He is the son of Marie Statnyk and grandson of the late Dr. Reverend Ellen Bruce, Robert Bruce Sr. and Agnes Mills of Old Crow, Yukon.

58:16

Kris is an Indigenous rights lawyer who works with Indigenous communities in support of their rights to self-determination. Prior to becoming a lawyer, he completed a Bachelor of Arts in Political Science at the University of Alberta and a Juris Doctor at the University of Victoria Faculty of Law. Welcome, Kris.

Kris Statnyk:

Mahsi cho, thank you Cheryl for the introduction and for inviting me on today.

Cheryl Milne:

Can you start by telling us a little bit about your practice?

Kris Statnyk:

58:43

Sure, my practice is what I would describe in the area of Aboriginal law. That's of course the body of Canadian law as it is applied to Indigenous peoples. I think it's always important for me to point out that it's not to be confused with Indigenous law being distinctly the laws of Indigenous peoples themselves. I've been practicing in this area of law for 10 years now.

59:11

I worked exclusively for Indigenous peoples, communities and organizations, primarily in the Yukon as well as British Columbia. I started out working at a law firm in Vancouver that specialized in this area of law. I was very fortunate to get great mentorship there, and I've been now working as a sole practitioner for the past three years. My practice, in my practice, I primarily...

59:40

assist my clients outside of the courtroom. And that is mostly in advising in the negotiation or implementation of agreements. Those agreements typically address my clients inherent or collective rights, whether those are Aboriginal rights or treaty rights. And that includes working with my own First Nation in the Yukon, the Vuntut Gwitchin First Nation, in the implementation of our modern treaty and self-government agreement...

01:00:09

Which we entered into over 30 years ago now. But it also involves working with other First Nations here in BC that don't have such arrangements and are nonetheless still seeking to have their collective rights recognized, respected, and implemented. So, I get quite a varied number of files that keep me engaged on lots of really interesting issues.

Cheryl Milne:

01:00:38

Thank you. I can hear, we heard a little bit of dog barking in the background. So, I know you're coming from your home in northern BC, is that right?

Kris Statnyk:

Yes, so I live now in New Hazleton, BC, where I practice from. I am on the road quite a bit, but I'm very fortunate to live here in the Gitxsan territories, which is the homelands of my wife and my son. Of course, there's quite...

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significant legal constitutional history emanating from these territories with a historic Delgamuukw case. And so, I'm very fortunate to get to learn from the folks here about their laws and legal orders.

Cheryl Milne:

I mean, we're talking about vast territories as well that you're working within. So as you said, there's a lot of travel. How do you manage all of that with your practice?

Kris Statnyk:

You know, I was previously practicing in Vancouver and...

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You know, it was a bit of a trade-off as an Indigenous person practicing law. Living in the city away from your communities and families is difficult. But at the same time, it was very easy to travel from a central place like Vancouver. So now that I'm living in New Hazleton, I find maybe, you know, an extra day or two of travel on either side of my work to attend meetings or gatherings or negotiations. But it is nice to, you know...

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come home and have some quietness and be amongst the mountains and tall cedars and the rivers here.

Cheryl Milne:

Sounds wonderful. I want to turn now to the Dickson and Vuntut Gwitchin case. You were involved. Can you tell us a little bit about your involvement of the case and then what your views of the decision are?

Kris Statnyk:

Yeah, I mean, the outcome for me wasn't totally surprising in the sense that it's a similar outcome.

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that we had from all levels of the court, including at the Supreme Court. Generally, the outcome being that the law at issue, the Vuntut Gwitchin residency law in our Constitution was upheld ultimately by an application of Section 25 of the Charter. So, I think that that outcome was largely sort of maintained, although the reasoning and how the courts got to that outcome...

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differed throughout and I find, you know, some of those differences being really interesting. Personally, I struggle with some of them as a Vuntut Gwitchin citizen, you know, someone sort of alive to the Vuntut Gwitchin perspective. You know, there's some things that we're, you know, continuing to try to make sense of in the ruling and sort of what does it mean for us moving forward. In some respects, I find the decision from the...

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the Supreme Court of Canada, you know, it's a bit like holding up a mirror to the country right now and the state of reconciliation in the country. And sometimes that reflection isn't always a nice one or a fully reflective of Indigenous perspectives. And I think we, for me, the case and its outcome says to me that we still have, you know, work to do on that project of reconciliation.

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And still will continue to grapple with the decision and its outcome and what it means for our community. I think one of the challenging parts of the case was from my client's perspective and from the Vuntut Gwitchin perspective. You know, the case was never really about the Charter. It was never really about Section 25 or Section 15. For them, you know, this was a case about Section 32, the application of the Charter, you know, the interpretation of...

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modern treaties, the existence of the inherent right of self-government, and the interpretation of Vuntut Gwitchin law as distinct from an interpretation of Canadian law or the Charter. So, there was, I guess, much more at stake for my client than just simply the specific residency law that was at issue. And we're still trying to make sense of...

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what that means for a variety of things. And it is a challenge as a community, very, you know, we're not a large community. 300 people living in our community of Old Crow, who are primarily charged with implementing our form of governance, and to, you know, now have to become a bit of Charter experts and have to-

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place a greater emphasis on essentially Charter analysis over our decision-making, our lawmaking. It's just an added layer of complexity to our work.

Cheryl Milne:

And we've heard from Kerry Wilkins in the first part of this podcast to just how the court really didn't want to go as far as talk about the inherent rights of self-government. And I hear that in your disappointment with the case as well.

Kris Statnyk:

Yeah, I mean,

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I think one of your questions for me was, do you think this decision is a positive step forward towards achieving Indigenous self-government? And I think that's ultimately where I find a lot of struggle is, I read one commentary where they describe the decision as around self-government as essentially a step forward and also a step backward in respects. I'm not quite sure where that leaves us.

01:06:17

I did find the reluctance to address head on the question of the inherent right to self-government and its existence. I think it was a missed opportunity here from my perspective. It is 2024 and we're still debating, at least within the Canadian judiciary, the existence of this right, which is, from an Indigenous perspective, just quite fundamental...

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and basic. And, you know, I'm just, I was sort of struck by the majority's comments in paragraph 47 of their decision, where they note that the court has yet to recognize the inherent right to self-government as an Aboriginal right protected under section 35. But then at the same time, recognizing that it is affirmed, you know, within the United Nations Declaration on the Rights of Indigenous People as a human right. And so, you know, just not having,

01:07:15

clear access to be able to rely on what's recognized as a human right in an international human rights instrument, which is supposed to be the minimum standards for the collective survival of Indigenous peoples. I find it's troubling to me that we haven't yet affirmed that. It did, I feel like, had implications on the outcome of the case and how it was decided.

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Like I said, from the Vuntut Gwitchin perspective, it was sort of not a debate of whether we possess this right. I mean, it's right in the preamble of our constitution that that is the right that we, from our perspectives, understand we're exercising when we're making our decisions and enacting laws. And all of our legal arguments sort of flowed from that basic understanding from a Vuntut Gwitchin perspective. So to be...

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I guess having to bring that perspective into forums where the other participants aren't quite ready to accept that basic notion for us has led to or I think contributed to the varied sets of reasons that we did see in the Supreme Court's judgment. When I read through the decision, in my mind I replaced the words indigenous difference with the inherent right to self government and it makes a lot more sense to me.

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And so, I think, like I said, from my perspective, the law still has some ways to go in terms of developing and recognizing and respecting indigenous rights of self-government.

Cheryl Milne:

Well, we've heard in other contexts, I think what comes to mind is an episode earlier this season where we talked to Professor Kent Roach about remedies and his comment is how courts are...

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generally sort of incremental in the way they do these things. And so, the context in which this case is that the court was able to kind of formulate its reasons, was that there is this piece of legislation that governments signed on to, in a sense, bestowing upon your First Nation this ability to have self-governance, and that they kind of use that as a shield, I guess, to...

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stop going so far as to say an inherent right to self-government. Would you say that that's kind of an accurate way of describing it?

Kris Statnyk:

It seemed quite clear that they felt that it wasn't necessary in this case for them to decide the existence of an inherent right to self-government because of the fact that there are these agreements implementing what we say is that inherent right.

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I do think though that from the Vuntut Gwitchin perspective, it was unfortunate that they didn't seem to fully grapple with the fact that was quite clear in the evidence that this was an issue of negotiation between Vuntut Gwitchin and the Crown, that Vuntut Gwitchin did not express they did not want the application of the Charter in discussions in those agreements....

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and the fact that those agreements do not refer to the Charter or its application. And so, from, I guess, an Indigenous perspective where treaty making is between two sovereigns, the pre-existing sovereignty of Indigenous peoples and Crown sovereignty, really that relationship should be based on mutual consent and to have the courts as well are treaty partners before the court essentially say,

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that doesn't matter, you know, the Charter applies regardless of what, you know, the Indigenous party to the agreements wishes or says or is a challenge, I think, just generally for, like I say, the project of reconciliation.

Cheryl Milne:

So, as you say, there's now this sort of what appeared, I'm going to use my own words for this, but the sort of this long arm of the government coming into Vuntut Gwitchin...

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territory to say you must apply the Charter. How do you think this decision will affect sort of future assertions under section 25 and also how your nation deals with this application of the Charter to what they do?

Kris Statnyk:

Yeah, I mean, I think the decision, you know, did provide obviously some more clarity than existed before around what section 25 means, how the Charter interacts with self-government.

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But I think there's still quite a bit of uncertainty that the court's judgment leaves, including around the Section 25 framework. You know, it is not straightforward, for example, how to demonstrate the existence of an other right or freedom, or what is the full scope of what's included in Indigenous difference. Those things are not straightforward, just in terms of what is the nature of evidence...

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the type of evidence, the volume of evidence, you know, and in other types of litigation involving collective indigenous rights. We have seen the courts, say for example, essentially summary type proceedings or regulatory type proceedings or criminal proceedings are really not the proper forum to be litigating, you know, proof of rights just because of, you know, the...

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types of evidence that are needed to establish the existence of rights and explain their nature can be quite significant. I mentioned earlier, for example, the Delgamuukw decision, where there was over 300 trial days of oral history evidence. In this case, the Vuntut Gwitchin case, all the evidence was brought forward entirely through affidavit. And so, it was a challenge to...

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convey what the Vuntut Gwitchin perspective was through affidavit evidence, you know, documentary evidence, you know, to really convey things like our geography, our history, you know, which are quite unique, you know, our demographics, all these things are really hard to explain, particularly to lawmakers or, you know, other participants in the legal process that may not be so familiar with those things. Like, you know, we were lucky we had...

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I find Justice Veale at the Yukon Supreme Court, who, prior to being on the bench, actually acted as legal counsel for Vuntut Gwitchin First Nation on various things. He'd been to Old Crow before; I think he'd attended a general assembly. He knew many of the individuals involved and their evidence that was put forward in affidavits.

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But the appeal was by Zoom during COVID, by judges sitting in Vancouver from the BC Court of Appeal. Of course, the Supreme Court hearing was held in Ottawa. And I'm not too certain even how many Supreme Court justices had been to even the Yukon territory in their lives before. So, it's interesting dynamics of having to try to bring these perspectives before the courts...

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you know, like I say, in a summary type proceeding, like a petition or a judicial review. And so, I find that that's going to continue to be a challenge and, you know, potentially create some burdens on Indigenous peoples who might want to rely on Section 25. And so, I wonder about that. I also wonder about the difficulties of, you know, establishing whether a conflict is reconcilable or not...

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under their framework and I guess what is that threshold of when a collective right is not reconcilable and where is it reconcilable? The court at least presumes that there are cases where there can be a reconciliation of collective and individual rights, but it's not super straightforward how any Canadian court might apply that moving forward.

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And so, I think that due to some of these costs, complexity, and uncertainty, you may see First Nations that may choose to rely on, for example, sections one of the Charter, or I think, you know, there's this question about section 33 now, you're a government for the meaning of section 32. Are you a government, you know, within the meaning of section 33, which...

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you know, I think is not really where I contemplated, you know, this being what the path forward is having to think about questions like that.

Cheryl Milne:

That's a fascinating argument to make. And I guess, you know, for those of us who practice in the area of constitutional law, like myself, the Charter is this, oh, is this great instrument...I mean, it has its flaws, obviously, but people need to hear that there are...

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groups and communities and collectives within Canada that are not so wanting to make their own version of rights protection through self-government. So, it's a very different perspective on this. It'd be interesting if it were also a requirement that all judges making decisions about some of these First Nations actually have to travel to the territory to really get a full sense of...

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what the impact of their decision could be.

Kris Statnyk:

Well, it is, I think it is interesting, but from a practice perspective, I think it, for example, the Vuntut Gwitchin Constitution, it does have its own rights, recognition, and protection with respect to individual rights. There is an individual right to equality that is guaranteed in the Vuntut Gwitchin Constitution, separate and apart from the Charter. That was always kind of at the forefront of my clients' arguments.

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before the courts was...

Cheryl Milne:

What do you take from the court not really addressing that part of the argument?

Kris Statnyk:

Well, I can tell you it's leaving us with this question of, like, what is the point of us having that in our Constitution if in the event of a dispute it's really not taken into account? And it's the Charter that, in the Charter analysis, that governs that, you know, conflict. So, like I said, it...

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It leaves some uncertainty there, but I think, you know, as part of self-government, dispute resolution and adjudication by First Nations is something that I think is desired by many and should be promoted. And I do think there are ways moving forward where, at the very least, issues or conflicts such as this as a matter of first instance are maybe heard by...

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Indigenous Peoples own, you know, decision-making bodies or institutions so that, you know, their legal perspectives are sort of at the forefront as a matter of first instance. We do not yet have a Vuntut Gwitchin Court, and so these things go to the Yukon Supreme Court now, but it is very much something now that, you know, we're talking more about is, you know, how do we ensure that at the very least, you know, we have...

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adjudication based on Vuntut Gwitchin and law and principles included in, you know, responding to these types of claims.

Cheryl Milne:

It sounds to me that that is in the forefront of what we're going to see in the coming years of litigation in this area. Thank you, Kris, for this perspective. I've really enjoyed hearing what your First Nation has experienced and what you've experienced through advocacy in this case. Is there anything else that you want to comment on about the Dickson decision or your thoughts on Section 25...

Kris Statnyk:

01:19:38

You know, you mentioned as a legal professional, Canadian legal professional, you know, that this case confronting our attachment to the Charter. And there's a great article, Professor Naomi Metallic, she refers to it as our romantic attachment to the Charter. And I think the title of her paper is Checking Our Romantic Attachment.

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And, you know, as an advocate, in this case, you know, I found that sort of romantic attachment very difficult to confront, you know, even amongst my peers and other people who've worked for Indigenous peoples their whole lives. You know, this notion that the Charter may not apply or that an Indigenous group may not want it to apply to their own governance and legal orders was sort of a difficult notion just to sort of accept...

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And I think, you know, as a profession, we should think critically about that. Like, what is that within us that, you know, guides us to that? You know, having had a front row sort of seat through this process, you know, I reflect on what, for example, the Truth and Reconciliation Commission wrote,

you know, 10 years ago now in 2015, where, you know, they talked about Canadian law still being, you know, a significant obstacle to reconciliation...

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and the need for Indigenous laws to really be at the forefront of reconciliation. So, I think, just reflecting on this case, I see how some of those obstacles still exist. But I do find it at least somewhat vindicating that at least one Canadian judge seemed to hear the Vuntut Gwitchin perspective that was shared. And of course, I'm thinking of Justice Rowe's....

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dissent here in the judgment. And, you know, personally, as an advocate, I found it somewhat vindicating that at least there was one set of reasons, you know, on sort of the historical record, you know, of what our perspective was. And, you know, I would just encourage listeners and legal practitioners to sort of read that dissent and reflect on, you know, I think what it says about our legal culture and the role of the profession...

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because I think Justice Rowe had some really important points and reasons for us to reflect on.

Cheryl Milne:

I think that's a great place to end off. Thank you again, Kris, for taking the time with us today. So, thank you listeners for tuning into this episode of Charter a course, where we have been discussing Section 25 and its application in the recent Supreme Court decision. I wish to thank our guests on this episode, Professor Kerry Wilkins and Kris Statnyk, for providing their insight and expertise on the subject.

01:22:31

Thanks, as usual to our producer, Tal Schreier, and special thank you to the law students who researched and helped produce this episode and our previous episode on Section 35 of the Constitution. That's Joshua Schwartz, Meg Zhang, and Emma Blanchfield, who are all members of our Indigenous Self-Governance Student Working Group in 2023-24.

Well, that's the end of this season of the podcast.

01:22:53

If you've been enjoying listening to these episodes as much as we've enjoyed putting them together, please share them with a friend and like and follow us wherever you stream so you won't miss any future episodes. You can always find us on the Asper Center website too. Thanks again for joining us and until next time.

Outro Music:

Charter a course, I will charter a course, if we can just get the country to trust us. Charter of course, southeast, west and north, and along the way we may find justice.

01:23:24

Charter a course, I will charter a course, if we can just get the country to trust us. Charter a course, southeast, west and north and ***along the way we may find justice...***

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