FOUNDATIONS TO LAW (LAW 401)

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Courts and Separation of Powers

Principle of Federalism

- Basis for Confederation (1867) was agreement of political leaders to divide legislative power between a federal government and provincial/regional governments; also, to separate Canada into Ontario and Quebec.
    - Supreme Court acknowledged this in *Quebec Secession Reference*, stating it was important for provincial legislatures to have extensive jurisdiction over all private legal relationships (civil/property matters)
- Supreme Court identified Federalism as an unwritten principle of the Constitution, as it recognized regional cultural diversity, particularly in Quebec
    - Textual source for division of power is in *Constitution Act (1867),* which lists different powers for national and provincial governments
        - Criminal law, trade and commerce, banking are national jurisdiction
        - Hospitals and municipalities, civil and property rights, in provincial jurisdiction
        - "Property and Civil Rights," was first used in Quebec Act (1774), which encompassed all civil obligation: tort, contract, and family law
            - For this reason, provinces have extensive jurisdiction in matters of the economy, except in international and interprovincial trade
- **Residual Power**: anything not covered under separation of powers in Constitution, belongs to Parliament (Federal)
    - POGG: "Peace, Order, and Good Government of Canada"
    - Prior to 1982 and the Charter, there was no limit on what kinds of laws the federal or provincial government could create. After the Charter, limits were placed on both.

Principle of the Separation of Powers

- **Principle of Separation of Powers**: the division of government functions between the legislative, executive, judicial branches of government.
    - Legislative: making law
    - Executive: implementing law
    - Judicial: interpreting and applying law
- The Framers of the American Constitution created separation of powers to create checks and balances, and to ensure power was not invested in any one individual or group
    - President, as chief executive, is elected separately from Congress and appoints cabinet members from outside Congress
    - In Canada, there is not as strict a separation
    - Pre-eminence given to legislative branch, to which the executive branch is subordinate
    - Overlapping of personnel between legislative branch and executive branch
- Prime Minister and members of Cabinet are the Executive Council, who advise the Queen (head of state). Executive Council is all elected.
    - In Canada, distinction between the three branches has 2 purposes:
        - Functional purpose of identifying institutional homes of each branch
        - Normative purpose of providing general boundaries for each institution

Functional Role of Separation of Powers: Relationship between the Three Branches

- *Constitution Act (1867)* expressly divides power between the three branches
- Legislative decision-making is:
    - Forward-thinking
    - Broad (for all the people, or large groups)
    - Open-ended in range of outcomes
- Judicial decision-making is:
    - Retrospective
    - Localized (involving single individuals)

- Narrow in outcome (produces the "right" outcome)
- Executive decision-making shares aspects of both and is the most difficult to define.

Civil Cases

- **Civil Case**: a private case where someone sues someone else (suit or action)
- Civil suit starts when individuals or corporations disagree on a legal matter
  - Ex. Terms of contract, property, injury, damage
- Several stages to a suit
  1) Pleadings
  2) Discovery
  3) Trial
- Pleading
  - Plaintiff files a pleading with the court, which sets out the complaint against the defendant and the remedy the plaintiff is seeking
  - Then, a court officer issues the claim by affixing the seals of the court and signing the pleading on behalf of the court. Copies are then served to the defendant.
  - Defendant must provide court with a statement of defence. If not, then likely found guilty.
  - Plaintiff and defendant entitled to consult a lawyer. Lawyers often settled (98% of time) before trial.
- Discovery
  - Each party is entitled to examination for discovery before trial.
  - Clarifies claim against defendant
  - Lets each side examine evidence the other side intends to use
- Trial
  - Plaintiff's responsibility to present facts to support the claim against defendant. Plaintiff must prove that it is probable the defendant is liable (legally responsible).
  - Balance of Probabilities: standard of proof for civil case. Just as "proof beyond reasonable doubt" is proof in criminal case.
  - If facts justify the remedy, the court will hold the defendant liable.
- What happens at civil trial?
  - Plaintiff presents evidence against defendant: witnesses/documents. Defendant may cross-examine plaintiff's witnesses. Defendant then presents own witnesses/documents. Plaintiff has right to cross-examine.
  - Judge makes sure all evidence/questions relevant to case.
  - At the end, plaintiff and defendant summarize arguments. Judge considers evidence and makes decision based on what is most probable.
  - Depending on the suit and court, defendant may have right to trial by judge and jury. Judge decides which law applies and explains evidence/laws to jury. Jury considers which version it believes and reaches a verdict.
- How a trial ends
  - If defendant not liable, judge dismisses case.
  - If defendant liable, judge/jury must consider: the remedy, facts, and how to compensate the plaintiff
- Remedies
  - Monetary
    - Known as damages. Most common.
    - Judge/jury fixes the amount.
    - Considers expenses of plaintiff. Where law permits, can award additional sum to compensate plaintiff for wrongdoing of defendant.
    - Not required to award the amount the plaintiff asked for.
    - Punitive Damages: expresses disapproval of community. Intended to punish defendant for offensive behaviour.
  - Declaratory
    - Simply states the rights of both parties.

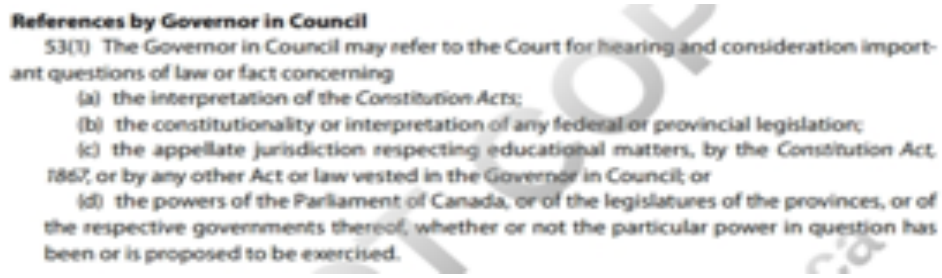
        - Ex. Interprets a will or determining who owns the land.
    - Injunction
        - Restraining order that says someone can or cannot do something. Court has discretion to make the order or award damages.
        - Ex. Stop neighbours from burning garbage.

Criminal Cases

- Crime is considered an offence against society, so the state, or Crown, prosecutes the accused under public-law statute
    - Criminal Code or Controlled Drugs & Substances Act
- Types of Criminal Offences
    - Summary Offences
        - Minor offence
        - Accused appears before provincial court judge for trial that will normally proceed immediately.
        - Maximum penalty is usually $5000 fine, 6 month prison sentence, or both
    - Indictable Offences
        - Serious offence
        - Three Choices
            1) Judge hears case in provincial court
            2) Have judge/jury hear case in superior court
            3) Have judge alone hear case in superior court
- Preliminary Hearing: judge examines if there is enough evidence to proceed with trial. If not, case is dismissed.
- Arrest
    - Must follow procedures to protect rights of accused.
    - Tell accused they have right to consult lawyer without delay
    - Explain reasons for arrest and specific charge, if one is being made.
- Custody
    - If in custody, goes to holding cell or detention centre.
    - Right to appear before justice of the peace or judge ASAP (usually 24 hours)
    - Judge decides on pre-trial release or bail.
    - In bail hearing, prosecutor must show why accused should remain in custody. Must have very strong reasons for doing so.
    - If judge decides on release, may have conditions.
- Decisions in Criminal Cases
    - If not guilty, acquitted and free to go
    - If guilty, judge decides on appropriate sentence
        - Fine, restitution, probation, community service, imprisonment
        - Two years or more = federal; less = provincial
    - Judge does not have to convict, even if accused found guilty
        - Absolute discharge
        - Conditional discharge
            - Obey conditions or face more severe sentence
            - Does not receive a record for the offence
- Appeals
    - Important safeguard in case a court makes an error in trial. Both sides can appeal.
    - Can usually appeal to a higher level of court
    - No “right” to appeal, but can seek “permission” to appeal
        - Higher court may deny permission, affirm, or reverse lower court’s decision. Can also order new trial.
    - Can appeal just damages/sentence.

Constitutional Law: Reference Procedure

- **Reference Procedure**: constitutional issues can reach courts through process initiated by executive branch of government
    - Called "abstract review", rather than "concrete review" of litigation between private parties
- Government can refer important legal questions directly to appellate court for advisory opinion
- Provincial cabinets have legislation to send reference questions to provincial appellate courts. Federal Cabinet sends directly to Supreme Court.



References by Governor in Council

53(1) The Governor in Council may refer to the Court for hearing and consideration important questions of law or fact concerning

(a) the interpretation of the *Constitution Acts*;

(b) the constitutionality or interpretation of any federal or provincial legislation;

(c) the appellate jurisdiction respecting educational matters, by the *Constitution Act, 1867*, or by any other Act or law vested in the Governor in Council; or

(d) the powers of the Parliament of Canada, or of the legislatures of the provinces, or of the respective governments thereof, whether or not the particular power in question has been or is proposed to be exercised.

- Court has duty to answer the questions posed
    - Though, Supreme Court has refused to answer if no legal content, ambiguous, or inadequate information.
        - Reference re Same-Sex Marriage [2004]: Supreme Court said couples had already married based on decisions made at provincial level. Also, upset that federal government did not appeal first to Supreme Court after losing at appellate court level.
- Section 53 stipulates that, if the interest of a provincial government is implicated by a reference question, that province has the right to be heard.
    - Supreme Court must have that province represented by someone, even somebody appointed by the court.
- Provincial cabinets can initiate references to its own court of appeal; can appeal the appellate court's ruling, without seeking permission, to Supreme Court
- Reference Procedure departs from common law requirement that courts consider legal issues in context of concrete disputes (hence "abstract review")
    - Common law prefers to discuss facts, rather than hypotheticals
    - Criticism that the reference procedure politicizes the judiciary by considering hypothetical issues
        - However, reference cases often used to formalize or expedite cases with similar challenges.
- Government may want to take more control over the issue to be decided, or shift the cost from private parties to the state.
- Reference procedure is quick way of obtaining definitive answer because it bypasses the trial level
- Can be used to determine validity of upcoming legislation
- Reference cases are advisory opinions, without weight of precedent
    - however, considered authoritative in practice

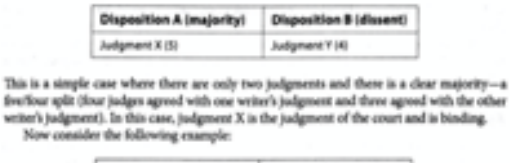
Reading & Understanding Case Law

- **Case Law**: decisions of the courts
- Important to analyze judicial decisions effectively and read cases most relevant to the issue you are facing
- Judgement/Decision/Case
    - Used interchangeably; context helps determine what sense it is used
        - Judgment: final outcome; or, when the court provides its reasons for judgment
        - Decision: final outcome; or, holding of a case; or reasons court provides
        - Case: reasons for judgment; or, the court process
        - Law Reports
- Many cases reported in print volumes, with added features to help the reader understand the decision (headnotes, cases/statutes referenced, etc.)

- **Headnotes**: summaries of the decision
- Even if case is unreported, can locate full text in court's registry file or online database

Format of Law Reports

- Names of Parties
  - Located at start of case
  - In civil disputes, plaintiff's name listed first; government first in criminal cases
  - **R**: regina, or rex. Latin for Queen/King
  - In appeal process, name of appellant is first, followed by respondent
    - Appellant: individual or corporation who lost at trial and initiates appeal to higher court
    - Respondent: individual or corporation who won at trial and is responding to the appellant on an appeal to a higher court
  - **Re**: "in the matter of." Used when someone applies to court for interpretation of rights (ex. Bankruptcy, adoption, etc.)
  - **Ex parte**: "on the application of one party." Used when only one side is before the court (ex. Applying for an order to prevent a party from dissipating assets prior to trial).
    - Generally involve urgency.
- Date of Decision
  - Older cases may not be reliable precedent
- Court and Judges
  - Lists court that decided the case and the judge(s) involved
- **Headnote**: concise summary of the case, prepared by editor of the report
  - Enables reader to quickly obtain facts/issues/reasons
  - Lists cases/legislation the court used to make judgment; good source for further research
  - Used only to help with research; not used for arguments
- Nature of the Proceedings and Counsel
  - States the purpose or nature of the proceeding (ex. "An appeal from a decision…")
  - Provides the namers of the lawyers on each side of dispute
  - Reasons for Judgment: actual decision by the court
    1. Nature of proceedings
    2. Relevant facts of case
    3. Legal issue(s) that must be resolved
    4. Arguments of both lawyers
    5. Legal rule(s) pertaining to issue(s)
    6. Application of rule(s) used
    7. Court's conclusion(s)
- **Ratio**: the governing legal rule; the way the rule is applied to the facts
  - Obiter dicta: "statements said in passing."
    - Judicial statements about the law that may be of interest but are not necessary to the decision in the case and are therefore not binding
- **Multiple Judgments**: appeals always have more than one judge (ex. Supreme Court has 9)
  - Trial judgments always have a single judge
  - If judges are unanimous, there is a single judgment; if not, two or more of the judges write their own judgments
  - Determining Ratio
    - Look at how many judges there are for each judgment…the more there are, the stronger the ratio
    - When briefing multiple-judgment cases, isolate the most important judgment. In a note following the brief, summarize the differences between that judgment and the others. Were different rules applied? Same rules but different conclusion?



Disposition A (majority)	Disposition B (dissent)
Judgment X (5)	Judgment Y (4)

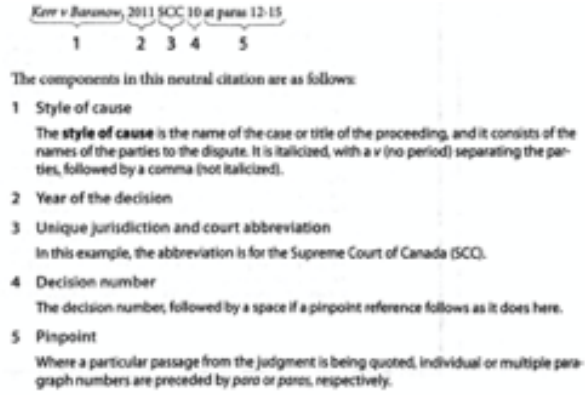
This is a simple case where there are only two judgments and there is a clear majority—a five/four split (four judges agreed with one writer's judgment and three agreed with the other writer's judgment). In this case, judgment X is the judgment of the court and is binding.

Now consider the following example:

- **Disposition**: the formal order of the court
    - Ex. “Motion dismissed,” “Judgment for the plaintiff”
    - If multiple-judgments, disposition represents the decision of the majority

Citation of Cases

- **Neutral Citation**: unique process, recognized internationally and in all Canadian courts
    - Courts number each of their judgments consecutively for the year in question, as well as the paragraphs within the judgments
    - Each paragraph within each judgment is numbered consecutively
    - Purpose is to make cases, and their passages, easy to find



Kerr v Baranow, 2011 SCC 10 at paras 12-15
1 2 3 4 5

The components in this neutral citation are as follows:

1 Style of cause

The **style of cause** is the name of the case or title of the proceeding, and it consists of the names of the parties to the dispute. It is italicized, with a *v* (no period) separating the parties, followed by a comma (not italicized).

2 Year of the decision

3 Unique jurisdiction and court abbreviation

In this example, the abbreviation is for the Supreme Court of Canada (SCC).

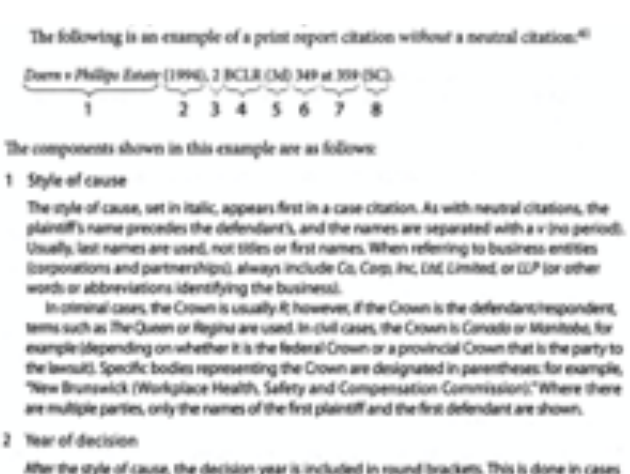
4 Decision number

The decision number, followed by a space if a pinpoint reference follows as it does here.

5 Pinpoint

Where a particular passage from the judgment is being quoted, individual or multiple paragraph numbers are preceded by *para* or *paras*, respectively.

- Protocol is to no longer include parallel (extra) citations if there is a neutral citation
    - Only include print citation if it is necessary (ie. not available online)
    - Recommended to include at least one parallel citation for older cases without neutral citation.



The following is an example of a print report citation *without* a neutral citation:[40]

Doerr v Phillips Estate (1996), 2 BCLR (3d) 349 at 359 (SC).
1 2 3 4 5 6 7 8

The components shown in this example are as follows:

1 Style of cause

The style of cause, set in italic, appears first in a case citation. As with neutral citations, the plaintiff's name precedes the defendant's, and the names are separated with a *v* (no period). Usually, last names are used, not titles or first names. When referring to business entities (corporations and partnerships), always include *Co*, *Corp*, *Inc*, *Ltée*, *Limited*, or *LLP* (or other words or abbreviations identifying the business).

In criminal cases, the Crown is usually *R*; however, if the Crown is the defendant/respondent, terms such as *The Queen* or *Regina* are used. In civil cases, the Crown is *Canada* or *Manitoba*, for example (depending on whether it is the federal Crown or a provincial Crown that is the party to the lawsuit). Specific bodies representing the Crown are designated in parentheses: for example, "*New Brunswick (Workplace Health, Safety and Compensation Commission)*." Where there are multiple parties, only the names of the first plaintiff and the first defendant are shown.

2 Year of decision

After the style of cause, the decision year is included in round brackets. This is done in cases

and a year in square brackets. (Note, however, that if there is a neutral citation preceding a report series citation, it will never be necessary to include the year in round brackets; the neutral citation makes it clear what the year of the decision is.)

3 Volume of law report

Set out the volume number, followed by a space. Law reports consist of numerous volumes that cover many years. If the report series being cited reports by volume number and not by year, the volume numbers can get quite high, sometimes in the hundreds. If the report series reports by year, there still may be a volume number following the year in square brackets, but the numbers run only for the year in question and will never be that high.

4 Law report abbreviation

Next is the law report abbreviation. Cases are always cited according to the abbreviated form of the law report in which they are found. Many law reports state in the front of each volume how they are to be cited—what abbreviations should be used.

5 Law report series

The law report series appears, where applicable, after the law report abbreviation. Periodically, a law report may change its format and binding, or make other editorial changes. When this occurs, the law report may begin a new series. This means that the numbering system begins over again. If a law report has multiple series, the series number, starting with the second one, is indicated in round brackets—(2d)—followed by a space. The abbreviations are 2d, 3d, 4th, 5th, and so on. Superscript is not used, and there is no *n* in 2d or *r* in 3d.

6 Page

After the law report abbreviation or (if there is one) series indication, the page number on which the case begins in the law report is set out. The reference is to the first page only and does not include *p* for *page*.

Canadian Courts: Constitutional Basis

- *Constitutional Act (1867)* sets out power over courts and judicial appointments

92. In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subject next hereinafter enumerated; that is to say, ...

4. The Establishment and Tenure of Provincial Offices and the Appointment and Payment of Provincial Officers. ...

14. The Administration of Justice in the Province, including *the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction*, and including Procedure in Civil Matters in those Courts. ...

96. The *Governor General shall appoint the Judges of the Superior, District, and County Courts in each Province*, except those of the Courts of Probate in Nova Scotia and New Brunswick. ...

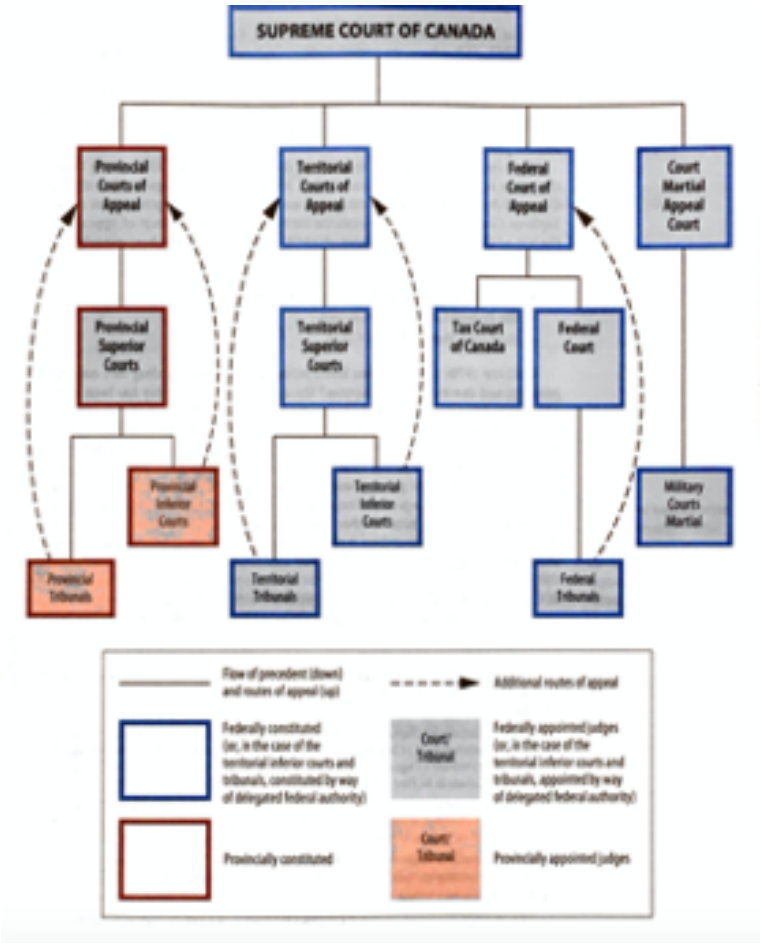
99.(1) Subject to subsection (2) of this section, the judges of the superior courts shall hold office during good behaviour, but shall be removable by the Governor General on address of the Senate and House of Commons.

(2) A judge of a superior court ... shall cease to hold office upon attaining the age of seventy-five years. ...

101. *The Parliament of Canada may*, notwithstanding anything in this Act, from Time to Time *provide for the Constitution, Maintenance, and Organization of a General Court of Appeal for Canada, and for the Establishment of any additional Courts for the better Administration of the Laws of Canada.*[2]

- Since Confederation, Parliament and provinces have used constitutional powers to create 3 types of court:
    - Inferior Courts
    - Provincial/Territorial and Federal
        - Jurisdiction over minor criminal matters; family matters; small claims
        - Federal Court Martial (military court) uses inferior court
    - Superior courts
- Terms applied to provincial courts, inferior and superior, is inconsistent
    - Provincial superior courts also known as Superior Courts/Supreme Courts/Courts of Queen's Bench
    - Provincial inferior courts often simply referred to as provincial courts
    - Territorial courts may refer to inferior or superior
    - Use context to determine which court the term refers to
- Provincial Inferior Courts
    - exist through provisions in Constitution Act (1867) that gives provinces and territories the power to establish inferior courts and appoint territorial judges
    - These provincial courts are the workhorses of the court system
- Federal Inferior Court
    - Jurisdiction over armed forces personnel who commit service offences
    - Ex. Military Court
- Provincial Superior Court
    - Jurisdiction to hear all matters (unless taken away by legislation)
    - Two levels: trial and appeal level
    - Known as "Section 96 Courts," because their judges are federally appointed under section 96 of the Constitution Act (1867)
    - Federally appointed because their judges can hear federal matters (ie. bankruptcy)
        - Would be unconstitutional for provinces to assign to provincially appointed judges matters that were adjudicated by superior courts

    - Territorial Superior Courts are similar in function to Provincial Superior Court, but are constituted under federal legislation (Constitution Act [1871], rather than Constitution Act [1867])
- Federal Superior Courts
    - Federal Court
    - Federal Court of Appeal
    - Tax Court of Canada
    - Court Martial Appeal Court
    - Constituted under federal legislation, with federally appointed judges
    - Federal Court and Federal Court of Appeal have jurisdiction throughout Canada
        - Authority overlaps with provincial courts, which has led to jurisdictional disputes
- Supreme Court of Canada
    - Canada's highest court and the final court of appeal
    - Considered a Federal Superior Court, but in its own category
    - At time of Confederation, deemed important for the country to have a general court of appeal to interpret statutes and decide future constitutional disputes likely to arise over the division of powers between federal government and provinces
    - Jurisdiction to hear appeals from: all provincial/territorial Courts of Appeal; Federal Court of Appeal; Court Martial Appeal Court
    - Focus on public law appeals in criminal matters, statutory interpretation, Charter issues.
    - Supreme Court Act requires that 3 of 9 judges come from Quebec, to avoid fear that common law majority on the Court would graft common law precepts onto Quebec's civil law system.
        - 3 from Ontario; 2 from West; 1 Atlantic; 3 Quebec
    - One chief justice, with eight **puisne** ("inferior in rank") judges



Name	Supreme Court of Canada (1875)
Constitutional Authority	Section 101, *Constitution Act, 1867*
Act	*Supreme Court Act*, RSC 1985, c S-26
Rules	*Rules of the Supreme Court of Canada*
Judges	• 1 chief justice of Canada • 8 puisne judges • Quorum: 5-9 judges
Key Jurisdictional Features	• Hears appeals in criminal and non-criminal cases (if the case concerns a matter of public importance or significant legal question) • Leave to appeal is required in some instances • Hears appeals in criminal cases involving indictable offences where the court of appeal upholds a conviction but with a dissenting opinion • Hears appeals in criminal cases where the court of appeal substitutes a guilty verdict for an acquittal • Hears references

How Cases Come Before the Supreme Court

- Cases come in three ways: (1) leave to appeal, (2) appeal as of right, (3) on a reference
    - Leave to Appeal: court grants a party leave to appeal his case to Supreme Court
        - Most common way for non-criminal matters to be appealed
        - Can come from provincial Court of Appeal, or SCC itself
        - Applicants file written submissions, then three panels (each with three SCC judges) determine whether it will be heard
        - Leave to Appeal granted if: matter of public importance; significant legal question; or, any matter the court believes warrants its attention
    - Appeal as of Right
        - Right to appeal if convicted but on appeal court, a judge dissents on question of law
        - Person acquitted, but Court of Appeal substitutes guilty verdict
    - On a Reference
        - Unlike other ways, not dependant on existing legal action in lower court
        - Federal Cabinet refers important questions regarding constitutionality of proposed statute or course of action to Supreme Court for advice
        - Provincial cabinet might ask reference question to provincial Court of Appeal. That court's decision can be appealed as of right to Supreme Court.

Special Courts in Alberta

- Different special courts have been created to deal with cases in a therapeutic and culturally appropriate manner
- Mental Health Court
    - Court uses collaborative approach to find a solution, with professionals
- Calgary Indigenous Court
    - Restorative and holistic justice system
- Indigenous Courts in Indigenous Communities
- Drug Court
    - Intended to break cycle of drug addiction by completing a program
- Domestic Court
    - Recognizes unique characteristics of violence between family members

First Indigenous Court in Canada

- Mohawk band council of Akwesasne introduced first system outside of federal framework (focus on civil matters)
    - Mixes aspects of Canada's legal system with Mohawk values and principles

What is Law?

Introduction

- Legal theories tend to focus on several related questions:
    - What is the relationship between law and morality? Is law derived from universal moral truths? Are morally repugnant laws nevertheless binding?
    - What is the relationship between law and power? Are laws simply rules backed by force? To what degree does law reflect cultural forces?
- Legal systems built around ideas that are historically and culturally specific
    - Canada's system based on English common-law system and reflects Canadian values
- **Jurisprudence**: the study of legal theory

Positivism and Natural Law

- **Legal Positivism**: the belief that law is nothing more than the rules and principles that actually govern society.
    - Separation of law and morality: no reference to justness or legitimacy
    - Focuses only on issues of law, not what law ought to be
- **Natural Law Theory**: not just rules, but adhere to moral and universal truths
    - Law arises from nature, or beliefs accepted by society
    - However, what about laws that govern commercial transactions?
    - Law is thought to be absolute and determinative, but morality can be relative
    - Sees Legal Positivism as necessary, but if it contradicts Natural Law, there is no moral obligation to follow it

Re Drummond Wren [1945]

- After purchase, applicant asks to invalidate covenant from land stating, "not to be sold to Jews or persons of objectionable nationality."
- Against public policy: "Any agreement which tends to be injurious to the public or against the public good is void as being contrary to public policy."
    - Public policy can change from time to time
- Contravened Racial Discrimination Act (1944), which was designed to combat "Whites Only" and "No Jews Allowed" signs in public places.
    - Section 1 of this Act prohibits publication or display of representations indicating an intent to discriminate on the basis of race or creed.
- Judge discusses public policy as a variable thing that changes with the times
    - Courts may look at different Acts and public law as aid in determining public policy
    - Judge cites charter from United States that Canada signed emphasizing human rights
- If a court were to support this covenant, the consequence would be that sale of land could be equally prohibited to other religions
    - Would deepen divisions between religious groups
- Such a policy would be unlikely to exist as legislation, which judicial branch must take into account
    - Common law courts, through precedents, have gotten rid of need to have rigid constitutional guarantees
    - While courts should not try to create new public policy, they may continue what is already happening by applying it to new set of facts
- Covenant found void because it is offensive to public policy
    - Conclusion is reinforced by wide official acceptance of international policies
    - No need to even consider the Racial Discrimination Act (1944); even if you needed to, it simply stands as legislative recognition of the public policy applied

Re Noble and Wolf [1948]

- Wolf sought to have covenant stating lands not to be sold to "coloured race or blood" rendered invalid on grounds of public policy, based on precedent in Re Drummond Wren

- Judge says difference between Re Drummond Wren and this case is that, now, residents are seeking recreation and not shelter; also, restriction in that case was unlimited
- Judge says the judge in Re Drummond Wren evolved a new public policy
    - Danger in doing this because citizens will not be able to avail themselves of indisputable laws; renders all law vague and uncertain
    - Gives judges too much discretion and power
    - Up to Legislature to determine what is best for public good
    - Though some instances of courts using public policy led to it becoming established law, that doesn't justify doing it still

However, if the judge in Re Drummond Wren allowed the covenant to stand, it would lead to discriminatory practices that would be allowed, so long as they carefully abide by the laws.

- While legislative authorities won't likely enact law inconsistent with signed treaties, can't say that we can create public policy that interferes with the greater public policy that one shouldn't lightly interfere with freedom of contract
- Judge says there is no established principle of law recognized in Courts or by the State that enables him to strike down covenant as offensive against policy of law
- Motion dismissed. No costs awarded to purchaser who supported vendor's motion.
- Struck down in Supreme Court on application of common-law rules…no mention of public policy.

Critical Legal Studies

- Radical alternative to most legal theories, rejecting that there is objective "natural legal order"
- Descendant of Legal Realism
    - Attacked idea that common law rules were neutral, objective, and certain
        - Any articulation of a rule is subject to multiple interpretations; therefore, any decision reflects the unstated public policy preference of the judge
- How independent is law from broader social and political considerations?
- Due to law's subjectivity, how can we use law as a tool to change society?
- Law legitimizes the authority and power of certain social groups
- Three Key Stages

    Stage 1: Hegemonic Consciousness — law maintained by beliefs that have foundation in liberal, market-driven economy; thus, they reflect the interests of a dominant class

    Stage 2: Reification — these beliefs are presented as necessary and objective; thus, law

    Stage 3: Denial — law aids in the denial of real truths; ie. racism that still exists

Whiteness as Property

- Evolution of whiteness from colour -> race -> status -> property
    - Progression rooted in white supremacy and economic hegemony over others
- Whiteness and property share the "right to exclude"
    - After segregation was overturned, law ratified white privilege as legitimate and natural baseline
- Race and property conflated through Black labor; Native Americans conquered by property rights of whites in Native American land
    - only the "white" type of property ownership was validated

Toward Feminist Jurisprudence

- The law sees and treats women the way that men see and treat women
    - The state as "male" in the feminist sense

R v. Morgentaler (1988)

- Doctor charged with violating law that prohibited abortion unless approval obtained through lengthy process. Argued it violated s. 7 of Charter: "life, liberty and security of the person".

- SCC judge states that it is necessary to determine whether a pregnant woman cannot, as a constitutional matter, be compelled by law to carry the foetus to term against her will, reviewing the law itself is pointless.
- Issue: what is meant by the right to liberty in the context of abortion?
    - Right to Liberty
        - The right to make fundamental personal decisions without interference from state; grants individual a degree of autonomy in making decisions of fundamental personal importance
        - Abortion has profound psychological, economic, and social consequences for the woman
        - Right to reproduce or not reproduce is part of women's struggle to assert her dignity and worth as a human being
        - The law that prohibits abortion thus violates s. 7 of Charter, as it takes the decision away from the woman
        - A woman has the right to decide for herself
- Appeal allowed. The law prohibiting abortion without approval struck down.

Law and Economics

- Law and Economics theories look at efficiency, rather than morality.
- **Efficiency**: an ideal where the welfare of each party can no longer be maximized except at the expense of other parties
- Applies economics methodology to legal rules in order to assess whether the rules will result in outcomes that are efficient.
- Assumes humans are rational and have preferences; will act to maximize their welfare
- Behavioral economists have critiqued the idea that humans are rational

Public Law and Economic Theory

- Justice and efficiency are interrelated
- Governments have to consider costs of providing and maintaining institutions of justice
- Public policy is government intervention as a "correction" to market failure
- Explains why some public policies appear to run counter to public good
- Assumes policy-makers are rational; act to maximize political support
- Thus, their decisions are for themselves, not the public
- If legislation favors the legislators, then the complaints of Law and Economics theorists is similar to Critical Legal Studies and feminist scholars.

Rule of Law

Law in Context

- "Rule of Law" doesn't simply mean "law and order."
    - More to do with duties on governments than on citizens: governments should only rule by way of laws
- Rule of law requires that government should be in accordance with rules
    - No arbitrary use of power
    - Any government discretion should be limited and exercised within the limits imposed by general laws
    - Violations of rule of law by government means there are not rules at all and, therefore, no obligation to obey them.
- Rule of Law valued for three reasons:
    1. Curbs power of government; prevents it from becoming absolute
    2. Protects rights and liberties of citizens
    3. Promotes personal autonomy in that individuals can predict the circumstances when governments will interfere with their lives, so they can plan accordingly
- Rule of law not to be confused with "the rule of good law."
    - It is a virtue of a legal system, but distinct from other virtues, like democracy, justice, equality and human rights.

The Morality that Makes Law Possible

- Allegory of a king, who wants to revamp a legal system.
- Eight Ways to Disaster When Making Rules
    1. Failure to achieve rules at all; every decision arbitrary
    2. Failure to publicize rules to all parties
    3. Abuse of retroactive legislation; no rules would be forward-thinking
    4. Failure to make rules understandable
    5. Enactment of contradictory rules
    6. Rules that require conduct beyond powers of affected parties
    7. Frequent changes in the rules so that subjects cannot act accordingly
    8. Mismatch between the rules as announced and their administration
- A failure in any of the eight ways means there is no legal system at all
    - Bond of reciprocity: government says, "if you follow these rules, these are the rules that will be applied to your conduct." When this bond is broken by the government, no reason for citizens to obey the rules.
- Respect for constituted authority must not be confused with fidelity to law.

Common and Civil Law

Common Law

- Derived from England, Canadian law is common law in source and practice
    - Term comes from judges in England trying to develop a "common" law for disputes
- Common law is the body of judicial decisions that has developed over time
    - Judges decide present disputes by referring to past decisions and establishing rules for the future
- Common law is unwritten law: not contained in any one code
    - The judges' decisions are the law
- **Legislation**: rules and principles that must be followed.
- **Legislative Supremacy**: legislation is superior to common law and, in a conflict, will prevail.
- **Civil Law**: written codes that combine to form a complete statement of law
- Past decisions are to be followed and treated as binding.
    - "Chain-novel exercise:" judges approach giving reasons for judgment in cases as if they had been asked to read previous chapters and then contribute one of their own that continues the story.
    - Places restraints on judge, while providing some room for creativity
- Common law system provides check against arbitrary judges and gives people predictability against which to organize their own affairs.
- "Like cases are to be treated alike."
    - Provides reasoning that is binding on inferior courts in deciding later cases.
    - The force of a precedent, therefore, is determined by the authority of the deciding court, its ruling and its subsequent history.
        - ie. A case decided by the Supreme Court is binding on all other courts.

Nature of Common and Civil Law

- Common Law Theory
    - Judges do not make the law, just apply facts to uncovered legal rules
    - All relevant past decisions are considered as evidence of the law; judges infer from these precedents what the law actually is
    - Common law is set of fixed rules, unearthed by judges through reasoning and precedent
    - Legislation is merely an addition into common law
- Civil Law
    - Came from France and derived from judicial interpretations of the law
    - Based not on cases, but established laws written as broad principles
    - Legislation is the main source of law
    - Quebec has aspects of both civil and common law

Comparison of Common and Civil Law

- Judges in both system consult prior decisions to solve issues
- Statutes are a source of law
- Civil law may apply to other provinces in Canada if the issue involves Quebec

CHARACTERISTICS	CIVIL LAW SYSTEM	COMMON LAW SYSTEM
Judicial Decisions	*Not Authoritative* • not a primary or authoritative source of law; only legislation (civil code and other statutes) is binding • regard for precedent is informal (however, previous cases may be persuasive, along with academic commentary, as noted below)	*Authoritative* • a primary and authoritative source of law, along with legislation • judges are bound by precedent following the principle of *stare decisis*
Role of Judges in Dispute Resolution Process	*Inquisitorial System* • judges are appointed from a special school for judges in many civil law jurisdictions—prior experience as a lawyer not required • judges conscious of being part of civil service—i.e., representatives of government • courtroom process is based on the idea that judges should actively assist lawyers in presenting their case—truth is best determined this way • judges are free to call and question witnesses, and order investigations into other evidentiary matters	*Adversarial System* • judges are appointed from the legal profession, after years of practice as lawyer or law professor • judges are conscious of being independent of the government that appoints them • courtroom process is based on the idea that truth is best determined by lawyers presenting their respective cases, unhindered by interference from the trial judge
Academic Commentary	*Important Interpretive Role* • academic commentary is one of the foundations of the civil law system and is called *doctrine* • scholarly texts and articles about the civil code play a significant role overall in helping judges decide cases	*Persuasive* • academic commentary is a type of secondary source and assists in the finding or interpretation of primary sources (judicial decisions and legislation) • texts and articles about the law have varying degrees of persuasiveness in cases in which they are cited, depending on the type of case and the author of the commentary
Juries	Generally not used	Can be used

Common Law & Equity

- **Equity**: the body of law developed by the Court of Chancery prior to its dismantling in 1873
    - its function was to provide a corrective to the harshness of common law
    - no formal methodology or strict doctrine of precedent
    - common law doesn't always achieve justice in the particular case; equity accounts for the uniqueness of each case
- Matters within the jurisdiction of equity include: property, contracts, guardianship, commercial matters
- In 1873, equitable and common law systems fused
    - Equitable principles continue to develop alongside common law and are applied concurrently in all superior courts
    - Equity prevails in cases of conflict

Equitable Doctrines and Maxims

- Law of equity developed equitable doctrines and maxims, which the court applies to guide its discretion to grant equitable relief
    - Provides equitable relief when there is a recognizable right, but no remedy under common law
- Clean Hands
    - Equity will not grant relief where the seeker of equity has committed a wrong
    - A plaintiff cannot profit from committing a wrong
    - Requires the seeker of equity to demonstrate "clean hands"
        - Plaintiff seeks injunction, but breached his own injunction
        - Plaintiff acted in bad faith
        - Plaintiff threatened employer with blackmail, then seeks to enforce contract
- Those Who Seek Equity Must Do Equity
    - Must act fairly towards the person whom you are seeking relief against
    - Deals with future conduct
    - Plaintiff may be granted equitable relief upon fulfilling terms and conditions
- Equity Follows the Law

- Equity does not replace statutes or common law; it applies where there is no remedy from statute or common law, but must be consistent with them
- Delay Defeats Equity
  - **Laches**: unreasonable delay in seeking legal remedy such that the granting of relief would produce inequitable results
    - Implies neglect to do what ought to have been done
  - Consider whether delay was excusable
    - What acts were done during delay; how parties were affected during delay; justice vs. injustice

Indigenous Legal Traditions

- Contemporary Canadian law concerning indigenous peoples originates in, and is extracted from, unique Indigenous legal systems.
- Rely on elders to identify and communicate law
- Ceremonies are rituals that enable participation in law
- Relies less on centralized proclamation and enforcement than rest of Canada's legal traditions
  - Many indigenous legal traditions and each might have a different method of interpretation
- Decision-making in indigenous communities should not necessarily occur through those who are distant, professionalized and impersonal
  - Each member has a role to play

The Constitution

- Canada has had a formal constitution since its creation in 1867 by the BNA Act
  - Repatriated Constitution in 1982 – added Charter of Rights and Freedoms
- Until 1982, constitution divided powers between federal and provincial governments, but did not restrict what they could do or enact within their authorized area (ie. new laws only had to consider jurisdiction)
  - *Charter* now places limits on the kind of action a particular legislature can take
- "Living Tree" Document
  - Constitution is not fixed or static: capable of growth and expansion
  - Must be capable of growth and development over time to meet new social and political realities
- Constitution can only be changed through substantial consent of provincial and federal governments
- Constitution still needs to be interpreted – judicial precedent important.
  - Argument can be made that the constitution is amended every time it is judicially interpreted.

Statutes

- **Statute**: the primary form of legislation.
  - Federal or provincial
- How Parliament Makes Statutes

1. Introducing a Bill
   - **Bill**: the draft version of a proposed statute
   - Introduced in House of Commons or Senate
2. Passage Through Parliament
   - **Reading:** a bill's formal presentation to legislature before it becomes a statute
   - **Royal Assent**: formal approval of a bill by the Queen's representative (G.G.)
   - Federal bill requires six readings: three in House of Commons; three in Senate
     - First Reading: House passes motion with no debate
     - Second Reading: House debates general principles; referred to special committee who may make amendments
     - Third Reading: debate limited and vote held. If passed, goes to Senate.
     - Similar process in Senate.
     - Bill then given Royal Assent.
     - If bill does not pass through all stages before end of legislative session, it "dies."
     - If a bill does not specify a date it becomes law, it is effective upon Royal Assent.

Provincial Statutes

- **Provincial Statutes**: provincial legislation
- *Charter* requires provincial elections within 5 years; thus, governing party has 5 years to advance agenda
- How Provincial Legislatures Make Statutes
    - Similar to federal process, but only require three readings (because there is no Senate)
    - After three readings and royal assent, it becomes a statute
- Territorial Statutes
    - Similar to provincial statutes, except a federal commissioner gives assent.

Subordinate (Delegated) Legislation

- Parliament or Provincial Legislatures can delegate power to a subordinate body to make the law.
    - A statute that delegates to another body is the *enabling* section.
- **Regulations**: subordinate legislation passed to expand or fill out a statute's idea.
    - to become law, they are simply drafted and approved by the relevant body
    - *General Regulations Statute*: each jurisdiction has an Act that has rules for the making of regulations

Public and Private International Law

- **Public International Law**: examines relationships between nations and the binding rules between them.
    - Governs relationship between states and international entities.
    - Nations in dispute may empower a court or tribunal to resolve conflict
        - These tribunals apply international law, with consideration of the customs, conventions and jurisprudence of the involved nations.
- **Private International Law**: disputes between individuals or businesses where the law of more than one nation may apply.
    - Commonly arises through commercial transactions between different nations.
    - Addresses which jurisdiction may hear a case
    - Typically involves contracts.
    - Nations involved may submit dispute to legal system to interpret agreement in accordance with the laws of either or both nations.
- If a dispute arises as to which law will apply, "conflict of law" rules are used to determine which country's law will apply.

International Law

- **International Law**: the law as between nations.
    - "Nation" could mean broad human community, or the state.
- International Law usually refers to the law among states; the body of rules that are binding by states in their intercourse with each other.
- International Law includes rules relating to the functioning of international organizations
- The law among states; also the law of certain rights and obligations states have with non-state actors (individuals and organizations).
    - Thus, international law is almost a "universal" law: it establishes a baseline standard that states must observe in their own jurisdiction, not just in their interactions with others.

Treaties with Indigenous Peoples

- **Treaty**: Constitutionally recognized agreement between the Crown and Indigenous peoples
- Different Perspectives:
    - Government sees an exchange where Indigenous nations agree to share interests of land in exchange for payments or promises
    - Indigenous peoples see it as a moral relationship between them and the government

- Historically, government treaty negotiators believed treaties were inexpensive and convenient ways to strip Indigenous ownership to give to settlers.

Customs and Values

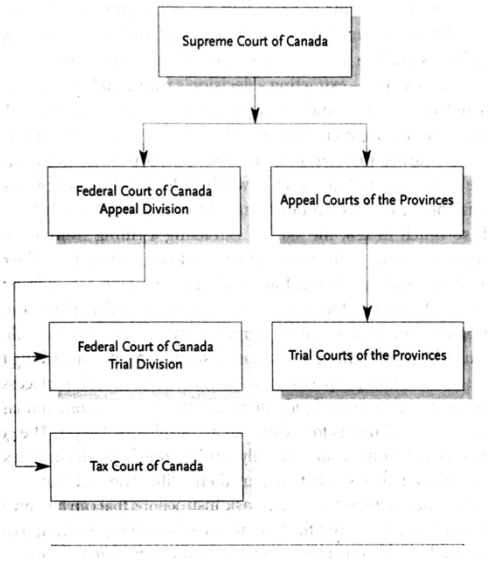
- Some laws arose organically and independent of legal system; only received official recognition later.
- Customs accepted as law if continuous, certain, reasonable, and followed.
    - Common law method
    - Common in areas of civil obligations: did the person act reasonably according to the accepted customs?
- Judges will justify their decision by referring to its social or political consequences.
- Law is about values: important to ask what those values are, whose they are, and who they benefit.

Indigenous Peoples: Law as Hierarchy

- Indigenous Laws have uncertain status in Canada's formal legal system
    - Debate about what constitutes law and whether they practiced law, or customs?
    - Does society only possess law if declared by a power capable of enforcing them?
- Indigenous peoples have been denigrated for not submitting to hierarchical political government
    - Customs and conventions seen as bottom of food chain; need to submit to higher sources of power
- **Rule of Reception:** Assumption that law only arrived with English settlers; Indigenous customs not considered law
    - erases Indigenous legal systems as a source of law in Canada
- Acknowledging Indigenous law as legitimate would create stronger relationship

Hierarchy of Courts

- **Rule of Precedent**: precedent only binding on lower courts; decisions of courts of equal or lower standing is more persuasive than binding.
    - Courts often consider precedents in Britain and USA for advice.
    - Decisions of one province not binding on courts of another province, but treated with respect



Reading and Briefing Cases

Reading Cases: The Ruling

- **Ratio**: reasons for the decision.
    - explicit or implicit legal reasons used by judge to decide the particular factual dispute.
    - To find *ratio*, necessary to distill decision down to its bare legal and factual essentials.
    - The less facts and the less specific the facts, the broader the application of the ratio.
    - The more general or abstract the facts, the broader the application of the ratio.
    - Future court decisions decide on the level of generality for the ratio; you will see whether it can be applied broadly or narrowly.

    - When a precedent has multiple reasons, all reasons are binding.
    - When there are multiple judges, the majority must agree for the reason to be binding.
        - When judges have different reasons, find essential areas of agreement.
    - What is the part of the reasoning that needs an extra step?
    - To be ratio, it must decide the case!
- **Obiter Dicta**: reasons expressed by judge that are not essential to the decision made.
    - Some persuasive authority depending on the issue, but not same precedential pull.
- A case never stands for only one ruling that is the same for all purposes at all times.
    - Creativity and flair are needed.
- Phrase doesn't count as obiter dicta unless it receives the endorsement of a judge.

Reading Stages

- Begin by skimming without notes, to get a general sense of dispute and how court approached it.
- Read each judge's opinion carefully, highlighting important points.
    - Don't skip quoted legislation, as it may hold key to outcome.

Briefing a Case

- **Case Brief**: summary of the main points of judicial decision.
- **Heading**: case name, court, date, citation, judges.
- **Key Words**: to help with research.
- **Procedural History**: events within legal system predating the case.
    - Check if any further appeals, or if other courts have declined to follow the decision.
- **Parties**: identifies parties involved, with emphasis on real-world relationship between them that led to conflict.
- **Remedy Sought**: what plaintiff is asking court to do. Defendant asks court to dismiss plaintiff's action.
    - both parties almost invariably ask for other to pay costs.

Facts

- pertinent facts necessary to understand issues in dispute.
- don't summarize until you understand the legal rule.
- To decide what facts to include, ask yourself what you must know to understand how the court characterize the legal issues, what rule was applied, and what outcome followed from applying that rule. Then, include other facts that provide important context for why the dispute arose or why the court ruled a certain way.
- Present facts in chronological order.
- Avoid detail not related to legal issues.

Issue

- the question the court had to answer in order to decide the case.
- States a question about the relationship between a legal rule and real-world facts.
- Issue = (law + facts) in question form.
- To discern issue, put yourself in position of judge, and ask yourself what questions you would have to address in deciding the case.
- May be several distinct issues
    - plaintiff may bring several claims, or defendant asserts multiple defenses
    - in appeal, party may challenge conduct of a trial, correctness of decision/remedy
- some issues are questions about what the law is or should be, as applied to agreed upon facts.
    - Other issues are application of settled law to disputed facts.
- Issue should not be solely a question about what happened, or what the law is.
- Issue might be substantive or procedural
    - Substantive = conduct of people in real world
    - Procedural = govern events in legal system (time limits, etc.)
- Can have sub-issues of same issue.
- Only focus on issues relevant to client's situation.
- Some judges state the issue early; some summarize the arguments of parties (can deduce issue)

Holding

- court's response to the issue.
- Connects the law to the facts of the case to reveal the legal significance/consequences of those facts.
- Holding = (law + facts) in statement form.

- State the resolution of the issue, not who won or lost.
    - Lawyer needs holding that identifies what was in dispute and how it was resolved.
- May be legal or factual; broad or narrow; substantive or procedural; simple or complex
- Multiple holdings if there are multiple issues
- Creates or confirms precedent: court should have a similar holding on similar facts in the future.
- Narrow phrasing means the case has little impact beyond specific facts.
    - Broad phrasing can have broad application.
- When briefing, you have choice to state holding narrowly or broadly. What you choose depends on your client's situation.

Rule of Law

- legal analysis supporting the holding; applies rules to facts.
- States the legal consequences that flow from certain factual conditions.
- Similar to holding in that the case becomes an authority for the rules of law stated within it.
- To find rule, look for a statement of legal consequences paired with factual conditions that could cover similar cases.
- Phrase in own words to be sure you understand it.
- Can be put in "Reasoning" section below.

Reasoning

- summarize how the court decided on what rule to apply and how it applied it.
- Provides guidance on how narrowly or broadly to read a case; insight into how the court will analyze future cases.
- Judge will explain why the rule is appropriate to apply to the specific facts of the case and the consequences of the application.
- May refer to social or policy goals.
- Cites major authorities it relied upon in reaching its conclusion.

Dictum

- matters described by the judge that are not essential to the holding. "Remarks by the way."
- helps situate the decision in the broader context of legal developments in the subject area.
- May hypothesize how the rule would apply to different facts.
- Not considered binding statements of law; persuasive if coming from higher court.

Majority/Minority/Concurring/Dissenting Opinions

- note the type of opinion(s) provided.
    - dissents are not precedent.
- Keep revising briefs so that the facts, issues, holdings, rule, and reasoning consistently support each other.
- Rule should address the issue that is stated.
- Five C's
    - Completeness: is everything present that is needed to understand the case.
    - Correctness: all points stated accurately.
    - Coherence: do all parts of the brief fit together?
    - Clarity: is the brief easy to read?
    - Comprehensibility: could another person understand the significance of the case and scope?
- Review: cases are like fable, with facts the story and the holding is the moral
    - Read the case several times
    - Ponder the two narratives: who did 5 w's in real world? 5 w's in legal system?

Jordan House Ltd. v. Menow (1974)

Facts: Frequent patron of hotel bar (P) becomes intoxicated and is ejected by hotel employees. Operator (D) knows P is unable to care for himself due to intoxication and would need to walk home on highway. P is struck by vehicle and sustains serious injuries.
Procedural History: appeal from Ontario Court of Appeal.
Issue: Was a duty of care owed? If so, was that duty of care fulfilled?
Reasoning: The D had told employees not to serve P unless accompanied by responsible person. D had also helped other patrons arrange transportation home in previous instances. D was responsible for continuing to serve P alcohol after clear intoxication and known issues with alcohol, with a breach of statutory rules. D knew P would need to walk home on highway.
Holding: Hotel came under a duty to Menow to assure he got home safely by arranging transportation or placing him under charge of responsible person. Appeal dismissed with costs.
Ratio: Alcohol proprietors have a duty of care to patrons they over-serve in breach of statute and who are at risk of probable injury.

Obiter Dicta: Consider the burden a duty of care places on business operator and the business' knowledge of the particular patron so as not to impose duty on every operator to act as watchdog on all patrons.

Indigenous Peoples

How to Talk About Indigenous Peoples

- Indigenous
  - Three Distinct Groups: First Nations, Metis, Inuit
  - Using term "Indigenous" is like using term "Asian": works sometimes, but need to be specific
  - If you don't know, ask them to self-identify
- Metis
  - Descendants of First Nations and European settlers
  - All across Canada, but share a unique cultural heritage
- Inuit
  - Inuit = people; Inuk = person
- "Aboriginal" being replaced by "Indigenous"
- If referring to one group, be specific. If referring to all groups, use "Indigenous"

Truth and Reconciliation

- Law has been used by Canada to remove lands, governments, traditions, and children from Indigenous peoples.
  - As a result, Indigenous people came to see law as a tool of government oppression.
- Many Indigenous peoples have a distrust of Canada's political and legal systems because of the damage they've caused.
  - As a result, law continues to be a significant obstacle to reconciliation.

Peace and Good Order: Indigenous Justice

- Farmer kills Indigenous man after the man enters his property with a group of friends. Aquitted by all-white jury. Leads to tension between Indigenous peoples in Saskatchewan and Saskatchewan government.
- Over-incarceration of Indigenous peoples, despite Code stipulation that asks judges to consider contextual factors.
  - Law as a tool for forced subordination.
- All Canada's wealth that is extracted from the land comes from rights received at treaties.
- Indigenous peoples expect fairness from the law, but receive something different.
- Against the law, from 1927-1951, for Indigenous people to hire a lawyer to bring claims against the government.

Myth of the Wheat King and the killing of Colten Boushie

- Myth of Wheat King: Canada state-law created this myth from the homesteader; it was an important tool of colonialism.
  - Plains Cree were imagined as a constant threat to prairie kingdoms
- Homesteaders were promised land to move to Canada; this right to land was denied to Indigenous peoples
- "Prisons of Grass": the *Indian Act* controlled the economic threat of Indigenous peoples by confining them to certain territories through the pass system
  - Denied right to farming equipment
- Ignoring Colten Boushie's Indigenous heritage also ignores centuries of evidence planted in the imagination of the prairie farmer
- Castle Imagery
  - Colten Boushie case used "property as a person's castle" argument
  - This imagery is loaded with justifications for sanctioned violence against Indigenous
- Committing to remembering the past and present injustice of Indigenous peoples has practical effects on the criminal justice system
  - Allows us to see the impact of the Wheat King myth on justice

R. v. Barton (2019)

- Juries require freedom from bias, prejudice, or sympathy.
  - But Supreme Court has discussed the impact of prejudices on Indigenous peoples.

- Trial judges play important role as "gatekeepers"
    - Instruct jury to act impartially
    - While this can't be assumed to work all the time, it can help expose biases and prejudices and encourage jurors to grapple with them directly
- Supreme Court encourages criminal justice system to take reasonable steps to address system bias
    - Trial judges encouraged to provide direct instruction aimed at countering prejudice against Indigenous; this instruction would go beyond more generic instruction to reason impartially
- Preferable to call someone by their name, not title (ie. "Native).
    - Times where it is appropriate for trial judge to intervene to ensure this principle is respected

Indigenous Law

Introduction

- Indigenous Law: collaborative processes managed through time
    - Draw from stories to solve problems
- Law grounds you to the land and helps you to live well in the world
- Law is the stories that helps us regulate our relations with others
- Traditions are 'living traditions': need to use the traditions to deal with modern issues
- Elders and community leaders can be referenced for underlying principles that need to be taken into consideration.

Confronting Intergenerational Injustice

- Understanding and applying Indigenous legal concepts could address the distrust between people in a way criminal trials do not.
- All systems of law share the same universal human concerns: community safety, fairness, accountability.
- Supreme Court has recognized that Indigenous laws continue to be valid, along with common law and civil law.
    - Indigenous laws stopped being recognized as laws when colonial interests turned from the fur trade to land acquisition – there was then motivation to mythologize the "lawless Indigenous".
- Indigenous peoples had their own system of law taken away from them, but also were denied adequate access to the promises of safety, peace and order from the Euro-Canadian legal system.
- Indigenous Laws continue to exist in Canada – the processes, ceremonies and practices can be drawn on to resolve conflicts and restore peace.
- Engagement with Indigenous Law may deepen our understanding of our responsibilities to one another

Drawing upon the Wealth of Indigenous Laws in the Yukon

- First Nations are learning how to address the imposition of law on their social, economic, legal and spiritual lives, while ensuring their own Indigenous Law is recognized and understood.
- Indigenous peoples are generally encouraged to create legislation to support their own Indigenous Law.
- We have a duty to engage with Indigenous Law through a constitutive approach
    - **Constitutive**: giving organization to something
    - Encourage the raising up of Indigenous Law through an examination of constitutionalism in a broad sense
- Political Canada sees "constitutionalism" as formal and informal understandings
    - Indigenous constitutions draw from their "lifeworlds" – as social and legal norms shift, so does its constitutionalism
    - Beyond written texts or customary practices, its principles lie in narratives, songs, ceremonies, etc.
- Should consider the constitutive institutions and practices of a particular First Nation as broader than just its written documents
    - Just as Canada considers its own constitution broader than what is simply on the page
- Due to Indigenous and treaty rights in Canadian Constitution, it has been difficult for Indigenous peoples to throw off false constitutional limits
    - Also, due to common law, Canada's Constitution is becoming more "written" all the time, leaving less place for Indigenous' unwritten traditions
    - Writing down Indigenous constitution also risks the assumption that 'everything' is written down
- Methods to Engage with Indigenous Constitutionalism
    1. Linguistic Approach
        a. Indigenous language as a method to articulate legal principles and traditions

b. Identifies an important word or value and recognize it is principle
c. Challenges with accessibility and translation

2. Source of Law Approach
    a. Law comes from five locations: sacred, natural, customary, deliberative, positivistic
3. Storied Approach
    a. Stories as a resource to access legal principles
    b. Critiqued for lack of interpretive limits

- Reconciliation can occur when we work thorugh the potential conflicts involved in the overlapping of common law and Indigenous law

Sauvé v. Canada [2002]

Facts: All prisoners were previously denied right to vote in federal elections. This was deemed unconstitutional, so Parliament responded by replacing the law with one denying the right to vote to anyone serving two years or more.
Issues: Does denying the right to vote to prisoners serving two years or more infringe the guarantee of the right of all citizens to vote under s. 3 of the Charter and if so, is the infringement justified under s. 1 of the Charter?
Reasoning: Respondent concedes the voting restriction violates s. 3. Prisoners have long voted in other jurisdictions without adverse consequences. People should not be left guessing about why their Charter rights have been infringed through vague rules. Demonstrable justification requires that the objective or rule clearly reveal the harm the government hopes to remedy.
Holding: Denying the right to vote violates s. 1 and 3 of the Charter. Wholesale disenfranchisement of prisoners is not justified in a free and democratic society. Appeal granted.
Ratio: The reasonable limitation of a Charter right requires demonstrable justification that the rule clearly reveal the harm the government hopes to remedy.
Dissent: Denying prisoners the right to vote asserts and enhances the right to vote. It does not infringe on their "dignity" or "worth."

Statutory Interpretation

What are the Maxims?

- **Maxims of Statutory Interpretation**: handy interpretive guidelines expressed in Latin phrases
    - each Latin phrase refers to a specific principle that helps courts interpret legislation
    - this "grammar" helps us understand pattersn of language in legislative texts
    - not strict rules with universal application
        - often describe the result that should be reached in issues of interpretation, but courts are free to ignore the maxims if it feels its inappropriate
    - describe what drafters *probably* meant: sources of argument, rather than binding rules
    - provides lawyers with persuasive arguments in cases involving legislation
    - maxims lead directly to a set of logical inferences that explain why that pattern is appearing in the legislation
    - allows lawyers to make useful arguments and predictions concerning the meaning of legislation
- **Noscitur a Sociis:** "know a thing by its associates." → CONTEXT
    - Unclear words should be given whatever meaning makes the most sense given context.
    - Applies wherever a statutory provision contains a word or phrase susceptible to more than one meaning.
    - Compare the contention word/phrase with other words/phrases that accompany the language being interpreted.
        - Ex. "Disability" is ambiguous – until used in context of "death" and "illness"
        - Ex. "Conceal" could be active concealment – or passive concealment, through failure to disclose
- **Ejusdem Generis**: "of the same class."
    - General words must be understood by reference to the specific terms with which they're associated.
        - Listed items have been included for some purpose – that purpose is to narrow the meaning
    - Used whenever a provision contains a list of specific items, accompanies by general words that embrace those specific items.
        - Ex. "lions, tigers, bears, and other animals."
    - The general words ("other animals") may be read down to include only those items that are of the same class as the specific items.
        - We would exclude any animals that are essentially different from lions, tigers, bears (like humans, organisms, etc.)
    - *Ejusdem Generis* instructs us not to give general words their widest possible meaning, but to narrow them so that they only capture items in the same class as the specifically listed items.

- Logically, if "other animals" was intended to be read in its broadest possible sense, there would be no need to include "lions, tigers, bears," as they would already be included in "animals")
- A fundamental assumption in statutory construction is that there are no extraneous words in legislation – so what is the role in the text of saying "other animals?"
  - Ex. "Lions, tigers, bears, and other animals must be housed in paddocks enclosing no less than one hectare per animal."
    - Class of "other animals" is unclear – could be all mammals, all dangerous animals, etc.
    - Using *Ejusdem Generis*, we can exclude organisms, house cats, etc. due to "housed in paddocks." This phrase provides a guide as to what is meant by "other animals"
  - Ex. "book, pamphlet, picture, film, paper, print, or other matter"
    - "other matter" would include only things comprehensible by sight

- **Expressio Unius Est Exclusio Alterius**: "to express one thing is to exclude another." → IMPLIED EXCLUSION
  - Whenever there is reason to believe that if the legislature had meant to include a particular thing within its legislation, it would have referred to that thing expressly. Thus, failure to mention the thing becomes ground for inferring that it was deliberately excluded. Although there is no express exclusion, exclusion is implied.
    - Ex. "pigs, chickens, cows, and horses must be inspected."
      - Implies the exclusion of other non-listed animals such as sheep.
    - Ex. "I leave to my cousin my Toyota and my Cadillac, together with the tires on my Cadillac"
      - We may infer that the tires on the Toyota have not been given – explicitly stated one car's tires, so presumably she would have also said the other car's tires if that's what was intended.
      - If she wanted the tires on both cars to be given, she wouldn't have mentioned tires at all.
  - Requires assumption that the drafter actually thought about the items he intended to exclude
    - Ex. "No ships, boats, or jet-skis are permitted"
      - Doesn't include "hovercraft," but no indication that the author even thought about hovercraft and excluded them intentionally.
      - If a later provision in the statute mentioned hovercraft, we could be certain the author was aware of hovercraft and intentionally excluded it in the earlier provision.

Approaches to Statutory Interpretation

- Different approaches to statutory interpretation can lead to vastly different outcomes
  - But, all approaches try to accomplish the same objective: to give effect to the will or intent of the legislature.
- **Textualist Approach**: considers only the meaning of the legislation's words and may be aided by dictionary definitions of those words.
  - Legislative history or context is unreliable or too subjective – this is not what was intended by the legislature, and so allows judges to choose their preferred interpretation
  - May consider *contextual text*: other wording in the statute
  - If there is an issue with interpretation, it should be fixed by the legislature, not the court
  - Offers a clear separation between the legislature and judiciary
  - Fails to acknowledge incomplete rules; absurd interpretations; slow-moving legislature
- **Intentionalist Approach**: considers the words of the enacted language in light of the legislative background of the statute
  - Considers prior version, committee reports, legislative debates.
  - Legislative history is a check to ensure a particular interpretation accords with legislative will
  - Intent: the words and meanings attached to words, along with its relationship to other rules
  - Purpose: the hoped-for impact on real-world events; what is it designed to accomplish?
    - Ex. "No Vehicles in Park."
      - Intent: only intended high-speed vehicles to be included.
      - Purpose: protecting the safety of pedestrians in the park.
  - Ensures that a particular interpretation does not frustrate the policies underlying a new law
    - Helpful for cases not anticipated by the legislature
  - Dangers: shifts focus from legislative will to the consequences of a decision
    - Judicial over-reaching to not consider the will of the legislature
    - No guidance as to what sorts of consequences *should* be desired
  - Benefits: weighing of consequences for different interpretations is what courts do and, perhaps, *should* do

The Executive and its Functions

- Executive Branch: those institutions that implement and enforce laws, whether those laws or created by the legislature or through common law judiciary.
    - Queen, governor-general, lieutenant governors, Cabinet, Crown Corporations
- Common to draw a distinction between "political executive" and broader "administrative executive"
    - Political executive: elected officials responsible for political direction
- Administrative Law: legal principles establishing boundaries of executive power
    - Requirement that government officials exercise their power in furtherance of public, not private, interests
    - Rules in administrative law constrain administrative discretion in ways that respect the intentions of the legislative branch and promote outcomes that further public interest.
- Canada's Constitution places very few restrictions on the ability of the legislature to "delegate" authority to executive bodies
    - Legislature enacts statutes giving an executive body powers; delegated authority has been granted by statute to a variety of executive bodies in virtually every area of public policy.

Rule-Making (Delegated/Subordinate Legislation)

- Administrative Rule-Making
    - Regulation-making power legislature delegates to Cabinet
    - Municipal by-laws
    - Rules developed by administrative agencies
- Subordinate legislation is considered inferior to statutes; conflicts will resolve in favor of statute
- Regulations preferred in situations that require adjustment over time, or consultation with stakeholders
    - The availability of time in federal legislature is limited; regulations are faster; allows for rule creation by experts
- Concerns over how much scrutiny by elected officials the regulations receive; do civil servants become the masters?
    - In practice, regulation-making is reasonably transparent through government policy and statute
    - *Statutory Instruments Act* set out basic requirements that must be followed
- *Cabinet Directive on Regulation, s 3*
    - Departments and agencies guided by four principles:
        1. Regulations protect and advance the public interest and good government
            a. Protect health, safety, security, social and economic well-being
        2. Regulatory process is modern, open, and transparent
        3. Regulatory decision-making is evidence-based
        4. Regulations support a fair and competitive economy
- Regulatory Impact Analysis Statements: designed to analyze benefits/costs of proposed regulation
- "Life Cycle" Approach
    - Attention given to implementation, evaluation, and review of existing regulations
    - Prevent regulatory duplication, promote efficiencies

Collecting and Spending Money

- Revenue, primarily through taxation, furnishes government with the resources it needs to maintain and provide government services
- Governments can use taxation to create incentives or disincentives for certain behavior
    - Ex. Income tax deductions for charitable contributions
    - Ex. "Sin" taxes on alcohol and tobacco
    - Ex. Grants or subsidies

Dispute Resolution

- Administrative agencies can be created in order to hear and decide certain disputes
- Administrative tribunals are sometimes similar to courts, with similar processes and powers
- Administrative dispute resolution can be different from courts
    - Formalities dispensed with, so more open to public participation
    - Flexibility in who decision-makers are (ie. experts in a field)

Benefit or Obligation Determination

- Benefit Determination: administrative decision-makers sometimes granted power to determine whether someone will be granted a particular benefit
    - Ex. Welfare entitlement; licenses
    - Raises fairness concerns if others are rejected; may have complex sets of condition attached
- Obligation Determination: usually initiated by an agency, so individual has right to appeal to an administrative tribunal
- Desire for fairness in individual cases is often in conflict with need for administrative efficiency
    - Sometimes low-level employees are the ones making the decision
    - Ex. High number of refugee applications

Enforcement Decisions

- Executive branch investigates violations of statutory and regulatory requirements
    - Statutes may give investigatory powers on administrative officials
    - Ex. *Aeronautics Act* authorizes federal minister of transportation to assess monetary penalties
        - Person can appeal through an administrative tribunal

Overlapping Functions

- Any administrative body may have a variety of functions
    - Rule-making; investigatory powers; decision-making powers
- Some administrative bodies defy classification
    - Ex. A tribunal may be similar to a court, but engages in policy creation

Provision of Services, Goods, and Facilities

- Armed forces, fire departments, roads, etc.
- At times, executive branch has taken responsibility for provision of important social services
    - Subsidize medical services, post-secondary education
    - auto insurance, electricity, air and rail transportation
        - sometimes as a monopoly, or in private competition
- Traditional structure of service delivery is through ministries headed by members of Cabinet
    - May be done through Crown corporations, hospitals, universities
    - May contract with private companies: waste collection, snow removal, etc.

Succeeding on Exams

Thinking Like a Lawyer

- The ability to hear a story, identify the issues, apply the law to those issues, and come to a conclusion/prediction → this is what an exam tests.
- Not about reciting rules…reason and make careful and convincing arguments.
- What counts as "knowledge," is the ability to predict whether certain actions will result in certain consequences.
- Steps to Thinking Like a Lawyer
    1. What kind of issue is it?
    2. Understand and interpret the legal rule that fits the case.
    3. Make arguments why, under that rule, your client should win.
    4. Final step is in giving the client an assessment, or prediction, of how likely each outcome is.

Exam Skills

- Points are only given for talking about issues
- Professors will only award so many points for any given aspect of an exam question
    - Lengthy discussions aren't always best
- Identifying legal issues and analyzing them properly to make good arguments
- Don't worry about writing well; worry about scoring points – making the kinds of arguments that good lawyers make.

IRAC

- Issue, Rule, Application, Conclusion
    1. Identify and frame the issue
    2. Identify as relevant (and make the case for) one or more legal rules
    3. Argue how the rules apply to the issue
    4. Assess the likelihood of a given argument prevailing
- Argue both sides!
- You are turning real-world facts into the language of the law

Lucy v. Zehmer

Facts: Suit brought by Lucy (P) against Zehmer (D) for specific performance of contract. Alleged that D sold P land. D claims the sale was in jest. P believed it to be a good faith sale.
Issue: Is there a contract?
Reasoning: D not deemed intoxicated; contract discussed for forty minutes; re-writing of first draft; signing by wife of P; provision for examination of title; no request to give contract back is all proof it was a serious transaction. Even if D was joking, P acted as though it was a good faith sale. "We must look to the outward expression of a person as manifesting his intention rather than to his secret and unexpressed intention." "If the words or other acts of one of the parties have but one reasonable meaning, his undisclosed intention is immaterial except when an unreasonable meaning which he attaches to his manifestations is known to the other party."
Holding: There is a contract. Sent back for re-trial.

Constitution

British North America Act, 1867

- "An Act for the Union of Canada, Nova Scotia, and New Brunswick, and the Government thereof…"
- "…to be federally united into one Dominion under the Crown…with a Constitution similar…"
- "…whereas such a Union would conduce to the Welfare of the Provinces and promote the Interests of the British Empire…"
- "…Provision be made for the eventual Admission into the Union of other Parts of British North America…"
- "The Provisions of this Act referring to Her Majesty the Queen extend also to the Heirs and Successors…"
- "…shall form and be One Dominion under the Name of Canada…"

An Act to Encourage the Gradual Civilization of the Indian Tribes in this Province (1857)

- "desirable to encourage the progress of civilization…facilitate the acquisition of property by said Tribes…to have deserved it…"
    - Land was taken away, but you get it back if you "deserve" it
- Any male Indian, not under twenty-one, able to speak, read, write English or French well, and is advanced in basic education, and is of good moral character and free from debt, may be enfranchised under this Act and will no longer be an Indian.
    - Can also be enfranchised if you apply and are accepted
    - Also give up your "tribe" status
    - Does not apply to women, unless married to an enfranchised male
- Name to be chosen after enfranchisement must be his baptismal name and approved by Commissioner
- Imprisonment for falsely claiming to be enfranchised
- If enfranchised, you get your land, but lose claims to any other land
- School may apply to take the land reserved for Indians, if it needs.

The Indian Act Said What?

- 1876: *Indian Act* created. Any existing Indigenous self-government extinguished. Indian define as "male person of Indian blood" and their children. Status women who marry non-status men lose status; non-status women who marry status men gain status and anyone with status who earns a degree or becomes a doctor, lawyer, or clergyman is also enfranchised.
- 1880: Policy, though not law, Indigenous farmers expected to have a permit to sell resources, or buy groceries and clothes.
- 1884: Attendance in residential schools mandatory. Sale of alcohol to Indigenous peoples is prohibited.
- 1885: banned from conducting spiritual ceremonies. Pass system created.
- 1886: definition of Indian expanded to include any person who is reputed to belong to a particular band or who follows Indian mode of life, or any child of such a person. Voluntary enfranchisement allowed for anyone of good moral character and temperate habits.
- 1914: Indigenous peoples required to ask permission to wear "costume" at public events. Dancing is outlawed.
- 1918: Canadian government gives itself the power to lease out Indigenous land for farming purposes.
- 1927: Indigenous peoples are banned from hiring lawyers regarding land claims against the federal government without the government's approval.
- 1951: bands on dances, ceremonies and legal action is removed.
- 1960: Indigenous peoples allowed to vote.
- 1961: compulsory enfranchisement removed.
- 1969: first Trudeau government announces intention to eliminate the Indian Act with White Paper, drawing ire from Indigenous communities. Government abandons idea.
- 1970: recommended to repeal Indian Act provisions against women.
- 1973: Supreme Court rules that Indigenous rights to land do exist.
- 1978: Canada acknowledges unfair rule stripping women of status if they marry non-status men.
- 1985: "marrying-out removes status" rule is removed.
- 2015: Quebec rules that several provisions of *Indian Act* violate section 15 of the Charter

Reference to Meaning of Word "Persons" (1930)

- Issue: Are women eligible for appointment to the Senate of Canada?
    - Ie. are women "persons?"
- Supreme Court ruled in negative
    - Common law disability of women to hold public office and decisions denying their right to vote for MP's
- "persons" in section 24 is restricted to males
- Considered previous cases and the Act itself
- Go into lengthy history about why women were excluded from public office to begin with (ie. didn't bear arms and men could better defend themselves)
- Previous judgments pointed out their reluctance to deviate from the meaning of the word that had been used for centuries
- "persons" used to refer to those to be elected; which historically, only referred to males because women could not hold office
    - Customs are apt to develop into traditions stronger than law, even after the reason for them has disappeared; thus appealing to history to change the law is not conclusive
- Not deciding the rights of women, simply their eligibility for a particular position
- No reason why the word "persons" itself should not include women
- How does the adjective "qualified" play in this discussion?
- There are sections in the Act which show that, in some cases, the word "person" must include females
    - "male person" is used in matters relating to males only

- Conclusion: "persons" in section 24 includes females and, therefore, women are eligible to be summoned to the Senate

An Act for the Grant of Aid for the Relief of Unemployment (1930)

- Unemployment, usually dealt with at provincial and municipal level, is so widespread that it has become a national concern
- $20 million granted
- Granted for construction, extending or improve public works, railways, highways, bridges and canals, harbors; assisting in distribution of resources; any public work that may help relieve unemployment

P.C. 1003 (1944)

- New regulations to support Canadian industry during wartime: *Wartime Labour Relations Regulations*
- Rights of Employees and Employers
    - All employees have right be in union
    - Every employer has right to be part of an employers' organization
    - Bargaining representatives allowed in order to create peaceful relations (collective agreements)
- Every collective agreement made after these regulations shall contain a provision establishing procedures for final settlement, without stoppage of work

Co-Operative Committee on Japanese Canadians v. Attorney-General for Canada [1947]

- Was legal to deport Japanese during WWII for "national security"
    - Including wives and children
- If deported, cease to be naturalized citizens
- Appellants argued that the War Measures Act did not authorize deportation and that it should receive a limited interpretation
    - Even if deportation is allowed under the War Measures Act, it contravenes other statutes
    - Finally, any order made was invalid after the Transitional Powers Act
- Court determined that War Measures Act did not contravene prior legislation and was valid; deportation was technically allowed; dictionary definition of "deportation" does not specify it can only be aliens; the power was exercised for an authorized purpose

An Act to Promote Fair Accomodation Practices in Ontario (1954)

- No person shall deny to any person or class of persons the accommodation, services or facilities available in any place to which the public is customarily admitted because of the race, creed, colour, nationality, ancestry or place of origin
- Publishing or displaying discriminatory signs prohibited
- Free speech not affected
- Commission may be created for inquiry

Constitution Act (1982)

- Part I: Charter of Rights and Freedoms
    - Guarantee of Rights and Freedoms
    - Fundamental Freedoms
    - Democratic Rights
    - Legal Rights
    - Equality Rights
- Part II: Rights of Aboriginal Peoples of Canada
    - Existing aboriginal and treaty rights recognized and affirmed
    - "includes the Indian, Inuit and Metis peoples of Canada"

- Rights are guaranteed equally to males and females

Confederation

- *BNA Act 1867 (Constitution Act 1867)*
  - United 3 British colonies: Canada, New Brunswick and Nova Scotia, into "Canada"
  - Is considered Canada's Constitution and Supreme Law; all laws need to comply
- History
  - First Nations peoples as early as 21,000BC
  - First explorers in late 1400's
  - Europeans quickly settled the land; New France in 1608; First Nations systems not recognized
- Treaties – Peace and Friendship
  - Signed between 1701 and 1862 to encourage cooperation between British and First Nations
- Battle of Quebec: Plains of Abraham (1759)
  - British defeat France in Quebec City; France loses all claims to Canada except fishing
- Royal Proclamation (1763)
  - Purpose: to assimilate French population to British rule, and to secure allegiance and loyalty of First Nations
- Quebec Act (1774)
  - Passed to ensure loyalty of French Canadiens to the British government
  - Government recognizes dual cultures within Canada
- Constitution Act (1791)
  - Quebec divided into separate colonies – Upper and Lower Canada – with their own provincial legislatures
  - Purpose is to assimilate each colony's constitution to that of Britain
  - Limited powers of elected assemblies by creating legislative councils of appointed members who could veto – this set the stage for rebellion in Canadas
- Patriot Rebellions (1837-38)
  - Wanted to be represented through elected assemblies; Britain crushes uprising
- Act of Union (1841)
  - Attempt to create peace through unification
  - Upper and Lower Canada merged into 'Province of Canada' – angers Quebec by not recognizing their uniqueness
  - Responsible government not approved by Britain
- 1840's-1860's
  - Shift to responsible government and convincing the Crown that Confederation is a good idea
- French-Canadian feelings about Confederation
  - Concerns about too much power being given to federal government
  - Wanted protection of French-Canadien way of life, language, civil government
- Confederation (1867)
  - In exchange for joining Confederation, provinces were promised ease of trade, protection from USA, railway links, employment
  - Formed by Imperial Statute: BNA Act
- BNA Act (1867)
  - Constitution of Canada
  - Preamble – written and unwritten
  - Structure of Government
    - Federal Parliament with 2 houses: HoC and Senate
    - Provincial Legislatures
    - Governor-General
  - Division of Powers: federal and provincial

- Indigenous peoples not consulted during process of Constitution

Indian Act

- Not normal legislation – most Acts delegate legislative authority and therefore govern limited aspects of everyday life (ex. Air travel, taxes, etc.). The *Indian Act* covers every aspect of the lives governed by it.
    - Focused on control of lands, membership, and local government
- First passed in 1876, but was really a collection of different Acts whose purpose was to "assimilate"
- Canada was concerned about USA taking over its territory, and so wanted to take over land by expanding west
- *Indian Act* not applied uniformly across Canada; dependent on how "advanced" the Indigenous peoples of an area were
- A Superintendant-General was given extreme power and could determine "who is or is not a member of any band of Indians."
- New amendments being constantly added in the 20th century to exert even more control.
- By 1940's, it was becoming clear that the goals of the *Indian Act* were not working; it was creating even more anger and division…Indigenous peoples were not being assimilated.
- 1951 Revision to Indian Act transferred authority to Department of Immigration, but its stated goal of assimilation remained the same.
- White Paper (1969)
    - Sought to abolish Indian Act under banner of equality – really, government just wanted to avoid accusations of discrimination
    - Indigenous did not accept White Paper: said it only made them equal Canadian citizens, when they wanted recognition as equal nation with Canada
        - Known as 'Red Paper'
- *Indian Act* continues to exist, but only on tenuous grounds – could be eliminated entirely with the right case that comes before the courts

Suffrage and 'Persons Case'

- Laws tell you what a society values; values change over time
- All women got the right to vote in 1960
- In 1867, laws in founding provinces prohibited women from voting
- 1916-1925: provincial laws changed to allow women to vote
- 1918: women were allowed to vote in federal elections
- Most women of colour prohibited from voting until 1940's
- Indigenous women could not vote until 1960 without giving up their treaty rights and status
- *Edwards v. Attorney-General for Canada (1929)* – the "Persons Case"
    - SCC said that "qualified Persons" did not include women because, when written into the Constitution, those words would have referred to men only.
    - On appeal to Privy Council (highest at the time), women were deemed "qualified Persons" for Senate appointment. Said meaning is derived internally from the Act itself and externally from other legislation and decided cases – the meaning is ambiguous.
    - SCC interpretation was formalistic and rigid; Privy Council approach was generous
        - This is the "living tree" doctrine which continues to apply today
    - The Famous Five

Great Depression and Social Welfare State

- Most administrate of relief was decided by municipal governments
- Unemployment and Farm Relief Act -- $21m for direct relief
    - 15% of population received relief: cash or vouchers

- Lots of rules regarding applications for relief: needed to live in a municipality for certain time
- Depression revealed the failure of locally administered relief
- Family Allowance (1944) – federal program that gives money to mothers to purchase items for children
    - Would prevent the depression that normally takes place at end of wars
- Union gave up right to strike during life of collective agreement
    - Took disputes out of court system and into private arbitrators

Japanese Internment and Dispossession

- First Japanese immigrants in British Columbia experienced discrimination and unemployment
    - Not allowed to vote locally, in B.C. or federally
- Japanese-Canadians kept trying to gain right to vote
- Registration cards mandated on basis of race, on order of law (1941)
- *War Measures Act*
    - Allowed lawmaking power to be transferred from Parliament to Cabinet, under Executive Orders
    - "In a time of emergency, Parliament must have power to pass laws to meet its demands."
    - Did not recognize Separation of Powers between federal and provincial governments
    - Japanese-Canadians required to carry registration cards
- After war with Japan, state confiscation of property of Japanese became common
- Internment camps became common: inadequate housing
- State decided that empty properties would go to state; understood it would be held in trust and returned at end of war
    - Japanese-Canadians hired lawyers to challenge the constitutionality of seizure of their property
    - In meantime, state sold all Japanese property at auctions
- Some Japanese-Canadians were not allowed to return home ("protected areas") after war
    - Forced east into Canada
    - Stayed in internment camps or went into exile and stripped of citizenship
- JCPC said during time of war, governments cannot be questioned as to the use of their executive powers
- National Association of Japanese-Canadians made presentation during writing of *Charter of Rights and Freedoms*

Civil Rights Activism

- Brotherhood of Sleeping Car Porters (1950's)
    - Became official spokesperson for black community; any issues of race involved them
    - Developed ability to organize and deal with government in official manners
- Dresden, in Ontario, was a town separated by race
    - Black citizens formed National Unity Association to fight discrimination
    - Began to pressure town for equality by-law; gave referendum to people who voted to continue discriminatory practices
- Government asked for proof that discriminatory practices existed
    - Led to organized groups and meetings
- Premier of Ontario decided to assist civil rights movement, despite opposition within his own government
    - Made discriminatory practices illegal; though it still occurred in practice
    - New law put to test in Dresden; eventual victory despite pushback from businesses

Patriation and the Constitution Act (1982)

- BNA Act (1867)
    - Stated any amendments to Constitution needed to be requested by Canada to Britain

    - Constitution Act (1982) – Patriated Constitution, transferring authority of BNA Act from Britain to Canada
- When Trudeau elected in 1967, he wants a constitutional bill of rights and ability to review Constitution on their own (amending formula)
- Trudeau's Patriation Plan (1980)
    - Patriation of Constitution from Britain to Canadian federal government
    - Provinces upset that it's a power grab and provinces left out
    - Joint Parliamentary Committee does cross-Canada tour for feedback on proposed Charter
    - Aboriginal peoples upset that they are not represented in the process – eventually acknowledged in Charter
    - Women's Conference in 1981 decide on equality rights in Charter
    - April Accord: rejects Charter of Rights
    - Patriation Reference Case: court says government *unilaterally* patriate, but provincial consent is important
    - Provinces sign, but Quebec does not
- *Constitution Act (1982)*
    - Charter of Rights and Freedoms
    - Aboriginal Rights
    - Patriation with amending formulas