

Cases That Have Changed Society

Many cases are started by individuals or groups, to respond to a particular event or to change a situation. The outcomes of these cases will often lead to changes in certain areas of the law which impact on all Canadians. The short summaries below are some of the decisions that have changed Canadian society in the last 25 years. The full text of each of these decisions is available at www.ojen.ca.



Expanding Equality Protections

Andrews v. Law Society of British Columbia

[1989] 1 S.C.R. 143

Mark Andrews, a British citizen, challenged the requirement that members of the legal profession in B.C. had to be Canadian citizens, claiming this was a violation of section 15 of the *Charter*. Mr. Andrews had all of the other qualifications to be a lawyer. In deciding this case, the Supreme Court of Canada developed the first framework to be used to decide if there has been a violation of a person's equality rights. Citizenship status was not one of the protected grounds listed in s. 15. The court found that citizenship status was 'analogous' to the other grounds protected by s. 15. This case marked the beginning of a structured approach to equality issues and created the test for analogous characteristics that deserve protection.

Right to a Fair Trial

R. v. Stinchcombe, [1991] 3 S.C.R. 326

William Stinchcombe, a lawyer, was charged with breach of trust, theft and fraud. At trial, the Crown decided not to call a witness who had made police statements that supported the accused. The Crown refused to give Mr. Stinchcombe a copy of the police statements. Mr. Stinchcombe's counsel asked for disclosure of the statement, but the trial judge refused, saying that there was no obligation on the Crown to disclose the statements.

The Supreme Court of Canada decided that the Crown must disclose all relevant information to the accused prior to the trial. This obligation fulfills the s.7 right of an accused person to be able

to make full defence to criminal charges. This case has dramatically changed the criminal trial process, improved trial fairness, and helped to protect against wrongful convictions.

Abortion Rights

R. v. Morgentaler, [1988] 1 S.C.R. 30

When this case was heard, a woman had to get approval from the therapeutic abortion committee of an approved hospital before she could get an abortion. Abortions done without this approval were illegal. Three doctors, including Dr. Morgentaler, set up a clinic to perform abortions for women who did not have the necessary approval and the doctors were criminally charged. They argued that the abortion laws violated a woman's right to security of the person under s. 7 of the *Charter*.

The majority of the Supreme Court of Canada decided that the *Criminal Code's* restrictions on abortion were unconstitutional because they increased health risks to women, depriving them of the right to security of the person (s. 7). Since this decision, no abortion laws have been enacted.

No Death Penalty

United States v. Burns, [2001] S.C.R. 287

Glen Burns and Atif Rafay, Canadian citizens, were wanted for murder in Washington State. They were arrested in B.C. and U.S. authorities asked the Canadian government to extradite them to Washington for prosecution. Extradition is when one country asks another country to deliver the accused person to face trial. If convicted, both

Burns and Rafay could have received either the death penalty or life imprisonment without parole. Canada's Minister of Justice ordered their extradition to the U.S. without getting assurances that the death penalty would not be imposed or carried out.

The Supreme Court of Canada reviewed the Minister's decision and decided that it was a breach of s. 7 of the *Charter* to send them to the U.S. without this promise. To do so would violate their right to life, liberty and security of the person (s. 7). Some say that this decision guarantees that the death penalty will never be brought back in the Canadian justice system because it violates s.7.

Same Sex Rights

Vriend v. Alberta, [1998] 1 S.C.R. 493

Mr. Vriend, a college instructor, was fired when the college found out that he was gay. Alberta's human rights legislation did not protect against discrimination on the ground of sexual orientation. After learning that he could not make a human rights complaint because sexual orientation was not a protected ground, Mr. Vriend challenged the human rights legislation as discriminatory.

The Supreme Court of Canada held that by not protecting sexual orientation the Alberta legislation discriminated against homosexuals and therefore violated s. 15 of the *Charter*. To fix this injustice, the court interpreted the legislation as if it included "sexual orientation". Following this decision, the Premier was pressured to invoke the *Charter's* notwithstanding clause (s.33) to overrule the court's decision but he eventually decided not to invoke it. This was an important case to recognize gay/lesbian claims for legal equality.

Substantive Equality

Eldridge v. British Columbia (Attorney General)
[1997] 3 S.C.R. 624

The plaintiffs in this case were born deaf and used sign language to communicate. They claimed

discrimination based on disability because B.C. failed to fund sign language interpretation during doctor visits.

In this decision, the Supreme Court of Canada recognized that sometimes, equal treatment requires different services for different groups. For deaf patients to receive the same level of basic health care as other patients, they required sign language interpreters. This is called substantive equality.

A Duty to Act to Protect Rights

Dunmore v. Ontario (Attorney General)
[2001] 3 S.C.R. 1016

Ontario's Labour Relations Act did not allow farm workers to unionize or receive labour protections. Four farm workers and a Union challenged this exclusion as an infringement of their s. 2(d) right of association, as well as their rights under s. 15.

The majority of the Supreme Court of Canada made the unique finding that the freedom to organize may require the government to extend legislative protection to vulnerable groups. Usually the *Charter* protects rights when the government has acted in a way which violates an individual's rights. When a government has not taken any action (program, legislation etc), it usually cannot be said to have violated any *Charter* rights. In this case, the court decided that because the farm workers were unable to exercise their collective freedom to assemble without the protection of labour rights, their freedom of association was violated. The government was required to act to protect these rights. This case acknowledges that the *Charter* may, in some cases, impose a government duty to act in order to protect Charter rights.

No Means No

R. v. Ewanchuk, [1999] 1 S.C.R. 330

After interviewing a job applicant, Mr. Ewanchuk invited her into his trailer to show her some work. He began to touch her. Each time she said no, he

stopped his advances but then soon after he would make an even more intimate advance. Mr. Ewanchuk was charged with sexual assault. He raised the defence of 'implied consent,' arguing that although the woman initially said no, she stayed in the trailer and failed to continually object to his advances. The trial judge accepted this defence and acquitted him.

The Supreme Court of Canada found 'implied consent' is not a defence to sexual assault. The court recognized that an accused may have a defence if there is evidence that the accused had an honest but mistaken belief that someone had consented, but the court will not imply consent. This case is notable for debunking the myths and stereotypes about sexual assault and making clear that people must always establish the clear consent of their sexual partners.

Aboriginal Title

Delgamuukw v. British Columbia. [1997] 3 S.C.R. 1010

The appellants, Gitksan and Wet'suwet'en chiefs, claimed Aboriginal title, or ownership, to 58,000 square kilometres of land in B.C. on behalf of their "houses". This claim was based on their legal system of property rights and their pre-contact ownership of the land.

The Supreme Court of Canada recognized for the first time that First Nations held title to their land prior to European arrival on the continent. The decision discusses the unique nature and characteristics of Aboriginal title. The court decided that there was not enough evidence to determine if this land was historically owned by the Gitksan and Wet'suwet'en Nations, or whether the Nations had ceded, or given up ownership to the land. However the court did discuss what kind of evidence could be used to establish a land claim. This case creates the legal possibility of a successful claim to Aboriginal title under Canadian law. This case is also notable because it recognizes the importance Aboriginal people attach to oral histories and demonstrates how

Canadian legal rules of evidence can accommodate oral histories during trial.

Accommodating Religious Beliefs

Multani v Commission scolaire Marguerite-Bourgeoys [2006] 1 S.C.R. 256

The Supreme Court of Canada struck down a Quebec School Board order that prohibited Gurbaj Multani, an Orthodox Sikh, from wearing a kirpan at school, a requirement of his religion. The court held that the board's decision infringed Mr. Multani's freedom of religion under s. 2(a) of the *Charter*.

The Supreme Court of Canada considered when to recognize a particular practice as a religious requirement. This decision then dealt with the appropriate method for accommodating religious practice in a multicultural society. The school board argued that it had to protect the safety of the rest of the students even if this meant infringing the rights of this one student. The court rejected this argument, finding that it is necessary to find reasonable ways to accommodate different religions, even in schools, and to balance different rights.

Aboriginal Treaty Rights

R. v. Marshall [1999] 3 S.C.R. 456

Donald Marshall Jr., a Mi'kmaq Indian, was charged with selling eels without a license, fishing without a license, and fishing during the close season with illegal nets. He argued that he had a Mi'kmaq treaty right to catch and sell fish based on the treaties that had been signed between the British and the Mi'kmaq in 1760-61.

Treaty rights are aboriginal rights, protected by s.35 of the Constitution, and set out in agreements between a group or nation of Aboriginal people and the government.

Mr. Marshall argued that the court should not only look at what was written in the signed treaty but also evidence of what was said in negotiations at the time of the signing of the treaty. The Supreme Court of Canada decided that, as with other contracts between individuals it should consider all of the evidence of what both parties wanted to determine the full extent of the treaty rights. In doing so, the court found that the Mi'kmaq treaties signed in 1760-1 include the right to harvest and sell eel. Mr. Marshall was acquitted.

This case is important because it showed a willingness to consider the different types of evidence available for proving treaty rights.

Same Sex Marriage

Reference re: Same Sex Marriage [2004] 3 S.C.R. 689

In 2003, the Liberal government asked the Supreme Court of Canada to give an opinion on whether the proposed bill on same-sex marriage was in line with the Canadian Constitution. Prior to this reference, the courts in several provinces had found that restricting marriage to a marriage between a man and a woman was unconstitutional. The government also asked the court to give its opinion on whether the bill if passed, would violate the s.2 (a) (freedom of religion) rights of religious officials who did not want to perform same-sex marriages.

The court found that the proposed bill met the equality principles in s.15 of the *Charter*. The court spoke about how the *Charter* is a "living tree" which evolves as society changes. The court also recognized that the bill could lead to a conflict between s. 15 equality rights and s.2(a) freedom of religion. However it decided that the bill was broad enough to protect religious officials from being compelled to perform religious same sex marriages that go against their religious beliefs. The court noted that when conflicts between *Charter* rights arise they must be resolved by balancing rights not by denying one type of rights. Same-sex marriages were legalized across

Canada on July 20, 2005 when this bill became law.

Private vs. Public Health Care

Chaoulli v. Quebec (Attorney General) [2005] 1 S.C.R. 791

A physician who wanted to practise outside the public health care system and a patient who had suffered delays receiving health treatment challenged the Quebec laws that prevented a resident from paying for faster access to health care.

The Supreme Court of Canada found that the Quebec laws preventing residents from using private health care breached s. 1 of Quebec's *Charter of Rights*, which protects the right to life and personal inviolability. The potential national significance of this case lies in the decision by three of the judges who found that the Quebec laws would also violate s. 7 of the Canadian *Charter*. The trio of judges concluded that the Quebec laws allow only the "very rich" to obtain private health care in order to avoid delays in the public system. The decision opens the door for private health care in Quebec. The comments of the three judges suggest that a similar change might be possible in the rest of Canada in a future case. This case has been very controversial, especially because Canadians are proud of our public health care system. Some people consider our public health care system to be a defining characteristic of our nation.

Security Certificates

Charkaoui v. Canada (Citizenship and Immigration) 2007 SCC 9

Certificates of inadmissibility to Canada, known as 'Security Certificates,' were issued against three people. All three were living in Canada when they were arrested. It was alleged that each posed a threat to national security for involvement in terrorist activities.

Canada's immigration legislation allows the government to issue a certificate stating that a foreign national or permanent resident (a non-Canadian citizen) cannot be admitted to Canada because they pose a security risk. The person is detained (held in jail). A judge can review the certificate and the detention. However, during the review, the government can refuse to show the detained person any of the information on which the security certificate is based. If the judge finds the certificate reasonable, it becomes a removal order (the person is deported to their home country). A removal order cannot be appealed and may be immediately enforced. In this case, all three men challenged the provisions in Canadian immigration law that allow for their detention and the provisions which prevented them from having access to information in the review process.

The Supreme Court of Canada unanimously held that the procedures for reviewing the detention and the security certificate violate an individual's right under s. 7 of the *Charter*. Since a person might be deported to a country where his or her life of freedom is in danger, the court found that to make this kind of order without a fair hearing where the person has the chance to see the evidence is a violation of s. 7. This decision is important because it demonstrates that *Charter* rights are to be protected and respected even when a government makes claims of increased national vulnerability and heightened security.

Community Standards of Obscenity

Little Sisters Book and Art Emporium v. Canada
[2000] 2 S.C.R. 1120

Little Sisters is a gay and lesbian bookstore. It imported erotica from the United States. The Canadian *Customs Tariff Act* prohibits anyone from importing 'obscene' material, as set out in the *Criminal Code*. Customs officers frequently seized Little Sisters's shipments of erotica. In response, Little Sisters started a court case to challenge the definition of obscenity and the

customs review process that singled out gay and lesbian material.

The Community Standards test is used by the court any time it is asked to determine if material is obscene. A judge applying this test decides whether the larger public would consider the material to be harmful to society. The bookstore argued that this test was discriminatory against gays and lesbians because only a single community, or single perspective, was considered.

The result in this case was mixed. The Supreme Court of Canada found that the seizure of the materials did violate s. 2(b), freedom of expression, but that the violation was justified by s. 1. It also looked at the existing definition of obscenity and the test used to interpret the definition and found that it was not discriminatory (the s.15 argument). However, what the court did find discriminatory towards gays and lesbians was the customs *process*.

This decision is criticized by many for failing to recognize that Canada is comprised of numerous communities that may not all share the same opinion on what is harmful and therefore may have different community standards. Newer case law has developed the harm principle, to determine when a private citizen should be criminalized for their actions. See *R v. Labaye* on the OJEN website.

