

Judicial Interpretation of Section 15

This section features comments Justice Peter Cory and Justice Frank Iacobucci (two former justices of the Supreme Court of Canada), responding to questions posed by Mr. Peter Hogg about judicial interpretation of s.15. This video clip is recommended for its candid look at the job of judges and the way it exposes the very human side of the decision makers who hear equality cases.

What you will find in this section:

- Speaker Summaries and Viewing Notes
- Key Terms
- General Discussion Questions
- Activities for Civics and Law classes
- Resource Links
- Curriculum Expectations



Speaker Summaries and Viewing Notes

Mr. Peter Hogg (Scholar in Residence, Former Law Professor at Osgoode Hall Law School) poses questions about judicial interpretation to

Justice Frank Iacobucci (Former Justice of the Supreme Court of Canada) and

Justice Peter Cory (Former Justice of the Supreme Court of Canada)

Question 1 (5:02 minutes) - “How much does the fact situation of a particular case influence the court in making its decisions? Do sympathetic facts place pressure on the court to come to a particular result?”

Justice Cory [paraphrased]– Justice Cory notes that judges do lose sleep over a sympathetic case because when they are dealing with *Charter* cases under s. 15 they are dealing with cases that touch upon “human dignity”. These cases affect them because judges are human and sensitive but cannot let it affect the ultimate decision. Referring to the Rodriguez case (doctor-assisted suicide), he talks about how this case impacted on him. He says that dying is an integral part of living and surely we should be able to die with dignity as well as live with dignity. However he notes that decisions of the court are majority based and the concerns with assisted suicide swayed a majority of the Court to not allow the practice of assisted suicide under law.

Justice Iacobucci [paraphrased] – Following up on Justice Cory’s comments, Justice Iacobucci states that he too anguished over the Rodriguez case. He confirms that the legal and judicial process cannot be divorced from the humanity of the people who participate in it.

- *This first clip is good to show students that judges, even at the highest level of court, cannot help but be affected by the subject matter of the cases that they deal with. This is also a good clip to prompt a discussion of the manner in which panels of judges come to a decision when there are different opinions or when questions of personal values are raised.*

Question 2 (2:51 minutes) - “How do you see s.15 relating to other sections of the *Charter*?”

Justice Iacobucci [paraphrased] - He notes that we say that a statute should be read harmoniously and the same should be true of the Constitution. He underlines that there is no pecking order in the *Charter* – we must attempt to read all provisions of the *Charter* harmoniously and look for compatibility.

Justice Cory [paraphrased] – He points out that section 15 has not been explored in relation to s.27 which is the very fabric of Canadian society. (Section 27 reads: *This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.*)

- *This is a brief clip which could prompt a discussion of how the Charter should be interpreted in situations where rights come in to conflict – for example when freedom of religion creates a situation where someone is discriminated against in violation of s. 15.*

Question 3 (2:24 minutes)- “What advice would you give to rights seeking individuals or groups in making a s.15 case? What is effective in terms of arguments and in terms of facts?”

Justice Iacobucci [paraphrased] – Justice Iacobucci asks us to reflect on what the case is really about, and what facts we you need to know to advance our case. Justice Iacobucci asks litigants not to engage in overkill and to present an argument that clarifies rather than clouds the issues. He suggests that litigants should put themselves into the seats of those who are going to judge the case.

- *This clip is useful for students preparing arguments for a class mock hearing, or as participants in OJEN’s Charter Challenge Program (see www.ojen.ca for more details).*



Key Terms in this Section

Equality
Vision of equality
Diversity
Civil society
Human Dignity
Judicial interpretation
Sympathetic facts
Doctor-Assisted suicide
Harmonious reading
Multiculturalism



General Discussion Questions

- How do these clips confirm or challenge the ways that you expect judges to come to a decision? What do you think is most difficult about being a judge?
- Do you think being a judge is something you would want to do? Why or why not?
- How is being a judge different from being a politician? Does society have different expectations of each?
- Do you think it is possible to entirely separate your emotions as a decision maker?
- What do the speakers mean when they say there is no pecking order or hierarchy to the Charter? Do you think some rights should get more attention than others? Do some rights get more attention than others?
- Why do you think the court wants litigants to avoid “over kill” in making their arguments? Why do you think litigants often make too many arguments?



Activities

Suitable for:
Civics 10
Law 11 or 12

Judicial Interpretation Worksheet

- a) Have students view the first 2 clips and complete the worksheet on Page 7.
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Defining the Undefinable

***Suitable for:
Law 11 and 12***

- a) Justice Iacobucci suggests to *Charter* litigants that they present an argument that clarifies rather than clouds the issues.

Consider the following two excerpts from the Supreme Court in two different equality law cases including one decided by Justice Iacobucci himself:

Andrews v. Law Society of British Columbia, [1989] 1 S.C.R. 143 (S.C.C.'s 1st *Charter* Case): McIntyre J. noted that, as embodied in s.15(1) of the *Charter*, the concept of equality is "an elusive concept", and that "more than any of the other rights and freedoms guaranteed in the *Charter*, it lacks precise definition" (at 164).

Law v. Canada (Minister of Employment and Immigration), [1999] 1 S.C.R. 497
Iacobucci J.: "Part of the difficulty in defining the concept of equality stems from its exalted status. The quest for equality expresses some of humanity's highest ideals and aspirations, which are by their nature abstract and subject to differing articulations. The challenge for the judiciary in interpreting and applying s.15(1) of the *Charter* is to transform these ideals and aspirations into practice in a manner which is meaningful to Canadians and which accords with the purpose of the provision."

Ask students to comment in light of the excerpts above on:

- 1) How the "elusive" nature of s. 15 make it difficult for claimants to present a clear and concise argument?
- 2) What strategies claimants could use to make their arguments more "clear"?
- 3) Consider the fact situation on Page 9. Have students attempt to make a claim of "discrimination" based on s. 15 while also making a claim under the "elusive concept" of human dignity.



Resources/Links

- Classroom Civics or Law Textbooks
- The Canadian Charter of Rights and Freedoms
- “Try Judging DVD” and resources at <http://www.tryjudging.ca/>
- Justice Canada: www.canada.justice.gc.ca
- Section 15: www.section15.gc.ca
- Canadian Human Rights Commission: www.chrc-ccdp.ca
- Ontario Human Rights Commission: <http://www.ohrc.on.ca/en/>
- Canadian Heritage: *Your Guide to the Canadian Charter of Rights and Freedoms* Minister of Public Works and Government Services Canada 2003
- Notes on Charter Interpretation: (Sharp, Robert J., Swinton, Katherine E., & Roach, Kent. *The Charter of Rights & Freedoms, 2nd Edition*. Toronto: Irwin Law Inc., 2002. Chapter 3)
- Charter Decisions Digest - S.15 <http://www.canlii.org/ca/com/chart/s-15-1.html>
Same Sex Marriage Case - *Halpern v. Canada (Attorney General of)*, 2003 CanLII 52137 (ON C.A.). This Landmark Case can be found on this DVD in the Related Landmark Cases section or in the resources section of the OJEN website at www.ojen.ca



Curriculum Expectations

Civics Open Grade 10 (CHV2O)

- Distinguish between democratic and authoritarian forms of decision-making, and compare the benefits and drawbacks of each form when used in everyday contexts
- Describe fundamental beliefs and values associated with democratic citizenship
- Communicate their own beliefs, point of view, and informed judgments, and effectively use appropriate discussion skills
- Demonstrate and ability to organize information effectively
- Explain the causes of civic conflict, and identify the need for decision-making processes and strictures

Understanding Canadian Law, Grade 11, University/College Preparation (CLU3M)

Overall Expectations

- describe the rights and freedoms enshrined in Canadian law and explain how they are interpreted, how they may be limited, and how they are enforced in Canada and in Ontario
- describe historical and contemporary barriers to the equal enjoyment of human rights in Canada

Specific Expectations

Barriers to Human Rights

- evaluate the contribution of individual citizens and organizations in developing and

increasing awareness of human rights issues

- describe the development of rights legislation in Canada (e.g., *Canadian Charter of Rights and Freedoms*, Ontario Human Rights Code)

Human Rights Legislation in Canada and in Ontario

- describe the rights and freedoms found in the *Canadian Charter of Rights and Freedoms*
- explain the role of the judiciary, especially the Supreme Court of Canada, in interpreting the *Charter* and the role of government in enforcing *Charter* rights

Canadian and International Law, Grade 12, University Preparation (CLN4U1)

Overall Expectations

- describe the historical development of human rights legislation in Canada
- demonstrate an understanding of the rights and responsibilities of individuals under the Canadian Charter of Rights and Freedoms
- explain the role of the legislature and the judiciary in defining, interpreting, and enforcing Charter rights in Canada
- analyze the conflicts between rights and freedoms and between minority and majority rights in a democratic society and describe the methods available to resolve these conflicts

Specific Expectations

Human Rights in Canada

- identify historical and contemporary barriers to the equal enjoyment of human rights faced by individuals and groups in Canada and analyze their effects
- explain the evolution of Canadian human rights legislation from English common law to the Canadian Bill of Rights and then the *Canadian Charter of Rights and Freedoms*

The Canadian Charter of Rights and Freedoms

- explain what is meant by entrenching rights in a written constitution;
- analyze how rights and freedoms are protected under the *Charter of Rights and Freedoms* (e.g., fundamental freedoms; democratic, mobility, legal, equality, and language rights)
- explain the definitions of legal rights, fundamental freedoms, and democratic, language, equality, and mobility rights under the *Charter*
- explain how citizens can exercise their rights under the *Charter* (e.g., by initiating *Charter* challenges in the courts to legislation or government action; by raising the *Charter* as a defence when charged with an offence)

The Legislature and the Judiciary

- explain how rights may be limited or overruled according to the *Charter* (e.g., section 1, section 33)
- evaluate the role of the courts and tribunals and, in particular, the Supreme Court of Canada in interpreting *Charter* rights;
- describe how Charter rights are enforced

Minority and Majority Rights

- demonstrate an understanding of the difficulty of balancing rights in a democracy
- evaluate the political and legal avenues available for resolving conflicts (e.g., the courts, tribunals, referendums)



Judicial Interpretation S.15: Worksheet

Prior to viewing Clip 1

Question – “How much does the fact situation of a particular case influence the court in making its decisions? Do sympathetic facts place pressure on the court to come to a particular result?”

After viewing Clip 1

1) Should judges be influenced by sympathetic fact situations (e.g.: Sue Rodriguez or Robert Latimer)? If so, how?

2) Do you think that Justice Cory allowed his emotions to influence his decision to support Ms. Rodriguez’s request for assisted suicide? If yes, do think he still acted properly as a judge? What were his reasons based on?

3) Consider the following ways that laws and human rights can be interpreted by the court:

- a) **strict reading**: words should be read just as they are written. When looking for meaning the court should understand the words in light of the meaning at the time of drafting.
- b) **progressive/purposive approach**: courts should read laws in an open way that allows the wording to adapt to new societal needs and values. When looking for meaning courts should read the words in the context of international human rights norms and evolving community values and philosophies.

Think of the American Constitution which when it was written in 1787 granted every American the right to bear arms. This provision is now used to support the modern day sale and purchase of firearms. How would a strict reading of this “right” be different from a purposive approach? What was the purpose of that right in 1787?



4) Recently the issue of “same sex marriage” came before the Supreme Court of Canada and the court was asked to decide on whether the definition of marriage as “one women and one man” which was in effect when the Constitution was first enacted in 1867 should remain the definition of marriage in the 21st century.

How would a strict reading of the definition marriage differ from a purposive reading?

5) In 1930 in a case referred to as the Persons case the court was asked to consider whether women were “persons” in respect to eligibility for a seat in the Senate. The judge Viscount Sankey (Edwards v. R., [1930] A.C. 124 at 136-37) concluded:

“The BNA Act planted in Canada a **living tree** capable of growth and expansion within its natural limits. The object of the Act was to grant a Constitution to Canada ... Their Lordships do not conceive it to be the duty of this Board – it is certainly not their desire – to cut down the provisions of the Act by a **narrow and technical construction**, but rather to give it a **large and liberal interpretation** ...”.

When the Supreme Court decided the Same Sex Marriage Reference and ruled on the definition of marriage as “one man and one women” the court agreed with lower courts that the existing definition of marriage discriminated against same sex couples. The court ruled that the “living tree” approach to the Constitution and the *Charter* must be applied here because it “ensures the continued relevance and, indeed, legitimacy” of our rights. It was decided that the meaning of marriage is not fixed at the time the Constitution was enacted in 1867. The Court ruled instead that marriage must be viewed as part of the evolution in Canadian society since that time, including the fact that Canada is a pluralistic country and the fact that same-sex marriage has now been recognized in seven Canadian jurisdictions and two European countries.

Do you think that the “living tree” approach to interpretation is an appropriate one for courts to use? Why is this approach particularly applicable to something like the right to equality? How does the “living tree” approach prepare Canadian society to deal with other changes in demographics or politics?

Discrimination Scenario

You are a lawyer representing a client who is an employee at a factory. Because of safety concerns with new equipment that is being brought in to speed up production, the employer has enacted a policy that requires ALL employees keep their hair short if they wish to keep their position at the factory. In your client's religion, however, hair has great significance and hair length is a measure of a member's devotion to their religious belief.

After viewing the speaker clips in this section prepare an argument to convince a judge that the actions of the employer should be considered discrimination that is a violation to the equality guarantees in s. 15 of the Charter. Consider Justice Cory's reminder that s. 15 must be read consistently with s. 27 of the Charter (multiculturalism).

Think of the following questions in constructing your argument:

- i What is the nature of the religious observance? Is the employee's dignity affected by the rule?
- ii What is the reason for the employer's rule?
- iii Are there health or safety factors involved?
- iv. If so, do they involve the health or safety of the employee alone or are there consequences for other employees?
- v. What other measures could the employer have taken to accommodate the employee? Were there alternatives to requiring hair be cut that would have still addressed the employer's concerns?
