

Lesson 2: Identifying and Analyzing Key Themes

Activity 1: Then and Now - Decisions by the Court of Appeal

Before the class, review *Then and Now: Decisions by the Court of Appeal* (Handout 2). You may wish to use the following questions (or similar ones) as an approach to reflecting on key themes in the video.

Note: Suggestions for answers are provided in the smaller type.

1. The video emphasizes the need for a fair and impartial appeal process.
 - Identify some ways in which judges in the Court of Appeal aim to ensure decisions are fair and impartial?
They review all the details of the trial decision; they consider written and oral arguments from lawyers for each party; they consult together in a panel; they review the law in similar cases; they make written decisions; their decisions can be appealed to the Supreme Court of Canada.
2. The video stresses the importance of the rule of law and of judicial independence.
 - What does “the rule of law” mean?
The rule of law expresses the fundamental principle that all people should be equal under the law and no one should be above the law. The laws are passed by our democratically elected representatives. If we have a dispute, we can depend on our rights being determined according to the laws. When there is a disagreement about how a law should be interpreted, judges review the law and make a decision.
 - What is judicial independence?
Neither politicians nor any other person or group may seek to influence the decision of judges except by submissions made in open court, which may only be made by the parties to the action or by persons allowed by the court to appear as “intervenor.” Politicians cannot comment on the merits of a case that is before the courts and the government cannot demote or fire judges.
 - Why is judicial independence necessary?
Judicial independence is necessary for the protection of the rule of law. Judicial independence guards against arbitrary governance.
 - What would happen if judges were not independent?
If judges could be influenced to decide in a particular way, it would be very unfair to the competing interests in the case. If governments were able to influence cases, judicial decisions would be based on the government’s view, not on the evidence and the law. In the video we saw what happened when Hitler became the Supreme Judge of Nazi Germany and told judges what sentences to give out.
3. The video makes the point that “The court operates in the context of the society of the time.” In 1914 the *Komagata Maru* incident was very controversial because the people who were refused the right to land in Vancouver were subjects of the British Empire. Munshi Singh, a passenger on the *Komagata Maru*, appealed to the courts in an effort to be allowed to enter Canada. Think about the Court of Appeal decision in the appeal made by Munshi Singh (summarized in Handout 2).

- What did the Court of Appeal decide in the case of Munshi Singh?
The Court of Appeal found that the Immigration Act of the time (a) authorized racially-discriminatory immigration regulations and orders, and (b) prohibited the courts from reviewing the order under which Munshi Singh was denied entry to Canada. All of the judges were bound by the legislation which denied the court any jurisdiction to review the order to deny Munshi Singh entry.
- How do you think the majority of British Columbia voters in 1914 would have viewed the discriminatory immigration legislation that was before the Court of Appeal in this case?
Issues include: Who was able to vote at that time?
The main point is that most of Canada's population in 1914 was of European ethnic origin. Most (but not all) held the belief that their own cultures and ways of life were superior to those of Asian countries.



4. In 2008 the federal and provincial government apologized for the *Komagata Maru* incident.
 - What legislation now exists that prohibits discrimination on grounds that include race and ethnic origin?
The equal rights of Canadians are now guaranteed under section 15 of the Charter, which prohibits discrimination on grounds that include race and ethnic origin.
5. A lawyer in the video says, “One of the most important reasons for having a Charter of Rights and Freedoms is to protect the rights of minorities.” Egale, a gay rights organization, appealed to the courts in an effort to extend the right to marry to same-sex couples. Think about the Court of Appeal decision in the appeal made by Egale (summarized in Handout 2).
 - What did the court decide in this case?
A three-judge panel of the BC Court of Appeal unanimously held that the common-law rule restricting marriage to opposite-sex couples was unconstitutional as it was discriminatory and not justifiable. The Court went on to change the common-law rule to remove the restriction and permit same-sex couples to marry.
 - What role did the Charter play in protecting the rights of minorities in the Egale decision?
The BC Court of Appeal ruled that denying gays and lesbians the right to marry violated their equality rights under the Canadian Charter of Rights and Freedoms. The Court of Appeal also held that the equality rights of same sex couples to marry did not displace the rights of religious groups to refuse to marry same-sex couples when this is against their religious beliefs. The court found that similarly, the rights of religious groups to freely practise their religion cannot cancel out the rights of same-sex couples by insisting on maintaining the barriers in the way of that equality.

Time: 25 minutes

Activity 2A: Time Warp at the Court of Appeal

Ask the students to divide into groups. Provide each student with a copy of *Time Warp at the Court of Appeal* (Handout 3). Introduce the activity by going over the scenario and the task. Explain that each group will be making a presentation to the class at the conclusion of the activity.

SCENARIO

Appeal Court judges in 1914 heard the case of Munshi Singh, a passenger on the *Komagata Maru*, but the judges have slipped through a time warp and now find themselves sitting in today's Court of Appeal. They are amazed by many things, including:

- (a) the 2008 apology made by the government for the *Komagata Maru* incident;
- (b) the fact that the Court of Appeal now includes women judges; and
- (c) the fact that there has been an Indo-Canadian on the Court of Appeal (Wally Oppal, also a former Attorney General).

The 1914 Court of Appeal judges understand that the courts operate in the context of their own time. They realize they need to be brought up to speed on contemporary British Columbia, so that they can fulfill their duties in today's Court of Appeal.

STUDENT TASK

Students have the task of respectfully briefing the 1914 Court of Appeal judges. What would the judges need to know about today's society? Refer students to their handout in order to prepare their answers to the following questions:

1. What social values and attitudes should the judges be aware of?
2. What major legal developments do the judges need to know about?
3. What issues might today's Court of Appeal cases deal with?

Ask students to consider the following issues and provide their own examples:

- multicultural society (consider who lives in your community)
- respect for diversity as a contemporary Canadian value
- contemporary attitudes and values (social relations/work/lifestyles/beliefs)
- Charter introduced in 1982. Judges are now assigned with the task of deciding whether a particular law is consistent with the Charter.
- Supreme Court of Canada is the highest court. (In 1914 the highest court for Canadians was in England. It was called the Judicial Committee of the Privy Council.)
- technological changes
- women's equality, environmental issues, Aboriginal issues

Working in their groups, students develop their briefings to the judges caught in the time warp. Each group presents their briefing to the class.

Time: 35 minutes

Activity 2B: Role of Court of Appeal Judges

1. Ask the students to divide into groups. Provide each student with a copy of *Role of Court of Appeal Judges* (Handout 4). You may want to introduce the activity by asking students what they see as being the proper relationship between the judiciary and the legislators.
2. Assign discussion questions 1 & 2 to all groups; and assign one additional question to each group (using discussion questions 3-5). Question 6: *Optional question*. If students have learned about the Charter's override clause, you can assign question 6 to one or more groups as their additional question.

STUDENT TASK

Working in their groups, students develop their comments on their three questions.

- If there is agreement among the majority within the group about their responses to a question, they appoint one member to present their opinion.
- If there are dissenting opinions, students present them separately.

Time: *35 minutes*

DISCUSSION QUESTIONS

1. If you had been a Court of Appeal judge in 1914, what would you have decided in the *Munshi Singh* case? On what would you have based your decision?

In 1914 Parliament was the supreme law of Canada and Parliament had passed a racially discriminatory law. In addition, the Immigration Act of the time expressly forbade judges to challenge decisions of immigration boards of inquiry.

Under the Constitution Act 1867, Canada had adopted the notion of Parliamentary supremacy from the United Kingdom. The federal and provincial legislatures made the law, the executive implemented and enforced the law, and the judiciary was responsible only for interpreting the law that the others had made and enforced.

Dealing with this question will likely prove controversial among students. Students may suggest that if they had been one of the judges, they would have gone back to the legislation to see if they could find any “wiggle room” to allow them to reach a fair decision.

2. How has the role of Court of Appeal judges changed since 1914?

The Constitution Act 1982, which incorporates the Charter, has made the Constitution the supreme law of the land. Section 52 of the Constitution Act, 1982 states that “The Constitution of Canada is the supreme law of Canada and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.” The Constitution thus modified the tradition of Parliamentary supremacy with the principle of constitutional supremacy. As such, Judges have an even stronger role to play in the Canadian justice system than they did before the Charter.

Judges can strike down a law passed by Parliament if it violates one of the freedoms protected by the Charter and the government cannot justify the violation as the only reasonable way to meet an important need. Parliament then must decide whether or not to redraft the law in such a way that the Charter is not breached. These leads to a “back-and-forth relationship” between judges and legislators that is often described as “dialogue.”

3. Should judges comment on the political policy that underlies legislation?

There is a well-established principle that it is improper for judges (who are unelected) to comment on the policy, or political aspects, of statutes passed by elected legislators.

4. Should judges be able to override constitutionally valid legislation with which they disagree?

Judges cannot strike down or choose not to apply legislation simply because they disagree with the legislation (or because some other province has different legislation on the matter). Subject to constitutional challenge on jurisdiction or for breach of the Charter, legislation is supreme law.

5. Should judges be elected, so that they like the legislators will represent majority views?

Student responses may focus on the issue of possible conflict between being accountable to an electoral majority and having to remain impartial. Other comments may focus on ways in which accountability exists in forms other than electoral majority support. (For background information, see Judicial Appointment: www.LawConnection.ca/index.php?q=content/judicial-appointment).

6. (*Optional*) Would overtly discriminatory legislation be enforced today if Parliament chose to invoke s. 33, the Charter “override” clause?

Parliament or the legislatures have the power to use the “override” or “notwithstanding” clause (s. 33) of the Charter and pass legislation that overrides decisions by judges on the constitutionality of statutory provisions. Although government is able to limit Charter rights in this way, it must provide clear reasons for doing so and accept responsibility for the consequences. Laws that limit Charter rights can operate for five years only, unless they are renewed.

The override clause is rarely used. (Parliament has never used it. Some provinces have, e.g. Quebec on language issues.) Public and legal attitudes towards discrimination on the basis of race, gender, disability and sexual orientation have changed substantially in Canada in the last one hundred years and the political risks for government in using the override clause to uphold overtly discriminatory legislation would be very high.

Charter Resources

Your Guide to the Canadian Charter of Rights and Freedoms, from the Department of Canadian Heritage. Online: <http://www.pch.gc.ca/pgm/pdp-hrp/canada/guide/index-eng.cfm>.

Fundamental Freedoms: The Canadian Charter of Rights and Freedoms: website with interactive resources and teacher materials. Online: http://www.charterofrights.ca/en/02_00_01.

Advanced students may be challenged to find out more about the “override clause.” A useful resource is “The Notwithstanding Clause of the Charter” available from the Library of Parliament. Online: <http://www.parl.gc.ca/information/library/PRBpubs/bp194-e.htm>.

Extension Activity: Educating the Public about the BC Court of Appeal

This is an optional enrichment activity that can be done in-class activity or assigned as homework.

Students can be asked to prepare an educational presentation for the public about the BC Court of Appeal. Possibilities for format include: a multimedia website, a poster, an article for a local publication, a public service announcement, a comic book, or a Powerpoint presentation for a community group. Direct students to prepare a one or two-page proposal outlining the key points of their education campaign.

Working individually or in groups, students decide what format they want to use and identify the critical information that should be communicated. In their education campaign, students could make creative use of the phrase, “Though the heavens fall, let justice be done”.