Court Cases Illustrating Some Key Values of the Justice System

Some of the core values of the justice system have been identified as the rule of law, impartiality, fairness and equality. Individual rights are protected by the Constitution, particularly the Charter of Rights and Freedoms. The following cases highlight the reasoning of Canadian courts concerning individual rights within the context of the public interest.

These are unofficial case summaries for the assistance of the classroom teacher. They do not represent the text of the Court decision. For the actual reasoning, please refer to the full Court decision.

1. S. 15 of the Charter: Equality: *Vriend v. Alberta* [1998] 1 S.C.R. 493
Legislatures Which Infringe Charter Rights Must Demonstrate Infringement is Reasonable
http://www.lexum.umontreal.ca/csc-scc/en/pub/1998/vol1/html/1998scr1_0493.html

Mr. Vriend became a full time college employee in Alberta in 1988. In 1990, when asked by the college president, he disclosed he was a homosexual. In early 1991 the college adopted a position on homosexuality and Mr. Vriend was asked to resign. He did not and he was fired for non-compliance with the college's policy on homosexual practice. Mr. Vriend attempted to file a complaint with the Alberta Human Rights Tribunal but could not because under the Individual's Rights Protection Act (IRPA), sexual orientation was not a protected ground. Mr. Vriend and others filed a motion in court. The trial judge found that the omission of protection against discrimination of sexual orientation was an unjustifiable violation of s. 15 of the Charter. She ordered that the words "sexual orientation" be read in to the IRPA as a prohibited ground of discrimination. The Court of Appeal allowed the government's appeal.

The SCC held that the Charter did apply to the case. The "omission" was an act of the legislature. Under inclusiveness did not alter the fact that the IRPA was under scrutiny and not the activities of the private entity. The rights enshrined in s.15 (1) of the Charter are fundamental to Canada. In order to achieve equality the intrinsic worthiness and importance of every individual must be recognized regardless of personal characteristics. Legislatures ought to be accorded deference, however this does not give them unrestricted license to disregard an individual's Charter rights. When the Charter was introduced in 1982, Canada went from a system of Parliamentary supremacy to constitutional supremacy. Canadians were given individual rights and freedoms, which no government could take away. However rights and freedoms are not absolute, governments and legislatures can justify qualification and infringement of constitutional

rights under s. 1. Alberta failed to demonstrate any reasonable basis for excluding sexual orientation from the IRPA. Rather than find the whole of the IRPA unconstitutional, the Court chose, as the least intrusive and expensive mechanism, to read in, as had been ordered by the trial judge, the words "sexual orientation".

2. S. 8 of the Charter: Search and Seizure: *R. v. M.R.M.* [1998] 3 S.C.R. 393
http://www.lexum.umontreal.ca/csc-scc/en/pub/1998/vol3/html/1998scr3_0393.html

A junior high school vice-principal was told that a student would be attending a school dance to sell drugs. He asked the student and his companion to his office and asked each if they were in possession of drugs and told them he was going to search them. A plainclothes RCMP officer was present but did not speak or act. The vice-principal found a small amount of marijuana taped in a bag taped on the student's ankle under his sock. The marijuana was turned over to the RCMP officer who arrested the student and advised him of his rights. The student tried to call his mother who was not at home and declined to call anyone else. At trial the judge decided that the vice-principal had acted as an agent of the police and held that the search violated the student's rights under the Charter. The Court of Appeal allowed the Crown's appeal and ordered a new trial. The issue before the SCC is when and in what circumstances a search by an elementary or secondary school official should be considered unreasonable and in violation of a student's rights under the Charter.

The Charter's guarantee against unreasonable search and seizure (S. 8) is applicable to schools because they constitute part of government. However, the SCC decided that the vice principal was not acting as an agent of the police, and that different standards apply to teachers and school authorities who conduct searches of students. (1) Students have a lower expectation of privacy at school because they know that teachers and school authorities are responsible for providing a safe learning environment and that safety concerns may require teachers to search students and their personal effects and seize prohibited items. (2) Teachers and principals cannot perform their duties without the flexibility to deal with discipline problems in schools and the ability to act quickly and effectively. Therefore teachers are not required to obtain a search warrant when there are reasonable grounds for them to believe that a school rule has been violated and the evidence will be found on the student. (3) Reasonable grounds may be provided by information received from one student considered to be credible, from more than one student or from observations of teachers or principals or a combination of these, which are believed to be credible.

3. Reasonable Apprehension of Bias: *R. v. Brown* (2002) 57 O.R. (3d) 615
s. 9 of the Charter: Arbitrary Detention

Decovan Brown, a young black man, was driving a Ford Expedition on the Don Valley Parkway in Toronto. Before being stopped he was traveling slightly in excess of the posted speed limit. Traffic was moderate. Speeding is common on this highway. He was dressed in an athletic suit and baseball cap. He was polite and courteous to the police including when giving breath samples. He was charged with driving "over 80".

Defense counsel at trial brought an application to exclude the results of the Breathalyzer test arguing that Mr. Brown had been arbitrarily stopped as a result of racial profiling.

There was significant evidence that this was true including the fact that the police had begun a vehicle registration check prior to stopping the car. In the course of the defense counsel's submissions the judge described the allegations as "nasty" and "malicious" and commented on the lack of tension and hostility between the accused and the arresting officer. The trial judge dismissed the application without calling for submissions from the Crown. The accused was convicted. During sentencing the trial judge referred to his "distaste for the matters raised during trial" and suggested that an apology be given the arresting officer. The accused appealed; it was allowed and a new trial ordered.

A judge hearing an application must be scrupulously aware of the need to maintain public confidence in the court's fairness. The judge's comments were a significant departure from a judge's obligation, and inconsistent with the duty to hear and determine a matter with an open mind. The judge showed a failure to appreciate the evidence and that racial profiling can be a subconscious factor when exercising discretionary power in a multicultural society. A reasonable person aware of the prevalence of racism in the community, the nature of the application, and the traditions of integrity and impartiality in the judiciary would reasonably apprehend bias on the part of the trial judge.

4. Racial Prejudice/Fair Trial: *R. v. Barnes* [1999] O.J. No. 3296 (Ont. C. A.)

http://www.ontariocourts.on.ca/decisions/1999/September/barnes.htm

The accused, a black man from Jamaica, was convicted of trafficking in cocaine, possession of cocaine and possession of the proceeds of crime. The trial judge did not allow certain questions to be asked prospective jurors which would have alerted them to his nationality and the nature of the crime or whether they would be more likely to believe a police officer. The trial judge did allow jurors to be asked whether their ability to judge the evidence without bias or prejudice would be affected by the fact that the accused was black. The trial judge accepted that within Metropolitan Toronto existed a wide spread prejudice that people of West Indian origin were more likely to commit crimes than people of other origins. However he believed potential prejudice arising from this could be overcome by proper instructions to the jury and by jury dynamics.

The Appeal Court agreed that such prejudice exists, but that instructions might not be capable of jurors setting aside their prejudice. However the Court decided that the offender was allowed to challenge jurors for cause on the basis of racial bias, which adequately addressed the offender's concerns about nationality, type of crime and police partiality. The Court referred to the right to challenge prospective jurors for cause on the ground of partiality and race (an aboriginal) in the SCC decision of *R. v. Williams* [1998] 1 S.C.R. 1128 and quoted Doherty, J.A. who explained in *R. v. Parks* (1993) 15 OR (3d) 324 that it is essential that counsel be permitted to challenge jurors for cause on the basis of racial prejudice.

5. S. 9 of the Charter: No Arbitrary Detention: *R. v. Latimer* [1997] 1 S.C.R. 217
S. 10(a): Right to Reasons for Detention and Arrest
S. 10(b): Right to Counsel
Fair Trial Interference with Jury
http://www.lexum.umontreal.ca/csc-scc/en/pub/1997/vol1/html/1997scr1_0217.html

Mr. Latimer was convicted of second-degree murder of his daughter Tracy. Tracy was a severely disabled child who suffered from extreme cerebral palsy and was a quadriplegic. As a result of her physical condition she was largely immobile and bedridden and unable to care for herself. She was in constant pain and despite medication suffered four to five seizures a day. Mr. Latimer was detained at his farm for investigation into his daughter's death. An RCMP officer advised him of his rights and he was taken to the police station. There he was again advised he had a right to counsel and a telephone was placed before him with the telephone number of Legal Aid. He declined to call. He confessed to having asphyxiated his daughter by carbon monoxide poisoning and later took the police to the farm where he showed them the implements used. The trial judge found he had been adequately informed of his right to counsel, he was convicted and given the mandatory sentence of life imprisonment without eligibility for parole for ten years. The Court of Appeal dismissed his appeal.

Subsequent to the Court of Appeal's decision fresh evidence was adduced which indicated that the Crown counsel had interfered with the jury. Crown counsel and the RCMP had prepared a list of questions for prospective jurors; the questionnaire was distributed to 30 of the 198 prospective jurors. There were also some unrecorded discussions with prospective jurors, which went beyond the exact questions in the questionnaire. Crown counsel never advised the judge of this direct contact with prospective jurors. 5 of the 30 prospective jurors who were administered the questionnaire served on the jury that convicted the accused.

The SCC decided that Mr. Latimer had not been arbitrarily detained, s. 9, but was under de facto arrest when he was detained at his farm for the investigation. The fact that he was not told he was "arrested" did not offend s.10 (a). He was adequately informed of his right to counsel, s. 10(b). However, the actions of the Crown in interfering with the prospective jurors were a flagrant abuse of process and an interference with the administration of justice. A new trial was ordered.

6. Instructions to a Jury: *R. v. Morin* (Ont. C.A.) [1987] O.J. No. 531
Admissibility of Psychiatric Evidence; Standard of Proof: Reasonable Doubt Whether Applicable to Individual Items of Evidence

Guy Paul Morin was accused of the murder of his 9-year-old neighbour Christine Jessop. At trial he was found innocent. The Crown appealed on the basis that the judge had improperly instructed the jury. The court stated that it is a misdirection to instruct a jury that it must be satisfied beyond a reasonable doubt with respect to individual items of evidence. Although the correct instructions were given elsewhere, this did not remove the likely effect of incorrect instructions. There should be no confusion. The Court also held that the judge's failure to instruct the jury that it could consider psychiatric evidence relating to the identity of the killer was a non-direction amounting to a misdirection. A new trial was ordered.

7. Defense of Necessity/Sentencing: *R. v. Latimer* [2001] 1 S.C.R. 3

http://www.lexum.umontreal.ca/csc-scc/en/pub/2001/vol1/html/2001scr1_0003.html

During the second trial defense counsel asked the trial judge for a ruling, in advance of his closing submissions, on whether the jury could consider the defense of necessity. The trial judge told counsel that he would rule on necessity after the closing submissions, and later ruled that the defense was not available. In the course of its deliberations, the jury sent the trial judge a note inquiring, in part, whether it could offer any input into sentencing. The trial judge told the jury it was not to concern itself with the penalty. He added: "it may be that later on, once you have reached a verdict, you -- we will have some discussions about that". After the jury returned with a guilty verdict, the trial judge explained the mandatory minimum sentence of life imprisonment, and asked the jury whether it had any recommendation as to whether the ineligibility for parole should exceed the minimum period of 10 years.

Some jury members appeared upset, according to the trial judge, and later sent a note asking him if they could recommend less than the 10-year minimum. The trial judge explained that the Criminal Code provided only for a recommendation over the 10-year minimum, but suggested that the jury could make any recommendation it liked. The jury recommended one year before parole eligibility. The trial judge then granted a constitutional exemption from the mandatory minimum sentence, sentencing the accused to one year of imprisonment and one year on probation. The Court of Appeal affirmed the conviction but reversed the sentence, imposing the mandatory minimum sentence of life imprisonment without parole eligibility for 10 years.

The SCC dismissed the appeals against conviction and sentence should be dismissed. The defense of necessity is narrow and of limited application in criminal law. The accused must establish the existence of the three elements of the defense. First, there is the requirement of imminent peril or danger. Second, the accused must have had no reasonable legal alternative to the course of action he or she undertook. Third, there must be proportionality between the harm inflicted and the harm avoided. While the timing of the removal of the defense of necessity from the jury's consideration was later in the trial than usual, it did not render the accused's trial unfair or violate his constitutional rights. The mandatory minimum sentence for second-degree murder in this case does not amount to cruel and unusual punishment within the meaning of s. 12 of the Canadian Charter of Rights and Freedoms.

This appeal is restricted to a consideration of the particularized inquiry and only the individual remedy sought by the accused -- a constitutional exemption -- is at issue. Here, the minimum mandatory sentence is not grossly disproportionate. Murder is the most serious crime known to law. Even if the gravity of second-degree murder is reduced in comparison to first-degree murder, it is an offence accompanied by an extremely high degree of criminal culpability. In this case the gravest possible consequences resulted from an act of the most serious and morally blameworthy intentionality. In considering the characteristics of the offender and the particular circumstances of the offence, any aggravating circumstances must be weighed against any mitigating circumstances. On the one hand, due consideration must be given to the accused's initial attempts to conceal his actions, his lack of remorse, his position of trust, the significant degree of planning and premeditation, and his daughter's extreme vulnerability. On the other hand, the accused's

good character and standing in the community, his tortured anxiety about his daughter's well being, and his laudable perseverance as a caring and involved parent must be taken into account. Considered together the personal characteristics and particular circumstances of this case do not displace the serious gravity of this offence. Finally, this sentence is consistent with a number of valid penological goals and sentencing principles. Although in this case the sentencing principles of rehabilitation, specific deterrence and protection are not triggered for consideration, the mandatory minimum sentence plays an important role in denouncing murder.

8. Conditional Sentencing and Community Values: *R. v. Proulx* [2000] 1 S.C.R. 61

http://www.lexum.umontreal.ca/csc-scc/en/pub/2000/vol1/html/2000scr1_0061.html

The accused was a newly licensed driver who after an evening of partying and some drinking drove home on slippery roads weaving in and out of traffic and passing cars without signaling. In attempting to pass a car he sideswiped one vehicle and crashed into another. The passenger in his car was killed; the other driver was seriously injured and the accused was in a coma for some time but recovered. He pled guilty to one count of dangerous driving causing death and one count of dangerous driving causing bodily harm.

The sentencing judge decided to sentence the accused to 18 months of incarceration because a jail term was more appropriate than a conditional sentenced served in the community. Although the offender was not a danger to the community, didn't need to be deterred from similar future conduct or need rehabilitation, a jail term was necessary to denounce his conduct and to deter others from similar conduct. The Court of Appeal allowed the appeal and substituted a conditional custodial sentence for the jail term. The SCC decided that the trial judge's sentence was not demonstrably unfit in the circumstances and that the Court of Appeal should not have interfered to substitute its own opinion. The Court stated that trial judges are closer to their community and know better what would be acceptable to their community. The Court reinstated the term of incarceration, but because the offender had already completed his conditional sentence the jail sentence was stayed.

Despite its decision the Court observed that Parliament had enacted amendments to the Criminal Code (sentencing) and other Acts, such as Bill C-41 because too many people were being sentenced to jail terms. Generally, a conditional sentence would better achieve restorative objectives of rehabilitation, reparations to the victim and the community, and promotion of a sense of responsibility in the offender and acknowledgment of the harm done to the victim and the community. Where a combination of both punitive and restorative objectives may be achieved, a conditional sentence would likely be more appropriate than incarceration. Where objectives such as denunciation and deterrence are particularly pressing, incarceration would generally be the preferable sanction. This may be so notwithstanding the fact that restorative goals might be achieved. However, a conditional sentence may provide sufficient denunciation and deterrence, even in cases in which restorative objectives are of lesser importance, depending on the nature of the conditions imposed, the duration of the sentence, and the circumstances of both the offender and the community in which the conditional sentence is to be served.

9. Wrongful Conviction/Fresh Evidence: *R. v. Morin* [1995] O.J. No. 350 Ont. C.A.

Guy Paul Morin was accused of the murder of his nine-year-old neighbour, Christine Jessop. He was initially tried and acquitted. The Crown appealed the acquittal and the Court of Appeal ordered a new trial. The SCC upheld this order. In 1992, after a two-year trial, he was convicted. The accused appealed to the Court of Appeal on a number of issues. However, DNA evidence became available which excluded the accused as the offender. Fresh evidence is only admissible where such evidence could have affected the verdict. The court decided not to order a new trial in this case because the unequivocal nature of the fresh evidence was such that no jury properly instructed on the law and acting judicially, could convict the appellant on the charge of first-degree murder.

10. Wrongful Conviction: *Re Milgaard* (Can.) [1992] 1 S.C.R. 866
A Fair Trial Does Not Always Guarantee a Safe Verdict:
http://www.lexum.umontreal.ca/csc-scc/en/pub/1992/vol1/html/1992scr1_0866.html

Mr. Milgaard was convicted by a judge and jury of the sexual assault and murder of Gail Miller in January 1970 in Saskatoon. The Court of Appeal confirmed his conviction [1971] and the SCC [1971] dismissed his application. In 1991 the Governor general in Council referred the matter to the SCC because of fresh evidence. The court decided that Mr. Milgaard had received a fair trial in 1970. There was no probative evidence that the police acted improperly in their investigation or in their interview of witnesses, or that there was improper disclosure in accordance with the practice of that time. He had experienced counsel and no error in law or procedure has been established. However, a key witness of the time recanted his testimony.

Additional evidence was presented about Mr. Milgaard's alleged motel room confession. More importantly, there was evidence that another person had committed and confessed to sexual assaults in October 1970. The court was not satisfied beyond a reasonable doubt that David Milgaard was innocent, however the new evidence constituted credible evidence that could reasonably be expected to have affected the verdict of the jury at the time. Because a continued conviction would be a miscarriage of justice, the court recommended a new trial, and, should a new trial proceed and a verdict of guilty given that Mr. Milgaard be granted a conditional pardon.

11. Wrongful Conviction/Judicial Independence *MacKeigan v. Hickman* [1989] 2 S.C.R. 796
The Inquiry into the Reference by the Court of Appeal of Nova Scotia into the Wrongful Conviction of Donald Marshall Jr.
http://www.lexum.umontreal.ca/csc-scc/en/pub/1989/vol2/html/1989scr2_0796.html

On November 5, 1971, Donald Marshall Jr., a 17 year old native was convicted of murder the murder of Sandford William Seale. The offender consistently maintained his innocence throughout trial, incarceration and until his release in May 1983. He was released after favourable resolution of a reference made by the Federal Minister of Justice to the Supreme Court of Nova Scotia based on fresh evidence. The panel of the Court of Appeal hearing the reference quashed the conviction and directed an acquittal. However at the end of its judgment the panel stated that "Any miscarriage of justice is, however, more apparent than real" and concluded that Mr. Marshall's untruthfulness had

contributed in large part to his conviction. Compensation to Mr. Marshall for the 11 years he spent in prison was affected by the panel's comments. One of the panel members was the former Attorney General of Nova Scotia at the time of the conviction.

In 1986 a Royal Commission was established to inquire into the prosecution and the handling of Marshall's case. The Commission wished to question the panel but they refused. The SCC upheld the panel's refusal. Judicial independence requires that relations between the judiciary and the other branches of government not impinge on the essential "authority and function" of the court. A judge cannot be compelled to testify as to how and why that judge arrived at his or her conclusions. This is a matter of judicial impartiality in adjudication. A judge cannot be compelled to testify as to why a particular judge sat on a particular case. That matter goes to administrative or institutional aspect of judicial independence. The power to investigate into the conduct or integrity of judges lies with the federally created Canadian Judicial Council.

12. Fundamental Justice: *Kindler v. Canada (Minister of Justice)* [1991] 2 S.C.R. 779
S. 7 of the Charter:
S. 12 of the Charter: Cruel and Unusual Punishment
Extradition Without Assurances When Death Penalty may be Imposed
http://www.lexum.umontreal.ca/csc-scc/en/pub/1991/vol2/html/1991scr2_0779.html

The accused was found guilty of first-degree murder, conspiracy to commit murder and kidnapping in the State of Pennsylvania and the jury recommended the imposition of the death penalty. Before he was sentenced, the appellant escaped from prison and fled to Canada where he was arrested. After a hearing, the extradition judge allowed the U.S.'s application for his extradition and committed the appellant to custody. The Minister of Justice of Canada, after reviewing the material supplied by the appellant, ordered his extradition pursuant to s. 25 of the Extradition Act without seeking assurances from the U.S., under Art. 6 of the Extradition Treaty between the two countries, that the death penalty would not be imposed or, if imposed, not carried out. Both the Trial Division and the Court of Appeal of the Federal Court dismissed appellant's application to review the Minister's decision. This appeal is to determine whether the Minister's decision to surrender the appellant to the US, without first seeking assurances that the death penalty will not be imposed or executed, violates the appellant's rights under s. 7 or s. 12 of the Canadian Charter of Rights and Freedoms.

The majority of the Court decided that Section 7 of the Charter, and not s. 12, is the appropriate provision under which the actions of the Minister are to be assessed. The Minister's actions do not constitute cruel and unusual punishment. The execution, if it ultimately takes place, will be in the US under American law against an American citizen in respect of an offence that took place in the US It does not result from any initiative taken by the Canadian Government.

Reference *Re Ng Extradition (Canada)* [1991] 2 S.C.R. 858
http://www.lexum.umontreal.ca/csc-scc/en/pub/1991/vol2/html/1991scr2_0858.html

Mr. Ng, a resident of California, was charged with several offenses including twelve counts of murder. If the accused were found guilty in California, he could receive the death penalty. Before trial he escaped from prison and fled to Canada where he was

arrested. The extradition judge allowed the US's application for extradition. The Minister of Justice ordered the extradition without assurances that the death penalty would not be imposed. The Governor General in Council referred the matter to the SCC asking whether the surrender of Mr. Ng to the US where, if convicted, the death penalty could be imposed, constitute a breach of the fugitive's rights under the Charter. The SCC decided this matter at the same time as Kindler. The Court decided that it would not be Canada imposing the death penalty it would be the United States.

13. The SCC Changes Its Mind: Extradition Without Assurances Offends S. 7 of the Charter: *United States of America v. Burns* [2001] 1 S.C.R. 283

http://www.lexum.umontreal.ca/csc-scc/en/pub/2001/vol1/html/2001scr1_0283.html

Glen Burns and Atif Rafay, Canadian citizens, were wanted in Washington state on three counts of aggravated first degree murder of Mr. Rafay's parents and sister. They were apprehended in British Columbia as the result of an RCMP sting operation during which they claimed responsibility for organizing and carrying out the murders. The United States began proceedings to extradite the accused to Washington to face trial there. If the accused were found guilty they would face either the death penalty or life in prison without possibility of parole. Under the Extradition Treaty between the United States and Canada, a fugitive may be extradited with or without assurances that the death penalty not be imposed. The Minister of Justice of Canada, after considering the circumstances and the fugitives ages, just 18 at the time of the murders, decided not to ask for assurances. The British Columbia Court of Appeal set aside the Minister's order and directed him to seek assurances as a condition of surrender. The Minister appealed.

The Minister [the executive branch of government] has a broad discretion to decide to request assurances, but it must exercise it in accordance with the Charter. The Court has traditionally given deference to the Minister is extradition cases, and the Court should not interfere with international relations, however, the Court [the judicial branch] is the guardian of the Constitution and death penalty cases are uniquely bound up with basic constitutional values. While an individual who commits a crime in another state must be answerable to the justice system of that state, in Canada the death penalty is not an acceptable element of criminal justice. Abolition of the death penalty is a major Canadian international initiative. Since earlier court decisions there has been a change in attitude toward capital punishment in Canada, the United States and Great Britain. The death penalty does not advance the public interest in a way that life without parole wouldn't. A refusal to request assurances would not undermine Canada's international obligations or good relations. The Extradition Treaty provides for assurances. If fugitives are returned to a foreign country to face the death penalty or to face death from natural causes after life in prison, they are equally prevented from using Canada as a safe haven.

14. Constitutional Rights and Responsibilities: Reference *re Secession of Quebec* [1998] 2 S.C.R. 217

The Governor in Council referred three questions to the SCC pursuant to s. 53 of the Supreme Court of Canada Act. The Court decided it had the jurisdiction to answer the questions that were justiciable. The Court also identified four unwritten foundational principles of the Canadian Constitution: federalism, democracy, constitutionalism and the rule of law, and respect for and protection of minorities. All of these are interdependent

and enhance each other. However the latter principle is a fundamental structural feature of the Canadian Constitution that both explains and transcends the minority rights which are specifically guaranteed in the constitutional text.

Simply stated the three questions were: (1) under the Constitution could the province of Quebec unilaterally decide to secede from Canada; (2) did international law give Quebec the right to secede, and is there an international right to self-determination which gave Quebec the right to secede from Canada; and (3) in the event of a conflict between domestic and international law which would take precedence in Canada.

(1) The Court decided that the "under the Constitution" a clear majority vote in Quebec in favour of secession would confer democratic legitimacy on the secession initiative which the other participants in Confederation would have to recognize, but Quebec could not secede unilaterally without principled negotiation with the other participants in the Confederation. Political decisions and prerogatives would have to determine what would be a "clear majority on a clear question". The content and process of the negotiations would be political. The Court would have no supervisory role.

(2) Although much of Quebec's population shares the characteristics of a "people" they are not, in international law, a "people" subject to alien subjugation, domination or exploitation. Quebec's people are not oppressed nor have they been denied meaningful access to government to pursue political, economic, cultural and social development. Quebec does not enjoy an international right to secede unilaterally from Canada.

(3) The question need not be answered because there is no conflict in domestic and international law.

15. Métis Aboriginal Rights: *R. v. Powley* (2003) SCC43, File No. 28533, Heard March 17, 2003, Reasons Released September 19, 2003
Constitutional Law: S. 35 Constitution Act 1982

The Supreme Court of Canada upheld the decisions of the trial judge and the Court of Appeal of Ontario. The Court decided that the Métis have their own rights, which are not dependent on the rights of their ancestral Indian forebears. Métis rights, protected by s.35 of the Constitution Act, 1982, arise after contact with Europeans but before European control and political authority is established. The Court agreed with the trial judge and the Court of Appeal of Ontario that the Powleys were members of the historic Métis community of Sault Ste. Marie, which had hunted for food continuously since the community's inception prior to European control over the area. The Powleys, therefore, (and other members of their Métis community) have the constitutional right to hunt food without obtaining a license to do so.

Steve and Roddy Powley were arrested for killing a moose in Sault Ste. Marie without having obtained a license. They pleaded not guilty because they are Métis and claimed they have an aboriginal right to hunt for food protected by s. 35 of the Constitution Act, 1982. The trial judge agreed. He found that the Powleys were Métis who belonged to an historic community of Métis that had lived in the area of Sault Ste. Marie since before European control of the area and that the community had continuously hunted for food. The Ojibway, the ancestral forebears of this Métis community had hunted for food prior

to the arrival of Europeans.

The government of Ontario appealed this decision to the Court of Appeal who agreed with the trial judge and concluded that while it was difficult to determine who is a Métis, it is not impossible. The Court of Appeal indicated that Métis rights ought not be dependent on the rights of their ancestral Indian forebears. The right to hunt was not a right to hunt moose but to hunt for food. While there may be an environmental interest in reducing the number of moose killed each year the government could not infringe on the parties constitutional right. The decision was also appealed by Ontario.

The Supreme Court upheld the trial judge's findings of fact and the conclusions of the Court of Appeal. The Court reaffirmed the test it set out in R v. Van der Peet [1996] 2 S.C.R. 507 on how to aboriginal rights can be recognized and affirmed under s. 35 of the Constitution. The Court added that for the Métis to meet the Van der Peet test they need only establish that the right was practiced continuously since before European control and political authority was established. The Court made statements defining Métis, for the purpose of this case:

- The term Métis does not include all peoples of mixed Indian and European heritage but only those distinctive peoples who, in addition to their mixed blood ancestry, developed their own customs, way of life and recognizable group identity separate from their Indian or Inuit and European forebears.

- Métis communities evolved and flourished before the entrenchment of European control and political institutions became pre-eminent.

- Different groups of Métis exhibit their own distinctive traits and traditions.

- The purpose of s.35 is to protect practices that were historically important features that continue in the present day as integral elements of the Métis culture.

The Court repeated what it said in Van der Peet. Canada's commitment to recognize and value a distinctive Métis culture is enshrined in the Constitution. Métis rights can only survive if the Métis are protected along with other aboriginal communities. The Court used the Van der Peet test in analyzing the Powleys' claim.

a) Characterization of the Right: The judge at trial held that the right was the right to hunt food not the right to hunt moose. The SCC agreed.

b) Identification of an Historic Rights Bearing Community: A distinctive Métis community emerged in the Great Lakes region about mid-17th century and peaked around 1850. There was demographic evidence and proof of shared customs, traditions and that Indians and Whites saw them as a separate people.

c) Identification of a Contemporary Rights-Bearing Community: Aboriginal rights are community rights. The evidence indicated that the Métis continued to live in the Sault Ste. Marie region to the present day in much the same manner as they had in the pastfishing, hunting, trapping and harvesting other resources for their livelihood.

d) Verification of the Claimant's Membership in the Rights-Bearing Community: There was clear evidence the Powleys were descendants of the Ojibway forebears of the community and were accepted by the historical and current Métis community as members.

> The Court stated that establishing membership in a Métis community might not be as simple as that of establishing membership in an Indian band. The courts must establish membership on a case-by-case basis. Important components of membership include:
>
> First, self-identity as a member of the Métis community for some time not just recently.
>
> Second, evidence of an ancestral connection to an historic community. Some proof that the claimant's ancestors belong to the historic community by birth, adoption or other means.
>
> Third, the community must accept the claimant. Only those members with a demonstrable ancestral connection to the historic community can claim a s. 35 right.

e) Identification of the Relevant Time Frame: The Métis need not find the origin to their rights in pre-contact practice of their aboriginal ancestors.

f) Whether the practice is Integral to the Claimant's Distinctive Culture: Subsistence hunting and fishing was a constant in the Métis community.

g) Continuity between Historic Practice and Contemporary Right Claimed: S. 35 is a constitutional commitment to protect practices that were historic features of particular aboriginal communities.

h) Determination of Whether or Not the Right was Extinguished: The doctrine of extinguishment applies equally to Métis and First Nations claims. For the Sault Ste Marie Métis, the Robinson-Huron Treaty of 1850, which excluded them, did not extinguish their right.

i) If there is a Right, a Determination of Whether there was an Infringement:
Ontario does not recognize any Métis right to hunt for food or "any special access rights to natural resources". The Powley application exposed this infringement of the protected historical practices of their Métis community.

j) Determination of Whether the Infringement is Justified: Although conservation is important, there was no evidence that the moose population is under threat. The Métis are entitled to priority. Ontario's blanket denial of Métis rights is not justified.
The Supreme Court decided that its decision take force without delay.