The Top Five 2003

Each year Justice Stephen Goudge of the Ontario Court of Appeal identifies five cases that are of significance in the educational setting. This summary, based on his comments and observations, is appropriate for discussion and debate in the classroom setting.

A Resource for Teachers of Civics and Law:
Five Recent Significant Cases based on presentations by Justice S. Goudge during the 2003 Summer Law Institutes

A Note to Teachers: In addition to the case summaries, the accompanying websites provide you with access to the entire text of each case.

R. v. Sheppard, 2002 SCC 26
Requirement To Give Reasons
http://www.lexum.umontreal.ca/csc-scc/en/pub/2002/vol1/html/2002scr1_0869.html

The accused, Sheppard, was charged with theft of two windows from a local supplier. The accused, a carpenter, had no criminal record. He had also recently separated from his girlfriend, but the separation was not amicable. The only evidence against him came from his ex-girlfriend who testified that the accused had confessed to her that he stole the windows to use in his house; however, there was no evidence that a search had been made of his premises and no stolen windows were found. He denied his guilt. Sheppard also noted other individuals had access to the windows. The trial court convicted Sheppard, saying only: "Having considered all the testimony in this case and reminding myself of the burden on the Crown and the credibility of witnesses, and how this is to be assessed, I find the defendant guilty as charged."

The Newfoundland Court of Appeal set aside the conviction and ordered a new trial. The Crown appealed to the Supreme Court of Canada. The Supreme Court of Canada (SCC) unanimously dismissed a further appeal, agreeing with the Court of Appeal of Newfoundland that a trial judge must provide reasons for her or his decision to permit an appeal judge to review the correctness of that decision. Simply put, the Supreme Court of Canada upheld the appeal ruling, thereby entitling Sheppard to another trial.

Questions for Class Discussion:

i) The justice system is designed to give reasoned outcomes. In other words, a Justice must be able to demonstrate how she or he arrived at any decision in a logical, reasonable way. Review how the Justice arrived at the

judgment. To what extent is there a reasoned outcome in this case? Use evidence from the case to support your answer.

ii) Imagine you are the Crown or Defence counsel in this case. Outline the major arguments you would use to support your case.

iii) Explain the role of testimony in this case. Do you think it was reliable? Explain why or why not.

iv) As we can see in this case, a judgment may be set aside by an appeal court if there was some error or omission in the judicial process. What error or omission was made in this case? Why would a new trial be necessary?

v) Locate and research other cases in which judgments have been set aside. Identify the key point of law used to justify setting aside the decision.

Chamberlain v. Surrey School District No. 36, 2002 SCC 86

Requirement Of Public Bodies To Take A Secular And Nonsectarian Approach In Applying Legislation

http://www.lexum.umontreal.ca/csc-scc/en/rec/html/chamberl.en.html

A Kindergarten-Grade One ("K-1") teacher asked the Surrey School Board to approve three books (*Asha's Mum*s, *Belinda's Bouquet,* and *One Dad, Two Dads, Brown Dad, Blue Dad*s) as supplementary learning resources, for use in teaching the family life education curriculum. The books depicted families in which both parents were either women or men in same-sex parented families. The *School Act* in British Columbia gives the Minister of Education the power to approve basic educational resources to be used in teaching the curriculum in public schools, and gives school boards the authority to approve supplementary educational resource material, subject to Ministerial direction. (For example, the Minister of Education can determine which textbooks are to be used, while the Board of Education can decide which videos, posters, handouts, or other educational materials can be used to supplement the text.)

The Board passed a resolution declining to approve the books. The Board's biggest concern, as found by the trial judge, was that the books would create controversy due to some parents' religious objections to the morality of same-sex relationships. The Board also felt that children at the K-1 level should not be exposed to ideas that might conflict with the beliefs of their parents; that children of this age were too young to learn about same-sex parented families; and that the material in these books was not necessary to achieve the learning outcomes in the curriculum.

The British Columbia Supreme Court, in reviewing the reasonableness of the Board resolution, quashed or rejected the Board's resolution, finding the decision offended s. 76 of the *School Act*, because members of the Board who had voted in favour of the resolution were inappropriately influenced by religious considerations. The Court of Appeal set aside the decision on the basis that the resolution was within the Board's jurisdiction. The meant that the Court of Appeal felt it did not have the authority to rule on the issue; however, the SCC in a 7-2 decision

allowed the appeal and ruled that the School Board's decision was unreasonable because the Board did not apply the criteria required by the B.C. *School Act*, curriculum and the Board's own regulations for approving supplementary learning resources, and the Board failed to act in accordance with the secular or non-religious mandate of the *School Act*. The SCC noted that a secular and non-sectarian approach resonates with values in the Charter founded on equality. In the end, the Board, by allowing religious concerns to influence its decision-making, was found to be wrong in denying use of these texts.

Starson v. Swayze, 2003 SCC 32

Consent To Treatment

http://www.lexum.umontreal.ca/csc-scc/en/rec/html/2003scc032.wpd.html

Starson suffered from bipolar disorder, a type of mental illness that involves extreme mood swings. (Individuals with bipolar disorder experience highs of mania and lows of deep depression. The manias are often characterized by tremendous bursts of energy, feelings of invincibility, and sleeplessness. The depressions can include excessive fatigue and very low energy.) Starson was found not criminally responsible for making death threats and was detained in a hospital. Starson's physicians', including Dr. Swayze, proposed treatment included various medications which Starson refused to take. Starson, although functioning behind the walls of a secure facility during his appeals, was regarded as a leading Physics thinker. Despite not having advanced university degrees in Physics, the level and quality of his thinking led to Nobel prize-winning scientists to co-author academic papers with him.

Starson argued that the medications prevented him from working and thinking at his full capacity. Dr. Swayze found that Starson lacked the capacity to decide whether or not to accept the proposed treatment. The Ontario Health Care Consent Act permitted a person to be treated without consent on the ground of lack of capacity – the ability to make an informed choice -- if it was found that they could not understand the information relevant to making a decision about treatment and could not appreciate the reasonable foreseeable consequences of that decision. The Ontario Consent and Capacity Board confirmed Swayze's finding of incapacity. The Board's decision was overturned by the Superior Court on judicial review. The Ontario Court of Appeal upheld the findings of the reviewing judge. Swayze appealed.

The SCC dismissed the appeal and ruled that the reviewing judge correctly held that the Board's finding of incapacity was unreasonable, as it was based on findings that were not supported by the evidence, and that the Board had misapplied the statutory test for capacity. Simply put, Starson was not incapacitated. While the Board found that Starson failed to appreciate the risks and benefits of treatment, it did not address whether the reasons for that failure demonstrated an inability to appreciate these risks and benefits. The Board went beyond its powers in deciding about capacity and improperly allowed its own conception of Starson's best interests

to influence its finding of incapacity. In the end, Starson's capacity to make decisions about his treatment was upheld.

Halpern v. Ontario Court of Appeal, June 10, 2003
Civic Institution Of Marriage: Same Sex Couples: Whether Common Law Definition of Marriage Violates S. 15 of the Canadian Charter of Rights & Freedoms

http://www.ontariocourts.on.ca/decisions/2003/june/halpernC39172.htm

From April 22 to 25, 2003, a panel of the Court of Appeal for Ontario, composed of Chief Justice McMurtry and Justices MacPherson and Gillese, heard a constitutional challenge to the definition of marriage. The definition of marriage, which is found only in the common law, requires that marriage be between "one man and one woman". This opposite-sex requirement was challenged by eight same-sex couples ("the Couples") as offending their right to equality as guaranteed by s. 15(1) of the *Canadian Charter of Rights and Freedoms* ("the *Charter*") on the basis of sexual orientation. The opposite-sex requirement was also challenged by the Metropolitan Community Church of Toronto ("MCCT") as violating its right to freedom of religion under s. 2(a) of the *Charter* and its equality rights under s. 15(1) of the *Charter* on the basis of religion. There was a central conflict between the definition of marriage, religious freedom, and equality rights.

On July 12, 2002, the Divisional Court (Associate Chief Justice Smith, Regional Senior Justice Blair and Justice LaForme) unanimously held that the opposite-sex requirement of marriage infringed the Couples' equality rights under s. 15(1) of the *Charter* and was not saved as a justifiable limit in a free and democratic society under s. 1 of the *Charter*. The Divisional Court was also unanimous in ruling that the rights of MCCT as a religious institution were not violated. The Court was divided on the issue of remedy. The formal judgment of the Court declared the common law definition to be inoperative. The declaration was suspended for two years to enable Parliament to fashion an appropriate remedy. If Parliament failed to act within two years, then the common law definition of marriage would be automatically reformulated by substituting the words "two persons" for "one man and one woman". Time would be provided for publicly elected politicians to discuss the issue with their constituents, parties, and within the House of Commons.

In a unanimous judgment, the Court of Appeal also upheld the decision of the Divisional Court that the common law definition of marriage offends the Couples' equality rights under s. 15(1) of the *Charter* in a manner that cannot be justified in a free and democratic society. The Court further agreed that MCCT's rights as a religious institution are not violated. In an effort to find the best way to remedy or fix the infringement of equality rights, the Court declared the current definition of marriage to be invalid, reformulated the definition of marriage to be "the voluntary union for life

of two persons to the exclusion of all others", and ordered the declaration of invalidity and the reformulated definition to have immediate effect.

Richard Sauvé v. The Attorney General of Canada, the Chief Electoral Officer of Canada and the Solicitor General of Canada

Right To Vote: Should Prisoners Be Allowed To Vote

[Note to Teachers: At the time of updating our website, this September 2003 SCC decision was not available online, and we are not able to provide a citation; however, the SCC's website will be updated to include this case. Please go to http://lexum.umontreal.ca/csc-scc/en/ to locate this or any other SCC decision.]

Previously, Section 51(e) of the *Canada Elections Act* denied all prison inmates the right to vote in federal elections regardless of the length of their sentences. This prohibition was challenged as unconstitutional by Richard Sauvé who had been convicted of murder as an aider and abettor and been sentenced to 25 years in prison. In 1993 the Supreme Court of Canada agreed. As a result Parliament revised the wording of Section 51(e) of the *Act* to deny the right to vote only to those inmates serving a sentence of two years or more.

Mr. Sauvé challenged the newly worded section of the law. At trial the judge decided that the new Section 51(e) violated the *Charter*'s guarantee of the right to vote and was not demonstrably justified. He stated that denying prisoners the right to vote hindered their rehabilitation and reintegration into society. These negative consequences were more important than any benefits produced by the law. The Federal Court of Appeal disagreed with the trial judge noting that Parliament has a role in maintaining and enhancing the integrity of the electoral process and that denying the right to vote to these inmates was a reasonable means to achieve those objectives. The Court of Appeal decided that the prohibition was not overbroad or disproportionate. Mr. Sauvé appealed to the SCC.

At the SCC the respondents (the government), conceded that restricting the voting rights of the prisoners did violate the *Charter*, but argued that the violation was justifiable under S. 1, just as the Federal Court of Appeal had decided. The SCC's opinion was divided. Four members, (the minority), agreed with the government and the Court of Appeal, but five members, (the majority), decided that the denial of a prisoner's right to vote was not justifiable, and Section 51(e) was struck down. The Chief Justice of the Supreme Court, Beverley McLachlin, wrote for the majority. They decided that the right to vote is so fundamental to democracy and the rule of law that limits on it is not a matter of deference to Parliament but requires careful examination. "This is not a matter of substituting the Court's philosophical preference for that of the legislature, but of ensuring that the legislature's proffered justification is supported by logic and reason."

The government argued, and the minority of the Court agreed, that the objective of the law was to enhance prisoner's civic responsibility and respect for law. Denying the right to vote was educative. If inmates voted it would demean the political system. Denying them the right to vote was an appropriate punishment no matter what crime had been committed.

The majority decided that denying the right to vote does not teach anything about the nature of our rights and obligations under the law. Denying the right to vote runs counter to the Canadian commitment to the inherent worth and dignity of every individual. The majority noted that right to vote is a Charter right that cannot be "overrode" by the notwithstanding clause (Section 33). The Parliament cannot invoke the notwithstanding provision. The majority indicated that the government cannot equate inmate disenfranchisement with youth voting restrictions. They are different. Inmates are denied the right to vote because they are considered unworthy. Youth are not allowed to vote because of their level of experience. Punishment should have a penal purpose: deterrence, rehabilitation, rehabilitation and denunciation. The majority found that the government did not show how punishing an inmate by disenfranchisement is relevant to the offender's particular crime or serves a legitimate sentencing purpose. The Court also stated that Aboriginal peoples in particular would be disproportionately affected due to their over-representation in prisons.

In the opinion of the minority of the Court, Parliament may temporarily suspend the right to vote of inmates. Even if it is a violation of the Charter, it is justifiable. The minority wrote that the issue before the Court was a matter of competing social or political philosophies and that the Court ought not to approve or prefer one over the other. The minority stated that discriminating against inmates right to vote was strikingly different from past discrimination. This is a temporary suspension of their right to vote based exclusively on serious criminal activity; it is not based on an irrelevant personal characteristic like gender, race or religion. Responsible citizenship is logically related to whether or not a person engages in criminal activity.

The right to vote is not an absolute right. For example, youth are not allowed to vote. Parliament is allowed to make such choices under section 1 of the *Charter* as long as they are rational reasonable limitations that are justified in a free and democratic society. The issue is not about good penal policy or bad penal policy. The Court ought not to decide what theories of penology should be adopted by our elected legislatures.

The minority stated that the provision in question denounces serious crime. Permitting offenders convicted of serious crime to vote undermines the rule of law because such persons have demonstrated disrespect for the community, stability and order. Therefore society may temporarily curtail their rights. The community should be empowered to exclude from elections persons with no nexus to the community.

An overview of Canadian provinces and other countries indicate that Canada's approach to the curtailment of prisoner's rights is quite moderate. The minority would have upheld the decision of the Federal Court of Appeal.