Canadian Constitutional Law Revision

Week 1 Lecture 1

Judicial Review

Constitutional Challenge

- Appeal: Trial court came to the wrong conclusion because they interpreted facts incorrectly or misinterpreted facts
    - The court is being asked to consider the merits of the case – Examine the facts and apply the law and see if they come to a different conclusion
- Judicial Review: Statute or provision under which someone has been charged was unconstitutional
    - Maybe the governmental body behaved in a way that infringed someone's constitutional rights
    - Examine the conduct of the government official or the statute under which the person is charged to see if it is constitutional
- Appeal and Judicial Review application can be filed together but examined separately

Week 2 Lecture 1

Constitutional Judicial Review – Two grounds

- Federal Grounds – It has to be outside the enacting body's jurisdiction
- Charter Grounds – someone brings forward a challenge because impugned legislation or governmental action contravenes one or more enumerated rights under the Charter (2-25)
    - Parties need to state which grounds for judicial review (Federal or Charter) but they must also state a remedy
        - Declaration of invalidity
        - 24(1) – Individual remedy for unlawful governmental action
        - 24(2) – Disposal of evidence obtained unlawfully – In violation of the Charter
- Three kinds of parties that have been recognized as having standing
    - Attorney General – Province or Canada – Canada has inherent standing for a challenge – Challenge on Federal or Provincial grounds
        - They can also seek an advisory opinion – Seek a reference from the provincial superior court or the Supreme court of Canada
        - They can only apply for a declaration of invalidity for section 52
    - Parties directly affected by the matter
        - Not corporations – The right has to be extended to corporations
            - This would also apply if they were charged under a piece of legislation – R v Big M. Drug Mart – This is a direct affect
            - Section 2 – Freedom of religion doesn't apply for corporations because corporations can't hold religious beliefs – The right doesn't extend to them
        - Denied a constitutionally protected right – Harmed by an unconstitutional statute or due process rights

- Is the provision within a valid regulatory scheme?
- System of rules that are connected with the core of essential character of the law – If the answer is no, the entire statute could be invalidated – If yes, then the court moves on

Third Stage – Is there a rational connection between the impugned provision and the overall aims of the statute? Was the provision necessary truly necessary to meet the aims of the statute or legislation? If the aim can be met without the provision, then the court will strike down the provision

If the provision is only encroaching slightly, the court will only see if there is a connection between the provision and the aims of the statute

If the provision's encroachment is significant, the court will see if the provision is necessary in order to meet it's aim – Without the provision, the statute won't be able to meet it's aim

Reference re: Good and Services Tax – Example of how the ancillary doctrine applies

Interjurisdictional Immunity – When valid legislation has effects on a class of subjects or matters that fall under the jurisdiction of the non-enacting body – Meant to protect federal jurisdiction

- Usually happened where provincial laws affected federal companies to do their job (fell under section 91)
- Courts would usually have the law read down so the federal companies become immune to the provincial law
- Commission du Salaire Minimum v Bell Telephone (1966) – It only needs to affect a vital part of the management and operation of classes of subjects that fell within the non-enacting body's jurisdiction
    - It's a lot more broad
- Bell Canada v Quebec (1988) – Provincial law could only be declared inapplicable if it went beyond merely affecting a vital part of the federal undertaking
- Irwin Toy v Quebec – Laws of general application would only be declared inapplicable only if they impaired a vital part of the management and operation of the undertaking
- Canada Western Bank v Alberta – If you had a provincial law that was regulating something that was not considered a vital part of that undertaking, that law would be declared inapplicable even if it affected it, even if it impaired it
    - Vital part – Activities that were indispensable or necessary to the operation of the undertaking

Quebec AG v Canadian Owners and Pilots Association

R v Oakes [1986] 1 SCR 103

- Based on analysis of Dickson CJ in that case – provides a two stage test to establish whether " ... a limit is reasonable and demonstrably justified in a free and democratic society."
- First the objective " .. Must be of sufficient importance to warrant overriding a constitutionally protected freedom" not trivial ... " pressing and substantial
- Second – must be proportionate -
- Three elements make up the second limb.
- 1. Law must be rationally linked to the objective.
- 2. Must impair right no more than is necessary.
- 3. Must not have a disproportionally severe effect on the persons to who it applies. (Hogg argues this last leg is redundant 38.12 (b)

- Is there another way of achieving that right that doesn't restrict it too seriously?

Dagenais v CBC

- There is no rights hierarchy
- Check the necessity of the action
- Look at the proportionality between the ban's salutary effects and its deleterious effects – Do the salutary effects outweigh any deleterious effects?

Section 33

- A piece of legislation in relation to an act or part of an act that it should operate notwithstanding that it conflicts with a provision of the Charter
- It has to expressly explicitly set out
- It going to be limited – A 5 year limit
- Ford v Quebec – Language Rights

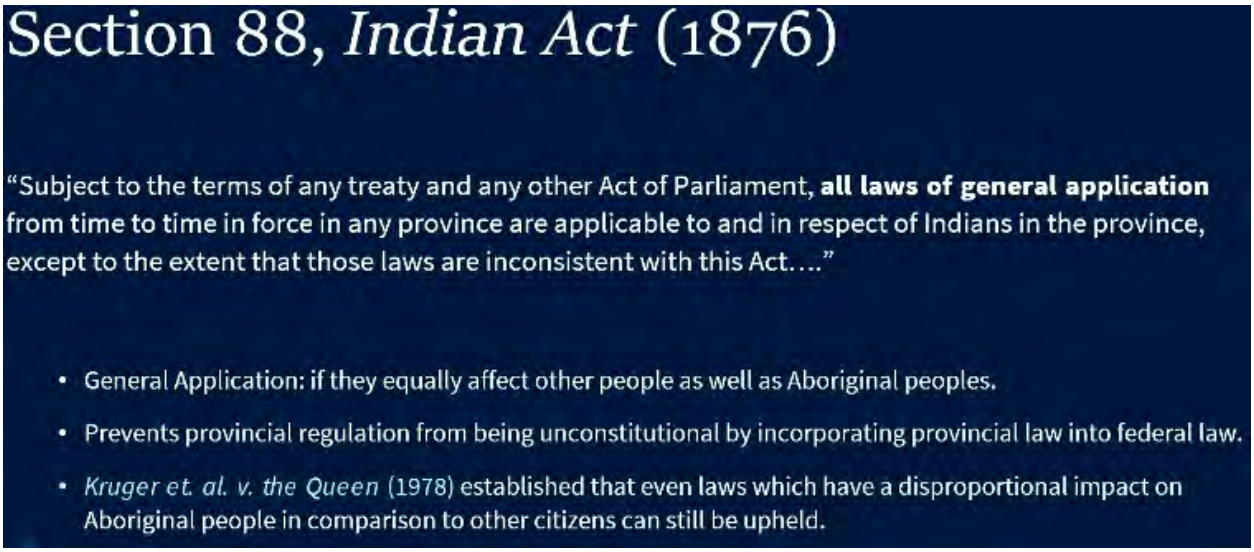
Section 28 – The rights and freedoms of men and women were accorded equally

Week 5 Lecture 1

Criminal law making power is given to the Federal government – Section 91(27) – only the federal government can change the criminal code

- Substantive – Written or statutory rules that tell us what our rights and obligations are
- Procedural – Rules about how to enforce substantive law
    - Canada evidence Act
- Criminal law is not really centralized
    - S 92(14) – Power to make law in relation to administration of justice
    - S92(6) – Jurisdiction over prisons (Federal government has power over penitentiaries)
    - S92(15) – Quasi-Criminal Law – regulatory offences
        - Parking, impaired driving offenses…etc
        - Imposition of punishment by fine penalty or imprisonment for enforcing any law of the province in relation to any matter coming within any of the classes of subjects in this section – Matters that come within their jurisdiction
        - Does not require the same level proof

  - The legislation infringes on an existing Aboriginal right, title or treaty rights
- Application of judicial review can be filed under section 35



- These provincial laws are applicable to Aboriginal people, lands including reserve lands
  - They are bound by regulations on and off the reserve
  - Licensing
  - Professional practice rules – R v Hill – Someone was charged for practicing medicine without a license and it was constitutional
- You need this law because it would mean that anything that affected Aboriginal lands and people, then it would be immediately unconstitutional under section 91(24)

- There may be overstepping if it does one or more of these things – Provincial is encroaching on federal jurisdiction under 91(24)