Module A - Week 1 - The Structure of the Canadian Court System

1. The online reading quiz will be available on the 16th
2. Figure out the group assignment

On Coming to Law

Introduction

1. Judicial branch - lawyers judicate the claims of parties
2. Practicing branch - advice and advocate for clients
3. Academic branch - lawyers who prepare others to be lawyers and hold other branches to account
4. Excludes are legislators, governmental officials, police and citizens at large
5. Regulative rules - rules that regulate activities, like speeding
6. Constitutive rules - define activities that would otherwise not exist, like the rules in chess

The Judicial Branch

Structure

1. Four categories of court
    a. Provincial superior courts
    b. Provincial inferior courts
    c. Federal courts
    d. Supreme court of Canada

Provincial Superior Courts

1. Trial courts and appeal courts
2. Constituted by virtue or provincial power over the administration of justice in the province
3. The federal government appoints and pays them
4. Provincial superior trial courts are the cornerstone of the court structure in Canada
5. Decisions may be appealed to the perinatal court of appeal
6. They had jurisdiction in the first instance
7. The appeal court is parasitic upon the jurisdiction of the trial court's - appellate jurisdiction
8. While they are constituted upon legislation, they are not contingent on this legislation, and rather are common law
9. Appellate courts ensure that the lowes courts protect the rights of those involved and that they interpreted the law properly

Provincial Inferior Courts

1. They have a civil and a criminal justice
2. Jurisdiction over offences created by provincial statute
3. The criminal code defines three types of offences
    a. Summary convictions
    b. Indictable offences
    c. Hybrid offences
4. Indictable offences are more serious offences while summary are less serious offences
5. Murder and treason are the jurisdictions of the superior court

Federal Courts

1. There is the supreme court of Canada, a federal court of appeal, federal court, tax court of Canada

2. Created the federal court of appeal and the federal court
3. These sit and transact business anywhere in Canada, but are limited to federal lar

Supreme court of Canada

1. Became supreme in 1949
2. Jurisdiction over all matters of law
3. Includes common law and Quebec law
4. Grant leave to cases that are of national importance and reference cases

Hierarchy

1. Supreme court authority is final and binding on all lower courts in terms of future determinations
2. They might have throughgoing humility and be committed to judicial minimalism
3. Reputations of some judges may waft to other jurisdictions and persuaded how they judge

Appointment and Discipline

Appointment

1. Falls within the jurisdiction of the federal and provincial governments
2. The process exists by convention, not law
3. Judges hold office on good behaviour until they retire
4. Other than being in law for a minimum time there are no requirements
5. Progress towards widening and formalizing the consultation process
6. They are only able to say recommended or unable to recommend

Discipline

1. No superior court judge has ever been removed by a joint address
2. Council charged with discipline of judges

Lecture

1. Doctrinal law - doctrines that form around a piece of text to produce a judicial interpretation
2. Judges have put different interpretation on the BNA clause of peace order and good government
3. Talk about the legal nature of politics - ex senate reform, quebec succession, slew of indigenoud rights cases
4. Law limits what we can do, also a tool to provide opportunities for different groups
5. The law frames political action
6. Go through assignments on syllabus again
7. Reading quiz opens thursday - 2 chances, 15 multiple choice choice questions, 90 minutes, last attempt counts
    a. Need to do week 2 readings before writing the quiz
    b. Looks at just weeks 1 and 2
8. Video mini lectures instead of a class on thanksgiving, no seminar that week
9. Still do the readings, they will be options on tests

Lecture - The structure of the canadian court system

Law and the Liberal Democratic State

1. Canada is a liberal democratic society

2. Liberal democracy tries to stop tyranny by making procedures and limiting the power of the people from making decisions that infringe on natural rights
3. Limit the division making of rulers so they cannot act arbitrary
4. Rules and ruled alike must obey impartial rules
5. Nobody is above the law
6. Individual rights and freedoms that cannot be violated
7. Laws to prevent people from hurting each other, and to prevent the government from hurting the people
8. 4 institutional conditions for the rule of law
    a. Constitution - intentionally difficult to change law that is the backbone of the state
        i. Believe in constituonalism - regime must be forged in appcore with agreed upon rules that are supreme
        ii. Clear limitations on those who rule
        iii. Constitution must be to some extent supreme
    b. Independent judiciary
        i. Neutral judge to determine when the law is violated
        ii. Judiciary must be independent
        iii. They interpret the constitution and its rules and determine when it is violated
        iv. They cannot be subject to the rulers, so they are able to make independent decisions
        v. Effective impossible to remove a supreme court justice
    c. Public legislature
        i. People should be aware of what decisions are being made
    d. Civilian control of military and police
        i. Someone to enforce the law

The Canadian Constitution

1. Main parts of the judiciary were set out in the BNA 1867 or the Constitution Act 1867 and the second part is the constitution act 1982
2. Secions 92, 96, 101 of BNA Act
3. Section 92(14) provincial courts are created
4. 96 governor general appoints judges of superior courts in each province
5. 101 parliament of canada creates a court of appeal for canada
6. See slide 8 for a good diagram of what sections created what courts

Canada's Court system

1. Territorial - geogrpahic areas over which a court has juisitcion over
2. Hierarchical - original/trial/appeal jurisdiction
3. appellate/appeal court - court that reviews decisions of lower courts
4. Appeal courts are concerned with disputes of law, clarify the rules of the game, fix errors in law, keep facts of original court, but determine how the law was applied
5. Orriciala court is the first court to hear a case, determine the facts of the case, what actually happened
6. Subject matter jurisdiction - the type of cases heard by a court (family law ect)

7. Section 92 and 96 courts are provincial/territorial courts - their decisions only apply to the areas they rule within
8. Section 92 courts are only trial courts, hear appeal sometimes from magistrates or justices of the peace - take on the bulk of the criminal law workload
9. Section 96 courts have virtually unlimited constitutional administration
10. Section 96 court judges are appointed by the governor general
11. Section 92 court judges are appointed by provincial governments
12. Provinces can organize courts in their own way
13. Section 101 courts have federal jurisdiction, have very narrow jurisdiction apart from the supreme court
    a. Their ruling applies nationally
    b. Does a lot of work in immigration

Supreme Court of Canada

1. Apex of canadian court system
2. Does not have that many cases
3. Its decisions are binding over all other courts
4. Section 101 created it
5. It was created in 1875
6. Unlimited jurisdiction
7. Until 1949 the supreme court was not the highest, it was a court in britain called jcpc
8. Before the supreme court was a court of appeal, but it could also be bypassed towards the jcpc
9. To get more autonomy from britain they created the supreme court
10. Supreme court hears appeals on the case of public importance or issues of law
    a. If this is the case the sc can grant leave to appeal so that they hear the case
    b. As of right cases - the sc has to hear the case
    c. Hear cases by leave and as of right
11. The higher the court the more discretion it has over what cases it hears
12. Appeals as of right have decreased - very specific circumstances for criminal cases, civil cases in rare circumstances like between governments, appeals given by provincial governments or federal governments, like reference questions
13. 6% of leave applications were granted in 2020
14. Average time to hear a case is about 18 months
15. 49% of decisions are unanimous
16. Standing - only parties who are a part of a legal case can initiate a legal case towards to sc
    a. Someone affected by a law directly has standing to bring a case

Supreme court composition

1. 9 judges
2. 3 from quebec
3. Convention that judges will represent the 4 regions of canada, ontario, west, maritimes (but this is not mandated)
    a. 3 from ontario
    b. 2 from west

    c. 1 from atlantic canada
4. They can all sit for a case, have to have 5 judges, often sit in panels of 7
5. Appointed by independent advisory committee who suggests names to the PM, then they appoint them
6. Lower judges are appointed by minister of justice, supreme court judges are usually appointed by the PM
7. This is only convention, not law
8. Traditionally very little vetting of supreme court justices
9. Increased public scrutiny and oversight since 2005
10. After appointed MPs can ask them questions

Controversy

1. Liberal government says that they want people who are bilutial and diverse
2. Bilingual part limits the pool significantly, and there is interpretation services in the court already
3. Bilingual requirement limits the pool, and the amount of diversity that could possibly have
4. Now there is one visible minority justice but they were only appointed in 2021
5. Convention to have a relative gender balance within the court

Overall

1. Supreme court judges are making law, where no presidents exist or where it is unclear
2. Quality of their decision matters
3. Compared to how influential they are on canada they have relatively little scrutiny by the general public
4. Expected that their decisions are political
5. Important that they consider issues as fully as possible
6. The supreme court is primarily a court of appeal, it can refuse to hear a case, and then the decision of a lower case is upheld
7. Only time they are the first court to hear a case is when a federal government poses a reference question to the supreme court

Module A - Week 2 - The Constitution, Conventions and Statutes

The Canadian Regime

1. Constitution - set of rules that establishes the structure and fundamental principles of the political regime
2. Political power is thought to consist of three distinct types
    a. Legislative power - make law and set policy
    b. Executive power - execute or andmister that law or policy judicial power - settle questions about specific violations of law
    c. Judicial power - settle questions about specific violations of law
3. Second function is to provide a division of power structure between national and regional governments
    a. There still will likely be overlapping areas of jurisdiction
4. Delineate the limits of government power so that no government can violate its citizens rights
5. Provide an orderly way to make changes to it

Constitutional Forms - Conventions and Laws

1. There are constitutional rules that are enforced politically called constitutional conventions
2. Conditional laws is followed because a violation of of it will be overturned by the course
3. Constitutional conventions/customs
    a. Judges cannot enforce them
    b. Thought that voters will know what they are and enforce them
4. Constitutional law
    a. Organic statutes - deal with the organs of the regime, how it functions
    b. Entrenched constitutional act - enricable by cours, as they are the supreme law of the regime, difficult to change as changing them is beyond the reach of either the state or federal government
5. Entrenchment provides the best way of protecting the rights of citizens as politicians cannot legally violate them, or change them easily

The Canadian Constitution

1. Mixture of british and american regimes
2. The term dominion was created to represent a country that was more independent than a colony, but not entirely independent
3. The canadian constitution was legislated by britain
4. It included some sections that had nothing to do with constitutional matters, and were then repealed
5. Statutes and conventions formed the core of canada's constitutional order
6. It was significantly incomplete as it lacked an amending formula
7. Had to request the british government to amend it
8. Britain invited canada to partiate its constitution in the 1920s, but it had been unable to as parties could not agree
9. Put in a clause that amendments having impact on the provinces have to require the supported of a significant number of them
10. CA 1982 has many parts, including the canadian charter of rights and freedoms

Rights of Indigenous Peoples in Canada

1. Constitutionally entrenched legal recognition of treaty rights
2. Canada today is negotiating land claim agreements with community rather than treaties
3. It also entrenches existing indigenous rights like their inherent right to their lands and self government
4. The document points to both the sovereign authority of the crown and the sovereignty of indigenous people with unceded territory
5. Guarantees the constitutional provisions affecting indigenous people will not be changed without significant indigenous consultation

Amending Canada's Constitution

1. Established five different formulas for five distinct situations
2. No amendment can be adopted without widespread support

Judicial Review of the Constitution

1. It is written in language that is very general
2. Difficult to know how to apply this in very specific situations

3. Judiciary talks with defining constitutional terms and determining if the actions of the government are consistent with them

Constitutional Politics since 1982

1. The province of quebec was opposed to the CA 1982
2. They do not believe that they are signatories to the constitution as through the amending formula they would be needed to change it, and they did not sign onto it
3. Also did not have representation of indifenous people at the negotiating table
4. Mulroney put a new agreement to a referendum, but it did not pass as something offended everyone
5. SC was asked what was needed for Quebect to cede from the union, and they said that they would need to have a clear majority of quebecers voting for it

Constitutional Conventions and Parlement

1. Some laws are too broad or antiquated
2. Some important matters are not covered by formal rules at all
3. Conventions can even contradict an antiquated legal rule
4. The speaker of the house will enforce the formal rule over the convention
5. Question period is a lively event, with many conventions to have fair questions
6. Customs and habits are only symbolic traditions or pleasing rituals
7. There are also rules around who can form government and who should be asked to

Democratizing the constitution

1. Conventions are an essential part of our democratic constitution

What are Constitutional Conventions

1. Conventions can also be treaties signed by signatory countries
2. Conventions can also be codified rules or traditions
3. They are often non-legal rules on conduct
4. By are binding rules of behavior that are informed politically, not through the judiciary

Conventions and the Court

1. Conditional experts disagree about the legal status of conventions
2. But there are also clear examples of judges being willing to acknowledge conventions
3. They are conditional rules with important implications
4. Courts are not in a position to pursue a judicial remedy when a convention is found to be broken

Conventions and Consensus

1. Conventions are the product of politics
2. Responsibility of the political community to establish and re-establish conventions
3. Conventions are the product of politics
4. Too much disagreement can bring the end of a convention
5. Three part test
    a. Is there a precedent
    b. Did the actors involved believe themselves to be bound by the rule
    c. Is there is reason for the rule
6. Some believe that conventions do not need precedents, but rather can simply be born of the agreement between prime political actors
7. Also can be difficult to determine who the relevant political actors are

The Case of the 2008 Dissolution and Election Call

1. In 2008 Harper dissolved the house and called for an election despite the fixed term election law that his party created in 2007
2. Duff Conaccher challenged the prime minister's dissolution in curt
3. The argument was that
    a. Several provinces have fixed election dates and none of them have had an early election since bringing in the law
        i. Established precedent that election terms must be respected
    b. Expressed agreement from the political parties was met as they voted for it
4. However conventions cannot be enforced in court
5. Court said that the test was not met as the relevant political actors had set no precedent
6. Ideally conventions should allow the constitution to evolve in response to changing political realities

Confidence, Prorogation and Dissolution

Confidence Votes

1. Not all votes on bills and such need to be sonsted confidence votes
2. Confidence votes have three categories
    a. Those designated in advance
    b. Those that would approve crucial government policy
    c. Motions by the opposition worded to express a lack of confidence
3. Can use this tactic against opposition parties in a minority government to force them to pass government policy that if denied would trigger an unfavorable election
4. Some votes such as budget motions or votes on a throne speech have always been considered votes of confidence
5. Motions by the opposition are not as common

Loss of Confidence

1. When confidence is lost the PM can either resign ir ask the governor general to dissolve parliament for an election
2. If the PM resigns the governor general can ask an opposition leader to form government
3. In a majority situation a PM can take confidence for granted
4. PMs do not like minorities and will try for a majority if they think it is possible

Prorogation and Dissolution

1. These powers are legally the powers of the Governor general
2. There must be a sitting of parliament at least once every 12 months so a prorogation cannot exceed that
3. House of commons and senate do not meet during a prorogation nor do they committee
4. Prorogations are routine
5. To dissolve parliament is to terminate business completely and bring an end to the tenure of MPs there
6. The governor general's role in these is purely symbolic byt the PM must ask for them to do it
7. It would be unconventional for this request to be denied
8. King-Byng affair was the only example for a request for dissolution to be denied, and prorogation has never been denied

The Consequences of a Crumbled Consensus

The Confidence Convention

1. Hard to tell when a PM has lost the confidence of parliament
2. A conservative once raised a motion saying that the PM should have a committee or resign
3. Paul Marin did not resign, and claimed that the motion was procedural rather than substantive and thus did not qualify as a confidence motion
4. Historical percent does not support Martin's thought as as four governments previously had been defeated by similar motions
5. Others think that since he went on to win various votes including a budget that he still had the confidence of parliament
6. Harper after they lost a confidence vote offered that the PM could ask for another confidence vote
7. Harper delayed a confidence vote by delaying opposition days, then withdrawing proposals for controversial legislation
8. Leaders then took to the airwaves to argue that they should control government, either through a harper minority, or a dion coalition
9. Question of if the governor general should listen to the PM when they have lost the confidence of parliament

Silencing the House of Commons

1. Prorogation and dissolution bing the work of the house of commons to an end
2. These allow the government to work on a new agenda and to have a throne speech
3. Prorogation can also be used by a PM to avoid a defeat or avoid scrutiny
4. Prorogation of 2008 had protest against it for the first omte
5. Jean Cretien also used prorogation for political purposes
6. This prorogation gave Canadians an opportunity to become more aware of the constitution and the uncertainty about it
7. This event did not set a precedent for the future, so if a similar situation occurs it will be just as murky

Lecture - Sources of Law

1. Morality - provides a guide for conduct
2. Law - written rules that are imposed on us
3. Precedent, and legislation are the main sources of law in Canada
    a. This is true of most common law legal systems
4. Common law - find the most similar case to decide what action should be taken in the present case
5. Civil law - based on written codes, legislation and written constitutions
    a. They have massive written codes
    b. Quebec uses this for private law disputes
6. Precedent cases are important, but statutes are the most important
7. Legislatures are the sovereign decision making bodies in canada - parliamentary sovereignty
8. Judges will often leave their answers very abstract so that the political actors can fill in the blanks

9. 11 sovereign legislative bodies in canada - but they are restricted by the constitution
    a. 10 provincial government, 1 federal government
10. There are 3 phases in the legislative process, cabinet phases, parliamentary stage, and then comes into law
11. Primary legislation
    a. Goes through the process
12. Subordinate legislation
    a. Enacted by a person or tribunal that is subordinate, but has been delegated these roles
    b. Examples are regulations and by-laws
    c. One example is a municipal government
    d. Provinces have power over municipalities
13. Cases
    a. Courts are bound to follow precedent - stare decisis
    b. Lower courts are bound to follow higher courts
14. Other sources can be
    a. Custom and convention
    b. Royal prerogative
    c. Morality
    d. Writing of notable scholars - judges will actually look to their books during legal decisions

Types of Constitutional Rules

1. Constitutional Law
    a. A foundational law enforced by the courts that is difficult to change
    b. Even higher than primary legislation
    c. Significant amending procedure
    d. Provinces and the federal government have to both agree to change it
    e. Legally enforced rule
2. Constitutional Conventions
    a. A political rule rather than a legal rule
    b. Politically enforced rule
    c. Created by common acceptance by a lot of people
    d. Indirectly enforced, the recognition of the convention makes the convention enforceable
    e. Conventions have been used in court decisions before
3. Organic Statues/Quasi Constitutional Statutes
    a. Statue - it is an act of an authoritative administrative body
    b. Organic - pertains to constitutional matters
    c. Organic statutes deal with constitutional matters or questions
    d. Passed by parliament relevant to constitutional issues, but did not go through the more rigorous system of constitutional amendments
    e. The advantage of statutes is that they can be brought to court, and be enforceable

    f. Ex. 1960 bill of rights - protected rights, but was difficult to protect as they could not make it more important than other laws
    g. Constitutional rights only really got put in place in 1982
    h. Can add a manor and form requirement makes a statue a little bit more powerful, and there is a bit more assent needed to pass
    i. Government would have to say that a law they were creating would not have to align with the bill of rights
    j. Harper's fixed election date legislation is also an organic statute
    k. Organic statues can be violated
    l. Idea is that political actors will just follow them
4. Conventions are very important aspects, many things are determined by convention

Responsible government

1. Foundation of canada's political system
2. 5 conventions of responsible government
    a. Crown only acts on advice of its ministers
    b. Crown normally only appoints MPs to be its ministers or advisors
        i. This holds them to account during question period
        ii. Run for the next seat available, and resign from their cabinet position if they lose (this is convention)
    c. Collective ministerial responsibility
        i. Why you don't see public criticisms of the government from cabinet ministers
        ii. Have to resign if they are going to critique
    d. Confidence
        i. The crown can only maintain misters people who have the majority of support in the HoC
        ii. If they fail to pass an important bill then they do not have the confidence of the HoC and have to resign
    e. Ministry without confidence must resign or call new elections
        i. The PM would have to resign or call elections
3. These concepts are not laid out in the constitution, they are just principles

Something trivial

1. Formal and political executive
2. Formal - performs ceremonial actions, Queen is the head of state
3. Political executive is the PM and cabinet ministers
    a. Part of the legislative branch of government
4. BNA act does not mention the PM at all
5. The constitution gives the GG a lot of discretion, and according to it has a lot of power
6. GG can refuse to sign a bill, or set it aside for 2 years
7. These powers are rarely used, and if they are used they are done with the consent of the PM and council
8. The crown plays a more ceremonial role, but there are some areas where they have some discretion (prerogative powers)

Parliamentary Systems

1. Head of state invoices someone from the legislature to form and head the government
2. The PM presents a cabinet to the head of state and then they are sworn in
3. New cabinet meets the legislature and receives its confidence or not
4. Head of state also decides when the government should dissolve
5. Head of the state decises and enforces the conventions of responsible government
6. Head of state is the guardian of the system
7. Have more or less power depending on the country

Head of state

1. Official that ensures that the government has the confidence of government
2. They have 3 reserve powers that can be verified at the discretion of the GG
    a. Appointment - pick the PM and invite them
    b. Dismissal - can force the PM to resign (not been used so far)
    c. Dissolution - dissolve parliament and call elections, this can involve some discretion especially when there is a minority government
        i. This has happened once federally, and a few times provincially
3. BNA act gives the GG the power to summon and dissolve parliament, but most is rooted in conventions

Q - what degree of discretion does the GG have?

1. Do they have to follow the PM's orders, or do they have personal decision making power
2. Convention is that the incumbent PM gets the first change to form government if it is a minority government
3. If the leading party is unable to get confidence then they can turn to another party to see if they can get the support
    a. Happened in Ontario 1985
4. Wouldn't call elections without the house even trying to form a government
5. If the PM has a majority and asks for parlement to be dissolved this will happen
6. If there is a minority, they could go to another party leader, instead of dissolving

King-Byng Affair - 1926

1. Being refused king's request for dissolution
2. King had a minority, and had less seats because he had the support of another party
3. Scandal involving corruption came out
4. Opposition parties were discussing a motion of censure - this motion was going to pass
    a. Harsh criticism, but does not force to resign
5. King tried to preempt this by having another election
6. Byng appointed the conservative party but they did not have the support of the house
7. King gave the impression that Byng had allowed the conservatives to govern illegally
8. The convention now is that the GG must do what the PM asks
9. Since this, no GG has refused any advice of the PM

Constitutional Convention - Excerpt from book Democratizing the constitution

1. They say you cannot have a convention without a widespread general agreement
2. Questions surrounding what happens if a PM loses a confidence motion
3. Statues to clarify conventions of responsible government
4. Don't want to give the GG discretionary power as they are not elected
5. Suggest 4 changes

    a. Requirement for Parlement to be summoned 30 days after an election;
    b. Fixed election dates, 2/3 majority non-confidence vote required to dissolve Parliament early;
    c. Only explicit non-confidence motions would count as confidence votes and these would have to be “constructive” (have to support a new PM)
    d. Consent of the Commons required before prorogation is granted

Coalition Controversies of 2008

1. Did the GG have to accept the advice of the PM to prorogue parliament as he had a minority
2. Liberals, Bloc, NDP formed a coalition with a formal agreement to topple the conservatives as soon as possible
3. To avoid this non-confidence motion Harper prorogued parliament so they could not put in place this non-confidence movement
4. Prorogation - end of a parliamentary session - it happens regularly, government resets an agenda
5. Dissolution - termination of parliament, elections and a new parliament must follow
6. Recess - short break within a session of parliament (summer and winter holidays)
7. Harper’s prorogation was politically motivated, as he wanted a cooling off period so people would be less mad at them, not the first time this had happened
8. Question is if the GG had to agree to this prorogation
    a. Essentially they were deciding between a conservative or a coalition government
    b. Conventions are not entirely clear

Conventions

1. GG listening to PM
    a. Fairly solid
    b. Bad relationship
    c. Some dissent from the people
2. Appoint non-partisans to the senate
    a. Not a lot of foundation, not many rotations of government through that
    b. Pretty supported by the public
    c. Senators would not let them be effective
    d. The public would be frustrated
3. GG rotates between being French and English
    a. A pretty solid convention, its been happening for a while, country is bilingual
    b. Similar media outrage to having a non-bilingual GG
4. Fixed elections
    a. Not solid, routinely violated
    b. People still get angry, encourages them to think twice before calling an election

Module A - Week 3 - Understanding Judicial Decision-Making

Lecture

1. Legal resource assignment is due monday
2. Cases/precedent are the main sources of judicial decision making in canada
3. Adjudicative model
    a. Judges confine their role to the adjudication of private disputes

    b. Similar to legal positivism - scientific approach to law, there is a method to finding the true core of the law
    c. Avoids questions of morality or values
    d. Focuses on letter of legal documents
    e. There is a single true answer to law that can be found though applying principles of legal interpretation
    f. Judges are still somewhat interpreters of the law
        i. Figure out how to apply existing legal principles to a concrete case
    g. Not possible for judges to be completely passive, but body of legal principles are found outside of courts
    h. Judges make decisions based on the concrete dispute in front of them
    i. Only modify law enough to apply it to a specific situation
    j. Not future oriented
4. Policy making model
    a. Judges have a quasi-legislative role because of ambiguity or because it is seen as a good thing for judges to impact policy
    b. Judicial activism is expected so that law can respond to changing political conditions
    c. Policy making function is just as important than their adjudicative roles

Approaches to Law

1. 4 main theories
    a. Legal positivism
    b. Natural law - cant divorce law from moral questions
    c. Legal realism / Sociological perspectives - there are factors outside of law that impact legal decision making, there are gaps in the laws that are filled by judges personalities and their background factors
    d. Critical legal studies - critical race theory, feminism, critical of legal positivism and the assumptions that it makes
2. Provide a more philosophically complete picture of the law
3. 2,3,4 are all critiques of legal positivism, more policy making like

2 models of Judicial Decision Making

1. Chart on slide 4

Access to courts

    a. Adjective - only access to parties in the dispute
    b. Policy making - more relaxed, bring it forward if they are involved, or if they are an interested citizen and there is no other way that the issue would be brought forward
2. R v Borowski (1981) - man wanted to challenge the abortion law
    a. He was not involved in aboriton at all, not a doctor, or woman
    b. Granted standing because he was a interested citizen and nobody else was brining a case forward
    c. Case got to SC on 1989, and by then the law had been struck down that he was challenging
    d. He still wanted them to hear the case, as he wanted to say his pro-life side

    e. He was declined, as there was no law to effect
3. Smith Case (1924)
    a. Sc said a person could only bring a case forward if the issue directly affected them
4. More flexibility for standing in constitutional law cases - in line with the policy making approach
5. Mootness - a case that is no longer live
    a. Adjudicative model would not want to hear the case, policy making would say it might have implications on the future
    b. To hear most cases they would have to have some impact on legislation
    c. Some moot cases will still be heard
6. Ripeness - has the despite had enough time to establish a good foundation, will courts hear cases that are somewhat hypothetical

Number of Parties

1. Third party interveners
    a. Encouraged in the policy making model
    b. Interest in the case but not parties to a dispute
    c. Often non-profit organizations, or lobbying groups
    d. Present oral arguments before the court or make written statements
    e. Adjudicative model - bi-polar, only want 2 parties

Fact finding

1. Lower courts find adjudicative facts - what happened, case specific facts
2. Appeal courts will often collect their own social facts - legislative facts, about broader context of the case
3. Adjudicative model - legalistic fact finding process, strict rules of judicial notice
    a. Judges can take into account extra facts only if both sides agree on that fact
4. Policy making model - looser judicial notice rule would allow a judge to bring in additional outside information, like gladue, can do own background research
5. Judges can be more active in fact finding

Mode of Reasoning

1. Adjudicative model - creation of new rules must be moderate in incremental, but they should mainly interpret how rules should be applied to a specific case
2. In policy making model - focus is on creating law to govern future behavior, courts should be less different to legislatures, more judicial discretion

Stare Decisis

1. Follow precedent of previous courses, and follow the precedent set by higher courts
2. Like cases should be decided alike
3. Courts must follow the decisions of the highest court, with persuasive actions towards similar level courts, or higher courts in other jurisdictions
4. Highest court in other common law jurisdictions would have some impact on canadian courts
5. More recent precedent cases are more influential
6. Possible to have federal laws that are interpreted differently in different provinces
7. The decisions of outer provincial courts are not highly persuasive on other provinces

8. Federal laws can vary province to province until the SC steps in and fixes it
    a. 1988 there were two cases that went before provincial courts of appeal
    b. R. v. Keegstra – AB CA struck down Criminal Code section banning the distribution of hate literature
    c. R. v. Andrews – ON CA ruled the same section was constitutional
    d. In 1990 there was a unifying influence provided by the supreme court
    e. Overturned Alberta's ruling and upheld the secion banning hate literature
9. Question of how binding precedent is
    a. There are still ways to get around precedent
    b. Distinguishing - argue that the cases are not similar so precedent does not need to be followed
    c. Obiter dicta - argue that something is extraneous and is not persuasive on the ruling
    d. Per Incuriam - precedent case was wrongly decided in some way
    e. They could ignore precedent overall, but usually they use one of the other ones
10. Is the SC bound by precedent?
    a. No court has binding authority on the SC
    b. JCPC and other state courts are considered persuasive, but they are only bound by their own decisions, or decisions that the JCPC made previously
    c. Think that their main job is to get the job done right, so they don't follow pass interactions of the court
    d. They have indicated in passing that they don't have to adhere to precedent, but this was not direct
11. Most judges believe that there is a need for stability and predictability from a closer adherence to precedent, but they also think that they should have some flexibility in determining each case

Principles of Statutory Interpretation

1. Need to figure out how to interpret written law
2. Framers intent/original intent - what did the people who wrote it intend for it to mean
3. No common intent actually existed between all the people who wrote it, but it is a useful legal fiction
4. Supporters
    a. Allows for a neutral interpretation rather than what judges think it should say
    b. It refers to the legislature, and is thus democratic
    c. Promotes greater predictability and stability in law
5. Opponents
    a. Can't restrict it to ideas at the time passed
    b. Need for the law to keep up with current social values
    c. Impossible to determine the framer's intent, especially as there was many people writing the law
6. In constitutional law it has not been a major factor in judicial decision making
7. JCPC completely ignored framers intent in their decisions

8. JCPC took this position as they were reluctant to use legislative history like reports, testimony and speeches in interpreting law and thus they would have no basis to determining what the framers intent was
9. SC uses living tree doctrine as they believe that law should evolve over time as law changes
10. Proponents of framers intent would be more lily to fall into adjudicative model

Textualist Approach

1. JCPC took this approach
2. Read the text and interpret what it means
3. Rules of construction
    a. Plain meaning - literal interpretation, explain words in terms of statute
    b. Golden rule - modify the terms to fix inconsistencies if it is unjust of absurd, do as little as possible
    c. Mischief rule - what mischief was it designed to remedy, what problem was it supposed to solve
        i. Allows outside material to be introduced to gather the meaning
        ii. This would be the only place that framers intent could be used
4. Go through first two first, then start bringing in outside information

Aids to Statutory Interpretation

1. Help judges if text isn't clear
2. Look to definition section
3. Look for content in other sections of same text
4. Interpretation statutes - general in nature, and apply to all federal or provincial legislation, provide general definitions for all documents
5. Other statues from same legislative body on the same subject
6. Legislative history - help to figure out what provision means, not a major factor in canada, usually look at predecessors to law
7. Legally treaties and dictionaries like the one by Peter Hogg
8. Text of statue in other official language

“Extra-legal” Factors in Judicial Interpretation

1. Policy preferences/ideology/attitudinal model
    a. Emerged in the US
    b. Claimed that judges used the law to actually get what they wanted
    c. Argument is that you can predict results by knowing the ideological makeup of the court
    d. These have traditionally been less clear in canada
    e. Some question about if this is changing, and if the ideologies of judges is becoming important, there are competing studies on this topic
2. Role orientations
    a. Judges conception of how they should act
    b. Judicial activism vs judicial restraint - activists see a stronger role for themselves, restraint allows for a stronger role for the legislature
    c. This says nothing of their values, just how active they are
3. Personal attributes will impact their decisions

    a. Everyone has a set of values, experiences and assumptions that shape their attitudes and decisions
    b. Race, gender and class background impact their decisions
4. Personal relationships
    a. Persuade people to join their opinion
    b. Some were okay with having dissenting opinions
5. External influences
    a. Public opinion, media, legal community, interest groups, parliament and the executive
6. These would be considered important by non-positive theories as they go beyond the direct facts of the case
7. Theory that judges want some sort of result in the case, and then they pick things that back this result up
8. Law cannot be separated from its context

Law, Politics and the Judicial Process in Canada

1. Developments in law include an entrenched bill of rights, and the house of lord overturning their rule that precedents could not be overruled
2. There is also used of the behavioral sciences to study judicial decision making
3. There is a set of expectations about what conduct is appropriate to judges
4. There is a debate if judges should be adjudicators or policy makers

Adjudication of Disputes Model

1. Mechanical application of legal rules which are found established in the legal system
2. These are binding on judges
3. Judges adjudicate specific concrete disputes and dispose of rpob,es by applying a legal regime to facts

Settlement of Concrete Disputes

1. Not future oriented or debates over general policy questions

An Adversary Process

1. Interested parties have the opportunity to addicate evide and make arguments to the interested but impartial arbiter(judge)

Need for Standards

1. Must be a consensus between the parties about what standards are going to apply
2. People should be able to reasonably know n the standards that would be used to examine their conduct at the time of their actions
3. The adjudicative process should have enhanced rationality

Judicial Policy Maker Model

1. Judges should collaborate with other bodies in society to create the law as it ought to be
2. Should be limits on judicial decision making to legitimate the final product
3. Many political scientist believe that judges should be perceived as political actors
4. For some courts political action is becoming their primary concern
5. When judges become policy makers they will be subjected to political pressures, and their decision shall be subject to the same analysis that is applies to other political actors

Canadian Courts - Law, Politics and Process

1. There are many influences on judges decisions

Distinguishing Trial and Appeal Court Decision

1. Three important steps in a trial judge's decision making
    a. Identifying relevant facts
    b. Identifying relevant law
    c. Combining facts nad law to produce the right result
2. Adversarial nature menas lawyers have an interest in obscuring facts
3. Appeal courts review lawyer courts decisions
4. On questions of law appellate judges review as if it were new, but defer to trial dges for facts of the case
5. Role of appellate courts is to delineate and define legal rules
6. High- level courts of appeal direct their attention to clarifying the law and developing it
7. They are able to address issues with less pressures than trial judges

Deciding to take a case - appellate courts first decision

1. The higher the level of appeal court the more discretion judges have in deciding what cases they want to hear
2. Provincial and appellate divisions of federal courts hear cases primarily as of right rather than by leave
3. Supreme court hears more cases by leave
4. There is a unit in the SC responsible for screening appeals
5. Panels on the Square of 3 and made at random
    a. 2 quebec judges sit on one panel and judge ases primarily from Quebec
6. SC accepts applicants for leave if they are issues of public importance, but this is not defined
7. Also more likely to grant leave if there is a change that a person has been unfairly convicted
8. Different panels emphasise different rules in making their decision
9. SCC judges will often volunteer to write opinions

Process of Hearing and Deciding Cases

1. Once leave is granted parties make written submissions to the court
2. Then a date is set for oral arguments
3. This is about 8 months after notice of appeal is filed
4. Sometimes they know panel in advance, other times they do not
5. There is a preference for larger panels
6. Frequent panel is is 7
7. More likely to assign all 9 justices when there is a charter issue present
8. Judges with expertise in some area are more likely to sit on panels for cases relating to that
9. More likely to sit on cases from their home province

Oral Arguments and Preliminary Votes

1. In appellate courts only the parties lawyers attend and they are given a specified amount of time to present their argument
2. Judges frequently interrupt and ask questions
3. Judges then meet in conference to discuss the case
4. In the SC they go from most junior to sr to hear initial votes

Crafting Opinions in a Case

1. The author of the majority opinion have to send a draft to the judges in an effort to get as many judges as possible to sign onto it
2. They prefer a unanimous decision for controversial cases
3. Dissenting opinions are rarer in provincial courts
4. Dissenting opinions can make the majority stronger or provide an opportunity for legislatures to change laws
5. Concurring opinions can be written by a judge who agrees with the outcome of the case, but not the reasoning behind it

Outcome of the Case

1. Appellate courts can vote to uphold the lower court's opinion or overturn it
2. Provincial courts hear most cases as of right and dismiss more than they allow
3. SCC dismisses and allowing the appeals in about equal measure

Determinants of Judicial Decision Making

1. SC justices face fewer restriction
2. Their cases are more complex and have no clear solution

Legal Factors

1. The law is often ambiguous and open to different interpretations
2. Argue that the law should only be altered by parliament, and that judges have to honour the correct interpretation of the law

Precedent

1. The court create precedent
2. Stare decisis
3. Provincial courts are not bound to follow each others opinions, their decisions are merely considered persuasive
4. Ratio decidendi - legal reasoning necessary to decide the case
5. Ober dictum - discussion of law that are not the basis of courts decisions
6. There is a value in stability of law
7. Less pressure to follow precedent at the SC and more pressure to get it fight
8. Some suggest that justices reach the decision they want and then use precedent to justify their result

Framers Intent

1. A way to figure out what the law means
2. Also called original intent in the US
3. Look at legislative history for it
4. Others think that the law should be kept in time as part of the living tree doctrine
5. Idea that the framers may have left it open
6. Court sometimes uses it as a starting point, not as something they are bound by

Statutory Interpretation: Legislative intent and Textualism

1. States that the judge should look at the legislative intent while drafting a provision
2. Idea that the text should be what determines the law
3. Is the meaning is ambiguous then there is the mischief rule
4. Some argue that plain meaning is not as objective as something

Policy Preferences

1. Idea that the policy preferences of judges play some role in decisions
2. Knowing who is on a panel allows for somewhat accurate predictions of how the court will rule
3. Judges used to be perceived as non-political

Measuring Judicial Policy Preferences

1. Attitudinal model - additional responses to specific facts of a case that can be triggered in different areas of law
2. Scholars usually turn to outside measles of ideology
3. Policy preferences may change

Testing Policy Preferences in Canada

1. Ideology plates a role in criminal and economic cases but not a significant role in civil rights and liberties

Strategic Model of Decision making

1. Believes that justices have goals that they are pursuing
2. They face constraints which cause them to adjust their positions

Role Orientations

1. May be influenced by what they believe to be appropriate behavior

Personal Attributes

1. Career experiences, education, partisan affiliation, background and other related factors shape a justice's addities

Gender

1. Female jdeges voted liverarlly in civl rights and empliyent discrimination cases more often
2. They also affect the voting preferences of male judges
3. Gender doesn't influence decisions in all areas of law

Courts and Inside Influences

1. In majority rules cases they might tailor their decision in a way to appeal to other judges
2. unanimous decisions are believed to have more legitimacy

Courts and Outside influences

1. Should feel relatively security in ignoring outside indulgences they are secure in their jobs
2. They may still value the approval of outside influences

Public Opinion

1. In high profile cases the media may keep public informed of courts behaviour
2. Justices may avoid controversial decisions that divide public opinion
3. Judges are more likely to compromise for unanimity if a decision is controversial

The Media

1. Judges may want to have positive reactions from the public and media so their decisions get enforced, but they also may just enjoy positive coverage

Legal Community

1. Care about the opinions of those close to them
2. Citation of legal academics has become more of the norm

Interest Groups

1. Interest groups may sponsor a case or intervening in it

Parliament and the Executive

1. Governments are responsible for appointing judges at all levels
2. This means governments can shape courts approaches over the long term
3. Governments have usually not taken advantage of this power
4. Judges might also be concerned about the enforcement of their decisions

Module B - Week 6 - Federalism After 1949: POGG and the Spending Power

Lecture

Review

1. Each level of government has a sphere of sovereign power
2. enumerated powers are in sections 91 and 92
3. Beginning of section 91 has the POGG powers preamble - the general power
4. Potential problem with POGG is determining what it means
    a. Matters if it is interpreted narrowly or broadly
5. JCPC interpreted POGG narrowly
6. POGG is broken up into three main branches
    a. Residual power
    b. National concern
    c. Emergency power branch

Evolution of POGG

1. National concern is created in Russel v the Queen
2. It is then narrowed over the years
3. POGG becomes essentially an emergency doctrine only
4. There are hints of the idea of national concern in the Russell decision
5. Local prohibition case names the national concern doctrine, but says that it should be limited
6. JCPC ruled that when conflicting laws exit the federal law is paramount
7. Board of commerce - POGG is exceptional, only use when there is an emergency
8. Toronto electric commissioners - confirms that it is for emergencies only, tries to explain the Russell case as being an emergency
9. EI - emergencies must be temporary
10. Broad reading of provincial powers, narrow reading of POGG
11. Amendment to the constitution that creates employment insurance as a specific aspect of the constitution under the federal powers
12. When the SCC becomes Canada's top court
13. JCPC takes a bit of a shift in their last case - Canada temperance act
    a. Ontario wanted to see if that legislation would still be supported
    b. Question of if they can still have the prohibition legislation
    c. Court claimed that the reduction of POGG to an emergency power was too narrow a reading, this moved to an increase in national concern ideas
14. SC continues to bring back the idea of POGG involving national concern
15. Some narrow expansions in the federal powers
16. SC has more complicated decisions than the JCPC
17. JCPC had unanimous answers, no dissents or concurrences

18. SC has influential dissents

Reference Re Anti-Inflation Act

1. Impugned legislation
    a. Federal legislation to enact wage and price controls in the wake of the OPEC crisis
    b. Controls applied to private sector, federal decor employees provinces could opt in for public sector employees
    c. The legislation needed to be renewed in 3 years - so it was temporary
2. SCC decision - 7-2 majority said that it was intra-vires
3. Reasoning - it invades provincial tuition but it is temporary so it is justified
4. Political implications
    a. First-time emergency doctrine was used in peacetime
    b. How to determine what is an emergency
    c. Living tree doctrine - not a loose or a tight definition of national concern
5. Specific issues
    a. Is the act supportable as crisis legislation under emergency doctrine of POGG
        i. More clearly set out than national concern doctrine
        ii. Reduction of inflation is a matter of serious concern, it is an urgent matter
        iii. Evidence of a crisis
    b. Said that it is valid emergency legislation
6. Dissenting opinion - written by Beetz, quite influential - extends to the provincial private sector
    a. National concern doctrine is problematic due to the broad definition of inflation - gives the federal government too much economic power
    b. Containment of inflation is not a new concern
    c. Inflation is not temporary, it has existed forever
    d. Doesn't think it should be used on broad matters that affect provincial jurisdiction
    e. Recognized that national concern and emergency powers are not the same
    f. National concern - confine it and not put broad topics under it
    g. Emergency - explicitly declare an emergency to make laws under emergency doctrine
7. First time the emergency doctrine was used in peacetime
8. Federal war measures act was changed to the emergencies act as a result
9. The burden of proof for determining if there is an emergency lies on those who challenge the emergency

The Queen v. Crown Zellerbach Canada Ltd. (1988)

1. Refines the criteria for national concern
2. Impugned legislation - ocean dumping control act
3. CZ dredged wood waste from ocean and dumped it into provincial marine waters
4. Company was charged for not having a permit for dumping
5. ODCA is federal legislation but define sea as all internal waters that are not fresh water
6. Question if the ocean dumping act is within the jurisdiction of the federal government
7. 4-3 majority supported the appeal which sought the conviction of CZ

8. Said that the enumerated powers of the feds does not give them the power to legislate this
9. Question of if it could be justified under POGG
10. 4 conclusions about national concern doctrine
    a. Distinct from the emergency powers
    b. National concern applies to issues that didn't exist at federation, and things that have become matters of national concern
    c. It must have a singleness, distinctiveness and indivisibility that distinguishes it from matters of provincial concern
    d. Provincial inability test - if a province does not deal with an issue there will be extra-provincial effects
11. Claimed that marine pollution was a single distinct indivisible issue
12. This legislation is constitutional
13. Dissenting opinion
    a. Concern over federal power to control pollution
    b. May be hard to control federal power if it grows too big
    c. Better to require the provincial powers and federal powers to cooperation
14. Upheld federal legislation using the provincial inability test for the first time
    a. Used during the carbon tax arguments today

R v Hydro Quebec Case

1. Turn towards federal enumerated powers for environmental legislation
2. Enlarged scope of criminal law power - way for the federal government to prohibit pollution by attaching a criminal law punishment to it
3. Argue that it doesn't interfere with the provinces

Reference re Greenhouse Gas Pollution Pricing Act (GGPPA)

1. Canada has had a carbon tax since 2018
2. $10 carbon price which rose by $10 a year
3. Federal backstop bill
4. Part 1 - levy on fossil fuels
5. Part 2 - cap and trade system for large emitters
6. Through this legislation the federal government has imposed a federal government
7. Provinces can put in their own comparable program
8. Alberta, Saskatchewan and Ontario put in a case
9. 6-3 decision in terms of Canada upholding the act
10. Majority
    a. Pith and substance - establishing minimum national standards, backstop legislation
    b. Majority is okay with putting more issues in federal jurisdiction
    c. Okay if both government can legislate - they should work towards a harmonious regime
    d. Because of the way pith and substance is defined that POGG must be used
    e. Want to limit the impact of this decision
11. Provinces could cooperate - but if one didn't sign on then the whole thing would collapse, thus thus is not an option

12. Grave extra provincial effects of climate change
13. One province not holding up its bargain is a serious risk
14. Provinces cannot do this on their own
15. Impact on provincial power is qualified and limited - everyone just has to meet the minimum standard
16. Dissent - particularly Malcolm Rowe - a different perspective on POGG
    a. National concern is a residual power of last resort - cannot be used here
    b. Preamble in POGG stresses that anything under provincial jurisdiction cannot be under federal jurisdiction - if you interpret it strictly
    c. For Rowe POGG national concern is a residual power that can only be used if it doesn't fall under a provincial jurisdiction
    d. Criteria for national concern
    e. Disagree with modernization of national concern doctrine
    f. Disagreement about double aspect doctrine - he says that it belongs in one box of the other
17. Implication is possible widening of power, dissents are very worried about that
18. Supervisory federalism - feds dictate the standards the provinces put in place
19. Fear That the feds could create minimum national standards for everything

2008 Liberal Green Shift

1. Main plank is a carbon tax, not a carbon tax floor
2. They were going to use this to lower income taxes

Federal Taxation

1. Powers of resolution and disallowance were frequently used
2. Rise of the federal spending power begins where conditional grants begin
3. Ability of the federal government to spend its money how it wants - including attaching conditions to financial transfers
4. The more centralized the country is the more conditions on grants
5. Equalization grants are unconditional
6. Health grants are conditional grants
7. Conditional grants is how the federal government funds our provincial health care system
8. 5 conditions for provincial health
    a. Universality as well as others
    b. Extra bills - charing more than the agreed upon rate that amount gets paid back to the federal government
9. Abide by act over fear they will stop getting money

Module B - Week 4 - Introduction to Federalism and Judicial Review

Lecture - Introduction to Federalism and Judicial Review

1. Federal government approved the trans mountain pipeline
2. Question if interprovincial pipelines are federal jurisdiction
3. Section 92 gives privinesc power over local works and undertaking, but there is an exceptions

    a. Exception is inter-provincial works
4. Some ways that provincial governments can complicate this as governments can regulate what occurs on their territory
    a. Lil Jay get struck down if they are seen to be interfering too greatly with federal works
5. There have been many legal battles over pipelines

Judicial Review

1. Courts decide on pipelines through judicial review
2. Different than an appeal - appeals focus on if a court decided properly
3. Courts rule on if a decision was lawful anyways
4. Constitutional law - examines legislation to determine if it is constitutional
5. If it is not it is intra vires and it will be struck down
6. This applies to legislation and executive activities
7. This had a fairly narrow scope - as it only dealt with distribution of powers, now deals with violations of the charter

Federalism

1. A method of dividing powers so that the general and regional governments are each within a sphere coordinate and independent
2. Powers are divided
3. They have some degree of autonomy in some areas
4. If a regional government had no sovereignty then it would be a unitary state
5. Confederation - sovereignty is held by regional governments, not a federal one
6. Federalism - shared between central and constituent government

Quasi Federal System

1. Sir john A Macdonald - all the great subjects of general legislation should be conferred on the federal government
2. This avoided the problem of state rights
3. To avoid having a fragmented system canada developed a Quasi federal
4. It was more of a dissolved unitary government

Lecture - The Division of Powers and Evolution of Canadian Federalism

1. These are found in part VI of the BNA act
2. The constitution lays out what powers each government has

Concurrent powers

1. Both held by federal and provincial governments
2. Federal paramountcy unless the constitution says otherwise

Residuals powers

1. Powers not specified in the constitution
2. New issues arise over time that were not consisted

Provincial

1. Provincial government can only collect direct taxes, while the federal government could collect indirect taxes
    a. These indirect taxes were the most important and direct were not collected much
    b. When provinces wanted to impose more taxes they had to convince the federal government to lower their taxes

2. Reservation period for provincial governments is only 1 year
3. Provincial governments has power over property and civil rights in the province and all local and private natures in the provinces
    a. JCPC interpreted these very widely and federal powers very narrowly

Federal

1. Powers of reservation and disallowance
2. Veto power of governor general or ability to set it aside
3. Declaratory power
    a. Federal government can declare something that is under provincial power to be of the canadian interest and then they would be a federal power
4. Criminal law power - federal government to prohibit a behavior by declaring it a crime

Centralization

1. There have been swings in provincial dominance and we are now moving towards provincial autonomy
2. There was a shift towards provincial autonomy after pro provincial rulings of the JCPC
3. Dual federalism - defined or distinct power with little room for overlap
4. Greater equality between levels
5. More centralization during the war period and while they built the welfare state
6. Federal government uses it superior inances to bully the prinvies into what they want
7. Era of contested federalism leads to increased provincial autonomy

Origins of Judicial Review - Lecture

1. Suggested that the JCPC played a major role in declining federal powers
2. Judicial review by the JCPC was going to undermine federal power
3. Why did john a macdonald agree to it
4. Judicial review was established when the supreme court act was passed
5. Gave supreme court jurisdiction in reviewing legislation
6. A reference questions was created
7. GG can refer things or questions to the court
8. These questions are not binding, but they would lose if it went to court

Why did Macdonald Agree

1. BNA allowed the federal government to basically control all legislation
2. Federalists agreed to it because they did not expect that it would rule in the favour of the provincial government
3. This would mean that the government wouldn't have to use their unpopular powers
4. Provincial pushback and some concessions were demanded by those who wanted to use the courts as an umpire of federalism
5. Federal government hoped that an appeal to JCPC would not occur
6. The JCPC stayed on even as the supreme court was involved
7. Court decisions started siding with the provinces

Provincial Rights

1. Federal government focused on economic nationalism
2. Different parties dominated at different levels
3. Citizens tended to side with the provinces
4. Wanted the provinces to be equal partners with the federal government

5. Lieutenant governor was appointed by the governor general and they did not like this
6. Reservation and disallowance became unusable as it was so unpopular
7. JCPC allowed provinces to make tangible changes
8. Once the JCPC took over judicial review and they supported the provinces more
9. JCPC was only able to undo federal governance as people supported their provincial governments more

Judicial Review on Federal Grounds - Lecture

1. Question is the challenges law intra or ultra vires of the powers of the body who enacted it
2. Preamble to sections 91 and 92
3. Look at law and characterize the law
4. Interpret what class of subject should this matter be assigned to
5. Pith and substance - what is the matter of the law
6. Some judges can be split on the matter of the law and thus which section it fits under
7. Recent pipelines cause constitutional questions regarding who has jurisdiction over it
8. Incidental effects/ancillary results - when a side effect of the law affects those outside of the jurisdiction
9. Need to prove connection between the core of the events
10. Double aspect - part of law may be federal, and part my be provincial
    a. Judicial restraints - something they can rely on when it is argued that it is outside the jurisdiction
11. Use mischief rule for interpreting the purpose of the legislation
12. Court can look at its effects
13. Is it colourable - is it framed misleadingly

Jurisdictional Review on Federal grounds

1. Does the law strike a vital part of a power held by a government - cannot be invaded by other jurisdiction
2. Possible for federal and provincial laws to conflict
    a. Federal laws prevail

Remedies for laws that are ultra-vires

1. Strike down a law and declare it unconstitutional
2. Severance - strike down a small part of the legislation
3. Reading down - if legislation can be read in broad and narrow ways they read it from the narrow

I have a question about the assignment. I submitted my group's work yesterday but we forgot to attach the photo of our meeting. I can’t submit the assignment so I was wondering if I could email in the picture or get one of my group members to submit it instead.

Module b quiz this thursday and friday - weeks 4 and 5 readings - in particular the one by russell, hog, monohan

Office hours wednesday about discussion paper assignment

No in-person class next week - just video lectures

The appellant goes first in the list (appellant v. respondent)

Module B - Week 5 - Federalism to 1949: POGG in the JCPC Era

Lecture - POGG

1. POGG - Peace, order and good government
2. Federal government can make POGG laws - general power as it has no specific content
    a. Debates about its interpretation
3. Enumerated - numberrdd powers are in the second half
4. 3 or 4 branches of POGG
    a. Emergency branch
        i. Parliament can enact any legislation if it regards an emergency
        ii. It can also be pre-emptive
        iii. Emergency powers should only be invoked if the government declares an emergency
        iv. This was used often by the JCPC
    b. Residual powers or gap branch
        i. If it doesn't follow within an enumerated power then it goes to the federal government
        ii. Gaps in enumerated heads
        iii. This is rarely used as an exclusive basis as provincial government has civil rights power which is interpreted very broadly
    c. National concern branch
        i. Used more after 1946
        ii. Question of what is a matter of national concern
    d. Matters of interprovincial concern (?)
        i. May be an emerging branch
        ii. We are going to ignore this for our purposes
        iii. Assume these fall under national concern branch instead
5. First three branches have been set out by the SC and explicitly acknowledged by them

Lecture 2

1. Russel v the Queen
    a. Impugned legislation - canada temperance act
    b. Russell was convicted of selling intoxicating liquors
    c. Convicted of the prohibition act
    d. JCPC upheld the act saying it was intra vires
    e. Question 1 - the pith and substance of the legislation

    f. Question 2 - does it fall under provincial enumerated powers
    g. Then it must be a federal power
    h. If it is a provincial power then
    i. Question 1 - is it also a federal enumerated power
    j. Question 2 - does it fall under the POGG powers
    k. If law falls under federal and provincial then there is the question of paramountcy
    l. Argued that it fell under federal powers and that it is a matter of general concern to the dominion
    m. Case becomes important because it outlines definition of POGG and restricted the federal trade and commerce powers
2. Local prohibition case
    a. Impugned legislation - ontario local prohibition act
    b. Question if the ontario government could enact prohibition legislation
    c. SCC said that they did not have this power, JCPC said that it was intra vires
    d. Provinces can make provincial laws as long as they are not of national significance
    e. Matter of local or private matter
    f. Problem that as per russel governments can also have these laws, federal legislation has paramountcy
    g. Introduces the president of federal paramountcy
    h. JCPC makes a distinction between POGG and enumerated powers
    i. POGG cannot be used to things listed in section 92
    j. Expresses national concern doctrine which presents a possible test for POGG - interpreted very narrowly, use it narrowly
3. Re Board of Commerce act and Combines and Fair Prices Act
    a. Corporations count gounce people on essential goods
    b. Issue of if the federal government can do this
    c. SC was divided
    d. JCPC said it was ultra vires
    e. Said that it was a permanent peacetime law, so it did not fall under emergency powers
    f. Provinces regulate civil rights so it belongs to the provinces
4. Toronto Electric commissioners
    a. Ultra vires as it walls under section 92 and is provintila power
    b. Said it is not federal enumerated powers
    c. Issue of russell case which said that powers go to general life of canada
    d. They are-interpreted it narrowly
    e. Explain how temperance was an extraordinary peril
    f. Set up a high bar for triggering POGG
    g. Said that the labour legislation did not trigger POGG
    h. Affirmed POGG as exclusively and emergency power
5. AG Canada Employment and social insurance act
    a. RB bennett tried to introduce more helps
    b. Lyon Mackenzie King referred it to SC and JCPC to see if it was intra vires

c. Agreed that it was beyond powers of government
d. Insurance provisions especially regarding employment fall under province
e. Not an emergency situation as it was permanent rather than temporary
f. Government claimed that it was to deal with the depression
g. Prevented government from responding to the depression
h. Growing hatred of the JCPC
i. Led to constitutional amend adding 91(2A) giving them federal employment insurance
j. Also important based on federal spending power
k. Question of if it was a form of taxation and therefore it could dispose of it anyway it wanted

Lecture 3

1. Question - why did they interpret federal powers narrowly and provincial powers broadly
2. Russel et al said that they were highly legalistic and they were trying to read the text in a logical way
3. Some argue that they were textualists, while others argue that they were policy makers
4. Citizens insurance
    a. Overlap
    b. Each legislation needs to be put in a cubbyhole
    c. Created a step-by-step approach
5. According to tecualism they should rely purely on what the law says
6. Question if they brought in something outside of the text
7. Idea that the framers intent was for federal dominance
    a. So if this mattered then they should have ruled in the federals favour
8. Classic federalism
    a. What the JCPC produced
    b. They would have been unfamiliar with federalism so they treated them as separate states
    c. Wanted to create watertight departments where each level has defined rules
    d. Create parameters where each powers ends
    e. Wasn't always possible to put something in its own box
9. Double aspect doctrine suggests an alternative
    a. Could be concerancy between levels requiring collaboration for anything to work
10. JCPC's classic federalism approach was indicated early on
11. Question of why they adopted this approach remains
12. Should the JCPC be confined to the framers intent

Module C - Week 7 - Constitutional Patriation and Secession

Lecture - Constitutional Patriation and Secession

1. Essay outline is not graded - pass or fail
2. Due before class
3. Discussion papers will be handed back Tuesday

Question - has the supreme court unduly intervened in amending the constitution

1. Question of quebec and the dualist origins of canada - now there is the idea of more than two nations, but this is a more recent thought emerging in the 60s and 70s

2. French have been after the preservation of their culture, and their language

Decline of French in canada

1. 1763 - frankophones outnumbered anglophones 8-1
2. 1800 - about equal
3. 1871 - anglophones outnumbered frankophones 2-1
4. 2011 - anglophones outnumbered franko phones 4-1
5. Outside of quebec only 4% of canadians have a mother tongue of french
6. Number of bilingual anglophones is slightly going up, but these are less french-canadians

Historical English-French Relations

1. BNA act was actually canada's 5th constitution
2. Royal proclamation of 1763 - assimilation of French
    a. Ruled with an advisory committee that excluded catholics
    b. Created schools to assimilate the french
    c. Influx of english speakers to north america, so the french didn't dominante anymore
    d. It was difficult to see the french markers of culture being given up
    e. Catholic church allowed them to preserve their identity
    f. They eventually dropped the assimilationist policies to avoid revolution
3. Quebec act of 1774
    a. Formal protection for french and roman catholic religion
    b. Dropped goal of formal assimilation
    c. Regime of cultural coexistence was formed
    d. Every ensuing constitution entrenched the protections of language and religion for the french

The Quiet Revolution

1. Hanging of Louis Riel and conscription crisis of the wars were points of anger
    a. These drove them away from the conservative party for a long time
2. French nationalism was turned into quebecois nationalism
3. Pre this nationalism was based on the catholic church and language
4. After this there was an assertion of self-governance
5. Most businesses in quebec were owned by the english
6. Emergence of a quebecois nationalism that quested the anglophone minority control over them
7. It was a secular movement focused on the quebec state
    a. Rattrapage - catching up
    b. Maitres chez nous - masters of their own house
8. Increasing role for the quebec state with the growth of the canadian welfare system, took over from the catholic church, more state coordination of functions, the state is dominated by the frankophones
9. Quiet revolution was a gradual thing
10. Split into federalists and nationalists in politics
11. There remained considerable disagreements as to how much the state should intervene

12. They want clear limits on the federal spending power - want to be able to opt-out of federal programs but get the same amount of money as everyone else - no strings attached payments
13. Concern with the decline of french across canada, so there are periodic language bills
14. 1980 Quebec referendum on sovereignty association - events heated up
    a. No - 59.6%
    b. Yes - 40.4%
15. Then there are negotiations for patriating canada's constitution
16. Reference cases are often used for political sticky issues as it helps them to avoid blame

Reference re Resolutions to Amend the Constitution (patriation reference 1981)

1. 1980 referendum on separation lost by a large margin
2. As of 1980 canada couldnt amend its constitution, had to ask the UK
3. Belief that Canada should be able to make changes itself, but it needed an amending formula
4. 1982 it repatriated the constitution and could amend it
5. It was really difficult to get the leaders of different levels to agree on what it would look like
6. Quebec was difficult
7. No sense that a package was going to be submitted to the people or even the legislature, it was mostly just an agreement between primeres
8. Wasn't clear that agreement of all primers was even responded
9. Wasn't clear that they needed any provincial consent to get an amendment
10. Trudeau announced that the federal government was going to proceed to patriate the constitution unilaterally
11. Provinces took this issue to court to decide if they had to be consulted or not
12. The peoples package included an amending formula, and a charter of rights and freedoms
13. In response, manitoba, nfld and QB submitted reference questions to their court of appeal
14. The SC addressed the following equations
    a. Would they affect provincial-federal relationship - yes
    b. Is there a convention that they consult the provinces first - yes
    c. Is there a constitutional requirement to consult the provinces - no
15. No legal requirement of a provincial consultation but there is a convention requiring a substantial degree of provincial consent
16. Provinces argued that - provincial consent as a convention had become so entrenched that it is a requirement
    a. Responded by saying that there is no case where a convention is crystallized into a law
    b. What defines conventions is that they are politically enforced
    c. Dissenting judges changed the way the question was posed - said that they prefer the way quebec posed the question, ask what part of the BNA allows the federal government to unilaterally amend the constitution
        i. This changes the onusd

17. Conventional requirement because most previous amendments affecting provinces had provincial consent and federal principle requires that changes to provincial powers cannot be made by unilateral federal action
    a. Majority refused to specify the amount of support required, just said they needed a substantial amount
    b. Dissenting judges answers if all provinces must be consulted - so they dissented on this basis
18. Result was that all provinces except quebec agreed
19. Failure to include quebec caused another reference question if this could happen
    a. Decision was that there was no convention requiring quebecs consent
20. Led to another decade of mega-constitutional politics - attempts to get quebec to sign onto the constitution

Quebec Referendum 1995

1. Voter turnout was 93%
2. Oui - 49.4%
3. Non - 50.6%
4. Quebec has still not approved or signed onto any part of the constitution
5. Push for giving quebec the ability to push for better conditions, or secession
6. Yes position dominated francophone areas
7. Yes side adopted a confrontational stance after it
8. Yes forces vowed to hold another referendum in the near future
9. Contentious issues of what would happen if the yes side won

The referendum question

1. Argued that it was vague and misleading to voters
2. Ambiguity as to what the position would be within our outside of canada afterwards
3. Most voters wanted a middle ground between status quo and strict separation
4. Asked people to say yes to 4 different things in a row
5. PM took a hands off approach during the campaign, during the end he sensed a close vote, and pled for unity on national TV
6. Gave quebec a veto
7. Sent reference questions to determine what was in quebecs power
8. Cretian thought that they couldn't unilateral kkkt separate

Two issues

1. Does quebec have a right to self determination
2. Can it unilaterally opt out
3. How much territory would it take with it - just those who voted yes, or also those who voted no

1998 reference questions

1. Can it unilaterally separate under canadian law - no
    a. Constitution is more than a written text
    b. 4 principles - federalism, democracy, constitutionalism, the rule of law and respect for minorities

    c. However, a clear majority vote on a clear question would confer democratic legitimacy of the session initiative which all other participants in the confederation would have to recognize
        i. Duty to come to a table
2. Can it unilaterally separate under international law - no
    a. UN resolution 1960 - "all peoples have the right to self-determination"
    b. SC says that Quebec does not meet the criteria of a colonial people or an opposed people and it has not been denied the opportunity to pursue its own development
        i. As such this resolution does not apply in this case
3. If there is a conflict between canadian and international then who wins - didn't answer

Bill C20 The Clarity Act

1. Feds won't enter into any negotiations over separation unless the house of commons determines
    a. The referendum question is clear
    b. A clear majority of the population has expressed a will to separate
        i. HoC uses any manner of circumstances determined to be relevant to determine if a majority is clear
2. This gave a sense of what would be involved if there was a yes vote
3. The rights of all canadians within and outside of quebec can be seen as players in this negotiation
4. Idea that this act forced the federal government to respond to the Alberta equalization reference
5. Within 30days of the question being released the government will make a judgement on how clear the question is
6. Cannot discuss a mandate to negotiate without discussing if the province intends to separate from Canada
7. Expression of majority
    a. Size of majority
    b. Voter turnout
    c. Anything else it determines to be relevant

Module C - Week 8 - Constitutional Amendment and the Question of Senate Reform

Lecture

1. If you want feedback set up an appointment, they will not be handed back with feedback
2. Won't be a seminar period next week

Review - Quebec secession Reference and Constitutional Principles

1. Crown Zellerbach test are central and important
2. Likely the test for the national concern doctrine going forward
3. This test sets up the criteria for succession
4. Underlying constitutional principle of democracy
5. Principled approach to law
6. Were the judges right to settle on these 4 principles
    a. Historians often criticize it as they say it is difficult to say they are at the base of the constitution, these principles only emerge if you gloss over the historical facts

    b. Say you cannot pluck principles from thin air and decide that these are the principles from history
7. 2014 senate reform reference relies on similar principles
8. They see these principles as a constitutional architecture
9. The court didn't say what formula would be needed for a province to cede

The Senate in BNA act

1. Section 22 - 4 regions, Ontario, Quebec, Atlantic and west
    a. According to contemporary population the math about how many senators they each get does not make sense
    b. Newfoundland is not included as a region, it gets its own 6
    c. The territories each get one and are not included in the same region structure
2. Section 23 - Qualifications
    a. Must be 30
    b. Own $4000 of property
    c. Be a resident in the province for which they are appointed
        i. Controversial as there are no outlines as to what being a resident is
        ii. Mike Duffy didn't live in PEI
3. Section 26 - GG can appoint 4-8 extra senators
    a. This doesn't get used very often
    b. Used by Mulroney to get his law passed through
4. Section 29 - Hold tenure until 75 (originally life)
5. Section 31 - disqualifications
    a. Treason, felony, not attending senate during at least 2 sessions of the senate (not attend the senate for essentially over 2 years)
    b. Senators are unusually disqualified over internal rules of the Senate rather than constitutional rules
6. In 1965 the federal government unilaterally changed the rule of age
7. Unclear how far the unilateral power of the federal government went

Reference re Legislative Authority of Parliament in relation to the Upper House (1979)

1. Urge for senate reform picked up in the 70s
2. 1949 - amendment to the BNA act - federal power to amend the constitution of Canada so long as it did not affect the rights and privileges of the provinces
3. Most of the reform proposals in the 70s were formed around modest changes to senate appointments
4. An elected senate would be incompatible with the electoral system (like in the US)
5. Changes to the Senate would have to go through UK parliament
6. Provinces could amend their constitution
7. Federal government wanted the power to amend its institutions - like the senate and HoC
8. 1949 amendment - federal government can amend the constitution if it does not affect provinces in any way
    a. This section has been repealed
9. Provinces liked the senate as a way of regional representation because then they wouldn't be dominated by provinces with just larger populations

10. In 1978 Trudeau is considering a draft bill that would have the senate have a mixed federal-provincial appointment power
    a. Question - could the federal government unilaterally do this, or did they need to go to the UK parliament
11. They asked a series of reference questions - upper house reference
    a. Can parliament abolish the senate
        i. no
    b. Can parliament make various changes to the senate
        i. No for the most part
    c. Section 91.1 - federal amending power has a very limited scope
12. Reasoning to a reference question
    a. Provinces should be consulted before asking the UK parliament - asking them was a convention
    b. Senate plays a vital role in system created by the BNA act
    c. There is a narrow interpretation of federal government's federal amending power
        i. This power was limited to federal housekeeping powers
    d. The other changes proposed would all be fundamental in the constitution
    e. No changes that affect the fundamental features or essential characteristics are beyond the scope of section 91(1)
13. Remained unresolved if the federal government would have to consult the provinces before they go to the UK parliament or not

Amending Formula

1. 5 different amending formulas
2. General formula - 7/50, S 38
    a. 7 provinces that make up 50% of the population have to agree
    b. Powers of the senate and the method of selecting senators, as well as the number of senators a province is entitled to be represented by
    c. Anything not explicitly specified is automatically the general formula
3. Unanimous formula - all 10 provinces, HoC, Senate, GG, s 41
    a. Applies to changes to GG, Queen or
    b. Changes to the constitution of the SC
    c. Amendments to the amending formula also require unanimous approval
4. Some provinces + parlement s. 43
    a. Amendments regarding just one or a few provinces that are directly affected
5. Parlement alone s. 44
    a. Amend the aspects of the federal government that do not affect provincial interests
6. Provinces alone s. 45
    a. Anything that only affects their own province
7. If something affects more than one formula, use the highest formula

Senate Reform Reference (2014)

1. ⅔ canadians says that the senate is too damaged to gain their goodwill
2. Questions about which amending formula applied to amendments to the senate
3. These debates have been more powerful in the last decade due to senate scandals

4. Most canadians want the senate to be changed in some sort of dramatic way
5. Question - does the constitution allow the federal government to unilaterally reform the senate - they don't want to trigger amending formulas as it is very difficult
    a. Unanimous formula is likely impossible as some provinces have an interest in keeping it the way it is
6. 2006 - Harper and conservatice party put forward bills to modify length of senate terms and the consultation process
    a. Set put a voluntary framework for provinces to use to elect senators
    b. Proposed terms of 9 years, and after that they would be done
    c. Harper feared a constitutional challenge to the bills
    d. HoC didn't try to pass these bills
    e. Though the federal government doesn't have much room to maneuver on its own
    f. Almost every change requires 7/50 formula
    g. Senators are not officially elected, they are advisory or consultative elections to get around constitutional issues
7. 4 main questions
    a. Can Ottawa limit Senate terms without consulting the provinces
        i. No
    b. Can Ottawa establish consultative elections for Senate nominees without consulting the provinces?
        i. No
    c. Can Ottawa repeal the requirement that Senators own at least $4,000 in property without consulting the provinces?
        i. Yes, but with proviso of Quebec's special rule
    d. Would a vote to abolish the Senate require the support of seven provincial legislatures that represent at least half of Canada's population or all provincial legislatures?
        i. Unanimous formula
8. Consider both the text of changes, and how these changes will affect the constitutional architecture
9. They tried to argue that as most senators have a fixed 9 year term, why is having a fixed term an issue?
    a. The senate is a chamber of sober second thought, and changing their long tenure means that it affects the fundamental aspect of the senate
    b. Couldn't say what length of term is reasonable, but it would have to be long to protect the sober second thought
    c. Political question that would have to be answered between federal government and provinces
10. This affected their plan for consultative elections as well
    a. The federal government tried to argue that they should be able to unilaterally have these as the PM would still technically appoint senators and thus no change of law is needed
    b. SC said that this would affect the substance of the constitution
    c. Accused them of being narrow textualists

    d. Framers wanted the senate to be an appointed chamber to prevent deadlock and prevent them from being partisan, and this would change the structure
    e. This would mean that the senate would get democratic legitimacy, and thus they would feel free to create deadlocks
    f. Would have to use the 7/50 formula to get this to go through
11. One area where the feds can unilaterally act is by repealing the property requirement, except as it pertains to quebec
12. NDP has advocated for abolishing the senate, whereas the Conservatives are more interested in reforming it
    a. The NDP has had a long standing view that it should be abolished as it is an elite chamber
13. To abolish the senate you would need the unanimous formula
14. Basic principle says that changing the senate would change the consititual architecture and thus requires consultation
15. Question of why the federal government was allowed to introduce a retirement age, but it can't put a limit on the senate tenure
    a. This doesn't make a whole lot of sense
16. The idea of constitutional architecture isn't rooted in any legislation or constitution, so it makes it vague and ambiguous
    a. This will likely have a chilling effect on constitutional change as it is not clear what can be done
17. Mcfarland said that senate reform is very difficult, and it won't likely get majorly overhauled
18. Smaller reforms, like Justin trudeau's will likely still occur

Trudeau and senate reform

1. They campaigned on turning the senate into an independent, and merit based chamber
2. Stop putting partisans in the senate
    a. This was argued as to why the senate had become so distressed over the years
3. He implemented an independent advisory board for senate nominations
    a. Provinces the PM with a short list of 5 names every time there is a vacancy
    b. You can apply online to be a senator, anyone over 30 can put their name forward
    c. PM still chooses under this plan, but choose from a merit based list
4. Some people think that this plan still doesn't address the fundamental issues of the senate
5. This plan has been used to appoint 52 senators
6. A number of other senators have defected from their caucasus to form a part of the independent senate group
    a. These are a majority right now
7. These changes have been implemented through convention, so they could be easily changed
8. These independent senators are supported by a majority of canadians, unclear if they would choose this over more fundamental change
    a. They currently just seem a lot better than the previous system

Senators may be hesitant to change laws dramatically as rhey are not seen as legitimate
Senate does produce good deep studies of legislation through investigative commitees
They make a lot of technical changes
There is a concern that reforms will create deadlocks especially if they are elected
It is there as an ultimate check if the legislation is really unpopular or unconstitutional in some way

Most reform policies also result in the power of the senate being reduced, like a suspensive veto rather than an absolute veto, can only suspend the bills, not veto them

Module C - Week 9 - A New 'Mega-Constitutional' Politics?

Lecture

1. Question - is it time to reopen the constitution
2. Justin Trudeau has said no - it is not something that matters to canadians, not on his agenda
3. Other groups would like to see constitutional renewal - indigenous people, quebecois
4. Albera and saskatchewan have also been advocating for constitutional change
5. 1980 there was a period where the constitution was a prominent issue - era of mega constitutional politics
    a. Larger than debate over specific constitutional concern
    b. Concern over what the nation is based on
6. Quebec never signed the constitution 1982
7. Two major attempts to get the signing to happen
    a. Meech lake accord 1987
    b. Charlottetown accord 1992
8. Quebec wasn't the only group demanding further action
    a. Constitutional conference with indigenous peoples was to be held within a year
    b. 2 amendments that slightly increased their rights
    c. 3 more conferences
9. After the last of the conferences on abolrigial self government - no changes occurred, as they remained reluctant to entrench self-government in the constitution
10. Focus shifted to address in quebecs concerns

1987 Meech Lake Accord

1. Sometimes called quebec round
2. A PC government with brian mulroney
3. Lead an electoral revival for his party that got a lot of support in quebec
4. He and the primers held a series of meetings to try to get quebec to sign on
5. 5 conditions the quebec government put forwards
6. Process of elite accommodation
    a. Closed doors meetings of first ministers - just the top officials
7. Package of 5 amendment, extended much of the provisions to other provinces as well

8. Meech lake did not pass in the end
9. A few aspects of the agreement require unanimous consent, so package was a unanimous proposal - all or nothing
10. Either a legislature accepted what had been come up with, or they rejected it and the agreement fell apart
11. After one legislature accepts it the others have 3 years to accept it
12. Quebec accepted it, but it started to become less popular and less supported
13. Main opposition came from english canada
14. English canadians felt that there wasn't a need to address specific issues in quebec, and it didn't meet the demands of others
15. Distinct society clause was premised on a dualistic vision, did not take into account indigenous people
16. Some concern about elitist closed manner method in which it was negotiated
17. It was close to being ratified
18. 8/10 ratified it by the middle of 1988
    a. Only manitoba and new brunswick has not signed on
19. Manitoba didn't sign on and newfoundland rescinded their proprofs
20. Elijah harper voted against speeding up the process in manitoba, and thus they didn't meet the deadline - he was the one indigenous MLA
21. Ultimately 2 provinces with 8% of the population prevented it from passing
22. This understates how unpopular it was
    a. Elected legislatures were out of touch with the people they were supposed to represent
    b. 60% of people opposed the accord
    c. Future constitutional reform would have to be more inclusive

Clauses

1. Recognises that quebec is a distinct society
    a. Would be placed as an interpretive clause at the beginning of the constitution
2. Increased primvital powers with regard to imigration
    a. All provinces got this
3. Provincial input on senate of SC constitutions
    a. All provinces got this
4. Ability to opt out of federal-provincial shared cost programs
    a. Limit the federal government’s spending power
    b. No longer conditions on money coming from federal government
    c. All provinces got this
5. Constitutional veto for all provinces on more issues
    a. All provinces got this
    b. Every province has a veto, any province can object
    c. This means more things have the unanimous approval

1992 Charlottetown Accord

1. Greater degree of public participation
2. Territorial leaders were included as well as the leaders of major indigenous organizations, but it was still a fairly narrow elite process

3. There was a referendum campaign at the end
4. Contained a host of provisions to satisfy different groups
5. Provisions included
    a. Distinct society for quebec
        i. Got a guarantee they would have at least 25% of seats in the HOC
        ii. Francophone veto to get rid of changes to language
    b. Recognition of self government for indifenouc people
    c. Triple E senate for the west (equal, elected, effective)
        i. 6 from each provinces, 1 each territory, unspecified amount of aboriginal senators
    d. More powers and influence
        i. Limits to spending power
        ii. Provincial veto more
        iii. Provincial input in supreme court appointments
        iv. First ministers conferences would occur once per year, instead of randomly
        v. Provincial jurisdiction was increased
6. Submitted it to the people with a referendum
    a. This idea was introduced late
    b. Agreement was not constructed to be able to sell it
    c. Gap between elite negotiation and popular redification
7. The charlottetown accord ultimately failed
8. No side won by 54;45 referendum
9. Rejected by several provinces
10. Technically referendum was consultative

Overall

1. Charlottetown defeat marked the end of 2 decades of mega constitutional politics
2. Great effort but ultimate futility have lead to one gigantic constitutional hangover
3. No interest in constitutional change since 1992
4. Alternative to constitutional politics are
    a. Constitutional innovations through constitutional conventions
    b. Organic statutes - problem is they are easy to change or get around, not as entrenched
5. Federal government has used organic statues as a work around - after meech lake 2 proposals were enacted
    a. Quebec's status as a distinct society was passed as an organic statue, a number of times
    b. Regional veto statute was passed in 1996 to share the fefera veto with other regions of canada
    c. This is a significant acknowledgement, but not as legally binding as a constitutional amendment
6. Baker and jarvis point out a limitation
    a. Supreme court decisions have limited the scope for informal change
    b. Like senate reform reference - steered government back to amendment process

    c. Courts use of constitutional architecture idea - question of what is needed to create formal changes
    d. Baker and jarvis claim that recent decision will have a chilling effect on constitutional change, and enhance the role of the courts which brings up the idea of court legitimacy
    e. They would like to see informal change bounce back
        i. Formal changes should be pursued first
        ii. Focus on small issues rather than mega constitutional packets

Simulation - federal government

1. KEY PROPOSALS YOU WANT TO BE INCLUDED IN THE ACCORD
    a. IF SENATE REFORM, CONSIDER HOW YOU WANT THE SENATE TO BE REFORMED:
    b. 4 REGIONS (MARITIME PROVS, ON, QC, WESTERN PROVS) LIKE NOW? EQUAL PROVINCES, LIKE US?
    c. ELECTED? UNDER WHICH SYSTEM? APPOINTED? BY WHO?
2. YOUR POSITION ON EXPECTED KEY DEMANDS OF OTHER ACTORS
    a. E.G. THE WEST WILL LIKELY WANT SENATE REFORM – ARE YOU WILLING TO ACCEPT THIS? UNDER WHAT CONDITIONS?
3. HOW SHOULD IT DECIDE IF ACCORD IS ACCEPTED OR NOT. SOME POSSIBILITIES:
    a. AGREEMENT OF FIRST MINISTERS (LIKE CONSTITUTION ACT, 1982)?
    b. FIRST MINISTERS SEND AGREEMENT THROUGH LEGISLATURES (LIKE MEECH LAKE)?
    c. NATIONAL REFERENDUM (LIKE CHARLOTTETOWN)?

Senate reform

1. Indigenous representation
2. West representation
3. Quebec - nobody else should gain more representation
4. We think that we have done enough, good as it is

How should it be decided

1. Referendum - don't want the elites
2. Try to avoid the omnibus package - make it simple
3. Clear and concise language
4. Propose a review every 5 years - modify the constitution over time
5. Address specific issues with each provinces - do smaller discussions

Quebec language/succession

1. Pluralistic rather than dualistic
2. Recognition of a distinct nation
3. Language issues
4. Veto - want it entrenched in the constitution, or is an organic statue enough?

Ontario

1. status quo
2. No senate reform
3. Expansion

Alberta

1. Distribution in the senate
2. Equalization payment
3. Resautoonomy in resource development

Indigenous

1. 1 senator from each province
2. Indigneous
3. Jurisdiction over communities
4. Nation rights

Quebec

1. Distinct society status
2. Preserve sovereignty
3. Be own nation
4. No senate reform

Consulting

1. Ontario - referendum is okay
2. Alberta - love a referendum, agreement a
3. Indigenous - referendum not good - send agreement through legislator
4. Quebec - agreement not referendum

Resource development

1. Alberta relies on oil and gas
2. Give them more powe
3. Ontario - enhance albertas power - ruining the environment
4. Quebec - yes

Junristion over communities

1. Nations should be able to have power over their own communities
2. Provinces shouldn have power over that
3. Be declaresd a distinct society
4. Seen as a municipality and a sovereign nation

Module D - Week 10 - Indigenous Peoples and the Canadian Constitution

Lecture - Indigenous peoples and the canadian constitutional order

1. Optional attendance for final class - review class - have questions

Early Indigenous policy

1. Indigdenous people were thought to need to be civilized by their white superiors
2. Until 1960 indigenous policy was assimilationist, with a model of paternalistic dependency
3. Phrase fairly protected meant protecting what indifenous people could do

4. Prior to 1982 the key constitutional provision was under the division of powers in section 91
    a. Federal government has power over indians and land of indians
    b. Thought to be wards of and dependants on the state
5. Key policy under this was the indian act of 1876
    a. Passed shortly after confederation, and still exists today
    b. Defines status indian as a biological component, as non native women can become native by marrying into it
    c. Gender discrimination in the provison as women could loose their status - but this has since been removed
    d. Inuit and metis are considered indian but don't have the same status and status indians and have other agreements with the government
6. Indian act also defines a resersever
    a. Tract of land given to a group of indians, but the crown hold legal title
    b. The land and resources must be used for the benefit of those living on the land
7. Provided a way for them to select band councils and chiefs
    a. This was based on liberal democratic practices rather than traditional structures
    b. Often nations will have both elders and band councils at the same time which creates a tense situation
8. It was a paternalistic policy made to make them dependent on the state
9. Until 1960 they had to renounce their status to vote, or become a canadian citizen
10. Residential school system was also an example of assimilation

1969 White Paper

1. Some suggest that this is still assimilationist
2. Tried to get rid of dependency aspect by getting rid of the reserve system
3. Elimited their special entitlements and reserve system to make them exactly equal
4. Indigenous people in response to this began to resist more overtly, and started the movement towards self-governance

RCAP - Royal Commission on Aboriginal Peoples

1. Slow movement towards reconciliation and removal of the indian act
2. But this is a very slow process
3. Courts have been essential in pushing this process forward

Royal Proclamation of 1763

1. Can be considered and early version of the canadian constitution
2. Important text for indigenous people
3. Aboriginal rights are based on the occupancy and use of the lands before settlers arrived
4. Said that their rights could not be taken away without due process - like a negotiated treaty
    a. This is why they are not pushed aside as easily in canada as they are in the us
5. Say that they should not be molested or reserved if they are on territories that have not been ceded or purchased
6. Dissuade people from purchasing land straight from indigenous people, or just occupying land

7. The only person who could purchase land is the british crown and they would do this at a public meeting
8. Any land that had not been ceded was indigneous land
9. Areas of BC, Quebec, and the north are subject to the most land claim cases today
10. Even with declaration of the need to negotiate treaties, the policies are still ones of assimilation
    a. They created treaties in return for peace
    b. Indigenous people conceded peace, as well as sovereignty
    c. The british would reserve or set aside land for indigenous people to ensure they wouldn't get in the way of new settlements

What are Aboriginal Rights

1. These are different than treaty rights
2. Aborigianal rights are inherent, courts interpret, set boundaries of what they are
    a. Aboriginal rights come from common law, the historic use and occupation of the land
3. Treaty rights come from agreements, determined by the crown and indigenous negotiation
    a. Derived from specific official agreements through process set out in royal proclamation
    b. They are enforceable obligations
    c. Nation-to-nation agreements
4. Aboriginal rights often become treaty rights
5. Can break into generic or specific
6. Generic - given to all aboriginal groups
    a. Example is aboriginal title - those that can prove their claim to the land are given title
        i. Although the definition can change all aboriginal groups can attempt to get this
    b. Right to language
    c. Right to self government - says it is probably a generic right, anyone can try to meet this criteria, but it will look different, has not been legally recognized by the courts
        i. Just interpreted title so broadly this it is a form of self government
7. Specific rights - rights that are specific to an indigenous nation, vary from nation to nation
    a. Site specific rights - specific to a particular parcel of land, not as strong as title, like a hunting right
    b. Floating right - engage in activities not tied to land
    c. Cultural right - not linked to land at all, still linked to historic traditions and practices
8. Exclusive rights - can only be exercised by indigenous individuals, non exclusive rights are shared with non indigenous people
9. Depletable rights often have some built in limits

Aboriginal Rights and Canadian Law

1. Easy to see a shift in the scope of aboriginal rights

2. Governments were also forced to respond as indigenous people demanded more rights

St Catherine's Milling and Timber Co V the Queen

1. Result of a federal provincial dispute over who could allow logging rights in treaty land
2. Could the federal government allow the milling company to log on the land
3. It was initiation by ontario provincial government
4. Ontario claimed that they controlled government lands in the area
5. The federal government claimed that they had jurisdiction over lands held by indians or that regarded them in some sort
    a. Wanted to control not just reserve lands, but also all treaty land
6. JCPC ruled against the milling company, and the federal government could not issue permits
    a. Only power over reserves, not all treaty land
7. Provinces have control over land and resources in their territory
8. Interesting about what it said about aboriginal title
9. What are the implication
    a. According to the proclamation the tenure of indians was an personal right and usufructuary right dependent on sovereign god will
        i. They are able to use the land that belongs to the crown as long as they don't alter its substance
    b. The ground has the ability to use the land the way they see fit whenever inditigenos title was surrendered
10. Sense that the crown has power over all land surrendered by indigenous people even if there has been a treaty
11. This case was for a long time the leading precedent for aborignal title
12. It interpreted title very conservatively
13. Legal views on aborigianl title didn't change for the next 100 years until the calder case

Calder v AG British Columbia

1. Brought forward by frank calder on the behalf of the Nisga'a people
2. Question - does aboriginal tiles still exist in BC
3. The BC government had been reluctant to negotiate with land claims, because it said that BC was outside of the royal proclamation land
    a. Tried to say that they were not subject ot this procedure
4. Nisga'a claimed that their claim to the tile had never been ceded
5. There was a tie, so they lost the case
6. While their land does not fall under the proclamation, they were organized in societies when colonizers arrived, but the milling case is still too narrow
    a. Royal proclamation is not the only source of title, it can also come from common law possession
    b. Posesion was extinguished by BC's colonial governor
7. Dissent - Justice Hall
    a. Courts should draw on new historical research, and reject the outdated ideas that they are without cohesion law or culture
    b. Argues that they continue to occult the land of their ancestors, and they were never conquered

    c. As they still possess it it is still there's
    d. If there is no aboritinal title, when why was treaty 8 negotiated, only could have been because they thought the royal proclamation did apply
    e. Ultimate question is were common law or royal proclamation rights extinguished
    f. Had no right to extinguish title, only way would have been for them to say that they were taking title, but this did not occur
8. Political implications
    a. Nisga'a lost the case
    b. But 6 of 7 judges ruled that aborigianl title was an aborigional right through treaties and common law possession
    c. Majority judges claimed that aboriginal title exists wherever it hasn't been extinguished with a treaty
    d. Dissenting agreement created a high bar for extinguishment
    e. Forced the federal government and provinces to restart treaty negotiations which had stopped in 1921 - these turned into the modern land claims process

Modern Land Claims Process

1. James bay and northern quebec agreement comes a few years after in 1975
2. At least 25 modern claim agreements have been negotiated
3. The Nisga'a got an agreement in 1999
4. Nunavut Land claims agreement in 1993 ford the basis of nunavut
5. Indigenous people could make any claim to land they used and occupied
6. Aboriginal rights are exchanged for very specific treaty rights
7. Treaties are preferred by governments and the courts as they have certainty to them
8. Specific claims are disputes where treaties exist - disputes over fulfilment of terms of the treaty
    a. Often over misappropriation of lands and failure to honour commitment
    b. Compensation comes in the form of money or land
9. Comprehensive claims come where there is no existing treaty
10. Caulder case marked a significant turning point

Aboriginals and the Constitution act 1982

1. Section 35 includes a section for indigenous peoples
2. States that the existing aboriginal and treaty rights of aborigianl peoples of canada are recognised and affirmed
3. Say this includes the indian, inuti and metis people
4. Treaty fights include rights that currently exist or land claim agreements that may exist in the future
5. Aboriginal treaty rights are given equally to make and female persons
6. Courts became more activists after the constitution act
7. They followed the minority dissenting opin more and interpreted it more broadly

R v Sparrow (1990)

1. Federal government has the power to regulate fisheries
2. In the 1980s special licenses were granted to indigneous people in BC
    a. These allowed them to use drift nets up to 50 fathoms

3. Sparrow was arrested for using one to long, and he said that traditionally they had used far longer drift nets - argued for having an existing rights
4. Court issues a 7-0 decision that was largely in favour of sparrow
5. Did Not overturn his sentence but sent the case back to trial
6. As it was the first case after the constitution act the was a question of how the constitution should be interpreted
    a. It says that it should be given a generous liberal interpretation
    b. There are no reasonable limits, or notwithstanding clause, given a high degree of protection
7. Second question - what are existing aborignial rights
8. They took a slightly broader approach in interpreting existing aboriginal rights
9. Can governments regulate aborigianal rights
    a. Yes but must be justified
        i. Is there a valid reason for this legislation - could be for the sake of conservation
        ii. Is the infringement consistent with the honour of the corun
            1. Indigenous group should be consulted
            2. There should be as little indiringemnet as possible
10. Generous and liberal interpretation is significant
11. Test provides ways for the government to justify infringement

R v Van der peet

1. They sold salmon, question if selling salmon was a traditional practice of the band and thus protected
2. She lost the case 7-2
3. To qualify as an aboriginal right it must be a practice or culture important to the group
    a. This must have occurred prior to contact with europeans, and continued to the present
    b. Practices can evolve, and they should be given a liberal interpretation
4. Need to be sensitive to aborginal practices , and be flexible as there were limited writings
5. Take aborignal practices and code them in a way that is understandable to the canadian legal system
6. They decided that bartering was not a big part of their culture pre european contact and it was not a key part of their culture
7. Tied rights to specific practices from before context
    a. Some were critical of this interpretation saying that it froze rights

Delgamuukw v. British Columbia (1997)

1. BC government resisted negotiation with aboriginal peoples even after calder decision
2. Gitkan and Wet'suwet'en people put forward legal claim to large area of land
3. Lot the claim but were granted right to use a smaller area of land
4. 3 main complex issues
    a. What is admissible and required as proof of aboriginal title
        i. Trial judge was wrong to dismiss oral histories
    b. What is the nature of protection to aborigal title

        i. “Right to exclusive use and occupation of the land…for a variety of purposes, which need not be aspects of those aboriginal practices, customs and traditions which are integral to distinctive aboriginal cultures.”
            1. Can be used for purposes other than traditional ones
        ii. Inherent limit that cannot be destroyed; inalienable; communal in nature.
            1. Can't use land in a way that would destroy its value
            2. Aborignal title is communal, not held by individuals, would have to be ceded to the crown first then sold to individuals
    c. Did the province have the authority to extinguish title after confederation
    d. When can governments justifiably infringe on Aboriginal title?
        i. Further a compelling and substantive legislative objective.
        ii. Consistent with the “special fiduciary relationship between the Crown and aboriginal peoples.”
            1. Three considerations: extent of infringement; duty of consultation; and fair compensation
5. Does Aboriginal title include self-government?
    a. Unanimous decision of “the Court” – Impossible for SCC to judge in this case.
6. Could BC have extinguished Aboriginal title?
    a. No, only the federal government has power to extinguish the title.
7. Encouraged all parties to negotiate and to use the political process
8. Legislative response - these was a series of land claim agreements with other BC nations

Haida Nation V British Columbia (2004)

1. Crucial for what decision claims about consultation
2. They have ong claim the islands situated off the wea cost of BC
3. BC government have been issuing permits to lumber companies to cut trees on the island without consultation
4. They were contesting tile on it
5. Issued a 7-0 decision in favour of the haida
6. If they win their claim to title, but the trees are gone then they would have lost an important aspect of their culture
7. This is based on the honour of the crown
    a. Crown should not run roughshod over aborignal interests
8. Should commit to meaningful consultation in good faith
9. Give serious consideration to various points of view and try to accommodate concerns
10. Outlines provincial responsibilities to consult before taking action on indigenous land
11. This was important in the approval of the trans mountain pipeline

Tsleil-Waututh Nation et al. v. Attorney General of Canada (FCA, 2018)

1. Claimed that there was no meaningful attempt at dialogue before transmountain pipeline

Tsilhqot'in Nation v. British Columbia (2014)

1. Expanded the concept of aboriginal title - has the potential to expand future negotiations
2. Court had interpreted it narrowly - specific sites used by ancestors

3. Postage stamp approach - only grant title to a very small area, lesser rights are granted to land used less intensively
4. It is less than 5% of territory used by nation
5. This decisions expanded the criteria of occupation and lead to an expanded concept of aboritnal title, no longer restricted to small sites of use
6. Must be sufficient, continuous use
7. They were given title to over 2000 square km of land, 40% of the land they claimed rather than 5%
    a. Have right to use and control land and reap benefits from it
8. They can still be regulated if permission is obtained or if it is part of their duty
9. Indigneous people control 0.2 percent of land
    a. This lack of land is central to the poverty of indigenous people

Module D - Week 11 - Perspectives on Reconciling Constitutional Orders

Lecture

1. Next week is optional review class
2. Take home exam posted next tuesday - due tuesday after that
3. Video lectures are taken off on monday

Review

1. How far does recognition of aboritinal rights extend
    a. 1973 calder case developed idea of aboritional title based on common law use and possession of land
    b. Caulder dissent presented a high standard for extinguishment
    c. Delgamuukw case set out the 4 features of the nature of title
    d. 2014 silquotine nation - boradend case for occupation for title
        i. Increases in the amount of land that title is given to
2. How are these rights defined
    a. Are they frozen to pre-contact practices
    b. Or are they allowed significant scope to evolve and change over time
    c. Spander and van der peet said there was an anchor in pre-contact practices but it is not completely frozen
3. To what extent can they prove their land claim
    a. What evidence is admissible
    b. Van der peet allowed oral history and anthropological evidence
        i. Outside of conventional legal practices
4. To what extent is infringement by the government allowed
    a. What purposes can they infringe on indigenous rights
    b. How much of a say do they have
    c. What recourse do they have if their rights are violated
    d. These are set out in sparrow and delgamuk cases
    e. Evolved over time the criteria for consultation
    f. Haida nation case said that the government has the obligation to listen to and accommodate

Flanagan

1. Flanagan defends colonization and makes a similar argument to white paper - indigneous people should be assimilate, subsumed indigneous constitutional orders to canadian constitutional order
2. Book tries to take down aboriginal orthodoxy
    a. A position that supports a strong sense of indigenous self-government
    b. They would have a parallel government
    c. They would be akin to being their own provinces
3. Breaks down into 8 claims
4. We read chapter on property
5. Dissect claim that aborigional property rights should be entrenched through land claim agreements
6. Critique of what the courts have done to advance aboriginal rights
7. Suggests that different aboriginal groups had different conceptions of property
    a. Wrong for the courts to pick one conception over the other
8. Critical of royal proclamation
9. Criticises delgamuukw decision
    a. Says it created the lamer doctrine - sets out 4 components of aboritianl title
        i. Communal
        ii. Inalienable
        iii. Inherent limit of not use in ways contrary to original use
        iv. Criteria for justifiable infringement by the government
10. Criticises first two components of lamer doctrine
    a. Define it in a way that make it incompatible with modern economy
    b. Communal ownership is an awkward system in a market economy
11. Infringement aspect is the only okay part of lamer doctrine
    a. Things government should be able to infringe on indigenous rights when they are obstructing economic development
    b. He prefers that the market could drive economic development, but the government is better
12. Claims that there is a high degree of uncertainty about what is needed to prove title
13. Delgamuukw and other decisions in prison indigneous people within a system that does not work well with modern economic development
14. Criticises the court's interpretation of title from the perspective of a free market economy
15. Endorses a policy of integration and assimilation, and equal rights with all other canadian citizens - get rid of special entitlements

Counter Arguments

1. Most responses start with underlying assumption that collective property and communal rights are actually good things
2. Problem with liberalism is that it cannot be reconciled with indigenous culture
3. Ladner provides argument in favour of indigenous self-determination
4. Different ideas and degrees of independence
5. Some suggest third level - still in canada but self determination
6. Overall position is that indigenous people are self-governing people, and treaties are nation-to-nation

    a. If they weren't nation to nation then why would the crown negotiate it
7. Her view is of treaty federalism or treaty constitutionalism
8. Treaties recognize a regionition to self government and sovereignty
9. Term treaty usually refers to a formal agreement or contract between countries
10. There is no time limit to treaties, and cannot be broken, they are intended to benefit both parties
    a. Some prefer term covenant
11. Indigneous people saw treaties as a way to take advantage of new economy without being assimilated into new culture
12. Settlers accepted treaties because there was a threat of war from the south, treaties allowed for peace
13. The two parties had conflicting views
    a. Indigneous people didn't understand that european settlements required sovereignty

Ladner's take on section 35

1. Says that existing treaty rights are recognised and confirmed
2. This could be argued to recognise constitutional orders that treaties were based on
3. Interpreted by courts as pushing reconciliation of previous societies with crown sovereignty
4. Indigneous constitutional orders have always been in the inferior position
5. She uses the term of legal magic - process of subordinating indigenous orders
    a. Indigenous people never ceded land or consented to be ruled
    b. Idea that they did is a historical myth
    c. Early examples can be seen in the royal proclamation
    d. Assumed a relationship of protective stewardship, not an equal relationship
    e. Such legal magic did not eliminate indigenous constitutional orders
6. Ladner is critical about what courts have done about indigneous rights
7. Sees some rays of hope in terms of recognizing aboriginal orders
    a. Endorses haida nation case emphasis on duty to consult
8. Federal government needs to implement a policy on the honour of the crown in order to make sure that it follows these policies
9. Treaty federalist interpretation of section 35 is a good way to move forward

Take Home

1. 2 short answer
2. 1 essay question
3. Can't write on the same thing you wrote your essay on
4. There will be choice in both sections
5. One deals with cases, one deals with arguments for short answer
    a. 250 for short answer
6. 750-1000 for essay

Alex Cameron, "Judicial Activism and its Critics," in *Power Without Law* (2009):

1. How does Cameron generally see the actions of the Supreme Court in the area of Aboriginal law? (Which view of judicial decision-making?)
    a. See p. 30, middle paragraph
    b. Sees the courts as activist
2. What does Cameron think of the Supreme Court's interpretation of s. 35 of the *Constitution Act, 1982* in the *Sparrow* case?
    a. See pp. 31(bottom)-32(top)
    b. Aspirational and not justifiable
3. According to Cameron, where did the Supreme Court go wrong in its *Van der Peet* decision?
    a. See p. 36(bottom)-37(top)
    b. It lacks limits on evolutioN
4. What, according to Cameron, is problematic regarding the Supreme Court's assertion that Aboriginal title is held communally in the *Delgamuukw* case?
    a. See p. 38 (middle-bottom)
    b. Aboriginal title is not communal for all groups, lamer simplified it to being communal for everyone

Arthur Manuel, "Upping the Ante" and "End of Colonialism," in *Unsettling Canada* (2015):

1. What is the significance of the "doctrine of discovery" and what does Manuel mean by suggesting it needs to be repudiated?
    a. See p. 128
    b. Basis of occupation of indigenous lands
    c. Repudiating it would allow Canada to become a moral country
2. What is Manuel's overall assessment of *Delgamuukw*?
    a. See pp. 115-116
    b. Colonial context of doctrine of discovery
    c. Should consult but can still do what they want
3. The Nisga'a people were the ones who initiated the 1973 *Calder* case. They finally reached a land claims agreement with the government in 1998, just after the *Delgamuukw* decision. What does Manuel think about the Nisga'a Final Agreement?
    a. See pp. 119-120
    b. They were extinguished
    c. Used older policies and ruling, even though more modern decisions had been made
    d. Ceded a great deal of land for only a small package of rights
    e. Didn't like how it was paraded around, only a handful of agreements had been signed since
4. What does Manuel mean when he says, "travel in two canoes in the water together (224)" and how does the *Tsilhqot'in Nation* decision help to get there?
    a. Two nations going their own way on the same land
    b. Recognise colonization and decolonize