Framework 2.4 – Majority and Minority Rights

The French-English Conflict

Early History

New France was established in North America in 1534, upon Jacques Cartier's first expedition. The French then laid claim to parts of Canada until all French holdings were formally ceded to the British by the **Treaty of Paris, 1763**. This treaty brought an end to the global conflict known as the **Seven Years' War,** the North American theatre of which is sometimes referred to as the **French and Indian War**. Although the British accommodated the language, culture, and the Roman Catholic faith of the inhabitants of the former New France, Canada slowly became less and less French as more and more British settled here, particularly with the influx of **United Empire Loyalists** after the American Revolution. By the time of Confederation, the French were clearly a minority in Canada, but their language rights were protected by s.93 of the British North America Act, 1867.

Tensions since Confederation

There have been numerous periods of tension between the French and English cultures since Confederation related to language rights or differing political visions. Examples include the **prohibition of French-language schools** in Ontario by Regulation 17, issued in 1912, and the **Conscription Crises** that occurred during the First and Second World Wars. Many Quebeckers resisted being drafted into service due to the lack of French-speaking or even French-accommodating units.

Quebec's Quiet Revolution

Up until 1960, the francophones in Quebec lived with the fact that the highest positions of social and economic power in the province were held by the English minority. Then the **"Quiet Revolution"** took place under the leadership of **Premier Lesage**; between 1960 and 1966 the francophone majority resisted the control of the English, the Roman Catholic Church, and their rural roots to establish a more open and industrialized society. They wanted to have an equal partnership with English Canada and assurance of the survival of the French language and culture. To this end, Lesage's Liberal government created a number of new government departments, such as Cultural Affairs. At the same time, the Roman Catholic Church saw the level of its social and political influence decline. The Quiet Revolution also included the formation of the **Front de Libération du Québec**, a paramilitary group with **socialist ideals** and an agenda that included the **separation** of Quebec from Canada. The **FLQ** commenced its terrorist activities in 1963 with bombings of a number of military barracks and a railway station.

Pierre Trudeau

When Pierre Trudeau was elected Prime Minister in 1968, he and his Liberal government were committed to the goals of **equal status** for the two cultures and **bilingualism**. In an attempt to realize this vision, they introduced the **Official Languages Act**, which was passed in 1969. It required all federal government services to be available in both languages.

Separatism

The empowerment of francophones in Quebec over the 1960's led to many of its citizens developing separatist ideals. This created a stage for the competing views of outright separation or Quebec **sovereignty**, partial separation or **sovereignty-association**, or continued

federalism. In 1968, the **Parti Québécois** was formed under the leadership of René Lévesque. As the official opposition, the PQ pressured the ruling Liberal party under Premier Robert Bourassa to introduce Quebec's **Official Language Act, 1974**. That legislation made French the only official language in Quebec, promoted the teaching of French in English schools, and prohibited the admission of immigrant children into English schools unless they were already proficient with English.

Bill 101, the Charter of the French Language

In 1976, René Lévésque and his Parti Québécois took office and the following year enacted **Bill 101, the Charter of the French Language**. With the stated goal of protecting the French language and culture, the legislation went beyond making French the sole official language which really only applied to government actions. It was designed to make French the dominant language throughout Quebec society. For example, employers were required to address their employees in French and companies with 50 or more employees had to conduct business mainly in French. Bill 101 also included the ***Sign Law*** which prohibited the use of any language other than French to be used on commercial and road signs. Amendments have been made since the passage of the Canadian Charter of Rights and Freedoms which now allow the limited use of languages other than French on signs as long as French is predominant.

Bill 101 and the Notwithstanding Clause

In 1988, the Supreme Court of Canada actually struck down the French-only sign provisions of Bill 101 for violating the right to freedom of expression guaranteed by the Canadian Charter of Rights and Freedoms (**Ford v. Quebec**). However, Premier Robert Bourassa then invoked the **Notwithstanding Clause** contained in s.33 of the Charter to protect the sign law despite the court's decision.

Bill 101 and Access to Schools

Bill 101 restricted access to English Schools to those children who were both born in Quebec and used English as their first language. This restriction resulted in a sharp decline in enrolment and the closing of several hundred English schools.

The Economic Impact of Bill 101

The requirement that business be conducted in French resulted in many corporate head offices, most of which were in Montreal, relocating outside of the province. Most of them were moved to Toronto. In addition, many employees feared for their job security if they could not read and write fluently in French. These factors contributed to approximately 100,000 Quebec **Anglophones** and **Allophones** leaving the province. The uncertainty along with the language restrictions made Quebec a very unappealing place to invest. Overall, Quebec's economy suffered greatly, which was most apparent in the sharp increase in the unemployment rate.

The 1980 Referendum

René Lévésque's PQ government scheduled a referendum in May of 1980 on the question of **sovereignty-association**. This would give Quebec the exclusive power over making laws affecting the province, levying taxes, and foreign relations while maintaining an economic association with the rest of Canada including free trade and a common currency. Prime Minister Trudeau appointed his Minister of Justice, Jean Chretien, to organize the federalist campaign. Voter turnout on the day of the referendum was over 80%, and a clear majority of nearly 60% voted "Non" to separation. Spurred on by this victory, Prime Minister Trudeau hoped to further

unify the country by **patriating the constitution**. He successfully did so on April 17, 1982, but it was without Quebec's agreement; Lévésque's government could not reconcile its **nationalist** ideals with the provisions of the new constitution.

The 1995 Referendum

In 1994, the PQ were again elected to power, this time under the leadership of **Jacques Parizeau**. He considered this victory as a mandate to hold a second referendum on the issue of **sovereignty**. On October 30, 1995 with a voter turnout of over 90%, the "Non" side was again victorious, but this time with a very slim majority of 50.6%. In response to this near-loss, Liberal Prime Minister Jean Chretien pushed a resolution through Parliament that recognized Quebec as a **"distinct society"** and urged government institutions to conduct themselves accordingly.

The Clarity Act, 2000

The federal government referred the question of Quebec's ability to secede from Canada unilaterally to the Supreme Court. In 1998, the court ruled that Quebec could not separate without consulting the rest of Canada. However, the court qualified this by stating that the federal government would have to negotiate separation in good faith if a "clear majority" of Quebeckers had voted for separation in response to a "clear question." Due to the vagueness of these terms, the federal Liberals engineered the passing of the **Clarity Act, 2000** which set out procedures to follow if a future referendum were to be won by the separatists as well as clear guidelines to determine if the question and the majority were sufficiently "clear."

Cooperative Federalism

Jean Charest and his Quebec Liberal Party were elected in 2003, offering the province the stability of a federalist premier. The Quebec Liberals operated under the principle of **"cooperative federalism"** until their defeat in 2012. Cooperative federalism subscribes to continued federalism but recognizes the need for individual provinces to collaborate more in the creation of federal policy and to participate in international dealings in their own right as part of a global economy.

Aboriginal Rights

There are over one million Canadians with Aboriginal ancestry. There are 12 distinct Aboriginal languages which can be further subdivided into 50 different dialects. Aboriginal peoples have fought for their collective rights on the basis of their occupation of Canadian lands for thousands of years.

Aboriginal-European Relations

When French and British settlers started arriving they were eager to establish collaboration with the Aboriginals for economic and military purposes. The first alliances were with the Mi'kmaq: They originally allied themselves with France, but then in 1760 they signed the Peace and Friendship Treaty with Britain which included provisions for freedom, mutual protection, and trade. After the Seven Years' War between France and Britain and the signing of the Treaty of Paris, 1763, King George III issued the ***Royal Proclamation of 1763***. This document recognized Aboriginal peoples as autonomous political units and declared that they were entitled to the lands in their possession until or unless they gave or traded them away under the administration of the British Crown. The proclamation has been considered the "Magna Carta of

Aboriginal rights" and is still referenced in Aboriginal negotiations. It has also been given the force of a statute by the courts and was recognized in s.25 of the Charter.

Assimilation Policy

Starting in 1830, the government operated under a policy of assimilation, which was justified as being in the best interests of the Aboriginal people who were seen to be dying out after the introduction of European diseases. The policy included removing children from their villages and placing them in church-run **residential schools** where they were forced to speak English and learn European ways. This policy has been referred to as *cultural genocide* by Aboriginal groups and there are still lawsuits going through the courts between Aboriginals and the religious groups that ran the schools due to the abuses that took place there.

The Indian Act, 1876

Section 91 of the BNA Act, 1867 gave the federal government authority over "Indians and lands reserved for Indians." This authority was codified in the **Indian Act, 1876**, but Aboriginal peoples were not consulted during its formulation and it did not include provisions for self-government. Following the passage of the Indian Act, Canada's Aboriginal peoples gave up vast amounts of land to make room for European immigrants in exchange for exclusive rights to certain reserve lands and other benefits. It has been argued that they could not have fully understood the implications of these treaties at the time of signing. Traditionally, each Aboriginal community governed itself according to its own rules. That all changed with the passage of the Indian Act, 1876, which defined who was "Indian" and dictated how Aboriginal chiefs and councils could operate. It also provided for the appointment of non-Aboriginal agents to be responsible for the smooth operation of the legislation. The Act also gave authority to the federal government over the health care, social services, and education of Aboriginals, which otherwise were provincial responsibilities. The Indian Act also prohibited Aboriginals from manufacturing, possessing, or selling liquor or from being intoxicated, whereas other Canadians had no such restrictions. In the first legal test of the Bill of Rights, 1960, the Supreme Court of Canada struck down the prohibition against intoxication for Aboriginals as a violation of their equality rights [R. v. Drybones (1970)]. Aboriginal leaders were not happy with the administration of the Indian Act. In many instances their land was sold or leased without their consent, and in general it was a struggle to have their voices heard. They formed a lobby group in 1968 called the National Indian Brotherhood which was later renamed the **Assembly of First Nations**. The **AFN** has been very successful in voicing Aboriginal concerns regarding treaty rights, social development, housing, justice, and health. In 1969, the Trudeau government tabled a White Paper that proposed the repeal of the Indian Act and the amendment of the British North America Act to remove the distinction between Aboriginals and other Canadians. This most recent attempt to fulfill the policy of assimilation was met with great resistance, as it would have meant a weakening of the Aboriginal communities and culture as well as losing compensation for the surrender of their lands.

Aboriginal Land Claims

Aboriginal peoples who had lost their lands without their consent under a treaty have continually sought justice in various forms, but they did not meet with much success until **the Calder case** in 1973. Frank Calder was the Nisga'a chief in British Columbia. He launched a lawsuit on behalf of the Nisga'a people against the province of British Columbia to establish title to their ancestral lands. In **Calder v. Attorney General of British Columbia [1973]**, the Supreme Court of Canada found that English law, during the time of colonization, recognized Aboriginal title. This case affirmed that Aboriginal title to ancestral land exists as a legal concept in Canada. In response to this decision, the Liberal federal government established a process for

negotiating Aboriginal land claims. The policy would result in clearly defined rights and benefits set out in settlement agreements.

The Land Claim Process

There are three types of land claims that can be brought before Canadian Courts. **Specific land claims** are brought by Aboriginal groups that have **signed treaties** but feel the government has not fulfilled its obligations under the Indian Act. This might involve disputes as to the size or location of reserve lands or issues that arose after the signing of the treaty such as damage or encroachment on the reserve lands by public actions such as flooding caused by hydroelectric power generation or the building of highways or railways. **Comprehensive land claims** are brought by Aboriginal groups who have **never signed treaties**, but who have somehow lost their rights to ancestral land and resources. These non-treaty Aboriginal groups are situated in parts of British Columbia, the Atlantic Provinces, and the territories. The goal for comprehensive land claims is that the Aboriginal groups will become economically self-sufficient. The third type of claim is for **lands surrendered for sale**. These lands had been surrendered to the Crown so that it could sell them and use the proceeds for the benefit of the First Nation that had occupied them. In some cases, however, the lands remain in Crown hands long after the surrender with no sale and no compensation having been made. Land claims involve complex issues such as the outright **ownership** of land, **control** of resources, and **compensation**. In most cases, non-Aboriginal Canadians have legal title to parts of the lands in dispute. There is a great deal of negotiation involved, and the process is very slow.

Aboriginal Rights and the Constitution

Prior to the passage of the Constitution Act, 1982, Canada's Aboriginal peoples lobbied hard for inclusion in the process of drafting its terms. Their rights were consequently guaranteed by s.25, found in Part I, the Charter, and by s.35, included in Part II, Rights of the Aboriginal Peoples of Canada. **Section 25** states that other rights guaranteed by the Charter must not interfere with the rights of Aboriginal peoples. For example, it cannot be claimed that benefits derived from a treaty are a violation of the equality rights of other Canadians.

> **25.** The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including
> *a*) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and
> *b*) any rights or freedoms that now exist by way of land claims agreements or may be so acquired.

Section 35 also affirms "**existing** aboriginal and treaty rights":

> RIGHTS OF THE ABORIGINAL PEOPLES OF CANADA
> **35.** (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
> (2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit, and Metis peoples of Canada.
> (3) For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.
> (4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.(17)

The question of whether or not a particular right is "**existing**" is a challenging one which has often been referred to the Supreme Court of Canada. A number of these cases involved Aboriginal fishing rights. In **R. v. Sparrow [1990]** the Supreme Court recognized existing Aboriginal rights to overturn a man's conviction for using an oversized fishing net in violation of the federal Fisheries Act. In so doing, the Court laid down a three part test for claiming an Aboriginal right under s.35; the person must prove that;

- the treaty right existed
- he or she was exercising that right, and

- the right had been infringed by government regulations

In another decision, **R v. Marshall, 1999**, the Supreme Court affirmed the treaty right of the Mi'kmaq to earn a **"moderate livelihood"** from fishing and hunting. This decision became controversial as it was argued that Aboriginal groups relied on it too heavily. For example, some groups started fishing for lobster out of season in Eastern Canada. This led to the Court issuing a second decision, **R v. Marshall (No.2), 1999** which clarified and qualified their earlier decision by stating that the federal government had the right to restrict Aboriginal fishing for **justifiable purposes** such as conservation. The tensions caused by this issue erupted into the ***Burnt Church Crisis*** in New Brunswick between 1999 and 2001, during which non-Aboriginal fishermen vandalized hundreds of Aboriginal lobster traps and three fish processing plants.

Affirmative Action

Affirmative action refers to policies or programs designed to counteract systemic or historic discrimination. Affirmative action programs are protected by **s.15(2) of the Charter** despite that fact that they might be in violation of the equality rights guaranteed by s.15(1).

> *Equality Rights*
> **15.** (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
> (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

This allows for laws or regulations that favour some groups over others, but which are justifiable as a **means to correct existing inequality**, such as hiring quotas based on race or gender in the public sector. Subsection 15(2) has raised many issues of interpretation. One example is how equality should be measured; does it require equal **opportunity** or equal **representation**? Hiring quotas would be an example of a policy designed to create equal representation in a work force. Another issue is the meaning of the term "**disadvantaged**". Many critics have argued that affirmative action programs are not justifiable and have labelled them as **reverse discrimination**. Their reasons include the principles of free enterprise and democracy; merit and hard work should be the only factors involved in a person's success in society. Critics have also argued that the programs are misplaced, giving advantages to those that were not disadvantaged in the first place and penalizing those who were not responsible for previous unequal treatment. One interesting decision from the Supreme Court of Canada tested the validity of affirmative action programs that increased the numbers of female correctional officers. In **Conway v. The Queen, 1993**, an inmate launched a legal action claiming that his rights had been violated while being subjected to frisk searches and cell patrols by female guards. The Supreme Court sided with the government policies demonstrating support for the affirmative action hiring policy. They then went further in legitimizing unequal treatment according to gender by stating that although searches and surveillance of male inmates by female guards is justifiable, the reverse would not be due to historical, sociological, and biological differences.