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Constitutional Law of Canada

This publication is the definitive work on Canadian constitutional law, written by a respected constitutional law scholar. All aspects of the subject are thoroughly analyzed, including: basic constitutional concepts, distribution of powers, civil liberties and practice-related issues.

This release features updates to case law and commentary in Chapters 5 (Federalism), 7 (Courts), 20 (Trade and Commerce), 21 (Property and Civil Rights), 28 (Aboriginal Peoples), 29 (Public Property), 39 (Override of Rights), 40 (Enforcement of Rights), 43 (Expression), 45 (Voting), 47 (Fundamental Justice), 48 (Unreasonable Search or Seizure), 51 (Rights on Being Charged), 56 (Language), and 60 (Proof). The Index has been updated accordingly.

Case Law Highlights

- **Federalism — Cooperative Federalism** — An explicit invocation of cooperative federalism was made in 2018 in a federal-provincial proposal for a national securities regulator, a project that in the past had been stymied by constitutional issues. In the Supreme Court of Canada decision in *Re Pan-Canadian Securities Regulation*, what was proposed was a “cooperative securities regulator”, which would have two components: (1)

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a uniform provincial securities act, which would be broadly similar to existing provincial securities acts, and which would be enacted by all provinces participating in the cooperative system; and (2) a federal act aimed at preventing and managing “systemic risk”, establishing criminal offences relating to securities markets, and creating a national securities regulator. Aside from the federal power over systemic risk, the national securities regulator would derive its regulatory powers by delegation from the provinces in their uniform securities acts; the national securities regulator would become the sole regulator in the participating provinces.

- **Aboriginal Peoples — Section 35 — Duty to Consult Aboriginal People —** In *Mikisew Cree (No. 2)* (2018), the Mikisew Cree First Nation argued that the Crown in right of Canada was under a duty to consult the First Nation before Parliament enacted environmental legislation that had the potential to adversely affect the First Nation’s treaty rights to hunt, trap and fish. The majority of the Supreme Court held that the duty to consult did not apply to the “law-making process”. It was not appropriate to “transpose a consultation framework and judicial remedies developed in the context of executive action into the distinct realm of the legislature.... [T]he law-making process does not constitute ‘Crown conduct’ that triggers the duty to consult.” It followed from the majority opinion that legislation could not be challenged on the ground that a duty to consult had not been fulfilled.
- **Expression — Access to Courts — Restrictions on Reporting —** “Informer privilege” arises when police receive information under a promise of confidentiality. Such a promise can be explicit “or can arise implicitly from police conduct that would ‘have led a person in the shoes of the potential informer to believe, on reasonable grounds, that his or her identity would be protected. There are two related reasons for protecting the identity of an informer. First, the informer is likely to be at risk of serious danger if his or her cooperation with the police becomes known. Second, in reliance on the shield of informer privilege, other persons may be willing to come forward with information for the police.
- **Voting — Section 3 of Charter —** In *Frank v. Canada* (2019), the Canada Elections Act’s disqualification from voting of citizens who have been absent from Canada for five years was struck down by the Supreme Court of Canada. The two plaintiffs in the case were Canadian citizens who lived outside Canada and had attempted to vote in the Canadian federal election of 2011. They were both notified that that they were not entitled to receive a ballot because they had been residing outside Canada for more than five years. They brought the case to challenge the constitutionality of their disqualification. They were successful in the Supreme Court. Wagner C.J., who wrote for the majority, pointed out that a citizen’s right to vote was guaranteed by s. 3 of the Charter, and s. 3 “tethers voting rights to citizenship, and citizenship alone. The Charter does not mention residence.”

The Court struck from the eligibility provisions of the Act the words “a person who has been absent from Canada for less than five consecutive years and who intends to return to Canada as a resident”, and replaced them with “an elector who resides outside Canada” with no stipulations as to time of absence or intention to return.

- **Fundamental Justice — Fair trial — Full answer and defence** — In *R. v. R.V.* (2019), a sexual assault case, the complainant was pregnant and she testified that the only possible cause of the pregnancy was a sexual assault by the accused. Aside from that single act of forced intercourse, she testified that she was a virgin. The accused denied that he had ever engaged in intercourse with the complainant, and, since she was undoubtedly pregnant, he applied to cross-examine her about her sexual activity with other men. The Supreme Court of Canada held that the accused’s right to full answer and defence did confer a right to cross-examine the complainant, but that right was subject to restrictions giving effect to protections to safeguard the rights of the complainant. In this case, the Supreme Court of Canada held that R.V.’s right to full answer and defence gave him the right to engage in a limited cross-examination of the complainant with respect to any other sexual activity.
- **Language — Language of Courts — Right to Interpreter** — The right to an interpreter was an important element of the reasoning of the Supreme Court in *Mazraani v. Industrial Alliance Insurance* (2018). The case originated in a trial in the Tax Court of Canada in which most of the witnesses were French-speaking. One of the witnesses was unilingual in English and he requested an interpreter. In response, the judge asked the French-speaking witnesses to “make an effort” and testify in English in order to avoid the delay that would be caused by employing an interpreter. The French-speaking witnesses complied with the judge’s request and testified in English. When one of the counsel spoke in French, the judge intervened to request that he switch to English. In this fashion, the trial proceeded in English without an interpreter. The case was appealed up to the Supreme Court of Canada. The Court pointed out that the language rights of the witnesses had been breached. The right to speak in either English or French was guaranteed both by s. 133 of the Constitution Act, 1867 and by s. 19(1) of the Charter of Rights, and the right to an interpreter was guaranteed by s. 14 of the Charter. It was the duty of the trial judge to do whatever was necessary to ensure that these rights were not breached in the conduct of the trial.