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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 7 (Courts), 8 (Supreme Court of Canada), 20 (Trade and Commerce), 28 (Aboriginal Peoples), 41 (Exclusion of Evidence), 47 (Fundamental Justice), 48 (Unreasonable Search or Seizure), 51 (Rights on Being Charged), 52 (Trial Within Reasonable Time), 59 (Procedure). The Index has been updated accordingly.

Case Law Highlights

- **Supreme Court of Canada — Precedent —** In *R. v. Comeau*, the trial judge in the New Brunswick Provincial Court had to decide whether the province's Liquor Control Act imposed a valid restriction on the amount of liquor that could be brought into the province. A decision of the Supreme Court of Canada in *Gold Seal v. Alberta* (1921) had upheld a federal law aimed at assisting "dry" provinces to keep liquor out of their territories. The provincial judge in *Comeau* declined to follow *Gold Seal* on the ground that it was wrongly decided, and held instead that s. 121 of the Constitution

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Act, 1867 invalidated the Liquor Control Act's purported restriction on the amount of liquor that could be brought into the province. The Supreme Court held that *Gold Seal* was a binding authority which could not be bypassed by historical evidence. The correct interpretation of s. 121 could not be ceded to an expert; it was the primary task of the judge himself. The judge in *Comeau* was bound by the decision of the higher court in *Gold Seal* and was not at liberty to refuse to follow it. The Supreme Court was at liberty to refuse to follow *Gold Seal*, a previous decision of its own, but it decided that New Brunswick's restriction on the amount of liquor that could be brought into the province did not violate s. 121: *R. v. Comeau*, 2018 SCC 15.

- **Aboriginal Peoples — Aboriginal rights — Definition of aboriginal rights —** A First Nation's freedom of religion was a central issue in *Ktunaxa Nation v. British Columbia*. In that case, the Ktunaxa Nation applied for judicial review of the decision of the B.C. Minister of Forests to grant a permit for the construction of a ski resort in a valley in southeastern B.C. The First Nation lived in the valley and objected to the proposal on the ground that the proposed resort was within an area of spiritual significance to the First Nation because it was home to an important population of grizzly bears and to Grizzly Bear Spirit, a principal spirit within the Ktunaxa religion. The court application had been preceded by 20 years of consultations by the Crown (the B.C. Minister) and the promoter of the resort with the Ktunaxa and the Shuswap First Nation, which also inhabited the valley. As the result of the consultations, significant accommodations had been made to the ski-resort proposal, including the removal of areas critical to First Nation use and to grizzly bear habitat. The Shuswap eventually supported the proposal because of the benefits that the ski resort would bring to their people and the region. However, late in the process, the Ktunaxa took the position that no accommodation was possible because they believed that the development would drive the Grizzly Bear Spirit out of the valley which would irrevocably impair their religious beliefs and practices. After fruitless attempts to revive the consultation process, the Minister declared that reasonable consultation had occurred and approved the project. The Supreme Court decided that the Minister's decision to end consultation and approve the project was reasonable, and since reasonableness was the standard of review for issues of mixed fact and law like this one, the Court unanimously upheld the Minister's decision: *Ktunaxa Nation v. British Columbia*, [2017] 2 S.C.R. 386, 2017 SCC 54.

- **Aboriginal Peoples — Treaty Rights — Interpretation of Treaty Rights —** In *First Nation of Nacho Nyak Dun v. Yukon*, the treaty to be interpreted was the First Nation of Nacho Nyak Dun Final Agreement, which was concluded with Canada and Yukon in 1993. The Final Agreement was based on the Umbrella Final Agreement, also entered into in 1993 by Nacho Nyak Dun and all the other Yukon First Nations. Karakatsanis J.,

for a unanimous Supreme Court, said that: “Because modern treaties are ’meticulously negotiated by well-resourced parties’, courts must ’pay close attention to their terms’...Compared to their historic counterparts, modern treaties are detailed documents and deference to their text is warranted.” However, she did acknowledge in an obiter dictum that even a modern treaty is “subject to such constitutional limitations as the honour of the Crown.” The question in the case was whether Yukon had the power unilaterally to adopt a regional land use plan for the Peel Watershed, a remote region of the territory, which would increase access to and development of the region. The answer to the question was no, because the Final Agreement stipulated in detail a robust process of consultation with the First Nation for a land use plan of this kind and Yukon had not followed that process. Karakatsanis J. quashed the Yukon plan, explaining that it could be revived only by following the Final-Agreement process of consultation with the First Nation: *First Nation of Nacho Nyak Dun v. Yukon*, [2017] 2 S.C.R. 576, 2017 SCC 58.

- **Exclusion of Evidence — Nature of Official Conduct — Good Faith —** In *R. v. Marakah*, the sender had sent text messages on his cell phone to the recipient regarding illegal transactions in firearms. The police, without a warrant, unlawfully seized and searched the recipient’s cell phone and charged the sender with firearms offences, proffering the text messages as evidence against the sender. The Court held that the sender retained a reasonable expectation of privacy in the messages, and the police had therefore obtained the messages in breach of the sender’s s. 8 right to be free of unreasonable search and seizure. In order to determine whether the messages could still be admitted as evidence, an assessment had to be made of “the seriousness of the infringing state conduct”. McLachlin C.J., for the majority of the Court, held that: “The police’s Charter-infringing conduct was sufficiently serious to favour the exclusion of the evidence.” The police had committed a “serious breach of the Charter” in searching the recipient’s cell phone without a warrant which led them to the sender’s messages, and the police error, even if made “in good faith”, could not regarded as “reasonable”. The police action also had a “significant” impact on the sender’s Charter-protected privacy interest. Although society’s interest in the adjudication of the case on the merit would have favoured admission, she concluded that “on balance” the admission of the evidence would bring the administration of justice into disrepute, and it had to be excluded under section 24(2): *R. v. Marakah*, [2017] 2 S.C.R. 608, 2017 SCC 59.

- **Rights on Being Charged — Variation of Penalty (s. 11(i)) —** *Tran v. Canada* was a case that interpreted s. 36 of the federal Immigration and Refugee Protection Act. Under s. 36, a “permanent resident” of Canada was liable to deportation on the ground of “serious criminality”, which was defined as including a conviction for an offence “punishable by a maximum term of imprisonment of at least 10 years”. In March 2011, Mr. Tran, who was a

permanent resident of Canada, committed the offence of production of a controlled substance (he had a marihuana grow operation). At that time of commission, the maximum penalty for the offence was seven years of imprisonment. On November 6, 2012, the maximum penalty for the offence was increased to 14 years of imprisonment. On November 29, 2012 he was convicted of the charge against him and received a 12-month conditional sentence to be served in the community. At that time of sentencing, the maximum penalty of 14 years, if applicable to Mr. Tran, would have made his conviction count as "serious criminality" under s. 36 and would have exposed him to the risk of deportation. Côté J., who wrote for a unanimous Supreme Court, pointed out that: "When Mr. Tran committed his offence, he could not have been aware that doing so was an act of 'serious criminality' that might...lead to deportation." She held that the effect of Charter s. 11(i) was to avoid that unforeseeable consequence: Mr Tran was never liable for more than the maximum penalty at the time of commission, which was seven years imprisonment. The punishment had been varied between the time of commission (seven years) and the time of sentencing (14 years), and he was entitled to "the benefit of the lesser punishment". It followed that he had not been convicted of an offence punishable by a maximum term of imprisonment of at least 10 years, which was the standard of "serious criminality" and the standard for deportation. Côté J. accordingly quashed the process that had been commenced to deport Mr Tran: *Tran v. Canada*, [2017] 2 S.C.R. 289, 2017 SCC 50.