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CRIMINAL PLEADINGS AND PRACTICE IN CANADA

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What's New in this Update:

This release updates case law and commentary in Chapters 31 to 34.

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Highlights:

- The “federal and provincial *legislatures*” are subject to “Charter scrutiny”. In particular, the state is *not* entitled to an absolute immunity from liability for damages when it enacts “unconstitutional legislation” that infringes Charter rights. *Damages* may be an “appropriate and just remedy” under s. 24(1) of the Charter in respect of the enactment of “legislation later declared unconstitutional”: *Canada (Attorney General) v. Power*, 2024 SCC 26, at **31:108**.
- Any “complete ban” on unionized workers’ “ability to strike” after the *expiry* of a collective agreement will *invariably* “substantially interfere” with their s. 2(d) Charter protected collective bargaining rights. While the *question* of whether “interest arbitration” serves as a “constitutionally adequate substitute” for the right to strike may be an “important factor” in the s. 1 Charter “justification analysis”, it has “no bearing” on the threshold question of whether eliminating the right to strike *violates* s. 2(d) of the Charter: *Amalgamated Transit Union, Local 113 v. Ontario*, 2024 ONCA 407, at **31:376**.
- Section 320.27(1)(b) of the *Criminal Code* “now” requires a detained person “to *immediately* provide the samples of breath” into an “approved screening device” – generally at roadside. However, s. 320.27(1)(b) allows “some time” for the police to explain the “approved screening device” (ASD) test process *and* the consequences of refusing. Thus, the ASD test process is treated as a “transaction” – that is, as a “series of connected acts *extending* over a period of time”: *R. v. Khandakar*, 2024 ONCA 620, at **31:881**.
- While there is a “general presumption *against* combining remedies” under ss. 24(1) and 52(1) of the Charter, there is “no categorical restriction”. A functional and flexible approach to “combining remedies” is driven by “principled and purposive considerations” even though the “existence of an “alternative remedy” is a countervailing consideration. The availability of a *declaration* under s. 52(1) *cannot* absolutely displace a claim for *damages* under s. 24(1). The same is true for the availability of “judicial review” for a decision under the “invalid law”: *Canada (Attorney General) v. Power*, 2024 SCC 26, at **31:1413.50**.
- The *Jordan* framework has “no application in the *extradition* context,” which views delay through a different lens. The “impact of delay” in the extradition context is assessed in light of “Canada’s treaty obligations” and relationships in an international forum. Absent exceptional circumstances, “issues related to trial fairness” should be left to the “foreign court”: *United States v. J.L.*, 2024 BCCA 201, at **32:60**.

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