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CONSTITUTIONAL LAW OF CANADA

Hogg

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Publisher's Special Release Note 2021

The pages in this work were reissued in July 2021 and updated to reflect that date in the release line. Please note that we did not review the content on every page of this work in the July 2021 release. We will continue to review and update the content according to the work's publication schedule. This will ensure that subscribers are reading commentary that incorporates developments in the law as soon as possible after they have happened or as the author deems them significant.

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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 1 to 60, including an extensive revision to Chapter 55, Equality. The Index has been updated accordingly.

Case Law Highlights

- **Basic Concepts — Courts — Implications of Constitution's Judicature Sections — Inferior Courts —** In *Re Code of Civil Procedure (Que.), art. 35* (2021), the Supreme Court of Canada released a decision that raised new questions about whether the treatment of inferior courts and administrative tribunals had indeed fully converged. Côté and Martin JJ., who wrote jointly for the bare majority of the Court, made it clear that the Residential Tenancies test and the core jurisdiction test apply to administrative-tribunal cases and inferior-court cases. However, they took the opportunity to refine the core jurisdiction test, and in doing so, they seemed to suggest that this refined core jurisdiction test would apply only in inferior-court cases. Côté and Martin JJ.'s conclusion that the impugned provision was inconsistent with s. 96 turned on the core jurisdiction test. Under this test, a grant of jurisdiction will be inconsistent with s. 96, even if it satisfies the Residential Tenancies test, if: (1) the jurisdiction being granted falls within the core jurisdiction of the superior courts; and (2) the grant of jurisdiction has the effect of removing this aspect of, or otherwise impermissibly invades, the core jurisdiction of the superior courts. In an attempt to clarify the core jurisdiction test, Côté and Martin JJ. outlined the following list of factors to guide the analysis at the second stage of the test: (1) the scope of the jurisdiction being granted; (2) whether the grant of jurisdiction is exclusive or concurrent; (3) any monetary ceilings applicable to the grant of jurisdiction; (4) whether there is an accessible appeal to the superior courts; (5) the impact of the grant of jurisdiction on the caseload of the superior court; and (6) whether there is an important societal objective.
- **Distribution of Power — Judicial Review on Federal Grounds — Interpretation of Constitution — Unwritten constitutional principles —** The Supreme Court of Canada engaged directly with the question of whether unwritten constitutional principles can be invoked to invalidate legislation in *Toronto (City) v. Ontario* (2021). Abella J., who wrote a dissenting opinion that was joined by three other judges, took the view that a faithful reading of the Court's decisions "leads inescapably to the conclusion … that unwritten principles may be used to invalidate legislation if a case arises where legislation elides the reach of any express constitutional provision but is fundamentally at odds with our Constitution's 'internal architecture' or 'basic constitutional structure' ". However, Wagner C.J. and Brown J., writing jointly for a bare majority of the Court, disagreed. They accepted that unwritten constitutional principles can be used as an interpretive aid, to assist with the interpretation of the written Constitution where the text of the

Constitution is not "sufficiently comprehensive or definitive" to yield an answer. They also accepted that unwritten constitutional principles "can be used to develop structural doctrines unstated in the written Constitution per se, but necessary to the coherence of, and flowing by implication from, its architecture". But, adopting a narrow reading of the unwritten constitutional principle cases described earlier in this section, they firmly rejected the view that the unwritten constitutional principles provide an independent basis to invalidate legislation, even if the Constitution's "internal architecture" is involved. The unwritten constitutional principles are "part of the law of the Constitution, in the sense that they form part of the context and backdrop to the Constitution's written terms", but they are not "provisions of the Constitution", capable of invalidating laws inconsistent with them.

- **Civil Liberties — Rights on Being Charged — Trial by Jury (s. 11(f)) — Jury —** In *R. v. Chouhan* (2021), the Supreme Court of Canada considered whether the abolition of peremptory challenges infringed ss. 11(d) and 11(f) of the Charter. Peremptory challenges allow an accused to exclude a prospective juror without explanation. Peremptory challenges were abolished in 2019 as part of a suite of changes to the jury selection process because there was a concern that they were used to discriminate against prospective jurors based on their race and other visible personal characteristics, impacting jury diversity. There were five opinions issued by the Court in the case, but Moldaver and Brown JJ.'s joint opinion on the ss. 11(d) and 11(f) argument seemed to attract the agreement of a majority of seven judges. Moldaver and Brown JJ. concluded that the abolition of peremptory challenges did not violate s. 11(d). They went on to say that their conclusion on s. 11(d) was dispositive of the s. 11(f) issue as well because "section 11(f) offers no greater protection of impartiality than the specific guarantee of impartiality enshrined in s. 11(d)". They also reiterated the Court's earlier holding in *R. v. Kokopenace* that s. 11(f)'s "guarantee of representativeness requires the state to provide a fair opportunity for a broad cross?section of society to participate in the jury process, by compiling a jury roll that draws from a broadly inclusive source list and by delivering jury notices to those who have been selected".

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