

Index

Charter of Human Rights and Responsibilities Act 2006 (Australia) — judicial disengagement and rights-compatible interpretation

Bill of Rights Act 1990 (NZBORA), 190-191, 198, 200, 204, 218, 220, 222, 228, 229, 230

Charter

background, 186-187

early jurisprudence on s. 32(1) – Supreme Court of Victoria, 202-203

generally, 184

judicial neutralization of s. 32(1), 185-186

provisions

comparative landscape, 190-192

“consistently with [statutory] purpose”, 198-200

enforcement mechanisms, 188-190

if “remedial”, how “remedial”?, 193-198

methodology, 200-202

“remedial” or “ordinary” statutory interpretation, 192-193

rights and limitations, 187-188

generally, 183-186, 232-234

Human Rights Act 1998 (UKHRA), 188, 190-191, 193, 196-198, 200, 202, 204, 211, 213, 227

post-*Momcilovic* jurisprudence

cases following Court of Appeal, 223-226

generally, 222

s. 32(1) beyond principle of legality, 226-228

problems with jurisprudence

principle of legality – parliamentary intention vs strained interpretation, 228-230

s. 7(2) factors

Court of Appeal methodology, 231-232

principle of legality, 230-231

R. v. Momcilovic

- 2010 — Victoria Court of Appeal
 - cases under UKHRA and NZBORA, 204
 - critique of decision, 207
 - Drugs, Poisons and Controlled Substances Act 1981* (Vic), 203-204
 - methodology, 205-207
 - ordinary interpretative direction, 204-205
- 2011 – High Court of Australia – appeal
 - constitutional background, 208-209
 - decision, 209-210
 - generally, 207
 - ratio of decision not apparent, 222
 - support for Court of Appeal decision, 210-215
 - support for NZ/UK approach, 216-221

declaratory legislation

- abandonment of unnecessary form of legislation, 389-393
- Canada Bread Company*, 354, 380-388, 389, 390
- changed law rule, 372, 374, 378
- generally, 353-354, 389-393
- Hawkesbury City Council v. Sammut*, 360, 390
- legal fiction as unnecessary and archaic, 389-393
- legislation promoting political outcomes, 354-356
- nature of declaratory form of legislation, 356-361
- Scrymgour v. Moore*, 390-392
- separation of powers, and
 - Canada Bread Company*, a cautionary tale
 - analysis, 385-388
 - dissent, 383-384
 - generally, 380-382
 - majority decision, 382-383
- direction problem
 - Parliament can change laws of general application, 372-374
 - Parliament cannot direct courts in resolution of dispute, 374-377
 - Parliament cannot directly set aside prior judgment, 370-371
- generally, 362-365
- implications, 378-380
- interpretation problem, 365-370
- significance of declaratory legislation, 361-362

gender identity interpretive challenge in Australia

Acts Interpretation Act 1901

“creative interpretation”, occasions where appropriate, 62
 generally, 58-59, 61-62
 purposive approach of s. 15AA, 59-60
 reference to extrinsic materials in s. 15AB, 60
Anti-Discrimination Act 1977 (NSW), 69
Births Deaths and Marriages Act 1995 (NSW)
 s. 32A, 69
 s. 32DA, 70
 s. 32DC(1), 70
Crimes Act 1900 (NSW), s. 81A, 64-65
 gender identity cases
 AB and AH v. State of Western Australia, 65-66
 Bellinger (FC) (Appellant) v. Bellinger, 63-64
 Corbett v. Corbett (otherwise Ashley), 63, 65
 NSW Registrar of Births, Deaths and Marriages v. Norrie, 68-72
 R. v. Harris, 64-65
 Re Kevin, 64
 Western Australia, v. AH and Another, 72-73
Gender Reassignment Act 2000 (WA)
 s. 14, 68
 s. 15, 66-67
 generally, 55-56, 56-62, 73-74
Interpretation Act 1984 (WA), s. 18, 67-68
Interpretation Act 1987 (NSW), ss. 33, 34, 70
 judicial interpretation of legislation generally, 55-56
Marriage Act 1961 (Cth), 64
Matrimonial Causes Act 1973, s. 11(c), 63
 modern approach to statutory interpretation, 58-59
 shifting view of gender identity, 72

***Human Rights Act 1998* (UK) and judicial powers of interpretation**

constitutional adjudication
 Charter of Rights and Freedoms (Can.), notwithstanding clause,
 251-252
 European Convention on Human Rights, 247-248, 250, 252, 253-254
 generally, 254-255
 “living instrument” approach, 249
 new approach to interpretation of law required by *Human Rights
 Act 1998*, 247-248, 254
 Parliamentary sovereignty, 251
 “unlawful act by a public authority”, 252-253
 US Supreme Court vs UK courts, powers of, 250
 White Paper, 247

evolution of human rights in the UK, 261-263
generally, 235
history of rights protection in the UK
 Bill of Rights 1689 (UK), 236, 238-240
 European Convention on Human Rights, 240-242, 243, 247, 254
 generally, 236
 Habeas Corpus Act 1679, 237
 Human Rights Act 1998, 242-244, 247
 Magna Carta (1215), 236-237
judicial-political divide, 260-261
political reaction to European and UK court rulings, 255-260
traditional statutory interpretation
 “anxious scrutiny”, 246
 Heyden’s Case, 245
 Interpretation of Statutes (1969), report of Law Commission and
 Scottish Law Commission, 244-246
 principle of legality, 246-247
White Paper, 247

Interpretation Act (Canada)

application and scope, 10-15
constitutional implications
 analysis in Canada, 6-10
 analysis in UK, 5-6
 Charter of Rights and Freedoms, 8
 generally, 4-5
declaratory legislation, retroactive application of, 15-16
enactment in 1867, 1-3
federal statutes overriding, 14-15
generally, 24
Interpretation Act 1850 (UK), 3
Interpretation Act 1889 (UK), 3
Interpretation Act 1978 (UK), 3
key provisions
 administrative matters, 23-24
 computation of time in federal legislation, 22-23
 Crown immunity, and, 20
 interpretation of federal legislation, 20-22
 mechanics of federal legislation, 15-20
 repeal, replacement and amendment, 17
 territorial scope of federal law, 19
 transition, nine rules governing, 18
Lord Brougham’s Act — Interpretation Act 1850 (UK), 3

statutory workhorse, 1

jurisprudential maxims (Canada)

generally, 321-322, 350-351

interpretive axioms

administrative decision-makers are entitled to err, 325-331

deference as respect incorporates remedial pluralism, 345-346

inconsistency is not a violation of rule of law, 340-344

more than one valid interpretation is plausible, 331-336

only “true” jurisdiction exists, 336-340

range of intelligible, defensible outcomes is possible, 344-345

pluralism and judicial review

domestic legal systems, 322

judicial activism, 324

non-court-centric model, 323

sources of law, 322

reasonableness review vs correctness review, 347-350

legislative amendments — interpreting substance or style

amending provisions, judicial interpretation

Australia, 412-419

Canada, 404-412

background and history

Australia, 401-403

Canada, 398-401

generally, 397-398

Interpretation Act amendment provisions, 398

Uniform Model Interpretation Act comparison, 400-401

generally, 395-397, 419-423

***Migration Act 1958 (Australia)* — role of international law in statutory interpretation**

Convention Relating to the Status of Refugees (1951)

Article 1A(2), 267

first mention in Australian legislation, 269-270

generally, 265, 266, 269

drafting history and references to *Refugees Convention*

definition of refugee included in 1991 amendment, 269-270

definitions of refugee, 267-268

“dualist model” of reception of international treaty obligations, 269

Migration Amendment Act (No. 2) 1980 (Cth), first mention of

Refugees Convention in Australian legislation, 269

generally, 265-266, 291-292

international law as instrument of statutory interpretation

Legacy Act 2014

- Australian interpretation of refugee status, 282-284
- criticisms and concerns, 284-286
- post-*Legacy Act* interpretation, 286-291
- principles governing application of international law
 - debate over recourse to international law, 275
 - essential rules of construction, 275-276
 - generally, 270-271
 - where text of treaty is transposed into statute, 271-275
- refugee definition, jurisprudence on, 276-282
 - Vienna Convention*, 271-272, 279-280
- Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Seeker Legacy Caseload) Act*, (2014), 266, 270, 282-284
- Protocol Relating to the Status of Refugees* (1967), 267

ouster clauses — statutory interpretation and the British Constitution

- Anisminic Ltd. v. Foreign Compensation Commission*, 134-135, 138-140, 146
- constitutional context
 - Anisminic Ltd. v. Foreign Compensation Commission*, 140, 141
 - Privacy International v. Investigatory Powers Tribunal*, 142, 144-146
 - R. v. Secretary of State for the Environment, ex parte Ostler*, 141-142, 145
 - R (Cart) v. Upper Tribunal*, 142-143, 145, 149
 - Smith v. East Elloe (Rural District)*, 141-142
- constitutional principle and ouster clause interpretation
 - dicta* indicating repudiation of constitutional orthodoxy, 151-153
 - Evans v. Information Commissioner*, 147, 148
 - generally, 146-147
 - interpretive role of courts, 149
 - ouster beyond Parliament's legislative reach, 149
 - R (A) v. Director of Establishments of the Security Service*, 149
 - R (Cart) v. Upper Tribunal*, 149
 - R (Jackson) v. Attorney General*, 149-150
 - Unison v. Lord Chancellor*, 148
- forms of ouster
 - ex post* ouster, 136
 - generally, 134
 - quasi-ouster
 - Evans v. Information Commissioner*, 136
 - Freedom of Information Act 2000*, 136
 - Tribunals, Courts and Enforcement Act 2007*, 136-137
 - Unison v. Lord Chancellor*, 136-138

total ouster

Anisminic Ltd. v. Foreign Compensation Commission, 134-135

Foreign Compensation Act 1950, 134

generally, 131, 133-134, 153-155

Liversidge v. Anderson, 131-133, 134

purposive approach in New Zealand

generally, 293-294, 319

historical analysis of interpretation legislation

Acts Interpretation Act 1908, 298

Acts Interpretation Act 1924, 298, 301, 302, 303-305, 311

Interpretation Act 1867 (Can.), 297

Interpretation Act 1888, 296-297

Interpretation Act 1999

approach of courts, 315-319

Law Commission recommendations, 311-314

progress of Bill through Parliament, 314-315

Interpretation Ordinance 1851, 295-296, 297

purposive provisions and the courts before 1999

canons of construction, 299

case law, 300-302

change in approach, 306-310

commentaries, 302-303

reasons purposive provisions were not used, 303-305

rule of law — statutory interpretation and the Canadian Constitution

generally, 111-112, 130

relationship between statutes and the Constitution

generally, 112-113, 120

notwithstanding clause and statutory override, 113-115

quasi-constitutional statutes, 115-117

statutory limits to *Charter* jurisdiction, 117-120

statutory bars to constitutional remedies

Energy Resources Conservation Act, s. 43 immunity clause, 126-127

Ernst v. Alberta Energy Regulator, 126-128, 130

Henry v. British Columbia (Attorney General), 128-129

Ward v. Vancouver (City), 127

statutory tribunal jurisdiction over the Constitution

Doré c. Québec (Tribunal des professions), 124

generally, 120-121

J. (G.), Re, 124

Law Society of British Columbia v. Trinity Western University, 124-

125

Loyola High School v. Quebec (Attorney General), 124

R. v. Conway, 121-124, 125

Trinity Western University v. Law Society of Upper Canada, 124-125

Scotland Act 1998, s. 101 – statutory interpretation and legislative competence

absence of constitutional review of primary legislation in UK constitution, 157-158

Act of the Scottish Parliament (ASP)

compared to Act of UK Parliament, 166

generally, 157

s. 101, reading down legislation, 159, 167

bias in favour of devolution

Northern Ireland's more positive approach to interpretation, 169-170

purpose and method of inquiry, s. 101, 167-169

purpose of interpretative obligation defined in s. 3 of *Human Rights Act 1998*, 167-168

constitutional review

consequences of legislating beyond Parliament's competence, 161

pre-enactment checks and cross-checks, 162

"third way" of constitutionalism, 159-160

generally, 157-159, 181-182

Human Rights Act 1998

purpose of interpretative obligation defined in s. 3, 167-168

Jackson v. Attorney General, 158

judicial constitutional review and s. 101

Anderson v. Scottish Ministers, defines approach courts take to

application of s. 101(2), 174-175

challenged ASPs, 176-178

DS v. HM Advocate, 175-176

generally, 174

R. v. Lambert, and proper scope of interpretative obligation, 175

Labour Party general election victory, 158

Parliamentary constitutional review and s. 101, 178-181

presumption of competence

departure from common law principles of constitutional interpretation, 171

fluidity of constitutional intensity of devolution statutes, 174

generally, 170

Imperial Tobacco, Petitioner, 173-174

Northern Ireland Act 1998, 173

"presumption of constitutionality", 172

"principle of efficacy", 172

Robinson v. Secretary of State for Northern Ireland, 173
safeguarding devolution settlement
absence of safeguards in Act, 163
ASP compared to Act of UK Parliament, 166
bias in favour of devolution, 167
Miller v. Secretary of State for Exiting the European Union, 166
s. 28(7) preserves power of UK Parliament to legislate in devolved areas, 163
Sewel convention, 164-165
Smith Commission, recommendations for further devolution of powers, 165-166
traditional approach to legality of *Acts of Parliament*, 157
Whaley v. Lord Watson of Invergowrie, 158

shared parenting in family law disputes — Australian experience

agitation for reform, 1995 amendment to *Family Law Act*
“80-20 rule”, 31-32
conflict between parental responsibility and court’s duty to protect children from abuse, 30
failure to clarify how courts delegate parental responsibility, 29
Hull Report, 31, 32, 34
men’s groups, power of, 30
parental responsibility, concept introduced, 28
Australian Institute of Family Studies (AIFS), 48-49
equal shared parental responsibility (ESPR)
exception to, 37
generally, 32, 48, 51
presumption despite risk of family violence, 45
false allegations of domestic violence, 46
Family Law Act 1975 (Cth)
amendment, 32
generally, 26, 52
Family Law Amendment (Shared Parental Responsibility) Act 2006
ESPR, exception to, 37
generally, 27, 34-35
men’s groups, 36
“primary considerations”, 37
reduction of judicial discretion, 36
response to 2006 reform, 38
Family Law Legislation Amendment (Family Violence and Other Measures) Act 2011, 27, 50
generally, 25-28, 50-53
men’s groups, 30, 36, 46, 52

parental responsibility, 28, 33

2006 reform

consequences, 40-45

costs awarded for false allegations of domestic violence, 46-47

dissatisfaction with, 48-50

“friendly parent”, 45-46

generally, 38-40, 51

presumption of equal shared parental responsibility despite risk of family violence, 45

problems for lawyers, 48

“twin pillars” – equalising shared care with child safety, 47-48

tax avoidance in Canadian income tax law

departures from traditional Anglo-Canadian approach in 1970s and 1980s

Bronfman Trust v. R., 84-86

generally, 81

Golden v. R., 81, 86

Johns-Manville Canada Inc. v. R., 83, 84

“modern rule”, 81

R. v. Imperial General Properties Ltd., 83-84

Stubart Investments Ltd. v. R., 81-82, 86, 89

general anti-avoidance rules (GAARs)

application, three requirements

misuse or abuse requirement, 90-91

non-tax purpose test, 89-90

tax benefit resulting from transaction or series of transactions, 87-89

characterization of avoidance transaction as abusive, 90

generally, 75, 76, 86-87

Income Tax Act

s. 245(1), 87-88, 91

s. 245(2), 91

s. 245(3), 87, 89

s. 245(4), 90

s. 245(5), 91

s. 248(10), 88

scope, 88, 90

tax consequences, 91-92

generally, 75-76, 109-110

specific anti-avoidance rules (SAARs), 80

tax avoidance and statutory interpretation after GAAR

generally, 92-93

- Lipson v. R., Copthorne Holdings Ltd. v. R.* and broader policy arguments
 - 1245989 Alberta Ltd. v. R.*, 108
 - generally, 105-107
 - Gervais c. Canada*, 107-108
 - Triad Gestco Ltd. v. R.*, 109
- lower court GAAR cases, 1997-2005
 - Duncan v. R.*, 99
 - generally, 98
 - McNichol v. R.*, 99
 - OSFC Holdings Ltd. v. R.*, 99-101
- lower court cases, 2005-2013
 - Collins & Aikman Products Co. v. R.*, 104
 - Evans v. R.*, 104
 - Gwartz v. R.*, 105
 - Landrus v. R.*, 105
 - SCC decisions in *Mathew v. R.* and *Canada Trustco Mortgage Co. v. R.*, effect of, 101-104
- tax avoidance at Supreme Court of Canada, 1988-2005
 - Antosko v. Minister of National Revenue*, 94
 - Duha Printers (Western) Ltd. v. R.*, 94-95, 98
 - Entreprises Ludco ltée c. Canada*, 96-98
 - Friesen v. R.*, 94
 - McClurg v. Minister of National Revenue*, 93
 - Neuman v. Minister of National Revenue*, 95-96, 98
 - Shell Canada Ltd. v. R.*, 96, 98
- traditional Anglo-Canadian and American approaches to tax statutes
 - Gregory v. Helvering*, 78-79, 80
 - Inland Revenue Commissioners v. Duke of Westminster*, 77-78, 79, 80, 81
 - Partington v. Attorney General*, 77
- specific anti-avoidance rules (SAARs), 80
- Tennant v. Smith*, 77