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CONSTITUTIONAL LAW OF CANADA

Hogg

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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 the case law and commentary in Chapters 1 (Sources), 9 (Responsible Government), 15 (Judicial Review on Federal Grounds), 16 (Paramountcy), 22 (Transportation and Communication), 39 (Override of Rights), 40 (Enforcement of Rights), 43 (Expression), 45 (Voting), 47 (Fundamental Justice), 51 (Rights on Being Charged), 52 (Trial Within Reasonable Time), and 53 (Cruel and Unusual Punishment).

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Highlights

- **Distribution of Power — Judicial Review on Federal Grounds — Characterization of Laws — Double aspect** — The double aspect doctrine is not a primary doctrine that, like the pith and substance doctrine (and the ancillary powers doctrine), provides a free-standing analytical framework that can be applied in determining whether a law is valid. It is a secondary doctrine that, when invoked, is folded into the analysis of whether a law is valid under the pith and substance doctrine (and the ancillary powers doctrine). This raises the obvious question: at which step of the pith and substance doctrine should the double aspect doctrine be addressed if invoked? The double aspect doctrine is most relevant to the analysis at the second step of the pith and substance doctrine (the classification step), which, recall, requires a determination of whether the matter of a challenged law falls within a head of power allocated to the level of government that enacted it. Under the double aspect doctrine, a law will be found to be valid at the classification step if it relates to an “aspect” of a matter that falls within a head of power allocated to the enacting level of government, even though the matter has another aspect that falls within a head of power allocated to the other level of government. However, the double aspect doctrine will likely also subtly influence the analysis at the first step of the pith and substance doctrine (the characterization step), which, recall, requires a determination of the matter (or pith and substance) of the challenged law. This is because the courts – as noted in an earlier section – tend to use concepts that will assist in classifying a law at the second step of the pith and substance analysis when they characterize a law at the first step of the pith and substance analysis, despite the Supreme Court of Canada’s entreaty – also noted in that earlier section – that the courts keep the two steps of the pith and substance analysis distinct. This explains why the double aspect doctrine is addressed in the part of this chapter relating to the characterization of a law under the pith and substance doctrine, rather than the part of the chapter relating to the classification of a law under the pith and substance doctrine (even though, as noted, the double aspect doctrine is also – indeed particularly – relevant to the classification of a law).
- **Civil Liberties — Enforcement of Rights — Remedy Clause — Apprehended infringements** — In *R. v. Varennes* (2025), the Supreme Court of Canada awarded a s. 24(1) remedy for another Charter infringement that it feared might occur in the future. In that case, the accused, who was charged with the second-degree murder of his spouse, was to stand trial in September 2020, only a few months after the initial outbreak of the COVID-19 pandemic. In the months leading up to the trial, various public health restrictions were instituted to mitigate the spread of COVID-19, including a suspension of jury trials. In June 2020, to avoid potential COVID-19 related delays, the accused requested a trial by judge alone, which is allowed under the Criminal Code if both the accused and the Crown consent. The accused argued that potential COVID-19 delays to jury trials risked infringing his s. 11(b) Charter right to be tried within a reasonable time. However, the Crown refused

to consent to a trial by judge alone for public interest reasons. The accused brought a motion seeking an order for a judge-alone trial in the superior court without Crown consent. The trial judge granted the accused's motion for a judge-alone trial and, at the end of his trial, acquitted him of second-degree murder, convicting him of manslaughter instead. The case ended up in the Supreme Court on appeal, where the central issue was whether the trial judge had the jurisdiction to order a judge-alone trial without Crown consent. Karakatsanis J., who wrote for the majority of the Court, held that the trial judge had the jurisdiction to order a judge-alone trial without Crown consent under the inherent jurisdiction of the superior courts. However, she declined to resolve the standard that should be applied in determining whether to exercise this jurisdiction because she held that s. 24(1) also provided the trial judge the jurisdiction to order a judge-alone trial without Crown consent. The trial judge had concluded that COVID-19 related delays to jury trials would likely have infringed the accused's right to be tried within a reasonable time under s. 11(b), and so had the jurisdiction to order a judge-alone trial without Crown consent as a remedy under s. 24(1).

