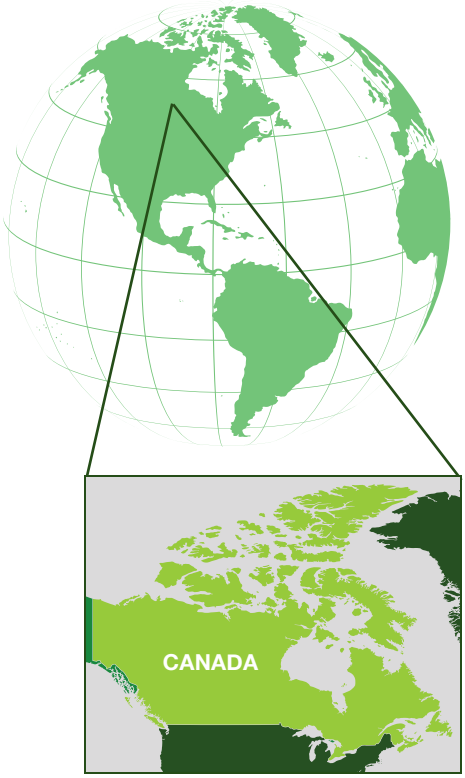

Canada

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I. INTRODUCTION

2019 saw Prime Minister Justin Trudeau complete his first term in office embroiled in several major political-turned-constitutional dossiers that caused the Liberal Party to lose its majority in the Commons at the fall general election. Among them were the nationalized Trans Mountain Pipeline expansion project from Alberta to the Pacific Coast, the imposition of a nationwide carbon pricing system and the Prime Minister's exercise of unlawful influence on his Attorney General in the prosecution of an international bribery and corruption case of Libyan officials.[1] A month before the dissolution of Parliament, the government succeeded in filling a Supreme Court of Canada vacancy with the appointment of Justice Nicholas Kasirer, an appellate judge from Québec and a former civil law professor.

Except in criminal procedure, the Supreme Court decided fewer constitutional cases in 2019 than in previous years. The three selected for this report deal with the following questions: (i) the right to vote of long-term non-resident citizens in federal elections; (ii) the concurrent application of provincial environmental protection laws and federal bankruptcy laws to spent oil and gas sites; and (iii) the availability of *habeas corpus* to federal immigration detainees. However, probably the most constitutionally significant development of the year originates from the enactment of An Act Respecting the Laicity of the State, in which the government of the province of Québec decided to invoke the famous 'notwithstanding clause' of the Canadian Charter of Rights and Freedoms. The ensuing legal challenges to the Laicity Act added to a number of highly politicized cases that have been working their way up to the Supreme Court (or are already pending), giving the nine justices opportunities to revisit and reshape important parts of the Constitution and Canadian policy in the near future.

II. MAJOR CONSTITUTIONAL DEVELOPMENTS

The Return of the 'Notwithstanding Clause(s)'

The result of a last-minute political compromise in 1981 between the federal government and some provinces as a condition for adopting a constitutional bill of rights, s. 33 of the Canadian Charter allows the federal Parliament or a provincial legislature to include an override in an act stating 'that the Act or a provision thereof shall operate notwithstanding' the rights and freedoms guaranteed in ss. 2 or 7 to 15 of the Charter. Except for the omnibus override law passed by the Québec provincial legislature[2] to protest the adoption of the Constitution Act 1982 without its consent, use of the notwithstanding clause has been rare. Only fewer than two dozen instances have been reported to date, mainly originating from Québec.[3] However, after a hiatus of over a decade, resort to the notwithstanding clause (and equivalent clauses in provincial human rights legislation) seems to have picked up.

[1] See Office of the Conflicts of Interest and Ethics Commissioner, *Trudeau II Report* (2019).
[2] Act respecting the Constitution Act 1982.
[3] See PW Hogg, *Constitutional Law of Canada* (5th edn Carswell, 2007), 39-2-39-4 (looseleaf edn).

In 2018, Saskatchewan enacted an override provision.[4] Later in the year, Ontario tabled a bill that also included an override.[5]

On June 16, 2019, the Québec Legislature again used the notwithstanding clause (as well as the corresponding clause of the Québec Charter of Human Rights and Freedoms) in passing the Laicity Act, the main purpose of which is to prohibit public sector employees 'in a position of authority',[6] such as lawyers, police officers and school teachers, 'from wearing religious symbols in the exercise of their functions' (s. 6). The Act stems from a long-standing anxiety manifested in many parts of the population about the perceived increasing place taken by non-Christian religions in the public space, and more generally, from a fear by many Québecers of French-Canadian ancestry of the perceived threat from ethno-cultural diversity to their identity and values.[7] In 2008, a Québec governmental commission had already recommended that judges, Crown prosecutors and law enforcement officers be prohibited from wearing religious signs.[8] In 2013-14, the minority government of the Parti Québécois, a secessionist party, attempted to enact the ban on religious symbols[9] but was prevented from carrying the bill through the legislature after it called and lost a snap election.

Shortly after its enactment, the Laicity Act became the subject of four separate lawsuits by a labour union federation, an English public school board, a civic organization and civil rights groups. In *Hak v Québec*,[10] a Québec Superior Court judge dismissed the appellants' application for a provisional stay of the ban on religious symbols and the requirement that public sector employees exercise their functions with their faces uncovered. On appeal, the appellants submitted a new argument, namely that the impugned provisions violated a rarely used gender equality clause in the Charter that is out of reach of the notwithstanding clause. By a 2.1 majority decision, the Court of Appeal upheld the Superior Court decision.[11] The appellants have now sought leave to appeal to the Supreme Court on the stay application. When the laicity cases finally proceed on the merits, they will be the first Charter challenges involving the notwithstanding clause in more than 30 years.

The courts' anticipated interpretation of the notwithstanding clause could well have direct bearing on yet another intended use of the clause in New Brunswick. Following an outbreak of measles in a high school during the spring of 2019, the province's minority government introduced a bill that would require all children of school age to receive immunization for prescribed diseases. It later decided to insert a notwithstanding clause[12] in order to pre-empt Charter challenges by anti-vaccination groups and parents.

The recent intended and actual uses of notwithstanding clauses, along with a resurgence of minority governments across the country (federal, British Columbia, New Brunswick, Newfoundland, Prince Edward Island), can be interpreted as signs that Canada has not escaped from the current global divisiveness and polarization, in many democracies over public issues. A similar trend can also be observed at the Supreme Court. From a low of 21% in 2014, the proportion of split decisions has steadily increased to a high of 52% in 2018.[13] In fact, 2017 and 2018 have seen the highest number of split decisions since at least the turn of the century.[14] The most significant 2019 Supreme Court constitutional cases reported below follow the same trend.

III. CONSTITUTIONAL CASES

1. Frank v Canada (AG): Long-Term Non-Resident Citizens' Right to Vote

Section 3 of the Canadian Charter states that 'Every citizen of Canada has the right to vote in an election of members of the House of Commons.' In *Frank*, two Canadian citizens residing in the United States claimed that s. 11(d) of the Canadian Elections Act, which rendered citizens abroad ineligible to vote in federal elections if they had been absent from the country for more than five years, violated their right to vote under the Charter. By the time the case reached the Supreme Court, the government had conceded that the five-year residency condition was a breach of s. 3. As a result, the debate focused solely on whether it was a justifiable limit under the savings clause of s. 1 of the Charter. After the appeal was heard but a few weeks before the Court announced its judgment, Parliament repealed s. 11 of the Act.[15]

[4] The School Choice Protection Act 2018, s 2.2.

[5] In September 2018, the Ontario government introduced Bill 31, *Efficient Local Government Act, 2018*, to circumvent the effect of a Superior Court judgment in which a provincial statute reducing the number of Toronto City wards and councillors from 47 to 25 was declared a violation of the candidates' and voters' Charter right to freedom of expression. The government decided not to enact the bill when, a week later, the Court of Appeal stayed the Superior Court decision, thus allowing the city elections to proceed under the 25-ward structure.

[6] Minister of Immigration, Diversity and Inclusion and Government House Leader, 'Le projet de loi no 21 sur la laïcité de l'État est adopté – Une loi historique pour le Québec' (Government of Québec, 17 June 2019) <https://perma.cc/2UR5-MRHE>

[7] G Bouchard and C Taylor, *Building the Future: A Time for Reconciliation* (Consultation Commission on Accommodation Practices Related to Cultural Differences 2008) 18.

[8] Ibid 271.

[9] See Bill 60, *Charter Affirming the Values of State Secularism and Religious Neutrality and of Equality between Women and Men, and Providing a Framework for Accommodation Requests* (2013).

[10] *Hak v Québec (AG)*, 2019 QCCS 2989.

[11] *Hak v Québec (AG)*, 2019 QCCA 2145.

[12] Bill 11, *An Act Respecting Proof of Immunization* (2019).

[13] Supreme Court of Canada, *2018 Year in Review* (2019), 15 <https://perma.cc/93VM-ZL3U>

[14] Ibid; Supreme Court of Canada, *Statistics 2000-2010* (2011), 9 <http://publications.gc.ca/collections/collection_2018/csc-scc/JU7-3-2010-eng.pdf>

[15] Elections Modernization Act 2018, s 7.

Delivering the majority judgment of the Court, Wagner CJ found that the government had not established that the five-year requirement was a reasonable limit on Canadians' right to vote. More specifically, in the view of the majority justices, the requirement failed both at the minimal impairment and proportionality stages of the s. 1 test. Absent any serious explanation on the part of the government, Wagner CJ considered the five-year limit to be overbroad and not carefully tailored to achieve Parliament's objective of preserving the fairness of the Canadian electoral system and ensuring that voters maintain a sufficient connection with Canada. For the government, that connection was manifested in citizens' commitment to the country and their subjection to Canadian laws. Wagner CJ opined that, in itself, long-term residency was not determinative of the extent of a citizen's commitment to Canada. Neither could residents' subjection to Canadian laws be considered an appropriate measuring stick of a citizen's connection, as diplomats, soldiers and other public sector employees posted abroad and their dependents accompanying them (as well as short-term non-resident citizens) should also be disenfranchised; however, these citizens living abroad are eligible voters under the law. Moreover, Wagner CJ gave little weight to the existence of residency requirements in electoral laws of other Westminster democracies, preferring the view that Canada was 'an international leader' in respect of universal enfranchisement. At the final proportionality stage, Wagner CJ opined that 'any salutary effects of ensuring electoral fairness, as asserted by the government, are clearly outweighed by the deleterious effects of disenfranchising well over one million non-resident Canadians who are abroad for five years or more' (para 77). According to Wagner CJ, the government had failed to demonstrate 'how the fairness of the electoral system is enhanced when long-term non-resident citizens are denied the right to vote' (para 78). Therefore, the majority of the Court concluded that the five-year residency requirement was unconstitutional.

In a concurring judgment, Rowe J argued that there was a rational connection between the residency requirement and electoral fairness as it was reasonable to believe that long-term non-residents are less connected to Canada and are less affected by Canadian laws than residents. However, he agreed with the majority justices that the government had failed to demonstrate that the salutary effects of the five-year requirement outweighed its deleterious effects of denying long-term non-resident citizens the right to vote. In reaching that conclusion, Rowe J gave weight to the fact that the electoral impact of that category of voters was negligible, as suggested by the number of international ballots cast in the 2011 election, which ranged between 0.05% to 0.2% of total registered electors in a constituency.

Côté and Brown JJ filed a lengthy dissent in which they argued that the Act's impugned residency requirement struck an acceptable balance between citizens' right to vote and the objective of ensuring that voters maintain 'a relationship of some currency to their communities'. For the dissenting justices, support for the centrality of geographical representation and, more generally, the reasonability of Parliament's choice could be found in eligibility requirements based on residency in other Westminster democracies, in particular New Zealand, Australia and the UK. Moreover, the deleterious effects of the limit on the right to vote were tempered by the fact that long-term non-resident Canadians could regain their right to vote immediately upon their return to Canada. Therefore, in the view of the dissenting justices, the temporary denial of the right to vote was outweighed by the Act's 'salutary effects of preserving the integrity of Canada's geographically based electoral system and upholding a democratically enacted conception of the scope of the right to vote in Canada' (para 172).

2. Orphan Well Association v Grant Thornton Ltd: Competing Application of Federal Bankruptcy Laws and Provincial Environmental Protection Laws to the Disposal of Spent Oil and Gas Sites

Led by the province of Alberta, Canada has risen to become the world's fifth largest producer of oil and gas. While the country's economy has greatly benefited from these natural resources, their intensive exploitation has come at a significant cost to the environment. According to the government of Alberta, an estimated 176,000 oil and gas wells were in operation on its territory in 2019, but an equal number were inactive or permanently dismantled.[16] In a November 2018 statement, the Alberta Energy Regulator calculated that total liability cost to clean up all the decommissioned oil and gas sites in the province would amount to C$58.65B.[17] Not all oil and gas sites that have ceased their activities have been safely closed and restored to their prior condition. As of 2019, there were approximately 10,000 of these 'orphan' wells, pipelines and other sites across the province, which had no legally responsible party financially able to decommission them properly.[18] When an oil and gas site turns orphan, the Regulator and its agent, the Orphan Well Association, are empowered under provincial law to enforce the end-of-life obligations of the company owners of the orphan sites.

In 2015, Redwater Energy Corp, a publicly traded oil and gas company with its principal activities and assets in Alberta, went into receivership. At the time, the company was the owner of 127 oil and gas assets but only 19 wells and facilities were still producing; the remaining ones had become inactive or spent. By the summer of 2015, the receiver for Redwater, Grant Thornton Ltd, had come to the conclusion that the cost of executing the end-of-life obligations for the spent wells would exceed the sale proceeds of the productive wells. Therefore, it informed the

[16] Government of Alberta, 'Upstream oil and gas liability and orphan well inventory' (2019) <https://perma.cc/2J67-MJGB>

[17] Alberta Energy Regulator, 'Public Statement' (1 November 2018) <https://perma.cc/3FDC-E2T2>

[18] Orphan Well Association, 'Orphan Inventory' (1 November 2019) <https://perma.cc/V34M-UQ3Z>

Regulator that it was taking possession of the productive sites and renounced the rest of Redwater's assets, including their associated end-of-life obligations. The Regulator countered by ordering the receiver (who was appointed trustee upon Redwater's bankruptcy) to fulfill all of the company's end-of-life obligations up to the value of the remaining assets in the Redwater estate. Grant Thornton opposed the Regulator's order by invoking the federal Bankruptcy and Insolvency Act (BIA) and the doctrine of federal paramountcy over provincial laws. More specifically, Grant Thornton argued that the provincial regulatory scheme, as applied in this case, conflicted with s. 16.06(4) of the BIA, which provides that 'notwithstanding anything in any federal or provincial law', the trustee is not personally liable for failure to comply with an order to remedy an environmental condition or damage if the trustee disclaims any interest or right in the property affected by the condition or damage.

The outcome of the case hung on the interpretation of s. 16.06(4) and the extent to which the Supreme Court justices could reconcile the federal rules with the provincial regulatory scheme. In a 5.2 majority judgment, Wagner CJ found that there was no conflict between the provincial scheme and s. 16.06(4), which was concerned with limiting the personal liability of the trustee upon disclaimer of the assets. It did not allow the bankrupt estate to avoid liability for its end-of-life obligations vis-à-vis the disclaimed assets. Moreover, the majority of the Court stated that, in seeking to accomplish a public duty for the benefit of citizens, the Regulator could not be considered a creditor, and that the performance of the end-of-life obligations was too uncertain to be subject to adequate determination and valuation. Therefore, those obligations stood outside the priority scheme established by the BIA. In another lengthy dissent, Côté J (Moldaver J concurring) disagreed with the majority justices' finding of absence of conflict between the BIA and the provincial scheme. In her view, the latter prevented the trustee from exercising its right to disclaim selected assets of the bankrupt estate and sell the estate's productive assets for the benefit of its creditors. Côté J also asserted that the Regulator should be considered as a creditor with a provable claim in bankruptcy against Redwater, namely the costs that will be incurred to remedy the environmental damage caused by Redwater.

In the end, the constitutional significance of the case may be second to its practical consequences. With sustained low oil prices on the international markets, the Canadian oil and gas industry will continue to have its share of struggles. For the first three quarters of 2019, the Office of the Superintendent of Bankruptcy Canada has reported five more oil and gas company bankruptcies, including four in Alberta.[19] It remains to be seen whether the Supreme Court's ruling applying a 'polluter pays' principle will bring the industry to bear a greater share of the burden of cleaning up its spent sites or cause oil and gas companies and their creditors to adjust their businesses in a way that will end up turning up even more orphan sites.

3. Canada (Public Safety and Emergency Preparedness) v Chhina: Federal Detainee's Right to File for Habeas Corpus in Provincial Superior Courts

The central place in Canada's judiciary has traditionally been occupied by the provincial superior courts, considered to be the descendants of the English central royal courts.[20] Over time, Parliament granted exclusive or concurrent jurisdiction on an increasing number of matters to federal statutory courts. Inevitably, the creation and expansion of a parallel federal judicial system alongside and partly overlapping provincial courts has generated an important volume of jurisdictional litigation.

In *Chhina*, the appellant, a convicted criminal, was detained by federal immigration authorities in a maximum security facility that kept inmates on lockdown 22½ hours a day. In accordance with the federal Immigration and Refugee Protection Act (IRPA), the Immigration and Refugee Board reviewed the detention on a monthly basis, each time maintaining it. Approximately six months into his detention, the appellant applied for *habeas corpus* – a right guaranteed by the Canadian Charter – in the Alberta Court of Queen's Bench rather than by way of judicial review in the Federal Court.[21] The chambers judge declined jurisdiction to consider the application on the grounds that the IRPA has put in place 'a complete, comprehensive and expert statutory scheme which provides for a review at least as broad as that available by way of *habeas corpus* and no less advantageous'(para 2). The decision was overturned on appeal. By the time the case reached the Supreme Court, the detainee was deported to Pakistan. Nevertheless, the Court agreed to hear the appeal.

In her majority judgment, Karakatsanis J ruled that the IRPA 'does not provide for review as broad and advantageous as *habeas corpus* where the applicant alleges their immigration detention is unlawful on the grounds that it is lengthy and of uncertain duration' (para 59). In detention review under the IRPA, the government need only make out a *prima facie* case for continued detention and is not required to explain or justify the length and duration of the detention. Then, on judicial review, the onus lies on the applicant to establish that the Immigration and Refugee Board's decision is unreasonable. By contrast, in a *habeas corpus* application hearing, the onus is on the government to justify the legality of the detention in any respect (once the applicant has raised a legitimate ground). In Karakatsanis J's view, the remedies available under the IRPA were also less advantageous than those available to an application for *habeas corpus*. Leave is required for judicial review of a detention de-

[19] Office of the Superintendent of Bankruptcy Canada, 'Business Bankruptcy and Business Proposal Statistics by the North American Industry Classification System by Province' (January 1 to September 30, 2019) <https://www.ic.gc.ca/eic/site/bsf-osb.nsf/eng/h_br01011.html>

[20] WR Lederman, 'The Independence of the Judiciary [2]' (1956), 34 CBR 1139, 1160, 1165-68.

[21] Under the *Federal Courts Act*, the Federal Court has no authority to issue a writ of *habeas corpus* except 'in relation to any member of the Canadian Forces serving outside Canada' (s. 18(2)).

cision and, if the application is successful, the judge will generally return the parties before the Board for a rehearing. By contrast, '[t]he writ of *habeas corpus* is not a discretionary remedy; it issues as of right' if the government has failed to justify the deprivation of liberty (paras 18, 65). Release of the applicant is then ordered immediately.

In her dissenting judgment, Abella J argued that, properly interpreted, the IRPA scheme for the review of immigration detention allows for at least the same substantive assessment as undertaken on *habeas corpus* review and offers a remedy to detainees that is as advantageous as review by way of *habeas corpus*. Whereas the detainee applying for *habeas corpus* must raise a legitimate ground upon which to question the lawfulness of the detention, the IRPA provides that the government bears the onus throughout of justifying the detention before the Board. The individual applying for *habeas corpus* who is able to show a legitimate ground would also meet the requirement for leave to apply for judicial review before the Federal Court. More generally, Abella J underlined the fact that the IRPA scheme and its application must comply with the Charter.

In 2021, the Federal Courts will celebrate the fiftieth anniversary of their creation since succeeding their predecessor, the Exchequer Court of Canada. Despite the Federal Courts' long-standing existence, *Chhina* illustrates a continuing preference of some parties (other than the federal government) to take proceedings before provincial superior courts instead of the Federal Court. Historical, legal and practical reasons, including the Federal Courts' narrower jurisdiction compared to that of their provincial counterparts as well as counsel's greater familiarity with provincial courts, explain the legal community's strong attachment to the provincial court system, especially for matters of individual rights and freedoms. In this regard, the place of Federal Courts in the Canadian judicial system differs from that of the US federal judiciary, where, incidentally, its district judges have authority to issue the 'Great Writ of Liberty'. The provincial superior court's retention of the (near) sole jurisdiction to grant *habeas corpus* is another reminder of the generally accepted view that, in Canada, it is 'the only court of general jurisdiction and as such is the centre of the judicial system'.[22]

IV. LOOKING AHEAD

There is no shortage of highly anticipated decisions that will be heard or decided in the coming months or year. Possibly at the top of the legal and political agenda is the March hearing of the constitutionality of the federal carbon tax system, which will give the Supreme Court a rare opportunity to revisit its four-decade-old landmark precedent on Parliament's general power 'to make Laws for the Peace, Order and good Government of Canada'. While the Court cleared a major roadblock for the C$4.5B Trans Mountain Pipeline project in January 2020 by unanimously ruling that it could not be subject to a discretionary provincial permit scheme on oil transportation,[23] several related cases against the government are pending, in particular concerning the Crown's duty to consult with the Indigenous peoples whose rights are adversely affected by the project. At the lower court level, the challenges of Québec's Laicity Act have the potential to break new constitutional ground in several areas in addition to the notwithstanding clause, including Parliament's exclusive jurisdiction over criminal law. In this respect, the Supreme Court may well have an early say on the outcome of those cases in an upcoming decision on the constitutionality of a federal statute that prohibits communication of a person's genetic test results without that person's consent.[24] Finally, among the possible upcoming constitutional developments is a curious case about the validity of Parliament's consent to (and, indirectly, the constitutionality in conventional terms of) the changes to the rules of succession to the Crown enacted by the UK Parliament in 2013.[25]

V. FURTHER READING

R Albert, P Daly and V MacDonnell (eds), *The Canadian Constitution in Transition* (University of Toronto Press, 2019)

J Baron and M St-Hilaire (eds), *Attacks on the Rule of Law from Within* (LexisNexis, 2019)

J Borrows, L Chartrand, OE Fitzgerald and R Schwartz (eds), *Braiding Legal Orders: Implementing the United Nations Declaration on the Rights of Indigenous Peoples* (McGill-Queen's University Press, 2019)

C Mathen, *Courts Without Cases: The Law and Politics of Advisory Opinions* (Hart Publishing, 2019)

F Mathieu and D Guénette (eds), *Ré-imaginer le Canada: vers un État multinational?* (Presses de l'Université Laval, 2019)

[22] *MacMillan Bloedel Ltd v Simpson* [1995], 4 SCR 725 [37].

[23] *Reference re Environmental Management Act* 2020 SCC 1.

[24] *Canadian Coalition for Genetic Fairness v Québec* (AG), appeal heard 10 October 2019 (SCC 38478).

[25] *Motard v Canada (AG)*, leave to appeal filed 23 December 2019 (SCC 38986).