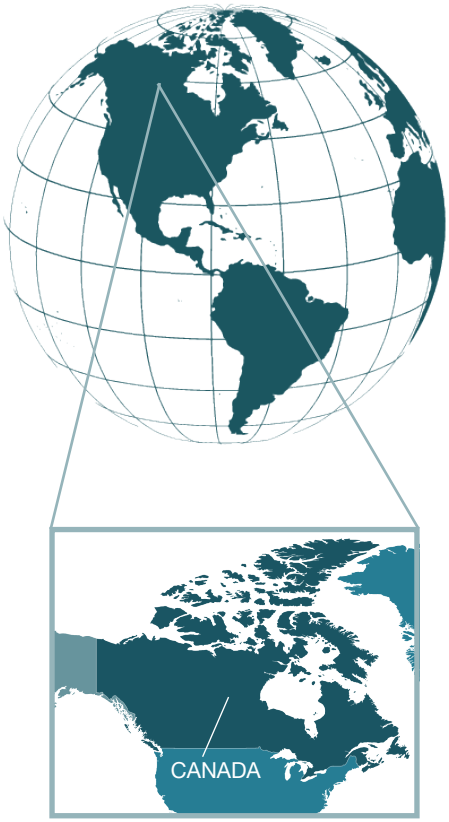

Canada

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I. INTRODUCTION

There has been an unusually rich array of events and developments of constitutional significance in the past year. Part II recounts a series of 'firsts', among others the appointment of the first Indigenous Governor General of Canada, the appointment of the first person of colour to the Supreme Court of Canada and the first use of the 'notwithstanding clause' by the government of the most populous province of Canada. Part III begins with a report of what is probably the most politically and constitutionally momentous case of the past decade, *References re Greenhouse Gas Pollution Pricing Act*, in which the Supreme Court dismissed a series of constitutional challenges to the federal 'carbon tax' legislation. The second case, *Toronto (City) v Ontario (AG)*, marks the final chapter of the controversy surrounding the redrawing of Toronto's electoral boundaries midway through the municipal election campaign. Finally, the report concludes with the uncommon Supreme Court case of two persons convicted of an offence that had already been declared unconstitutional in 2013.

II. MAJOR CONSTITUTIONAL DEVELOPMENTS

Federal Constitutional Politics

On July 1, 2021, Mahmud Jamal was appointed to the Supreme Court of Canada, replacing Rosalie Abella, who had reached mandatory retirement age after serving nearly 17 years on the Court. Born in Kenya into an Indian Muslim family of Ismailis, Jamal J became the first person of colour appointed to the Supreme Court. Jamal J is Liberal Prime Minister Justin Trudeau's fourth Supreme Court pick. A few days later, PM Trudeau announced that Mary Simon would become the 30th Governor General of Canada, making her the first Indigenous person and fifth woman to occupy the post since Confederation in 1867. Governor General Simon was sworn in on July 26.

The new Governor General had not taken office for a month when, on her Prime Minister's advice, she dissolved Parliament and called a snap election. Although the duration of the election campaign was fixed to 36 days, the minimum length required by law, it was the most expensive election in Canadian history with an estimated cost of C$630 million. In the end, the Liberal Party's hope of turning its minority government into a majority government did not materialize, as the electors returned all the political parties to the Commons with an almost identical number of seats. The country is now under its fifth federal minority government since 2004. Before then, the previous one was in 1979-80. For the Conservative Party, the loss of a third consecutive federal election since 2015 (despite receiving the greatest number of votes) eventually caused some members of the caucus to trigger, for the first time in February 2022, a statutory 'leadership review'[1] that resulted in the resignation and replacement of their party leader.

Ontario and Québec Invoke the Notwithstanding Clause

On June 14, 2021, the Legislature of Ontario enacted the Protecting Elections and Defending Democracy Act, the purpose of which was to use its override power pursuant to s 33 of the Canadian Charter of Rights and Freedoms to shield the province's restrictions on third-party 'political advertising' from Charter challenges. The Act was a response to *Working Families Ontario v Ontario*,[2] where the Ontario Superior Court struck down, as a violation of freedom of expression, several of those restrictions, in particular the spending limits of C$24,000 in one electoral district and of C$600,000 in total on political advertising by a third party during the year prior to a provincial election campaign.

Following the government's decision to use its override power, the applicants from *Working Families Ontario* launched a new constitutional challenge against the 2021 Act on the basis that it violated the right to vote guaranteed by s 3 of the Charter, which cannot be subject to the notwithstanding clause. On December 3, 2021, the Ontario Superior Court ruled that the impugned Act did not infringe on the right to vote.[3]

The 2021 Act marks the first time in nearly two decades that an override has come into force outside Québec.[4] In that province, the government inserted an override in the Act respecting the laicity of the State 2019 (also known as Bill 21), which prohibits public sector employees in a position of authority from wearing religious symbols while in the exercise of their functions. In *Hak v Québec (AG)*,[5] the Québec Superior Court upheld the constitutionality of Bill 21, except as applied to English language educational facilities, on the basis that s 23 of the Charter guarantees minority language education rights and cannot be subject to the notwithstanding clause. The decision is under appeal.

In May 2021, the Québec government decided to resort again to the notwithstanding clause in introducing Bill 96, an important reform that seeks to strengthen the Charter of the French Language (the latter also known as Bill 101). Doubtless, the government is poised to pass the law before the next provincial general election set for the fall of 2022.

III. CONSTITUTIONAL CASES

1. *References re Greenhouse Gas Pollution Pricing Act*: The Federal 'Carbon Tax' and the National Concern Doctrine

After the federal and provincial governments failed to negotiate the introduction of a pan-Canadian benchmark for carbon pricing, Parliament enacted the Greenhouse Gas Pollution Pricing Act 2018, whose primary aim is to set minimum national standards of greenhouse gas ('GHG') price stringency to reduce GHG emissions. The Act establishes a fuel charge applying to producers, distributors and importers of carbon-based fuel and a pricing mechanism for industrial GHG emissions by large emissions-intensive industrial facilities. Most importantly, the Act only operates as a backstop: it does not come into operation in provinces having an already sufficiently stringent GHG pricing system. And it does not displace provincial jurisdiction over the choice and design of pricing instruments.

As designed, the Act could not be a valid exercise of any of Parliament's enumerated legislative powers, including criminal law and taxation. At issue, therefore, was whether the Act could rest on the second prong of Parliament's residuary jurisdiction under the 'Peace, Order and Good Government' ('POGG') clause of s 91 of the Constitution Act 1867, ie federal power over matters of national concern.[6] In the Court's longest decision ever (88,457 words; 616 paras), a 6.3 majority said that it could.

All division of powers analyses require, at the first stage, the identification of the 'pith and substance', or true subject matter of the contested legislation. Only after then will a court examine whether such a subject matter falls under federal legislative authority. The challenge raised by the national concern doctrine is that courts not only ascertain the dominant feature of an impugned law, but also define the scope and nature of the 'matter of national concern' to which it can be hooked on. In so doing, courts perform a constituent role, adding a new 'permanent' and 'exclusive' jurisdiction, 'including [in] its intra-provincial aspects' (paras 102 and 121) to Parliament's enumerated powers. In assessing the scope of such a matter of national concern, judges must, therefore, bear in mind the potentially centralizing impact of their decision on Canadian federalism.

Speaking for the majority, Wagner CJ defined both the pith and substance of the 2018 Act and the matter of national concern in an identical and very narrow fashion: the establishment of minimum national standards of GHG price stringency to reduce GHG emissions (paras 80 and 119). This strategy enabled him to uphold the Act. In respect of the matter of national concern, Wagner CJ refurbished the test established 33 years earlier in *R v Crown Zellerbach Ltd*,[7] which requires a matter of national concern to be endowed with a 'singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern and a scale of impact on provincial jurisdiction that is reconcilable with the fundamental distribution of legislative power under the Constitution.' To determine distinctiveness, the Court in *Zellerbach* had introduced the criterion of 'provincial inability' according to which 'it is relevant to consider what would be the effect on extra-provincial interests of a provincial failure to deal effectively with the control or regulation of the intra-provincial aspects of the matter'.

First, Wagner CJ found that the Act's regulatory mechanism of GHG pricing satisfied the criterion of distinctiveness because it was 'specific, and limited' (para 175). Second, such distinctiveness was held to exist because the minimum national standards of GHG price stringency, implemented as they were through the backstop architecture of the Act, constituted an identifiable matter 'qualitatively different' from matters of provincial concern (para 176). Finally, in his analysis of the criterion of provincial inability, Wagner CJ emphasized the extra-provincial effects of provincial inaction on a collective national and international action problem such as the fight against climate change (para 187).

Wagner CJ not only confined the new exclusive matter of national concern to the specific and limited regulatory mechanism established under the Act, he also recognized that the national concern doctrine did not prevent the application of the 'double aspect' doctrine, which comes into play when 'the federal and provincial features of the challenged rule are of roughly equivalent importance so that [it] could be enacted by either the federal Parliament or provincial legislature.'[8] Wagner CJ reasoned that '[p]rovinces can regulate GHG pricing from a local perspective (under 92(13) and (16) and 92A [of the Constitution Act 1867])', while 'Canada can regulate GHG pricing from the perspective of addressing the risk of grave extraprovincial and international harm associated with a purely intraprovincial approach to GHG pricing' (paras 197-98). Having so concluded, he held that the balance of federalism had not been jeopardized, and added that, '[c]onsidering the impact on the interests that would be affected if Canada were unable to address this matter at a national level, the matter's scale of impact on provincial jurisdiction is reconcilable with the division of powers' (para 207).

In dissenting judgments, Brown and Rowe JJ[9] argued that 'courts should look *first* to the enumerated powers, resorting to the residual POGG authority only if necessary' (para 341). Having concluded that the pith and substance of the Act mainly related to enumerated provincial heads of power, they were of the opinion that the inquiry should go no further (para 348). Still, they went on to examine the national concern doctrine.

Brown and Rowe JJ repeatedly denounced the adoption of a 'minimum national standards' criterion in the application of the national concern test. In their view, the 'injection' of such a standard 'adds nothing' to the qualification of the matter when the latter is falling within provincial legislative authority (para 303).

More importantly, they defined the matter of national concern at stake in a very broad manner: 'the reduction of GHG emissions' (para 370). Having thus qualified the matter, they unsurprisingly concluded that such a broad power did not satisfy the requirement of indivisibility, and that recognizing Parliament's authority over it has implications that would 'permanently alter the Confederation bargain' (para 592).

What is striking in the dissenting justices' application of the *Zellerbach* test is their next to total indifference to the issue of extraprovincial harm. They basically discarded the provincial inability test by stating that it was not a mandatory criterion, 'but one indicium of singleness and indivisibility' (para 383).

2. *Toronto (City) v Ontario (AG)*: Freedom of Expression and Redrawing Electoral Boundaries During a Municipal Election Campaign

On June 7, 2018, the Progressive Conservative Party won the provincial general election, and its new party leader Doug Ford became premier of Ontario.[10] Shortly after the commencement of the parliamentary session, the government passed the Better Local Government Act 2018, which reduced the number of electoral wards for the City of Toronto from 47 to 25. At the time, the city was in the midst of its mayoral and municipal election campaign. On September 19, 2018, four weeks before election day, the Ontario Court of Appeal denied an application to restore the 47-ward structure, thus allowing the elections to proceed under the 2018 Act.

At Supreme Court level, a 5.4 majority upheld the constitutionality of the Act. Delivering the majority judgment, Wagner CJ and Brown J characterized the freedom of expression claim of the City of Toronto as one seeking the enforcement of a positive obligation on the part of the state to restore or maintain the 47-ward structure. In order to succeed in their Charter challenge, the city had to meet the higher standard of demonstrating substantial interference with freedom of expression, namely that the 'lack of access to a statutory platform has the effect of radically frustrating expression to such an extent that meaningful expression is "effectively preclude[d]"'. Concerning the Toronto's 2018 local elections, Wagner CJ and Brown J noted that all the candidates still had 69 days of campaign left after the 2018 Act came into force. Therefore, the majority justices were of the view that the complaint of state interference with freedom of expression was, in reality, a complaint about diminished effectiveness, which did not amount to the level of substantial interference.

Counsel for the City of Toronto submitted a second argument to the Court, namely that the change in ward structure violated an 'unwritten constitutional principle of democracy'. Neither the majority nor the dissenting justices properly defined what unwritten principles were, but from their discussion of the relevant Canadian case law and commentaries, one could safely assume that they referred to legal norms that 'are not to be found in the written constitutional text and cannot be derived by normal processes of interpretation from the text'.[11] The majority justices rejected the City's argument and adopted the position that, while the constitution does include unwritten principles, they cannot be used as a standalone basis for invalidating legislation. In their view, unwritten constitutional principles may assist courts in only two ways: in the interpretation of constitutional provisions and 'to develop structural doctrines unstated in the Constitution *per se*, but necessary to the coherence of, and flowing by implication from, its architecture'. By contrast, Abella J, who issued the dissenting judgment, opined that unwritten constitutional 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"[.] This would undoubtedly be a rare case' (para 170).

For the dissenting justices, the central issue of the appeal was whether the timing of the 2018 Act violated the Charter freedom of expression. The dissenting justices refused to adopt the distinction between positive and negative obligations, observing that all rights have positive and negative dimensions. In any event, they were of the view that the Act did not fall under the narrow category of underinclusive statutory regimes that would have triggered the application of the substantial interference test. Applying that the general framework of analysis for freedom of expression cases, the dissenting

justices concluded that, by redrawing electoral boundaries during a municipal election without serious justification, the Act violated citizens' rights in the electoral process to engage in political discourse.

3. *R v Albashir*: Temporal Effects of Judicial Invalidations of Laws

In 1985, the Supreme Court of Canada rendered a landmark judgment in *Reference re Manitoba Language Rights*[12] in which it declared that all the laws passed by the provincial legislature of Manitoba since 1890 were unconstitutional because they had not been enacted in both English and French as required by the Constitution. However, to prevent the province from descending into a lawless state, the Court created a new constitutional remedy, the *suspended* declaration of invalidity, whereby the normal effects of a declaration of invalidity would be temporarily suspended to give the legislature an opportunity to remedy the constitutional infirmity.

Since the Supreme Court's 1985 reference case, suspended declarations of invalidity have become a staple of the Canadian law of constitutional remedies. In a recent case, the Court catalogued 23 decisions where it had issued a suspended declaration of invalidity of a law held to violate the Charter.[13] One such instance was in *Canada (AG) v Bedford*,[14] where the Court struck down the offence of living on the avails of sex work because it prevented sex workers from accessing security-enhancing safeguards, such as drivers and bodyguards, thus violating sex workers' s 7 Charter right to security.

In *Albashir*, the appellants were charged with the offence of living on the avails of sex work after it was struck down in *Bedford*. More specifically, at the time of the indictments, the period of suspension set in *Bedford* had expired although the offences had been committed during that period. In a majority judgment, Karakatsanis J reiterated the general principle that, unless stated otherwise by the issuing court, a judicial declaration of invalidity is retroactive, subject to exceptions such as the principle of *res judicata*. In the context of a suspended declaration of invalidity, the same question of its temporal character arises as well. When a court did not specify whether its suspended declaration of invalidity would operate retroactively or prospectively, the subsequent determination of the suspension's temporal effects must be made by examining its purpose, namely protection of a compelling public interest. Karakatsanis J added that: '[i]f retroactivity would undermine that purpose, the declaration must apply purely prospectively.'

Applying the principles to the facts of the case, Karakatsanis J stated that the purpose of the suspension of the declaration of invalidity in *Bedford* was the protection of sex workers. Interpreting that declaration as retroactive would amount to conferring criminal immunity to exploitative pimps during the suspension. Therefore, Karakatsanis J held that the declaration of invalidity in *Bedford* operated prospectively. To the extent that the prospective character could leave certain persons liable to prosecution solely because they helped ensure the protection of sex workers, Karakatsanis J observed that they could be entitled to an individual exemption under s 24(1) of the Charter.

In a dissenting opinion, Rowe J (Brown J agreeing) interpreted the declaration of invalidity in *Bedford* to operate retroactively, in the absence of a clear statement to the contrary by the Court in *Bedford*.

IV. LOOKING AHEAD

Having reached mandatory retirement age, Moldaver J will retire from the Supreme Court in September 2022. Between 2008 and 2015, the Conservative government of Prime Minister Harper was generally able to steer the Court to the right through seven appointments.[15] The current Court looks to be evenly divided on the political spectrum with the Chief Justice seemingly acting as somewhat of a swing vote. In this context, PM Trudeau's next pick to replace one of the four right-leaning justices will be all the more crucial and may provide the left-leaning wing of the Court with a more consistent fifth vote. Thereafter, the next Supreme Court vacancy may not occur before 2028.

Among the upcoming Supreme Court cases of particular interest is *Québec (AG) v Bissonnette*, which will examine the constitutionality of the life sentence without parole that would have been applicable to the respondent, a university student, who opened fire in a mosque in 2017 during Sunday prayer, killing six persons and injuring a dozen. In all likelihood, the constitutional challenge of the Laicity Act (Bill 21) will eventually end up before the Supreme Court. One can also expect a constitutional challenge of the language law reform (Bill 96) as soon as it is enacted.

Finally, we surely have not seen the last of all the legal repercussions of the pandemic. On February 14, 2022, for the first time in over half a century, the Trudeau government decided to invoke the Emergencies Act (which replaced the War Measures Act in 1988) to put an end to the blockades by, and protests of, the self-proclaimed 'Freedom Convoy'.

V. FURTHER READING

J Borrows, *La Constitution autochtone du Canada* (Presses universitaires du Québec 2021), transl. *Canada's Indigenous Constitution* (University of Toronto Press 2010)

Y Boyer and L Chartrand, *Bead by Bead: Constitutional Rights and Métis Community* (UBC Press 2021)

I Loveland, *British and Canadian Public Law in Comparative Perspective* (Hart Publishing 2021)

M Valois and others (eds), *The Federal Court of Appeal and the Federal Court: 50 Years of History* (Irwin Law 2021); *Cour d'appel fédérale et Cour fédérale: 50 ans d'histoire* (Presses de l'Université de Montréal 2021)

JHA Webber, *The Constitution of Canada: A Contextual Analysis* (Hart Publishing 2021)

1 See s 49(5) of the Parliament of Canada Act.
2 2021 ONSC 4076.
3 *Working Families Coalition (Canada) Inc v Ontario*, 2021 ONSC 769.
4 In 2018, Saskatchewan enacted an override in response to a decision from the Court of Queen's Bench, but the law never came into force after the judgment was overturned on appeal.
5 2021 QCCS 1466.
6 Parliament's emergency power constitutes the second prong and only allows for the adoption of temporary legislation.
7 [1988] 1 SCR 401.
8 WR Lederman, 'Classification of Laws and the British North America Act' in WR Lederman (ed), *The Courts and the Canadian Constitution* (McLelland and Stewart 1964) 193, cited with approval in *Multiple Access Ltd v McCutcheon*, [1982] 2 SCR 161, 181.
9 While Brown and Rowe JJ wrote lengthy separate opinions, both concurred with each other's reasons. Côté J agreed with Wagner CJ's reformulation of the national concern test, but refused to consider the establishment of national standards of price stringency as a matter of national concern 'because the breadth of the discretion conferred by the *Act* on the Governor in Council results in the absence of any meaningful limits on the power of the executive' (para 222).
10 Prior to his entry into provincial politics earlier that year, Mr Ford had served one term as a Toronto City councillor and later unsuccessfully ran in the 2014 mayoral election when his brother, Rob Ford, who was the incumbent mayor, withdrew his candidacy due to health and other personal reasons before passing away later that year.
11 PW Hogg and WK Wade, *Constitutional Law of Canada* (5th edn Carswell, 2007), 15-51 (looseleaf edn). The authors appear to have borrowed the definition by TC Grey 'Do We Have an Unwritten Constitution?' (1975) 27 *Stan L Rev* 703, 703-04.
12 [1985] 1 SCR 721.
13 See *Ontario (AG) v G*, 2020 SCC 38 [118], reviewed in H-R Zhou and D Pomerleau-Normandin, 'Canada', in R Albert et al (eds), *The 2020 I·CONnect-Clough Center Global Review of Constitutional Law* (2021) 49, 51-53.
14 [2013] 3 SCR 1102.
15 Strictly speaking, the Harper government made eight Supreme Court appointments, but its first appointee in 2006, Justice Marshall Rothstein, was announced only four days after PM Harper took office and following a selection process completed under the previous Liberal government.