Index

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

Bill of Rights Act 1990 (NZBOR), 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 NZBOR, 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
   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
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
constitututional 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
gennerally, 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

_Apps Interpretation Act 1908_, 298

_Apps 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
Legislating Statutory Interpretation

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 liée 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