Volume 5.2 (2000)

Full Journal

Articles

The Judicial Conceptualization of Culture after Delgamuukw and Van der Peet
Michael Asch

Abstract

The author examines the current Canadian approach to the resolution of claims concerning Aboriginal rights and title. Discussion focuses on the Canadian law as enunciated by the Supreme Court of Canada in R . v. Van der Peet and Delgamuukw v. British Columbia, as well as its historical development through selected Canadian and English jurisprudence.

The author finds the central feature of the Supreme Court of Canada's approach to be the recognition of Aboriginal rights and title on the basis of "cultural distinctiveness." However, it is argued that the approach utilizes antiquated logic, which conflicts with contemporary anthropo-logical conceptions of culture. Furthermore, the author argues that the Supreme Court of Canada's emphasis on cultural components detracts from political issues surrounding Crown sovereignty in the context of Aboriginal rights. Consequently, the current Canadian approach to Aboriginal rights and title may lead to future results that are unpredictable and inconsistent.

Finally, the author suggests an alternative framework in which claims regarding Aboriginal rights and title may be resolved. Specifically, it is contended that the equitable resolution of Aboriginal claims may ultimately require the recognition of political rather than cultural rights.

Les Procédures de modification constitutionnelle dans les fédérations
Louis Massicotte and Antoine Yoshinaka

Abstract

By world standards, the search for an amending formula in Canada, and the debates thereon, have been exceptionally long-lasting and intense. Minimal consideration has been given to the amending procedures in force in other federations. Following a review of the literature, seven normative assumptions as to what a federal amending procedure should include have been identified. This paper checks whether federations actually comply with these assumptions.

Constitutional amendment procedures are found to differ widely among federations. The principle that central governments should not be excluded from the process is the only one that is almost universally respected. The idea that States should be involved in one way or another is challenged by almost one-third of federations. While all central governments are

endowed with the right to initiate amendments, States are in only half of federations. Referendums are found to be compulsory in less than one-quarter of federations. Three frequently advocated techniques for protecting particular States – unanimity, personal vetoes and opting-out – are very rarely found as part of the standard procedure, even in heterogeneous federations. Free and democratic federations do not differ markedly from more authoritarian ones, except by the greater incidence of referendums.

The Partial Commencement of Acts: A Constitutional Criticism of the Lieutenant Governor in Council's "Line-Item Veto" Power
Craig E. Jones

Abstract

The extent to which a separation of powers doctrine applies in the context of a parliamentary democracy such as Canada has long been a matter of debate. The author argues that this doctrine does have application in Canada and that it is violated by the blanket ability of some provincial executives to proclaim only portions of passed acts in force. This ability is rooted in the Interpretation Acts of a number of provinces and its effect, which the author equates with a line item veto, is to usurp the authority of the legislature and potentially upset the legislative compromise that ordinarily accompanies the passage of legislation. In the United States, the Supreme Court has found that bestowing a largely unfettered ability on the Office of the President to delete portions of legislation passed by Congress is not permitted by the US Constitution. Given the application of some form of a separation of powers doctrine in Canada, the author argues that the partial commencement of acts is also unconstitutional.

Separating Minimal Impairment from Balancing: A Comment on R. v. Sharpe (B.C.C.A.)
Guy Davidov

Abstract

The constitutional challenge to the child pornography legislation (R. v. Sharpe, B.C.C.A.) is used here as a vehicle to reflect on the practical application of the standards of constitutional review set by the Supreme Court in R. v. Oakes. It is shown that the B.C.C.A. in Sharpe – and the Supreme Court in previous cases – have confused the distinction between minimal impairment and balancing (the second and third stages of the Oakes proportionality test). Trying to avoid balancing and appear more objective, judges tend to over-use and misapply the minimal impairment test by examining alternatives that cannot achieve the legislative goal in full.

It is suggested that constitutional analysis in cases like R. v. Sharpe should, first, separate the two stages, i.e., balancing should be performed openly and only as part of the last proportionality stage; and second, be based on much sounder empirical foundations, including findings regarding the magnitude of the risk to children (the chance of the risk materializing and the intensity of the harm), and the magnitude of the infringement of rights.