



OVERSEAS DECISIONS BULLETIN

Produced by the Legal Research Officer,
High Court of Australia Library

Volume 16 Number 3 (1 May – 30 June 2019)

Decisions of the Supreme Court of the United Kingdom, the Supreme Court of Canada, the Supreme Court of the United States, the Constitutional Court of South Africa, the Supreme Court of New Zealand and the Hong Kong Court of Final Appeal. Admiralty, arbitration and constitutional decisions of the Court of Appeal of Singapore.

Administrative Law

Department of Commerce v New York
United States Supreme Court: [Docket 18-966](#)

Judgment delivered: 27 June 2019

Coram: Roberts CJ, Thomas, Ginsburg, Breyer, Alito, Sotomayor, Kagan, Gorsuch and Kavanaugh JJ

Catchwords:

Administrative law – Census – Where, in order to apportion congressional representatives among States, Constitution requires “Enumeration” of population every 10 years, to be made “in such Manner” as Congress “shall by Law direct,” Art I, §2, cl 3 and Amdt 14, §2 – Where *Census Act* provides for Secretary of Commerce to conduct decennial census “in such form and content as he may determine,” 13 USC §141(a) – Where population count used to allocate federal funds to States and draw electoral districts, *inter alia* – Where in March 2018, Secretary of Commerce announced his decision to reinstate citizenship question on 2020 census questionnaire – Where two separate suits filed, alleging that Secretary’s decision violated Enumeration Clause and requirements of *Administrative Procedure Act*, and raising equal protection claim – Whether Enumeration Clause permits Secretary to inquire about citizenship on census questionnaire – Whether Secretary’s decision reviewable under *Administrative Procedure Act* – Whether Secretary’s decision was supported by evidence before him – Whether Secretary

violated *Census Act*, §6(c) and §141(f) – Whether decision to reinstate citizenship question can adequately be explained in terms of Department of Justice’s request for improved citizenship data.

Held: Affirmed in part, reversed in part, and remanded.

In the matter of an application by Dennis Hutchings for Judicial Review (Northern Ireland)

United Kingdom Supreme Court: [\[2019\] UKSC 26](#)

Judgment delivered: 6 June 2019

Coram: Lords Reed, Kerr, Lady Black, Lords Lloyd-Jones and Sales

Catchwords:

Administrative law – Judicial review – Where appellant commanded members of Life Guards regiment of British Army – Where appellant was charged with attempted murder and with attempting to cause grievous bodily harm – Where Director of Public Prosecutions (“DPP”) issued certificate pursuant to s 1 of *Justice and Security (Northern Ireland) Act 2007* directing that appellant stand trial by a judge sitting without a jury – Where appellant was not made aware of issue of certificate for over a year – Where appellant claims he ought to have been provided with reasons why DPP issued a certificate and material on which decision based – Where appellant claims he should have been given opportunity to make representations on whether a certificate should have been issued in advance of any decision – Where appellant sought to challenge DPP’s decision to issue certificate by way of judicial review – Whether condition 4 defined in s 1 includes a member of armed forces shooting a person he suspected of being a member of Provisional Irish Republican Army – Whether DPP acted within his powers.

Held (5:0): Appeal dismissed.

Azar v Allina Health Services

United States Supreme Court: [Docket 17-1484](#)

Judgment delivered: 3 June 2019

Coram: Roberts CJ, Thomas, Ginsburg, Breyer, Alito, Sotomayor, Kagan, and Gorsuch JJ

Catchwords:

Administrative law – Notice and comment obligations – Where Medicare program offers additional payments to institutions that serve a “disproportionate number” of low-income patients, 42 USC §§1395ww(d)(5)(F)(i)(I) – Where payments calculated in part using a

hospital's "Medicare fraction" – Where agency overseeing Medicare posted on its website Medicare fractions for fiscal year 2012, noting that they included Part C patients – Where respondent hospitals claim government violated Medicare Act's requirement to provide public notice and 60-day comment period for any "rule, requirement, or other statement of policy ... that establishes or changes a substantive legal standard governing ... the payment for services," §1395hh(a)(2) – Whether government's 2014 announcement established or changed a "substantive legal standard" – Whether government's policy must be vacated on basis that no lawful excuse for neglecting its statutory notice-and-comment obligations.

Held (7:1): Affirmed.

Fort Bend County v Davis

United States Supreme Court: [Docket 18-525](#)

Judgment delivered: 3 June 2019

Coram: Ginsburg J delivered opinion for unanimous Court

Catchwords:

Administrative law – Jurisdiction of District Court – Where respondent filed a charge with Equal Employment Opportunity Commission ("EEOC") against employer petitioner alleging sexual harassment and retaliation for reporting harassment – Where while EEOC charge was pending, petitioner fired respondent because she failed to show up for work on a Sunday and went to a church event instead – Where respondent attempted to supplement her EEOC charge by handwriting "religion" on a form called an "intake questionnaire" but did not amend the formal charge document – Where upon receiving a right-to-sue letter, respondent commenced suit alleging discrimination on account of religion and retaliation for reporting sexual harassment – Where only religion-based discrimination claim remained, petitioner asserted for first time that District Court lacked jurisdiction to adjudicate case because respondent's EEOC charge not state a religion-based discrimination claim – Whether charge-filing requirement jurisdictional rule or not – Whether claim-processing mandatory rule is forfeited if not asserted in timely way.

Held: Affirmed.

Smith v Berryhill

United States Supreme Court: [Docket 17-1606](#)

Judgment delivered: 28 May 2019

Coram: Sotomayor J delivered opinion for unanimous Court

Catchwords:

Administrative law – Jurisdiction of Federal District Court – Where petitioner’s claim for disability benefits under Social Security Act was denied at initial-determination stage, upon reconsideration, and on the merits after hearing before administrative law judge – Where Social Security Administration Appeals Council dismissed petitioner’s request for review as untimely – Where petitioner sought judicial review of dismissal in Federal District Court, which held that it lacked jurisdiction to hear the suit – Where Sixth Circuit affirmed, holding that Appeals Council’s dismissal of untimely petition not a “final decision” subject to federal-court review – Whether Appeals Council dismissal on timeliness grounds after a claimant has had an administrative law judge hearing on the merits qualifies as a “final decision ... made after a hearing” for purposes of allowing judicial review under §405(g).

Held: Reversed and remanded.

Nagaenthran a/l K Dharmalingam v Public Prosecutor
Court of Appeal of Singapore: [\[2019\] SGCA 37](#)

Judgment delivered: 27 May 2019

Coram: Sundaresh Menon CJ, Andrew Phang Boon Leong and Judith Prakash JJA, Chao Hick Tin SJ and Belinda Ang Saw Ean J

Catchwords:

Administrative law – Judicial review – Where appellant was convicted and sentenced to death for drug importation – Where execution of appellant’s sentence was stayed because Parliament was undertaking review of mandatory death penalty for drug offences – Where appellant applied to be re-sentenced under new sentencing regime, seeking to show he was suffering from abnormality of mind that substantially impaired his mental responsibility – Where application to be re-sentenced dismissed and appellant appealed – Whether impairment of appellant’s mental responsibility for his acts – Where Public Prosecutor (“PP”) informed appellant he would not issue certificate of substantive assistance under s 33B(2)(b) of *Misuse of Drugs Act* (Cap 185, 2008 Rev Ed) in appellant’s favour – Where appellant sought leave to commence judicial review proceedings against PP’s decision, and appeals from dismissal of that leave application – Whether s 33B(4) an ouster clause – Whether PP failed to consider effect of appellant’s information in his contemporaneous statements on disruption of drug trafficking activities – Whether PP’s decision was reached in absence of a precedent fact being established.

Held (5:0): Appeals dismissed.

Bessette v British Columbia (Attorney General)
Supreme Court of Canada: [2019 SCC 31](#)

Judgment delivered: 16 May 2019

Coram: Wagner CJ, Abella, Moldaver, Karakatsanis, Gascon, Côté, Brown, Rowe and Martin JJ

Catchwords:

Administrative Law — Prerogative writs — Certiorari — Availability of remedy — Adequate alternative remedy — Right to be tried by provincial court judge who speaks official language of Canada that is language of accused — Where accused charged with provincial driving offence in British Columbia — Where provincial court judge dismissed application by accused for trial in French — Whether right to be tried by provincial court judge who speaks official language that is language of accused under *Criminal Code*, RSC 1985, c C-46, s 530 extends to persons accused of certain provincial offences in British Columbia — Whether determination of whether accused has right to trial in French amounts to jurisdictional issue giving rise to certiorari — Whether appeal following conviction by English-speaking court constitutes adequate alternative remedy to certiorari — *Offence Act*, RSBC 1996, c 338, s 133.

Held (9:0): Appeal allowed and order of Provincial Court quashed. Accused entitled to stand trial in French.

Telereal Trillium v Hewitt (Valuation Officer)

United Kingdom Supreme Court: [\[2019\] UKSC 23](#)

Judgment delivered: 15 May 2019

Coram: Lords Reed, Carnwath, Lady Black, Lords Lloyd-Jones and Briggs

Catchwords:

Administrative law – Valuation for non-domestic rating list – Where three-storey block of offices vacant when non-domestic rating list for area came into force by virtue of s 41(2) of *Local Government Finance Act 1988* – Where valuation of £490,000 was made by valuation officer for purposes of new rating list – Where Valuation Tribunal for England reduced rateable value to £1 – Where valuation officer appealed to Upper Tribunal and in light of comparable properties gave final assessment of £370,000 – Where parties lodged a ‘Joint Position Paper’, agreeing that at time of antecedent valuation date nobody in real world would have been prepared to occupy property and pay a positive price – Whether rateable value of property to be assessed by reference to general demand as evidenced by occupation of other office properties with similar characteristics.

Held (3:2): Appeal allowed.

R (on the application of Privacy International) v Investigatory Powers Tribunal & Ors

United Kingdom Supreme Court: [\[2019\] UKSC 22](#)

Judgment delivered: 15 May 2019

Coram: Lady Hale, Lords Reed, Kerr, Wilson, Sumption, Carnwath and Lloyd-Jones

Catchwords:

Administrative law – Judicial review – Ouster clause – Where Investigatory Powers Tribunal (“IPT”) a specialist tribunal established under *Regulation of Investigatory Powers Act 2000* (“RIPA”) with jurisdiction to examine conduct of intelligence services – Where IPT ruled that s 5(2) of *Intelligence Services Act 1994*, which empowers Secretary of State to issue warrant, extends to warrants authorising class of activity in respect of a class of property – Where s 67(8) of RIPA provides that “determinations, awards and other decisions of the Tribunal (including decisions as to whether they have jurisdiction) shall not be subject to appeal or be liable to be questioned in any court” – Where appellants applied for judicial review – Whether s 67(8) of RIPA “ousts” supervisory jurisdiction of High Court to quash a judgment of IPT for error of law – Whether and, if so, in accordance with what principles, Parliament may by statute “oust” supervisory jurisdiction of High Court to quash decision of inferior court or tribunal of limited statutory jurisdiction.

Held (4:3): Appeal allowed.

Arbitration

Rakna Arakshaka Lanka Ltd v Avant Garde Maritime Services (Private) Limited

Court of Appeal of Singapore: [\[2019\] SGCA 33](#)

Judgment delivered: 9 May 2019

Coram: Sundaresh Menon CJ, Judith Prakash and Steven Chong JJA

Catchwords:

Arbitration – Jurisdiction of arbitral tribunal – Where parties agreed to form private-public partnership and entered into Master Agreement providing disputes to be settled by arbitration in Singapore – Where new Sri Lankan government launched investigations into alleged bribery, corruption and abuse of power and looked into dealings between these parties – Where respondent commenced arbitration proceedings against appellant on basis that appellant breached cl 3.1 of Master Agreement by failing to provide utmost assistance to respondent – Where appellant

informed tribunal that parties agreed to withdraw arbitration on basis of memorandum of understanding, but respondent challenged this a few days later, arguing that appellant was not ensuring continuity of Master Agreement – Where tribunal proceeded and gave arbitral award in favour of respondent – Whether defendant who chooses not to participate in arbitration proceedings entitled to apply to set aside arbitral award on ground that arbitral tribunal had no jurisdiction, even if defendant failed to utilise mechanism for challenging jurisdiction provided by art 16(3) of UNCITRAL Model Law on International Commercial Arbitration and s 10(3) of *International Arbitration Act* (Cap 143A, 2002 Rev Ed).

Held (3:0): Appeal allowed; tribunal’s award set aside.

Constitutional Law

Nandutu & Ors v Minister of Home Affairs & Ors
Constitutional Court of South Africa: [\[2019\] ZACC 24](#)

Judgment delivered: 28 June 2019

Coram: Mogoeng CJ, Cameron, Froneman, Jafta and Khampepe JJ, Ledwaba AJ, Madlanga and Mhlantla JJ, Nicholls AJ and Theron J

Catchwords:

Constitutional law – Foreign spouse – Where application for “spousal visa” under s 11(6) of *Immigration Act* rejected on basis that temporary visa holders not able to apply for change in visa status from within South Africa and must make applications from outside South Africa in accordance with s 10(6) of Act – Where exceptions contained in reg 9(9)(a) of *Immigration Regulations*, but no exception for holders of visitors’ visas who are spouses or children of South African citizens or permanent residents – Where able to apply directly to Minister of Home Affairs under s 31(2)(c) of Act to waive requirement to apply for change in visa status from outside South Africa – Whether reg 9(9)(a) of *Immigration Regulations* unconstitutional on basis that it limits right to dignity by limiting rights of persons to marry and cohabit, and/or best interests of children by limiting their rights to family care.

Held (7:3): Appeal upheld; declaration of inconsistency; suspension of declaration for 24 months and interim reading-in; costs awarded to applicants.

S v S & Anor
Constitutional Court of South Africa: [\[2019\] ZACC 22](#)

Judgment delivered: 27 June 2019

Coram: Mogoeng CJ, Cameron, Froneman, Jafta and Khampepe JJ, Ledwaba AJ, Madlanga and Mhlantla JJ, Nicholls AJ and Theron J

Catchwords:

Constitutional law – Where father sought interim care and custody of three minor children pending outcome of divorce under r 43 of *Rules of Court* – Where judge granted maintenance to mother in a sum father contended was financially untenable – Where father wished to appeal but precluded by s 16(3) of *Superior Courts Act 2013*, which prohibits any appeal against r 43 orders – Whether prohibition infringes various constitutional rights, namely rights of children under s 28(2), right to equality under s 9 and/or right to access to courts under s 34 of Constitution.

Held (10:0): Appeal dismissed; applicant to pay costs of first respondent.

Rucho v Common Cause

United States Supreme Court: [Docket 18-422](#)

Judgment delivered: 27 June 2019

Coram: Roberts CJ, Thomas, Ginsburg, Breyer, Alito, Sotomayor, Kagan, Gorsuch and Kavanaugh JJ

Catchwords:

Constitutional law – Jurisdiction – Federal courts – Gerrymandering – Where voters and other plaintiffs in North Carolina and Maryland filed suits challenging their States’ congressional districting maps as unconstitutional partisan gerrymanders – Where North Carolina plaintiffs claimed State’s districting plan discriminated against Democrats, while Maryland plaintiffs claimed State’s plan discriminated against Republicans – Where plaintiffs alleged violations of First Amendment, Equal Protection Clause of Fourteenth Amendment, Elections Clause, and Article I, §2 – Whether partisan gerrymandering claims present political questions beyond reach of federal courts – Whether proposed “tests” for evaluating partisan gerrymandering claims offer limited and precise standard that is judicially discernible and manageable.

Held (5:4): Vacated and remanded.

United States v Haymond

United States Supreme Court: [Docket 17-1672](#)

Judgment delivered: 26 June 2019

Coram: Roberts CJ, Thomas, Ginsburg, Breyer, Alito, Sotomayor, Kagan, Gorsuch and Kavanaugh JJ

Catchwords:

Constitutional law – Right to trial by jury guaranteed by Fifth and Sixth Amendments – Where respondent convicted of possessing child pornography – Where after serving a prison sentence of 38 months, and while on supervised release, respondent found with what appeared to be child pornography – Where government sought to revoke supervised release and secure new and additional prison sentence – Where judge without jury found by preponderance of evidence that respondent knowingly downloaded and possessed child pornography – Where, because possession of child pornography an enumerated offense under 18 USC §3583(k), judge imposed that provision's 5 year mandatory minimum sentence – Whether §3583(k) violates right to trial by jury guaranteed by Fifth and Sixth Amendments and is unconstitutional.

Held (5:4): Vacated and remanded.

Tennessee Wine and Spirits Retailers Association v Thomas

United States Supreme Court: [Docket 18-96](#)

Judgment delivered: 26 June 2019

Coram: Roberts CJ, Thomas, Ginsburg, Breyer, Alito, Sotomayor, Kagan, Gorsuch and Kavanaugh JJ

Catchwords:

Constitutional law – Commerce Clause – Where Tennessee law imposes durational-residency requirements on persons and companies wishing to operate retail liquor stores, requiring applicants for initial license to have resided in State for prior two years, *inter alia* – Where following state attorney general's opinion that residency requirements discriminated against out-of-state economic interests in violation of Commerce Clause, Tennessee Alcoholic Beverage Commission ("TABC") declined to enforce requirements – Where petitioner, a trade association of in-state liquor stores, threatened to sue TABC if it granted licenses two businesses that did not meet residency requirements – Where TABC's executive director filed declaratory judgment action to settle question of residency requirements' constitutionality – Whether Tennessee's 2-year durational-residency requirement applicable to retail liquor store license applicants violates Commerce Clause and, if so, whether it is saved by Twenty-first Amendment.

Held (7:2): Affirmed.

United States v Davis

United States Supreme Court: [Docket 18-431](#)

Judgment delivered: 24 June 2019

Coram: Roberts CJ, Thomas, Ginsburg, Breyer, Alito, Sotomayor, Kagan, Gorsuch and Kavanaugh JJ

Catchwords:

Constitutional law – Unconstitutionally vague provision – Where respondents charged with multiple counts of *Hobbs Act* robbery, one count of conspiracy to commit *Hobbs Act* robbery, and under 18 USC §924(c), which authorizes heightened criminal penalties for using, carrying, or possessing a firearm in connection with any federal “crime of violence or drug trafficking crime”, §924(c)(1)(A) – Where “crime of violence” is defined in two subparts, namely elements clause, §924(c)(3)(A), and residual clause, §924(c)(3)(B) – Where residual clause defines “crime of violence” as felony “that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense” – Where jury convicted respondents on most of underlying charges and on two separate §924(c) charges for brandishing firearm in connection with crimes – Whether s 924(c)(3)(B) unconstitutionally vague.

Held (5:4): Affirmed in part, vacated in part, and remanded.

Iancu v Brunetti

United States Supreme Court: [Docket 18-302](#)

Judgment delivered: 24 June 2019

Coram: Roberts CJ, Thomas, Ginsburg, Breyer, Alito, Sotomayor, Kagan, Gorsuch and Kavanaugh JJ

Catchwords:

Constitutional law – First Amendment – Where respondent sought federal registration of trademark FUCT – Where Patent and Trademark Office denied application under provision of *Lanham Act* that prohibits registration of trademarks that “[c]onsist[] of or comprise[] immoral[] or scandalous matter,” 15 USC §1052(a) – Where respondent brought First Amendment challenge to “immoral or scandalous” bar in Federal Circuit, which invalidated that provision – Whether *Lanham Act*’s prohibition on registration of “immoral[] or scandalous” trademarks violates First Amendment – Whether “immoral or scandalous” bar fails to draw line at lewd, sexually explicit or profane marks.

Held (6:3 in part): Affirmed.

Knick v Township of Scott

United States Supreme Court: [Docket 17-647](#)

Judgment delivered: 21 June 2019

Coram: Roberts CJ, Thomas, Ginsburg, Breyer, Alito, Sotomayor, Kagan, Gorsuch and Kavanaugh JJ

Catchwords:

Constitutional law – Takings Clause of Fifth Amendment – Where Township of Scott, Pennsylvania, passed ordinance requiring that “[a]ll cemeteries ... be kept open and accessible to the general public during daylight hours” – Where petitioner, whose 90-acre rural property has small family graveyard, was notified she was violating ordinance – Where petitioner filed action in Federal District Court under 42 USC §1983 alleging that ordinance violated Takings Clause of Fifth Amendment – Where District Court dismissed claim under *Williamson County Regional Planning Commission v Hamilton Bank of Johnson City*, 473 US 172, which held property owners must seek just compensation under state law in state court before bringing federal takings claim under §1983 – Whether government violates Takings Clause when it takes property without compensation and property owner may bring Fifth Amendment claim under §1983 at that time – Whether state-litigation requirement of *Williamson County* should be overruled.

Held (5:4): Vacated and remanded.

Gundy v United States

United States Supreme Court: [Docket 17-6086](#)

Judgment delivered: 20 June 2019

Coram: Roberts CJ, Thomas, Ginsburg, Breyer, Alito, Sotomayor, Kagan, and Gorsuch JJ

Catchwords:

Constitutional law – Nondelegation doctrine – Where *Sex Offender Registration and Notification Act* (“SORNA”) requires broad range of sex offenders to register and backs up those requirements with criminal penalties – Where, for individuals convicted of a sex offense before SORNA’s enactment (“pre-Act offenders”), Attorney General “shall have the authority” to “specify the applicability” of SORNA’s registration requirements and “to prescribe rules for [their] registration”, 34 USC §20913(d) – Where Attorney General issued rule specifying that SORNA’s registration requirements apply in full to pre-Act offenders – Where petitioner, a pre-Act offender, convicted of failing to register – Whether Congress unconstitutionally delegated legislative power when it authorised Attorney General to “specify the applicability” of SORNA’s registration requirements to pre-Act offenders.

Held (5:3): Affirmed.

American Legion v American Humanist Association

United States Supreme Court: [Docket 17-1717](#)

Judgment delivered: 20 June 2019

Coram: Roberts CJ, Thomas, Ginsburg, Breyer, Alito, Sotomayor, Kagan, Gorsuch and Kavanaugh JJ

Catchwords:

Constitutional law – First Amendment’s Establishment Clause – Where in 1918, residents of Prince George’s County, Maryland, formed committee for purpose of erecting memorial for county’s World War I fallen soldiers to stand at terminus of National Defense Highway – Where land including Cross (completed by American Legion) was acquired by government in 1961, though American Legion reserved right to continue using site for ceremonies – Where public funds used to maintain Cross ever since – Where American Humanist Association and others filed suit, alleging Cross’s presence on public land and maintenance of Cross violate First Amendment’s Establishment Clause – Where American Legion intervened to defend Cross – Whether Bladensburg Cross is constitutional.

Held (7:2): Reversed and remanded.

Manhattan Community Access Corp v Halleck

United States Supreme Court: [Docket 17-1702](#)

Judgment delivered: 17 June 2019

Coram: Roberts CJ, Thomas, Ginsburg, Breyer, Alito, Sotomayor, Kagan, Gorsuch and Kavanaugh JJ

Catchwords:

Constitutional Law – First Amendment – Where New York state law requires cable operators to set aside channels on their cable systems for public access – Where New York City designated petitioner, a private non-profit corporation (“MNN”), to operate public access channels on Time Warner’s cable system in Manhattan – Where respondents produced film critical of MNN and MNN televised it, but later suspended respondents from all MNN services and facilities – Where respondents sued, claiming MNN violated their First Amendment free-speech rights when it restricted their access to public access channels because of content of their film – Whether MNN is a state actor subject to First Amendment constraints on its editorial discretion.

Held (5:4): Reversed in part and remanded.

Virginia Uranium Inc v Warren

United States Supreme Court: [Docket 16-1275](#)

Judgment delivered: 17 June 2019

Coram: Roberts CJ, Thomas, Ginsburg, Breyer, Alito, Sotomayor, Kagan, Gorsuch and Kavanaugh JJ

Catchwords:

Constitutional law – Where petitioner wants to mine raw uranium ore from a site in Virginia but Virginia law prohibits uranium mining in Commonwealth – Where petitioner filed suit, alleging that, under Constitution’s Supremacy Clause, *Atomic Energy Act* (“AEA”) pre-empts state uranium mining laws and ensconces the Nuclear Regulatory Commission as lone regulator in field – Whether AEA pre-empts Virginia’s law banning uranium mining.

Held (6:3): Affirmed.

Gamble v United States

United States Supreme Court: [Docket 17-646](#)

Judgment delivered: 17 June 2019

Coram: Roberts CJ, Thomas, Ginsburg, Breyer, Alito, Sotomayor, Kagan, Gorsuch and Kavanaugh JJ

Catchwords:

Constitutional law – Double jeopardy – Dual-sovereignty doctrine – Where petitioner pleaded guilty to a charge of violating Alabama’s felon-in-possession-of-a-firearm statute – Where federal prosecutors then indicted him for same instance of possession under federal law – Where petitioner moved to dismiss, arguing that exposed to double jeopardy under Fifth Amendment – Where District Court denied this motion, invoking dual-sovereignty doctrine, according to which two offenses “are not the ‘same offence’ ” for double jeopardy purposes if “prosecuted by different sovereigns”, *Heath v Alabama*, 474 US 82, 92 – Where petitioner pleaded guilty to federal offense but appealed on double jeopardy grounds – Whether dual-sovereignty doctrine should be overturned.

Held (7:2): Affirmed.

Leung Chun Kwong v Secretary for the Civil Service & Anor

Hong Kong Court of Final Appeal: [\[2019\] HKCFA 19](#)

Judgment delivered: 6 June 2019

Coram: Ma CJ, Ribeiro and Fok PJJ, Tang NPJ and Gleeson NPJ

Catchwords:

Constitutional law – Basic Law of Hong Kong Special Administrative Region and Hong Kong Bill of Rights, arts 1(1), 22, 25 – Unlawful discrimination – Where same-sex marriage is not recognised in Hong Kong – Where appellant married his same-sex partner in New Zealand – Where appellant is immigration officer and under Civil Service Regulations (“CSR”) he and his family (including a spouse) entitled to various medical and dental benefits – Where Secretary for Civil Service decided that appellant’s marriage was not a marriage for purposes of CSR – Where appellant sought to include spouse when e-filing his income tax return – Where Commissioner of Inland Revenue decided that appellant’s marriage was not a marriage for purposes of *Inland Revenue Ordinance* (Cap 112) – Where appellant challenged CSR and taxation decisions by way of judicial review proceedings, arguing they unlawfully discriminate against him on ground of his sexual orientation – Whether these decisions involving differential treatment are justified – Whether any rational connection between denying appellant employment and tax benefits and aim of protecting institution of marriage in Hong Kong.

Held (5:0): Appeal allowed.

R v Le

Supreme Court of Canada: [2019 SCC 34](#)

Judgment delivered: 31 May 2019

Coram: Wagner CJ, Moldaver, Karakatsanis, Brown and Martin JJ

Catchwords:

Constitutional law — Charter of Rights — Arbitrary detention — Remedy — Exclusion of evidence — Where police entering private backyard where five young men were gathered without warrant or consent — Where police questioned men and requested documentary proof of identities — Where accused fled backyard and caught in possession of firearm, drugs and cash — Whether encounter between police and accused infringed accused’s right to be free from arbitrary detention — If so, whether admission of evidence would bring administration of justice into disrepute warranting its exclusion — *Canadian Charter of Rights and Freedoms*, ss 9, 24(2).

Held (3:2): Appeal allowed; evidence excluded; convictions set aside and acquittals entered.

Phaahla v Minister of Justice and Correctional Services & Anor (Tlhakanye Intervening)

Constitutional Court of South Africa: [\[2019\] ZACC 18](#)

Judgment delivered: 3 May 2019

Coram: Mogoeng CJ, Basson AJ, Cameron J, Dlodlo AJ, Froneman J, Goliath AJ, Khampepe and Mhlantla JJ, Petse AJ and Theron J

Catchwords:

Constitutional law – Invalid legislation – Where previous *Correctional Services Act* of 1959 provided that anyone sentenced to life imprisonment eligible to apply for parole after serving a minimum of 20 years, but 1998 Act specified a minimum of 25 years – Where s 136(1) states that inmates sentenced before 1 October 2004 subject to the 1959 Act, but inmates sentenced afterward are subject to 1998 Act – Where applicant was convicted on 25 September 2004 but was sentenced to life imprisonment on 5 October 2004 – Where applicant challenged s 136(1) in High Court on grounds that use of date of sentence rather than date of commission of offence violated his fair trial right under s 35(3)(n) of Constitution, right to equal protection of law and right not to be unfairly discriminated against in terms of s 9 of Constitution – Where High Court declared s 136(1) invalid – Whether s 136(1) invalid on grounds that use of date of sentence rather than date of commission of offence breaches constitutional right to equal protection of law and/or right to benefit of least severe punishment – Whether retroactive application of law in violation of s 35(3)(n) of Constitution and principle of legality – Whether parole is part of punishment and therefore that rules lengthening non-parole periods increase severity of punishment.

Held (10:0): Order of invalidity confirmed and para 1 varied; Minister of Justice and Correctional Services must pay costs.

Civil Procedure

1068754 Alberta Ltd v Québec (Agence du revenu)

Supreme Court of Canada: [2019 SCC 37](#)

Judgment delivered: 27 June 2019

Coram: Wagner CJ, Abella, Moldaver, Karakatsanis, Gascon, Côté, Brown, Rowe and Martin JJ

Catchwords:

Civil procedure — Banks — Request for information and documents — Where Quebec tax authority sent formal demand for information and documents to Calgary branch of bank as part of audit of trust — Where

demand sent to branch in Calgary rather than in Quebec to comply with federal banking legislation directing that certain documents pertaining to customers be sent to branch of account — Whether legislation required tax authority to send demand to Calgary branch — If so, whether complying with legislation rendered tax authority's actions extraterritorial and thus ultra vires — *Bank Act*, SC 1991, c 46, ss 462(1), (2).

Held (9:0): Appeal dismissed with costs.

Virginia House of Delegates v Bethune-Hill
United States Supreme Court: [Docket 18-281](#)

Judgment delivered: 17 June 2019

Coram: Roberts CJ, Thomas, Ginsburg, Breyer, Alito, Sotomayor, Kagan, Gorsuch and Kavanaugh JJ

Catchwords:

Civil procedure – Standing – Where after 2010 census, Virginia redrew legislative districts for State's Senate and House of Delegates – Where voters in 12 impacted House districts sued two state agencies and four election officials (collectively, State Defendants), charging that redrawn districts were racially gerrymandered in violation of Fourteenth Amendment's Equal Protection Clause – Where House of Delegates and its Speaker (collectively, House) intervened as defendants – Where District Court held that 11 districts were unconstitutionally drawn – Where Virginia's Attorney General announced that State would not pursue an appeal but House did file an appeal – Whether House lacks standing, either to represent State's interests or in its own right.

Held (5:4): Appeal dismissed.

L'Oratoire Saint-Joseph du Mont-Royal v JJ
Supreme Court of Canada: [2019 SCC 35](#)

Judgment delivered: 7 June 2019

Coram: Wagner CJ, Abella, Moldaver, Karakatsanis, Gascon, Côté, Brown, Rowe and Martin JJ

Catchwords:

Civil procedure — Limitation periods — Prescription — Civil liability — Class action — Authorization to institute class action — Where sexual assaults being alleged against members, since deceased, of religious congregation — Where application for authorization to institute class action for damages for injuries caused by sexual assaults allegedly committed — Where applicable period for instituting action for damages

for bodily injury resulting from act which could constitute criminal offence — Whether three-year period provided for in art 2926.1 para 2 of *Civil Code of Québec* for instituting action in case in which author of act has died results in forfeiture of remedy — Whether that period begins running at time of death of author of act or on date victim becomes aware that injury suffered is attributable to that act — Whether that period applies to every action instituted in relation to that act — Whether Court of Appeal's intervention in Superior Court's decision was warranted — Whether Court of Appeal's decision authorizing institution of class action is tainted by error justifying review — *Code of Civil Procedure*, CQLR, c C-25.01, art 575.

Held (5:4, 3 in part): Appeals dismissed.

Taggart v Lorenzen

United States Supreme Court: [Docket 18-489](#)

Judgment delivered: 3 June 2019

Coram: Breyer J delivered opinion for unanimous Court

Catchwords:

Civil procedure – Civil contempt – Where company and two of its owners sued petitioner claiming he had breached company's operating agreement – Where before trial petitioner filed for bankruptcy under Chapter 7 of *Bankruptcy Code* and was released from liability for most pre-bankruptcy debts – Where after discharge order Oregon state court entered judgment against petitioner and awarded attorney's fees to respondents – Where petitioner returned to the Federal Bankruptcy Court seeking civil contempt sanctions against respondents for collecting attorney's fees in violation of discharge order – Where Ninth Circuit applied a subjective standard and concluded that a "creditor's good faith belief" that discharge order "does not apply to the creditor's claim precludes a finding of contempt, even if the creditor's belief is unreasonable" – Whether party's subjective belief of complying with order insulates them from civil contempt if belief objectively unreasonable – Whether court may hold creditor in civil contempt for violating discharge order if no fair ground of doubt as to whether order barred creditor's conduct.

Held: Vacated and remanded.

Home Depot USA Inc v Jackson

United States Supreme Court: [Docket 17-1471](#)

Judgment delivered: 28 May 2019

Coram: Roberts CJ, Thomas, Ginsburg, Breyer, Alito, Sotomayor, Kagan, Gorsuch and Kavanaugh JJ

Catchwords:

Civil procedure – Where Citibank NA filed debt-collection action in state court alleging respondent liable for charges incurred on Home Depot credit card – Where respondent responded by filing third-party class-action claims against petitioner and Carolina Water Systems Inc, alleging they had engaged in unlawful referral sales and deceptive and unfair trade practices under state law – Where petitioner filed a notice to remove case from state to federal court but respondent moved to remand, arguing that controlling precedent barred removal by a third-party counterclaim defendant – Whether general removal provision, 28 USC §1441(a), and/or removal provision in *Class Action Fairness Act* of 2005, §1453(b), permits removal by a third-party counterclaim defendant.

Held (5:4): Affirmed.

Franchise Tax Board of California v Hyatt

United States Supreme Court: [Docket 17-1299](#)

Judgment delivered: 13 May 2019

Coram: Roberts CJ, Thomas, Ginsburg, Breyer, Alito, Sotomayor, Kagan, Gorsuch and Kavanaugh JJ

Catchwords:

Civil procedure – Immunity – Where respondent sued petitioner (“Board”) in Nevada state court for alleged torts committed during tax audit – Where Supreme Court of the United States held that Full Faith and Credit Clause did not prohibit Nevada from applying its own immunity law and that Board entitled to same immunity that Nevada law afforded Nevada agencies – Where on remand Nevada Supreme Court declined to apply a cap on tort liability applicable to Nevada state agencies but Supreme Court of the United States reversed – Whether *Nevada v Hall*, 440 US 410, which held that Constitution does not bar suits brought by an individual against a State in courts of another State, should be overruled.

Held (5:4): Reversed and remanded.

Competition Law

Apple Inc v Pepper

United States Supreme Court: [Docket 17-204](#)

Judgment delivered: 13 May 2019

Coram: Roberts CJ, Thomas, Ginsburg, Breyer, Alito, Sotomayor, Kagan, Gorsuch and Kavanaugh JJ

Catchwords:

Competition law – Standing to sue – Where Apple Inc sells iPhone applications directly to iPhone owners through its App Store, the only place where iPhone owners may lawfully buy apps – Where most of those apps created by independent developers under contracts with Apple – Where respondents, four iPhone owners, sued Apple alleging that company unlawfully monopolized aftermarket for iPhone apps – Where Apple moved to dismiss, arguing that iPhone owners could not sue because not direct purchasers from Apple under *Illinois Brick Co v Illinois*, 431 US 720 – Whether iPhone owners were direct purchasers who may sue Apple for alleged monopolization.

Held (5:4): Affirmed.

Criminal Law

HKSAR v Tsang Yam-Kuen, Donald (曾蔭權)

Hong Kong Court of Final Appeal: [\[2019\] HKCFA 24](#)

Judgment delivered: 26 June 2019

Coram: Ma CJ, Ribeiro, Fok and Cheung PJJ and Gleeson NPJ

Catchwords:

Criminal law – Bribery and misconduct in public office – Where appellant was Chief Executive and President of Executive Council – Where appellant approved applications for sound broadcasting licences, including those in which Mr Wong Cho-bau had an interest – Where appellant was concurrently arranging to lease apartment (to be refurbished at landlord's expense for around HK\$3.5 million) from company linked with Mr Wong Cho-bau – Where appellant made no declaration of interest in relation to apartment – Where appellant charged with accepting advantage contrary to ss 4(2B)(a) and 12 of *Prevention of Bribery Ordinance* (Cap 201), and misconduct in public office, contrary to common law and punishable under s 101I(1) of *Criminal Procedure Ordinance* (Cap 221) – Where appellant convicted on Count 2 and sentenced to term of imprisonment – Whether jury was appropriately guided on how to approach elements of wilful misconduct and seriousness – Whether trial judge's directions on wilfulness and/or seriousness inadequate.

Held (5:0): Appeal allowed; conviction and sentence quashed.

Flowers v Mississippi

United States Supreme Court: [Docket 17-9572](#)

Judgment delivered: 21 June 2019

Coram: Roberts CJ, Thomas, Ginsburg, Breyer, Alito, Sotomayor, Kagan, Gorsuch and Kavanaugh JJ

Catchwords:

Criminal law – Jury selection – Peremptory strikes on basis of race – Where petitioner tried six separate times for the murder of four victims – Where petitioner is black and three of four victims were white – Where at first two trials, State used its peremptory strikes on all qualified black prospective jurors and in each case jury convicted petitioner and sentenced him to death – Where convictions reversed based on prosecutorial misconduct – Where at third trial, State used all of its 15 peremptory strikes against black prospective jurors but Mississippi Supreme Court reversed conviction and sentence, finding that State exercised its peremptory strikes on basis of race in violation of *Batson v Kentucky*, 476 US 79 - Where fourth and fifth trials ended in mistrials – Where at sixth trial, State exercised six peremptory strikes (five against black prospective jurors, allowing one black juror to be seated) – Where petitioner again raised *Batson* claim, but trial court concluded that State had offered race-neutral reasons for each of five peremptory strikes – Where jury convicted petitioner and sentenced him to death – Whether trial court at petitioner’s sixth trial committed clear error in concluding that State’s peremptory strike of one black prospective juror was not motivated in substantial part by discriminatory intent – Whether disparate questioning can be probative of discriminatory intent.

Held (7:2): Reversed and remanded.

Rehaif v United States

United States Supreme Court: [Docket 17-9560](#)

Judgment delivered: 21 June 2019

Coram: Roberts CJ, Thomas, Ginsburg, Breyer, Alito, Sotomayor, Kagan, Gorsuch and Kavanaugh JJ

Catchwords:

Criminal law – Where petitioner entered United States on nonimmigrant student visa to attend university but was dismissed for poor grades – Where petitioner subsequently shot two firearms at firing range – Where petitioner prosecuted under 18 USC §922(g), which makes it unlawful for certain persons (including aliens illegally in country) to possess firearms, and §924(a)(2), which provides that anyone who “knowingly violates” first provision can be imprisoned for up to 10 years – Where jury instructed

that Government not required to prove petitioner knew he was unlawfully in country and returned guilty verdict – Whether in prosecution under §922(g) and §924(a)(2) Government must prove both that defendant knew he possessed firearm and that he knew he belonged to relevant category of persons barred from possessing firearm.

Held (7:2): Reversed and remanded.

McDonough v Smith

United States Supreme Court: [Docket 18-485](#)

Judgment delivered: 20 June 2019

Coram: Roberts CJ, Thomas, Ginsburg, Breyer, Alito, Sotomayor, Kagan, Gorsuch and Kavanaugh JJ

Catchwords:

Criminal law – Limitation of actions – Fabrication of evidence – Where petitioner processed ballots as commissioner of county board of elections in primary election in Troy, New York – Where respondent specially appointed to investigate and prosecute case of forged absentee ballots in that election, and petitioner became his primary target – Where petitioner alleges respondent fabricated evidence against him and used it to secure grand jury indictment – Where respondent brought case to trial and presented allegedly fabricated testimony, but trial ended in mistrial – Where respondent again elicited allegedly fabricated evidence in second trial, which ended with petitioner’s acquittal on all charges – Where petitioner sued respondent under 42 USC §1983, asserting claim for fabrication of evidence – Where District Court dismissed claim as untimely and Second Circuit affirmed – Whether 3-year limitations period began to run when petitioner learned that evidence was false and was used against him during criminal proceedings and he suffered loss of liberty as result of that evidence, or when criminal proceedings against him terminated in his favour.

Held (6:3): Reversed and remanded.

HKSAR v Lew Mon Hung

Hong Kong Court of Final Appeal: [\[2019\] HKCFA 22](#)

Judgment delivered: 11 June 2019

Coram: Ma JC, Ribeiro, Fok and Cheung PJJ and Gleeson NPJ

Catchwords:

Criminal law – Common law offence of attempting to pervert course of justice – Where appellant had supported candidate in successful bid to

become Chief Executive of Hong Kong Special Administrative Region ("CE") but their relationship subsequently soured – Where appellant arrested by Independent Commission Against Corruption ("ICAC") on suspicion for having conspired with others to commit bribery – Where appellant had letters sent to CE and ICAC Commissioner describing investigation as "groundless" and "political persecution", foreshadowing that "a political bomb would be detonated" and that he would call for CE's resignation using "shocking insider information" if investigation not cease – Where appellant was tried and acquitted on conspiracy charges, but subsequently tried and convicted for doing acts tending and intended to pervert course of public justice – Whether in order to prove that appellant's acts had tendency to pervert course of justice necessary for prosecution to establish that CE or Commissioner could, by the lawful exercise of a legal power that he possesses, stop or interfere with criminal investigation.

Held (5:0): Appeal dismissed.

Nieves v Bartlett

United States Supreme Court: [Docket 17-1174](#)

Judgment delivered: 28 May 2019

Coram: Roberts CJ, Thomas, Ginsburg, Breyer, Alito, Sotomayor, Kagan, Gorsuch and Kavanaugh JJ

Catchwords:

Criminal law – Arrest – Retaliatory arrest – Where respondent arrested by police officers Nieves and Weight for disorderly conduct and resisting arrest during winter sports festival – Where police allege that seemingly intoxicated respondent started shouting at group of attendees not to talk to police and yelled at Nieves to leave – Where police further allege that respondent approached Weight in aggressive manner while he was questioning a minor, stood between them, and yelled with slurred speech that Weight should not speak with minor – Where respondent stepped toward Weight and was pushed back before Nieves initiated an arrest – Where respondent was slow to comply and officers forced him to the ground – Where respondent denied intoxication, yelling, and aggression – Where respondent claimed that after he was handcuffed, Nieves said "bet you wish you would have talked to me now" – Where respondent sued under 42 USC §1983, claiming that officers violated First Amendment rights by arresting him in retaliation for his speech (i.e. his initial refusal to speak with Nieves and his intervention in Weight's discussion with minor) – Whether retaliatory arrest claim fails as a matter of law when there is probable cause to arrest.

Held (6:3 in part or wholly): Reversed and remanded.

Yusuke (David) Sena v New Zealand Police
New Zealand Supreme Court: [\[2019\] NZSC 55](#)

Judgment delivered: 24 May 2019

Coram: William Young, Glazebrook, O'Regan, Ellen France and Winkelmann JJ

Catchwords:

Criminal law – Where appellant found guilty after trial by judge alone of five charges of assaulting his children under s 194(a) of *Crimes Act 1961* – Where on appeal against conviction High Court treated factual findings of trial judge as equivalent of jury verdict and found factual findings were open on evidence – Whether *Criminal Procedure Act 2011* requires same approach to appellate review of factual findings made by a judge in criminal cases as applies to appeals in civil cases (i.e. by way of rehearing) – Whether reasons given for verdicts were adequate.

Held (5:0): Appeal allowed; convictions quashed; new trial directed.

Makhokha v S

Constitutional Court of South Africa: [\[2019\] ZACC 19](#)

Judgment delivered: 3 May 2019

Coram: Mogoeng CJ, Cameron, Froneman, Jafta and Khampepe JJ, Ledwaba AJ, Madlanga and Mhlantla JJ, Nicholls AJ and Theron J

Catchwords:

Criminal law – Where applicant convicted of unexplained possession of motor vehicle reasonably suspected to have been stolen and sentenced to 15 years in prison – Where applicant already serving sentence of life imprisonment for another offence – Where magistrate directed that two sentences were to run consecutively and ordered that applicant “must never be released on parole” – Whether 15 year sentence appropriate – Whether non-parole order should be set aside on basis it conflicts with s 276B(1)(b) of *Criminal Procedure Act* and/or s 12(1)(a) of Constitution – Whether determination that 15-year term of imprisonment and life imprisonment to run consecutively legally incompetent on basis it conflicts with s 39 of *Correctional Services Act*.

Held (10:0): Leave to appeal against sentence refused; leave to appeal against non-parole and consecutive term orders granted and appeal upheld.

Defamation

Lachaux v Independent Print Ltd & Anor
United Kingdom Supreme Court: [\[2019\] UKSC 27](#)

Judgment delivered: 12 June 2019

Coram: Lords Kerr, Wilson, Sumption, Hodge and Briggs

Catchwords:

Defamation – Where s 1(1) of *Defamation Act 2013* provides “[a] statement is not defamatory unless its publication has caused or is likely to cause serious harm to the reputation of the claimant” – Where claimant, a French aerospace engineer, commenced three libel actions against publishers – Where libel actions concerned articles regarding claimant’s behaviour towards wife during marriage and in relation to custody of their son following break-down of their marriage – Whether statements in articles were not defamatory because they did not meet “serious harm” test under s 1(1).

Held (5:0): Appeals dismissed.

Evidence

R v Goldfinch
Supreme Court of Canada: [2019 SCC 38](#)

Judgment delivered: 28 June 2019

Coram: Abella, Moldaver, Karakatsanis, Gascon, Brown, Rowe and Martin JJ.

Catchwords:

Evidence — Admissibility — Complainant’s sexual activity — Where accused charged with sexual assault — Where accused sought to introduce evidence that he and complainant in sexual relationship at time of alleged assault — Where trial judge admitted evidence and gave mid-trial and final limiting instructions to jury on use it could make of it — Where accused acquitted — Whether sexual relationship evidence admissible — *Criminal Code*, RSC 1985, c C-46, s 276.

Held (6:1): Appeal dismissed.

Mitchell v Wisconsin
United States Supreme Court: [Docket 18-6210](#)

Judgment delivered: 27 June 2019

Coram: Roberts CJ, Thomas, Ginsburg, Breyer, Alito, Sotomayor, Kagan, Gorsuch and Kavanaugh JJ

Catchwords:

Evidence – Exigent circumstances exception – Where petitioner arrested for operating vehicle while intoxicated after preliminary breath test registered blood alcohol concentration (“BAC”) that was triple legal limit – Where arresting officer drove petitioner to police station and then hospital for blood test – Where petitioner unconscious when arrived at hospital, but blood drawn under state law that presumes person incapable of withdrawing implied consent to BAC testing has not done so – Where BAC above legal limit and petitioner charged with violating two drunk-driving laws – Where petitioner moved to suppress results of blood test on ground that it violated Fourth Amendment right against “unreasonable searches” because it was conducted without warrant – Where petitioner convicted – Whether, when unconscious driver cannot be given breath test, exigent circumstances doctrine generally permits blood test without warrant.

Held (5:4): Vacated and remanded.

R v Barton

Supreme Court of Canada: [2019 SCC 33](#)

Judgment delivered: 24 May 2019

Coram: Wagner CJ, Abella, Moldaver, Karakatsanis, Côté, Brown and Rowe JJ

Catchwords:

Evidence — Admissibility — Charge to jury — Complainant’s sexual activity — Mistaken belief in communicated consent — Where accused charged with first degree murder in death of Indigenous sex worker — Where Crown alternatively submitting that accused committed unlawful act manslaughter by causing deceased’s death in course of sexual assault — Where accused testified at trial about previous sexual activity with deceased without having applied to adduce such evidence — Where evidence going to jury without detailed limiting instruction — Whether trial judge erred in failing to determine whether evidence of prior sexual activity admissible — Where accused relying on defence of honest but mistaken belief in communicated consent — Where accused acquitted — Whether trial judge erred in his charge to jury in failing to caution jury on mistakes of law related to defence — Whether new trial warranted — *Criminal Code*, RSC 1985, c C-46, s 276.

Held (4:3 in part): Appeal allowed in part and new trial on unlawful act manslaughter ordered.

Immigration

Canada (Public Safety and Emergency Preparedness) v Chhina
Supreme Court of Canada: [2019 SCC 29](#)

Judgment delivered: 10 May 2019

Coram: Wagner CJ, Abella, Moldaver, Karakatsanis, Gascon, Côté and Brown JJ

Catchwords:

Immigration — Detention — Habeas corpus — Jurisdiction — Where respondent subject to detention pending deportation — Where respondent alleged detention lengthy, indeterminate and illegal — Where immigration detainee applying for habeas corpus — Where superior court declining jurisdiction to hear application on basis that detention review scheme in *Immigration and Refugee Protection Act*, SC 2001, c 27 is complete, comprehensive and expert statutory scheme providing for review at least as broad as that available by way of habeas corpus and no less advantageous — Whether superior court erred in declining jurisdiction.

Held (6:1): Appeal dismissed.

Insolvency Law

Mission Product Holdings Inc v Tempnology LLC
United States Supreme Court: [Docket 17-1657](#)

Judgment delivered: 20 May 2019

Coram: Roberts CJ, Thomas, Ginsburg, Breyer, Alito, Sotomayor, Kagan, Gorsuch and Kavanaugh JJ

Catchwords:

Insolvency law – Where petitioner given license to use respondent’s trademarks in connection with distribution of certain clothing and accessories pursuant to contract – Where respondent filed for Chapter 11 bankruptcy and sought to reject its agreement with petitioner – Where s 365 of *Bankruptcy Code* enables debtor to “reject any executory contract”, 11 USC §365(a), and provides that rejection “constitutes a breach of such contract”, §365(g) – Where Bankruptcy Court held that rejection terminated petitioner’s rights to use trademarks – Whether s 365(g)’s statement that rejection “constitutes a breach” means rejection does not terminate rights that would survive a breach of contract outside bankruptcy.

Held (8:1): Reversed and remanded.

Labour Law

National Union of Metalworkers of South Africa obo Nganezi & Ors v Dunlop Mixing and Technical Services (Pty) Limited & Ors
Constitutional Court of South Africa: [\[2019\] ZACC 25](#)

Judgment delivered: 28 June 2019

Coram: Mogoeng CJ, Cameron, Froneman, Jafta and Khampepe JJ, Ledwaba AJ, Madlanga J, Nicholls AJ and Theron J

Catchwords:

Labour law – Unfair dismissal – Derivative misconduct – Violent strike – Where members of National Union of Metalworkers of South Africa engaged in protected week-long strike during course of which several acts of serious violence, intimidation and damage to property were alleged to have occurred – Where Dunlop dismissed workers involved in strike, 65 of whom were dismissed for derivative misconduct though not positively and individually identified as being present when violence committed – Whether derivative misconduct incorrectly defined below as creating obligation on striking workers to come forward and disclose to employers even if they have no material information to provide – Whether contractual duty of good faith implies imposition of unilateral fiduciary obligation on employees to disclose known information of misconduct by co-employees to their employer.

Held (9:0): Appeal succeeds; orders in Labour Court and Labour Appeal Court set aside; no order as to costs.

Modern Cleaning Concept Inc v Comité paritaire de l'entretien d'édifices publics de la région de Québec
Supreme Court of Canada: [2019 SCC 28](#)

Judgment delivered: 3 May 2019

Coram: Wagner CJ, Abella, Moldaver, Karakatsanis, Gascon, Côté, Brown, Rowe and Martin JJ

Catchwords:

Labour law — Collective agreements — Juridical extension by government decree — Franchises — Where provincial legislation guaranteeing minimum conditions of employment by extending collective agreement to all employees and professional employers within scope determined by means of government decree — Where parity committee responsible for administering and overseeing scheme created by decree — Where

franchisee entering into agreement with franchisor to perform cleaning services — Where parity committee seeking unpaid wages and other benefits on behalf of franchisee pursuant to applicable decree — Whether decree applies to relationship between franchisor and franchisee — Whether franchisee was employee of franchisor — Act respecting collective agreement decrees, CQLR, c D-2, ss 1(g) “professional employer”, 1(j) “employee” — Decree respecting building service employees in the Québec region, CQLR, c D-2, r 16.

Held (6:3): Appeal dismissed.

Social Security

Samuels v Birmingham City Council

United Kingdom Supreme Court: [\[2019\] UKSC 28](#)

Judgment delivered: 12 June 2019

Coram: Lady Hale, Lord Carnwath, Lady Black, Lords Lloyd-Jones and Kitchin

Catchwords:

Social security – Homelessness – Where appellant an assured shorthold tenant of property where she lived with four children – Where appellant fell into rent arrears and given notice to leave – Where appellant applied to respondent council to be treated as homeless under Part VII of *Housing Act 1996* – Where local housing authority under duty to secure accommodation to person found homeless if *inter alia* they are not satisfied that person “became homeless intentionally” – Where council decided appellant was intentionally homeless on grounds that accommodation was affordable and reasonable for her to continue to occupy and that its loss was result of her deliberate act in failing to pay rent – Whether council adopted correct approach in determining that accommodation was “affordable” for purposes of *Housing Act*.

Held (5:0): Appeal allowed; council’s decision quashed.

R (on the application of DA & Ors) v Secretary of State for Work and Pensions; R (on the application of DS & Ors) v Secretary of State for Work and Pensions

United Kingdom Supreme Court: [\[2019\] UKSC 21](#)

Judgment delivered: 15 May 2019

Coram: Lady Hale, Lords Reed, Kerr, Wilson, Carnwath, Hughes and Hodge

Catchwords:

Social security – Benefits cap – Where appeals brought on behalf of various lone parent mothers and their young children to challenge legislative provisions which, by *Welfare Reform and Work Act 2016*, capped specified welfare benefits at £23,000 for household in London and £20,000 elsewhere – Where single people (including lone parents) exempt from revised cap if they work for 16 hours each week – Whether in introducing revised cap, government, through Parliament, discriminated against lone parents of young children and against the children themselves – Whether regulations incompatible with European Convention on Human Rights.

Held (5:2): Appeals dismissed.

Statutory Interpretation

Kisor v Wilkie

United States Supreme Court: [Docket 18-15](#)

Judgment delivered: 26 June 2019

Coram: Roberts CJ, Thomas, Ginsburg, Breyer, Alito, Sotomayor, Kagan, Gorsuch and Kavanaugh JJ

Catchwords:

Statutory interpretation – Where petitioner, a Vietnam War veteran, first sought disability benefits from Department of Veterans Affairs in 1982, alleging post-traumatic stress disorder from military service – Where agency denied initial request, but petitioner moved to reopen claim in 2006 and agency agreed he was eligible – Where agency granted benefits from date of motion to reopen, not from date of petitioner’s first application – Where Federal Circuit affirmed decision by applying doctrine of *Auer v Robbins*, 519 US 452 (or sometimes *Bowles v Seminole Rock & Sand Co*, 325 US 410) deference, whereby court defers to agency’s reasonable reading of its own genuinely ambiguous regulations – Whether *Auer*, as well as predecessor *Seminole Rock*, should be overruled.

Held (9:0): Vacated and remanded.

Food Marketing Institute v Argus Leader Media

United States Supreme Court: [Docket 18-481](#)

Judgment delivered: 24 June 2019

Coram: Roberts CJ, Thomas, Ginsburg, Breyer, Alito, Sotomayor, Kagan, Gorsuch and Kavanaugh JJ

Catchwords:

Statutory interpretation – *Freedom of Information Act* (“FOIA”), Exemption 4 – Where respondent filed FOIA request with United States Department of Agriculture (“USDA”), seeking names and addresses of all retail stores that participate in national food-stamp program (“SNAP”) and each store’s annual SNAP redemption data from fiscal years 2005 to 2010 – Where USDA declined to disclose store-level SNAP data, invoking FOIA’s Exemption 4, which shields from disclosure “trade secrets and commercial or financial information obtained from a person and privileged or confidential,” 5 USC §552(b)(4) – Where respondent sued USDA and District Court held that revealing store-level SNAP data could work some competitive harm, but could not say that disclosure would cause “substantial competitive harm,” and thus ordered disclosure – Where petitioner, a trade association representing grocery retailers, intervened and filed appeal – Whether commercial or financial information customarily and actually treated as private by owner and provided to government under assurance of privacy is “confidential” within Exemption 4.

Held (6:3 in part): Reversed and remanded.

PDR Network LLC v Carlton Harris Chiropractic Inc

United States Supreme Court: [Docket 17-1705](#)

Judgment delivered: 20 June 2019

Coram: Roberts CJ, Thomas, Ginsburg, Breyer, Alito, Sotomayor, Kagan, Gorsuch and Kavanaugh JJ

Catchwords:

Statutory interpretation – Where petitioners (collectively “PDR”) sent health care providers faxes stating they could reserve free copy of new e-book version of Physicians’ Desk Reference on PDR’s website – Where respondent, a fax recipient, brought putative class action claiming PDR’s fax was “unsolicited advertisement” prohibited by *Telephone Consumer Protection Act of 1991*, 47 USC §227(b)(1)(C) – Where *Administrative Orders Review Act (Hobbs Act)* provides that courts of appeals have “exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of” certain “final orders of the Federal Communication Commission”, 28 USC §2342(1) – Where Court of Appeals held District Court was required to adopt interpretation of “unsolicited advertisement” set forth in 2006 Federal Communication Commission Order (“FFC Order”) – Whether and when FCC Order binds lower courts.

Held (9:0): Vacated and remanded.

Secretary of State for Work and Pensions v Gubeladze

United Kingdom Supreme Court: [\[2019\] UKSC 31](#)

Judgment delivered: 19 June 2019

Coram: Lady Hale, Lords Kerr, Carnwath, Hodge, Lady Black, Lords Lloyd-Jones and Sales

Catchwords:

Statutory interpretation – Where respondent, a Latvian national, worked for various employers in UK between September 2009 and November 2012 – Where *Accession (Immigration and Worker Registration) Regulations 2004* (SI 2004/1219) established Worker Registration Scheme (“WRS”) which obliged any national of an A8 State (including Latvia) to register before starting employment and before taking up any new employment – Where Government decided to extend measures applicable to nationals of A8 States for further two years in 2009 – Where respondent issued with registration certificate under WRS on 20 August 2010, but her prior UK employment was not covered by certificate – Where respondent made claim for state pension credit on 24 October 2012 – Whether decision to extend WRS is open to challenge on grounds of proportionality – Whether art 17(1)(a) of Directive 2004/38/EC requires people to show that throughout period of continuous residence they enjoyed legal right of residence – Whether respondent entitled to receive state pension credit.

Held (7:0): Appeal dismissed.

OWD Ltd trading as Birmingham Cash and Carry (In Liquidation) & Anor v Commissioners for Her Majesty’s Revenue and Customs

United Kingdom Supreme Court: [\[2019\] UKSC 30](#)

Judgment delivered: 19 June 2019

Coram: Lords Reed, Sumption, Hughes, Lady Black and Lord Briggs

Catchwords:

Statutory interpretation – Where *Finance Act 2015* introduced regulatory scheme requiring wholesalers supplying duty-paid alcohol to be approved by Her Majesty’s Revenue and Customs Commissioners (“HMRC”) under s 88C of *Alcoholic Liquor Duties Act 1979* – Where wholesalers were already involved in wholesale supply of duty-paid alcohol when scheme was introduced – Where HMRC refused approval because not satisfied that wholesalers were fit and proper – Where wholesalers appealed to First-tier Tribunal (“FTT”) and asked HMRC to permit them to continue trading whilst appeals pending – Where HMRC refused to provide interim approval and wholesalers brought judicial review proceedings in High Court challenging refusal – Whether HMRC has power to permit a person to carry on trading pending determination of appeal to FTT – Whether High

Court can grant interim relief if HMRC lacks power or refuses to exercise it.

Held (5:0): Appeal dismissed; HMRC's cross-appeal allowed.

Sveriges Angfartygs Assurans Forening (The Swedish Club) & Ors v Connect Shipping Inc & Anor

United Kingdom Supreme Court: [\[2019\] UKSC 29](#)

Judgment delivered: 12 June 2019

Coram: Lords Reed, Hodge, Lloyd-Jones, Kitchin and Sumption

Catchwords:

Statutory interpretation – Insurance – Where shipping vessel seriously damaged by engine room fire while on voyage in Red Sea – Where owners appointed salvors under Lloyds Open Form 2011 – Where vessel towed by salvors to Suez and notice of abandonment served on insurers – Where proceedings brought in support of claim against hull underwriters for constructive total loss under *Marine Insurance Act 1906* – Whether “cost of repairing the damage” to vessel under s 60(2)(ii) includes expenditure incurred before service of notice of abandonment – Whether relevant costs include charges payable to salvors under SCOPIC (Special Compensation, Protection and Indemnity) clause of Lloyd’s Open Form.

Held (5:0): Appeal allowed in part.

Quarles v United States

United States Supreme Court: [Docket 17-778](#)

Judgment delivered: 10 June 2019

Coram: Kavanaugh J delivered opinion for unanimous Court (Thomas J concurring)

Catchwords:

Statutory interpretation – “Burglary” – Where petitioner pleaded guilty to being a felon in possession of a firearm in violation of 18 USC §922(g)(1) and appeared to qualify for enhanced sentencing under *Armed Career Criminal Act* because he had at least three prior “violent felony” convictions, §924(e) – Where petitioner claimed that a 2002 Michigan conviction for third-degree home invasion did not qualify, even though §924(e) defines “violent felony” to include “burglary” – Where petitioner argued Michigan’s third-degree home invasion statute too broad – Where District Court rejected argument, and Sixth Circuit affirmed – Whether generic remaining-in burglary occurs under §924(e) when defendant forms intent to commit a crime at any time while unlawfully remaining in

a building or structure – Whether the Michigan home-invasion statute substantially corresponds to or is narrower than generic burglary.

Held: Affirmed.

Return Mail Inc v Postal Service

United States Supreme Court: [Docket 17-1594](#)

Judgment delivered: 10 June 2019

Coram: Roberts CJ, Thomas, Ginsburg, Breyer, Alito, Sotomayor, Kagan, Gorsuch and Kavanaugh JJ

Catchwords:

Statutory interpretation – “Person” – Where *Leahy-Smith America Invents Act* (“AIA”) of 2011 created Patent Trial and Appeal Board (“Board”), 35 USC §6(c), and established three types of administrative review proceedings that enable a “person” other than patent owner to challenge validity of a patent post-issuance, including covered-business-method review (“CBM review”) – Where Return Mail owns patent that claims method for processing undeliverable mail – Where Postal Service subsequently introduced enhanced address-change service to process undeliverable mail which Return Mail asserted infringed its patent – Where Postal Service petitioned for CBM review – Where Board concluded that the subject matter of Return Mail’s claims was ineligible to be patented and thus cancelled the claims underlying its patent – Whether Government is a “person” capable of instituting the three AIA review proceedings.

Held (6:3): Reversed and remanded.

Parker Drilling Management Services Ltd v Newton

United States Supreme Court: [Docket 18-389](#)

Judgment delivered: 10 June 2019

Coram: Thomas J delivered opinion for unanimous Court

Catchwords:

Statutory interpretation – Conflict of laws – Where respondent worked for petitioner on drilling platforms off California coast – Where respondent not paid for time on standby – Where respondent filed class action alleging California’s minimum-wage and overtime laws required petitioner to compensate him for standby time – Where platforms subject to *Outer Continental Shelf Lands Act* (“OCSLA”), which provides all law on Outer Continental Shelf (“OCS”) is federal law and deems adjacent State’s laws to be federal law only “[t]o the extent that they are applicable and not

inconsistent with" other federal law, 43 USC §1333(a)(2)(A) – Whether *Fair Labor Standards Act of 1938* ("FLSA") left no significant gap in federal law for state law to fill – Whether state law applicable under OCSLA and not "inconsistent" with federal law because not incompatible with federal scheme.

Held: Vacated and remanded.

Mont v United States

United States Supreme Court: [Docket 17-8995](#)

Judgment delivered: 3 June 2019

Coram: Roberts CJ, Thomas, Ginsburg, Breyer, Alito, Sotomayor, Kagan, Gorsuch and Kavanaugh JJ

Catchwords:

Statutory interpretation – Where petitioner was released from federal prison and began a 5-year term of supervised release that was scheduled to end on 6 March 2017 – Where in 2016 he was arrested on state drug trafficking charges to which he pleaded guilty and was subsequently sentenced to six years' imprisonment – Where petitioner challenged District Court's jurisdiction to issue a warrant and set supervised-release hearing on the ground that his supervised release had been set to expire on 6 March 2017 – Where Sixth Circuit held that petitioner's supervised-release period tolled under §3624(e), which provides that "term of supervised release does not run during any period in which the person is imprisoned in connection with a conviction for a ... crime unless the imprisonment is for a period of less than 30 consecutive days" – Whether pretrial detention later credited as time served for a new conviction is "imprison[ment] in connection with a conviction" and thus tolls the supervised-release term under §3624(e), even if court must make tolling calculation after learning whether the time will be credited.

Held (5:4): Affirmed.

Cochise Consultancy Inc v United States ex rel Hunt

United States Supreme Court: [Docket 18-315](#)

Judgment delivered: 13 May 2019

Coram: Thomas J delivered opinion for unanimous Court

Catchwords:

Statutory interpretation – Limitation of actions – Where *False Claims Act* permits private person, known as a relator, to bring a *qui tam* civil action "in the name of the [Federal] Government", 31 USC §3730(b), against

"any person" who "knowingly presents ... a false or fraudulent claim for payment" to the Government or to certain third parties acting on the Government's behalf, §§3729(a), (b)(2) – Where action must be brought within either 6 years after the statutory violation occurred, §3731(b)(1), or 3 years after the "the official of the United States charged with responsibility to act in the circumstances" knew or should have known the relevant facts but not more than 10 years after the violation, §3731(b)(2) – Where respondent filed complaint alleging that two defense contractors (collectively, Cochise) defrauded Government by submitting false payment claims for providing security services in Iraq – Where respondent claims he revealed allegedly fraudulent scheme during November 2010 interview with federal officials – Where Cochise moved to dismiss complaint as barred by statute of limitations – Whether respondent's complaint timely under §3731(b)(2).

Held: Affirmed.

Torts

Dutra Group v Batterton

United States Supreme Court: [Docket 18-266](#)

Judgment delivered: 24 June 2019

Coram: Roberts CJ, Thomas, Ginsburg, Breyer, Alito, Sotomayor, Kagan, Gorsuch and Kavanaugh JJ

Catchwords:

Torts – Damages – Punitive damages – Unseaworthiness – Where respondent was working on vessel owned by petitioner when hatch blew open and injured his hand – Where respondent sued petitioner, asserting a variety of claims, including unseaworthiness, and seeking general and punitive damages – Where petitioner moved to dismiss claim for punitive damages, arguing that they are not available on claims for unseaworthiness – Whether plaintiff may recover punitive damages on a claim of unseaworthiness.

Held (6:3): Reversed and remanded.

Poole Borough Council v GN (through his litigation friend "The Official Solicitor") & Anor

United Kingdom Supreme Court: [\[2019\] UKSC 25](#)

Judgment delivered: 6 June 2019

Coram: Lady Hale, Lords Reed, Wilson, Hodge and Lady Black

Catchwords:

Torts – Negligence – Duty of care – Vicarious liability – Where claimants sought damages for personal injuries suffered while they were children living in area of defendant council – Where claimants alleged injuries suffered as result of council’s negligent failure to exercise its powers under *Children Act 1989* to protect them from harm at hands of third parties – Where claimants alleged they and their mother placed by council in house on estate next to a family who, to council’s knowledge, persistently engaged in anti-social behaviour – Where claimants allege they were targets of harassment and abuse at hands of this family – Where claimants alleged they suffered physical and psychological harm as a result – Whether council owed a duty of care to claimants and their mother – Whether council was vicariously liable for any negligence of social workers.

Held (5:0): Appeal dismissed.

Merck Sharp & Dohme Corp v Albrecht

United States Supreme Court: [Docket 17-290](#)

Judgment delivered: 20 May 2019

Coram: Roberts CJ, Thomas, Ginsburg, Breyer, Alito, Sotomayor, Kagan, Gorsuch and Kavanaugh JJ

Catchwords:

Torts – Failure to warn – Claims pre-empted by federal law – Where petitioner manufactures Fosamax, a drug that treats and prevents osteoporosis in postmenopausal women but may increase risk of atypical femoral fractures – Where Food and Drug Administration (“FDA”) first approved of manufacture and sale of Fosamax in 1995 without warning of the then-speculative risk of atypical femoral fractures on label – Where stronger evidence connecting Fosamax to atypical femoral fractures developed after 1995 and FDA ordered petitioner to add warning to label in 2011 – Where respondents, more than 500 individuals who took Fosamax and suffered atypical femoral fractures between 1999 and 2010, sued petitioner on ground that state law imposed legal duty to warn about this risk – Where petitioner argued respondents’ claims should be dismissed as pre-empted by federal law, asserting that FDA would have rejected attempt to add warning, pointing to FDA’s rejection of petitioner’s 2008 attempt to warn of a risk of stress fractures – Whether “clear evidence” that FDA would not have approved a change to label.

Held (9:0): Vacated and remanded.

Tribal treaties

Herrera v Wyoming

United States Supreme Court: [Docket 17-532](#)

Judgment delivered: 20 May 2019

Coram: Roberts CJ, Thomas, Ginsburg, Breyer, Alito, Sotomayor, Kagan, Gorsuch and Kavanaugh JJ

Catchwords:

Tribal treaties – Where 1868 treaty between United States and Crow Tribe promised in exchange for most of Tribe’s territory in modern-day Montana and Wyoming its members would “have the right to hunt on the unoccupied lands of the United States so long as game may be found thereon ... and peace subsists ... on the borders of the hunting districts”, 15 Stat 650 – Where Wyoming charged petitioner with off-season hunting in Bighorn National Forest and being an accessory to same – Where state trial court rejected argument pursuant to treaty and jury convicted petitioner – Whether treaty rights expired upon Wyoming’s statehood – Whether petitioner precluded from arguing that treaty rights survived Wyoming’s statehood because Crow Tribe had litigated *Repsis* on behalf of itself and its members – Whether Bighorn National Forest became categorically occupied when it was created such that treaty does not apply even if treaty survive statehood.

Held (5:4): Vacated and remanded.

Taxation

North Carolina Department of Revenue v Kimberley Rice Kaestner 1992 Family Trust

United States Supreme Court: [Docket 18-457](#)

Judgment delivered: 21 June 2019

Coram: Sotomayor J delivered opinion for unanimous Court; Alito J filed concurring opinion in which Roberts CJ and Gorsuch J joined

Catchwords:

Taxation – Trusts – Fourteenth Amendment’s Due Process Clause – Where trust for benefit of children formed in State of New York – Where trustee resident of New York and was granted “absolute discretion” to distribute trust’s assets to beneficiaries – Where daughter moved to North Carolina and trustee later divided initial trust into three separate sub-trusts – Where North Carolina sought to tax trust under law authorizing State to tax any trust income that “is for the benefit of” a state resident, NC Gen Stat Ann §105–160.2 – Where State assessed tax of more than \$1.3

million for tax years 2005 through 2008, when beneficiary had no right to, and did not receive, any distributions – Where trustee paid tax under protest and then sued taxing authority in state court, arguing tax violated Fourteenth Amendment’s Due Process Clause – Whether presence of in-state beneficiaries alone empowers State to tax trust income not distributed to beneficiaries where beneficiaries have no right to demand income and are uncertain to receive it.

Held: Affirmed.

Hancock & Anor v Commissioners for Her Majesty’s Revenue and Customs

United Kingdom Supreme Court: [\[2019\] UKSC 24](#)

Judgment delivered: 22 May 2019

Coram: Lords Reed, Sumption, Carnwath, Briggs and Lady Arden

Catchwords:

Taxation – Capital Gains Tax – Where appellants seek to show that redemption of loan notes, issued to them in connection with sale of their shares in their company, fell outside charge to capital gains tax (“CGT”) – Where appellants rely on exemption in s 115 of *Taxation of Chargeable Gains Act 1992* (“TCGA”) for disposals of qualifying corporate bonds (“QCBs”) – Whether there was a single conversion or two separate conversions – Whether on true interpretation of s 116(1)(b) of TCGA potential gain within non-QCBs was frozen on conversion.

Held (5:0): Appeal dismissed.
