Q1 | TORYS QUARTERLY • WINTER 2026

What's hot in public law in 2026

AUTHORS

Andrew Bernstein

T. Ryan Lax

Yael Bienenstock

Arif Virani

Jon Silver

Michaela Hill

Public law is everywhere in 2026, with courts tackling issues ranging from project permitting to bike lanes, and from privative clauses to Indigenous rights. In this article, we highlight the top administrative and constitutional law cases that we expect will be heard and/or decided this year.

The Court's oversight role

An important theme in public law remains the scope and limits of the judicial role when it is overseeing government action. Four important cases will answer key questions pertaining to this role, including:

- **Can legislatures shield administrative decisions from review?** The Supreme Court kicked off this year by hearing *Democracy Watch v. Attorney General of Canada*[1]. The issue was whether the constitution prohibits strong statutory restrictions on judicial review (known as "privative clauses"). Many statutes feature privative clauses, so this decision could have broad implications for the scope of review.

- **What is the Court's role when the notwithstanding clause is used?** In the last few years, governments have invoked the notwithstanding clause in section 33 of the *Charter* to enact controversial legislation that could otherwise infringe *Charter* rights. The Supreme Court will hear two cases that ask whether the courts can still adjudicate the presence or absence of such a breach, even if section 33 has been invoked. The first relates to Québec's Bill 21 and its ban on religious symbols for public employees, including teachers, police officers and judges[2]. The second relates to Saskatchewan's law requiring parental consent for gender identity changes for minors[3]. The Québec and Saskatchewan Courts of Appeal divided sharply on whether declaratory relief is available when a legislature invokes section 33. These decisions will define the Court's role, if any, when the notwithstanding clause is invoked.

- **Can courts review a decision to prorogue Parliament?** Even without section 33, some government action may not be amenable to judicial review. In *MacKinnon v. Canada*[4], the Federal Court of Appeal will consider whether courts have jurisdiction to review former Prime Minister Trudeau's decision to seek prorogation of Parliament in early 2025, on the cusp of a potential non-confidence vote. The Federal Court held that it had jurisdiction, but it dismissed the underlying judicial review. The appellant, MacKinnon (who is a Canadian with an interest, but not currently involved in the political process), is urging the Court to apply a common law test from the UK, which would expand the court's role in reviewing prorogation decisions.

- **When can the federal government invoke its emergency powers?** After *Vavilov*[5], most decision are juridically reviewed on a reasonableness standard. Earlier this month, the Federal Court of Appeal upheld a ruling that the federal government acted unreasonably when it used the *Emergencies Act* to clear the 2022 freedom convoy protests[6]. Since the Act and its predecessor have rarely been invoked, this decision sets an important precedent, and the government may seek leave to appeal to the Supreme Court.

Scope of Indigenous consultation duties and rights claims

Courts will also decide several important cases about Indigenous consultation and Aboriginal rights. These cases will have implications for Indigenous communities, project proponents and governments:

- **What role does UNDRIP play in consultation and in proving Aboriginal rights?** In recent years, courts have increasingly considered what role the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) has in domestic law, given the passage of the federal *United Nations Declaration on the Rights of Indigenous Peoples Act* and similar legislation in some provinces and territories. In 2026, appellate courts will decide two key cases in this area. In *Kebaowek First Nation v. Canadian Nuclear Laboratories*[7], the Federal Court of Appeal will determine whether UNDRIP informs the constitutional duty to consult and, if so, how (for more on this case, read our summary of the decision). In *R c. Montour*[8], the Québec Court of Appeal will address whether UNDRIP requires a new test for proving Aboriginal rights in litigation.

- **How will courts address claims involving Aboriginal title and other overlapping rights?** In late 2025, the Supreme Court heard arguments in *Nisga'a Nation v. Malii*[9], a case concerning overlapping claims to Aboriginal title and rights. The Court's decision is expected to clarify what a declaration of Aboriginal title—which is intended to be a right of exclusive occupation—means for other Indigenous communities asserting or holding rights in the same territory. Two recent decisions—*Cowichan Tribes v. Canada (Attorney General)*[10] and *J.D. Irving Limited et al. v. Wolastoqey Nation*[11]—have also created uncertainty in the law on whether Aboriginal title can be declared over privately held lands (for more, read our recent bulletin pertaining to these cases). The decisions reach substantively different conclusions, and both are being appealed. We expect that this issue will make its way to the Supreme Court.

Bike lanes, plastics and federal permits

We round out our list with three interesting cases that defy easy classification, but which are clearly ones to watch:

- **Does the *Charter* require bike lanes in Toronto?** Can the constitution protect bike lanes? This month, the Court of Appeal for Ontario is scheduled to hear *Cycle Toronto v. Ontario*[12], the buzzworthy case about Toronto's bike lanes which prompted considerable public response from provincial leaders. In the court below, the applicant successfully argued that statutory amendments authorizing the removal of bike lanes from busy Toronto streets violated section 7 of the *Charter*. The soon-to-be-heard appeal will not just impact Toronto commuters; it will have broad ramifications for the scope of section 7, including how courts evaluate competing evidence from different levels of government and the extent to which governments must justify their decisions as non-arbitrary.

- **Can the federal government declare plastics "toxic"?** 2026 will hopefully bring a decision in the *Responsible Plastic Use Coalition v. Canada* appeal, which was argued in 2024[13]. The case centres around the reasonableness and constitutionality of a federal government order adding "plastic manufactured items" to the list of toxic substances in Schedule 1 of the *Canadian Environmental Protection Act.* The long-awaited Federal Court of Appeal decision will have important implications for the ban on single-use plastics and federal efforts to regulate environmental issues more broadly.

- **Has the federal government fixed its projects approval legislation?** The *Impact Assessment Reference* is heading back to the Alberta Court of Appeal. In 2023, the Supreme Court declared the *Impact Assessment Act* (the federal environmental legislation governing major project approvals) largely unconstitutional on federalism grounds[14]. Canada amended the *Impact Assessment Act* in response to the decision, but the Alberta government continues to argue that it is unconstitutional. Given the importance of the *Impact Assessment Act* to major projects across the country, the latest ruling will be watched closely by both government and project proponents.

FOOTNOTES

1. *Democracy Watch v. Canada (Attorney General)*, 2024 FCA 158.
2. *Organisation mondiale sikhe du Canada c. Procureur général du Québec*, 2024 QCCA 254.
3. *Saskatchewan (Minister of Education) v. UR Pride Centre for Sexuality and Gender Diversity*, 2025 SKCA 74.
4. *MacKinnon v. Canada (Attorney General)*, 2025 FC 422.
5. *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65.
6. *Canada (Attorney General) v. Canadian Civil Liberties Association*, 2026 FCA 6.
7. *Kebaowek First Nation v. Canadian Nuclear Laboratories*, 2025 FC 319.
8. *R. c. Montour*, 2023 QCCS 4154.
9. *Nisga'a Nation v. Malii*, 2024 BCCA 313.
10. *Cowichan Tribes v. Canada (Attorney General)*, 2025 BCSC 1490.
11. *J.D. Irving, Limited et al. v. Wolastoqey Nation*, 2025 NBCA 129.
12. *Cycle Toronto et al. v. Attorney General of Ontario et al.*, 2025 ONSC 4397.
13. *Responsible Plastic Use Coalition v. Canada (Environment and Climate Change)*, 2023 FC 1511.
14. *Reference re Impact Assessment Act*, 2023 SCC 23.

To discuss these issues, please contact the author(s).

This publication is a general discussion of certain legal and related developments and should not be relied upon as legal advice. If you require legal advice, we would be pleased to discuss the issues in this publication with you, in the context of your particular circumstances.

For permission to republish this or any other publication, contact Richard Coombs.

© 2026 by Torys LLP.

All rights reserved.