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CONSTITUTIONAL LITIGATION IN CANADA

Lokan & Fenrick

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This one volume looseleaf is a comprehensive resource on the topic of constitutional litigation. It features a full and systematic treatment of the issues that arise at all stages of a proceeding from a practical perspective. Both practitioners and students alike will find included precedents, such as pleadings, affidavits, and facta, useful.

This release features case-law updates in chapters 2, 3, 4, 5, 6, 7 and 10.

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Highlights

- **Parties – The Law of Standing – Division of Powers – Standing as of Right –** The British Columbia Director of Civil Forfeiture brought claims under *Civil Forfeiture Act* for forfeiture of three clubhouses operated by a motorcycle club. The defendants had challenged the constitutionality of these provisions of *Civil Forfeiture Act* on division of powers grounds. The Court of Appeal agreed with the trial judge that the defendants should be recognized as having private interest standing: *British Columbia (Director of Civil Forfeiture) v. Angel Acres Recreation and Festival Property Ltd.*, 2023 BCCA 70, 2023 CarswellBC 376.
- **Choice of Procedure – Class Proceedings – Aboriginal Class Actions –** In this case, the representative plaintiff was an Indigenous man who claimed he was assaulted and subjected to racial slurs in the course of an arrest by RCMP officers when he was 15 years old. The plaintiff's proposed class included all Indigenous persons who were assaulted by RCMP officers. The plaintiff's motion for certification was conditionally granted by the motions judge, but this was set aside on appeal and sent back to the Federal Court for amendment based on the Federal Court of Appeal's reasons for decision. The plaintiff's claim disclosed reasonable causes of action, including systemic negligence and *Charter* breaches. An identifiable class existed, as there was a recognized definition of Aboriginal or Indigenous people. The common question of aggregate damages was to be deleted from the claim because the plaintiff had not put forth a method for conducting an assessment of these damages. The motion judge properly determined that a class proceeding was preferable to determine common issues: *Canada (Attorney General) v. Nasogaluak*,2023 FCA 61, 2023 CarswellNat 697.
- **Remedies – Declaratory Relief –** The Supreme Court of Canada confirmed a Court of Appeal decision stating that in the circumstances of this case, reading in was not an appropriate remedy. The accused in this case pleaded guilty to 6 counts of first-degree murder and was automatically imposed a sentence of imprisonment for life, being eligible for parole only after serving an ineligibility period of 25 years. Relying on s. 745.51 of the *Criminal Code*, the Crown asked that the periods without eligibility for parole for each murder conviction be served consecutively. The accused challenged the constitutionality of s. 745.51. The sentencing judge held that this provision infringed the accused's right not to be subjected to any cruel and unusual treatment or punishment and applied the technique of reading in. The sentencing judge ordered that the accused must serve a total ineligibility period of 40 years before being able to apply for parole. The Court of Appeal, and then the Supreme Court of Canada, declared s. 745.51 of *Code* invalid and ordered that the accused serve the 25-year parole ineligibility periods concurrently. The remedy of reading in was not appropriate because Parliament had already rejected the interpretation proposed by the trial judge: *R. c. Bissonnette*, 2022 SCC 23.
- **Remedies – Reading Down –** In the Supreme Court declined to read down a law in a way that would contradict the clear intention of Parliament. At issue was a law about the national sex offender registry that required people convicted of certain offences two or more times to

be registered for life. The Supreme Court found this law was unconstitutional but refused to read it down so that it would not apply to people who are not at risk of reoffending. The Court agreed with the Crown that this would "reinstate judicial discretion and contradict Parliament's clear intention to remove all judicial discretion to exempt offenders at the time of sentencing from the registry". *R. v. Ndhlovu*, 2022 SCC 38.

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