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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 updates to the case law and commentary in Chapter 6 (Remedies). Additionally, Appendix SLL - Selected Legal Literature and Appendix WP. - Words and Phrases have been updated.

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Highlights

- **CHAPTER 6 REMEDIES** — In *Canada (Attorney General) v. Power* (“Power”), 2024 CarswellNB 344, the Supreme Court of Canada appears to have departed (unanimously on this point) from the application of private law principles to public law remedies. In *Power*, a person convicted of two indictable offences applied for a record suspension but his application was denied. At the time he was convicted, he could have applied for a suspension five years after his release. Parliament later enacted transitional provisions that rendered him permanently ineligible. These transitional provisions were struck down as unconstitutional in other cases. He filed a claim seeking, among other things, *Charter* damages under s. 24(1). The issue came before the Supreme Court of Canada on the basis of a motion brought by the Crown on two questions of law: (1) can the Crown, in its executive capacity, be held liable in damages for government officials and Ministers preparing and drafting a proposed Bill that was later enacted by Parliament, and subsequently declared invalid by a court pursuant to s. 52(1) of the *Constitution Act, 1982*?, and (2) can the Crown, in its executive capacity, be held liable in damages for Parliament enacting a Bill into law, which legislation was later declared invalid by a court pursuant to s. 52(1) of the *Constitution Act, 1982*? Both lower courts answered the questions in the affirmative. A majority of the Supreme Court dismissed the appeal. The majority opinion (authored by Wagner CJC and Karakatsanis J) integrated the Court’s earlier decision in *Ward v. Vancouver (City)* with the *Mackin* decision, and concluded that the state may be liable in damages pursuant to s. 24(1) where if the legislation is clearly unconstitutional or was in bad faith or an abuse of power. The majority affirmed that there is a general presumption against awarding s. 24(1) remedies in tandem with s. 52(1) remedies and held that the existence of a s. 52(1) remedy as an alternative is an appropriate consideration under the *Ward* analysis when determining whether damages are an appropriate and just remedy.
- **APPENDIX WP WORDS AND PHRASES — EXTRINSIC EVIDENCE** — Extrinsic evidence includes the Act’s legislative history and the legislative debates surrounding its enactment...*Sri Lankan Canadian Action Coalition v. Ontario (Attorney General)* (2024), 2024 ONCA 657, 2024 CarswellOnt 13344 (Ont. C.A.) at para. 38 Fairburn A.C.J.O., K. van Rensburg and Zarnett J.J.A.
- **APPENDIX WP WORDS AND PHRASES — INTRINSIC EVIDENCE** — Intrinsic evidence refers to the Act’s title, preamble, text, structure and any provisions setting out its purpose...*Sri Lankan Canadian Action Coalition v. Ontario (Attorney General)* (2024), 2024 ONCA 657, 2024 CarswellOnt 13344 (Ont. C.A.) at para. 38 Fairburn A.C.J.O., K. van Rensburg and Zarnett J.J.A.

THE FOLLOWING SAMPLE OF SELECTED LEGAL LITERATURE HAVE BEEN ADDED AS POTENTIAL RESOURCES ON THE SUBJECT:

- Revisiting the analytical distinction between s. 7 and s. 1 of the *Charter* [*Canadian Charter of Rights and Freedoms*]: legislative objectives, policy goals and public interests; by Debra M. Haak; (2023) 112 Sup. Ct. L. Rev. (2d) 115-148.

- Structural analysis, unwritten principles and constitutional remedies: *Charter* damages for the enactment of legislation by Parliament; by Alexandre Marcotte; (2024) 18 J.P.P.L. 69-88.
- The Dialogue within: deference and self-assertion in the Supreme Court of Canada in the *Charter* [*Canadian Charter of Rights and Freedoms*] era; by Thomas M.J. Bateman; (2023) 17 J.P.P.L. 85-100.
- Unwritten business in unwritten justice: unwritten constitutional principles after *Toronto (City) v. Ontario (Attorney General)*; by Andre Matheusik; (2024) 61 Alta. L. Rev. 933-962.