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CONSTITUTIONAL LITIGATION IN CANADA

Lokan & Fenrick

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Publisher's Special Release Note 2021

The pages in this work were reissued in October 2021 and updated to reflect that date in the release line. Please note that we did not review the content on every page of this work in the October 2021 release. We will continue to review and update the content according to the work's publication schedule. This will ensure that subscribers are reading commentary that incorporates developments in the law as soon as possible after they have happened or as the author deems them significant.

Changes to chapter and heading numbering may have occurred. Please refer to the Correlation Table in the front matter if you wish to confirm references.

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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 Chapter 2 (The Scope of Constitutional Litigation: Government Action), Chapter 3 (Parties), Chapter 4 (Choice of Forum) and Chapter 6 (Remedies).

Case Highlights

- **Chapter 5 — Choice of Procedure — Actions — The Law of Standing — Motions to Strike:** Even if a statement of claim is flawed, before striking the claim without leave to amend, the court will typically consider whether amendments could be made to cure the defects in the claim and assert a viable cause of action. This is particularly the case for aboriginal rights claims, where the law evolves quickly and where the practice has been that claims are often amended multiple times before trial. In these cases, the Supreme Court of Canada has stated that courts should take a functional rather than a technical approach to pleadings, whereby "minor defects should be overlooked", as long as the pleadings achieve the aim of providing the parties with an outline of the material allegations and relief sought, and there is no clear prejudice. The Supreme Court of Canada has also stressed that access to justice concerns are raised if the Crown fails to take a practical and pragmatic approach with a view to resolving disputes effectively while minimizing costs and complexity. Excessive use of motions to strike would run counter to this approach. See: *Tsilhqot'in Nation v. British Columbia*, 2014 CarswellBC 1814, 2014 CarswellBC 1815, 2014 SCC 44, [2014] 2 S.C.R. 257, 374 D.L.R. (4th) 1, 58 B.C.L.R. (5th) 1, 43 R.P.R. (5th) 1, [2014] 7 W.W.R. 633, [2014] 3 C.N.L.R. 362, 312 C.R.R. (2d) 309, 459 N.R. 287, 356 B.C.A.C. 1, 610 W.A.C. 1, [2014] S.C.J. No. 44 (S.C.C.); *Kwikwetlem First Nation v. British Columbia (Attorney General)*, 2021 CarswellBC 2588, 2021 BCCA 311, 461 D.L.R. (4th) 357, 53 B.C.L.R. (6th) 1, 70 C.P.C. (8th) 1 (B.C.C.A.); and *Newfoundland and Labrador (Attorney General) v. Uashaunnuat (Innu of Uashat and of Mani-Utenam)*, 2020 CarswellQue 640, 2020 CarswellQue 641, 2020 SCC 4, 443 D.L.R. (4th) 1 (S.C.C.).
- **Chapter 7 — Commencing the Proceeding — Specific Rules Applying to Crown or Government — Crown Immunity Provisions:** In 2019, Ontario introduced legislation (the CLPA) that replaced the former *Proceedings Against the Crown Act*, and purported to immunize the Crown from liability for negligent acts of a legislative nature, regulatory decisions made in good faith, or negligence claims arising from certain decisions respecting a policy matter. These immunization provisions are drafted in broad terms that could potentially expand the scope of Crown immunity substantially. Further, the legislation requires claimants to bring a motion for leave to proceed with their proceeding if that proceeding includes a claim in respect of a tort of misfeasance in public office or a tort based on bad faith of the Crown or an officer or employee of the Crown. However, the Ontario Court of Appeal considered

s. 11(4) and (5) of the CLPA (the immunization provisions for policy matters) and applied the presumption that the common law is preserved unless there is a clear and unequivocal expression of legislative intent to change it. The Court of Appeal found that there was no clear intent to depart from the prevailing divide between policy and operational decisions. This suggests that the impact of the new CLPA provisions may be limited. On its terms, the CLPA applies to tort liability rather than direct liability under the Charter, but there may be some overlap on the facts of any given case. See: *Francis v. Ontario*, 2021 CarswellOnt 4233, 2021 ONCA 197, 402 C.C.C. (3d) 211, 154 O.R. (3d) 498, 73 C.C.L.T. (4th) 171 (Ont. C.A.); and *Leroux v. Ontario*, 2021 CarswellOnt 4128, 2021 ONSC 2269, 75 C.C.L.T. (4th) 57 (Ont. Div. Ct.).

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