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Lokan & Dassios

# Constitutional Litigation in Canada

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 Chapters 5 (Choice of Procedure) and 6 (Remedies) and updates to the **Selected Legal Literature** section of the book.

## Case Highlights

- **Choice of Procedure — Applications — Ontario:** In Ontario, applications are permitted in any of the situations listed in Rule 14.05(3) of the Rules of Civil Procedure. There may be situations in which a litigant can bring a case either as a Rule 14 application or as an application for judicial review. In this case, the applicant made a Rule 14 application to challenge a drivers' license regulation which required him to have a prescribed level of visual acuity in both eyes. The Attorney General moved to transfer the case to the Divisional Court, arguing that a challenge to a regulation was a challenge to the exercise of a statutory power, and as such was required to be brought as a judicial review application. The court dismissed the motion, noting that constitutional challenges to regulations or by-laws by way of a Rule 14 application were accepted practice in Ontario. However, the court noted that the Divisional Court had also heard such cases on occasion, and that this might be a possible parallel route: *Di Cienzo v. Ontario (Attorney General)*, 2017 CarswellOnt 5772, 19 Admin. L.R. (6th) 288 (Ont. S.C.J.).

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- **Choice of Procedure — References — Scope of the Reference Power:** The Federal Court is unusual in that a reference may be brought by the Attorney General of Canada at any stage of the proceedings of a federal board, commission, or tribunal, or a federal board, commission, or tribunal may itself bring a reference at any stage of its proceedings. However, there are limits on this power. The reference must arise from a specific ongoing proceeding, and the application must present a proper factual foundation necessary to determine the issue appropriately: *Francis, Re*, 2016 CarswellNat 2707, 2016 CarswellNat 10354, 2016 FC 750 (F.C.).
- **Remedies — General Principles — Availability of Concurrent Remedies Under Sections 52 and 24:** The debate over the justifications for not granting s. 24(1) remedies where a s. 52(1) remedy is appropriate was in part the subject of the recent decision of the Supreme Court of Canada. In a recent Supreme Court of Canada case, the plaintiff brought a claim against the Alberta Energy Regulator seeking Charter damages under s. 24(1). The regulator benefited from a statutory immunity provision. Based on this immunity, it moved to strike the claim. Before the Supreme Court of Canada, the plaintiff, for the first time, sought a declaration that the immunity provision was invalid pursuant to s. 52(1) of the Charter. Justice Abella, writing for herself, struck the claim largely on the basis that the plaintiff had not served a Notice of Constitutional Question. Justice Cromwell, writing for himself and three other justices, held that it was plain and obvious that the immunity provision protected the regulator from a Charter damages claim. Justice Cromwell expressly relied on private law principles (specifically, the public policy objections to finding that public regulators owe a duty of care in negligence) when setting the framework for public law remedies. In contrast, Chief Justice McLachlin, Justice Moldaver and Justice Brown (writing for themselves and Justice Coté) recognized that the private law analysis has significant limitations when considering public law remedies: *Ernst v. Alberta Energy Regulator*, 2017 CarswellAlta 32, 2017 CarswellAlta 33 (S.C.C.).