

## Publisher's Note

2018 — Release 3

Previous release was 2018-2

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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 9 (Discovery of Documents).

### Case Highlights

- **Choice of Procedure — Applications — Ontario:** Where a challenge does not involve subordinate legislation, but rather a challenge to the exercise of a statutory power by a public body, the challenge must be brought to the Divisional Court as an application for judicial review: *Christian Medical and Dental Society of Canada v. College of Physicians and Surgeons of Ontario*, 2018 CarswellOnt 1135, 2018 ONSC 579, 140 O.R. (3d) 742 (Ont. Div. Ct.); *Alford v. Law Society of Upper Canada*, 2018 CarswellOnt 11340, 2018 ONSC 4269 (Ont. S.C.J.).
- **Choice of Procedure — Judicial Review or Statutory Appeals from Tribunals — From Evidentiary Hearings:** The Supreme Court of Canada has held that the British Columbia Supreme Court, hearing an application for judicial review of a Minister's decision to approve a ski resort development, could not grant a declaration that "Qat'muk is sacred to the Ktunaxa and that permanent construction is banned from that site". The Court noted that "[i]n judicial proceedings, such a declaration can only be made after trial of the issue and with the benefit of pleadings, discovery, evidence and submissions", because "Aboriginal rights must be proven by tested

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evidence; they cannot be established as an incident of administrative law proceedings that centre on the adequacy of consultation and accommodation”: *Ktunaxa Nation v. British Columbia (Forests, Lands and Natural Resource Operations)*, 2017 CarswellBC 3020, 2017 CarswellBC 3021, 2017 SCC 54, [2017] 2 S.C.R. 386, 415 D.L.R. (4th) 52, 25 Admin. L.R. (6th) 1, 1 B.C.L.R. (6th) 223, 12 C.E.L.R. (4th) 1, [2017] 12 W.W.R. 1, [2018] 1 C.N.L.R. 19, 394 C.R.R. (2d) 293 (S.C.C.).

- **Discovery of Governments — Access to Information Legislation:** In a recent decision, the Federal Court of Appeal considered whether to recognize a new “class-based” public interest privilege for documents provided to the Commissioner of Competition in the course of his investigations. The court noted that under Supreme Court of Canada jurisprudence the threshold for establishing a new class-based privilege was extremely high, and could likely only be achieved by legislative action. Public interest privilege could still be claimed on a document-by-document basis, but the reviewing tribunal “should consider whether alternative, lesser means of protecting” confidentiality would be available, such as “redacting portions of individual documents, undertakings of confidentiality, protective orders, sealed volumes of documents, in camera sessions” etc.: *Vancouver Airport Authority v. Commissioner of Competition*, 2018 CarswellNat 98, 2018 CarswellNat 3820, 2018 FCA 24, 420 D.L.R. (4th) 163 (F.C.A.).