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### **GOVERNMENT LIABILITY LAW AND PRACTICE**

**Karen Horsman and Gareth Morley**  
**Release No. 2, July 2023**

This looseleaf publication is a practitioner-oriented guide to conducting civil litigation when one of the parties involved is the Crown. With contributions from leading practitioners from the private, public and academic bar, this is the first resource of its kind that is regularly updated, addressing the evolving area of civil government liability. It examines the civil liability of the federal and provincial governments in common-law Canada with respect to the major areas of private law, including: Tort, Restitutions, Contract, Procedure and Fiduciary Duties.

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### What's New in this Update:

This release features new case law and commentary in Chapters 1 (Legal Personality of the Crown), 2 (Legal Personality of Gov't Bodies), 3 (Crown Liability in Contract), 4 (Crown Liability in Restitution/Unjust Enrichment), 7 (Nuisance), and 11 (The Crown as a Fiduciary).

### Highlights of this release include:

- **Chapter 2 — Legal Personality of Gov't Bodies — Crown Liability in Contract — When Does a Governmental Entity Have Civil Personality?** — In *Levy v. British Columbia (Ministry of Public Safety and Solicitor General)*, 2022 BCSC 356 (B.C. S.C.), the court awarded a victim of crime more than he might be statutorily entitled to when that was promised in a binding settlement agreement by the public authority responsible for compensation. It is only where the statute unambiguously restricts the contractual capacity of the Crown to settle that a promise to pay will be rendered unenforceable either because it “fetters” discretion or even if it exceeds what would be awarded under the statutory scheme alone.
- **Chapter 4 — Crown Liability in Restitution/Unjust Enrichment — Disposition of Law — Valid Legislation** — In some cases, a legislative scheme may not be violated but does not provide a juristic reason for the transfer of wealth. For example, if a permittee makes payments under a permit that is later cancelled for environmental reasons, the legislation, even if perfectly valid, may not imply any intention to let the government retain the payments. If the payments were implicitly in return for the benefit of the permit, the statutory scheme does not provide a juristic reason for the government to keep them when it (lawfully) deprives the permittee of those benefits: *Northern Cross (Yukon) Ltd. v. Yukon (Energy, Mines and Resources)*, 2021 YKCA 6 (Y.T. C.A.), leave to appeal refused, 2022 CarswellYukon 52 (S.C.C.).
- **Chapter 7 — Nuisance — Standing — Who can be Sued — Executive Action** — The B.C. Court of Appeal in *British Columbia (Minister of Public Safety) v. Latham*, 2023 BCCA 104 (B.C. C.A.), confirmed that purely administrative or regulatory action impacting land cannot give rise to liability in nuisance. Nuisance requires, at minimum, that the defendant engage in some use of the land from which the interference emanates. This is consistent with the traditional rationale for the tort of nuisance, which is the mediation of competing land uses.
- **Chapter 11 — The Crown as a Fiduciary — The Crown's Ad Hoc (Undertaking) Fiduciary Duty — Government**

**Care through Guardianship, Custodianship and Similar Relationships — Inmates of Correctional Institutions** — In 2022, the B.C. Court of Appeal ordered a breach of fiduciary claim against the province in respect of alleged sexual assault and sexual abuse by a corrections officer in a corrections facility to be struck. The court concluded that the pleadings did not allege that the province had undertaken to act in the best interests of all inmates, and an undertaking could not be inferred from either the statutory framework or the common law of gaolers, and so failed because there was no reasonable prospect of success on the pleadings. In coming to this pleadings decision, the court went further, casting substantive doubt on the possibility that, at least under the statutory framework in British Columbia, the Province could owe the alleged undertaking: *Johnson v. British Columbia (Attorney General)*, 2022 BCCA 82 (B.C. C.A.), leave to appeal refused, 2023 CarswellBC 419 (S.C.C.).

### **ProView Developments**

Your ProView edition of this product now has a new, modified layout:

- The opening page is now the title page of the book as you would see in the print work
- As with the print product, the front matter is in a different order than previously displayed
- The Table of Cases, Table of Statutes and Index are now in PDF with no searching and linking
- The Table of Contents now has internal links to every chapter and section of the book within ProView
- Images are generally greyscale and size is now adjustable