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GOVERNMENT LIABILITY LAW AND PRACTICE Karen Horsman and Gareth Morley Release No. 3, December 2024

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 updates to the case law and commentary in Chapter 6 (Negligence) and Chapter 8 (Misfeasance in Public Office).

Highlights of this release include:

- **§ 8:9—Legislative Functions**—There is some conflict in earlier authorities on the question of whether bad faith conduct in the enactment of legislation constitutes an exception to this general rule. In the recent decision of *Canada (Attorney General) v. Power*, 2024 CarswellNB 345, a majority of five judges of the Supreme Court of Canada held that the state is not immune from damages claims under s. 24(1) in respect of the enactment of legislation that is later determined to infringe a *Charter* right where the legislation is clearly unconstitutional at the time it was enacted, in bad faith, or an abuse of power. As will be discussed, whether tort law damages would be available for similar conduct in the enactment of legislation is questionable. *Power* involved a claim for *Charter* damages in respect of transitional provisions in two federal statutes that made the claimant ineligible for a criminal record suspension. The majority concluded that there was no absolute immunity for the enactment of legislation later found to be unconstitutional. It interpreted the Court’s earlier decision in *Mackin v. New Brunswick (Minister of Finance)*, 2002 CarswellNB 60, as establishing a limited immunity for the enactment of an unconstitutional law, under which damages would be an available remedy where the law was “clearly wrong, in bad faith or an abuse of power”.
- **§ 8:22—Leave Requirement in Ontario**—Pursuant to s. 17 of the Ontario *Crown Liability and Proceedings Act, 2019*, any proceedings including a claim for misfeasance in public office or other tort based on bad faith against the Crown are deemed to be stayed, and the claimant must apply for leave to proceed. The court may only grant leave if it is satisfied that the proceeding is being brought in good faith, and there is a reasonable possibility the claim will succeed. Section 17 sets out a detailed procedure in respect of applications for leave. The claimant is required to file an affidavit setting out a concise statement of the material facts on which they intend to rely, and to disclose all relevant documents. The defendant is not required to file any evidence, and the claimant has no right of discovery, other than to examine the defendant’s affidavit if it chooses to file an affidavit.