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GOVERNMENT LIABILITY LAW AND PRACTICE

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Publisher's Special Release Note 2021

The pages in this work were reissued in June 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 June 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 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.

What's New in this Update:

This release features new case law and commentary in Chapter 5 (“Takings”: Government Liability to Compensate for Forcibly Acquired Property), Chapter 7 (Nuisance), Chapter 9 (Malicious Prosecution), Chapter 10 (False Arrest or False Imprisonment), and Chapter 11 (The Crown as a Fiduciary).

Highlights of this release include:

- **Nuisance — The Elements of the Tort of Private Nuisance — Nuisance by Executive Action** — The Yukon Court of Appeal recently declined to strike a pleading which alleged that a government moratorium on hydraulic fracturing (“fracking”) constituted a nuisance. The plaintiff expended money to start a fracking business and obtained permits which granted specified oil and gas rights over a designated area, however, in 2015 the Yukon government announced a moratorium on fracking which applied to the permitted areas. Various causes of action were pleaded, including nuisance. Yukon argued that the moratorium could not constitute a nuisance as it was not a use of land, and because nuisance involves an indirect interference with land whereas the moratorium is direct. The Court of Appeal concluded that these matters are not plain and obvious. The court observed that the law of nuisance is focussed on the interference with the plaintiff’s interest in land, and that the law protects access to property, citing cases in which fences, gates or blockades were held to constitute a nuisance. The Court of Appeal also cited *St. Lawrence Cement Inc. v. Barette*, *Antrim Truck Centre v. Ontario*, and *Baker v. Rendle* for the proposition that the focus of nuisance law is on the harm suffered by the plaintiff, rather than on the nature of the conduct giving rise to that harm. The court noted that Yukon sought to reverse this focus, emphasizing instead the nature of the conduct leading to the interference: *Northern Cross (Yukon) Ltd. v. Yukon (Energy, Mines and Resources)*, 2021 YKCA 6.

- **The Crown as A Fiduciary — Unique Aspects of the Crown’s Fiduciary Duties — Balancing the Fiduciary’s Duty of Utmost Loyalty and the Crown’s Other Interests** — In 2021, Supreme Court of Canada again addressed Canada’s fiduciary duty in a statutory expropriation context. While the majority did not disturb the two-part approach from *Osoyoos Indian Band v. Oliver (Town)*, they did determine that the Crown’s fiduciary duty in terms of compensation was not limited to what a corollary expropriation statute required. That is, the standard required in an expropriation of fee simple lands was not the appropriate standard by which to adjudge Canada’s actions, as a fiduciary, when expropriating land under the *Indian Act*. Further, the fact that the lands taken from the Indian reserve were required for a public work “did not negate the obligations imposed by Canada’s fiduciary duty.” Instead, “the fiduciary obligations ... must reflect the nature of the interest, the impact of the loss on the First Nation, the importance of the fiduciary relationship, and reconciliation, which is the overarching goal of the fiduciary duty itself, based on the honour of the Crown.” Moreover, the proper inquiry was what Canada “ought to have done as a fiduciary,” not what it would likely have done. Put another way, “[t]he fiduciary duty imposes heavy obligations on Canada. The duty does not melt away when Canada has competing priorities.” Thus, an assessment of the Crown’s *balancing* of its interests and obligations was not part of the analysis: *Southwind v. Canada*, 2021 SCC 28.

ProView Developments

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