

LIABILITY OF THE CROWN

4th Edition

Hogg, Monahan & Wright

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by

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PREFACE

The first edition of *Liability of the Crown* was published in 1971, making 2011 the 40th anniversary of the book and a fitting year for the publication of the fourth edition. The first edition, which was an adaptation of Peter Hogg's Ph.D. thesis at Monash University, was published in Australia by the Law Book Company Ltd. It covered Australia, New Zealand and the United Kingdom, but not Canada. Canada was added to the covered jurisdictions in the second edition, which was written after Professor Hogg had moved to the Osgoode Hall Law School of York University; the second edition was published by Carswell in Canada in 1989. The first two editions were written by Professor Hogg alone, but Patrick Monahan joined him as a co-author for the third edition, which was published by Carswell in 2000. This fourth edition has a third co-author, Wade Wright, and is the joint project of all three of us.

The emphasis of the second and third editions of the book was on Canada, but we went to considerable lengths to also provide an accurate account of the law of Australia, New Zealand and the United Kingdom, making use of researchers and readers outside Canada. This was a daunting task, and for the fourth edition we have restricted the book to Canada. We still make frequent reference to the law of Australia, New Zealand and the United Kingdom, and we have tried to keep those references up-to-date to 2011; but the book does not purport to contain a comprehensive account of the law of any country other than Canada. We never harboured the ambition of including the United States in the book, although the law of governmental liability in that republic is in large measure derived from its colonial history under the Crown and is in many aspects similar to that of Canada; we have referred to the law of the United States from time to time where a comparison seemed interesting. So far as Canada is concerned, a welcome development in the source materials available to us was the publication in 2007 of Horsman and Morley (eds.), *Government Liability: Law and Practice* (details in bibliography), which is a multi-author, high quality, encyclopaedic account of the law, in loose-leaf format, regularly supplemented, which we have found useful and have cited frequently. The discussion in the book reflects the law as of June 30, 2011. The important decision of the Supreme Court of Canada in *R. v. Imperial Tobacco Can.* 2011 SCC 42 (dealing with two separate actions against the federal government, both involving various tort claims, for negligent misrepresentation and so on) was released as this book was going to print; accordingly, it has not been discussed. However, we do make reference to the decisions of the British Columbia Court of Appeal, which were reported as *Knight v. Imperial Tobacco Can.* (2009) 313 D.L.R. (4th) 695 (B.C.C.A.) and *B.C. v. Imperial Tobacco Can.* (2009) 313 D.L.R. (4th) 651 (B.C.C.A.), in chapter 7, Tort: Negligence. And happily, the Supreme Court's decision does not contradict,

and indeed largely affirms, what we have to say about the law of tort as it applies to the Crown.

The eleven years that have elapsed since the third edition have seen many developments in the law of governmental liability, and all but a few chapters have undergone heavy revision and some reorganization. The chapters on procedure, evidence, tort (especially negligence) and contract are the most changed. In this edition, there are new chapters on restitution, taking (expropriation), trust, estoppel and Crown as creditor, topics that were covered only briefly in the third edition, all (except taking) grouped together in a kind of miscellaneous chapter called Other Obligations. We have also taken up the suggestion of a reviewer of the third edition (Lorne Sossin), and added a concluding chapter, which tries to draw together a coherent thesis for the book. There had been a concluding chapter in the first edition, which of course originated as a thesis, but we had dropped that chapter from the subsequent editions; for this edition, we decided to revive it.

As in the previous editions, we take the view that the Crown ought to be governed by the same rules of legal liability for harm caused to private persons as a private defendant. We continue to reject the European-derived alternative of a distinctive public law of governmental liability, and we also reject the French model of special courts to administer the public law of governmental liability. This approach leads us to criticize most of the immunities, privileges and special rules that continue to apply to the Crown, although we acknowledge that some adaptation of the general law is needed to accommodate the special responsibilities of government. As in previous editions, we are forthright in asserting our own views, not hesitating to criticize legal doctrine or particular decisions. We think that we have always been frank in identifying our own opinions so that they can be appropriately discounted by the reader. We also think that moderation, reasonableness and adherence to legal principles are hallmarks of our views, but not everyone agrees. Begg J., in the Supreme Court of New South Wales, said of the first edition that Hogg “employs at times intemperate criticism of the authorities”, and his work “appears to be based to a degree upon sociological approaches rather than the strict principles of law” (*Connell v. Commonwealth* (1979) 37 F.L.R. 95, 100, defending the now discredited rule that the Crown cannot be liable in tort to a member of the armed forces).

Thanks are due to those who helped us prepare this edition. First and foremost is the law firm of Blake, Cassels & Graydon LLP, where Professor Hogg is the Scholar in Residence. This position provides access to all the infrastructure of the firm, including the services of the librarians, the students, and especially those of a superb secretary, Madeline Rumble, whose work has been invaluable to us. Blakes’ students who did research for us were Saad Ahmad, Stephen Birman, Bryn Gray, Catherine Hariton, Suzie Chiodo and Brandin O’Connor. The Osgoode Hall Law School, where Professor Monahan was Dean for most of the period of preparation (before being appointed Provost of the University), also provided research funding to hire students over the summers and during term.

The Osgoode students who did research for us were Jesse Rosenberg, James Gotowiec (who also worked for us while summering at Torys) and Brandin O'Connor (who also worked for us while summering at Blakes). We are extremely grateful for the work that all these outstanding students did for us, and to Blakes, Torys and the Osgoode Hall Law School, who made it possible. Finally, we record our gratitude to the Reference Librarians in the law library of Columbia Law School, where Wade Wright was an Associate in Law and continues to pursue his doctorate in law (J.S.D.): they were very helpful in arranging access to research materials from Canada, Australia, New Zealand and the United Kingdom.

Last but not least, we must thank our spouses, Frances Hogg, Monica Monahan and Alex Irwin, for all their understanding and support during the extravagant amount of time that goes into the writing of a book.

Toronto
June 30, 2011

Peter W. Hogg
Patrick J. Monahan
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