An Update has Arrived in Your Library for:

Please circulate this notice to anyone in your office who may be interested in this publication.
Distribution List

☐
☐
☐
☐
☐

GOVERNMENT LIABILITY LAW AND PRACTICE

Karen Horsman and Gareth Morley

Release No. 30, November 2018

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 Chapters 1 (Legal Personality of the Crown), 1A (Legal Personality of Other Government Bodies), 2 (Crown Liability in Contract), 3 (Crown Liability in Restitution/Unjust Enrichment), 4 ("Takings": Government Liability to

THOMSON REUTERS CANADA®

Customer Support
1-416-609-3800 (Toronto and International)
1-800-387-5164 (Toll Free Canada & U.S.)
Fax 1-416-298-5082 (Toronto)
Fax 1-877-750-9041 (Toll Free Canada Only)
E-mail CustomerSupport.LegalTaxCanada@TR.com.

Compensate for Forcibly Acquired Property), and 6 (Nuisance).

Highlights of this release include:

- **Chapter 1 — Legal Personality of the Crown —** The Supreme Court of Canada recently commented on the test for determining when common law powers the Crown or Crown agents share with the subject — such as powers of a property owner or contract holder — can be judicially reviewed. The test cannot be used to bring purely private entities within the scope of judicial review. Activities such as renting premises or hiring staff — contractual or proprietary matters occurring in a market with public and private actors — are not subject to judicial review: *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v. Wall*, 2018 SCC 26.

- **Chapter 4 — "Takings": Government Liability to Compensate for Forcibly Acquired Property — Protections At Common Law — The Measure of Compensation for Interests in Public Natural Resources — Why Property Interests in Public Natural Resources are Different —** When by statute, the Crown has taken an interest in public natural resources, either in whole or in part, the legislature often includes express provisions setting out the right to, and limits of, compensation for the private rights holder. However, even with the assistance of these provisions, quantifying compensation has been a less than straightforward exercise. While there is clearly a presumption of full compensation in the absence of a contrary legislative provision, and a willingness to limit compensation where the statute so requires there is still debate as to when, and whether, compensation awarded can exceed a claimant's losses.

- **Chapter 6 — Nuisance — Foreseeabililty —** The Ontario Court of Appeal recently concluded that foreseeability is not a necessary element of the tort of nuisance. In this case, solvents from a dry cleaning business contaminated nearby soil, following which ground water caused the contaminants to migrate to the plaintiff's land. However, during the historical period when the solvents in question were used, their risks were not understood, and downstream harm would not have been anticipated. Accordingly the defendant argued that the harm was not foreseeable. The court recognized that under English law foreseeability is required, but

noted that the law in Canada is "evolving" and that there are no precedents in this country binding on the court. In support of its view that foreseeability is not an element of nuisance, the court noted that nuisance is a "useful tool in the prosecution of environmental claims" and that accepting the defendant's position would mean the utility of the tort would be compromised: *Huang v. Fraser Hillary's Limited*, 2018 ONCA 527, 2018 CarswellOnt 9105, 47 C.C.L.T. (4th) 70, 16 C.E.L.R. (4th) 202 (Ont. C.A.).