Book Reviews
Compte rendu

Liability of the Crown.

By PETER W. HOGG & PATRICK J. MONAHAN.
Toronto, Ontario: Carswell, 2000, 3rd Edition, pp. 380.

Reviewed by Lorne Sossin[1]

This is a welcome third edition[2] of the standard reference text on Crown liability. While it is not the only book in the field,[3] it remains the most comprehensive and thorough treatment of crown liability in the common law world. The third edition has expanded the study both in size and in perspective, with Professor Patrick Monahan joining Dean Peter Hogg (both of Osgoode Hall Law School) as a co-author. For the most part, the book delivers what it promises — a concise and lucid analysis of the common law and the statutory environment of Crown liability in the various federal, provincial and state jurisdictions in Canada, New Zealand, the United Kingdom, and Australia.

The study continues to advance the core argument that animated Peter Hogg's doctoral thesis and the first two editions of the book derived from that thesis, which is that the Crown should be treated as any other party in the context of civil liability, and should not be protected by special privileges and immunities.[4] This argument is an extension of the Diceyan view of the rule of law, which is to subject government to the ordinary law, and enforce it via the judiciary. The authors state in their introduction: "our review of the law leads us to the conclusion that, for the most part, the "ordinary" law does work a satisfactory resolution of the conflicts between government and citizen."[5] However, this argument is not presented in an inflexible manner. From the outset, Hogg and Monahan note that the

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[2] The first edition was published as *Liability of the Crown in Australia, New Zealand and the United Kingdom* (Sydney: Law Book Company, 1971) [Liability of the Crown, 1st ed.] and refers to Canada only minimally. The second edition was published as *Liability of the Crown* (Toronto: Carswell, 1989) [Liability of the Crown, 2nd ed

[3] See also P. Lordon, *Crown Law* (Toronto: Butterworths, 1991); M. Sunkin and S. Payne, *The Nature of the Crown: A Legal and Political Analysis* (London: Oxford University Press, 1999); and S. Kneebone, *Tort Liability of Public Authorities* (Sydney: LBC Information Services, 1998).

[4] As the authors state in a subsequent chapter, "[t]here is no good reason why the Crown should be generally free to ignore the rules that have been enacted for the regulation of society". (p.276)

[5] *Liability of the Crown*, 3rd ed., p.3.

Crown has to "govern" and that this will inevitably will lead to derogation from Dicey's ideal of "equality" between the Crown and citizens. Further, the authors recognize that the principles of private law require adaptation in public law settings.

Nonetheless, the Diceyan view is embraced as the operating principle for Crown liability in the common law world; Despite always having had its detractors. Dicey's view is based on a laissez-faire understanding of the state that is, organized around, and for the protection of individual rights and property rights; and also inclined to see government first and foremost as a potential oppressor.[6]

I would have enjoyed reading a more detailed analysis of Dicey and the assumptions about government which underlie the authors' analysis; for instance, there are several attempts to analogize the Crown to a private corporation,[7] which strikes me as an assumption in need of more exposition than that provided.[8] I suspect, however, that most readers will be grateful for the crisp introduction, and for the emphasis on detailed descriptions and critiques of the leading cases in the various fields covered. After the publication of the second edition of this book, David Mullan extolled, "[a]s a text of this variety, it is a joy to read and a model for all writers of expository material."[9] This remains equally applicable praise with respect to the third edition.

The book is organized into 12 substantive chapters: remedies, enforcement of judgments, procedure, evidence, three chapters on torts, contract, other obligations (I have more to say on this chapter below), statutes, Crown agents, and federal questions. There is no explanation given for this division of chapters — why, for example, remedies comes before procedure and the substantive chapters (ie. on tort and contract law), or why some chapters require separate treatment at all (the "Enforcement of Judgments" chapter takes up barely 9 pages and likely could have been merged with the broader chapter on "Procedure"). However, the organization of the chapters is well-referenced, and the table of contents and index are clear and effective tools to pinpoint a particular issue of interest. Most readers of this volume will likely use these resources in order to obtain particular answers to specific questions rather than read the book cover to cover.

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[6] See, for example, R.J. Tresolini, "The Development of Administrative Law" (1951) 12 U. Pitt. L. Rev. 362 at 369-74.

[7] *Liability of the Crown*, 3rd ed., p. 61 (See, for example, the authors' argument as to why the Crown should be subject to contempt orders).

[8] *Ibid.* at 13-15.

[9] D. Mullan, "P.W. Hogg, Liability of the Crown (Toronto: The Carswell Co. Ltd., 2nd ed., 1989). Pp. 290, xxxiv, $75.00 (hardcover)" (1990) 10 Windsor Y.B. Access Just. 263 [Mullan].

While the core of the book is the law relating to suing the Crown for damages, the authors also purport to cover the powers of the Crown generally and the limitations on those powers. This leads to a somewhat cursory treatment of judicial review of public decision-making (i.e. certiorari, mandamus, prohibition, and habeas corpus) in the chapter devoted to "Remedies".[10] This aspect of the book is problematic in my view, and begs the question as to the logic of hiving off civil liability of the Crown from judicial supervision of public action more generally. The premise of this book is that the issue of monetary compensation for wrongs done by the Crown, along with the Crown's immunities from such suits, represents a discrete topic which justifies distinct treatment from other remedial aspects of administrative law. However, this premise is by no means obvious, and would benefit from elaboration.

Another concern relates to chapter ten of the volume, which is given the title of "Other Obligations". This heading refers to the various trust and fiduciary obligations which may be owed by the Crown as the chapter's title suggests; however these are treated as something of an afterthought. This is unfortunate. One of the most vibrant fields of scholarship and litigation in Canadian public law deals with the Crown's fiduciary obligations to aboriginal peoples.[11] Currently, the authors devote only a passing reference in a footnote to this important and expanding area of Crown liability.[12]

These minor concerns aside, the third edition of *Liability of the Crown* will more than satisfy the many practitioners, scholars and students who have come to rely on the previous two editions for insight and clarity in what is often an unduly complex field. The third edition has been updated and expanded, having grown by over 100 pages since the first edition, it is yet remains well-edited and tightly focussed. It also remains a strongly argued study, a feature of the work augmented by the addition of Professor Monahan's co-authoring. For example, the stinging criticism of the doctrine of "executive necessity" as a means for the Crown to escape contractual

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[10] *Liability of the Crown*, 3rd ed., pp. 40-46.

[11] See, for example, L. Rotman, *Parallel paths: Fiduciary Doctrine and the Crown-Native Relationship in Canada* (Toronto: University of Toronto Press, 1996); M.J. Bryant, "Crown-aboriginal relationships in Canada: the phantom of fiduciary law" (1993) 27 U.B.C. L. Rev. 19; L. Rotman, "Provincial fiduciary obligations to First Nations: the nexus between governmental power and responsibility" (1994) 32 Osg. Hall L.J. 735; and D. Elliott, "Aboriginal peoples in Canada and the United States and the Scope of the Special Fiduciary Relationship" (1996) 24 Man. L.J. 137.

[12] What began as a *sui generis* obligation owed by the Crown to aboriginal peoples, identified in *Guerin v. Canada*, [1984] 2 S.C.R. 335 has now been expanded to cover the government's administration of veteran's pensions (see *Authorson v. Canada (Attorney General)*, (2002), 215 D.L.R. (4th) 496 (Ont. C.A.), leave to appeal to the S.C.C. granted, [2002] S.C.C.A. No. 205 (Q.L.)). This may be expanded further to fields as diverse as tax administration (see *Harris v. Canada*, [2000] 4 F.C. 37 (C.A.)) and military decision- making (see *Duplessis v. Canada*, [2000] F.C.J. No. 1917 T.D.)).

obligations without compensating those who suffer a loss resulting is both forceful and compelling.[13]

One last quibble concerns the absence of a conclusion. The first edition of the book had a brief conclusion, in which Professor Hogg defended the flexibility of the common law to deal with the unique needs of government while preserving the equal treatment of the Crown and its subjects.[14] This third edition finishes abruptly with the last topic covered (the existence of a federal common law). In my view, a brief closure on the main themes addressed in the book would have been appropriate. That said, *Liability of the Crown*, 3rd ed., continues to serve as a first-rate piece of scholarship, and offers a sophisticated analyses of all the leading cases in the field. A reviewer of the first edition of the book concluded that "[e]veryone interested in the conflict between administrative action, the freedom of government to govern, and the rights and interests of the private individual, will find something of interest in this book."[15] David Mullan concluded his review of the second edition by noting that the book constituted "...a first port of call for any judge, practitioner and law student wishing to ascertain the state of the law pertaining to the Crown in any of the 20 jurisdictions covered."[16] I would simply add that those who practice, teach, or study in the field of Crown liability, as well as those with an interest in public law more generally, will come to regard this third edition of *Liability of the Crown* as indispensable.

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[13] See *Liability of the Crown*, 3rd ed., pp. 228-33. Professor Monahan clearly has kindred views on the dangers of crown privileges such as "executive necessity", which are apparent in, among other works, P. Monahan, "Is the Pearson Airport Legislation Unconstitutional?: The Rule of Law as a Limit on Contract Repudiation by Government" (1995) 33 Osg. Hall L.J. 411. In this article, Monahan refers to the "executive necessity" doctrine as "shadowy"at p. 412, fn. 1.

[14] *Liability of the Crown*, 1st ed., *supra* note 2 at 233-35.

[15] G. Bryce, "Liability of the Crown in Australia, New Zealand and the United Kingdom. By Peter W. Hogg, LL.B., LL.M., Ph.D., Professor of Law, Osgoode Hall Law School, York University, Toronto [Australia: The Law Book Company. 1971 xxvii and 250 and (index) 7 pp. 5.25" (1973) 89 L.Q.R. 142 at 144.

[16] Mullan, *supra* note 9 at 271.