# LAW REFORM COMMISSION OF BRITISH COLUMBIA

# REPORT ON CIVIL RIGHTS

# (PROJECT NO. 3)

# LEGAL POSITION OF THE CROWN

# PART I

**LRC 9**

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The Law Reform Commission of British Columbia was established by the *Law Reform Commission Act* in 1969 and began functioning in 1970.

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TO THE HONOURABLE ALEX B. MACDONALD, Q.C.
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The Law Reform Commission of British Columbia has the honour to present the following:

# REPORT ON CIVIL RIGHTS
(Project No. 3)

## PART I
## LEGAL POSITION OF THE CROWN

This Report has been prepared in the Commission's study on Civil Rights which is Project No. 3 in the Commission's Approved Programme.

In any dispute between the Crown (in the right of the Province of British Columbia) and one of its subjects, the existing law gives the Crown a number of special advantages and visits on the subject corresponding disadvantages. In this context, the Crown means the Government. This law may be summed up in the phrase "Crown immunity." The doctrine of Crown immunity developed in an age markedly different from our own: an age when the scope of Crown activity was limited and notions of governmental accountability and responsibility had not developed to their present stage. The Commission has, therefore, directed its attention to the subject of Crown immunity to determine the extent to which the retention of the doctrine is justified.

In this Report the Commission puts forward recommendations which would, if enacted, have the effect of ligniting the doctrine of Crown immunity and, in most cases, make those laws which are applicable in any action between subject and subject, also applicable in any action between the Crown and a subject.

# INTRODUCTION

## A. General

We live in an age characterized by the prodigious increase in governmental activities of all varieties including involvement of the government in areas of private industry and commerce. This fact gives added urgency to the problem of extending adequate legal protection to the individual who has suffered damage to a person or property because of the wrongful actions of the government. When a citizen is faced with the spectre of Crown immunity, a doctrine having its roots in the divine right of kings, he cannot be blamed for questioning its relevance to Canada in the twentieth century.

The subject of Crown immunity is very complex. The law is replete with ... obscurities, paradoxes, and pitfalls ..."[1] The rules and contour of Crown proceedings are vague and undefined. The immunities of the Crown are both procedural and substantive.

## B. History of Crown Reform

The subject of reform of the law of Crown immunity in Canada is not new. The need for reform has been recognized for at least half a century. W.P.M. Kennedy wrote in 1928, "The 'Crown' has become a shelter for all kinds of inequitable dealings, which, save for the prerogative, would soon receive short shrift in the courts."[2] He urged reform of the law in Canada. However, more than 40 years later the law in British Columbia is still unchanged.

One of the first major efforts to remedy the archaic and in some ways oppressive common law procedures against the Crown was taken in 1921, in the United Kingdom by a special Committee appointed by the Chancellor, Lord Birkenhead.[3] The Committee moved slowly and finally produced a draft Bill in 1927. It was not, however, until 1947 that the *Crown Proceedings Act* was passed in England. This Act produced major reforms in the law relating to an individual's rights against the Crown. The Act was indubitably the major impetus to legislative action in Canada. The following year, in 1948, the Conference of Commissioners on Uniformity of Legislation in Canada undertook a study of the problem. In 1950 the Commissioners adopted a model Act which was almost identical to the *English Act*.[4] The model Act has been adopted by the Federal Parliament and the Legislatures of Alberta, Manitoba, New Brunswick, Nova Scotia, Ontario, and Saskatchewan.

The *Uniform Act*, like the English legislation on which it was patterned, repealed the primary immunities of the Crown. The Crown under the new legislation could be sued without a fiat and was liable for its torts. There were still some immunities and privileges of the Crown at common law that were left unchanged.

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1. W.P.M. Kennedy, *Suits by and Against the Crown* (1928) 6 Can. Bar Rev. 329.

2. *Ibid.* at p. 329.

3. Barnes, *The Crown Proceedings Act, 1947* (1948) 26 Can. Bar Rev. 387, at p. 389.

4. (1950) *Proceedings of Conference of Commissioners on Uniformity of Legislation in Canada*, 76. *See* Appendix herein.

## C. The Basic Assumption Behind Crown Reform

It is important to state early a basic assumption adhered to by the Commission in examining the present state of the law regarding the legal position of the Crown. The most singular fact about the existing law is the special position and advantage which the Crown enjoys. This means that the individual subject is in a multitude of ways placed at a disadvantage, which is often very onerous, when he turns to the law to seek recourse against the government. This Report has sought to identify and scrutinize the special advantages and prerogatives of the Crown and to determine whether there is any justification for these privileges. The Commission's premise in making its recommendations is similar to that expressed by the Attorney General of Ontario in introducing his Government's Crown reform legislation in 1952:[5]

> We, being a Government of enlightened members and realizing that perfect as we may be, there still may be certain cases where mistakes are made, are prepared to submit all such cases to the courts, and if a citizen in this country suffers a wrong at the hands of any Crown official or department or employee, we think he should not be put in a worse position than he would be if that unlawful act had been committed by some ordinary individual or by a servant of some private corporation.

The above philosophy of justice for the government and its subjects is, in essence, an embodiment of the fundamental principle that the rule of law governs our society.

## D. The Commission's Report

The approach of this Report has been to consider the origin and effect of the major privileges or immunities of the Crown and attempt to determine the need for reform. Because there is so much comparative material on the subject, particularly the experience in Great Britain, the Report has largely centred upon this material. For this purpose the texts by Glanville Williams,[6] Harry Street,[7] J.D.B. Mitchell,[8] and P.W. Hogg[9] have been useful. There were no Canadian texts or monograms on the subject.[10] There were a number of Canadian periodical articles that were useful.[11]

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5. *Per* the Hon. Dana Porter, Q.C., Legislature of Ontario Debates, 1st Sess. 1952, vol. 33, p. C-5 as quoted in *Royal Commission Inquiry into Civil Rights* (McRuer Report) vol. 5, no. 3, at p. 2200.

6. Glanville Williams, *Crown Proceedings Act, 1947* (1948).

7. Harry Street, *Governmental Liability* (1953).

8. J.D.B. Mitchell, *The Contracts of Public Authorities* (1954).

9. Peter W. Hogg, *Liability of the Crown* (1971).

10. Cf. Ashley & Smails, *Canadian Crown Corporations* (1965).

11. W.P.M. Kennedy, *supra*, note 1; D. Park Jamieson, *Proceedings By and Against the Crown in Canada* (1948) 26 Can. Bar Rev. 373; S.C. French, *Rights in Contract and Tort in Relation to the Crown* (1956) Chitty's L.J. 76; D.W. Mundell, *Remedies Against the Crown*, Upper Canada Law Society Lectures 1962 at p. 149; D.W. Mundell, *Legal Nature of Federal and Provincial Executive Governments: Some Comments on Transactions Between Them* (1960) 2 Osgoode Hall L.J. 56; Laskin, *Companies and Civil Liability* (1944) 22 Can. Bar Rev. 927; Strayer, *Crown Immunity and the Power of Judicial Review in Contemporary Problems of Public Law in Canada* (O.E. Lang ed. 1968); A. Smith, *Liability to Suit of an Agent of the Crown* (1950) 8 U. Tor. L.J. 218; Binnie, *Attitudes Toward State Liability in Tort: A Comparative Study* (1964) 22 U. Tor. Fac. L. Rev. 88; Greenwood, *Liability of Crown Officers for Advising Refusal of a Fiat* (1962) 8 McGill L.J. 134; W.H.O. Mueller, *The Liability of the Ontario Government in Tort* (1967)

The focus of this Report has been on the major areas of the law of Crown immunity changed by reform legislation in other jurisdictions. This includes an examination of the necessity of a fiat, the need for an injunction, the rules of discovery, and Crown privilege. The immunity of the Crown in tort was also considered. The prerogative that the Crown is not bound by legislation was studied. During the course of this project the Commission also examined the privileges that the Crown enjoys under the law of contract but came to the conclusion that this topic was outside the terms of reference of this Report. Within this topic are such matters as government practice and standard terms, freedom of executive action, power of Crown servants to make contracts, breach of warranty of authority, legislative appropriations, and employment contracts.

In July, 1972 the Commission completed a working paper on the subject of this Report. That working paper was circulated for comment to a number of practising lawyers and law teachers who are knowledgeable on this subject. Copies were also circulated to civil liberties groups and to the Attorney-General for the Province of British Columbia in his capacity as the chief law officer of the Crown.

All persons who received copies of the working paper were asked to submit their written comment on and criticism of the proposals tentatively advanced by the Commission. A number of responses have been received, and the comments and submissions have been of great value to the Commission in assessing the tentative proposals and formulating the final recommendations which are contained in this Report. The responses received were almost unanimous in their approval of the Commission's general approach to the subject of Crown immunity. Those respondents who were critical of the contents of the working paper felt that the Commission's proposals did not go far enough in removing the advantages which the Crown now enjoys. In some cases such criticism was directed at specific proposals and in other cases at the terms of reference adopted by the Commission which excluded a consideration of certain problems which the respondents felt ought properly to be included in a project of this kind.

The objections in the former category are dealt with later in this Report in their appropriate context. The complaints in the latter category have caused the Commission to re-examine its terms of reference for this Report. The Commission has concluded that the terms of reference which it adopted for the purposes of the working paper should not be substantially altered. A number of the problem areas excluded by those terms of reference are highly complex and technical. To have undertaken the sort of study which would be required to deal with these areas in a proper fashion would have significantly delayed the production of this final Report. The Commission feels there is an urgent need for reform of the law relating to Crown immunity in this Province and that, on balance, the ends of justice are better served by the production of this Report covering the most critical areas at this time than by the production of a more comprehensive Report at a later date.

The Commission has noted, in the course of this study, that municipalities and other bodies whose undertakings are authorized by statute have some immunities which are in many ways similar to the Crown immunities disfeasance or for the torts of police officers employed by it and the defence of "statutory

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25 U. Tor. Fac. L. Rev. 3; Strayer, *Injunctions Against Crown Officers* (1964) 42 Can. Bar Rev. 1; D. Gibson, *Interjurisdictional Immunity in Canadian Federalism* (1969) 47 Can. Bar Rev. 40; R. Dussault & D. Carrier, *Le Contrat Administratif En Droit Canadien et Quebecois* (1970) 48 Can. Bar Rev. 439; MacKinnon, *The Contractual Liability of the State in Common Law Canada* (1964) 2 Colloq. Int. de Droit Compare 104; Patrice Garant, *Contribution a 1'Etude du Statut Juridigue de l'Administration Governementale* (1972) 50 Can. Bar Rev. 50.

authority" which may be available to a utility in an action of nuisance which may be brought against it. The Commission proposes to deal with these and related problems in a subsequent Report.

Throughout this project the Commission has had the able assistance of Professor James G. Matkin, of the Faculty of Law, University of British Columbia. Professor Matkin undertook the basic research for the Commission and prepared the working paper which formed the basis of this Report. The Commission wishes to express its gratitude to Professor Matkin for his contribution to this project.

# CHAPTER I THE SCOPE OF CROWN ACTIVITY

## A. Definition of Crown

The word "Crown" may be confusing to some. In law the Crown is a term of art, the meaning of which bears little resemblance to the chattel that sits in the Tower of London to be gazed at by sightseers.[1] The "Crown" is a description for Her Majesty Elizabeth II in her legal personage as Sovereign. The expression describes "... the corporate legal entity to which the law ascribes the legal rights and obligations of the various semi-sovereign units of government created by the *British North America Act*."[2] The is necessary to speak of the Crown in the right of "the particular unit of government." Therefore, the Crown for our purposes is Her Majesty in the right of British Columbia. It is sometimes said that the Crown is "one and indivisible,"[3] but his notion must be reconciled with the fact that there are 11 "semi-sovereign units of government" or "Crowns" in Canada. It is important to emphasize that the "Crown" is really synonymous with "government of the state." There is nothing mysterious about the "government." As Laski wrote:[4] "Crown who collect our taxes and grant us patents and inspect our drains. They are human beings with the money-bags of the State behind them."[5] The study of the Crown is then a study of the government. For this reason the two words are used interchangeably in this Report.

## B. Crown Activities

The Crown today is everywhere. The growth of government over the past few years has been remarkable. In British Columbia the administration of government impinges upon most fields of endeavour. The slang phrase "big government" is descriptive of a well-recognized phenomenon. The increased activity by government in areas formerly unregulated or in functions formerly performed by private individuals or companies raises serious questions as to the legal liability of such public authorities. This is true because all employees of the Government are servants of the Crown.

The law of liability for the Crown is very different from the law applicable to ordinary subjects. The Crown enjoys as part of its prerogative many special immunities and advantages. For this reason it is important to know who are Crown servants. The scope of Crown activity will also bear on the magnitude of the problem of the Crown prerogatives. In British Columbia it is significant that there are more than 100 agencies that may be able to take advantage of Crown immunity. These Government servants cover a very broad range of activities,

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1. *Constitutional History of England* 418; *see* Mundell, *Legal Nature of Federal and Provincial Executive Governments: Some Comments on Transactions Between Them* (1960) Osgoode H.L.J. 56.

2. Dale Gibson, *Interjurisdictional Immunity in Canadian Federalism* (1969) 47 Can. Bar Rev. 40.

3. *Ibid.* at p. 41.

4. *Ranaweera* v. *Ramachandran* [1970] A.C. 962, at 973 (P.C.). *See also* [1968] S.C.R. 754 and s. 14 of *The Proceedings Against the Crown Act* of Saskatchewan R.S.S. 1965 c. 87 which states "In proceedings under this Act the Crown shall be designated 'The Government of Saskatchewan.'"

5. H.J. Laski, *The Responsibility of the State in England* (1919) 32 Harv. L. Rev. 447 at p. 472 as quoted by Peter W. Hogg, *Liability of the Crown*, 10 (1971).

from beef-grading to the operation of ferries.

The activities of the Provincial Government in the Province fall into three different categories. First, there are Government departments. There are, for example, the Department of Agriculture; Commercial Transport; Health Services and Hospital Insurance; Highways; Industrial Development, Trade, and Commerce; Lands, Forests, and Water Resources; Mines and Petroleum Resources; Public Works; Municipal Affairs; Recreation and Conservation; Rehabilitation and Social Improvement; and Travel Industry. These departments are the traditional form of Government administration. They are under direct executive control and are obviously a part of the Crown.

The second kind of governmental entities are those agencies separate from the aforementioned departments but not necessarily independent of them. Under this category are the various inspectors, directors, commissions, and boards. For example, inspectors are appointed under the *Factories Act*,[6] the *Contagious Diseases Act*,[7] and the *Poultry and Poultry Products Act*.[8] There are administrative functions, such as the Labour Relations Board,[9] Workmen's Compensation Board,[10] and the Pollution Control Board[11]. All of these agencies and their employees are Crown servants. These agencies enjoy the immunities and privileges of the Crown. This is important because it is quite possible that their actions might involve claims in tort.

### C. Crown Corporations and Other Operating Agencies

The third category is those government authorities, often Crown corporations, that are involved in some economic activity or development. These Crown corporations and authorities are a more recent phenomenon. They often involve the government in activities which were formerly performed by the private sector. Their function is more proprietary than regulatory or administrative. In some instances the Courts have recognized this distinction in function as the basis of denying Crown immunities. For example, such a classification of Crown agencies was adopted in *Baton Broadcasting Ltd.* v. *Canadian Broadcasting Corp. et al.* discussed later.[12]

A prime example of such a distinctly proprietary function is the operation of the coastal ferry service by Government. This activity had previously been carried on by private business. This service and tis vessels were subsequently transferred to and vested in the Crown in the right of the Province, and are operated under the jurisdiction of the Department of Highways, subject to rules and regulation

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6. S.B.C. 1966, c. 14.

7. R.S.B.C. 1960, c. 73.

8. R.S.B.C. 1960, c. 291.

9. *See Labour Relations Act* R.S.B.C. 1960, c. 205.

10. *See Workmen's Compensation Act, 1968* S.B.C. 1968, c. 59.

11. *See Pollution Control Act, 1967*, S.B.C. 1967, c. 34.

12. [1966] 2 O.R. 169 (Ont. H.C.)

enacted by the Lieutenant-Governor in Council.[13] The effect of both arrangements has been to clock the proprietary activities with all the immunities and privileges of the Crown.

Crown corporations and other government proprietary entities are the most potentially abusive kind of Crown agent because they bring the government directly into the private sector. They engage in proprietary activities and, therefore, any justification of Crown immunity on the grounds of the special functions of government is inapplicable to the Crown corporation.

The following table lists a number of Crown corporations and authorities which seem to exercise proprietary functions in British Columbia. The table attempts to indicate the status of these authorities with regards to the immunities of the Crown. The first column shows whether or not there is a specific provision in the legislation making the authority a Crown agent. The send and third columns indicate whether the authority is immune from suit and tort liability.

**CROWN CORPORATIONS AND AUTHORITIES**

| | Specified Crown Agent | Petition of Right Necessary | Immune From Tort |
|---|---|---|---|
| B.C. Dyking Authority | Yes | | NoNo |
| B.C. Ferry Authority | Yes | | NoYes |
| B.C. Harbours Board | Yes | | NoYes |
| B.C. Hydro and Power Authority | Yes | | NoNo |
| B.C. Racing Commission | No | No | (?) |
| B.C. Regional Hospital District Financing Authority | Yes | No | Yes |
| B.C. School Districts Capital Financing Authority | Yes | No | Yes |
| Universities Real Estate Development Corporation | Yes | | YesYes |
| Children's Aid Society | No | | No(?) |
| Corporation of Land Surveyors | | No | No(?) |
| Liquor Control Board | No | | (?)(?) |
| Grasshopper Control Committee | No | | (?)(?) |
| Health Insurance Commission | No | | (?)(?) |
| Hospital Corporations | No | | No(?) |
| Medical Services Commission | Yes | | YesYes |
| Libby Dam Storage Reservoir Authority | Yes | | YesYes |
| Queen's Printer | No | | (?)(?) |

The above table[13] shows that there are a number of important corporations or authorities which are Crown agents. There appears to be a trend toward more

13. *See British Columbia Ferry Authority Act*, R.S.B.C. 1960, c. 380, and *British Columbia Ferry Authority (Vesting) Act*, S.B.C. 1968, c. 1. For discussion of the administration and control of Crown corporations, *see* Ashley & Smails, *Canadian Crown Corporations* (1965); Watson Sellar, *Government Corporations* (1946), 24 Can. Bar Rev. 394; W. Friedmann, *The New Public Corporations and the Law* (1947), 10 Mod. L. Rev. 233.

13*. The British Columbia Railway has been excluded from the table although it looks and behaves much like a Crown corporation. Historically, the railway was incorporated as a privately owned company and later all of its issued shares were transferred to the Crown when it met with financial difficulties. It has never been designated as a Crown agency. *See Pacific Great Eastern (Incorporation) Act*, S.B.C. 1912, c. 36; and *Pacific Great Eastern Settlement Act*, S.B.C. 1918, c. 66.

Government take-over of private functions. When this is done by the use of a Crown corporation, the problem of Crown immunity arises. The table indicates that whereas the majority of these Crown agents can be sued without a fiat, nevertheless, a substantial number are, or may be, immune from tort liability. It would seem that a very good case could be made for removing Crown immunities from these authorities.

The table also shows that a number of Government authorities are established without any specification in the legislation whether they are Crown agents. This has caused real problems of definition. It is uncertain whether these agencies can take advantage of Crown immunity. The Courts have attempted to supply the omission of the Legislature. The issue has been who may claim the immunity or advantages given to the Crown. How have the Courts determined whether an individual, a board, or corporation is acting on behalf of the Crown and therefore entitled to its privileges and immunities? The answer to this question will also give some indication of the scope of Crown immunity.

There is a considerable diversity of Crown corporations, agencies, authorities, and other creatures of statute. These bodies will vary in their capacity to be sued. In *Westlake* v. *The Queen in the Right of the Province of Ontario*,[14] Houlden J. recognized six different types of statutory creatures in Ontario:

> (1) Bodies corporate which are not expressly declared to be suable:
> (2) Bodies corporate which are expressly declared to be suable:
> (3) Bodies corporate which are expressly declared not to be suable:
> (4) Noncorporate bodies which are, by the terms of the statute creating he, expressly liable to suit:
> (5) Noncorporate bodies which are not, by the terms of the statute incorporating them, expressly liable to suit, but which are by necessary implication liable to be sued in an action for damages:
> (6) Noncorporate bodies which are not, by the terms of the statute incorporating them, or by necessary implication, liable to be sued in an action for damages, but who are a legal entity in that their actions may be reviewed in proceedings brought against them by way of the extraordinary remedies of certiorari, mandamus, and prohibition.

The analysis illustrates that the task of determining if a body is liable to be sued, the method by which it may be sued, and the extent of which it is immune from liability is not always an easy one.

### D. Who Are Crown Agents?

The question who or what is a Crown agent or agency has generated much litigation. To assist in this problem of classification the Courts have suggested that the correct legal description of any subordinate of Her "Majesty," whether an individual or a corporation, is the ordinary legal classification of "agent" or "servant" of Her Majesty. The phrase "emanation of the Crown" has also been used[15] but disapproved because it is "inappropriate and undefined" and tends to

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14. (1972) 21 D.L.R. (3d) 129 aff'd (1972), 26 D.L.R. (3d) 273 (Ont. C.A.).

15. *Gilbert* v. *Trinity House Corp.* (1886) 17 Q.B. 795 at p. 801.

obscure the question.[16] Although it is true the terms "agent" and "servant" have known and defined legal attributes, their use has not resolved some of the perplexities of the law.

In the first place it appears that an "agent" in this context does not include an independent contractor to the Crown who could not claim Crown immunity in tort. Professor Glanville Williams has concluded that "agent" seems to be simply a synonym for "servant."[17]

In deciding whether a particular authority, board, or public corporation is an agent of the Crown, the empowering statute may be of assistance. In British Columbia the legislature has frequently inserted a provision expressly stating that its public and commercial corporations are agents of Her Majesty. For example, the legislation establishing the British Columbia Hydro and Power Authority provides: "The Authority is for all its purposes an agent of Her Majesty the Queen in right of the Province, and its powers may be exercised only as an agent of Her Majesty."[18] This same provision is found in other legislation creating public authorities.[19]

The use of the phrase "agent of Her Majesty" is rooted in the early history of the delegated of the sovereign's executive authority.[20] The effect of thus describing a public corporation is to clothe it with the mantle of the prerogative and remove any doubt about its status before the law. The principle is that an agent or servant of the Crown enjoys the same immunity as does the Crown itself. This means that no relief can be obtained against the Crown indirectly by suing an agent or servant of the Crown "in his official capacity."[21] This was illustrated by the insertion of this key phrase in the British Columbia *Electric Power Act.*[22]

However, sometimes legislation does not indicate whether employees of various agencies are Crown servants. Then the question becomes a matter of judicial consideration. For example, the Legislature was silent on this point when it first enacted the British Columbia Medical Plan.[23] The question was raised when the Labour Relations Board held that employees under the Medical Plan were agents of the Crown and therefore outside the jurisdiction of the *Labour Relations Act.* The Board's decision was quashed by Mr. Justice Dohm, of the British Columbia Supreme Court, who held that the Medical Plan was not an agency of the Crown because, he said, "... it appears abundantly clear, to me at least, that the last thing

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16. *Int. Railway Co.* v. *Niagara Parks Commission* [1941] 2 All E.R. 456 at p. 462 (P.C.).

17. Granville Williams, *Crown Proceedings Act, 1947* (1948) 24.

18. S.B.C. 1964, c. 7, s. 4(1).

19. E.g., *British Columbia Dyking Authority Act* S.B.C. 1965, c. 1, s. 5(1); *British Columbia Harbours Board Act* S.B.C. 1967, c. 4, s. 4(1); *British Columbia Regional Hospital Districts Financing Authority Act* S.B.C. 1967, C. 5, S. 2(6); and *Universities Real Estate Development Corporation Act* S.B.C. 1965, c. 55, s. 4(1).

20. Laird, *The Ontario Crown Agency Act* (1959) 12 U. Tor. L.J. 281.

21. *Flexlume Sign Co.* v. *Macey Sign Co.* [1923] 1 D.L.R. 1185 (Ont. C.A.). In *Merricks* v. *Heathcoat-Amory* [1955] 1 Ch. 567; [1955] 2 All E.R. 453 (Ch.D.) the notion that there could be a third capacity not as representative of the Crown, but as a person designated to carry out certain functions prescribed by Act of Parliament was scotched.

22. R.S.B.C. 1948, c. 108, s. 88; *see also B.C. Power Commission* v. *Victoria* [1951] 2 D.L.R. 480 (B.C.C.A.)

23. *Medical Grant Act* S.B.C. 1965, c. 25; *see also The University of British Columbia Health Sciences Centre Act* S.B.C. 1963, c. 51.

in the world the Legislature intended was that the Province should enter the field of socialized medicine directly."[24] The Judge also emphasized the lack of control by the Province over the Medical Plan. This case is indicative of the lack of any guidelines in this are of the law. As stated by Laidlaw J.A. in *Regina* v. *Ontario Labour Relations Board*:[25]

> It is not possible for me to formulate a comprehensive and accurate test applicable in all cases to determine with certainty whether or not an entity is a Crown agent. The answer to that question depends in part upon the nature of the functions performed and for whose benefit the service is rendered. It depends upon the nature and degree of control exercisable of retained by the Crown.

Although Judges have not adopted a single test of answering this question of Crown agency or not, they have undoubtedly been most influenced by the so-called "control test."[26] In articulating the control test the Courts have relied on a number of different factors. Professor Frank Scott has collected from the cases the following list of criteria used to decide whether a public authority is an agent of the Crown:[27]

> Factors to be considered are whether the Crown appoints the members of the corporation, whether it can levy rates, whether its property is vested in the Crown, whether its funds are received from and must be returned to and audited by the government, whether it has discretionary powers of its own which it can exercise independently without consulting any representative of the Crown, whether the corporation is incorporated as a commercial company under the ordinary company legislation, whether its functions were formerly performed by private enterprises, and so on.

It is clear from these criteria and the way the Courts have applied them that in answering this question there is room for a great deal of judicial discretion. Professor Laskin, as he then was, recognized this vagueness in the law on Crown liability and suggested that the Courts' view of policy is the most important discriminating factor in determining the status in question. He wrote that cases involving suits against corporations created or controlled by the Crown reveal the familiar opposing tugs:[28]

> On the one hand, the force of precedent buttressing a traditional attitude to the prerogative and militating against the imposition or liability no so clearly provided for as to be beyond all doubt; on the other hand, the liberalizing tendency to subject Crown companies engaged in trade and commerce to the same legal processes which surround the private commercial corporation. Symptomatic of the first-mentioned attitude are *Oatway* v. *Canadian Wheat Board* and *McClay* v. *Wartime Housing Ltd.* The liberal drift is exemplified by *North and Wartime Housing Ltd.* v. *Madden* and by *Gagnon* v. *Canadian Broadcasting Corporation.* Mention also deserves to be made in this connection of the English decision in *Minister of Supply* v. *British Thomson-Houston Co. Ltd.*

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24. *Re. B.C. Medical Plan et al. and Office and Technical Employees Union, Local 15* (1967) 59 D.L.R. (2d) 646.

25. [1963] 2 O.R. 95 (Ont. C.A.).

26. R.v. *Ont. Lab. Rel. Bd., Ex parte Ont. Food Terminal Bd.* [1963] 2 O.R. 95 (Ont. C.A.); Mueller, *The Liability of the Ontario Government in Tort* (1967) 25 U. Tor. Fac. L. Rev. 3 at p. 5; Glanville Williams, *Crown Proceedings Act, 1947*, at pp. 23-25.

27 F.R. Scott, *Administrative Law* (1923-47) 268, 280-4.

28. *Crown Companies and Civil Liability* (1944) 22 Can. Bar Rev. 927.

There are a number of Government agencies which are clearly able to claim Crown immunity.[29] The situation is one which requires clarification and rectification.

**E. Personal Liability of Crown Servants**

The scope of Crown immunity is, or course, limited by the fact that the immunity does not protect the servant or agent of the Crown from suit in his personal capacity. This includes the highest Government servants, even the Prime Minister, as illustrated in *Roncarelli* v. *Duplessis*[30] where the Prime Minister of Quebec was held personally liable for damages in the amount of $33,123.53 because of a tort he committed as Minister of the Government. In this case the Supreme Court relied on the well-known statement by Dicey:[31]

> In England the idea of legal equality, or of the universal subjection of all classes to one law administered by the ordinary courts, has been pushed to its utmost limit. With us every official, from the Prime Minister down to t a constable of a collector of taxes, is under the same responsibility for every act done without legal justification as any other citizen. The Reports abound with cases in which officials have been brought before the courts, and made, in their personal capacity, liable to punishment, or to the payment of damages, for acts done in their official character but in excess of their lawful authority. A colonial governor (*Mostyn* v. *Fabrigas* (1774) 1 Cowp. 161; *Musgrave* v. *Palido* (1879) 5 App. Cas. 102; Governor Wall's Case (1802) 28 St. Tr. 51), a secretary of state (*Entick* v. *Carrington* (1765) 19 St. Tr. 1030; K. & L. 174), a military officer (*Phillips* v. *Eyre* (1867) L.R. 4 Q.B. 225; K. & L. 492), and all subordinates, though carrying out the commands of their official superiors, are a s responsible for an act which the law does not authorize as is any private and unofficial person.

The interesting question is whether the liability to suit of a Crown agent in his private capacity applies to agents that are Crown corporations. It is well established that incorporation gives a company a separate legal personality. Therefore, it is logical that such servants of the Crown should be as much responsible in law for their wrongs as a human personality. The point was recently tested in the case of *National Harbours Board* v. *Langlier* [32] before the Supreme Court of Canada. The issue was raised on a petition for an interlocutory injunction against the National Harbours Board to prevent it from committing an alleged unauthorized injury to the plaintiff's property. The Government defended on the grounds that the Harbours Board was incapable fo acting in any way other than as an agent of the Crown and therefore it enjoyed all of the immunities of the Crown. The relevant immunity in this case was the right of the Crown not to be enjoined by interlocutory proceedings. In dismissing the claim of Crown immunity, Mr. Justice Martinland again quoted from Dicey, supra, and relied on

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29. A multiplicity of Crown agencies presents an additional hazard to the potential litigant. Quite apart from any questions of immunity, he must decide whether to sue the agency, the Crown itself, or both. The Commission's attention has been drawn to the case of *Nakashima* v. *The King* [1947] Ex. C.R. 486. The suppliants, persons of Japanese origin, sought to prevent the Custodian who had been authorized by Order in Council to manage and control their property, from disposing of the property. The suppliants proceeded against the Crown by petition of right. It was held that the Custodian was not a servant or agent of the Crown but an independent person in respect of whose acts a petition of right against the Crown would not lie.

30. [1959] S.C.R. 121.

31. Law of the Constitution, 10th ed. 193-194 *per* Abbott, J., *ibid.* at p. 184.

32. (1969) 2 D.L.R. (2d) 81.

the principle in the *Roncarelli* case. He concluded:[33]

> What is in issue here is the responsibility of a person, whether individual or corporate, who, though a Crown agent, and purporting to act as such, commits an act which is unlawful. My understanding of the law is that a personal liability will result. The liability arises, not because his is an agent of the Crown, but because, though he is an agent of the Crown the plea of Crown authority will no avail in such event.
>
> There are some authorities which have stated, in terms which I consider to be too broad, the proposition that an instrumentality of the Crown enjoys the same immunity, from an action in tort, as does the Crown itself.

This recent decision of the Supreme Court is another illustration of the "liberal drift" by the judiciary toward Crown responsibility. The decision supports a policy of restricting the scope of Crown immunity and privilege and treating the Crown in law the same as the subjects it governs.

### F. Summary

The need for reform of the law regarding Crown procedures is underscored by the realization of the breadth of Government activity in British Columbia. The regulation of society by Government agencies is a burgeoning phenomenon which carries with it the problems of Crown immunity. There is also an already wide use in British Columbia of the Crown corporation as a substitute device for private enterprise. Some of these corporations carry the full privileges of Crown immunity. This fact is particularly incongruous and lends support to the view that Crown immunity should be abolished.

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33. *Ibid.*, at p. 89.

# CHAPTER II THE PETITION OF RIGHT

## A. Origin

The first immunity of the Crown is one of procedure. At common law the citizen had no right to sue the Crown because the Courts were the King's Courts, and no feudal lord was subject to the jurisdiction of his own Courts. A procedure was developed in reign of Edward I (1272-1307), known as a petition of right, to enable some kinds of action to be brought against the monarch. By this procedure a petition was submitted to the King and, if he in his unfettered discretion saw fit, he could by his fiat refer it to the Courts for adjudication in the normal way.[1]

This ancient common law procedure has been preserved by statute as par to the law of British Columbia. The *Crown Procedure Act* provides for the use of a "petition of right" as the form of making claims against the Crown.[2] The requirements of a fiat is found in section 4 (1) of the Act, which provides:

> The petition shall be left with the Provincial Secretary, in order that the same may be submitted to the Lieutenant-Governor for his consideration, and in order that the Lieutenant-Governor, if he thinks fit, may grant his fiat that right be done.

The granting of "fiat" is then a condition precedent to any legal proceedings against the Crown.

## B. Government Practice

In May 1972 the Attorney-General's Department, in a response to a request by the Commission, kindly provided some useful information on the Government's practice during the past 20 years regarding petitions claimed against the Crown. This information shows that 11 fiats have been granted to suppliant since 1952.[3] There are no statistics available on the number of fiats that have been denied. It, in the opinion of the Attorney-General's Department, the claim was in tort, then the fiat would be refused. In these circumstances no Order in Council would be made. Even if the claim is not in tort, a fiat may still be refused. It should be pointed out, however, that the Crown does, in practice, pay claims made in respect of torts committed by its servants on an *ex gratia* basis if, in its opinion, the claim is justified. This means that the denial of a fiat is not necessarily the denial of a remedy.[4]

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1. For the history *see* 9 Holdsworth, *A History of English Law* 17 (7th ed. 1956); Ludwig Ehrlich, *Petitions of Right* (1929) 45 L.Q.P. 60; Chitty, *Prerogatives of the Crown* 340 (1820); Clode, *Petition of Right* (1887).

2. R.S.B.C. 1960, c. 89.

3. Correspondence received from the Department of the Attorney-General, dated May 26, 1972.

4. In the last five years, the amounts paid out by the Department of Highways for all claims against employees of the Crown have been fairly substantial. A large proportion of these claims have arisen out of motor-vehicle accidents. The chart below indicates the amounts for the past five years.

| Fiscal Year | Motor-vehicle Claims | Total Amount Paid |
|---|---|---|
| 1966/67 | $33,660 | $119,087 |
| 1967/68 | 52,904 | 74,950 |
| 1968/69 | 80,475 | 239,649 |

At the time the foregoing information was obtained the administration's stated policy on the refusal of a fiat was to follow the "established legal rules on the subject."[5] As explained later, one of the established rules is that the Crown may grant or refuse the fiat in its absolute discretion. This rule provides little protection to the subjects. There is an important convention, however, that the fiat should not be refused unless the claim is frivolous. If there is "any feasible ground of suit, then the Crown's consent cannot properly be withheld."[6]

There have, however, been some occasions in the past when fiats have been refused where it could not be said the claim was frivolous or there was no feasible ground of suit. For example, Mr. Zucco was denied a fiat in 1957[7] when he sought a petition of right to sue the Workmen's Compensation Board for a pension. Zucco had evidence from a doctor that he was totally disabled as a result of silicosis. His claim was denied by the Board. The British Columbia Supreme Court held that no action could be brought against the Board without a petition of right.[8] The *Zucco* case was not a claim in tort nor was it frivolous. The same observation could be made regarding litigation arising out of the controversial expropriation by the Provincial Crown of all the shares in the B.C. Electric Co. Ltd. in 1961.[9] The parent utility company was denied a fiat to bring an action that in fact finally succeeded although the action had to be brought by another route.[10] These are only two illustrations that point out the inequities of the existing law requiring a fiat to sue the Crown or its servants.

It is also important to note that it has been the practice of the government to give no reasons for the denial of a fiat. The procedure then has been surrounded by a cloak of secrecy that increases the potential of abuse and, as well, leaves the government vulnerable to criticism which, in some cases - were the facts known - would seem to be unfounded.

### C. Discretionary Procedure

It will be noted that the granting of a fiat is discretionary and may be denied by the government without giving reasons. The discretion is very broad. The Act only requires that the Lieutenant-Governor grant a fiat "if he thinks fit." There is also no time limit fixed by the Act within which a fiat must be granted or refused.

Is there an appeal from a decision by the government to refuse a fiat? If the granting of a fiat is purely a matter of grace then presumably it could be arbitrarily denied without any right of review. There do not appear to be any instances in

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|---|---|---|---|
| | 1969/70 | 100,433 | 203,267 |
| | 1970/71 | 58,564 | 160,951 |

5. *Ibid.*

6. G.S. Robertson, *Civil Proceedings by and Against the Crown*, 377 (1908).

7. O.C. 923/57.

8. Zucco v. *Workmen's Compensation Board* (1956) 20 W.W.R. 257.

9. O.C. 2983/61.

10. *B.C. Power Corp.* v. *B.C. Electric Co.* [1962] S.C.R. 642; [1962] 34 D.L.R. (2d) 25.

which a court has proceeded in spite of the fact a fiat has been refused.[11] In the early English decision of Re Mitchell's Petition of Right[12] a fiat was refused and the petitioner attempted to have the case set down for trial without the fiat. The court held that no matter for what reason the fiat had been denied, the court had no jurisdiction to set down the petition of right without the fiat of Her Majesty being first obtained.

There is, however, dictum to suggest that the Crown's discretion to refuse a fiat is not absolute. For example, Lord Langdale said in *Ryves* v. *Duke of Wellington*:[13]

> I am far from thinking that it is competent to the King, or rather to his responsible advisers to refuse capriciously to put into a due course of investigation any proper question raised on a petition of right. The form of the application being, as it is said, to the grace and favour of the King, affords no foundation for any such suggestion.

Lord Justice Bowen explained in *In Re Nathan*:[14]

> ... that the fiat is granted as a matter, I will not say of right, but as a matter of invariable grace by the Crown whenever there is a shadow of claim - may, more, it is the constitutional duty of the Attorney-General not to advise a refusal of the fiat unless the claim is frivolous.[15]

Farwell, L.J. went even further in *Dyson* v. *Attorney-General*,[16] where he seemed to suggest that there was a legal right to a fiat:

> It is very unusual for the responsible minister to refuse to authorize the indorsement 'let right be done', and it would be unjustifiable to refuse in any case where a plausible claim is made out.

The granting of a fiat in proper cases is then at least a "moral obligation"[17] or a "constitutional usage."[18]

But it is doubtful whether the duty is any higher than custom, convention and good political sense and therefore the denial of a fiat is a decision that is immune from direct judicial review. In any event to sue the Crown for refusal to grant a fiat would also require a fiat which could presumably be refused and so on *ad nauseam*. Therefore, the Crown has very nearly an absolute discretion whether to allow its subjects a petition of right.

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11. The one exception is when the refusal prevents judicial review of the constitutional validity of legislation and will be considered later.

12. (1896) 12 T.L.R. 324 (Q.B. Div.).

13. (1846) 9 Beav. 579 at p. 600; 50 E.R. 467 at p. 475 (Rolls Court).

14. (1884) 12 Q.B.D. 461, 479 (C.A.).

15. A Canadian case has explained that the use of the term "constitutional duty" by Bowen, L.J. "does not mean and cannot mean the legal duty, the duty enforceable in a Court of law." *Orpen* v. *A.-G. for Ontario* [1925] 2 D.L.R. 366, 372 (Ont. S.C.).

16. [1911] 1 K.B. 410 (C.A.).

17. R. Anson, *The Law and Custom of the Constitution* (4th ed. 1935) part 2, 334.

18. Maitland, *The Constitutional History of England* 483 (1908).

## D. Exclusive Procedure

It is important to emphasize that proceeding by petition of right is the only way relief can be obtained from the Crown. The petition is an exclusive remedy.[19] The suggestion has, however, been made that an action for a declaration could be taken without the Crown's consent and thereby avoid the necessity of a fiat. There is some support in the authorities for this view but it is definitely the minority opinion.[20] The courts in British Columbia appear to have adopted the view suggested by Farwell L.J. in the *Dyson* decision to the effect that "where the estate of the Crown is directly affected the only course of proceeding is by petition of right."[21] In *Zucco* v. *Workmen's Compensation Board*[22] a declaratory action against the Crown failed because there was no petition of right. The British Columbia Supreme Court adopted the view of Farwell L.J. in the *Dyson* case showing that the courts will not permit the requirement of a fiat to be evaded by an action for a declaration.

Professor Zamir in his study of the declaratory judgment described this rule as an "illogical limitation on the scope of declaratory relief against the Crown."[23] The rule is anomalous because by definition a declaratory action cannot "affect" any rights. It is not executory. This limitation on the scope of declaratory relief against the Crown has been removed from English law by the *Crown Proceedings Act, 1947*, which abolished proceedings by way of petition of right.[24]

If the Crown cannot be sued directly is it possible to achieve some relief from an arbitrary denial of the fiat by bringing a personal action against the responsible ministers who advise the refusal? There does not seem to be any case where such an action bas succeeded. Of the few authorities that have considered the question it appears that the prevailing opinion is that a personal action would not lie.[25]

There is, however, a well reasoned argument in favour of personal liability made by F. Murray Greenwood in an article entitled, "The Liability of Crown Officers for Advising Refusal of a Fiat."[26] The argument is based on the decision of the Supreme Court of Canada in *Roncarelli* v. *Duplessis*[27] where Rand, J. explained the principle of statutory interpretation relevant to the exercise of a discretionary power:

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19. D.W. Mundell, *Remedies Against the Crown*, Upper Canada Law Society Lectures 1962 at p. 149.

20. *Dyson* v. *Attorney-General* [1911] 1 K.B. 410 (C.A.) *per* Cozens-Hardy M.R. Some cases have allowed declarations in circumstances where a petition of right apparently would have lain: *Wigg* v. *A.-G. for the Irish Free State* [1927] A.C. 674 (H.L.); *Egan* v. *Attorney-General* [1931] A.C. 112 (H.L.); *See* Glanville Williams, *Crown Proceedings Act, 1947* (1948) 90.

21. *Ibid.*, at p. 421.

22. (1956) 20 W.W.R. 257 (B.C.S.C.). Perhaps the case could be distinguished on its facts because executory relief was also claimed with the declaration.

23. I. Zamir, *The Declaratory Judgment* 22 (1962).

24. S. 13.

25. *Irwin* v. *Grey* (1862) 3 F. & F. 635, 176 E.R. 290 (C.P.); *Ruffy-Arnell and Baumann Aviation Co. Ltd.* v. R. [1922] 1 K.B. 599, 607 (K.B.); *Royal Trust Co.* v. *A.-G. for Alberta* [1936] 2 W.W.R. 337 (Alta. S.C.).

26. (1962) 8 McGill L.J. 134.

27. [1959] S.C.R. 121 at p. 140 (S.C.C.).

> ... no legislative Act can, without express language, be taken to contemplate an unlimited arbitrary power exercisable for any purpose however capricious or irrelevant, regardless of the nature or purpose of the statute. Fraud and corruption in the Commission may not be mentioned in such statutes but they are always implied as exceptions. "Discretion" necessarily implies good faith in discharging public duty; there is always a perspective within which a statute is intended to operate; and any clear departure from its lines or objects is just as objectionable as fraud or corruption. Could an applicant be refused a permit because he had been born in another province, or because of the colour of his hair? The ordinary language of the Legislature cannot be so distorted.

Greenwood argues that the above principles can be applied to a refusal of a fiat. The discretion to grant a fiat under section 4(1) of the *Crown Proceedings Act* would not, therefore be absolute. Greenwood explains:[28]

> As the discretion to refuse or to cancel a liquor license is circumscribed by the purposes of *Alcoholic Liquor Act*, so also is the discretion vested in the Lieutenant-Governor to grant the fiat "if he think fit" limited to the general purposes for which the Legislature has conferred the power. The Legislature's grant of discretion to the Lieutenant-Governor as advised by the Attorney-General has traditionally been explained as a safeguard for the State to provide against a constant barrage of frivolous litigation. If the reason for refusing the fiat is that the plaintiff has no cause of action, then as an honest judgment decision the claimant has no recourse in damages. If the Attorney-General's advice, however, can be proved to have been motivated by religious or political prejudice, personal animosity or the like, suppliant has, it is submitted, such a recourse. If it were otherwise the Attorney-General would be permitted to use a power granted for public purposes to inflict injury for private and malicious reasons. Surely such was not intended by the Legislature and cannot be implied in the absence of express wording in art. 1014 C.P.

*Roncarelli* v. *Duplessis* is also authority for the proposition that not only the person legally seized of the discretion - in the case of a fiat, the Lieutenant-Governor - but also any public officer exercising *de facto* power over the officer seized of the discretion owes a duty to members of the public.[29]

If the courts accepted the above argument then there is at least some relief against the worst abuses of this ancient procedure. But even if courts accepted such a principle this relief is of limited scope and fraught with difficulties. Since no reasons are given or required for the refusal of it would be extremely difficult to prove why it was refused. It would be equally difficult to decide what should be the measure of damages.[30] There is also the problem of identifying the cause of action in a common law jurisdiction such as British Columbia. In *Roncarelli* the action took place in Quebec and therefore under article 1053 of the Civil Code a cause of action was maintained. However, the common law of torts is not as broad in scope as article 1053 of the Code which provides:

> Every person capable of discerning right from wrong is responsible for the damage caused by his fault to another, whether by positive act, imprudence, neglect or want of skill.

There is perhaps one exception to the necessity of a fiat before one can sue

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28. *Supra* note 8 at 136.

29. *Ibid.*

30. *Fulton* v. *Norton* [1908] A.C. 451 (P.C.).

the Crown. The exception arises when the issue raised by the plaintiff is whether a statute is *ultra vires* the provincial Legislature. In such a case the refusal of a fiat will not prevent judicial review. This situation arose in British Columbia when the Legislature passed the *Power Development Act, 1961*[31] which expropriated the shares of the British Columbia Electric Company Limited, a provincially incorporated company wholly owned by British Columbia Power Company, a federal company. British Columbia Power Company attempted to seek a petition of right to claim additional compensation but the Crown refused to grant a fiat. As a result the company commenced a declaratory action without a petition against British Columbia Electric Company Limited and the Attorney-General challenging the validity of the *Power Development Act*.

Pending the outcome of this trial the plaintiff company obtained an interlocutory order appointing a receiver for the property in question. It was this order that raised the question of Crown immunity. The province urged that the receivership order was invalid because it directly affected the estate of the Crown and therefore no such order could be made except through petition of right procedure.[32] The Supreme Court of Canada rejected this argument and upheld the order. Kerwin, C.J. explained:[33]

> In a federal system, where legislative authority is divided, as are also the prerogatives of the Crown as between the Dominion and the Provinces, it is my view that it is not open to the Crown, either in right of Canada or of a Province, to claim a Crown immunity based upon an interest in certain property, where its very interest in that property depends completely and solely on the validity of the legislation which it has itself passed, if there is a reasonable doubt as to whether such legislation is constitutionally valid. To permit it to do so would be to enable it, by the assertion of rights claimed under legislation which is beyond its powers, to achieve the same results as if the legislation were valid. In a federal system it appears to me that, in such circumstances, the court has the same jurisdiction to preserve assets whose title is dependent on the validity of the legislation as it has to determine the validity of the legislation itself.

It appears that the decision of the Supreme Court in the *British Columbia Power* case had the indirect effect of overruling earlier contrary authority.[34] These decisions were not referred to by the court, but they were cited in the arguments of counsel.[35] Professor Strayer contends on this issue:[36]

> It must be concluded, therefore, that the Supreme Court has intentionally repudiated the English rule of immunity as applied in *Lovibond*, It has rejected Crown immunity as a limitation on judicial review in Canada where constitutional issues are involved, even in those jurisdictions which have not removed that immunity by statute.

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31. S.B.C. 1961, c. 4.

32. Factum of Attorney-General of British Columbia at 3-5, cited in Strayer, *Crown Immunity and the Power of Judicial Review in Contemporary Problems of Public Law in Canada* 85 (O.E. Lang ed. 1968).

33. *British Columbia Power Corporation* v. *British Columbia Electric Co. et al* [1962] S.C.R. 642 at P. 644-5.

34. *Orpen* v. *A.-G. for Ontario* (1925) 2 D.L.R. 366 (Ont. S.C.); *Lovibond* v. *Governor General of Canada* [1930] A.C. 717 (P.C.).

35. It is also significant that Kerwin, C.J. had been the trial judge in the Lovibond case. Strayer, *supra* note 14 at p. 87.

36. *Ibid.*

Of course, the above exception to the rule requiring a fiat before any claim can be made against the Crown is of limited application. It would only apply when a constitutional issue is involved and the Crown invokes its immunity to prevent judicial review.

In summary then it appears that for practical purposes the petition of right is the exclusive procedure to sue the Crown and that the declaratory action does not provide an alternative method of recourse. The possibility of a personal action against the Attorney-General is too speculative to be of any effect. It is only in the rare instance of a constitutional controversy that the necessity for obtaining a fiat may be avoided.

**E. The Need for Reform**

It is very difficult to find any convincing reasons for the retention of the procedural privilege
given the Government. The requirement of a fiat is a procedure born in mediaeval times which now clearly serves no good purpose. The injustice of the procedure is underscored by the pervasive scope of activities carried on by the Crown or the government today which could give rise to legal liability. As one writer explained.[37]

> The system whereby the Crown must signify its pleasure that "right be done," while perhaps compatible with the notion that duty of personal allegiance is owed by every subject to a supreme feudal lord, is a dangerous anachronism in the welfare state of the twentieth century. Its raison d'etre disappeared with the growth of the constitutional monarchy; its inherent injustice has been magnified a hundredfold by the proliferation of government boards and commissions, which claim to enjoy the all too pervasive "shield of the Crown."

The suggestion that such a procedure is needed to hold back the flood-gates of frivolous litigation is not supported by the experience elsewhere. The survey conducted of the other Canadian provinces that have abandoned the procedure of requiring a fiat shows that there is no substance to the fear. They have not been inundated with spurious suits against the Crown.[38]

The real inequity in requiring a fiat is that the Attorney-General and those other ministers who advise the Lieutenant-Governor on this matter are not in a position to decide whether a claim is meritorious or not. The fact that a fiat has been granted so seldom in British Columbia raises doubt that all claims of merit against the government are going to trial. The decision of whether a claim has merit can only be made fairly by judges in a court of law who have the advantage of hearing all the evidence given under oath and subject to cross examination. To allow these ministers to decide whether their government will be accountable before the law is directly contrary to the rule of law and the notion of independence of the judiciary. This is true because the procedure by way of petition of right puts the Crown above the law and makes it judge in its own case "if it thinks fit." In effect the denial of a fiat is a denial of natural justice sanctioned by the law. Where administrative law protects the individual's right to a hearing when his rights and interests are affected, the British Columbia *Crown Procedure Act* by

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37. *Greenwood*, *supra* at 26, at p. 140.

38. *See* survey *infra* chapter V, part B, sec. 3.

contrast takes away the right to a healing before the courts at the discretion of the defendant.

The obvious injustice of the fiat has long been recognized by other countries. The petition of right was abolished by Australia and New Zealand in the nineteenth century.[39] The necessity of a fiat to sue the Crown has been removed by the federal government and by all of the Canadian provinces except British Columbia, Prince Edward Island and Newfoundland.[40]

The statutes in Canada abolishing the fiat have followed almost exactly the form of the English *Crown Proceedings Act, 1947*, which provide:[41]

> Where any person has a claim against the Crown after the commencement of this Act, and, if this Act had not been passed, the claim might have been enforced, subject to the grant of His Majesty's fiat, by petition of right, or might have been enforced by a proceeding provided by any statutory provision repealed by this Act, then, subject to the provisions of this Act, the claim may be enforced as of right, and without the fiat of His Majesty, by proceedings taken against the Crown for that purpose in accordance with the provisions of this Act.

In Australia the legislative provision is similar. It reads:[42]

> Claims against the Crown Cognizable in any Competent Court - Any claim against His Majesty in His Government of the Union which would, if that claim had arisen against a subject, be the ground of an action in any competent court, shall be cognizable by any such court, whether the claim arises or has arisen out of any contract lawfully entered into on behalf of the Crown or out of any wrong committed by any servant of the Crown acting in his capacity and within the scope of his authority as such servant.

British Columbia has already recognized the need for reform by removing the requirement of a fiat in certain instances. In many statutes which create Crown agencies in the province there is a provision that the agency may "sue and be sued." For example, such a provision is found in the Act which established the British Columbia Harbours Board.[43] The section provides:

> The Board may sue and be sued in any Court of competent jurisdiction, and costs may be given for or against the Board.

The question arises whether such a provision has the effect of allowing suit against the Crown agency without the necessity of a fiat. One might assume that the answer is as simple as the words, but this is not the case. The meaning of the short phrase, "sue and be sued" has been the subject of much contention in the

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39. P.W. Hogg, *Victoria's Crown Proceedings Act* (1970) 7 Mel.U.L.Rev. 342 note 2.

40. *See The Proceedings Against the Crown Act*, R.S.A. 1970, c. 285, s. 4; R.S.M. 1970, c. P140, s. 4; R.S.N.B. 1952, c. 176, s. 3; R.S.N.S. 1967, c. 239, s. 3; R.S.O. 1970, c. 365, s. 3; R.S.S. 1965, c. 87, s. 4. *Special Procedure Act*, R.S.Q. 1964, c. 22, s. 1.

41 10 & 11 Geo. VI, c. 44, s. 1; *See also Uniform Model Act*, Appendix.

42 *Victoria Crown Liabilities Act* (No. 1 of 1910), s. 2.

43 S.B.C. 1967, c. 4.

courts.[44]

There are, on the one hand, cases that hold that the phrase does not abrogate any of the Crown's prerogatives and immunities including the necessity of a fiat.[45] For example, the Manitoba Court of Appeal held in *Oatway* v. *Canadian Wheat Board*:[46]

> ... the mere fact of an agent of the Crown being a corporate body, and that the statute of incorporation contains a clause that it may sue and be sued, does not in itself give the right to bring an action against it in the ordinary Courts, but that the Crown's immunity from such an action still exists.

The words "sue and be sued" under this interpretation mean "sue and be sued if the Crown so elects."[47]

In contrast to these authorities there are other decisions holding that the "sue and be sued" clause has the effect of eliminating the need for a fiat. In *Washer* v. *British Columbia Toll Highways and Bridges Authority*,[48] the British Columbia Court of Appeal considered the issue in construing section 8 of the *British Columbia Ferry Act* which states, "The Authority may sue and be sued in any Court of competent jurisdiction." The Court held:[49]

> There is no question that, as a crown agency, the appellant would have certain immunities, prerogatives and privileges inherent in the crown. An example would be immunity from suit, except that that immunity has been specifically removed by sec. 8 of the statute.

It seems clear that the approach in the *Washer* case is to be preferred. It means that the words in question effect a procedural and not a substantive change in Crown immunity. They simply enable an agent of the Crown to be sued in the ordinary way without seeking a petition of right against the Crown.

However, because of the dubious effect of the words "sue and be sued," the insertion of the clause does not allay the need for eliminating the necessity for obtaining a fiat. The right to sue the Crown is left too much at the discretion of the Crown. The power of the government to refuse a fiat could easily be abused resulting in the denial to a citizen of his day in court.

### F. Conclusion

The Commission feels that the requirement of a fiat to sue the Crown should be removed and that the same procedure for bringing a legal action should be adopted as presently exists between subject and subject. To accomplish this reform it is suggested that British Columbia adopt sections 4 and 22 of the *Uniform*

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44 *British Columbia Power Corporation Ltd.* v. *A.-G. of British Columbia et al* (1962) 34 D.L.R. (2d) 25 (B.C.C.A.) *per* Wilson, J.A.

45 *Int. Railway Co.* v. *Niagara Parks Commission* [1940] O.R. 33 (Ont. C.A.) rev'd. on other grounds [1941] A.C. 328 (P.C.).

46. [1944] 4 D.L.R. 381, 387 (Man. C.A.).

47. *Yeats et al* v. *Manufacturers Life Insurance Company et al* [1949] 2 W.W.R. 1110 (Alta. S.C. App. Div.) rev'd on other grounds *sub nom. Yeats* v. *Central Mortgage and Housing Corp.* [1950] S.C.R. 513 (S.C.C.) For a discussion of this case, *see* Smith, *Liability to Suit of an Agent of the Crown* (1950) 8 U. Tor. L.J. 218.

48. (1966) 53 D.L.R. (2d) 620 (B.C.C.A.).

49. *Ibid* at p. 628 followed in *McGrane* v. *British Columbia Ferry Authority* (1969) 1 D.L.R. (3d) 562 (B.C.S.C.). *See also Minister of Supply v. British Thomson-Houston Co.* [1943] K.B. 478 (C.A.).

*Model Act Respecting Proceedings Against the Crown.*

The Commission recommends:

1. *The requirement of a fiat to sue the Crown be removed.*

2. *The procedure by which a subject commences a legal action against the Crown be the same as that which applies in actions between subject and subject.*

# CHAPTER III INJUNCTIONS AND THE CROWN

## A. General

The injunction is primarily a private law remedy used to restrain illegal activity. Its particular advantage over other remedies is that it works to prevent any future illegality rather than merely to provide compensation after the event. Yet it is this prophylactic advantage of the injunction in the ordinary case that is given as the reason for not permitting this remedy in the "special case" of injunctions against Crown officers. The law is vague on the right to enjoin the Crown or its servants. It is clear that in some circumstances there is an immunity at common law. In some jurisdictions there is also legislation protecting the Crown from injunctions.

In reform legislation in this field injunctions and the right to obtain specific performance are often interdicted. Specific performance is available against the Crown at common law except when the plea of executive necessity is successful. Specific performance against the Crown has not been treated separately in this Report. Many of the considerations that apply to injunctions have relevance also to this remedy.

## B. The Common Law Position

### 1. Of the Crown

It is uncertain whether at common law an injunction can issue against the Crown itself. It is generally held that it cannot. The English position appears clear. Professor S.A. de Smith states unequivocally that an injunction "... would never lie against the Crown ..."[1] Yet in Canada there are instances of injunctions being granted against Her Majesty. For example, in *Carlic* v. *The Queen and Minister of Manpower and Immigration*[2] the Manitoba Court of Appeal granted an injunction against the Crown over its objection. The court held as a general principle the Sovereign should not be enjoined but the principle is based on practical problems of enforcing the order. "Here, however, the sovereign is not the sole defendant," said Mr. Justice Freedman, "and it may safely be assumed, on the one hand, that the order of the Court would be honoured and respected by all of the defendants and on the other hand, that in the unlikely event of the order being disobeyed, enforcement proceedings would then be sought only as against the other defendants." Confronting the Crown with such bold pragmatism is a very refreshing change from the usual obsequious mysticism that surrounds the prerogatives of the Queen, although to give the right to enjoin the Crown without the right to enforce the injunction is not perhaps an act of courage - it is a right without a remedy.

The court in *Carlic* relied on *Re Gooliah and Minister of Citizenship*[3] where the Crown was found to be a proper defendant. However, the action in that case was for *certiorari*, one of the prerogative writs, which is generically different from the injunction

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1. *Judicial Review of Administrative Action 461* (2nd ed. 1968). *See also* Street, *Crown Proceedings Act, 1947*, (1948) 11 Mod. L. Rev. 138.

2. (1968) 65 D.L.R. (2d) 633.

3. (1967) 63 D.L.R. (2d) 224 (Man. C.A.).

procedure.[4] The principle of Crown immunity from injunctions at common law is then in doubt. The Crown may be enjoined at least if there are other defendants to suffer the consequences of disobedience.

2. Of Crown Officers

The same confusion exists with regard to suits against Crown agents or servants, as is found in the law regarding suit against the Crown itself. It appears the courts have reached conflicting views on the availability of the injunction against Crown officers. The Canadian courts are again more willing to grant injunctions against Crown agents than are English courts. There are at least four situations in which injunctions have been granted against Crown agents. They are as follows:

(a) when the agents are sued in their personal capacity;

(b) when the agents act *ultra vires* their authority;

(c) when the agents are servants of Parliament rather than servants of the Crown; and

(d) when the agents perform non-governmental functions.

(a) *Personal capacity*

It is often said that while a Crown officer cannot be restrained in his "official" capacity he can be enjoined in his personal or private capacity.[5] The rule is also recognized in the United Kingdom.[6] The Canadian courts have extended the rule to corporations as well as to real persons. In a recent decision, the Supreme Court of Canada granted an interlocutory injunction against the National Harbours Board, which is a federal Crown corporation.[7] The court based its judgment on the ground that the Board was being sued in its personal capacity and not as an agent of the Crown. This holding was made in spite of the fact that the relevant legislation creating the Board stated that it: "... shall be and be deemed to be, for all purposes of this Act, the agent of Her Majesty in right of Canada."[8]

The court rejected the view that the corporation was incapable of acting in any way save as an agent of the Crown. It applied the principle of personal liability established in *Roncarelli* v. *Duplessis*[9] to corporations. Implicit in the judgment is the compelling inference that if the Board was sued in its "official" capacity as Crown agent, then no injunction would have issued because of Crown immunity. *Quaere* whether the decision can be reconciled with earlier cases that have held that an injunction would not be issued against Crown agents even in their personal

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4. *Samejima* v. *The King* [1932] S.C.R. 640; *The King* v. *Jeu Jang How* (1919) 59 S.C.R. 175.

5. *The Queen* v. *C.B.C.* [1958] O.R. 55 at p. 82-3; Strayer, *Injunctions Against Crown Officers* (1964) 42 Can. Bar Rev. 1 at p. 11.

6. *Nireaha Tamaki* v. *Baker* [1901] A.C. 561; De Smith, *supra* note 1.

7. *National Harbours Board* v. *Langelier* (1968) 2 D.L.R. (3d) 81 (S.C.C.).

8. *National Harbours Board Act*, R.S.C. 1952, c. 187, s. 3(2).

9. [1959] S.C.R. 121.

capacity if the practical effect thereof would be indirectly to restrain the Crown itself.[10] If there is no limitation on the liability of an agent in his personal capacity, then the distinction in status between "personal" and "official" agents becomes very artificial. It becomes merely a choice of the magic label.

(b) Ultra Vires *Authority*

It would appear further that when Crown agents act *ultra vires* their authority they may be enjoined even in their "official" capacity.[11] The Supreme Court of Canada granted an injunction against a Crown agent sued in its official capacity on the grounds that the court had jurisdiction "... to restrain ultra vires or illegal acts by a statutory body ..."[12] This exception to the general rule of Crown immunity is also based on the status of the Crown agent.[13] The view is that if a Crown officer is acting illegally he is not really a Crown officer and therefore he is being enjoined in his personal capacity. It may therefore be seen as nothing more than an extension of the personal-official dichotomy.

(c) *Agents of the Legislature*

A further justification for an injunction against the Crown is found in the unusual distinction between "servants of the Crown" and "agents of the Legislature." The latter classification gives the court jurisdiction to issue an injunction. The notion is that some government agencies are not part of the executive but are directly responsible to Parliament. They are servants of Parliament rather than servants of the Crown. Therefore they cannot claim the Crown's immunity.[14] The cases have not suggested any useful test for identifying this special kind of capacity. The logic of such a dichotomy has "little to commend it" suggests Professor Strayer.[15] It seems to create a distinction without a difference. It is then another example of the importance of labels or status. "Agents of the Legislature" become an unjustified fourth level of government. The principle has been rejected in Great Britain.[16] It is again a derivation of the status principle like the exception for *ultra vires* acts.

(d) *Non-governmental Functions*

It has been suggested that Crown agents may be enjoined if the subject of the litigation concerns private rights and not public rights. The argument was adopted as grounds for allowing an injunction against the Canadian Broadcasting

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10. *Barnard* v. *Walbem* (1880) 1 B.C.R. 120.

11. *Rattenbury* v. *Land Settlement Board* [1929] S.C.R. 52.

12. *Ibid* at p.63.

13. *See* criticism of this approach by Professor Strayer, *Injunctions Against Crown Officers, supra* note 5 at p. 27.

14. *Minister of Finance of B.C.* v. R. [1935] S.C.R. 278; *Canadian Pacific Ry.* v. *A.-G. of Saskatchewan* [1951] 3 D.L.R. 362 (Sask. K.B.); *Duplain* v. *Cameron, Beaudry and Holgate* (No. 2) (1960) 33 W.W.R. 38 (Sask. Q.B.); *Taal et al* v. *Sask. Medical Care Ins.* Comm. (1962) 40 W.W.R. 8 (Sask. Q.B.).

15. *Supra* note 5 at p. 20.

16. *Merricks* v. *Heathcoat-Amory* [1955] 2 All E.R. 453 (ch. D.).

Corporation, a federal Crown agency.[17] The plaintiff claimed an injunction to prevent the Crown agency from using film and tapes it had unlawfully obtained of the Miss Canada Pageant. The plaintiff claimed to have exclusive rights to broadcast and produce the pageant. The Canadian Broadcasting Corporation defended on the grounds that as an agent of the Crown it was immune from injunctions. In granting the injunction against the Crown agency Mr. Justice Grant placed some importance on the agency's business. He held that Crown agencies which were "in business ventures in competition with private interests" should be treated differently. The learned Judge said:

> In such cases, private rights are the subject of the litigation as distinguished from public rights which under the old cases [were] the matter in hand when immunity surrounding the Crown was set forth as reason for the Court's lack of jurisdiction. In circumstances such as the present, Crown agencies are not *per se* exempt from judicial authority.

The distinction between private and public rights is one of function. It is not unlike the distinctions based on status. It is a unique reason for granting an injunction but the distinction is not uncommon in other areas of Crown immunity.[18] The distinction could at least have the effect of removing from the umbrella of Crown immunity some of the least deserving "non-governmental" government activities. Perhaps the greatest defect of this principle is the impossibility of rationally drawing the distinction between activities which affect private rights.[19]

3. Summary

It is apparent that under the common law injunctions have been granted in limited circumstances against the Crown and its servants. The controlling principle appears to be the status of the defendant. The principle may be criticized as mechanical and devoid of important policy considerations, such as whether the control over the Crown agent would be better left to the Legislature. However, the notion that everyone is subject to the rule of law finds expression in allowing suits against the Crown on the personal-official dichotomy. The other principle justifying injunctions is the function of the Crown activity. The rule depends on distinguishing between public and private functions. It is a distinction that is difficult to make. But if the activity is characterized as private, proprietary or non-governmental then it is indeed difficult to justify any Crown privilege.

It is noticeable that the judicial decisions on the subject of injunctions and the Crown have developed the above stated principles granting the Crown immunity without any careful consideration of the reason for the privilege. The origin of the immunity is lost in history. The rule is now a matter of dogma. It has been suggested that the real justification of the injunction immunity is found in the notions of responsible government and parliamentary supremacy which mean that the executive, the Crown or the government are responsible to Parliament and not

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17. *Baton Broadcasting Ltd.* v. *C.B.C. et al* [1966] 2 O.R. 169 (Ont. H.C.).

18. For example, the basis for municipal immunity for police torts turns on a distinction between governmental and proprietary functions: *Bowles* v. *City of Winnipeg* [1919] 1 W.W.R. 198.

the courts.[20] This explanation of Crown immunity is similar to the justification given for the judicial technique of avoidance called "political questions." The Commission finds this rationale an unconvincing reason to add any legislative protection to the existing common law immunity.

### C. Legislation Elsewhere

When reforms have been made to Crown proceedings in other jurisdictions a provision has been included prohibiting the use of injunctions against the Crown. This is true of the English *Crown Proceedings Act, 1947* and the *Uniform Model Act* adopted in Canada by the Uniformity Commissioners.[22] The *Uniform Act* was followed on this point by the legislation of Nova Scotia,[23] New Brunswick,[24] Saskatchewan,[25] Ontario,[26] Alberta,[27] Manitoba,[28] and Quebec.[29] The *English Act* provides:

> 21. (1) In any civil proceedings by or against the Crown the court shall, subject to the provisions of this Act, have power to make all such orders as it has power to make in proceedings between subjects, and otherwise to give such appropriate relief as the case may require:
>
> Provided that:
>
> (a) where in any proceedings against the Crown any such relief is sought as might in proceedings between subjects be granted by way of injunction or specific performance, the court shall not grant an injunction or make an order for specific performance, but may in lieu thereof make an order declaratory of the rights of the parties; and
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> (b) in any proceedings against the Crown for the recovery of land or other property the court shall not make an order for the recovery of the land or the delivery of the property, but may in lieu thereof make an order declaring that the plaintiff is entitled as against the Crown

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19. The experience of the U.S. courts with this dichotomy is instructive. *See* E.M. Borchard, *Government Liability in Tort* (1924-25) 34 Yale L.J. 129: "In few, if any, branches of the law have they labored more abjectly under the supposed inexorable domination of formulas, phrases and terminology, with the result that facts have often been tortured into the framework of a formula, lacking in many cases any sound basis of reason or policy. This is notably the case in the effort to apply the supposedly settled rule that the municipal corporation is not liable for torts committed by its agents in the performance of governmental, political or public functions, whereas it is liable when the tort is committed in the performance of corporate or ministerial functions. Disagreement among the courts as to many customary municipal acts and functions may almost be said to be more common than agreement and the elaboration of the varying classifications is even less satisfying to any demand for principle in the law. Indeed, so hopeless did the effort of the courts to make an appropriate classification of function appear to the Supreme Court of South Carolina that they determined to abandon the distinction between governmental and corporate acts."

20. Strayer, *supra* note 5 at p. 7.

21. 10 & 11 Geo. VI, c. 44, s. 21.

22. *See* Appendix.

23. R.S.N.S. 1967, c. 239, s. 15.

24. R.S.N.B. 1952, c. 176, s. 14.

25. R.S.S. 1965, c. 87, s. 17.

26. R.S.O. 1970, c. 365, s. 18.

27. R.S.A. 1970, c. 285, s. 17.

to the land or property or to the possession thereof.

> (2) The court shall not in any civil proceedings grant any injunction or make any order against an officer of the Crown if the effect of granting the injunction or making the order would be to give any relief against the Crown which could not have been obtained in proceedings against the Crown.

There is no similar provision denying the remedy of an injunction in British Columbia,[30] nor is there any prohibition in the federal *Crown Liability Act* although this statute did follow the United Kingdom *Crown Proceedings Act* as to almost all other reforms of Crown procedure.[31] The absence of any restriction on proceeding by injunction in the federal legislation seems deliberate.

### D. Justification for Restricting Injunctions

The restriction on proceeding by injunction in the *English Act* was apparently justified on grounds of expediency.[32] The Lord Advocate spoke in favour of the provision in the House of Commons because he said "one must keep in mind the fact that the Crown may have to take certain steps at the shortest possible notice which infringe the rights of subjects ..."[33] Sir Thomas Barnes stated:

> No doubt the principle underlying this provision is that in times of national emergency the Crown may be compelled to take, at the shortest possible notice and with the certainty that its operations will not be interrupted by the courts, measures which may be thought to infringe the rights or alleged rights of the subject. In such a case the appropriate course is for the Government of the day to ask Parliament to validate what it has done and no doubt Parliament will in those cases decide how far the acts of the Crown were justified in the circumstances. If Parliament approves of what has been done and ratifies it by retrospective legislation it will also no doubt provide compensation for the persons aggrieved. The freedom of the Executive to meet a crisis by action of this kind would be fettered if it were open to the subject to obtain an interim injunction restraining the Crown from doing what it thought necessary in the public interest.

The fallacy of this justification is that it assumes the courts will not be sympathetic to the urgency of the situation and that it is desirable to allow the executive to exceed its authority. There is little or no evidence in Canada that judicial review has ever prevented the executive from taking immediate action. Indeed during the Second World War the Canadian courts' attitude to the

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28. R.S.M. 1970, c. P140, s. 17.

29. S. 94b. *See also New Zealand Crown Proceedings Act, 1950*, s. 17.

30. The *Crown Procedure Act*, R.S.B.C. 1960, c. 89.

31. R.S.C. 1970, c. C-38.

32 *See Queen* v. *Lords Commissioners of the Treasury* (1872) L.R. 7 Q.B. 387 and its progeny. Although this case involved the prerogative writ of mandamus which is different it has often been relied on as authority against granting injunctions. *See Barnard* v. *Walhem* (1880) 1 B.C.R. 120 at 139 (B.C.S.C.); *A.-G. Ontario* v. *Toronto Junction Recreation Club* (1904) 8 D.L.R. 440; *Lake Champlain and St. Lawrence Ship Canal Co.* v. *H.M. the King* (1917) 54 S.C.R. 461; *Melborne* v. *McQuesten* (1940) O.W.N. 311.

33 (1947) 439 H.C. Deb. (5th Sess.) 1949, quoted in *The Crown Proceedings Act 1947* (1948) 26 Can. Bar Rev. 387 at p. 395.

emergency has been ably criticized as too compliant.[34] It is also questionable whether the words of section 21 are apt to support the justification. Injunctions granted against Crown servants in their personal capacities would not be prohibited.[35] Further, if the no injunction clause is treated as a privative clause, it will clearly not protect from judicial review the unauthorized actions of government servants to meet a crisis situation.[36]

Professor Strayer has considered this remedy in an article entitled "Injunctions Against Crown Officers."[37] He suggests that the restrictions in the English *Crown Proceedings Act* do not necessarily point the way for Canada because "The legislative and administrative hazards of federalism do not beset the government of that country."[38] Because of Canada's federal division of powers, a closer parallel may be found in the laws of the United States and Australia. The injunction is available in the United States as a device for controlling unauthorized government activity.[39] The injunction is also permitted as a sanction against breaches of public law in Australia.[40]

The injunction appears to have served a useful function in the enforcement of public duties by private plaintiffs where the injury causes special damage peculiar to the plaintiff.

In his study of Governmental Liability, Professor Street recommends the use of injunctions against the government. He states:

> It is submitted that the ends of justice would be served by making injunctions available against government servants. To withhold them against a servant even where his act is plainly illegal, if he merely purports to be acting on behalf of the Crown, is particularly objectionable. The Treasury Solicitor says that this immunity is essential because the Crown might in an emergency want to override the law, leaving it to Parliament to decide whether to ratify ex post facto, and that it would be prevented from so doing by interlocutory injunction. *This ignores the prerogative rights of the Crown in an emergency which are untouched by the Act.* Moreover, it takes no account of the fact that injunction is a discretionary remedy. It is yet another example of the unwillingness of the Executive to trust the Judiciary. English law compares unfavourably both with Australia and the United States in this regard. [41]

The method of proceeding against the Crown where the injunction is prohibited is by a declaratory judgment.[42] Because declaratory judgments are

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34 *See* cases interpreting *War Measures Act*, such as *Reference re. Chemicals* (1943] 1 D.L.R. 248 (s.c.c.); *see also* L.H. Phillips, *Canada's Internal Security* (1946) Can. J. of Econ. & Pol. Sc., vol. 12, no. 1 at p. 18.

35 P.W. Hogg, *Liability of the Crown* (1971) 26.

36. Carter, *The Apparent Virility of Privative Clauses* (1967) U.B.C.L. Rev. (Centennial Edition) 219.

37. (1964) 42 Can. Bar Rev. 1.

38. *Ibid* at p. 2.

39. Davis, *Developments in the Law Remedies Against the United States and Its Officials* (1957) 70 Harv. L. Rev. 827 at p. 850-64.

40. W. Friedman, *Declaratory Judgment and Injunction as Public Law Remedies* (1949) 22 Aust. L.J. 446 at p. 448.

41. Street, *Governmental Liability* (1953) 142.

42. *Crown Proceedings Act, 1947*, s. 21(1).

almost never disregarded by governments this procedure would seem to provide the same relief against the Crown as if an injunction were used. However, there is an important distinction between the two procedures that does make the declaratory action a less attractive remedy. There is no interim relief available to preserve the matter in dispute until the question can be litigated in a declaratory action. It does not seem possible to get an interlocutory injunction against the Crown. In *Underhill* v. *Ministry of Food*[43] an interim declaration was sought to prevent the Ministry of Food from implementing a wartime rationing scheme that may have had the effect of putting the plaintiffs out of business. It was alleged that the Ministry exceeded its authority under the relevant legislation. It was also argued that the Ministry was estopped from implementing the rationing scheme. The case was dismissed on the grounds that the court had no jurisdiction to make an interim declaration in substitution for an interlocutory injunction. Mr. Justice Romer said:

> [Counsel for the Ministry] says that when the *Crown Proceedings Act, 1947*, s. 21 refers to the court making a declaration, it refers to a final declaration, and it is an unheard of suggestion that an interlocutory declaration should be made which might be in precisely the opposite sense of the final declaration made at the trial. He says, and I think rightly says, that what is usually done on the hearing of an interlocutory application is to grant some form of temporary remedy which will keep matters in status quo until the rights of the parties are ultimately found and declared, and that, accordingly, the reference to making a declaration of rights means a declaration at the trial as distinct from a declaration on some interlocutory application.[44]

This statement of the rule was quoted with approval by the English Court of Appeal in *Int. General Electric Co.* v. *Commissioners of Customs and Excise*.[45] This case raised the same issue and the court added to the reasons of Romer, J. the proposition that in proceedings between subjects it was "perfectly plain" that an interim declaration could not be granted, therefore because under section 21 of the *Crown Proceedings Act* the court only has "... power to make all such orders as it has power to make in proceedings between subjects ..." no interim order can be granted against the Crown. The weakness of this logic is that as between subjects there is no need for an interim declaration because an interim injunction can be obtained. But an injunction, interim or final, cannot be granted against the Crown. There is then a need for an interim declaration against the Crown.

Lord Justice Upjohn in the Court of Appeal did suggest that in special circumstances a declaration could be granted on an interlocutory proceeding. Such a declaration would have to determine finally the rights of the parties and would not be open to further review except on appeal. This kind of declaration would be rare and would not perform the function of an interim injunction to preserve the status quo until the rights of the parties can be finally determined. The learned judge concluded: "It seems to me quite clear that, in proceedings against the Crown, it is impossible to get anything which corresponds to an interim injunction."[46]

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43. [1950] 1 All E.R. 591 (ch.).

44. *Ibid* at p. 593.

45. [1962] Ch. 784 (C.A.).

46. *Ibid.*

The above cases are both English decisions which are not binding in Canada. It seems unlikely, however, that any different ruling would be given by a Canadian Court.

## E. Conclusion

The common law does provide a qualified immunity to the Crown and its agents and servants against the injunction procedure. The question is whether there should be a further legislative prohibition as found in Great Britain and some of the other Canadian jurisdictions (not in the federal legislation). The Commission considers that in a federal state like Canada there is a greater need for judicial review than in a unitary country like the United Kingdom. The provinces are limited by the constitution as to their legislative powers. It is the Court's duty to interpret the constitution and decide whether what is done or proposed is *ultra vires*. This is, therefore, one reason for not restricting the right to proceed against the Crown by injunction.

It is unconvincing to urge a restriction because of the government's need to respond immediately to a crisis situation. The prerogative of executive necessity is always available. The extra-legal principle of state necessity does provide the Crown with special powers to meet any grave emergency.[47] This prerogative has even justified the Crown assuming legislative authority.[48] Further, there is no evidence that the courts have been insensitive to the needs of an urgent situation. If history proves anything it is that during a crisis judicial compliance is to be feared more than judicial scrutiny.

The citizens deserve the protection of the court against illegal action by Crown officers. The declaratory judgment does not replace the need for an injunction against the Crown. This is true because no interim relief to preserve the subject matter of litigation is possible under the declaratory action. Litigation is sometimes a slow process. It is very important, therefore, that the rule of law is not frustrated by illegal activity which destroys the subject of litigation before a final decision is made as to the rights of the parties. This is the purpose of interim relief. It appears to be relief that should not be denied to subjects in actions against the government.

In its response to our working paper the British Columbia Civil Liberties Association suggested that the arguments which the Commission made against legislation prohibiting injunctions against the Crown lead. to the conclusion that whatever immunity from injunctions the Crown may have at common law should be specifically abolished. The Commission appreciates the logic of this comment but is troubled by the notion of abolishing a common law rule, the scope and indeed the very existence of which is uncertain. To the extent that the common law immunity exists at all, it is relatively narrow one. While the specific inclusion in reform legislation of a provision prohibiting injunctions against the Crown would lead to obvious injustice, there is no evidence at this time that the retention of the common law immunity would have a similar effect. If the recommendations contained in this Report are implemented, it is not unlikely that the Courts, at some point, will have to deal with the scope and existence of the common law immunity. If this anticipated development of the common law proves to be unsatisfactory, the Commission may, at some future time, re-direct

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47. de Smith, *Judicial Review of Administrative Action*, 463 (1968).

48 *Reference by H.E. The Governor General*, P.L.D. [1955] F.C. 435 (Federal Court of Pakistan.)

its mind to this problem but it is not felt that a specific recommendation dealing with the common law immunity is warranted at this time.

The Commission recommends:

*Injunctions against the Crown should not be interdicted as they are in the* Uniform Model Act *and other Crown reform legislation.*

# CHAPTER IV MANDAMUS

## A. Introduction

Mandamus is a prerogative writ which lies to compel the performance of a public duty.[1] While it is said to be beyond question that a mandamus cannot be directed to the Crown or any servant of the Crown[2] yet the writ will lie against a Crown servant who is designated as an agent of the legislature.[3] Historically, mandamus evolved as the residuary writ of judicial review. Mansfield said mandamus "... ought to be used upon all occasions where the law has established no specific remedy, and where in justice and good government there ought to be one."[4] Thus, a *mandamus* is potentially an order of the most extensive remedial nature, although it is primarily used to compel administrative agencies and officers to perform ministerial duties imposed on them by statute.[5] Generally, mandamus is described as a "... speedy, inexpensive and efficacious remedy ..." which the courts should not avoid granting.[6]

Traditionally, when Crown immunity has been removed in other jurisdictions, no reference has been made to the writ of mandamus.[7] The United Kingdom Crown reform legislation in 1947 did not remove the immunity, but it did expressly preserve the remedy of mandamus as developed by the common law.[8] The relevant section

> This Act shall not operate to limit the discretion of the court to grant relief by way of mandamus in cases in which such relief might have been granted before the commencement of this Act, notwithstanding that by reason of the provisions of this Act some other and further remedy is available.

Presumably the section was intended to meet the problem that mandamus is an extraordinary remedy which should not be granted if there is any other adequate remedy.[9]

It is interesting to note that while mandamus was originally restricted in the U.S. (Federal Rules of Civil Procedure Rule 81), in 1962 the law was changed and

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1. *See*, de Smith, *Judicial Review of Administrative Action* 559 (2nd ed., 1968); P.W. Hogg, *Liability of the Crown* 12 (1972).

2. *Minister of Finance of British Columbia* v. *The King* [1935] S.C.R. 278 at p. 285 (S.C.C.) citing R. v. *Lords Commrs. of the Treasury* (1872) L.R. 7 Q.B. 387.

3. *The King ex rel. Lee* v. *Workmen's Compensation Board* [1942] 2 D.L.R. 665 (B.C.C.A.)

4. R. v. *Barker* (1762) 3 Burr. 1265, at p. 1267; 97 E.R. 823 at p. 824. This statement was endorsed by the British Columbia Court of Appeal in *McLeod* v. *Board of School Trustees of Salmon Arm* (1951) 4 W.W.R. 385; *see, also* de Smith, *supra* note 1.

5. 11 Halsbury (3rd ed.) 84.

6. *Supra* note 3 at p. 678.

7. *See Model Uniform Act* - Appendix.

8. 10 & 11 Geo. 6, c. 44, s. 40(5).

9. *Karavos* v. *Toronto and Gillies* [1948] 3 D.L.R. 294, at p. 297 (Ont. C.A.) *per* Laidlaw, J.A.

mandamus relief was specifically provided: "The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff."[10]

**B. Scope of Immunity**

Mandamus will issue against Crown servants if a duty has been imposed on the servant to act in the capacity of an agent to the legislature rather than an advisor to the Crown.[11] Thus, mandamus would issue against the Commissioner of Provincial Police to compel the return of a driver's licence which had been improperly suspended because, although the Commissioner was a Crown servant, the relevant legislation conferred an authority which he exercised "... merely as an agent of the legislature to do a particular act.[12] Therefore, by drawing a distinction in status between Crown servants and agents of the legislature the Crown's immunity from mandamus is mitigated. The difficulty is discovering what factors are relevant in making the distinction of status.

The cases on point are difficult to reconcile. For example, the Collector of Customs for the port of Vancouver was held immune from an order of mandamus because he acted on the authority of the Minister of Customs and, therefore, the court had no power to command the Crown.[13] Yet, the Minister of Finance of British Columbia has been held subject to mandamus.[14] Assuming there is a statutory duty to distinguish between the status of the Crown servant and an agent of the legislature appears largely an arbitrary decision. The courts have not formulated any standards or criteria to make the distinction. Fortunately, the trend in recent cases has been to increase the scope of mandamus, as O'Halloran, J.A. said in 1942: "The modern tendency is to enlarge the scope of mandamus ..."[15]

It is sometimes said that mandamus cannot be used to enforce payment of moneys from the revenues of the Crown. Thus, mandamus was disallowed by the British Columbia Court of Appeal in a suit against the Workmen's Compensation Board as administrator of old age pensions by a pensioner on the grounds that "It is unquestioned law that public funds cannot be reached by mandamus."[16] Yet, in a later case, the same court allowed mandamus to compel the Workmen's

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10. 76 Stat. 744 (1962); 28 U.S.C.A. 1361.

11. *The King ex rel. Dumont* v. *Commr. of Provincial Police* [1940] 4 D.L.R. 721 where the B.C. Court of Appeal said: it is beyond question that a mandamus cannot be directed to the Crown or any servant of the Crown simply acting in his capacity of a servant, but where a person is acting as a mere agent of the Legislature to do a particular act, as appears to have been the case here, a mandamus lies against him in a proper case. *Minister of Finance of British Columbia* v. *The King* [1935],3 D.L.R. 316 at pp. 321-323, S.C.R. 278." *Per* McQuarrie, J.A. at p. 722.

12. *Ibid.* at p. 723.

13. *In re Carey and Western Canada Liquor Co.* [1920] 3 W.W.R. 329.

14. *Minister of Finance of B.C.* v. *The King* [1935] S.C.R. 278.

15. *The King ex rel. Lee* v. *Workmen's Compensation Board.* [1942] 2 D.L.R. 665, at p. 678 (B.C.C.A.).

16. *Gartley* v. *Workmen's Compensation Board* (1933) 57 B.C.R. 217 at p. 218 *per* Murphy, J. relying on the often cited case of *The Queen* v. *Commrs. of Inland Revenue* (1884) 53 L.J.Q.B. 229.

Compensation Board to continue a pensioner's payments.[17] The immunity may be only a consequence of the distinction between the two roles Crown servants are said to play. As Professor Hogg noted: "Not surprisingly, the courts have tended to hold that treasury officials, when disbursing public funds, are acting as Crown servants."[18]

### C. Justification for Immunity

The reason mandamus does not lie against the Crown is seldom considered in judgments by the Courts. The apparent justification for the immunity is in the notion that because this is a "prerogative" writ, it would be incongruous to ask the Crown "to command itself."[19] The same justification was urged for Crown immunity in tort.[20] Another explanation for the immunity has been that it would be wrong to expose the Crown to the risk of committal for contempt.[21] It is suggested that if there are failures by the executive to perform their duties, then the remedy lies with Parliament.[22] All of these reasons are unconvincing. The historical origins of prerogative writs and arguments based on sovereignty in the abstract have little relevance or cogency in modern times.

### D. The Need for Reform

Crown immunity from mandamus has been often criticized. Professor Hogg urged that because of the steady expansion of the functions of the central government, the immunity of the Crown from mandamus is a grave defect in the remedial law."[23] The distinction between Crown servants who are immune and agents of the legislature who are not is anomalous and unconvincing. As the United Kingdom Law Commission concluded:[24]

> It is difficult to see why the law should draw this distinction; it seems unreasonable that the availability of a remedy should depend on whether the duty is imposed upon the Crown or a named Minister or other Crown servant."

The defect of the present immunity is that it is unprincipled and creates uncertainty in the law. The immunity from mandamus may deny a remedy where it is most needed: to require administrative performance of a statutory duty.

The Commission recommends:

*The Crown and its servants should not be immune from proceedings by way of mandamus.*

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17. *Supra* note 5, McDonald C.J.B.C. dissenting and relying on *Gartley ibid.*

18. P.W. Hogg, *Liability of the Crown* (1972) 15.

19. *Re. Massey Manufacturing Co.* (1886) 13 O.A.R. 446.

20. *C.B.C. v. A.-G. for Ontario* [1959] S.C.R. 188, at p. 204 *per* Locke J.; *see* 11 Halsbury (3rd ed.) 99.

21. *R. v. Powell* (1841) 1 Q.B. 352 at p. 361; 113 E.R. 1166 at p. 1170.

22. B.L. Strayer, *Injunctions Against Crown Officers* (1964) 42 Can. Bar Rev. 1 at p. 7.

23. P.W. Hogg, *Liability of the Crown* (1972) 13.

24. The Law Commission, *Remedies in Administrative Law* 27 (published Working Paper No. 40.)

# CHAPTER V OTHER CROWN PRIVILEGES RELATING TO PROCEDURE

## A. Discovery

In litigation a very important part of the procedure is the discovery of documents and examination for discovery. These threshold procedures often determine the success of a law suit. Yet under the common law no discovery is available against the Crown.[1] This immunity has been described as one of the Crown's "garland of prerogatives."[2] It is very hard to justify such a complimentary description of such an obviously inequitable privilege. This Crown prerogative is typically very one-sided. The Crown may take advantage of discovery and interrogatories when it sues a subject but when a subject brings an action the Crown is immune.[3]

It has then the benefit without the concomitant responsibility.

It appears that in British Columbia the common law prerogative as to discovery applies Although it could be argued that section 10 of the *Crown Procedure Act*[4] allows discovery when it provides that the same rules as to "evidence" and the "means of taking evidence" in actions between subject and subject apply to the Crown.

There is little, if anything, that can be said in favour of the common law blanket privilege. It clearly works an injustice, particularly because of the importance in Crown proceedings of identifying the actual defendant so that a personal action may be brought against him. The prerogative should be abolished. The law was changed by the *English Act*[5] and the *Uniform Model Act*.[6] The English section provides

> 28. Discovery
>
> (1) Subject to and in accordance with rules of court and county court rules:
>
> (a) in any civil proceedings in the High Court or a county court to which the Crown is a party, the Crown may be required by the court to make discovery of documents and produce documents for inspection; and
>
> (b) in any such proceedings as aforesaid, the Crown may be required by the court to answer interrogatories:
>
> Provided that this section shall be without prejudice to any rule of law

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1. Glanville Williams, *Crown Proceedings Act. 1947*, (1948) 128.

2. P.W. Hogg, *Liability of the Crown, (1971)* 28.

3. *Attorney-General* v. *Newcastle-upon-Tyne Corp.* [1897] 2 Q.B. 384.

4. R.S.B.C. 1960, c. 89.

5. S. 28(1).

6. *See* Appendix, s. 11.

> which authorises or requires the withholding of any document or the refusal to answer any question on the ground that the disclosure of the document or the answering of the question would be injurious to the public interest.
>
> Any order of the court made under the powers conferred by paragraph (b) of this subsection shall direct by what officer of the Crown the interrogatories are to be answered.

The effect of this section is to make discovery available against the Crown in the same manner as against any other defendant, with the exception, as noted, of "public interest. This is dealt with below.

It is interesting that the *Ontario Act* leaves the decision of who may be examined on discovery to the Attorney General. It provides that "the person who shall attend to be examined for discovery shall be an official designated by the ... Deputy Attorney General."[7] This provision has been criticized because, "In many cases a plaintiff may be gravely handicapped by the decision of the Deputy Attorney General if he names for an examination an official other than the one whose negligence gives rise to the cause of action."[8] The discretion may then have the effect of frustrating the basic purpose of the section which is to remove any procedural handicaps from an individual suing the Crown.

The *Uniform Model Act* follows the English law except that it provides that the discovery shall be pursuant to the same rules of court as apply to corporations.[9] In the working paper the Commission proposed that this approach should be adopted. In its response to our working paper, the British Columbia Civil Liberties Association offered the following comments:

> A corporate structure has a clearly definable hierarchy within which it is easy for counsel to pinpoint the appropriate party to be examined. For that reason the requirement that any officer may be examined - but only once-works no real hardship. The structure of government, at least for the purpose of any court action against one of its main branches, is far less clearly defined. It is conceivable that a plaintiff might find himself at a complete loss when it came time to select the best government agent or other party to examine for discovery.

The present practice in British Columbia with respect to discovery against corporations does not, however, restrict examination for discovery to only one officer or servant. If it be found that the officer first examined was not in a position to give the answers, another officer or officers may be examined, although an order must be obtained in each case.[10] The Commission, therefore, does not feel that the criticism implied in the foregoing comments is apt. Further, to the extent that there is a problem, it is a problem relating to the discovery procedure itself, which is best dealt with in the context of the Commission's project on the Administration of Justice.

The Commission recommends:

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7. *The Proceedings Against the Crown Act*, R.S.O. 1970, c. 365, s. 12(b).

8. *Royal Commission Inquiry Into Civil Rights* (McRuer Report) vol. 5, no. 3 at p. 2214.

9. *See* Appendix Cs-11.

10. Supreme Court Rules Order 31A - Rule 3.

*The section of the* Uniform Model Act *dealing with discovery be adopted.*

## B. Crown Privilege

The subject of secrecy in government is a very difficult and controversial area of the law. The doctrine of "Crown privilege" provides that evidence may be withheld by the Crown if its admission is against the public interest. The privilege applies whether the Crown is a party, or not, to the case or action. The common law has attempted to reconcile two conflicting policies or interests. As Lord Reid explained:

> There is the public interest that harm shall not be done to the nation or the public service by disclosure of certain documents, and there is the public interest that the administration of justice shall not be frustrated by the withholding of documents which must be produced if justice is to be done.[11]

It is unnecessary to examine in detail the common law rules of Crown privilege. There are a number of important cases. Some have not satisfactorily balanced the competing interests as stated above.[12]

> No one suggests that there is not a legitimate interest in maintaining confidence about such things as international relations, national defence and security.[13]

There is in the recent legislation establishing the Federal Court a section defining Crown privilege. It provides:

> 41. (1) Subject to the provisions of any other Act and to subsection (2), when a Minister of the Crown certifies to any court by affidavit that a document belongs to a class or contains information which on grounds of a public interest specified in the affidavit should be withheld from production and discovery, the court may examine the document and order its production and discovery to the parties, subject to such restrictions or conditions as it deems appropriate, if it concludes in the circumstances of the case that the public interest in the proper administration of justice outweighs in importance the public interest specified in the affidavit.
>
> (2) When a Minister of the Crown certifies to any court by affidavit that the production or discovery of a document or its contents would be injurious to international relations, national defence or security, or to federal-provincial relations, or that it would disclose a confidence of the Queen's Privy Council for Canada, discovery and production shall be refused without any examination of the document by the court.

Section 41(2) which denies the right of judicial review has been vigorously criticized.[14] The intent of the federal Act is clearly in conflict with the views

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11. *Conway* v. *Rimmer and Another* [1967] 1 W.L.R. 1031 (C.A.); [1968] A.C. 910 (H.L.).

12. *Miles* v. *Miles* (1960) 24 D.L.R. (2d) 228 (Ont. H.C.). *See* comment in 19 U. Tor. Fac. L. Rev. 181; Richard Thompson, comment, 46 Can. Bar Rev. 482. The subject of executive secrecy was considered in *Royal Commission Inquiry Into Civil Rights* (McRuer Report) vol. 5, no. 3 at pp. 2197-2216.

13. Thompson, *supra*, note 2.

14. Mullan, *Crown Privilege Defined - Section 41 of the Federal Court Act*, printed in *Judicial Review of Statutory Powers, Cases and Materials by Christie, Carter and Mullan* (1971) at pp. 689-695.

expressed by the House of Lords in the leading case of *Conway* v. *Rimmer and Another*.[15] That case overruled some dicta in the earlier decision of *Duncan* v. *Cammell Laird Co. Ltd.*[16] which had held that the Crown's objection to the production of evidence was conclusive and must be accepted by the courts.[17] In Conway the Lord reversed this position holding that it is necessary for the judiciary to regain control over this area of the law.[18] Lord Upjohn explained:[19]

> There is only one other matter to which I want to refer; it is the question whether there is any objection to the private inspection by the judge himself of a document for which privilege is claimed. My lords, in a number of the leading cases, such as *Beatson* v. *Skene* (180) and *Duncan* v. *Cammell Laird Co. Ltd.* (181) itself, it has been held that there is some objection to the judge looking at the document in private, as being contrary to the broad rules of justice as we understand it, where all the documents must be open to both sides. I do not understand this objection. There is a lis between A and B; the Crown may be A or B or, as in this case, a third party, for both A and B in this case want to see the documents; but when the judge demands to see the documents for which privilege is claimed he is not considering that lis but quite a different lis, that is whether the public interest in withholding the document outweighs the public interest that all relevant documents not otherwise privileged should be disclosed in litigation. The judge's duty is to decide that lis; if he decides it in favour of disclosure, *cadit quaestio*; if he decides it in favour of non-disclosure he banishes its contents from his mind for the purposes of the main lis. There is nothing unusual about this; judges and juries have to do it every day. So it seems to me to be quite clear that there is no erosion on our normal ideas of justice inter partes if a judge, being not satisfied about the Crown's claim to privilege, himself privately inspects the allegedly privileged documents. But before reaching that stage he may, of course, require further and better affidavits by the Minister, and may direct the Minister to attend for cross-examination by any party to the litigation before he inspects the document.

The Commission agrees with the views expressed above. The right of the Crown to claim privilege unchallenged by the courts can only be justified if there is no faith in the integrity and wisdom of the Canadian courts. The executive have a considerable degree of self-interest in the question and therefore for the protection of the public and the government the issue should be reviewable in private by a judge.

Consistent with the basic approach to the subject of Crown liability it is clear that the same rules should apply to actions against the Crown as apply to individuals.[20] This approach is reflected in Crown proceedings legislation in Ontario which makes the right of discovery subject to the exception that:

> ... the Crown may refuse to produce a document or to answer a question on the ground that the production or answer would be injurious to the public

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15. [1968] A.C. 910.

16. [1942] A.C. 624 (H.L.).

17. *Ibid.*

18. *Supra*, note 5.

19. *Ibid* at p. 995.

20. *Supra*, note 8, Part A.

interest.[21]

This provision has been criticized because it goes further than the common law rules of Crown privilege.[22] Under the common law it is contended the evidence is excluded only if it is injurious to national security or some other national interest.[23] However, it is difficult to support this criticism because of the uncertainty of the common law. "There are no hard-and-fast rules" concludes Professor Hogg, "and no authoritative precedents as to what kinds of evidence are inadmissible by reason of Crown privilege."[24] There must be some exception made or the provision for discovery would have the-effect of repealing completely Crown privilege.

The Commission recommends:

1. *When Crown privilege is claimed with respect to any document, the court may order production of the document to the court, examine the document and, if it finds that public interest in the administration of justice should prevail over the public interest in withholding the document, order production and discovery of the document to the parties subject to any conditions or restrictions it deems appropriate.*

2. *The common law of Crown privilege apply in the same manner to actions to which the Crown is a party as to actions between subject and subject.*

## C. Costs

Under the common law, the Crown did not receive or pay costs.[25] This common law position has been codified in British Columbia in the *Crown Costs Act*.[26] This privilege has, however, been modified by statute in British Columbia and in most other jurisdictions.[27] Costs are now available against the Crown in a proceeding by way of petition of right in the same manner as in civil actions between subject and subject. The availability of costs, however, is restricted to actions under a petition of right.[28] In an action which is brought without a petition of right, such as a claim for a declaration, or an action brought by the Crown against an individual, no costs are payable.

It seems obviously unfair that an individual who succeeds in an action brought by the Crown should be deprived of his costs. It seems equally unfair that a person who seeks and obtains a declaration against the Crown should also receive no costs. Litigation of the latter sort can be prohibitively expensive. This suggests that costs should be available in actions involving the Crown to the same

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21. *Supra*, note 7, Part A.

22. McRuer Report, *supra*, note 8, Part A.

23. *Ibid.*

24. *Supra*, note 2, part A, at p. 61.

25. *Johnson* v. *E.* [1904] A.C. 817. *See* Hogg, *supra*, note 2, part A, pp. 29-30.

26. R.S.B.C. 1960, c. 87.

27. Costs are available in proceedings by petition of right: *Crown Procedure Act*, R.S.B.C. 1960, c.89, ss. 14-17. But they are restricted to this procedure. *See Crown Costs Act*, R.S.B.C. 1960, c. 87.

28. *Crown Costs Act*, R.S.B.C. 1960, c. 87. Correspondence received from Department of the Attorney-General dated May 31, 1972.

extent that they are available in actions between subject and subject.

It can be argued if costs were to lie against the potential plaintiff who sues the Crown, it might discourage the bringing of meritorious actions such as those which may be commenced to define welfare rights. The argument is that the threat of being penalized in costs might deter those who would otherwise permit themselves to become nominal plaintiffs in such test cases.

In the view of the Commission the threat of costs is a useful deterrent to frivolous litigation. Judges have a discretion with respect to the awarding of costs. This discretion can always be exercised in favour of the otherwise unsuccessful plaintiff in a test case when a judge feels it is justified. Having regard to this mitigating factor, the Commission does not feel that a departure from the general rules relating to costs is warranted.

The Commission recommends:

1. *The* Crown Costs Act *be repealed.*

2. *Legislation be enacted to provide that costs may be awarded in favour of, or against the Crown, in any civil action to which the Crown is a party to the same extent as in actions between subject and subject.*

The question of costs of accused on acquittal in relation to provincial offences is a different matter and has been fully explored in the research paper prepared for the Commission by Professor Peter Burns. The Commission expects to be reporting on this matter in due course.

## D. Jury Trials

It is almost universal in legislation reforming Crown procedure that a section states there shall be no jury trials in suits against the Crown.[29] It is true that trial by jury in civil cases is a matter of some controversy.[30] It is perhaps a procedure whose popularity is declining. However, the merit or otherwise of the jury trial does not justify its exclusion in Crown proceedings. What reason supports treating trials against the Crown in a different manner? One can only surmise that the exclusion arises from the fear that juries would be too generous when the defendant is the government because of its ability to pay. However, the same comment could be made about the other defendants such as private corporations who have vast financial resources.

The Commission recommends:

*The jury trial should be available in actions to which the Crown is a party to the same extent as in actions between subject and subject.*

## E. Estoppel

It is often stated in Canadian cases that the theory of estoppel cannot be

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29 *See* Appendix, s. 14; Ontario *Proceedings Against the Crown Act*, R.S.O. 1970, c. 365, s. 15.

30 For an interesting and eloquent defence of the civil jury *see* Edson L. Haines, *The Future of the Civil Jury*, Chapter 2, p. 10 in *Studies in Canadian Tort Law* by Linden (1968)

invoked against the Crown."[31] In *St. Ann's Island Shooting and Fishing Club Ltd.* v. *The King*[32] the Supreme Court of Canada held that estoppel could not be invoked against the Crown.[33] A Crown agent then must have actual authority to bind the Crown in contract. The doctrine of ostensible authority does not apply to the Crown.

The special advantage afforded the Crown with regard to estoppel has not been justified on any other basis than as the Supreme Court of Canada explained, there can be no estoppel in the face of an express provision of a statute ..."[34] Professor S.A. de Smith wrote that the cases show that a "... public authority cannot extend its powers by creating an estoppel."[35] If this rationale provides the limit of the privilege, then in fact the law is the same for both the government and the citizen. The principle is set forth in *Phipson on Evidence*[36] as follows:

> Estoppels of all kinds, however, are subject to one general rule: they cannot override the law of the land. Thus, where a particular formality is required by statute, no estoppel will cure the defect ...

But the inability of plaintiffs to raise estoppel against the Crown may be broader than the above explanation in *Phipson*. For example, estoppel does not "override the law of the land" when it is only raised against a servant of a department to prevent him from denying that he had the authority to bind the department. Do the ordinary rules of estoppel apply in such a case? The English authorities seem to be divided on this point. Professor Mitchell contends:[37]

> Where however the representation of capacity relates to that of one servant of a department or a public authority to bind the department or authority, the ordinary rules of estoppel are, it seems, applicable.

Although the exact issue does not seem to have been raised in the Canadian cases, in *Gamble* v. *The Queen*[38] the rule was viewed as a *privilege* of the Crown in contrast to the ordinary rules between subject and subject.[39] Mr. Justice Kearney said:

> Counsel for the suppliant, however, urged that an exception should be made to the applicability of estoppel against the Crown where the equivalent of an insurance policy is involved, as in this case. Jurisprudence cited in support of this submission referred to cases between subject and subject and, in my opinion, is inapplicable in a suit against the Crown.

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31. *Gamble* v. *The Queen* [1960] Ex.C.R. 138 at p. 145. *See A.-G. for Ceylon* v. *Silva* [1953] A.C. 461; *Millet* v. *The Queen* [1954] Ex.C.R. 562.

32. [1950] S.C.R. 211 at p. 220.

33. *See also Millet* v. *The Queen* [19591 Ex.C.R. 562; *Gamble* v. *The Queen* [1960] Ex.C.R. 138; *Maritime Elect. Co.* v. *General Dairies Ltd.* [1937] A.C. 610; *Bank of Montreal* v. *The King* (1907) 38 S.C.R. 258.

34. *Supra* note 2.

35. S.A. de Smith, *Judicial Review of Administrative Action* 86 (2nd ed. 1968).

36. 11th ed. (1970) at p. 924.

37. J.D.B. Mitchell, *Contracts of Public Authorities: A Comparative Study* at p. 75 (1954).

38. *Supra* note 1.

39. *Ibid.* at p. 145.

While it is obviously desirable that agency by estoppel should not be used as a device to protect illegal acts of Crown agents, the broader rule that no estoppels may be raised against Crown agents is unnecessary and may cause a hardship to government contractors. In British Columbia it is usual to provide by statute that government contracts are only binding if signed by the Minister or someone authorized to act in his behalf. For example, contracts with the Department of Highways[40] and the Department of Public Works[41] have this restriction. The section of the *Department of Highways Act* provides:

> 40. The Minister may enter into any contract with any person that may be necessary or advisable in carrying out the provisions of this Act, but no deed, contract, document, or writing shall be deemed to be binding on or to be the act of the Minister unless signed by him, and sealed with the seal of his Department; except that where it is inconvenient for the Minister to sign a deed, contract, document, or writing, it may be signed by such person as the Minister may, by writing, authorize to act in that behalf.

The use of the word "deemed" in the section may be interpreted as precluding estoppels for "any contract." The provision may also have the effect of precluding even the limited role of "ostensible authority" for representations of capacity to bind the department as explained above, because now these representations would raise the doctrine of *ultra vires*.[42]

The Commission feels that a blanket Crown immunity from estoppel is unjustified and, therefore, the law should be reformed to ensure that estoppel is available against the Crown when it would not have the effect of extending executive powers beyond statutory authority.

The Commission recommends:

*Legislation should provide that estoppel may be raised against the Crown to the same extent as in actions between subject and subject.*

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40. R.S.B.C. 1960, c. 103, s. 40.

41. R.S.B.C. 1960, c. 109, s. 40.

42. Mitchell, *supra* note 7 at p. 75.

# CHAPTER VI CROWN IMMUNITY IN TORT

In British Columbia the Crown is not liable in tort for the damage it does. This is a substantive immunity. It means that unlike every other individual or corporation in the Province the Crown and its servants and agents cannot be sued for compensation when loss is occasioned by the negligence of the Crown. For example, if an employee of the Department of Highways, while driving a government vehicle, over and injures a citizen, no right of recovery from the Government exists. By way of comparison, if the same person worked for a private employer and negligently caused injury to another person, the injured party may recover compensation from the other person's employer. Because of the immunity the individual is personally liable, but there can be no recourse against the Crown or government.

## A. Historical Background

Immunity of the Crown in torts is derived from the common law, meaning that it originated in the courts, rather than in the Legislature. There is then no legislation in British Columbia creating this immunity. Although the doctrine of Crown immunity for torts is a product of the courts, it is very unlikely that the courts will change the common law to be more responsive to modern conditions of government.[1] The immunity of the Crown in tort is firmly rooted in precedent.[2] In one of the very early decisions of the Supreme Court of Canada Chief Justice Ritchie explained that the rule of Crown immunity is based on the prerogative and "upon principles of public policy." The learned judge said the doctrine of immunity is "'as ancient as the law itself.'"[3] However, this latter assumption may be erroneous. It is said the doctrine originated in early English common law upon a mediaeval English theory that "the King can do no wrong."[4] This maxim which is an expression of the divine right of kings was carried even further by Blackstone, who wrote that the law "ascribes to the king, in his political capacity, absolute perfection" and he "is not only incapable of doing wrong, but even of thinking wrong."[5]

Some writers have, however, suggested that the famous maxim as an account for the Crown's immunity rests on an insecure historical foundation.[6] Ehrlich writes that the maxim "the King can do no wrong" merely meant that the King was not privileged to do wrong.[7] If his acts were against the law, they were *injuries*

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1. *Dubois* v. *The King* [1934] Ex.C.R. 195 at 207.

2. *Tobin* v. *The Queen* (1864) 16 C.B. (N.S.) 310 143 E.R. 1148 (Exch.).

3. *The Queen* v. *McLeod* (1883) 8 S.C.R. 1 at p. 26.

4. *Holdsworths History of English Law* 458 (5th ed., 1942); *Halifax City Ry.* v. *R.* (1877) 2 Ex.C.R. 433.

5. *Russell on Crime* 103 (11th ed. 1958).

6. Blachley & Oatman, *Approaches to Governmental Liability in Tort: A Comparative Survey* (1942) 9 Law & Contemp. Prob. 181 at p. 182; H. Street, *Governmental Liability* 2 f.n. 2 (1953) citing Ehrlich *Proceedings Against the Crown* (1216-1277).

7. Ehrlich, *Proceedings Against the Crown* (1921).

(wrongs).[8] However, the misunderstanding may not have been unintentional. The legal fiction created as the justification for Crown immunity may have been a deliberate choice of policy. As one writer observed, "It would have taken a fool to nail a writ to the door of James I."[9]

The confused and illogical historical explanation of the rule that the Crown is immune from suit in torts has caused one Canadian writer to characterize the rule as a "... blunder against legal scholarship."[10] Because of the doubt cast on its historical authenticity, Mr. Justice Locke of the Supreme Court of Canada repudiated the maxim "the king can do no wrong" as the proper basis for Crown immunity. His lordship wrote, "I do not think that it is any longer right to say that the Queen can do no wrong, though in earlier times the immunity was so stated."[11] Mr. Justice Locke asserted that the doctrine of Crown immunity "really rests upon the fact that no British tribunal has jurisdiction under which the sovereign can be tried."[12] This justification for the immunity assumes like Blackstone that "All jurisdiction implies superiority of power: authority to try would be vain and idle, without an authority to redress; and the sentence of a court would be contemptible, unless the co had power to command the *execution* of it: but who, says Finch, command the King?"[13] The justification of government immunity from suit because of some metaphysical notion of sovereignty has been advocated as well by the famous American Judge Oliver Wendell Holmes who said:[14]

> A sovereign is exempt from suit not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal light as against the authority that makes the law on which the right depends.

Yet if sovereignty is the basis of tort immunity why then is the Crown liable for breaches of contract and restitution of the subjects' property? It would seem that any attempt to justify the notion on theoretical grounds is unrealistic. Perhaps the only answer is the conclusion that the rule was "designed by policy-minded judges to meet what they conceived to be nineteenth century conditions."[15]

The importance of appreciating the origins of the doctrine is that it lends support to reform of the law to reflect the policy of our own era where Crown immunity is generally described as an anachronism and an "... affront to

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8. Borchard, *Government Liability in Tort* 34 Yale L.J. 2 n. 2 (1924).

9. Binnie, *Attitudes Toward State Liability in Tort: A Comparative Study* 22 U.Tor. Fac. L.R. 88 (1964). Blachley & Oatman, *supra* note 6, write: "As late as the thirteenth century it was recognized that the King could not act illegally. At the same time, special prerogatives of the King were developing; and in many instances the ground of public utility was made the basis of the King's claim that he was bound by the law of God to do right."

10. Moffatt Hancock, comment, 13 Can. Bar Rev. 602 at p. 604 (1935).

11. *C.B.C.* v. *A.-G. for Ontario* [1959] S.C.R. 188 at p. 204.

12. Russell, *supra* note 5 at 103.

13. Blackstone, *Commentaries* 242 (9th ed. 1783) cited in Blachley & Oatman, *supra* note 6.

14. *Kawananakoa* v. *Polybank* 205 U.S. 349 at p. 353, 27 S.Ct. 526 at p. 527 (1907).

15. Binnie, *supra* note 9 at p. 90.

enlightened public opinion ..."[16] The present climate of opinion has rightly brought government immunity into disfavour.

## B. The Need for Reform

The critics of government immunity in tort are very numerous. It is difficult to find any advocates for the retention of the doctrine. Justice Holmes expressed the sentiment of most writers towards Crown immunity in tort. He said:[17]

> It is revolting to have no better reason for a rule of law than that it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.

The longevity of this common law doctrine seems more the result of inertia than any merit in the law. Nearly every commentator who has considered the subject vigorously asserts that the doctrine of tort immunity is unjust and should be reformed.[18]

### 1. Reform Elsewhere

There is a wealth of experience in the area of government responsibility. Before making any change in the law in British Columbia it would be foolish indeed not to consider comparative systems of public responsibility. Roscoe Pound once said, "From the beginnings of a legal order in primitive communities, as communities have had peaceful contacts one with another, men have exercised reason in comparing their experience and the mode of meeting the problems raised by experience with what their neighbours have done with like problems."[19] This comment seems particularly pertinent to a consideration of any law reform regarding Crown immunity in British Columbia because the subject has been so thoroughly canvassed elsewhere.

The trend towards government responsibility in tort in other jurisdictions is unmistakably clear. There is an almost overwhelming movement towards a change of the Anglo-American law under which in the past the individual citizen has been left to bear almost all the risks of an ineffective and negligent administration by the government.[20] The trend is clearly towards government liability in tort.

British Columbia is noticeably out of step with the march of the law in other jurisdictions. The following chart proves this by illustrating the extent to which the principle of government responsibility in tort has gained universal acceptance. The chart shows that governmental responsibility has been widely adopted in most of Canada and the Western Hemisphere but not in British Columbia. This fact gives added force to a consideration of reform of the law in British Columbia.

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16. Hancock, *supra* note 10.

17. Holmes, *The Path of the Law* 10 Harv. L. Rev. 457 at p. 469 (1897).

18. Davis, *Tort Liability of Governmental Units* 40 Minn. Rev. 751 at p. 752 (1956). Borchard, *supra* note 8, Part A; Blachley & Oatman, *supra* note 9, Part A.

19. Pound, *The Passing of Mainstreetism* [1964] U. Ill. L. Forum 1023.

20. Borchard, *supra* note 8, Part A.

**SUMMARY OF CROWN IMMUNITY IN OTHER JURISDICTIONS**

| | Fiat Necessary to Sue Crown? | Can Be Sued In Tort? |
|---|---|---|
| Foreign country - | | |
| England | No | Yes |
| United States | No | Yes |
| New Zealand | No | Yes |
| South Africa | No | Yes |
| Australia | No | Yes |
| Victoria | No | Yes |
| Queensland | No | Yes |
| South Australia | | NoYes |
| New South Wales | No | Yes |
| Western Australia | No | Yes |
| Tasmania | | NoYes |
| Germany | | NoYes |
| France | No | Yes |
| Switzerland | No | Yes |
| Austria | No | Yes |
| Canada - | | |
| Canada (Federal) | No | Yes |
| British Columbia | Yes | |
| No | | |
| Alberta | No | |
| Yes | | |
| Saskatchewan | No | Yes |
| Manitoba | No | Yes |
| Ontario | No | Yes |
| Quebec | No | Yes |
| New Brunswick | No | Yes |
| Nova Scotia | No | Yes |
| Prince Edward Island | Yes | No |
| Newfoundland | Yes | No |

The above chart shows that in ten countries, six states, and seven Canadian provinces the Crown or government is liable in tort. In most of these jurisdictions the common law was reformed more than twenty years ago. British Columbia stands alone, except for Prince Edward Island and Newfoundland, against this tide of reform. The chart also shows the same contrast with regard to the ancient petition of right.

2. The Need for Immunity

(a) *Pragmatic Arguments*

Are there any arguments in favour of Crown immunity in tort? Those who have supported government immunity have usually done so on the practical ground that it is necessary for an efficient government. It has been pointed out that government agencies should not be treated like private enterprises because the government functions in a very different way from private business.

> Many of the activities carried on by government are of a nature so inherently dangerous that no private industry would wish to undertake the risk of administering them. Such activities, in addition to the street and highway system, include such services as law enforcement, fire fighting, care of mental patients, the keeping of jails and juvenile detention facilities and the control and treatment of communicable diseases. These activities are so important to the health, safety and welfare of the public that they could not possibly be abandoned, although the imposition of broad tort liability upon the agencies carrying on these activities might become extremely burdensome to the taxpayers.
>
> Practically all of the functions carried on by government are required by law and cannot be abandoned in the face of the high cost of operation, whereas private business has no legal duty to continue any of the services which it provides, and will of course eliminate any activity when it finds that its liability for continuing it is too great.
>
> There are no activities carried on by private business which have the impact upon members of the public that governmental activities have. Private industry does not make laws or administrative regulations or conduct courts. It does not issue or revoke licenses, franchises or permits or regulate zoning. Nearly all of such legislative, administrative or judicial activity harms someone, yet it would be totally impractical to hold government liable for such damage. It would indeed be strange to contemplate a damage action against government based upon some unwise legislative or judicial decision, even though such a decision might have produced substantial harm to many people.[21]

It cannot be denied that there is a significant difference between some government functions and the kind of activities carried on in the private sector although the government is increasingly becoming involved in activities that were formerly performed by private business.[22] The government is a unique enterprise, but saying as much does not prove the necessity of tort immunity. Each of the above arguments for special treatment is at bottom an argument based on the potentially extravagant cost of tort liability for the government. The purpose of emphasizing the difference of the government's role in society is to underscore the claim that the costs of responsibility would be too great a burden on the government.

(b) *Philosophical Justification*

The only argument that is not based on cost is the suggestion that Crown immunity is justified because wrongs committed by a government are a political matter and should be redressed by Parliament and not the courts. The argument is based on the notion that the executive is responsible only to the Legislature.

This argument is clearly untenable and impractical. It is unrealistic to assume that torts committed by Crown servants, such as the negligent operation of a ferry or truck by a servant of the Highways Department, can be redressed through a political remedy. There is no political issue here and in any event even if there were there is no individual compensation provided by voting the government out of office. Liability for torts is a question of law not politics. The impartial decision of a court is the time honoured method of deciding questions of law. The decision as to liability is one in which the Crown has considerable self interest.

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21. Kennedy & Lysich, *Some Problems of a Sovereign Without Immunity* 36 S. Cal. L. Rev. 161 at pp.177-178 (1963); Borchard, *supra* note 4.

22. *See* comments herein on the scope of Crown immunity.

The Commission believes therefore that the Crown should not judge its own case. This opinion is supported by the widespread reform of the law elsewhere making the government equal with the people.

### 3. The Cost of Reform

Because most of the Canadian provinces have enacted laws making the government liable in tort it is possible to make an assessment of the cost of such reform. For this purpose a survey was conducted to evaluate the experience of the seven Canadian provinces which have eliminated the tort immunity of the Crown.[23] Each government was questioned about the number of suits brought against the Crown, the cost per year of judgments rendered against the Crown in tort and whether liability insurance had been acquired to protect the Crown. They were also asked generally whether the reform of Crown immunity created any problems. Responses to the survey were obtained from all of the respective governments, although some governments did not have data available on each of the questions. The responses to the survey were very encouraging for reform. While most of the provinces had no exact statistics, the cost of Crown reform laws was generally described as small. The average annual cost appeared to be in the range of $50,000 per year. Even if the cost was twice this sum it is a small amount to pay for a responsibility that would otherwise be left on the shoulders of the individual. The number of law suits brought against the Crown each year was relatively small. No province had experienced any problem with a rash of frivolous or vexatious suits against the government.

In light of the survey it is unconvincing to argue that government responsibility for torts would create a burden on the public treasury. Most of the provinces have acquired liability insurance for motor vehicles and are self-insurers for other kinds of claims, although Nova Scotia has liability insurance on some of its real estate, elevators in public buildings and malpractice coverage for provincially operated hospitals. Quebec Crown has obtained insurance protection for all its employees up to $500,000 liability for a premium of $47,000 per year. It was the consensus of those governments purveyed that no other problems were created by government liability in tort.

### 4. Indirect Liability of the Crown

It is sometimes contended that there is no real injustice caused by Crown immunity because the government has in fact accepted liability through indirect methods. It is apparent that the arguments based on cost and those based on indirect methods of settling claims are mutually contradictory. If the government already pays for any deserving aims then removing Crown immunity cannot create any appreciable financial expense. It will only have the effect of making the law correspond with the practice of the government, which seems very sensible.

In fact there is evidence that the practice of the Crown in British Columbia is to pay many claims that would be valid if made against a private individual without regard to the Crown's immunity.[24] In the case of tort claims, the Crown, of

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23. The writer wishes to acknowledge the very able assistance of John R. Haig and G.R. Schmitt of the B.C. Civil Liberties Subsection, Canadian Bar Association in conducting this survey.

24. Letter to research assistant from G.R. Schmitt, of Guild, Yule & Co., dated January 11, 1972. Also correspondence received from the Department of the Attorney-General. In a memorandum attached to the letter, the Insurance and Claims Officer for the Department stated: "To my personal knowledge, there have not, in recent years, been any instances where the Crown has failed to stand

course, cannot be sued directly and the action has to be brought against the civil servant involved. In such cases the writs against the civil servants are delivered to the Department of the Attorney-General for a statement of defence. If the Attorney-General determines that the employees involved were acting in the course of their duties with the Crown rather than on a frolic of their own then the defence is conducted by the Department of the Attorney-General and the claims are settled or paid or defended as the case may be. When settlement is made or judgment obtained against a civil servant, then a requisition is submitted to the Cabinet for an Order in Council to allocate the money to pay the settlement or judgment. There is an average of 375 such claims paid each year.[25] Most of these claims involve the operation of motor vehicles but there are other causes such as construction, maintenance, and damage caused by survey crews. The effect of the government's practice of making *ex gratia* payments is that no serious argument can be made that the costs of Crown liability would be too onerous if the law were changed. The cost is already being incurred.

However, the Crown's practice of standing behind its servants as the only method of recourse against the government does not remove all injustices. The use of the indirect method of compensation for torts of government servants gives a government an advantage that is sometimes abused. It makes the citizen's right to compensation for wrongs done to him by a government a matter of grace. Such a position is repugnant to the values of our society. Some lawyers have indicated that their experience has been unsatisfactory because there has been uncertainty whether the government would indeed stand behind the defendant or not. The uncertainty may have caused plaintiffs to settle their claims without hard negotiations.

It is also impossible for a government to stand behind a defendant when the tort is committed directly by the government. This was illustrated in the United Kingdom by the decisions in *Adams* v. *Naylor*[26] and *Royster* v. *Cavey*[27] where the circumstances gave rise to non-vicarious liability. The result was that since the Crown could not be the real defendant in these actions there was no one who could be held liable to the plaintiffs. In fact it was because of the serious defect demonstrated by the Crown's practice of standing behind its servants that the law of Crown immunity was finally reformed in the United Kingdom.[28] For the same reason then there is a need for reform of the law in British Columbia.

There is another serious injustice created by the existing law in British Columbia. The Crown's practice of standing behind its servants is effective only when the identity of the Crown servant who in fact committed the wrong is known. Sometimes it is clear that damage resulted from the actions of a Crown servant, but the plaintiff is unable to identify the particular servant involved.[29] For example, a person may be injured by the negligent construction of a bridge or operation of a ferry without being able to identify just which Crown servant was

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behind servants faced with tort claims, *arising from their normal course of duties with the Crown*."

25. *Supra* note 8, memorandum from Insurance and Claims Officer.

26. [1946] A.C. 543 (H.L.).

27. [1947] K.B. 204 (C.A.).

28. Williams, *Crown Proceedings Act, 1947* (1948) at pp. 17-9.

29. *Supra* note 8, letter from G.R. Schmitt.

at fault. If this difficulty arose under a normal master-servant relationship the plaintiff could sue the master without naming his servant. However, because of Crown immunity this course of action is not available against the government. The present procedure of indirect liability is also defective because "when litigation is instituted against a Crown servant, the Crown may wish to claim for its damages, but not being a party to the initial action, cannot file a counter-claim, but must institute a separate suit. Conversely, where the Crown initiates litigation, the defendants cannot counter-claim for their damages (which, in effect, would be a tortious action against the Crown), but must file a separate action against Crown servants. Application can then be made for consolidation of the actions."[30]

5. Conclusion

The common law doctrine of Crown immunity in tort has little to be said in its favour and much to be said against it. Its historical foundations are in doubt. The Supreme Court of Canada has repudiated the belief that "the King can do no wrong" as a justification of the immunity. Attempts to justify the doctrine on the ground that the courts have no jurisdiction over the sovereign are unconvincing because Crown liability in contract proves the courts do have jurisdiction. The suggestion that the immunity is justified because the proper remedy is with the executive and not the courts is untenable because tort liability is a question of law not politics. The Crown's immunity in tort causes injustice. Although the government's practice generally is to stand behind Crown servants against whom claims are made, there are cases where the individual servant at fault cannot be identified and then the claimant is without remedy. The immunity is, in any event, unacceptable because it places the government above the law.

The fear that Crown liability in tort would cause a hardship on the government is unfounded. The cost of liability is now being substantially incurred through *ex gratia* payments to victims injured by government servants. The experience of other provinces also shows the reform of this area of law has not been expensive or productive of any other problems. It has rather provided a means of redress to valid claimants which they would be denied by the immunity. The Commission, therefore, feels that British Columbia should follow the example of almost every country and state in the Western Hemisphere and remove the immunity of the Crown in tort.

## C. The Method of Reform

A threshold issue is whether the doctrine of Crown immunity in tort should be modified by judicial decision or legislative action. In many of the American States the ancient common law rule that "the King can do no wrong" has been reversed by decisions of the courts. For example, the law was reversed by judicial decision in California. Chief Justice Traynor who wrote the decision observed that government immunity for torts was "an anachronism without rational basis, [which] has existed by the force of inertia."[31] In Canada, there is no evidence that the courts have ever reconsidered their position on the issue. Further, it seems a remote possibility that Canadian courts would be as judicially active on this issue as some American judges have been. Although the problem of Crown immunity was a product of the courts' fallibilities in the first instance it seems that legislative

30. *Supra* note 8, memorandum from Insurance and Claims Officer.

31. California: *Muskopf v. Lipiman* 11 Cal. Rptr. 89 at p. 92, 359 P2d 457 (S.C. Calif. 1961); Wisconsin: *Holytz v. City of Milwaukee* 17 Wis 2d 26, 115 N.W. 2d 618 (S.C. Wisc. 1962).

action is now the preferable method of reform. This is true because the legislative answer allows more flexibility and scope in coming to the desired solution.

However, the possibility does exist that the doctrine might be repudiated by judicial decision, if the legislature delays too long in abrogating the immunity.[32] The courts have not displayed any enthusiasm for the government's immunity in tort which means that judicial abrogation of the doctrine is not out of the realm of possibility.

### D. Legislative Provisions for Crown Liability

#### 1. General

In answering the question what form should the law take in providing for Crown liability in tort, the *Uniform Model Act* (see Appendix) will indubitably be the starting place. This model which is patterned on the Act in Great Britain has been followed in most of the Canadian provinces. No doubt it has imperfections as does the English *Crown Liability Act*, but any criticism has been very moderate.

It is interesting that notwithstanding the length of time that laws have existed in other jurisdictions which have removed the Crown's immunity in tort there are relatively few reported cases concerning these legislative provisions. Perhaps this fact is a tribute to the adequacy of the Crown reform laws. The issues in the reported Canadian decisions under the Crown liability statutes have generally centered on the exceptions to liability.[33] The question of what limits, if any, should be placed on the government's responsibility in tort is clearly the primary issue in providing legislative reform.

#### 2. Alternative Models

There are other models than that found in the *Uniform Act* to reform the law. It is perhaps the most popular approach to the subject. The models vary in accordance with the breadth of the Crown's responsibility in tort.

(a) *Equality*

The first model is based on the "equality" principle. It attempts to place the government on equal footing with the citizen and provides no exceptions. This model is attractive as it exemplifies the fundamental notion of the rule of law, that everyone (including the government) is subject to the same laws. Under this model any special prerogative of the government is not recognized. An example of this approach to government responsibility is found in the Commonwealth of Australia where legislation has imposed comprehensive liability in tort on the Crown.[34]

(b) *Liability with Exceptions*

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32. *Arro Van Alstyne, State Government: The Decline of Governmental Immunity* (1966).

33 *National Harbours Board v. Langelier* (1969) 2 D.L.R. (3d) 81 (S.C.C.); *McGrane* v. *B.C. Ferry Authority* (1969) 1 D.L.R. (3d) 562 (S.C.B.C.); *Burton* v. *The Queen* [1954] Ex. C.R. 715; *Hendryet alv. The Queen* v. *Brown et al* [1965] 1 Ex. C.R. 392; *Anctil* v. *The Queen* [1959] Ex. C.R. 229.

34 *Supreme Court Act* 1935-69 (S.A.), s. 74; *Crown Suits Act* 1947-54 (W.A.) s. 5; *see* Hogg, *Victoria's Crown Proceedings Act* 7 Mel. U.L. Rev. 342 (1970).

The second model approaches equality between the Crown and the subject but there are qualifications. The government is liable in tort, but there are exceptions. The exceptions arise by reason of certain kinds of torts (such as the rule in *Rylands* v. *Fletcher*)[35] or the immunity of certain persons such as Judges,[36] or by an outer limit being placed on the extent of the government's liability.[37] The approach of the *Uniform Model Act* is equality with exceptions.

(c) *Immunity with Exceptions*

A third model does not attempt to abrogate Crown immunity as a general principle of the law. Rather, the rule of tort immunity is maintained but there are specified instances when the government is liable for its torts. For example, the legislation in Texas and Colorado waives tort immunity only for the negligent operation of motor vehicles.[38]

(d) *Strict Liability*

The fourth model places a higher responsibility on the government than the law requires of ordinary citizens. In Switzerland the government is liable for all damage it causes without proof of fault.[39] Likewise in France, "The rule now generally applied by the Council of State is that of absolute liability. The French State is responsible in every case where damage has been caused by its acts."[40] Strict liability standard as a basis for government liability is supported on the grounds that it achieves a more equitable distribution of loss. As Professor Davis concluded:[41]

> A large enough governmental unit is the best of all possible loss spreaders, especially, perhaps, if its taxes are geared to ability to pay. This basic fact, which so far has been given too little heed, will in time lead us to see that the basis for government liability should not be fault but should be equitable loss spreading. The ultimate principle may be that the taxpaying public should usually bear the fortuitous and heavy losses that result from governmental activity. The key idea will be neither comparison with private liability in the same circumstances, nor the extra-hazardous character of the activity, nor authorized use of a government vehicle or other such instrumentality, nor fault on the part of the governmental unit or its agents; the key idea will be simply that a beneficent governmental unit ought not to allow exceptional losses to be borne by those upon whom the governmental activity has happened to inflict them.
>
> A sample of the attitude which may become the law of the future is the assumption by the British government of liability for all damage done by German bombs during the Second World War, as well as the somewhat similar

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35 *Power Measures Act* S.B.C. 1966, c. 38, s. 8.

36 U.K. Crown *Procedure Act 1947*, 10 & 11 Geo. VI, c. 44.

37 Oregon's *Tort Claims Act* places a monetary limit of $25,000 on property damage and $50,000 on personal injury with a $30,000 maximum for claims arising out of a single occurrence.

38 Texas *Tort Claims Act*, Art. 6252.19, Title 110A, s. 3; Colorado U.S. 1963 Chapter 72, Art. 16, s. 2-4.

39. Pock, *Systems of Public Responsibility in Switzerland, Germany and Austria* [1966] U. Ill. L. Rev. 1023, at p. 1030.

40. B. Schwartz, *French Administrative Law and the Common-Law World* 302 (1959); *see also* Schwartz, *Public Tort Liability in France* 29 N.Y. U.L. Rev. 1432 (1954).

41. Davis, *supra* note 2 Part B at pp. 811-12.

statute enacted by the United States Congress.

But even Professor Davis admits that there must be some limits to the government's responsibility. He comments that:

> Of course, this is far from saying that governmental units should be liable for all private losses they cause. Most such losses, as now, will have to be regarded as a part of the necessary price for the benefits of living in organized society. Nearly all policy determination - legislative, executive, judicial, or administrative - hurts someone. The losses caused by policy choices are usually well spread, and even when they are not, as when a statute destroys a profitable business by prohibiting sale of a product deemed harmful, the governmental unit probably should usually be immune from liability. Many losses, as now, will have to be borne by those upon whom they fall even when the governmental unit is at fault in causing the loss; for instance, those whose property is reduced in value by a zoning ordinance probably should not have a cause of action against the city, even if a court finally holds that the adoption of the ordinance was an abuse of discretion.

Another difficulty with the "insurer" approach to the problem of government responsibility is that it would be very uncertain what the costs of such a reform would be.

The adoption of the strict liability model was strongly advocated by the British Columbia Civil Liberties Association in its response to our working paper. Professor H.N. Janisch of the Faculty of Law at Dalhousie University also made a lengthy and cogent submission to the Commission. Although he specifically rejected a strict liability model, he suggested that what is really required is to "build up a body of law which reflects the unique nature of Government undertakings" and that "we should start looking at governmental liability from the right end of the telescope which brings into focus not the traditional tort remedies but the actual activities of government which, in turn, will allow us to make clear value judgments as to how we will want to deal with Government-induced losses." He went on to say:

> The inadequacy of tort law as presently constituted to provide satisfactory answers can be seen from a few commonplace examples:
>
> (1) Should compensation be paid to motel owners when traffic is diverted to a new highway? If they relocate along the new highway should they pay "compensation" for their new-found profits?
>
> (2) Should storekeepers be compensated who lose customers when road widening takes place on their street? What if the road work included new utilities beneficial only to others?
>
> (3) Should compensation be paid to an innocent bystander injured when police fire at a bank robber? Does it make any difference if police had used great care? What if the bystander's "priceless" Ming vase is destroyed?
>
> (4) Should compensation be paid when an individual is injured in a traffic accident apparently caused by the failure of the government to install a traffic signal? Or is this merely a case of "nonfeasance?"
>
> We cannot answer questions such as these by simply mouthing the traditional tests of "fault."

The Commission agrees that new laws may have to be developed to deal with

situations relating to government activities in which the traditional tort concepts may be inappropriate. It is the feeling of the Commission, however, that these new laws should be developed in the context of individual reports dealing with the particular areas of law or activities involved rather than through a massive assault in a Report on the Legal Position of the Crown. With reference to the specific problems raised by Professor Janisch, it is pointed out that the first two have already been dealt with in the Commission's Report on Expropriation.[42] The third problem might be more appropriately dealt with in the context of a scheme for the compensation of victims of crime. The fourth problem will be dealt with in the Commission's forthcoming Report relating to immunities attached to municipalities and undertakings authorized by statute.

3. Conclusion

The most popular model of Crown reform has been to place on the government the same responsibilities in tort as are required of its subjects. This is basically the approach of the legislation waiving Crown immunity of the other provinces in Canada, the Canadian federal legislation, the United Kingdom, the other Commonwealth nations and the United States. It was also the approach recommended in the *Uniform Model Act*. The legislation in each of these jurisdictions is similar in its intent to remove Crown immunity in tort by placing the government on an equal footing with its citizens, but there are some important differences. These arise regarding exemptions made for government liability in tort. The result is that the legislation is fairly complex. The approach and the complexity of its enactment are illustrated by the United Kingdom *Crown Proceedings Act, 1947* which provides for tort liability as follows:

> 2. (1) Subject to the provisions of this Act, the Crown shall be subject to all those liabilities in tort to which, if it were a private person of full age and capacity, it would be subject:-
>
> (a) in respect of torts committed by its servants or agents;
>
> (b) in respect of any breach of those duties which a person owes to his servants or agents at common law by reason of being their employer; and
>
> (c) in respect of any breach of the duties attaching at common law to the ownership, occupation, possession or control of property:
>
> Provided that no proceedings shall lie against the Crown by virtue of paragraph (a) of this subsection in respect of any act or omission of a servant or agent of the Crown unlqss the act or omission would apart from the provisions of this Act have given rise to a cause of action in tort against that servant or agent or his estate.
>
> (2) Where the Crown is bound by a statutory duty which is binding also upon persons other than the Crown and its officers, then, subject to the provisions of this Act, the Crown shall, in respect of a failure to comply with that duty, be subject to all those liabilities in tort (if any) to which it would be so subject if it were a private person of full age and capacity.
>
> (3) Where any functions are conferred or imposed upon an officer of the Crown as such either by any rule of the common law or by statute, and

42. Law Reform Commission of British Columbia, *Report on Expropriation* (L.R.C. 5 1971.)

that officer commits a tort while performing or purporting to perform those functions, the liabilities of the Crown in respect of the tort shall be such as they would have been if those functions had been conferred or imposed solely by virtue of instructions lawfully given by the Crown.

(4) Any enactment which negatives or limits the amount of the liability of any Government department or officer of the Crown in respect of any tort committed by that department or officer shall, in the case of proceedings against the Crown under this section in respect of a tort committed by that department or officer, apply in relation to the Crown as it would have applied in relation to that department or officer if the proceedings against the Crown had been proceedings against that department or officer.

(5) No proceedings shall lie against the Crown by virtue of this section in respect of anything done or omitted.to be done by any person while discharging or purporting to discharge any responsibilities of a judicial nature vested in him, or any responsibilities which he has in connection with the execution of judicial process.

(6) No proceedings shall lie against the Crown by virtue of this sectior in respect of any act, neglect or default of any officer of the Crown, unless that officer has been directly or indirectly appointed by the Crown and was at the material time paid in respect of his duties as an officer of the Crown wholly out of the Consolidated Fund of the United Kingdom, moneys provided by Parliament, the Road Fund, or any other Fund certified by the Treasury for the purposes of this subsection or was at the material time holding an office in respect of which the Treasury certify that the holder thereof would normally be so paid.

The basic provisions and form of the above *English Act* have been adopted by seven Canadian provinces, the federal government, the *British Columbia Hydro and Power Authority Act*,[43] by the New Zealand Crown *Proceedings Act, 1950*, and by the *Uniform Model Act*. There are some differences however among each of these statutes. It is clear that the *United Kingdom Act* has been the preferred form of legislation in Canada. In the working paper the Commission suggested that this model should be the starting point of any reform in British Columbia.

In his response to the working paper, Professor P.W. Hogg of Osgoode Hall Law School of York University, observed that in preparing an appropriate statute, the draftsman might "look at the old Australian statutes which are much simpler and have worked better than the more complex statutes based on the 1947 English Act." The drafting of legislation is not within the usual activities of the Commission.[44] However, the Commission does find some merit in Professor Hogg's suggestion. The *Australian Acts*[45] may provide some useful guidance to whoever is charged with drafting appropriate legislation and the Commission urges that they should not be overlooked.

### E. Exceptions to Crown Liability

The greatest difference and controversy concerns what should be the limits of Crown liability. It will be useful then to look at the major exceptions to the

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43. S.B.C. 1964, c. 7, as amended 1966, c. 38, s. 8.

44. *See* the comments contained in the Commission's first Annual Report (L.R.C. 2) at p. 15.

45. *Supra* note 2. The main provisions of these statutes are set out in the appendix to Professor Hogg's book, *Liability of the Crown*.

principle of government liability found in the *English Act* and the legislation in the other jurisdictions.

1. Definition of Crown Employees

The first limitation is one of definition. Although the *United Kingdom Act* purports to retain the common law definition of the Crown by designation in section 2(l)(a) that the Crown is liable "in respect of torts committed by its servants or agents," (the same language is used in all of the relevant Canadian legislation) by section 2(6) of the Act the common law definition of a servant or agent is restricted.

This section states that liability only extends to servants of the Crown who are "directly or indirectly appointed by the Crown" and who are wholly paid out of designated funds. The section has been criticized. Professor Street lists a number of defects, such as the possibility that the Crown would not like an ordinary master be liable for the torts of a borrowed servant or for the torts of a public corporation if the corporation has its own funds from which it pays its staff.[46] For these reasons he concludes "section 2(6) serves no worthwhile purpose" and does harm to the principle of equality.

The equivalent of section 2(6) is only found in the legislation of Nova Scotia and New Brunswick.[47] The absence of such a limitation in the laws of the other jurisdictions including the *Uniform Model Act* appears deliberate. There does appear to be a diluted provision in the *Ontario Act* which limits the definition of a Crown servant to one who "has been appointed by or is employed by the Crown." The provision has been criticized for the same reasons as section 2(6) of the *English Act*.[48]

The Commission finds that there is no good purpose served by limiting the common law definition of a Crown servant or agent.

2. Vicarious Liability

The *English Act* has further been criticized because it leaves a residue (albeit very small) of common law immunity. Some immunity remains because tort liability is predicated on vicarious liability with specified exceptions of direct liability. The *United Kingdom Act* provides direct liability for breach of employers' duties, occupiers' duties and statutory duties.[49] The Canadian legislation is the same except that the federal *Crown Liability Act*[50] does not provide direct liability for employers' duties or statutory duties. As Thorson, P. said in *Burton* v. *The Queen*[51], The Crown's liability is not a direct one. It is only a vicarious liability. Before it can be engaged it must appear that some servant of the Crown would himself be personally liable." This omission is remarkable. It is difficult to justify this exception in the federal law. The result is that there is a residue of common law immunity because the Crown

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46 Street, *supra* note 6, Part A, at pp. 34-35

47. *Proceedings Against the Crown Act*, R.S.N.S. 1967, c. 239, s. 4(7). *See* Mueller, *The Liability of the Ontario Government in Tort* (1967) 25 U. Tor. Fac. L. Rev. 3.

48. Mueller, *ibid.*

49. S. 2(l)(b) and (c).

50. S.C. 1952-53, c. 30.

51. (1954) Ex. C.R. 715, at p. 718.

is not directly responsible in tort. The above duties do cover most of the important heads of direct liability, but they are not exhaustive. For example, it has been suggested that the Crown would not be liable in a situation like *Collins* v. *Hertfordshire* County Council where a patient died because he had been given the wrong drug. It was held that the hospital was directly liable for failure to create an efficient system of drug administration.[52]

The need for provision for direct liability of the Crown in tort is also demonstrated by the case of *Keatings* v. *Secretary of State for Scotland*[53] where it was held that a woman injured through the negligence of her husband can recover against her husband's employer, but not against the husband because of the *Married Woman's Property Act, 1862*, section 12. If the Crown is not directly liable it may also be immune in situations where its agent was not capable of being sued. Such a situation is illustrated by the case of *Westlake* v. *The Queen in the Right of the Province of Ontario*[54] in which the shareholders in the disastrous Prudential bankruptcy attempted to recover in negligence against the Ontario Securities Commission. It was held that the Ontario Securities Commission was not a legal entity which could be sued for damages.[55]

The exemption of the Crown from nonvicarious liabilities has been uniformly criticized by commentators on the problem.[56] There appears to be no justification for the exception which seems more of an anomaly than a deliberate policy decision.

It may be preferable to change the form of the legislation so that it does not rest on vicarious liability with specified exceptions. This would overcome the difficulty of stating all of the limitations. An example of this approach is found in section 8 of the New York *Court of Claims Act*, which provides:

> The state hereby waives its immunity from liability and action and hereby assumes liability and consents to have the same determined in accordance with the same rules of law as applied to actions in the supreme court against individuals or corporations, provided the claimant complies with the limitations of this article.

The effect of the legislation is that both direct and vicarious immunity are waived. The provision also has the advantage of simplicity that is missing in the English model.

3. Statutory Exemptions for Torts of Crown Officers

There is a provision in the *Uniform Model Act* and in the relevant Ontario legislation relating to statutes which limit the liability of officers of the Crown.

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52. [1947] K.B. 598.

53. [1961] S.L.T. 63; *see also Smith* v. *Moss* [1940] 1 K.B. 424.

54. (1972) 21 D.L.R. (3d) 129; (1972) 26 D.L.R. (3d) 273 (Ont. C.A.)

55. The judgment of Houlden, J. appears to indicate that no further relief would be available to the plaintiffs. As the Ontario Crown was not immune from liability in tort, it is difficult to see why this should be the case. It may be that a limitation period intervened to prevent proceedings directly against the Crown. On the other hand, Houlden, J. may have considered the Crown to be immune in circumstances where it could not be vicariously liable because no action could be maintained against its servant, the Ontario Securities Commission.

56. Gordon, *The Crown as Litigant* 45 L.Q.R. 186 at pp. 189-90 (1929); Williams, *Crown Proceedings Act, 1947* (1948) 43-45; Hogg, *Victoria's Crown Proceedings Act* 7 Mel. U.L. Rev. 342 at pp. 345-50 (1970).

The provision reads:

> 5. (4) An enactment that negatives or limits the amount of the liability of an officer of the Crown in respect of any tort committed by that officer, in the case of proceedings against the Crown under this section in respect of a tort committed by that officer, applies in relation to the Crown as it would have applied in relation to that officer if the proceedings against the Crown had been proceedings against that officer.

The effect of this section is that if a statute relieves a servant of the Crown from tort liability then it will also have the effect of exempting the Crown itself from liability. It is significant that following this provision in the *Uniform Model Act* there is a note suggesting that the section is "optional and each province should decide whether it is desired to retain the exemption." The wisdom of this optional exemption was considered by the Royal Commission Inquiry into Civil Rights (McRuer Report). The Royal Commission recommended against such an exemption on the following grounds:[57]

> It is hard to know why some Crown servants have been by statute relieved of liability for tort and some have not. It is equally hard to know why the Crown should not be liable in tort in any of those cases where it has been exempt by reason of statutory provisions relieving its servants or agents of liability ...
>
> There is no apparent philosophy of justice in the legislation of this Province concerning damage suffered by individuals by reason of the wrongful acts of public servants. The Crown accepts full liability for the wrongful acts of police officers but for a large segment of those serving the Crown in other capricities no liability is accepted and the servants themselves are relieved of personal liability. In such cases the victim of the wrongful act is left without a remedy. To state that if a person is injured by the negligent act of an engineer of the Department of Public Works in the performance of his duties, both the engineer and the Crown are liable to pay damages, but if the injury is caused by an engineer performing duties under the *Elevators and Lifts Act* neither the Crown nor the engineer is liable for anything, is sufficient to demonstrate the irrational injustice of the law.
>
> In introducing the respective "Proceedings Against the Crown" Acts both the Honourable Mr. Porter and the Honourable Mr. Cass made clear statements of their purposes which we repeat. "... If a citizen in this country suffers a wrong at the hands of any Crown official or department or employee, we think he should not be put in a worse position than he would be if that unlawful act had been committed by some ordinary individual or by a servant of some private corporation."
>
> "This bill, subject to the exceptions mentioned ... removes all the immunities and privileges heretofore enjoyed by the Crown and enables any person to sue the Crown and its servants and agents in the courts as of right, and in the same manner that he may sue a person."
>
> That declared purpose has been defeated repeatedly by the subtle method of merely enacting legislation relieving servants of the Crown of liability.
>
> No doubt the nature of the service rendered by officers or servants of the Crown is sometimes of such a character that it is unreasonable that they should be asked to assume the risk of being held liable for injury done by reason of their wrongful acts. In such cases provision should be made for their

57. *Royal Commission Inquiry into Civil Rights* (McRuer Report) vol. 5, no. 3, pp. 2203, 2110-11.

> indemnification as has been done in the case of police officers. In the alternative, provision could be made relieving the officer or servant of liability but not relieving the Crown of liability as employer. The solution in no case should be the one adopted now - to leave the victim of wrongdoing to suffer the loss.

The Commission approves the above reasoning and also is opposed to adopting section 5(4) of the *Uniform Model Act*.

4. Judicial Acts

The *United Kingdom Act* and the *Uniform Model Act* specifically exempt any claims in tort against the Crown arising out of judicial proceedings. The American law is much wider and exempts all federal employees who exercise a "discretionary function or duty." The reason the English law omitted a comparable provision is that the Crown would not be liable for the exercise of a discretion without proof of negligence.[58]

The exemption of the judiciary is based on the sound policy that there should be an end to litigation and that judges should make their decisions without fear of the consequences. There is some question as to how far the exemption goes. Does it for example apply to administrative tribunals exercising some judicial functions?[59]

The exemption has been critized by Professor Street. He argues that:[60]

> The Act, of course, completely ignores the fact that the personal immunity of a judicial officer is not necessarily inconsistent with the acceptance by the State of the duty to compensate those who suffer loss unjustly at the hands of the judicial machine, even if the loss has not been caused by the fault of any employee of the Crown. When Adolf Beck was sent to prison for a crime which he did not commit, and released with a free pardon ten years later, surely his right to compensation should not have depended on the passing of a private Act for his benefit. The same is true of Oscar Slater who served nineteen years of a life sentence (a commuted death sentence) for a murder of which he was innocent. No one would saddle the trial judge with pecuniary liability, but that the convicted innocent should still be remediless is deplorable.

Compensation for defendants wrongly convicted of offences has been provided by legislation in other countries. For example, in the United States a federal statute provides:[61]

> Any person who, having been convicted of any crime or offence against the United States and having been sentenced to imprisonment and having served all or any part of his sentence, shall hereafter, on appeal or on a new trial or rehearing, be found not guilty of the crime of which he was convicted, or shall hereafter receive a pardon on the ground of innoncence, if it shall appear that such person did not commit any of the acts with which he was charged or that his conduct in connection with such charge did not constitute a crime or offence against the United States ... and that he had not, either intentionally or

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58. Street, *supra* note 6, Part A at pp. 43-4.

59. *Collins* v. *Henry Whiteway & Co.* [1927] 2 K.B. 378 at p. 383.

60. Street, *supra* note 6, Part A. at pp. 43-4.

61. 52 Stat. 438.

> by wilful misconduct, or negligence; contributed to bring about his arrest or conviction, may, ... maintain suit against the United States in the Court of Claims for damages sustained by him as a result of such conviction and imprisonment.

Some European countries have gone further in providing damages for detention preceding acquittal on first hearing or for reduced sentences on appeal, explains Professor Street. He then recommends reform of the law in England "where freedom of property seems so much better protected at the hands of the State than freedom of person."[62]

Unfortunately Canada is in the same position as England. There is no indemnity provided for victims of the judicial process such as persons wrongfully imprisoned. The need for law reform in this area seems obvious. The question deserves more consideration than can be given to it within the scope of this Report. There is also a question of whether the matter falls within the constitutional jurisdiction of the province.

Professor Street also criticizes the immunity granted officials from liability for acts done in the execution of judicial process.[63] He points out that different policy considerations apply because:

> A court officer is protected by statute when seizing property by way of execution, but this is not because there is a public interest in making the legality of his authority from the Court outside the scope of judicial review. On the contrary, the victim of an illegal execution can raise in court that illegality. The official is protected because he, a ministerial officer carrying out his duty, is entitlpd to rely on what seems on its face to be a valid authorization - to hold otherwise would be to subject him to a liability inconsistent with the nature of his job and his probable financial resources.

However, again the basis for the exemption is personal to the official and does not provide any justification for the Crown's immunity. It would appear fair to spread the risk of harm caused by illegal executions on the public generally rather than leaving the responsibility on the shoulders of the individual who was harmed.

5. Wilful Torts

Perhaps the most important exception in the United States federal *Tort Claims Act* is that of "Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentationr deceit or interference with contract rights."[64]

There is no specific exemption for these wilful torts in the *English* or *Uniform Model Act*. However in New Brunswick the legislation removing Crown immunity in tort does not appear to cover certain wilful torts. For example, in *Long* v. *Province of New*

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62. Street, *supra* note 6, Part A, at p. 44.

63. Street, *ibid.* at p. 45. *See* s. 2(5) of the U.K. Act which states: "No proceedings shall lie against the Crown by virtue of this section in respect of anything done or omitted to be done by any person while discharging or purporting to discharge any responsibilities of a judicial nature vested in him, or any responsibilities which he has in connection with the execution of judicial process."

64. S. 1346.

*Brunswick*[65] the court dismissed a claim for false arrest, malicious prosecution and forcible search against the Crown under the New Brunswick *Proceedings Against the Crown Act*[66] on the grounds that the statute did not provide liability for these kinds of torts. The New Brunswick legislation is very similar to the *United Kingdom Act.* The only difference is that instead of providing that the Crown is liable "(a) in respect of torts committed by its servants or agents," it provides liability "(a) in respect of a tort to real or personal property, or causing bodily injury, committed by an officer or agent."[67] The effect of this latter provision was held to preclude recovery for such torts as false arrest and malicious prosecution. Of the Canadian legislation the New Brunswick provision on this point appears to be unique. The provision would not, however, preclude actions for assault or battery, but it would seem to exempt the Crown from liability for such torts as libel, slander, misrepresentation, deceit or interference with contract rights.

The exemption for these wilful torts is difficult to justify. The legislative history of the United States law indicates that the purpose behind excepting these specified wilful torts was that they were thought to be the kind of tort in which the defendant was particularly vulnerable. There was also a fear that claims might be exaggerated. But as Professor Davis aptly pointed out, "negligent acts are as hard to defend and are as easily exaggerated."[68] There does not, therefore, appear to be any convincing reason to adopt an exception for the above named wilful torts. The Commission feels that British Columbia should not follow either the United States or the New Brunswick example of granting Crown immunity for certain wilful torts.

6. Punitive Damages

There is a specific exemption of the government from liability for punitive or exemplary damages under the United States legislation.[69] There is not any such immunity granted the Crown under either the *United Kingdom* or *Uniform Model Act.* Are punitivd damages appropriate against the government? It has been suggested that the notion of punishing the Crown "for a wanton outrage" is misplaced.[70] It is also true that punitive damages are in any event anomalous in the law of torts.[71] For these reasons Professor Street concluded that, "One may then approve the exclusion of those [punitive damages] from the federal *Tort Claims Act*, and deplore the absence of a similar provision in the *Crown Proceedings Act.*"[72]

The conclusion that punitive damages should not be granted against the Crown or government is hard to reconcile with the well known decision of the

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65. (1959) 19 D.L.R. (2d) 437 (N.B.S.C. App. Div.)

66. R.S.N.B. 1952, c. 176.

67. S. 4(l)(a).

68. 40 Minn. L.R. 751.

69. *Ibid.*

70. Street, *supra* note 6, Part A, at p. 53.

71. *Salmond on Torts* 717 (15th ed. 1969); Williams, *The Aims of the Law of Torts* 4 Curr. Leg. Prob. 137 (1951).

72. *Supra*, note 23.

House of Lords in *Rookes* v. *Barnard*.[73] This case restricted the ambit of exemplary damages to two categories, one of which was the torts of servants of the government which are "oppressive, arbitrary, or unconstitutional." Lord Devlin said "In the case of the government it is different, for the servants of the government are also the servants of the people and the use of their power must always be subordinate to their duty of service."[74] In Lord Devlin's view, punitive damages are appropriate as a check on arbitrary government power. In *Cassell* v. *Broome*[75] Lord Hailsham was of the view that the category "servants of government" was not to be too narrowly construed. He stated:[76]

> It would, in my view, obviously apply to the police ... and almost as certainly to local and other officials improperly exercising right of search or arrest without warrant, and it may be that in future it will be held to include other abuses of power without warrant by persons purporting to exercise legal authority.

Punitive damages stand as a deterrent to the abuse of the public trust given to government officials. Canadian courts have generally not followed *Rookes* v. *Barnard*, but only because Lord Devlin's view was too narrow. Spence, J. summarized the Canadian position when he said that in Canada the jurisdiction to award punitive damages is not so limited as Lord Devlin outlined in *Rookes* v. *Barnard*."[77]

It is often urged that as compensation and not punishment is the purpose of the law of torts therefore punitive damages should be abandoned. Arguments are made on both sides.[78] Without resolving this debate it does seem apparent that no immunity should be granted the Crown from these damages. If the law is to be reformed it should be changed for all defendants.

7. Strict Liability

There is a specific statutory provision making the British Columbia Hydro and Power Authority, a Crown corporation, liable in tort.[79] However, the Authority is exempted from liability under the doctrine of *Rylands* v. *Fletcher* and is only liable in nuisance if the Authority was also negligent. The Act provides:

> 52A. Notwithstanding section 52, the Authority is not liable in an action based on nuisance or on the rule in *Rylands* v. *Fletcher*, unless the Authority was negligent.

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73. [1964] A.C. 1129; [1964] 1 All E.R. 367.

74. *Ibid.* at p. 1226.

75. [1972] 1 All E.R. 801. The case is also notable for the rebuke delivered by Lord Hailsham to the Court of Appeal and Lord Denning on the subject of *Stare Decisis:*

> The fact is, and I hope it will never be necessary to say so again, that in the higher hierarchical system of courts which exists in this country it is necessary for each lower tier, including the Court of Appeal, to accept loyally the decisions of the higher tiers. *Ibid. at p. 809.*

76. *Ibid.* at p. 829

77. *McElroy* v. *Cowper-Smith & Woodman* (1967) 62 D.L.R. (2d) 65 (S.C.C.). A number of recent Canadian cases have supported the dicta of Spence J. *See Bahner v. Marwest Hotel Co.* (1970) 12 D.L.R. (3d) 646 and *Eagle Motors (1958) Ltd.* v. *Makaoff* (1971) 17 D.L.R. (3d) 222.

78. Jerome Atrens, *Intentional Infliction of Harm in Linden, Studies in Canadian Tort Law* at pp. 411-13.

79. S.B.C. 1964, c. 7, s.52.

The rule in *Rylands* v. *Fletcher*[80] is succinctly stated in *Salmond on Torts*:[81]

> The occupier of land who brings and keeps upon it anything likely to do damage if it escapes is bound at his peril to prevent its escape, and is liable for all the direct consequences of its escape, even if he has been guilty of no negligence.

It is obvious that the requirement of negligence in the *British Columbia Hydro and Power Authority Act* abrogates the strict liability rule of *Rylands* v. *Fletcher*.

It is important to recognize that the policy behind the strict liability rule is that some conduct is so potentially harmful and dangerous that the risk of loss should be placed on the person who engages in the activity. The notion is that the burden of loss should be shifted to the person who created the risk irrespective of fault or failure to conform to standards of care. The policy of *Rylands* v. *Fletcher* has been analogized to the modern development of *Workmen's Compensation Acts*.[82] For this reason it seems anomalous to exempt the government from liability for such a tort. It is true some government activities are extra hazardous by comparison with private activities. Therefore, the government may be subject to claims under this tort more frequently than others. For example, in one of the few reported cases under the reformed federal *Crown Liability Act* the rule in *Rylands* v. *Fletcher* was invoked to make the Crown liable for injuries caused the plaintiffs by the detonation of explosives by the Royal Canadian Engineers.[83] Also, operation of a mammoth water and power system is an activity with a high potential risk of liability under *Rylands* v. *Fletcher*. Yet, who should suffer the loss for damage caused by this government activity - the individual whose property was ruined or the government that was responsible for creating the risk? The answer seems obvious. It would be very unfair to the individual to exempt the Crown and its servants from tort liability under the rule in *Rylands* v. *Fletcher*.

Even if no specific exemption were given to the Crown from liability under the rule in *Rylands* v. *Fletcher*, consideration must still be given to the position at common law. A recognized defence to actions involving strict liability is one of statutory authority. *Clerk and Lindsell on Torts* states: "When a dangerous thing is used under statutory authority, it is necessary to prove negligence in order to establish liability."[84] This defence is also available if the action is framed in nuisance. Since almost every Crown undertaking involving a dangerous thing or which might result in a nuisance is done by authority of a statute, the defence of statutory authority will usually be available.

The question of the extent to which this plea should be available to the Crown is a troublesome one. However, the logic that suggests the Crown should be given no specific exemption in Crown reform legislation from tort liability under the rule in *Rylands* v. *Fletcher* leads one to the conclusion that the retention of the defence of statutory authority cannot be justified. The Commission accordingly

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80. (1868) L.R. 3 H.L. 330.

81. *Supra*, note 6, Part A, at p. 401.

82. Wright & Linden, *The Law of Torts* (5th ed.) 733.

83. *Lindsay* v. *The Queen* [1956] Ex. C.R. 186.

84. 13th ed. (1969) at p. 851.

feels that the defence should not be available in actions brought under the rule in *Rylands* v. *Fletcher*.

The availability of the defence in actions sounding in nuisance is an even more difficult problem. There may be undertakings which it is in the public interest to carry on, in which the creation of a nuisance[85] is unavoidable. In many cases the damages suffered by a property owner are comparable to those characterized as "injurious affection" in expropriation situations. The Commission's *Report on Expropriation*[86] considered this problem. A recommendation was made that:[87]

> Compensation should be payable for personal and business damage in all claims for damages for injurious affection if, in the absence of statutory authority, liability would have existed.

The adoption of that recommendation would have the effect of giving a person who would otherwise have a claim in nuisance with respect to the offending undertaking, a claim for compensation against the expropriating body. That recommendation would, however, have no application in situations which do not involve an expropriation.

It seems unfair that the right, to recover compensation, of a person who suffers damage as a result of a nuisance should depend on whether or not an expropriation was involved or whether or not the body creating the nuisance was authorized by statute. The anomalous position of the person against whom the defence of statutory authority may be raised should be rectified by making that defence unavailable to the Crown.

The Commission does however feel that the elimination of statutory authority should be restricted to claims for compensation. To eliminate the defence completely might permit the person who is likely to be adversely affected by an otherwise reasonable undertaking which is a potential nuisance, to obtain an injunction to prevent its operation or construction. It is felt that the question of whether or not an undertaking should be carried on is one in which the public interest must prevail and it would be inappropriate to eliminate the defence with respect to injunctions.

The retention of the defence of statutory authority where an injunction is sought would not permit the Crown to act negligently or to act unreasonably where its authority is permissive or conditional only. *Salmond on Torts*[88] states the common law position in the following way:[89]

> It is very necessary, however, in the application of the foregoing rule to distinguish between absolute and conditional statutory authority. Absolute authority is authority to do the act notwithstanding the fact that it necessarily causes a nuisance or other injurious consequence. Conditional authority is authority to do the act provided it can be done without causing a nuisance or

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85. *Ibid.* at p. 837.

86. Law Reform Commission of British Columbia, *Report on Expropriation* (LRC 5 1971).

87. *Ibid* at p. 164.

88. 15th ed. (1969).

89. *Ibid* at p. 681.

> other injurious consequence. This condition is sometimes expressed, but is more often left to be implied from the general provisions of the statute. In *Metropolitan Asylum District* v. *Hill* [(1881) 6 App. Cas. 193] a local authority, having statutory authority to erect a smallpox hospital, was restrained from erecting one in a place in which it would have been a source of danger to the residents of the neighbourhood. This statutory authority was construed, not as an absolute authority to erect a hospital where the defendants pleased, and whether a nuisance was thereby created or not, but as a conditional authority to erect one if they could obtain a suitable site where no nuisance would result. Whether authority is absolute or conditional is a question of construction depending on all the circumstances of the case.

The injunction would therefore continue as a remedy, its availability being governed by the common law rules.

The defence of statutory authority is also available to municipalities and other corporations in appropriate circumstances. If the availability of that defence is limited with respect to the Crown, it would in effect place the Crown in a worse position than such municipalities and corporations. This apparent anomaly will be dealt with in a forthcoming study by the Commission which will consider the "quasi-immunities" enjoyed by municipalities and other bodies authorized by statute.

**F. Conclusion**

The Commission has concluded that the Province should follow the very clear trend in Canada and elsewhere in the Western Hemisphere towards government responsibility by abrogating the common law doctrine of Crown immunity in tort. The need for this law reform is clear. The present immunity causes injustice when a plaintiff cannot identify which Crown servant committed the tort. It places the Crown above the law and encourages a view that the government is acting arbitrarily when it refuses to stand behind a claim against the Crown. The survey of other provinces indicates that the cost of such a reform is not large and that government responsibility creates no other problems.

The Commission recommends:

1. *Legislation be enacted to remove the Crown's immunity from liability in tort.*

2. *The legislation provide that the Crown be liable in tort to the same extent as a subject.*

3. *The common law definition of Crown servants or agents not be restricted as in the legislation in the United Kingdom, Nova Scotia and New Brunswick.*

4. *Crown liability not be predicated on vicarious liability. The Crown should be both vicariously and directly liable in tort.*

5. *No exemption be made relieving the Crown from liability when a statute exempts officers of the Crown from responsibility such as section 5(4) of the* Uniform Model Act.

6. *Judicial acts be immune from liability, but this immunity should not extend to the execution of the judicial process.*

7. *No exception be made for Crown liability for wilful torts such as false arrest, libel, or assault.*

8. *The Crown not be specially exempt from liability for punitive damages in tort.*

9. *No exemption should be given to the Crown, its servants and agents from actions based on strict liability, whether based on*

*nuisance, the rule in* Rylands *v.* Fletcher*, or otherwise.*

10. *The defence of statutory authority should not be available to the Crown in actions for nuisance or based on the rule in* Rylands *v.* Fletcher *except where the claim is for injunctive relief.*

# CHAPTER VII STATUTES AFFECTING THE CROWN

## A. Common Law Position

One of the basic prerogatives of the Crown at common law is the rule that the Crown is not bound by statute unless named or by necessary implication. The rule originated in the Middle Ages.[1] Professor Street suggests that the first case on this question was decided in 1457 by Ashton, J. who held, "quant un remedy soit fait pur un statute ce ne serra entendu en contre le roy s'il ne soit pas expressement reherse."[2] The notion behind the rule seems to be that legislation is presumably enacted only for subjects.[3]

### 1. Limitation of Action

An example of this prerogative is found in the rule that the Crown is not bound by limitation statutes.[4] This means that the Crown may bring an action in contract, tort, etc. at any time whereas an ordinary citizen is restricted by the relevant limitation periods. There is no reason why the valid purposes served by limitation statutes should not apply with equal vigour to the Crown.[5]

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There is some doubt whether the Crown is entitled to the benefit of a statute of limitation as a defence to proceedings brought against it.[6] It would appear the better opinion is that the Crown may take advantage of a limitation period.[7] This is true because the rule that the Crown is not bound by statute is one sided. It

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1. *See* Glanville *Williams,Crown Proceedings Act, 1947* (1948) 53.

2. Street, *Government Liability*, at pp. 143-44.

3. *Williams* v. *Berkley* (1562) 1 Plowd 223 E.R.; cf. *Attorney-General* v. *Donaldson* (1842) 11 L.J. Ex. 338; Maxwell, *Interpretation of Statutes* (12th ed.) 161-166.

4. P.W. Hogg, *Liability of the Crown*, 31-37 (1971); Williams, *supra* note 1 at p. 98.

5. *See* recommendation of Ontario Law Reform Commission, *Report on Limitation of Actions* (1969) at pp. 137-140.

6. *See* Hogg, *supra* note 4 at p. 31.

7. *Ibid.*

8. Maxwell, *Interpretation of Statutes* (11th ed. 1962) at p. 135; Hogg, *supra* note 4, at p. 31.

only applies where a statute may operate to the prejudice of the Crown.[8] In Crown reform legislation there is usually included a provision which expressly preserves the right of the Crown to take advantage of statutes which would be a defence to proceedings between subjects.[9] The *Federal Act* does not have a general provision allowing the Crown to take advantage of statutory provisions, but it does deal specifically with limitation of actions. The Act provides:

> 19. (1) Unless otherwise provided in this Act, the laws relating to prescription and the limitation of actions in force in any province between subject and subject apply to any proceedings against the Crown under this Act in respect of any cause of action arising in such province, and proceedings against the Crown under this Act in respect of a cause of action arising otherwise than in a province shall be taken within and not after six years after the cause of action arose.

The provision concerning limitations and the Crown is found in the English limitations of action legislation[10] rather than in the *Crown Proceedings Act.* There appears to be nothing in the British Columbia *Statute of Limitations*[11] which makes the Act, as a whole, binding on the Crown.[12] The *Statute of Limitations* is presently under review by the Commission and its application to the Crown will be considered in a forthcoming report.

While the wisdom of providing that the Crown should have the benefit of statutory defences cannot be doubted, such a provision points out the unfairness of the rule that the Crown is not bound by statutes to its prejudice. If the Crown is to have the benefits of a statute, justice demands that it accept the concomitant statutory obligations.

2. Presumption Crown is Bound

One of the great difficulties with the rule the Crown is not bound by statute except by necessary implication has been the determination of when the presumption operates. The courts have not developed any consistent or rational test

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9. *See Uniform Model* Act, Appendix s. 19; *Crown Proceedings Act 1947*, 10 & 11 Geo. VI, c. 44, s. 31.

10. The Law Reform (Limitation of Acts, etc.) Committee, 1954, 2 & 3 Eliz. II, c. 36.

11. R.S.B.C. 1960, c. 370.

12. S. 48 does provide a limitation period of 60 years to bring actions against persons adversely in possession of Crown lands.

13. Maxwell, *supra* note 8.

14. Williams, *supra note* 1 at p. 49.

for the meaning of the presumption.[13] For example; the Crown is not presumed bound by the duty imposed upon landlords in the English *Housing Act, 1936* to see that premises are reasonably fit for habitation.[14] Yet the Crown is bound by necessary implication in company legislation requiring the return of funds to revived companies because:

> Where it is reasonably clear that the intention was that the Crown, as well as subjects, should for example pay a fee for certain sercives, viz, the use of registration facilities, or should assist in carrying out the purposes of an Act to make it workable (in this case restore the fund) it is not necessary that the Crown should be named. It is not depriving the Crown of any property or prerogative rights in the broad sense contemplated by the rule nor appreciably imposing obligations upon it. The purpose of the rule requiring the Crown to be named is to make the intention clear. When therefore it is not named as in the sections of the Act under review one should look at the mischief to be remedied, the relief provided, coupled with the language employed, to ascertain whether or not the Crown, although not mentioned, was in fact within the contemplation of the Legislature.[15]

**B. Statutory Modifications**

In British Columbia the common law rule regarding Crown liability under statutes must be considered in light of section 35 of the *Interpretation Act*.[16] This section provides:

> No provision or enactment in any Act shall affect in any manner or way whatsoever the rights of Her Majesty, her heirs or successors, unless it is expressly stated therein that Her Majesty shall be bound thereby.

Thus, the Crown is not to be bound by a statute, unless there is an express statement in the statute to the contrary. The *Interpretation Act* appears to be more restrictive than the common law prerogative. The question is whether the Crown in British Columbia can be bound by a statute by "necessary implication." The weight of authority seems to suggest that the Crown will not be bound unless it is expressly mentioned in the legislation. In *Rankin* v. *R.*[17] the Exchequer Court held

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15. *Per* Macdonald, J.A., *in A.-G. of B.C.* v. *Royal Bank of Canada et al* (1936) 51 B.C.R. 241 at p. 265.

16. R.S.B.C. 1960, c. 199.

17. [1940] Ex. C.R. 105.

18 R.S.C. 1970, c. I.-23, s. 16 is exactly the same as s. 35 of the *British Columbia Act.*

19. *Supra* note 2 at p. 113.

20. [1947] 1 W.W.R. 227.

21. (1946) 62 T.L.R. 643.

that because of section 16 of the *Interpretation Act*[18] ... the Crown can not be ousted of a prerogative by mere implication; an express provision is required: ..." [19]

However, the authorities are not consistent on this point. In *Erickson* v. *Fisher*[20] the British Columbia Court of Appeal ignored the *Interpretation Act* and applied the common law rule. The court cited with approval the decision of the Privy Council in *Bombay (city)*:[21]

> If it can be affirmed that, at the time when the statute was passed and received the Royal sanction, it was apparent from its terms that its beneficial purpose must be wholly frustrated unless the Crown were bound: then it might be inferred that the Crown has agreed to be bound.

### C. The Need for Reform

The rule that a statute can bind the Crown only by express words may lead to certain injustices. A few examples from legislation in British Columbia may serve to highlight the need for reform.

The *Legitimacy Act*[22] provides that a child born out of wedlock will be legitimized by the subsequent marriage of his parents. The effect of such legitimation might be to prevent an escheat to the Crown in circumstances where it might otherwise occur. In the Ontario case of *Re. W*,[23] a person who had been legitimized by an *Ontario Act* analogous to our own, died intestate. He was survived by brothers and sisters who were born in wedlock to the same parents. The court, citing a section of the Ontario *Interpretation Act*[24] comparable to section 35 of the *British Columbia Act*, held that the Crown was not bound by the Cntario legitimation legislation and the property escheated to the Crown, rather than devolving to his legitimate brothers and sisters. A British Columbia court might well arrive at a similar result today.

It would appear that had the deceased been adopted, rather than legitimized, in principle, the result should be the same and the Crown could assert that it is not

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22. R.S.B.C. 1960, c. 217.

23. [1925] 2 D.L.R. 1177.

24. R.S.O. 1914, c. 1, s. 11.

25. R.S.B.C. 1960, c. 4.

26. R.S.B.C. 1960, c. 3.

27 R.S.B.C. 196o, c. 208.

bound by the *Adoption Act*.[25] If a deceased, in such circumstances, leaves a will naming as beneficiaries the persons who would otherwise benefit under the *Administration Act*[26] on an intestacy, presumably the Crown would still be free to assert that it is not bound by the *Adoption Act* or the *Legitimacy Act* and levy succession duties on the basis that beneficiaries are strangers, rather than relatives.

The *Land Registry Act*[27] provides another area of potential injustice. While section 38 purports to specifically bind the Crown in so far as that section is concerned, the Act as a whole does not appear to be so binding. Section 43 of the Act provides that the priority between various charges against land is based on the priority of registration, rather than execution. Where the Crown has a charge against property which was executed prior to, but registered subsequent to, another charge, the Crown may be able to assert that it is not bound by section 43 and that the common law rules as to priority should apply. Having regard to the present activity of the government in granting second mortgages under the Provincial *Home Acquisition Act*,[28] such a fact situation is not unlikely to arise.

The rule that express words are required in a statute to bind the Crown also leads to the conclusion that it is under no compulsion to observe legislation designed for the protection of the individual such as the *Human Rights Act*[29] and the *Maternity Protection Act 1966*.[30] The binding effect of the *Contributory Negligence Act*[31] is uncertain.[32]

The Crown would also appear to be free to disregard municipal by-laws.

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28. S.B.C. 1967, c. 39.

29. S.B.C. 1969, c. 10.

30. S.B.C. 1966, c. 25.

31. R.S.B.C. 1960, c. 74.

32. The binding effect of provincial contributory negligence legislation on the Federal Government has been considered by the courts. In *The Queen* v. *Murray* (1967) 60 D.L.R. (2d) 647 (S.C.C.) it was held that such legislation operated to limit the recovery of the Federal Government in circumstances under which at common law the full measure of damages would have been recovered. *See also Schwella* v. *The Queen et al* [1957] Ex.C.R. 22i. Quaere whether, in the absence of specific words binding the Crown, the Provincial Government would be similarly bound.

33. R.S.B.C. 1960, c. 255.

34. S.B.C. 1953, c. 55.

35. *See* report contained in Vancouver Sun, August 19 and September 24, 1971.

36. S.B.C. 1964, c. 7.

There does not appear to be any provision in the *Municipal Act*[33] or the *Vancouver Charter*[34] which gives a municipality the power to make by-laws which are binding on the Crown:

The foregoing should not be taken as a suggestion that the Crown is, in fact, ignoring or disobeying its own statutes or municipal by-laws at will. Rather, it has sought to demonstrate that the potential for abuse is there. Generally speaking, the Crown and its corporations and agents are quite scrupulous about obeying the statutes and the by-laws made by municipalities.

However, this is not always the case. In the summer of 1971, B.C. Hydro carried out certain spraying operations which were specifically prohibited by a municipal by-law in force. An information under the by-law was laid but the action was dismissed.[35] In the case, specific reference was made to section 53(1) of the *British Columbia Hydro and Power Authority Act*.[36] That section provides:

> Notwithstanding any specific provision in any Act to the contrary, except as otherwise provided by or under this Act, the authority is not bound by any statute or statutory provision of the Province.

So far as this specific case was concerned, that section was not really necessary as section 35 of the *Interpretation Act* would probably have led the court to the same result.

Section 53(1) of the *British Columbia Hydro and Power Authority Act*, however, goes much further than section 35 of the *Interpretation Act*, so that even if a statute specifically provides that it is binding on the Crown, it is not binding on B.C. Hydro unless that statute is specified as binding on B.C. Hydro by the *British Columbia Hydro and Power Authority Act*. The potential mischief inherent in this sort of provision is obvious. It has been noted earlier that section 38 of the *Land Registry Act*[37] which provides that a certificate of indefeasible title is conclusive evidence against the whole world that the person named as owner is seized of an estate in fee simple, is binding on "Her Majesty." That section does not, however, appear to be binding on B.C. Hydro. If, for example, a rogue were to convey property to B.C. Hydro who then failed to register the conveyance and the rogue subsequently sold the property again to an innocent third party who did register his conveyance and have a certificate of title issued in his name, apparently B.C. Hydro would still be able to assert its title against the third party, notwithstanding that the third party would be named in the certificate of title as owner, and otherwise entitled to rely on section 38 of the *Land Registry Act*.

Again, the Commission stresses that it has no evidence that such events are, in fact, occurring. Rather, it is seeking to demonstrate that the potential for abuse

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37. *Supra*, note 6.

38. *Supra*, note 1, Part A, at 53.

exists. To say that the government and its agencies generally obey the law is only a partial answer. The Crown is still free to choose which laws it will, or will not, observe or consider binding on it. To that extent, the existing rules regarding statutes and the Crown place the government above the law and are, therefore, unacceptable.

The rule that a statute can bind the Crown only by express words has been criticized by Glanville Williams as an anachronistic inheritance of the Middle Ages, whose survival "... is due to little but the *vis inertiae*." He suggests that the law be reformed. He writes:[38]

> Consider how much clearer the law would be if the rule were that the Crown is bound by every statute in the absence of express words to the contrary. Such a change in the law would make no difference to the decision of the preliminary question of legislative policy whether the Crown should be bound by a statute or not. At the moment, if the draftsman of a Bill is instructed that the Crown is not to be bound, he simply says nothing on the subject in the Bill. Under the rule here suggested, he would insert an express provision exempting the Crown. The change of rule would not prevent the Crown from being expressly exempted from a statute if its framers so wished. It would, however, make the interpretation of the statute a much simpler affair, for it would get rid of the question of "necessary implication."
>
> A second argument in favour of change is that it would, so to speak, alter the legal presumption. At the moment, if the draftsman receives no clear instructions on the question whether the Crown is to be bound, or if he does not think of it, he says nothing in his draft and the Crown remains free - unless a necessary implication can be discerned. Under the suggested new rule, the Crown would be bound unless the draftsman had clearly made up his mind to exempt it. Thus the result of the change of rule would be in practice to extend the number of statutes by which the Crown is bound.
>
> It is suggested that under modern conditions this change would be desirable. With the great extension in the activities of the State and the number of servants employed by it, and with the modern idea, expressed in the *Crown Proceedings Act*, that the State should be accountable in wide measure to the law, the presumption should be that a statute binds the Crown rather than that it does not.

The change could be accomplished in British Columbia by simply amending the *Interpretation Act* to reverse the presumption. One difficulty with making this reform is that it would mean that much existing legislation would apply to the Crown. To exempt this legislation under the new rule would require specific mention of the particular Act. This may be time consuming. However, the advantage of requiring a deliberate policy choice as to whether the Crown's immunity will be preserved seems to outweigh any inconvenience. It places the onus on the claim for immunity. This is more consistent with the philosophy in favour of government responsibility which the Commission adopts.

The Commission recommends:

*The British Columbia* Interpretation Act *be amended to provide that the Crown is bound by every statute in the absence of express words to the contrary.*

To the extent that special provision should be made regarding the

applicability of statutes of limitation to the Crown, these will be dealt with in the Commission's forthcoming Report on the Statute of Limitations.

# CHAPTER VIII CONCLUSION AND SUMMARY OF RECOMMENDATIONS

This Report on the Legal Position of the Crown in British Columbia points out the need for law reform in this field. The impact of the immunities, privileges and advantages of the Crown (which means the government) are very far reaching. The breadth of government activity is underscored by the burgeoning phenomenon of the Crown corporation which has become a substitute for private enterprise. The extent of government activity takes on real significance in light of the procedural and substantive immunities of the government in law.

First, the Crown can only be sued by a petition of right which depends on a fiat being granted to a plaintiff at the sole discretion of the Crown. This mediaeval procedure has the effect of making the government judge in its own case. Only eleven fiats have been granted in the past 20 years. The requirement of a fiat appears to serve no good purpose. It has been abolished almost everywhere else in the western world. It should be abolished in British Columbia.

The Crown enjoys other procedural privileges. At common law there are only limited circumstances when an injunction can be obtained against the Crown or its servants. In some jurisdictions legislation has been passed prohibiting any right to an injunction against the Crown. This results in removing any right to interim relief against the Crown. It is an unnecessary limitation on judicial review of executive action.

The Crown also enjoys an advantage over its subjects in regard to the right of discovery, Crown privilege, and jury trials. These matters of evidence and procedure are important to the conduct of a fair trial. The individual is handicapped by the present advantage which the law grants to the Crown. The justification for any special privilege for the Crown is not convincing.

Likewise, the Crown's immunity in tort is not justified. It creates a particular hardship when the defendant is a Crown servant but cannot be explicitly identified. The historical foundations of the immunity are dubious and the notion "the King can do no wrong" was repudiated by Mr. Justice Locke of the Supreme Court of Canada. The law should be changed.

The mood of law reform of Crown proceedings is clear. Government responsibility is the trend. The conclusions of this Reporthave exhibited the underlying philosophy that the law should be as far as possible the same for the government as it is for the subject. Indeed, one could urge a higher standard for as Lord Macaulay remarked "the primary end of Government is the protection of persons and property of men." Yet the present law imposes on the Crown a much lower standard of legal liability than on the citizenry. This Report might well be concluded in the same way that Professor Kennedy ended his article on the subject in 1928. He wrote, quoting from Sir M.S. Amos:

> Contrary to common belief, there is, so far as we know, no civilized country in which the right of the ordinary citizen to judicial protection against Government is more limited, or more embarrassed, by obscurities, paradoxes and pitfalls than is the case in England.

If the word "England" were changed to "British Columbia" this would accurately

reflect the situation. The statement is no longer true in England. The Commission believes it should not be true in British Columbia. Reform of the law is long overdue.

The recommendations of the Commission are set out below. The page at which each recommendation may be found in the body of the Report is indicated.

The Commission recommends:

1. *The requirement of a fiat to sue the Crown be removed.*

2. *The procedure by which a subject commences a legal action against the Crown be the same as that which applies in actions between subject and subject.*

3. *Injunctions against the Crown should not be interdicted as they are in the* Uniform Model Act *and other Crown reform legislation.*

4. *The Crown and its servants should not be immune from proceedings by way of mandamus.*

5. *The section of the* Uniform Model Act *dealing with discovery be adopted.*

6. *When Crown privilege is claimed with respect to any document, the court may order production of the document to the court, examine the document and, if it finds that public interest in the administration of justice should prevail over the public interest in withholding the document, order production and discovery of the document to the parties subject to any conditions or restrictions it deems appropriate.*

7. *The common law of Crown privilege apply in the same manner to actions to which the Crown is a party as to actions between subject and subject.*

8. *The* Crown Costs Act *be repealed.*

9. *Legislation be enacted to provide that costs may be awarded in favour of, or against the Crown, in any civil action to which the Crown is a party to the same extent as in actions between subject and subject.*

10. *The jury trial should be available in actions to which the Crown is a party to the same extent as in actions between subject and subject.*

11. *Legislation should provide that estoppel may be raised against the Crown to the same extent as in actions between subject and subject.*

12. *Legislation be enacted to remove the Crown's immunity from liability in tort.*

13. *The legislation provide that the Crown be liable in tort to the same extent as a subject.*

14. *The common law definition of Crown servants or agents not be restricted as in the legislation in the United Kingdom, Nova Scotia and New Brunswick.*

15. *Crown liability not be predicated on vicarious liability. The Crown should be both vicariously and directly liable in tort.*

16. *No exemption be made relieving the Crown from liability when a statute exempts officers of the Crown from responsibility such as section 5(4) of the* Uniform Model Act.

17. *Judicial acts be immune from liability, but this immunity should not extend to the execution of the judicial process.*

18. *No exception be made for Crown liability for wilful torts such as false arrest, libel, or assault.*

19. *The Crown not be specially exempt from liability for punitive damages in tort.*

20. *No exemption should be given to the Crown, its servants and agents from actions based on strict liability, whether based on nuisance, the rule in* Rylands *v.* Fletcher*, or otherwise.*

21. *The defence of statutory authority should not be available to the Crown in actions for nuisance or based on the rule in* Rylands *v.* Fletcher *except where the claim is for injunctive relief.*

22. *The British Columbia* Interpretation Act *be amended to provide that the Crown is bound by every statute in the absence of express words to the contrary.*

E. D. FULTON
*Chairman*

R. C. BRAY
*Commissioner*

J. N. LYON
*Commissioner*

**December 12, 1972.**