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Backgrounder

LRC 9—Report on the Legal Position of the Crown

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In any existing dispute between the Crown and its subjects, the law provides the Crown a number of special advantages, known as "Crown immunity." This report focuses on the doctrine of Crown immunity and the extent to which retention of the doctrine is justified. The commission observes the doctrine of Crown immunity developed during a time when the scope of Crown authority was limited and governmental accountability and responsibility had not developed to their present stage. In this report, the commission makes recommendations that effectively limit the doctrine of Crown immunity in the majority of cases, and make the laws applicable between two persons applicable in any action between the Crown and a person.

The report comprises an introduction and eight substantive chapters. In the report's introduction, the commission notes the complexity of Crown immunity, provides a history of Crown reform, and states the basic assumption underlying Crown reform, being that, the Crown has enjoyed special position and privilege relative to the multitudes and the individual is often placed at a disadvantage, particularly when seeking recourse through the law against the government. The commission seeks to identify and scrutinize the special advantages and prerogatives for the Crown and whether such privileges are justified.

Chapter one begins with a definition of the term "Crown" and examines the scope of Crown activity, which fall into three general categories: (1) various government departments; (2) agencies separate but not necessarily independent of the government, such as the Labour Relations Board, and the Workers Compensation Board; (3) government authorities, such as Crown corporations involved in economic activity or development such as British Columbia Ferry Authority.

The commission notes the considerable diversity in Crown corporations, agencies, and authorities, which vary in their capacity to be sued. The commission also acknowledges the difficulty in determining whether a particular authority, board, or public corporation is a Crown agent, particularly when empowering statutes lack an express provision to that effect. When the empowering statute is silent, the determination falls to the courts, which have adopted a "control test." Factors to be considered in a control test include Crown ap-

pointment, whether property is vested in the Crown, whether the body in question has discretionary powers it can exercise independently of consulting any representative of the Crown. The commission observes, however, that the scope of Crown is limited insofar as Crown immunity does not protect a Crown servant from being sued in his or her personal capacity.

The next chapter examines the origins of Crown immunity. At common law, an ordinary citizen had no right to sue the Crown. In ancient times, a citizen had to petition the King for the right to have a matter heard before his courts. In his discretion, the King could direct that the courts hear the matter (*i.e.*, granting a fiat). This practice has been preserved in the version of British Columbia's *Crown Proceedings Act* in force at the date of this report whereby a claim against the Crown must be by "petition of right" and the granting of a "fiat" is a condition precedent to legal proceedings against the Crown.

The commission goes on to note the discretionary nature of a fiat and as such, the decision to grant or not grant a fiat is immune from judicial review. The report then provides one possible exception from the necessity of obtaining a fiat; for example, if the issue in the action is whether the statute is *ultra vires* the legislation.

The commission observes that no convincing reason exists for retaining the procedural privilege of a fiat and to effectively allow the government to determine when the government should be accountable before the law, not only paves the way for abuse, it violates the rule of law and the notion of independence of the judiciary.

The commission subsequently makes the following recommendations: (1) the necessity of a "fiat" in order to sue the Crown be removed; (2) that legal proceedings be commenced against the Crown in the same manner in which a subject commences proceedings against another subject.

The report then goes on to examine a private law remedy of an injunction, which is used to restrain and/or prevent illegal activity, and its applicability to the Crown.

At common law, an injunction generally cannot be issued against the Crown. The commission notes that courts hold conflicting views with regard to whether injunctions may be granted against Crown officers but observes Canadian courts are more willing to grant injunctions against the Crown, then English Courts. The report details four specific situations in which injunctions have been granted against Crown agents: (1) agents are sued in their personal capacity; (2) when agents act *ultra vires* their authority; (3) when agents are servants of Parliament rather than servants of the Crown; (4) when agents perform nongovernmental functions.

The report notes reforms to Crown proceedings in other jurisdictions have included provisions prohibiting injunctions against the Crown, but notes the absence of such provisions in British Columbia's legislation, as well as the Federal *Crown Liability Act.* The commission concludes the chapter with a recommendation that British Columbia not insert comparative prohibition in its legislation.

Chapter four contains a discussion of mandamus, which is " 'a prerogative writ' which compels the performance of a public duty." The commission observes that a mandamus will issue against Crown servants if they are acting in the capacity of an agent to the Legislature rather than as a Crown agent. The commission observes that the reasoning behind Crown immunity from mandamus is unconvincing (*e.g.*, because it is a "prerogative" writ, it would be incongruous to ask the Crown to "command" itself), and accordingly, Crown immunity from mandamus should be abolished.

In the following chapter, the report begins with a discussion of the discovery process in litigation. Specifically, the commission observes the Crown has the benefit of conducting discoveries but is not subject to discovery. The report then addresses the doctrine of Crown privilege, which provides the Crown may withhold evidence if its admission is against public interest. The commission recommends as follows: (1) courts be allowed to determine whether Crown privilege applies to any particular set of documents; (2) the common-law position in respect of Crown privilege apply in the same manner to actions to which the Crown is a party as would ordinarily apply. The report then examines the issue of costs, and notes that under the common law, the Crown neither paid nor received costs. While legislation currently provides for costs in limited circumstances, the commission recommends enacting legislation, permitting the awarding of costs in any civil action to which the Crown is a party, insofar as would ordinarily be available. The commission then recommends jury trials be available in actions where the Crown is a party as would ordinarily be available. Finally, the commission observes a Crown agent must have actual authority in order to bind the Crown; the doctrine of ostensible authority, or estoppel, does not bind the Crown. The commission concludes by recommending legislation be enacted allowing *estoppel* to be raised against the Crown when it would not effectively extend executive powers beyond statutory authority.

Chapter six acknowledges the state of the law as of the date of the report—namely that the Crown is not liable in tort for the damage it causes. Thus, if a Crown employee is negligent, no right of recovery lies against the Crown. The report notes the origins of the rule, derived from the common law, which were likely "designed by policy minded judges to meet with what they perceived to be nineteenth century conditions." The commission goes on to observe the need for reform and notes British Columbia is out of step with other jurisdictions; in the majority of the western hemisphere, the government is liable in tort. The report then considers the arguments in favor of Crown immunity, and in particular, pragmatic arguments, philosophical justifications, cost of reform, and the concept of indirect liability as against the Crown. The commission concludes that none of the arguments in favor of Crown immunity in tort are particularly convincing; accordingly, the commission recommends British Columbia follow the example of almost every other country and state in the western hemisphere and remove Crown immunity in tort.

The report goes on to consider various methods of reform, and in particular, whether reform should be by judicial decision or by way of legislation. The commission then identifies four alternative models for reform: (1) equality; (2) liability with exceptions; (3) immunity with exceptions; (4) strict liability. The commission acknowledges the most popular

method of reform is one of equality. The report then examines seven categories of limitations in Crown liability: (1) definition of Crown Employee; (2) vicarious liability; (3) Statutory exemptions for torts of Crown Officers; (4) judicial acts; (5) willful torts; (6) punitive damages; (7) strict liability. The commission concludes the chapter by making various recommendations, primarily, that Crown immunity in tort be abolished.

Chapter seven contains a discussion of the common law prerogative that the Crown is not bound by statute unless specifically named or by necessary implication. For example, limitation statutes do not bind the Crown. Effectively, the Crown may bring an action at any time, whereas an ordinary citizen is restricted by relevant time limitations. The commission also notes the rule that a statute can bind the Crown only by express words may lead to potential injustices; examples from British Columbia legislation are provided to highlight the need for reform. Accordingly, the commission recommends enacting legislation that the Crown is effectively bound by legislation, absent express words to the contrary.

Finally, in chapter eight, the report summarizes the commission's position on Crown immunity and provides a detailed list of recommendations.

Further Developments

See *Crown Proceedings Act*, S.B.C. 1974, c. 24 (now *Crown Proceeding Act*, R.S.B.C 1996, c. 89); *Interpretation Act*, S.B.C. 1974, c. 42, s. 13 (now *Interpretation Act*, R.S.B.C 1996, c. 238, s. 14).