PROCEEDINGS BY AND AGAINST THE CROWN IN CANADA

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Limitations on the right of action against the Crown, both in the right of the Dominion and in the right of the Provinces, and, where such right exists, the prescribed procedure, have been commented on and criticised by the legal profession in Canada for many years. A review of the law on "Petitions of Right and Actions against the Crown" is contained in the Notes and Annotations by E. R. Cameron, K.C., in 24 S. C. R. at page 44, and an excellent article by Professor W. P. M. Kennedy entitled "Suits by and against the Crown" will be found in Volume 6 of the Canadian Bar Review at page 329.

This subject matter has occupied a large part of the time of the Section on the Administration of Civil Justice and the annual meetings of the Canadian Bar Association. The reports of the proceedings of the meetings of the Canadian Bar Association and the issues of the Canadian Bar Review contain frequent reference to it.[1] Since 1925 a series of resolutions have been passed and forwarded to the appropriate authorities, requesting remedial action to meet changing conditions, without appreciable result. Despite the fact that government, and its many departments, are increasingly invading the field of private enterprise, in which the immunities of the Crown have no place, no action has been taken to revise, generally, the statute law and procedure governing actions by and against the Crown.

The recent enactment in Great Britain of The Crown Proceedings Act, 1947,[2] which came into force on January 1st, 1948, and of the Federal Tort Claims Act[3] in the United States has given fresh impetus to the demand for similar action and legislation in Canada. This issue of the Review contains an article by Sir Thomas Barnes, the Treasury Solicitor, on The Crown Proceedings Act, 1947, and another by Professor Edwin Borchard entitled "Government Liability in Tort", in which he discusses the Federal Tort Claims Act and the position in the United States since its passing. This is a convenient time therefore to review the situation in Canada and to point out some of the difficulties

[1] Proceedings of Canadian Bar Association, Vol. 10, pp. 63, 229; Vol. 12, p. 334; Vol. 13, p. 216; Vol. 14, p. 224; Vol. 16, p. 168; Vol. 18, pp. 4, 200; Vol. 20, p. 185; Vol. 27, p. 247; Vol. 29, p. 173.

[2] 10-11 Geo. VI, c. 44.

[3] Title IV of the Legislative Reorganization Act of 1946, Public Law 601, 79th Congress.

which call for legislative action parallel to that already taken in Great Britain and the United States.

At Common Law

Procedure by petition of right for relief against the Crown can be traced back to the reign of Edward I (1272-1307). Under this procedure subjects, whose property or money was unjustly taken or detained by officers of the Crown, presented petitions to the King in Parliament. If favourably received, their petitions were referred for consideration to the Exchequer, the Chancellor or a Special Commission.[4] By Chapter 34 of 23-24 Victoria, the procedure for petitions of right was simplified, but no change was made in the matters for which petitions could be maintained.

Apart from special statutory authority, procedure by petition of right is only open to the subject in the following cases:

(1) where the land or goods or money have found their way into the possession of the Crown and the purpose of the petition is to obtain restitution, or, if restitution cannot be given, compensation in money;

(2) when a claim arises out of a contract, as for goods supplied to the Crown, or to the public service; and

(3) where the claim is for statutory compensation, as for example when a statute imposes a liability upon the Crown to pay for the use and occupation of property.

In the absence of specific statutory provision, a petition of right does not lie against the Crown for a claim sounding in tort.

General Statutory Law in Canada
The Petition of Right Act

In Canada, a Dominion Petition of Right Act was first passed in 1875 (38 Vict., c. 12); it now appears as R. S. C., 1927, c. 158. This statute provides that a petition of right may be addressed to His Majesty to the effect of the form "A" in the schedule to the Act[5] and that the petition shall be left with the Secretary of State of Canada, for submission to the Governor General for consideration and, if he thinks fit, for granting his fiat that right may be done.[6] In the event that a fiat is granted, the petition is filed in the Exchequer Court and the proceedings

[4] Clode, Petition of Right (1887), pp. 2-23.
[5] Section 3.
[6] Section 4.

thereafter are carried on in that court, which is given exclusive original jurisdiction.[7]

It will be noted that the granting of a fiat is discretionary and a matter of grace, and that there is no time limit fixed by the Act within which a fiat must be granted or refused.

While the Act permits the Crown in its statement of defence, in addition to any legal or equitable defence in fact or in law available under the Act, to raise any legal or equitable defence which would have been available if the proceeding had been a suit or action in a competent court between subject and subject,[8] it does not give to the petitioner as against the Crown the benefit of all defences which he would have if the action had been one in a competent court between subject and subject.

Exchequer Court Act

The Exchequer Court Act was passed in 1875 (38 Vict., c. 11), and is now R.S.C., 1927, c. 34. By this Act the Exchequer Court is given exclusive original jurisdiction in all actions against the Crown. The causes in which a petition of right lies against the Crown, in the right of the Dominion, are now set out in sections 18 to 20 of the Act, which, as amended, are as follows:

> 18. The Exchequer Court shall have exclusive original jurisdiction in all cases in which demand is made or relief sought in respect of any matter which might, in England, be subject of a suit or action against the Crown, and for greater certainty, but not so as to restrict the generality of the foregoing terms, it shall have exclusive original jurisdiction in all cases in which the land, goods or money of the subject are in the possession of the Crown, or in which the claim arises out of a contract entered into by or on behalf of the Crown.
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> 19. The Exchequer Court shall also have exclusive original jurisdiction to hear and determine the following matters:—
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> (a) Every claim against the Crown for property taken for any public purpose;
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> (b) Every claim against the Crown for damage to property injuriously affected by the construction of any public work;
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> (c) Every claim against the Crown arising out of any death or injury to the person or to property resulting from the negligence of any officer or servant of the Crown while acting within the scope of his duties or employment;
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> (d) Every claim against the Crown arising under any law of Canada or any regulation made by the Governor in Council;
>
> (e) Every set-off, counter claim, claim for damages whether liquidated or unliquidated, or other demand whatsoever, on the part of the Crown against any person making claim against the Crown;

[7] Section 5.
[8] Section 8.

(f) Every claim against the Crown arising out of any death or injury or loss to the person or to property caused by the negligence of any officer or servant of the Crown while acting within the scope of his duties or employment upon, in or about the construction, maintenance or operation of the Intercolonial Railway or the Prince Edward Island Railway;

(g) The amount to be paid whenever the Crown and any person have agreed in writing that the Crown or such person shall pay an amount of money to be determined by the Exchequer Court, or any question of law or fact as to which the Crown and any person have agreed in writing that any such question of law or fact shall be determined by the Exchequer Court;

(h) The determining of the value of any real or personal, movable or immovable, property, or of any interest therein, sold, leased or otherwise disposed of by the Crown, or which the Crown proposes to sell, lease or otherwise dispose of, when such matter has been referred to the Exchequer Court by the head of the Department charged with the administration of such property;

(i) Every claim, demand, set-off, counter claim, dispute, or question with respect to any debt, property right or interest mentioned in section three or section four of Part X of the Treaty of Peace with Germany, or in any similar section or provision which may be included in the Treaties of Peace with Austria, Bulgaria or Turkey, or in any statute or Order in Council passed for the purpose of carrying into effect the said section three or section four or any such similar section or provision.

(j) Every application for a writ of habeas corpus ad subjiciendum or a writ of certiorari or a writ of prohibition, or a writ of mandamus, in relation to any officer or man of any Canadian Naval, Military or Air Forces serving outside of Canada, or in relation to any proceedings, or to any act or omission respecting any such officer or man, to the same extent as and under similar circumstances in which jurisdiction now exists in the Exchequer Court of Canada or in the courts or judges of the several provinces in respect of similar matters within Canada.

2. Nothing in paragraph (i) shall affect the jurisdiction of any other court to hear and determine any matter now pending before such court.

3. Any writ mentioned in paragraph (j) of subsection one of this section shall be directed to the Minister of National Defence, and, upon receipt of such writ, it shall be the duty of the Minister of National Defence, by the most rapid means of communication available, to transmit such writ or notification of the issue and terms thereof, to the appropriate authority having regard to the matters to which such writ relates. Upon receipt of such writ or such notification, it shall be the duty of such appropriate authority to take such steps as may be necessary to comply with the terms thereof.

20. The Exchequer Court shall have exclusive original jurisdiction at the suit or upon the application of any person claiming to be entitled to public lands for which no patent has issued, as being the heir, devisee, representative or assignee of the original claimant, or as having derived a title or claim from or through any such heir, devisee, representative

> or assignee, or at the suit or upon the application of the Attorney General of Canada, in any case in which public lands are claimed by any such person, to ascertain, determine and declare who is the person to whom the patent for such lands ought to issue.
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> 2. The Court shall decide all such cases as in its judgment the justice and equity of the case demand, and shall report its decision to the Governor in Council; and letters patent may issue granting the lands in question in accordance with such decision.

Effect of Sections 18 and 19

Section 18 does not create or impose new liabilities on the Crown. Recognizing liabilities of the Crown already existing, it confers exclusive jurisdiction in respect of them upon the Exchequer Court, and regulates the remedy and relief to be administered.[9]

Section 19(1), paragraphs (a) and (b), give to the Exchequer Court the jurisdiction formerly possessed by the Official Arbitrators under 31 Vict., c. 12.

Section 19(1), paragraph (c), is one of the two provisions of the Act that, since its inception, have been amended to increase the rights of the subject. As contained in R.S.C., 1906, c. 140 (then section 20(c)), it read as follows:

> Every claim against the Crown arising out of any death or injury to the person or to property on any public work, resulting from the negligence of any officer or servant of the Crown, while acting within the scope of his duties or employment.

Under this wording it was held that the Court had no jurisdiction to award damages unless the person or property was present upon the public work at the time of the injury.[10] In 1917, possibly as a result of these decisions, the paragraph was repealed and the following substituted for it by 7-8 Geo. V, c. 23, s. 2:

> Every claim against the Crown arising out of any death or injury to the person or to the property resulting from the negligence of any officer or servant of the Crown while acting within the scope of his duties or employment upon any public work.

Under this wording the suppliant had to prove:

(1) a public work,

(2) negligence of an officer or servant of the Crown, while acting within the scope of his duties or employment, and

(3) that the injury was the result of such negligence.[11]

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[9] *Gauthier* v. *The King* (1918), 56 S.C.R. 176, at p. 190.

[10] *Olmstead* v. *The King* (1916), 53 S.C.R. 450; *Piggott* v. *The King* (1916), 53 S.C.R. 626.

[11] *Gauthier* v. *The King* (1920), 19 Ex. C.R. 335, at p. 339.

The paragraph was again amended in 1938 by 2 Geo. VI, c. 28, s. 1, which deleted the words "upon any public work" at the end of the section, and thus removed the former limitation imposed by these words.

In a recent case, *Farthing* v. *The King*,[12] O'Connor J. states the present position and points out (1) that, apart from section 19(1)(c) as amended in 1938, the Crown is not liable for the tort of negligence; (2) that the liability under section 19(1)(c) is vicarious, based as it is upon a tortious act of negligence committed by a servant while acting within the scope of his employment, and its condition is that the servant shall have drawn upon himself a personal liability to a third person; and (3) that the suppliant, to be entitled to the relief claimed, must establish that a servant of the Crown has drawn upon himself a personal liability to the suppliant and that, before a liability of a servant can be established, three things have to be proved (a) that the servant failed to exercise due care, (b) that the servant owed to the suppliant a duty to exercise due care, and (c) that the servant's failure was the "cause" of the injury in the proper sense of that term.

Section 50A

The second amendment increasing the rights of the subject is now found in section 50A. Following upon the decision of the President of the Exchequer Court in *McArthur* v. *The King*,[13] that a person who enlisted in an active unit of the Canadian Army during the last war was not an "officer or servant of the Crown", within the meaning of section 19(1)(c) of the Exchequer Court Act, and that the Crown was not liable for the negligence of such a person, the Act was amended by 7 Geo. VI, c. 25, s. 1, by adding section 50A as follows:

> For the purpose of determining liability in any action or other proceeding by or against His Majesty, a person who was at any time since the 24th day of June, 1938, a member of the naval, military or air forces of His Majesty in right of Canada shall be deemed to have been at such time a servant of the Crown.

General Provisions of the Act

Section 32 of the Exchequer Court Act provides that the laws relating to prescription and the limitation of actions in force in any province between subject and subject shall, subject to

[12] [1948] 1 D.L.R. 385, at p. 393.
[13] [1943] Ex. C.R. 77.

the provisions of any Act of the Parliament of Canada, apply to any proceeding against the Crown in respect of any cause of action arising in such province. It will be noted that this section applies only to proceedings against the Crown and not to proceedings by the Crown, and that the Crown may claim the benefit of a provincial statute in which it is not mentioned, although it is not adversely bound by it.

In *Zakrzewski* v. *The King*[14] it was contended for the suppliant that, since section 32 of the Exchequer Court Act does not specify that the provincial laws in force at any particular time shall apply, it must be read as meaning only the provincial laws relating to prescription and the limitation of actions in force at the time the Exchequer Court Act was first enacted. The President of the court (Thorson J.) held, however, that the provincial laws relating to prescription and the limitation of actions referred to in section 32, of which the Crown may avail itself, are those of the province in which the cause of action arose that are in force in such province at the time the Crown is called upon to make its defence to the petition of right.

Thus the position of the Crown in this regard differs from its position with respect to the application of the law of negligence, since the law of negligence to be applied, in any particular case, is the law of negligence of the province in which the alleged negligence occurred that was in force, not at the time when the negligence occurred, but at the time when the liability for it was first imposed upon the Crown.

Section 37 of the Exchequer Court Act provides that any claim against the Crown may be prosecuted by petition of right, or may be referred to the Court by the head of the department in connection with the administration of which the claim arises, and, if any such claim is so referred, no fiat shall be given on any petition of right in respect thereof.

While discovery and production of documents in actions by and against the Crown (in the right of the province) is not permitted in some provinces, the Rules of the Exchequer Court provide that any departmental or other officer of the Crown may, by order of the court or a judge, be examined at the instance of the party adverse to the Crown and that the court or a judge may order production of documents by any officer of the Crown.

[14] [1944] Ex. C.R. 163.

Difficulties Arising from Present Legislation and Procedure

It is impossible in this article to deal at length with all the inconsistencies and difficulties arising from the legislation and procedure just outlined. To show that the problem is an ever present and increasing one, several recent cases in which the inconsistencies, difficulties, and even injustice of the present legislation have been pointed out, or brought more forcibly to the attention of the public, are mentioned.

The President of the Exchequer Court in *Zakrzewski* v. *The King*[15] pointed out that it is necessary, before any provincial law relating to negligence is applied in a claim under section 19(1)(c) of the Exchequer Court Act, to consider whether that law was in force in the province at the time when the liability for such negligence was first imposed upon the Crown, since such liability, having been imposed by Parliament in the light of the provincial laws of negligence then in force and having no existence apart from the Parliamentary enactment by which it was imposed, cannot be altered by subsequent provincial enactment; and that the result of this state of the law is that the liability of the Crown for the negligence of its officers and servants may not be the same as that of an individual or corporation for the negligence of his or its officers or servants. The President (Thorson J.) further points out at page 168 that, "If the Crown is to be put in exactly the same position in the matter of liability for negligence as an individual or corporation would be, such a result, which seems a desirable one, can be accomplished only by a Parliamentary enactment declaring that in claims under section 19(1)(c) of the Exchequer Court Act, as amended, the law of negligence to be applied shall be the law of the province in which the cause of action shall arise that is in force in such province at the time of such cause of action and would be applicable if the proceeding were a suit or action between subject and subject".

Three recent cases where the question of contributory negligence arose should be noted. In *The King* v. *Laperrière*[16] the Crown contended that its liability under section 19(1)(c) of the Exchequer Court Act is confined to cases where the injuries to person or property are exclusively "resulting from the negligence of any officer or servant of the Crown", *i.e.* that there is no right of action against the Crown in a case of contributory negligence on the part of the Crown and the subject. It was held, *per* Kerwin,

[15] [1944] Ex. C.R. 163.
[16] [1946] S.C.R. 415.

Hudson and Estey JJ., that the Crown's contention is not well founded when the cause of action arose in the province of Quebec. The Chief Justice and Rand J. expressed no opinion on this point. In *Arial* v. *The King*[17] the suppliant claimed damages from the Crown for the death of her infant son alleged to have been caused by the negligence of an officer or servant of the Crown in the performance of her duties. Angers J. held that the doctrine of contributory negligence as contained in the Ontario Contributory Negligence Act, 1930, applied and that, both parties being equally responsible for the accident, the respondent should pay to the suppliant one half of the damages suffered by her. In *The King* v. *Toronto Transportation Commission*[18] the court found that the collision in question was caused by the combined negligence of the servants of the plaintiff and the servants of the defendant, and that the fault was in equal degree. Although stating that, in his view, the result was most inequitable, O'Connor J. held that, while the rights and liabilities of the parties are to be determined by the law of negligence in force in the Province of Ontario (in this case), no provincial enactment can reduce the rights or add to the liability of the Crown, in the right of the Dominion, and that therefore the provisions as to contributory negligence in the Ontario Negligence Act[19] are not applicable because they would limit the right of the Crown to recover. Judgment was accordingly given in favour of the Crown for the full amount of its damage (an appeal to the Supreme Court of Canada is pending).

It is apparent from these four cases that the subject and the Crown may not be governed by the same law as to negligence, and that the Crown can take advantage of the appropriate provincial law respecting contributory negligence but may not be bound by it. Legislation making the appropriate provincial law as to negligence (including contributory negligence), in force at the time the cause of action arose, applicable in actions both by and against the Crown and making the Crown subject thereto appears to be long overdue.

In Great Britain the general law relating to indemnity, contribution and contributory negligence has been made applicable to the Crown by section 4 of the Crown Proceedings Act, 1947, which is as follows:

> (1) Where the Crown is subject to any liability by virtue of this Part of this Act, the law relating to indemnity and contribution shall be

[17] [1946] Ex. C.R. 540.
[18] [1946] Ex. C.R. 604.
[19] R.S.O., 1937, c. 115.

enforceable by or against the Crown in respect of the liability to which it is so subject as if the Crown were a private person of full age and capacity.

(2) Without prejudice to the effect of the preceding subsection, Part II of the Law Reform (Married Women and Tortfeasors) Act, 1935 (which relates to proceedings against, and contribution between, joint and several tortfeasors) shall bind the Crown.

(3) Without prejudice to the general effect of section one of this Act, the Law Reform (Contributory Negligence) Act, 1945 (which amends the law relating to contributory negligence) shall bind the Crown.

Difficulty is frequently encountered in determining whether an action should be brought against the Crown or against its servant or agent and whether the action should be by petition of right and in the Exchequer Court, or by suit in the ordinary courts of the land. The ever-increasing encroachment by Government upon what was formerly looked upon as the field of private enterprise, the creation of special government departments or bodies for that purpose and the difficulty of deciding whether such bodies are subject to suit in the ordinary courts or must be proceeded against by petition of right has made the problem more acute. The present state of the law leads to useless litigation and, in some cases, results in a denial of justice.

A subject, having sought to enforce his claim by petition of right in the Exchequer Court, and having had judgment go against him on the ground that the body corporate in question is not a servant or agent of the Crown and that the Exchequer Court is not the proper forum for his action, may find, due to the delay in having his action heard and determined in the Exchequer Court, that his right of action in the ordinary courts has then been prescribed.

Several recent cases show how difficult it is to ensure that the subject is in the proper court. In *Gooderham and Worts Limited* v. *Canadian Broadcasting Corporation*[20] the defendant contended that the action would not lie against it on the ground that it was an emanation of the Crown and could only be proceeded against in the Exchequer Court. It was held that, while the defendant was an emanation of the Crown, the action would lie in the Supreme Court of Ontario because of the particular provisions of The Canadian Broadcasting Act.[21] In *International Railway Company* v. *Niagara Parks Commission*,[22] on appeal to the Privy Council, it was held that an action would lie against the Niagara Parks Commission (although an agent of the Crown) in respect

[20] [1940] O.R. 130.
[21] 1 Edw. VIII, 1936, c. 24, ss. 4, 8.
[22] [1941] 3 D.L.R. 385.

of a contract entered into by it, a petition of right against the Crown not being the sole recourse since the Commission had entered into the contract "on its own behalf as well as on behalf, and with the approval, of the Crown". In *McClay* v. *Wartime Housing Limited*,[23] it was held that Wartime Housing Limited (incorporated under the Dominion Companies Act) was an emanation or servant of the Crown and could not be sued for trespass in the British Columbia courts, the Exchequer Court having exclusive jurisdiction over the claim put forward. In *North and Wartime Housing Limited* v. *Madden*[24] it was held that North and Wartime Housing Limited, a company incorporated as a private company by letters patent under the Dominion Companies Act,[25] even though wholly owned by the Crown, was a private company and could be sued in the ordinary courts by ordinary process, without petition of right, and that its status was not affected by a provision in an Order in Council, prior to incorporation, that it should be deemed an "emanation of the Crown". In *Oatway* v. *Canadian Wheat Board*[26] it was held that the Canadian Wheat Board, although incorporated by the Canadian Wheat Board Act[27] as a body corporate with capacity to contract and power to sue and be sued, was still, having regard to the control over it vested by the Act in the Governor in Council, a servant of the Crown and that any action against it must be by petition of right.

Contrast the present position of uncertainty in Canada with the situation in Great Britain where actions against the Crown may now be brought in the ordinary courts and where, if there is any reasonable doubt as to the government department against which action should be taken, civil proceedings may be instituted against the Attorney General.[28]

The Crown in the Right of the Provinces

The limitations upon actions against the Crown in the right of the various provinces of Canada, and the prescribed procedure, are generally speaking similar to those relating to actions against the Crown in the right of the Dominion. It is impossible to deal here with the law in each province, which well might be the subject of a further article or articles. It has been said that the relief

[23] [1944] 3 D.L.R. 729.
[24] [1944] 4 D.L.R. 161.
[25] S.C., 1934, c. 33.
[26] [1944] 4 D.L.R. 381.
[27] S.C., 1935, c. 53.
[28] Crown Proceedings Act, 1947, s. 17(3).

available to the subject in actions against the Crown in the right of the provinces is nugatory.[29]

In some provinces there is in force a Crown Procedure Act. In Ontario a Petition of Right Act,[30] passed in 1872, was not carried into the revision of 1887; instead the provisions of the Act were transferred to the Consolidated Rules of Practice. They are now found in Rules 738 to 750 of the Supreme Court of Ontario. The procedure in actions against the Crown in the right of Ontario, in contract, keeps all the Crown's prerogatives in pleading and practice intact. While the Crown in the right of Ontario may obtain discovery in actions to which it is a party, it has been held that the prerogative of the Crown to refuse discovery is not relinquished by its instituting action and is not destroyed by Rules 2, 327 and 744 of the Supreme Court of Ontario.[31]

The general rule in Ontario is that the Crown and departments of government cannot be sued in tort. In the absence of specific statutory authority permitting an action for tort to be brought against the government department in question (*e.g.*, The Highway Improvement Act, R.S.O., 1937, c. 56, s. 75), an action for tort will not lie against any government department. And the fact that the government department or servant or agent of the Crown is a body corporate, with power to sue and be sued, does not destroy its immunity from actions for tort.[32] There is no legislation in Ontario with provisions similar to section 19(1)(c) of the Exchequer Court Act.[33]

Professor Borchard in his article on Government Liability in Tort deals at some length with actions against municipalities in the United States. Again, the comparable position in the various provinces of Canada is outside the scope of this article and might well be the subject of a further article.

Remedial Action

The present position in Canada, with respect to legal proceedings by and against the Crown (both in the right of the Dominion and the Provinces), might well be described in the

[29] Report of British Columbia Section on the Administration of Civil Justice, January 1948.

[30] 35 Vict. c. 13; R.S.O., 1877, c. 59.

[31] *Atty.-Gen.* v. *Newcastle-upon-Tyne Corporation*, [1897] 2 Q.B. 384; *Atty.-Gen. Ontario* v. *Toronto Junction Recreation Club* (1904), 8 O.L.R. 440; *Crombie* v. *Rex* (1922), 52 O.L.R. 72.

[32] *Peccin* v. *Lonegan and T. & N. O. Railway Commission*, [1934] O.R.701.

[33] R.S.C., 1927, c. 34.

words of Sir M. S. Amos,[34] (as quoted by Professor Kennedy), with the single change of the concluding word "England" to "Canada":

> 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.

Reform in the law respecting actions by and against the Crown is long overdue. On the part both of the legal profession and the public there is a great desire for simplification of legal proceedings in which the Crown is a party. One would find it difficult to give any good reason why actions in which the Crown is a party should be on any different basis from those between subject and subject. The maxim, "the King can do no wrong", can have no valid application to present conditions resulting from the growth of public ownership and the increasing tendency of governments and their departments, agencies and servants to enter the business field in competition with private enterprise. The prerogative of the Crown has no place in a business enterprise, even though the business is government owned or operated.

Procedure by petition of right and the exclusive jurisdiction of the Exchequer Court have resulted in useless litigation, unnecessary difficulties, delays and often inequities.

Great Britain and the United States have taken remedial action and the legislation passed in those countries should be helpful when consideration is being given to reform in Canada.

There may be some difference of opinion as to the manner in which the reform should be brought about and how far it should go. It has been suggested that a conference of representatives of the Dominion and Provincial Governments should first be called to consider parallel and contemporaneous action. On the other hand, it might expedite matters if the appropriate legislative action were first taken by the Dominion Government. Consideration might be given by the Dominion Government to the appointment of a Committee, such as was appointed by the Lord Chancellor in Great Britain in 1921, "to consider the position of the Crown as litigant and to propose such amendments to the law as might be considered advisable and feasible, having regard to the exceptional position of the Crown, and to prepare a Bill embodying and giving effect to such changes".

The long title of the Crown Proceedings Act in Great Britain will give some idea of the matters to be considered if the whole

[34] In (1928), 10 Journal of Comparative Legislation 131.

field is to be covered —"An Act to amend the law relating to the civil liabilities and rights of the Crown and to civil proceedings by and against the Crown, to amend the law relating to the civil liabilities of persons other than the Crown in certain cases involving the affairs or property of the Crown, and for purposes connected with the matters aforesaid".

It is suggested that in any action taken consideration should be given to:

(1) abolishing the procedure of Petition of Right;

(2) abolishing the exclusive jurisdiction now possessed by the Exchequer Court in actions by and against the Crown in the right of the Dominion;

(3) giving the subject the right to proceed against the Crown in the ordinary courts of the land (including County Courts) as a matter of right;

(4) making the Crown liable to be sued in tort;

(5) making the rights and liabilities of the parties, in any civil action to which the Crown is a party, as nearly as possible the same as in an action between subject and subject;

(6) assimilating the procedure in actions by and against the Crown to that in actions between subject and subject, including such matters as discovery and costs;

(7) enabling the court, in case of a claim of privilege by the Crown, to go behind the claim and decide for itself whether the discovery would, in fact, be prejudicial to the public interest.

It is clear that remedial action lies with the Dominion Government and with the Provincial Governments; the legal profession is eagerly awaiting some indication that they are aware of the need for reform and that action will be taken to bring it about.