

CROWN AGENT STATUS

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The Crown agency issue has arisen most frequently in the past in connection with claims of Crown immunity. The modern approach of the courts is simply to examine the government's right to control the person or statutory body claiming Crown status. It is suggested that this approach is an incomplete one in the domestic immunity context. There should be a further analysis of the suitability of the particular immunity claimed to the particular function performed by the agent. Under this approach the assessment of control would remain for the preliminary purpose of determining whether or not the person or body was a Crown agent. An "enterprise control" test may be used for this purpose. Additionally, such a test may have application in other contexts where the Crown agent characterization is relevant. It may possibly be applied, for example, to determine the scope of operation of the Charter.

Par le passé, la question d'agent de la couronne se posait surtout quand il s'agissait de revendiquer l'immunité de la couronne. De nos jours, les tribunaux examinent seulement le droit du gouvernement à exercer son autorité sur la personne ou l'organisme statutaire qui revendique le statut de la couronne. L'auteur suggère que, dans le contexte de l'immunité interne, cette façon de faire ne va pas assez loin. On devrait aussi se demander si l'immunité revendiquée dans un cas particulier correspond à la fonction particulière que remplit l'agent. Si l'on suit cette façon d'agir, l'évaluation de l'autorité ne vaut que pour les fins premières, à savoir de décider si la personne ou l'organisme est un agent de la couronne ou non. Pour ce faire, on pourrait utiliser le concept d'"enterprise control" que propose l'auteur. Ce concept pourrait de plus servir dans des cas différents mais où il est important de savoir s'il est question ou non d'agent de la couronne. Il se pourrait qu'on puisse l'utiliser par exemple pour décider de la portée d'application de la Charte.

Introduction

The question whether or not a person or body is a Crown agent¹ has been continually before the courts in this century. This is attributable to the fact that there are distinct advantages for those who can be charac-

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¹ With respect to statutory bodies, it is not uncommon to find such terms as "instrumentality" and "emanation of the Crown" used by the judges. (See for example, *R. v. Achtem* (1979), 19 A.R. 338, at p. 342 (Alta. C.A.)). The use of such terms has been frowned on by the Privy Council (*International Railway Company v. Niagara Park Commission*, [1941] 2 W.W.R. 338, at p. 346) and the Supreme Court of Canada (*National Harbours Board v. Langelier* (1968), 2 D.L.R. (3d) 81, at p. 90).

terized as Crown agents.² In particular, Crown agent status attracts the immunities which the Crown itself enjoys.³ For example, the Crown is still generally immune from the operation of statutes in most Canadian jurisdictions.⁴

Recently it has become important to distinguish between the Crown and others for two additional general purposes. First, in the international context, it is necessary to determine whether particular bodies are agents or "alter egos" of specified foreign states in order to assess a claim of sovereign immunity made by such bodies. Secondly, now that the Supreme Court of Canada has decided that the Charter of Rights and Freedoms⁵ does not apply in litigation between private parties absent some govern-

² Crown agent status is only occasionally a disadvantage. In *Workers' Compensation Board v. Deloitte Haskins and Sells Limited* (1982), 41 C.B.R.N.S. 315 (Alta. Q.B.), the Board would not have enjoyed the priority it did (under the Bankruptcy Act) if it had been characterized as a Crown agent.

³ G. Sawyer, *Shield of the Crown Revisited* (1957), 1 Mel. U. Law Rev. 137, at p. 137. These immunities have sparked much discussion and criticism in the literature. Representative articles would include W.P. Kennedy, *Suits By and Against the Crown* (1928), 6 Can. Bar Rev. 329; D.M. Gordon, *How Far Privative or Restrictive Enactment Binds the Crown* (1940), 18 Can. Bar Rev. 751; W.I. Binnie, *Attitudes Toward State Liability in Tort: A Comparative Study* (1964), U. of T. Fac. Law Rev. 88; S.I. Bushnell, *Crown Privilege* (1973), 51 Can. Bar Rev. 551; R.M. Lieberman, *Executive Privilege* (1975), U. of T. Fac. Law Rev. 181.

These immunities, it should be pointed out, are only available when the Crown agent has not exceeded its authority: *R. v. Canadian Broadcasting Corporation* (1983), 47 N.R. 19 (S.C.C.); *National Harbours Board v. Langelier*, *supra*, footnote 1; *Baton Broadcasting Ltd. v. Canadian Broadcasting Corporation*, [1966] 2 O.R. 169 (Ont. H.C.). See also *R. v. Eldorado Nuclear Limited*, [1983] 2 S.C.R. 551, at pp. 567-568.

It is also clear that a Crown agent will not be able to take advantage of its status if it has acted on its own behalf even though it may also act on behalf of the Crown. See *Perehinec v. Northern Pipeline Agency*, [1983] 2 S.C.R. 513; *International Railway Co. v. Niagara Parks Commission*, *supra*, footnote 1 (Case note at (1941), 19 Can. Bar Rev. 543).

Crown agent status is also relevant for purposes other than determining the availability of Crown immunities. See *The Queen v. Gibson* (1954), 34 M.P.R. 265 (Nfld. S.C.), and *R. v. Achtem*, *supra*, footnote 1.

⁴ R.S.A. 1980, c. I-7, s. 14, R.S.C. 1970, c. I-23, s. 16 and R.S.O. 1980, c. 219, s. 11. See *Re Caisse de Depot et Placement du Quebec and Ontario Securities Commission* (1983), 149 D.L.R. (3d) 456 (Ont. Div. Ct.), and *Re Doxtator* (1984), 4 D.L.R. (4th) 733 (Ont. S.C.). An early version of the Ontario provision can be found at R.S.O. 1877, c.1, s.46. Note that the provision is reversed in a few provinces (see footnote 10, *infra*). Although not specifically mentioned, it is clear that these provisions extend to agents of the Crown (see *R. v. Eldorado Nuclear Limited*, *supra*, footnote 3, at p. 565). As to the applicability of these provisions between the federal and provincial governments, see the case note at (1978), 56 Can. Bar Rev. 145. Also see W.D. Moull, *Intergovernmental Immunity from Taxation: The Unresolved Issues* (1984), 32 Can. Tax. J. 54, at p. 60; D. Gibson, *Interjurisdictional Immunity in Canadian Federalism* (1969), 47 Can. Bar Rev. 40.

⁵ Constitution Act, 1982, Part I.

mental action,⁶ it will be necessary to distinguish between governmental and private action.

The first purpose of this article is to examine the Crown agency jurisprudence in the domestic immunity context. A preliminary review of the historical evolution of the "control" test now utilized for identifying Crown agents sets the stage for a consideration of the detailed application of that test. It is concluded that there is some uncertainty over just what degree of governmental control will be sufficient to create Crown agent status. The second purpose of the article is then to describe an approach that addresses this uncertainty. This approach utilizes the same control test as before but it adds a perspective that has been missing. It operates to define with some precision the control threshold beyond which Crown agent status is found. The test is recommended but, at the same time, its limited utility in the domestic immunity context is recognized. Satisfaction of the test is necessary to acquire Crown agent status but, arguably, it is another question altogether whether that status alone should attract every or even any Crown immunity. Finally, some observations are added with respect to the use of this control test for the purposes of sovereign immunity and Charter claims.

I. Domestic Crown Immunity

Many writers and judges have thought that various of the privileges of the Crown should be abolished or, at the very least, not indiscriminately extended to the numerous public authorities that have been created by every modern government.⁷ They doubt that many of these privileges have any historical or modern justification. They believe that the most satisfactory and equitable resolution of disputes will occur when Crown authorities are subject to the same law as private persons.

To date reform has been slow although not insignificant. Major reform, for example, has occurred with the extinction of the Crown immunity from liability for torts committed by its officers and agents and the elimination of the need to proceed against the Crown by petition

⁶ *Retail, Wholesale and Department Store Union, Local 580 v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573.

⁷ See *R. v. Eldorado Nuclear Limited*, *supra*, footnote 3, at p. 558; F.R. Scott, *Administrative Law: 1923-1947* (1948), 26 Can. Bar Rev. 268, at pp. 280-381; H. Street, *The Effect of Statutes Upon the Rights and Liabilities of the Crown* (1948), 7 U.T.L.J. 357; Sawyer, *loc. cit.*, footnote 3, at pp. 137-138; P.W. Hogg, *Liability of the Crown* (1971), especially pp. 213-224; C.H. McNairn, *Governmental and Intergovernmental Immunity in Australia and Canada* (1977), pp. 21-22. Also see C.H. McNairn, *The Ontario Crown Agency Act* (1973), 6 Ottawa Law Rev. 1, where the author notes that the statute discussed may have the effect of extending the range of entities entitled to Crown agent status.

of right.⁸ Other reforms have occurred and still others are proposed.⁹ One major reform suggested is to reverse the statute immunity of the Crown so as to make the Crown and its agents subject to general legislation unless specifically exempted.¹⁰ Of course, to the extent that the legal position of the Crown is made congruent with the legal position of private persons, there will no longer be a need to distinguish between Crown agents and others. But it would appear unlikely that the law will achieve complete congruency in the near future.

A. *Statutory Crown Agent Status*

When our legislators create a new statutory body they often do not indicate whether that body has the status of Crown agent. In that event, when such status is alleged, it becomes necessary to determine the matter under the common law. Indeed, some courts have resorted to the common law even when the legislation does, arguably, expressly confer Crown agent status.¹¹

(1) *The Function Test*

In nineteenth-century England practically every public body that had any connection whatsoever with the Crown claimed for itself the privileges of the Crown; in particular, the immunity from assessment for poor taxes. Not until the later half of the century was it confirmed that not every public body would attract the benefits of Crown status.¹²

The test which first emerged to restrict the benefits of Crown status was entirely functional.¹³ Only if the body performed a governmental function would it attract the favoured status:

⁸ Proceedings Against the Crown Acts, for example R.S.A. 1980, c. P-18; R.S.O. 1980, c. 393. For the origin of this kind of legislation, see H. Street, *Governmental Liability* (1953, reprinted 1975), pp. 6-7.

⁹ Report on the Crown as Creditor: Priorities and Privileges, L.R.C. 57 (1982), Law Reform Commission of British Columbia. See generally Hogg, *op. cit.*, footnote 7, and Street, *op. cit.*, footnote 7.

¹⁰ Note that this reform has been given effect in British Columbia (R.S.B.C. 1979, c. 206, s. 14) and Prince Edward Island (S.P.E.I. 1981, c. 18, s. 14).

¹¹ *R. v. Ontario Labour Relations Board, Ex parte Ontario Housing Corporation* (1971), 19 D.L.R. (3d) 47 (Ont. H.C.); *Mellenger v. New Brunswick Development Corporation*, [1971] 2 All E.R. 593 (C.A.); *Bodrug v. Manitoba Housing and Renewal Corp.* (1977), 79 D.L.R. (3d) 409 (Man. Q.B.); *Kardinal Homes Ltd. v. Alberta Housing Corporation* (1978), 8 Alta. L.R. (2d) 56 (Alta. Dist. Ct.); *Atlantic Richfield Company v. Petro-Canada* (1982), 41 A.R. 46 (Alta. Q.B.); *Re Forte* (1984), 50 C.B.R.N.S. 135 (Ont. S.C.). For the view that even an express statement of Crown agent status is not enough see the conflicting judgments of the court in *British Columbia Power Corporation Ltd. v. Attorney-General of British Columbia and British Columbia Electric Co. Ltd.* (1962), 34 D.L.R. (2d) 25 (B.C.C.A.) and also McNairn, *loc. cit.*, footnote 7, at p. 10. Then see the treatment accorded the B.C. Power case in *R. v. Eldorado Nuclear Ltd.*, *supra*, footnote 3, at pp. 574-575.

¹² Sawyer, *loc. cit.*, footnote 3, at p. 137.

¹³ There is another test that can be dismissed quickly. It has been suggested that the incorporation of a statutory body raises a presumption that it is not a Crown agent. The

To summarize: the courts moved in this earlier period from a position where they were prepared to exempt bodies from liability to pay the poor rate because their purposes were broadly "public" to a position where exemption was only granted if the purposes were both public and governmental. But where the purposes were public and governmental the bodies were not on that account invariably regarded as Crown servants; they might only be *in consimili casu*. The Public Works Commissioners were generally regarded as Crown servants either as being a government department (by statutory provision or historical development) or as exercising governmental functions. No attempt was however made to define what purposes or functions are governmental.¹⁴

In the twentieth century, the common law has proceeded to discount the significance of the "function" test. The "control" test became established at the beginning of this century and then gradually displaced the function test as the primary determinant of Crown agent status. In *Halifax v. Halifax Harbour Commissioners*,¹⁵ the function test was utilized by Duff C.J.C. to assess the status of the Harbour Commission with regard to its liability to pay municipal taxes. Duff C.J.C. found that the services contemplated by the legislation governing the commission were "... not only public services in the broad sense, but also, in the strictest sense, Government services . . .".¹⁶ The judgment, however, is almost completely devoted to a consideration of the substantial Crown control to which the commissioners were subject in the exercise of their powers. Duff C.J.C. viewed this control as establishing that the occupation of the commissioners was an occupation "for the Crown".

In 1949 the application of the function test by Denning L.J. led to a denial of Crown agent status in *Tamlin v. Hannaford*.¹⁷ Denning L.J. was here concerned with the status of the British Transportation Commission. With respect to the Commission, he stated: "It is, of course, a public authority and its purposes, no doubt, are public purposes, but it is not a government department nor do its powers fall within the province of government."¹⁸ Denning L.J. recognized the "great powers" which the Minister of Transport could exercise over the Commission but dis-

supposed presumption seems to be based on the view that incorporation is evidence of the body's independence. But incorporation merely creates a person, it says nothing about the independence of that person. Even if it did, the test would only amount to a more narrow control test. The fact of the incorporation has usually been regarded as irrelevant in the few decisions which mention it. For example, *Metropolitan Meat Industry Board v. Sheedy*, [1927] A.C. 899, at p. 905 (P.C.); *Halifax v. Halifax Harbour Commissioners*, [1935] 1 D.L.R. 657, at p. 667 (S.C.C.) (quoting from the *Sheedy* case).

¹⁴ J.A.G. Griffith, *Public Corporations as Crown Servants* (1951-52), 9 U. of T. Law J. 169, at p. 178. The article includes a review of the early cases.

¹⁵ *Supra*, footnote 13.

¹⁶ *Ibid.*, at p. 665.

¹⁷ [1949] 2 All E.R. 327 (C.A.).

¹⁸ *Ibid.*, at p. 329.

missed the assertion of Crown agent status based on those powers with the following words:¹⁹

The only fact in this case which can be said to make the British Transport Commission a servant or agent of the Crown is the control over it which is exercised by the Minister of Transport, but there is ample authority both in this court and the House of Lords for saying that such control as he exercises is insufficient for the purpose: see *Central Control Board (Liquor Traffic) v. Cannon Brewery Co.* (5), [1918] 2 Ch. 123, and [1919] A.C. 757. When Parliament intends that a new corporation should act on behalf of the Crown, it, as a rule, says so expressly, as it did in the case of the Central Land Board by the Town and Country Planning Act, 1947, which was passed on the same day as the Transport Act, 1947. In the absence of any such express provision, the proper inference, in the case, at any rate, of a commercial corporation, is that it acts on its own behalf, even though it is controlled by a government department.

The decision has been questioned²⁰ and is not often cited in subsequent Canadian cases.

Many writers have commented on the function test. Virtually all have doubted its legitimacy or utility.²¹ Generally, they consider that the scope of government functions should not be restricted by historical or theoretical views of what is a proper "governmental" function. The desirability of or need for the government to undertake new functions is a matter of policy to be addressed by the legislature. It is not something to be circumscribed by courts looking to the historical, current or "proper" functions of government. Judges have offered similar reasons for disposing of "function" or "novelty" arguments.²² Latham C.J., in the High Court of Australia, dealt with the argument as follows:²³

¹⁹ *Ibid.*, at pp. 329-330.

²⁰ See J.A.G. Griffith, *Public Corporations as Crown Servants* (1949), 12 Mod. Law Rev. 496. Canadian courts have not generally drawn the inference suggested by Lord Denning. Note that it would be difficult to draw such an inference where the statute declares that the function is government business (see *The Queen v. Gibson*, *supra*, footnote 3, at p. 268).

²¹ W.H. Moore, *Liability for Acts of Public Servants* (1907), 23 Law Q. Rev. 12, at pp. 20-24; J.M. Jelbart, *Public Bodies and the Crown's Immunity From Statute* (1931-32), 5 Aust. Law J. 216, at pp. 218-219; W.G. Friedman, *Legal Status of Incorporated Public Authorities* (1948), 22 Aust. Law J. 7, at pp. 12-14; Griffith, *loc. cit.*, footnote 14, at pp. 183-184; Sawyer, *loc. cit.*, footnote 3, at pp. 141, 144; T.H. Wilson, *Crown Agencies: Maple Leaf Services v. Townships of Essa and Pettawawa; Regina v. Ontario Labour Relations Board* (1964), 22 U. of T. Fac. Law Rev. 126; W.H.O. Mueller, *The Liability of the Ontario Government in Tort* (1967), 25 U. of T. Fac. Law Rev. 3, at pp. 9-11; Hogg, *op. cit.*, footnote 7, pp. 209-211; McNair, *loc. cit.*, footnote 7, at p. 2.

²² See *Reference Re Questions Set Out in O.C. 1079/80*, [1981] 3 W.W.R. 408, at pp. 428-431 (Alta. C.A.), *aff'd* (1982), 42 N.R. 361 (S.C.C.); *The Federated Amalgamated Government Railway v. The New South Wales Railway Traffic Employees Associated* (1906), 4 C.L.R. 488, at pp. 538-549.

²³ *The State of South Australia v. The Commonwealth* (1941), 65 C.L.R. 373, at p. 423 (H.C. Aust.).

There is no universal or even general opinion as to what are the essential functions, capacities, powers, or activities of a State. Some would limit them to the administration of justice and police and necessary associated activities. There are those who object to State action in relation to health, education, and the development of natural resources. On the other hand, many would regard the provision of social services as an essential function of government. When Lord Watson said in *Coomber v. Justices of Berks* that "the administration of justice, the maintenance of order, and the repression of crime are among the primary and inalienable functions of a constitutional government", he was not purporting to give an exhaustive definition of the functions of government. In a fully self-governing country where a parliament determines legislative policy and an executive government carries it out, any activity may become a function of government if parliament so determines. It is not for a court to impose upon any parliament any political doctrine as to what are and what are not functions of government, or to attempt the impossible task of distinguishing, within functions of government, between essential and non-essential or between normal or abnormal. There is no sure basis for such a distinction.

Following the *Tamlin* decision, Canadian courts have moved to the position where the function test now has only a secondary or perhaps supplementary operation. In *R. v. Ontario Labour Relations Board, Ex parte Ontario Food Terminal Board*,²⁴ Laidlaw J.A. of the Ontario Court of Appeal stated that the answer to the question of whether or not an entity is a Crown agent depended in part upon the nature of the functions performed but mainly upon the nature and degree of control exercised by the Crown.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 in part upon the nature and extent of the powers entrusted to it. It depends mainly upon the nature and degree of control exercisable or retained by the Crown.

Then, in the 1976 Supreme Court of Canada decision in *Westeel-Rosco Ltd. v. Board of Governors of South Saskatchewan Hospital Centre*,²⁶ Ritchie J. stated that it was plain that the status of a statutory body "... depends upon the nature and degree of control which the Crown exercises over it". Ritchie J. completely ignored the reference to function in Laidlaw J.A.'s description of the test, which he quoted, and did not apply the function test in his judgment. Three years later, the Supreme Court reiterated and confirmed Ritchie J.'s description of the test while noting that he "... cited with approval a passage from the judgment of Laidlaw J.A. ...".²⁷ The Supreme Court has subsequently confirmed the control test on two other occasions while ignoring the function test.²⁸

²⁴ (1963), 38 D.L.R. (2d) 530 (Ont. C.A.).

²⁵ *Ibid.*, at p. 534.

²⁶ (1976), 69 D.L.R. (3d) 334, at pp. 342-343 (S.C.C.).

²⁷ *Fidelity Insurance Co. of Canada v. Workers' Compensation Board* (1979), 102 D.L.R. (3d) 255, at p. 256 (S.C.C.).

²⁸ *R. v. Eldorado Nuclear Limited*, *supra*, footnote 3, at pp. 573-574; *Perehinec v. Northern Pipeline Agency*, *supra*, footnote 3, at pp. 519-521.

Thus, although the Supreme Court has apparently not absolutely foreclosed the use of the function test, it seems clear that it is not to be the primary test. Other later cases utilize only the control test²⁹ or emphasize that the control test is the main test but that the nature of the function is also relevant (relying on Laidlaw J.A.'s words).³⁰

The function test, in view of these authorities, probably cannot take precedence over the control test. Thus, where it is clear that the function undertaken could not be viewed as a "governmental" function (whatever that means), still the body would be found to be a Crown agent if the government exercised substantial control over its activities. Indeed, even those who feel Crown privileges ought to be abolished or restricted as far as possible would find this a correct result.³¹ They, of course, seek a different result through express reforming legislation.

Although the operation of the function test is circumscribed in this fashion, it may continue to have a determinative effect in the absence of control. That is, even though there is no significant control, the function performed might be so obviously "governmental" in nature that it would be impossible to deny Crown agent status. Bodies involved in the administration of justice, for example, could be characterized as Crown agents on the basis of their function notwithstanding that little or no governmental control is provided for. The function test, in this way, might retain a supplementary application.

(2) Adoption of the Control Test

In the 1898 decision of *Fox v. The Government of Newfoundland*³² the Privy Council was faced with determining the relationship between the Newfoundland government and several boards of education established under the Education Act, 1892. If the boards were "distributing agents" for the government the government was entitled to money held

²⁹ *Workers' Compensation Board v. Deloitte Haskins and Sells Limited*, *supra*, footnote 2; *Kardinal Homes Ltd. v. Alberta Housing Corporation*, *supra*, footnote 11; *Re Black Forest Restaurant Ltd.* (1981), 121 D.L.R. (3d) 435 (N.S.T.D.), appeal dismissed (1982), 126 D.L.R. (3d) 417 (N.S. App. Div.); *Atlantic Richfield Company v. Petro-Canada*, *supra*, footnote 11. Also see *Canadian Pittsburgh Industries v. Crown Constructions Limited* (1979), 107 D.L.R. (3d) 196, at pp. 200-202 (Nfld. Dist. Ct.).

³⁰ *Re Board of Industrial Relations and C.I.B.C.* (1981), 125 D.L.R. (3d) 487 (B.C.C.A.); *R. v. Achtem*, *supra*, footnote 1; *Farm Adjustment Board v. Fundy Lamb Producers Limited* (1982), 135 D.L.R. (3d) 731 (N.B.C.A.); *Bodrug v. Manitoba Housing and Renewal Corp.*, *supra*, footnote 11, at p. 413. See also *Re Canada Dairies Corporation Limited and Milk Commission of Ontario* (1981), 40 C.B.R.N.S. 101 (Ont. S.C.), and *Fairbank Lumber Co. Ltd. v. O'Connor* (1974), 4 O.R. (2d) 576 (Ont. Co. Ct.) (in which cases different conclusions are reached as to the status of the Ontario Milk Marketing Board).

³¹ See Hogg, *op. cit.*, footnote 7, pp. 2; Sawyer, *loc. cit.*, footnote 3, at p. 144 (and see his earlier remarks at p. 141).

³² [1898] A.C. 667 (P.C.).

in accounts at an insolvent bank in the name of the boards. The Privy Council rejected the "distributing agent" argument as being inconsistent with the provisions of the Act and stated that the provisions "... indicate that it is not to be a mere agent of the Government for the distribution of money, but is to have within the limit of general educational purposes a discretionary power in expending it—a power which is independent of the Government".³³ This appears to be the first use of a control test for assessing Crown agent status. Here, of course, the discretion of the boards was equivalent to an absence of control by the government.

The next several cases then confirm by example that the extent of government control provided for by the statute is a primary consideration.³⁴ The often cited words of Duff C.J.C. in *Halifax v. Halifax Harbour Commissioners*³⁵ illustrate that control is foremost in the minds of the judges by 1935:

To state again, in more summary fashion, the nature of the powers and duties of the respondents: Their occupation is for the purpose of managing and administering the public harbour of Halifax and the properties belonging thereto which are the property of the Crown; their powers are derived from a statute of the Parliament of Canada; but they are subject at every turn in executing those powers to the control of the Governor representing His Majesty and acting on the advice of His Majesty's Privy Council for Canada, or of the Minister of Marine and Fisheries; they cannot take possession of any property belonging to the harbour property without the consent of, and only upon such terms as may be imposed by, the Government; they cannot acquire property or dispose of property without the same consent; they can only acquire capital funds by measures taken under the control of the Government; they can only apply capital funds in constructing works and facilities under a supervision and control, the character of which has been explained; the tolls and charges which are the sources of their revenue they can only impose under the authority of the Government; the expenditure of revenues in the maintenance of services is under the control and supervision of a Government department; the salaries and compensation payable to officers and servants are determined under the authority of the Government; the regulations necessary for the control of the harbour, the harbour works, officers and servants, the proceedings of the corporation, can only take effect under the same authority; the surplus of revenue after providing for costs of services and the interest on the debenture debt goes into a sinking fund under the direction of the Minister; finally, they are appointed by the Crown and hold office during pleasure.

³³ *Ibid.*, at p. 672.

³⁴ *Scott v. Governors of University of Toronto* (1913), 10 D.L.R. 154 (Ont. S.C.); *In Re Sid B. Smith Lumber Company, Limited*, [1917] 3 W.W.R. 844 (B.C.S.C.); *Quebec Liquor Commission v. Moore*, [1924] 4 D.L.R. 901, per Duff J. (S.C.C.); *Metro-politan Meat Industry Board v. Sheedy*, *supra*, footnote 13; *Rex v. Pauwels*, [1932] 2 D.L.R. 339 (Man. C.A.).

³⁵ *Supra*, footnote 13, at p. 664. Also see the *obiter* comments of Graham J. in *Re Nova Scotia Power Commission & Bank of Nova Scotia*, [1935] 3 D.L.R. 494, at pp. 498-500 (N.S.S.C.), where he states that the "old test" of function is not conclusive.

That control was firmly established as a proper test for Crown agent status by 1950 was recognized in *Governors of the University of Toronto v. Minister of National Revenue*.³⁶ Cameron J., after reviewing several of the cases, stated "[n]ow the test applied in all the cases to which I have referred above, was the degree of control exercised or retained by the Crown . . .". Since then control has become the primary test of status. The modern description of the test, quoted in virtually every subsequent decision, is that of Ritchie J. in *Westeel-Rosco Ltd. v. Board of Governors of South Saskatchewan Hospital Centre*³⁸ where, as we have seen, he stated that "[w]hether or not a particular body is an agent of the Crown depends upon the nature and degree of control which the Crown exercises over it".³⁸ Very recently, the control test has been re-described in the majority judgment of the Supreme Court of Canada decision in *R. v. Eldorado Nuclear Ltd.*³⁹ (without reference to the *Westeel-Rosco* case) as follows:

At common law the question whether a person is an agent or servant of the Crown depends on the degree of control which the Crown, through its ministers, can exercise over the performance of his or its duties. The greater the control, the more likely it is that the person will be recognized as a Crown agent. Where a person, human or corporate, exercises substantial discretion, independent of ministerial control, the common law denies Crown agency status. The question is not how much independence the person has in fact, but how much he can assert by reason of the terms of appointment and nature of the official . . .

All of the control test cases illustrate that the assessment of Crown agent status requires a close examination of the legislation in question. Apart from disclosing the intention of the legislature,⁴⁰ such an examination is required in order to ascertain the government's "right to control".⁴¹

³⁶ [1950] 2 D.L.R. 732 (Exch. Ct.). In addition to the cases cited in the judgment, see *Rex ex rel MacGinnis v. Hassell*, [1937] 1 W.W.R. 726 (B.C.S.C.); *Recorder's Court v. Canadian Broadcasting Corporation*, [1941] 2 D.L.R. 551 (Que. K.B.); *Oatway v. Canadian Wheat Board*, [1944] 4 D.L.R. 381 (Man. C.A.) (see the case comment by Bora Laskin at (1944), 22 Can. Bar Rev. 927); *In Re Saskatchewan Government Insurance Office and City of Saskatoon*, [1947] 2 W.W.R. 1028 (Sask. C.A.); *Nakashima v. The King*, [1947] Ex. C.R. 486.

³⁷ *Ibid.*, at p. 748.

³⁸ *Supra*, footnote 26, at pp. 342-343.

³⁹ *Supra*, footnote 3, at pp. 573-574.

⁴⁰ *Quebec Liquor Commission v. Moore*, *supra*, footnote 34, at p. 910; *Governors of the University of Toronto v. M.N.R.*, *supra*, footnote 36, at p. 740; *Pike v. Council of the Ontario College of Art* (1972), 29 D.L.R. (3d) 544, at p. 547 (Ont. H.C.).

⁴¹ Hogg, *op. cit.*, footnote 7, pp. 208-209. Presumably Professor Hogg's words are addressed to the situation where the government's statutory right to control exceeds the control it actually exercises over the particular body. This is what usually occurs. In the converse situation, where the *de facto* control of the government exceeds its statutory control rights, a sufficient degree of actual control could create an implicit contractual Crown agency even though the statutory control rights would not create such status. Also see *R. v. Achtem*, *supra*, footnote 1, at p. 347.

The degree of control which is in fact exercised over a public corporation at any given time is irrelevant. It is the degree of control which the executive is legally entitled to exercise which is relevant. The question is therefore resolved by an examination of the statute empowering the corporation.

Statutory rights in relation to a body establish a connection or relationship between it and the government. The adoption of the control test by the common law makes this connection the basis for granting the special status of the Crown to that body. Whether or not the connection is sufficient for this purpose depends on the kinds of provisions found in the particular statute. Although statutory provisions entirely unrelated to the extent of government control are sometimes offered by courts to support their particular conclusion,⁴² it is the perceived control provisions which are the most important.

(3) *Statutory Provisions*

Two initial points should be made regarding the judicial consideration of the statutory provisions. First, many cases provide no discussion whatsoever of some or all of the provisions which are offered to support the conclusion reached. The provisions are merely listed in such a way as to imply either that they are examples of government control or examples of the independence of the statutory body. It sometimes seems as if provisions are simply thrown in for whatever value they might appear to have in buttressing the position taken. Secondly, the cases show a considerable disagreement over the effect or significance of particular provisions. It is not uncommon to find the same provisions being offered in one case to support Crown agent status and in another case to deny such status. Part of the problem is that the judges often canvass only the leading cases and they therefore apply the control test enunciated in those cases on the basis of their individual perceptions of what amounts to government control without the benefit of previous, if sometimes only implicit, findings with respect to particular provisions.

The foregoing points are vividly illustrated by the different judicial views regarding statutory requirements to submit to a government audit and to provide the government with an annual report. Most courts which offer these provisions as evidence of government control merely list

⁴² For example, a provision deeming employees to be public servants or that they are to benefit from public servant legislation (*Quebec Liquor Commission v. Moore*, *supra*, footnote 34, at p. 910; *The Queen v. Gibson*, *supra*, footnote 3, at p. 271; *R. v. Achtem*, *supra*, footnote 1, at p. 352; *Kardinal Homes v. Alberta Housing Corporation*, *supra*, footnote 11, at p. 58; *Recorder's Court v. Canadian Broadcasting Corporation*, *supra*, footnote 36, at p. 562); or a provision exempting the body from taxation (see *R. v. O.L.R.B.*, *Ex parte Ont. Food Terminals Board*, *supra*, footnote 24, at p. 540). As to a provision enabling the body to sue and be sued, see *Oatway v. Canadian Wheat Board*, *supra*, footnote 37, at pp. 387-388; *O.L.R.B.*, *Ex parte Ont. Food Terminals Board*, *supra*, footnote 24, at p. 539.

them without further discussion.⁴³ One Chambers decision goes further, but even then, only to the extent of saying that "[t]he control exercised over the board . . . is further emphasized by [such provisions]".⁴⁴ The opposing view is found in several cases where it is indicated that such provisions only serve to provide the government with information and are not manifestations of control.⁴⁵ The latter view, it is submitted, is the correct one. These provisions are control neutral. Nothing in them gives the government the right to interfere. Anything the government does as a result of receiving the information disclosed in an audit or report is done through other provisions which give the government some power to control.

Disagreement is also found in those cases which have considered the fact that a particular body is funded by the government. In judgments where Crown agent status is eventually found the fact or procedure of government funding is offered to imply some element of government control.⁴⁶

In other and more authoritative judgments government funding is considered irrelevant where the body has discretionary power to spend those funds.⁴⁷ This latter view recognizes the formal neutrality of a funding provision. Theoretically, it would only be some other separate government right to determine how these funds are to be utilized which could support a characterization of Crown agent. Even the government's initial or periodic ability to determine the quantum of funding is theoretically neutral because, unless the government has some other right to specify

⁴³ *Halifax v. Halifax Harbour Commissioners*, *supra*, footnote 13, at p. 662; *Recorders Court v. Canadian Broadcasting Corporation*, *supra*, footnote 37, at p. 562; *The Queen v. Gibson*, *supra*, footnote 3, at p. 269; *R. v. O.L.R.B., Ex parte Ont. Housing Corp.*, *supra*, footnote 11, at p. 52; *Kardinal Homes Ltd. v. Alta. Housing Corporation*, *supra*, footnote 11, at p. 58.

⁴⁴ *In Re Sid B. Smith Lumber Company, Limited*, *supra*, footnote 34, at p. 848.

⁴⁵ *Fox v. Government of Newfoundland*, *supra*, footnote 32, at p. 672; *Rex ex rel McGinnis v. Hassell*, *supra*, footnote 36, at p. 728; *Governors of the University of Toronto v. M.N.R.*, *supra*, footnote 36, at p. 749; *R. v. O.L.R.B., Ex parte Ont. Food Terminal Board*, *supra*, footnote 24, at p. 539; *Westeel-Rosco v. Board of Governors of South Saskatchewan Hospital Centre*, *supra*, footnote 26, at p. 345; *Pike v. Council of the Ontario College of Art*, *supra*, footnote 40, at p. 548.

⁴⁶ *Recorders Court v. Canadian Broadcasting Corporation*, *supra*, footnote 36, at p. 563; *Kardinal Homes Ltd. v. Alberta Housing Corporation*, *supra*, footnote 11, at p. 58; *Fundy Lamb Producers Limited v. Farm Adjustment Board*, *supra*, footnote 30, at p. 735; *Aviation Portneuf Ltee v. The Queen* (1984), 42 C.P.C. 170, at p. 179 (Fed. C.T.D.).

⁴⁷ *Fox v. Government of Newfoundland*, *supra*, footnote 32, at p. 672; *Governors of the University of Toronto v. M.N.R.*, *supra*, footnote 36, at pp. 749-750; *Westeel-Rosco v. Board of Governors of the Saskatchewan Hospital Centre*, *supra*, footnote 26, at p. 345.

the use of the funds, the body in question can apply such funding as it receives in such manner as it sees fit within its terms of reference.

On the other hand, government control over funding could clearly be used *in terrorem* to achieve particular desired results. In the circumstances, however, the ability to withhold funding is perhaps only a bargaining device and not a control device. It probably has to be assumed that the government cannot reduce funding below the minimum level needed for the body to operate since the government, by its creation of the body, has indicated the need or desire for the particular basic function to be performed. Thus, funding considerations would only impact at the margin (that is beyond the minimum level) and, as the basic function is intact and being performed with such discretion as the legislation allows, could only be used to bargain with rather than control the statutory body. In the result, the formal view would prevail. Still, if funding control *was* effective to give the government *de facto* control it would be possible to characterize the body as a Crown agent.

Although some judgments suggest that a provision authorizing the government to guarantee the borrowing of the statutory body indicates an element of control,⁴⁸ the better view is that such a provision is irrelevant.⁴⁹ The provision is obviously not even directed at the statutory body although for its benefit if used. It is simply an enabling provision for the government—it says nothing about control.

Crown agent status is indicated, however, when the statute provides that surplus revenues or other monies belong to the Crown or are made payable into a fund or account to the credit or under the control of the Crown. All of the courts, including those which deny Crown agent status,⁵⁰ implicitly agree that the lack of ownership or control of surplus funds by the particular body strongly suggests that it is a mere agent of the Crown.⁵¹

⁴⁸ *Oatway v. Canadian Wheat Board*, *supra*, footnote 36, at p. 384; *R. v. O.L.R.B.*, *Ex parte Ont. Housing Corp.*, *supra*, footnote 11, at p. 52.

⁴⁹ *R. v. O.L.R.B.*, *Ex parte Ont. Food Terminal Board*, *supra*, footnote 24, at p. 538. Laidlaw J.A. implies as much when he notes that borrowing was not restricted in any way.

⁵⁰ *Metropolitan Meat Industry Board v. Sheedy*, *supra*, footnote 13, at pp. 905-906; *Re Nova Scotia Power Commission & Bank of Nova Scotia*, *supra*, footnote 35, at p. 501; *Rex ex rel MacGinnis v. Hassell*, *supra*, footnote 36, at p. 728; *R. v. O.L.R.B.*, *Ex parte Ont. Food Terminal Board*, *supra*, footnote 24, at p. 538.

⁵¹ *In Re Sid B. Smith Lumber Company Limited*, *supra*, footnote 34, at p. 848; *Quebec Liquor Commission v. Moore*, *supra*, footnote 34, at p. 910; *Halifax v. Halifax Harbour Commissioners*, *supra*, footnote 13, at p. 662; *The Queen v. Gibson*, *supra*, footnote 3, at p. 269; *Re Board of Industrial Relations and C.I.B.C.*, *supra*, footnote 30, at p. 498; *C.N.R. v. Newfoundland* (1984), 142 A.P.R. 52, at pp. 73-74 (Nfld. Dist. Ct.).

As Laidlaw J.A. stated in regard to the omission of such a provision in the statute before him:⁵²

. . . the omission in the later Act of a like provision to s. 7 in the earlier Act is most significant and important. My inference and conclusion from such an omission is that it was not intended that the Board should exercise its powers for the benefit or in the service of the Crown.

A similar consensus is found with respect to a provision declaring that all property acquired by the particular body is the property of the Crown. Such a provision clearly supports Crown agent status according to the cases.⁵³ It does so, however, on the basis of government ownership rather than government control. Where there is government ownership of the property, rarely will there be any doubt as to the Crown status of the body in question. Agency is implicit in the government ownership of the property being employed or earned.

A provision requiring government approval of regulations made by the statutory body has been offered in several cases to show government control.⁵⁴ Such a provision, however, was dismissed by Laidlaw J.A. in the *Food Terminal* case on the basis that its only effect was to give force and effect to the regulations made by the Food Terminal Board.⁵⁵ Laidlaw J.A., in zealously trying to show the independence of the Board, probably went too far on this point. The plain words of the provision were not limited or restricted in the fashion suggested. Obviously the government could not control the making of the regulations (as pointed out by Laidlaw J.A.) but equally obviously it need not approve them. The true effect of a power to approve regulations depends on the nature of the matters which are to be dealt with by regulation. Matters preliminary or ancillary to the performance of the particular function (for example, appointing officers, setting out powers and duties of officers, prescribing the form of seal to be used) would be of little or no consequence. On the other hand, when the regulations deal with substantial ongoing matters such as property improvements to be made, the charges to be levied (for example, prices, tolls, fines) and the use to be made of facilities, the required approval of the government amounts to a significant measure of

⁵² *R. v. O.L.R.B., Ex parte Ont. Food Terminal Board*, *supra*, footnote 24, at p. 535.

⁵³ *Quebec Liquor Commission v. Moore*, *supra*, footnote 34, at p. 910; *Halifax v. Halifax Harbour Commissioners*, *supra*, footnote 13, at p. 659; *The Queen v. Gibson*, *supra*, footnote 3, at p. 269. Cases dealing with ownership of surplus revenues are also set out in footnote 51, *supra*.

⁵⁴ *Rex v. Pauwels*, *supra*, footnote 34, at p. 340; *Halifax v. Halifax Harbour Commissioners*, *supra*, footnote 13, at pp. 659-660; *Recorders Court v. Canadian Broadcasting Corporation*, *supra*, footnote 36, at p. 562; *The Queen v. Gibson*, *supra*, footnote 3.

⁵⁵ *R. v. O.L.R.B., Ex parte Ont. Food Terminal Board*, *supra*, footnote 24, at pp. 535-537. Also see *Canadian Pittsburgh Industries v. Crown Construction*, *supra*, footnote 29, at p. 202.

control which correspondingly reduces the discretion of the particular body. A general provision requiring the approval of the government for a regulation in respect of, for example, "any other matter necessary or advisable to carry out effectively the intent and purpose of this Act" is probably not significant one way or the other for it does not indicate what type of matter would be dealt with thereunder or how often, if ever, the government would be required to exercise the power.

Perhaps most indicative of Crown agent status are control provisions requiring the approval of the government before the statutory body may engage in specified transactions or activities. The matters most often considered by the courts have been the power to borrow monies and the power to acquire or dispose of property. Cases in which there is a provision requiring approval of borrowing find Crown agent status⁵⁶ while the opposite conclusion is reached where approval is not required.⁵⁷ The absence of a provision requiring approval for the acquisition or disposition of property leads to a denial of Crown agent status⁵⁸ while the presence of such a provision will support a characterization of Crown agent⁵⁹ unless overcome by other provisions granting the body complete discretion in most other matters.⁶⁰

A provision whereby the government appoints the members of the statutory body is irrelevant in assessing status. Although a few courts seem vaguely to imply some element of control in such a government right,⁶¹ other courts attempt to articulate, with varying degrees of suc-

⁵⁶ *Halifax v. Halifax Harbour Commissioners*, *supra*, footnote 13, at p. 660; *R. v. O.L.R.B., Ex parte Ont. Housing Corp.*, *supra*, footnote 11, at p. 52 (the status of the Ontario Housing Corporation was again considered in *Berardinelli v. Ontario Housing Corporation* (1977), 15 O.R. (2d) 217 (Ont. C.A.)); *Kardinal Homes v. Alberta Housing Corporation*, *supra*, footnote 11, at p. 58. See also *Fundy Lamb Producers Limited v. Farm Adjustment Board*, *supra*, footnote 30, at p. 735 (no borrowing authority whatsoever).

⁵⁷ *R. v. O.L.R.B., Ex parte Ont. Food Terminal Board*, *supra*, footnote 24, at pp. 538, 540; *Westeel-Rosco v. Board of Governors of South Saskatchewan Hospital Centre*, *supra*, footnote 26, at p. 345. See also *Governors of the University of Toronto v. M.N.R.*, *supra*, footnote 36, at p. 750.

⁵⁸ *Metropolitan Meat Industry Board v. Sheedy*, *supra*, footnote 13, at p. 905; *R. v. O.L.R.B., Ex parte Ont. Food Terminal Board*, *supra*, footnote 24, at pp. 540-541; *Governors of the University of Toronto v. M.N.R.*, *supra*, footnote 36, at p. 750.

⁵⁹ *Halifax v. Halifax Harbour Commissioners*, *supra*, footnote 13, at p. 661; *Recorders Court v. Canadian Broadcasting Corporation*, *supra*, footnote 36, at pp. 561-562; *Oatway v. Canadian Wheat Board*, *supra*, footnote 36, at p. 384; *The Queen v. Gibson*, *supra*, footnote 3, at p. 269.

⁶⁰ *Westeel-Rosco Ltd. v. Board of Governors of South Saskatchewan Hospital Centre*, *supra*, footnote 26, at pp. 345-346; *Johnson & Herbert Construction Ltd. v. Athabasca University* (1985), 60 A.R. 75, at pp. 77-78 (Alta. Q.B.); *Workers Compensation Board v. Deloitte Haskins and Sells Limited*, *supra*, footnote 2, at p. 318.

⁶¹ *Metropolitan Meat Industry Board v. Sheedy*, *supra*, footnote 13, at p. 905; *R. v. O.L.R.B., Ex parte Ont. Housing Corp.*, *supra*, footnote 11, at p. 50.

cess, the fact that such a right in no way governs or relates to the discretion exercised by the appointees.⁶² Undoubtedly the government can use this power to determine the political persuasion or personality of the statutory body but that, of course, does not affect its independence. It does appear, however, that Crown agent status will be supported where there exists a provision specifically requiring the chairman of the body to be an officer of the Crown⁶³ or where the government exercises its power to appoint a board of directors consisting solely of deputy ministers.⁶⁴

A number of cases indicate that Crown agent status is supported by a provision whereby the government is given the power to replace appointed members (that is, the appointees hold office "during pleasure").⁶⁵ A contrary view, however, is expressed in *Governors of the University of Toronto v. M.N.R.*⁶⁶ where Cameron J. stated:

The main submission is, of course, that as the Lieutenant-Governor in Council appoints twenty-two members of a Board of twenty-four—only eight of whom are appointed following recommendation by the Alumni Federation, and as ten members are required to constitute a quorum—the actions of the Board could at all times be controlled by the Lieutenant-Governor in Council removing members who are not carrying out the will of the Government, and by replacing them by others of a more compliant disposition. Theoretically, it might be possible for the Lieutenant-Governor in Council to appoint only members of the Board who were committed to carry out the instructions and wishes of the Government. It could hardly be suggested, however, that anyone possessed of the knowledge, experience and independence essential to the proper carrying out of the important and difficult duties of a Board such as this would accept the appointment under any such conditions.

Cameron J. is right to defend the skill and integrity of the typical appointee. To do so, however, does not negate the control quality of the power to remove. Indeed, Cameron J.'s words implicitly acknowledge the control quality of this power. No doubt someone will accept a particular appointment even if it is patently clear that it is a puppet position. And

⁶² *Scott v. Governors of the University of Toronto*, *supra*, footnote 34, at pp. 155-156; *Radych v. Manitoba Power Commission*, [1942] 1 D.L.R. 445, at p. 446 (Man. K.B.), *aff'd*, [1942] 2 D.L.R. 776 (Man. C.A.); *R. v. O.L.R.B., Ex parte Ont. Food Terminal Board*, *supra*, footnote 24, at pp. 541-542; *Pike v. Council of the Ontario College of Art*, *supra*, footnote 40, at pp. 547-548; *Lucas v. Taxicab Board* (1985), 31 M.V.R. 51, at pp. 60-61 (Man. C.A.).

⁶³ *Re Board of Industrial Relations and C.I.B.C.*, *supra*, footnote 30, at p. 498. See also *Perehinec v. Northern Pipeline Agency*, *supra*, footnote 3, at p. 520; *In Re Saskatchewan Government Insurance Office and City of Saskatoon*, *supra*, footnote 36, at p. 1029. *Cf.* the obiter comments of Graham J. in *Re Nova Scotia Power Commission & Bank of Nova Scotia*, *supra*, footnote 35, at pp. 499-500.

⁶⁴ *R. v. Achtem*, *supra*, footnote 1, at pp. 348-349.

⁶⁵ *Quebec Liquor Commission v. Moore*, *supra*, footnote 34, at p. 910; *Rex v. Pauwels*, *supra*, footnote 34, at p. 340; *Halifax v. Halifax Harbour Commissioners*, *supra*, footnote 13, at pp. 663-664.

⁶⁶ *Supra*, footnote 36, at pp. 748-749. See also *Brodie v. The King*, [1946] Ex. C.R. 283, at pp. 305-306.

if the power exists, it can be used. Such a power vests in the government the ability to achieve desired results. The power may be used in *terrorem* so as to create the necessary degree of understanding between the parties. It is not to be assumed that the government would never use such a power. Further, it is only the existence of the power and not whether it is, or ever would be, exercised that is relevant. The power may only be indirect or ultimate control but, nevertheless, it is actual control.

As a final matter, it is to be noted that the government will sometimes utilize for a particular purpose a corporation which is incorporated under general corporate legislation rather than a corporation specifically incorporated by particular legislation. The bare fact that the government holds all or a majority of the shares of such a corporation is irrelevant to the question of whether or not the corporation is a Crown agent. It has been established conclusively ever since *Salomon v. Salomon & Co.*⁶⁷ that mere shareholding does not create a principal/agent relationship between a shareholder and a corporation. The "agency of the company" must be established substantively and cannot be inferred from . . . the control of the shares alone".⁶⁸ In the present context, the agency of the corporation will only be established if the corporation agrees to or is legislatively subjected to a sufficient degree of government control (or is expressly deemed to be an agent). The irrelevance of government shareholding is implicit in the 1983 Supreme Court decision in *R. v. Eldorado Nuclear Limited*.⁶⁹ In that case, all the shares of two corporations (except qualifying shares of the directors) were held by or on trust for the government. In his *obiter* comments on the common law control test, and on the basis of that test, Dickson J. found one of these corporations to be a Crown agent while the other was not. Other cases are to the same effect.⁷⁰

It may be added that if mere shareholding does not create agency status, the control powers arising out of such shareholding (for example the right to elect directors and the ability to remove them) cannot create such status. Those rights are held and exercised *qua* shareholder and are internal to the corporation. The corporation is an entity separate from the government by reason of its corporateness (which masks or makes irrelevant the identity or status of the shareholders) and does not become

⁶⁷ [1897] A.C. 22 (H.L.).

⁶⁸ *British Thomson-Houston Company, Limited v. Sterling Accessories, Limited*, [1924] 2 Ch. 33, at p. 38 (Ch. D.).

⁶⁹ *Supra*, footnote 3.

⁷⁰ *British Columbia Power Corporation Ltd. v. Attorney General of British Columbia*, *supra*, footnote 11, at p. 32; *Re Forest Protection Ltd. and Guerin* (1979), 104 D.L.R. (3d) 260 (N.B. App. Div.). Also see *McClay v. Wartime Housing Ltd.*, [1944] 3 D.L.R. 729 (B.C.S.C.); *Re McGruer & Clark Ltd.* (1976), 13 O.R. (2d) 385 (Ont. S.C.) (a case in which the Ontario Crown Agency Act, R.S.O. 1970, c. 100, was applied).

an agent of the government unless it is otherwise controlled by the government or is deemed to be an agent. An example of when the corporation would be otherwise controlled is where the government in fact told the directors what to do and they, for whatever reason, did as they were instructed.

The foregoing review and analysis of the cases suggest that the majority of courts would not find Crown agent status merely because the body is established and watched over by the government.⁷¹ Specifically, it is submitted, the government can set up the body (whether incorporated or not), appoint its members, provide its funding, guarantee its borrowing, require audits and demand an annual report, all without conferring Crown agent status. The reason this is so is that none of these factors provide the government with any measure of control in the circumstances. But if the government goes further and provides itself with control powers or simply takes control then, at some point, the degree of control retained will convert the body into a Crown agent.

B. *The Control Test*

The test for Crown agent status, in the words of Ritchie J., is the "nature and degree of control" exercised by the government.⁷² It is convenient to separate the two elements of this formulation of the test, the "nature" of control and the "degree" of control, and to examine each in turn.

(1) *The Nature of Control*

Of the various statutory provisions most often considered by the courts we have seen that only a few actually represent control. The other provisions, many of which are necessary to make the statutory body operational, do not allow the government to interfere. The true control provisions give the government some ability to make decisions regarding the ongoing operation of the statutory body. These provisions allow the government to apply its risk set or risk disposition⁷³ to the employment of assets within the limitations of the particular provision. If we recognize that this is what each provision does, then it is apparent that a reference to the "nature of control" is misleading. Control, *per se*, has only one "nature". Each control provision, in accordance with its scope, gives full effect to the risk-taking of the government in relation to the particular matter dealt with in that provision. Even if we are considering

⁷¹ Other general discussions of these various provisions are found in Mueller, *loc. cit.*, footnote 21; McNairn, *loc. cit.*, footnote 7; Hogg, *op. cit.*, footnote 7, pp. 208-209; Scott, *loc. cit.*, footnote 7, at p. 284.

⁷² The reader is reminded that Ritchie J. found this formulation of the test in Laidlaw J.A.'s judgment in *R. v. O.L.R.B., Ex parte Ont. Food Terminal Board*, *supra*, footnote 24, at p. 531.

⁷³ "Risk set" or "risk disposition" simply means the risk-taking propensity or personality of the person referred to.

a provision which is non-specific as to the matter dealt with, such as the power to remove appointees, the "nature" of control is not different since the provision still merely enables the government, no more and no less, to apply its risk set to the employment of assets. This particular power gives the government control over a range of matters (corresponding to the range of matters controlled by the appointee), as opposed to a specific matter, but that fact does not evidence a different nature. Whether control is direct or indirect—the same process is occurring. The particular matters dealt with may vary in their nature but the control exercised over them does not.⁷⁴

The other provisions discussed above, conversely, are not instances of government control. In the case of provisions requiring an audit and annual reports, for example, there is no decision to be made—no employment of operating assets occurs. In the case of a provision giving the government the power to make appointments there will be an initial application of risk-taking in the selection of appointees but, because assets are not being employed at this stage, there is no operative control.

The conclusion, at least in this context, is that control has a singular nature and, accordingly, the application of the control test does not involve an examination into the nature of control but merely a preliminary separation of control and non-control provisions.⁷⁵ Only once that is accomplished will an analysis of the nature of the matters subject to control be relevant in quantifying the "degree" of government control. The Supreme Court, it will be noted, has discarded the "nature" element of the control test in two recent decisions. The test is now described as the "extent and degree of control"⁷⁶ or, simply, the "degree of control".⁷⁷

(2) *The Degree of Control*

Once the control provisions are identified it must then be determined whether the extent of government control manifested in those provisions is sufficient to establish Crown agent status. Obviously, in this regard, the "degree" of control is not a limiting concept. It simply conveys the idea that control may be less than complete, that control over some matters may not exist. For this reason, it is necessary to find some other concept which will define the point where there is a sufficient degree of government control.

⁷⁴ The relevance of the nature of the matter controlled has to do with the "degree" of control (that is, the degree of control depends on the importance of the matters subject to control). Negative and special rights are *types* of control which also relate to degree.

⁷⁵ After his review of the law in the 1950 decision of *Governors of the University of Toronto v. M.N.R.*, *supra*, footnote 36, at p. 748, Cameron J. stated that the test was the "degree of control". The "nature" element appears to have been added by Laidlaw J.A., *supra*, footnote 72.

⁷⁶ *Perehinec v. Northern Pipeline Agency*, *supra*, footnote 3, at pp. 517-518.

⁷⁷ *R. v. Eldorado Nuclear Limited*, *supra*, footnote 3, at p. 573.

In most cases, the judges have not been motivated to identify the point at which the degree of government control becomes sufficient to establish Crown agent status. They do not attempt to go beyond the facts before them and, consequently, their words are merely conclusory rather than analytical. The following quotations are illustrative:

... they are subject at every turn in executing those powers to the control of the Governor . . .⁷⁸

The Board . . . is to have, within the limits of the purposes for which the University was established, a very wide discretionary power in the management and control of the University—a power which I think is quite independent of the Government. In doing what it does it acts on its own behalf and not on behalf of the government, and is not controlled by a department of the Government.⁷⁹

... Board is subject to substantial control by the Government . . .⁸⁰

... but in all other respects the Board appears to be endowed with a complete discretion to conduct its own affairs within the limits of its statutory powers.⁸¹

These statements are primarily meant to summarize the cumulative effect of the statutory provisions examined in the particular case. Because of that, they are imprecise in defining the point of sufficient control. They define only the two extremes of “substantial control” and “wide discretionary power”. And the two extremes, it will be appreciated, are not contiguous. There is a gap or an absence of continuity between a wide discretion for a statutory body and a substantial control for the government. This is shown diagrammatically on a continuum of increasing government control:



Where there is substantial government control, the body will be a Crown agent. If such control is absent, if the body instead has a wide discretion, no Crown agency will be found. But what of the middle range where there is significant, but not substantial, government control? Where do we draw the line between the two extremes?

There is one recent suggestion as to what the point of sufficient control might be. In the Supreme Court decision *R. v. Eldorado Nuclear*

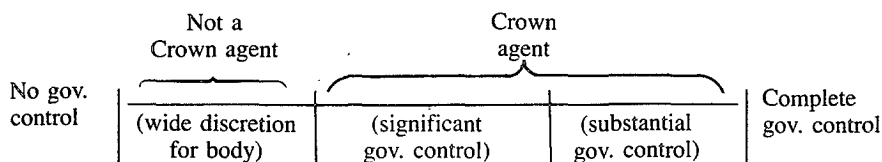
⁷⁸ *Halifax v. Halifax Harbour Commissioners*, *supra*, footnote 13, at p. 664.

⁷⁹ *Governors of the University of Toronto v. M.N.R.*, *supra*, footnote 36, at p. 664.

⁸⁰ *MacLean v. Liquor Licence Board of Ontario* (1975), 61 D.L.R. (3d) 237, at p. 244 (Ont. Div. Ct.).

⁸¹ *Westeel-Rosco Ltd. v. Board of Governors of South Saskatchewan Hospital Centre*, *supra*, footnote 26, at p. 346.

Ltd.,⁸² Dickson J. stated that "[w]here a person, human or corporate, exercises substantial discretion, independent of ministerial control, the common law denies Crown agency status". This would appear to suggest that anything less than substantial discretion will result in a Crown agent characterization. In other words, any *significant* government control, even though it could not be said to be *substantial* control, would be sufficient to establish a Crown agency. If that is so, the precise degree of control required is *significant* control and, accordingly, the line would be drawn between the two extremes at that point.



Supporting this view is the fact that there are no cases in which a Crown agency was found, on a control basis, where there was less than a very wide discretion or autonomy allowed to the body in question.⁸³ The case law results, unfortunately, are not helpful beyond this. In part, this is because the judges have confused control provisions with provisions that are control neutral or irrelevant. It is also due to the presence of "ownership" type provisions in most cases where a Crown agency was found.

There is at least one other basis upon which it may be argued that any significant government control will be sufficient to create Crown agent status. This involves a case concerned with contractual Crown agency.

C. Contractual Crown Agency and the Enterprise Control Test

Crown agent status may be conferred on a private person by the terms of a contract between that person and the government. The classic decision on contractual Crown agent status, and on independent contractor status generally, is *Montreal v. Montreal Locomotive Works Ltd.*⁸⁴ In this case a corporation sought to avoid property and business taxes on the ground that its contract to manufacture tanks and gun carriages for

⁸² *Supra*, footnote 3, at pp. 573-574. (Emphasis added).

⁸³ Consider the decisions in *Johnson & Herbert Construction Ltd. v. Athabasca University*, *supra*, footnote 60; *Aviation Portneuf Ltée v. The Queen*, *supra*, footnote 46.

⁸⁴ [1947] 1 D.L.R. 161 (P.C.). Also see *Regina Industries Limited v. The City of Regina*, [1947] S.C.R. 345; *Re Delta Parking Systems Ltd. and Township of Toronto* (1964), 48 D.L.R. (2d) 130 (Ont. H.C.); *Re Forest Protection Ltd. and Guerin*, *supra*, footnote 70. Note also *Bank of Montreal v. Bay Bus Terminal (North Bay) Ltd.*, [1972] 1 O.R. 657, at p. 663 (Ont. H.C.), where it is pointed out that contractual Crown agents only have that status for the purposes of the particular contract.

the government gave it the status of Crown agent. The issue, accordingly, was whether the corporation was a Crown agent or servant or simply an independent contractor who did work for the government. In considering the matter, Lord Wright suggested a new approach for distinguishing between servants and independent contractors, or, for present purposes, Crown agents and others.

The traditional approach to the servant-independent contractor distinction had been to consider whether the employer exercised any control, especially as to the manner of doing the work, over the worker. Lord Wright's contribution was subtle. He changed the perspective from which one was to view the problem. Lord Wright looked initially to the worker rather than to the employer. He did so in order to decide whether or not it could be said that the worker carried on a distinct business, a business separate from that of the employer. According to his Lordship:⁸⁵

In this way it is in some cases possible to decide the issue by raising as the crucial question whose business is it, or in other words by asking whether the party is carrying on the business, in the sense of carrying it on for himself or on his own behalf and not merely for a superior.

The result of this change in perspective was to reveal a simple and intuitive basis for differentiating between servants and independent contractors. The difference between servants and independent contractors becomes the difference between enterprises. If there are two distinct enterprises, the worker is not the servant of the employer. If no separate worker enterprise can be identified, the worker is only a servant of the employer's enterprise.

The precision of this approach is found in the "enterprise control" test extracted from Lord Wright's judgment.⁸⁶ This test involves assessing the control associated with the productive employment of the assets of the activity or operation in question. As discussed at length elsewhere, the test identifies whether or not separate enterprises are being carried on.⁸⁷ A separate worker enterprise will be found on the basis of this test if there is a high degree of worker control. That is, separate enterprises will not be found if the employer exercises more than a nominal degree of control in relation to the activity or operation. The test is straightforward. The "enterprise" aspect is the conceptual background or framework for analysis. "Control" is the factor which is analyzed to determine if a separate enterprise exists. In the servant-independent contractor context, the effect of the test is to prevent the employer from being able to insulate his or her risk-taking.⁸⁸

⁸⁵ *Ibid.*, at p. 169.

⁸⁶ R. Flannigan, *Enterprise Control: The Servant-Independent Contractor Distinction* (1987), 37 U.T.L.J. 25.

⁸⁷ *Ibid.*, at pp. 39-51.

⁸⁸ *Ibid.*, at pp. 26-37.

Lord Wright's novel approach⁸⁹ was offered in a case concerned with a contractual Crown agency situation. Presumably it would be equally applicable in a statutory Crown agency situation. In the former case there would be a control analysis of contractual provisions, and in the latter, a control analysis of statutory provisions. Crown status would attach if there were a sufficient connection or relationship. The effect of the test, in the present context, is to define as a Crown agent any person or body engaged in an activity or operation which the government controls in whole or in part. This is in conformity with Dickson C.J.C.'s suggestion in *R. v. Eldorado Nuclear Limited*.⁹⁰ A sufficient degree of control would be any *significant* government control.

Crown Immunity and Public Policy

This would all be very straightforward and convenient if it implemented the public policy or policies behind the granting of immunities to the Crown. Unfortunately, in this area of the law, public policy concerns are notably absent. Virtually every decision is totally devoid of any consideration of policy, either generally or in relation to specific immunities.

Undoubtedly there are public policies both in favour of and against the various immunities which the Crown has enjoyed. However, when the courts first began to restrict the extension of these immunities they did not engage in a case by case analysis of the policies underlying the particular immunity being considered. Instead, they chose simply to restrict or extend these immunities, in the case of contractual and statutory agency, to those persons or bodies who had some connection to the Crown.⁹¹ They took a global approach and, on the basis of the connection, either conferred blanket Crown status or denied such status entirely, irrespective of the immunity or matter being considered. If Crown agent status was indicated, that status existed for all purposes.⁹² This test of connection was originally framed in terms of function. Only when the body fulfilled a "governmental" function did it have a close enough connection to the Crown to attract Crown agent status. Later on, this close connection was framed in terms of control. The body was connected to the government if the government exercised an appropriate degree of control over it. In the result, the availability of Crown immunities was and is dependent only on a mechanical assessment of status.

The present legal position that Crown agent status attracts all Crown immunities for all authorized purposes, unless otherwise provided for by

⁸⁹ Lord Wright found this approach in the academic literature (see Flannigan, *ibid.*, at p. 40).

⁹⁰ *Supra*, footnote 3.

⁹¹ See Griffith, *loc. cit.*, footnote 14, at pp. 171, 181-183; Sawyer, *loc. cit.*, footnote 3, at pp. 137-138.

⁹² But see *Re Ile à la Crosse Native Industries*, [1983] 6 W.W.R. 565 (Sask. Q.B.).

statute, is quite unsatisfactory. Once Crown agent status is mechanically ascertained under the control or enterprise control test, there ought to be a further examination of the policies that support or reject the availability of the particular immunity. It may be that, on balance, public policy would support the immunity of a particular Crown agent from the application of a taxing statute, but it is doubtful that public policy would support the complete immunity of a commercially active Crown agent from all statutes which seek to regulate generally the conduct of commercial enterprises. The regulating statutes themselves evidence a non-supporting public policy. Each particular policy should be considered. One is hard pressed, for example, to understand why the Liquor Control Commissions of the provinces (a number of which have been found to be Crown agents)⁹³ should attract any of the immunities of the Crown.

The availability of Crown immunities should depend on the nature of the immunity having regard to the function of the ostensible agent. This would not be a mechanical assessment of function only (as in the application of the "function" test) but rather a policy analysis of the suitability of the particular immunity to the particular function. This approach is justified as being an assessment of the purpose of the particular contract or legislation. Indeed, the approach might usefully be applied to the Crown generally. It should make no difference that the activity is pursued directly rather than through an agent.

The control test is not irrelevant in the domestic immunity context. Where there is no other express or implicit statement of Crown status, it is clearly a first hurdle for those who would claim the immunities of the Crown. There must be some initial connection or relationship to support such a claim. But there must be a further examination of the suitability of the particular claimed immunity to the particular function being performed. Only upon this second analysis being undertaken and successfully addressed should the immunity attach.

A different approach to the availability of immunity has been taken in the sovereign immunity context. The analysis there is partly functional and involves a higher threshold of control.

II. *Sovereign Immunity*

In the words of the Australian Law Reform Commission, "the most vexed question in foreign state immunity has been what entities apart from the state, head of state and central government should be entitled to the shield of foreign state immunity"?⁹⁴ The Commission thought the

⁹³ E.g., *Quebec Liquor Commission v. Moore*, *supra*, footnote 34; *Rex v. Pauwels*, *supra*, footnote 34.

⁹⁴ Foreign State Immunity, Report No. 24, Law Reform Commission, Australian Gov. Publishing Service, Canberra, 1984, p. 16.

matter perplexing because it could find no *precise* test for determining when immunity was available. It was not that it knew of no test, it simply thought the tests proposed to date were imprecise.

Lord Denning, the Commission noted,⁹⁵ had offered a dual function/control test. In *Trendtex Trading Corporation Ltd. v. Central Bank of Nigeria*⁹⁶, he stated:

But how are we to discover whether a body is an 'alter ego or organ' of the government? . . . It is particularly difficult because different countries have different ways of arranging internal affairs. . . This difference in internal arrangements ought not to affect the availability of immunity in international law . . .

I confess that I can think of no satisfactory test except that of looking to the functions and control of the organisation. I do not think that it should depend on the foreign law alone. I would look to all the evidence to see whether the organisation was under government control and exercised governmental functions.

Notwithstanding the Law Reform Commission's reservations, other courts have adopted Lord Denning's approach. Thus, the circumstances are examined to ascertain if there is a sufficient degree of state control (the control aspect). But even if such control is present, immunity will not be extended to purely commercial transactions (the function aspect) under the doctrine of restricted sovereign immunity.⁹⁷

Although it is far from clear at this point, given the dearth of authority, there may be a distinction in the sovereign immunity context between (1) an "alter ego" and (2) an "agent" of a foreign state. The former is found where there is substantial control, the latter where there is merely significant control. Canadian courts, at least, have taken the view that substantial state control is a prerequisite to being characterized as an "alter ego" or "organ" of a foreign state. In *Ferranti-Packard Ltd. v. Cushman Rentals Ltd.*,⁹⁸ the Ontario Divisional Court was of the view that "an alter ego is another self, a reasonably exact counterpart". This implies substantial state control as a necessary element. And in *Lorac Transport Ltd. v. The Atra*,⁹⁹ McNair J. understood the "determinative question" in the *Ferranti* case to be whether the particular body there "was under the complete control of the State of New York in the sense of being its *alter ego* or organ". According to the courts in both these

⁹⁵ *Ibid.*, pp. 16-17.

⁹⁶ [1977] 1 All E.R. 881, at pp. 893-894 (C.A.).

⁹⁷ See *Western Surety Co. v. Elk Valley Logging Ltd.* (1985), 23 D.L.R. (4th) 464 (B.C.S.C.) and *Sparling v. Caisse de Dépôt et Placement du Québec* (1985), 22 D.L.R. (4th) 336 (Que. C.A.). Also see the State Immunity Act, S.C. 1980-81-82-83, c. 95, s. 5.

⁹⁸ (1981), 115 D.L.R. (3d) 691, at p. 696 (Ont. Div. Ct.). The reasons and conclusions of the Divisional Court were adopted by the Ontario Court of Appeal at (1981), 123 D.L.R. (3d) 766.

⁹⁹ (1984), 9 D.L.R. (4th) 129, at pp. 141 (Fed. T.D.).

cases, only bodies characterized as "alter egos" of a foreign state would attract sovereign immunity.¹⁰⁰

A mere "agent" may not be granted sovereign immunity by the common law. An "agent" is a person or body subject to state control, but not substantial or complete state control. This is illustrated in the South African decision of *Banco de Mocambique v. Inter-Science Research and Development Services (PTY) Ltd.*¹⁰¹ There it was expressly decided that the central bank of Mocambique was not the "alter ego" of the state even though it was its "agent".¹⁰² This same distinction is alluded to in the *Ferranti*¹⁰³ case and again in the *Lorac Transport*¹⁰⁴ case. If this is the distinction, it is presented on a continuum of increasing state control in the following way:

	Not a Crown agent	Crown agent	Alter ego or organ	
No gov. control	(wide discretion for body)	(significant gov. control)	(substantial gov. control)	Full gov. control

This is consistent with the determination of Crown agent status in the domestic context, at least insofar as the required degree of control for Crown agent status remains significant government or state control. The major difference is that, for the purposes of sovereign immunity, it would appear that the common law requires more than Crown "agent" status—the person or body must be the "alter ego" of the state.

A number of observations may be made when considering and assessing the respective approaches in the domestic and international contexts. First, it would appear that the enterprise control test can provide the precise test that is said to be absent in this area. The "enterprise" framework of the test would provide the conceptual background for a control analysis.¹⁰⁵ Thus, whenever the issue is whether a particular person or body is a mere "agent" of a foreign state, the "enterprise" question would be asked. Is there that high degree of independence which establishes that an enterprise separate from the government is being carried on?

¹⁰⁰ Consider the implications and impact of recent legislation. For example, State Immunity Act, *supra*, footnote 97; Foreign Extraterritorial Measures Act, S.C. 1984, c. 49.

¹⁰¹ 1982 (3) S.A.L.R. 330 (Transv. Pr. Div.).

¹⁰² *Ibid.*, at pp. 343-344.

¹⁰³ *Supra*, footnote 98.

¹⁰⁴ *Supra*, footnote 99, at pp. 143-144.

¹⁰⁵ *Supra*, footnote 86.

Even where the issue is whether the particular person or body is an "alter ego" of the state, the enterprise approach can still be applied. The question would be whether the particular body is "another self" of the foreign state. This is answered on a control basis. A body would be "another self" if, through it, the foreign state did as it pleased unfettered by a significant discretion possessed by that body. This is equivalent to determining that the state has more than significant control, that it has substantial or complete control. Here, in effect, the enterprise question is being asked of the state rather than the particular body. Does the state have that high degree of control which indicates that it is carrying on a separate enterprise alone rather than partly by itself and partly through an agent. The state alone carries on the enterprise if the body is nothing more than its alter ego. Where the body is independent in some significant respect, it will not be the "alter ego" of the foreign state and, of course, where it has substantial or wide discretion, it is neither an "alter ego" nor an "agent" of the foreign state. Only where there is complete or substantial domination of the body can it be said that the state alone is acting.

A final observation follows upon this. If an "alter ego" characterization is required for the purposes of attracting sovereign immunity, it might be considered whether that would not also be a more appropriate requirement in the domestic immunity context. In the sovereign immunity context, there is at least the comity principle to justify the few cases where sovereign immunity will be found on the basis of the substantial control needed to support an alter ego characterization. In the domestic situation, there is no comparable basis for justifying the immunities that have been granted to government agencies. Such a change would not generally confront the issue of appropriateness of immunity but it would reduce the number of persons or bodies who can put forward the immunity claim.

III. *The Charter*

In *Retail, Wholesale and Department Store Union, Local 580 v. Dolphin Delivery Ltd.*,¹⁰⁶ the Supreme Court of Canada stated that the Charter of Rights and Freedoms¹⁰⁷ "was not intended in the absence of some governmental action to be applied in private litigation". This at once creates the need to distinguish between government action and private action.

Whatever else may constitute "government action", it would seem clear that government "control" is included within that concept. The Charter, in the words of McIntyre J., "was intended to restrain govern-

¹⁰⁶ *Supra*, footnote 6, at p. 593.

¹⁰⁷ *Supra*, footnote 5.

ment action and to protect the individual".¹⁰⁸ To do this, it is necessary to identify those persons or bodies through which the government acts. Where the government controls a person or body in any non-nominal respect, there is direct "government action" involved in the particular activity or operation being pursued. If the Charter is to regulate or restrain governmental action effectively, it must apply to such activities or operations. Otherwise, such action remains insulated from the Charter by reason of the interposed person or body.¹⁰⁹

This appears to call for a straightforward application of the enterprise control test. Any person or body subject to significant or non-nominal government control is characterized as a "Crown agent" under this test. Upon such a characterization, the Charter would be applicable to the activities of this person or body. If there is no significant government control, there is an enterprise distinct from that of the government. There would then be no control basis for a finding of "government action". There may be "government action" on some other basis or analysis, but there is no control basis. In any event, the enterprise control test would identify at least one category of "government action".

Perhaps the most interesting question in this context is whether or not there should be a "commercial transaction" or "commercial activity" exception to the application of the Charter to government agents. The question is not easily answered.¹¹⁰ If the exception were adopted, the scope of application of the Charter would depend in part on whatever test was formulated to distinguish government commercial activities from "government action".

Conclusion

Historically it has been virtually an unqualified advantage to be characterized as a Crown agent. This was a consequence of the immunities which such status attracted for the domestic activities of the particular person or body. The companion "alter ego" characterization that became significant under a restricted sovereign immunity regime conferred further immunity in the international context. But no longer does the advantage of a government characterization remain unqualified. Now there is a price to pay for Crown or "alter ego" status. The price is the applicability of the Charter to the activities or operations carried on. The effect,

¹⁰⁸ *Supra*, footnote 6, at p. 593.

¹⁰⁹ A control analysis is found in recent decisions at the Court of Appeal level addressing the "mandatory retirement" issue. See *Harrison v. The University of British Columbia*, [1988] 2 W.W.R. 688 (B.C.C.A.); *Stoffman v. Vancouver General Hospital*, [1988] 2 W.W.R. 708; and see *McKinney v. The University of Guelph* (1987), 24 O.A.C. 241 (Ont. C.A.).

¹¹⁰ See D. Gibson, *The Law of the Charter: General Principles* (1986), pp. 100-104.

at least at the margin, will be to reduce the number of claims made for Crown status.

Whatever practical effect the Charter has in this respect, it will still be necessary to differentiate between the Crown and others for these various purposes. That can be accomplished through the application of the enterprise control test. If the degree of control required for Crown agent status is *significant* control and that required for "alter ego" status is *substantial* control, the "enterprise" concept provides an organizing framework for the necessary investigation which will disclose whether or not the relevant quantum of control is present. That, however, may not or should not be the end of the analysis depending on the purpose for which the characterization is required. It will not be necessary to determine if a "government function" is involved but it may be necessary to determine, as in the sovereign immunity cases, whether the activity or operation is purely commercial in nature. In other cases, where particular domestic immunities are involved, arguably it should be necessary to go further and assess the relevance of the particular immunity to the particular function. Where the Charter is concerned, on the other hand, the Crown characterization may be sufficient. It will be sufficient if the purpose of the Charter is to restrain "government action" without further qualification or exception. But whatever the proper answer to these latter questions of policy may be, it is at least possible to make the Crown agent or "alter ego" characterization itself with a fair degree of precision. It is the framework of the enterprise control test that provides the perspective for this task.