THE CROWN AS LITIGANT

REPORT OF COMMITTEE ON COMPARATIVE PROVINCIAL LEGISLATION AND LAW REFORM, 1936

It is perhaps advisable to make brief reference to the report tendered in 1935. The Committee sought and received from the Association authority to canvass the subject and make further report thereon, and it has, after due consideration, been deemed timely to submit a draft Act or Bill which might form the framework, or at least a starting point, for alteration in the law. A draft Bill for the Province of Alberta appears at the foot of this report, on which some comments will hereafter be made.

There seems no question but reform of some character is overdue. The Dominion Parliament has already gone some distance, and the provinces appear to be lagging far behind the lead given by it. The agitation for revision of the law finds expression by our judges, members of the bar, and the general public. In a recent case, *Peccin* v. *Lonegan*,[1] Mr. Justice Davis, then of the Court of Appeal of Ontario, remarked on the desirability of reform:

> In conclusion, it may be that this case affords another instance of the necessity for steps to be taken by the Legislature to alter the law as to actions for tort against Government Commissions.

Professor Holdsworth, in his *History of English Law*,[2] at the conclusion of an erudite enquiry into the origins of petitions of right, says:

> The subject's rights against the Crown are, therefore, we have seen, governed by the inadequate rules of medieval common law.

and referring to advanced legislation in New South Wales discussed in *Farnell* v. *Bowman*,[3] continues:

> It is obvious that this reasoning applies with great force to the activities of our modern socialistic state; and that, in consequence, a reform of the law . . . . is urgently needed in the interests of the public at large.

Practising lawyers everywhere have found how difficult it is to explain to a client that the Crown is privileged and immune from ordinary judicial process. The doctrine illustrated by the maxim "The King can do no wrong" is, in fact, incomprehensible to the average layman. Summing up some of the anomalies:

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[1] [1934] O.R. 701.
[2] Vol. IX at p. 44.
[3] (1887), 12 App. Cas. 643.

There is no appeal from the refusal of a fiat;[4] there is no remedy against the Crown in tort except where specially provided by statute;[5] the Crown has the prerogative right to refuse discovery;[6] the Court will not decree against the Cown specific performance of its contract in circumstances where such relief would be available as between subjects; the Crown cannot be made a party to interpleader proceedings; the Crown is not bound by a statute of limitations;[7] the doctrine or rule of *res ipsa loquitur* cannot be invoked against the Crown;[8] nor is the Crown in the right of the Dominion affected by provincial legislation regulating motor vehicles.[9]

There has been reform elsewhere. For instance, in Australia The Judiciary Act (1903) provides for suits by the subject against the States and the Commonwealth, whether sounding in contract or tort. In the Union of South Africa, all citizens possess by statute the right to institute proceedings against the Crown, sounding in contract or in tort, as though the Crown were a private person. It is also understood that the law of New Zealand, with some limitations, is similar to that of Australia.[10] In England, the subject can obtain relief in contractual matters, generally by petition of right, but is without remedies in tort, and it may be well to restate the history of attempts at reform there. In 1921, Lord Birkenhead, Lord Chancellor, with the approval of the then Attorney-General and Solicitor-General, had a committee, including a number of eminent jurists, undertake the task of reviewing the position of the Crown as litigant, and requested the preparation of a Bill which, amongst other things, would provide for the Crown becoming liable to be sued in tort. Before the committee's deliberations were complete, Lord Haldane, Lord Chancellor in 1924, urged the immediate submission of a Bill without a report on the deliberations of the committee in course of such task, and a draft Bill, termed *Crown Proceedings Bill*, was accordingly drafted and submitted to Lord Cave, Lord Haldane's successor, in 1927. The Bill was submitted to the House of Commons on December 12, 1928, by the then

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[4] *Lovibond* v. *Governor-General of Canada*, [1930] A.C. 717; Royal *Trust Company* v. *Attorney-General for Alberta*, [1936] 2 W.W.R. 337.

[5] *The King* v. *Zornes*, [1923] S.C.R. 257.

[6] *Crombie* v. *The King* (1922), 52 O.L.R. 72.

[7] *Re Rex* v. *Rutherford* (1927), 60 O.L.R. 654; *Public Works Commissioners* v. *Pontypridd Masonic Hall Company*, [1920] 2 K.B. 233.

[8] *Montreal Transportation Company* v. *The King*, [1923] Ex. C.R. 139.

[9] *Rex* v. *Anderson*, [1930] 2 W.W.R. 595.

[10] See W.P.M. Kennedy, *Suits By and Against the Crown* (1928), 6 Can. Bar Rev. 329.

solicitor-general, Sir Henry Slesser, and given its first reading, after which nothing further was heard of it.[11]

It is hardly possible, in the limits of this report, to review this Bill, but it has proved of inestimable value to the Committee in drafting the sample Bill incorporated with this report, not so much in adopting its specific language as in suggesting fields of enquiry. It is regrettable that the deliberations of the English committee were not reduced to writing and made public, since we would then have the reasons which underlie the draughtsmanship of the English Bill, which, in some instances, might prove of greater value than the provisions of the Bill itself. The agitation for reform in England has evidently been rather sporadic, but received quite an impetus this year owing to one or two deaths through the instrumentality of motor cars owned by the Crown.

The present state of the law in Canada demands some comments.

In claims against the Crown in right of the Dominion, the initial proceedings are governed by the Petition of Right Act,[12] and upon a fiat being granted, all further steps in contested proceedings are governed by the Exchequer Court Act.[13] The Exchequer Court is clothed with original jurisdiction. Possibly the most familiar jurisdiction exercised, or at any rate the one of most interest to the public and to the profession under present day conditions, in view of the activity of the Government in so many fields heretofore reserved to private enterprise, is that providing the subject with a remedy where death or injury arises 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. What is a "public work" within the meaning of the statute, has given rise to much litigation and indicates the necessity for further ameliorating legislation. Some of the illustrative cases, briefly noted, are as follows:

The King v. *Dubois*, [1935] S.C.R. 378. Radio car in government service is not a public work.

Moscovitz v. *The King*, [1935] S.C.R. 404. Transport driver for Crown negligently collided with car driven by M., who was killed. *Held* no recovery against Crown since the transport was not a public work.

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[11] The Bill can be obtained at H.M. Stationery office, Adastral House, Kingsway, London, W.C. 2, price 9d. An interesting criticism of the Bill is to be found in 45 L.Q.R. 186.

[12] R.S.C. 1927, c. 158.

[13] R.S.C. 1927, c. 34, secs. 18-20.

The King v. *Mason*, [1933] S.C.R. 332. Action in tort by fisherman against King for damage to former's net caused by negligent dredging of Government. This was held a public work.

The Wolfe Company v. *The King* (1921), 63 S.C.R. 141. The Government rented the basement and first floor of a building for an indefinite period for recruiting. *Held* that this was not a public work.

Toman v. *The King*, [1934] Ex. C.R. 161. An automobile belonging to R.C.M.P. is not a "public work" and the Crown is not liable for negligent driving of the constable.

Larose v. *The King* (1901), 31 S.C.R. 206. A rifle range under the control of the Department of Militia and Defence is not a "public work" within the meaning of the Exchequer Court Act.

Johnson v. *The King*, [1931] Ex. C.R. 163. Suppliant was injured by an icicle which fell on her from the roof of the Ottawa Post Office. Crown held liable.

See also *Annotation*, [1928] 2 D.L.R. 265.

The position of the subject with relation to railways is governed by two statutes. Under the Canadian National Railways Act,[14] suits against the Canadian National Railways may be brought without a fiat in any court of competent jurisdiction in Canada, and collection of any judgment may be enforced in the same manner as any judgment against a subject. The other statute is The Government Railways Act,[15] which by section 86 confers rights on the subject against a Government Railway (not to be confused with the Canadian National Railways) exercisable in provincial courts to the limited amount of $500.00. The Exechequer Court Act, section 19, provides additional remedies pursued by petition of right as to claims in excess of $500.00.

In the recent session of the House of Commons, the question of the subject's rights against the Crown arose for discussion upon consideration of the National Harbours Board Bill No. 17, when Mr. Cahan urged that this Bill, introduced by the Minister of Marine, be amended by giving the subject the right of suit, similar to that available to the subject against the Canadian National Railways. The Hon. Minister of Justice, Mr. Lapointe, while expressing sympathy with the object sought by Mr. Cahan, opposed it on the grounds of policy, deprecating piecemeal legislation on the matter, but intimating that the government proposed bringing down general legislation relating to the subject's rights against the Crown, probably at the 1937 session.[16]

The law in the respective Provinces varies considerably but can roughly be classified in three groups, the first of which

[14] R.S.C. 1927, c. 172.
[15] R.S.C. 1927, c. 173.
[16] See House of Commons Debates, 1936, pp. 3250 and 3365.

comprises Ontario and the Western Provinces. All of them have petition of right legislation.[17] Generally, they give the subject, to paraphrase the language of Lord Watson in *Windsor and Annapolis Railway Co.* v. *The Queen*,[18] a remedy where land or goods, or money of a subject 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, or where a claim arises out of contract. But ordinarily there is no remedy in tort.[19] The Crown's position as to tortious acts by its servants or emanations is clearly indicated by *The King* v. *Zornes*,[20] where in petition proceedings the subject recovered for injuries sustained by the negligence of the Alberta Government Telephones, a government-owned utility, on the ground that such utility was subject to The Public Utilities Act, which declared that a public utility should be responsible for unnecessary damage it causes in operating any of its works. But for this legislation thus encroaching on the Crown's prerogative, the subject would have been without relief. In Ontario, there are several statutes analogous to that under consideration in the *Zornes* case broadening the subject's remedies.[21]

But for a recent decision in the Supreme Court of Canada, *The King* v. *Joseph Cliche*,[22] it could probably be said that the law of Quebec was not essentially different from that of Ontario. Article 1011 of the Code of Procedure deals with petition of right and is said to be derived from the English Act of 1860 which is the foundation of other Canadian statutory enactments. It was not regarded as embracing delict and quasi delict, but in this case the subject recovered damages from the Crown for injuries sustained as a passenger in an automobile which collided with an unlighted steam roller the property of the Crown. The immunity of the Crown was not raised in the provincial courts, and a commentator in THE CANADIAN BAR REVIEW,[23] states that this decision is merely an authority for the proposition that the Crown is answerable for damages caused by construction and maintenance of provincial highways. Duff J. in *The Quebec Liquor Commission* v. *Moore*,[24] held that the

[17] Crown Procedure Act, R.S.B.C. 1924, c. 63; Petition of Right Act, R.S.A. 1922, c. 94; Petition of Right Act, R.S.S. 1930, c. 61; Petition of Right Act, R.S.M. 1913, c. 152; Ontario Rules of Practice, Rules 738-750

[18] (1886), 11 App. Cas. 607 at p. 614.

[19] *Tobin* v. *Regina* (1864), 16 C.B.N.S. 310, 143 E.R. 1148.

[20] [1923] S.C.R. 257.

[21] Power Commission Act, R.S.O. 1927, c. 57, s. 6(4); Hydro-Electric Negligence Act, R.S.O. 1927, c. 61; Highway Improvement Act, R.S.O. 1927, c. 54, s. 74; Public Works Act, R.S.O. 1927, c. 52, secs. 10 and 39.

[22] [1935] S.C.R. 561.

[23] (1936), 14 Can. Bar Rev. 252.

[24] [1924] S.C.R. 540.

Liquor Commission as an instrument of the Crown was not liable in tort, bearing out the view that the *Cliche* case is not an authority recognizing liability in the Crown throughout the whole field of delict. In no reported case other than the *Cliche* case has the Provincial Crown been held liable in tort.

The Provinces of Prince Edward Island, Nova Scotia, and New Brunswick appear to be in still a different position. They are without any statutory provisions as to petition of right. Unlike the other Canadian provinces, they have not enacted legislation patterned after the English Act, and petition of right seems an entire stranger to the practitioner in those provinces, even in cases where merely contractual obligations of the Crown are involved, and the profession in some of these provinces has been pressing for reform limited probably to legislation not embracing tort. As the remedy of petitioning the Sovereign is a very ancient one, the Committee would assume that the subject even in those provinces might have some remedy at common law, but it must be noted that prior to the statute of 1860, the practice in England was uncertain and cumbersome, and even there legislation was necessary to make the remedy more generally available.

The Committee is conscious of the fact that the draft Bill may contain defects, but it is submitted, not as a piece of work ready for enactment, but rather as a foundation for discussion. Legal periodicals are filled with articles advocating the need of reform, and assuming there is general unanimity in the view that the Crown's prerogative should be at least in part abrogated, it is hoped that this Bill, notwithstanding any imperfections or shortcomings, will prove of some value to those interested in achieving an alteration of the present law. Section 3 (a) is expected to provoke discussion particularly, because of the use of the words "legal and equitable relief," which were added to provide for those instances where it might develop that the subject's claim against the Crown sounded neither in contract nor in tort,[25] but even this language may fall short of defining with sufficient breadth all types of relief that the subject might seek against the Crown, for instance, claims founded on statute. The Australian Judiciary Act merely employs the words "in contract or in tort." The language of paragraphs 4(a) and (b) follows fairly closely the language used in the English Bill. In Alberta, actions are commenced by statement of claim, and the more formal procedure of writ of summons is abolished. There

[25] See *Torts*, SALMOND, 8th ed., at p. 8.

is, of course, room for a difference of opinion as to whether trial by jury should be abolished, but it is submitted that it is desirable to leave adjudication solely to judges who will not be so likely to be affected by the political and popular phases of any litigation. It will be observed that it is provided that the Crown shall be subject to the usual rules as to discovery,[26] but this new right conferred on the subject has been circumscribed to the extent of preventing discovery where public interest is involved. In the Dominion field, with matters of external affairs arising from time to time, additional provisions would probably be necessary for the Crown's due protection.

Lastly, a minority of the Committee, unimpressed by the polite fiction of law that to know of an injury and to redress it are inseparable in the royal breast, were of the view that the subject should be entitled to enforce judgment by ordinary execution, subject to a discretion in the Court to grant a stay on reasonable grounds, and this minority offered rather cogent reasons for such relief, but the majority took the view that the Bill in other aspects alters the law so materially that collection from the Crown should follow the procedure now provided by various provincial Petition of Right Acts. No provision is made in this Bill saving existing rights under some Petition of Right Acts, and doubtless this will be necessary. No limitation has been placed on the liability of the Crown in respect of civil actions that might arise out of criminal proceedings commenced at the instance of Crown officers, and some protection should be provided in that regard, particularly in jurisdictions where the grand jury has been abolished.

C. C. McLAURIN,
Chairman.

DRAFT BILL

AN ACT RESPECTING PROCEEDINGS AGAINST THE CROWN

HIS MAJESTY, by and with the advice and consent of the Legislative Assembly of Alberta, enacts as follows:

1. This Act may be cited as "The Crown Proceedings Act".
2. In this Act, unless the context otherwise requires:—
   (a) "Officer" in relation to the Crown includes servant and agent.
   (b) "Crown" shall mean Crown in the right of the Province.
3. (a) The Crown shall, notwithstanding any rule of law to the contrary, be liable in contract and in tort and in any matter in which a claim is made for legal or equitable relief.

[26] See *Crombie* v. *The King* (1922), 52 O.L.R. 72.

(b) The Crown shall be liable for any wrongful act done, or any neglect or default committed, by an officer of the Crown in the same manner and to the same extent as that in and to which a principal, being a private person, is liable for any wrongful act done, or any neglect or default committed, by his agent, and for the purposes of this subsection, and without prejudice to the generality thereof, any officer of the Crown acting, or purporting in good faith to be acting, in pursuance of a duty imposed by law, shall be deemed to be the agent of and to be acting under the instructions of the Crown.

4. (a) Proceedings under this Act against the Crown shall be brought against the Attorney-General, or, in the case of counterclaim by the defendant in proceedings instituted by a Government department, against that department.

(b) No proceedings against the Attorney-General shall abate or be affected by any change in the person holding the office of Attorney-General.

(c) In the case of proceedings against the Crown under this Act, the statement of claim or other instrument originating the proceedings shall be personally served upon the Attorney-General, the Deputy Attorney-General, or Assistant Deputy Attorney-General.

5. It shall not be necessary for any person, before instituting proceedings against the Crown under this Act, to obtain His Majesty's fiat that right be done.

6. This Act shall not be deemed to authorize or sanction the bringing or institution of any proceedings or actions against the Crown except in the courts of the Province.

7. In any proceedings against or by the Crown, neither party shall be entitled to trial by jury and all such proceedings shall be tried by a judge alone.

8. The ordinary rules as to costs shall apply.

9. Proceedings between the Crown and the subject shall be governed by the Consolidated Rules of the Supreme Court, and the ordinary rules as to viva voce discovery, and production of documents shall apply to the Crown except that the Crown shall also be entitled to object to production of documents or to make answer to questions on discovery on the ground that the production thereof or such answers would be injurious to the public interest, and the validity of such objections in any action or proceedings shall be subject to review by the Court in the same manner as a claim of privilege by a subject.

10. The power to make rules of court conferred by the Consolidated Rules of the Supreme Court shall include power to make rules for the purpose of carrying into effect the provisions of this Act, and any rules so made may contain provisions to have effect in relation to any Crown proceedings in substitution for or by the way of addition to any of the provisions of the rules applying to proceedings between subjects.

11. No action or proceedings against the Crown may be proceeded with unless the same are brought or instituted within a period of two years from the date that such cause or action arose or the right to relief accrued.

12. (a) Whenever upon such proceedings judgment is given that the subject is entitled to relief and there is no appeal, and whenever upon an appeal judgment is affirmed or given that the subject is entitled to relief, and whenever any judgment or order is given or made entitling the subject to costs, a judge shall, upon application on behalf of the subject after a lapse of fourteen days from the making, giving, or affirming of such judgment, certify to the Provincial Treasurer the tenor and purport of the same in the words or to the effect of the form in Schedule A of this Act; and such certificate may be sent to or left at the office of the Provincial Treasurer during office hours.

(b) Upon the tenor or purport of any judgment or order being certified to him as aforesaid, the Provincial Treasurer shall pay out of any moneys in his hands for the time being legally applicable thereto, or which may be thereafter voted by the Legislature for that purpose, the amount of any moneys and costs awarded by such judgment or order to the subject in any such proceedings.

13. The Petition of Right Act, being Chapter 94 of the Revised Statutes of Alberta, 1922, is hereby repealed.

14. This Act shall come into force upon a date to be fixed by Proclamation of the Lieutenant Governor in Council.

SCHEDULE A.

(Section 12 (a))

CERTIFICATE OF JUDGMENT

In the Supreme Court of Alberta,

To the Honourable the Provincial Treasurer:

A.B., Plaintiff v. The Attorney General for Alberta, Defendant	I hereby certify that on the..... of.....A.D. 19...., it was by the said Supreme Court of Alberta adjudged (or ordered) that the above named Plaintiff was entitled, to, etc.

Dated, etc.

Judge's signature.