ADMINISTRATIVE LAW: INJUNCTIVE RELIEF AGAINST THE CROWN

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The Common Law

At common law, it is generally accepted that an injunction will not issue against the Crown.[1] The position with respect to Crown servants and agents is less clear.[2] However, stated simply, in Canada it would appear generally that Crown immunity extends to servants and agents only when they are acting within their authority; if they commit or threaten to commit an act which lies outside the scope of their lawful powers, it is within the court's jurisdiction to issue a restraining order against them.[3]

Legislation

Provisions relating to the availability of injunctions against the Crown and Crown officers now appear in the legislation of all Canadian provinces.[4] In Manitoba, subsection 17(2) of *"The Proceedings Against the Crown Act"*[5] reaffirms the Crown's common law immunity from injunctive relief, and provides that a declaration may be granted in lieu of an injunction. With respect to Crown servants, subsection 17(4) states:

> The court shall not in any proceedings grant an injunction or make an order against an officer of the Crown if the effect of granting the injunction or making the order would be to give any relief against the Crown that could not have been obtained in proceedings against the Crown, but may, in lieu thereof, make an order declaratory of the rights of the parties.

The import of this latter provision is less than clear. Most commentators suggest that the corresponding English provision takes away any possibility which may have existed at common law of obtaining an injunction against Crown servants acting in their capacity as such.[6] Canadian authority, however, indicates that the immunity provided by such a legislative provision may be less far-reaching. In *MacLean* v. *Liquor Licence Board of Ontario,*[7] the court suggested that the legislation merely preserves the common law

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1. *But see Carlic* v. *The Queen and Minister of Manpower and Immigration* (1967), 65 D.L.R. (2d) 633 (Man. C.A.), where an interim injunction was awarded against the defendants, including the Crown. The court recognized the general principle that the Sovereign should not be enjoined, but noted that the principle was based on the practical problem of enforcing such an order. The court thought it unlikely that the defendants would disobey the order, but stated that if they did so, enforcement proceedings could be brought against the defendants other than the Crown. *See Jaundoo* v. *Attorney-General of Guyana,* [1971] A.C. 972 (P.C.), where the Privy Council criticized the inclusion of the Crown amongst the defendants subject to the interim injunction in the *Carlic* case.

2. For a more in-depth look at this complex issue, *see* the useful discussions in Law Reform Commission of British Columbia, *Report on Civil Rights: Part I — Legal Position of the Crown* (Report No. 9, 1972), at 25-27; B.L. Strayer, "Injunctions Against Crown Officers" (1964), 42 Can. Bar Rev. 1; R.J. Sharpe, *Injunctions and Specific Performance* (1983) 167 *et seq.*

3. *Rattenbury* v. *Land Settlement Board,* [1929] S.C.R. 52; *Le Conseil des Ports Nationaux* v. *Langelier,* [1969] S.C.R. 60; *Carlic* v. *The Queen and Minister of Manpower and Immigration, supra* n. 1. *See also* the comments in *MacLean* v. *Liquor Licence Board of Ontario* (1975), 61 D.L.R. (3d) 237 (Ont. Div. Ct.).

4. The legislation is based on the *Crown Proceedings Act 1947,* 10 & 11 Geo. 6, c. 44, s. 21 (U.K.) and the *Uniform Proceedings against the Crown Act,* Proceedings of Conference of Commissioners on Uniformity of Legislation in Canada (1950).

5. C.C.S.M. c. P140.

6. H. Street, *Governmental Liability; A Comparative Study* (1953) 141; B.L. Strayer, *supra* n. 2. *See also* The Law Commission, "Remedies in Administrative Law" (Working Paper No. 40, 1971).

7. *Supra* n. 3.

principles, and that, accordingly, an injunction is available to restrain *ultra vires* activities of Crown servants. The court further stated, in the alternative, that:

> . . . even if it [the section precluding injunctions against Crown servants] is applicable in the case where the Crown servant whose authority is questioned is the designated official to carry out some policy of the Crown, it surely cannot apply where a minor civil servant is officiously abusing his apparent powers.[8]

R.J. Sharpe has put forward the argument for a narrow interpretation of the section as follows:

> It would be odd if legislation designed to facilitate redress against the Crown and to put the Crown on the same basis as other litigants should be read so as to significantly curtail individual rights recognized prior to the legislation. The provision dealing with Crown servants may, it is submitted, be taken merely to restate the common law position and leave untrammelled the power of the courts to restrain illegal acts by State officials. The distinction between injunctions against the Crown and injunctions against Crown servants exceeding their powers has long been recognized. The subsection excludes injunctive relief only where the effect of the injunction against a Crown servant would be to give an injunction against the Crown. Injunctions against Crown servants exceeding their powers have never been considered to amount to injunctions against the Crown, and the legislation should be read in light of this basic distinction.[9]

While the reasoning of the court in *MacLean* and the argument put forward by Sharpe may be appealing, the scarcity of authority on this subject leaves uncertain the exact scope of the legislation which precludes the awarding of injunctions against officers of the Crown.

Deficiencies of the Present Law

Because declaratory relief is readily available against the Crown and Crown servants, limitations on the availability of a permanent injunction pose no real problem. It is generally safe to assume that the Crown and its officers will respect a declaratory order of the court; the coercive aspect of injunctive relief is therefore not required to ensure compliance.

The substitution of declaratory for injunctive relief, however, has one major weakness: the courts have held that an order declaring the rights of the parties must by its very nature be a final order, and that there is no such 'animal' as an interim declaration.[10] The result is that interim relief cannot be obtained against the Crown or against those Crown officers who are protected from injunctive relief. No immediate remedy to curtail governmental wrongdoing is available.

The Arguments for and against Crown Immunity

Several arguments are generally raised in support of Crown immunity from injunctive relief:

a) The first argument rests in constitutional theory.

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8. *Ibid.*, at 250.
9. R.J. Sharpe, *supra* n. 2, at 175-176.
10. *International General Electric Co. of New York Ltd.* v. *Commissioners of Customs and Excise*, [1962] Ch. 784 at 790 (C.A.); *Underhill* v. *Ministry of Food*, [1950] 1 All E.R. 591 (Ch. Div.); *Shaw* v. *R. in Right of British Columbia*, [1982] 6 W.W.R. 718 (B.C.S.C.). *But see Gloucester Properties Ltd.* v. *R. in Right of British Columbia*, [1980] 6 W.W.R. 30 (B.C.S.C.).

> . . . [T]he court exercises its judicial authority on behalf of the Crown. Accordingly any orders of the court are themselves made on behalf of the Crown and it is incongruous that the Crown should give orders to itself.[11]

b) A second argument focuses on the relationship between the judiciary and the executive. The Crown, in fact, is the elected government, accountable to the legislature and the electorate. In the course of making decisions, the executive must consider background policy and other political factors. The court should not be able to obstruct or compel state activity; to do so involves the court in governing the state and that is beyond the judicial function. Interim injunctions are particularly unpalatable because they allow the court to halt the machinery of government in its tracks even before it has been ascertained conclusively that the executive is acting unlawfully.

c) In times of emergency, the government might find it imperative to act beyond its authority, or to infringe on individual rights. To allow the court to fetter the freedom of the executive in crisis situations by issuing a restraining order would be contrary to the public interest.[12]

d) Disobedience of an injunction amounts to contempt of court, punishable by fines, imprisonment or attachment. It is inappropriate to subject the Crown to such proceedings.

In answer to these concerns may be offered the following:

a) " '[T]he Crown' in this context is really the state and . . . there is nothing inherently illogical in the state functioning through various organs each having some measure of control over, and dependence on, the other."[13]

b) Particularly in a federal state like Canada, limited control by the courts of the executive is not contrary to the principles of responsible government. The legislative powers of government are subject to constitutional limitations. Similarly, executive action is limited by the Rule of Law to those acts supported by authority at common law or statute. It is the proper function of the courts to intervene to prevent or redress *ultra vires* activities.

With respect to the specific concern that interim injunctive relief allows for court intervention *before* it is conclusively determined that the challenged activity is unlawful, it is expected that a court would not restrain governmental action unless the applicant demonstrated a strong *prima facie* case and a balance of convenience in his favour.

c) The argument that immunity is necessary to allow the government freedom of action in times of emergency is unconvincing. The prerogative of executive necessity may be invoked to meet any grave emergency. It is also open to the government to arm itself in advance with necessary

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11. *Jaundoo* v. *Attorney-General of Guyana*, *supra* n. 1, at 984.
12. *See e.g.*, Sir Thomas Barnes, "The Crown Proceedings Act, 1947" (1948), 26 Can. Bar Rev. 387 at 395.
13. B.L. Strayer, *supra* n. 2, at 6.

statutory powers to meet a crisis. Furthermore, the courts are unlikely to be insensitive to the needs of the government in times of emergency; discretion can be exercised to refuse relief in light of the public interest. "If history proves anything, it is that during a crisis judicial compliance is to be feared more than judicial scrutiny."[14] Finally, this is not a valid ground for denying relief against the Crown and its servants in ordinary circumstances.

d) The concern with the inappropriateness of subjecting the Crown and its servants to enforcement proceedings carries little weight. The Crown almost invariably complies with orders of the court. Furthermore, to anticipate the unlikely event of the Crown choosing to ignore a court order, it would be possible to provide in legislation that disobedience of an injunction by the Crown should not be deemed to be a contempt of court.[15]

Alternatives For Reform

While some commentators have suggested that injunctive relief generally should be made available against the Crown and its servants,[16] the provision of such relief would appear unnecessary. As noted previously, declaratory orders, which governments and their servants can be expected to obey, are available and appear to offer a satisfactory alternative to the permanent injunction. What is lacking, however, is a form of interim relief in the nature of an interlocutory injunction to prevent irreparable unlawful interference with rights pending the final hearing of an action.

The need to have available interim relief against the Crown and its servants is widely acknowledged.[17] Several options have been proposed with respect to the form such relief should take.

a) The Law Reform Commission of Canada has recommended that interim injunctions should be made available against the Crown in judicial review proceedings.[18] They did not discuss whether such injunctions should be attended by the sanctions normally available for disobedience.

b) In its working paper on administrative law,[19] The Law Commission of England stated that they were unable to discover any convincing reasons for the immunity of the Crown and its servants from injunctive relief. Accordingly, they were of the view that both interim and permanent restraining orders should be made available in judicial review proceedings. They did, however, suggest that it may be possible to

14. Law Reform Commission of British Columbia, *supra* n. 2, at 31.

15. *de Smith's Judicial Review of Administrative Action* (4th ed. J.M. Evans, 1980) 448.

16. *See e.g.*, H. Street, *supra* n. 6, at 142 with respect to Crown servants; de Smith, *supra* n. 15, with the qualification that disobedience should not constitute contempt.

17. de Smith, *supra* n. 15; H. Street, *supra* n. 6; R.J. Sharpe, *supra* n. 2; B.V. Harris, "Interim Relief Against the Crown" (1981), 5 Otago Law Rev. 92; Law Reform Commission of British Columbia, *supra* n. 2, at 31; Lord Diplock in *Inland Revenue Commissioners* v. *Rossminster Ltd.*, [1980] A.C. 952 at 1014 (H.L.). *But see* Lord Wilberforce (at 1001), Viscount Dilhorne (at 1007) and Lord Scarman (at 1027) in *Rossminster;* Sir Thomas Barnes, *supra* n. 12.

18. Law Reform Commission of Canada, *Judicial Review and the Federal Court* (Report No. 14, 1977).

19. *Supra* n. 6.

exempt the Crown from the sanctions of contempt proceedings or sequestration of property in the event of non-compliance.

In its final report,[20] The Law Commission departed somewhat from the views expressed in its working paper. Acknowledging the desirability of having a form of interim relief which would have the effect of preserving the *status quo* where a declaration was being sought against the Crown, they recommended the following:

3.-(1) On an application for judicial review the court may grant such interim relief as it considers appropriate pending final determination of the application.

(2) In section 21 of the Crown Proceedings Act 1947 (nature of relief in civil proceedings by or against Crown), for paragraph *(a)* of the proviso to subsection (1) there shall be substituted the following paragraph:-

"*(a)* the court shall not grant an injunction, or order specific performance, against the Crown but may in lieu thereof-

(i) in a case where the court is satisfied that it would have granted an interim injunction if the proceedings had been between subjects, declare the terms of the interim injunction that it would have made; or

(ii) make an order declaratory of the rights of the parties;".[21]

The recommendation respecting interim declaratory relief against the Crown was made "[i]n spite of the judicial doubts which have been expressed as to the logical character of a provisional declaration."[22] Although many of the recommendations contained in The Law Commission's report were subsequently implemented by a revision of the court rules,[23] the suggested amendment to the *Crown Proceedings Act* was not made.

c) In New Zealand, the following provision appears in the legislation which governs applications for judicial review:

"8.(1) Subject to subsection (2) of this section, at any time before the final determination of an application for review, and on the application of any party, the Court may, if in its opinion it is necessary to do so for the purpose of preserving the position of the applicant, make an interim order for all or any of the following purposes:

"(a) Prohibiting any respondent to the application for review from taking any further action that is or would be consequential on the exercise of the statutory power:

"(b) Prohibiting or staying any proceedings, civil or criminal, in connection with any matter to which the application for review relates:

"(c) Declaring any licence that has been revoked or suspended in the exercise of the statutory power, or that will expire by effluxion of time before the final determination of the application for review, to continue and, where necessary, to be deemed to have continued in force.

"(2) Where the Crown is the respondent (or one of the respondents) to the application for review the Court shall not have power to make any order against the Crown under para-

20. The Law Commission, *Report on Remedies in Administrative Law* (Law Com. No. 73, Cmnd. 6407, 1976).

21. *Ibid.*, clause 3 of the Draft Bill at Appendix A.

22. *Ibid.*, at 23-24.

23. Order 53 of the Rules of the Supreme Court (U.K.) as substituted in 1977 by the Rules of the Supreme Court (Amendment No. 3) 1977, (S.I. 1977 No. 1955), as am. by the Rules of the Supreme Court (Amendment No. 4) 1980, (S.I. 1980 No. 2000). *See also* the *Supreme Court Act 1981*, c. 54 (U.K.).

graph (a) or paragraph (b) of this section; but, instead, in any such case the Court may, be interim order,-

"(a) Declare that the Crown ought not to take any further action that is or would be consequential on the exercise of the statutory power:

"(b) Declare that the Crown ought not to institute or continue with any proceedings, civil or criminal, in connection with any matter to which the application for review relates.

"(3) Any order under subsection (1) or subsection (2) of this section may be made subject to such terms and conditions as the Court thinks fit, and may be expressed to continue in force until the application for review is finally determined or until such other date, or the happening of such other event, as the Court may specify."[24]

Subsections 8(1) and 8(3) were adopted in accordance with the recommendations of the Public and Administrative Law Reform Committee.[25] However, the Committee had also recommended that the binding interim orders under subsection 8(1) be made available against the Crown. This recommendation Parliament did not accept; instead, it introduced the compromise provision in subsection 8(2) which empowers the court to make interim declaratory orders.

In reviewing this section of the New Zealand Act, Dr. Smillie stated:

> Although it may be doubted whether the Legislature's refusal to permit the issue of binding interim orders against the Crown is warranted, the interim declaratory order will almost certainly achieve the desired object. There is no reason to doubt that the Crown will respect and comply with the terms of an interim declaration in the same way as it complies with a final declaratory order.[26]

Another commentator, B.V. Harris, has observed as follows:

> The innovation in the 1977 Amendment Act cleverly maintains the Crown's immunity from coercive control pending litigation, thus allowing the Crown freedom to disobey an interim order should the Crown feel it could later justify such disobedience as being in the public interest. This satisfies one of the traditional reasons for the Crown's immunity from injunction. However at the same time the individual litigant's interests will be protected in the absence of a publicly justifiable reason for non-compliance . . .
>
> Another aspect of the section 8(2) relief which should not be overlooked is the fact that the court has a discretion as to whether or not to issue the interim order. It is submitted that the court, as well as employing an approach analogous to that with respect to the discretion to issue interim and interlocutory injunctions, will also balance the competing public interests — the possible public interest in the government being able to act free from court restraint in the circumstances and the public interest in the applicant being protected from possible further interference with his rights pending the final determination of the application. If one is a critic of the law under section 17 of the Crown Proceedings Act 1950 then section 8(2) of the Judicature Amendment Act 1972 (as amended) can be seen as allowing a more just relief against the Crown in the public law context.[27]

Indeed, in his rather in-depth examination of interim relief against the Crown, Prof. Harris appears to favour reform in the nature of that suggested by the English Law Commission or that adopted in New Zealand.

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24. *Judicature Amendment Act 1972*, No. 130 of 1972, s. 8 as am. by *Judicature Amendment Act 1977*, No. 32 of 1977, s. 12.
25. *Administrative Tribunals; Constitution, Procedure and Appeals* (8th Report, 1975).
26. J.A. Smillie, "The Judicature Amendment Act 1977", [1978] N.Z.L.J. 232 at 238.
27. *Supra* n. 17, at 103-104.

d) A further alternative may be simply to provide that, notwithstanding *"The Proceedings Against the Crown Act"* or any common law rule to the contrary, the court may make such interim order against the Crown or its officers as it considers proper pending the final determination of the judicial review application. It would be a matter of the court's discretion whether such relief should take the form of a stay of proceedings, an interim declaration or an interim injunction.

Conclusion

The extent of immunity afforded the Crown and its servants from injunctive relief remains uncertain. Whatever its scope, the availability of declaratory relief provides an adequate alternative in circumstances where a final injunction cannot be awarded. However, the unavailability of interim relief against the Crown and those Crown officers who share its immunity appears to present a lacuna in the law of judicial review.

Although a brief survey of the reasons advanced for Crown immunity from injunctive relief reveals no convincing justification for its retention, it is suggested that a satisfactory solution can be reached by permitting the court to declare the terms of an interim order — what ought to be done or not done — pending the final resolution of judicial review proceedings. This approach should placate those who find unacceptable the notion of the court ordering the Crown to act or refrain from acting. As well, concern respecting the impropriety of exposing the Crown to contempt proceedings would be obviated. Most importantly, the court would be equipped with a flexible tool with which to preserve the *status quo* pending a final hearing of an application for review in which it is alleged that the Crown or its servants have acted unlawfully.