

ESTOPPEL AND THE CROWN

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Estoppel is, in Canada, ineffective against the Crown. The Crown I refer to is the federal Crown but the principle is just as applicable for the provincial Crown. First, one must define at least the principal term estoppel. Leaving aside the refinements for now differentiating between legal and equitable estoppel, the definition found in *Eccles v. Merchants Bank of Canada* is as good as any: "Estoppel is a rule of evidence whereby one person is estopped from denying the truth of the statement which he has made to another and on which the other has acted."¹

The definition of estoppel as a rule of evidence has been commented on in a number of cases. It has been stated several times that it "is *not* a cause of action and cannot create a substantive right in law which does not otherwise exist, or impose a liability where there is none by law imposed."² As late as 1975, however, Lord Denning was attempting to refine the definition:

Estoppel is not a rule of evidence. It is not a cause of action. It is a principle of justice and of equity. It comes to this. When a man, by his words or conduct, had led another to believe in a particular state of affairs, he will not be allowed to go back on it when it would be unjust or inequitable for him to do so.³

One more definition is by means of its elements:

Estoppel is a complex legal notion, involving a combination of several essential elements - the statement to be acted upon, action on the faith of it, resulting detriment to the actor. Estoppel is often described as a rule of evidence, as indeed it may be so described. But the whole concept is more correctly viewed as a substantive rule of law. The purchaser or other transferee must have acted upon it to his detriment It is also true that he cannot be said to rely on the statement if he knew that it was false; he must reasonably believe it to be true and therefore act upon it. Estoppel is different from contract both in its nature and consequences. But the relationship between the parties must also be such that the imputed truth of the statement is a necessary step in the constitution of the cause of action. But the whole case of estoppel fails if the statement is not sufficiently clear and unqualified.⁴

This suffices to define estoppel as it affects subject and subject. But this paper concerns the Crown and specifically the Crown prerogative. Therefore it is necessary to briefly comment on the prerogatives of the Crown:

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1. [1923] 3 D.L.R. 1103, at 1116, per Masten J. (Ont. S.C. App. Div.).
2. *Tracey v. Swansea Construction Co.* (1965), 47 D.L.R. (2d) 295, at 311, per Thompson, J. (Ont. H.C.), approving *Nippon Menkawa Kabushiki Kaisha (Japan Cotton Trading Co.) v. Dawsons Bank, Ltd.* (1935), 51 Lloyd's Rep. 147, at 150 (P.C.).
3. *Moorgate Mercantile v. Twitchings*, [1975] 3 All E.R. 314, at 323 (C.A.).
4. *Canada and Dominion Sugar Co. v. Canadian National (West Indies Steamships Ltd.)*, [1946] 3 W.W.R. 759, at 764, per Lord Wright (P.C. on appeal from S.C.C.).

The royal prerogative may be defined as being that pre-eminence which the sovereign enjoys over and above all other persons by virtue of the common law, but out of its ordinary course, in right of her regal dignity, and comprehends all the special dignities, liberties, privileges, powers and royalties allowed by the common law to the Crown of England.⁵

Note that the prerogative is not confined to the British Islands but extends to all parts of the Commonwealth of which the Queen is sovereign, including, obviously, Canada:⁶

The prerogative is thus created and limited by the common law, and the Sovereign can claim no prerogatives except such as the law allows, nor such as are contrary to Magna Carta or any other statute, or to the liberties of the subject. The courts have jurisdiction, therefore, to inquire into the existence or extent of any alleged prerogative, it being a maxim of the common law that the King ought to be under no man but under God and the law, because the law makes the King. If any prerogative is disputed, the courts must decide the question whether or not it exists in the same way as they decide any other question of law. If a prerogative is clearly established, they must take the same judicial notice of it as they take of any other rule of law.⁷

Historical Perspectives

In 1613, it was held that the Crown was not bound by fictions of law.⁸ This has been held specifically to apply to the fiction of law called estoppel.⁹ In Everest & Strode's work on the law of Estoppel, the learned authors state:

... it appears from the authorities that the King is not bound by estoppels, though he can take advantage of them. Thus, it is laid down in Viner's Abridgment that the King is not bound by estoppels and that the King is not estopped by his patent. It is also stated in Brooke's Abridgment that the King shall not be concluded,¹⁰ if he has matter to serve him. 'The King' says Holt, C.J. in Sir Edward Coke's Case, 'is not bound by estoppels nor recoveries had betwixt strangers, nor by fundamental jurisdiction of courts, as appeareth 38 Assize 20, where a suit was for tithes in the Exchequer, being a mere spiritual thing: and shall he be bound by a conveyance?' On the other hand 'the King shall take advantage of an estoppel though he be not party to the record; for he is always present in the Court.'¹¹

There were, even then, different forms of estoppel: estoppel by record and estoppel *in pais*. To explain the difference I will quote from Sir William Holdsworth's *History of English Law*, Volume IX, pages 144-5:

In the twelfth and thirteenth centuries cases were decided, not by a process of reasoning from evidence offered to the court, but by modes of proof selected by the parties or ordered by the court. In those days the matters relied upon to create an estoppel were regarded as operating as modes of proof, which settled the case in much the same way as battle compurgation or ordeal. Probably the earliest way of proving one's case by means of an estoppel, and therefore the earliest form of estoppel, is that which is known as estoppel by matter of record; and it is a direct

5. 8 *Halsbury's Laws* (4th ed.) 583.
 6. *Id.*, at 585.
 7. *Supra* n. 5.
 8. *Sheffield and Ratcliff* (1613), Jenk. 287; 145 E.R. 207 (Ex. Div.).
 9. *Sir Edward Coke's case*, (1623), Godbolt 289, at 299.
 10. From Coke's description it is called an estoppel or *conclusion* because a man's own act or acceptance stoppeth or closeth up his mouth to allege or plead the truth; Co. Litt 352a.
 11. *Everest & Strode's Law of Estoppel* (1907) 8.

result of that machinery for the enrolment of pleas which was instituted in the twelfth century. In the thirteenth century statements made by a person under his seal were allowed an effect very similar to the statements contained in a record; and at the close of the medieval period, certain acts, such as the giving of livery of seisin, entry on property, or acceptance of an estate - acts of which the pays¹² or jury might be expected to know something - were given the same effect as statements in a deed. They created an estoppel 'by matter in pais'.

To summarize the above in a phrase of my own invention, estoppel *in pais* is estoppel by deed where the conduct is recognized by quasi-judicial notice taken by the jury, to be a deed equivalent. The key is that estoppel *in pais* is given the same effect as estoppel by deed. The idea was to admit the conduct establishing a representation was such that it amounted to the equivalence of a sealed representation. Thus in *Greenwood v. Martins Bank*, in discussing the essential factors giving rise to estoppel the court says it is "a representation or conduct amounting to a representation" ¹³

The Collom Case

From earliest times there has not been one hint of any challenge to the doctrine that estoppel by deed does not bind the Crown. Any challenge otherwise has come in an adoption of the dictum taken from *Attorney-General to the Prince of Wales v. Collom*:

There is authority for the general proposition [that no estoppel binds the crown] so far as estoppel by deed is concerned. I know of no authority for the proposition as applied to estoppel in pais.¹⁴

This is the basis for *all* judgments finding estoppel binding the Crown:

I find, with respect, great difficulty in seeing the logic of the learned Judge in the *Collom* case when he assumed that a prerogative clearly established for a higher form of estoppel should not have also governed the form of estoppel created to meet the situation where there was insufficient evidence to create the proof of a deed.

At this juncture I would like to look closer at the *Collom* case. The case involved a claim for some property by the Duke of Cornwall (i.e., the Prince of Wales) against the occupier of that property who was using the same as a girls' school. In respect of one piece of the property the argument was raised, using the principle enunciated in *Ramsden v. Dyson*¹⁵ that an equity equivalent to estoppel was applicable.

In *Ramsden v. Dyson* a question of equity was purported to be raised where a tenant, knowing himself to be a tenant, builds on the

12. Literally "the country," i.e., the people. *Black's Law Dictionary* (4th ed.) 1286.

13. [1933] A.C. 51, at 57, per Lord Tomlin (H.L.), quoted with approval in *Morgan v. Boles* [1946] 1 W.W.R. 1, at 6, per Parlee J.A. (Alta. S.C.).

14. [1916] 2 K.B. 193, at 204, per Atkin J.

15. (1866-67), L.R. 1 H.L. 129.

landlord's land and maintains subsequently that the landlord's agent's agent held out to the tenant that the tenant would be entitled to a lease in perpetuity. The court held the tenant not to be entitled but in the course of the judgment considered a rule of equity which could be applied in the proper case. At pages 140-41, Lord Cranworth stated the much quoted passage:

if a stranger begins to build on my land supposing it to be his own, and I, perceiving his mistake, abstain from setting him right, and leave him to persevere in his error, a court of equity will not allow me afterwards to assert my title to the land on which he had expended money on the supposition that the land was his own. It considers that, when I saw the mistake into which he had fallen, it was my duty to be active and to state my adverse title; and that it would be dishonest in me to remain wilfully passive on such an occasion, in order afterwards to profit by the mistake which I might have prevented.

But it will be observed that to raise such an equity two things are required, first, that the person expending the money supposes himself to be building on his own land; and secondly, that the real owner at the time of the expenditure knows that the land belongs to him and not to the person expending the money in the belief that he is the owner. For if a stranger builds on my land knowing it to be mine, there is no principle of equity which would prevent my claiming the land with the benefit of all the expenditure made on it. There would be nothing in my conduct, active or passive, making it inequitable in me to assert my legal rights.

It should be specifically and emphatically noted that the case of *Ramsden v. Dyson* did not involve the Crown and that therefore the Crown in relation to that rule of equity was not considered.

In the *Collom* case, Atkin J. made two more statements for the purpose of reaching his decision. He stated at page 204:

- (a) that the case of *Attorney General for Trinidad and Tobago v. Bourne*¹⁶ is authority for the proposition that equitable defences 'such as I consider this to be' are available against the Crown, and
- (b) that the principle of estoppel laid down in *Ramsden v. Dyson* was applied against the Crown in *Plimmer v. Mayor, etc. of Wellington*.¹⁷

The *Bourne* case is a decision of the Privy Council on appeal from the Supreme Court of Trinidad and Tobago and involved a dispute in regard to an equitable contract entered into by the Crown and an individual for the purchase of land. The contract had been partially performed by the individual and the Court found as a fact that before the action was commenced the individual had concluded his portion of the contract by tendering the remainder of funds due. The Court held, therefore, that the Crown was obliged to do its part in respect of the contract, which was to grant the title to the individual. In other words, what was sought was specific performance against the Crown. Estoppel was not involved at all. Moreover nowhere in the judgment is authority given for the proposition that,

16. [1895] A.C. 83 (P.C.).

17. (1883-84), 9 App. Cas. 699 (P.C.).

as the headnote states 'in action of ejectment by the Crown a defendant may set up any equitable defence which would have availed against a private plaintiff.'¹⁸ The Privy Council specifically affirms the judgment of the Supreme Court of Trinidad and Tobago and it may be that in that nation there is statute law which limits the prerogatives of the Crown to that extent. In my submission it is not a decision binding on Canadian Courts,¹⁹ and the principle which is enunciated in the headnote is not one which has been followed with any consistency in Canada.

The *Plimmer* case is an earlier decision of the Privy Council on appeal from the Court of Appeal of New Zealand. There for almost twenty years a wharfinger had occupied property with the consent, indeed for part of that time at the express request, of the Crown. The Privy Council held that the title of the wharfinger had changed from a revocable right by the conduct of the Crown to an indefinite right in the nature of an easement. The purpose and the essence of the case was to establish sufficient interest in land for the wharfinger to obtain compensation under the Public Works Act, 1882. From my reading of the case, it would appear no argument was advanced as to the prerogatives of the Crown. Consider the dictum of Sir Arthur Hobhouse, who delivered the judgment:

There are perhaps purposes for which such a license would not be held to be an interest in land. But their Lordships are construing a statute which takes away private property for compensation, and in such statutes the expression 'estate or interest in, to or out of land' should receive a wide meaning. Indeed the statute itself directs that, in ascertaining the title of anybody to compensation, the Court shall not be bound to regard strict legal rights only, but shall do what is reasonable and just. Their Lordships have no difficulty in deciding that the equitable right acquired by John Plimmer is an interest in land carrying compensation under the Acts of 1880²⁰ and 1882.²¹

Again returning to the *Collom* case I would direct the reader's attention to page 204 of the judgment where the learned judge expresses doubt as to the Duke of Cornwall being the Crown. This would if so, and I submit his doubt was valid, make the entire dictum, respecting estoppel vis-à-vis the Crown, *obiter*.

It is respectfully submitted therefore that the *Collom* case is extremely precarious a perch for the principle in question to stand upon.

18. *Supra* n. 16.

19. The decision of the Privy Council was after 1870.

20. "Wellington Harbour Board and Corporation Land Act," 1880.

21. *Supra* n. 17, at 714.

Canadian Precedent

In Canada prior to the decision in the *Collom* case, the Supreme Court of Canada, per Davies, Idington, and Duff JJ., held that estoppel cannot be invoked against the Crown.²²

Four years after the *Collom* case, the Manitoba Court of Appeal reached the same conclusion. In *R. v. Royal bank of Canada*,²³ a case involving a cheque cashed by a Crown employee without authority and where the bank was held negligent in paying the employee who converted the funds to his own use, Cameron J.A. said:

. . . even if there can be found in the case facts and circumstances sufficient to constitute Burgess [the crown employee] an agent by estoppel, nevertheless, the crown is not bound thereby. 'It appears from the authorities that the King is not bound by estoppels, though he can take advantage of them' (Everest & Strode, Law of Estoppel, P. 8). This rule has been frequently applied in Canada, and I am not aware that it has ever been rescinded or relaxed.²⁴

The next Canadian case making some note of the doctrine of estoppel is *The King v. Gooderham & Worts Ltd.*²⁵ a decision of the Ontario Supreme Court per Grant J.A. This case involved an action by the Crown for the recovery of sales tax. One of the defences was that the goods were exported and were therefore exempt. The onus was on the defendant to prove exportation. In order to do that the defendant sought to use estoppel in that certain customs officers had stamped certain export documents. At page 133, the learned Judge stated in part:

. . . the customs officers who, too easily satisfied, provided stamp and signature, were acting under the Customs Act, and not under the War Revenue Act . . . In so far as they purported to act (or to acquiesce in what was being done) under the War Revenue Act, their acts and acquiescence were not authorized, and the Crown is not bound thereby . . . *Although it may be considered as well-settled that the defence of estoppel in pais may be effectual even as against the Crown,* yet, upon the facts as I find them, there is no sufficient basis for applying that doctrine in the present case. (emphasis added)

Let me make three points in regard to that quotation:

(a) The statement respecting the doctrine of estoppel *in pais* against the Crown is *obiter dictum*.

(b) It is most cautiously stated: "it *may* be considered . . . *may* be effectual . . . *even* as against the Crown."

(c) No authority is given which is binding on Canadian Courts. This is only fair since there were none. It seems obvious that Grant J.A. had in mind the *Collom* case but the only Canadian cases to date had not made reference to any varieties of estoppel; they had merely

22. *The Bank of Montreal v. The King* (1907), 38 S.C.R. 258.

23. [1920] 1 W.W.R. 198 (Coram: Perdue, C.J.M., Cameron, Hoggart, Fullerton, and Dennistoun, J.J.A.) (Man. C.A.).

24. *Id.*, at 209.

25. [1928] 3 D.L.R. 109 (Ont. S.C.).

recited that estoppel did not bind the Crown. The English cases considered to this point are not binding on the Canadian courts though, of course, respect and courtesy demands they be given honourable consideration.

In the case which followed, *Queen Victoria Niagara Falls Park Commissioners v. International Railway Co.*,²⁶ a case involving the use of land by its occupiers, Grant J.A. adopted the same position he took in the *Gooderham & Worts* case that "the doctrine of estoppel *in pais* operates even as against the Crown is well established"²⁷ and cited as authorities, the *Collom*, *Bourne* and *Plimmer* cases. I submit, with respect, that the Court applied an incorrect doctrine not properly established by the authorities cited and contradicted by previous Canadian cases which though not necessarily binding on that court should have been more persuasive.

In 1930, the last of the Canadian cases to adopt the *Collom* case as authority was heard in the Exchequer Court, *The King v. C.P.R.*²⁸ a decision of Audette J. Here the Crown sought to remove a line of telegraph poles and wire erected by the CPR upon the right of way of the CNR i.e., Crown land, plus damages. One of the CPR's defences was that entry onto the land had been by leave of proper officers of the CNR with the Crown acquiescing over a great number of years. In this connection, the learned trial judge said:

Now, there is a difference between estoppel by deed, and estoppel *in pais* or equitable estoppel, arising from acts and conduct. And while it may be readily conceded that the Crown is not bound by estoppel by deed . . . yet it is held in the case of *Attorney-General v. Collom* that the Crown is bound by estoppel *in pais*.²⁹

In 1931, however, the Privy Council, on appeal from the Supreme Court of Canada who ignored the entire issue of estoppel, held, *inter alia*, that the license found to be granted to the CPR to erect lines was revocable. In that judgment, delivered on behalf of their lordships by Lord Russell of Killowen, the decisions in *Plimmer* and *Ramsden* were clarified, and distinguished so as not to provide authorities to assist the CPR in this case.

From that point on, no Canadian case with one exception, adopts *Collom* or any other such decision as authority to find estoppel of any kind able to bind the Crown. Between 1931 and 1949 Canadian cases involving estoppel and the Crown included first *The King v. Capital Brewing Co. Ltd.*³⁰ per Angus J. who said plainly:

26. [1928] 4 D.L.R. 755 (Ont. S.C. App. Div.).

27. *Id.*, at 769.

28. [1930] Ex. C.R. 26.

29. *Id.*, at 37.

30. [1932] Ex. C.R. 171.

“ . . . the Crown is not estopped by any statement of facts or any opinions set out in any department report or letter by any of its officers or servants.”³¹ Later, in *Western Vinegars Limited v. Minister of National Revenue*, Angus J. held again that “The Doctrine of estoppel does not apply against the Crown . . .”,³² citing, Chitty’s *Prerogatives of the Crown* and Robertson’s *The Law and Practice of Civil Proceedings by and against the Crown*.³³ Finally, in *Attorney General of Canada v. C.C. Fields & Co.*,³⁴ where the defendants had attempted to rely on *The King v. C.P.R.*³⁵ as authority for estoppel binding the Crown, Hope J. in rendering his decision distinguished the *C.P.R.* case and instead cited as authority that the Crown is not bound by acts of the Crown’s servants and that the defence of estoppel cannot be invoked against the Crown, per *Bank of Montreal v. The King*.³⁶

Lord Denning’s Dicta

At this point we turn to Lord Denning, and his creation of equitable or promissory estoppel.

In *Robertson v. Minister of Pensions*,³⁷ Robertson had written to the British War Office respecting a disability and had received a reply stating that the disability had been accepted as attributable to military service. He therefore took no steps to obtain independent medical opinions on his own behalf. Subsequently the Minister of Pensions decided the disability was *not* attributable to war service. Robertson appealed on the grounds that the Crown should be estopped from denying the attribution of the disability to war service. This appeal was heard by Denning J. as he was then. Denning found for Robertson. In so doing he said: “The next question is whether the assurance in the War Office letter is binding on the Crown. The Crown cannot escape by saying that estoppels do not bind the Crown, for that doctrine has long been exploded.”³⁸ With respect, this is a great example of ‘the surely principle.’ No authority is given for such a sweeping statement and only three years before in *Western Dominion Coal Mines Ltd. v. The King*,³⁹ Cameron D.J., although

31. *Id.*, at 182.

32. [1938] Ex. C.R. 39, at 42.

33. Incidentally the *Western Vinegars* case has most recently been considered in *Re Director of Soldier Settlement of Canada* (1971), 18 D.L.R. (3d) 94, at 97 by Sirois J. of the Saskatchewan Queen’s Bench who went so far as to say:

The simple answer . . . is that laches cannot be imputed to the Crown, and the doctrine of estoppel does not apply against the Crown. It is a privilege of the Queen not to be bound by the mistakes, omissions or neglects of her officers or servants.

34. [1943] 1 D.L.R. 434 (Ont. H.C.).

35. *Supra* n. 28.

36. *Supra* n. 22.

37. [1949] 1 K.B. 227.

38. *Id.*, at 231.

39. [1946] Ex. C.R. 387.

declaring in that case that there was no basis for raising the question of estoppel, had taken the time to comment briefly on what he called the conflicting state of the law on estoppel against the Crown. Interestingly, virtually all of the cases clearly holding that estoppel does not bind the Crown, are Canadian; while the majority of cases holding, albeit without emphasis, that estoppel does bind the Crown, are English. I would note, before turning to criticisms of the *Robertson* case, that it is not binding on Canadian courts.

By 1951, Denning J. had become Denning L.J. and as a member of the Court of Appeal had given a decision in *Falmouth Boat Const. Co. v. Howell*.⁴⁰ This case went to the House of Lords as *Howell v. Falmouth Boat Construction Co.*⁴¹ The interesting part for our purposes is the following:

... [Lord Justice Denning] described the principle that he invoked as of particular importance in these days when the officers of government departments are given much authority by Orders and circulars which are not available to the public. I will state this principle in his own words:

'Whenever government officers, in their dealings with a subject, take on themselves to assume authority in a matter with which he is concerned, the subject is entitled to rely on their having the authority which they assume. He does not know and cannot be expected to know the limits of their authority, and he ought not to suffer if they exceed it. That was the principle which I applied in *Robertson v. Minister of Pensions* and it is applicable in this case also.'

My Lords, I know of no such principle in our law nor was any authority for it cited.⁴²

Lord Simonds, who spoke the latter words, then goes on to speak of the principle of misleading assumption of authority being unable to affect a statutory prohibition. Lord Normand, who also gave reasons in the *Howell* case said the following about Denning's decision: [After quoting Denning L.J.'s statement quoted above]

As I understand this statement, the respondents were, in the opinion of the learned Lord Justice, entitled to say that the Crown was barred by representations made by Mr. Thompson [the government licensing officer] and acted on by them from alleging against them a breach of the statutory Order, and further that the respondents were equally entitled to say in a question with the appellant that there had been no breach. But it is certain that neither a minister nor any subordinate officer of the Crown can by any conduct or representation bar the Crown from enforcing a statutory prohibition or entitle the subject to maintain that there has been no breach of it.⁴³

In Canada the *Robertson* case was considered in *Re Chenoweth* by Ruttan J. of the British Columbia Supreme Court who reported:

... [Lord Denning's] views to the effect that in the present day no distinction should be drawn as to the legal effect of its or their actions between the crown and ordinary subjects, so that the effect of a representation made by the crown could

40. [1950] 2 K.B. 16 (C.A.).

41. [1951] A.C. 837 (H.L.).

42. *Id.*, at 844-45.

43. *Id.*, at 849.

no longer be qualified so as to be subject to the future exercise by the crown of its executive authority, has been disapproved by the House of Lords in the later case of *Falmouth Boat Construction v. Howell* . . .⁴⁴

Before the *Howell* decision in the House of Lords but after the Denning decision in *Robertson*, the Supreme Court of Canada is seen to say in *St. Ann's Island Shooting and Fishing Club Ltd. v. The King*: . . . "[T]here can be no estoppel in the face of an express provision of a statute . . ."⁴⁵ citing as authority the *Gooderham & Worts* case.

"Restatement" in Canada

Then in 1954, Fournier J. of the Exchequer Court took the time to consider the state of the law in Canada on estoppel against the Crown in *Millet v. The Queen*.⁴⁶ This was a petition of right to recover an amount alleged payable to the suppliant under a policy of insurance issued by the Crown pursuant to *The Veterans Insurance Act*.⁴⁷ One of a series of cheques was dishonoured. The Crown's position was that the policy terminated by failure to pay within the allotted time (including a grace period). The suppliant argued that the Crown was estopped from alleging the policy had lapsed as officers of the Crown did not themselves comply with the provisions of the contract. The learned Judge looked at all the cases to date and he preferred the cases which took as the law that estoppel does not bind the Crown. From one of the authorities he cites, *Attorney-General of Canada v. C.C. Fields & Co.*,⁴⁸ he breaks down the law into three restatements:

- (i) statements or acts of Crown servants or agents cannot bind the Crown by estoppel.
- (ii) estoppel cannot be allowed to give relief from an obligation or duty imposed by statute or regulations.
- (iii) estoppel cannot be invoked to prevent the Crown from establishing the conditions of a contract between the parties and the facts pertinent to the dispute.

With respect to the first of the restatements, Fournier J. was merely adopting Hope J's *dictum* in the *Fields* case where the latter said ". . . [N]or can the acts of the Crown's servants or agents bind it by estoppel. The interests of the Crown are certain and permanent and they must not suffer by the misconduct or negligence of its servants . . ."⁴⁹ And then he went on to cite the *Capital Brewing, Bank of Montreal* and *Western Vinegars* cases which have already been discussed.

44. (1963), 45 W.W.R. (N.S.) 364, at 367 (B.C.S.C.).

45. [1950] S.C.R. 211, at 220, per Rand, J.

46. [1954] Ex. C.R. 562.

47. S.C. 1944-45, c. 49.

48. *Supra* n. 34.

49. *Supra* n. 34, at 444-45.

Peter Hogg in his 1971 book, *Liability of the Crown in Australia, New Zealand and the United Kingdom*, in discussing briefly the principle of estoppel and the Crown, utilizes the law of agency. He writes: "The agency doctrine of ostensible authority is a form of estoppel by representation. There is no doubt that the Crown is bound by the act of a servant within his ostensible authority."⁵⁰ But Professor Hogg appears to take great stock in Denning's decision in *Robertson v. Minister of Pensions*. I find of particular interest his comment concerning the power of Crown servants to make contracts and the *Robertson* decision and its aftermath:

Nevertheless, the disadvantage of extending the doctrine of ostensible authority in the way suggested by Denning J. outweighs the advantage. The advantage of the suggested rule is that it would remove the risk of hardship from everyone who is misled by Crown servants acting without authority. The disadvantage is that the operations of government would be extraordinarily difficult to control if Crown servants could bind the Crown simply by 'assuming' the requisite authority. It seems to me that this is the greater of the two evils.⁵¹

It seems illogical to bind the Crown by the conduct of its servants, other than in the way contemplated by *The Crown Liability Act* and similar legislation, when estoppel does not bind the Crown itself, who like a corporation can act only through its agents.

With respect to the second of those restatements no further question arises. That issue was definitively determined in *Maritime Electric Company Ltd. v. General Dairies Ltd.*,⁵² a decision of the Privy Council on appeal from the Supreme Court of Canada. A utility company sent incorrect statements to its customer. After discovering the error it sought to recover the remainder due. The true rates had been published as required in a public tariff. The customer raised the issue of estoppel. It was held that estoppel is only a rule of evidence and could not be used to release the appellants from an obligation to obey the statute, nor could it enable the respondents to escape from the statutory obligation to pay at the scheduled rates. The judgment of the Court was delivered by Lord Maugham who stated⁵³ [quoting at first Lord Atkin in an earlier case]

'... it seems to me well established that it is impossible in law for a person to allege any kind of principle which precludes him from alleging the invalidity of that which the statute has, on grounds of general public policy, enacted shall be invalid.' It should be added that as regard estoppel by deed it was long ago held that if the deed were executed in contravention of a statute there could be no estoppel. The leading case is *Doe d. Chandler v. Ford*.⁵⁴

This decision was followed by the Exchequer Court in *Woon v. Minister of National Revenue*⁵⁵ and by the British Columbia

50. P. Hogg, *Liability of the Crown in Australia, New Zealand and the United Kingdom* (1971) 146 n. 33.

51. *Id.*, at 127.

52. [1937] A.C. 610 (P.C.).

53. *Id.*, at 622-23.

54. (1835), 3 A. & E. 649, 111 E.R. 561 (K.B.).

55. [1951] Ex. C.R. 18 (per Cameron J.).

Supreme Court in *Grevas v. the Queen*.⁵⁶ Of further interest is a statements appearing in Snell's *Principles of Equity*: "It may be that such an estoppel [*i.e.* promissory estoppel] will apply even if the representations are of law; but, like estoppel at common law, though it may bind the Crown, [citing *Robertson* as authority] it cannot negative the operation of a statute."⁵⁷

This brings me to the third restatement, and obviously the entirety of this paper has been to confirm that restatement in Canadian law.

Transworld Shipping Ltd. v. The Queen

I would like to briefly analyze what would seem a troublesome case from the point of view propounded in this paper. It is the decision of Noel, A.C.J. in *Transworld Shipping Ltd. v. The Queen*.⁵⁸ In that case the learned trial Judge found the existence of a contract between Her Majesty and the plaintiff notwithstanding a provision in *The Department of Transport Act*⁵⁹ that purported to require the signature of the Minister or his Deputy on the contract before it became binding on the Crown. The contract in question arose out of a tender call for the chartering of dry cargo vessels in connection with the Department's 1970 Arctic Resupply Program. After having notified the plaintiff that its bid was accepted and to prepare a charter party the Department required a change in the specifications which the plaintiff could not or would not meet. The learned trial Judge went through the requirements and obstacles involved in a government contract and then determined that the contract was a verbal one. He then held that Section 15 which provides "No deed, contract, document or writing relating to any matter under the control or direction of the Minister is binding upon Her Majesty unless . . ."⁶⁰ is effective only in respect of written contracts and therefore did not apply in this case. Unfortunately, from my point of view, the learned trial Judge found it necessary or at least convenient to incorporate into his judgment a substantial portion of the decision of Denning J. in the *Robertson* case. He then stated that the principle enunciated therein, promissory estoppel, had been applied by both the Federal Court or its predecessor as well as the Supreme Court of

56. (1957), 23 W.W.R. (N.S.) 577 (B.C.S.C.).

57. (27th ed. R.E. Megarry and P.V. Baker 1973) 564, citing *Lyle-Meller v. A. Lewis & Co. (Westminster)*, [1956] 1 W.L.R. 29 (C.A.) as authority. See also *Gamble v. The Queen*, [1960] Ex. C.R. 138; *Gibbon v. The Queen* (1977), 77 D.T.C. 5193 (F. Tr. Div.); *Minister of National Revenue v. Inland Industries Limited* (1971), 72 D.T.C. 6013 (S.C.C.); *Stickel v. Minister of National Revenue* (1972), 72 D.T.C. 6178 (F. Tr. Div.).

58. [1973] F.C. 1274 (F. Tr. Div.).

59. R.S.C. 1970, c. T-15, s. 15.

60. R.S.C. 1970, c. T-15, s. 15.

Canada citing *Curtiss-Wright Corp. v. The Queen*;⁶¹ *Canwest Exploration Co. v. Letain*;⁶² *John Burrows Ltd. v. Subsurface Surveys Ltd.*⁶³ and *Canadian Superior Oil Ltd. v. Hambly*.⁶⁴

With respect, none of the authorities cited are of value to establish promissory or any estoppel being operative against Her Majesty. The three latter cases, of course, did not involve the Crown at all but in *Curtiss-Wright Corp. v. The Queen*, Jackett P. found that there was neither a representation of fact as to raise an estoppel *in pais* against a licensee (who was *not* the Crown) nor a representation of the licensee's state of mind so as to give rise to the doctrine of promissory estoppel. Then to add to it he also held that even if the licensee had been precluded from denying the validity of the patents in question, such preclusion did not avail against the Crown by virtue of a cited section of *The Defence Production Act*. Thus even if the courts have accepted the doctrine of promissory estoppel there is no authority whatsoever making it binding on the Crown.⁶⁵

The decision in *Transworld Shipping Ltd. v. The Queen* was appealed to the Federal Court of Appeal⁶⁶ where the unanimous judgment was given by Chief Justice Jackett. He also found that a verbal contract had been entered into between the parties and that was sufficient to dismiss the appeal. However he made one comment, by footnote,⁶⁷ where he considered the estoppel issue which he clearly did not deem part of the *ratio*:

If there were a statutory necessity for Treasury Board or Governor in Council authority as a condition precedent to a valid contract that had been properly raised by the pleadings, I should have grave doubt that the Crown could have been estopped from relying on it as suggested by the learned Trial Judge. Compare *St. Ann's Island Shooting and Fishing Club v. The King*⁶⁸ . . . per Rand J. . . : 'there can be no estoppel in the face of an express provision of a statute', and *Gooderham & Worts Ltd. v. C.B.C.* [1947] A.C. 66.⁶⁹

Conclusion

I trust my point has been made as to the law of estoppel and the Crown. I would remind readers, however, of a statement from *Halsbury's Laws of England* quoted near the beginning of this paper to the effect that the Crown's prerogative is created and limited by the common law. The Crown may, as has been the case in Crown

61. [1968] 1 Ex. C.R. 519.

62. [1964] S.C.R. 20.

63. [1968] S.C.R. 607.

64. [1970] S.C.R. 932.

65. *Supra* n. 61.

66. [1976] 1 F.C. 159 (App. Div.).

67. *Id.*, at 172.

68. *Supra* n. 45.

69. *Supra* n. 25.

liability in torts, for example, withdraw or limit Her prerogative. It may that the advantage of the Crown in respect of estoppel is not required or as a matter of equity should be withdrawn or in some way limited. This is not an argument I am prepared to make, nor is this the place for me to deny it. My point is merely this: To this date, the law of Canada is that estoppel does not bind Her Majesty in Right of Canada.