A PRACTICAL GUIDE TO PROCEEDINGS AGAINST THE FEDERAL CROWN

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Introduction:

The Crown could not be sued at common law. The Courts were creations of the Crown and as such it could not be compelled to appear before them and submit to their jurisdiction. Liability of the Crown has developed largely as a result of a series of statutes which have expanded the rights of individuals to claim against the Crown and have simplified the procedure associated with the exercise of these rights.

While Parliament has by legislation and with the assistance of the Courts relaxed or abolished many of the Crown's special immunities and prerogatives, it has not yet placed the Crown in the same position as an ordinary litigant. There still remains a distinct body of "Crown law" which is largely procedural rather than substantive. The following should hopefully assist the unfamiliar practitioner to avoid some of the associated pitfalls.

Historical Background

While the Crown was not subject to the jurisdiction of the Courts, it nevertheless had a recognized moral obligation to address legitimate complaints of its subjects. The Petition of Right developed as an early remedy for resolution of disputes with the Crown. The remedy required the subject to petition the Crown for permission, which if given, would result in a fiat being issued and the case being referred to the Courts for

determination. The remedy developed in relation to claims concerning property and later contract. In Canada, the *Petition of Right Act* 1876, S.C. 1876, c. 27 which replaced the *Petition of Right Act* passed the year before, codified the procedure governing the remedy and vested jurisdiction to adjudicate these cases in the newly created Exchequer Court. The *Act* was amended in 1951 to abolish the requirement of a fiat. The Petition ultimately gave way to a right to proceed by way of a Statement of Claim in the Federal Court with the passage of the *Federal Court Act* in 1970.

Another remedy developed to address claims by the subject was the declaration. Declaratory relief could be obtained without the requirement of a petition of right where relief was claimed as against the Attorney General rather than the Crown. The initial advantage of the declaration disappeared with the abolition of the requirement of a fiat and the petition of right, however, more recently it has been relied upon as a way to test the constitutional validity of federal legislation in the superior courts of the provinces.

The petition of right did not develop as a remedy in relation to claims in tort. While at common law Crown servants could be sued individually for torts committed in the course of their employment, the Crown remained largely immune from vicarious liability for their conduct until 1938. The *Exchequer Court Act* was amended in 1887 to introduce vicarious liability in respect of death or injury to person or property "on any public work" but general vicarious liability awaited the removal of this requirement by amendment in 1938.

Crown liability in tort was expanded with the adoption of the *Crown Liability Act,* SC, 1952-53, c.30 which was based on a uniform model *Crown Proceedings Act.*. That liability has largely continued into the present *Crown Liability and Proceedings Act* R.S.C. 1985, c. C-50 (*CLPA*) which provides:

3) The Crown is liable in tort for the damages for which, if it were a private person of full age and capacity, it would be liable
   a) In respect of a tort committed by a servant of the Crown; or
   b) In respect of a breach of duty attaching to the ownership, occupation, possession or control of property.

4) The Crown is liable for the damage sustained by any person by reason of a motor vehicle, owned by the Crown, on a highway, for which the Crown would be liable if it were a private person of full age and capacity.

Who are the proper parties?

The question of who are the proper parties is intertwined with the question of which court do you sue in. Generally, the Crown is the proper party, however, there are differences in how the Crown should be named.

Proceedings against the Crown should usually be taken in the name of the Attorney General of Canada in accordance with s. 23 of the *CLPA*. The exception is that proceedings against the Crown in Federal Court should be taken in the name of Her Majesty the Queen in accordance with s. 48 of the *Federal Court Act.*

Proceedings can be brought against Crown agent corporations in their own name in provincial superior courts in respect of obligations and liabilities incurred on behalf of the Crown, where this is authorized by statute. Such statutory authority is normally found in what is known as a "sue and be sued" provision in their incorporating statute or in s. 98 of the *Financial Administration Act*. A Crown agent corporation can not be sued in the Federal Court as it has been held that they do not come within the meaning of

"Crown" in s. 17(1) and (2) of the *Federal Court Act*: *Rasmussen* v. *Breau, [1986] 2 F.C. 500 (C.A.)*. However, the Crown can be sued in Federal Court in respect of the conduct of Crown agent corporations whether in tort or as the principle liable for contracts entered into by its agent.

The Crown is the proper party in proceedings alleging vicarious liability for the tortious conduct of its employees as provided in s. 3 and s. 4 of the *CLPA*. Employees of Crown agent corporations may or may not be servants of the Crown as provided in the corporation's incorporating legislation. Where they are servants of the Crown it is the Crown and not the corporation which is vicariously liable for their torts. Where the incorporating statute provides that they are not servants of the Crown then the agent corporation is vicariously liable.

A longstanding question is whether it is proper or necessary to sue individual Crown servants together with or in lieu of the Crown. This was of course necessary prior to the advent of legislation making the Crown vicariously liable for the tortious conduct of its servants committed in the course of their employment. Following the introduction of vicarious liability the practice of proceeding against the Crown servant continued as a practical means of avoiding proceedings in the Exchequer Court and later the Federal Court. Generally, claims against the Crown had to be brought exclusively in the Federal Court as the jurisdiction given to provincial superior courts by the *Crown Liability Act* was limited to claims of less than $1,000. Claims against Crown servants of any amount could be brought in provincial superior courts and Treasury Board Policy provides that the Crown will indemnify them against any liability incurred by any act or omission within the scope of their employment so long as they acted honestly and without malice.

With amendments to the *Crown Liability Act* in 1992, the renamed *Crown Liability and Proceedings Act* gave concurrent jurisdiction over claims against the Crown to provincial superior courts. With this change it is no longer practical or necessary to name the Crown servant as a party unless there is some question about whether the employee was acting within the scope of his employment at the time.

Proceedings are frequently brought against improper parties in actions against the Federal Crown. Proceedings should not be commenced against government departments such as the Department of Public Works and Government Services as they are not legal entities capable of being sued. This applies equally to other non-legal entities such as the RCMP, the Canadian Armed Forces, and the Canadian Coast Guard. Similarly, proceedings cannot be brought naming a Minister of the Crown as a party in his representative rather than personal capacity. However, improperly naming the Crown is generally treated as cause for an amendment to pleadings rather than fatal to the proceedings.

Which Court do I sue in?

Generally, with claims against the Crown in contract or tort there is an option to commence proceedings in either the Federal Court or the Supreme Court. The Federal Court has concurrent original jurisdiction under s. 17 of the *Federal Court Act* and the Supreme Court has concurrent jurisdiction under s. 21 of the *CLPA*. However, s. 21 (2) of the *CLPA* provides that there is no jurisdiction in the Supreme Court to entertain an action where a proceeding exists in the Federal Court dealing with the same matter. The Small Claims Court has no jurisdiction over proceedings against the Crown as it is not

included in s. 21 of the *CLPA*, although action may still be brought in that Court against Crown servants in their individual capacity. As noted previously actions against Crown corporations can be brought in the name of the corporation in the Supreme Court where authorized by their incorporating statute or the *Financial Administration Act*.

The present concurrent jurisdiction in actions against the Crown results from 1992 amendments to the *Crown Liability Act* and the *Federal Court Act*. The pre 1992 situation was very confusing and some of that confusion remains. The *Federal Court Act* originally purported to give exclusive jurisdiction to that Court over actions both by or against the Crown. However, the Supreme Court of Canada in McNamara Construction (Western) Ltd. v. The Queen, [1977] 2 S.C.R. 654, severely limited Federal Court jurisdiction over private defendants. The resulting nightmarish situation meant that while most claims against the Crown had to be commenced in Federal Court, that Court had no jurisdiction over counter claims or third party claims by the Crown against private litigants. Such claims had to be brought separately in the Supreme Court thereby creating a multiplicity of proceedings. Similarly, while most claims by the Crown had to be commenced in Supreme Court, counter claims and third party claims against the Crown were within the exclusive jurisdiction of the Federal Court and had to be brought separately: Dywidag Systems Int. Com. Ltd. v. Zutphern Bros. Construction, [1990] 1 S.C.R. 654. This state of affairs continued until 1992 when Parliament fashioned a legislative solution which conferred concurrent jurisdiction upon the Federal and Provincial superior courts.

Today such multiplicity of proceedings can be avoided by proceeding with claims both by and against the Crown in Supreme Court. Where proceedings are commenced

against the Crown in Federal Court and the Crown wishes to institute a counter claim or third party proceedings in respect of the same matter, the Crown may apply pursuant to s. 50.1 of the *Federal Court Act* for a stay of proceedings forcing the Plaintiff to recommence the proceeding in the Supreme Court.

Section 18 of the *Federal Court Act* transfers jurisdiction for judicial review of decisions of "federal boards, commissions or other tribunals" from provincial superior courts to the Federal Court. Generally, proceedings for judicial review are to be brought in the trial division pursuant to s. 18, however, s. 28 carves out exclusive jurisdiction for the Federal Court of Appeal for certain tribunals specifically named therein. The jurisdiction of provincial superior courts in this area is now limited to granting writs of *habeas corpus* and declaratory relief against administrative tribunals with respect to the constitutionality and *vires* of legislation.

Notice of Proceedings:

The general rule is that no notice is required to commence proceedings against the Crown in either Federal or Supreme Court. The only exception is for claims arising from the ownership, occupation or control of property where notice in writing of intention to claim must be given within 7 days from after the claim arose: s. 12 (1) *CLPA*. However, s. 12(2) allows the court to relieve against failure to give notice, which is generally exercised generously in favour of the Plaintiff. There is likewise no requirement of notice in respect of proceedings against Crown agencies, except in these circumstances: s. 35(1) *CLPA*..

Prior to the 1992 amendments to the *Crown Liability Act* there was a 90 day notice requirement for proceedings against the Crown or Crown agencies commenced in Supreme Court pursuant to Part II of that Act. Along with the expansion of provincial superior court jurisdiction over claims against the Crown, the amendments to the *CLPA* and Regulations replaced the notice requirement with special rules that give the Crown additional time to respond to pre-trial steps in a proceeding. Section 5 of the *Crown Liability and Proceedings (Provincial Court) Regulations* gives the Crown 30 days to file a defence and s. 25 of the *Act* prohibits default judgement without leave of the Court which is obtained by application giving 14 clear days notice thereof to the Attorney General. Nevertheless, whether because of notice requirements for proceedings against other levels of government or because of an abundance of caution, it is not uncommon to still receive notices of intended action against the Federal Crown or its agencies.

How is Service Effected?

Service of originating documents in proceedings against the Federal Crown or its agencies is relatively straight forward and in many instances simpler than that in proceedings between private litigants.

Where the action is commenced in the Federal Court and the Crown is the defendant, s. 48(3) of the *Federal Court Act* has always provided that service is effected by filing a copy of the Statement of Claim with the Registry of the Court. As a result of more recent changes, Rule 133 of the Federal Court Rules provides that personal service of any originating document on the Crown, the Attorney General of Canada or any other Minister of the Crown is effected by filing the document with the Registry. In practice

documents filed with the Ottawa Registry of the Court are transmitted to the office of the Deputy Attorney General in Ottawa and redirected to the regional offices of the Department of Justice as appropriate. Documents filed with local registries of the Court are transmitted directly to regional offices of the Department. Rule 140 provides that subsequent documents are served on the Crown at the address for service of the solicitor of record for the Crown.

Service of originating documents in proceedings against the Crown in Supreme Court is governed by s. 4 of the Crown Liability and Proceedings (*Provincial Court*) Regulations. Section 4(2) states that for proceedings in Nova Scotia or other Atlantic Provinces service can be effected on the office of the Deputy Attorney General in Ottawa or the Regional Director of the Halifax Regional Office of the Department of Justice. Service of originating documents in proceedings against Crown agencies is effected by service on either the Deputy Attorney General or the chief executive officer of the agency as provided in s. 23(2) of *CLPA*. Service of all subsequent documents is as provided by the rules of practice and procedure of the Nova Scotia Supreme Court or other provincial superior courts in accordance with s. 27 of the *CLPA*.

Limitation Periods and Statutory Bars

Section 32 of the *CLPA* provides that provincial laws relating to prescription and limitation of actions between ordinary litigants are applicable to actions by or against the Crown except where otherwise provided in that *Act* or some other act of Parliament. It is necessary, therefore, to check for any applicable legislation which may contain a specific limitation period before concluding that regular provincial limitation periods apply.

There are specific short limitation periods applicable to claims against Crown officers acting in the performance of their duties in s. 269(1) of the *National Defence Act*, R.S.C., c. N-5. and s. 106(1) of the Customs Act, R.S.C. 1985, c. C-52.6; as well as other acts.

Potentially, limitation periods contained in provincial statutes other than general limitation of action legislation may also be applicable. In Al's Steak House and Tavern Inc. v. Deloilte Touche (1994) 120 OAC 144, the Ontario Court of Appeal held that Revenue Canada inspectors were entitled to the benefit of a six-month limitation period provided in provincial legislation for the protection of public authorities. Based on this decision some Federal Crown servants in Nova Scotia may be entitled to the benefit of the six-month limitation provision contained in the *Constables Protection Act*, R.S.N.S. 1989, c.88.

Where provincial limitation law is applicable this would include those procedural provisions permitting the Court to relieve against defences based on provincial limitation periods in actions by and against the Crown. Quere whether such provisions are applicable to relieve against defences based upon specific limitations contained in other federal legislation.

There are also statutory bars to proceedings against the Crown and Crown servants contained in various federal statutes. Perhaps the most frequently confronted is the prohibition against proceedings where an intended Plaintiff or his dependants are receiving, or are eligible to receive, a pension or some other form of compensation from the Crown. Several statutes contain prohibitions which are intended to prevent duplication of remedies and the possibility of double recovery. There is a general bar in s. 9 of the *CLPA* and more specific bars in s. 111 of the *Pension Act*, R.S.C. 1985, c. P-6

and s. 12 of the *Government Employees Compensation Act*, R.S.C. 1985, c. G-5. These limitations on the liability of the Crown should be considered in any proposed proceeding by present or former Crown employees, members of the R.C.M.P. or members of the Canadian Armed Forces.

Remedies

There are peculiar common law and statutory rules limiting the relief available against the Crown.

The Crown is immune at common law from relief by way of injunction and specific performance. This immunity is codified in s. 22(1) of the *CLPA* which provides that in lieu thereof the Court may make an order declaratory of the rights of the parties. Crown agencies are not immune from such relief as s. 35 of the *CLPA* exempts them from the application of s. 22.

Attempts have been made to circumvent the immunity by seeking the injunction against a Minister or officers of the Crown. At common law any such injunction would only issue in circumstances where the Minister or Crown officers were acting illegally; that is, beyond statutory authority. Section 22(3) of the *CLPA* provides that the Court shall not make an order against a Crown servant that it could not grant against the Crown, however, it has been held not to change the common law in this respect.

Other attempts have been made to circumvent the rules by seeking an "interim declaration". While s. 22(1) of the *CLPA* provides that in lieu of injunctive relief the Court may make an order declaring of the rights of the parties, the Court has refused to extend this to "interim declarations".

Sections 18 and 18.1 of the *Federal Court Act* provide that in judicial review proceedings against "federal boards, commissions or other tribunals" the Court may grant an injunction or declaratory relief among other extra ordinary remedies. Section 18.3 provides for the grant of such relief on an interim basis.

There are other remedies not available as against the Crown. Section 14 of the *CLPA* bars in rem proceedings, or any arrest, detention, seizure or lien against Crown property. As provincial legislation is generally not binding upon the Federal Crown, causes of action arising under such legislation such as mechanics liens do not apply. At common law the effect of a judgment against the Crown was declaratory only. The Crown was exempt from execution and not subject to remedies such as distress, liens, garnishment or attachment. This immunity is codified in s. 29 of the *CLPA*. However, s. 30(1) imposes a corresponding statutory duty on the Crown to satisfy all judgements against it.

Conclusion:

While much has been done by way of legislation and judicial interpretation to bring the position of the Crown in line with that of the ordinary litigant, there remain significant differences. With the expanding interest in the liability of public authorities practitioners are increasing venturing into this field. With these differences expected to continue it is not enough to approach such litigation from the perspective that they should no longer exist. Rather what is required is an appreciation of the nature of the substantive and procedural differences and the associated pitfalls, in initiating such proceedings.