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INSTITUTE OF LAW RESEARCH AND REFORM
The University of Alberta

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JUDICATURE ACT, SECTION 24
(Permission to take Proceedings Against Crown officers and public authorities)

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I. INTRODUCTION

At the suggestion of the Attorney General the Institute undertook to examine section 24 of the Judicature Act, R.S.A. 1970, c. 193, and to make recommendations with regard to it. The section provides that certain actions shall not be brought or maintained unless permission has first been given by the Lieutenant Governor in Council. The first subsection requires permission for an action against a member of the Executive Council of the Province for things done or omitted in the execution of his office. The second subsection requires permission if the relief claimed includes an injunction, mandamus, prohibition or other process affecting or interfering with acts or omissions authorized or directed by provincial statute or order in council. This Report is the result of our examination and research.

II. HISTORY OF SECTION 24

The predecessor of section 24 was enacted by Chapter 16 of the Statutes of Alberta, 1936 (Second Session). It became section 27 of the Judicature Act, R.S.A. 1922, c. 72. It has remained in substantially the same form ever since.

In 1936, the Crown could not be sued in tort. It could be sued in other cases only if the Lieutenant Governor in Council granted a fiat under the Petition of Right Act, R.S.A. 1922, c. 94. The granting of the fiat was discretionary, and security for costs was required. Declaratory judgments could sometimes be obtained against the Crown but

were not available in all cases and did not give substantive relief binding upon the Crown. Action could be brought personally against Crown servants for their torts.

In 1936 a Canadian Bar Association Committee under the Chairmanship of C. C. McLaurin, K.C., proposed that the fiat be done away with and that the Crown be made liable in tort. On August 21st, 1936, the Association adopted the Committee's Report (Proceedings of the 21st Annual Meeting of the Canadian Bar Association, August 19th, 20th and 21st, 1936, pp. 43-47, 177-187). A private member thereupon introduced in the Alberta Legislature a bill intended to remove the obstacles in the way of actions against the Crown.

The Attorney General of the day, Mr. J. W. Hugill, is reported to have said in debate that "neither the Crown of Great Britain or any other government has given serious consideration to such legislation" and that it would "make it possible virtually to enable government under our present constitution to become impracticable" (Edmonton Journal, Sept. 1, 1936). The bill was defeated.

The government then introduced the bill to enact the section with which this Report is concerned. According to the newspaper report the Attorney General referred to "a case which cost the government a lot of money a short time ago" and went on to say that he had had other cases brought to him, in some of which, where there was justification for them, he had made settlements. Riley J. in Poitras v. Attorney General for Alberta (1969), 68 W.W.R. 224 appeared to be of the opinion that the section was passed in reaction to the judgment of Ford J. in Royal Trust Co. (Executor of Cochrane Estate) v. Attorney General for Alberta (No. 3) [1936],

2 W.W.R. 337. However, the plaintiff in the Cochrane case failed for want of a fiat; and the Attorney General's statement suggests that he had another case in mind in which the province was compelled to pay; possibly a case such as Powlett and Powlett v. University of Alberta et al [1934], 2 W.W.R. 209 which was then a cause célèbre.

The notion that governments should be legally responsible later gained ground. The Proceedings Against the Crown Act (U.K.) of 1947 gave impetus to it. In 1950 the Commissioners on Uniformity of Legislation adopted a Model Act which was similar to the English Act and which has been adopted by seven provinces including Alberta. Parliament enacted a similar Act in 1952-53 (now The Crown Liability Act, R.S.C. 1970, c. C-38) and British Columbia has just done so (S.B.C. 1974, c. 24).

Alberta enacted its Proceedings Against the Crown Act as Chapter 63, S.A. 1959. It is now R.S.A. 1970, c. 285. The new Act repealed the Petition of Right Act. It is the Model Act. It is not necessary for the purposes of this Report to describe it in detail. In general, it is designed to place the Crown in the place of an ordinary litigant; but there are some exceptions of which two are relevant to this Report. One is the protection afforded to the Crown and its officers against injunctions; that protection is provided for in the Model Act. The second exception is the overriding effect which it gives to section 24 of the Judicature Act; the latter exception is not contemplated by the Model Act, and can, as will appear later, be interpreted so as to deny to the individual many of the rights which would otherwise be given by the Model Act.

III. LEGAL EFFECT OF SECTION 24

Section 24(1)

Section 24(1) reads as follows:

> (1) No action whereby relief of any kind is claimed on account of anything done or proposed to be done, or on account of anything omitted to be done by a member of the Executive Council of the Province in the execution of his office shall be brought or maintained against that member unless permission to bring or maintain the action has first been given by the Lieutenant Governor in Council.

In Poitras v. Attorney General for Alberta (1969), 68 W.W.R. 224 Riley J. struck out the Statement of Claim in an action for a declaration that revenues received by the Crown from minerals in Metis lands should be held in trust for the Metis; he held that the subsection precluded actions for declarations based on Dyson v. Attorney General [1911], 1 K.B. 410. Such actions had previously been entertained in Alberta (Great West Life Assurance Co. v. Baptiste, [1924] 2 W.W.R. 920 (App. Div.)). In Aremex Minerals Ltd. v. Reg. (unreported; S.C. action 70835, Edmonton, 1971) Sinclair J. held that permission was required for an action for a declaration that the plaintiff was entitled to be granted a lease of minerals. The plaintiff claimed that the lease had been withdrawn from disposition by the Minister after the plaintiff had allegedly accepted an offer made by a departmental official. The statute gave the Minister power to withdraw the minerals.

The law is clear that without permission a subject cannot sue a member of the Executive Council acting in the execution of his office, even for declaratory relief. The Crown can be sued without permission, but not its principal officers.

Section 24(2)

Section 24(2) reads as follows:

> (2) No action whereby the relief claimed or part of the relief claimed is an injunction, mandamus, prohibition or other process or proceeding affecting or interfering directly or indirectly with the doing by a person or the omission by a person of an act authorized or directed by a statute of the Legislature of the Province, or by an order in council of the Province, shall be brought or maintained unless permission to bring or maintain the action has first been given by the Lieutenant Governor in Council.

The subsection raises some problems of interpretation. In some cases the courts have given it a narrow interpretation. In others they have not.

The subsection was restrictively interpreted in Rex ex rel Mikklesen and McGaughey v. Highway Traffic Baord, [1947] 1 W.W.R. 342 (S.C. Alta.). In that case, O'Connor J.A., sitting in the Trial Division, granted a mandamus to compel the Highway Traffic Board to hold public hearings of certain applications as required by statute. He held that subsection 24(2) prohibited an action for mandamus but did not prohibit a motion for mandamus. The distinction appears to have been present to the mind of Milvain C.J.T.D. in Kish and Vaskovics v. Director of Vital Statistics, [1973]

2 W.W.R. 678, a mandamus application, when he said that the technical difficulty raised by section 24(2) was removed by agreement of counsel to consider the matter to have been commenced by motion rather than by originating notice. It was expressly drawn by him in Board of Governors of Mount Royal College v. Board of Industrial Relations et al (unreported; S.C. Action 114141, Calgary, June 10, 1974) an application by way of certiorari to quash an order certifying a bargaining agent. He said:

> It will be noted that the section [24(2)] prohibits, without consent, an 'action'. Section Section 2(2) of the Judicature Act defines the word 'action' to mean:-
>
> > a civil proceeding commenced in such manner as may be prescribed by the Rules of Court and include a suit.
>
> Rule 6 of the Rules stipulates that civil proceedings may be commenced in any of three ways; Statement of Claim, Originating Notice or Petition.
>
> This application was launched by Notice of Motion and is not touched by the statute. See R. ex rel Mikkelson and McGaughey v. Highway Traffic Board [1947] 3 W.W.R. 342.

It might still be possible to argue in another case that an application for an order in the nature of certiorari is a civil proceeding and that the Rules of Court prescribe that it be commenced by notice of motion, but the authority of the Mikkelson and McGaughy and Mount Royal cases is unequivocal.

The subsection was also restrictively interpreted in Canadian Interurban Properties Ltd. and Westco Investment Ltd. v. The Development Appeal Board of the City of Calgary

and the City of Calgary (unreported; S.C. Action 108070, Calgary, March 5th, 1974). Milvain C.J.T.D. assumed jurisdiction to entertain an application for prohibition against the Development Appeal Board. We are told that counsel for the applicant advanced two arguments to establish that section 24(2) did not apply. The first argument was that the Board was acting under a by-law of the City of Calgary and not under statutory authority. The second was that section 24(2) does not apply when the respondent is acting outside its statutory authority. Milvain C.J.T.D. held that section 24(2) did not apply but did not say which argument he had accepted, or whether he had accepted them both. He dismissed the application on the merits.

The second argument was also raised in Vladicka v. Board of School Trustees of Calgary. [1974] 4 W.W.R. 159. A public school supporter brought a class action for an order determining whether the school trustees had power under The School Act to award themselves certain honoraria. D. C. McDonald J. dismissed the application on the merits. However, he held that he had jurisdiction to entertain it without the statutory permission. He distinguished the Mikkelsen and McGaughey case on the grounds that the proceeding before him was clearly an "action", but went on to say at page 164:

> However, in my view, the relief sought by the applicant, if granted, would not amount to 'affecting or interfering directly or indirectly with the doing by a person or the omission by a person of an act authorized or an act directed by a statute. . . .' If the applicant is correct in asserting that the respondent's resolution is beyond the powers granted to the respondents by s. 65(4)(f) of The School Act, then the respondent, by adopting the resolution, has not done an act 'authorized or directed by a statute.' Indeed,

> the position would be that the respondent has done an act not authorized by The School Act. Therefore, it was not necessary to obtain the permission of the Lieutenant Governor in Council before commencing this proceeding.

A similar argument was accepted by Milvain C.J.T.D. in the Mount Royal case which we have previously mentioned. He said:

> I am further of the view that a superior court cannot, short of very clear legislation, be deprived of the power and duty of determining whether an inferior tribunal never had jurisdiction or having started with it, lost its grip through wrong doing amounting to a denial of natural justice. If an inferior tribunal either lacks jurisdiction or has lost it, then surely any proceeding designed to quash the result does not interfere either directly or indirectly with the doing of an Act authorized by statute or order in council. I cannot contemplate there being authority to do such improper act.

If the subsection does not apply when it is alleged that the act complained of is done without authority, its application will be restricted. It may even be that it would not prevent the court from granting an interim injunction to an applicant who could show a good arguable case that the act complained of was done without authority.

We turn now to cases in which section 24(2) has been held to prevent an action being maintained. It, as well as section 24(1), was in issue in the Aremex case in which Sinclair J. held that the action could not proceed without permission. Sinclair J. said:

> When one considers closely the far-reaching provisions of section 24 of the Judicature Act it is possible to envisage their being invoked by the Crown in a wide range of proceedings, involving a broad spectrum of claims for relief, because, taken literally, there could scarcely be any kind of a claim against the Crown that could not be said to affect, at least indirectly, the doing by a person or the omission by a person of an act authorized or directed by a statute of the Legislature of the Province.

In Grande et al v. County of Parkland et al (unreported, S.C. Action 70009, Edmonton, September 10, 1971) Lieberman J. tended to the view that section 24 applied where the Queen was named as defendant but the complaint arose from things done by the Minister of Education.

In Aristocrat Holdings Ltd. v. The Energy Resources Conservation Board & Calgary Power Ltd. (unreported, S.C. Action 77130, Edmonton, October 6, 1972) Moore J. dismissed an application to prohibit the Energy Resources Conservation Board from proceeding with a hearing to determine whether or not a permit should issue for a power line, holding that section 24(2) applied. Although the proceeding was commenced by notice of motion the distinction between an "action" and a motion was not drawn.

In Re Red Deer College Inquiry [1973], 2 W.W.R. 222 an application was made by way of certiorari to quash an investigation under the Public Inquiries Act on the ground that the order in council appointing the Commissioner had not been filed under the Regulations Act and was therefore a nullity. The rights of the Crown were not affected. Primrose J. said that "one cannot overlook the provisions of section 24(2) of the Judicature Act, which have a specific

purpose" and that without the statutory permission the court had no jurisdiction. The same judge, Primrose J., in Kritzinger v. The Stony Plain Hospital District No. 84 (unreported; S.C. action 84219, April 22nd, 1974) adjourned an application for certiorari while the applicant obtained the statutory permission. The application was brought to quash the suspension by a hospital board of a doctor's privileges to practice in the hospital.

Section 24(2) can be applied to many cases which affect either Crown property rights or high government policies. It can also be applied to many more cases which affect neither. While future jurisprudence might restrict its application, the subsection remains capable of broad application.

IV. PRACTICE RELATING TO SECTION 24

Some lawyers think that upon occasion the statutory permission has been denied. We have not, however, found such a case; and we are informed by the Department of the Attorney General that at least for some years past permission has been granted as a matter of course. An applicant is necessarily delayed for the time required to obtain an order in council.

The Attorney General's Department upon occasion raises the absence of permission if in the opinion of the Department proceedings against a Minister should have been brought against the Crown itself. The Department has also raised the absence of permission in other cases such as the Aremex and Red Deer cases referred to above. In cases where the respondent is not an organ of government, he is at liberty to raise the absence of permission if he sees fit.

V. PROPOSALS FOR CHANGE

1. Actions Against the Crown and Crown Servants

(1) General Considerations

The first question is whether the Crown and its servants should have special protection against lawsuits. Our opinion is that they should not except where special considerations clearly apply. The Crown's common law immunity in tort and the common law requirement of a fiat in other cases created injustice. The Proceedings Against the Crown Act was intended to do away with that injustice, though it left some special procedural and substantive protections to the Crown, most of which are not relevant to this Report. Before that Act was passed, however, section 24 had gone on to extend to Ministers and other Crown servants the procedural protection which at common law was available only to the Crown itself.

One argument in favour of subsection 24(1) is that an application for permission to sue gives notice of the intended action and gives the government an opportunity either to settle it or to see that it is brought against the proper party. We have therefore considered whether a requirement of notice might be substituted for the requirement of permission. We think, however, that the disadvantages would outweigh the advantages. The disadvantages include delay and embarrassment to litigants, and the possible loss of a cause of action if an action is not properly constituted in time because notice is not given. We note that the Commissioners on Uniformity decided against such a provision (Proceedings of the Conference of Commissioners on Uniformity, 1950, p. 22).

It may be said that section 24(1) gives a valuable protection to Ministers against vexatious proceedings which may be politically motivated. We do not accept that argument. Other political figures are not similarly protected. The law now provides ways of disposing of vexatious proceedings, and if better ways are needed they should be made available to all defendants.

In our opinion, the special protection which section 24(1) gives to Ministers of the Crown is not justified. The procedural protection of Ministers can create the same kind of injustice as did the procedural protection of the Crown. Unless there is special reason for the protection, we are of the opinion that it should not be given. The protection of the provincial government against money judgments is not such a reason today whatever may have been the case in 1936, and we do not think there is any other sufficient justification for the section.

(2) Injunctions and Orders giving Relief Against the Crown and its Servants

The next question is whether there is special reason to protect the Crown and its servants against injunctions. The arguments against such protection are forcefully presented in the Report on Civil Rights, Legal Position of the Crown, 1972, issued by the Law Reform Commission of British Columbia, though its resulting recommendation was not given effect to by the Crown Proceedings Act, S.B.C. 1974, c. 24 which adopted most of the Commission's recommendations. The Commission points out that the federal Crown Liability Act, R.S.C. 1970, c. C-38, did not include protection against injunctions; and it thinks that the experience of Australia and the United States, which do not provide for such protection, is more

relevant to a federal state such as Canada than is the experience of a unitary state such as the United Kingdom. The Commission argues that the courts will in proper cases refuse injunctions and that the lack of the protection of an interim injunction may well cause irreparable damage to a citizen whose rights are attacked by government. It suggests that "the prerogative of executive necessity is always available" and that "the extra-legal principle of state necessity" has even justified the Crown in assuming legislative authority so that the statutory protection of the Crown against injunctions is not necessary.

Nevertheless we think that there may be cases in which in the interest of effective government, the executive branch of government should have the power to act without being restrained by injunction; and we think that it must be left to the executive to identify those cases. The citizen will have the right to sue for a declaration and for other substantive relief such as damages. He will also have his right to raise his grievance through the political process.

The next question is whether section 24 of the Judicature Act is necessary in order to protect the Crown and its servants against injunctions. We think not. We believe that section 17 of the Proceedings Against the Crown Act gives the necessary protection. It reads as follows:

> 17.(1) Where in proceedings against the Crown any relief is sought that might, in proceedings between persons, be granted by way of injunction or specific performance the court shall not, as against the Crown, grant an injunction or make an order for specific performance but may, in lieu thereof, make an order declaratory of the rights of the parties.

> (2) The court shall not in any proceedings grant an injunction or make an order against an officer of the Crown where 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.

"Officer" is defined in section 2(c) of the Act to include "a Minister of the Crown and any servant of the Crown."

Section 17(1) clearly protects the Crown itself. Section 17(2) appears to us to be sufficiently broad to prevent an indirect restraint by injunctions being obtained against Ministers and other servants of the Crown when an injunction could not be obtained against the Crown itself.

In summary, we think that section 17 of the Proceedings Against the Crown Act properly balances the public interest against the rights of the individual. It enables the executive branch to act in the public interest even if the rights of the individual must temporarily suffer; but it leaves the individual free to obtain declaratory relief and damages as well as to any remedies which he may obtain through the political process.

2. Actions Against Others

Agencies and individuals acting under statutes and orders in council perform many important functions. However, we see no reason why they should not perform their functions under the supervision of the courts. School

boards, development appeal boards, public inquiries and registrars of vital statistics, to name a few of those mentioned in the cases, can function quite adequately under that supervision. No other jurisdiction finds it necessary to require permission for proceedings against them. Municipal government in Alberta is not protected by section 24(2); or at least no municipal body has raised the section. We note, too, that the need for permission by way of order in council to bring action against the University of Alberta was removed when the new Universities Act was passed in 1966.

Some agencies may do things which relate to high government policy. The freedom of the executive branch to act is, however, protected by section 17 of the Proceedings Against the Crown Act; and we think that that freedom is all that the public interest requires. Other matters may be more fittingly left to the courts.

3. Recommendations

For the reasons that we have given, we have concluded that section 24 is not needed and is capable of creating injustice. We are reinforced in this opinion by the governmental practice of granting permission as a matter of course; if it were a necessary protection governmental practice would be different.

Is it important that the section be repealed? Our answer is affirmative. In the hands of an administration which chose not to grant permission as a matter of course the section could be used to deny justice to the individual. It is contrary to the spirit of the Proceedings Against the Crown Act and is capable of being interpreted in a way which would greatly restrict the rights granted by that Act. Even if permission is granted freely, the section causes

embarrassment and expense to litigants who do not know of its existence, and it must necessarily cause delay to those who obtain permission.

We therefore recommend that section 24 of the Judicature Act be repealed and that the reference to it in section 3(1) of the Proceedings Against the Crown Act be deleted.

7 August 1974

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NOTE: Dr. Kreisel is a member of the Institute but is not a lawyer and has no responsibility for the contents of this Report.

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