CLASS ACTIONS AGAINST THE CROWN: A SUBSTITUTION FOR JUDICIAL REVIEW ON ADMINISTRATIVE LAW GROUNDS?

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INTRODUCTION

Class actions against the Crown do not fit neatly in existing private law or public law paradigms. Private law liability tends to flow from discrete duties owed to specific individuals or groups, while judicial review at public law is premised on public duties such as the obligation of decision-makers to exercise their statutory authority in a fair and reasonable fashion. Class actions typically are brought on private law grounds alleging discrete duties but in contexts where the decision-makers were exercising broad statutory authority in the public interest. Class actions against the Crown often compel courts to draw artificial distinctions between private and public law paradigms. In these paradigms, either the Crown owed a specific private law duty and may be subject to liability for damages and/or declaratory relief, or it owed only a general public law duty and the Crown may be subject to only judicial review on administrative law grounds leading to administrative law remedies (usually quashing the impugned decision). In this brief article, I wish to explore frameworks that are capable of surmounting this dichotomy – Put differently, I am interested in developing approaches to the relationship between class actions against the Crown and administrative law proceedings against the Crown which do not devolve inexorably into private law and public law spheres. This article will argue that class actions against the Crown can only be properly understood as a site of convergence between private law and public law spheres.

While class actions against the Crown are not new, they are taking on unprecedented prominence as an alternative to judicial review on administrative law grounds. It is hardly surprising that the Crown has been a frequent defendant in class actions. Given the state's presence in the economic and social life in this country, together with the state's deep pockets, litigation against the Crown is to be expected. Increasingly, however, these class actions seek to impose civil liability for government decision-making, based on regulatory negligence or a breach of a minister's fiduciary or other equitable obligations, in circumstances where judicial

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review could also be available.[1] In other words, rather than seeking to invalidate government decisions, parties are opting to pursue compensation and vindication through civil liability. Whether seeking a declaration against the Crown or substantial damages, the aggregate nature of class actions may mirror the public accountability sought through judicial review.

Seeking accountability from the Crown through a civil action is certainly not unprecedented (for example, *Roncarelli v. Duplessis*,[2] often invoked as a foundation for Canadian judicial review of executive discretion, was an action for damages). It is the arresting size and scope of modern class actions against the Crown that has led many observers to raise concerns.[3] To take just one example, the class action against the Government of Canada for its handling of the "Mad Cow" crisis of 2003-2005 involves a putative class of at least 100,000 farmers, and claims for damages in excess of $20 billion.[4] While this may provide a form of legal accountability, I believe that in many if not most of these cases, class actions are not well-suited to reviewing government action, and in some cases, class actions may result in privatizing key aspects of the policy process with deleterious consequences.[5]

In several distinctive respects, the Crown does not behave as other defendants tend to in the face of class actions. For example, the Crown has access to funds to meet judgments, even extremely large judgments. Unlike large corporate defendants who may be vulnerable to the threat of huge damage awards (and may even be vulnerable to the publicity surrounding disclosure of contingent liability if huge damages are sought), the Crown is not easily intimidated in this fashion.[6] Some observers have commented on the culture of the Crown (in particular, the federal Crown) as averse to settlements and aggressive in the use of procedural mechanisms in an attempt to strike out virtually all claims that seek to impose liability for policy choices.[7] Furthermore, if push comes to shove, the government retains the ultimate

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1 For a review of these cases, see D. Elliot, "Fit for a Queen: Fiduciary Duties and the Crown" (Paper presented to the Crown Liability Conference, Osgoode Hall Law School, 16 November 2005).

2 *Roncarelli v. Duplessis*, [1959] S.C.R. 121.

3 For a review of this literature, see C. Jones & A. Baxter, "The Class Action and Public Authority Liability: 'Preferability' Re-Examined" in this volume of the U.N.B.L.J.

4 *Sauer v. Canada (Attorney General)* 2006 A.C.W.S.J. LEXIS 19.

5 For a more detailed discussion of this position, see L. Sossin, "Redress for Unjust State Action: An Equitable Approach to the Public/Private Distinction" in D. Dyzenhaus & M. Moran, eds., *Calling Power to Account* (Toronto: University of Toronto Press, 2005) 196 [Sossin, "Redress for Unjust State Action"] and L. Sossin, "Public Fiduciary Obligations, Political Trusts and the Evolving Duty of Reasonableness in Administrative Law" (2003) 66 Sask. L. Rev. 129 [Sossin, "Public Fiduciary Obligations"].

6 See Jones & Baxter, *supra* note 3. Specifically, Jones and Baxter contend that the Crown is not a "rational actor" in the sense this term is used in the class actions literature and that the analogy of the Crown to a corporation with voters as shareholders, etc., is not sustainable.

7 See J. Kelly & L. Sossin, *The Federal Government in Court* (2005) (an unpublished paper commissioned by the Department of Justice and archived with the author).

trump card, which is simply to legislate itself retroactively out of liability for civil damages, a tactic discussed in more detail below.

Governments are driven by political and not economic bottom lines (although the two certainly may be intertwined). For example, in the "tainted blood" litigation, the Federal Government agreed to extend the number of people subject to a settlement beyond what any reasonable likelihood of liability might have justified because it was politically expedient to do so.[8] In other settings, such as the Chinese "head tax" class action, the Crown eventually settled with unsuccessful classes following the negative press arising from government success in the courtroom.[9] Part of the consequence of political rather than economic bottom lines is often an emphasis on short-term solutions. This dynamic is compounded by the fact that the government who decides on a strategy to use in defence against a class action may not be the same government that has to live with the results of the decision.

I conclude that class actions against the Crown which seek to attribute liability on the Crown for the preferences pursued by government may have distorting effects for public policy and for public law. Both judicial and government responses to the rise of class actions against the Crown are justified to address these challenges. Those responses, however, must be tempered by recognition of why litigants turn to class actions in the first place – accountability for alleged wrongdoing or harm caused by executive action. The goal of judicial and government initiatives in this area should not be to immunize government action from judicial scrutiny or to further ossify the categories of judicial review; rather, the goal should be a more coherent, rigorous and responsive set of avenues for holding the government accountable for its actions. It is possible and desirable for administrative law to develop in a manner that acknowledges and addresses the public and private motivations behind administrative law litigation.

This analysis is divided into three sections. In the first section, I examine class actions against the Crown as a form of administrative law by other means,

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[8] The Federal Government settled a series of "tainted blood" class actions, including a national class action originating in Ontario, in 1999, but the settlement covered only the 1986-1990 period. Those infected before or after this date were not included in the settlement. Political criticism and effective lobbying resulted in a decision in 2004 to extend the "tainted blood" settlement to groups whom the government had said in 1999 could not have successfully litigated their claims – see Brian Laghi & Erin Anderssen, "Ottawa set to aid hep C 'forgotten'" Globeandmail.com (22 November 2004), online: <http://www.hepc8690.com/PDFs/GlobeAndMail-2004-11-22.pdf>.

[9] For example, the Court of Appeal for Ontario upheld the denial of a certification of a class action by Chinese-Canadians seeking repayment of "head taxes" paid by Chinese immigrants in the early 20th century. See *Mack v. Canada (Attorney General)* (2002), 60 O.R. (3d) 737 (C.A.), leave to appeal to the S.C.C. refused, [2002] S.C.C.A. No. 476 [*Mack*]. Following a concerted political campaign in the wake of this judicial defeat, it became an issue in the 2005 federal election campaign with various parties offering apologies, compensation and education funds – see "Political debate heats up over Chinese head tax" CBC News (5 January 2006), online: <http://www.cbc.ca/story/canadavotes2006/national/2006/01/05/chinese-tax060105.html>. In June of 2006, Prime Minister Stephen Harper kept his campaign pledge and offered an apology and symbolic compensation for the "head tax".

highlighting the public/private dichotomy used by the Court to distinguish class actions from judicial review of administrative action. In the second section, I consider whether judicial review should form a condition precedent for some class actions against the Crown. Finally, in the third section, I turn to an analysis of the range of government responses to class actions against the Crown. I conclude that class actions against the Crown should not be artificially divorced from judicial review against the Crown – each of these should serve as mutually reinforcing forms of legal accountability for public action. To accomplish this end, each avenue for redress against the Crown must be reformed, and to some extent, reconceptualized.

1. Administrative Law by Class Actions

The conventional view is that private law duties are inconsistent with review of government decision-making because private law duties presuppose a duty owed to a discrete group, whereas the nature of public law authority presupposes a duty owed to the public as a whole. A Minister deciding on funding cannot be said to owe a specific duty to act in the interests of a particular constituency; rather, it is in the nature of policy-making to choose from among worthy recipients for public benefits and burdens. This dichotomy between public and private duties owed by the Crown was taken up by the Supreme Court in the context of regulatory negligence in *Cooper v. Hobart*[10] and *Edward v. Law Society of Upper Canada.*[11]

Both *Cooper* and *Edward* involved class actions brought by investors who lost money due to the mishandling of their investment by mortgage brokers (*Cooper*) or lawyers (*Edward*). These investors then sought recovery from the relevant regulators on the grounds that the regulators had violated their duty of care by not taking steps to prevent the misdeeds at issue. In both cases, the Supreme Court found that the regulators were not liable. The basis for this finding in each case was that nothing in the governing statutes indicated that the regulators owed a special duty to these investors as opposed to the general duties owed by the regulators to the public as a whole. McLachlin C.J.C. and Major J., writing jointly for a unanimous Court, explained this logic succinctly:

> In this case, the statute does not impose a duty of care on the Registrar to investors with mortgage brokers regulated by the Act. The Registrar's duty is rather to the public as a whole. Indeed, a duty to individual investors would potentially conflict with the Registrar's overarching duty to the public.[12]

This passage reflects a common judicial response to allegations of civil liability against the Crown. Courts attempt to demarcate a zone of deference to policy-making from a zone of intervention for the breach of recognized private law duties.

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[10] *Cooper v. Hobart*, 2001 SCC 79 [*Cooper*].

[11] *Edward v. Law Society of Upper Canada*, 2001 SCC 77 [*Edward*].

[12] *Cooper, supra* note 10 at para. 44.

In this sense, the approach taken to the discretion exercised by the Registrar of Mortgage Brokers in *Cooper* is akin to the notion of deference from administrative law. They explain that another reason why no civil liability should attach to the policy choices made by the Registrar is the distinction between government policy and the execution of policy: "As stated, the Registrar must make difficult discretionary decisions in the area of public policy, decisions which command deference."[13] In other words, even when considering the application of liability in the private law sense, courts may continue to view the impugned act (or omission, in this case) in fundamentally public law terms.[14]

The dichotomy between the Crown's duty to the public and its duty to a discrete individual or group was highlighted again in *Harris v. Canada.*[15] *Harris* involved a class action against the Minister of National Revenue for providing an advance tax ruling in 1991 which, in effect, permitted a wealthy family trust to transfer assets to the U.S. without tax penalties.[16] The plaintiff was a member of an unincorporated public interest group named "CHO!CES", which is concerned with social justice and fiscal issues. Harris claimed that the Minister's exercise of discretionary authority was undertaken, *inter alia*, illegally, improperly or for ulterior motives (namely favouritism and preferential treatment by way of a covert deal when the Minister interpreted the provisions of the Act in favour of a specific trust) and constituted a breach of the fiduciary obligation owed to all taxpayers to act in their interest. The remedy sought by the class was not damages but rather a declaration by the Court that the decision of the Minister was invalid. The litigation raised the issue of whether a Minister's duty under civil law to all taxpayers not to breach fiduciary obligations could be distinct from the Minister's duty to discharge the public trust in the administrative law sense (i.e. the duty to exercise discretion reasonably and fairly).[17] Some might wonder why a class action was needed in such circumstances at all. Without damages to aggregate, there is no substantive difference between a declaration issued to all taxpayers that a governmental decision breached a duty and a declaration to that effect issued to just one taxpayer. Here again, however, the sense that the Minister owed a duty to "a class" blends private and public senses of accountability.

While the government succeeded in having the claim struck at first instance on the grounds that a third party has no standing to challenge the Minister's decision on

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[13] *Ibid.* at para. 53.

[14] See also *Mt. Sinai Hospital Centre v. Quebec*, [2001] 2 S.C.R. 281 (per Binnie J.).

[15] *Harris v. Canada*, [2000] 4 F.C. 37 (C.A.), leave to appeal to S.C.C. refused on 26 October 2000, without reasons, 2000 CarswellNat 1644 [*Harris*].

[16] This could also be characterized as "follow-on" litigation as it relied on an Auditor General's critical report of the transaction.

[17] Another approach to this dichotomy is to construe administrative law duties themselves as equitable, and to question the public/private divide in settings of governmental accountability – for a discussion, see Sossin, "Public Fiduciary Obligations", *supra* note 5.

a tax assessment,[18] the class was successful in appealing this ruling to a Federal Court judge,[19] and the Federal Court of Appeal upheld this decision, finding that the claim raised a justiciable issue, that Harris had established public interest standing to pursue the action, and that it was not "plain and obvious" that Harris' claim could not succeed.[20] Specifically, the Federal Court of Appeal held that it was not "plain and obvious" that the Crown owed no fiduciary obligation. After procedural wrangling about Crown privilege and discovery, the case proceeded to trial. At the conclusion of the trial, Dawson J. dismissed the claim,[21] holding that no fiduciary duty, or duty akin to a fiduciary duty, is owed by the Minister of National Revenue to all taxpayers when providing an advance ruling on a tax matter to a particular taxpayer. Dawson J. rearticulated the traditional dichotomy between public and private duties – either the Crown owed specific, private law duties to all taxpayers, or the Crown owed a general public law obligation to uphold the public interest. She chose the latter characterization and the class action consequently was dismissed. Absent any obvious indications of bad faith, it was, in her view, for the appropriate Minister to determine what state action is or is not in the public interest.

Private accountability through civil actions for damages (or declarations) is premised on the view that the government owes a duty of care to discrete individuals and groups, rather than to the public interest at large. On this basis, as in *Harris*, courts have dismissed several attempts at advancing class actions against the Crown. This principle has been reinforced in a number of subsequent cases. For example, in *Grant v. Canada (A.G.)* (a class action involving damage due to toxic mould in new housing to which an Aboriginal community was relocated), Cullity J. struck certain paragraphs from a statement of claim for characterizing alleged governmental shortcomings as breaches of fiduciary obligation. He could find no duty to the class apart from the general duty owed to the public.[22] In *Gorecki v. Canada*, Rady J. struck a claim against the Crown for failing to pay interest on retroactive Canadian Pension Plan (CPP) benefits on similar grounds; that is, that the government owed no duty to the proposed class of plaintiffs that was distinct from its duty to the public as a whole.[23] Still other cases have characterized the government's obligation to a proposed class as a "political trust" rather than a legally enforceable duty.[24] Such decisions reflect the commonly held view that the government either owes a general obligation to the public interest or specific obligations to certain individuals and

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[18] *Harris v. R.* (1997), 98 D.T.C. 6072 (F.C.T.D.) at 6077.

[19] *Harris v. R.*, [1999] 2 F.C. 392 (T.D.).

[20] *Harris*, *supra* note 15 at 58-59.

[21] *Harris v. R.*, [2001] F.C.J. No. 1876 (T.D.).

[22] *Grant v. Canada (Attorney General)*, 2003 FCA 77 at para. 2.

[23] *Gorecki v. Canada*, (17 August 2005), 39924 CP (Ont. Sup. Ct.).

[24] See, for example, *Callie v. Canada* (1991), 41 F.T.R. 59 (the case involved the same class and fact pattern before the Federal Court that later was brought before the Ontario Superior Court in *Authorson*, *infra* note 26. While the government was successful, it settled the claim in advance of the appeal of the decision.)

groups; but it cannot owe and discharge both obligations simultaneously. However, why should this necessarily be an either/or proposition? It is hardly inconsistent with general public interest duties that some public officials or bodies owe specific duties to some individuals and groups.

Class actions are particularly popular as mechanisms to hold the Crown legally accountable for decisions made in the more distant past (when judicial review applications arguably would be moot). Cases such as *Mack v. Canada* (a class action against the federal Crown for unjust enrichment arising out of the "head tax" imposed on Chinese immigrants to Canada over a period stretching from 1885 to 1947),[25] *Authorson v. Canada* (a class action against the federal Crown for breach of fiduciary obligations arising out of a failure to award interest on pension payments to disabled veterans over a period from 1917 to 1990),[26] as well as *Bonaparte v. Canada*[27] and *Cloud v. Canada*[28] (class actions against the federal Crown for breach of fiduciary obligation involving residential schools for aboriginal children and damages for abuse suffered by those children and for loss of culture, language and heritage), pose the particular question of when governments should be held civilly liable for decision-making which was valid at the time it was made, in a public law sense, but which has come to be viewed retrospectively as an injustice.

Whether to recognize and redress past injustices through reparations is ultimately a political decision, but it is one to which class action litigation may contribute constructively. In an earlier analysis of *Authorson* and *Mack*, I suggested that courts should approach these cases as catalysts for political settlement, not as adjudicators of reparations. Courts can give critical legitimacy to the arguments of those harmed by state action or their descendants, but beyond declaratory relief, there are significant distortion effects to which these class actions might give rise.

These distortion effects arise because, in order to succeed in a class action on this basis, the applicants must persuade the Court that the Crown breached specific duties owed to them. For example, the applicants in *Authorson* argued that the Crown breached an equitable obligation by failing to invest their pension funds in interest-bearing accounts as any reasonable trustee in the private sector would have done, while the applicants in *Mack* argued the Crown breached an equitable obligation by enriching itself unjustly through the "head tax" against Chinese immigrants. However, focusing on a breach of specific duties suggests that the Crown breached no public duties by this inequitable conduct. In my view, this distorts our focus on the legal accountability of the Crown. While the Chinese immigrants may be entitled to have their money back (or moneys paid to the benefit of the present-day Chinese community), the Crown's duty was and is to the public at

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[25] *Mack, supra* note 9.

[26] *Authorson v. Canada* (2002), 215 D.L.R. (4th) 496 (Ont. C.A.), rev'd 2003 SCC 39 [*Authorson*].

[27] *Bonaparte v. Canada* (2003), 64 O.R. (3d) 1 (C.A.).

[28] *Cloud v. Canada* (2005), 73 O.R. (3d) 401 (C.A.).

large in how it deals with vulnerable groups, such as new immigrants. To see the Crown's relationship with the disabled veterans in *Authorson* or the Chinese immigrants in *Mack* as founded on private law principles constructs, in my view, an artificial and unsustainable boundary between the Crown's obligations to those affected by their decisions and to the public interest broadly construed.

While the court has cleaved to the distinction between the Crown's public and private duties, litigation against the Crown on public and private law grounds may often arise from similar facts or transactions. Class actions against the Crown, for example, are sometimes "follow-on" claims, where the work of public bodies such as regulatory agencies, criminal prosecutions and public inquiries provide the groundwork and factual record for a class action to proceed upon.[29] In such settings, private actions are predicated on public proceedings. Where the public body has succeeded in its investigations and taken appropriate actions, it is not clear what additional accountability class actions can provide. For example, *Harris* arose following an Auditor General's critical report on the circumstances of the tax advance ruling. Similarly, a class action alleging liability for government acts and omissions at the city, provincial and federal levels relating to the SARS crisis,[30] followed closely on the heels of a judicial inquiry, an independent task force review, numerous ministry studies and election campaigns at the city, provincial and federal level since 2003. In such circumstances, what more can a class action alleging civil wrongs accomplish beyond reallocating public funds to private litigants in contexts where the government of the day has seen fit not to do so or to do so subject to its own conditions?

What I have termed "distortion effects" of class actions against the Crown are exacerbated by the relatively low threshold of proof necessary for a class action to clear the only hurdle which matters – the certification motion. Whereas judicial review applications must succeed on their merits, class actions in most cases need achieve no more than certification (or sometimes just public interest standing) to yield significant leverage toward settlement. Whereas judicial review applications are aimed at the validity of government decisions within a framework of statutory authority, class actions attack government decisions only collaterally (often a more appealing prospect for plaintiffs). In addition, class actions are more likely to attract media attention and the attention of defendant governments than the more esoteric judicial review applications.

In some cases, the class action itself has merged with the traditional judicial review application, such as where a class action raises exclusively administrative law

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[29] See J.B. Laskin, L. Plimpton & A. Kemshaw, "The Certification of Competition-Related Class Actions in Canada" (Paper presented to the Litigating Conspiracy Conference London, Ontario, March 2005) (observing that virtually all class action certifications in the competition law settings have followed on convictions for antitrust conspiracy).

[30] See *Williams v. Canada (Attorney General)* (2005), 257 D.L.R. (4th) 704 (the class action against the federal Crown and the City of Toronto were struck out while the class action against the provincial Crown was permitted to go forward).

grounds. For example, a recent class action sought a declaration from the Court that hundreds of immigration decisions were flawed on grounds of a lack of independence and impartiality due to the reorganization of the Immigration and Citizenship ministry after a cabinet shuffle.[31] While this case was unsuccessful, it raises an intriguing question as to whether administrative law requirements such as fairness, impartiality and reasonableness may also be seen as duties of care in the private law sense. Where a government acts unfairly, or in a biased manner or unreasonably, why should the government not be liable for damages which result to particular individuals or groups as a result? There is nothing inconsistent with a public law approach to see the Crown's legal relationship with those affected by its decisions in monetary terms – what I object to is the attempt to draw bright lines which link monetary damages necessarily to the Crown owing only private obligations to discrete groups.

I believe there may be an approach which permits us to surmount the dichotomy between public and private law discourses over Crown liability. To adopt the phrase of the moment, there is in this setting a "third way". This approach involves seeing administrative law requirements themselves as equitable in origin and understood as duties in a public law sense,[32] while seeing breaches by the Crown of private law duties as calling into question the validity of the government action in a public law sense. Seeking to merge traditionally public and private law frameworks for Crown action may lead to a number of practical consequences. For example, it is arguable that unless a public law duty is breached, it is difficult to conceptualize how damages could flow from government decision-making on grounds of civil liability. In other words, unless it is clear that a government decision is invalid on public law grounds (e.g. by infringing an administrative law standard such as fairness or reasonableness), a finding of civil liability or damages may well be inappropriate. This sequential logic has led to calls for a judicial review application as a condition precedent for class actions against the state. It is to the merits and implications of this argument that I now turn.

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[31] See *Nalliah v. Canada*, [2004] F.C. 1649.

[32] See Sossin, "Public Fiduciary Obligations", *supra* note 5. This argument builds on an historical analysis showing that administrative law guarantees of fairness and especially reasonableness emerged as a species of trust relationship and early cases often characterized public decision-makers as "trustees" or "fiduciaries". On this view, administrative law duties are not simply boundaries of legality but also equitable obligations which may vary according to the interests and relationships at stake. In this sense, public officials not only owe a general duty to all to engage only in action that is legal, but also an equitable duty to particular individuals or groups with which that decision-maker has a relationship of trust or dependence. See also P. Finn, "The Forgotten 'Trust': The People and the State" in Malcolm Copp, ed., *Equity Issues and Trends* (Sydney: The Federation Press, 1995) c. 5; and A. Mason, "The Place of Equity and Equitable Doctrines in the Contemporary Common Law World: An Australian Perspective" in D.W.M. Waters, *Equity, Fiduciary and Trusts* (Toronto: Carswell, 1993) 131.

2. Should Courts Require Public Law Challenge as a Condition of Certification for Class Actions Against the Crown?

If, as suggested above, public and private law frameworks for seeing the legal accountability of the Crown are artificially distinguished, and class actions against the Crown can have distorting effects by emphasizing this distinction, what can be done to stem the tide? One approach is to build in a finding of invalidity against the Crown in the public law sense to the criteria for private law liability, much as the Court has in its adaptation of the *Anns* test for negligence incorporated public policy considerations.[33] In *Liability of the Crown*, Hogg and Monahan write:

> It goes without saying that the Crown is liable to pay damages only if the plaintiff can establish facts that amount to a cause of action against the Crown. A lawful act by the Crown, even if it causes injury, is not tortious, and therefore gives rise to no liability to pay damages. Even an act that is unauthorized by law is not necessarily tortious: if the circumstances do not come within a recognizable head of tortious liability, the Crown will come under no liability to pay damages. [34]

In light of this, should the Crown be able to insist on parties seeking judicial review for a government decision prior to bringing a class action against the Crown?[35] This requirement would capture, albeit imperfectly, the sense described above that a successful class action against the Crown necessarily implies a breach of public as well as private law duties. The foundation for this position may be found in existing jurisprudence. In *Comeau's Sea Foods Ltd v. Canada (Minister of Fisheries and Oceans)*, Stone J.A. of the Federal Court of Appeal explained the rationale in the following terms:

> I have concluded that the availability of administrative law remedies by way of judicial review is a consideration to be taken into account under the second branch of the *Anns* test in deciding whether the scope of the prima facie duty of care should be negatived in the circumstances of this case. In my view that duty is so negatived. Accordingly in my view, as the appellants owed no duty of care to the respondent, the appellant should not be held liable in negligence.[36]

Stone J.A. was analyzing, on the merits, an action in negligence and was determining whether there were any residual policy considerations which could negate a duty of care on the part of the Minister of Fisheries and Oceans. He was applying the second

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[33] *Anns v. Merton London Borough Council*, [1978] A.C. 728 (H.L.) [*Anns*].

[34] Hogg & Monaghan, *Liability of the Crown*, 3rd ed. (Toronto: Carswell, 2000) at 26.

[35] I am indebted to Michelle Ducharme for drawing my attention to this issue in her research toward an LLM in Administrative Law with Osgoode Hall Law School. For a case in which a Court struck out a claim on these grounds, see *C.A.M.T. v. Mayne Nickless Transport Inc.*, [1999] BCJ No. 2732. (S.C.).

[36] *Comeau's Sea Foods Ltd. v. Canada (Minister of Fisheries and Oceans*, [1995] 2 C.F. 467 at 488 (F.C.A.), aff'd by [1997] 1 S.C.R. 12.

branch of the *Anns*[37] test, and concluded that the availability of administrative law remedies in judicial review could be taken into account as a factor in determining whether the duty of care should be trumped by policy considerations. In other words, the elements of negligence in the context of a statutory discretion require that:

a) there was an unlawful exercise of statutory discretion; and
b) this unlawful exercise was tortious, in that it met the elements of a common law tort.

On a motion to strike out a statement of claim, the Court must be satisfied that assuming the facts as stated in the statement of claim can be proven, it is plain and obvious that the plaintiff's statement of claim discloses no reasonable cause of action.[38] While courts have accepted that the availability of administrative remedies in judicial review constitute a factor to be taken into consideration in the application of the second branch of the *Anns* test,[39] it has yet to be the basis for a court declining to certify or grant standing to a class action against the Crown.

The Federal Court has also recognized that another rationale for the requirement of judicial review prior to the launching of a private action is to forestall collateral attacks on administrative decisions. As long as the harm is still occurring and judicial review is an available option, these decisions have held that it would be an impermissible collateral attack to bypass judicial review and seek liability in a civil court. In *The Queen v. Grenier*,[40] for example, the Federal Court required a prisoner seeking damages for being placed in administrative confinement by the warden to first pursue a judicial review of the warden's penalty.[41] Where the harm is no longer able to be challenged by way of judicial review, however, the Federal Court has been unwilling to impose this requirement to preclude civil liability.[42] The existence of an adequate alternative remedy should always be considered by a Court in evaluating a proposed class action against the Crown, but it would be unfair in some circumstances to prevent a class from pursuing a civil claim in circumstances where a judicial review is no longer viable. In light of the many contingencies which may accompany class actions against the Crown, including those alleging historic wrongs, it is preferable to articulate the applicable principles rather than creating a bright line threshold to be applied blindly.

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[37] *Anns*, *supra* note 33.

[38] As established by the Supreme Court of Canada in *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959, the test is as follows: assuming that the facts as stated in the statement of claim can be proven, is it "plain and obvious" that the plaintiff's statement of claim discloses no reasonable cause of action?

[39] See *Radil Bros. Fishing Co. v. Canada (Department of Fisheries and Oceans)*, [2002] 2 F.C. 219 (F.C.A.) at paras. 36-37.

[40] *The Queen v. Grenier*, 2005 FCA 348.

[41] This approach has been followed in *Mohiuddin v. Canada*, 2006 FC 664; and *Dhalla v. Canada (Minister of Citizenship and Immigration)*, [2006] FCJ No. 132.

[42] See *Samimifar v. Canada (Minister of Citizenship and Immigration)*, 2006 F.C. 1301.

The central principle animating such cases is that legal accountability for decision-makers exercising discretion should include a public component. This principle will usually be satisfied by a court requiring a judicial review and a finding that a public duty was breached as a condition of permitting a class action against the Crown from proceeding. In circumstances where a court views this condition as inappropriate, the court should be convinced either that there is another mechanism for securing the accountability for the public law duty or that the private duties arising in the case ought to prevail over the public duty because of the specific circumstances of the case.

Another concern with judicial review as a requirement for permitting a class action to proceed is that it might necessitate multiple proceedings and inhibit access to justice for the aggrieved applicants. Applicants could (and already do), however, bring public and private proceedings challenging the same decision or practice. For example, in *Hislop v. Canada* a representative plaintiff launched a challenge to the CPP exclusion of same sex couples from survivor pension benefits, as a class action seeking damages and as a class proceeding seeking a declaration under the *Charter*.[43] While the Court struck claims for breach of fiduciary obligation and unjust enrichment (the basis of the class proceeding), the claim of a *Charter* equality breach succeeded, resulting in an award for prospective pension payments and arrears. To require a finding of invalidity as a condition to imposing private law liability should not put applicants to the unfair burden of two separate legal proceedings.

Another example of this fusion of public and private accountability through both a judicial review and civil claim (although not in the context of a class action) was *Doe v. Board of Commissioners of Police for Metropolitan Toronto*.[44] The *Doe* case involved a suit against the Toronto police in negligence combined with a *Charter* challenge under both sections 7 and 15 alleging that a woman was used as "bait" to catch a sexual offender and not warned by police of the danger because of discriminatory views on how women generally would react to such warning. The plaintiff/applicant was successful (the City of Toronto settled rather than appeal the case to the Court of Appeal) and as a result, public officials were called to account for their policy choices. *Doe* falls into the category of public torts which at the same time have been framed as collateral review cases and should have culminated only in the remedy of a public law declaration.[45]

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[43] *Hislop v. Canada* (2003), 234 D.L.R. (4th) 465 (Ont. SCJ); *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Charter*].

[44] *Doe v. Board of Commissioners of Police for Metropolitan Toronto* (1989), 58 DLR (4th) 396, aff'd (1990), 74 OR (2d) 225 (Div Ct) [*Doe*].

[45] See C. Harlow, "Damages and Human Rights" (2004) N.Z.L. Rev. 429 at 435. As Harlow notes of *Doe*, "The fact that the judge awarded over $220,000 in damages, with costs of up to $5 million, suggests that sanction or punishment was the underlying motivation for the decision."

The approach outlined above will enable courts to be more judicious in permitting class actions against the Crown to proceed. It may be appropriate in some cases to defer or deny certification of a class action where there is an available alternative route of judicial review on administrative law or constitutional grounds. Depending on the outcome of such a judicial review, the Court hearing a certification motion will be in a better position to determine if a class action is the preferable procedure to the dispute at hand, and in some cases, this will likely dispose of the need for a certification motion.

Consider two hypothetical class actions are filed against the Crown. The first class action is against the federal Crown on behalf of all those detained on security certificates and deported to their country of origin. The second class action is against the federal Crown for failing to detain terror suspects on security certificates and jeopardizing the safety of communities across the country as a result. In both cases, the exercise of a statutory authority is at issue. In each case, if it were a judicial review, the key question for the Crown would be whether it complied with its legal duties in exercising or choosing not to exercise its discretion to issue security certificates. While the issuance or non-issuance of security certificates may have a range of consequences for the affected parties, it remains fundamentally a public decision. It is a core principle of administrative law that if the government decision-makers have complied with their public law duties, the fact that the decision-maker has been afforded discretion necessarily implies that they have the leeway to choose between a range of reasonable courses of action. It ought to be incumbent on an aggrieved applicant to demonstrate that the decision-maker failed to discharge her or his public duty prior to imposing a private duty. In the hypothetical scenario presented above, this might serve to facilitate a class action by those held by the state on security certificates, since there already have been judicial reviews of the invalidity of security certificates.[46] However, it could serve as a hurdle to the class action alleging damage from the failure to issue security certificates. Those applicants would first have to show that the decision not to issue security certificates was unreasonable in a public law sense (which to the best of my knowledge has yet to be the subject of a judicial review).

Clarifying the relationship between public and private forms of legal accountability is designed to create a body of principles and standards in public law and private law that are mutually reinforcing and coherent. My hope is that just as certain equitable, tortious and other kinds of liability against the Crown should be contingent on findings of invalidity on administrative law grounds, so those findings of invalidity should consider the Crown's administrative law duties in equitable terms and not just terms of legality.[47] In other words, to insist that a public duty be found to have been breached before a private duty will be imposed is not to reinforce a watertight distinction between public and private duties. It is intended, rather, to highlight the interdependence between these two forms of legal accountability and to

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[46] See, for example, *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1.

[47] This argument is developed further in Sossin, "Redress for Unjust State Action", *supra* note 5.

confirm each has application against the Crown. One, however, should not be permitted to usurp the important function and distinct rationale of the other.

One further objection to the approach advanced above is that it subjects the Crown to different standards and protections against certification than other defendants in the context of class actions. The Crown ought to be held to a different standard than other class action defendants, however because the Crown, through its control over the legislative process, has the unique ability to modify its common law liability both on administrative law and private law grounds when it wishes to do so. This dynamic is discussed in greater detail below.

3. Legislative Responses to Class Actions: Defending the "Public Interest"?

In the previous two sections, the judicial response to class actions against the Crown has been considered. In this third section, I examine more closely the legislative response. As a result of the close relationship between the executive and legislative branches of government in a Westminster, Parliamentary democracy, a government may use legislation to facilitate, impede or modify class actions. In a sense this unique power of the Crown to legislatively modify (or nullify) its liability is why I believe the "third way" common law approach to Crown liability (through the fusion of administrative law and equitable obligations) is not impractical or too onerous on the Crown. Indeed, while the approach I advocate may result in greater protection for the Crown against class actions for damages, it also would expand the availability of judicial review on administrative grounds (and perhaps also declaratory class actions).

Governments have access to the legislature to alter the playing field of class actions. Most dramatically, provincial class action regimes such as the Ontario *Class Proceedings Act*[48] represent legislation intended to facilitate class action litigation, including against the Crown itself. While generally viewing class actions as promoting access to justice, governments have also sought to immunize the Crown against specific class actions through legislative amendment. For example, in the context of the disabled, veterans' pensions which had been permitted to accumulate for six decades without interest being awarded, the government introduced legislation in 1990 to begin paying interest on these accounts. But the legislation also created a statutory bar to any civil recovery for interest not paid prior to 1990. It was this statutory bar that lay at the heart of the *Authorson* litigation, referred to above.[49] In *Authorson*, both the trial judge and a majority of the Court of Appeal found that the statutory bar had been enacted without sufficient "due process" as within the meaning of s.1(a) of the *Canadian Bill of Rights*.[50] The Supreme Court unanimously overturned this finding, affirming that a duly enacted statute need not

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[48] *Class Proceedings Act, 1992*, S.O. 1992, c. 6.

[49] *Authorson, supra* note 26.

[50] *Canadian Bill of Rights*, 1960 c. 44

be subject to any procedural constraints with respect to affected parties. Writing for the Court, Major J. construed the statutory bar as a form of expropriation, which was a permissible legislative function. He held that the only procedure due to any citizen of Canada in relation to the legislative process is that the proposed legislation receive three readings in the Senate and House of Commons and that it receive Royal Assent.[51] The remedy for affected parties lay with the political process and the ballot box, not the courts.[52]

This issue was addressed recently in *Kingsway General Ins. Co. v. Alberta*[53] in which a lower court in Alberta upheld the constitutionality of an amendment to the Alberta *Insurance Act*[54] freezing retroactively increases in automobile insurance premiums in the province, notwithstanding that some insurance companies had already collected the higher premiums. One of the affected companies, Kingsway, commenced a court action against the Province, alleging that the insurance company had suffered damages. After Kingsway commenced its action, the government passed further legislation which named Kingsway's court action explicitly, extinguished it without costs and precluded other similar actions against the government. Relying on this legislation, the government then sought summary dismissal of Kingsway's action claiming the legislation as a complete defence. Kingsway brought a counter-motion for a declaration that the legislation extinguishing its claim was *ultra vires*. Relying on the holding from *Authorson* that affected parties are not entitled to procedural rights in the context of legislated bars to civil recovery (and the fact that the *Alberta Bill of Rights*, like the *Canadian Bill of Rights* on which it is modeled, applied only to individuals, not corporations), the Court upheld the legislation.[55]

Governments may legislate new procedures in relation to class actions which can provide incentives or disincentives for certain kinds of class actions. For example, in *Energy Probe v. Canada (Attorney General)*,[56] the Ontario Divisional Court upheld a statute which provided a cap of $75 million on civil recovery for damages from an operator of a nuclear power plant. The Divisional Court rejected

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[51] *Authorson*, *supra* note 26 at para. 37.

[52] It is perhaps noteworthy that the lawyers for *Authorson* have continued to seek judicial remedies even in the face of the statutory bar being upheld by the Supreme Court (and in the face of the death of Joseph Authorson in 2003). The litigation continued on the question of whether funds in the veterans' pension accounts should have devolved to their estates rather than to the Crown to be disbursed. See J. Jaffay, "Ottawa not obliged to pay disabled vets' pensions to estates" *Lawyers Weekly* (9 April 2004).

[53] *Kingsway General Ins. Co. v. Alberta* (2006), 258 D.L.R. (4th) 507 (Alta Q.B.).

[54] *Insurance Act*, R.S.A. 2000, c. 1-3.

[55] *Canadian Bill of Rights*, 1960, c. 44. *Alberta Bill of Rights*, R.S.A. 2000, c. A-14. Read J. also rejected the argument that the legislation undermined the rule of law and judicial independence and the somewhat novel claim that Kingsway had been subject to a "bill of attainder" (a finding of guilt legislated directly without a judicial trial).

[56] *Energy Probe v. Canada (Attorney General)* (1994), 17 O.R. (3d) 717 (Div. Ct.) [*Energy Probe*].

Energy Probe's contention that the cap in the *Nuclear Liability Act*[57] would lead to cost cutting in safety expenditures by Ontario Hydro. The Court also held that there were no constitutional impediments to such a cap: "under current law the rights guaranteed by s. 7 do not embrace the civil right to bring an action in court to recover damages. Actions for damages involve economic interests which are not protected by s. 7."[58]

While that legislation addressed the potential of class actions in the event of a nuclear accident, the Ontario Government has responded to a more tangible challenge in the securities context. The new amendments to the Ontario *Securities Act*[59] which came into effect December 31, 2005, are intended to make lawsuits by plaintiffs easier in Ontario, because plaintiffs will no longer need to prove that the defendants intended to deceive, manipulate or defraud, or that they acted recklessly. Liability under this new Ontario regime is also capped: the maximum amount that can be recovered from each director or officer is $25,000 or half of his or her compensation for the past 12 months, whichever is greater. The limit on recovery from the public company itself is higher: $1 million or 5% of the company's market capitalization, whichever is greater. Further, a plaintiff is required to obtain leave of the court before bringing a lawsuit, and the court will grant leave only if it is satisfied that the suit is being brought in good faith and has a reasonable prospect of success at trial.

Thus, the government will sometimes perceive it to be in the public interest to cap liability, at other times to facilitate civil liability, and at still other times to do both. Whatever its preference, the courts have been clear that they will not interfere with legislative modifications to the sphere of civil liability.

A recent and notable example of judicial deference to governmental policy preference in the sphere of civil liability is the Supreme Court's decision in *British Columbia v. Imperial Tobacco Canada Ltd.*[60] The case considered the validity of the *Tobacco Damages and Health Care Costs Recovery Act.*[61] This statute authorizes an action by the Government of British Columbia against a manufacturer of tobacco products for the recovery of health care expenditures incurred by the

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[57] *Nuclear Liability Act*, R.S. 1985, c. N-28.

[58] *Energy Probe*, *supra* note 56 at 754.

[59] *Securities Act*, R.S.O. 1990, c. S.3, amended by: 1992, c. 18, s. 56; 1993, c. 27, Sched.; 1994, c. 11, ss. 349-381; 1994, c. 33; 1997, c. 10, ss. 36-40; 1997, c. 19, s. 23; 1997, c. 31, s. 179; 1997, c. 43, Sched. F, s. 13; 1999, c. 6, s. 60; 1999, c. 9, ss. 193-221; 2001, c. 23, ss. 209-217; 2002, c. 18, Sched. H, ss. 6-14; 2002, c. 22, ss. 177-188; 2004, c. 8, ss. 46, 47 (1); 2004, c. 16, Sched. D, Table; 2004, c. 17, s. 32; 2004, c. 31, Sched. 34; 2005, c. 5, s. 64; 2005, c. 31, Sched. 20; 2006, c. 8, s. 144; 2006, c. 19, Sched. C, s. 1 (1, 2); 2006, c. 21, Sched. F, s. 136 (1). The specific provisions addressing civil liability are now found in ss.138.1 -138.14

[60] *British Columbia v. Imperial Tobacco Canada Ltd*, 2005 SCC 49 [*Imperial Tobacco*].

[61] *Tobacco Damages and Health Care Costs Recovery Act*, S.B.C. 2000, c. 30.

government in treating individuals exposed to those products. Here, the Crown acted as a proxy for a plaintiff class (by bringing litigation on behalf of all those who have incurred health care expenses in British Columbia as a result of smoking). Where the Crown pursues an aggregate claim, a reverse burden of proof arises, by which a defendant manufacturer must show that exposure resulting from its breach of duty did not give rise to the disease in respect of which the government claims for its expenditures. This legislation was upheld by the Supreme Court which rejected arguments that the legislation infringed judicial independence and the rule of law. Major J., writing for the Court, held:

> The judiciary has some part in the development of the law that its role requires it to apply. Through, for example, its interpretation of legislation, review of administrative decisions and assessment of the constitutionality of legislation, it may develop the law significantly. It may also make incremental developments to its body of previous decisions - i.e. the common law - in order to bring the legal rules those decisions embody 'into step with a changing society': *R. v. Salituro*, [1991] 3 S.C.R. 654, at p. 666. See also *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130, at paras. 91-92. But the judiciary's role in developing the law is a relatively limited one. '[I]n a constitutional democracy such as ours it is the legislature and not the courts which has the major responsibility for law reform': *Salituro*, at p. 670.
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> It follows that the judiciary's role is not, as the appellants seem to submit, to apply only the law of which it approves. Nor is it to decide cases with a view simply to what the judiciary (rather than the law) deems fair or pertinent. Nor is it to second-guess the law reform undertaken by legislators, whether that reform consists of a new cause of action or procedural rules to govern it. Within the boundaries of the Constitution, legislatures can set the law as they see fit. 'The wisdom and value of legislative decisions are subject only to review by the electorate': *Wells v. Newfoundland*, [1999] 3 S.C.R. 199, at para. 59.
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> In essence, the appellants' arguments misapprehend the nature and scope of the courts' adjudicative role protected from interference by the Constitution's guarantee of judicial independence. To accept their position on that adjudicative role would be to recognize a constitutional guarantee not of judicial independence, but of judicial governance.[62]

What then are the limits of the government's ability to evade accountability through civil action? In light of the view that there is no "right" to civil damages, it would appear that the only fixed limit is the long-recognized constitutional bar on legislation insulating government action from judicial review on administrative law grounds – in other words, where it is alleged that a government decision-maker acted without jurisdiction or forfeited jurisdiction through breaching the duty of fairness or acting in a patently unreasonable fashion, it is not open to the legislature to modify

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[62] *Imperial Tobacco*, *supra* note 60 at paras. 51-53.

the legal accountability of the Crown.[63] In this sense, while class actions may appear to represent administrative law by other means, it remains at best a contingent form of accountability, subject to the vicissitudes of the public interest. Judicial review on administrative grounds, if expanded to include the sort of equitable obligations which often fuel class actions against the Crown, would provide more robust legal accountability precisely because it would embody constraints on executive action which cannot be ousted by political will.

CONCLUSION

In this brief analysis, I have explored why class actions against the Crown for government decision-making are on the rise and the implications of this trend. I have also suggested that courts should consider denying or deferring certification of class actions where an alternative route of judicial review remains available (or combining class proceedings with a judicial review of the validity of the government action on administrative law grounds). Class actions against the government should not be permitted to serve as a route to privately enforced administrative law accountability.

The more the obligations and duties of government are construed in private law terms through class action litigation, the more the government's public interest commitments may be distorted. However, it is both possible and desirable to infuse public accountability with the added enhancements of access to justice, public recognition and aggregate involvement which characterize class actions. In other words, at the end of the day, the evolution of administrative law should not be to sharply distinguish between class actions and judicial review but rather to creatively combine the two contexts where government may be held to account. Ultimately, neither public nor private law provides, on its own, an effective and principled recourse to those who are aggrieved by the actions of the state.

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[63] See *Crevier v. Attorney General of Quebec*, [1981] 2 S.C.R. 220.