Case and Comment

CONSTITUTIONAL LAW — CROWN — CROWN CORPORATIONS — PREROGATIVE — EXECUTIONS — PRIORITIES — COMMERCIAL TRANSACTION.

The changing face of government activity over the past few decades has caused the courts to take a serious look at the Crown prerogative of priority of payment over ordinary creditors in executions against a debtor. Whether or not the Crown may claim the prerogative where it ventures into areas of commercial enterprise was the problem in *Regina (Provincial Treasurer) v. Workmen's Compensation Board and Edmonton (City.)*[1] The action here was brought pursuant to an interpleader order to determine priorities in payment out of a fund in the hands of the sheriff, among the Crown in the right of Alberta, the Workmen's Compensation Board and the City of Edmonton. The Board had filed a distress warrant in respect of the recovery of unpaid assessments. Afterwards a distress warrant was filed on behalf of the Provincial Treasurer of Alberta based on two chattel mortgages made by the debtor company to secure advances from the Treasury to the debtor. Under the Crown's warrant seizure of specific chattels was authorized and made. Subsequently the City of Edmonton filed a distress warrant in respect of a claim for unpaid business taxes. Ultimately the Board instructed the sheriff to sell the chattels seized under the Treasurer's warrant and the three parties claimed priority in the disbursement of the fund. The Crown based its claim on a common law prerogative to have first payment out of the assets of a Crown debtor.

Buchanan, C.J.D.C., held that the order of priorities was the City, the Board, and the Crown. The interesting aspect of the decision is the narrowing of the prerogative effected by the trial judge. After discussing several cases outlining the prerogative he followed the dicta in *Food Controller et al. v. Cork,*[2] a 1923 House of Lords decision, and decided that the debt arising out of the chattel mortgages was not within the scope of debts traditionally covered by the royal prerogative, and that no priority vests in the Crown where the debt is one of a commercial nature. On appeal to the Appellate Division of the Supreme Court of Alberta,

1 (1962), 39 W.W.R. 291; (1963), 36 D.L.R. (2d) 166.
2 [1923] A.C. 647.

the court affirmed his decision on the point without further considering the question, though the appeals were allowed on another ground.[3]

The Crown has long exercised the privilege of having first payment out of a debtor's assets. Initially, at common law, this privilege embraced the right to prevent a subject from suing the King's debtor until the King's debt had been paid. However the scope of the narrow prerogative was substantially restricted by subsequent legislation. By the statute 25 Edw. 3, c. 19, in 1351, a subject creditor was allowed to sue the King's debtor, although this was qualified by the condition that he could not have execution upon his judgment until the King's debt had been satisfied.[4] It is of interest to note that the question of priority in execution did not really arise here since the subject's right to execute was contingent upon the satisfaction of the King's claim and did not exist concurrently with that claim. Later, in 1541, by the statute 33 Hen. 8, c. 39, the rights of the subject were extended to permit execution without first satisfying the King's debt.[5] The issue of priority was thus conceived, since the subject creditor could validly issue a writ of execution upon his judgment to bind his debtor's goods. At the same time the Crown could initiate its process of recovery by writ of extent, issuing out of the Court of Exchequer, which bound the debtor's property upon teste.[6] The two writs necessarily came into conflict, illustrating the basic situation in which the Crown, over the years, has insisted on a right to first execution.

In such situations, where Crown and subject both have valid processes subsisting, competing for satisfaction out of a common debtor's property, the Crown's right to priority is generally considered to be predicated on a wide prerogative, judicially recognized as early as Lord Coke's time[7] and enunciated by Macdonald, C.B., in the early leading case, *The King v. Wells*.[8] In that case the Chief Baron held that wherever a subject's writ of execution upon a judgment and the King's writ of extent concurred, both attaching at some time before the sale of the debtor's goods, then the King's title was to be preferred. He said:

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3 (1963), 42 W.W.R. 226.

4 *Giles v. Grover* (1832), 9 Bing. 128, at pp. 281-2; 131 E.R. 563, at p. 621, *per* Lord Tenterden.

5 *Ibid.*

6 *Stringefellow v. Brownesoppe* (1549), 1 Dy. 676; 73 E.R. 142; *The King v. Cotton* (1751), Parker, 112; 145 E.R. 729.

7 *Quick's Case* (1611), 9 Co. Rep. 129a; 77 E.R. 916.

8 (1796), 16 East, 278; 104 E.R. 1094.

> I take it to be an incontrovertible rule of law, that where the King's and the subject's title concur, the King's shall be preferred . . . That in the case of two executions subsisting at the same time, the Crown's and the subject's title do concur; . . . each derives under his execution a title to be satisfied his debt out of the effects of his debtor. Both executions are in force at some one point of time before either is executed; the instant they thus concur, the King's prerogative to be preferred attaches . . .[9]

In *Giles v. Grover,*[10] Baron Alderson complemented that statement by referring to the situation where a creditor has completed his execution by sale, before the King's writ is issued. He added:

> If, however, the right of the subject be complete and perfect before that of the King commences, it is manifest that the rule does not apply, for there is no point of time at which the two rights are in conflict; nor can there be a question which of the two ought to prevail in a case where one, that of the subject, has prevailed already . . .[11]

The cases indicate that this wide prerogative, brought to the fore by Chief Baron Macdonald, has been judicially adopted to effect recovery of Crown debts over a wide range of situations. For instance, the prerogative has been claimed and applied to recover such debts owing to the royal revenue as duties for malt,[12] property and income taxes,[13] rent owing for the lease of Crown property,[14] deposits by government departments claimed in the liquidation of a bank,[15] and taxes due under the Special War Revenue Act.[16] Generally, the prerogative was claimed to recover money owed directly to the government coffers arising out of normal and traditional government activities. It was applied liberally and its scope was not questioned until early in the present century.

It is significant to note that authorities indicate that this "wide" prerogative is not particularized to cases involving executions against Crown debtors but is of much more comprehensive scope "determining a preference in favour of the Crown in all cases, and touching all rights of what kind soever, where the Crown's and the subject's right concur, and so come into compe-

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9 (1796), 16 East, 278, at p. 282; 104 E.R. 1094, at p. 1096.
10 (1832), 9 Bing. 128; 131 E.R. 563.
11 (1832), 9 Bing. 128, at pp. 156-7; 131 E.R. 563, at p. 574.
12 *The King v. Wells* (1796), 16 East 278; 104 E.R. 1094.
13 *In re Henley & Co.* (1878), 9 Ch. D. 469; *Comm'rs of Taxation for N.S.W. v. Palmer et al.,* [1907] A.C. 179.
14 *Attorney-General v. Leonard* (1888), 38 Ch. D. 622.
15 *The Queen v. The Bank of Nova Scotia* (1886), 11 S.C.R. 1.
16 *Re D. Moore Co. Ltd.,* [1928] 1 D.L.R. 383; *Re Tyrer Co. Ltd.,* [1930] 4 D.L.R. 320.

tition".[17] The vague generality of the substantive right has allowed the courts to limit its operation in the light of social, political and economic change, without, strictly speaking, contravening the traditional privilege of the Crown.

The expanding field of government activity originating about the turn of the century and rapidly intensifying through the period of the two Great Wars into the present day has given rise to the problem which is the subject of this comment. The Crown has moved into the traditional jurisdiction of private enterprise in building its vast corporate empire, some aspects of which are completely controlled by government, others merely directed or semi-controlled. Judicial notice of the change was taken in *Food Controller v. Cork*,[18] by Lords Birkenhead, Atkinson, and Shaw in the House of Lords and by Lord Sterndale, M.R., in the Court of Appeal.[19] These judges, in strong dicta, doubted that the Crown prerogative could be exercised to recover commercial or trading debts owed to large government departments in priority over ordinary creditors. In this case the Food Controller, in the exercise of statutory powers, appointed a company as agent to sell on commission and distribute frozen rabbits imported from Australia by the Board of Trade. The company sold the rabbits and was bound to pay over to the Food Controller the purchase money less commission. The company went into voluntary liquidation and the Food Controller claimed to be paid in priority over other creditors on the ground that this was a Crown debt. The Law Lords decided that the Companies (Consolidation) Act 1908 bound the Crown with respect to the prerogative, by virtue of a common law rule of statutory interpretation which lays down that where a statute specifically or impliedly makes reference to the Crown, it is bound thereby. However, in important dictum, the Earl of Birkenhead, L.C., said:

> The construction which I adopt makes it superfluous to embark upon any general consideration of the prerogative, or of the difference between Crown debts as the term was used generations ago and that term in a changed age, when it governs sums of money owing to the immense trading establishments which various Government Departments have been authorized to create.[20]

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17 *The King v. Wells* (1796), 16 East, 278, at p. 282; 104 E.R. 1094, at p. 1096; Halsbury's *Laws of England*, 3rd ed., vol. 7, p. 326; *Crowther v. Attorney-General of Canada* (1959), 17 D.L.R. (2d) 437, *per* Macdonald, J.

18 [1923] A.C. 647.

19 *sub nom., In re H. J. Webb & Co. (Smithfield, London) Ltd.*, [1922] 2 Ch. 369.

20 [1923] A.C. 647, at p. 657.

Lord Atkinson said:

> I concur with the Master of the Rolls in thinking that the expression "Crown debts" and "debts due to the Crown" are unfortunate expressions, inasmuch as they suggest, at least to the uninitiated, that the Sovereign claims the right to be paid debts due to him, to the exclusion of the rights of his subjects, either for his own use or for the public use as determined by him. Ages ago these words would probably be considered to apply to taxes or suchlike, but now, and especially during the war, when the different Departments of Government became more like great trading and industrial corporations than anything else, it is obvious that it leads to misunderstanding when the trade debts due to these Corporations are sought, by the exercise of the royal prerogative, to be recovered in priority to those due to subject creditors . . .[21]

And Lord Shaw:

> My Lords, I venture to interpose much doubt as to the application or extension of the expression used by Macdonald, C.B., "that when the King's and the subject's title concur the King's shall be preferred," and the modernization of it given by Lord Macnaghten,[22] to cases of ordinary commercial or industrial contracts entered into by a Government department in the course of the business or enterprise which it carries on. If a special statute confers upon such departments priorities, preferences, excuses for misfeasance or exemptions from liability, then of course the statute controls the situation. But if the propositions above cited should ever be used to justify or widen the royal prerogative by the inclusion of ordinary contracts into the range of privilege, then it is, I think, very important to realize that this dictum of Lord Macnaghten's occurred in a case in which the nature of the debts, as Crown debts, and that in a very strict sense, was clear beyond all question. . . .[23]

A little further on he adds:

> How is this a Crown debt? It springs out of no power vested in the Crown by way of the imposition of a duty or a tax. It is not in the ordinary enumeration of debts incurred for the service of the country. It is an instance simply of a debt arising under ordinary transactions of principal and agent. A Government Department, in the course of realizing Government property, appointed an agent to conduct a transaction. That agent defaulted to the extent of nearly £10,000 and then became bankrupt. The debt arises purely in commercio.[24]

It is on these remarks that Chief Judge Buchanan based his distinction in *Regina v. Workmen's Compensation Board* that while Crown debts in the traditional sense may be entitled to priority,

21 *Ibid.*, at p. 659.
22 *Comm'rs of Taxation for N.S.W. v. Palmer et al.*, [1907] A.C. 179.
23 [1923] A.C. 647, at p. 666.
24 *Ibid.*, at p. 667.

Crown debts in the modern commercial sense are "not of the kind or nature held from earliest times to be included in or covered by the royal prerogative . . .".[25]

The problem cited by their Lordships in the *Food Controller* case is certainly not isolated within the narrow confines of the situation before them. Their words are reflective of the hard look being taken at the applicability of Crown prerogatives in general within commercial areas. It is useful to remember that many of these rights grew up and became embedded in our law when the Crown was something more personal than today's bureaucratic establishment. Judges in past centuries were more inclined to condone the unlimited exercise of prerogatives by a more sacrosanct Crown image, the King himself, in view of the more active role played by the royal personage in the business of government. Later, in the nineteenth century, and in this century,[26] courts have shown a disposition towards allowing the prerogative to operate within the confines of normal government activity.

The twentieth century aberration, manifested in government sorties into the commercial field through the medium of the Crown Corporation, has given rise to the new judicial attitude. The trend appears to be against allowing the Crown to carry sovereign rights into commercial spheres. For example in *Tamlin v. Hannaford*,[27] where it was sought to identify the British Transport Commission with the Crown by the common law "control test", so as to extend Crown privileges to the Commission, Lord Justice Denning said:

> . . . the proper inference, in the case at any rate of a commercial corporation, is that it acts on its own behalf, even though it is controlled by a government department.[28]

This approach was approved in *Regina v. Ontario Labour Relations Board; Ex parte Ontario Food Terminal Board*[29] where the Court refused to hold that the Ontario Food Terminal Board was the Crown so as to prevent its being an "employer" under the Labour Relations Act.

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25 (1962), 39 W.W.R. 291, at p. 302.

26 *In re Sid B. Smith Lumber Co.* (1917), 25 B.C.R. 126; *The King v. Star Kosher Sausage Mfg. Co.*, [1940] 4 D.L.R. 365; *Crowther v. Attorney-General of Canada* (1959), 17 D.L.R. (2d) 437; *Stroud and Dakota Enterprises Ltd. v. Imperial Oil Ltd. et al.* (1961), 28 D.L.R. (2d) 366; *Emerson v. Simpson* (1962), 32 D.L.R. (2d) 603; *The Queen v. Hamilton* (1963), 37 D.L.R. (2d) 545 are some cases within the past half-century upholding the prerogative.

27 [1949] 2 All E.R. 327.

28 *Ibid.*, at p. 330.

29 (1962), 35 D.L.R. (2d) 6.

In another vein, there can be found some suggestion in *Robinson v. State of South Australia*[30] that the Crown privilege to protection from the introduction in evidence of certain documents can rarely be sustained where they relate to the trading, commercial or contractual activities of a state. This was approved in the Exchequer Court of Canada by Angers, J., in *Dufresne Construction Co. Ltd. v. The King*.[31]

This trend extends beyond the domestic level into the sphere of international law where serious doubts have been cast upon the right of a foreign state to claim sovereign immunity with regard to state-owned vessels, when the vessels are employed for commercial purposes.[32] Lord Macmillan seems to capture the basic concept in a single sentence:

> It is only in modern times that sovereign states have so far condescended to lay aside their dignity as to enter the competitive markets of commerce, and it is easy to see that different views may be taken as to whether an immunity conceded in one set of circumstances should to the same extent be enjoyed in totally different circumstances.[33]

These are but a few indications of this prevalent attitude.

The decision in *Regina v. Workmen's Compensation Board* gives an indication of how far at least one court was prepared to go to restrain the Crown from exercising its prerogative, owing to the commercial taint to the transaction. Whether or not this was truly a "commercial" debt within the contemplation of the *Food Controller* dicta may be open to doubt. It is arguable that the words of Lords Birkenhead and Atkinson go no further than the fact situation before the court, and were aimed primarily at excluding, from the operation of the prerogative, debts accruing to Crown corporations set up to participate in commercial ventures. On the other hand, Lord Shaw, on whom the trial judge placed much stress, may be interpreted as excluding all debts of any commercial nature whatsoever entered into by any government department. The details of the mortgage transaction in *Regina v. Workmen's Compensation Board* are not set out with any degree of clarity, so exclusive reliance must be placed on the finding of fact that the debt was one of a "commercial" nature within the scope of the *Food Controller* restriction. As a matter of fair comment it should be pointed out that since the applicability of the prerogative rests on the sole consideration as to

30 [1931] A.C. 704.

31 [1935] Ex. C.R. 77, at pp. 88-89.

32 *The Cristina*, [1938] 1 All E.R. 719, *per* Lord Macmillan, at pp. 725-726; *Flota Maritima Browning de Cuba S.A. v. The Republic of Cuba*, [1962] S.C.R. 598, *per* Ritchie, J.

33 *The Cristina*, [1938] 1 All E.R. 719, at p. 726.

whether or not the debt is "commercial", perhaps the courts should make a more detailed examination of the particular transaction in determining this factor.

Notwithstanding that a definite policy approach to the question has yet to be clearly enunciated in the Supreme Court of Canada, this case stands as an indication that Canadian law seems to be moving towards the exclusion of sovereign prerogatives where Crown enterprise assumes a commercial complexion.

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INSURANCE — UNIFORM ACT — CHANGE OF PREFERRED BENEFICIARY — STATUTORY TRUST — CAPACITY — TEST OF INSANITY—TESTAMENTARY OR CONTRACTUAL.

The British Columbia Court of Appeal in the case of *Re Rogers*[1] deals with a question of considerable interest. The point before the court was whether the designation of a preferred beneficiary by the insured could be contested on the ground that the insured lacked capacity to make such a declaration. Although this issue has been raised before,[2] few judges have attempted to describe the nature of the transaction by which a preferred beneficiary is designated and the consequent test of mental capacity required, preferring, rather, to ground their decision on a more general issue: ". . . It comes down to this simply: Was the act mentally and physically really that of the donor?"[3]

Confining comment to the insurance aspect of the case the facts are as follows. In 1958, Rogers took out a policy of insurance on his life naming his parents beneficiaries. By section 141(2)[4] of the British Columbia Insurance Act (this incorporates in substance, as do the Insurance Acts of the other common law provinces, the Uniform Life Insurance Act) the parents became preferred beneficiaries, and by section 147(1)[5] a statutory trust was created in their favour. On July 10, 1961, Rogers was married to the respondent. On October 11, 1961, he revoked the designation of his parents and by declaration named his wife as

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1 *Re Rogers* (1963), 39 D.L.R. (2d) 141.

2 *Book v. Book et al.* (1900), 32 O.R. 206; *Re Baeder and Canadian Order of Chosen Friends* (1916), 36 O.L.R. 30; *Clark v. Loftus*, [1912] 4 D.L.R. 39; *Young v. Toronto General Trust Corp. et al.*, [1939] 4 D.L.R. 766; *Re Isaacs*, [1954] O.R. 942.

3 *Clark v. Loftus*, [1912] 4 D.L.R. 39, *per* Meredith, J.A., at p. 52.

4 R.S.B.C., 1960, c. 197; R.S.N.B., 1952, c. 113, s. 150(2).

5 R.S.N.B., 1952, c. 113, s. 156(1).