THE LIABILITY OF CROWN OFFICERS FOR ADVISING REFUSAL OF THE FIAT

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It is a prerogative of the Crown in Right of Quebec to refuse its fiat to any petition of right. It makes no difference for what reason the petitioner has not obtained the fiat; the case cannot be set down for trial.[1] The mystique of the prerogative has engendered the idea, seldom challenged, that the discretion of the Crown to grant or refuse the fiat is without limit. Canadian judges have expressed the opinion that the courts are not concerned with the soundness of the reason behind the refusal of a fiat and that such refusal leaves the claimant without any remedy whatsoever.[2] I respectfully submit that such statements are correct only in relation to the continuance of suit against the Crown and are inapplicable to the personal liability of a Crown Minister who advises the Lieutenant-Governor to refuse the fiat. The proposition I shall attempt to establish in the following pages is that the Lieutenant-Governor's responsible ministers[3] are liable to an aggrieved suppliant for advising refusal of the fiat, whenever that advice is given for no reason integrally connected with the merits of suppliant's cause of action.

A preliminary point must be made. Even assuming that wrongful refusal can amount to a 'faute' under art. 1053 C.C., can it be shown that the plaintiff has suffered damage? I suggest that the damage suffered results directly from the loss of the action. For if the fiat is once granted, the plaintiff can proceed to

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*This article is a revised version of one chapter of a thesis entitled "The Contractual and Delictual Liability of the Crown in Right of Quebec", which won the Public Law Prize in third year at McGill University. Mr. Greenwood is presently a fourth year law student at the University of Montreal.

[1]*Re Mitchell's Petition of Right* (1896) 12 Times L.R. 324 at p. 458; *Tobin v. Reg.* (1864) 16 C.B.N.S. 310. For the contrary opinion see Chitty, *Prerogatives of the Crown*, p. 341: "In every case however, in which the subject hath a right against the Crown . . . a petition is the birthright of the subject and is sustainable at common law". In Quebec the requirement to obtain the fiat is laid down in art. 1014 of the Code of Procedure.

[2]*Royal Trust Co. v. Attorney-General for Alberta* [1936] 2 W.W.R. 337 at p. 341 (Ford, J.); *Orpen v. Attorney-General for Ontario* [1925] 2 D.L.R. 366 at p. 372 (Riddell, J.).

[3]The minister primarily responsible for advising the Lieutenant-Governor to grant or refuse the fiat is the Attorney-General: Attorney-General's Department Act R.S.Q. 1941, c. 46, s. 3. In cases of political importance the involvement of other ministers, particularly the Premier, is not inconceivable. Although the Lieutenant-Governor enjoys no immunity in respect of delictual or quasi-delictual liability (see *Musgrave v. Pulido* (1879) 5 A.C. 102) he incurs no personal liability for a refusal of the fiat. Considering the impropriety of the Lieutenant-Governor exercising an independent discretion in this matter, sanction of a wrongful refusal ordered by his minister cannot amount to a 'faute' under art. 1053 C.C.

judgment in the ordinary manner. Recourse may be had to the method whereby damages are established in an action against an attorney whose negligence has resulted in the peremption of his client's suit. The court estimates whether or not the client's action would have succeeded and in what amount had his attorney's negligence not intervened.[4] To ascertain the existence and extent of the prejudice suffered in a case of wrongful refusal, the court would estimate the soundness of the original cause of action against the Crown and the probable amount—at least in cases where a sum of money is prayed for—which the suppliant would have been awarded. It may be argued that this method of establishing damages would be acceptable were the Crown liable to executionary process, but since as a general principle it is not,[5] the failure of the claimant to obtain permission to sue does not necessarily entail monetary loss. Even if a petitioner obtains judgment payment remains a matter of Crown discretion. This is true in that Crown funds cannot be seized in execution. A judgment for a sum of money is not however purely declaratory. It is sanctioned by the duty imposed by the Legislature on the Minister of Finance, who upon receipt of a certified copy of the judgment "*must* then pay the amount due out of monies placed at his disposal for such purpose".[6] Breach of this duty would undoubtedly entail his personal liability.[7] Payment therefore is not strictly a matter of pure discretion; it is a matter of legal duty. The fact that this duty is subject only to the indirect sanction of personal liability is not a relevant consideration, for such sanction is sufficient to ensure that in all probability a judgment obtained against the Crown will be satisfied.

Does the Attorney-General or other responsible minister in advising refusal for no reason integrally connected with the merits of suppliant's claim, commit a fault actionable under art. 1053 C.C.? Art. 1053 C.C. establishes a general duty of care binding on all officers of the Crown, who cannot plead special immunity or act of state by way of defense.[8] Distinctions in the field of Crown liability are normally made between suing an officer personally and suing the Crown itself. The procedure whereby a fiat is necessary to sue the Crown admittedly precludes an aggrieved party from any recourse against the Crown without one; there is no legal procedure by which the court's decree will stand in lieu of a fiat. This by itself, however, does not rule out the possibility of

[4]Savatier, *Traité de la Responsabilité Civile*, vol. 2, p. 460.

[5]R. *v. Central Railway Signal Co.* [1933] S.C.R. 555. Where, however, the Government is adjudged to surrender moveable or immoveable property the court may accordingly issue a writ of attachment in revendication or a writ of possession: arts. 1022 and 1023 C.P.

[6]Art. 1024 C.P.

[7]Considering the imperative terms of the article, the courts would in all likelihood adopt the French rule, which permits that a minister refusing without good cause to honour a judgment against the Government may be sued for his "faute personnelle" in the civil courts: see J. Appleton, *Traité Elémentaire de Contentieux Administrative*, Paris (1927), p. 335. Mandamus would not lie: art. 87 a C.P.

[8]*Roncarelli v. Duplessis* [1959] S.C.R. 121; *Entick v. Carrington* (1765) 19 St. Tr. 1030; Dicey, *Law of the Constitution*, 9th ed., p. 193.

suit for wrongful refusal; such an action is no longer directed against the Crown, but against the defaulting officer personally.

Whenever any person or corporation is given a discretionary power to exercise, that discretion is never absolute, unless of course Parliament's grant is expressed so widely and in such detail as to clearly encompass the most diverse, irrational and extraneous reasons for acting. The clearest and most learned statement of this principle of statutory interpretation was given by Mr. Justice Rand in the Supreme Court of Canada in the recent Quebec case of *Roncarelli v. Duplessis*:[9]

> In public regulation of this sort there is no such thing as absolute and untrammelled "discretion", that is that action can be taken on any ground or for any reason that can be suggested to the mind of the administrator; no legislative Act can, without express language, be taken to contemplate an unlimited arbitrary power exercisable for any purpose, however capricious or irrelevant, regardless of the nature or purpose of the statute. Fraud and corruption in the Commission may not be mentioned in such statutes but they are always implied as exceptions. "Discretion" necessarily implies good faith in discharging public duty; there is always a perspective within which a statute is intended to operate; and any clear departure from its lines or objects is just as objectionable as fraud or corruption. Could an applicant be refused a permit because he had been born in another province, or because of the colour of his hair? The ordinary language of the Legislature cannot be so distorted.

It also results from *Roncarelli v. Duplessis*[10] that not only the actual repository of the discretion[11], but also any public officer exercising *de facto* power[12] over the latter owes a duty to members of the public. Anyone—legally seized of the discretion or not—who for reasons extraneous to the statute makes use of administrative power to inflict damage on a third party commits an actionable wrong and is liable under art. 1053 C.C.

The principles laid down by the Supreme Court can be applied to a refusal of the fiat. As the discretion to refuse or to cancel a liquor license is circumscribed by the purposes of the Alcoholic Liquor Act, so also is the discretion vested in the Lieutenant-Governor to grant the fiat "if he think fit" limited to the general purposes for which the Legislature has conferred the power. The Legislature's grant of discretion to the Lieutenant-Governor as advised by the Attorney-General has traditionally been explained as a safeguard for the State to provide against a constant barrage of frivolous litigation. If the reason for refusing the fiat is that the plaintiff has no cause of action, then as

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[9][1959] S.C.R. 121, at p. 140.

[10]See particularly the judgment of Rand, J., at pp. 141-142.

[11]As indicated in footnote 3, the Lieutenant-Governor, unless contrary to constitutional convention he exercises an independent discretion in refusing the fiat, will not incur personal liability.

[12]It may be argued that by virtue of s. 3 of the Attorney-General's Department Act the Attorney-General is the *de jure* legal adviser of the Lieutenant-Governor and the principle of *Roncarelli v. Duplessis* could apply only to the intermeddling of ministers other than the Attorney-General. It can be answered that the Legislature by stating that the Attorney-General is to advise the Lieutenant-Governor could not in the absence of express wording intend to permit the Attorney-General to influence the use of the discretion in a manner wholly irrelevant to the purposes of art. 1014 C.P. Could it seriously be argued that had Mr. Duplessis been statutory adviser to the Liquor Commission, that fact alone would have enabled him to influence the use of the discretion vested in the Liquor Commission for a purpose not contemplated by the Alcoholic Liquor Act?

an honest judgment decision the claimant has no recourse in damages. If the Attorney-General's advice, however, can be proved to have been motivated by religious or political prejudice, personal animosity or the like, suppliant has, it is submitted, such a recourse. If it were otherwise the Attorney-General would be permitted to use a power granted for public purposes to inflict injury for private and malicious reasons. Surely such was not intended by the Legislature and cannot be implied in the absence of express wording in art. 1014 C.P.[13]

The perspective within which the discretionary power to refuse the fiat is to operate has been discussed in a number of English cases. In *Dyson v. Attorney-General*, Farwell, L. J.[14] stated that "it would be unjustifiable to refuse the fiat in any case where a plausible claim is made out". In *Irwin v. Grey*, the Chief Justice[15] spoke of the Home Secretary's function as advising whether or not a cause of action arose. Brett, M. R. in *Re Nathan*[16] indicated that the granting of the fiat depends on a "judicial discretion". In the same case Bowen, L. J.[17] referred to the Attorney-General's "constitutional duty" not to endorse a refusal of the fiat unless the claim is frivolous. It can be argued that Bowen, L. J.'s use of the term "constitutional duty" suggests that sanction is restricted to Parliamentary criticism[18], while Farwell, L. J.'s expression "unjustifiable" does not necessarily mean unjustifiable in a legal sense. Lord Langdale in *Ryves v. The Duke of Wellington*[19] is more explicit however, and it is clear that in his opinion it would be unjustifiable in a legal sense to refuse a fiat for any but sound reasons:

> I am far from thinking, that it is competent to the King, or rather to his responsible advisers, to refuse capriciously to put into a due course of investigation any proper question raised on a petition of right. The form of the application being, as it is said, to the grace and favour of the King, affords no foundation for any such suggestion.

The one Quebec case touching on the point in issue expresses a similar conclusion: the discretionary right to withhold the fiat does not extend to refusal

[13]It may be objected that art. 1014 C.P. is merely declaratory of the common law and cannot be dealt with in the same restrictive manner as modern statutory regulation: the presumption that the Legislature unless it speaks expressly could not have intended to sanction a biased use of discretion is inapplicable. I submit that in relation to the point in question there exists no essential difference between a power recognized by the common law and one given by statute. If the question arises as to the limits of a common law power, and the court is in doubt as to its extent, surely the same presumptions that fraud and bias can never be implied are equally cogent. To hold otherwise is to suggest that the Legislature when it concerns itself with statutory regulation enacts sweet reasonableness, while that which it deems unnecessary to regulate is inherently unreasonable.

[14][1911] 1 K.B. 410, at p. 422.

[15](1862) 3 F. & F. 635, at p. 637. See below, footnote 22.

[16][1884] 12 Q.B. 461, at p. 474.

[17]At p. 479.

[18]*Cf.* 9 Halsbury, 2nd ed., p. 694, n.e.: "It has been suggested that it is the duty of the Attorney-General to advise the Crown to grant its fiat to all petitions except those which are frivolous; but it is doubtful whether there is any real ground for this view. In any case the Attorney-General could only be responsible to the King and Parliament in the matter, and not to the courts".

[19](1846) 9 Beav. 579, at p. 599.

"lorsqu'il paraît par les allégations d'une pétition de droit, si elles étaient prouvées, qu'un citoyen a une réclamation contre le gouvernement".[20] The court did not attempt to define what the claimant's recourse would be in case of wrongful refusal.[21]

The English decisions cited above are likewise reticent on the question of recourse. The Canadian courts, finding no express legal sanction laid down in these cases, have tended to minimize statements concerning the duty to exercise the discretionary power in a rational manner. Faced with an attempt by a claimant to continue suit against the Crown, and constrained by unambiguous precedent to find against him however unsound the reason for the fiat being refused, they have adopted the unfortunate course of relegating inconvenient judicial dicta to the limbo of well-intentioned moralizing.

Had the question of delictual recourse been before them, the tendency to describe a frustrated petitioner's position as absolutely hopeless might well have undergone serious qualification. Indeed had they examined carefully the one English decision on point, such qualification would have been likely. In *Irwin v. Grey*[22] plaintiff took an action against the Home Secretary. His case, as Erle, C. J. pointed out was that Sir George Grey was guilty of a wrong in advising Her Majesty not to grant the prayer of the petition. The action was dismissed on the grounds that the facts alleged were not proved. The Chief Justice was of the opinion that the Home Secretary had properly fulfilled his duty to the plaintiff:[23]

> . . . it was clearly the duty of the Secretary of State to examine the petition of right and to give his advice upon it, *whether a cause of action against the Crown arose* and he having done so, no action lay.

There was no indication in the judgment that a personal action in damages would *never* lie.[24] The holding presupposes that such an action would lie if the Home Secretary did *not* properly fulfil his duty of advising on the merits of the claim. It is submitted that this case is authority, at least by implication, for the proposition that a public officer who advises refusal of the fiat must, if he is to escape personal liability, base his advice on a *bona fide* estimate of the soundness of petitioner's cause of action.

Keeping in mind the arguments developed in the preceding paragraphs, it is appropriate here to outline those cases, both English and Canadian, which

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[20]*McDonald v. La Reine* (1890) 16 Q.L.R. 221, at p. 228 (Caron, J.).

[21]Caron, J. cited Chitty (see above footnote 1). If he meant to suggest that the court's decree could stand in lieu of the fiat, his judgment to that extent expresses an incorrect proposition of law in view of the later Canadian cases on point (discussed below).

[22](1862) 3 F. & F. 635. In England it was the custom for the Home Secretary in conjunction with the Attorney-General to advise on the fiat: see Robertson, *Proceedings By and Against the Crown*, p. 376.

[23]At p. 637.

[24]It has, however, been held to be authority for that proposition: *Ruffy-Arnell and Baumann Aviation Co. Ltd. v. Rex* [1922] 1 K.B. 599, at p. 607 (McCardie, J.). The relevant dictum was unnecessary to the decision, which dealt with suppliant's right to amend his petition without obtaining a second fiat. There was no discussion of *Irwin v. Grey*, merely a remark made *en passant* that it established that a personal action would never lie.

suggest that for whatever reason the fiat is refused, such refusal cannot be challenged in court. It will be shown that in each case the suppliant continues to sue the Crown and not the responsible agent of the Crown in his personal capacity. For this reason statements as to the absolute nature of the discretion to refuse the fiat can be considered obiter as far as suppliant's delictual recourse is concerned.

In *Re Mitchell's Petition of Right*,[25] the fiat was refused, whereupon petitioner moved that the case be set down for trial as though the fiat had been affixed thereto. It was held that "no matter for what reason the fiat had not been obtained, the court had no jurisdiction to set down the petition of right without the fiat of Her Majesty being first obtained". The fiat is a condition precedent to suit against the Crown; this alone is the holding in Mitchell's Case and in the three Canadian cases which follow it. In *Orpen et al v. Attorney-General for Ontario*[26] the question for decision was whether or not the court could compel the Attorney-General to advise the Lieutenant-Governor to grant a fiat for the hearing of a petition of right. In *Royal Trust Company v. Attorney-General for Alberta*[27] plaintiff, having been refused a fiat, took an action against the Attorney-General in his *official* capacity and prayed for a declaration that the Crown in Right of Alberta had no title to certain monies which had been remitted to its agent in payment of succession duties. In *Lovibond v. Governor-General of Canada*[28] the insufficiency of the reason behind the refusal of the fiat made no difference to the Privy Council's inability to go behind the refusal and in effect act as a court of appeal.[29]

To summarize we can say that in one case only has the issue of a delictual recourse come before the courts and the judgment in that case indicates that such a recourse will lie in certain circumstances. The most unfavourable cases deal with suits against the Crown without the fiat and not with suits against the responsible agent of the Crown. There is no reason of public policy why a suppliant with a *prima facie* cause of action should be refused a fiat. Judicial abhorrence of the notion that the Crown's advisers can be criticized in court for not allowing right to be done[30] is an unedifying example of the medievalism too often employed in dealing with the prerogative, and is a clear perversion of the rule of law, whatever definition of Dicey's phrase we accept. According to the Supreme Court anyone upon whom the Legislature has conferred discretion must exercise it without bias, while persons other than the recipient of the power who influence its exercise in a manner not contemplated by the relevant statute are liable under art. 1053 C.C. for the damage caused. When

[25](1896) 12 Times L.R. 324.

[26][1925] 2 D.L.R. 336.

[27][1936] 2 W.W.R. 337.

[28][1930] A.C. 717.

[29]The specific holding in the case was that the Governor-General in deciding whether to grant the fiat did not act as a "judicial officer" within the meaning of s. 3 of the Judicial Committee Act of 1833, and therefore no appeal lay to the Privy Council from his refusal.

[30]See particularly the judgment of Ford, J., in *Royal Trust Company v. Attorney-General for Alberta.*

considering a petition of right the Attorney-General acts as a safeguard against a burdensome load of needless litigation. When in advising refusal of the fiat he ceases to perform this function, he acts illegally and is personally liable. The petition of right procedure—particularly the power of granting or refusing the fiat—is an exceptional provision in our law and should be restrictively interpreted. The personal liability of every officer of the Crown for his delicts and quasi-delicts is a general rule and should be given full effect. For these reasons I submit that wrongful refusal of the fiat is actionable in delict.

The acceptance by the judiciary of the principle of personal liability would ameliorate the intolerable position of the litigant involved in proceedings against the Crown; it would not provide a cure. The difficulty of proving bias is obvious. Nor does an honest judgment decision by the Attorney-General guarantee that suppliant's claim has been equitably dealt with. The Attorney-General is often in no position to make up his mind on the adequacy of a petition; only a court of law after hearing all the evidence, given under oath and subject to cross-examination, can efficiently decide such a question.

The system whereby the Crown must signify its pleasure that "right be done", while perhaps compatible with the notion that a duty of personal allegiance is owed by every subject to a supreme feudal lord, is a dangerous anachronism in the welfare state of the twentieth century. Its *raison d'être* disappeared with the growth of the constitutional monarchy; its inherent injustice[31] has been magnified a hundredfold by the proliferation of government boards and commissions, which claim to enjoy the all too pervasive "shield of the Crown". Subjection of the executive government to the law is a basic essential of a well-ordered society, and is imperative where that government no longer restricts itself to the laissez-faire role of policeman-referee in an economic community based on the freedom of contract, but organizes a widespread regulation of trade and industry and indeed is itself industrialist and trader.

The only sane way to deal with this "relic of the middle ages", as one irate Superior Court judge aptly characterized the petition of right[32], is to do away with it or at least with the necessity of obtaining a fiat. The Dominion and the majority of the provinces have already eliminated the fiat with none of the dire consequences which earlier government statements foresaw. The bogey of a swarm of legal locusts is belied by the experience of those jurisdictions which have established the Crown's liability to suit on a basis similar to that of a private defendant. In any case, by simply enacting that the suppliant must give security for costs, the Quebec Legislature can ensure a minimum of frivolous claims.

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[31]For an example of how the discretion to grant the fiat can be exercised in an arbitrary way, see the unreported case of *Day-Baldwin v. Lareau and Taschereau* discussed in R.L. Calder, *Comment Eteint La Liberté*, Montreal (1935), pp. 76-78.

[32]Boulanger, J., *in Le Syndicat des Employés du Service Extérieur de la Cité de Québec v. La Cité de Québec*, [1951] P.R. 85.