# Compensation Against the Federal Crown

## Introduction

Although this article emphasizes compensation (or set-off) in civil law, the principles involved can be applied generally to compensation against the Crown in right of Canada. It is submitted that there can be no compensation against the federal Crown in the Federal Court for the following reasons:

(1) Notwithstanding the fact that a petition of right is now unnecessary, the Crown cannot be sued indirectly through a claim for compensation. Unless an action against the Crown is instituted in conformity with section 48 of the *Federal Court Act*[1] and Rule 600 of the *Federal Court Rules*,[2] the Federal Court is without jurisdiction. A claim for compensation does not come within the Court's jurisdiction so defined.

(2) Compensation is in effect a payment. Our law of public administration requires that for every payment there must first be an express legislative or executive authorization and section 57(3) of the *Federal Court Act* requires that money awarded against the Crown be paid out of the Consolidated Revenue Fund.[3] Compensation would amount to a payment that did not fulfill these criteria.

(3) Since as a matter of law no execution shall issue on a judgment against the Crown,[4] a claim against the Crown is never demandable and thus is not amenable to compensation, since compensation presumes two debts that are liquidated and demandable.[5]

What follows is an elaboration of each of these points.

## The arguments against compensation

(1) *Lack of jurisdiction of the Federal Court*

The refusal of the courts to entertain a claim for compensation against the Crown has most often been based on the grounds that

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[1] R.S.C. 1970, c.10 (2d supp.).

[2] P.C. 1971-270 of 9 Feb., 1971, SOR/71-68, Can.Gaz. Part II, vol.105, no.5, 168, 10 Mar. 1971.

[3] *Supra*, note 1.

[4] *Ibid.*, s.56(8).

[5] Art.1188 C.C. See also *Halsbury's Statutes of England* 3d ed. (1971), vol.30, 331: "Set-off and counterclaim are both creations of statute, and had no existence at common law."

the Crown could be impleaded only with its express consent. This argument lost some of its weight when the requirement of the Governor General's fiat in response to a petition of right was abolished in 1951.[6] It is the writer's contention however that a procedural bar has survived in a different form. Although the right to sue the Crown without its express consent has been established, it cannot be exercised in all courts, by any procedure. In some cases it must be exercised in the Federal Court, and when this is so it must be done in the manner defined in section 48 of the *Federal Court Act*, which provides that:

> A proceeding against the Crown may be instituted by filing in the Registry of the Court a document in the form set out in Schedule I to this Act.

Schedule I requires a "statement of claim" or a "declaration". Rule 600(2) provides that:

> Except where otherwise specially authorized, an action against the Crown shall be commenced in the manner provided by section 48 of the Act.

It is settled law that to compensate or set-off is the equivalent of bringing suit against the Crown.[7]

As Wurtele J. said in *Fortier* v. *Langelier*, "the form in which the demand is made is immaterial".[8] The *Federal Court Act* expressly provides for direct proceedings against the Crown but nowhere is it enacted that the Crown can be sued indirectly by way of exception or by way of defense. Had Parliament intended the *Federal Court Act* to authorize compensation against the Crown, this would have been done explicitly as it was, for example, in section 10(1) of the *Crown Liability Act*.[9] The latter Act deals with proceedings against the Crown in provincial courts, requiring that except in the case of a counterclaim no proceedings shall be commenced unless the claimant has served a notice ninety days in advance.

The writer does not consider that Rules 418 (Compensation or set-off) and 1722 (Counterclaim — set-off) of the *Federal Court*

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[6] *An Act to amend the Petition of Right Act*, S.C. 1951, c.33, s.1.

[7] See *Fortier* v. *Langelier* (1895) 5 B.R. 107; *R.* v. *Montreal Woollen Mills* (1895) 4 Exch.C.R. 348; *R.* v. *British American Bank Note Co.* (1901) 7 Exch.C.R. 119; *McLachlan* v. *Camosun* [1909] A.C. 597; *R.* v. *The Cosgrave Export Brewing Co.* [1928] Exch.C.R. 103; *Morley* v. *Minister of National Revenue* (1949) 4 D.T.C. 29; and *R.* v. *Pfinder* [1959] Exch.C.R. 30.

[8] (1895) 5 B.R. 107, 110.

[9] *Crown Liability Act*, R.S.C. 1970, c.C-38. On the other hand, it could be argued that the *Crown Liability Act* refers only indirectly to proceedings against the Crown (*i.e.*, it does so by way of stating an exception), that as such it assumes compensation is permissible and that the same assumption could be made of the *Federal Court Act*.

*Rules*[10] can be applied to the Crown since they do not specifically refer to the Crown. Furthermore, the jurisdiction of the Federal Court is to be found in the *Federal Court Act* and not in the *Federal Court Rules*. In the words of Lord Gorell with respect to *An Act to amend "The Supreme and Exchequer Courts Act"* and other statutes conferring Admiralty jurisdiction upon the Exchequer Court:

> [T]he power to make rules for procedure and practice is confined to the making of rules for the exercise of the jurisdiction thus conferred, so that the ... rule ... does not affect the case unless the defence or set-off is within the Admiralty jurisdiction.[12]

As was said by Mr Justice Henry in 1884, "[t]he Sovereign not being named therein, is not affected by the statutes relating to set-off against the Crown".[13]

This contention is supported by statutory provisions enacted in the U.K. and in Canada. The English *Crown Proceedings Act* and the Proceedings Against the Crown Acts of New Brunswick, Manitoba, Ontario and Saskatchewan[14] have dealt specifically with the question of set-off or counterclaim against the Crown. A good example is the following, found in the Ontario Act and based on the British Act:

> [A] person may avail himself of any set-off or counterclaim in proceedings by the Crown if the subject-matter of the set-off or the counterclaim relates to a matter under the administration of the particular government department with respect to which the proceedings are brought by the Crown.[15]

The absence of equivalent legislation applicable to the federal Crown suggests that there is no compensation against the Crown in right of Canada in the Federal Court. Until such legislation is adopted by Parliament (and there is no apparent reason why this should not be done) the Courts are bound to apply the law as it stands.

That this is a question not of mere procedure but of jurisdiction was stated in *R.* v. *Montreal Woollen Mills, McLachlan* v. *Camosun*

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[10] *Supra*, note 2.

[11] S.C. 1887, c.16.

[12] *McLachlan* v. *Camosun, supra*, note 7, 608.

[13] *R.* v. *Whitehead* (1884) 1 Exch.C.R. 134, 143.

[14] *Crown Proceedings Act*, 1947, 10-11 Geo.VI, c.44, s.35(2)(g) (U.K.); *Proceedings Against the Crown Act*, R.S.N.B. 1973, c.P-18, s.14(5) and (6); *The Proceedings Against the Crown Act*, R.S.M. 1970, c.P-140, s.17(5) and (6); *The Proceedings Against the Crown Act*, R.S.O. 1970, c.365, s.20; *The Proceedings Against the Crown Act*, R.S.S. 1965, c.87, s.17(5) and (6).

[15] *The Proceedings Against the Crown Act*, R.S.O. 1970, c.365, s.20(2).

and *R.* v. *The Cosgrave Export Brewing Co.*[16] If a claim is not brought against the Crown in the manner prescribed by the *Federal Court Act*, the Federal Court is without jurisdiction to hear it. Prior to 1972, it was provided that "[a]ny claim against the Crown *may be prosecuted* by petition of right, or may be referred to the Court by the head of the department".[17] In the present *Federal Court Act*, it is provided in subsection 48(1) that "[a] proceeding against the Crown *may be instituted* by filing in the Registry of the Court a document in the form set out in Schedule I to this Act".[18] In considering the import of this provision, it must be kept in mind that a claim for compensation or set-off is equivalent to a bare action[19] and as such constitutes "a proceeding against the Crown", and also the general rule that there is no compensation against the Crown in the absence of specific legislation. Since section 48 does not constitute such legislation, and since a claim for compensation cannot be brought within the form it prescribes for proceedings against the Crown, the Federal Court has no jurisdiction to hear a claim for compensation against the Crown. Support for this view may also be drawn from *Halsbury's Laws of England*, commenting on the English *Crown Proceedings Act*:[20]

> A person may not *without leave* avail himself of a set-off against the Crown, except where the subject matter of the set-off relates to a government department in whose name proceedings are brought. No right of set-off is available in proceedings by the Crown for the recovery of taxes, duties or penalties, nor may any right or claim to repayment thereof be made the subject of a set-off by any person in any proceedings by the Crown.[21]

It is the writer's contention that the Crown can only be impleaded directly and that the abolition of the petition of right has introduced only that possibility and not the possibility of an indirect claim. Such an interpretation in no way privileges the Crown since

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[16] See note 7, *supra.*

[17] *Exchequer Court Act*, R.S.C. 1970, c.E-11, s.36 (emphasis added).

[18] *Supra*, note 1 (emphasis added). Schedule I of the Act reads as follows: "In the Federal Court of Canada Trial Division/Between A.B. Plaintiff and Her Majesty the Queen Defendant/Statement of Claim or Declaration (N.B. Either title may be used)/*Facts (State with convenient certainty the facts on which the Plaintiff relies as entitling him to relief)./Relief sought/* The Plaintiff therefore claims as follows: (a)/(b)/Dated at ... the ... day of ... (Signature) Counsel for Plaintiff (*or the Plaintiff himself if he acts for himself*)".

[19] See cases referred to in note 7, *supra.*

[20] *Supra*, note 14.

[21] *Halsbury's Laws of England* 3d ed. (1960), vol.34, 398, para.676 (emphasis added).

a defendant remains entitled to institute a separate action directly against the Crown. In the words of Rowlatt J.:

> I think it right to point out that at the back of the apparently hard rule that there can be no set-off in this case against the Crown there lies this fact, that the subject cannot make good a claim against the Crown except in a particular way and my decision merely shows that he cannot get round that by refusing to pay a debt to the Crown and then asserting his claim by setting it off.[22]

Rather than simply disallowing a counterclaim for compensation against the Crown, the Federal Court could use Rule 1718 and order such counterclaim to be struck and tried as a separate action. Subsection (3) of that Rule provides:

> If it appears that the subject-matter of a counterclaim ought for any reason to be disposed of by a separate action, the Court may order the counterclaim or cross-demand to be struck out, may order it to be tried separately, or may make such order as may be expedient.[23]

Whichever of the approaches in the two preceding paragraphs is adopted, both principles are saved: that the Crown cannot be impleaded indirectly and that the Crown has no privilege.

This rule should apply to all kinds of compensation against the Crown in right of Canada. An exception was made in *R.* v. *Whitehead*[24] with respect to running accounts where the claims of one side could not properly be investigated apart from those of the other. The writer is not convinced that this case should stand. The reasons for not allowing compensation against the Crown are reasons of principle that should not suffer any exception. When a Court is without jurisdiction, it should not even attempt to characterize the subject-matter of such compensation before declining to hear it.

Equally unacceptable is Mr Justice Dumoulin's contention in *R.* v. *Pfinder* that in abolishing the petition of right

> [t]he Sovereign now agrees to be impleaded before His Courts in the ordinary manner. If then claim and counterclaim are considered absolutely alike, in their practical objects, the subsequent removal of any hindrance in the prosecution of a claim likewise affects counterclaims . . . .
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> Now looking closer at the essence of a counter-claim we, at once, see that it is nothing but a "claim" emanating from the defendant . . . .
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> Should it be objected . . . that such a proceeding is a roundabout way of

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[22] *Attorney-General* v. *Guy Motors Ltd* [1928] 2 K.B. 78, 80; Rowlatt J.'s words were adopted in *Morley* v. *Minister of National Revenue* (1949) 4 D.T.C. 29, 32.

[23] *Supra,* note 2, 269.

[24] (1894) 1 Exch.C.R. 134.

> impleading the Crown, then, even so, whatever is directly permitted also is indirectly permissible.[25]

This decision was concerned with a counterclaim but the Court would probably have reached the same conclusion had a plea of compensation been made. Dumoulin J. did not refer to any previous decision and it is not at all certain that since "[t]he Sovereign now agrees to be impleaded ... in the ordinary manner" that one may also implead the Sovereign indirectly. The reasoning of Dumoulin J. when he said "whatever is directly permitted also is indirectly permissible" appears to be wrong, especially when applied to the Crown; it is suggested that his decision cannot be regarded as a binding or decisive authority on the subject.

Also worthy of consideration is the case of *Cosgrave Export Brewing*[26] in which the defendant attempted to set-off a claim to recover certain duties paid to the Crown that were absolutely distinct from duties claimed by the Crown. Mr Justice Audette disallowed the set-off because the Court was without jurisdiction "to hear the counterclaim until a *fiat* has been given to hear the same".[27] After stating this principle he commented on the *Whitehead* case as follows:

> Yet the *Whitehead* case recognizes the rule against pleading set-off against the Crown, but decides that when the amounts are so linked and interwoven that you could not deal with one part without dealing with the other you had to let in the set-off.[28]

Not only are these words *obiter* (and we shall come back to them later on), but the writer submits that Audette J. in his comments went farther than Henry J. himself. The *Whitehead* case, as Audette J. rightly says, "recognizes the rule against pleading set-off against the Crown",[29] but it certainly did not go as far as deciding that set-offs are automatically allowed "when the amounts are so linked and interwoven that you could not deal with one part without dealing with the other".[30] It was, as Audette J. remarked, "a case of special circumstances". It was alleged and admitted in *Whitehead* "that the claims on both sides were one continued transaction, and that the one could not properly be investigated without the other", which

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[25] [1959] Exch.C.R. 30, 32-33; the Court dismissed a motion to strike out a counterclaim joined to a statement of defense filed in an action brought by the Crown after an automobile accident.

[26] *R.* v. *The Cosgrave Export Brewing Co., supra,* note 7.

[27] *Ibid.,* 105.

[28] *Ibid.,* 104.

[29] *Supra,* note 26, 104.

[30] *Ibid.*

brought the case "within the rule applicable to connected accounts".[31] One could argue that such a rule should not have been extended outside the very limited world of connected accounts and that one should be most careful in extending it further.

On two occasions Canadian courts have refused a claim of set-off where such claim had its origin in the same facts as those on which the Crown's claim rested. *R.* v. *Montreal Woollen Mills*[32] was a case in which the Crown sued for damages resulting from a break in the bank of the Lachine Canal. The defendants asked by way of incidental demand to be reimbursed for the sums they had had to spend in repairing their works damaged by the break, allegedly caused by the negligence of the Crown's servants. The Court, in putting aside the incidental demand for lack of jurisdiction, said:

> In their incidental demand they set up a claim against the Crown which, while it may have its origin in some of the facts, or *even in the same state of facts,* as those on which the Crown's claim rests, is wholly independent of such claim.[33]

In the second case, *R.* v. *British American Bank Note Co.*,[34] the Crown sued for breach of a contract to print stamps and the defendant wanted to set-off the use made of the stamps by the Crown. Set-off was not permitted.

### (2) *Need for legislative appropriation*

The second argument has been clearly stated by Mr Justice Wurtele of the Quebec Court of Appeal in *Fortier* v. *Langelier*, a case in which set-off was claimed between personal tax owed the Quebec Government by a Judge and sums due to him from the Government for professional services:

> The rule thus laid down by our public administrative law with respect to the expenditure of public moneys is that for every payment there must be in the first place a legislative appropriation, and in the next place that the payment itself be made out of the consolidated revenue fund ... or, as in the case of a petition of right, be authorized by a special statute.
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> Now as compensation is in effect a fictitious payment ... it is clear that to allow compensation to take place against a direct tax which belongs to

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[31] *Supra,* note 24, 142.

[32] (1895) 4 Exch.C.R. 348. It should be noted that both this case and the case cited in note 34, *infra,* were decided before the *Petition of Right Act,* R.S.C. 1970, c.P-12 was repealed by the *Federal Court Act, supra,* note 1, s.64(1) and before the *Crown Liability Act, supra,* note 9, was passed.

[33] *Ibid.,* 353 (emphasis added).

[34] (1901) 7 Exch.C.R. 119; see note 32, *supra.*

> the consolidated revenue fund, would be to allow a payment to be made otherwise than out of an appropriation and than under an express executive or legislative authorization.[35]

This reasoning was followed by Mr Justice Choquette in *Côté* v. *La Compagnie du Chemin de Fer du Comté de Drummond*[36] in which set-off was claimed between a tax owed to the provincial government and moneys to be refunded to a tax-payer because a previous tax had been declared unconstitutional. *Fortier*[37] was also followed by Mr Justice Paradis in *Archambeault* v. *Gouin*,[38] the facts of which were similar to those of *Fortier*.

It is submitted that the reasoning applicable to compensation against the Crown's claim for taxes applies to all kinds of compensation against the Crown. The *Federal Court Act* provides that:

> There shall be paid out of the Consolidated Revenue Fund any money or costs awarded to any person against the Crown in any proceedings in the Court.[39]

It is also evident from the Ontario Act[40] that what is at stake is not a procedural privilege benefitting the Crown, but the practical necessity of enabling the Crown to administer its affairs in a proper manner. An administration would be embarrassed if compensation were permitted with respect to claims attaching to different departments. When only one department is involved, problems of appropriation are easier to deal with and compensation possibly comes as no surprise. This perhaps explains Audette J.'s reference to amounts that "are ... linked and interwoven"[41] and could be the basis of Dumoulin J.'s decision in *Pfinder*[42] to allow a counterclaim in a case involving an automobile accident. However, even with respect to set-offs involving the same department the court should decline jurisdiction; the courts must apply the law as it is and should not distinguish one case from another merely because civil servants may be expecting a claim for compensation in some instances. If there has not been in the first place a legislative appropriation,

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[35] (1895) 5 B.R. 107, 111. The rule of public administrative law referred to by Mr Justice Wurtele could be founded on s.19 of the *Financial Administration Act*, R.S.C. 1970, c.F-10 which states: "Subject to the British North America Acts, 1867 to 1965, no payments shall be made out of the Consolidated Revenue Fund without the authority of Parliament".

[36] (1898) 15 C.S. 561.

[37] *Supra*, note 35.

[38] (1906) 12 R. de J. 470.

[39] *Supra*, note 1, s.57(3).

[40] *The Proceedings Against the Crown Act*, *supra*, note 15, s.20.

[41] *Supra*, note 28.

[42] *Supra*, note 25.

and if the payment itself is not made out of the Consolidated Revenue Fund, there can be no valid payment. This principle should apply independently of the nature or origin of the claim in question. Convenience cannot supersede the law, no matter what impracticalities may be created.

(3) *No execution shall issue against the Crown*

Since the *Federal Court Act*[43] provides that no execution can issue on a judgment given against the Crown, it follows that no claim is ever enforceable against the Crown. Thus, not being demandable, such a claim cannot consist of compensation. While the Crown may pay its debts in fact, it cannot in law be compelled to do so. To use the words of Wurtele J. in *Fortier*:

> When the Crown is adjudged upon a petition of right to pay a sum of money the suppliant cannot seize moneys belonging to the Government for the purpose of exacting and obtaining the payment of his claim ... .[44]

Furthermore, as Chief Justice Duff in *R.* v. *Bradley* explained:

> In the nature of things the Court does not and cannot make a mandatory order against the Crown; but the Court can and does declare the rights of the suppliant as between the suppliant and the Crown in cases of specific performance. ... The subject's right to relief is declared by the Court in full assurance that the Crown will give effect to the right so declared ... The respondent is ... entitled to reasonable compensation .... Such a judgment is not a mere declaratory judgment in any pertinent sense. It is a judgment establishing his right to appropriate relief in the only form in which that can be done in a judgment against the Crown.[45]

A further illustration of this principle can be found in *Charron-Picard* v. *Tardif*,[46] where the Supreme Court refused to compensate two liquidated debts when one was not demandable because a certificate of payment of succession duties had not yet been produced.

**Conclusion**

The courts have not yet, it would seem, had the opportunity to study the problem of compensation against the Crown in right of Canada in the light of these three arguments taken together. In fact, the decisions that have allowed set-off against the Crown did not refer at all to the arguments concerning legislative appropriation

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[43] *Supra*, note 39, s.56.
[44] *Supra*, note 35.
[45] [1941] S.C.R. 270, 275-277.
[46] [1961] S.C.R. 269, aff'g *Jean* v. *Gagnon* [1944] S.C.R. 175.

and the impossibility of execution against the Crown. Consequently they should not be given a great deal of weight.

It is obvious that these arguments do not fit within the general trend expressed by Rule 2(2) of the *Federal Court Rules* which states that:

> These Rules are intended to render effective the substantive law and to ensure that it is carried out; and they are to be so interpreted and applied as to facilitate rather than to delay or to end prematurely the normal advancement of cases.[47]

However, the Rules do not and cannot confer jurisdiction upon the Federal Court. Therefore, notwithstanding delays and inconveniences that may be caused to defendants, the courts should apply the law as found in the statutes. Compensation against the Crown in right of Canada should be denied until Parliament decides to imitate its British and provincial counterparts and provide expressly for set-offs and counterclaims against the Crown. Parliament has done so by way of exception in the *Crown Liability Act*[48] for proceedings against the Crown in provincial courts. It would seem advisable that it should do so, in more precise terms, for proceedings against the Crown in the Federal Court.

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[47] *Supra,* note 2, 171.
[48] *Supra,* note 9.
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