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## Public Power and Private Obligation: An Analysis of the Government Contract

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## I. Introduction

This paper analyzes contracts made by the Government<sup>1</sup> in terms of political theory.<sup>2</sup> From this perspective, it explores the assumptions, utility, and accuracy of the private law model which historically has governed the Government's liability in contract.<sup>3</sup> The paper's overarching

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1. This paper focuses on contracts entered into by the executive arm of Government – that is, Crown contracts. The term “Crown contracts” will not appear here however. For several reasons, I will instead refer to “State contracts” or “Government contracts.” First, as the Law Reform Commission of Canada has pointed out, there is considerable confusion regarding what “Crown” signifies. See its report *The Legal Status of the Federal Administration* (Working Paper No. 40) (Ottawa: Law Reform Commission of Canada, 1985), at 24-26. Second, “Crown” is unnecessarily outdated and monarchical. See discussion on this by the Law Reform Commission of Canada, at 5, and by David Cohen, “Thinking about the State: Law Reform and the Crown in Canada” (1987), 24 *Osgoode Hall Law Journal* 379-404 at 383. Third, by avoiding the word “Crown” one eliminates an unhelpful legal fiction. As Lord Diplock pointed out in *Town Investments Ltd. v. Department of Environment* [1978] A.C. 359 at 380-381: “to continue nowadays to speak of ‘the Crown’ as doing legislative or executive acts of government, which, in reality as distinct from legal fiction, are decided on and done by human beings other than the Queen herself, involves the risk of confusion.”

2. While this approach gaining more adherents, it is still not common to analyze administrative law in terms of theory. As Patrick McAuslan notes in “Administrative Law and Administrative Theory: The Dismal Performance of Administrative Lawyers” (1978), 9 *Cambrian Law Review* 40, there are several reasons for this, including, at 42, constraints that emanate from the profession:

The profession is suspicious of theory; academics are, in the practising profession's eyes, too theoretical and the way to win professional acclaim is to denigrate theory. Instead of standing up to the profession and explaining and justifying the role of theory and philosophy in administrative law, most administrative lawyers are slightly shame-faced about their interest in the subject.

3. Given the magnitude of the State's contractual presence in the marketplace, the suitability of the model determining its liability becomes an increasingly important question. According to S. Arrowsmith, *Government Procurement and Judicial Review* (Toronto: Carswell, 1988) at 29, public sector procurement by the federal government alone amounted to an estimated \$73.6 billion in 1984. She notes at 29, footnotes 9 and 10, that the value of commercial contracts entered into by Crown corporations approached \$14.4 billion, with procurement expenditures of \$4.23 billion. These figures by themselves demonstrate the presence of a truly dominating force in the Canadian marketplace and confirm that the days of a limited Canadian State – if ever they existed – are long gone now. As the Law Reform Commission of Canada points out, *supra*, note 1 at 52:

The State has ceased to be simply the provider and guarantor of a liberal order: it is also responsible for performing a host of services which have considerably altered the nature of its functions. ... Academic opinion is unanimous in noting the transition from a “Watchdog State” to a “Welfare State.”

objective is to question the propriety of applying private law principles to a public entity, particularly within the context of liberal democratic values to which both the Canadian State and society are pledged.<sup>4</sup> In accord with McAuslan, it regards theoretical inquiry as significant.<sup>5</sup> It asserts that if the current model of State liability collides with fundamental Canadian political constructs, or falls into descriptive inaccuracy, or generates false conclusions, the model ought to be replaced with a more competent one.

Part II of this paper sets out the private law model of contract. Part III assesses the premise behind applying this model to the State contract, namely, that the State has a workable private analogue. Part IV evaluates the ability of the private law model to account for the law governing the State contract as well as its compatibility with liberal democratic theory. And finally, Part V weighs the model's success in protecting the interests of the contracting individual.<sup>6</sup>

## II. *The Private Law Model*

Government liability in contract has historically been determined by private law. It is agreed that – subject to legislation and prerogative powers – the Government has a common law power to contract,<sup>7</sup> is bound as if it were an individual,<sup>8</sup> has a “duty to abide by and obey the law”<sup>9</sup> in all its parts, and enjoys no common law immunity from liability for breach.<sup>10</sup> As Lord Watson asserts in *Windsor and Annapolis Rwy. Co. v. The Queen*:

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4. See the Law Reform Commission of Canada's discussion of Canadian liberalism, *supra* note 1 at 42-51. For a very recent and insightful account of the nature of Canadian State and society, see A. Cairns, “The Past and Future of the Canadian Administrative State,” (1990) 40 University of Toronto Law Journal 319-361. See, in addition, Cairns's “The Embedded State: State-Society Relations in Canada” in Keith Banting, ed., *State and Society: Canada in Comparative Perspective* (Toronto: University of Toronto Press, 1986) at 53.

5. McAuslan, *supra*, note 2 at 40-49.

6. Note that throughout this paper, I will for ease of reference refer to the *individual* contracting with the State, bearing in mind that corporations also do so.

7. *Attorney General of Quebec v. Labrecque*, [1980] 2 S.C.R. 1057 at 1082.

8. *Bank of Montreal v. Attorney General for Quebec*, [1979] 1 S.C.R. 565 at 573-574.

9. Per Sir George Farwell in *The Eastern Trust Company v. McKenzie, Mann & Co.*, [1915] A.C. 750 at 759 (J.C., on appeal from the S.C.C.). The duty to abide by the law is placed on the Crown and “every branch of the Executive.”

10. See *Thomas v. The Queen* (1874), L.R. 10 Q.B. 31 which provides that a petition of right for unliquidated damages would lie against the Crown for breach of contract; referred to with approval in *The Queen v. Murray*, [1965] 2 Ex.C.R. 663 at 668-669, affirmed (1967), 60 D.L.R. (2d) 647 (S.C.C.).

it must now be regarded as settled law that, whenever a valid contract has been made between the Crown and a subject, a petition of right will lie for damages resulting from a breach of that contract by the Crown.<sup>11</sup>

Absent statutory restriction to the contrary, even ordinary rules of agency apply,<sup>12</sup> meaning that the Government can be contractually bound through the actual or ostensible agency of its Ministers<sup>13</sup> or its public officers.<sup>14</sup> The Government is taken to be just like – or just about like – anyone else.

The strategy of treating the Government as if it had a private analogue is both political and historical. Politically, the goal is to protect the individual from overarching State power, to reconcile, on the one hand, the conflict between the individual sovereignty of each citizen – derived from liberal democratic theory – with the reality of an institutional and coercive State, on the other.<sup>15</sup> Reliance on a private law model of State liability thereby combines the liberal idea of maximizing liberty with the objective of attaining a fair outcome in legal contests between individual and State.<sup>16</sup>

Historically, the private law strategy conforms with a central and constitutionally enshrined, liberal democratic tenet, namely the Rule of Law.<sup>17</sup> While the Rule of Law is essentially a “contested concept,”<sup>18</sup> it has

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11. (1886), 11 A.C. 607 at 613, quoted with approval by the Supreme Court of Canada in *Bank of Montreal*, *supra*, note 8 at 573.

12. *Verreault v. Attorney General for Quebec* [1977] 1 S.C.R. 41 at 46-47; *The Queen v. CAE Industries Ltd.* (1985), 20 D.L.R. (4th) 347 at 373-374 (F.C.A.), leave to appeal to the S.C.C. refused (1985), 20 D.L.R. (4th) 347n.

13. *A.G. of Canada v. Newfield Seed Ltd.* (1989), 63 D.L.R. (4th) 644 at 660 (Sask. C.A.) and *The Queen v. Transworld Shipping Ltd.* (1975), 61 D.L.R. (3rd) 304 at 307 (Fed. C.A.).

14. *Transworld*, *ibid* at 308, referring with approval to *Carltona Ltd. v. Commissioners of Works*, [1943] 2 All E.R. 560 at 563. A public officer is one whose fills a statutory office, per *Sumner v. Chandler*, [1878] 18 N.B.R. 175 at 185 (C.A.), or one who is appointed to discharge a public duty and is paid by the Crown to do so, per *Smith v. Christie*, [1920] 3 W.W.R. 585 at 591-592 (Alta. S.C.A.D.). As the court in *Carltona* at 308 points out, no Minister could personally attend to all his or her administrative responsibilities and so

duties imposed upon ministers and the powers given to ministers are normally exercised under the authority of the minister by responsible officials of the department. Public business could not be carried on if that were not the case.

15. See Quentin Skinner’s discussion of the conflict between individual autonomy and State power in “The State” in *Political Innovation and Conceptual Change* (Cambridge: Cambridge University Press, 1989), 90-131 at 122.

16. See H. Collins, *The Law of Contract* (London: Weidenfeld and Nicholson, 1986) at 1 where he identifies the “latent social ideal” of contract law to be the maximization of individual liberty.

17. The preamble to Schedule B to the *Canada Act 1982* (U.K.) (The Canadian Charter of Rights and Freedoms) provides that Canada is founded on “principles that recognize the supremacy of God and the rule of law.”

18. M.J. Radin, “Reconsidering the Rule of Law” (1989), 69 *Boston University Law Review* 781 at 791.

a relatively stable judicial meaning in Canada. Indeed, the Supreme Court of Canada has expressly affirmed the historical and constitutional importance of the Rule of Law, defining it as “conveying, for example, a sense of orderliness, of subjection to known legal rules and of executive accountability to legal authority.”<sup>19</sup>

The Rule of Law – the same Rule of Law – applies to both individual and State. This accords with Dicey’s late nineteenth-century pronouncement that no person is “above the law, but (what is a different thing)... [everyone] ... of whatever rank or condition is subject to the ordinary law of the realm and amenable to the jurisdiction of ordinary tribunals.”<sup>20</sup> Subjecting the State to the private law of contract thereby conforms to “a widely-held political ideal,”<sup>21</sup> by constraining the arbitrary exercise of State power.<sup>22</sup> In short, the common law protects individual autonomy from sovereign power by declining to recognize the State’s status as governor when it is in the contractual arena.

This private law strategy – while powered by objectives closely tied to liberal democratic theory – is nonetheless problematic. There are two important objections. The first relates to the premise behind the strategy: it assumes that the State is like the individual and has a private analogue,

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19. *Re Language Rights under the Manitoba Act, 1870* (1985), 19 D.L.R. (4th) 1 at 23 (S.C.C.) quoting with approval its earlier pronouncement in *Reference re Amendment to the Constitution of Canada (nos. 1,2,3)* (1981), 125 D.L.R. (3d) 1 at 46.

It is beyond the scope of this paper to discuss the debate between theorists who regard the Rule of Law instrumentally – such as J. Raz, “The Rule of Law and Its Virtue” in Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Oxford: Clarendon Press, 1979) – and those who regard it substantively, such as F.A. Hayek, *The Constitution of Liberty* (Chicago: University of Chicago Press, 1960). For a useful summary of the varying positions, see M.J. Radin *ibid.* Note too, the Supreme Court of Canada in *Re Language Rights under the Manitoba Act, 1870* has expressly favoured Raz’s approach, at 23.

20. A.V. Dicey, *Introduction to the Study of the Law of the Constitution* (10th ed.) (London: MacMillan & Co. Ltd. 1964) at 193, first published in 1885.

21. P. Hogg, *Liability of the Crown*, 2nd ed., (Toronto: Carswell, 1989) at 2.

Note that while Dicey is traditionally invoked in support of a system which makes the State responsible, pursuant to the ordinary law, for its tortious and contractual conduct, Dicey was not in favour of such a proposition. As Cohen points out, it was Dicey’s position that the State should have no legal status at all – that individual bureaucrats should bear personal liability. See Cohen, *supra*, note 1 at 389-390.

22. Liberal theory regards State power suspiciously and requires constraint on its exercise to avoid results contrary to the Rule of Law, including arbitrariness. See J. Gray, *Concepts in Social Thought: Liberalism* (Minneapolis: University of Minneapolis, 1986) at 74. See too D. Hartle’s assertion in *Public Policy and Decision Making and Regulation* (Toronto: Butterworths, 1979) at 44, that the State has a vital role

as the ultimate rule maker and rule enforcer that can and does, by changing the rules, affect all of the sources of well-being of all individuals directly or indirectly, for good or for ill.

Quoted with approval by Alan Cairns, “The Past and Future of the Canadian Administrative State,” *supra*, note 4 at 320, n. 3

thereby permitting – in theory at least – application of a private law model of liability. I propose to explore this assumption in the next section. The second objection concerns the model’s competence to account for the current state of the law. I will turn to this matter in Part IV.

### III. *The Feasibility of the Private Law Model and its Analogue*

Treitel provides the following definition of a contract: “A contract is an agreement giving rise to obligations which are enforced or recognized by law.”<sup>23</sup> An agreement, in turn, implies at least three elements which are particularly germane to an analysis of the State contract. First, it implies freedom of contract – that parties are empowered to strike any bargain they please. This is a tempered freedom of contract, of course, as modern contract theory rejects the classicists’ world of “totally autonomous individuals, free to transact on any terms ... and thereby to control their own destinies”.<sup>24</sup> Instead, it selects the image of “relatively autonomous individuals transacting in an environment regulated by trade custom and state intervention that alleviates the most extreme hardships of the market.”<sup>25</sup> It is within this latter context<sup>26</sup> that freedom of contract remains a private law value. Second, an agreement implies some measure of equality in bargaining power between the parties so as to define the line between true consent and “a state of mind which cannot properly be described as consent at all.”<sup>27</sup> Third, it requires both finality and closure as contractual obligations are concluded at a single point in time: “generally speaking, an agreement is made when one party accepts an offer made by the other.”<sup>28</sup> It is at this moment that the deal is set, the terms defined; it is from such a vantage point that one assesses mutual obligations and so what constitutes breach. Events, words, and obligations originating before or after this critical moment are, as a general proposition, of no legal consequence.

To apply these three elements to the Government contract, one must first establish that the individual and State are largely equivalent in the

23. Treitel, G. H., *The Law of Contract* (8th ed.) (London: Stevens & Sons, 1991) at 1.

24. J. Feinman, “The Significance of Contract Law Theory”, [1990] 58 *Cincinnati L.R.* 1283 at 1309-1310.

25. *Ibid.*, at 1310. Treitel points out that there are now statutory regimes which regulate the terms and conditions of many important contractual relationships, *supra*, note 23 at 2-5, and this reduces the scope of classically conceived freedom of contract. See too P.S. Atiyah, *The Rise and Fall of Freedom of Contract* (Oxford: Clarendon Press, 1979).

Note that Feinman rejects both the classical and modern theories of contract because, among other matters, they do not recognize their own ideological perspectives, *ibid.*, at 1309-1310.

26. Feinman, *ibid.*, at 1286.

27. Treitel, *supra*, note 23 at 3.

28. *Ibid.*, at 8.

market place – that the State is competent to have a workable private analogue. Related to this point is the necessity of showing that the State contract can be competently analyzed in terms of the private law ingredients outlined above and further, that such an analysis is consistent with liberal democratic theory. Compatibility with theory is important because a model of State liability ought not to conflict with Canadian values and its liberal democratic heritage. Finally, for the analogue to survive, there must be evidence that State defences to liability are comparable to those available to the ordinary individual. I propose to consider each of these matters in turn.

### 1. *The Analogical Premise*

#### a. *The liberal democratic perspective*

In this section, I will briefly introduce two elements derived from political theory which render the State fundamentally different from the individual, even within a contractual relationship, namely its coercive resources and duties of governance.

#### i. *The State's coercive resources*

The fact of State power persists even in a liberal democratic society which elevates the Rule of Law. Put briefly, the principle of Parliamentary sovereignty means that the State is never entirely subject to law<sup>29</sup> and so is fundamentally unlike the individual. State power means that the State has coercive resources from which the individual requires protection.<sup>30</sup> It means that the State is “a monopolist of legitimate force.”<sup>31</sup> In short, within the context of a liberal democracy, the State embraces

a double system of power. It is a system by which people can be *governed*, that is, made to do things they would not otherwise do, and made to refrain from doing things they otherwise might do. Democracy as a system of government is, then, a system by which power is exerted by the state over individuals and groups within it.<sup>32</sup>

Still, it does remain rare for the State to *force* the individual into a contractual relationship. On this basis, therefore, one could argue that the fact of State power remains largely irrelevant in the market-place. Yet it must be remembered that when the State and individual agree to certain

29. T. Prosser, “Towards a Critical Public Law” (1982), 9 *Journal of Law and Society* 1-19, at 7.

30. Mr. Justice Sopinka notes that the role of the Charter is to protect the individual “against the coercive power of the state.” See *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229 at 444.

31. Skinner, *supra*, note 15 at 107.

32. C.B. Macpherson, *The Real World of Democracy* (Toronto: Canadian Broadcasting Corporation, 1965) at 4. See too discussion by the Law Reform Commission of Canada, *supra*, note 1 at 61-65.

contractual provisions, the commitment each gives is essentially different. This is because the State retains its identity even when submitting to the private law and is never stripped of its extraordinary resources. Rather, in entering the market, it elects in a non-binding way to place those resources in abeyance; it has a legal alter-ego to which it can revert. The individual, by way of contrast, is fully and finally bound.

ii. *The State's duties of governance*

Of course, it is beyond the scope of this paper to attempt a thorough account of the State's obligations pursuant to liberal democratic theory.<sup>33</sup> I do propose to offer, however, some general comments.

Among other matters, liberalism requires the State to show a solemn regard for the human person and manifest respect for individual autonomy.<sup>34</sup> At the same time – and this is clearly a competing principle – the State is required to act in the public interest.<sup>35</sup> One of the State's central obligations in this latter category is to ensure the presence of justice in the community for, as Dworkin points out, individual autonomy is not possible in an unjust community. And while there may be disagreement as to what justice may require, there is, at least, a shared understanding that

politics is a joint venture in a particularly strong sense: that everyone, of every conviction and economic level, has a personal stake – a *strong* personal stake for someone with a lively sense of his [sic] critical interests – in justice not only for himself but for everyone else as well. That understanding provides a powerful bond underlying even the most heated argument over particular policies and principles.<sup>36</sup>

Because an unjust community hinders the individual in pursuing the good life, each of us “shares that powerful reason for wanting our community to be a just one.”<sup>37</sup> As Dworkin concludes:

our success or failure in leading the lives people like us should have, are in that limited but powerful way parasitic on our success together in

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33. Liberal democratic theory does not embrace a single perspective. As Gray notes, *supra*, note 22 at x, liberalism regards itself as tolerant and meliorist. In this way, liberalism does the very thing it seeks to describe by defying the possibility of autocratic pronouncements regarding what it entails.

34. Liberalism is constructed on the notion of respect for individual autonomy. See Gray, *ibid.*; J. Blum “Critical Legal Studies and the Rule of Law” (1990), 38 *University of Buffalo Law Review* 59 at 120 and Stephen Macedo, *Liberal Virtues: Citizenship, Virtue and Community in Liberal Constitutionalism* (Oxford: Clarendon Press, 1990) at 39.

35. For example, the State is only entitled to exercise its power to contract in fulfilment of the common good. See my discussion, *infra* at 12-14.

36. R. Dworkin, “Liberal Community” (1989), 77 *California Law Review* 479-504 at 501-502.

37. *Ibid.*, at 504.



politics. Political community has that ethical primacy over our individual lives.<sup>38</sup>

The Government's duties of governance – including the matters discussed above – argue against an individual-State analogue and this even in the market-place. Because it is the State's job to ensure the presence of justice in the community, to respect its role as lawmaker,<sup>39</sup> to guarantee a liberal order,<sup>40</sup> as well as to exercise its powers in the interests of the common good, the State must always have due regard for the quality of its actions. For, without integrity and consistency of State conduct, an intolerable contradiction would emerge between "idea and conduct," between "form and practice in public life."<sup>41</sup>

The individual's contractual behaviour, on the other hand, is not similarly constrained. Indeed, and a matter I will return to in the next section of this paper, it is a hallmark of democratic liberalism to minimize formal demands on the individual because he or she occupies a qualified position of primacy over the collective<sup>42</sup> and because liberalism maintains "a more or less neutral stance with regard to permissible patterns of social life."<sup>43</sup>

#### b. *The common law perspective*

Though the private law model claims that the State is contractually bound as if it were an individual,<sup>44</sup> a review of British and Canadian case law, dating back to the eighteenth-century, reveals judicial recognition that the State differs from the individual in basic, unbridgeable ways. While it must be emphasized that this case law does not constitute a large body, it is nonetheless important for identifying legally significant differences between the State and individual and this even in a commercial setting.

As early as 1786, in the decision of *Macbeath v. Haldimand*,<sup>45</sup> Lord Mansfield stated that when a Crown servant enters into a contract, there is, as a general proposition, no personal liability: "we cannot argue from the nature of private agreements .... The presumption is that the public

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38. *Ibid.*

39. See *Northern Territory of Aus. v. Skywest Pty.* (1987), 48 N.T.R. 20 at 46.

40. Law Reform Commission of Canada, *supra* note 1 at 52.

41. K. Dyson, *The State Tradition in Western Europe: A Study of an Idea and an Institution* (Oxford: Martin Robertson, 1980) at 6.

42. J. Gray, *supra*, note 22 at x.

43. Collins, *supra*, note 16 at 1.

44. See *Bank of Montreal, supra*, note 8.

45. 1 T.R. 181.

faith, or justice of the Crown is always relied upon.”<sup>46</sup> A nineteenth-century textbook writer, quoted with approval in the 1878 decision of *Sumner v. Chandler*, also invokes a value laden presumption regarding the standard of behaviour expected from the State when an agent seeks to contract on its behalf:

The natural presumption ... is that the contract was made upon the credit and responsibility of the government itself, as possessing an entire ability to fulfil all its just contracts far beyond that of any private man; and that it is ready to fulfil them not only with good faith, but with punctilious promptitude, and in the spirit of liberal courtesy.<sup>47</sup>

In 1920, a Canadian court even enforced a Government apprenticeship contract which it otherwise would have found to be too obscure, it said, had only individuals been involved.<sup>48</sup> The presence of the Crown as the other contracting party allayed any concern that the apprentice involved would have been made unreasonably vulnerable under the contract. In the Court’s opinion, “it must be assumed that the Crown, acting by a responsible minister, will deal fairly and justly.”<sup>49</sup>

Considerably more recently, the Supreme Court of Canada, in a 1990 decision<sup>50</sup> emphasized some of the distinctive interests which the State represents in a contractual dispute:

The Crown represents the state. It constitutes the means by which the federal aspect of our Canadian society functions. It must represent the interests of all members of Canadian society in court claims brought against the Crown in right of Canada. The interests and obligations of the Crown are vastly different from those of private litigants making claims against the federal government.<sup>51</sup>

There is even judicial reflection—from an Australian Court—on the link between government conduct in the contractual arena and the Rule of

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46. *Ibid.* at 185. One finds a parallel pronouncement in the decision of *Hopkins v. Mehoffey* (1824) 11 Serge & Rawle 126 at 128:

In general, it is true, that there is a distinction between contracts that are entered into *on the part of government*, by its agents, and those which are entered into *on the part of individuals or corporations*, by those who represent them. In respect of the first ... *the public faith is exclusively relied on*, whenever the agent does not speedily render himself liable.

47. *Story on Agency* (8th ed.), quoted in *Sumner, supra*, note 14 at 186-187.

48. *R. v. Novak*, [1920] 1 W.W.R. 136 at 137 (Man.C.A.).

49. *Ibid.* Whether this case continues to be good law is questionable – I cite it only as an example of a judicial attitude.

50. *Rudolph Wolff & Co. v. The Queen* (1990), 69 D.L.R. (4th) 392 (S.C.C.).

51. *Ibid.* at 397.

On the basis that “the Crown cannot be equated with an individual,” the Court upheld the constitutionality of legislation giving the federal courts exclusive jurisdiction on claims against the Crown, *ibid.*

Law. As the Court in *Northern Territory of Aust. v. Skywest Pty. Ltd.* observes:

A government is not only a party to a contract; through its control of Parliament it is a lawmaker. In that capacity it has an interest in ensuring that people respect and observe the law, and to do so it must display by its actions some minimum respect for its own rules. For it is in the public interest that when a government contracts with an ordinary person, it deals fairly with that person and is seen to do so.<sup>52</sup>

The Court implies that more is expected from the State in a contractual context because more is at risk should it disregard its obligations and treat the individual unfairly, namely, social respect for the Rule of Law.<sup>53</sup>

*Macbeath* and other decisions like it,<sup>54</sup> suggest that some of the principles derived from commercial practice are misplaced when the contractual principal is the State. The decisions in *Novak* and *Skywest Pty* intimate that the contractual presence of the State calls for a similar modulation – this because the State can be relied upon to be less combative, less obstructive,<sup>55</sup> and more reasonable than the ordinary individual. These Courts assume that the Crown has an extra-legal obligation to do the right thing, to “do ample justice to the plaintiff’s demand if it be well founded,”<sup>56</sup> and so, indirectly at least, expect no less of it. While their assumptions are never expressly tied back to the liberal democratic quality of the State’s obligations as governor, the courts do see it as an entity which can be trusted to be fair and just even if it were entitled to be otherwise by contract or operation of law. And the Courts

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52. *Supra* note 39 at 46.

53. *Ibid.*

54. *Sumner v. Chandler*, *supra* note 14; *Hopkins v. Mehoffey*, *supra* note 46.

55. For example, according to the Court in *Deare v. Attorney General* (1835), 1 Y & C 197 at 208:

It has been the practice which I hope never will be discontinued, for officers of the Crown to throw no difficulty in the way of any proceedings for the purpose of bringing matters before a Court of justice where any real point of difficulty that requires judicial decision has occurred.

This quotation has been referred to with approval in *The Eastern Trust Company v. McKenzie, Mann & Co.*, *supra*, note 9 at 760.

56. *Macbeath*, *supra*, note 45.

are willing to enforce the State's solemn obligation to act in the public interest even *within the context of a contractual dispute*.<sup>57</sup>

In giving legal significance to the State's duties of governance, the forgoing cases accord with liberal political theory and so run counter to the private law model of State liability. They expressly recognize that the State has more and different obligations than the individual has in the same setting.

## 2. Conclusion

Thus far, I have attempted to show – in a general way – that both the coercive resources and public duties of the State make it fundamentally different from the individual.<sup>58</sup> This fact is easily lost sight of because the private law model, in pursuit of a paradoxical strategy to protect individual autonomy, must insist on the presence of an analogue.<sup>59</sup> Accordingly, whether the State can be likened to the individual is not generally a matter of judicial inquiry – it is the accepted starting point. But the starting point is nonetheless inaccurate. To demonstrate this contention in greater detail, the next section of this paper will explore examples of how the private law model fails to account for the State contract and how, therefore, it analogical assumption founders.

## IV. *The Accuracy of the Private Law Model*

The private law model seeks to absorb the primary differences between individual and State but it cannot consistently accomplish that task. First, to do so would be entirely contrary to basic principles of a liberal

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57. It should be noted that the Supreme Court of Canada in *Rudolph Wolff*, *supra*, note 50, leaves open the possibility that where the Crown's activities "are indistinguishable from those of any other litigant engaged in a commercial activity," a section 15 Charter comparison might be "just and appropriate," at 397. The opening left here, however, is very small indeed because the Supreme Court of Canada has applied *Rudolph Wolff* to a case involving what would appear to be an extremely commercial matter – a contract to repair a wharf in Nova Scotia. See *R. v. Dywidag Systems International et al* (1990), 40 C.L.R. 1 at 4 (S.C.C.).

It could be argued that the Government's activity in *Dywidag* was not purely commercial as its contractual obligations were incurred for the benefit of the people of Nova Scotia. If this argument is correct, then there can be no real exception to the principle in *Rudolph Wolff & Co.* because all Government contracts must be entered into for the public good. See *infra* at 496. If this is true, then there exists high judicial recognition that the State is intrinsically different from the contracting individual even in highly – if not fully – commercial matters.

58. Accord Cohen who writes *supra*, note 1 at 381, that:

The state (or community) has no private analogue, and, in developing legal concepts and a public policy of the state, we should not carry with us the conceptual baggage of another era, designed to deal with other problems.

59. As discussed earlier in this paper, the assumption is that, in order to protect the individual from overarching State power, the law should deny any formal recognition of the identity of the State when it is in the contractual arena.

democracy. Second – and this is a related point – application of the model is already modified by public law principles derived from liberal democratic theory, on the one hand, and feudal incidents of prerogative powers, on the other. These principles are not formally organized nor are their limits judicially explored because they are seen as exceptions to the general rule. Nonetheless, they distinguish the State contract from legal agreements between individuals and so compromise the operation of the private law model. Indeed, as I will discuss in this section, the State contract is not governed by private law elements alone but by an unstructured array of constitutional, administrative, and contractual principles in addition to the incidents of sovereignty found in the Crown’s legislative, common law, and prerogative powers.

### 1. *Freedom of Contract*

The private model of contract assumes that the State and individual share a parallel – if not identical – freedom to contract. The assumption, in turn, raises two questions. First, does liberal democratic theory recognize unique constraints on the State’s freedom to contract and second, are there any judicially acknowledged limitations imposed on the State contract which contradict the basis of the model?

#### a. *Liberal democratic theory*

As already discussed, liberal democratic theory obligates the State both to preserve individual autonomy and to act in the interests of the public good. As these duties are both mandatory and general, the State is required to respect its relationship with the individual and society at large even when a named individual and the State interact in other ways – including contractual ones. Neither the antecedent individual-State relationship nor the State-society relationship disappear when a contract is made because liberal democratic theory says they cannot.<sup>60</sup> On the contrary, these relationships persist and influence the State’s newly assumed obligations.

This means that, like any other public body, the State “possesses powers solely in order that it may use them for the public good.”<sup>61</sup> It means that the State has nothing to win or lose by entering into a contract because:

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60. The Court in *Skywest* acknowledges that even in a contractual setting, the State remains a lawmaker. See *supra*, note 39 at 46.

61. H.W.R. Wade, *Administrative Law*, 6th ed, (Oxford: Clarendon Press, 1988) at 400.

it represents, not its own interest (indeed, it is difficult to envisage how the administration, as such, can have any interests of its own), but the interests of the public, of society in general.<sup>62</sup>

The State's obligations are not contained in the contract alone because it continues to owe duties of governance to society at large and to the private party who, obviously enough, continues to be an individual citizen. The State is not simply bound to a contract; it must fulfil simultaneously its duties within these pre-existing relationships as well. Liberal democratic theory limits what the State can do in the marketplace, how it can do it, and for what reasons.

Similar limits are not placed on participants in private contractual arrangements. There, the liberal ideal of freedom has a wider scope; the terms and conditions of the contract more fully circumscribe obligation; the individual has fewer positive obligations. As Hugh Collins summarizes it,

A ... conventional classification of the law of contract, which has dominated legal discourse during the last century, views the purpose of contract law as the creation of a facility for individuals to pursue their voluntary choices. Its latent social ideal embodies a liberal state in which the law maximizes the liberty of individual citizens, [and] encourages self-reliance ... It secures these goals by facilitating the creation of legal obligations on any terms which individuals freely choose. This familiar textbook picture unites the law of contract by deriving its principal doctrines from the concept of voluntary choice.<sup>63</sup>

Notwithstanding the clear differences between individual and State, the State's ongoing liberal democratic obligations in the contractual arena are often forgotten. First, because the private law model does not generally give legal significance to extra-contractual relationships, State obligations are referenced only with respect to the contract in question. Second – absent bad faith on the part of a State official<sup>64</sup> – the State's liberal democratic duty to act in the public good and treat the individual with respect is largely unenforceable. In sum, because it is not clear when

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62. A. Mewett, "The Theory of Government Contracts" (1959), 5 McGill Law Journal 222 at 223, in reference to French public contracts.

63. *Supra*, note 16 at 1. There are, of course, common law principles which ameliorate some of the harshness which can come from this model. Further, its descriptive accuracy has been challenged by scholars such as Collins and Ian Macneil. See, in particular, Macneil's *The New Social Contract: An Enquiry into Modern Contractual Relations* (New Haven: Yale University Press, 1980). Nonetheless, the liberal ideal of voluntary choice remains at the centre of neo-classical contract law.

64. According to Arrowsmith, *supra*, note 3 at 182, State officials must act within the doctrine of good faith and so are "prohibited from acting out of personal motives." The official must also respect the rule against self-dealing – it must not deal in its official capacity with itself in its personal capacity, at 186. If either the doctrine or the rule are disregarded, the contract is voidable at the instance of the Government, at 186.

the State's contractual conduct will be subject to judicial review, and even whether it is bound by fiduciary principles,<sup>65</sup> the larger social and political context of the State contract is ignored.

The fact that many of the State's liberal democratic duties may be unenforceable or of uncertain legal stature does not make them less solemn or politically mandatory. Nor does it mean that the individual and State are therefore equally free in the marketplace. The private law model largely disregards individual-State differences only because it does not have the categories to contemplate them in the first place. Its conclusion that the State and individual share the same freedom of contract is tenuous at best and cannot produce a liberal democratic pedigree.

#### b. *Common law principles*

We have already seen that the State has a duty to contract in the interests of the public good and continues to owe the individual contracting party certain liberal democratic obligations. We have also seen that the State remains itself – even in a commercial contract – and so has unique coercive resources. Notwithstanding the private law model's inability to accommodate the dual fact of State power and obligation, there are common law principles, albeit limited, which expressly override the model and restrict what kind of contract the State can enter.

In accepting that the State and individual are not analogical, and that legal consequences flow from differences, these principles contradict the private law model in the name of liberal democratic values. They testify against the model's descriptive accuracy and usefulness. Unfortunately, as I will show, because the principles are seen to co-exist with the model as mere exceptions, their application is not generally clear, their scope is sometimes tentative, and their significance is always undervalued.

#### i. *The exercise of governmental power must be consistent with the Canadian constitution*

The State's exercise of its executive powers, whether derived from "statute, common law or prerogative, must be adapted to conform with

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65. See Arrowsmith's discussion, *ibid.* at 189-190. In Arrowsmith's view, there should be an express public law of fiduciary obligations, at 189-190, because it would impose a greater range of substantive obligations and remedies. For example, where a public contract is awarded on the basis of a bribe, it constitutes "a breach of the public law doctrine of good faith" and so can be set aside. But, according to Arrowsmith, at 184, the

fiduciary obligation ... goes further – it forbids a party from accepting a bribe, not merely from acting on it. Thus, a party relying on this doctrine need not show that any award was induced by the bribe, but only that the bribe was made.

constitutional imperatives.”<sup>66</sup> Even decisions made by cabinet, however political, “are all subject to judicial scrutiny for compatibility with the Constitution”<sup>67</sup> because they constitute a matter within the authority of Parliament or the legislature, pursuant to section 32(1) of the Charter.<sup>68</sup> As Mr. Justice Dickson states: “I have no doubt that the executive branch of the Canadian government is duty bound to act in accordance with the dictates of the *Charter*.”<sup>69</sup>

That Charter constraints apply to the State contract is confirmed by the Supreme Court of Canada’s decision in *Douglas College v. Douglas/Kwantlen Faculty Association*.<sup>70</sup> In that case, the Supreme Court of Canada determined that first, the actions of a Crown agency (here a community college) in negotiating and administering a collective agreement constituted an action of government for the purposes of section 32 of the Charter;<sup>71</sup> second, that the collective agreement was “law” within the meaning of the section 15 equality provision of the Charter,<sup>72</sup> and

66. *Air Canada v. Attorney General of British Columbia*, [1987] 1 W.W.R. 304 at 309. (S.C.C.).

In this case, Air Canada had issued a petition of right to bring an action for a governmental accounting based on the alleged unconstitutionality of a taxation statute. On the advice of the Attorney-General, the Lieutenant-Governor denied to grant his fiat. Justice La Forest, for the Supreme Court of Canada, found that the exercise of the Lieutenant-Governor’s discretion here was reviewable: “In my view, if even a statute cannot permit the retention of moneys obtained under an unconstitutional statute, that result cannot be achieved under a purported exercise of a discretion to refuse a fiat, whatever may be the legal foundation of the supposed discretion,” at 309.

See too *Retail, Wholesale & Department Store Union, Local 580 v. Dolphin Delivery*, [1986] 2 S.C.R. 573, hereafter *Dolphin Delivery*.

67. *Operation Dismantle Inc. v. The Queen*, [1985] 1 S.C.R. 441 at 455. At issue here was a federal cabinet decision to allow the testing of American cruise missiles over Canadian territory. The appellants alleged that such a decision was contrary to section 7 of the Charter as being contrary to security of the person, at 448.

68. *Ibid.* at 455 and 463-464.

Section 32(1) of the Charter provided:

This Charter applies

(a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and

(b) to the Legislature and government of each province in respect of all matters within the authority of the legislature of each province.

69. *Ibid.* at 455.

70. *Douglas College v. Douglas/Kwantlen Faculty Association*, [1990] 3 S.C.R. 570. For the text of section 32, see note 68.

71. *Ibid.*

72. The majority found the agreement to be “law” because it involved a mandatory policy, *ibid.* at 585. Even working with this minimum standard, a State contract would be “law” as it too reflects government policy with respect to what goods and services are needed and on what basis.

Section 15(1) of the Charter provides:

Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.



third, to the extent that the impugned contract violated Charter rights, it would be unenforceable: “To permit government to pursue policies violating *Charter* rights by means of contracts and agreements with other persons or bodies cannot be tolerated.”<sup>73</sup>

Such a constraint on the State’s freedom of contract is mandatory from the perspective of liberal democratic theory. Clearly, the State must respect Canada’s “supreme law;” it could not be at liberty to ignore the idea of the Canadian State, to violate the rights and freedoms of its citizenry, and to disregard through its own contractual conduct the requirements of justice in the community.

By way of contrast, contracts between individuals are not subject to provisions of the Charter – though provincial human rights legislation may impose limitations – because no governmental action is involved. It is assumed that in the private sphere, individuals can take care of themselves and are more free to be bound to the terms they please. Further, as the British Columbia Court of Appeal expresses it, one ought to reject the Charter’s application to private arrangements because:

It is a rare commercial contract which does not *ex facie* infringe on some freedom set out in section 2 or some legal right under section 7 [of the Charter.] To include such private commercial contracts under scrutiny of the Charter could create havoc in the commercial life of the country.<sup>74</sup>

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73. *Ibid.*

It should be noted that the Court contemplated the possibility of an individual being competent to bargain away some of his or her rights – such as the right not to be discriminated against on the basis of age – if that bargaining away is rational, at 585. The Court said it would be unlikely to find as rational bargaining away the right not to be discriminated on the basis of race, however.

Note too Justice Sopinka’s dissent on this point in *Douglas College*, *supra* note 70 at 616:

Both La Forest and Wilson JJ. are of the view that the mandatory retirement provisions in the collective agreement qualify as “law” under s. 15 of the *Charter* notwithstanding that such “policies” may be the product of fair negotiations reflecting the desired objectives of both parties. I respectfully disagree that the consensual nature of the policies in question may be so discarded in the examination as to whether they constitute “law.” In this regard, I share the misgivings of my colleague Justice Cory, as expressed in *McKinney*, with the proposition that an individual cannot, under any circumstances contract out of the rights of equality in matters pertaining to age.

74. See *Re Bhindi* (1986), 29 D.L.R. (4th) 47 at 54 (B.C.C.A.), referred to with approval in *McKinney v. University of Guelph*, *supra* note 30 at 262 where the Court held that the Charter is not applicable to a private contract.

Note that in *Re Bhindi*, the trial judge expressly rejected the argument that the Charter would apply to all contracts as the State has a presence in all aspects of society. See *Re Bhindi* (1985), 20 D.L.R. 391 (Q.B.). See too *Dolphin Delivery*, *supra*, note 66.

*ii. The exercise of government power must be consistent with the State's statutory powers and duties*

The State cannot fetter by contract its statutory power to enact, amend, or repeal legislation.<sup>75</sup> Its legislative powers are to be exercised for the public interest alone<sup>76</sup> and not in furtherance of a contractual obligation. Similarly, the public interest requires that neither the government nor a public authority contractually disable itself from performing a statutory duty or from exercising a discretionary power conferred by or under a statute.<sup>77</sup> A contract which is incompatible with the government's legislative obligations and "statutory birthright"<sup>78</sup> fails even if the matter is largely commercial. This is because it is difficult to distinguish between the State's discretionary power which is to be used in the public good and the State's executive power to enter into commercial contracts.<sup>79</sup>

The private law strategy of recasting as exceptional a dominant and subsisting aspect of the State's identity – namely its legislative and statutory powers and obligations – produces a perplexing result. In order to make the State fit the private law model, it is said that the State is like the individual in a contractual setting. Yet should the State act like an individual and not concern itself with its unique legislative and discretionary duties, the model reminds the State of its true identity,<sup>80</sup> holds it to that standard, and cuts back on the freedom of contract it originally seemed to have. This convolution makes one question yet again the model's analogical starting point and the coextensive freedom of contract which it presumes between State and individual.

*iii. The principles of review*

Individuals bargaining in the marketplace owe each other a minimum regard because liberalism assumes that each person will look to his or her own interests; further, it seeks to be neutral concerning how people ought

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75. *Ansett Transport Industries (Operations) Pty. Ltd. v. The Commonwealth*, [1977] 139 C.L.R.54 at 71 (H.C.Aus.); *The King v. Dominion Stamp of Canada*, [1930] S.C.R.500; *Esquimalt & Nanaimo Railway Company v. A.G. of B.C.*, [1949] 2 W.W.R. 1233 (P.C., on appeal from the S.C.C.).

76. *Ansett, ibid* at 71. See too Wade, *supra*, note 61 at 377.

77. *Ansett, ibid* at 74.

There is, in addition, some very limited authority for the proposition that the State is not competent to fetter the exercise of its future executory power by contract. I discuss this doctrine in Part V and take the position that it does not state the law.

78. *Kell-Erny's Enterprises v. Dyck* (1987), 34 D.L.R. (4th) 456 at 461 (B.C.C.A.).

79. *Ansett, supra*, note 75.

80. See *Ansett, ibid* and other cases cited in footnote 75. See too *Kell-Erny's Enterprises, supra*, note 78.

and ought not to interact.<sup>81</sup> Of course, the law enforces limits so that contracts retain the level of voluntariness and fairness required to be contracts properly so called. The law does not tolerate, for example, fraud, misrepresentation extortion, duress or unconscionable behaviour.<sup>82</sup> Nor is the State allowed to bargain in such unacceptable ways. But in addition, the State is subject to unique judicial scrutiny because it is the State. Though the grounds for and scope of judicial review remain unclear, to the extent that the State's contractual conduct is justiciable where the individual's conduct is not, their respective freedom of contract does not coincide. Put another way, if the State's conduct is specifically regulated in the contractual arena, it is not empowered to enter any arrangement it pleases. It can only strike an agreement which is the product of an approved kind of bargaining.

Beyond the requirement for constitutionality discussed earlier, there is no general proposition concerning judicial review of the State contract. We do know, however, that—unlike the individual—the State owes a duty of fairness in the certain contractual situations. In 1990, for example, the Court in *Thomas Assaly*<sup>83</sup> asserted that governmental decisions concerning the acceptance or rejection of tenders:

directly affect the interests of persons invited to bid ... There is therefore attached a duty of fairness which Courts can enforce by certiorari, [see eg. *Martineau v. Matsqui Institution Disciplinary Board* [1980] 1 S.C.R. 602 at 628] a public law remedy to control the proper exercise of governmental powers.<sup>84</sup>

A similar determination to ensure fairness in the awarding of governmental contracts is at work in *The Glenview Corp v. Canada (Min. of Public Works)*<sup>85</sup>:

The Court must be vigilant in assuring itself that the Crown is acting in utmost good faith and not actually attempting to obviate the tendering process.<sup>86</sup>

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81. Collins, *supra*, note 16 at 1.

82. See Treitel, *supra*, note 23, Chs. 9, 10, 11, and 12.

83. *Thomas C. Assaly Corp. v. Canada* (1990), 34 F.T.R. 156 (T.D.).

84. *Ibid.*, at 158. In this particular case, fairness required that "the party whose interests are to be affected by a decision be aware of the issues he must address to have a chance of succeeding," at 159.

85. (1990), 34 F.T.R. 292 (T.D.).

86. *Ibid.*, at 296. Note that there is recent *obiter* commentary in favour of the proposition that the Government does not owe a duty of fairness when involved in a purely commercial contract which does not affect the public interest. See *St. Lawrence Cement v. Ontario (Minister of Transportation)* (1991), 3 O.R. (3d) 30 (Ont.Ct.G.D.) which involved a tender call for the reconstruction of a public highway. Given the Supreme Court of Canada's decision in *Dywidag Systems* which implicitly determined that a contract for the construction of a wharf in Nova Scotia was not a purely commercial matter, the reasoning in *St. Lawrence Cement* is suspect. See my discussion of *Dywidag*, *supra*, footnote 57.

But in both *Thomas Assaly* and *Glenview*, the Courts confine themselves to the tendering context. We still have no judicial pronouncement on whether the executive owes a duty of fairness in all its contractual dealings, whether established by tender or not.<sup>87</sup> We still have no Canadian position on whether the question of review is also dependent on the contractual power being exercised statutorily as opposed to being an incident of the State's common law powers.<sup>88</sup> We still do not know the extent to which administrative law principles of justice are relevant to the State contract.

For now, it is enough to note that an important public law standard has been adopted into the private law regime of State contracts. *Assaly* and *Glenview* may mark the beginnings of a trend whereby the judiciary seeks to ensure that governmental decisions are made on the basis of fair

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87. What is ironic about the absence of a clear judicial position is that opportunities to state the law have presented themselves but not been seized by the Courts. In *Quasar Helicopters Ltd. v. The Queen*, [1983] 1 F.C. 536 (T.D.), for example, the plaintiff brought action against the Government for failing to consider a tender which—unknown to the Government at the time despite its best efforts—in fact, had met all statutory and regulatory prerequisites to consideration. The plaintiff argued that the Government owed it a duty of fairness—here to consider tenders which meet the requisite preconditions—and breached that duty in failing to do so. Instead of providing some guidance on this point, the Court seized upon the fact that the Government had attempted to be scrupulously fair in determining whether the plaintiff's tender was eligible but the procedure proved unavoidably fallible. On this basis, the Court asserted, at 563:

The procedure was fair and was followed. Accordingly there was no breach of the duty of fairness by the Minister and his servants, assuming there was such duty which counsel for the defendant contended did not exist and which I do not decide.

Note that, because the Government in *Quasar* had not been negligent, the respondents could not even rely on the case of *Walter Cabott Construction Ltd. v. The Queen* (1974), 44 D.L.R. (3rd) 82 at 98 (F.C.T.D.) which held that “the relationship between the person who invites tenders on a building contract and those who accept that invitation is such a particular relationship as to impose a duty of care upon that person. ...”

88. To the extent that a contract is based on a statutory or delegated statutory power, one could argue that a duty of fairness is also owed. This is because administrative law already recognizes the public interest in the proper exercise of all statutory and statutorily delegated power. See *Board of Education of Indian Head School Division v. Knight*, [1990] 3 W.W.R. 289 at 306 (S.C.C.).

It is not always clear however, whether an executive contract is the product of the State's common law power to contract or if the authority is statutory. See Arrowsmith's recitation of case law in support of the both propositions, *supra*, note 3 at 138-143. Accordingly, the scope of review in Canada is still not known.

It is worth noting that the confusion outlined above could be avoided if Canadian Courts would adopt the reasoning of the House of Lords in *Council of Civil Service Unions v. Minister for Civil Service*, [1985] A.C. 374 (hereafter *C.C.S.U.*) There, at 410, the Court takes the position that the availability of judicial review should not turn on whether the impugned act has a statutory or common law source:

I see no reason why simply because a decision-making power is derived from a common law and not a statutory source, it should for that reason alone be immune from judicial review.

procedure. This, in turn, reduces the competence of the private model to account for the law of State contracts and to provide direction for the future.

Related evidence of a judicial movement towards reducing the State's freedom of contract is found in the relatively new doctrine of legitimate expectation.<sup>89</sup> Under its English rubric, the doctrine provides that all executive conduct<sup>90</sup> is subject to judicial review on the grounds of "illegality," "irrationality" and "procedural impropriety." What follows is Lord Diplock's account of these grounds:

By "illegality" as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable.

By "irrationality" I mean what can now be succinctly referred to as "Wednesbury unreasonableness"... . It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system....

I have described the third head as "procedural impropriety" rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal [should one be involved] to observe procedural rules ... even where such failure does not involve any denial of natural justice.<sup>91</sup>

Lord Diplock's statement of the law goes beyond the traditional principles of administrative review in two ways. First, it renders justici-

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89. For discussion by English courts of the doctrine of legitimate expectation see *Schmidt v. Secretary of State for Home Affairs*, [1969] 1 All E.R. 904 at 909 (C.A.); *Attorney General Hong Kong v. Ng Yuen Shiu*, [1983] 2 A.C. 629 at 636 and 638; *O'Reilly v. Mackman*, [1983] 2 A.C. 237; *Reg. v. Liverpool Corporations, Ex parte Liverpool Taxi Fleet Operators' Association*, [1972] 2 Q.B. 299; and *C.C.S.U.*, *supra* note 88.

90. That legitimate expectation applies to executive action is underscored by Lord Roskill who asserts in *C.C.S.U.*, *supra*, note 88 at 417:

If the executive in pursuance of the statutory power does an act affecting the rights of the citizen, it is beyond question that in principle the manner of the exercise of that power may today be challenged.

91. *Ibid.*, at 410-411.

able the State's contractual conduct<sup>92</sup> when the individual's interests are materially affected.<sup>93</sup> Second, by requiring procedural propriety, the doctrine can demand more than simple fairness. It can require that the State be fair in very specific ways. For example, if a citizen reasonably assumes that a given procedure will be employed by the State in order to make its determination, the doctrine of legitimate expectation requires the State to comply with that reasonable assumption. As the Court provided in *Ng Yuen Shiu*:

when a public authority has promised to follow a certain procedure, it is in the interests of good administration that it should act fairly and should implement its promise, so long as implementation does not interfere with its statutory duty.<sup>94</sup>

Similarly, if the citizen has a legitimate expectation that he or she will receive a benefit from the State based on well established practice, "the courts will protect his expectation by judicial review as a matter of public law," even if the person "has no legal right" to the benefit as a matter of private law.<sup>95</sup> And while the judicial enquiry is never one which goes to the merits,<sup>96</sup> the objective is for the Court to review the impugned proceedings "so as to ensure, as far as may be, that justice is done."<sup>97</sup>

The doctrine of legitimate expectation has recently been considered by the Supreme Court of Canada in *Old St. Boniface Residents Association Inc. v. The City of Winnipeg and the St. Boniface-St. Vital Community Committee*.<sup>98</sup> In that case, the Court referred to the doctrine in light of a dispute regarding rezoning by the City of Winnipeg. The appellants alleged, *inter alia*, that the City planning committee assured them of an opportunity for consultation prior to development. But, despite their "legitimate expectation," no such consultation occurred.<sup>99</sup> Mr. Justice

92. *C.C.S.U.*, *ibid*, involved a Minister unilaterally altering a term of employment pursuant to a Service Code and Order-in-Council entitling her to do just that. The Court found, however, that the Minister's employees – due to a long standing practice of consultation within the Department – would normally have had the right to be consulted on the Government's decision to change a significant condition of their employment, at 412-413. However, the Government successfully argued against the duty to consult given the interests of national security, at 413.

93. Accordingly to Lord Diplock, *ibid.*, at 408-409, the individual can invoke the doctrine of legitimate expectation when the government, or other public body, alters an individual's legally enforceable rights or obligations, or alternatively, withholds from the individual a benefit contrary to past dealings or express assurances.

94. *Ng Yuen Shiu*, *supra*, note 89 at 638.

95. *C.C.S.U.*, *supra*, note 88 at 401 per Lord Fraser of Tully Belton.

96. As the Court in *C.C.S.U.* states, *ibid* at 401, quoting *Chief Constable of the North Wales Police v. Evans*, [1982] 1 W.L.R. 1155 at 1173: "Judicial review is concerned, not with the decision, but with the decision-making process."

97. Per Lord Denning in *Secretary of State for Home Affairs, Ex parte Hosenball*, [1977] 1 W.L.R. 766, quoted with approval in *C.C.S.U.*, *ibid* at 400.

98. (1990), 75 D.L.R. (4th) 385 (S.C.C.)

99. See judgment of Sopinka J., *ibid.*, at 413-414.

Sopinka summarized the case law regarding the doctrine of legitimate expectation in the following terms:

The principle developed in these cases [including *C.C.S.U.* and *Ng Yuen Shiu*] is simply an extension of the rules of natural justice and procedural fairness. It affords a party affected by the decision of a public official an opportunity to make representations in circumstances in which there otherwise would be no such opportunity. The court supplies the omission where, based on the conduct of the public official, a party has been led to believe that his or her rights would not be affected without consultation.<sup>100</sup>

Unfortunately, His Lordship expressed no opinion on the general application of the doctrine in Canada. He simply determined that the planning and zoning process itself provided the appellants with an adequate opportunity to be heard:

Even if the conduct of this [planning] committee raised expectations on the part of the appellant, I am of the opinion that this would not justify this Court in mounting onto the elaborate statutory scheme yet another process of consultation.<sup>101</sup>

In *Reference re: Canada Assistance Plan*,<sup>102</sup> the Supreme Court of Canada had occasion to consider the doctrine of legitimate expectation in greater detail. Here, Mr. Justice Sopinka clearly affirmed the doctrines' existence in Canada and underscored several important provisos restricting its applicability. First, he noted that the doctrine cannot be invoked to create substantive rights.<sup>103</sup> Second, he emphasized that the doctrine cannot be invoked to prohibit government from introducing legislation in Parliament or the legislatures because such a prohibition would be contrary to the requirements of a democracy.<sup>104</sup> In this regard, Mr. Justice Sopinka quoted with approval the following passage from *West Lakes Ltd. v. South Australia*, a decision of the Supreme Court of Australia which concerned contractual obligations:

Ministers of State cannot, however, by means of contractual obligations entered into on behalf of the State fetter their own freedom, or the freedom of their successors or the freedom of other members of parliament to propose, consider and, if they think fit, vote for laws, even laws which are inconsistent with the contractual obligations.<sup>105</sup>

Rather, the doctrine of legitimate expectations is relatively circumscribed:

It is a part of the rules of procedural fairness which can govern administrative bodies. Where it is applicable, it can create a right to make

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100. *Ibid.*, at 414.

101. *Ibid.*

102. [1991] 2 S.C.R. 525

103. *Ibid.* at 557.

104. *Ibid.* at 559.

105. (1980), 25 S.A.S.R. 389 at 390, quoted with approval in *Reference re Canada Assistance Plan*, *ibid.* at 560.

representations or to be consulted. It does not fetter the decision following the representations or consultation.<sup>106</sup>

Even prior to these two very recent decisions of the Supreme Court of Canada, the doctrine of legitimate expectation had received a largely favourable reception from the lower courts. It has been applied in its English form by the Federal Court of Appeal,<sup>107</sup> British Columbia Court of Appeal,<sup>108</sup> the Ontario High Court of Justice,<sup>109</sup> as well as being referred to with approval in numerous other instances.<sup>110</sup> Only in Alberta had the doctrine been rejected for being based on a distinction which did not “reflect a principle that can withstand scrutiny in the light of the object of judicial review by certiorari.”<sup>111</sup>

It is apparent that the kind of review favoured by the Courts in *Assaly* and in *Glenview*, as well as by those which recognize the doctrine of legitimate expectation, originates in administrative law and is intended to protect the individual from the improper exercise of State power.<sup>112</sup> This is always a legitimate judicial concern in a liberal democratic society. In order to preserve the reciprocity between governor and governed, to enforce State duties of governance, and to reduce individual vulnerability, the principle of judicial review constrains – albeit on an unsystematized and incomplete basis – the State’s freedom of contract. The beginnings of judicial review – whether derived from administrative or constitutional grounds – require the governor to treat the individual fairly<sup>113</sup> in spite of the private law model and the individual-State analogue.

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106. *Reference re Canada Assistance Plan*, *ibid.* at 557-558.

107. *Bendahmane v. Minister of Employment* (1989), 95 N.R. 385 at 392-393 (F.C.A.).

108. *Reference re Canada Assistance Plan*, reversed by the Supreme Court of Canada, *supra* note 102.

109. *Ontario Nursing Home Association et al. v. The Queen in Right of Ontario* (1990), 72 D.L.R. (4th) 166 (H.C.J.). Here, in recognizing the doctrine, the Court also recognized that it cannot “impose a positive obligation on government to grant substantive rights,” at 180.

110. For the more recent examples, see *St. Lawrence Cement Inc. v. The Queen in Right of Ontario*, *supra*, note 86; *Rainbow v. Central Okanagan School District No. 23*, [1990] B.C.J. No. 2057 (C.A.); *Central Kootenay (Regional District) v. Canada (Minister of Transport)* (1990), 39 F.T.R. 60 (T.D.); *Hamilton-Wentworth (Regional Municipality)* (1991), 2 O.R. (3d) 716 (Div. Ct.); *Piche v. Canada* (1989), 98 N.R. 148 (F.C.A.); and *Pacific Fishermen’s Defence Alliance of Canada v. Canada* (1987), 84 N.R. 387 (F.C.A.).

111. *Hutfield v. Board of Fort Sask. General Hospital District No. 98* (1986), 49 Alta. L.R. (2d) 256 at 267 (Q.B.), *aff’d* (1988), 60 Alta. L.R. (2d) 165 (C.A.).

112. Wade defines the primary purpose of administrative law as to “keep the powers of government within their legal bounds, so as to protect the citizens against their abuse. The power engines of authority must be prevented from running amok.” See *supra*, note 61 at 5.

113. An individual’s legitimate expectation regarding what another individual ought to do has, in general, no legal consequences and affords no private law remedy. See *O’Reilly*, *supra*, note 89 at 275.



## 2. *Equality of Bargaining*

There are, as I discussed earlier, two features of the State which make it unbridgeably different from the individual – its duties of governance and coercive resources. We have seen that the presumption of a coextensive freedom of contract between individual and State is fallacious because it submerges these differences. The private law's presumption of equality of bargaining is also fallacious and uses a similar submerging technique. The model concludes that the individual and State are contractual equals because it recognizes only exaggerated forms of inequality such as incapacity, duress and unconscionability.<sup>114</sup> It concludes that *equality* is present based on an unrealistically restrictive notion of what would count as *inequality*.

To demonstrate my contention that there is a basic and formal inequality between individual and State, I will explore three ways in which State power in the contractual arena undermines the private law's assumption of equality. They are: Crown prerogatives; State control over its internal organization; and State control over contractual terms.<sup>115</sup> To the extent that these factors give the State advantages in the bargaining for and enforceability of its contracts is the extent to which, yet again, the descriptive accuracy of the private law model is impugned.

### a. *Crown prerogatives*

Crown prerogatives are an historical incident of sovereignty and so constitute a unique category of privilege. According to Blackstone:

By the word prerogative we usually understand that special pre-eminence, which the king hath over and above all other persons, and out of the ordinary course of the common law, in right of his regal dignity. It signifies, in its etymology, (from *prae* and *rogo*), something that is required or demanded before, or in preference to all others. And hence it follows, that it must be in its nature singular and eccentric; that it can only be applied to those rights and capacities which the kind enjoys alone, and in contradistinction to others, and not to those which he enjoys in common with any of his subjects.<sup>116</sup>

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114. See Treitel's account of these forms of inequality in *supra*, note 23.

115. It should be noted that prohibitions, discussed in the previous section, against the State entering into contracts which are contrary to the Canadian Constitution or which fetter the State's statutory powers and duties demonstrate an inequality between individual and State, but one operating in the opposite direction.

116. Blackstone, *Commentaries*, vol. 1 (Chitty ed. 1826) at 238-239.

Because prerogative powers give immunity to the State from certain common law liabilities and duties, they refute the analogical premise of the private law model by enforcing legal distinction. There are complex prerogative rules<sup>117</sup> covering a wide array of subject matter including: the bindingness of statutes on the State; the employment of Crown servants; the availability of judicial remedies against the State such as injunction, specific performance, distress, garnishment and attachment; State liability for interest; as well as its susceptibility to the doctrines of estoppel, waiver and laches.<sup>118</sup> Due to the scope of the project, I do not propose to engage in a thorough review of the law of prerogatives in order to establish my point that the individual is not the State's contractual equal. Instead, I will discuss the State's immunity from the doctrine of estoppel, since this has a very direct impact on State's contractual obligations.

Sherwin Lyman identifies estoppel<sup>119</sup> as a Crown prerogative which reaches back at least as far as the early seventeenth century.<sup>120</sup> He notes that in 1613, the English Courts held the Crown not to be bound by fictions of law<sup>121</sup> and in 1623, determined that the Crown was not bound by a fiction of law known as estoppel.<sup>122</sup> The entire matter is summarized in Everest & Strode's *Law of Estoppel*,

it appears from the authorities that the King is not bound by estoppels, though he can take advantage of them. Thus, it is laid down in Viner's Abridgement that the King is not bound by estoppels and that the king is not estopped by his patent.<sup>123</sup>

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117. As Holdsworth has asserted, with respect to Crown prerogatives, in *A History of English Law*:

This miscellaneous collection of rights and privileges, which make up the incidental prerogatives of the Crown, come ... from many different periods in English legal history, and are based on many different ideas. ... All of these diverse ideas have, from an early date, become the starting-points for the continuous development of bodies of very technical rules, some of which are wholly or partially obsolete, while others have survived and function in an environment to which they are ill-suited.

Quoted with approval by the Alberta Court of Appeal in *Canada Deposit Insurance Corp. v. Code* (1988), 84 A.R. 241 at 246, per Kerans J.A.

118. See, for example, Hogg's account of the Crown prerogatives and immunities, *supra*, note 21.

119. There is no definitive account of estoppel by conduct by Lord Denning's attempt is useful: Estoppel is not a rule of evidence. It is not a cause of action. It is a principle of justice and of equity. It comes to this. When a man, by his words or conduct, had led another to believe in a particular state of affairs, he will not be allowed to go back on it when it would be unjust or inequitable for him to do so.

See *Moorgate Mercantile v. Twitchings*, [1975] 3 All E.R. 314 at 323 (C.A.).

120. S. Lyman, "Estoppel and the Crown" (1978), 9 *Manitoba Law Review* 15 at 15-16.

121. *Sheffield and Ratcliff* (1613), Jenk. 287; 145 E.R. 207 (Ex. Div.), referred to by Lyman, *ibid.* at 16.

122. *Sir Edward Coke's Case* (1623), Godbolt 289 at 299, referred to by Lyman, *ibid.*

123. (1907) at 8, quoted by Lyman, *ibid.*

But though the origin of the prerogative is clear, its modern day scope is contested and polemically so. On the one hand, Lyman writes: “Estoppel is, in Canada, ineffective against the Crown.”<sup>124</sup> Hogg, on the other hand, contends: “The Crown is bound by the law of estoppel.”<sup>125</sup> And there is numerous case law cited by both writers in favour of their respective positions.<sup>126</sup>

But even if it were possible, it is beyond the scope of this paper to resolve the debate between Lyman and Hogg.<sup>127</sup> Instead, I propose to explore an incontestable strand of the Crown’s immunity from estoppel and one which has a significant impact on the State contract. That strand has been succinctly summarized in the following terms:

where a particular obligation or duty is imposed by statute or by regulations validly made thereunder and embodied in a contract no estoppel should be allowed to give relief from the said obligation.<sup>128</sup>

This Crown immunity constitutes an important example of inequality between individual and State in the contractual arena. It means that in every statutory contract, estoppel cannot lie against the State. Indeed, because the terms and conditions of a statutory contract are legislative,<sup>129</sup> any State representation which does not align is contrary to law and so unenforceable.

124. *Ibid* at 15.

125. Hogg, *supra*, note 21 at 189.

126. See Lyman’s entire article, *supra*, note 120 and see Hogg, *ibid* at 189-191, including notes.

127. Part of the difficulty in resolving uncertainty regarding the scope of the Crown’s immunity relates to the numerous circumstances in which the immunity might be invoked and a failure to distinguish amongst them. What is required is an analysis of the types of situations in which the State invokes its immunity from estoppel and the judicial outcome. Lyman provides an effective beginning to this project, *supra*, note 120.

128. *Millet v. The Queen*, [1954] Ex.C.R. 562 at 572. See too *St. Ann’s Island Shooting and Fishing Club Ltd. v. The King*, [1950] S.C.R. 211 at 220 which provides that “There can be no estoppel in the face of an express provision of a statute.” See too case law cited in favour of this proposition in P. Lordon, *Crown Law* (Toronto: Butterworths, 1991) at 321. My research has found no case which contradicts this particular statement of law.

129. See *Attorney General of Newfoundland v. Churchill Falls (Labrador) Corporation Limited* (1983), 49 Nfld. & P.E.I.R. 181 at 211 (Nfld. S.C.); *aff’d* on other grounds in (1985), 56 Nfld. & P.E.I.R. 91 (Nfld. C.A.); *aff’d* on both grounds in [1988] 1 S.C.R. 1085. See also *Millet*, *supra* note 128 at 570.

It is, of course, true that if the individual were to make representations to the State which contradicted the terms of a statutory contract, estoppel would not lie against the individual. One could therefore argue that the Crown’s immunity from estoppel within this context is no different than that enjoyed by the individual. There are two points to be made in opposition to this argument. First, the statutory contract – reflecting the Crown’s superior bargaining position – is largely comprised of terms which give the State specific rights, powers, and privileges. There are few terms in favour of the individual. Second, even on those occasions where an individual has waived a privilege and successfully resisted the doctrine of estoppel due to the statutory nature of the contract, the State remains competent to amend by legislation the statutory contract in question and so make it accord with the terms of the individual’s representation. In these two fundamental ways, therefore, the individual’s “immunity” from estoppel is largely theoretical and practically weak.

Statutory contracts are by no means unusual. They dominant in all industries involving the exploitation of State-owned natural resources and are made in the context of State-run insurance and pension schemes.<sup>130</sup> In these kinds of contracts at least, the private law model is significantly displaced because different rules of reliance and liability apply.

An illustration of the State's prerogative is found in a 1983 decision of the Newfoundland Trial Division. In *Churchill Falls*,<sup>131</sup> the Government of Newfoundland (hereafter "the government") statutorily leased to the defendant (hereafter "CFLCo") the right to exploit and sell Churchill Falls produced energy. Clause 2(e) of the lease provided that "upon the request of the Government[,] consumers of electricity in the province shall be given priority where it is feasible and economic to do so."<sup>132</sup> On the basis of express representations from the government that what it required pursuant to clause 2(e) would be 300MW of electricity, CFLCo contracted to sell to Quebec Hydro all the remaining energy it produced, beyond that 300MW. Subsequently faced with increased energy needs, the government by Order-in-Council demanded 800MW. When CFLCo refused to comply because of its contractual commitment to Hydro Quebec, the Government sought a declaration of entitlement from the Court.

One of the defences which CFLCo raised was estoppel and it did so with very good reason. As the Court points out:

There were discussions between the Government and CFLCo in which the Government held out that a recapture provision of 300 MW would be satisfactory to it. CFLCo relied on this and held out to Hydro Quebec that that was the position of Government. Hydro Quebec relied on this. ...

It has all the earmarks of estoppel. The Government held out a certain position and CFLCo relied upon this position and acted upon it.<sup>133</sup>

Hence, but for any prerogative immunity, the representations would have been binding.<sup>134</sup>

However, as the lease was statutory, the Court found that clause 2(e) represented the will of the House and could not be altered by the representations of a government official:

The Lease by itself is a contract between the Government and CFLCo. It is something more, however. It is part of an act of the House of Assembly. ... It has legislative sanction. The law of the land is that the Newfoundland consumer, upon the request of the Lieutenant-Governor, be given priority.

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130. See *Millet, ibid.*

131. *Supra*, note 129.

132. *Ibid.*, at 194.

133. *Ibid.*, at 240.

134. *Ibid.*, at 241.

No person, however highly placed, may deny that right to the Crown, or limit it. Only the House of Assembly may do that.<sup>135</sup>

Accordingly, and leaving open the possibility that estoppel might be available against the Crown in certain circumstances, the Court found that estoppel would not lie.<sup>136</sup>

In disposing of the case, the Court did determine that the government was not entitled to all the energy it was seeking. Due to the Court's interpretation of clause 2(e), the government was entitled only to recapture energy which was surplus to CFLCo's contractual obligations.<sup>137</sup> On appeal, the matter of estoppel was not discussed by the Court.<sup>138</sup> On further appeal, the Supreme Court of Canada endorsed the approaches taken by both lower levels without further comment.<sup>139</sup>

*Churchill Falls* is not the first example of a person seeking unsuccessfully to rely on official representations within the context of a statutory contract. In the earlier decision of *Millet v. The Queen*,<sup>140</sup> at issue was a contract made pursuant to the *Veterans Insurance Act*.<sup>141</sup> The plaintiff sought to claim on a life insurance policy which the government had purported to cancel for nonpayment of premiums. While, in fact, the last two premiums were overdue, the plaintiff sought to raise estoppel against the State on the basis that previous late payments had been accepted by government officials without cancellation.<sup>142</sup> The judge found, however, that estoppel could not lie:

The Veterans Insurance Act and its regulations ... is the law of the land applicable to this contract of insurance. The contention that these regulations [governing when payments are due] did not bind the parties or have the force of law is not based on any sound reason.<sup>143</sup>

The plaintiff's petition of right was accordingly dismissed.<sup>144</sup>

From a liberal democratic perspective, aspects of the State's immunity from estoppel can clearly be defended. The immunity is intended to protect the public good<sup>145</sup> and ensure that the State officials are held to the

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135. *Ibid.*, at 243.

136. *Ibid.*, at 242-243.

137. *Ibid.*, at 313.

138. *Churchill Falls Corporation Limited (C.A.)*, *supra*, note 129.

139. *Ibid.* (S.C.C.).

140. *Supra*, note 128.

141. S.C. 1944-45, 8 Geo. VI, c. 49.

142. *Supra*, note 128 at 570.

143. *Ibid.*

144. *Ibid.*, at 572.

145. *Laker Airways v. Dept. of Trade*, [1977] 2 All E.R. 182 at 194.

Rule of Law.<sup>146</sup> Yet, even as these interests are elevated, the integrity of the State is subject to compromise because what is tolerated is the making of official representations without legal consequences. A necessary corollary is that the individual who has relied on the State is without remedy, not even in restitution. This is problematic from the perspective of fairness generally and individual rights specifically.

Further, the State's residual power to contradict itself<sup>147</sup> in legally unchallengeable ways belies the analogical premise of the private law model. The individual and the State do not share equivalent legal resources but this escapes the attention of a model which is only alert to inequality evidenced by duress, incapacity, or undue influence. The conclusion of equality is merely the restatement of its own premise.

#### b. *The State's internal organization*

The State's unusual control over the nature of its contractual obligations finds another source in the power emanating from the Government's internal organization. As the Law Reform Commission of Canada asserts:

For the purposes of allegedly internal organization and operation, the Administration uses instructions, guidelines, manuals, directives and other similar practices which enable it to alter substantially the state of the law in many cases.<sup>148</sup>

While the Commission does not give examples of this phenomenon, they are not difficult to find. Take, for instance the Federal Government's Treasury Board Manual, clause .4.2.2: "Conviction under Section 121, 124 and 418 of the *Criminal Code*<sup>149</sup> denies the capacity to contract with the Crown." Or consider the policy requirement providing that when the Government is contracting for goods and services worth \$200,000 or more with a contractor employing 100 or more people, conditions of the Federal Contractors Program for Employment Equity must be met.<sup>150</sup> These are just two examples of the mandatory requirements<sup>151</sup> placed on the private party contracting with the State, requirements which have the

146. *Churchill Falls* (Nfld. S.C.), *supra*, note 129 at 243; *Millet*, *supra*, note 128 at 570.

147. See also P. McDonald, "Contradictory Government Action: Estoppel of Statutory Authorities", [1979] 17 *Osgoode Hall Law Journal* 160.

148. Law Reform Commission of Canada, *supra*, note 1 at 37, footnotes omitted.

149. These provisions relate to the offenses of: frauds on the government (s. 21), selling or purchasing office (s. 124), and selling defective goods to her Majesty (s. 418).

150. Federal Government's Treasury Board Manual, clause .4.2.5.

151. Clause .4.1 of the Treasury Board Manual makes mandatory the policy requirements contained in it for "all departments and agencies, including departmental corporations and branches designated as departments for the purpose of the *Financial Administration Act*." See also clause .3 of the Manual.

very real effect of altering the law through means other than a legislative instrument. Control over the State's internal organization thus becomes a source of both real and potential power. But as the private law model has no mechanism to detect this reality, it accords it no formal significance.

*c. Conditions of contracting*

Another manifestation of State power and source of control over bargaining is found in the standard form contracts which set out the terms and conditions of the State contract. Like royal prerogatives and the Government's internal management policies, the standard form contract exerts influence over the quality of the State's contractual promise.

It is, of course, easy to exaggerate the oppressive implications of the standard form contract. As Trebilcock points out, use of the standard form may not be evidence of concentration of market power but rather, a desire to reduce transaction costs and "facilitate the conduct of trade."<sup>152</sup> Nonetheless, while it is true that most individuals are not forced to contract with the State,<sup>153</sup> the State is an enormous consumer and a potentially lucrative source of income.<sup>154</sup> Being such a substantial consumer functions to give the Government a good deal of control over its obligations and liabilities and those which the individual is asked to assume. Indeed:

The Government is a large scale purchaser and is often able to impose its own terms on a contractor. There is no special body of case law governing the standard term contract; the quasi-legislative character of such contracts should be recognized and their terms subject to a measure of judicial review.<sup>155</sup>

Nor has the extent and effect of governmental control over the contracting process escaped those with experience in delivering procured goods and services to the federal government. Grant Murray of IBM Canada Ltd. has observed, as recently as 1986, the government's "great reluctance to accept contract terms which are more in keeping with the

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152. M. Trebilcock, *The Common Law of Restraint of Trade* (Toronto: Carswell, 1986) at 165.

153. Further, under certain relatively rare circumstances, the individual is in a superior bargaining position, as in times of war and national shortage. See Mewett, *supra*, note 62 at 233-234.

154. See *supra*, at footnote 3 for the estimated value of procurement contracts entered into by the Federal Government and its Crown corporations in 1984.

155. H. Street and R. Brazier, eds., *de Smith: Constitutional and Administrative Law*, 5th ed., (Harmondsworth: Pequin Books, 1985) at 630. The adhesive, legislative quality of the standard form government contract has been remarked upon by other legal scholars as well. See H. Street, *Government Liability: A Comparative Study* (Cambridge: Cambridge University Press, 1953) at 99 and 104 and Friedmann, *Law in a Changing Society*, 2nd ed., (New York: Columbia University Press, 1972) at 403.

terms and conditions commonly found in the commercial marketplace,<sup>156</sup> thus placing an onerous burden on the private contracting party.<sup>157</sup> Take Murray's example of the federal government's short-form standard contract which he finds to be deficient for not addressing the issue of patent indemnification. It is industry practice, he notes, to insert a patent indemnification clause in contracts for the supply of data processing machinery because there are "literally thousands of patents relating to information-handling technology and, even with the best of intentions, it is possible to overlook a patent."<sup>158</sup> The federal government, however, will not allow a comparable clause. Rather: "it vigorously resists giving the supplier this escape and insists that the supplier leave the equipment in place and also indemnify the Government against all claims."<sup>159</sup>

Other standard clauses, particularly the termination of convenience clause, can prove needlessly onerous on the private contracting party and unreasonably protective of the Government's interests – yet they constitute an ingredient in the standard short form contract. And when the termination clause is invoked the contractor is only entitled to be reimbursed for actual costs.

reasonably and properly incurred ... but in no case shall such reimbursement exceed the Contract price or shall the Contract have claim for damages, compensation, loss of profit or otherwise, except as herein provided.<sup>160</sup>

This is not, I suggest, a clause one would readily agree to because it makes no effort to assess and distribute risk – it is all borne by the contractor.<sup>161</sup> Murray may well be correct when he describes the procurement process in the following terms:

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156. "Contracting with the Government" in the Law Society of Upper Canada Continuing Legal Education Series: *Doing Business with Government* (Toronto: LSUC, 1986) at K-4.

157. *Ibid.*

158. *Ibid.* at K-13.

159. *Ibid.* at K-14.

160. See Supply and Services Canada Short Form DSS-MAS 9329 (General Conditions for the purchase of commercially available off the shelf goods and services.)

The effect of this clause is to disentitle the contracting individual from securing damages from the government for loss of expectation and loss of opportunity, to name two heads of damage. In addition, if the individual had entered into sub-contracts and then went into breach because the government invoked this clause, he or she could not look to the government for indemnification of any third-party liability.

161. In fact, under French public law – known as *droit administratif* – termination for convenience clauses are classified as a *clause exorbitante* because they "confer rights or impose obligations upon the parties quite unlike in their nature those which anyone would freely agree to in the context of civil or commercial law." See L. Brown and J. Garner, *French Administrative Law* (3rd ed) (London: Butterworths, 1983) at 88, quoting Stein, CE 20 October 1950.



The system has been kept in place largely to give the Government the best of all possible worlds. On the one hand, the Government wants to procure everything at the lowest possible price ... preferably lower than the lowest commercial price. On the other hand, if some problem develops with one of the Government's contractors, politicians want to be in a position to stand up in the House or before the media and say that the government has not compromised its legal rights in any way and is, therefore, able to pursue all legal remedies.<sup>162</sup>

Because standard form contracts tend to be weighted heavily and explicitly in favour of the Government, and because contractual claims against the federal government can be handled by the federal Department of Supply and Services Contracts Settlement Board,<sup>163</sup> there is little reported case law on disputes arising out of these contracts. In instances where disputes are reported, the outcome is generally favourable to the government. Take, for example, the Federal Court of Appeal decision in *Government of Canada v. Construction JRL Ltee.*<sup>164</sup> In that case, the respondent contracted to build on a riverbank at a fixed price. Its costs went well over estimates because of soil instability previously known to the Government. At trial, the Court held that while the Government had no contractual liability for the cost overruns, it was liable for failing to warn the contractor of possible problems. The Federal Court of Appeal, however, reversed this decision as the subject contract excluded extra payments to the Contractor unless agreed to by the Owner's engineer pursuant to clause 12(1)(a) of the General Conditions.<sup>165</sup>

That the State is well positioned through its standard form contracts is also evidenced in *Entreprises de Transport Marcel Boivin Inc. v. Canada*<sup>166</sup> which regards the matter from a civil law perspective. In that case, the plaintiff contracted to collect garbage from federal government sites. The Government became dissatisfied, however, because the contractor left some sites messy, on several occasions failed to pick up the garbage at all, and was difficult to contact by telephone. On the basis of these deficiencies, the Government terminated the contract.

General Condition DSS-9076 (P-4) provided the following penalties for default:

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162. *Supra*, note 156 at K-4.

163. According to Arrowsmith, *supra*, note 3, though the Board's decision is not binding on the individual contractor, they are accepted in over 90 percent of the cases even though the results are adverse to the contractor in 50 percent of the cases, at 79, footnote 76. Arrowsmith does not provide a figure on the number of cases which are resolved on the basis of an *ex gratia* payment.

164. (1983), 52 N.R. 1 (F.C.A.).

165. *Ibid.*, at 3 and 9.

166. (1989), 44 B.L.R. 208 (F.C.T.D.)

## 16. Default

(1) If the Contractor is in default in carrying out any of the terms, conditions, covenants or obligations of the Contract ... the Minister may, by giving notice in writing to the Contractor, terminate the whole or any part of the Contract. Upon giving of such notice the Contractor shall have no claim for any further payment save as hereinafter provided, but shall remain liable to Her Majesty by reason of the default or occurrence upon which such notice was based.<sup>167</sup>

Clause 15 entitled the party to a terminated contract to be paid “a reasonable price for performing any of the work that has been completed at the time of termination and other cost directly incurred ... but in no event shall the aggregate of the price paid ... exceed the total Contract price.”<sup>168</sup>

The plaintiff argued that its defaults were not particularly serious and that the termination was accordingly wrongful. The Court was unsympathetic:

Seen from the standpoint of a contract for services between private parties, such clauses may undoubtedly appear draconian; but it should be noted that this is an administrative contract, where a public authority has decided to award a contract to ensure the proper functioning of a public service. While the government body is acting in the public interest, the other contracting party is acting in a private interest. ... ‘[D]efault [in administrative contracts] will be judged with a strictness and severity unknown to private law.’<sup>169</sup>

The Court found that, as the government had terminated in accordance with all the contractual terms, the plaintiff’s action had to fail.<sup>170</sup>

By its in-house policies, procedures and standard form contracts, the Government seeks to protect the public interest. This is in accord with liberal democratic theory. Yet, evidence and commonsense show that Government officials will also try to secure unreasonably favourable terms in order to protect themselves from the consequences of seceding any of the State’s superior bargaining position.<sup>171</sup> The private law model cannot accord any legal importance to this basic reality, however: it is content with its strong presumption of equality and knowledge that no

167. *Ibid.*, at 213.

168. *Ibid.*, at 214.

169. *Ibid.*, at 214–215, quoting with approval P. Lemieux, *Les Contrats de l’Administration Fédérale, Provinciale et Municipale* (Sherbrooke: Revue du Droit Université de Sherbrooke, 1981) on government contracts.

170. *Ibid.* at 215–216.

171. As Cohen points out, *supra* note 1 at 398, it may be dangerous to assume that: “the bureaucracy is a benign entity simply fulfilling the wishes of its political or command masters. Other views are quite different. In these an activist, independent bureaucracy shapes state policy, and then actively implements that policy to achieve bureaucratically defined objects [footnotes omitted].”

one is generally *forced* to contract with the State.<sup>172</sup> This, in turn, may mean that the private law model ignores too much.

### 3. *Temporally Fixed Source of Contractual Obligations*

As earlier references to Treitel have shown, the private law model recognizes that a contract comes into existence upon acceptance of an offer: it is at this moment that rights and obligations of the parties solidify legally. With the obvious exceptions of fraud, estoppel, duress and misrepresentation, and other matters going to consent, the nature of any antecedent relationships between the parties is legally insignificant.

There are good reasons for this general proposition within the context of private, commercial relationships between individuals. The rule is intended to provide a measure of certainty in the market place, to respect the individual's right to control effectively the nature and extent of the obligations he or she assumes, to put limits on what can and cannot be demanded by the other party. But there are equally good reasons for rejecting the application of this proposition to the State contract. Liberal democratic theory posits an inalienable relationship between individual and State, on the one hand, and State and society on the other. These relationships place mandatory obligations on the State even when it is in a contractual relationship: it must continue to demonstrate concern and respect for individual autonomy; it must seek to discover and act upon the common good.

The private law model has no mechanism to enforce obligations from these pre-existing relationships because it locates obligation in the moment of acceptance only. To the extent that the private law model cannot accommodate a central component of liberal democratic theory makes it ill-suited to its task of defining State liability.

### 4. *Defences to Liability*

In addition to the defences which flow from its prerogative powers, control over inhouse procedure, or terms drafted in its favour, the State has unique defences to relieve it from contractual liability.

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172. As another instance of State control over contractual terms, one can look to the Government of Alberta's standard petroleum and natural gas license which empowers the Government unilaterally to amend through legislation. The standard lease provides that the license is bound by the provision of the Mines and Minerals Act of Alberta as amended from time to time or any replacement thereof as well as by all present and future subordinate legislation.

a. *Doctrine of executive necessity*

There is some authority for the proposition that, as an incident of the Crown's common law power to contract, the State can invoke the doctrine of executive necessity to negate the existence of any alleged contract and so the consequences of an alleged breach. In *Rederiaktiebolaget Amphitrite v. The Queen*,<sup>173</sup> the Court held that the British Crown's undertaking not to confiscate the plaintiff's merchant ship – which would otherwise be subject to seizure, on the ground that it was a foreign ship entering a British port during wartime – did not produce a contract because:

it is not competent for the Government to fetter its future executive action, which must necessarily be determined by the needs of the community when the question arises. It cannot by contract hamper its freedom of action in matters which concern the welfare of the State.<sup>174</sup>

Accordingly, when the British government seized the plaintiff's ship for undisclosed reasons, the plaintiff was left without a remedy as the Court found there to be no contract between the litigants.

If the court in *The Amphitrite* is correct, it is difficult to imagine how the Government would ever be legally constrained by its apparent contractual undertakings to do or not do certain acts. It is difficult to imagine how Government, unless it chose to submit itself, could ever be held civilly liable for failing to meet obligations which, absent this doctrine, would be contractual ones. Indeed, the case has the effect of stripping away contractual bindingness as every contract, no matter how modest, inconsequential and fleeting, constitutes a fetter on future executive discretion.

The decision has been roundly criticized<sup>175</sup> on these and related grounds – so thoroughly in fact, that little would be gained by duplicating

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173. [1921] 3 K.B. 500.

174. *Ibid.*, at 503.

175. Critical commentary on *The Amphitrite* is legion. See Peter Hogg, *supra*, note 21 at 171-172 and his footnote 51 at where he cites critical discussion by C. Turpin, *Government Contracts* (London: Penguin, 1972) at 19-25; M. Aronson and H. Whitmore, *Public Torts and Contracts* (Sydney: Law Book Co., 1982) at 194-202; R. Dussault and L. Bourgeat, *Administrative Law: A Treatise* (trans. Murray Rankin) (Toronto: Carswell, 1986); S. Arrowsmith, *supra* note 3 at 125-130; Campbell, "Agreements about the Exercise of Statutory Powers" (1971) 45 *Aus. L.J.* 338.

See too Mason J.'s comment in *Ansett Transport Industries (Operations) Pty. Ltd.*, *supra*, note 75 at 74 that *The Amphitrite's* statement of law "has been criticized on the ground that is expressed too generally and so it is." Also at 74, Mason J. refers to adverse commentary on *The Amphitrite* in Sir William Holdsworth, "A Casebook on Constitutional Law," (1929) 45 *L.Q.R.* 166-167; H. Street, *Government Liability*, *supra* note 155 at 98-99; J.D.B. Mitchell, *Contracts of Public Authorities* (1954) at 57 et seq.; P.W. Hogg, "The Doctrine of Executive Authority in the Law of Contract," (1970) 44 *Aus. L.J.* at 338; J.E. Richardson, "The Executive Power of the Commonwealth" in L. Zines, ed. *Commentaries on the Australian Constitution* (Sydney: Butterworths, 1977) at 76-80.

Finally, see Graham Zelleck's recitation of commentators opposed to Rowlatt J.'s pronouncement, in "Government Beyond Law" (1985), *Public Law* 283 at 286, n. 28.

the debate here – especially since *The Amphitrite* has never been followed<sup>176</sup> and shows no signs of life.

b. *The Doctrine of State necessity*

The doctrine of state necessity, according to the Supreme Court of Canada, “provides a justification for otherwise illegal conduct of a government during a public emergency.”<sup>177</sup> It was this doctrine which empowered the Supreme Court of Canada – in the name of the Rule of Law, legal order, and the avoidance of a “legislative void”<sup>178</sup> – to give Manitoba laws temporary effect notwithstanding their judicially declared unconstitutionality for failure to comply with section 23 of the *Manitoba Act*.<sup>179</sup>

While there are no cases addressing this point, it seems certain that Government could invoke the doctrine of state necessity as a means of justifying what would otherwise be an illegal disregard of its obligation to perform contractual undertakings or pay Court ordered damages in lieu thereof. Although successful invocation of the doctrine would be contingent on the existence of a “public emergency,” it is nonetheless a powerful, final-answer defence which belies the analogical premise.

c. *The State cannot act outside of a statute which limits its contractual powers*

Where a contract is statutorily governed, the mandatory requisites of that Statute must be met or the contract does not come into existence.<sup>180</sup> As the Australian High Court puts it:

When the administration of particular functions of government is regulated by statute and the regulation expressly or impliedly touches the power of contracting, all statutory conditions must be observed and the power no doubt is no wider than the statute contemplates.<sup>181</sup>

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176. Hogg, *supra*, note 21 at 172. On this point, Graham Zelleck, *ibid* at 286 declares: [The doctrine of executive necessity] was constructed on the most fragile foundations, it is supported by neither previous nor subsequent authority, it is possibly *obiter* and it has been condemned by virtually every commentator and criticized by Denning J. (as he then was) as long ago as 1948 [footnotes deleted].

My research shows no Canadian decision even considering, let alone following *The Amphitrite*.  
177. Per Chief Justice Dickson, *Reference Re: Language Rights under the Manitoba Act, 1870*, *supra* note 19 at 29-30.

178. *Ibid.*, at 33.

179. Section 23 required Manitoba’s laws to be enacted, printed and published in both French and English and this successive Manitoba legislatures had failed to do.

180. *CAE Industries Ltd.*, *supra* note 12 at 371.

181. *State of New South Wales v. Bardolph* (1934), 52 C.L.R. 455 at 496 (Aus. H.C.), quoted with approval in *CAE Industries Ltd.*, *ibid* and by the privy Council in *Cudgen Rutile (No. 2) Pty. Ltd. v. Chalk*, [1975] A.C. 520, per Lord Wilberforce.

If mandatory statutory conditions to a contract are not met the individual is left without remedy – even if he or she were ignorant of the limitations<sup>182</sup> – unless there are the grounds to invoke a remedy based in restitution.<sup>183</sup> The general principle constitutes a defence which can work hardship to the individual.

It is of course true that parties to a purely private contract must also comply with all applicable statutory and common law requirements necessary to the creation of a contract. To this extent, the individual-State analogy holds. But the State contract is generally more heavily regulated because, in the modern Canadian State, there is a “separation of ownership from control and power, which is characterized by the development of bureaucracies.”<sup>184</sup> As bureaucratic control and power constitute such a large part of the State, statutory supervision is required to ensure compliance with the requirements of governmental accountability. And to the extent that statutory compliance is not seen, the individual is left vulnerable.

In *Lake Champlain and St. Lawrence Ship Canal Co. v. The King*,<sup>185</sup> for example, the plaintiff spent a considerable sum of money in reliance on a grant to be awarded to it pursuant to a special Act passed for this very purpose. This Act provided that the plaintiff’s plans for the construction and operation of a canal were to be submitted for approval by the

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182. The Supreme Court of Canada in *The Queen v. Woodburn* (1898), 29 S.C.R. 112 at 123 held:

It is perfectly clear that a contractor dealing with the Government is chargeable with notice of all statutory limitations placed upon the power of public officers. Where a statute expressly defines the power, it is notice to all the world.

183. Courts have held that where a contract fails for statutory non-compliance, the individual is entitled to a quantum meruit. See *May v. R.* (1913), 14 Ex.C.R. 341 at 346; *National Dock and Dredging Corp v. The King*, [1929] Ex.C.R. 40 at 54 (where no contract but Crown accepts the plaintiff’s work, *quantum meruit* applies). See too *Walsh Advertising Co. Ltd. v. The Queen*, [1962] Ex.C.R. 115 where the Crown was ordered to pay a quantum meruit for adopting some of the results of the plaintiff’s service even though the contract itself failed for non-compliance with mandatory statutory provisions, at 130. Finally, see *The Gresham Blank Book Company v. The King* (1912), 14 Ex.C.R. 236 at 240. The plaintiffs in these cases would not, of course, be entitled to any compensation for expectation interest or loss of opportunity. Where the contract fails for statutory non-compliance, a remedy in unjust enrichment may be possible if the plaintiff can bring itself within the test articulated by Mr. Justice Dickson in *Rathwell v. Rathwell*, [1978] 2 S.C.R. 436 at 455: there must be an enrichment, a corresponding deprivation, and an “absence of any juristic reason – such as a contract or disposition of law – for the enrichment.”

Note that in *City of Moncton v. H.E. Carson & Sons Ltd.* (1982), 138 D.L.R. (3d) 596 (N.B.C.A.), the respondent supplied goods and services to the City of Moncton on request of the City’s engineer. The City refused to pay the account because the alleged contract did not meet statutorily mandatory conditions, including the signature of the mayor and clerk. In its action on the contract, the respondent was unsuccessful due to statutory non-compliance, at 603. It appears, however, that no claim in unjust enrichment was made.

184. Cohen, *supra*, note 1 at 392.

185. (1919) 54 S.C.R. 461.

Governor-in-Council prior to commencement of construction. The Governor-in-Council refused its approval, not because of problems with the plans submitted but because the Government had, between the passing of the legislation and the submitting of the plans, decided against the necessity for building a canal. Accordingly, it declined to give its consent on “the high political grounds of public policy.”<sup>186</sup> Notwithstanding a strong dissent by the Chief Justice,<sup>187</sup> the majority found that no contract came into existence because the statutorily mandatory approval was not obtained.

d. *The fact of legislative power*

The State has unequivocal control over the outcome of a contractual dispute through exercise of its legislative powers. Hence, if legislation is passed making it an “imperative duty of the Government” to terminate a contractual agreement, “the Crown ... [incurs] no liability ... by performing that statutory duty.”<sup>188</sup> Similarly, if legislation creating a public office is repealed, then the office-holder no longer has a contract to sue on and thus is without remedy even when terminated without cause, without notice, and without payment in lieu.<sup>189</sup>

Further, the State is competent to overturn a judicial decision by simply passing a law to the contrary. Such legislation – subject to its constitutional validity – thereby has the effect of removing all legal consequences of Governmental liability. As Zelleck asserts:

The Government has a truly wonderful magic wand. ... When it is waved with the incantation “Parliamentary Sovereignty,” a great and mysterious and sometimes terrible thing called an Act of Parliament is brought into being which can turn right into wrong, justice into injustice and subvert the rule of law.<sup>190</sup>

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186. *Ibid* at 477.

187. As the Chief Justice notes, *ibid* at 467:

That the claim is a meritorious one, seems clear. It would surely be an injustice if the suppliants after incurring large expenditures on the faith of a Parliamentary grant were to be deprived of all their rights not through any defect in their plans but because the Government did not approve of the undertaking and dissenting from the decision of Parliament could by withholding approval of the plans could prevent altogether the carrying out of the works.

188. *Windsor & Annapolis Rwy Co. v. The Queen*, *supra*, note 11 at 616. Note that in this case, the court found that legislation invoked by the Crown as authority for terminating the contract at issue had no such effect.

189. In *Wicks v. A.G. of B.C.*, [1975] 4 W.W.R. 283 (B.C.S.C.) the plaintiff’s statutory position was repealed by an Act of the British Columbia legislature. When the plaintiff brought an action for breach of contract against the Government, his action was dismissed on the theory that, upon repeal of the statutory position, the contract of employment no longer existed. Accordingly, there was nothing to left to sue on. The Court found that the plaintiff’s only hope was for an *ex gratia* payment from the Crown, at 289.

190. Graham Zelleck, *supra*, note 175 at 288.

Zelleck cites several examples, though none involving a State contract, wherein the British government passed legislation to overturn the effect of a judicial decision:

Probably the best known example of [this kind of] retrospective legislation ... denying a successful litigant the redress to which he [or she] had been entitled was the War Damage Act 1965, which deprived the Burmah Oil Company of the compensation awarded to it by the House of Lords in respect of the destruction of its installations in Burma during the second world war so that they would not fall into the hands of the advancing Japanese forces.<sup>191</sup>

While it cannot be said that use of a legislative strategy to avoid liability is frequent, or utterly immune from attack,<sup>192</sup> it is a powerful weapon in the hands of the State alone. It means that, at the end of the day, Government is only bound by a contract if it wants to be. Indeed, the fact of the State's legislative power reduces the resonance in the judicial pronouncement that "it is the duty of the Crown and of very branch of the executive to abide by and obey the law."<sup>193</sup> At the very most, it is an admonition.

#### V. *The Model's Success*

We have seen that the underlying object in applying the private law model to the State contract is protection of the individual from overarching State power. The model's underlying assumption is the presence of a private analogue. My conclusion is that the model cannot justify its assumption and so cannot attain its object. Indeed, deference to the private law model of State liability prevents the development of a Canadian public law which is consistent with liberal democratic theory. On the one hand, the model distorts critical components in the State contract. It refuses to

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191. *Ibid.*, at 290.

192. It may be the case that where the State acts unlawfully to deprive a individual of his or her rights, legislation purporting to shelter the government would not be applied by the Court. In the Alberta decision of *Chinook Farms Ltd. v. Alberta Government* (1986), 48 Alta. L.R. 337 (Q.B.), for example, the corporate plaintiff sought an injunction against the Government to restrain it from continuing to flood its farmland. The Crown argued that section 17 of the *Proceedings Against The Crown Act* R.S.A. 1980 c. P-18 prevented the Court from granting an injunction against the Crown. Certainly, this is what the words of the Act would imply. Notwithstanding, MacLean J. rejected the Crown argument, at 338, on the following basis:

The Crown and its officers and ministers cannot shield themselves under s. 17 of the *Proceedings Against the Crown Act* in matters where they have acted in an unlawful manner which results in depriving an individual of his [or her] rights.

It may be the case that similar reasoning would apply where the State passes legislation excusing itself from liability for a contractual breach. But as such an argument conflicts with the concepts of Parliamentary sovereignty, it is by no means clear that the argument would be successful.

193. Per Sir George Farwell, *The Eastern Trust Company*, *supra*, note 9 at 759.



recognize ongoing obligations arising from the antecedent individual-State and State-society relationships because the model locates all obligations in the moment of acceptance. It misconstrues the imbalance of power between the individual and State because it recognizes only exaggerated forms of inequality. It accords little formal recognition of the State's duties of governance because what the model looks for is "freedom of contract" tested only against the standard of uncoerced consent. It cannot account for a self-interested bureaucracy. It fails to recognize the significance of special State defences and so cannot comprehend that contracts never fully bind the State.

On the other hand, when public law principles are confronted by the Court because they are inescapable, the result is unsystematic and dissipative. They are seen as exceptions which prove the rule rather than as evidence of an independent area of law requiring disciplined attention. As a direct consequence, there is still no definitive judicial position on whether the executive owes a duty of fairness in all its contractual dealings. There is still no consistent attempt to develop content to the meaning of that duty. There is insufficient attention paid to when and why the State can legitimately invoke prerogatives as well as to the consequences of prerogatives on individual rights. There is no sustained attempt to enforce the State's rights and obligations without making the individual unreasonably vulnerable and *vice versa*.

The contradiction generated by this private law strategy is significant. In seeking to respect and protect individual autonomy, our public law system claims to be, for the most part, a private law system. In accord with Dicey, everyone therefore is "subject to the ordinary law of the realm and amenable to the jurisdiction of ordinary tribunals."<sup>194</sup> But a private law strategy produces a public law system in spite of itself and one which – because it is unknowing – is not equipped to do its job. It generates uncertainty because its sources of law are both numerous and unstructured. Because it has no plan, it cannot develop "general principles and legal categories ... which attempt to take account of the inherent differences of position between public authorities and private individuals."<sup>195</sup> For the same reason, it is unable to generate a rational "synthesis of public law by relating judgements to principles derived from a coherent and evolving philosophy."<sup>196</sup> As a result, our "public law" system heightens the vulnerability of the individual instead of reducing it – an ironic and counter-productive result.

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194. Dicey, *supra*, note 20 at 193.

195. Dyson, *supra*, note 48 at 233.

196. *Ibid.*

Given the impoverished conclusions to which the private model leads, it becomes critical to explore alternatives. Of assistance would be a model of Canadian public law which acknowledges the differences between individual and State<sup>197</sup> and seeks to accommodate those differences within the context of liberal democratic theory, the Rule of Law and other Canadian constitutional imperatives. What is required is a model of liability which confronts, instead of concealing, the competition between public and private interests inevitably present.<sup>198</sup> What is required is a model which recognizes its own political implications and so the essential role of theory. In short, Canada requires a public law system which recognizes itself as such.<sup>199</sup>

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197. Accord Cohen, *supra*, note 1 at 381 and the Law Reform Commission of Canada, *supra* note 1 at 26-27, and 59-60.

198. There are at least three sets of competing interests in the State contract which require legal resolution: that of the individual contractor who has undertaken to the State to provide goods or services, that of society for whose benefit the contract was entered, and that of the officials who act on behalf of the State in the contractual process. Of course, theoretically, the bureaucrats' interest should be coextensive with the State's interest but, in practice, this is not always the case. As Cohen points out, *supra* note 1 at 398, it may be dangerous to assume that the bureaucracy is a "benign entity simply fulfilling the wishes of its political or command masters." And as William Bishop comments in "A Theory of Administrative Law" (1990), 19 *Journal of Legal Studies* 489 at 501:

The bureaucrat, often lacking any sharply defined or measurable goals, will make at least some decisions in his own interest, rather than in the interest of the public, as defined by law, that he has been hired to serve.

199. A public law strategy is already employed in several European countries including France, Italy, Belgium, certain Latin American countries influenced by France, and, to a lesser extent, Germany. See W. Friedmann, *Law in a Changing Society*, *supra* note 155 at 402. Such a strategy is favoured, in varying degrees by the Law Reform Commission of Canada as well as by numerous legal scholars. Indeed, The Law Reform Commission of Canada, *supra* note 1, calls for administrative law with a "distinctive meaning" at 26-27, and one which would recognize the differences between individual and State, at 59-60; Cohen, *supra* note 1, notes that "private law doctrine is an inadequate tool to resolve individual-state conflict," at 381; H. Street, *supra* note 155 at 82 argues that Government contracts should to some extent be governed "by different legal rules" and at 185 he suggests that "Anglo-American countries ought to copy the French by subjecting all administrative authorities to a uniform law;" L. Brown and J. Garner, *supra* note 161 at 131 note that "the English failure to recognize the need for a special administrative contract has led not only to infelicities and inelegancies, but on occasion results in positive injustice;" Alan Mewett, *supra* note 62 at 246 remarks that government contracts have too many unique characteristics to "make a complete assimilation between them and the ordinary contract between private persons. ... Confusion will inevitably arise if the features of government contracts are explained and applied according to principles and terminology of private law." In sum, and as Friedmann asserts, *supra* note 155 at 407:

the case for open recognition, and appropriate regulation, of contracts between government and other public authorities on one part, and private individuals on the other is overwhelming.