CASE NOTES

EX P. A.C.T.U.-SOLO[1] AND THE HIGH COURT'S ORIGINAL JURISDICTION

In *Ex p. A.C.T.U.-Solo* the applicant sought from the High Court an order nisi for certiorari against the Royal Commission on Petroleum to quash its third report. This report had dealt solely with and commented adversely on the conduct of the applicant in the course of a particular transaction involving its purchase of an amount of indigenous crude oil. The application was dismissed by Stephen J. on the ground that certiorari would not lie to quash the Royal Commission's report, because it neither affected the applicant's interests nor formed a necessary part of a process by which the applicant's interests could be affected subsequently.

Ignoring for the moment the question of the Court's jurisdiction in the matter, this result had seemed inevitable on the authorities, an examination of which had earlier led de Smith to suggest[2] that if one wished to impugn directly the validity of a report of the sort the subject of A.C.T.U.-Solo's application, one would be better advised to seek either an injunction or a declaration instead of certiorari. Why the applicant did not heed this advice is unknown, especially since it was apparently unable to refer to any authorities beyond those which had led to de Smith's suggestion—certainly none were referred to in Stephen J.'s reasons for judgment. However, even if the applicant had been able to persuade the Court to depart from tradition in this respect, there is another aspect of its choice of remedy sought which deserves comment.

Assuming that A.C.T.U.-Solo were able to make out a ground of invalidity of the Royal Commission's action, by virtue of what authority would the High Court have been able to grant it the remedy of certiorari? It does not seem promising to suggest that s. 75(v) of the Constitution would have provided the necessary jurisdictional basis, because that head of High Court jurisdiction refers only to the remedies of mandamus, prohibition and injunction and does not mention certiorari. This omission almost certainly precludes the Court from granting certiorari under s. 75(v).[3] The jurisdiction referred to in s. 76(i)[4] could not be relevant, because A.C.T.U.-Solo was not seeking to rely on any constitutional argument. The only other prospect appears to be s. 75(iii), which confers jurisdiction on the High Court in matters in which, *inter alia*, the Commonwealth or a person being sued on behalf of the Commonwealth is a party.

[1] *R.* v. *Collins; Ex p. A.C.T.U.-Solo Enterprises Pty. Ltd.* (1976) 8. A.L.R. 691.
[2] de Smith, *Judicial Review of Administrative Action* (3rd ed.), 1973, 342-346.
[3] See Lane, *Australian Federal System*, 1972, 510-511.
[4] Conferred on the Court by the Judiciary Act, 1903-1973 (Cth), s. 30(a).

Assuming the Royal Commission to be characterized as an agent of the Commonwealth, would this head have sufficed?

I do not believe so and for a simple reason. It seems to be well established in cases unembarrassed by any complication arising from the High Court's limited original jurisdiction that certiorari, to say nothing of prohibition or mandamus, is not available against the Crown.[5] That being so, these remedies ought not to be available under s. 75(iii) of the Constitution against either the Commonwealth or a person being sued on its behalf. This point was recognized by Quick and Garran as far back as 1900 in the context of the amenability of the Commonwealth and its agents to mandamus.[6]

If, then, certiorari could not have been granted against the Royal Commission on Petroleum in the High Court, why did Stephen J. not dismiss A.C.T.U.-Solo's application on the ground that the Court had no jurisdiction to hear it rather than on the ground he did? Presumably, his answer to this question would have been that there was no need to consider the Court's jurisdiction in the matter, since the application failed on the merits in any event. It is submitted that this method of deciding cases, although, admittedly, it has been used before,[7] puts the cart before the horse.[8]

Finally, it should be pointed out that if A.C.T.U.-Solo had followed de Smith's suggestion and sought either or both of the remedies he had referred to, no difficulties regarding the High Court's jurisdiction would have been likely to arise.[9]

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[5] *Banks* v. *Transport Regulation Bd. (Vic.)* (1968) 119 C.L.R. 222, 241, *dictum* per Barwick C.J. re state Governor; *Australian Communist Party* v. *Cth* (1951) 83 C.L.R. 1, 179, *dictum* per Dixon J. (as he then was) re all prerogative writs and Governor-General; *Reynolds* v. *Attorney-General* (1909) 29 N.Z.L.R. 24 (C.A.), 38, *dictum per curiam* re Governor; *Border Cities Press Club* v. *Attorney-General Ontario* [1955] 1 D.L.R. 404 (Ont. C.A.), *per curiam* re provincial Lieutenant-Governor; *Re Attorney-General Canada and Anti-Dumping Tribunal* (1973) 30 D.L.R. (3d) 678 (Fed. Ct. of Canada, Trial Div.), 716, *dictum* per Cattenach J. re all prerogative writs. *Contra, Re Gooliah and Minister of Citizenship and Immigration* (1967) 63 D.L.R. (2d) 224 (Manitoba C.A.), *per curiam* re Crown in the right of Canada; *Carlic* v. *The Queen and Minister of Manpower and Immigration* (1967) 65 D.L.R. (2d) 663 (Manitoba C.A.), *per curiam* re Crown in the right of Canada. It is submitted that the *dicta* in the *Communist Party* and *Anti-Dumping Tribunal* cases are too wide, because, unlike other prerogative writs, habeas corpus will lie against the Crown. It has done so in the High Court, without any discussion as to potential Crown immunity, in *Ex p. Freer* (1936) 56 C.L.R. 381, and in *Ex p. Taylor* (1968) 123 C.L.R. 28; see also de Smith, footnote 2, supra, 522, and Hogg, *Liability of the Crown*, 1971, 17. The Manitoban rule laid down in *Gooliah* and reiterated in *Carlic*, whether or not it is desirable in principle (as to which, see de Smith, 340-341, and Hogg, 16), was created in reliance on cases in which, without discussion as to potential Crown immunity, the Supreme Court of Canada had granted habeas corpus against the Crown. It is submitted that these cases were not a sound foundation for the rule because of the unique nature of habeas corpus.

[6] Quick and Garran, *Annotated Constitution of the Australian Commonwealth*, 1901, 779.

[7] See *Ex p. White* (1966) 116 C.L.R. 644; *Ex p. Thompson* (1968) 118 C.L.R. 488.

[8] Cf. the High Court's attitude to an attempt to invoke the appellate jurisdiction under s. 73 of the Constitution in *Cockle* v. *Isaksen* (1957) 99 C.L.R. 155.