Crown Immunity From Subdivision Control

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By Matthew Helfand and Leo F. Longo

Overview

Do subdivision control provisions in the Planning Act apply to Crown corporations? The answer is, it depends.

The power to control the division of land under the Planning Act is a means by which the Province prevents undesirable and unplanned growth, and assists with the planning of municipal infrastructure and service provisions. In accordance with subsection 50(3) of the Planning Act, any conveyance of land, or the creation of any interest or entitlement in land, without subdivision approval or a consent is prohibited if the conveyance or interest exceeds a period of 21 years.

Subsection 50(3), however, also provides a list of exceptions to subdivision control provisions. One of these exceptions, subsection 50(3)(c), provides that the rule against division of land does not apply where “land or any use of or right therein is being acquired or disposed of by Her Majesty in right of Canada, Her Majesty in right of Ontario or by any municipality.”

Exemption for Crown Corporations

It is unclear simply from the language of the subsection 50(3)(c) whether Crown corporations are exempt from subdivision controls. There is no definition in the Planning Act for “Her Majesty in right of Canada” or “Her Majesty in right of Ontario.” Further, there is very little case law interpreting this provision, and none as it relates to Crown corporations.

In a 1996 Ontario Divisional Court decision in Sudbury Hydro-Electric Commission, Re, the eponymous commission brought an application for a declaration that it was exempt from the subdivision control provisions of the Planning Act. The court determined that the applicant was the statutory agent of a municipality and therefore was exempt from subdivision control provisions of the Planning Act pursuant to subsection 50(3)(c), and was permitted to grant easements without seeking municipal approval.

The principle from Sudbury Hydro-Electric Commission, Re, that municipal agents are immune from subdivision control provisions, may reasonably be extended to apply to agents of Her Majesty, either in right of Canada or Ontario. An agent of the Crown may include certain Crown corporations. However, it is important to note that just because a corporation carries the name “Crown corporation,” it will not automatically be immune from subdivision control. Similarly, some corporations may not be Crown corporations on their face, but may be so by declaration or common law, and thus immune from subdivision control provisions.

Agents of the Crown

To determine whether a corporation is an agent of the Crown, and therefore immune from subdivision control, it is necessary to determine the source of the agency relationship. That agency relationship may be statutory or common law.

Statutory Agents

Pursuant to Part X of the Financial Administration Act, agent Crown corporations are Crown corporations that are “expressly declared by, or pursuant to, any other Act of Parliament to be agents of the Crown.”
For example, a corporation may be a statutory agent under the *Government Corporations Operation Act*. That Act states that a corporation incorporated under the *Canada Business Corporations Act* is an “agent of Her Majesty in right of Canada” if all the issued shares are owned by or held in trust for Her Majesty in right of Canada. Alternatively, regulations made under the *Government Corporations Operation Act* declare certain corporations to be agents of the Crown, such as, and among others:

BDC Capital Inc.;

Development Finance Institute Canada Inc.;

Project Deliver I Ltd.; and

Parc Downsview Park Inc.

By virtue of being declared agents of the Crown under the *Government Corporations Operation Act*, these corporations are immune from subdivision control provisions.

**Common Law Agents**

A corporation may also be an agent of the Crown by common law. Whether a person (human or corporate) is a common law agent of the Crown will depend on the extent to which it is under direct ministerial control. As stated by the Supreme Court of Canada decision in *R. v. Eldorado Nuclear Ltd.*:

At common law the question whether a person is an agent or servant of the Crown depends on the degree of control which the Crown, through its ministers, can exercise over the performance of his or its duties. The greater the control, the more likely it is that the person will be recognized as a Crown agent.

Therefore, it is necessary to assess the level of control that can be exercised over a corporation to determine whether that corporation is an agent of the Crown, and thus immune from subdivision control.

**Conclusion**

This esoteric provision of the *Planning Act* may have material consequences for Crown corporations and municipalities alike.

A corporation may be immune from subdivision control pursuant to subsection 50(3) of the *Planning Act* if it is an agent of the Crown. It is important to analyze the source of the agency relationship, as that may determine the scope of the immunity. This analysis can become particularly important in the case of land that is held by a subsidiary of a Crown corporation. While the parent corporation may be an agent of the Crown and thus enjoy immunity from subdivision control, it does not necessarily follow that the subsidiary will also enjoy that immunity.

Similarly, municipalities should be aware that their powers to control the subdivision of land may be limited as against Crown corporations. However, a municipality attempting to assert subdivision control over an ostensible “Crown corporation” should analyze whether the subsection 50(3) immunity indeed applies, as it only extends to agents of the Crown.

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1 R.S.O. 1990, c. P.13
2 1996 CarswellOnt 2529
3 R.S.C., 1985, c. F-11
4 R.S.C., 1985, c. G-4
5 R.S.C., 1985, c. C-44

7 SOR/2006-43

8 SOR/2017-245

9 SOR/2018-167

10 SOR/2003-313


12 See also, Peter Hogg et al. *Liability of the Crown*, 4th ed, Carswell, 1989

13 See, for instance: *Canada Lands Co. CLC Ltd. and Teamsters, Local 938, Re*, 2010 CarswellNat 6375

**Authors**

Matthew Helfand  
Associate  
T 416.865.4624  
mhelfand@airdberlis.com

Leo F. Longo  
Partner  
T 416.865.7778  
llongo@airdberlis.com

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