1968

*Mar. 8, 11
Oct. 1

LE CONSEIL DES PORTS NATIONAUX ..APPELLANT;

AND

JEAN LANGELIER, ARMAND J. LAVOIE, LARRY LAJOIE, HONORABLE JOSEPH JEAN et IMMEUBLES BOURGET INC. .... RESPONDENTS.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC

Crown—Injunction—Whether National Harbours Board subject to injunction—National Harbours Board Act, R.S.C. 1952, c. 187.

By a petition for interlocutory injunction, the respondents, owners of properties bordering on the St. Lawrence river, asked that the National Harbours Board be restrained from carrying out certain works on the river which, it was claimed, would injuriously affect their respective properties. The Board moved by way of declinatory exception to dismiss the petition on the ground that, being an agent of the Crown, it was not subject to injunction. The exception was dismissed at trial, and this judgment was affirmed by the Court of Appeal. The Board was granted leave to appeal to this Court.

Held: The appeal should be dismissed.

*PRESENT: Fauteux, Martland, Ritchie, Spence and Pigeon JJ.

The appellant corporation has the capacity to be sued and is, for the purposes of the Act which created it, a servant of the Crown. But it does not thereby enjoy an immunity from claims in tort, if it acts wrongfully. A personal liability will result when a person, whether individual or corporate, although a Crown agent and purporting to act as such, commits an unlawful act. The position of an agent of the Crown is not different because the agent is a corporation and not an individual. If a corporation commits a wrongful act, it is liable therefor and it cannot escape liability by alleging that it is not responsible for anything done outside its corporate powers. This is true whether it is purporting to act as a Crown agent or not. If a corporation can be held liable civilly in damages for wrongs which it has itself committed or ordered, it is obvious that a person threatened with the commission of an unlawful act by a corporate Crown agent can seek the assistance of the Court to prevent the corporation from doing that which it is not authorized to do as a Crown agent. The appellant cannot prevent the Court from inquiring into the legal justification for its conduct merely by saying that because it is an agent of the Crown it is immune from suit.

Couronne—Injonction—Peut-on obtenir une injonction contre le Conseil des ports nationaux—Loi sur le Conseil des ports nationaux, S.R.C. 1952, c. 187.

Les intimés, ayant des propriétés le long du fleuve St-Laurent, ont demandé contre le Conseil des ports nationaux une injonction interlocutoire lui enjoignant de discontinuer certains travaux dans le fleuve qui, ils ont allégué, ruineront la valeur de leurs propriétés respectives. Le Conseil des ports nationaux a opposé une exception déclinatoire, demandant que la requête d'injonction soit rejetée pour le motif que, étant un mandataire de la Couronne, une injonction ne peut être décernée contre lui. L'exception a été rejetée par la Cour de première instance, et ce jugement a été confirmé par la Cour d'appel. Le Conseil a obtenu la permission d'en appeler à cette Cour.

Arrêt: L'appel doit être rejeté.

La corporation appelante est habile à ester en justice et est, pour les fins de sa loi constitutive, un serviteur de la Couronne. Mais, elle ne jouit pas de ce fait d'une immunité à l'égard des réclamations basées sur la faute, lorsqu'elle agit illégalement. Lorsqu'un individu ou une corporation, mandataire de la Couronne et agissant comme tel, commet un acte illégal, il en résulte une responsabilité personnelle. La condition de mandataire de la Couronne n'est pas différente lorsque ce mandataire est une corporation au lieu d'être un individu. Si une corporation commet un acte illégal, elle encourt une responsabilité, et elle ne peut pas échapper à cette responsabilité en alléguant qu'elle n'est pas responsable de ce qui est fait en dehors de ses capacités. Ceci est vrai, qu'elle prétende agir comme mandataire de la Couronne ou non. Si une corporation peut être tenue civilement responsable en dommages pour la faute qu'elle a elle-même commise ou ordonnée, il est évident qu'une personne, menacée de la commission d'un acte illégal de la part d'une corporation, mandataire de la Couronne, a droit d'obtenir l'aide des tribunaux pour

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empêcher la corporation de faire ce qu'elle n'est pas autorisée de faire comme mandataire de la Couronne. La corporation appelante ne peut pas empêcher les tribunaux d'examiner la légalité de sa conduite pour le seul motif qu'étant un mandataire de la Couronne elle est à l'abri de toute poursuite.

APPEL d'un jugement de la Cour du banc de la reine, province de Québec[1], confirmant un jugement du Juge Mitchell qui avait rejeté une exception déclinatoire. Appel rejeté.

APPEAL from a judgment of the Court of Queen's Bench, Appeal Side, province of Quebec[1], affirming a judgment of Mitchell J. dismissing a declinatory exception. Appeal dismissed.

Laurent E. Bélanger, Q.C., and *J. M. Jacques*, for the appellant.

Paul Trudeau, for the respondents.

The judgment of the Court was delivered by

MARTLAND J.:—This is an appeal from a judgment of the Court of Appeal of the Province of Quebec[1], dismissing an appeal by the appellant from a decision of the Superior Court which dismissed a declinatory exception made by the appellant against a petition by the respondents for an interlocutory injunction. The circumstances which gave rise to these proceedings are stated by the learned trial judge as follows:

The petition for interlocutory injunction alleges in substance that the Petitioners are proprietors of properties in Pointe-aux-Trembles bordering the St. Lawrence river; that for several days Respondents National Harbours Board and Shell Canada Ltd. had been carrying out or procuring the carrying out illegally of the filling in of the St. Lawrence river for the purpose of creating a new and extensive parcel of land of a width of 500 feet and installing thereon reservoirs, thereby illegally displacing the limits of the river which borders Petitioners' property; that the continuation and realization of this work will cause serious and irreparable harm to the Petitioners, ruining for ever their properties, as well from the residential as from the commercial point of view; that the Respondent City of Pointe-aux-Trembles has issued a permit to construct in the immediate vicinity of Petitioners' property huge reservoirs of 48 feet in height even before the site had been prepared;

[1] [1968] Que. Q.B. 113.

praying for the issue of an interlocutory injunction, enjoining Respondents, their employees and representatives to cease and cause to cease all works of construction or preparation of the ground now in process on the bed of the St. Lawrence adjacent to the Petitioners' property.

Petitioners also requested the issue of an immediate interim injunction, and after hearing the parties, an interim injunction was issued as prayed for by Mr. Justice Caron on the 28th March 1966, to remain in force until the 14th April 1966, pending hearing and disposition of the prayer for the interlocutory injunction.

At the hearing for the interim injunction Respondent National Harbours Board appears to have orally objected to the jurisdiction of the Court as regards it, but no judgment having been rendered thereon, a formal motion by way of declinatory exception was duly filed and, after argument, was taken on délibéré. Pending judgment on the exception the interim injunction was continued in force until April 20th, 1966 and the petition for an interlocutory injunction continued to the same date.

The basis for the declinatory exception is that Respondent National Harbours Board is an emanation or instrumentality of the Crown, and is therefore exempt from any process, upon the principle that the King can do no wrong, the Court therefore being incompetent ratione materiae to adjudicate with respect to it.

The appellant is a body corporate created by the *National Harbours Board Act*, R.S.C. 1952, c. 187. The sections of that Act, which are relevant to this appeal, are the following:

3. (1) There shall be, under the direction of the Minister, a Board to be known as the "National Harbours Board" consisting of four members, namely, a Chairman, a Vice-Chairman and two other members, who shall be appointed by the Governor in Council to hold office during good behaviour for ten years.

(2) The Board is a body corporate and politic and shall be and be deemed to be, for all the purposes of this Act, the agent of Her Majesty in right of Canada.

(3) The Board has the capacity to contract and to sue and be sued in the name of the Board.

39. (1) Subject, as hereinafter provided any claim against the Board arising out of any contract entered into in respect of its undertaking or any claim arising out of any death or injury to the person or to property resulting from the negligence of any officer or servant of the Board while acting within the scope of his duties or employment may be sued for and prosecuted by action, suit or other proceeding in any court having jurisdiction for like claims between subjects.

(2) Any such action, suit or other proceeding may be commenced and prosecuted to judgment in the same manner and subject to the same rules of practice and procedure and to the same right of appeal as nearly as may be as in cases between subjects.

(3) The said court has the same jurisdiction to order or adjudge the payment of costs either by plaintiff or defendant as in like cases in the said court between subjects.

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The learned trial judge held that the claim in question here fell within s. 39(1), holding that the "negligence" referred to in that subsection meant tortious liability as understood at common law, or for fault, as contemplated by articles 1053 *et seq.* of the *Civil Code*, and that "injury to property" included injurious affection of property rights.

This decision was sustained on appeal, Pratte J. dissenting. Choquette J., with whom the other three members of the Court agree, said as follows:

> Outre l'article 39 de la loi précitée, il y a l'article 3, dont les paragraphes 2 et 3 se lisent comme suit:
>
> 3. (2) Le Conseil est un corps constitué et politique, et, pour toutes les fins de la présente loi, il est et est censé être le mandataire de Sa Majesté du chef du Canada.
>
> (3) Le Conseil est habile à passer des contrats ainsi qu'à ester en justice en son propre nom.
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> Comme on le voit, ce n'est que «pour les fins de la présente loi» que le Conseil «est censé être le mandataire de Sa Majesté». Si le Conseil excède les pouvoirs que la loi lui confère, si, par exemple, il s'empare de «terrains ou d'un droit de propriété limité, ou d'un intérêt limité dans des terrains» sans l'autorisation préalable du gouverneur en conseil et sans l'expropriation ou le consentement prévus à l'article 11, il ne peut être dit que le Conseil agit comme mandataire de la Couronne. Dans ce cas, le Conseil est dans la position d'un ministre qui outrepasserait ses attributions, engageant ainsi sa responsabilité personnelle.
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> Ce n'est donc pas contre la Couronne que les intimés demandent une injonction, mais contre le «corps constitué et politique» qui a excédé ses pouvoirs et qui est quand même «habile à ester en justice en son propre nom» pour se voir ramener dans les limites de son mandat. L'injonction est aussi dirigée contre les représentants et préposés du Conseil.

The appellant contends that s. 39 is not applicable, there being no claim for damages and no allegation of negligence as against any officer or servant of the appellant and there being no provision for remedy by way of injunction. It is also submitted that the appellant, being an agent of the Crown, enjoys all of the immunities of the Crown at law, and cannot be sued at all, save to the extent that such suit is specifically permitted by statute. It was also argued that the National Harbours Board, as such, was incapable of acting in any way, save as an agent of the Crown, and that if, in fact, its powers were exceeded, any such act could not be that of the Board, but would be only the act of the individuals involved.

These latter propositions raise a question of considerable importance. If correct, they would involve the conclusion that no subject, threatened with an unlawful act by a corporate Crown agent, would have any recourse to the courts against such corporation in order to prevent it.

The appellant is a corporation created by a statute which defines its corporate powers. It has the capacity to be sued. It is, for the purposes of the Act which created it, a servant of the Crown. Does it thereby enjoy an immunity, in the same manner as the Crown itself, from claims in tort, if it, i.e., the corporation itself, acts wrongfully?

A convenient starting point for the consideration of this matter is to be found in the well known statement by Dicey, "The Law of the Constitution", 10th ed., p. 193:

> In England the idea of legal equality, or of the universal subjection of all classes to one law administered by the ordinary courts, has been pushed to its utmost limit. With us every official, from the Prime Minister down to a constable or a collector of taxes, is under the same responsibility for every act done without legal justification as any other citizen. The Reports abound with cases in which officials have been brought before the courts, and made, in their personal capacity, liable to punishment, or to the payment of damages, for acts done in their official character but in excess of their lawful authority. A colonial governor, *Mostyn v. Fabrigas,* (1774) 1 Cowp. 161; *Musgrave v. Pulido,* (1879) 5 App. Cas. 102; *Governor Wall's Case,* (1802) 28 St. Tr. 51, a secretary of state, *Entick v. Carrington,* (1765) 19 St. Tr. 1030; K. & L. 174, a military officer, *Phillips v. Eyre,* (1867) L.R. 4 Q.B. 225; K. & L. 492, and all subordinates, though carrying out the commands of their official superiors, are as responsible for any act which the law does not authorise as is any private and unofficial person.

This principle was applied in this Court in *Roncarelli v. Duplessis*[2]. The quotation was cited in his reasons by Abbott J., at p. 184.

The proposition was clearly stated in *Feather v. The Queen*[3], by Chief Justice Cockburn, at p. 297:

> But in our opinion no authority is needed to establish that a servant of the Crown is responsible in law for a tortious act done to a fellow subject, though done by the authority of the Crown—a position which appears to us to rest on principles which are too well settled to admit of question, and which are alike essential to uphold the dignity of the Crown on the one hand, and the rights and liberties of the subject on the other.

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[2] [1959] S.C.R. 121, (1959), 16 D.L.R. (2d) 689.

[3] (1865), 6 B. & S. 257, 122 E.R. 1191.

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It was stated again by Viscount Finlay in *Johnstone v. Pedlar*[4]:

> It is the settled law of this country, applicable as much to Ireland as to England, that if a wrongful act has been committed against the person or the property of any person the wrongdoer cannot set up as a defence that the act was done by the command of the Crown. The Crown can do no wrong, and the Sovereign cannot be sued in tort, but the person who did the act is liable in damages, as any private person would be.

In *Nireaha Tamaki v. Baker*[5], the Privy Council considered a claim for an injunction by a person who claimed a native title of occupancy to certain lands in New Zealand. The respondent was the Commissioner of Crown Lands in the provincial district of Wellington. The Governor had advertised for sale lands, including those claimed by the appellant, and the appellant sued for a declaration that the land still remained land owned by natives, under their customs and usage, to which undisturbed possession had been guaranteed by treaty, and for an injunction against selling the same. The respondent objected that the interest of the Crown in the lands in question could not be attacked by this proceeding. At p. 575 Lord Davey says:

> The learned judges in the Court of Appeal thought that the case was within the direct authority of *Wi Parata v. Bishop of Wellington*, 3 N.Z.J.R. (N.S.) S.C. 72, previously decided in that Court. They held that "the mere assertion of the claim of the Crown is in itself sufficient to oust the jurisdiction of this or any other Court in the Colony. There can be no known rule of law," they add, "by which the validity of dealings in the name and under the authority of the Sovereign with the native tribes of this country for the extinction of their territorial rights can be tested". The argument on behalf of the respondent at their Lordships' bar proceeded on the same lines.
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> Their Lordships think that the learned judges have misapprehended the true object and scope of the action, and that the fallacy of their judgment is to treat the respondent as if he were the Crown, or acting under the authority of the Crown for the purpose of this action. The object of the action is to restrain the respondent from infringing the appellant's rights by selling property on which he alleges an interest in assumed pursuance of a statutory authority, the conditions of which, it is alleged, have not been complied with. The respondent's authority to sell on behalf of the Crown is derived solely from the statutes, and is confined within the four corners of the statutes. The Governor, in notifying that the lands were rural land open for sale, was acting, and stated himself to be acting, in pursuance of the 136th section of the Land Act, 1892, and the respondent in his notice of sale purports to sell

[4] [1921] 2 A.C. 262 at 27.

[5] [1901] A.C. 561, 70 L.J.P.C. 66, 84 L.T. 633.

in terms of s. 137 of the same Act. If the land were not within the powers of those sections, as is alleged by the appellant, the respondent had no power to sell the lands, and his threat to do so was an unauthorized invasion of the appellant's alleged rights.

In the case of *Tobin v. Reg.*, 16 C.B. (N.S.) 310, a naval officer, purporting to act in pursuance of a statutory authority, wrongly seized a ship of the suppliant. It was held on demurrer to a petition of right that the statement of the suppliant shewed a wrong for which an action might lie against the officer, but did not shew a complaint in respect of which a petition of right could be maintained against the Queen, on the ground, amongst others, that the officer in seizing the vessel was not acting in obedience to a command of Her Majesty, but in the supposed performance of a duty imposed upon him by Act of Parliament, and in such a case the maxim "Respondeat superior" did not apply. On the same general principle it was held in *Musgrave v. Pulido,* (1879) 5 App. Cas. 102, that a Governor of a Colony cannot defend himself in an action of trespass for wrongly seizing the plaintiff's goods merely by averring that the acts complained of were done by him as "Governor" or as "acts of State". It is unnecessary to multiply authorities for so plain a proposition, and one so necessary to the protection of the subject. Their Lordships hold that an aggrieved person may sue an officer of the Crown to restrain a threatened act purporting to be done in supposed pursuance of an Act of Parliament, but really outside the statutory authority.

Part of this passage is cited by Newcombe J., who delivered the reasons of the majority of this Court in *Rattenbury v. Land Settlement Board*[6]. In that case the appellant complained of the imposition of taxes against his land in British Columbia and against himself under the *Land Settlement and Development Act,* R.S.B.C. 1924, c. 128, alleging that certain sections of that Act, relied upon by the respondent, were *ultra vires* of the provincial legislature. He claimed a declaration, damages and an injunction. The respondent pleaded, *inter alia,* that it was a branch of the provincial Department of Agriculture, a servant and agent of the Crown, that it possessed no other capacity, that its acts were done in that capacity and that it could not be sued.

At p. 62, Newcombe J. says:

For myself, I see no reason to doubt that the defendant Board is sued in its official capacity. It is described and identified in the action not otherwise than by its corporate name; it is thus the corporation, and not its individual members, which is the party defendant; and as a statutory body, it has no capacity other than that which it derives from its constituting Act. I do not question the general truth involved in the proposition expressed by Bankes L.J., in *Mackenzie-Kennedy v. Air Council,* (1927) 2 K.B. 517, at p. 523:

[6] [1929] S.C.R. 52, [1929] 1 D.L.R. 242.

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In the absence of distinct statutory authority enabling an action for tort to be brought against the Air Council, I am of opinion, both on principle and upon authority, that no such action is maintainable. The Air Council are not a corporation, and even if it were to be treated as one the respondent's position would not be improved. The learned Lord Justice mentions the case of *Roper v. Public Works Commissioners,* (1915) 1 K.B. 45; and he quotes from an Irish case, *Wheeler v. Public Works Commissioners,* (1903) 2 Ir. Rep. 202, a passage from the judgment of Palles C.B., as follows:

> Now, if a corporation be constituted for the sole purpose of doing acts for the Crown, it is *prima facie* outside its powers to do anything except for the Crown, and, as in law a wrongful act cannot be done for the Crown, such a corporation is not capable of doing such wrongful act in its corporate capacity. In such a case, therefore, the wrongful act cannot be deemed that of the corporation, but must be deemed the personal act of those who committed it.

With these observations, however, are to be contrasted what was said by Atkin L.J., at p. 533 of the *Air Council case,* (1927) 2 K.B. 517. But whatever may be said about the Air Council, and while it is certainly true that the revenues of the Crown cannot be reached by judicial process to satisfy a demand against an officer or servant of the Crown in any capacity, whether incorporated or not, it is common practice, founded upon general principle, that the court will interfere to restrain *ultra vires* or illegal acts by a statutory body, and, when it is charged, as in this case, that the proceedings in question, though authorized by the letter of the statute, are nevertheless incompetent, by reason of defect in the enacting authority of the legislature, the court must, I should think, have jurisdiction so to declare, and to restrain the *ultra vires* proceedings, although directed by the statute and in strict conformity with the legislative text. To this extent, in my view, the action is properly constituted; indeed, upon this point the authority is conclusive.

After citing from the *Tamaki* case, he goes on to say:

It is not necessary for me to consider the position of the individual members of the Board, because I hold that, as such, they are not before the Court; but, upon the authorities, it seems to be established that the doer of a wrongful act cannot escape liability by setting up the authority of the Crown, unless in proceedings by a foreigner against a British subject, in which case an exception is introduced, as appears by *Feather v. The Queen,* (1865) 6 B. & S. 257, at pp. 279, 295, 296, in which Baron Parke's charge in *Buron v. Denman,* (1848) 2 Exch. 167, was explained. It seems to be only in such a case that it is of any use to justify upon the authority of an act of State. *Walker v. Baird.* (1892) A.C. 491.

In the *Mackenzie-Kennedy* case[7], to which he refers, it was held that the appellant's action in tort did not lie against the Air Council. The Air Council was not an incorporated body. Bankes L.J. said that it was a Department of State. It was held that an action for tort would not lie against the statutory body set up under that name.

[7] [1927] 2 K.B. 517, 96 L.J.K.B. 1145.

Bankes L.J. cited with approval what was said by Romer J. in *Raleigh v. Goschen*[8]:

I will state some general principles of law which I conceive govern this class of cases; and if you challenge any portion of what I am about to say, then I will hear you in reply. It appears to me that if any person commits a trespass (I use that word advisedly as meaning a wrongful act or one not justifiable) he cannot escape liability for the offence, he cannot prevent himself being sued merely because he acted in obedience to the order of the executive Government, or of any officer of State; and it further appears to me, as at present advised, that if the trespass had been committed by some subordinate officer of a Government Department or of the Crown, by the order of a superior official, that superior official—even if he were the head of the Government Department in which the subordinate official was employed, or whatever his official position—could be sued; but in such a case the superior official could be sued, not because of, but despite of, the fact that he was an officer of State. I think it is clear that the head of a Government Departmen is not liable for the neglect or torts of officials in the Department, unless it can be shown that the act complained of was substantially the act of the head himself; in which case he would be liable as an individual, just as a stranger committing the same act would be.

Atkin L.J., at p. 532, has this to say, as to what might have been the position had the Council been incorporated:

Applying these considerations to this action it appears clear that unless the Air Council is incorporated the name is but a name for the individuals that compose it. I do not think that it can be used at all as the equivalent of the names of its members in a suit which is directed against the members in their private capacity. In any event in this case I think it is plain, plainer even than in the case of *Raleigh v. Goschen*, (1898) 1 Ch. 73, where at least the Lords Commissioners were individually named, that this present action is directed against the members of the Air Council in their official or, as I prefer to say, representative capacity as servants of the Crown, and therefore will not lie. If, however, the Air Council were incorporated different considerations might apply. The Crown may and does employ as its servant or servants, an individual, a joint committee or board of individuals, or a corporation. None can be made liable in a representative capacity for tort; the individuals may be made liable in their private capacity, and I see no reason why this liability should not extend to the juristic person, the corporation, as well as to the individual. It may be true that the corporation in such a case will have no private assets available to meet execution, but that may also be true of the individual. One must also face the difficulty that such a corporation will have no servants, for as in the case of individual officials, those who serve under it are not its servants, but servants of the Crown. It is, therefore, only for torts actually committed by it, or to which it is directly privy, as by giving orders for their performance, that it can be made liable. But for such a tort proved, for example, by a minute of an incorporated board expressly commanding the commission of a tort, in principle, as it appears to me, an action would lie, however unprofitable such an action would be.

[8] [1898] 1 Ch. 73 at 77, 67 L.J. Ch. 59, 77 L.T. 429.

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The case chiefly relied upon by the appellant was *City of Halifax v. Halifax Harbour Commissioners*[9]. That case, however, only held that the Commissioners, who occupied Crown property in Halifax for the exercise of their powers, were not assessable for business tax as an "occupier" because their occupation of the property was for the Crown.

This case was followed in *Cour de Recorder et Cité de Montréal v. Société Radio-Canada*[10] in respect of the respondent's liability for municipal sales tax.

These cases are not of assistance in respect of the issue which is before us. They illustrate that, where a Crown agent is properly exercising its function as such, its acts, being those of its principal, the Crown, are to be dealt with on that basis.

What is in issue here is the responsibility of a person, whether individual or corporate, who, though a Crown agent, and purporting to act as such, commits an act which is unlawful. My understanding of the law is that a personal liability will result. The liability arises, not because he is an agent of the Crown, but because, though he is an agent of the Crown, the plea of Crown authority will not avail in such event.

There are some authorities which have stated, in terms which I consider to be too broad, the proposition that an instrumentality of the Crown enjoys the same immunity, from an action in tort, as does the Crown itself. Thus, as an example, in *Peccin v. Lonegan and T. & N.O. Railway Commission*[11], Davis J.A. says this:

> The principle is that the privileges enjoyed by departments of State and by the officials thereof are so enjoyed by virtue of the Crown's prerogative, such departments and their officers being, as it were, representatives of the Crown and deriving their powers therefrom. As it was put in *Gilbert v. Corporation of Trinity House* (1886), 17 Q.B.D. 795, at p. 801: "All the great officers of state are ... emanations from the Crown. They are delegations by the Crown of its own authority to particular individuals."

On the facts of that case, however, the decision went no further than to say that the Temiskaming and Northern

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[9] [1935] S.C.R. 215, [1935] 1 D.L.R. 657.

[10] (1941), 70 Que. K.B. 65.

[11] [1934] O.R. 701 at 707, 43 C.R.C. 199, [1934] 4 D.L.R. 776.

Ontario Railway Commission, a body appointed by the Crown to administer a public undertaking of the Crown, enjoyed the Crown immunity from suits in tort for the tortious acts of its servants or agents.

As to the phrase "emanation from the Crown", I would refer to what is said by Luxmoore L.J., in the Privy Council, in *International Railway Co. v. Niagara Parks Commission*[12]:

> Kelly J. in his judgment referred to the Commission not only as being the agent or servant of the Crown but also as "an emanation of the Crown". The latter phrase is also used by McTague J.A. Their Lordships are unable to appreciate the precise meaning intended to be attributed to this phrase by the Courts below. If it is intended to refer to the Commission in some capacity other than that of agent or servant it is impossible to ascertain from the judgments delivered what the legal significance of that capacity may be. The word "emanation" is hardly applicable to a person or a body having a corporate capacity. Its primary meaning is "that which issues or proceeds from some source" and it is commonly used to describe the physical properties of substances (e.g. radium) which give out emanations of recognizable character. The words seem first to have been used by Day J. in *Gilbert v. Trinity House* (1886), 17 Q.B.D. 795.

After referring to the judgment of Day J., in which the phrase is used, he goes on to say:

> The learned Judge in the passage quoted seems to use the word as synonymous with servant or agent and in no other sense. Their Lordships are of opinion that it would avoid obscurity in the future if the words agent or servant were used in preference to the inappropriate and undefined word "emanation".

After reviewing the authorities cited by counsel, and a number of other cases, which I do not think it is necessary to list, my understanding of the position of servants or agents of the Crown, at common law, in respect of a claim in tort, is this:

First is the proposition that the Crown itself could not be sued in tort.

Second is the proposition that Crown assets could not be reached, indirectly, by suing in tort, a department of government, or an official of the Crown. As to a government department, there was the added barrier that, not being a legal entity, it could not be sued.

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[12] [1941] 3 D.L.R. 385 at 393, [1941] A.C. 328, [1941] 2 W.W.R. 338 [1941] 2 All E.R. 456, 53 C.R.T.C. 1.

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Third is the proposition that a servant of the Crown cannot be made liable vicariously for a tort committed by a subordinate. The subordinate is not his servant but is, like himself, a servant of the Crown which, itself, cannot be made liable.

Fourth is the proposition that a servant of the Crown, who commits a wrong, is personally liable to the person injured. Furthermore, if the wrongful act is committed by a subordinate, at his behest, he is equally liable, not because the subordinate is his servant, but because the subordinate's act, in such a case, is his own act. This is what is said in the passage from *Raleigh v. Goschen,* previously cited.

Is the position any different because the agent in this case is not an individual, but a corporation? I think not, and I agree with the reasoning of Atkin L.J. in the *Mackenzie-Kennedy* case.

As Choquette J. has pointed out, in the reasons for judgment of the Court of Appeal, s. 3(2) of the *National Harbours Board Act* declares that the Board "shall be and be deemed to be, *for all the purposes of this Act,* the agent of Her Majesty in right of Canada". (The italicizing is my own.) It is only when the Board is lawfully executing the powers entrusted to it by the Act that it is deemed to be a Crown agent.

I am not prepared to accept the proposition enunciated in *Wheeler v. Public Works Commissioners*[13], *supra,* that a corporation constituted for the sole purpose of doing acts for the Crown is not capable of doing a wrongful act in its corporate capacity, unless that statement is to be limited in its meaning to say that such a wrongful act is not authorized by its corporate powers. Otherwise the statement subscribes to the theory that a corporation cannot be made liable in tort because its corporate powers do not authorize it to commit a wrong. In my opinion, if a corporation, in the purported carrying out of its corporate purposes, commits a wrongful act, it is liable therefor and it cannot escape liability by alleging that it is not responsible for anything done outside its corporate powers. This is true whether it is purporting to act as a Crown agent, or not.

[13] [1903] 2 I.R. 202.

This view appears to be implicit in the statement of Duff J., as he then was, in *The Quebec Liquor Commission v. Moore*[14]:

> The broad principle, of course, is that the liability of a body created by statute must be determined by the true interpretation of the statute. It is desirable, perhaps, to advert first of all to a discussion of the subject in *The Mersey Docks and Harbour Board Trustees v. Gibbs* (1864) L.R. 1 H.L. 93. Mr. Justice Blackburn, delivering the opinion of the judges in that case, proceeded upon the principle stated by him in these words (p. 107):
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> > It is well observed by Mr. Justice Mellor in *Coe v. Wise,* (1864) 5 B. & S. 440; 4 New Rep. 352, of corporations like the present, formed for trading and other profitable purposes, that though such corporations may act without reward to themselves, yet in their very nature they are substitutions on a large scale for individual enterprise. And we think that in the absence of anything in the statutes (which create such corporations) showing a contrary intention in the legislature, the true rule of construction is, that the legislature intended that the liability of corporations thus substituted for individuals should, to the extent of their corporate funds, be co-extensive with that imposed by the general law on the owners of similar works.
>
> An exception is recognized, however, in the judgment of Mr. Justice Blackburn, as well as in the speeches of the Lords in the case of public officers who are servants of the Government; that is to say, officers fulfilling a public duty, appointed directly by the Crown and acting as officers of the Crown. Such a public officer is not responsible for the acts of inferior servants or officials merely because the superior officer has the right of the selection and appointment, as well as the right of removal at pleasure. *Canterbury v. The Attorney-General,* (1842) 1 Ph. 306 at p. 324. It is now recognized also that there is nothing to prevent the Crown being served by a corporation, and nothing to prevent such a corporation claiming the same immunity as an individual. *Bainbridge v. The Postmaster General,* (1906) 1 K.B. 178 at pp. 191-192, and *Roper v. The Commissioners of His Majesty's Works and Public Buildings,* (1915) 1 K.B. 45.

What he is saying here is that a corporation which is a servant of the Crown enjoys the same immunity as an individual servant of the Crown, and is not vicariously liable for torts committed by its servants. It follows that, its immunity being no greater, its liability is also the same as that of an individual servant of the Crown.

In the matter of liability for the acts of its servants, the matter has now been dealt with, so far as the appellant is concerned, by s. 39 of the Act.

If it can be held liable civilly in damages for wrongs which it has itself committed or ordered, it is obvious that

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[14] [1924] S.C.R. 540 at 551, [1924] 4 D.L.R. 901.

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a person threatened with the commission of an unlawful act by a corporate Crown agent can seek the assistance of the Court to prevent the corporation from doing that which it is not authorized to do as a Crown agent. This is clearly the principle laid down in the *Tamaki* and the *Rattenbury* cases.

In the present case the respondents allege that the appellant commenced to engage in and intended to continue the commission of an unlawful act which injuriously affected them. They seek an injunction to prevent it. If that which the appellant seeks to do is lawfully justified that is the end of the matter. But in my opinion the appellant cannot prevent the Court from inquiring into the legal justification for its conduct merely by saying that because it is an agent of the Crown it is immune from suit.

I have reached my conclusions without reference to s. 39 of the *National Harbours Board Act*. The purpose of that section was, I think, to make it clear that actions of the kind described in it were not to be subject to the exclusive jurisdiction of the Exchequer Court. That Court, when the *National Harbours Board Act* was passed, had exclusive jurisdiction in respect of claims arising out of contracts entered into by or on behalf of the Crown and claims against the Crown arising out of death or injury to person or property resulting from the negligence of any officer or servant of the Crown while acting within the scope of his duties or employment.

The Board was given capacity to contract, but, as it was an agent of the Crown, it might have been considered, therefore, as contracting on behalf of the Crown. At common law, an agent of the Crown was not vicariously liable for the acts of his subordinates, who were not his servants, but were servants of the Crown.

Section 39 made it clear that the Board itself could be sued on its contracts and, also, as vicariously liable for the negligence of its officers and servants, and the recourse in such event was not limited to proceedings in the Exchequer Court against the Crown.

But, as already stated, there was always recourse in the common law courts in respect of acts done, without legal justification, by an agent of the Crown, and the Board, on that principle, is liable if it commits itself, or orders or

authorizes its servants to commit, an act done without legal justification. Equally, if it threatens to commit an act, without legal justification, a subject, whose legal rights are thereby threatened, has recourse to the Courts to restrain the commission of such act.

I would dismiss this appeal with costs.

Appeal dismissed with costs.

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