

<div style="text-align: center;"> <div style="border-top: 1px solid black; display: inline-block; padding-top: 2px;">1958</div>  <div style="border-bottom: 1px solid black; display: inline-block; padding-bottom: 2px;">1959</div>  <div style="border-bottom: 1px solid black; display: inline-block; padding-bottom: 2px;">Jan. 27</div> </div>	<div style="display: flex; align-items: center;"> <div style="flex: 1;"> <p>THE CANADIAN BROADCASTING CORPORATION .....</p> </div> <div style="font-size: 3em; line-height: 1; padding: 0 10px;">}</div> </div>	<p>APPELLANT;</p>
AND		
	<div style="display: flex; align-items: center;"> <div style="flex: 1;"> <p>THE ATTORNEY-GENERAL FOR ONTARIO .....</p> </div> <div style="font-size: 3em; line-height: 1; padding: 0 10px;">}</div> </div>	<p>RESPONDENT.</p>

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

*Crown—Sunday observance—Information under the Lord's Day Act, R.S.C. 1952, c. 171, s. 4, laid against the Canadian Broadcasting Corporation—Whether Act binding on Her Majesty—Whether Act binding on Corporation—Immunity of Sovereign—Writ of prohibition to prevent further proceedings—The Canadian Broadcasting Corporation Act, R.S.C. 1952, c. 32—The Interpretation Act, R.S.C. 1952, c. 168, s. 16—The Criminal Code, 1953-54 (Can.), c. 51, s. 2(15).*

The Canadian Broadcasting Corporation was charged before a magistrate with violating the *Lord's Day Act* by operating a broadcasting station on the Lord's Day. The corporation applied before a judge in chambers for a writ of prohibition to prevent any further proceedings and to quash the summons on the ground that the Act did not apply to Her Majesty and therefore did not apply to the corporation, being an agent of Her Majesty. The application was refused by the Chief Justice of the High Court, and his judgment was affirmed by the Court of Appeal.

*Held* (Taschereau, Abbott and Judson JJ. dissenting): The *Lord's Day Act* did not apply to the Canadian Broadcasting Corporation, therefore the corporation was entitled to the writ of prohibition as applied for.

*Per* Rand, Cartwright and Fauteux JJ.: The Act did not expressly affect the rights of Her Majesty. To interpret the definition of the word "person" in s. 2(15) of the *Criminal Code*, which definition is incorporated in the *Lord's Day Act*, as drawing the Crown or its agent within the ambit of any prohibitory or punitive provision of the Act, would be repugnant to the principle of the immunity of the Crown. The mention of certain Crown services by s. 11 of the Act as being

exempt from the statute's application was to be taken as *ex abundantia cautela*. Consequently, as the Sovereign was free to broadcast on Sundays, its agent, the corporation, was immune to prosecution.

*Per* Locke J.: Construed in the manner required by s. 15 of the *Interpretation Act*, it was implicit in the language of s. 8 of the *Canadian Broadcasting Act*, that the broadcasting activities to be carried on by the corporation were to be those of a character suited to a national system. Parliament did not contemplate that these activities should be restricted to week-days. Before arriving at the conclusion that the activities were unlawful, it was necessary to show that the prohibitory legislation was clear beyond question and capable of no other reasonable or sensible interpretation. *The King v. Bishop of Salisbury*, [1901] 1 Q.B. 573, and *River Wear Commissioners v. Adamson*, [1877] 2 App. Cas. 743, applied. The interpretation to be given to the word "person" in the *Criminal Code* was that the word included the Sovereign only as one of those against whose person and property various criminal offences could be committed by others. By the amendment of 1950, declaring that the corporation was for all purposes an agent of Her Majesty, the same immunity was conferred on the Canadian Broadcasting Corporation.

*Per* Taschereau, Abbott and Judson JJ., *dissenting*: The Act applied to the corporation, an agent of Her Majesty, who, by statute, agreed to be bound. There was no ambiguity in the section of the *Lord's Day Act* which purported to bind the Crown. The Act must be read as if the word "person", as defined in s. 2(15) of the *Criminal Code*, were a part of the Act itself, and therefore meant Her Majesty in relation to the acts and things she was capable of doing or owning. The very terms of s. 2(15) ruled out the proposition that the Crown was included only when it was the victim of a criminal act.

APPEAL from a judgment of the Court of Appeal for Ontario<sup>1</sup>, affirming a judgment of McRuer C.J.H.C. Appeal allowed, Taschereau, Abbott and Judson JJ. *dissenting*.

*W. B. Williston, Q.C.*, and *P. M. Troop*, for the appellant.

*C. F. H. Carson, Q.C.*, *C. R. Magone, Q.C.*, and *J. B. S. Southey*, for the respondent.

The judgment of Taschereau, Abbott and Judson JJ. was delivered by

TASCHEREAU J. (*dissenting*):—The appellant the Canadian Broadcasting Corporation was prosecuted by the Attorney-General for Ontario, and the information dated March 19, 1957, reads as follows:

This is the information of Roy Elmhirst, of the City of Toronto in the County of York, secretary hereinafter called "the informant".

The informant says that he has reasonable and probable cause to believe and does believe that the Canadian Broadcasting Corporation

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<sup>1</sup>[1958] O.R. 55, 27 C.R. 165, 120 C.C.C. 84.

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did on the Lord's Day Seventeenth of March Nineteen Hundred and Fifty Seven carry on the business of its ordinary calling by operating a broadcasting station contrary to the Lord's Day Act.

"R. H. Elmhirst"

Signature of Informant

A motion was made before Chief Justice McRuer of the High Court of Justice of Ontario to prohibit Magistrate T. S. Elmore from taking any further proceedings on the above information, and for an order quashing the summons issued pursuant to the information laid.

The contention on behalf of the Canadian Broadcasting Corporation is that it is by statute an agent of Her Majesty and as such, it is not bound by the provisions of the *Lord's Day Act*.

The relevant provision of the *Lord's Day Act*, R.S.C. 1952, c. 171, is the following:

4. It is not lawful for any person on the Lord's Day, except as provided herein, or in any provincial Act or law now or hereafter in force, to sell or offer for sale or purchase any goods, chattels, or other personal property, or any real estate, or to carry on or transact any business of his ordinary calling, or in connection with such calling, or for gain to do, or employ any other person to do, on that day, any work, business, or labour.

The only question which has to be resolved now is: Does s. 4 of the *Lord's Day Act* apply to the Canadian Broadcasting Corporation which is by statute an agent of Her Majesty? If the answer is affirmative, as decided by the learned Chief Justice of the High Court of Ontario, whose judgment was confirmed by the Court of Appeal<sup>1</sup>, the case will proceed, and it will of course then be open to the appellant to raise the defence of "mercy and necessity" as provided in s. 11 of the Act. If the answer is negative, then the case will have come to an end.

Section 4 of the *Canadian Broadcasting Corporation Act*, R.S.C. 1952, c. 32, provides:

4.(1) The Corporation is a body corporate having capacity to contract and to sue and be sued in the name of the Corporation.

(2) The Corporation is for all purposes of this Act *an agent of Her Majesty* and its powers under this Act may be exercised only as an agent of Her Majesty.

(3) Actions, suits or other legal proceedings in respect of any right or obligation acquired or incurred by the Corporation on behalf of Her Majesty, whether in its name or in the name of Her Majesty may be

<sup>1</sup>[1958] O.R. 55, 27 C.R. 165, 120 C.C.C. 84.

brought or taken by or against the Corporation, in the name of the Corporation in any court that would have jurisdiction if the Corporation were not an agent of Her Majesty.

There is no doubt that at common law the Crown is not bound by a statute, unless expressly named or bound by necessary implication. Halsbury, 3rd ed., vol. 7, p. 246.

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As it has been said by Lord Alverstone in *The Hornsey Urban District Council v. Hennell*<sup>1</sup>:  
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In our opinion, the intention that the Crown shall be bound, or has agreed to be bound must clearly appear either from the languages used or from the nature of the enactments . . .

It is unnecessary to cite all the authorities that have been referred to us on the matter except perhaps the cases of *Weymouth v. Nugent*<sup>2</sup>, *The Attorney General for Quebec v. The Attorney General for Canada* (Silver Brothers case)<sup>3</sup> and *Bombay v. Bombay*<sup>4</sup>, which are leading authorities on the matter, and particularly the last of these three cases in which it was held by the Judicial Committee that it is the general principle in England that in deciding whether the Crown is bound by a statute, it must be expressly named, or be bound by necessary implication. This appears to me to be now the settled law, and it has not been challenged by the parties in the present case and is accepted by both of them.

Under the *Interpretation Act*, R.S.C. 1952, c. 158, s. 16, it is provided:

16. No provision or enactment in any act affects, in any manner whatsoever, the rights of Her Majesty, her heirs or successors, unless it is expressly stated therein that Her Majesty is bound thereby.

Furthermore, the *Lord's Day Act*, s. 4, applies to any person and s. 2(d) of the same Act defines the word "person" as follows:

2.(d) "person" has the meaning that it has in the Criminal Code.

The *Criminal Code*, s. 2(15), defines the word "person" as follows:

2.(15) "every one", "person", "owner", and similar expressions include Her Majesty and public bodies, bodies corporate, societies, companies and inhabitants of counties, parishes, municipalities or other districts in relation to the acts and things that they are capable of doing and owning respectively.

<sup>1</sup>[1902] 2 K.B. 73 at 80, 71 L.J.K.B. 479, 86 L.T. 423.

<sup>2</sup>(1865), 6 B. & S. 22, 34 L.J.M.C. 81, 11 L.T. 672.

<sup>3</sup>[1932] A.C. 514.

<sup>4</sup>[1947] A.C. 58.

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It is the contention of the appellant corporation that Parliament will not infringe rights or depart from the general system of law by ambiguous language found in a definition section. The intention to make such changes must appear with irresistible clearness. In support of this proposition, counsel for the appellant has cited among others the following statement of Earl Halsbury in *Leach v. Rex*<sup>1</sup>:

If you want to alter the law which has lasted for centuries, and which is almost ingrained in the English Constitution, . . . to suggest that that is to be dealt with by inference, and that you should introduce a new system of law without any specific enactment of it, seems to me to be perfectly monstrous.

The result is that I entirely concur with the judgment of the Lord Chancellor, and particularly with that part of it in which he said that such an alteration of the law as this ought to be by definite and certain language.

And also what has been said by Lord Goddard in *National Assistance Board v. Wilkinson*<sup>2</sup>:

. . . it may be presumed that the legislature does not intend to make a substantial alteration in the law beyond what it expressly declares. In *Minet v. Leman* (1855) 20 Beav. 269, Sir John Romilly M.R. stated as a principle of construction which could not be disputed that "the general words of the Act are not to be so construed as to alter the previous policy of the law, unless no sense or meaning can be applied to those words consistently with the intention of preserving the existing policy untouched."

No one, of course, will challenge these propositions, and I fully agree with the appellant's contention that what is deep-seated in the common law of the country can only be overturned by a clear, definite and positive enactment, and not by some ambiguous reference to other statutes (*Leach v. Rex supra*), but when the enactment is clear, the statute overrides the common law, and may even, in some cases, affect the prerogatives of the Crown.

I cannot find any ambiguity in the section of the *Lord's Day Act* which purports to bind the Crown. It is my opinion that the combined effect of the *Lord's Day Act* and of the relevant sections of the *Criminal Code*, is to import and incorporate into the *Lord's Day Act*, the definition of the word "person" found in the *Criminal Code*.

<sup>1</sup>[1912] A.C. 305 at 311.

<sup>2</sup>[1952] 2 Q.B. 648 at 658.

The *Lord's Day Act* must be read as if the word "person" as defined in the *Criminal Code* were a part of the Act itself, and therefore meant Her Majesty, in relation to the acts and things she is capable of *doing and owning*. A meaning must be given to these words, and I find it impossible to ignore them, and not give them the full effect that Parliament, I think, intended to give them.

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It has been argued that the word "person" includes the Crown only when it is a victim of a criminal act. The very terms of s. 2(15) of the *Criminal Code*, which applies to the *Lord's Day Act*, rule out this proposition, because in most unambiguous language, the section states that "person" includes Her Majesty in relation to the acts that she is capable of *doing and owning*.

I fully admit that the rule that the Crown is bound when a statute says it in unequivocal terms, may lead to very serious consequences. I can easily visualize cases, particularly in criminal matters, where it would be *repugnant* to the common law to hold Her Majesty liable. Many reasons would outweigh all that could be said in support of the binding effect of the Act. What is *repugnant and leads to an absurdity* must be considered as inoperative.

It has often been said that no modification of the language of a statute is ever allowable in construction, except to avoid an absurdity, which appears to be so, not to the mind of the expositor merely, but to that of the legislature, that is, when it takes the form of a *repugnancy* (Maxwell on Interpretation of Statutes, 10th ed., p. 252).

In the case of *Warburton v. Loveland*<sup>1</sup>, Burton J. says:

However, it is, for the present, sufficient to say, that no necessity for adopting it is shown; and I apprehend it is a rule in the construction of statutes, that, in the first instance, the grammatical sense of the words is to be adhered to. If that is contrary to, or inconsistent with any expressed intention, or any declared purpose of the statute; or if it would involve any absurdity, repugnance, or inconsistency in its different provisions, the grammatical sense must be modified, extended, or abridged, so far as to avoid such an inconvenience, but no farther.

This judgment of Mr. Justice Burton was confirmed by the House of Lords<sup>2</sup>.

<sup>1</sup>(1828), 1 Hud. & B. 623.

<sup>2</sup>6 E.R. 806.

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In *Abel v. Lee*<sup>1</sup>, Mr. Justice Willes says:

No doubt the general rule is that the language of an Act of Parliament is to be read according to its ordinary grammatical construction, unless so reading it would entail some *absurdity, repugnancy or injustice*.

At page 372 it is said that in case of absurdity we ought to modify the language of the Act.

In *Cox v. Hakes*<sup>2</sup>, Lord Field said:

Now the admitted rule of construction, from which I am not at liberty to depart, lay down that I cannot infer an intention contrary to the literal meaning of the words of a statute, unless the context, or the consequences which would ensue from a literal interpretation, justify the inference that the Legislature has not expressed something which it intended to express, or unless such interpretation (in the language of Parke B. in *Becke v. Smith* (2 M. & W. 191, 195)) leads to any manifest "*absurdity or repugnance*" . . .

In *Cristopherson v. Lotinga*<sup>3</sup>, Justice Willes said:

I am not disposed to differ from the opinion expressed by my Lord and my Brother Williams, though I must confess I should have thought we might have arrived at a satisfactory conclusion by acting upon the rule laid down by Lord Wensleydale in *Becke v. Smith* 2 M. & W. 191, 195, upon the authority of Burton J., in *Warburton v. Love land d. Ivie*, 1 Hudson & Brooke, 623, 648, where he says: "It is a very useful rule in the construction of a statute, to adhere to the ordinary meaning of the words used, and to the grammatical construction, unless that is at variance with the intention of the legislature, to be collected from the statute itself, or leads to any manifest absurdity or repugnance, in which case the language may be varied or modified, so as to avoid such inconvenience, but no farther". I subscribe to every word of that, assuming the word "absurdity" to mean no more than "repugnance".

In *Motteram v. The Eastern Counties Rly Co.*<sup>4</sup>, Willes J. expressed his views as follows:

Even if that were not the true grammatical construction of the statute, I apprehend it would nevertheless be necessary so to construe it; because, if the giving a strict grammatical construction to a statute leads to any repugnance or absurdity,—in the sense of being contrary to the mind and intention of the framers of the act,—we are bound so to read the words as to avoid that result.

The above principles might surely apply in criminal matters, for it would be an absurdity, and a repugnancy to the laws of the land, to hold that His or Her Majesty, the "fountain of justice", who is incapable of doing a "wrong act" could be guilty of some of the crimes found in the *Criminal Code*.

<sup>1</sup>1871), L.R. 6 C.P. 365, 23 L.T. 844.

<sup>2</sup>(1890), 15 App. Cas. 502 at 542.

<sup>3</sup>(1864), 15 C.B. N.S. 808, 143 E.R. 1003 at 1004-5.

<sup>4</sup>(1859), 7 C.B. N.S. 58, 141 E.R. 735 at 744.

But here, we are not dealing with the *Criminal Code*, but with the *Lord's Day Act* and with a particular case, where an agent of the Crown is alleged to have committed a violation of the statute. It is only the definition of the word "person", which includes the Crown, that is imported from the *Criminal Code*. I can see no absurdity, repugnance or inconsistency with any other existing laws, written or unwritten, in the fact of the Attorney General of Ontario in the rights of Her Majesty the Queen, prosecuting the appellant, a federal agent of Her Majesty, who by statute has agreed to be bound.

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The principle that the Crown is indivisible is not an absolute one. There is no legal obstacle to prevent the federal Government in the rights of Her Majesty, to enforce its rights before the Courts of the country, against a provincial Government also in the rights of Her Majesty, and vice versa. The Crown operates through distinct instrumentalities in respect of its several governments. (Halsbury, 3<sup>rd</sup> ed., vol. 5, p. 459).

As Lord Dunedin said in *Silver Brothers, supra*, at p. 514:

Quoad the Crown in the Dominion of Canada the Special War Revenue Act confers a benefit, but quoad the Crown in the Province of Quebec it proposes to bind the Crown to its disadvantage. It is true that there is only one Crown, but as regards Crown revenues and Crown property by legislation assented to by the Crown there is a distinction made between the revenues and property in the Province and the revenues and property in the Dominion. There are two separate statutory purses. In each the ingathering and expending authority is different.

If the appellant corporation were right in its submissions, it would mean as pointed out by the learned Chief Justice of the High Court, that it could breach the provisions of the *Canadian Broadcasting Act* which prohibits dramatized political broadcasting without the announcement of the names of the sponsor or sponsors, and political broadcasts on any Dominion, provincial or municipal election day and on the two days immediately preceding such election day.

I am quite satisfied that it never entered the mind of Parliament that C.B.C. could not be reached by the statute, while all the other private stations, not agents of the Crown, and which are now on an equal footing with the appellant, would be amenable to the law.

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For the above reasons as well as for those given by Roach J. A. in the Court of Appeal, with which I am in substantial agreement, I am of the opinion that this appeal fails and that it should be dismissed.

The judgment of Rand, Cartwright and Fauteux JJ, was delivered by

RAND J.:—At common law admittedly the Sovereign could not be impleaded in his courts; they were established by him to administer the law of the land between subjects; but, as Bracton laid it down and as Coke admonished James I, he himself was under the law, a law which brooded over England encompassing all persons and, among other things, created the powers of the Sovereign, the residue of which today we call the prerogative.

In the language of the early commentators and Courts that immunity was associated with qualities attributed to him: he was the fountain of justice and of honour; the writs commanded in his name; through his Attorney-General he guarded the public interest against violators; and something more, he could do no wrong. The view advanced today is that this affirmation derived from that lack of jurisdiction, which I take to mean as distinct from affecting the quality of an act done, and not from the impossibility, in existing legal contemplation, of attributing wrong to him.

To the penal law of England all persons were subject and no mandate or order from any state officer up to and including the Sovereign could render lawful an act prohibited as a crime; this excluded obviously any executive act within the prerogative. May a statute in general words apply so as to stigmatize the act as done by the Crown an offence without affecting the Crown's immunity from proceedings? Is liability to punishment in all cases essential to criminal quality of an act? Is an act forbidden the Crown excluded from attribution to the Crown for all purposes including accessorial liability of an agent? Answers to these questions may not be essential to a decision here but their consideration is not irrelevant.

Some light is thrown on them by the judgment in *Cain v. Doyle*<sup>1</sup>. There an officer of the Crown was charged with "aiding and abetting" in the dismissal of an employee of

<sup>1</sup>(1946), 72 C.L.R. 409.

the Crown contrary to a regulation made applicable to the Crown, and in general language providing a penalty for violation. Notwithstanding that the regulation as a directive bound the executive, for the breach of which, apparently, civil remedies against the Crown would lie, it was held that the penalty did not so extend and that the officer could not be convicted as charged although his act appears to have brought about the termination of employment. As he was not an "employer" he could not be held liable as principal; as the penalty was not incurred by the Crown, not as accessory. That I take to be the effect of the majority reasons of Dixon J. (now Chief Justice). The language of application was that "unless the contrary intention appears" the word "employer" included the Crown; and the "contrary intention" was found in the principle of immunity. Notwithstanding that the act was not null and void, that it was effective in one aspect, the same result was reached as from the conception that the Crown is incapable of wrong, that there was no criminal quality in what was done.

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The act there is distinguishable from that here in several respects: it was in contractual relations; it could be done only by or for an employer; and the Crown was forbidden to do it. Here the act is wholly criminal, it can be done by a subject, who, if the act is forbidden to the Crown, would be liable as principal if purporting to act for the Crown. If the statute extends to the Crown neither in relation to the act nor to liability, there can be no doubt of its lawfulness.

The offence has been created by the *Lord's Day Act*, R.S.C. 1952, c. 171, s. 4:

It is not lawful for any person on the Lord's day, except as provided herein, or in any provincial Act or law now or hereafter in force, to sell or offer for sale or purchase any goods, chattels, or other personal property, or any real estate, or to carry on or transact any business of his ordinary calling, or in connection with such calling, or for gain to do, or employ any other person to do, on that day, any work, business, or labour.

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By s. 2(d) of that Act, " 'person' has the meaning given in the *Criminal Code*". Section 2(15) of the Code defines "person" as

"every one," "person," "owner," and similar expressions include Her Majesty and public bodies, bodies corporate, societies, companies and inhabitants of counties, parishes, municipalities or other districts in relation to the acts and things that they are capable of doing and owning respectively;

The enactment is met at the threshold by s. 16 of the *Interpretation Act*:

No provision or enactment in any Act affects, in any manner whatsoever, the rights of Her Majesty, her heirs or successors, unless it is expressly stated therein that Her Majesty is bound thereby.

Does, then, the *Lord's Day Act* expressly affect the rights of Her Majesty?

The definition of the Code is to be taken as incorporated in the *Lord's Day Act* but its interpretation in each case must be the same; the purpose of its incorporation was undoubtedly to make the application of the new offences to "persons" uniform with that of the general law and we are remitted to its meaning in the Code.

To say that it intends and has effect to include the Crown as an ordinary subject of the prohibitory or the penal provisions of the Code is repugnant to the principle of immunity in both aspects. If such a fundamental change had been intended it would not have been effected by a clause of general definition. There is ample matter for legitimate application to Her Majesty, the obvious one being that of a "person" who is the victim of criminality, not its perpetrator: in such and other instances it is used in the description of a factual situation. The definition is to be read distributively and wherever a person so designated can properly be brought within the substantive provisions, that is, in the light of their intendment, of the underlying basic ideas and assumptions of the common law, two of which are that the King can do no wrong and that he cannot be impleaded, and within the punishment prescribed, then that "person" is intended to be designated as one against whom the prohibition is directed and on whom the penalty can be imposed. The application of the word to corporations, societies, companies, and the other legal entities enumerated must clearly be made on those considerations.

So interpreted, I am unable to agree that the definition expressly draws the Crown within the ambit of any prohibitory or punitive provision of the *Lord's Day Act*. The mention of certain Crown services by s. 11 as exempt from the statute's application is, as Laidlaw J. held, to be taken as *ex abundantia cautela*.

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The situation of the Crown, then, is this: by the *Canadian Broadcasting Act*, R.S.C. 1952, c. 32, ss. 4 and 8, the appellant, as agent of Her Majesty "shall carry on a national broadcasting service within Canada." No limit or restriction of time is prescribed for furnishing that service; and in the absence of an express and contrary enactment by Parliament, that time is unlimited. The effect of s. 16 of the *Interpretation Act* is to render the Crown under the *Broadcasting Act* as unrestricted as if the *Lord's Day Act* had not been passed. If the Sovereign is free to broadcast on Sunday, those who do the acts necessary to that service are immune from prosecution because the act they do is the lawful act of the Sovereign, attributable to him and untainted with criminal character.

I would, therefore, allow the appeal, set aside the judgment and order below, and direct a prohibition to issue as applied for.

LOCKE J.:—By an information laid before a justice of the peace of the Province of Ontario on March 20, 1957, the Canadian Broadcasting Corporation was charged with carrying on "the business of its ordinary calling by operating a broadcasting station, contrary to the *Lord's Day Act*". The corporation moved before a judge of the Supreme Court of Ontario, sitting in chambers, for an order to be directed to Magistrate T. S. Elmore, senior magistrate of the County of York, before whom it was proposed that the charge be heard, that he:

be prohibited from taking any further proceedings in this matter and more particularly from convicting the Canadian Broadcasting Corporation of the charge.

That motion was dismissed by a judgment of the Chief Justice of the High Court and the appeal taken by the broadcasting corporation from that judgment was in turn dismissed by the Court of Appeal<sup>1</sup>; Laidlaw and F. G. Mackay JJ. A. dissenting. Pursuant to leave granted by this Court, the present appeal was brought.

<sup>1</sup>[1958] O.R. 55, 27 C.R. 165, 120 C.C.C. 84.

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It is to be noted that the charge laid was not that the corporation carried on broadcasting of any particular kind or nature on Sunday. It was simply a charge that the corporation violated the Act by operating a broadcasting station. While the information does not say so, presumably the broadcasting station referred to was one operated in the Province of Ontario.

While broadcasting as a national enterprise was undertaken several years earlier in England, it was first so undertaken in 1932 when the *Canadian Radio Broadcasting Act* was passed (c. 51, Statutes of 1912). That Act established the Canadian Radio Broadcasting Commission which was declared to be a body corporate, with capacity to contract and to sue and be sued in its own name and to hold property. By s.8 power was given to the commission to regulate and control broadcasting in Canada carried on by any person, including His Majesty in the right of the province or of the Dominion. Section 9 gave to the commission power to carry on the business of broadcasting in Canada and, *inter alia*, to construct broadcasting stations and to make operating agreements with private stations for the broadcasting of national programs.

The 1932 Act was repealed by the *Canadian Broadcasting Act 1936* (c. 24). This statute established the corporation which is the present appellant and prescribed the manner in which its activities should be directed. Section 8 declares that the corporation "shall carry on a national broadcasting service within the Dominion of Canada". For that purpose the corporation may, *inter alia*, maintain and operate broadcasting stations, equip such stations with the requisite plant and machinery, originate programs, collect news relating to current events in any part of the world and in any manner that may be thought fit, and do all such other things as the corporation may deem incidental or conducive to the attainment of any of the objects or the exercise of any of the powers of the corporation. To the extent that its revenues are insufficient, the moneys required for its activities are provided by grants authorized by Parliament.

By s. 5 of c. 51 of the Statutes of 1950, s. 4 of the 1936 Act, which declared that the corporation shall be a body corporate having capacity to contract and to sue and be sued in its own name, was amended by adding the following:

(2) the corporation is for all purposes of this Act an agent of His Majesty and its powers under this Act may be exercised only as an agent of His Majesty.

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A further amendment provided that actions, suits and other legal proceedings in respect of any right or obligation acquired or incurred by the corporation on behalf of His Majesty might be brought by or against it.

The Act now appears as R.S.C. 1952, c. 32.

It is to be noted that the language imposing upon the corporation the obligation to carry on a national broadcasting service is imperative. While the power to maintain and operate broadcasting stations is permissive in form, in this context this and other powers, the exercise of which is necessary for carrying on an effective national service, being coupled with a duty should be construed as imperative: *Julius v. Bishop of Oxford*<sup>1</sup>; *The King v. Mitchell*<sup>2</sup>.

The *Lord's Day Act* was first enacted by Parliament as c. 27 of the Statutes of 1906 and subs. (b) of s. 1 then read: "Person" has the meaning which it has in the *Criminal Code* 1892.

It was apparently passed in consequence of the finding of the Judicial Committee in *Attorney General of Ontario v. The Hamilton Street Railway*<sup>3</sup>, that the *Lord's Day Act* of Ontario, R.S.O. 1897, c. 246, was *ultra vires*. The early history of this latter statute is described in the judgment of Mr. Justice Laidlaw<sup>4</sup>.

In the present statute, R.S.C. 1952, c. 171, subs. (d) of s. 2 reads:

"Person" has the meaning that it has in the *Criminal Code*.

The *Criminal Code*, when first enacted in 1892, by subs. (t) of s.2 differed only in an immaterial manner from subs. (15) of s.2 of the new *Criminal Code* which reads:

"every one," "person," "owner," and similar expressions include Her Majesty and public bodies, bodies corporate, societies, companies and inhabitants of counties, parishes, municipalities or other districts in relation to the acts and things that they are capable of doing and owning respectively.

<sup>1</sup> (1880), 5 App. Cas. 214, 42 L.T. 546, 49 L.J.Q.B. 577.

<sup>2</sup> [1913] 1 K.B. 561, 108 L.T. 76, 23 Cox C.C. 273.

<sup>3</sup> [1903] A.C. 524.

<sup>4</sup> [1958] O.R. 55 at 64.

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Section 4 of the *Lord's Day Act* declares that, subject to defined exceptions, it is not lawful for any person on the Lord's Day "to carry on or transact any business of his ordinary calling or in connection with such calling". The ordinary calling of the Canadian Broadcasting Corporation is broadcasting from stations situate at various places in Canada and, if the Act applies, any broadcasting of any nature appears to be prohibited unless such activities can be brought within some of the exceptions to be found in s.11. That section appears under a sub-heading "Works of Necessity and Mercy Excepted." These exceptions, with a slight change, immaterial in the present matter in subs. (s) appeared in the Act when it was first enacted. Of necessity, since broadcasting was unknown in 1906, none of the exceptions refer to the business of broadcasting, whatever the purpose. Subsection (t) excepts "work done by any person in the public service of Her Majesty while acting therein under any regulation or direction of any department of the government", as being one of the works of necessity referred to in the sub-heading. The Canadian Broadcasting Corporation does not fall within this exception since, while all its activities are carried on as the agent of Her Majesty, it does not act under any regulations or directions of any department of the government. Thus, if the Act applies, there was jurisdiction in the magistrate to entertain the charge.

The penal provisions of the *Lord's Day Act* of 1906 have not been changed, but times have changed. It is now sought to apply them in circumstances that were never contemplated by the Parliament which passed the Act.

The *Canadian Broadcasting Act* is to be construed in the manner required by s. 15 of the *Interpretation Act*, R.S.C. 1952, c.158, and receive:

such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act . . . according to its true intent, meaning and spirit.

In my opinion, it is implicit, in the language of s.8 of the Act, that the broadcasting activities to be carried on were to be those of a character suited to a national broadcasting system, with all that this implied. The broadcasting of news, of music and of various other material was

commenced as a national undertaking in England prior to 1926 and has been carried on exclusively by the British Broadcasting Corporation since that year. In Canada, the Canadian Broadcasting Commission of the 1932 Act and the corporation established in 1932 were created, in my opinion, in order to supply to the people of this country the same general kind of service as was then being given in England. The activities of the British Broadcasting Corporation in distributing news and performing other useful public services were never restricted to week days. Parliament did not contemplate in 1932 and 1936 that they would be so restricted in this country, in my opinion.

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The institution of broadcasting provided a means whereby news could be communicated to all of the people of Canada with a speed theretofore unknown. Formerly, newspapers, the telephone, the telegraph and the mail afforded the only means of such communication. The transmission of telephone and telegraph messages is one of the exceptions to the prohibition provided by s.11: the publication of newspapers on Sunday is, however, still forbidden.

For more than 25 years past, the agency set up by Parliament has kept the Canadian people informed by radio of world events within hours of their occurrence, and that this should be done on every day of the week has become an accepted part of our way of life. In addition, services have been rendered daily which are of great value in the preservation of life and property in navigation and agriculture, of which weather forecasts and storm warnings are examples. Other broadcasting such as that of church services and religious music on Sunday, for the benefit of the sick and the disabled and those living in places where access to churches is difficult or impossible, is carried on throughout the week. This is, I am sure, regarded as of inestimable benefit by great numbers of Canadian people. The exceptions provided by s. 11 of the *Lord's Day Act* do not appear to cover any such activities and, accordingly, they are unlawful if the respondent's contention is to be accepted.

Before arriving at any such conclusion, it is necessary, in my judgment, that the prohibitory legislation be clear beyond question and capable of no other reasonable or sensible interpretation.

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The point to be determined is as to the meaning to be assigned to the language of subs. (15) of s.2 of the *Criminal Code*, in so far as it relates to Her Majesty. It reads that "person" includes Her Majesty. Does this mean that the Sovereign may be charged with any of the multitude of offences described in the *Criminal Code* which she, as an individual, is capable of committing and summoned to appear before a tribunal charged with the duty of determining the guilt or innocence of persons infringing the criminal laws and, if guilty, imposing punishment?

The definition of "person" in substantially its present form, as has been stated, appeared when the *Criminal Code* was first enacted in 1892. At that time and at present the state of the law in relation to the liability of the Sovereign to criminal proceedings appears to me to be accurately stated in Halsbury, 3<sup>rd</sup> ed., vol. 7, p. 223, in the following terms:

The person of the Sovereign is inviolable, since it is declared by statute to be the undoubted and fundamental law of the kingdom that neither the peers of this realm nor the Commons, nor both together, either in Parliament or out of Parliament, nor the people collectively or representatively, nor any other persons whatsoever, ever had, have, or ought to have any coercive power over the persons of the Kings of this realm.

So also the person of the Sovereign is immune from all suits and actions at law, either civil or criminal.

There is no power or authority within her dominions capable of binding the Sovereign, save only the Sovereign herself in Parliament, and then only by express mention or clear implication.

I do not think that it is any longer right to say that the Queen can do no wrong, though in earlier times the immunity was so stated: Holdsworth's *History of English Law*, vol. 3, p. 458.

The true ground appears to me to be correctly stated in the following passage from Russell on Crime, 11<sup>th</sup> ed., p. 103:

Notwithstanding the words of Hale "the law presumes, the king will do no wrong, neither indeed can do any wrong"; and of Blackstone, who carried this further by stating that the law "ascribes to the king, in his political capacity, absolute perfection" and that he "is not only incapable of doing wrong, but even of thinking wrong," the doctrine of regal immunity really rests upon the fact that no British tribunal has jurisdiction under which the sovereign can be tried.

The matter is similarly dealt with in Kenny's Outline of Criminal Law, 17<sup>th</sup> ed., p. 69.

The consent of the Sovereign to all legislation in the Parliament of Canada is given on her behalf by her representative, the Governor General, and that assent was, of necessity, given when the *Criminal Code* was first enacted. The question, however, is: was it intended to depart from the long standing principle of law which had existed in England since prior to Bracton's time and subject the Sovereign personally to criminal prosecution in the Courts of this country?

In my opinion, the language should not be so interpreted. Rather, should it be construed as meaning that "person" includes the Sovereign as one of those against whose person and property various criminal offences may be committed by others. In *The King v. Bishop of Salisbury*<sup>1</sup>, Wills J. said that, where an affirmative statute is open to two constructions, that construction ought to be preferred which is consonant with the common law. I would apply that rule in the present matter. I am further of the opinion that the remarks of Lord Blackburn in *River Wear Commissioners v. Adamson*<sup>2</sup>, are applicable.

In my view, support is to be found for this construction in the fact that Parliament in 1950 added to the *Canadian Broadcasting Act* an express declaration that in all its activities the corporation acts as agent of the Sovereign. It was apparently considered desirable that the broadcasting corporation should not be controlled by and be subject to the direction of a department of the federal Government. Had that been done, its activities would have been exempt under subs. (t) of s.11 of the *Lord's Day Act*. In lieu of that, the status of the corporation was declared to be that of an agent of Her Majesty and its activities as being carried on on her behalf which, I consider, conferred the same immunity.

I would allow this appeal and direct that a writ of prohibition issue.

*Appeal allowed*, Taschereau, Abbott and Judson JJ. *dissenting*.

<sup>1</sup> [1901] 1 Q.B. 573 at 577.

<sup>2</sup> (1877), 2 App. Cas. 743 at 764-5, 37 L.T. 543.

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*Solicitors for the appellant: Fasken, Robertson, Aitchison,  
Pickup & Calvin, Toronto.*

*Solicitor for the respondent: The Attorney-General for  
Ontario, Toronto.*

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