

## THE KING CAN DO NO WRONG

by

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In England, as in other Commonwealth countries (including Canada which recognizes her Majesty the Queen as the formal head of State), the government is commonly referred to as "the Crown". Canada having a federal system, the divisibility of the Crown was legally recognized and we therefore have the Crown in right of Canada and the Crown in right of each of the provinces. In each case, the Crown enjoys the powers, privileges and traditional immunities of the Crown.

Under the Common Law, the Crown was entitled to a wide range of such privileges and immunities. The title of the present article refers to one of the most famous immunities of the Crown: the immunity from being sued for the tortuous acts of its agents or servants. The Crown also benefits from another important traditional immunity: a statute will not be applicable to the Crown unless there is a clear statement to that effect in said statute.

Even though it is immune to actions in tort and from the application of statutes, it is recognized that the Crown acting through its Parliament or legislatures is free to adopt laws applicable to itself. However, in the absence of a clear statement to that effect, a statute will not be applicable to the Crown. The Federal Court of Canada recently gave an example of the application of these principles.

An individual, owner of a patent of invention, sued before the Federal Court of Canada ONTARIO-HYDRO, HYDRO-QUÉBEC and THE NEW BRUNSWICK ELECTRIC POWER COMMISSION, alleging that the three provincial Crown corporations in charge of the production and transportation of electricity within their province, had infringed his patent. Section 54 of the Patent Act (R.S.C. (1985), c. P-4) provides for the concurrent jurisdiction of the provincial and federal courts in matters of patent infringement. The Federal Court of

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Canada was created by statute and any jurisdiction given to it must be clearly expressed in the Federal Court Act (R.S.C. 1985, c. F-7).

The three defendants did not raise the absence of jurisdiction *ratione materiae*, i.e. on the subject-matter before the Court, patent of invention. The defendants claimed that as Crown agents, they could not be sued in the Federal Court of Canada as there was no clear enactment in the Federal Court Act or Patent Act giving jurisdiction *ratione personae* to the Federal Court. The issue was stated as follows by the Honourable Mr. Justice Dubé at p. 2 and 3 of his judgment (*Youssef Hanna Dableh vs Ontario-Hydro, Hydro-Québec and The New Brunswick Electric Power Commission*, an unreported decision dated October 4, 1990):

"Throughout the years, federal and provincial laws have been enacted to establish Crown liability to tort actions, but the acts vary in each jurisdiction. In the instant case, the objections raised by the three alleged Crown corporations are not *ratione materiae*, as this Court has clearly concurrent jurisdiction in matters of patent infringement. The challenge is *ratione personae*: the defendants claim that they may only be sued in tort (patent infringement) in their own respective supreme courts.

The plaintiff alleges that the three defendants are provincial Crown corporations. Hogg, in his *Constitutional Law of Canada*, 2d ed. (Toronto (sic): Carswell, 1985), at page 232, points out that "the immunity of the Crown from statutes, like other Crown privileges, extends to public corporations that are 'agents of the Crown' ". Are the three defendant corporations "Crown agents" such that they may benefit from Crown immunity, with the result that they may only be sued for patent infringement in their own respective supreme courts? The answers vary in each case."

Mr. Justice Dubé was therefore obliged to review the rights of the defendants on an individual basis.

In the Case of THE NEW BRUNSWICK ELECTRIC POWER COMMISSION, Mr. Justice Dubé found that it was created by the Electric Power Act (R.S.N.B. 1973 c. E-5), in which Section 5 describes the Commission as a Crown corporation and an agent of the Crown. He also found that the Proceedings Against the Crown Act (R.S.N.B. 1973 c. P-18) of New Brunswick stipulates in Section 6 that all proceedings against the Crown (defined as including a Crown corporation) must be instituted in the Court of Queen's Bench of New Brunswick. With respect to this defendant, Mr. Justice Dubé concluded:

"In other words, the Federal Court, being a statutory Court, and the traditional Crown immunity being implied unless otherwise expressed, no words of exclusion are necessary to take a provincial Crown corporation which is a Crown agent out of the Federal Court jurisdiction, whereas express words would be necessary to bring such Crown agents within this Court's ambit. Therefore, an action in tort against a provincial Crown, or a provincial Crown which is an agent of the Crown, must be launched in a provincial Court, unless a statute expressly provides for Federal Court jurisdiction *ratione personae* over the Crown, as well as *ratione materiae* over the subject-matter."

With respect to ONTARIO-HYDRO, Mr. Justice Dubé found that the Proceedings Against the Crown Act (R.S.O. 1980 c. 393) define the Crown to mean only "Her Majesty the Queen in right of Ontario". Section 3 of the Ontario Crown Agency Act (R.S.O. 1980 c. 106) explicitly excludes ONTARIO-HYDRO from the Act. Therefore, Mr. Justice Dubé found:

"Thus, these statutory provisions clearly indicate that Ontario Hydro is neither the Crown within the definition found in the Proceedings Against the Crown Act, nor a Crown agent under the Crown Agency Act. As the Power Corporation Act defines Ontario Hydro as a corporation, it is a sueable entity. For the above reasons, Ontario Hydro may not claim the benefit of Crown immunity, for it is not a Crown agent. Therefore, the jurisprudential trilogy referred to earlier does not apply to this defendant corporation."

Mr. Justice Dubé found that the Federal Court of Canada had jurisdiction to entertain an action in tort relating to patent infringement against the defendant ONTARIO-HYDRO.

Finally, with respect to HYDRO-QUÉBEC, Mr. Justice Dubé found that under Section 13 of the Loi sur Hydro-Québec (L.Q. 1988, c. H-5), HYDRO-QUÉBEC was a Crown corporation and an agent of the Crown in right of the Province of Quebec. Even without a specific act providing that all actions against the Crown had to be instituted before provincial courts, Mr. Justice Dubé recognized the immunity and that the Crown was not bound by a statute (the Federal Court Act) in which it was not expressly mentioned that it will apply to the Crown. The action against HYDRO-QUÉBEC was also dismissed.

This judgment is of some importance for the legal community in Canada. In this case, three defendants were allegedly infringing a patent of invention by reason of working together under an agreement concerning the maintenance of their "Candu" reactors. By reason of the decision of Mr.

Justice Dubé, in order to possibly obtain the same remedy, the plaintiff will now have to sue THE NEW BRUNSWICK ELECTRIC POWER COMMISSION in the Supreme Court of New Brunswick and HYDRO-QUÉBEC in the Superior Court of the Province of Quebec and maintain his action in the Federal Court against ONTARIO-HYDRO, three separate cases for basically the same cause of action. Mr. Justice Dubé recognized that the proceedings were instituted before the Federal Court of Canada by the plaintiff, obviously to avoid the multiplicity of actions. However, as recognized by Mr. Justice Dubé, convenience alone does not create jurisdiction.

It should also be remembered that pre-trial motions to dismiss are argued without any evidence adduced before the Court. The facts alleged in the Statement of Claim are, for the purpose of such a motion, presumed to be true. A plaintiff being in doubt as to the exact legal nature and status of the potential defendant should make a complete inquiry to this end and if the plaintiff is of the view that a defendant is not a Crown agent, he should clearly allege in his Statement of Claim the legal nature of status of the corporation he is suing and of its relationship with the Crown.

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