

CONSTRUCTION CONTRACTING FOR PUBLIC ENTITIES

CLAIMS AGAINST THE CROWN

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The object of this paper is to identify and discuss certain fundamental aspects of claims against the Crown. The subject is worthy of, and has received, the attention of learned academics and text writers. The present authors' goals are much more modest and extend only to introduce the seven substantive topics set out below.

1. The Crown can Do No Wrong

In the 1950s, public servants in New York were exempted from liability because a fear of suits against them may well have dissuaded them from doing their duties.¹ Luckily for Canadians, our public officials are Her Majesty's servants and, as Lord Reid modestly pointed out in the House of Lords

¹ *Williams v. New York* (1955), 127 N.E.2d 545; see A.M. Linden, *Canadian Tort Law* (Toronto: Butterworths, 1997) at 620.

decision in *Home Office v. Dorset Yacht Co. Ltd.*,² “Her Majesty’s servants are made of sterner stuff” than their counterparts serving mere commoners.³ Nevertheless, even Her Majesty’s servants do, from time to time, make mistakes that adversely affect Her Majesty’s subjects, who then seek redress against Her Majesty.

Until the second half of this century, two ancient common law principles prevented most actions against the Crown. The first maxim provided that the King could not be impleaded in his own courts, unless by petition of right. It was first held in *Thomas v. The Queen*⁴ that proceedings by petition of right were available to recover unliquidated damages from the Crown for breach of contract. The second principle held that the King could do no wrong. While that principle may originally have stood for the proposition that the King was not above the law and therefore not privileged to commit illegal acts,⁵ it was generally held to mean that no action in tort could be maintained against the Crown.⁶ Things in the United Kingdom changed dramatically with the

² [1970] 2 All E.R. 294.

³ Quoted in A.M. Linden, *Canadian Tort Law* (Toronto: Butterworths, 1997) at 620.

⁴ (1874) LR 10 QB 31.

⁵ See P. W. Hogg, *Liability of the Crown* (Toronto: Carswell, 1989) at 4.

⁶ See *Viscount Canterbury v. The Queen* (1843), 12 L.J. Ch. 281.

introduction of the *Crown Proceedings Act, 1947*,⁷ which in section 2 provided for Crown liability as follows:

Subject to the provisions of this Act, the Crown shall be subject to all those liabilities in tort to which, if it were a private person of full age and capacity, it would be subject:

- (a) in respect of torts committed by its servants or agents;
- (b) in respect of any breach of those duties which a person owes to his servants or agents at common law by reason of being their employer...

provided that no proceedings shall lie against the Crown by virtue of paragraph (a) of this subsection in respect of any act or omission of a servant or agent of the Crown unless the act or omission would apart from the provisions of this Act have given rise to a cause of action in tort against that servant or agent or his estate.

Canada introduced a federal *Crown Liability Act* in 1952-53,⁸ the most current version of which⁹ provides in section 3(a) that:

Liability in tort

3. The Crown is liable in tort for the damages for which, if it were a private person of full age and capacity, it would be liable

- (a) in respect of a tort committed by a servant of the Crown; or
- (b) in respect of a breach of duty attaching to the ownership, occupation,

⁷ 10 & 11 Geo. 6, c. 44 (U.K.).

⁸ S.C. 1952-53, c. 30

⁹ *Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50 [title amended S.C. 1990, c. 8, s. 20].

possession or control of property.¹⁰

Ontario's *Proceedings Against the Crown Act*¹¹ reads as follows:

Liability in tort

5.--(1) Except as otherwise provided in this Act, and despite section 11 of the Interpretation Act, the Crown is subject to all liabilities in tort to which, if it were a person of full age and capacity, it would be subject,

- (a) in respect of a tort committed by any of its servants or agents;
- (b) in respect of a breach of the duties that one owes to one's servants or agents by reason of being their employer;
- (c) in respect of any breach of the duties attaching to the ownership, occupation, possession or control of property; and
- (d) under any statute, or under any regulation or by-law made or passed under the authority of any statute.

Where proceedings in tort lie

(2) No proceeding shall be brought against the Crown under clause (1) (a) in respect of an act or omission of a servant or agent of the Crown unless a proceeding in tort in respect of such act or omission may be brought against that servant or agent or the personal representative of the servant or agent.

Liability for acts of servants performing duties legally required

(3) Where a function is conferred or imposed upon a servant of the Crown as such, either by a rule of the common law or by or under a statute, and that servant commits a tort in the course of performing or purporting to perform that function, the liability of the Crown in respect of the tort shall be such as it would have been if that function had been conferred or imposed by instructions lawfully given by the Crown.

Application of enactments limiting liability of servants of the Crown

(4) In a proceeding against the Crown under this section, an enactment that negatives or limits the liability of a servant of the Crown in respect of a tort committed by that

¹⁰ See A.M. Linden, *Canadian Tort Law*, 6th edition (Toronto: Butterworths, 1997) at 616.

¹¹ R.S.O. 1990, c. P.27, s. 5.

servant applies in relation to the Crown as it would have applied in relation to that servant if the proceeding against the Crown had been a proceeding against that servant.

Property vesting in the Crown

(5) Where property vests in the Crown independent of the acts or the intentions of the Crown, the Crown is not, by virtue of this Act, subject to liability in tort by reason only of the property being so vested; but this subsection does not affect the liability of the Crown under this Act in respect of any period after the Crown, or any servant of the Crown, has in fact taken possession or control of the property.

Limitation of liability in respect of judicial acts

(6) No proceeding lies against the Crown under this section in respect of anything done or omitted to be done by a person while discharging or purporting to discharge responsibilities of a judicial nature vested in the person or responsibilities that the person has in connection with the execution of judicial process. R.S.O. 1980, c. 393, s. 5.

Between 1951 and 1974, all Provinces except British Columbia and Quebec introduced similar provisions, based on a model Act drafted by the “Conference of Commissioners on Uniformity of Legislation in Canada” in 1950.¹² In British Columbia, the Crown is liable in tort as if it were a person.¹³

The new British Columbia *Crown Proceeding Act* provides that:

Liability of government

Subject to this Act,

- (a) proceeding against the government by way of petition of right is abolished,
- (b) a claim against the government that, if this Act had not been passed,

¹² See A.M. Linden, *Canadian Tort Law*, 6th edition (Toronto: Butterworths, 1997) at 616-7.

¹³ See Article 1011 of the Quebec Civil Code and s. 2 of the British Columbia *Crown Proceedings Act*, R.S.B.C. 1996, c. 89.

might be enforced by petition of right, subject to the grant of a fiat by the Lieutenant Governor, may be enforced as of right by proceeding against the government in accordance with this Act, without the grant of a fiat by the Lieutenant Governor,

- (c) the government is subject to all the liabilities to which it would be liable if it were a person, and
- (d) the law relating to indemnity and contribution is enforceable by and against the government for any liability to which it is subject, as if the government were a person.

2.1 The Policy / Operational Distinction: Claims in Negligence

The Crown is, obviously, not a person. There are certain decisions that the Crown needs to make without fear of liability in tort. Budgetary decisions and decisions regarding the allocation of resources, for example, cannot be made subject of a duty of care. They are policy decisions. It is therefore necessary to distinguish between those Crown decisions that are true policy decisions and those that are merely operational, in the sense that they implement policy.

It is clear that in cases where the Crown is sued for negligence, the test to be applied is the test in *Anns v. Merton London Borough Council*.¹⁴ In *Just v. British*

¹⁴ [1978] A.C. 728 (H.L.).

Columbia,¹⁵ Cory J, writing for the majority of the Supreme Court of Canada in 1989, held as follows:

In cases such as this where allegations of negligence are brought against a government agency, it is appropriate for courts to consider and apply the test laid down by Lord Wilberforce in *Anns v. Merton London Borough Council*, [1978] A.C. 728. At pages 751-52 he set out his position in these words:

Through the trilogy of cases in this House -- *Donoghue v. Stevenson* [1932] A.C. 562, *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.* [1964] A.C. 465, and *Dorset Yacht Co. Ltd. v. Home Office* [1970] A.C. 1004, the position has now been reached that in order to establish that a duty of care arises in a particular situation, it is not necessary to bring the facts of that situation within those of previous situations in which a duty of care has been held to exist. Rather the question has to be approached in two stages. First one has to ask whether, as between the alleged wrongdoer and the person who has suffered damage there is a sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter -- in which case a prima facie duty of care arises. Secondly, if the first question is answered affirmatively, it is necessary to consider whether there are any considerations which ought to negative, or to reduce or limit the scope of

¹⁵ (1989), 64 D.L.R. (4th) 689 (S.C.C.).

the duty or the class of person to whom it is owed or the damages to which a breach of it may give rise: see *Dorset Yacht* case [1970] A.C. 1004, per Lord Reid at p. 1027.

That test received the approval of the majority of this Court in *City of Kamloops v. Nielsen*, [1984] 2 S.C.R. 2. As well it was specifically referred to by both Beetz and L'Heureux-Dubé JJ. in *Laurentide Motels Ltd. v. Beauport (City)*, [1989] 1 S.C.R. 705.

The facts of the *Just* case point out the distinction between operational and policy conduct. In *Just*, a father and his daughter were traveling on a highway on their way to a skiing weekend at Whistler. Heavy snowfall set in and traffic backed up. While they were waiting for the cars in front of them to move, a heavy rock fell from the slopes above the highway, crashed the car, killed the daughter and seriously injured her father, who sued the Province. Cory J. had no difficulty whatsoever finding a duty of care. The highway was a busy highway leading to one of the Province's prime tourist destinations, and it was readily foreseeable for the Province that if the highway were not reasonably maintained, travelers on the highway might be harmed. It was held to be eminently reasonable for the plaintiff as a user of the highway to expect proper maintenance. The duty of care having thus been established, two more aspects had to be determined: Did the applicable legislation impose any obligations on the defendant to maintain the highway or, alternatively, did it exempt the

defendant from liability for failing to maintain it, and second, was the defendant shielded from liability because the system of inspection, including quantity and quality, was a policy decision. Having answered the first question in the affirmative,¹⁶ the focus of the discussion was the distinction between a government's policy decision and its operational implementation. Cory J. held that:

The functions of government and government agencies have multiplied enormously in this century. Often government agencies were and continue to be the best suited entities and indeed the only organizations which could protect the public in the diverse and difficult situations arising in so many fields. They may encompass such matters as the manufacture and distribution of food and drug products, energy production, environmental protection, transportation and tourism, fire prevention and building developments. The increasing complexities of life involve agencies of government in almost every aspect of daily living. Over the passage of time the increased government activities gave rise to incidents that would have led to tortious liability if they had occurred between private citizens. The early governmental immunity from tortious liability became intolerable. This led to the enactment of legislation which in general imposed liability on the Crown for its acts as though it were a person. However, the Crown is not a person and must be free to govern and make true policy decisions without becoming subject to tort liability as a result of those decisions. On the other hand,

¹⁶ Based on the *Highway Act*, R.S.B.C. 1979, c. 167, s.8; the *Ministry of Transportation and Highways Act*, R.S.B.C. 1979, c. 280, s. 14; and the *Crown Proceeding Act*, R.S.B.C. 1979, c. 86, ss. 2 and 3.

complete Crown immunity should not be restored by having every government decision designated as one of "policy". Thus the dilemma giving rise to the continuing judicial struggle to differentiate between "policy" and "operation".

Seeking guidelines to assist courts in making the distinction, Justice Cory relied upon the Australian High Court decision in *Sutherland Shire Council v. Heyman*,¹⁷ where Mason J. held that:

The distinction between policy and operational factors is not easy to formulate, but the dividing line between them will be observed if we recognize that a public authority is under no duty of care in relation to decisions which involve or are dedicated by financial, economic, social or political factors or constraints. Thus budgetary allocations and the constraints which they entail in terms of allocation of resources cannot be made the subject to a duty of care. But it may be otherwise when the courts are called upon to apply a standard of care to action or inaction that is merely the product of administrative direction, expert or professional opinion, technical standards or general standards of reasonableness.

Applying these principles to the case before him, Cory J. found both the manner and frequency of highway inspections to be “manifestations of the

¹⁷ (1985), 60 A.L.R. 1 (Aust. H.C.).

implementation of the policy decision to inspect”, i.e. operational matters subject to review by the Court.

Sopinka J., the sole dissenter, considered the decisions to be matters of policy, arguing that to find otherwise would extend Crown liability beyond the scope of *Anns* and *Kamloops*.

The Supreme Court of Canada made clear that it will not hesitate to impose liability on the Crown for negligent operational conduct most recently in its March 2, 2000, decision in *Ingles v. Tutkaluk Construction Ltd.*,¹⁸ where the Court held that negligent conduct on the part of an owner-builder does not absolve a municipality of its duty of care when inspecting buildings. The Supreme Court overturned a decision by the Ontario Court of Appeal, which had ruled that by commencing construction before a permit was issued, the owner had removed itself from the class of persons to whom a duty of care was owed and consequently had no recourse against the municipality. The case is significant for at least five reasons:

¹⁸ (2000), 183 D.L.R. (4th) 193 (S.C.C.).

1. It interprets *Rothfield v. Manolakos* [1989] 2 S.C.R. 1259 (S.C.C.). Contributory negligence is no longer a complete bar to recovery against a municipality unless it is the “sole source” of the plaintiff’s loss.
2. The *Anns v. Merton* [1978] A.C. 728 (H.L.) case was applied, once again, to impose on a public authority a private law duty toward individuals.
3. We see the Supreme Court of Canada taking notice of public safety policy concerns, commenting on a municipality’s duty to inspect and to do so completely. As Justice Bastarache took pains to emphasize, “where inspection is provided for by statute, a government agency cannot immunize itself from liability by simply making a policy decision never to inspect”.
4. Neither municipal inspectors nor building owners can rely on contractors’ assurances. They have a free standing duty, based on sound policy. As the Court stated, it is “unreasonable for an inspector to conclude that a project has met the standards in the building code simply because the contractor has said so”.
5. Finally, as to the standard of care, it is again reaffirmed that the more serious the foreseeable harm, which is particularly true of fundamental structural elements such as underpinnings, the greater the standard of care.

The owner had commenced structural work without a building permit on the advice of its contractors. This made later inspection of the underpinnings difficult unless they were ordered uncovered for that purpose. The inspector did not order the underpinnings to be uncovered, although the relevant by-law gave him the power to do so, and, as a result, he failed to notice a structural defect. Although the trial judge had found the city negligent for the conduct of its inspection and liable for the owner's loss, the Ontario Court of Appeal allowed the city's appeal. Sharpe J., for the Court of Appeal, held that:

Having gone along with [the contractor's] scheme, which the respondent knew would preclude inspections while the underpinning work was being done and make inspections much more difficult thereafter, the respondent cannot look to the City to rescue him from the chance he took. By his own actions, the respondent placed himself outside the ordinary inspection scheme. In the circumstances, the respondent could have no reasonable expectation that he was entitled to rely on the due exercise of the inspection power to uncover any neglect or deficiency of the contractor. Having gone along with [the contractor's] scheme to do the underpinning before obtaining a permit, the respondent engaged in a course of conduct that is simply incompatible with his now looking to the City for compensation for the consequent loss.

The inspection of building projects was held to be operational and therefore capable of grounding a legal duty of care. Once the conduct of the Crown's

agent was found to be in its operational capacity, the test formulated by Lord Wilberforce in *Anns* was applied:

1. Is there a sufficiently close relationship between the parties (the local authority and the person who has suffered the damage) so that, in the reasonable contemplation of the authority, carelessness on its part might cause damage to that person? If so,
2. Are there any considerations which ought to negative or limit (a) the scope of the duty and (b) the class of persons to whom it is owed or (c) the damages to which a breach of it may give rise?

On the question of proximity in the *Ingles* case, the Court of Appeal conceded that once the municipality had made the policy decision to inspect building construction, it placed itself in such proximity to persons who ought reasonably to rely on such inspections that it owed them a duty of care not only to perform such inspections, but to perform them with a reasonable degree of competence. In *Ingles*, the City could have foreseen that the owner of the property would likely be damaged by a shoddy inspection.

Thus far, it could be said that the Ontario Court of Appeal and the Supreme Court of Canada agreed. However, the Court of Appeal then applied the

second arm of the test to state that the owner's conduct in the case would negative or otherwise limit the scope of the duty and class of persons to whom it was owed. The Ontario Court of Appeal held that the class of persons to whom a duty was owed should not extend to owners who place themselves outside the ordinary inspection scheme by, for example, commencing construction without an issued building permit. It seemed to the Court of Appeal that Ingles approached the Building Code with a double standard: He could breach it with impunity, but the City could not. The Court cited an earlier decision in the Supreme Court of Canada in *Rothfield v. Manolakos*.¹⁹ In *Rothfield*, an owner had submitted a sketch for a retaining wall. On the basis of that sketch, a building permit was issued on the basis that the project could be inspected as it was being built. The owner subsequently failed to notify the municipality and no inspections were carried out until defects appeared. The Court held that failure to notify alone did not exclude the owner from the duty of care owed by the Municipality, but stated that there were situations where an owner could, by its own conduct, exclude himself from that duty. The Court of Appeal found that *Ingles* was such a case.

The Supreme Court of Canada overturned the Court of Appeal on its interpretation and application of the second branch of the *Anns v. Merton* test.

¹⁹ [1989] 2 S.C.R. 1259 (S.C.C.).

Bastarache J., for the unanimous Supreme Court of Canada, held that *Rothfield* had been misinterpreted by the Court of Appeal. *Rothfield* now provides a municipality with a complete defence in a case of an owner's contributory negligence only in the rarest of circumstances, where the owner's conduct was such that a court could only conclude that he or she was the "sole source" of his or her own loss. To avail itself of the defence, the Court held, the Municipality has to show that the owner-builders "knowingly flouted" the applicable building regulations or directives of the inspector or "totally failed to acquit themselves of the responsibilities that rested on them". An owner in fact has to "mock the inspection scheme" in order to meet the standard envisaged by the Court. Bastarache J. gave the following examples of behavior falling into that category:

1. The owner never applies for a building permit;
2. The owner never notifies the inspector of the need for an inspection;
3. The inspector receives the notification so late that that it would be impossible, upon full exercise of the powers granted under the governing legislation, to discover any hidden defects.

In all other cases, a municipality will now be limited to claiming contributory negligence and seeking apportionment of damages accordingly.

The trial judge's apportionment of fault was restored by the Supreme Court of Canada. The contractor was liable for 80% of the damages, the City for 20%. In light of the owner's negligence, the City's liability was reduced by 30%.

3. Claims in Contract

The 1930 Supreme Court of Canada decision in *R. v. Dominion of Canada Postage Stamp Vending Co.*²⁰ stands for the proposition that the government cannot contract away its legislative authority. In that case the Supreme Court reversed a judgment of the Exchequer Court and held that a covenant by the Postmaster General not to revoke a license to sell stamps was *ultra vires* and invalid. As recently as 1999, in the case of *Wells v. Newfoundland*,²¹ the Crown attempted to rely on the 1930 *Canada Postage Stamp Vending* decision to argue that the Crown had the unfettered sovereign power to breach a contract of employment of a commissioner of the Public Utilities Board. The commissioner had been appointed to the board with tenure to the age of 70. When the board was restructured by legislation, the commissioner's position was abolished. No matter what the terms of the commissioner's contract were, the Crown's

²⁰ [1930] 4 D.L.R. 241 (S.C.C.).

²¹ (1999), 177 D.L.R. (4th) 73 (S.C.C.).

argument went, the legislature had at all times retained the power to eliminate the position. Reliance was also placed on the Supreme Court of Canada's decision in *Reference re Canada Assistance Plan (B.C.)*,²² where Sopinka J., writing for the unanimous Court, adopted the following principle set forth in the Supreme Court of South Australia case of *West Lakes Ltd. v. State of South Australia*.²³

Ministers of State cannot, however, by means of contractual obligations entered into on behalf of the state fetter their own freedom, or the freedom of their successors or the freedom of other members of parliament, to propose, consider and, if they think fit, vote for laws, even laws which are inconsistent with the contractual obligations.

While Justice Major, writing for the Court in *Wells*, held that there was no doubt that the Government of Newfoundland did have a right to restructure or even abolish the Board, he stipulated that there was a difference between the Crown legislatively avoiding a contract and altogether escaping the legal consequences of such action. The legislature could pass a law specifically denying compensation to an individual, but it would require very clear language to do away with rights previously conferred on that individual. In this case, the Newfoundland government had not passed such legislation, it had merely

²² (1991), 83 D.L.R. (4th) 297 (S.C.C.).

repealed the old legislation creating the position. In these circumstances, the Court held, the commissioner's basic contractual rights to severance pay remained. Major J. found this to be the only possible outcome in a democracy:

In a nation governed by the rule of law, we assume that the government will honour its obligations unless it explicitly exercises its power not to. In the absence of a clear express intent to abrogate rights and obligations -- rights of the highest importance to the individual -- those rights remain in force. To argue the opposite is to say that the government is bound only by its whim, not its word. In Canada this is unacceptable, and does not accord with the nation's understanding of the relationship between the state and its citizens.

*Reilly*²⁴ should be taken as turning on the interpretation given to the specific statute of abolition. To the extent it is relied upon for the proposition that the Crown can implicitly avoid its contractual obligations by indirectly legislating a breach, it is no longer the law in Canada.²⁵

²³ (1980), 25 S.A.S.R. 389.

²⁴ *Reilly v. The King* [1934] 1 D.L.R. 434 was a Privy Council decision holding that where further performance of a contract became impossible because of subsequent legislation, the contract was discharged.

²⁵ Consequently, *Peddle v. Newfoundland* (1994), 116 D.L.R. (4th) 161 (Nfld. C.A.) is also no longer the law in Canada.

4. Immunity By Statute From Statute

Section 11 of the *Interpretation Act*²⁶ reads as follows:

11. No Act affects the rights of Her Majesty, Her heirs or successors, unless it is expressly stated therein that Her Majesty is bound thereby.

Similarly, section 17 of the federal *Interpretation Act*²⁷ provides that:

17. No enactment is binding on Her Majesty or affects Her Majesty or Her Majesty's rights or prerogatives in any manner, except as mentioned or referred to in the enactment.

In *Toronto Area Transit Operating Authority v. Mississauga (City)*,²⁸ GO Transit was engaged in the construction of a train station and a management facility. The authority brought applications for declarations that it was neither required to obtain building permits nor pay development charges, file a site plan and have it approved, nor pay a parks levy or contribution. The Court held that GO

²⁶ R.S.O. 1990, c. I.11.

²⁷ R.S.C. 1985, I-21.

²⁸ (1996), 133 D.L.R. (4th) 257 (Ont. Gen. Div.). Notices of appeal were filed, but the appeal was abandoned on April 2, 1997.

Transit was a Crown agency²⁹ and that Crown agencies were included in the meaning of section 11 of the Province's *Interpretation Act*. Had the Ontario Legislature intended Crown agencies to be bound by the *Planning Act*,³⁰ the *Building Code Act, 1992*³¹ and the *Development Charges Act*,³² the Court held, it could have easily done so. As it had not done so, the Crown was not bound by any of the Acts.

Even where a statute does not state that the Crown is bound by its terms, the Crown may be bound by necessary implication, i.e. where an intention to bind the Crown is manifest from the very terms of the statute and in cases where the entire purpose of the statute would be wholly frustrated if the Crown were excluded from liability. These two exceptions to the general rule of immunity were set forth in the Supreme Court of Canada decision in *Alberta Government Telephones v. Canadian Radio-television and Telecommunications Commission*,³³ where Dickson C.J.C. adopted the exceptions articulated by Lord du Parcq in *Province of Bombay v. City of Bombay*, a 1947 Privy Council decision.³⁴ If, for example, the primary purpose of a statute is to protect citizens from government actions, then the Crown may be taken to be bound by that statute based on a contextual

²⁹ Based on section 2(9) of the *Toronto Area Transit Operating Authority Act*, R.S.O. 1990, c. T.13 and s. 2 of the *Crown Agency Act*, R.S.O. 1990, c. C.48.

³⁰ R.S.O. 1990, c. P.13.

³¹ S.O. 1992, c. 23.

³² R.S.O. 1990, c. D.9.

interpretation, even if the statute was not expressly made binding on the Crown.³⁵

5. The Crown's Defence of Statutory Authority

Statutory authority may be defence to a claim in nuisance. The traditional rule regarding statutory authority was that liability would not be imposed on the Crown if the activity was authorized by statute and the Crown could prove that the nuisance was the inevitable result or consequence of exercising that authority.³⁶ The application of the doctrine had been more than uncertain in the aftermath of the Supreme Court of Canada decision in *Tock v. St. John's Metropolitan Area Board*.³⁷ In *Tock*, Wilson J., writing for himself and Justices Lamer and L'Heureux-Dubé, suggested limiting the defence to cases involving mandatory duties or statutes specifying the precise manner of performance and to abolish the doctrine in cases dealing with permissive legislation. La Forest J., Dickson C.J.C. concurring, wanted to abolish the defence unless an express statutory exemption from liability existed. Sopinka J. preferred the traditional approach:

³³ (1989), 61 D.L.R. (4th) 193 (S.C.C.).

³⁴ [1947] A.C. 58 (P.C.).

³⁵ See *Alberta Government Telephones v. Canadian Radio-television and Telecommunications Commission* (1989), 61 D.L.R. (4th) 193 (S.C.C.); relying on P.W. Hogg, *Constitutional Law of Canada*, 2nd edition (Toronto: Carswell, 1985) at 234.

The defendant must negative that there are alternate methods of carrying out the work. The mere fact that one is considerably less expensive will not avail. If only one method is practically feasible, it must be established that it was practically impossible to avoid the nuisance. It is insufficient for the defendant to negative negligence. The standard is a higher one. While the defence gives rise to some factual difficulties, in view of the allocation of the burden of proof they will be resolved against the defendant.

McIntyre J. took no part in the decision, so that no clear majority was established on the applicable test, leaving courts below somewhat in doubt.³⁸ The situation was eventually clarified in *Ryan v. Victoria (City)*,³⁹ where the Supreme Court of Canada revisited the issue and found that the test outlined by Sopinka J. should be adopted, holding that the traditional test remained the most predictable approach as well as the simplest to apply. In *Ryan*, a motorcyclist was injured when his tire got caught in an unusually wide gap beside a rail track. The defendant city and railway company argued that as the size of the gap fell within the range provided for in the applicable statute,⁴⁰ it should be shielded from liability. The Supreme Court of Canada held that the

³⁶ See *Ryan v. Victoria (City)* (1999), 168 D.L.R. (4th) 513 (S.C.C.).

³⁷ (1989), 64 D.L.R. (4th) 620 (S.C.C.).

³⁸ See *Canada (Attorney General) v. Ottawa-Carleton (Regional Municipality)* (1991), 5 O.R. (3d) 11 (Ont. C.A.); *Oosthoek v. Thunder Bay (City)* (1996), 30 O.R. (3d) 323 (Ont. C.A.).

³⁹ (1999), 168 D.L.R. (4th) 513 (S.C.C.).

⁴⁰ *Railway Act*, R.S.C. 1970, R-2.

question was whether the hazard created by the gaps was an inevitable result of the exercise of the statutory duty. The statute and regulations prescribed a minimum width of 2.5 inches for the gap, the defendants had opted for a 4 inch gap. That decision, the Court held, was a matter of discretion and not the inevitable consequence of complying with any regulations. A four inch gap creating a considerably greater hazard than a 2.5 inch gap, the defendants had opted for a greater than necessary risk, making the defence of statutory authority unavailable.

The Crown will therefore not be able to avail itself of the defence of statutory duty unless it can prove that it was practically impossible to avoid the nuisance. It is not sufficient to disprove negligence, it is necessary to also negative the existence of alternative methods of carrying out the work.⁴¹

⁴¹ See *Rideau Falls Generating Partnership v. Ottawa (City)* (1999), 174 D.L.R. (4th) 160 (Ont. C.A.).

6. Technicalities: Notice and Limitation Provisions

6.1 *Proceedings Against the Crown Act*

Various statutes stipulate different notice requirements to be observed in claims against the Crown. Section 7 of the *Proceedings Against the Crown Act*⁴² provides as follows:

Notice of claim

7.--(1) Subject to subsection (3), except in the case of a counterclaim or claim by way of set-off, no action for a claim shall be commenced against the Crown unless the claimant has, at least sixty days before the commencement of the action, served on the Crown a notice of the claim containing sufficient particulars to identify the occasion out of which the claim arose, and the Attorney General may require such additional particulars as in his or her opinion are necessary to enable the claim to be investigated.

Limitation period extended

(2) Where a notice of a claim is served under subsection (1) before the expiration of the limitation period applying to the commencement of an action for the claim and the sixty-day period referred to in subsection (1) expires after the expiration of the limitation

⁴² R.S.O. 1990, c. P.27.

period, the limitation period is extended to the end of seven days after the expiration of the sixty-day period.

Notice of claim for breach of duty respecting property

(3) No proceeding shall be brought against the Crown under clause 5 (1) (c) unless the notice required by subsection (1) is served on the Crown within ten days after the claim arose.

While s. 7 does not stipulate who within the government is to be served with the notice, it has recently been held that it is sufficient to provide such notice in writing to an official of the ministry which has the most direct interest in the matter.⁴³ It has also been held that the requirement of giving notice of a claim is not met by merely writing a letter outlining concerns.⁴⁴ Defining “claim” as “a demand or request for something considered one’s due”, Justice Cumming held that an expression of concern was not giving notice of a claim. Where notice was given orally rather than in writing, a claim was dismissed in *Olesiuk v. LeCompte*.⁴⁵

In *Piotrowski Consultants Ltd. v. Osburn Cotman Belair Architects Inc.*,⁴⁶ the plaintiff subcontractor did mechanical and electrical work on an office building for the

⁴³ *Mattick Estate v. Ontario (Minister of Health)* (1999), 46 O.R. (3d) 613 (Ont. S.C.J.).

⁴⁴ *Ibid.*

⁴⁵ (1991), 2 O.R. (3d) 473 (Ont. Gen. Div.).

defendant Ministry of Government Services. A lien action failed because the plaintiff did not commence its action within the time limit set forth in the *Construction Lien Act*.⁴⁷ The order dismissing that action held that the plaintiff's right to bring a fresh action on the contract was not prejudiced thereby. The subcontractor had failed to give notice according to s. 7 of the *Proceedings Against the Crown Act*, but argued that as the claim was identical to that asserted in the lien action, service in the lien action constituted notice for the action in contract. Sharpe J. agreed:

In my view, the plaintiff's position is valid. The Crown was notified of the existence of the plaintiff's claim and, as I interpret the order dismissing the action, should not have considered the matter forever closed upon the dismissal of the construction lien action. The purpose of s. 7 is to give the Crown timely notice of a claim so that it could investigate and ensure that its records and evidence is maintained. In my view, that purpose was satisfied by the service of the construction lien claim and accordingly, the Crown cannot not insist that the matter be dismissed for non-compliance with the section.

6.2 *Public Authorities Protection Act*

⁴⁶ (1995), 23 C.L.R. (2d) 211 (Ont. Gen. Div.).

⁴⁷ R.S.O. 1990, c. C.30.

In *Piotrowski*, the defendant Ministry also relied on the limitation period provided for in section 7 of the *Public Authorities Protection Act*.⁴⁸

Action for act done under public authority to be begun within six months

7.--(1) No action, prosecution or other proceeding lies or shall be instituted against any person for an act done in pursuance or execution or intended execution of any statutory or other public duty or authority, or in respect of any alleged neglect or default in the execution of any such duty or authority, unless it is commenced within six months next after the cause of action arose, or, in case of continuance of injury or damage, within six months after the ceasing thereof.

Application of subs. (1)

(2) Subsection (1) does not apply to an action, prosecution or proceeding against,

- (a) a sheriff for an act, neglect or default in certifying as to a writ of execution that binds land; or
- (b) a land registrar for an act, neglect or default in connection with his or her duties under the Registry Act and the Land Titles Act.

The Court held that the Crown could not avail itself of the *Public Authorities Protection Act* defence in light of the Supreme Court of Canada decision in

⁴⁸ R.S.O. 1990, c. P.38.

Berardinelli v. Ontario Housing Corp.,⁴⁹ where it was held that section 7 of the Act only applied to Crown activities that were of a public aspect as distinct from a private connotation. In other words, government activities of an internal or operational nature and having a predominately private character will not be covered by the Act. The Ontario High Court, in *Comstock International v. R.*,⁵⁰ found that an action by a contractor against the Crown arising from a construction contract fell within the private exception set forth by Estey J. in *Berardinelli*. Consequently, Justice Sharpe held in *Piotrowski* that the Crown could not rely on section 7 of the *Public Authorities Protection Act*.

The interplay between the *Proceedings Against the Crown Act* and the *Public Authorities Protection Act* has been criticized as being somewhat diffuse. In the recent decision in *Mattick Estate v. Ontario (Minister of Health)*,⁵¹ Cumming J. found that:

However, it is apparent that the overall regime for bringing a civil action against the Crown in respect of an act done under public authority is anomalous. One has to be wary of the confusing maze created by the combination of s. 7(1) of the *PAPA* and s. 7 of the *PACA*. First, the limitation-of-actions period of six months provided by s. 7(1) of the aptly named *PAPA* is significantly shorter than the normative periods for the limitation-

⁴⁹ (1978), 90 D.L.R. (3d) 481 (S.C.C.).

⁵⁰ (1980), 29 O.R. (2d) 486 (Ont. H.C.).

of-actions seen in the *Limitations Act*, R.S.O. 1990, c. L.15. Second, as shall be discussed, the notice requirement provided by s. 7(1) of the *PACA* can easily trap the unwary. Query whether the overall regime could not be simplified and made less restrictive. However, that is, of course, a matter for consideration by the legislature and not the court.

6.3 *Public Utilities Act*

Contractors and subcontractors working on watermains in Ontario should be aware of section 33 of the *Public Utilities Act*,⁵² which provides as follows:

No action shall be brought against any person for anything done in pursuance of this Act, but within six months next after the act committed, or in case there is a continuation of damage, within one year after the original cause of action arose.

In *Suppa Construction Ltd. v. Etobicoke (City)*,⁵³ the Court held that even where a contractor's action was clearly out of time under s. 33, the city was precluded from relying on the limitation provision. The contractor had made clear that it was going to seek damages from the city as soon as problems occurred. The parties then entered into a series of negotiations which led the contractor to

⁵¹ (1999), 46 O.R. (3d) 613 (Ont. S.C.J.).

⁵² R.S.O. 1990, c. P.52.

⁵³ (1992), 2 C.L.R. (2d) 311 (Ont. Gen. Div.)

believe that the limitation period would not be enforced. The Court found that the city had paid similar claims in the past, had apparently promised to pay the contractor and had therefore impliedly waived its right to rely on section 33.

6.4 Ontario's *Public Transportation and Highway Improvement Act*

The *Public Transportation and Highway Improvement Act*⁵⁴ makes the Ministry liable to members of the motoring public for damage caused by want of repair:

Ministry to maintain and repair

33.--(1) The King's Highway shall be maintained and kept in repair by the Ministry and any municipality in which any part of the King's Highway is situate is relieved from any liability therefor, but this does not apply to any sidewalk or municipal undertaking or work constructed or in course of construction by a municipality or which a municipality may lawfully do or construct upon the highway, and the municipality is liable for want of repair of the sidewalk, municipal undertaking or work, whether the want of repair is the result of nonfeasance or misfeasance, in the same manner and to the same extent as in the case of any other like work constructed by the municipality.

Liability for damage in case of default

⁵⁴ R.S.O. 1990, c. P.50.

(2) In case of default by the Ministry to keep the King's Highway in repair, the Crown is liable for all damage sustained by any person by reason of the default, and the amount recoverable by a person by reason of the default may be agreed upon with the Minister before or after the commencement of an action for the recovery of damages.

Insufficiency of fence, etc.

(3) No action shall be brought against the Crown for the recovery of damages caused by the presence or absence or insufficiency of any wall, fence, guide rail, railing or barrier adjacent to or in, along or upon the King's Highway or caused by or on account of any construction, obstruction or erection or any situation, arrangement or disposition of any earth, rock, tree or other material or thing adjacent to or in, along or upon the King's Highway that is not on the roadway.

Notice claim

(4) No action shall be brought for the recovery of the damages mentioned in subsection (2) unless notice in writing of the claim and of the injury complained of has been served upon or sent by registered letter to the Minister within ten days after the happening of the injury, but the failure to give or the insufficiency of the notice is not a bar to the action if the judge before whom the action is tried is of the opinion that there is reasonable excuse for the want or insufficiency of the notice and that the Crown is not thereby prejudiced in its defence.

Limitation of action

(5) No action shall be brought against the Crown for the recovery of damages occasioned by the default mentioned in subsection (2), whether the want of repair was the

result of nonfeasance or misfeasance, after the expiration of three months from the time the damage was sustained.

Where an action essentially falls within the regime established by this section and the plaintiff either complied with the notice provisions set forth therein or had a reasonable excuse for failing to do so, there was held to be sufficient notice even for the part of the action that fell outside the Act. In *Greenaway v. Ontario (Minister of Transportation and Communications)*,⁵⁵ the Court held that it would be unreasonable to require the plaintiff to comply with more than one notice requirement when bringing one action against the Crown. The Ministry's attempt to have the action dismissed based on the plaintiff's failure to comply with the more stringent requirements of s. 7 of the *Proceedings Against the Crown Act* consequently failed. The case also indicates that waiting for an expert report to raise a cause of action may establish a reasonable excuse for complying with s. 33 of the *Public Transportation and Highway Improvement Act*.

⁵⁵ (1999), 44 O.R. (3d) 296 (Ont. Gen. Div.).

7. Court Jurisdiction Over Claims Against the Crown

The 1992 reforms to the *Crown Liability Act* abolished the Federal Court of Canada's exclusive jurisdiction in claims against the Crown and made concurrent jurisdiction the rule. Section 21 of the new *Crown Liability and Proceedings Act*⁵⁶ reads as follows:

Concurrent jurisdiction of provincial court

21. (1) In all cases where a claim is made against the Crown, except where the Federal Court has exclusive jurisdiction with respect thereto,

- (a) the county or district court of the province in which the claim arises that would have jurisdiction under the laws of that province if the claim were against a private person of full age and capacity,
or
- (b) if there is no such county or district court or the county or district court does not have that jurisdiction, the superior court of the province

has concurrent jurisdiction with respect to the subject-matter of the claim.

Section 17 of the *Federal Court Act*⁵⁷ now provides that:

Relief against the Crown

17. (1) Except as otherwise provided in this Act or any other Act of Parliament, the Trial Division has concurrent original jurisdiction in all cases where relief is claimed against the Crown.

Cases

(2) Without restricting the generality of subsection (1), the Trial Division has concurrent original jurisdiction, except as otherwise provided, in all cases in which

- (a) the land, goods or money of any person is in the possession of the Crown;
- (b) the claim arises out of a contract entered into by or on behalf of the Crown;
- (c) there is a claim against the Crown for injurious affection; or
- (d) the claim is for damages under the *Crown Liability and Proceedings Act*.

⁵⁶ R.S.C. 1985, C-50, as amended by S.C. 1990, c. 8.

As a result, the Federal Court now has exclusive jurisdiction only in the rare cases where such is expressly provided by statute.⁵⁸

8. Conclusion

The Supreme Court of Canada has provided the country's courts with guidelines to facilitate the differentiation between the policy and operational level. It has become clear that courts will hold the Crown liable in tort only if the Crown is operating negligently at the operational level. On the other hand, courts have not hesitated to dismiss actions against the Crown if the special procedures governing such actions were disregarded or applied in a cavalier fashion. Counsel representing clients pursuing the Crown are advised to thoroughly review the applicable legislation and doctrines, which can at times lead to unexpected results.

⁵⁷ R.S.C. 1985, F-7.

⁵⁸ See, for example, the *Expropriations Act*, R.S.C. 1985, E-21.