GOVERNMENT CORPORATIONS

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At the close of the first Great War, corporations of the Government of Canada were associated mainly with the management and operation of transportation facilities, Since 1940 Canada has applied the corporate device in many fields: wool from Australia, rubber from the Indies, silk, tea and coffee from the Orient and petroleum from the Americas are examples of commodities sought and obtained far from home by the use of government corporations. At home, in addition to use in the production of munitions, the company device has been employed for such purposes as building houses, working mines, constructing and operating merchant shipping, logging sitka spruce and producing synthetic rubber. Commercial air pilots were recruited outside of Canada by a corporate management. A corporation was the contracting party when the United States ordered war supplies in Canada. The co-ordinating management of the numerous explosive plants constructed jointly by the governments of Canada and the United Kingdom was by a crown company. These are examples. In turn, the government of Canada had dealings with like corporations of other governments.

In time of war there is but one objective—to destroy the enemy. Decisions must be made quickly and in a way that will neither impair international relationships nor be embarassing to other countries. Managements of Canadian crown companies having faced many exceptional problems, the writer (statutory auditor of over thirty wartime corporations) is impressed by the fact that the clue to the solution of many had to be found in English, American and Australian practices—Canada having been singularly free from public controversy and litigation arising out of administration by independent corporate bodies.

The war is over, the efficiency of the corporate device has been proven and it is not unreasonable to anticipate its continued use, especially in commercial ventures. Consequently, the status of such bodies, vis à vis the taxpayer, private enterprise and other divisions of government, may be of continuing concern.

Public service corporations being the consequence of the devolution of legislative power, they are *ad hoc* bodies which

> cannot be regarded as Departments of State directly responsible to the Legislature[1]

and

[1] WADE AND PHILLIPS, CONSTITUTIONAL LAW, 2nd ed., 1931, p. 105-6.

> by such bodies is achieved a compromise between unlicensed individualism and rigid nationalisation in an era which has come to recognise the collectivist state.[1]

In countries like Canada, where spheres of legislative influence are divided, there is ever present the risk that corporate bodies (federal, provincial and municipal) may have the benefit of inter-governmental immunities which were developed solely as constitutional safeguards. Likewise, when administration is by use of a corporation because it lends itself to more effective competition with private enterprise, this question presents itself: Should the public agency enjoy any privilege that is not available to its competitors? Exempton from taxation and immunity from industrial legislation are examples. It is the writer's opinion that the answer may be to distinguish public activities which are founded on political policies of legislatures from those which are constitutional obligations of "the government". That is the English practice, so it is not surprising that Lord Justice Luxmoore, for the Privy Council, not so long ago commented on Ontario courts describing the Niagara Park Commission as both an "agent and servant" and as an "emanation" of the Crown. He said:

> Their Lordships are unable to appreciate the precise meaning intended to be attributed to this phrase by the courts below. If it is intended to refer to the commission in some capacity other than that of agent or servant, it is impossible to ascertain from the judgments delivered what the legal significance of that capacity may be. The word 'emanation' is hardly applicable to a person or a body having a corporate capacity. Its primary meaning is 'that which issues or proceeds from some source', and is commonly used to describe the physical properties of substances (e.g. radium) which give out emanations of recognisable character.[2]

Administration by corporate body may be a breach in the wall of responsible government, but no better device has yet been evolved to operate efficiently and economically commercial phases of public enterprise. So regarded, the need is to make certain that abuses are avoided. The safeguards the English courts have established are directed to making such a body subject to the same liabilities as comparable private enterprises. In the United States and Australia recourse to the courts has more frequently been to make certain that, by a side-wind, neither national nor state governments lose jurisdiction in a field assigned by the constitutions. That which follows is intended to outline the growth of practice in each country.

[2] *International Railway Co.*, v. *Niagara Parks Commission*, [1941] 2 All E.R. 456, at p. 462.

England

The majority of existing public service corporations in England were created by local and private acts. To illustrate the trend of judicial and parliamentary thought, harbour authorities are selected for discussion because, England beingan is land and port facilities essential to the life of the country, port authorities come closer to a constitutional obligation of the Crown than most other governmental corporations. For this reason the courts might have been expected to favour them in litigation. Furthermore, one such authority, the Mersey Docks and Harbour Board, has been the prime litigant in this class of case.

The first general municipal tax statute was the Poor Relief Act, 1601 (43 Eliz. c. 2), which directed that church wardens in each parish

> raise weekly or otherwise, by taxation on every inhabitant, parson, vicar, and others, and of every occupier of lands, houses, tithes, impropriate or propriations of tithes, coal mines or saleable underwoods in the said parish such competent sum and sums of money as they shall think fit

to provide a stock of flax, hemp, wool, thread, iron and other necessary wares in order to provide work and care for the poor, etc. The statute had general effect over all England until 1869, and over a substantial part until 1925. It has been said of it:

> The Act of 1601 was strictly construed, and for more than two and a half centuries various classes of property escaped rating because no mention was made of them. Thus, the mention of 'coal' mines was thought by implication to exclude other kinds of mines, and the mention of 'saleable underwoods' to exclude woods and plantations generally.[3]

and

> The Crown not being named in the Statute of Elizabeth (The Poor Relief Act, 1601) which is the foundation of the liability to the poor rate, is not bound by that statute.[4]

The Mersey Docks and Harbour Board was created in 1857 by private act of Parliament to acquire and operate port facilities at Liverpool. The legislation set out the objects to which revenues might be applied and prohibited any distribution of a surplus. Poor rate levies of about £20,000 were made on it. The Board resisted the levy on various grounds. Two only need now be noted. The first was that the Board should be regarded

[3] HALSBURY'S LAWS OF ENGLAND, Vol. 14, p. 452

[4] MACMILLAN'S LOCAL GOVERNMENT LAW AND ADMINISTRATION, Vol. 4, p. 272.

as relieved from the incidence of the tax because Parliament had specifically enumerated the objects to which its revenues might be applied and had ended the listing with these words:

> and except as aforesaid such moneys shall not be applied by the board for any other purpose whatsoever.

Naturally, taxes had not been listed as objects of expenditure. To this Mr. Justice Blackburn in *Mersey Docks and Harbour Board Trustees* v. *Jones and Cameron*,[5] in the name of the majority of the judges, replied:

> enactments directing that the revenue shall be applied to certain purposes and no others are directory only and mean that, after all charges imposed by law on the revenue have been discharged the surplus or free revenue which otherwise might have been disposed of at the pleasure of the recipients shall be applied to these purposes.

The other contention was that the Board was, without expectation of profit, performing a service for the public and therefore should have the benefit of the Crown's immunity from poor rates. The House of Lords decided against this argument, holding that immunity was claimable only when occupation was ascribable to a bare trust for purposes required and created by the government of the country. The board did not, in the view of the House of Lords, occupy as servants of the public or government. In the words of the Lord Chancellor:

> the only ground of exemption from the statute of Elizabeth is that which is furnished by the rule, that the Sovereign is not bound by that statute, and that consequently when valuable property (that is, property capable of yielding a net rent above what is required for its maintenance), is sought to be exempted on the ground that it is occupied by bare trustees for public purposes, the public purposes must be such as are required and created by the government of the country, and are therefore to be deemed part of the use and service of the Crown.[6]

Some years later in an income tax case, *Coomber* v. *The Justices of the County of Bershire*, Lord Watson said that the *Jones and Cameron* decision

> meant to affirm, and did affirm, that the exemption extended not only to the immediate and actual servants of the Crown but to all other persons, not being servants of the Crown, whose occupation was ascribable to a bare trust for purposes required and created by the Government of the country. And seeing that, in my opinion, the administration of justice, the maintenance of order, and the repression of crime, are among the primary and inalienable functions of a constitutional Government, I have no hesitation in holding that assize courts and police stations

[5] (1865), 11 H.L.C. 443.
[6] *Ibid.*, at pp. 404-505

> have been erected for proper government purposes and uses, although the duty of providing and maintaining them has been cast upon county or other local authorities.[7]

He adopted the argument relied on by the County of Berkshire: the administration of justice and police has always been considered peculiarly within the province of the central government; thus, they are not matters of local government, but of local administration of central government.

In 1866 the Mersey Board was again before the House of Lords.[8] This time the question was liability for damage done a ship by reason of the Board failing to remove an obstruction. The Lord Chancellor addressed certain questions to five judges. The broad principle applied is that set out in the answers (delivered through Mr. Justice Blackburn):

> It is well observed by Mr. Justice Mellor in *Coe* v. *Wise* [(1864), 5 B. & S. 440; 4 New Rep. 354], of corporations like the present, formed for trading and other profitable purposes, that though such corporations may act without reward to themselves, yet in their very nature they are substitutions, on a large scale, for individual enterprise. And we think that, in the absence of anything in the statutes (which create such corporations) showing a contrary intention in the Legislature, the true rule of construction is, that the Legislature intended that the liability of corporations thus substituted for individuals should, to the extent of their corporate funds, be co-extensive with that imposed by the general law on owners of similar works.[9]

And to the argument proposed to the effect that:

> They said that by the general law of this country, bodies such as the present are trustees for public purposes, and that being such, they are not in their corporate capacity liable to make compensation for damages sustained by individuals from the neglect of their servants and agents to perform the duties imposed on the corporation, or, at all events, that the duty of such corporations was limited to that of exercising due care in the choice of their officers, and that if they had properly selected their officers, any evil which ensued must be the fault of the officer, and that redress for it must be sought against him alone.

Mr. Justice Blackburn accepted the law as being that

> where a person is a public officer in the sense that he is a servant of the Government, and as such has the management of some branch of the Government business, he is not responsible for any negligence or default of those in the same employment as himself.[10]

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[7] (1883), 9 App. Cas. 61, at p. 74.
[8] *Mersey Docks and Harbour Board Trustees* v. *Gibbs* (1866), L.R., 1 H.L. 687.
[9] *Ibid.*, at p. 707.
[10] *Ibid.*, at p. 711.

But he added:

> the Defendants in the present action are not servants of the public in that sense. For this we need do no more than refer to the recent decision of your Lordships' House in *Jones* v. *Mersey Board,* where they were held to be rateable as occupiers of the docks on the very ground that they did not occupy as servants of the public or Government.[11]

Subsequent application may be illustrated by reference to Trinity House—a body with a long history of rights conferred by royal favour and usage. In 1854 it was the subject of legislation, being charged with the duty of safeguarding all navigable waters surrounding the British Isles. The cost was authorized to be recovered from shipping. It sought, in an action against it for damages,[12] to be regarded as an agent of the Crown performing a public service and therefore not liable for the torts of its servants. This argument was rejected by Mr. Justice Day who stated:

> The Trinity House, to my mind, is not in the position of a great officer of state. It is nothing more than an amalgamation by authority of state of a vast number of bodies having general authority over the lighthouses and beacons and buoys throughout the country for the general convenience. It is a corporation with very great powers vested in it by statute, but in no possible sense can it be deemed to represent the Crown. All the great officers of state are, if I may say so, emanations from the Crown. They are delegations by the Crown of its own authority to particular individuals. This is not the case with the Trinity House, which has its nature and origin defined with sufficient clearness to enable us to say that at any rate it is in no sense an emanation from the Crown, nor in any way whatever a participant of any royal authority.[13]

Apparently it has never been seriously contended that an enforceable contract may not be made between such bodies and the Crown. An interesting illustration to the contrary (because the character of the issue lent itself to such a defence by the Crown) is *Wick Harbour Trustees* v. *The Admiralty.*[14] This was a test case brought on behalf of all dock and harbour authorities of the United Kingdom. Section 28 of the Harbour, Docks and Piers Clauses Act, 1847 (the general legislation with respect to local ports) directs that all ships of His Majesty "shall have the free use" of harbours, docks or piers "without any charge or rate being made for using the same". Nevertheless, the Government early adopted the practice of making annual

[11] *Ibid.*, at pp. 712-713.
[12] *Gilbert* v. *Trinity House* (1886), 17 Q.B.D. 795.
[13] *Ibid.*, at p. 801.
[14] [1921] 2 S.L.T. 109.

ex gratia payments to port authorities whose facilities were utilized by the Crown. The first Great War increased governmental use of these facilities to such an extent that T. P. O'Connor, M.P., acting on behalf of all port authorities, negotiated for more generous treatment. A representative of the Government undertook by letter that:

> In lieu of the *ex gratia* payments which the Government are now making or have agreed to make, the following *ex gratia* payments will be made. . .

Wick Harbour, using the schedule provided, demanded £6,169. The Admiralty offered £1,400, and litigation followed. Lord Sands opened his judgment with these words:

> Under section 28 of the Harbour, Docks and Piers Clauses Act, 1847, vessels in His Majesty's service are exempt from rates and dues. It was suggested, rather than urged, by the Lord Advocate, that in virtue of this statutory exemption no binding agreement for payment of rates and dues can be made on the part of a Government Department. But a Government Department, though not liable, may, subject to the provision of the money by Parliament, pay harbour rates and dues just as it pays local rates. And if it may pay them I think it may undertake to do so.

The real issue was the meaning to be given to the words "ex gratia". Lord Sands decided that:

> All payments, whether of local rates or of harbour dues, by a Government Department are *ex gratia* and may be properly so described. But when the Department agrees to make certain payments, although in the eye of public law they are still *ex gratia* payments, as a matter of particular undertaking the obligation is binding.[15]

Litigation having established that corporate public agencies are liable to local taxation, the next step is to trace the action taken with respect to their liability to general taxes. For purposes of convenience, liability to income tax will be used as an example. The general position was stated by Lord Watson in *Coomber* v. *County of Berkshire:*

> There is not, in my opinion, one kind of Crown exemption from the Statute of Elizabeth, and another kind of Crown exemption from the Income Tax Acts. In other words, it appears to me that the existence of the same kind and degree of interest, on the part of the Crown, which is deemed in law sufficient to protect an occupier from liability to the poor-rate, must also be held sufficient to shield the owner of the bare legal estate against any demand for payment of income tax.[16]

Thus unless a special status can be established, the body is liable to income tax. The Mersey Dock Board in the case of

[15] *Ibid.*, at p. 111.
[16] *Op cit.*, at p. 76.

The Mersey Docks and Harbour Board v. *Lucas*[17] endeavoured to escape tax on that part of its income that was credited to sinking fund. Its act of incorporation provided that, after various charges were discharged from revenue, contributions up to £100,000 annually were to be made to sinking fund. The Board argued that this provision, by implication, removed payment to sinking fund from taxable revenue for the purposes of the Income Tax Act. This argument was rejected, for, as the Lord Chancellor pointed out, it necessitated treating a private and local act as capable of overriding a general taxing act. "The tax is to be upon the profits", and he held that:

> the construction of new works, the payment of interest and the repayment of principal, all pre-suppose that the profits have been earned and that there is a clear fund that can be so applied.[18]

Lord Blackburn added:[19]

> there is nothing in the nature of things, there is nothing in the words of the Act, to say that when an income has been actually earned, when an actual profit upon which the tax is put has been earned and received by any person or corporation, Her Majesty's right to be paid the tax out of it, in the least degree depends upon what they are to do with it afterwards . . . .

Port of London Authority v. *Commissioners of Inland Revenue*[20] introduced a new issue. The Authority contested a levy of excess profits tax of 50% on profits over and above normal profits. Excess profits taxes are generally regarded as having at least four objectives: (a) to produce revenue, (b) to penalize high profits in munitions production, (c) to average profit and (d) to limit industrial profits so that they conform to the national sacrifice necessitated by a state of national emergency. By its legislation (a public act) the London Port Authority was obligated to apply its income to operating expenses, debt retirement, capital improvements, etc. No distribution of surplus may be made. The Master of the Rolls remarked:

> There may be some question as to why the Legislature should have thought fit to take a percentage of profits which, when earned, would be applied to public purposes, thereby perhaps in this case necessitating an increase in the charges of the Port of London Authority on shipping.[21]

[17] (1883), 8 App. Cas. 891.
[18] *Ibid.*, at p. 907.
[19] *Ibid.*, at p. 910.
[20] [1920] 2 K.B. 612.
[21] *Ibid.*, at p. 618.

Lord Justice Scrutton also commented:

> One may be surprised to find public authorities included by the Legislature in the excess profits tax . . . .[22]

But they and Lord Justice Warrington agreed that Mr. Justice Rowlatt was right when he held in the lower court:

> Once you have got a taxable income the ultimate destination of that income is immaterial . . . .[23]

Municipal authorities, in the main, are treated similarly. British income tax is assessed under five schedules, of which four are applicable to municipal authorities. A surplus of income from the general levy is exempted; otherwise, profits from operations, including interest on various classes of investments, are taxable. Income tax is assessed on profits derived from the operation of municipal undertakings such as "markets, slaughter-houses, water, gas, electricity, tramways and omnibus undertakings".[24]

On the other hand, Parliament annually appropriates sums (in the last year before the war it was £2,685,270) to be distributed as *ex gratia* grants to municipal authorities in lieu of the payment of rates on Crown property. The government uses its own assessors to determine public property values in each municipality, and may or may not calculate the payment by use of the local rate applicable to surrounding property.

Up to this point attention has been directed to corporations which are easily distinguishable from "the government". Turning now to those performing governmental services, a convenient start may be made with the British Post Office, which, in addition to carrying the mails, operates the telegraph and telephone services. Frequent references will necessarily have to be made to statutes and parliamentary proceedings. The Telegraph Act, 1868, provides that:

> All land, property and undertakings purchased or acquired by the Postmaster General under this Act shall be assessable and rateable in respect to local, municipal, and parochial rates, assessments, and charges at sums not exceeding the rateable value at which such land, property and undertakings were properly assessed or assessable at the time of such purchase or acquisition.

But lands vested in the Postmaster General, as a corporation sole, for postal purposes, are declared by section 45 of the Post Office

[22] *Ibid.*, at p. 625.
[23] [1919] 2 K.B. 608, at p. 614.
[24] MACMILLAN'S LOCAL GOVERNMENT LAW AND ADMINISTRATION, Vol. 7, p. 150.

Act to be held "in trust for His Majesty for the purposes of the Post Office". Consequently, it was held that a building leased for post office purposes is not liable for rates.[25] The Post Office does not pay income tax on its communications' profits, although it operates by financing itself out of its revenues. That is, since 1933 it charges its expenditures directly to revenues and not to parliamentary appropriations. But it is required to contribute a fixed sum annually to the public revenue, any remaining surplus being available to extend and improve services.

The Post Office is not a true corporation; the British Broadcasting Corporation is. The Corporation was created by royal charter and operates under ten-year licences granted by parliament. The Postmaster General has certain statutory rights and obligations with respect to it. When Sir William Mitchell-Thompson was Postmaster General, he stated to the House of Commons:

> As regards matters of general policy, I am prepared to take a certain measure of responsibility . . . in the ordinary matters of detail and of day-to-day working, the governors are absolutely masters of their own house . . . If any Hon. member . . . is desirous of making remarks on the character of the programs, all I have to say is that I shall faithfully see that what he says is conveyed to the British Broadcasting Corporation and the governors thereof . . .[26]

The Crown retains a portion of the licence fees. The Corporation is subject to local and general taxes.

The London Passenger Transport Board differs from B.B.C. It was created by The London Passenger Transport Act, 1933, to own and operate the underground railways, tramways and bus undertakings in the metropolitan area. The Board pays the usual local taxes, but by section 92 provision is made for the mode to be applied in establishing valuations for rating purposes. Apart from certain specific exemptions from stamp duties (associated with the issue of the Board's securities in place of those of former owners) the Board is subject to all general taxes.

During the recent war the government caused various companies to be constituted under ordinary company law. Among them was the United Kingdom Commercial Corporation which dealt in commodities of various kinds. Its capital of £5,000,000 was subscribed by the government. On a business of approximately £150,000,000 a profit of £10,666,000 was realized to March 31st, 1944. Income and excess profits taxes of approxi-

[25] *Smith* v. *Birmingham Union* (1857), 7 El. & Bl. 483.
[26] 219 H.C. Deb. (1928) p. 2489.

mately £6,000,000 were estimated as payable to the Commissioners of Inland Revenue. The proceedings of the Public Accounts Committee on October 30th, 1945, record this question and answer:

> Q. If the Treasury is a 100 per cent shareholder, what is the purpose of making provision for British taxes, and why do they require to be paid?
>
> A. We have always taken the view, and the Treasury have agreed, that this company should be treated as a commercial body. The fact that the Treasury own the shares should not, in our view or the Treasury's view, differentiate it from any other commercial body, but we should be subject to the tests of that kind of body.

The day before, second reading had been given the Bill to acquire all stock of the Bank of England. That Bill (now law) directs that

> no dividends on bank stock shall be declared but in lieu of any such dividend the Bank shall pay to the Treasury on every fifth day of April and of October £873,180, or such less or greater sum as may from time to time be agreed upon between the Treasury and the Bank.

In the Schedule to the Bill appears:

> 14. In charging the profits and gains of the Bank for the purposes of income tax for any year of assessment, the sums paid by the Bank as aforesaid in that year shall be allowed as a deduction.

The Chancellor of the Exchequer on December 17th, 1945, said in the House of Commons:

> The Bank will not be a branch of the civil service . . . but it will nevertheless become part of the public services, using that term rather broadly to include the various public boards, many of which already exist, and others which we are proposing to set up.

It would appear that the policy of the House of Commons is to regard Ministers as without responsibility for administrative decisions of corporations created by statute.[27] That is, the relationship between the corporation and Parliament is direct, with disciplinary action effectuated by legislative amendment. In 1912 there was a dockworkers' strike in London. The Port of London Authority (created by public act) administered the Port. The governing body consisted of eighteen elected members and ten appointed members—two of the latter by the President of the Board of Trade. On July 22nd, 1912, the adjournment of the House was moved to discuss:

[27] W.I. JENNINGS, PARLIAMENT, 1939, at p. 11.

> The failure of the Board of Trade through its representatives to bring pressure to bear on the Port Authority to carry out its obligations under the Port of London Act, which has resulted in the growing congestion of traffic in the Port and the casualisation of labour.

The Speaker rejected the motion on the ground that:

> The Port of London is an authority set up by Parliament and quite independent of the Board of Trade. I have looked through the Act which set up the Authority and I can only find some three sections which introduce the Board of Trade at all as a controlling authority. These sections deal with audits if required, with the question of increase of duties, and with complaints about warehousing. As far as I can ascertain, these are the only sections in the Act which give the Board of Trade any power whatever or any control over the Port Authority. That being so, it is clear that the Board of Trade has no such control as the Hon. Gentleman would wish to imply in his motion.

And to the supplementary argument that the Board of Trade, having three representatives on the Authority, should instruct them to cause the Authority to meet the strikers, the Speaker replied:

> I do not know whether they have given instructions or not, but it seems to me that even if they have given instructions they have no control, and they cannot compel the independent authority to take a particular line.

(TO BE CONTINUED).

FUNDAMENTAL PRINCIPLES AND PRIMARY VALUES

There is something heartening, perhaps reassuring, in the universal respect and admiration in which this gallant exemplar of the American tradition of law is held. He has no backing of government; he has developed no militant ideology; he leads no large bloc of votes; he has eschewed the histrionics of popular crusades. His authority has been and is only the power of reasoned ideas, of intellectual insight and tempered wisdom, of conscience and lofty patriotism in his objectives. American lawyers are proud of him and grateful for him, and wish him Godspeed on his new journey and long life for his great adventures in the realm of ideas. ("Roscoe Pound To Go to China in His 76th Year", American Bar Association Journal, March, 1946)