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## The Contractual Liability of the Crown and Its Agents

Sue Arrowsmith

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## The Contractual Liability of the Crown and Its Agents

### Abstract

This article considers the question of the capacity in which Crown agents enter into contracts - whether on behalf of the Crown or in an independent capacity - and examines the significance of this for questions such as the application of Crown immunities. It is argued that the courts' attempt to deal with these questions through the recognition of a dual capacity in Crown agents and the application of the private law of agency is highly unsatisfactory, and it is suggested that this area well illustrates the pressing need to reconsider the dual legal status of the administration.

### Keywords

Government liability; State, The; Canada

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# THE CONTRACTUAL LIABILITY OF THE CROWN AND ITS AGENTS<sup>©</sup>

BY SUE ARROWSMITH\*

This article considers the question of the capacity in which Crown agents enter into contracts – whether on behalf of the Crown or in an independent capacity – and examines the significance of this for questions such as the application of Crown immunities. It is argued that the courts' attempt to deal with these questions through the recognition of a dual capacity in Crown agents and the application of the private law of agency is highly unsatisfactory, and it is suggested that this area well illustrates the pressing need to reconsider the dual legal status of the administration.

I. INTRODUCTION .....	572
II. THE CAPACITY IN WHICH PUBLIC AUTHORITIES CONTRACT .....	574
A. <i>General Principles</i> .....	574
B. <i>The Scope of Powers to Contract on Behalf of the Crown</i> .....	575
C. <i>Scope of the Independent Capacity to Contract</i> ....	578
1. Corporate Crown Agents .....	579
2. Unincorporated Crown Agents .....	588
D. <i>In What Capacity Is The Contract Made?</i> .....	590

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III. THE SIGNIFICANCE OF THE CAPACITY IN WHICH CONTRACTS ARE MADE . . . . .	595
A. <i>The Position of Government Bodies Inter Se</i> . . . . .	595
B. <i>The Position of the Other Party to the Contact</i> . . . . .	596
1. General . . . . .	596
2. Jurisdiction of the Federal Court . . . . .	597
3. Privileges and Immunities of the Crown . . . . .	599
4. Immunity of Crown Agents from Warranty of Authority Rule . . . . .	608
5. Miscellaneous . . . . .	609
IV. CONCLUSION: THE NEED FOR A COHERENT APPROACH . . . . .	610

## I. INTRODUCTION

The central governments of Canada and of the individual provinces do not consist of a single entity of the State, but are characterized by a certain duality. On the one hand, many of the powers of the Executive, both common law and statutory, are vested in "The Crown."<sup>1</sup> These powers are presently not exercised personally by the monarch but by government bodies and officials acting on behalf of the Crown.<sup>2</sup> On the other hand, powers have also sometimes been conferred on public authorities in an independent capacity. Many public authorities also act in a dual capacity, exercising some powers as agents of the Crown and other powers on their own behalf.

In considering the legal liability of the government, it is not always clear in which capacity, or capacities, a power is given to a

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<sup>1</sup> On the nature of the Crown in the Canadian jurisdictions, see D.W. Mundell, "The Legal Nature of Federal and Provincial Executive Governments: Some Comments on Transactions Between Them" (1960) 2 Osgoode Hall L.J. 56.

<sup>2</sup> The better view is that in acting in public affairs these authorities are not in fact acting in law on behalf of the monarch at all, but on behalf of a common law corporation which has legal powers distinct from those of the monarch personally. On this, see S. Arrowsmith, *Government Procurement and Judicial Review* (Toronto: Carswell, 1988) at 109-29.

public authority, or in which capacity it is exercised in a particular case. One area in which this causes difficulties is in relation to the contractual activities of the Administration: when a public body enters into a contract, on whom does legal liability rest – the agency itself or the Crown? Several important consequences may depend on the answer to this question. In particular, there are a number of legal rules which apply to the Crown but not to other public authorities. However, as is frequently the case with issues of government liability, legal doctrine on this point has become characterized by an unfortunate degree of complexity and uncertainty. It is the aim of this article to outline the current legal position, and to highlight the main problems within this area of the law. In doing so, this paper hopes to illustrate the pressing need for a more rational and coherent approach to questions of state liability, a point which was recently expressed in a Canada Law Reform Commission Working Paper.<sup>3</sup>

The discussion of the present law will be divided into two main parts. The first part considers the basic question: when does a public authority undertake liability on its own behalf, and when on behalf of the Crown? The second part will examine the significance of this question of capacity, both for the government and for the other party to the contract. These two questions are very interrelated since the consequences of the capacity in which a contract is made have shaped the decisions concerning the nature of the government's capacity to contract. However, for the sake of clarity in a complex area, it is convenient to consider the two questions separately.

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<sup>3</sup> Law Reform Commission Of Canada, *The Legal Status of the Federal Administration* (Working Paper 40) (Ottawa: The Commission, 1985). The methodology of the Commission and some of its reasoning have been subject to heavy criticism: see in particular D. Cohen, "Thinking about the State, Law Reform and the Crown in Canada" (1986) 24 *Osgoode Hall L.J.* 379. However, the Commission's basic point regarding the need for a reappraisal of the legal status of the Administration cannot be questioned.

## II. THE CAPACITY IN WHICH PUBLIC AUTHORITIES CONTRACT

### A. *General Principles*

How does one determine the capacity in which any particular contract is made? In considering liability on government contracts, and the relationship between the Crown and specific public authorities, the law has employed the same basic concepts of agency that apply to private individuals and corporations. In any agency situation, it is necessary to consider the question of liability for contracts made by the agent from two perspectives.

The first is that of the parties to the principal–agency relationship *inter se*: which one is ultimately, or primarily, liable for the cost of performing the particular contract? In general terms, a person is primarily liable for a contract made by his agent when it is made for the purposes of the principal and is within the scope of the express or implied authority of the agent. But if the agent makes the contract for his own purposes, or outside the scope of his authority, he bears the primary liability.

The second perspective of liability is the position of principal and agent *vis-à-vis* the other party to the agreement: which one is party to the contract made? The law admits of three possibilities: that the agent alone is liable, that only the principal is liable, or that both principal and agent are party to the contract.<sup>4</sup> An agent may make himself a party, either alone or with his principal, even though he acts for the purposes of the principal and within the scope of his authority, so that the principal is primarily liable. In such a case, the principal must indemnify the agent for any costs incurred as a result of the agent's own liability on the agreement.<sup>5</sup> Thus, when a public authority makes a contract, it is necessary to consider whether the Crown or the agent itself is ultimately liable. In addition, it

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<sup>4</sup> See F.M.B. Reynolds, *Bowstead on Agency*, 15th ed. (London: Sweet & Maxwell, 1985) at 426-40.

<sup>5</sup> See, generally, *ibid.* at 210-245.

must be determined who is actually a party to the agreement – the Crown, the agent, or both.

These issues are determined partly by judicial decisions and partly by legislation. It is convenient to consider them by examining three questions. First, what is the scope of a public authority's power to conclude a contract on behalf of the Crown? Second, what is the scope of its power to undertake liability in its own name? At this point, it is necessary to consider how far it may undertake primary liability, as opposed simply to making itself party to a contract for which the Crown is primarily responsible. Finally, one must consider in what capacity, or capacities, the authority has acted in the particular case.

### B. *The Scope of Powers to Contract on Behalf of the Crown*

The power of an administrative authority to make contracts on behalf of the Crown depends on two things: the scope of the Crown's own capacity to make contracts, and the scope of the particular agent's authority to enter into the contract on the Crown's behalf. The first generally presents no difficulty since the Crown possesses at common law a capacity to contract which is equivalent to that of any natural person of full age and capacity.<sup>6</sup> Therefore, the Crown lacks the capacity to make a contract only to the extent that its power is cut down by statute.

The extent to which individual public bodies have authority to exercise this power on the Crown's behalf is more complicated. One must ask, first, if a body is an agent of the Crown, and, second, if it is, what is the scope of its authority to bind the Crown?<sup>7</sup>

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<sup>6</sup> See R. Dussault & L. Borgeat, *Administrative Law*, 2d ed., trans. M. Rankin (Toronto: Carswell, 1985) at 483-84. For a full discussion of the question, see Arrowsmith, *supra*, note 2 at 109.

<sup>7</sup> Since many bodies act sometimes in an independent capacity and sometimes on behalf of the Crown, it may seem logical to consider directly what is the scope of an authority's agency for the Crown. However, this is a useful functional approach (and one used in the cases and legislation) since most act either predominantly on behalf of the Crown or predominantly on their own behalf. The term *Crown agent* is a useful general description of the former type.

Who is a Crown agent? Clearly the Ministers of the Crown are its agents. In the case of other bodies, the common law test for Crown agency, developed mainly in determining the Crown's immunity from suit in tort, focuses mainly on the degree of control exercised over the body by the Ministers of the Crown. This test was reaffirmed by the Supreme Court of Canada in *Northern Pipeline Agency v. Pehinec*.<sup>8</sup> Other factors, though, are also taken into account. Space does not permit a detailed discussion here of the nature of the common law test,<sup>9</sup> but there has been much criticism of the uncertainty, inconsistency, and expansiveness in the application of the test, which has the consequence of allowing a large range of commercial-type bodies to claim many of the benefits of Crown immunity.

To some extent the question is now dealt with by statute. Both federal and provincial statutes creating public authorities now often expressly state that the authority is to have Crown agency status. Some statutes have also dealt with the question at a more general level. In Ontario, "Crown agency" is defined in the *Crown Agency Act*, which was enacted to bring certain bodies within the ambit of Crown immunity from excise tax, although the definition is not confined to such purposes. A Crown agent is defined as a body "owned, controlled or operated by Her Majesty under the authority of the legislature or the Lieutenant Governor in Council."<sup>10</sup> Clearly the application of this test must depend heavily on case law. At present, the *Government Corporations Operation Act*<sup>11</sup> deals specifically with corporations, created under Part I of the *Canada Corporations Act*<sup>12</sup> or under the *Canada Business Corporations Act*,<sup>13</sup>

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<sup>8</sup> [1983] 2 S.C.R. 513 [hereinafter *Pehinec*].

<sup>9</sup> On this see P. Vita, "Relief Against the Crown: Who to Sue" in *Civil Proceedings by or Against the Government* (Toronto: Canadian Bar Association – Ontario, Continuing Legal Education, 1985) at 14-17; C.H. McNairn, "The Ontario Crown Agency Act" (1973) 6 Ottawa L. Rev. 1; R. Flanagan, "Crown Agent Status" (1988) 67 Can. Bar Rev. 229.

<sup>10</sup> R.S.O. 1980, c. 106, s. 2.

<sup>11</sup> R.S.C. 1985, c. G-4.

<sup>12</sup> R.S.C. 1970, c. C-32.

<sup>13</sup> R.S.C. 1985, c. C-44.



of which all the shares<sup>14</sup> are owned by or held in trust for Her Majesty. Such corporations are expressly stated to be Crown agents.<sup>15</sup> It may be noted that a body or individual which does not normally act as a Crown agent may sometimes act as such for limited purposes. This situation usually arises from an agreement between the Crown and that party, not from statute.<sup>16</sup>

Even where a body is a Crown agent, it can only bind the Crown in contract if it has the authority to make the particular agreement on the Crown's behalf. It is generally assumed that a Crown agent has the authority to make any contract which is ancillary to the substantive functions which it is authorized to carry out. Thus, if an agent authority is established in order to construct a highway, for example, it will have authority to make on behalf of the Crown, any contracts necessary to enable it to perform that function – contracts to purchase materials, to employ engineers, *et cetera*. The test for determining the scope of such a body's authority to contract on behalf of the Crown seems to be the same as that for determining the scope of the capacity to contract of non-natural persons of limited capacity which are not Crown agents, such as municipal corporations and (in some jurisdictions)<sup>17</sup> private business corporations. These bodies have an implied capacity to make contracts which are reasonably necessary to carry out the functions they are authorized to perform.<sup>18</sup>

At one time there was uncertainty concerning the scope of the authority of Ministers of the Crown; some cases stated that they did not have the authority to make contracts in connection with any matter within their general statutory jurisdiction, but required such authority from a specific statutory provision or an Order in

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<sup>14</sup> With the exception, where relevant, of the directors' qualifying shares.

<sup>15</sup> *Supra*, note 11, s. 3.

<sup>16</sup> On this, see *Montreal v. Montreal Locomotive Works Ltd*, [1947] 1 D.L.R. 161 (P.C.).

<sup>17</sup> In some jurisdictions, business corporations have an unlimited capacity to contract (in others, *ultra vires* contracts are now generally enforceable by third parties).

<sup>18</sup> *Ashbury Railway and Carriage Co. v. Riche* (1875), 7 L.R. 653 (H.L.); *A.G. v. Great Eastern Railway* (1880), 5 App. Cas. 473 (H.L.).

Council.<sup>19</sup> However, in *J.E. Verault & Fils Ltée v. A.G. Quebec*,<sup>20</sup> the Supreme Court of Canada stated that the test for determining the authority of Ministers to bind the Crown is the same as the authority test in private law: the Crown will be bound if the agent has actual or ostensible authority. How actual authority is to be determined in public law is far from clear: arguably specific legislative authority is still required.<sup>21</sup> What does seem clear, however, is that the doctrine of ostensible authority will now make a Minister's contract binding where it relates to the general area of his statutory jurisdiction,<sup>22</sup> unless his authority is specifically curtailed by statute.<sup>23</sup>

### C. *Scope of the Independent Capacity to Contract*

So far we, have considered the power of public authorities to make contracts on behalf of the Crown. The next issue, the scope of their powers to contract in their own name, is less straightforward.

A public authority, which is a corporation and which does not exercise its powers on behalf of the Crown, possesses a capacity to contract under the rule already referred to — that corporate bodies have an implied capacity to make contracts which are reasonably necessary to enable them to carry out their functions. What of unincorporated bodies which are not Crown agents? The

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<sup>19</sup> *De Cosmos v. R.* (1883), 1 B.C.R. 26 (B.C. S.C.); *Livingston v. R.* (1919), 19 Ex.C.R. 521; *Jacques Cartier Bank v. R.* (1895), 25 S.C.R. 84; *Walsh Advertising v. R.*, [1962] Ex.C.R. 115; *R. v. Transworld Shipping Ltd.*, [1976] 1 F.C.R. 159; *Wood v. R.* (1877), 7 S.C.R. 634.

<sup>20</sup> [1977] 1 S.C.R. 41.

<sup>21</sup> Of the cases cited in note 19, this was the view taken in *Walsh Advertising*, *Livingston*, and, possibly, *Jacques Cartier Bank*. The other cases cited took the view that a Minister has actual authority to make any contract in connection with the general functions assigned to him by statute, by implication from such statutes.

<sup>22</sup> It seems a Minister has the capacity to make contracts on behalf of the Crown although the functions to which they relate may be carried on by him as *persona designata*, not as agent of the Crown. This must be the case, since Ministers do not have an independent capacity to contract: see *infra*, note 49.

<sup>23</sup> On this see A. Hilliard, Case Comment (1976) 54 Can. Bar Rev. 401.

common law rule is that an unincorporated body may neither sue nor be sued on a contract, since only private individuals and corporations have a legal personality. This rule may be abrogated by statute, and where a public body is established by statute, it may be deemed a "suable entity," either expressly or by necessary implication<sup>24</sup>. When a power to enter into contracts is necessary for that body to function effectively, clearly it must be a suable entity by implication with the capacity to enter into contracts ancillary to its functions in the same way as a corporate body.

A body which is not a Crown agent obviously needs a capacity to contract in order to carry out its functions effectively. A Crown agent, on the other hand, does not normally need an independent capacity to make contracts. This is because it already has a power to make any necessary contracts, by virtue of the authority it possesses to contract on behalf of the Crown. The capacity to contract in its own name is not in any way necessary for it to function. Nevertheless, it is recognized that, in some cases at least, a Crown agent *does* have the power to contract in its own name, as well as on behalf of the Crown. It will be seen later that the reason this power has been recognized is that it provides a convenient device to avoid the operation of certain special rules and immunities which apply to the Crown but not to other public bodies. The nature of these rules and the precise significance of the independent capacity doctrine from this perspective are considered in the next section. Here, it is necessary to consider the scope of this capacity, and also its nature: does it allow an agent to undertake primary liability on a contract, or simply to make itself party to an agreement made on behalf of the Crown?

### 1. Corporate Crown Agents

A number of cases have questioned whether a Crown agent which is a corporation may contract in its own name. This possibility was first acknowledged in the English King's Bench decision in *Graham v. Her Majesty's Commissioners of Public Works*

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<sup>24</sup> *Perehinec, supra*, note 8.

*and Buildings*.<sup>25</sup> This case involved an alleged breach by the government of a contract for the plaintiff to construct a post office. At that time, the Crown enjoyed immunity from suit on its contracts; the only way in which proceedings could be brought before the court was by laying a petition of right, which required the Crown's fiat, or permission, before it could be heard. To avoid the need for a petition of right, the plaintiff sued the Commissioners instead of the Crown. The court held that an action could be brought against the Commissioners in their own name, and that the plaintiff could proceed against them in an ordinary action rather than by petition of right.

The two judges, however, took different approaches. Phillimore J. based his decision on the view that *whenever* a corporate Crown agent contracts on behalf of the Crown it may be sued in its own name. He seemed to think that this should apply whether or not the agent has actually purported to contract in its own name as well as (or instead of) on behalf of the Crown. The very purpose of incorporating such bodies, he reasoned, was to allow them to be sued on their contracts in order to avoid the petition of right procedure. He made it clear, though, that in other respects the action should be treated as one against the Crown. The effect of incorporation is simply to allow the agent to be sued in its own name as a "nominal" defendant for the Crown.<sup>26</sup>

Ridley J. concluded that the Commissioners were liable to suit on the view that they had actually contracted in their own name. Clearly he envisaged that they possessed the capacity to contract on their own behalf, as well as in the name of the Crown. Although he acknowledged that both capacities may exist with respect to the same contract, he did not contemplate the possibility that both may be party to the same contract. Thus, he says:

The question here is, Have the defendants, or have they not, been acting in this particular case in their capacity as agents of the Crown?... What we have to decide

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<sup>25</sup> [1901] 2 K.B. 781 [hereinafter *Graham*].

<sup>26</sup> *Ibid.* at 790-91.

here is whether the particular contract was made for and on behalf of the Crown, or was a contract made by the Commissioners themselves.<sup>27</sup>

It is not clear whether or not he thought that an authority is primarily liable when it undertakes liability in its own name.

Several subsequent cases have also considered the liability of corporate Crown agents to suit in their own name. One such case is *Gooderham & Worts v. Canadian Broadcasting Corporation*,<sup>28</sup> in which an action was brought against the CBC for specific performance of a lease and for damages for breach of its terms. This case was different from *Graham* in that the corporation had been given a specific statutory power to "sue and be sued" in contract in its own name. The issue considered here was whether the action was required to be brought in the Exchequer Court rather than the provincial courts (the Exchequer Court had jurisdiction if the contract were made on "behalf of the Crown").

The Ontario Court of Appeal held that the provincial courts did have jurisdiction. Riddell J.A. noted that the corporation had been given "full power to contract" and thus should be able to have its contracts dealt with by the ordinary courts. This seems to suggest that the corporation has an independent capacity to contract, rather than being liable simply as a nominal defendant for the Crown. However, he did not investigate the capacity in which the corporation actually contracted. The judgment of McTague J.A. is also ambiguous on whether liability is merely nominal, or whether it is dependent on the existence and exercise of an independent capacity to contract. He cited the judgment of Phillimore J. in *Graham* as authority for concluding that the corporation can be sued in the ordinary courts, assuming that this follows from the fact that the corporation can be sued in its own name. Unlike Phillimore J., McTague J.A. did not consider the mere fact of incorporation sufficient for liability, but thought that this depended on the construction of the particular statute. The corporation's liability to be sued on its contracts in the ordinary courts could be inferred since the corporation engages in activities all over the world and it would be inconvenient if it could not be sued in the ordinary way.

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<sup>27</sup> *Ibid.* at 787.

<sup>28</sup> [1939] 4 D.L.R. 241 (Ont. C.A.) [hereinafter *Gooderham & Worts*].

Again, he did not consider in what name the authority actually purported to contract. Although the judgements themselves are not clear as to whether liability is merely nominal, it is difficult to see how, if this is so, the contract cannot be considered to have been made "on behalf of the Crown" for the purpose of the *Exchequer Court Act*.<sup>29</sup> It may be noted that the wording of the relevant section was not actually discussed in the judgments. Nothing is said by either judge to indicate whether the corporation is capable of making itself *primarily* liable.

Another relevant case is *McLean v. Vancouver Harbour Commissioners*,<sup>30</sup> an action for damages for wrongful dismissal of a servant of the authority. One of the questions for the court was whether the Commissioners, a corporate body, could be sued in their own name. It was held in the affirmative by Robertson J. Again it is not considered in what capacity the authority had purported to contract, and it is possible that the judge considered liability in its own name to be automatic on all contracts made by the corporation on behalf of the Crown.

The question of whether a corporate body may be sued in its own name eventually arose for consideration by the Privy Council, on appeal from Ontario in *International Railway Ltd v. Niagara Parks Commission*.<sup>31</sup> In this case the Commission had taken over a railway run by the plaintiff pursuant to an agreement. Compensation had been settled by arbitration proceedings, but the plaintiff now sought interest on the award. The agreement expressly stated that it was made by the Commissioners "on their own behalf as well as on behalf of and with the approval of the government of the province of Ontario." The Plaintiff sued the Commission in the courts rather than proceeding against the Crown by petition of right. It was argued for the Commission that it only had capacity to make

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<sup>29</sup> This Act (R.S.C. 1970, c. E-11) was replaced by the *Federal Court Act*, R.S.C. 1985, c. F-7.

<sup>30</sup> [1936] 3 W.W.R. 657 (B.C. S.C.) [hereinafter *McLean*].

<sup>31</sup> [1941] A.C. 328 [hereinafter *Niagara Parks*].

contracts on behalf of the Crown. This argument was accepted by the lower courts.<sup>32</sup>

The decision on this point, however, was reversed by the Judicial Committee. Luxmoore J., giving the judgment, expressly rejected the view of Kelly J. that the "Commission has no other capacity than that of Crown agent or servant." He stated:

The Act of Incorporation plainly constitutes the commission as a corporation with a separate legal identity, and in some, at any rate, of its powers it was obviously recognised that it would have contractual capacity separate from the Crown, e.g., the power to make itself responsible for the moneys secured by debentures under the Act, for it is provided that the repayment of the moneys secured by the debentures 'may be guaranteed by the Crown'. This provision would be meaningless if the Commission was not to be under any liability in the first instance.<sup>33</sup>

He concluded that the Commissioners had the power to undertake liability on the contract and, as they had clearly purported to do so, could be sued on it.

It is significant that the approach of the Privy Council is the same as that of Ridley J. in *Graham*. The Court considers, first, whether the relevant legislation has conferred a capacity to contract on the agent, and, second, whether it has actually purported to contract in that capacity. Clearly, the Court does not consider that a Crown agent is automatically liable on any contract made by it on behalf of the Crown simply because it possesses corporate status, as Phillimore J. suggested in *Graham*. It seems to be assumed that the power to make *itself* party to the contract exists for any contract made on behalf of the Crown. But the Court does not consider whether the agent might undertake primary liability; this was not at issue, since the contract in question was clearly made on behalf of the Crown.

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<sup>32</sup> See the earlier decision of *Niagara Parks* at [1940] O.R. 33 (C.A.).

<sup>33</sup> See *supra*, note 31 at 342. The reasoning in this passage is open to some criticism. The provision for the raising of money by debentures which is referred to by Luxmoore J. seems to envisage a *primary* liability on the agent. If this were not so, there should be no need for the Crown to guarantee the debentures since it would probably be liable to be sued on the contract anyway. The fact that the Crown agent has a power to undertake primary liability in some cases is hardly a basis for deciding that an agent may undertake liability on a contract when it is acting on behalf of the Crown.

Thus, the courts have recognized that at least some of the corporate agents of the Crown may be liable to suit on contracts in their own name although they are acting on behalf of the Crown. Following the decision in *Niagara Parks*, it seems that their liability will depend on the existence and exercise of an independent capacity; they will not automatically be liable for all contracts made on behalf of the Crown. As will be seen in the next section, this approach is consistent with the position of unincorporated Crown agents. It has sometimes been suggested that the position could be affected by the provision found in the *Interpretation Acts* of both Canada and Ontario, which state that all corporations can sue and be sued.<sup>34</sup> A similar clause has been included in a number of English statutes setting out the powers of particular Crown agents, stating that the particular agent can sue and be sued. Such clauses have been held to render Crown agents liable to suit as nominal parties for the Crown in respect of all contracts made through their agency.<sup>35</sup> It is submitted, however, that such an interpretation is not plausible when applied to a section of a general statute dealing with *all* corporations, many of which are *not* Crown agents.<sup>36</sup> Clearly, the section is intended to make clear that such bodies are suable entities, liable to suit and able to sue on their *own* contracts. This view finds specific support in *McLean* (discussed above) in which the court, although considering the Commissioners liable to suit in their own name, rejected the argument that this consequence followed from a general clause stating that corporate bodies could sue and be sued;<sup>37</sup> the decision of the Court of Appeal in *Niagara Parks* also supports this notion.<sup>38</sup>

However, in a case like *Gooderham & Worts*, where there is a "sue and be sued" clause in the specific statute setting up the

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<sup>34</sup> *Interpretation Act*, R.S.C. 1985, c. I-21, s. 21(1)(a); *Interpretation Act*, R.S.O. 1980, c. 219, s. 26(a).

<sup>35</sup> *Minister of Supply v. British Thomson-Houston Co.*, [1943] 1 K.B. 478 (C.A.); *The Brabo*, [1949] 1 All E.R. 294 (H.L.), [1949] A.C. 326.

<sup>36</sup> This seems to be the view taken in A. Smith, "Liability to Suit of an Agent of the Crown" (1949) 8 U.T.L.J. 218.

<sup>37</sup> *Supra*, note 30 at 659-60.

<sup>38</sup> See *supra*, note 32.



agency, it is still arguable that the agent will automatically be liable on all contracts, though it is unclear whether in an independent capacity or as a nominal defendant for the Crown. It also seems that, as assumed in *Niagara Parks*, the power to contract in an independent capacity will generally exist whenever there is a power to contract on behalf of the Crown. If this power is recognized, there are no reasons why it should be more limited.

At the federal level, the question of an agent's power to contract in its own name when acting on behalf of the Crown is now affected by section 97 of the *Financial Administration Act*.<sup>39</sup> This section states that all agent corporations may enter into contracts in the name of the Crown or in the name of the corporation. An agent corporation is defined<sup>40</sup> as any corporation wholly owned by the Crown (or a wholly owned subsidiary of such a corporation) which is declared by statute to be an agent of the Crown, but excluding bodies classified in the *F.A.A.* as "departmental corporations." Generally speaking, this definition includes most Crown corporations engaged in commercial-type activities, while excluding those involved in regulatory and advisory functions.

The effect of a similar provision was considered by the Supreme Court of Canada in *Yeats v. Canada Mortgage and Housing Corporation*,<sup>41</sup> a case involving an alleged breach of a contract to lend money for a house purchase to the plaintiff. The issue was whether the provincial courts had jurisdiction over the question. The statute creating the corporation in this case stated that "[t]he corporation may, on behalf of Her Majesty, enter into contracts in the name of Her Majesty or in the name of the corporation" and further provided that "where the corporation has acquired or incurred an obligation in the name of the corporation it may sue or be sued in respect thereof in the name of the corporation."<sup>42</sup> It was

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<sup>39</sup> R.S.C. 1985, c. F-11 [hereinafter *F.A.A.*].

<sup>40</sup> *Ibid.*, s. 83(1) (see definitions of "agent corporation," "Crown corporation," and "parent corporation").

<sup>41</sup> [1950] S.C.R. 513.

<sup>42</sup> The *Central Mortgage and Housing Corporation Act* has been repealed, and the relevant sections 5(2) and 5(4) are absent from its replacement, the *Canada Mortgage and Housing Corporation Act*, R.S.C. 1985, c. C-7.

assumed for the appeal that the corporation had acquired or incurred the obligation in its own name. On this basis, the court held that the provincial courts did have jurisdiction over the claim.

It is not clear, however, whether the court considered the defendant liable in an independent capacity, or whether the effect of the section was simply to make it a nominal defendant for the Crown in cases where it chose to contract in its own name. On the one hand, the Court cites with apparent approval the decision of the English House of Lords in *The Brabo*<sup>43</sup> which seems to have been decided on the basis that the defendant was rendered liable by statute as a nominal representative of the Crown. The better interpretation concludes that the defendant corporation was independently liable in line with the common law because nominal liability would seem to bring a body within the provisions of the *Exchequer Court Act*. This *Act* requires that actions on contracts made on behalf of the Crown be brought in the Exchequer Court while the *Yeats* decision held that the corporation could be sued in the provincial court. The parallel provision in the *F.A.A.* is probably, thus, to be considered simply as a confirmation and clarification of the common law position regarding commercial Crown agents: when engaged in functions on behalf of the Crown, they may undertake contractual liability in an independent capacity should they so wish.

An important question remains as to exactly which corporate bodies the independent capacity doctrine applies where the issue is not dealt with by statute. At the federal level, this includes corporate Crown agents which are not within the definition of "agent corporation" under the *F.A.A.* – those which are given the power to contract in their own name by statute. In Ontario there is no statute applicable to this question. At the federal level, the scheme of the *F.A.A.* assumes that those corporate bodies outside the definition – those classified as "departmental corporations" (generally the non-commercial agents) – do not possess an independent capacity to contract. Obviously, it would be sensible for the court to construe legislation establishing specific corporations in the same manner as the scheme adopted in the *F.A.A.* and to deny such a capacity to those bodies. In jurisdictions where there is no statutory

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<sup>43</sup> *Supra*, note 35.

guidance, the courts are perhaps likely to recognize an independent capacity to undertake contractual liability according to whether or not a body is *commercial* in nature. As will be explained in the next section, this has been the approach with unincorporated bodies. It is always possible, however, that such a capacity might be recognized for all corporate Crown agents.

So far, the discussion has concerned contracts made by Crown agents on behalf of the Crown. But what of the power of Crown agents to undertake *primary* liability on their contracts? It is submitted that it would be odd if an agent were able to undertake primary liability on its contracts as a general rule. If the activity to which the contract relates is generally being carried out on behalf of the Crown with Crown funds, then ultimately Crown funds should be used to meet any liability on the contract. Furthermore, Crown agents often do not have assets of their own but hold all their assets on behalf of the Crown.<sup>44</sup> Thus, they obviously cannot undertake primary liability. As a general rule, then, it is submitted that statutes should not be construed as conferring on a Crown agent the power to undertake *primary* liability on a contract.<sup>45</sup> It is in fact now widely provided for by specific statutory provisions that Crown agents exercise their powers only as agents for the Crown, a policy which seems to preclude such agents from primary liability.<sup>46</sup> At the

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<sup>44</sup> In the federal jurisdiction, see *F.A.A.*, *supra*, note 39, s. 94 (all property held by an agent corporation is the property of the Crown).

<sup>45</sup> There are provisions in a few statutes stating that a Crown agent may employ servants on its own behalf and that such servants are not officers or servants of Her Majesty. An example is the *Canada Mortgage and Housing Corporation Act*, R.S.C. 1970, c. C-16, s. 14(1), although the corporation is also stated to be "for all purposes an agent of Her Majesty in right of Canada" (s. 5(1)). In *Briere v. Canada Mortgage & Housing Corp.* (1986), 30 D.L.R. (4th) 375 (Fed. C.A.), Marceau J. commented that this provision "cannot but prompt surprise." He could see no reason for it since the agent appears to have no independent assets; arguably, section 14(1) should be construed subject to section 5(4) in determining liability in contract with the Crown being primarily liable, and section 14(1) should be construed as having the more limited application of taking away an employee's status as Crown servant for the purposes of Crown immunity (as was held to be one consequence of the section in *Briere*). This is suggested as a possible interpretation of another statutory provision which has been held to make a servant an employee only of a Crown agent. See the discussion of *Washer v. British Columbia Toll Highways and Bridges Authority*, *infra* at 602-3.

<sup>46</sup> These provisions do not preclude the agency from making itself a party to a contract which is made primarily on behalf of the Crown - see *Perehinec*, *supra*, note 8, where both the agency and Crown were held liable on a contract where such a provisions applied.

federal level, this is provided for in the *F.A.A.* for agent corporations, and it is frequently provided for in specific statutes setting up Crown agencies. In Ontario, a similar provision applies to all bodies falling within the definition of Crown agent under the *Crown Agency Act*.<sup>47</sup>

If an agent does have independent assets which are distinct from those of the Crown, then it is not implausible for the legislature to provide that certain of its expenditures are to be deducted from those assets. A careful examination of the financial structure of the agency and of its financial relationship with the Crown is needed to see if this is an appropriate interpretation. A body or person which is a limited Crown agent by agreement will, of course, have its own assets, and will frequently make contracts outside the scope of its own agency for its own purposes, on which it will undertake primary liability.

## 2. Unincorporated Crown Agents

It is now necessary to consider the position of unincorporated authorities: when may a non-corporate Crown agent contract in its own name? The category of unincorporated authorities in the Canadian jurisdictions includes ordinary governmental departments<sup>48</sup> as well as a variety of other public bodies. To be contractually liable, such a body must be a suable entity, but this question often runs together with that of contractual capacity. If the legislation confers a capacity to contract, clearly the implication is that the authority is able to sue and be sued on those contracts, and thus, is a suable entity at least to that extent.<sup>49</sup>

In several decisions it has been held that an unincorporated Crown agent is not suable in contract. For example, *Flexlume Sign Co. v. Macey Sign Co.*<sup>50</sup> held that the Commissioner of Patents could not be sued on a contract in his official capacity. The decision in

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<sup>47</sup> R.S.O. 1980, c. 106, s. 2.

<sup>48</sup> In England, government departments have often been incorporated.

<sup>49</sup> This was the approach adopted in *Perehinec*, *supra*, note 8, discussed later in this section.

<sup>50</sup> (1922), 69 D.L.R. 632 (Ont. S.C.).

*Graham* was distinguished as only being applicable to corporations. It is also widely accepted that Ministers of the Crown are not liable to suit.<sup>51</sup>

An unincorporated body was, however, recently held liable in contract by the Supreme Court of Canada in *Perehinec*.<sup>52</sup> The case involved a claim for damages against the agency for breach of an employment contract which the agency had purported to make on its own behalf. The issue for decision by the Supreme Court was the familiar one of whether the provincial court had jurisdiction over the action. In this case, it was necessary to consider the application of the *Federal Court Act*, the successor to the *Exchequer Court Act*, which requires an action against the government to be brought in the Federal Court where it "arises out of a contract entered into by or on behalf of the federal Crown."<sup>53</sup> The Court held that the agency was liable on the contract in its own name, and that an action against it could be brought in the provincial courts. This applied, the Court said, even though the contract may have been made also on behalf of the Crown (in which case, presumably, the Crown would be primarily liable). In concluding that the agency was capable of contracting in its own name, the Court relied on a statutory provision which conferred on it a power to appoint staff without any specific reference to capacity. It may be noted that, like the Privy Council in *Niagara Parks*, the Court thought it relevant to consider whether the agency had actually *exercised* the power which it possessed to undertake liability in its own name; it did not consider liability to be automatic on all contracts made on behalf of the Crown.

What are the implications of this decision? As mentioned, the Court relies on a specific section in the statute as conferring contractual capacity. With corporate bodies, however, the courts

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<sup>51</sup> See *Fox Hitchener v. Alberta* (1977), 6 A.R. 43 (S.C.T.D.) (dictum that Attorney General not liable in contract in official capacity). The view that Ministers who have no corporate status are not liable in contract is expressed by Dussault & Borgeat, *supra*, note 6, and is assumed in the English decisions considering the effect of "sue and be sued" clauses, as to which see *supra*, note 35, and also *Rowland v. Air Council* (1927), 96 L.J. Ch. 470 (C.A.).

<sup>52</sup> *Supra*, note 8.

<sup>53</sup> See *supra*, note 29, s. 17(2)(b); see also *infra*, note 67.

have assumed the capacity to contract arises by implication and extends to all contracts made on behalf of the Crown. It is difficult to see why unincorporated bodies should be in a different position. It is submitted that the specific provision should be considered to have been included *ex abundanti cautela*, and that the general position should be applicable to corporate bodies.

Secondly, it is unlikely that this decision would be applied to governmental departments, even where these are given a specific statutory power to contract without reference to any particular capacity, as is sometimes the case. It has generally been assumed that such bodies always contract on behalf of the Crown. As with corporate authorities, a distinction seems to exist between commercial bodies and those of a more governmental nature in determining whether these authorities may contract in their own name.

Regarding the possibility of *primary* liability, the same points made in relation to corporate authorities apply. Thus, when exercising functions on behalf of the Crown, such bodies will generally be able to contract only as Crown agents, although in doing so they may render themselves liable to suit.

#### D. *In What Capacity Is The Contract Made?*

Where an authority possesses the power to contract only in one capacity – either as agent for the Crown or independently – that is the presumed capacity in which it will be considered to act if the contract is unclear. We have seen that Crown agents frequently have powers to make a particular contract both on behalf of the Crown and in their own name (although it was suggested that as a general rule they will not be able to undertake primary liability). In such cases, who is party to the contract depends, according to the approach adopted in the leading cases, on the capacity in which the agent has actually purported to act. Thus, having determined that a dual capacity to contract exists, it is necessary to consider in whose name the contract has been made: that of the agent, the Crown, or both?

In the context of determining the scope of the authority of a public body acting for the Crown, the Supreme Court of Canada

in *J.E. Verault & Fils Ltée v. A.G. Quebec*<sup>54</sup> stated that the ordinary private law rules of authority apply. In determining the capacity in which an agent acts in making a contract, the courts have similarly followed the basic private law approach of giving effect to the intentions of the parties to the contract, as determined through an examination of their actions and/or any relevant documents, and through the application of certain presumptions where their intentions are unclear. However, the equation of the position in public and private law cannot be taken too far because the nature of the relationship between government entities is very different from that between an ordinary principal and agent. A Crown agent generally does not have assets of its own. The consequences of the capacity in which liability is undertaken are also very different in public and private law, as will be further explained in the next section. Hence, the factors to be taken into account in construing the intentions of the parties are very different; their actions and documents cannot be interpreted in the same way as if both were ordinary private parties, and special policy considerations may sometimes be needed. Thus, although the basic approach is the same in both public and private law, the specific rules and presumptions of construction are inevitably somewhat different.

It is relevant first to consider the significance of a supposed rule which has been invoked in a number of cases dealing with a Crown agency. This rule states that where a person contracts as a Crown agent, there is a presumption that he contracts only on behalf of the Crown and does not undertake personal liability.<sup>55</sup> Hence, although under the usual rules of construction an agent might be considered to be undertaking personal liability, he will not necessarily be considered to do so when acting as a Crown agent:

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<sup>54</sup> *Supra*, note 20.

<sup>55</sup> *MacBeath v. Haldimand* (1786), 99 E.R. 1036 (K.B.); *Gidley v. Lord Palmerston* (1822), 129 E.R. 1290 (Common Pleas); *Sumner v. Chandler* (1878), 18 N.B.R. 175 (S.C.). It is said that this is a *supposed* rule since in many other cases it has been blatantly disregarded, even though lip service has been paid to it. See, for example, *Scully v. Baillie* (1834), 1 N.B.R. 407 (S.C.), and the cases referred to there by the reporter. No doubt these decisions were based on the desire to ensure that the other contracting party received payment – at the time, they were decided that the Crown itself could not be sued. It was assumed that although troublesome for him, the agent would in practise be reimbursed (and was legally entitled to be, the Crown no doubt being primarily liable).

the clearest indication of an intention to be personally liable is required. The reason for this rule, it has been said, is that any other "would in all probability, prevent any proper prudent person from accepting a public situation at the hazard of such peril to himself."<sup>56</sup>

This rule has sometimes been invoked in cases dealing with the liability of public authorities which are Crown agents. Thus in *Graham*, Ridley J. accepted that this presumption was relevant in considering the liability of the Commissioners, an incorporated public body, but he held that the presumption had been overcome on the facts of the case. It is clear, however, that given the stated rationale for the rule, it can have no application where what is in issue is the liability of a public authority as opposed to the liability of a private individual: there is no policy objection to finding such an authority liable on the contract. No doubt the point was appreciated by Ridley J. who could not point to any specific evidence to support his conclusion that the presumption should not apply. It is clearly preferable that it should be openly acknowledged that the principle has no application in such a case.

How is it, then, to be determined in what capacity, or capacities, a contract is made where a dual capacity exists? In the first place a person will, in public as in private law, be a party to the contract where this is clearly stated. Thus, in *Niagara Parks*, the Crown and the Commissioners were liable where both were named as parties in the written contract. But it is not always clear from the agreement who is a party to it; the documents may be ambiguous, mentioning both principal and agent without stating who is actually a party.<sup>57</sup> Alternatively, only the principal or the agent may be mentioned. In the latter case, under private law rules, this fact will generally not be conclusive of who is a party. It may be

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<sup>56</sup> *Dunn v. MacDonald*, [1897] 1 Q.B. 401 at 406 (C.A.), Charles J.

<sup>57</sup> This was the position in the English case of *Town Investments v. Department of the Environment*, [1978] A.C. 359 (H.L.). The case is not particularly helpful, however, since their Lordships seemed to assume (contrary to *Niagara Parks*) that it was not possible for the authority to undertake liability as both the principal and agent; it is also unclear whether many of their Lordships considered the Department to possess an independent capacity to contract at all.



shown that the other was also intended to be liable,<sup>58</sup> and there is no reason why this should not be so in public law also. In all these situations, to resolve the question of who is a party to the contract, one must determine the parties' intention. Some important presumptions will assist in ascertaining this intention.

First, it is suggested that when the agent acts on behalf of the Crown in making the contract, the Crown is intended to be a party to it.<sup>59</sup> The reason given is that most Crown agents hold their assets on behalf of the Crown, so that if the agent alone is liable, there may be no assets available to satisfy judgment. However, the decision of the Exchequer Court in *Johnston v. R.*<sup>60</sup> seems to be contrary to this principle. Cassels J. held that a petition of right did not lie against the Crown for the sum due under a contract made by the Commissioners of the National Transcontinental Railway; it was necessary to bring an action against the Commissioners themselves. The judge acknowledged that the Commissioners did not possess independent assets, but pointed out that the Crown could, no doubt, in practice make the moneys available. Although this may be so, it would be preferable to allow the money to be recoverable as a matter of law to avoid any possibility of payment being refused. It seems that the judge in the case did not appreciate that both the Crown and its agent could *both* be liable on a contract and based his conclusion on the assumption that if the Commissioners themselves were liable, then the Crown could not be. The Privy Council in *Niagara Parks* subsequently made it clear that both could indeed be liable on the agreement. In light of this decision, it is submitted that the *Johnston* case should no longer be regarded as authoritative. It is submitted that the Crown will generally be liable on any contract made by its agent for Crown purposes unless there is clear evidence that this was not intended.

What about the liability of the agent where such is not expressly stated? In *Niagara Parks*, the Privy Council expressly

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<sup>58</sup> *The "Swan,"* [1968] 1 Lloyds L.R. 5 (Adm.D.).

<sup>59</sup> Although there is no general principle in private law that a principal is also liable where the agent is; see Reynolds, *supra*, note 4 at 446.

<sup>60</sup> (1910), 13 Ex.Ct. 155, *aff'd* on other grounds (1911), 44 S.C.R. 448.

declined to comment on the "more difficult question"<sup>61</sup> of what the position would be if the agent had not been expressly stated to be a party to the agreement. In *Perehinec* (in which it is not clear from the case exactly what was stated in the documents), the Supreme Court relied on a presumption in favour of the provincial courts to conclude that the authority should be considered to have contracted in its own name. This judgment may suggest that, at least with federal Crown agents, there is a general presumption that they have contracted in their own name, in order to ensure that their contracts are subject to the jurisdiction of the provincial courts.<sup>62</sup> It may be, as will be explained in the next section, that a finding that a contract is made in a dual capacity and not just on behalf of the Crown may enable the courts to avoid applying special Crown rules, which are sometimes inappropriate. If this is the case, it may also encourage the courts to adopt a presumption of this kind. However, the position is uncertain. In private law, the courts have often been willing to find an agent to be a party to a contract, either where this provides a particular advantage to the other party to it, or where the agent is actually mentioned in the agreement.<sup>63</sup>

Before proceeding further, it is useful to summarize the main propositions so far stated regarding the government's capacity to contract:

(i) The Crown has an unlimited capacity to enter into contracts at common law. Bodies which are Crown agents by statute have the authority to exercise this power on its behalf in order to make contracts which are reasonably incidental to the performance of their statutory functions.

(ii) Some Crown agents also have a capacity to make themselves party to a contract made on behalf of the Crown, with or instead of the Crown. This capacity should be the same whether the body is incorporated or unincorporated. This capacity is probably possessed only by bodies of a commercial nature.

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<sup>61</sup> [1941] A.C. 328 at 342 (P.C.), Luxmore L.J.

<sup>62</sup> It is not clear from the judgment in *Perehinec* itself whether the agent was mentioned in the written contract.

<sup>63</sup> See, generally, Reynolds, *supra*, note 4 at 426-47.

(iii) Crown agents do not normally have the capacity to undertake primary liability on contracts which are incidental to the activities in which they engage on behalf of the Crown.

(iv) Where an agent has independent capacity, there is, nevertheless, a strong presumption that the Crown is made party to the contract. There may also be a presumption that the agent is also liable, at least with federal agents. With some federal Crown agents, the liability of the agent is provided for by statute as a rule of law.

### III. THE SIGNIFICANCE OF THE CAPACITY IN WHICH CONTRACTS ARE MADE

We now turn to an examination of the significance of the capacity in which the government is liable on a contract. This topic was broached on in the previous section on several occasions, but it must now be considered in more detail.

#### A. *The Position of Government Bodies Inter Se*

We must consider first the significance of the issue of capacity for internal government relations: which funds are ultimately to pay for the contract, those of the Crown or of the agency? The question of primary liability is significant. It has been mentioned that assets used by government agencies are generally held on behalf of the Crown. Hence, the Crown is normally primarily liable on government contracts, either by statute or under the common law (although it is possible that an agent may have its own assets and pay some of its liabilities from these).

An alternative legal regime might have each agency owning all its own assets, with its own revenues and expenditures accruing to and being paid for out of these assets. Such a regime might have some advantages in ensuring that each agent is financially accountable for its activities, and that any funding from external sources is clearly apparent. At present, this accountability is a

matter of internal government practice subject to the *F.A.A.*<sup>64</sup> and other statutory provisions. Clearly, under the present regime, the relationship between the different institutions of government is quite different from that between the normal principal and agent in private law (where the agent has its own assets, used for its own distinct purposes).

## B. *The Position of the Other Party to the Contact*

### 1. General

The capacity in which a contract is made by an agent of another may be important to the other party to the contract. This other party is usually concerned with who is a party to the agreement, and not with the issue of primary liability.<sup>65</sup>

In public law, the question is significant for some of the same reasons as in private law. In both cases, it is necessary to know who is properly named as a party to the action. A mistake, however, will not entail serious consequences: a party will simply be required to pay the costs of amendment. It is more significant in private law that the assets of a party to the agreement will be available to satisfy a judgment against it, regardless of the question of primary liability. This is important if either principal or agent is insolvent. The prospect of a defendant becoming insolvent in the usual way is, of course, remote in public law. But it has been seen that government bodies often hold all their assets on behalf of the Crown, so that the Crown itself must be party to the agreement. It was suggested that there is a presumption to this effect. However, the theoretical possibility remains that an agent may choose to contract so as to render only itself liable to suit.

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<sup>64</sup> *Supra*, note 39.

<sup>65</sup> There is a possible exception to this in public law *if* the application of special Crown rules to an action against an agent depends on whether or not the Crown is primarily liable. On this see the discussion later in this section.

Other situations in which the question of contractual liability often arises in private law – such as where the principal is outside the jurisdiction<sup>66</sup> – are unimportant in public law. There are other reasons why the question of contractual liability may be significant in public law, arising from the existence of a number of special legal rules applying to the Crown but not to other public bodies. In some cases, at least, these rules do not apply where a Crown agent contracts in its own name. However, as will be seen, the precise significance of the independent contractual capacity of Crown agents is in many areas very uncertain. It is now necessary to consider this aspect of contractual capacity in more detail.

## 2. Jurisdiction of the Federal Court

One reason why it may be necessary to know who is party to the contract is to determine in which court an action on the contract should be brought: in the Federal Court or the provincial courts. The former has *exclusive* jurisdiction under the *Federal Court Act* over any claim *against* the federal government which "arises out of a contract entered into by or on behalf of the Crown."<sup>67</sup> Does this provision apply where a Crown agent is sued in its *own* name on a contract made for the purposes of the Crown? If not, it is necessary to determine whether the contract is made in the name of the Crown, the agent, or both, in order to know the appropriate forum<sup>68</sup> for an action against the government.

The question is governed to some extent by section 98 of the *F.A.A.*<sup>69</sup> This provides that proceedings in respect of a contract

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<sup>66</sup> The difficulties led to a presumption that an agent acting for a foreign principal intended to undertake personal liability. With the development of better communications, this rule seems to be on its way out; see Reynolds, *supra*, note 4 at 435-36.

<sup>67</sup> See *supra*, note 29, s. 17(2)(b). Although see *Zutphen Brothers Construction v. Dywidag Systems International Canada Ltd* (1987), 35 D.L.R. (4th) 433 (N.S. S.C.), holding the exclusive jurisdiction of the Federal Court to be unconstitutional.

<sup>68</sup> If the contract is made in the name of both, the plaintiff may choose the forum by choosing whom to sue.

<sup>69</sup> *Supra*, note 39, s.98.

of an agent corporation<sup>70</sup> may always be brought in the court that would have jurisdiction if the corporation were not an agent of the Crown, even where the contract was concluded in the name of the Crown. The scope of this provision is not entirely unambiguous. It could mean that an agent corporation can sue in the provincial courts on any contract which it makes, even if it is made *only* in the name of the Crown. Alternatively, "entered into" might mean "entered into in law" so that the agent can only be sued in the provincial courts if it has actually contracted in its own name. Probably the first interpretation is correct, since the section embodies a policy decision that the contracts of these commercial-type bodies may be dealt with in the ordinary courts if the plaintiff so chooses. If this is so, it is unnecessary for this purpose to determine whether the agent has contracted in its own name. It may, though, be relevant to know whether the Crown is a party should the plaintiff wish to sue in the Federal Court.

What is the position of Crown agents with a power to contract in their own name which are not agent corporations?<sup>71</sup> The question was considered by the Supreme Court of Canada in *Perehinec*<sup>72</sup> in which an unincorporated authority was sued in its own name. The court, relying on the presumption in favour of the jurisdiction of the ordinary courts, held that the action could in such a case be brought in the provincial court, even though the authority was acting on behalf of the Crown. Thus, it seems that where a body (which is not an agent corporation) concludes a contract for the Crown, the plaintiff will still have the choice of forum if the agent has made the contract in its own name. In this regard, the position may differ slightly from that of an agent corporation with which, it was suggested, the choice of forum exists under statute, irrespective of the capacity in which the agent actually purports to act.

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<sup>70</sup> For the definition of "agent corporation," see *supra*, note 39, s. 83(1).

<sup>71</sup> It was suggested earlier that the only other federal authorities with a power to undertake contractual liability in their own name are unincorporated bodies of a commercial nature.

<sup>72</sup> *Supra*, note 8.

In contract actions brought by a Crown agent, the jurisdiction of the Federal Court is limited to where the action is based on an existing federal statute<sup>73</sup> (though this is not usually the case). Where the action is based on a federal statute, jurisdiction is concurrent with that of the provincial courts "where the Crown or the Attorney General of Canada claims relief."<sup>74</sup> Normally the Crown will be party to the contract and so will be able to choose the forum; and arguably, it can also do so under this provision where it is primarily liable, although not party to the contract.

The question of forum does not arise where an action involves the Crown in right of a province as opposed to the Crown in right of Canada; such actions are always brought in the provincial courts.

### 3. Privileges and Immunities of the Crown

In addition to a special forum for the resolution of some disputes it is involved in, the Crown enjoys a number of privileges and immunities which may affect its position in contract. One former immunity of great importance, which was mentioned in the previous section, was the Crown's freedom from contractual suit in an action: proceedings could be brought against it only by petition of right. The need for a fiat to bring proceedings in contract was long regarded as an unjustified anachronism<sup>75</sup> which has now generally been abolished by statute in Canada<sup>76</sup> and Ontario.<sup>77</sup> However, a number of immunities remain which are relevant to the Crown's contractual activities. In the first place, at common law an

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<sup>73</sup> *Quebec North Shore Paper Co. v. Canadian Pacific Ltd.*, [1977] 2 S.C.R. 1054; *McNamara Construction (Western) Ltd v. R.*, [1977] 2 S.C.R. 654.

<sup>74</sup> *Federal Court Act*, *supra*, note 29, s. 17(5)(a).

<sup>75</sup> The discretion to refuse a remedy has been exercised even in relatively recent times; see the Law Reform Commission of British Columbia, *Legal Position of the Crown* (Working Paper No. 7) (Vancouver: The Commission, July 1972) at 21-22.

<sup>76</sup> *Crown Liability Act*, R.S.C. 1985, c. C-50.

<sup>77</sup> *Proceedings Against the Crown Act*, R.S.O. 1980, c. 393.

injunction is probably not available against the Crown,<sup>78</sup> and thus, cannot be obtained to prevent or restrain a breach of contract by the Crown. Specific performance is also unavailable although a party may obtain a declaration of entitlement to such a remedy.<sup>79</sup> Another special rule, which is also relevant from a contractual context, is that the assets of the Crown cannot be subject to execution when judgment is given against it.<sup>80</sup> Special rules have also been applied to the Crown's relationship with its servants. Once it was arguable that such a relationship normally would not be contractual at all. It was held recently in *A.G. Quebec v. Lebreque*<sup>81</sup> that the Crown's relationship with a casual employee was a contractual one. Authority still favours the existence of the rule that unless there is anything to indicate to the contrary, servants of the Crown are dismissable at pleasure.<sup>82</sup>

Finally, there is the rule that the Crown is not bound by a statute which would be burdensome to it unless expressly mentioned in the statute.<sup>83</sup> This rule is of diminished importance in relation to contractual matters since the Supreme Court of Canada decision in *Bank of Montreal v. A.G. Quebec*.<sup>84</sup> In that case, the government claimed the amount of a cheque, with a forged endorsement, debited to its account. The Bank raised the defence that legislation required

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<sup>78</sup> See J.M. Evans, *De Smith's Judicial Review of Administrative Action*, 4th ed. (London: Stevens & Sons, 1980) at 445.

<sup>79</sup> *Dominion Building Corp. v. R.*, [1933] 3 D.L.R. 577 (P.C.). In Ontario, these rules have been embodied in statute; *Proceedings Against the Crown Act*, supra, note 77, s. 18.

<sup>80</sup> At the federal level, see *Crown Liability Act*, supra, note 76, s. 17(1); *Federal Court Act*, supra, note 29.

<sup>81</sup> [1980] 2 S.C.R. 1057.

<sup>82</sup> See, for example, *Clarke v. A.G. Ontario*, [1966] 1 O.R. 539 (C.A.). This rule has been subject to criticism in the Supreme Court; see *Nicholson v. Haldimond-Norfolk Regional Board of Commrs of Police*, [1979] 1 S.C.R. 311 at 332-33, Laskin C.J., and *Nova Scotia Government Employees Assn v. Civil Service Commission of Nova Scotia*, [1981] 1 S.C.R. 211 at 222, Laskin C.J. However, it continues to be followed; see, for example, *Malone v. Ontario* (1983), 45 O.R. 206 (H.C.).

<sup>83</sup> *Interpretation Act*, R.S.C. 1985, c. I-21, s. 17; *Interpretation Act*, R.S.O. 1980, c. 219, s. 11. The common law rule was that the Crown would not be bound unless this appeared expressly or by necessary implication.

<sup>84</sup> [1979] 1 S.C.R. 565.



notice to be given of a forged endorsement within a year of discovery of the forgery, which had not been done. In reply, the government alleged that it was not required to give this notice since, by virtue of Crown immunity, it was not bound by the statute in question. The Court rejected this defence, and held that the Bank was not liable to pay because the obligation arose not by operation of law but by contract. The statute, the Court said, simply regulated the terms of the contract, and since the Crown is bound by its contracts in the same manner as private individuals, it could not rely on its special "prerogative" here. Immunity, it was said, depends on "whether the source of the obligation is contractual or legislative."<sup>85</sup> This considerably reduces the importance of this immunity in relation to contracts, but it does not seem to cover all legislation touching on contract such as that relating to the formalities for the creation of contracts, or general legislation governing costs and interest on judgments. The rule may, thus, still be of some relevance in a contractual action.

All these immunities will apply when the party to an action on a government contract is the Crown. But do they also apply where a Crown agent sues, or is sued, in its own name? If not, then clearly the existence of the agent's capacity to undertake contractual liability in its own name may be of some importance.

Consider the case where a Crown agent contracting in its own name acts on behalf of the Crown – that is, where the Crown is primarily liable. This is usually the position; an agent rarely undertakes primary liability. A number of decisions are relevant to the question of whether Crown immunities apply in such a case. First, there are the petition of right cases. As explained earlier, the original development of the independent capacity doctrine was prompted by a desire to avoid the anomalous petition of right procedure; it was held that this procedure did not have to be used where proceedings were brought against a Crown agent in its own name, but that it could be used in an ordinary action in the usual manner. It was seen that the approach of some judges was to regard the agent as automatically open to suit as a nominal defendant of the Crown. If this were the case, it would be expected

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<sup>85</sup> *Ibid.* at 574.

that the usual Crown immunities would apply in any action against the agent; this was expressly stated to be the case by Phillimore J. in *Graham*. However, as noted, the Privy Council in *Niagara Parks* took the view that a corporate agent's liability depends on the possession and exercise of an independent capacity to undertake contractual liability. On this approach, the conclusion that the petition of right procedure does not apply to a Crown agent suggests that the agent is not to be treated as the Crown for the purpose of applying Crown immunities.

Arguably a similar conclusion is suggested by the reasoning of the decisions considering the appropriate forum for actions under the *Federal Court Act*. In *Perehinec*, it was held that an action against a Crown agent in its own name did not arise out of a contract made "by or on behalf of the Crown" for the purpose of the *Act*, even though the agent was acting for the Crown, and the contract was also made in the Crown's name. In other words, the agent is not to be treated as if it were the Crown, in applying the section where the Crown is primarily liable on the relevant contract. A similar conclusion was reached in earlier cases dealing with corporate agents of the Crown. However, all these cases could be explained as turning on the constitutional presumption against the ousting of the jurisdiction of the ordinary courts. This presumption was expressly invoked in *Perehinec* in construing the relevant statutory section.<sup>86</sup> If explained in this way, they would not necessarily be relevant in considering the application of other immunities.<sup>87</sup>

Another case which might be used to support an argument that an agent sued in its own name does not benefit from Crown immunity is *Washer v. British Columbia Toll Highways and Bridges Authority*.<sup>88</sup> In this case, the Court held that the rule that Crown servants are dismissible at pleasure did not apply to a servant of the

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<sup>86</sup> *Supra*, note 8 at 521-22.

<sup>87</sup> It will also be remembered that it is now provided by statute that agent corporations may be sued in the ordinary courts. The decision in *Perehinec* may thus also be seen as an attempt to bring the position of unincorporated bodies in line with those which are incorporated.

<sup>88</sup> (1965), 53 D.L.R. (2d) 620 (B.C. C.A.).

authority. However, it may be that the court based its conclusion on the view that the agency was primarily liable on the contract: it was said that the servant in question was "not a servant of the Crown but only a servant of a Crown corporation which was an agency of the Crown."<sup>89</sup> This interpretation<sup>90</sup> is supported by the fact that the Court distinguished the power to employ servants from other powers of the agent (whose powers were stated generally to be exercisable on behalf of the Crown) on the basis that it was conferred to capacity by a specific statutory provision without any reference to capacity. Obviously, on this standing, the decision is irrelevant to the case where the Crown is primarily liable. It may be noted that if this is the correct interpretation, the decision is open to criticism; the court does not address the question of whether the agency had its own assets from which its servants could be paid. Alternatively, the decision might be interpreted as meaning simply that although paid by the Crown, the servant is not to be treated as a Crown servant for the purpose of Crown immunity. However, even if this is so, it does not provide authority for the general view that Crown immunity does not apply when an agent is sued in its own name because of the emphasis placed on the specific statutory section.

These cases could all be interpreted as providing support for the view that an agent sued in its own name does not enjoy the benefit of Crown immunity, but they are not conclusive. Supporting the contrary view, on the other hand, is the case of *McLean*.<sup>91</sup> As mentioned earlier, the case involved an action for unfair dismissal. Having determined that the agency was suable in its own name, the Court considered whether the rule that Crown servants are dismissible at pleasure applied in an action against it. It held in the affirmative: "in this regard the defendant's position is the same as the Crown."<sup>92</sup> Clearly, the judge is of the view that an agent

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<sup>89</sup> *Ibid.* at 628.

<sup>90</sup> The Supreme Court in *Perehinec* seemed to interpret the decision in this manner, assuming that the contract had been made on behalf of the Crown as well; see *supra*, note 8 at 538.

<sup>91</sup> *Supra*, note 30.

<sup>92</sup> *Ibid.* at 663.

bénéfits from Crown immunities whenever it acts on behalf of the Crown.<sup>93</sup>

One final case to note in this context is *Langlois v. Canadian Commercial Corporation*,<sup>94</sup> a decision of the Supreme Court of Canada. The corporation was sued in its own name on a contract made on behalf of the Crown. The Court was required to consider whether the corporation could take the benefit of the rule that the Crown is not bound by statute unless expressly mentioned. (In this case the relevant statute provided that interest should be paid on damages). A statutory provision stated that the corporation could be sued on contracts which it made on behalf of the Crown "as if the right or obligation had been acquired or incurred on its own behalf." It was held that the corporation could not take the benefit of Crown immunity since had the obligation been incurred on its own behalf, it would "stand in the same position before the Court as any private corporation."<sup>95</sup> The significance of this decision is not entirely clear because of the ambiguity in meaning of "on its own behalf." This phrase could refer simply to the agency contracting in its own name, in which case the decision suggests that an agent sued in its own name generally does not enjoy the benefit of Crown immunity. On the other hand, it could refer to the agency undertaking primary liability on a contract (which is the more usual meaning of the phrase). If this is the case, then the decision has no relevance in considering an agency's position when it acts for the purposes of the Crown.

The case law in this area does not really provide a clear answer to the question of how far an authority enjoys Crown immunity when it is acting on behalf of the Crown but is party to an

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<sup>93</sup> Although the Court considered that the agency was acting for the Crown (see *ibid.*) and was entitled to the benefit of Crown immunity regarding the dismissal of servants, it also reached the rather odd conclusion that an action was not required to be brought in the Exchequer Court for a contract made "by *or* on behalf of the Crown"(emphasis added). Furthermore, it has been suggested that where a contract is made by an authority as agent of the Crown, there is a strong presumption that the Crown itself is *party* to the contract. The conclusion that it was not, in this case, may be doubted. It seems that these conclusions are based on an assumption that only the Crown *or* agent could be liable, and not both; that both could be liable was established in the later *Niagara Parks* case.

<sup>94</sup> [1956] S.C.R. 954.

<sup>95</sup> *Ibid.* at 957.

action in its own name. Can any guidance be found in the decisions dealing with the application of immunity to Crown agents in other contexts? Unfortunately, the uncertain state of contract law reflects the long-standing confusion and controversy which pervades the whole area of Crown immunity. Analogy is, thus, also incapable of providing a conclusive answer to this question, or any clear indication of the direction which the courts are likely to take.

On the one hand, there has been considerable criticism of the scope of many immunities, and the courts have sometimes avoided applying these even to bodies of a clearly governmental nature. An example appears in the development of the *persona designata* doctrine that allows the courts to apply to Ministers the coercive remedies unavailable against the Crown.<sup>96</sup> The notion behind the doctrine's development – that public authorities do not benefit from Crown immunity when acting in an independent capacity – might suggest that immunity does not apply to a Crown agent contracting in its own name. It is true that in acting as *persona designata* a Minister is not acting on behalf of the Crown at all, which an agent normally is when entering into contracts, but he does use Crown revenues in carrying out these functions. Crown agents have also been held to be liable in tort<sup>97</sup> in an independent capacity. They are not entitled to the common law Crown immunity from suit even when the tort arises from the agent carrying out a Crown purpose. This analogy suggests that an agent sued in its own name in contract would not enjoy Crown immunity. A general hostility to the current width of Crown immunities can also be seen in the Supreme Court of Canada Crown decisions in *A.G. Quebec v. Labrecque* and *Bank of Montreal v. A.G. Quebec* mentioned earlier. Apart from criticisms of the existence or scope of certain immunities, particular objection has been made to the application of the immunity doctrines to bodies of a predominantly commercial nature. It has been seen that the power to undertake contractual liability in an independent capacity is probably confined to such bodies. This view perhaps makes it particularly likely that the courts

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<sup>96</sup> See *Air Canada v. A.G. British Columbia*, [1987] 1 W.W.R. 304 (S.C.C.); *R. v. Leong Ba Chai*, [1954] S.C.R. 10; *Minister of Finance of British Columbia v. R.*, [1935] S.C.R. 278.

<sup>97</sup> *Quebec Liquor Commission v. Moore*, [1924] S.C.R. 540.

will use the doctrine as a device to avoid Crown immunities, meaning that these immunities would apply only to the more peculiarly governmental authorities (whose reliance on some of the present immunities is generally considered more justifiable).

All this suggests that the courts may be prepared to take the view that an authority contracting in its own name does not enjoy the benefit of Crown immunity. Nevertheless, some recent cases have continued to uphold Crown immunity in the traditional manner for agents engaged in functions on behalf of the Crown. The traditional approach was recently adopted by the Supreme Court of Canada in *R. v. Eldorado Nuclear Ltd.*<sup>98</sup> In this case, the Court held the corporation to be immune from the operation of the *Combines Investigation Act* (which created certain criminal offences), by virtue of the Crown's immunity from the burden of statutes in which it was not expressly mentioned. The Court reached this conclusion despite its own view that it was undesirable as a matter of policy to apply the immunity to a commercial body of this kind, and refused to accept the argument that the agent could not be acting for the purposes of the Crown when engaged in unlawful activity.<sup>99</sup> In doing so, the Court clearly opted for tradition and consistency. This approach would clearly favour applying Crown immunity to agents contracting for Crown purposes, no matter in which name any action is brought. In view of the conflicting attitudes shown to Crown immunity by the courts in recent years, it is difficult to predict what the attitude of the Supreme Court would be to the present problem. The question must be considered to be an open one.

There is much to be said for a policy of applying Crown immunities to certain government activities, but not to those involved in commercial-type activities. However, even if the courts were to favour this approach, there are some problems with the independent capacity doctrine (as applied in *Niagara Parks* and *Perehinec*) as a device for achieving this end. This is because the

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<sup>98</sup> [1983] 2 S.C.R. 551.

<sup>99</sup> Earlier in *Canadian Broadcasting Corp. v. R.*, [1983] 1 S.C.R. 339, the Court held that immunity does not apply where the agent acts outside the purposes of the statute. But, in *Eldorado*, it refused to include all criminal or tortious activity within this principle.

application of immunities in any given case will depend on two things. First, it will depend on the capacity in which the agent has purported to act in making the contract in question. An agent could choose to make contracts only in the name of the Crown, and thus ensure that it is always able to take the benefit of Crown immunities. This problem can be met partially by a strong presumption that a Crown agent contracts in its own name, but this could be rebutted by clear words. Second, even where the contract is made in a dual capacity, whether Crown immunities apply may depend on the capacity in which the agent sues or is sued. Where the agent itself is suing, it may be able to take the benefit of Crown immunities by choosing to sue in the name of the Crown. Thus, suppose a statute imposes limits on the contracting parties' right to specific performance in certain circumstances, and there is no express mention of the Crown, so that it is not bound. Even if an agency would be bound by a statute if it sued in its own name, it could avoid its imposed limitations by suing in the Crown's name. The effect of any rule stating that a Crown agent does not enjoy the benefit of Crown immunities when sued in its own name will be mitigated since Crown agents often do not own independent assets. Thus, although a plaintiff may be able to succeed in his action by suing the agent in order to avoid the application of Crown immunities, it may be futile to do so where damages are sought, since there may be no assets from which the judgment can be satisfied. This route is unsatisfactory since an element of arbitrariness and inconsistency is introduced into this area of the law.

So far we have considered the case where an agent contracts in the course of carrying out functions on behalf of the Crown. But what is the position where a Crown agent acts entirely on its own behalf – that is, where it is primarily liable on a contract? It has been said that the decision in *Washer v. British Columbia Toll Highways and Bridges Authority*<sup>100</sup> may be such a case. Here, the Court concluded that although the authority itself was a Crown agent, its servant was not a servant of the Crown and hence could not be dismissed at pleasure. If this is based on the view that the

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<sup>100</sup> *Supra*, note 88.

contract was not made on behalf of the Crown, then it tends to suggest that Crown immunities do not generally apply where an agent undertakes primary liability. Apart from this case there seems to be no other authority relevant to this point. Where a body is a Crown agent for most purposes under statute it is perhaps open to debate whether it should enjoy immunity in respect of other functions also. However, where a company or individual is made a Crown agent by agreement for limited purposes, it is quite clear that it cannot by virtue of that agreement enjoy Crown immunities in carrying out its own independent functions!

#### 4. Immunity of Crown Agents from Warranty of Authority Rule

It is relevant also to mention briefly another special rule which is not an immunity of the Crown itself, but which applies to individual Crown servants which exceed their authority to contract on behalf of the Crown. Normally an agent acting outside the scope of its authority in making an agreement is liable to indemnify the other party for loss it suffers as a result of the alleged principal not being bound by the contract; it is said that the agent gives an implied warranty that he has authority to act for the principal. This rule, however, has no application to individuals contracting on behalf of the Crown.<sup>101</sup> The rationale for the rule (as with the presumption against the personal liability of Crown servants) is that persons would otherwise be deterred from entering the service of the Crown.<sup>102</sup> It could perhaps be argued that the rule does not apply where an individual purports to bind a Crown agency in its own name, but has no authority to do so. In such case, the other party to the agreement could then recover for loss suffered from the agency not being bound. As with the application of immunities which benefit the Crown itself, it is difficult to predict what the attitude of the courts is likely to be.

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<sup>101</sup> *Dunn v. MacDonald*, *supra*, note 56.

<sup>102</sup> As with the presumption against the personal liability of Crown servants, this rule also should not apply to public bodies acting as agents of the Crown since this policy consideration has no relevance in such a case.



## 5. Miscellaneous

The question of the capacity in which a contract is made could also arise in a miscellany of other contexts with the application of both statutory and common law rules. A case where this problem arose, in considering the application of a statute, is the English case of *Town Investments v. Minister of the Environment*.<sup>103</sup> The House of Lords had to decide whether certain premises were protected from rent increases under counter-inflation legislation. For the relevant statute to apply, it was necessary that the *tenant* and the *occupier* be the same person. A lease had been made through the Department of the Environment, which provided accommodation for other government bodies. The premises were occupied by officials of another department. It was argued that the Minister of the Environment was the tenant and not the Crown, and that since the premises were occupied by a different department, the tenant and occupier were not the same person. The court held, however, that the lease had been entered into on behalf of the Crown and the premises were also occupied on behalf of the Crown. Hence the legislation applied.

This particular question was approached by considering in what capacity the government had actually purported to contract. It is submitted that it is inappropriate that the application of the legislation should have depended on this point. It would have been preferable to have taken a less technical approach in construing the meaning of the statutory terms *tenant* and *occupier*, and to have considered whether the two were *in substance* the same, having regard to the policy of legislation. Since the Department had been acting as a common service agency in making the contract, certainly the conclusion reached was correct, but it would have been better to have looked directly to the realities of the relationship between different government agencies, rather than analyzing the problem in terms of technical private law relationships. This is a point to be considered should the question arise in any similar context.

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<sup>103</sup> *Supra*, note 57.

#### IV. CONCLUSION: THE NEED FOR A COHERENT APPROACH

It has been explained that the Crown has a capacity at common law to make contracts, and that Crown agents have the authority to exercise this power on its behalf in order to make contracts in connection with the functions which they carry out. In addition, some Crown agents – as a general rule, those of a commercial as opposed to an administrative nature – have the power to make themselves party to a contract, as does the Crown. Since they have the power to make any necessary contracts by acting in the name of the Crown, Crown agents do not need any power to contract in their own name in order to function effectively. The reason such a power has been recognized by the courts is to avoid applying to these bodies certain special Crown rules and immunities – in particular, the former requirement for a petition of right for contractual proceedings against the Crown, and the statutory provisions for actions against the Crown to be brought in a special court.

As noted, an argument can be made that Crown privileges and immunities generally do not apply when a public authority is party to a contract in its own name. If this is so, then Crown immunities will rarely apply to the contractual activities of Crown agents which are commercial in nature. This view is attractive to many who feel that such commercial bodies should not enjoy the benefit of such privileges, even if their application to bodies of a more governmental nature is justified. However, as explained, the law on this question is currently uncertain: it is unclear whether the independent capacity doctrine has any current significance for third parties apart from the question of the appropriate forum for bringing an action. This position is, as indicated, both a reflection and a consequence of the confused state of the law relating to Crown immunities generally. The Law Reform Commission of Canada, in its recent Working Paper, *The Legal Status of the Federal Administration*,<sup>104</sup> has called for a thoroughgoing legislative review of the operation and scope of Crown privileges. The confusion and

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<sup>104</sup> See Working Paper No. 40, *supra*, note 3.

uncertainty in the law relating to the contractual powers of the Administration clearly illustrates the urgent need for a review of this nature.

To the extent that the scope of special Crown rules *have* been curtailed through the development of the common law, it has been seen that the use of the independent capacity doctrine to achieve this end is far from ideal. In the leading decisions, both the Privy Council and the Supreme Court of Canada have adopted the approach of treating the Crown and the specific public authorities acting as its agents as distinct legal entities with a separate capacity to contract, and have applied to these the same concepts of agency as apply between private persons (rather than simply treating public authorities as nominal Crown representatives as was suggested in some of the early judgments). It was seen that the effect of this is to make the scope of Crown immunities dependent to some extent on the choice of the parties. Their operation may depend, first, on the capacity in which the parties choose to contract and second, where the contract is made in a dual capacity, on the capacity in which an agent is party to the action (which may depend on its own choice). Although in practice this may cause infrequent problems, in principle the approach is unsatisfactory. Obviously in any reform, any relevant immunities should apply, where apt, as a matter of law, and not depend on the intentions of the contracting parties.

Where the legislature has intervened in this area, the approach has also been unsatisfactory. Generally this has been done by imposing reforms on top of the basic principal-agency model developed by the common law. This has been the case even when laying down rules which are to apply as a matter of law (as, for example, with the provision considered in *Langlois*). Because of the complexity of this basic model, this approach has sometimes introduced unnecessary uncertainty and ambiguity into the law. It is submitted that any reform of this area should abandon this dual capacity model entirely and state the scope of any relevant rules clearly and simply by reference to the body or functions to which they are to apply.

Finally, it should be emphasized that apart from its role in limiting the operation of special Crown rules, the dual capacity doctrine is largely redundant. The concept does not fulfil the same functions in public law as in the private sphere, where the law is

generally concerned with the relationship between distinct persons with their own separate interest and own assets. The relationship between the various organs of government is wholly different in nature and throws up completely different problems. It has already been suggested that it is not an appropriate doctrine to employ in dealing with the problem of Crown immunities; equally it is submitted that it is not a helpful concept in considering other problems relating either to the dealings of government bodies *inter se* or their relationship with outside parties. In its recent Working Paper, the Canada Law Reform Commission also called for a more general reform of the current dual status of the central Administration at the federal level; the examination of the operation of this duality in relation to contractual powers provides clear support for the arguments for reform on this point. The duality doctrine developed as an *ad hoc* response to specific problems of Crown immunity; these problems would be better dealt with in other ways, and its present operation produces a complexity and uncertainty which is surely out of place with the needs of the modern commercial world.