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Faculty of Law,
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Vancouver, Canada

Date September 30, 1980
ABSTRACT

In 1841 Lord Sydenham, as Governor of the United Provinces, established a Board of Works as a separate legal entity to construct a canal system. This was the first public or crown corporation. Since then, there has been a significant increase in the use of the corporate form of enterprise organization and management by the government.

However, this marked governmental dependency on the corporate legal form has not been matched by any appreciable inquiry into the legal problems and issues posed and raised by the chosen legal form. This essay attempts to analyse some of those problems and issues.

Part One deals with the definition and classification of public corporations as well as the juridical forms that these corporations take. Interest groups, namely, taxpayers, creditors and suppliers of crown corporations, and victims of crown corporation delinquency are also introduced.

The substantive legal liability of crown corporations forms the subject of Part Two. Here the contractual and tortious liability of crown corporations as well as their liability for wrongs committed outside their national jurisdiction are considered. The procedural aspects of crown corporation law are treated in Part Three.

A basic problem that runs through Parts Two and Three is the dual nature of crown corporations. In substance, crown corporations are public authorities; they are part of the state machinery. In form, crown corporations are approximated to and resemble, private corporations. They enter into contracts and other legal relationships, commit torts and other legal wrongs, just like private corporations do. Since the crown, as the
personification of the state, traditionally enjoys a number of substantive and procedural immunities and privileges, it becomes necessary to determine the extent to which crown corporations partake of those immunities and privileges. At the same time there are sound reasons for arguing that crown corporations should be placed in the same position as private corporations, that is, they should not be permitted to shelter behind crown immunities and privileges.

The legal duties of those entrusted with the management and administration of crown corporations and the issue of creditor protection are examined in Part Four.

The discussion is conducted in the light of the interests of those groups referred to above. Proposals and suggestions are made in the course of the essay. A summary and conclusions appear in Part Five.
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1. INTRODUCTION

The proliferation of governmental activities and operations, a process which began in the last century but has assumed pre-eminence in the course of the present one, has blurred the once hallowed distinction between private and public powers. It can no longer be assumed, as was generally the case under the predominance of liberal economic philosophy in the nineteenth century that commercial and other economic activities are the province of the private sector, while that of the public sector is confined to defence, foreign affairs and certain elementary police and administrative functions. Now the activities of the state cover a large number of economic, managerial and industrial functions, as well as social services of many kinds.

More significantly for present purposes, the process or phenomenon just adverted to has brought to the forefront a search for a legal, administrative and organizational structure or framework suited to the changed, widened and extended activities of the state. In shopping around for such a structure the Canadian government, like other governments the world over, has stumbled upon the corporate form of enterprise organization. Hence the public or crown corporation. In slightly different language, Allan B. Blakeney reports on this development as follows:-

"Governments which only a few decades ago contended themselves with a very narrow field of activity are today branching forth into new and very different avenues of public service. This broadening of the scope of governmental activities has led to the evolution of new types of public administration. One of the new types which has found increasing favour in recent years has been the crown corporation."  

The use of the word 'new' by Allan B. Blakeney, unless otherwise
explained, would seem to be inappropriate. Public or crown corporations are not new legal institutions in the sense of having been established thirty or forty years ago. The factual situation is that, in Canada, the crown corporation made its debut in 1841, when Lord Sydenham, then Governor of the United Provinces, established a Board of Works with corporate form to construct a canal system. Since then, crown corporations have continued to mushroom.

Not unexpectedly, in their one hundred and forty or so years of existence, public or crown corporations have raised a myriad of issues and problems for lawyers and economists as well as political scientists. To the lawyer, issues relating to the legal status of these corporations, their liability to those they have wronged and the duties and responsibilities of those entrusted with the management and administration of these organizations, inter alia, require urgent and immediate examination and consideration. The extent to which crown corporations partake of crown immunities, privileges and prerogatives is of special vitality. These and other legal issues and problems form the substance of this essay, but the non-legal aspects of crown corporations are not completely ignored; they are discussed in so far as they pave the way for a legal exposition.

II. FORMS OF LEGAL PERSONALITIES

The concept of the legal, juristic or artificial personality manifests itself in a variety of forms. Without any doubt, the state is evidently the largest and most important legal personality. While it is an accepted fact that the state, by its legislature, makes laws, it may itself be bound by those laws, and notwithstanding the fact that, by its courts and tribunals, the state settles disputes, it may itself be bound by judicial
decrees. Thus, the state may be the subject of proprietary, contractual and tortious rights and duties. In a nutshell, it is a legal person.\textsuperscript{10}

In the second place are private corporations or companies. Their features are innumerable, and they appear in all sizes but the most outstanding features of these corporations are that they are basically privately owned and financed and their control, in terms of day-to-day activities, is in private hands, not public or official bodies or persons. Of course one does not lose sight of the fact that occasionally, private corporations, especially the large or widely-held ones, look to the government for funding. Also the protection of the general public calls for some measure of public or governmental control over these corporations.\textsuperscript{11} Private corporations, in Canada, are generally incorporated under the Canada Business Corporations Act\textsuperscript{12} and the various Provincial Statutes providing for the incorporation of companies,\textsuperscript{13} and operate in what the economists tell us is the private sector.

Not far removed from the state or government are purely official organizations, whose finances are provided by the taxpayer, whose affairs are concerned with government, and whose officers are public officials, responsible to a political authority and through that authority to the public at large.\textsuperscript{14} Local Government authorities provide obvious examples. These organizations are, however, detached from the state in that they incur liabilities and enforce their rights separately.

Next come the public corporations which may be divided into three broad categories; namely; - National or, in the Canadian context, federal public corporations; Provincial or state public corporations;\textsuperscript{15} and International or Multinational public corporations.\textsuperscript{16} This work is
devoted to Canadian federal public corporations. Save for purposes of comparison and analogy, provincial and international or multinational public corporations are not treated in this work. If any explanation should be sought, it is that any task must have its limits, otherwise it becomes too wide and unmanageable. Further, the sort of issues and problems raised and posed by provincial public corporations are to a large extent similar to those raised and posed by Federal public corporation and a repetitive analysis is therefore eschewed.

III. TERMINOLOGY

In the first place, the word 'crown' is not used in any personal sense but is used as "a convenient symbol for the state."  

"Crown in fact means government, and government means those innumerable officials who collect our taxes and grant us patents and inspect our drains. They are human beings with money-bags of the state behind them." 18

And Wells J.A. in Formea Chemicals Ltd. v. Polymer Corporation Ltd.19 was in agreement when he said;-

"The words 'Government of Canada' in this section may, I think, be equated with the term 'the crown' as used in many of the English decisions . . . In my opinion the words 'the crown' and the words 'the Government of Canada' have the same meaning." 21

The term 'Her Majesty' is assigned the same meaning.22 If then, crown means government, 'crown corporations' mean government corporations. They may as well be referred to as state corporations. Crown corporations are, however, legal entities, separate and distinct from the state or government,23 a clear application of the principles of the epoch-making case of Salomon v. Salomon & Co.24

In the second place, crown or government corporations are also herein
referred to as 'public corporations' insofar as 'public' expresses the antithesis of 'private'. They must at once be distinguished from large, widely-held or super-corporations, operating in the private sector but which are also sometimes referred to as public corporations. It has been claimed that there is little to distinguish between crown or public corporations and the giant private corporations; that both types of corporation perform vital societal functions, make decisions of national importance, and set policy in significant areas of concern, for example, the allocation of resources, the direction and nature of investment; and that in a real sense the giant private corporations are arms of the State. It may well be so, but the fact that crown or public corporations are financed by the taxpayer and controlled by the government whereas giant private corporations usually look to the private capital market as a source of funds and are not generally subject to ministerial and parliamentary control and guidance, is sufficient ground for a separate treatment of the two types of corporation. There is the further consideration that crown corporations are instruments of public or national policy while private corporations, whatever their size, are primarily motivated by the lust for profit.

'Crown corporations' and 'Public corporations' are used interchangeably.

IV. DEFINITION OF CROWN CORPORATION

It has been rightly pointed out that a precise definition of the term "public corporation" is far from easy and that little attempt has been made to give a general definition, but that should not deter one from trying to find a working definition of the same. Indeed a number of authors,
writers and essayists have endeavoured to define a public or crown corporation. L.C.B. Gower defines a public corporation as "... the type of body set up to operate nationalized industries or for the organization of other public enterprises and services." This definition does not tell us much about the public corporation and whatever force it might have, is minimized, in the Canadian context, by the fact that nationalization has not been as big or controversial an issue in Canada as it has been in Great Britain. John Loxley and John Saul understand public corporations to be "... those organizations which fall outside the main lines of the departmental and ministerial hierarchies and which have in consequence, some measure of quasiautonomy in their day-to-day activities (though of course all are ultimately tied into the centralized decision making process). This definition is pregnant with ambiguity. To R.B. Turkson public corporations are "... corporate bodies which have been established by parliament under legislation outside the framework of the Companies Code ..." Limitations must be placed on this definition as well, because there is nothing to prevent a government from establishing a public corporation within the framework of a companies or corporations code. In fact, in Canada, a number of public corporations have been incorporated under the Canada Business Corporations Act or its predecessors.

W. Friedmann outlines, in lieu of a definition, what he calls the universal legal characteristics of the public corporation. Some of these characteristics appear as follows:

(i) The public corporation is normally created by special statute or (exceptionally) by charter. It does not, like a commercial company, come into existence automatically, on fulfilment of certain conditions.
(ii) The public corporation has no shares and no shareholders, either private or public. Its shareholder, in a symbolic sense, is the nation represented through Government and Parliament.

(iii) The responsibility of the public corporation is to the Government, represented by the competent Minister, and through the Minister to Parliament.  

(iv) The administration of the public corporation is entirely in the hands of a Board which is appointed by the competent Minister, sometimes after and mostly without consultation with any special group or industry but invariably not on a basis of representation of special interests. Neither the Board members nor any employees of a Board are civil servants.

(v) The public corporation has the legal status of a corporate body with independent legal personality.

(vi) All public corporations are supervised by independent accounting and auditing as well as some form of public control. But the type of accounting and public control varies according to the type of public corporation.

(vii) All public corporations have a dual nature; they are instruments of national policy but they are autonomous units, with legal independence and certain aspects of commercial undertakings. The degree of independence varies, however, according to the type and purpose of the public corporation.  

Canadian authors have also made their contribution. Ashley and Smails define a crown corporation as "an institution with corporate form brought into existence by action of the Government of Canada to serve a public function." The acquisition or take-over by the Government of Canadair Limited and the De Havilland Aircraft of Canada Limited, formerly private companies, has undermined this definition. These two companies are beyond dispute, crown corporations, but it cannot be contended that they have been brought into existence by action of the Government of Canada; they were acquired as going concerns.

A statutory definition of a crown corporation is provided in section 61(1) of the Financial Administration Act as follows:-
"Crown corporation' means a corporation that is ultimately accountable, through a Minister, to Parliament for the conduct of its affairs, and includes the corporations named in Schedule B, Schedule C, and Schedule D."

Schedules B, C, and D appear as Appendix A, B, and C respectively hereto.

This definition has been condemned for uncertainty, ambiguity and confusion. Ashley and Smails reject this definition because the expression "through a minister" which appears in the definition leaves one wondering whether the Minister has a responsibility for the conduct of the corporation or whether he acts merely as a messenger or a reporting link to Parliament for the crown corporation. The true position is that the Financial Administration Act (F.A.A.) and the acts establishing the corporations vest considerable powers in the appropriate Minister. These powers imply a greater role and responsibility than simply a reporting link. For example, under the F.A.A. the appropriate Minister, with the President of the Treasury Board, approves the annual operating budgets of crown corporations and with the Minister of Finance and the President of the Treasury Board, recommends the approval of annual capital budgets to the Governor in Council. Further, under the constituent acts of the Northern Canada Power Commission, Central Mortgage and Housing Corporation, St. Lawrence Seaway Authority, Canadian Commercial Corporation, Agricultural Stabilization Board and Atomic Energy Control Board, the appropriate Minister has the power to direct the corporation respecting the exercise and performance of corporate powers and functions.

The Privy Council Office reported some confusion surrounding the term 'crown corporation' owing to the statutory definition quoted above and that this confusion stems from the fact that the statutory definition is not exhaustive, since one must look beyond the F.A.A. to determine what are
crown corporations. This criticism is generated by the word "includes" in that definition. To remedy the situation and remove any ambiguity associated with the term crown corporation, the government proposed that the term 'crown corporation' should be applied only to those corporations listed in the schedules of the F.A.A. and that a corporation could be added to the schedules and thereby become a crown corporation only if it were wholly-owned by the Government of Canada, either directly or indirectly through another crown corporation. Such a criterion would cover all corporations listed in the schedules of the F.A.A., plus subsidiaries of crown corporations and their subsidiaries as well as all corporations wholly-owned by the Government of Canada.

The above criticisms of the statutory definition of crown corporation are not without validity but the basic flaw in this definition is that it is silent on two of the fundamental characteristics or attributes of the public or crown corporation, namely that they are wholly-owned by the government and are instruments of broad national or public policy. The other fundamental attributes are that public corporations are financed through public sources, are subject to public control and are corporate bodies. A public or crown corporation may, therefore, be defined as a body corporate which is wholly-owned by the government and is an instrument of national or public policy. It is basically financed by the government and is subject to public control at two levels - cabinet or Ministerial and Parliamentary.

V. CLASSIFICATION OF CROWN CORPORATIONS

The Financial Administration Act, part VIII of which deals specifically with crown corporations, provides for the classification of crown corporations as "departmental", "agency" and "proprietary"
corporations. This classification is based on the extent of financial independence enjoyed by the corporations and the general nature of their activities.

(a) **Departmental Corporations**

A departmental or Schedule B corporation is "... any crown corporation that is a servant or agent of Her Majesty in right of Canada and is responsible for administrative, supervisory or regulatory services of a governmental nature." Save that they are legal entities, departmental crown corporations are indistinguishable from ordinary departments of government in the general character of their activities and their relations with the appropriate Minister as well as their financial administration. They are financed by appropriations and all their cash transactions take place through the consolidated Revenue Fund, and the Treasury Board, the Comptroller of the Treasury and the Auditor General have powers of control and regulation over their finances and accounting records. They are all audited by the Auditor-General of Canada.

In essence, therefore, departmental corporations are departments of government over which, in addition to the above authorities, the Governor in Council or the appropriate Minister exerts more or less continuous financial control and direction as would be the case for an ordinary department of government. They enjoy very little, if any, administrative and financial independence.

(b) **Agency Corporations**

An agency or Schedule C corporation is "... any crown corporation that is an agent of Her Majesty in right of Canada and is responsible for the management of trading or service operations on a quasi-
commercial basis, or for the management of procurement, construction or disposal activities on behalf of Her Majesty in right of Canada." Agency corporations are usually given controlled revolving funds. Each corporation is required to submit an annual operating budget to the appropriate Minister, which, after approval by the Governor in Council on the recommendation of the Minister responsible and the Minister of Finance, provides the figures for operations included in the estimates presented to Parliament. A capital budget is also required which is laid before Parliament, after approval by the Governor in Council on the joint recommendation of the appropriate Minister and the Minister of Finance. Annual reports, including financial statements, are required as soon as possible, but within three months, after the end of the financial year. They are addressed to the Minister, who lays them before Parliament within fifteen days of their receipt or if Parliament is not then in session, within fifteen days of the opening of the next session. The Governor in Council may make regulations with respect to the conditions upon which an agency corporation may undertake contractual commitments. Agency corporations have more breathing space, in terms of administrative, operational and financial independence, than departmental corporations.

(c) Proprietary Corporations

At the other end of the scale are proprietary corporations. A proprietary or Schedule D corporation is one that "... is responsible for the management of lending or financial operations, or for the management of commercial and industrial operations involving the production of or dealing in goods and the supplying of services to the public, and is ordinarily required to conduct its operations without appropriations."
Proprietary Corporations are clearly differentiated from departmental organizations by virtue of their having boards of management with substantial powers of direction and a corresponding diminution of ministerial responsibility. Unlike normal government departments and departmental corporations, proprietary corporations function primarily in spheres of active economic endeavour - finance, production, commerce and industry - and are normally expected to finance themselves, once they are firmly on their feet, from the sale of goods and services.

The government is not expected under the F.A.A. to approve or even see the annual operating budgets of proprietary corporations, but must approve their annual capital budgets. This means that while the government supervises the capital proposals and general policy of proprietary corporations, the persons entrusted with the management of these corporations have a free hand as far as day-to-day operations are concerned. Consequently these corporations enjoy the greatest degree of financial, administrative and operational autonomy. It is said that this relative independence from Parliament and government is necessary to establish an environment which will attract businessmen to the management of an entrepreneurial activity on behalf of the public, to protect the commercial secrecy of competitive crown corporations and to facilitate business management in the marketplace.

Like agency corporations, proprietary corporations must produce annual reports.

(d) Unclassified Crown Corporations

It has already been noted that by the use of the word "includes" in the statutory definition of crown corporations, crown corporations are
not limited to those organizations appearing in Schedules B, C, and D of the F.A.A. and using the definition of crown corporation herein enunciated, another set of crown corporations is discernible. These are referred to as other or unclassified crown corporations. They may be set up by specific Acts of Parliament or may be acquired by the government of Canada as going concerns. Wholly-owned subsidiaries of departmental, agency and proprietary corporations, which are not listed in any of the schedules to the F.A.A., also fall under this category. All unclassified crown corporations are not subject to the provisions of Part VIII of the F.A.A. and are governed by their acts or other documents of incorporation.

A partial list of unclassified crown corporations appears as Appendix D.

VI. JURIDICAL FORMS OF PUBLIC CORPORATIONS

Public or crown corporations take two juridical or legal forms depending on the mode of their creation.

(a) Statutory Corporations

These crown corporations are created by specific acts of Parliament or statutes. The incorporating statutes spell out the objectives, powers and other mundane matters incidental to the operation of the corporations and generally provide for the organization of the corporations. Statutory corporations pass under various names and titles - Boards, Commissions, Councils and Authorities, and form the largest portion of crown corporations. Examples of these corporations would include Atomic Energy Control Board, National Harbours Board, National Battlefields Commission, Northern Canada Power Commission, National Research Council, Canada Council, St. Lawrence Seaway Authority and Atlantic Pilotage
Authority.

(b) **Commercial Companies**

These corporations differ from statutory corporations in that they are not created by specific Acts of Parliament but are incorporated under the Canada Business Corporations Act (or its predecessors).

(i) **Crown Companies**

Crown companies are wholly-owned by the Government of Canada and are incorporated pursuant to a general power such as that found in the Defence Production Act or pursuant to a company formation power contained in an Act of Parliament setting up a statutory crown corporation. For example, section 27(1) of the St. Lawrence Seaway Authority Act provides that the St. Lawrence Seaway Authority, a statutory corporation, may, with the approval of the Governor in Council, procure the incorporation of any one or more corporations for the purpose of undertaking or carrying out any acts or things that the Authority is authorized to undertake or carry out. Atomic Energy of Canada Ltd., Canadian Arsenals Ltd., Defence Construction (1951) Ltd., Uranium Canada Ltd., Eldorado Aviation Ltd., and Eldorado Nuclear Ltd. are examples of crown companies.

Nationalized companies like Canadair Ltd. and De Havilland Aircraft of Canada Ltd. are included in this sub-set.

(ii) **Semi-Public or Mixed Enterprise Companies**

Somewhere along the line between purely private corporations and crown or public corporations lie the mixed enterprise companies. There is no universally accepted definition of a mixed enterprise company. However, the term "mixed enterprise company" is normally used to describe an enterprise the capital of which has been subscribed in part by private
interests and in part by Government and in which the Government has a measure of control by its possession of a right to nominate a specific number of directors. But these corporations reflect diversities both in the extent of governmental ownership and the nature of the partnerships consumated. In some cases, the state participates only with private corporations or firms while in others ownership is shared between the government and the general public, and in yet others the federal government, provincial governments and private investors all participate. Appendix E gives some of the better known mixed enterprise corporations.

Like crown companies, mixed enterprise companies are generally incorporated under corporation statutes and this explains their inclusion under the sub-heading 'commercial companies.' It is, however, apparent that mixed enterprise corporations are not strictly crown or public corporations and for that reason, fall outside the province of the present discussion. Further reference to them is, therefore, to be treated as an inevitable digression.

(iii) **Advantages of the Commercial Company Form**

R.F. Cranston and K.K. Puri note a tendency or trend for government to participate in economic activities in much the same way or manner as ordinary individuals. Rather than adopting the form of statutory corporation, many government enterprises currently utilize the legal form of an ordinary private corporation, that is, the commercial company form, wherein the shareholder or the most prominent shareholder, is the government. These observations are made with respect to Great Britain but are equally applicable in Canada. The commercial company form offers the following advantages for government enterprise:
(a) There is no need for special legislation to create such an entity. This is particularly important in times of emergency or crisis when conditions may not be conducive to parliamentary sittings or where a delay in calling parliament may cause irreparable damage. In Canada, during the Second World War, thirty-three crown companies were established to assist in the War effort.91

(b) It allows for participation by private interests through the sale of shares. Some doubts are raised about this advantage by the fact that the Canada Development Corporation, a statutory corporation, is a mixed enterprise, in which both the federal government and members of the general public are shareholders. Also, in 1936, an amendment to its constituent act made the Bank of Canada, a statutory corporation, a mixed corporation whose shares were to be held partly by the government and partly by the general public. This arrangement, however, lasted for only a short period before a further amendment resulted in all the shares being held by the government.92 The result is that any legal form of public corporation may allow for the participation in the enterprise by private interests.

(c) Government enterprises in the form of commercial companies are more flexible than statutory corporations in that there is no need for legislation to change their memorandum and
articles of association or other legal documents.  

(d) It is also contended that commercial companies are in a more competitive position and are less likely to attract opposition by acquiring the appearance of being in a favoured position with respect to such matters as procurement of financial assistance.  

II. NATURE OF ACTIVITIES CARRIED ON BY CROWN CORPORATIONS

Crown corporations are engaged in a plethora of activities which are divisible into two broad categories.

(a) Economic or Commercial Activities

These include banking and insurance, oil production, manufacturing real estate business, transportation and communications, electric power generation, mining, retail and wholesale trade. Economic and commercial activities while predominantly national in terms of operational field, sometimes spill over into the international market-place. Air Canada, the Canadian Broadcasting Corporation and Petro-Canada, among others, are empowered by their constituent acts to engage into international or transnational transactions. In a reciprocal fashion, foreign public corporations operate in the Canadian market.

Economic and commercial activities are essentially the preserve of agency and proprietary corporations.

(b) Non-Commercial or Other Activities

Under this category are research and management, administrative and supervisory or regulatory activities. They are principally undertaken
by departmental corporations.

The purpose of elucidating the nature of activities carried on by crown corporations is not to indulge in idle verbiage but to highlight a seemingly commonplace, but important factor, namely; that crown corporations do not function in a vacuum or a void but in a volatile world of legal relationships and engagements, rights and duties and responsibilities and interests, all striving for legal recognition and protection. The significance of this, if not already clear, is disclosed in the following section.

VIII. INTEREST GROUPS

Since crown corporations do not function in a vacuum, they necessarily come into contact with a wide variety of persons both within and without Canada and enter into multi-facetted legal relationships. They enter into contracts, commit torts and other delinquencies, making the issue of legal liability very urgent. The taxpayer, the universal guarantor of the crown corporation,98 cannot justifiably be relegated to a position of obscurity. Consequently, any meaningful analysis of the legal status or aspects of crown corporations must take cognizance of the interests of those persons who are in one form or the other affected by the activities or operations of crown corporations, and an abstract analysis is therefore rendered obsolete and is eluded. For the purposes of this essay the following interest groups are identifiable:-

(a) The Taxpayers

The Canadian taxpayers, by providing the funds utilized by crown corporations, are in effect the shareholders of these corporations, though they have no share certificates.99 Unlike shareholders in private
corporations who have legally recognized and enforceable personal proprietary rights in their shares and are entitled to a profit or dividend as and when it is available, taxpayers as shareholders in crown corporations, do not as such have a legally recognized and enforceable right arising from their contribution to the funds that form the life-line of crown corporation and do not anticipate a personal return on their money. But that is not to say that taxpayers are without any interest worthy of legal recognition and protection and by force of this statement, it is contended that, like shareholders in private corporations, taxpayers are, in law, entitled to expect that their money is not dissipated in unauthorized ventures or undertakings or does not form the object of private appropriation by those in charge of the corporations. Lord Denning, in _Tamlin v. Hannaford_, said, in connection with the protection of the taxpayer's interests:-

"... in this corporation ... there are no shareholders to subscribe the capital or have any voice in its affairs. The money which the corporation needs is not raised by the issue of shares but by borrowing; and its borrowing is not guaranteed by debentures, but is guaranteed by the Treasury. If it cannot pay, the loss falls on the consolidated fund ...; that is to say, on the taxpayer. There are no shareholders to elect directors or to fix their remuneration. There are no profits to be made or distributed. The duty of the corporation is to make revenue and expenditure balance one another, taking, of course, one year with another, but not to make profits. If it should make losses and be unable to pay its debts, its property is liable to execution, but it is not liable to be wound up at the suit of any creditor. The taxpayer would, no doubt, be expected to come to its rescue before creditors stepped in. Indeed, the taxpayer is the universal guarantor of the corporation. But for him it could not have acquired its business at all, nor could it now continue for a single day. It is his guarantee that has rendered shares, debentures and such like all unnecessary. He is clearly entitled to have his interest protected against extravagance or mismanagement." 104

This issue in _Tamlin v. Hannaford_, which was decided in the affirmative,
was whether or not the British Transport Commission, a public corporation, was bound by the Rent Restriction Act. The case, as can be gathered from the above quotation, considered a number of aspects of the public corporation, but the reader is, at this stage, requested to concentrate his attention on the question of taxpayer protection and in this respect the principles therein embodied are as equally applicable in Canada as they are in Britain.

Taxpayers as well as other members of the general public have interests also as users of the goods and services produced and offered by public corporations; they are the beneficiaries of the activities of public corporations. Therefore, virtually everyone in the land is concerned in seeing that public corporations are properly run and this calls for a high degree of probity on the party of management.

(b) Creditors, Suppliers and Others

In the first place, creditors, suppliers and all manner of persons having dealings with crown corporations have an interest in ensuring that their contracts or other engagements are given legal force and that in case of a dispute they should be able to obtain an adjudication thereon with a minimum of obstacles. It is desirable for the proper conduct of business that persons who contract with crown corporations for business purposes should have the same power of appealing to Her Majesty's Courts in the matter of the construction of such contracts or other legal contentions as any subject might have against his fellow subject. This would seem to rule out the application of Crown immunities, privileges and prerogatives to crown corporations.

In the second place, creditors need the assurance that any money lent to crown corporations will be used for the purposes for which it is intended.
and not diverted into dubious channels. Unless duties are imposed on management, creditors must look to divine or other equally uncertain powers.

(c) Victims of Delinquencies Committed by Public Corporations

These include victims of torts, breaches of contracts, unpaid employees and other equally unfortunate persons. Since as was noted, public corporations operate on the international plane, the issue of legal liability in respect of the aforesaid misdeeds transcends Canadian frontiers and bounces into the international arena, thus necessitating an examination of the international legal status of the public corporation. The persons that have been labelled victims of crown corporation delinquency are entitled to expect that wrongs done to them are expeditiously remedied and that their way to redress is not unnecessarily hampered. Galipeault J. in C.B.C. v. Cyr while dealing with the issue of whether garnishee proceedings could be taken against a crown corporation, had the occasion to revert to some of the inconveniences that may be subjected to victims of crown corporation wrongdoings when he said;-

"... it would be strange that the Legislature should have given it [the C.B.C.] the power to retain the services of technical, professional and other officers and clerks and necessary employees, should declare it to be a body corporate with capacity to contract, to sue and be sued, not in the name of His Majesty the King but in its own name, and at the same time should deprive those contracting with it of their recourse and of the ordinary procedure to establish their rights." 107

And further on he added;-

"If the contention of the appellant were sustained, it would be necessary for an employee hired by the Commission [the C.B.C.] which fixed his remuneration, each time that he wished to claim his salary, to proceed by way of petition of right. Nothing, I believe, will support the contention ... Parliament, in declaring that the corporation may be sued, would at the same time be denying an employee the right to recover his wages, would be
taking away with one hand what it gave with the other." 108
Indeed, it sounds absurd. Galipeault J. confined himself to employees but as has already been shown, the range of potential victims extends further than that. 109

IX. OBJECT OF RESEARCH

The position taken in this work is that the interests of the groups above referred to, are real and therefore worthy of legal recognition and protection. The object of this work, therefore, is to analyse, in a historical context, the extent to which the courts have vindicated or given legal recognition and protection to the interests of these groups and to suggest possible solutions where any particular approach by the courts, in relation to these interest groups, is considered wanting. It will, in particular, be pointed out that by a process of identifying crown corporations with the crown, the courts have sought to confer crown immunities, privileges and other advantages upon crown corporations to the detriment and inconvenience of those dealing with or having claims against, crown corporations. This has been the case especially in the fields of torts and international law and in the area of procedures.

This work will further show that there is a virtual absence of judicial consideration of the legal duties and responsibilities of those entrusted with the management of crown corporations and of the question of creditor protection. This does not mean that directors and managers of crown corporations should be left to their own devices or that those who provide funds to these corporations should be helpless spectators to their money being diverted into unauthorized channels.

It will be argued that no legal principle requires the attribution of
crown advantages to crown corporations and it will be suggested that there is a need on the part of the legislature to provide clear and positive solutions to the above issues and problems.
PART TWO
SUBSTANTIVE LEGAL LIABILITY OF CROWN CORPORATIONS

I. INTRODUCTION

In attempting to analyse the issue of the substantive legal liability of public or crown corporations one comes face to face with the interests of the victims of crown corporation delinquency as well as those of creditors, suppliers and other persons having dealings with crown corporations. The question that is, in effect, being asked is: Is Air Canada legally liable to 'A' if one of its aircraft flies into A's house or to 'B' if it fails to pay for fuel supplied to it on credit, by B? This is only a hypothetical case and the issue of the legal liability of crown corporations manifests itself in a variety of ways, but it suffices for a statement of the general nature of the problem. Before tackling the main issue or problem, a few preliminary observations are pertinent.

II. THE DUAL NATURE OF CROWN CORPORATIONS

Wills J. in the case of Gilbert v. Trinity House Corporation1 said:-

"The contention that there may be certain purposes in respect of which the Trinity House must be regarded as a private corporation, and other purposes in respect of which it must be regarded as a great department of state, appears to me singularly untenable. The common law furnishes no such instance of a composite person or corporation, and I can hardly conceive that any such person or corporation can have that duplicate capacity vested in them by statute . . . . I am clear that at common law there is no instance of any person or body having two distinct capacities - in one of which there is no liability to be sued because the person or body is the direct representative of the crown, and in the other there is a liability to be sued because the capacity is that of a private corporation or person." 2

The facts of that case were as follows: A beacon vested in the Trinity House Corporation, a statutory public corporation, having become partially destroyed, the corporation licensed one Griffiths to remove it, and in so
doing he negligently left an iron stump sticking up under water. The plaintiffs brought an action to recover damages caused thereby to their ship. The Defendant corporation contended that as crown servants entrusted with the performance of public functions, they were not liable. This is the contention that Wills J. rejected and accordingly the Defendant corporation was held liable for Griffiths' negligence. The decision in this case is, no doubt, commendable, for it is in accord with the protection of the interests above referred to, and takes the position that will ultimately be advocated for in this essay, that is, if a crown corporation commits any wrong, justice demands that it answers for its misdeed in the same way and to the same extent as an ordinary person or corporation would do so.

Unfortunately, subsequent cases and writings have proved Wills J. wrong insofar as he purports to deny the dual nature of crown corporations and the courts have confused an otherwise clear case of legal liability on the part of crown corporations. For example, in In re Oriental Holdings Pty. Ltd., it was held that the Victoria Railways Commissioners were entitled to crown priority in payment of a debt owed to them by a company in liquidation. The debt arose out of a sale of coal by the commissioners to the company. But in Victoria Railways Commissioners v. Herbert, a question arose as to whether the commissioners were bound by rent restriction legislation. The court held that the commissioners were not entitled to crown immunity from statute and were therefore bound by rent restriction legislation. These two cases involving the same public corporation, the Victoria Railways Commissioners, show that a public corporation may have a public status in right of which it can claim the benefit of crown immunities, privileges and prerogatives and in the process escape legal liability; and a private and independent status in right of
which it may not claim any such immunities, privileges and prerogatives and
shoulders its responsibilities like a private corporation.

The dual nature of public corporations may also be conveniently
gathered from some of the better known pronouncements on public
corporations:

"The public corporation is a hybrid organism, showing some of the
features of a government department and some of the features of a
business company, and standing outside the ordinary framework of
central and local government." 7

Of Sydney Harbour Trust Commissioners, Griffith C.J. observed;

"... that the Sydney Harbour Trust may be regarded in one sense,
as a department of the Government of New South Wales. But, in
another sense, I think that the commissioners are an independent
corporation..." 8

Equally applicable is President Franklin D. Roosevelt's classical
formulation of the concept of the public corporation as,

"A corporation clothed with the power of government, but possessed
of the flexibility and initiative of a private enterprise." 9

In Formea Chemicals Ltd. v. Polymer Corporation Ltd. (now Polysar
Ltd.),10 McLennan J.A. considered the issue whether the Respondent
public corporation was liable in an action for damages for infringement of a
patent and in holding that it was not, added:-

"It is only fair to say that to all outward appearances so far as
its contacts with the public are concerned, the respondent does
not exhibit any difference from an ordinary trading corporation,
but in view of the statutes to which I have referred (11) ... it
is apparent that the crown or rather the government of Canada is
in the business, through the respondent of manufacturing and
selling synthetic rubber products." 12

McLennan J.A., while conceding the dual nature of Polysar Ltd., gave weight
to public status of the corporation thus enabling the corporation to escape
legal liability.13
(a) Public Status

The factors that constitute a public corporation a public authority are not hard to discover. Frank Milligan, in one of the most recent articles on the topic under consideration outlines some of these factors, in relation to the Canada Council, a statutory public corporation engaged in support of research in humanities and social sciences, among other things, as follows: members of the council are appointed by the government, and removed by the same authority at will; its revenues are provided each year by parliamentary appropriations; it must report each year to parliament and its accounts are audited by the Auditor General of Canada. Save for slight variations depending on the classification of public corporations, the above factors are true of other crown corporations. One might also add that crown corporations are generally exempt from income tax. This is partly on the basis that public corporations are essentially part of the state function and that a state does not tax itself. The appointment of public officials to Boards of Crown corporations is further testimony to the public status of these corporations. It is in this sense that public corporations have been described as "governments in miniature". In substance, therefore, public corporations are part of the government, whose functions now involve a multitude of social and economic activities and undertakings.

It is now contended that were it not for the public status of public corporations, no issue, be it substantive or procedural, would particularly arise in relation to these corporations; they would be treated just like any other corporations to which, through instruction in company or corporate law, we have been accustomed. When a court of law denies legal liability of a public corporation or attributes a procedural advantage to a crown corporation, by one of those notorious devices such as 'emanation of the
crown' or 'shield of the crown', it is, consciously or unconsciously, but very often the latter, asserting the public status of the corporation. It is in effect saying that if the ultimate public authority, the government, is not liable in a particular instance or enjoys a certain advantage or privilege, then a public corporation, being also a public authority albeit a lesser one, should not be legally liable in that instance or should also enjoy that advantage or privilege. Whether that approach is desirable or not remains to be seen.

(b) Private Independent Status

Public corporations are separate legal entities and have many of the qualities which belong to corporations of other kinds. They own property, carry on business, borrow and lend money, just as any other corporation may do. They are thus correctly approximated to private companies. This is their private and independent status. When liability for misdeeds or evils of public corporations is established, it is this status that is being asserted and the protection of victims of crown corporation wrong-doing demands that the private status of these corporations be vindicated to the exclusion of the public status.

III. LACK OF A WELL DOCUMENTED LAW OF PUBLIC CORPORATIONS

As if the dual nature of public corporations is not a sufficient problem to contend with, one must also wrestle with the absence of a well documented law of public corporations. Any doubts that may be entertained about the validity of this assertion are dispelled by the revelation that virtually all law schools do not teach 'public corporations' as a separate subject.

Neither have legal treatise writers considered the subject of public or
crown corporations worthy of serious attention. As examples, L.C.B. Gower
treats the subject in nine pages, H.W.R. Wade in eight pages,
Peter Hogg in ten pages, and H. Street devotes nineteen pages to the
subject. It is not intended to doubt the ability of these learned
writers and publicists or to confuse quantity with quality or vice versa,
but to drive home the point that not much may be obtained from a reading of
ten or twenty pages of a book. Limited and scattered information and chance
remarks may also be found in books canvassing the wider subject of public
time. Legal and other periodicals provide some useful
information and are referred to in appropriate instances herein.

Ages may be spent in searching law library catalogues but not more than
a few books, entirely devoted to public or crown corporations, will be
found. W. Friedmann's "The Public Corporation" was compiled in 1954
and is ipso facto outdated. Further, it is a comparative analysis of public
corporations in thirteen countries and consequently is devoid of
detail on any particular aspect of public corporations. C.A. Ashley and
R.G. Smails in "Canadian Crown Corporations" give a descriptive
account of numerous crown corporations, but even this descriptive account is
to a substantial degree outdated.

The Legislature has not made the task any easier. A federal crown
corporations Act is nowhere in existence. Part VIII of the Financial
Administration Act only deals with the financial administration and
control and public or parliamentary accountability of crown corporations.
The Acts creating crown corporations basically amplify such matters as are
provided for in the F.A.A. The diminutive Government Companies Operation
Act is a replica of the F.A.A. only that it deals with crown
companies, while the F.A.A. deals with both crown companies and statutory
crown corporations. In relation to crown companies, which are incorporated under general corporation or company statutes, one is tempted to jump to the conclusion that their legal liability is the same as that of their counterparts in the private sector, but the public status of these crown companies militates against such a conclusion and rules out a wholesale application of ordinary company law principles.

Apart from the sources of information referred to above, one must resort to decided cases and other judicial pronouncements.

This then is the state of our literary and legal arsenal; it might have been in better shape and order, but it is not. The problems appear insurmountable but a start may as well be made.

IV. CROWN IMMUNITIES, PRIVILEGES, PREROGATIVES AND IMMUNITY FROM SUIT

(a) A Brief History of Crown Proceedings

In England, prior to the thirteenth century, the King or monarch could not be sued in any court whatsoever. This absolutist and monarchical notion was based on the feudal principle that a lord could not be sued in his own courts. Just as no lord could be sued in the court which he held to try the cases of his tenants, so the King, at the apex of the feudal pyramid and subject to the jurisdiction of no other court, was not suable. Moreover, to use the language of early commentators, the sovereign was the fountain of justice and of honour; the writs commanded in his name, and through his Attorney-General he guarded the public interest against violators. So in exempting the sovereign from legal liability it was thought that private interests were being subjected to public needs and that this was desirable. This purported vindication of public needs and interests is illustrated by the Australian case of Repatriation Commission
In that case the issue for determination was whether property vested in
the commission was liable to be distrained. The commission, a statutory
corporation, was established by the Australian Soldiers' Repatriation Act,
1920 and was charged with the administration of that Act. The High Court of
Australia held that the commission was entitled, in respect of property
vested in it pursuant to the said Act, to the same privileges and immunities
as the crown would have had if the property had been vested in it and
therefore the goods vested in the commission were not liable to be
distrained; Higgins J. observing;-

"This exceptional privilege enjoyed by the crown, this exemption
from distress, is not to be regarded as an unreasonable survival
of despotism; like other privileges attached to the crown
prerogative, it is a recognition of the principle that all private
interests are subordinate to the public needs. As John Locke put
the matter, the prerogative of the King consists of a
discretionary power of acting for the public good . . . the
privileges which it carries enure to the benefit of the people as
a whole. . ." 35

Inroads began to appear in the feudal principle that the King was not
suable, for in the course of the thirteenth century subjects with claims
against the King presented them informally to him whereupon he might refer
them to his courts.36 With the reign of Edward I, a standard procedure
of presenting claims against the King by petition of right was introduced.
This turn of events is attributable to the claim that the King was not
regarded as above the Law, and that on the contrary he was regarded as under
a duty - albeit an unenforceable one - to give the same redress to a subject
whom he had wronged as his subjects were bound to give each other.37
The procedure, on the Petition of Right, was that each petition was referred
by the King to the commissioners for the purpose of inquiring into the facts
alleged in the petition. If the facts found by the commissioners raised
questions of law which were appropriate for decision by the ordinary courts, then the King would plead to the questions of law and the petition would be handed over to the appropriate court to be tried.

The petition of right procedure had serious disadvantages. In the first place a great deal depended on the commissioners' view of the facts and perception of the law. In the second place, disputes were referred to the court as a matter of grace and a royal fiat was necessary before the petition could be transferred to the courts. A subject prejudiced by a royal refusal to consider a petition was remediless. Thirdly, the procedure was cumbersome and time-consuming. Fourthly, when the case came up for hearing the crown and the subject were on an unequal footing. The King's 'garland of prerogatives' included a number of privileges in pleading and procedure. For example, no execution could be made against the crown and the subject, even if successful, had to rely on the King's good will if he were to obtain the satisfaction to which the court had held him entitled.

A petition of right was available in respect of all proprietary actions; it was used not merely for recovery of land but also on a claim for damages in respect of an interference with an easement. It also lay for the determination of a claim to a corody and for the recovery of chattels. It has been said that, the courts, while holding the crown liable for breaches of contract, refused to hold it liable in tort. This immunity from tort is supposedly based on the well known adage "The King can do no wrong." In fact this maxim originally meant that the King was not privileged to commit illegal acts but has been corrupted by the courts and legal writers into an altogether undesirable meaning, namely, that the crown is not liable in tort. The true meaning of that maxim is
that the King's courts had no jurisdiction over the King because they were created by and subject to him. The principle of non-liability in tort is to be interpreted as one of jurisdiction rather than literal fact for "the view advanced today is that this affirmation derived from that lack of jurisdiction, which I take to mean as distinct from affecting the quality of an act done, and not from the impossibility, in existing legal contemplation of attributing wrong to him." 47

Even allowing for the perverted interpretation of the maxim, the King can do no wrong, it is not correct to say that the petition of right did not lie for torts. The examples given above, namely, recovery of land, claim for damages for interference with an easement and actions for recovery of chattels, would be covered by the modern actions of trespass, nuisance and detinue, which are, without cavil, tort actions. The correct rule is that a petition of right would not lie for those torts normally outside the province of a real action. 48 Therefore, reference to the immunity of the crown from tort actions is to be understood accordingly.

From the fifteenth until the nineteenth century, the petition of right fell into virtual disuse largely because of its complicated procedure and it was superseded by other less dilatory remedies and writs. 49 'Traverse of office' and 'monstrans de droit' were better remedies to enforce rights of feudal tenure, while the petition for a writ of liberte and the petition to the barons of the Exchequer were better remedies to enforce payment of debts. 50

The nineteenth century saw a revival of the petition of right. Traverse of office and monstrans de droit were becoming obsolete as the vestiges of feudal tenure disappeared. The petition for a writ of liberte, which had been used extensively by the Treasury for the settlement of
accounts, and the direct petition to the barons of the Exchequer had also become obsolete with changes in the fiscal machinery of the state.51 There was a large increase in government contracts, disputes over which contractors sought to settle by petition of right. But it was obvious that the rules of procedure on a petition of right, which had been unaltered for four hundred years, were not suited to nineteenth century conditions. Complaints by contractors thus led to the passing of the Petition of Right Act,52 which introduced a simpler procedure by way of alternative to that of the fourteenth century.53

Now the opportunity was ripe for an ascertainment of the scope of the revived petition of right. Was it available as a remedy in contract and tort generally? One view was that it was available whenever it was just and equitable that an individual should be compensated,54 another held that it lay only when property was being recovered.55 The first view was rejected by the courts in 1848.56 The liability of the crown in contract was firmly established in 1874 in Thomas v. Reg.57 where Blackburn J. strongly rejected the plea of the crown that the petition of right did not lie to claim damages for breach of contract and held that it did so lie. As far as tortious liability was concerned, the courts still remained unmoved, and quoting the decadent maxim that 'the King can do no wrong', held that he, the King, could neither commit nor authorise the commission of a tort.58 In Feather v. Reg.,59 Cockburn C.J. is quoted as having stated:—

"... the only cases in which the petition of right is open to the subject are, where the lands or goods or money of a subject have found their way into the possession of the crown, and the purpose of the petition is to obtain restitution, or if restitution cannot be given, compensation in money, or where the claims arise out of a contract, as for goods supplied to the crown or to the public service." 60
And fifty-five years later, Viscount Dunedin, in Attorney General v. De Keyser's Royal Hotel Ltd., confirmed this position when, speaking of the petition of right, he said:-

"... it will lie when in consequence of what has been legally done any resulting obligation emerges on behalf of the subject. The petition of right does no more and no less than to allow the subject in such cases to sue the crown. It is otherwise when the obligation arises from tort..." 61

The exclusion of claims in tort from enforcement by petition of right effectively freed the crown from most liability in tort, for no other remedy was available for the purpose.

In the currency of this period of vacillation and oscillation, that is, between the fourteenth and nineteenth centuries, a number of crown advantages, privileges and immunities, affecting both the substantive liability of the crown as well as procedural aspects of crown proceedings, were evolved. For example, at common law, no statute binds the crown unless the crown is expressly named therein, with the exception that the crown is bound by necessary implication in cases where the purpose of the statute would be wholly frustrated unless the crown were bound.62 This rule of immunity from statute, which was developed in a unitary English system poses problems when applied to a federal state like Canada. One such problem is whether the crown in right of a province is entitled to claim immunity from federal legislation. This problem was considered by the Supreme Court of Canada in The Queen in Right of Alberta v. Canadian Transport Commission (C.T.C.).63 In that case the Government of Alberta acquired control of Pacific Western Airlines Ltd. (P.W.A.), a public company by purchasing over 99% of its issued common shares and all of its preferred shares. The C.T.C., the regulatory authority under the Aeronautics Act, took the position that the Government of Alberta was obliged to notify the commission
and seek its approval of this acquisition under the provisions of sections 19 and 20 of the Air Carrier Regulations, SOR/72-145, enacted by the commission under the powers conferred on it by the Aeronautics Act. The Government of Alberta contested the authority of the C.T.C. to require it to comply with sections 19 and 20 of the Regulations. To resolve this dispute the commission stated the following question to the Federal Court of Appeal: "Is Her Majesty in Right of the Province of Alberta a person subject to the provisions of sections 19 and 20 of the Air Carrier Regulations and the jurisdiction of the commission concerning the acquisition of controlling interest in P.W.A. Ltd.?" On appeal to the Supreme Court of Canada from the Federal Court of Appeal's affirmative answer to the question, it was held that the Government of Alberta was not bound by sections 19 and 20 of the Air Carrier Regulations. The chief justice based his judgement on the common law principle enunciated above.

Although in this case the crown in right of a province was afforded immunity from federal legislation, the court did not decide that in all cases the crown in right of a province must be afforded such immunity. In fact the Chief Justice suggested that in view of Canada's constitutional arrangement, the notion of the indivisibility of the crown should be abandoned.64

Immunity from statute in turn affects the liability of the crown in respect of taxes, rates and other charges65 and other liabilities imposed by statute. The procedural advantages are in respect of such matters as venue or forum, discovery, debt priority, enforcement of judgements, limitation of actions and immunity from restraint and are discussed in part three.

It is certain that the privileges, immunities, prerogatives and
advantages referred to above were devised under and for a system of personal
government or government by mere delegation. They were evolved for
the benefit of the crown in a direct and personal sense. However, with the
establishment of constitutional monarchy in the seventeenth and eighteenth
centuries, a distinction between the King in his public and private
capacities could be perceived plainly, but no legal acknowledgement of this
was made. It began to be apparent that crown advantages enured less
for the benefit of the monarch than of the public government of the country
and there was a strong tendency to substitute any public authority for the
crown in the relevant rules. In consequence, the crown, as the
personification of the English State, was accorded all the immunities and
prerogatives originally personal to the King. It has been observed,
in this respect, that, "only out of the sixteenth century metaphysical
concepts of the nature of the state did the King's personal prerogatives
become the sovereign immunity of the state" and "the result is that
from a few and apparently simple rules relating to the King, there has grown
up an extensive department of public law."

Crown immunities and prerogatives were also extended to public
officials or servants acting in their official capacity. The
justification for this extension is that the business of government requires
that officials be given powers which are not accorded to private
individuals; and when exercising those powers, it is plain that those
officials are not subject to 'ordinary' law; the state cannot be equal in
all respects to its subjects because it has to govern.

Canada being a monarchy, the Federal government, subject to the
modifications contained in the British North America Act, enjoys all the
prerogatives and privileges of the British crown. So do the
provincial Executives.

What has been given above is a brief statement of the law up to and including, the nineteenth century when crown or public corporations made their debut on the legal scene in Canada, as distinct and separate legal institutions. How did the courts, jurists and writers react to this new situation?

(b) Crown Corporations Appear on the Scene

When crown corporations made their appearance in the second half of the nineteenth century and substantially multiplied in the first half of the present century, the courts were called upon to adjudicate on the legal liability of these corporations in a number of legal spheres - torts, contract, liability to tax, rates and other charges, to take but a few examples. The courts had to decide whether these corporations were entitled to the benefit of crown advantages or whether they were to be treated as separate and distinct legal entities unaffected by crown prerogatives and privileges. Put it another way; the courts were torn between giving priority to the public status of crown corporations and vindicating the private independent status of the same.

(i) Semi-Public Corporations or Mixed Enterprise Companies

Mixed enterprise companies can be disposed of in summary form. The controversy in relation to these corporations hinged upon two views: Did the state confer its privileges and immunities on a mixed enterprise corporation? or, did the state, by going into partnership with trading interests, reduce itself to the status of its partner or partners? The controversy was sealed as far back as 1824 in the case of The Bank of the United States v. Planters' Bank of Georgia. In that case Marshall C.J. said:-
"It is, we think, a sound principle, that when a government becomes a partner in any trading company, it divests itself, so far as concerns the transactions of that company, of its sovereign character, and takes on that of a private citizen. Instead of communicating to the company its privileges and its prerogatives, it descends to a level with those with whom it associates itself, and takes the character which belongs to its associates, and to the business which is to be transacted." 76

The principle enunciated by Marshall C.J., while strictly speaking, is American, is equally applicable in the Canadian situation and has survived the tests of time and bad judicial weather.77 There appears to be no reported case in which crown prerogatives have been attributed to a mixed enterprise company.

(ii) Contract

As has already been noted, the case of Thomas v. R.78 established the contractual liability of the crown. When faced with the issue of the substantive liability of crown corporations in contract, the courts had, therefore, no excuse to deny liability. One of the earliest reported cases involving a public corporation is Graham & Others v. His Majesty's Commissioners of Public Works and Buildings.79 In this case the plaintiffs entered into a contract with the defendants, a public corporation, whereby the plaintiffs undertook to construct a post office for the defendants. While the construction work was in progress, the defendants served upon the plaintiffs a written notice wrongfully determining and repudiating the contract and preventing the plaintiffs from executing and performing the same. Subsequently the defendants wrongfully entered upon the land upon which the post office was being erected, seized plant and building materials thereon belonging to the plaintiffs and wrongfully deprived the plaintiffs of the same by refusing to given them up on demand. The plaintiffs claimed damages for the above wrongful acts of the
defendants. In denying liability, the defendants contended that the contract was entered into by the defendants as servants and agents of the crown and on behalf of the crown as a department of the Government. The court had no difficulty in giving judgment for the plaintiffs.

Ridley J. held the commissioners liable for damages for breach of contract "because the commissioners must be taken to have made the contract specially themselves and not as agents of the crown;" and Phillimore J. "because the commissioners are in a position of servants of the crown who may be sued on their contracts." Phillimore J. also added that the mere fact of the commissioners' being incorporated without reservation conferred the privilege of suing and the liability to be sued.

In Roper and Another v. The Commissioners of His Majesty's Works and Public Buildings, Shearman J. held that an action for breach of a tenancy agreement was maintainable against the commissioners. The purpose of these two cases is to show that as far as the substantive liability of public or crown corporations was concerned, there was no ground for extricating these corporations from such liability by way of crown prerogatives or privileges. Subsequent cases have confirmed the contractual liability of crown corporations. But this is not to say that no other problems are posed by crown corporations in the matter of contract. Firstly, the procedural advantages of the crown, which are sought to be applied to crown corporations, cover all actions, whether they are in contract or other fields of law. Secondly, in the international sphere, the liability of the crown in contract has not been as accepted as it has been in the national arena.

Thirdly, crown corporations, being public authorities, may be subject to policy and administrative directions of a competent authority. For
example, the Atomic Energy Control Board is enjoined to comply with any
general or special direction given by the appropriate Minister with respect
to the carrying out of its purposes.\textsuperscript{86} In the exercise of
administrative supervision, it may happen that the Minister orders the
cancellation of a certain contract entered into by a crown corporation and
in such a case, the issue arises whether this is, from the standpoint of the
corporation, a case of impossibility or force majeure which excuses from
performance.\textsuperscript{87} W. Friedmann reports that no case of this kind appears
to have come before the courts,\textsuperscript{88} but the recent House of Lords case of
\textit{C. Czarnikow Ltd. v. Centrala Handalu Zagranicznego 'Rolimpex'}\textsuperscript{89} is not
far removed from this type of situation.

The facts of the \textit{C. Czarnikow} case are as follows: In 1974 the Polish
state estimated that for the season 1974-75 enough sugar would be produced
by the state to provide for domestic requirements and for export of a large
quantity of sugar. Accordingly, the state authorised the respondent
(Rolimpex) to enter into contracts with purchasers for the export from
Poland of 200,000 metric tons of sugar. Rolimpex, a separate legal
personality, was a state trading organisation entrusted with the export and
import of essential commodities such as sugar and was under the supervision
of, and financially accountable to, the Minister of Foreign trade and
shipping. Pursuant to the state authorisation, Rolimpex entered, in advance
of harvest, into two contracts with C. Czarnikow, an English company, for
the sale to it of 17,000 metric tons of sugar. The contracts were subject
to the Rules of the London Refined Sugar Association. By r. 18(a) of the
Rules, if delivery in accordance with the contracts was prevented 'by
Government intervention . . . or any [other] cause of force majeure . . .
beyond the seller's control', the contracts were to become void without
payment of a penalty on compliance with the procedure specified in r. 18(a).

Following bad weather in the autumn of 1974 the yield of sugar for the 1974-75 season fell below the estimated amount and was insufficient to provide for both domestic requirements and for export under the contracts entered into by Rolimpex. On 5th November the Polish government, without consulting Rolimpex, decided to impose an immediate ban on the export of sugar and to revoke export licences already granted. On the same day a decree was signed by the Minister of Foreign Trade and Shipping giving legal effect to the ban from that date. Because of the ban, fulfilment of the first contract with Czarnikow was completely prevented and fulfilment of the second contract was partly prevented. Czarnikow claimed against Rolimpex for damages for non delivery. Rolimpex contended that it was exempt from liability on the ground of force majeure by 'Government intervention beyond [its] control' within r. 18(a) of the Rules.

The House of Lords held that because Rolimpex had been prevented by 'government intervention' from performing its obligations under the contracts it was entitled to rely on r. 18(a) of the Rules to excuse it from liability for that failure. The significance of this case is that it appears a public corporation may set up government intervention or orders from a superior authority as ground for escaping contractual liability. It is, however, interesting to note that using the very public status of such corporations, a totally different result may be reached. In the Czarnikow case counsel for Czarnikow argued that Rolimpex was, in fact, part of the Polish government, that is, part of the structure of state administration, and that therefore the ban caused by the intervention of that government could not be recognized as being 'beyond the seller's control' within the
meaning of those words in r. 18(a); and that accordingly it followed that Rolimpex could not be excused on the ground of force majeure from fulfilling its obligations. As Lord Salmon admitted, this was a most skillful argument and had it not been for the factual findings by the arbitrator that Rolimpex was 'not so closely connected with the Government of Poland as to be precluded from relying on the ban as government intervention', Lord Salmon would have been prepared to buy counsel's argument. The reasons for the factual finding that Rolimpex was not so closely connected with the government of Poland, and was therefore not an organ or department of the Polish state, were that Rolimpex was a separate legal personality and that although it was under the general supervision of the Minister of Foreign Trade and Shipping, it generally made its own decisions about its business and had substantial freedom in its day-to-day activities. It is submitted that if Rolimpex had been less independent and consequently an organ or department of the Polish state, Lord Salmon would have held it not entitled to rely on government intervention as an excuse for not fulfilling its obligations under the contract for the government cannot claim that it has been prevented by itself from performing an obligation.

One of the solutions suggested to this problem is the incorporation of safeguarding provisions in the terms of the contract. Where such provisions are not made, it would clearly undermine confidence in commercial standing of public corporations if they were to be excused from performance or damages for non-performance by reliance on a superior order. The rule proposed here is that a court should not excuse a public corporation from contractual liability, unless a private corporation would have been excused from such liability under similar conditions and circumstances. This is the
only sure way of protecting those persons contracting with public
corporations against an injurious application of the elusive and often
unintelligible concept of public good and interest.

(iii) Other Liabilities

With respect to other forms of legal liability which were not well
established at the time public or crown corporations made their debut,
judges and academic jurists, evidently trying to force new situations into
old categories, responded to the new challenge by fastening on the now
notorious slogans and expressions, viz: 'emanation or shield of the
crown',93 'department of government',94 'incorporated public
department',95 'the hands of the crown',96 'instrumentality of the
crown or government',97 'organ of the crown',98 to mention but
some. All these phrases and slogans have two things in common; they are
impressive but highly imprecise.99 No wonder wiser heads have
criticised them. In Smith v. Canadian Broadcasting Corporation,100
Judson J., referring to the expression 'emanation of the crown' said: "The
language of the law and not the language of spiritualism should be used to
describe these public corporations."101

In International Railway Co. v. Niagara Parks Commission,102 the
issue was whether the Niagara Parks Commission, a public corporation, was
liable to be sued for breach of contract otherwise than by petition of right
in the exchequer court. The court held that an action would lie against the
Commission for breach of contract, the petition of right not being the sole
recourse, and Luxmore L.J. observed, in respect of the use of the expression
'emanation of the crown':-

"Their Lordships are unable to appreciate the precise meaning
intended to be attributed to this phrase by the courts below . . .
The word 'emanation' is hardly applicable to a person or body
having corporate capacity. Its primary meaning is 'that which issues or proceeds from some source' and is commonly used to describe the physical properties of substances (e.g. radium) which give out emanations of recognizable character . . . Their Lordships are of the opinion that it would avoid obscurity in future if the words agent or servant were used in preference to the inappropriate and undefined word 'emanation.' 103

Other judges have concurred with Luxmore L.J.104 and F.R. Scott105 refers to the expression as "the ghostly notion of the 'emanation of the crown' . . . fortunately exorcised by the Privy Council in International Railway Co. v. Niagara Parks Commission."106

In coining the phrases and expressions above listed the courts have been considering those situations or cases in which it has been sought to confer or deny a particular attribute, privilege or advantage of the crown to a crown corporation and the results have depended on whether the corporation in question is or is not an emanation, department, instrumentality or organ of the crown, or is within or without the shield of the crown. Some of the questions that the courts have had to consider include the following: Is the corporation liable to pay rates and taxes? Is the corporation liable to pay income tax? Do the corporation's debts enjoy crown priority in bankruptcy or winding up of its debtors? Or is the crown vicariously liable for the torts of the corporations' servants?

(c) The Real Issue Unearthed

Buried beneath the phrases adverted to above is a clear legal issue, and now one must use the language of law and not the language of spiritualism. Where some immunity or other advantage is claimed for a crown or public corporation by reference to a special position which the law accords to the crown, the real legal issue or question to be decided, whatever may be the language in which for convenience or by reason of ignorance, it may be expressed, is not, as W.H. Moore has falsely suggested,
"Who and what are covered by the shield of the crown?" or as Kitto J. has rightly disputed, "whether the corporation is the crown or part of the crown"; but is whether the nature of the relationship between the corporation and the crown entitles the corporation to the particular crown attribute or advantage which is claimed.

In determining whether the nature of the relationship between the corporation and the crown entitles the former to a particular crown attribute, a further and basic question must be asked; who can claim crown advantages? or in respect of which classes of persons or bodies can the principle of crown prerogatives be applied? A look at the decided cases will help identify the category of persons or bodies entitled to the benefit of crown prerogatives and privileges. In **Bank Voor Handel En Scheepvaart v. Administrator of Hungarian Property** the facts were these: After the enemy invasion of Holland in 1940, gold in London belonging to a Dutch banking corporation (the Appellant Bank) was transferred to the Custodian of Enemy Property, who sold it, investing and reinvesting the proceeds of sale and profits. These investments were subsequently transferred to the Administrator of Hungarian Property (the respondent) in the erroneous belief that they were the property of a Hungarian national. After the War the Appellant Bank obtained judgment for the recovery of the proceeds of sale, together with the interest or other profits earned. The question then arose as to whether the bank was also entitled to recover a sum equivalent to an amount assessed on the Custodian as income tax in respect of the income of the invested proceeds of sale and paid to him. The Appellant Bank contended that the custodian was a servant of the crown and therefore shared the crown's immunity from income tax which arose from the fact that the crown was not named in the Income Tax Acts. It
was beyond argument or controversy that if the custodian could claim immunity from income tax, then the Appellant Bank was entitled to the amount paid as tax. The issue properly stated was whether the custodian was a servant of the crown who could plead immunity or if not, whether he was a person in consimili casu with such a crown servant.

The court held that the custodian was a servant or agent of the crown, that if the custodian had asserted crown immunity he would not have been obliged to pay the tax in question and that this being so, the Appellant Bank was entitled to claim the amount paid as income tax. The court specifically considered the issue of the category of persons who could, in this particular case, that is taxation, claim crown immunity and came up with the following;

(i) the sovereign personally.

(ii) servants and agents of the crown in their representative capacity.

(iii) persons who are not crown servants or agents but who, for certain limited purposes are considered to be in 'consimili casu' with such servants or agents. 112

In Wynyard Investments Proprietary Ltd. v. Commissioner for Railways (N.S.W.), 113 the commissioner, a public corporation, being seised in fee of certain premises at Wynyard Railway Station, Sydney, leased them to one Collins for a term of five years. Later the interest of Collins was assigned to the appellant company. Upon expiry of the term the appellant company held over without the consent of the commissioner, who immediately instituted proceedings in a court of petty sessions under the Landlord and Tenant Act, 1899-1948 (N.S.W.) to recover possession of the premises. It was objected on behalf of the Appellant company on the hearing of such proceedings that the commissioner was bound by the provisions of the Landlord and Tenant (Amendment) Act, 1948-1952 (N.S.W.), he not being the
crown in right of the State of New South Wales within the meaning of section 5114 of such Act, and that as he had failed to comply with its provisions, notably that requiring the giving of a notice to quit, the information should be dismissed. This objection was overruled, and the commissioner, having otherwise made out his case, was adjudged entitled to possession.

On appeal, the High Court of Australia held that the commissioner represented the crown as its servant or agent and that in such representative capacity was not bound by the Landlord and Tenant (Amendment) Act. Kitto J. added, "... the immunity of the crown can never inure for the benefit of a subject. Whoever asserts it must assert it on behalf and for the benefit of the crown."115 The appeal was dismissed.

At this juncture, we are, by a systematic inquiry, going beyond the mere recording of events, and without seeking refuge in virtually meaningless phrases and slogans, in a position to ascertain the nature of the relationships entitling crown corporations to crown advantages and the range or category of bodies entitled to the benefit of the same. The relationships so far established are those, not unfamiliar to the general law, of master-servant and principal-agent, and the category of bodies-servants, agents and those bodies or persons in consimili casu with such servants or agents. To this one may add the relationship of trustee-beneficiary.

A caveat should be entered at this stage. The kind of relationship which will suffice to confer a crown attribute or advantage on a crown corporation in a particular case will vary according to the kind of attribute which is claimed. If what is claimed is immunity from rates and taxes on land it might be sufficient to establish that the corporation held
its land merely as trustee for the crown, and it is also usually enough to show that the corporation is a servant of the crown. When a plaintiff seeks to hold the crown liable under a contract made by a corporation, then it will be necessary to establish that the corporation entered into the contract as an agent of the crown. But if it is sought to hold the crown vicariously liable for torts committed by a corporation's servants, then neither the trust nor generally the bare agency relationship will do; it will be necessary for the plaintiff to establish that the corporation is a servant of the crown so that the corporation's servants are in truth crown servants. As Peter Hogg has pointed out, the master-servant relationship is the one which provides the only route to crown attributes, because the facts seldom give support to the existence of a trust or even a bare agency, and also because of the existence of the master-servant relationship generally does suffice to entitle the servant to enjoy the attributes of the master.

But even after unearthing the legal issue, one question still remains to be considered and answered. It is clear that there is neither a service contract, nor a contract of agency nor a deed of trust, executed between the crown and public corporations. What then constitutes a crown corporations a servant, agent or trustee of the crown?

(d) Criteria for Determining Whether or Not a Crown Corporation is a Servant, Agent or Trustee of the Crown

In determining whether or not a crown or public corporation is a servant, agent or trustee of the crown, two situations must be considered. Firstly, the situation where legislation creating the corporation does not contain any express statement of the extent to which the corporation is to be regarded as an agent or servant or trustee of the crown, that is, where
there is no express extension of the relevant crown prerogatives and
privileges to the corporation; and secondly, the situation where legislation
setting up the corporation contains some statement as to the status of the
corporation. The first of these two situations is analysed first.

(i) Where the Legislature is Silent

Where the legislature has been silent as to the status of the
corporation in issue, the question whether a public corporation is a crown
servant or agent or trustee has been decided by reference to a number of
criterion or tests - Financial autonomy, right of appointment of members or
directors of the corporation by the crown, incorporation, benefit flowing to
the crown, whether property of the corporation is vested in the crown,
whether the corporation is incorporated as a commercial company under
ordinary company legislation, nature of functions performed by the
corporation and the nature and degree of control exercised over the
corporation by the crown or representatives of the crown. These
tests are discussed hereunder.

(a) Financial autonomy test

According to this test, if the funds used by the corporation
are received from, and to be returned to, and audited by, the government,
then the corporation is an agent or servant of the crown. In Grain
Elevators Board of Victoria v. Dunmunkle, Latham C.J. considered
"the fact that financial control is in the crown - that revenues of an
authority go into the consolidated revenue and that its revenue is made out
of the consolidated revenue - is another element which helps to show the
identity of an authority with the crown." The case of Quebec Liquor
Commission v. Moore involved the liability of the commission for
injury caused to one Moore by the act of one of the commission's employees.
In holding the commission an instrumentality (which in effect means servant) of the government and therefore not liable in tort, Duff J., relied, inter alia, on the fact that all the money received by the commission was at the discretion of the Provincial Treasurer, was remissible to him, and, on receipt by him, became part of the consolidated funds of the Province of Quebec.

On the other hand, if a corporation has sufficient discretion to spend its money, within the limits of its general purposes or if it does not pay its receipts into the general revenue of the state, it is generally not considered a servant or agent of the crown and does not partake of crown privileges and immunities. In Metropolitan Meat Industry Board v. Sheedy, the Appellant Board which had been created by statute, claimed priority as to a debt due to it by a company in process of liquidation. The Board had been formed for certain purposes in connection with the administration of slaughter houses and based its claim to priority on the contention that it was a servant of the crown. One of the grounds for denying the Board the crown servant status was that it did not pay its receipts into the general revenue of the state and that the charges it levied went into its own fund.

This test cannot be very helpful in the Canadian situation since virtually all the funds utilised by crown corporations are provided by the government and most of the statutory corporations and a good number of crown companies are audited by the Auditor General. Further, s. 71(4) of the F.A.A. empowers the appropriate Minister and the Minister of Finance, with the approval of the Governor in Council, to direct a corporation to pay to the Receiver General so much of the money administered by it as is considered to be in excess of the amount required for purposes of the
corporation. If the financial autonomy test were to be used, virtually all Canadian crown corporations would be found servants of the crown.

This financial autonomy test has also been criticised by W. Friedman\(^{128}\) who considers it misconceived, meaningless and incapable of any practical application in modern circumstances. "The fact is that modern public authorities are both independent and subject to government control. It is of the very essence of the conception of a public corporation, in both the British and American legal systems, that it should have its own funds and be autonomous for purposes of management, efficiency, auditing and accounting, but that it should be responsible to Parliament as its 'shareholder' representing the nation . . . . Far reaching financial discretion and autonomy go together with accountability to the Minister and Parliament. There are many differences of degree, some due to technical reasons, but the existence of separate funds and independent budgeting and accounting in no way excludes ministerial control over revenue. This makes the consolidated fund test meaningless."\(^{129}\)

(b) Appointment and dismissal of members or directors of the corporation by the crown or its representatives

It is sometimes contended that the appointment and dismissal of members or directors of the Board of the corporation by the crown or its representatives, is a factor showing that a corporation is a servant or agent of the crown.\(^{130}\) In Canada where all members and directors of boards of public corporations (excepting some subsidiaries of crown corporations) are appointed and dismissed either by the Governor in Council or the appropriate Minister, this test cannot be taken seriously unless one wants to christen all crown corporations servants, agents and trustees of the crown. If it is desired, as is the case here, to make a public
corporation answerable for its misdeeds, without sheltering under the 'shield of the crown', this test must be rejected.\textsuperscript{131}

(c) \textbf{Vesting of the corporation's property in the crown}

Notwithstanding that public or crown corporations are separate legal entities, a common provision appears in the statutes creating departmental, agency and proprietary corporations in the following words:  

"Property acquired by the corporation is the property of Her Majesty and title thereto may be vested in the name of Her Majesty or in the name of the corporation." \textsuperscript{132}

A similar provision was interpreted in \textit{Quebec Liquor Commission v. Moore}\textsuperscript{133} as one of the factors showing that the commission was a servant of the government of Quebec. If accepted as valid, this test would be most relevant in those cases where property of the corporation is sought to be taxed, for the corporation would argue that it is holding the property as trustee for the crown and therefore not liable to be taxed by virtue of section 125 of the British North America Act.\textsuperscript{134} But as N. Tennant\textsuperscript{135} has fortunately pointed out, in a general sense,\textsuperscript{136} no legal principle requires a finding that a crown corporation is a servant or agent of the crown on account of the above quoted provision.

(d) \textbf{"Benefit for the crown' test}

G. Sawer\textsuperscript{137} traces the 'benefit for the crown' test to the case of \textit{Bank Voor Handel En Scheepvaart v. Administrator of Hungarian Property}.\textsuperscript{138} According to this test, if a particular immunity or privilege claimed by a crown corporation will operate to bring some benefit to the crown, then for that purpose the corporation will be treated as a servant or agent of the crown and therefore entitled to that immunity or privilege. In the \textit{Bank Voor Handel} case, the detailed facts of which have already been stated,\textsuperscript{139} the Administrator had held property of aliens.
during the War, on trusts which could finally be determined only after conclusion of the peace treaties; until then, it was possible that some or all of the property would eventually go to the owner, or to the crown, or to the crown's subjects, under reparation arrangements. The issue was whether the Administrator had properly paid income tax on the proceeds of the property while its ultimate destination was still doubtful. The House of Lords in a voluminous judgement, held that the crown had a sufficient interest in the property to invoke its immunity from tax if it chose to and for the purpose of asserting the crown's interest, the Custodian of Enemy Property was a servant or agent of the crown.

This test is most unsatisfactory. Insofar as 'crown' means government, it is quite delusory to talk as if any identifiable person or even group of persons constitutes the 'crown'. The money in the Bank Voor Handel case would not go to the Monarch, but to the Treasury for the general purposes of government. One cannot answer the question whether a crown interest is involved independently of the question whether the corporation is a servant or agent of the crown; the relationship between the crown and the corporation is the very thing which establishes a crown interest and not vice versa and so a benefit to or interest of, the crown cannot be a proper test.  

(e) Incorporation

In determining whether a crown corporation is a servant, agent or trustee of the crown and consequently entitled to crown advantages, the fact of incorporation and the attendant legal separateness of the entity, has been viewed as evidence showing an intention on the part of the legislature to cut the corporation adrift from the crown and to deny the corporation the advantages claimed. In Michaud v. C.N.R.
Co. the issue was whether the C.N.R. Co., a crown corporation, could be sued without recourse to the petition of right procedure. The New Brunswick Supreme Court, Appeal Division, held that it could be so sued and Hazen C.J. remarked;-

"... it certainly seems to me that it was the intention of Parliament create the company a corporation as a legal entity separate and distinct from the crown ... and place it in exactly the same position so far as its rights and liabilities were concerned as other companies ... I cannot help coming to the conclusion that it fully intended that the corporation created by the Act should in all respects stand in a similar position before the courts of the country as any other private corporation would."143

Other cases144 have suggested that incorporation by itself is not a sufficient test of legal autonomy so as to remove the shield of the crown or take away crown immunities. W.H. Moore145 adds that it is possible to regard incorporation as being purely for convenience of administration - an official existence devoid of legal incidence and consequence.

Evaluation of the merits of this test requires noting a few things. Firstly, it is neither necessary nor usual for any commission or other body of public functionaries to be incorporated unless such incorporation is considered necessary for the effective discharge of its functions. Secondly incorporation is necessary when a public body needs sufficient managerial freedom of movement and has to enter into sufficient transactions to make its separate legal identity a commercial and managerial necessity.146

There is therefore little sense in a provision stipulating that such incorporated bodies are capable of suing and being sued unless their rights and obligations should correspond. It is in this respect that the approach taken by some courts of detaching public corporation from the crown should be preferred. The suggestion by W. Friedmann147 and G. Sawer148 that unless there is some more conclusive test, there should be a
presumption in favour of full liability and separateness from the government whenever a public authority is incorporated, is equally welcome.

The reason, using the incorporation test, for denying a crown corporation, crown status, is therefore, not merely because Lord Halisbury, L.C. 149 said ". . . it seems to me impossible to dispute that once the company is legally incorporated it must be treated like any other independent person with its rights and liabilities appropriate to itself;" but because those engaged in transactions with crown corporations are legally entitled to expect that any disputes arising from those transactions will be settled without any leverage on the part of the corporations arising from their claim to being servants or agents of the crown.

(f) Nature of functions test

The nature of functions performed by a crown corporation, as a test for determining the legal status of crown corporations, has its origins in the case of Mersey Docks and Harbours Board Trustees v. Gibbs. 150 In that case the Board was sued by the owner of a ship and owner of cargo on board the ship for damage done to the ship and to the cargo through the ship striking a bank of mud situated at the entrance of a dock, owned by the Board. The damage was caused owing to the negligence of the servants of the Board. The House of Lords held the Board liable and stated that, the proper rule of construction of statutes empowering public bodies to execute and maintain public works is that, in the absence of words in the statute to show a contrary intention, the legislature intended that the authority created by statute should have the same duties, and that its funds should be subject to the same liabilities, as the general law would impose on a private person doing the same things. Blackburn J. formulated the nature of functions test in the following words;
"It is well observed ... of corporations, like the present formed for trading and other profitable purposes, that though such corporations may act without reward to themselves, yet in their very nature they are substitutions on a large scale for individual enterprise. We think that in the absence of anything in the statutes (which create such corporations) showing a contrary intention in the legislature, the true rule of construction is that the legislature intended that the liability of corporations thus substituted for individuals should, to the extent of their corporate funds, be co-extensive with that imposed by the general law on owners of similar works." 151

The application of the nature of functions test requires asking the question; Is the corporation in question performing governmental functions or is it merely a substitute for private enterprise? 152 If the corporation is engaged in the so-called inalienable government functions, then it is a servant or agent of the crown. If, on the other hand, it performs those functions formerly undertaken by private enterprise it is not such servant or agent.

The test, as formulated by Blackburn J., has one positive aspect, namely, that insofar as public corporations exercise functions of an essentially commercial character, it is generally desirable that they should have the legal rights and duties of private legal persons. That would go a long way towards protecting the interests of those who enter into commercial transactions with public corporations. But there is no reason why a different approach should be taken when the corporation is engaged in allegedly primary and inalienable governmental functions.

One thing, it is not clear what a government function is. Hoggins J. in Amalgamated Society of Engineers v. Adelaide Steamship Co. Ltd. 153 described such a function as one ". . . without which a civilized state cannot be conceived, a function with which the state cannot part". This description would probably include the administration of justice and police, the defence of the country and the conduct of foreign affairs. On the other
hand, Latham C.J., in the *Uniform Tax* case\textsuperscript{154} argued that, "there is no universal or even general opinion as to what are the essential functions ... or activities of the state. Some would limit them to the administration of justice and police and necessary associated activities. There are those who object to State action in relation to health, education and the development of natural resources. On the other hand, many would regard the provision of social services as an essential function of government ... It is not for a court to impose upon any parliament any political doctrine as to what are and what are not functions of government, or to attempt the impossible task of distinguishing, within functions of government, between essential and non-essential or between normal or abnormal. There is no sure basis for such a distinction. Only the firm establishment of some political doctrine as an obligatory dogma could bring about certainty in such a sphere."\textsuperscript{155} The same idea was expressed by Douglas J. in *New York v. U.S.* (Stratoga Springs Case)\textsuperscript{156} when he conceded that, "a state's project is as much a legitimate governmental activity whether it is traditional, or akin to private enterprise, or conducted for profit ... What might have been viewed in an earlier day as an improvident or even dangerous extension of state activities may today be deemed indispensable."\textsuperscript{157} The distinction between governmental and non-governmental functions, upon which the nature of functions test is premised cannot therefore be placed on sound or logical basis. Any activity may become a function of government if parliament so determines\textsuperscript{158} and the existence of crown corporations is but an extension and widening of governmental functions.

Further, it is very misleading to proceed as if collectivist enterprises are ever mere substitutes for private enterprise; government
intervention is usually undertaken to achieve further, if not different, purposes from those pursued by private enterprise. Public corporations have been set up to satisfy needs of the Canadian society, things which were thought desirable but which would not be undertaken by the private sector at all or to the extent required by Canadians. It is thus apparent that many of the functions exercised by public corporations are not a substitute for private enterprise but the outcome of new conceptions of social responsibility. The Central Mortgage and Housing Corporation, for example, exercises some of the functions of a private mortgage company, but it also discharges a social responsibility of providing low-cost accommodation to the low income population and senior citizens and others, and is bound in its activities to give priority to social policy considerations. The Canadian Broadcasting Corporation provides broadcasting services in isolated or remote areas, areas in which the private sector would not be interested; and Northern Canada Power Commission cannot charge prices in excess of its cost of production for the power it supplies.

In the final analysis, the nature of functions test does not give an adequate justification for separating public corporations between two legal types, with different legal rights and duties; it is outmoded and should be abandoned.

(g) Control or independent discretion test

Most writers are in agreement that the control or independent discretion test, is the most crucial and satisfactory test in determining whether or not a crown corporation is a servant or agent of the crown. If the corporation is able to exercise its powers with considerable freedom from ministerial control, then it is not a crown servant or
agent. In Fox v. Government of Newfoundland, the Privy Council in denying crown priority to the debts of an education board, emphasized the degree of independent discretion which the board in question possessed, and in Metropolitan Meat Industry Board v. Sheedy, the fact that the Board had a high degree of independent discretion in exercising their functions "without consulting the direct representatives of the crown" was treated by the court as evidence that the Board was not a servant or agent of the crown.

On the other hand, if the corporation is controlled by the Minister in much the same way as a government department, then it is a servant or agent of the crown. Since all crown corporations are subject to ministerial or cabinet control, the question must be one of degree and not simply control." The mere fact that some administrative control is exercised over a body will not of course deprive it of its persona and make it the mere instrument of the central government: it is of the nature of government to control its subjects without reproducing the private relation of principal and agent."

One then must determine the degree of control necessary to constitute a crown corporation a crown servant or agent. W.H. Moore formulates the extent of such control in these terms:-

"The question is whether the central government exercises such a general direction and control over the body in relation to its functions as to deprive it of any will of its own, and to make it the mere instrument of the collective will of the state." The courts that have had the occasion to express views on this matter have set an equally high degree by requiring that such control as is requisite to constitute a corporation a servant or agent of the crown must be absolute, complete, or that the corporation must "at every
turn, at every stage" be under control. In The City of Halifax v. Halifax Harbour Commission the commission was assessed for business tax in respect of property it occupied. It was contended by the commission that it was using and occupying property as the agent or servant of the government of Canada and therefore exempt from such taxation by virtue of s. 125 of the B.N.A.A. The Supreme Court of Canada held that the relation of the commissioners to the crown in respect of their occupation of the harbour property was of such character as to constitute that occupation an occupation 'for the crown' and therefore the commission was not assessable for tax. This was based on the degree of control exercised over the commissioners, who were said to be "at every step . . . under the control of the minister . . . and the Governor in Council" and " . . . subject at every turn . . . to the control of the Governor representing His Majesty . . . or the Minister." This type of control was derived from a number of factors - appointment of commissioners by the Governor in Council, the tenure of office was "during pleasure", the Governor in Council determined the remuneration of the commissioners, expenditure of all revenue of the commission was subject to supervision and control of the Minister, borrowing was to be approved by the Governor in Council, and by-laws of the commission required confirmation by the Governor in Council.

Such a high degree of control, insofar as it seeks to detach crown corporations from the crown and in the process establish their independent liability would be welcome as a protective mechanism for those wronged by crown corporations, but as G. Sawer has clearly pointed out, both W.H. Moore and the courts in the above quoted cases, overstate the amount of 'servitude' or the degree of control needed to bring or take a corporation within or without the shield of the crown. Agency and proprietary
corporations engaged in commercial activities as well as departmental corporations engaged in specialised fields like research and art, cannot, unless one were to part with practical reality, be said to be at every turn and at every stage under the control of the appropriate Minister or the Governor in Council. A certain amount of administrative, financial or commercial, and operational freedom or autonomy is a necessity. As Peter Hogg has suggested, it is not possible to specify what degree of control is required to make a public corporation a servant or agent of the crown; the issue depends on the circumstances of each particular case taking into account the other tests outlined above, together with any other relevant considerations.

A distinction is made between de facto and de jure control. The degree of control which is in fact exercised over a public corporation at any given time is irrelevant; it is the degree of control which the executive is legally entitled to exercise which is relevant. In R. v. Achtem the issue was whether the Alberta Housing Corporation was an agency of the Government of the Province of Alberta. The accused in that case had been convicted of paying a reward to a government official, namely, the Executive Director of the Corporation, contrary to s. 110(1)(b) of the Criminal Code of Canada. It was conceded that if the corporation was an agent or 'emanation or arm' to use the language of the court in that case, of the Government of Alberta, then the appellant was rightly convicted. It was therefore necessary to determine whether the corporation was such an agent, emanation or arm. In deciding that the corporation was an agency of the government, and thus dismissing the appeal, McDermid J.A. reiterated that "in considering the nature and degree of control it is not only in fact what control was exercised but the control that would lawfully be
exercised.¹⁸³ He proceeded to find such de jure control in the Alberta Housing Act,¹⁸⁴ which provides for the establishment of the Alberta Housing Corporation.

(h) General observation

The plenitude of tests and criteria by which, in the absence of express statutory indication, the status of a public corporation has been determined, is not an indication of certainty of result. Although the control test has been singled out as a more satisfactory test, there is no agreement that any of the tests gives a conclusive answer; the answer may depend on the respective weight given by the court to any one or several of the above mentioned tests.¹⁸⁵ Nor is it clear whether the tests laid down are of general application or are to be confined to a particular issue before the court.¹⁸⁶ And as the foregoing discussion has shown some of the tests are vague and based on shaky ground. The result is disconcerting for the public, practitioner and jurist alike.¹⁸⁷ Those situations in which there is some statutory indication of the status of the corporation will now be considered.

(ii) Where Legislation Contains Some Statement as to the Status of the Corporation

When the issue of the legal status of a statutory body is in question, the principal consideration one must have regard to is the language of the particular statute under which the body is established.¹⁸⁸ There is nothing in law to prevent the legislature from constituting a corporation a servant or agent of the crown or from conferring crown immunities and privileges to a crown corporation.¹⁸⁹ A great deal of private and public time and money would be saved if the parliamentary draftsmen were permitted to deal with each case by clear and
explicit language. For example, if privilege is desired it would be appropriate to provide that, "for all purposes of this Act the corporation shall have and may exercise all the powers, privileges, rights and remedies of the crown" and if avoidance of privilege is sought, it would be useful to provide that; "the corporation shall not be deemed to represent the crown for any purpose whatsoever."\textsuperscript{190}

Unfortunately, in most cases, legislation in question does not explicitly deal with the issue of the legal status of crown corporations\textsuperscript{191} and the courts have been faced with the task of interpreting provisions of statutes which are far from being explicit but which, that notwithstanding, have been considered as, in some way or another, indicating the status of these corporations. In \textit{Wynyard Investments Proprietary Ltd. v. Commissioner for Railways (N.S.W.)}\textsuperscript{192} s. 4(2) of the Transport (Division of Functions) Act, 1932-1955 (N.S.W.), which provides that "for the purpose of any Act the Commissioner for Railways shall be deemed a statutory body representing the crown" was construed by the court as meaning that the commissioner was a servant or agent of the crown and therefore not bound by the Landlord and Tenant (Amendment) Act 1899-1948 (N.S.W.). But in \textit{Rural Bank of New South Wales v. Hayes},\textsuperscript{193} the bank, a public corporation, was held to be bound by the very section in question in the Wynyard Investments case, that is, s. 62 of the Landlord and Tenant (Amendment) Act, the court saying; "A corporate lessor which is not the crown is bound by the Act, and it is nothing to the point that land of which the corporation is the lessor is held on behalf of the Government."\textsuperscript{194} In \textit{State Electricity Commission of Victoria v. Mayor, Councillors and Citizens of the City of South Melbourne},\textsuperscript{195} the respondent sued the appellant commission claiming rates imposed under the
provisions of the Local Government Act, 1958 in respect of lands within the City of South Melbourne. The State Electricity Commission Act, 1958 provided that the electricity undertaking was conducted by the commission 'on behalf of Her Majesty.' On appeal, the commission contended it was exempt from rates because the lands in respect of which rates were assessed were the property of Her Majesty used for public purposes, by virtue of the aforementioned provision. The issue then was whether or not the lands rated were the property of Her Majesty. The court rejected the appellant commission's contention and held that the land vested in the commission was not the property of Her Majesty. In effect the court rejected the phrase 'on behalf of Her Majesty' as insufficient to establish the relationship of trustee and beneficiary between the commission and the crown. The court also observed a strong tendency in modern authorities to regard a statutory corporation formed to carry on public functions as distinct from the crown unless Parliament has, by express provision, given it the character of the crown.

The provisions, in statutes creating public corporations, establishing the power to sue and the liability to be sued on the part of corporations, have been interpreted as evidence of separation of the corporations from the crown; a corporation which may sue and be used in its corporate name does not partake of crown prerogatives. In C.B.C. v. Cyr, a case in which a crown corporation sought to resist garnishee proceedings, the Quebec court of King's Bench, Appeal side, held that in view of the provisions of the statute creating the C.B.C., declaring it to be a corporation having capacity to sue and be sued in its name, the C.B.C. could not claim to be exempt from court proceedings as an agent or emanation of the crown. Hence the corporation was bound to make a declaration in
reply to a writ of attachment by a garnishment in respect of its employee. But in *Oatway v. Canadian Wheat Board*\textsuperscript{200} and *International Railway Co. v. Niagara Parks Commission*,\textsuperscript{201} the Manitoba Court of Appeal and the Ontario Court of Appeal, respectively, rejected as evidence of separation from the crown, the provisions establishing the power to sue and the liability to be sued, in corporate name. In the two cases the Canadian Wheat Board and the Niagara Parks Commission were held to be servants or emanations of the crown.

The Statute Law Amendment Act,\textsuperscript{202} in 1950, threw some light on the question of the legal status of crown corporations. That Act, which affected seventeen statutes, sixteen statutory crown corporations\textsuperscript{203} and all crown companies, introduced a uniform provision to the following effect;-

"The corporation is, for all purposes . . . an agent of Her Majesty, and its powers under this Act may be exercised only as an agent of Her Majesty." \textsuperscript{204}

This provision has since 1950 been reproduced in statutes creating departmental, agency and proprietary corporations,\textsuperscript{205} but does not appear in statutes establishing unclassified corporations.

It remains to be considered whether the above provision provides a last word as regards the status of crown corporation, and cases decided after 1950 would be useful in this respect. In *C.B.C. v. Attorney General for Ontario*\textsuperscript{206} the C.B.C. was charged before a magistrate with violating the Lord's Day Act\textsuperscript{207} by operating a broadcasting station on the Lord's Day. The corporation applied before a judge in chambers for a writ of prohibition to prevent any further proceedings and to quash the summons on the ground that the Act did not apply to Her Majesty and therefore did not apply to the corporation, being an agent of Her Majesty.\textsuperscript{208} The application was refused by the Chief Justice of the High Court, and his
judgment was affirmed by the Ontario Court of Appeal. On appeal to the Supreme Court of Canada, the court held that the Lord's Day Act did not apply to the C.B.C., and therefore the corporation was entitled to the writ of prohibition as applied for. The Supreme Court of Canada also held in B.V.D. v. The Queen\textsuperscript{9} that the crown as principal, could sue the appellant company to recover money owed by the appellant company to the Commodities Prices Stabilization Corporation, an agent of the crown. These two cases show that once the statutory agency relationship is established, then the corporation is entitled to the benefit of crown prerogatives and that the crown, in its own name, may enforce a right accruing to its agent.

However, other cases decided after 1950,\textsuperscript{210} tend to show that the mere establishment of a statutory relationship of agency does not indicate that the corporation as a servant or agent of the crown is entitled to all the attributes of the crown. In Marcel Langlois v. Canadian Commercial Corporation,\textsuperscript{211} the corporation was sued for damages for breach of contract. Interest on damages was allowed against the corporation pursuant to the general law of Quebec. It was contended for the corporation that it was an agent of the crown,\textsuperscript{212} that the crown may not be charged with interest on any principal sum, except by virtue of a statutory provision or its own consent, that the corporation was in the same position as the crown and therefore interest should not be allowed.\textsuperscript{213} The Supreme Court rejected these contentions and held that the corporation was in the same position as any other private corporation, notwithstanding that it was constituted an agent of Her Majesty. In Alberta Government Telephones v. Selk,\textsuperscript{214} Crossley J. had this to say:--

"The consideration, therefore, is whether or not the Alberta Government Telephones can exercise crown prerogatives that have been in existence for many centuries. In reading s. 39(1), 215
the only help we have is to the effect that the commission is an agent of the crown in the right of the Province. This section does not specifically state that the commission has any prerogative whatever."

Whereas prior to 1950 the Canadian courts were primarily engaged in seeking to establish a relationship of master-servant, principal-agent or trustee-beneficiary and to grant or deny crown attributes according to whether a desired relationship was established, now the courts have to determine whether the mere fact that a relationship has been established by statute is sufficient to confer onto the corporation all the crown attributes. Of course one does not forget that in respect of unclassified crown corporations, no such relationship is established. In respect of these unclassified corporations, one may interpret the silence of the legislature as an indication of an intent to disassociate these corporations from the crown, or as a negligent omission in which case it may still be necessary, using the various tests and criteria already outlined to determine the status of these corporations.

The Supreme Court of Canada has held in two recent cases that whether or not a particular body is an agent of the crown depends upon the nature and degree of control which the crown exercises over it. In Canada, therefore, the control test is the most crucial test in determining whether a desired relationship between the crown and a crown corporation is established. But as has been shown above, it is not enough to establish merely that a crown corporation is an agent or servant of the crown in order to attract crown attributes. What then should guide the courts as to the determination of the legal status of crown corporations?

It is submitted that in all cases the determining factor in seeking to establish the legal status of a crown corporation must have reference to the
interests sought to be protected or considered by the judges and other legal
technocrats worthy of legal protection. This is the only meaningful
solution or approach to the problem since as has been demonstrated above,
neither the tests used in absence of express statutory indication nor the
express provisions that a corporation is a servant or agent of the crown are
conclusive in determining the legal status of a crown corporation. Crown
advantages should be upheld only when there are objective purposes to be
served thereby and should be denied if no purpose is served by their being
upheld.

Bearing in mind the interest groups introduced in the introductory part
of this essay, one is able to rationalise the decisions made after 1950.
For example, C.B.C. v. Attorney General for Ontario\textsuperscript{217} involved the
criminal liability of the C.B.C. for broadcasting on the Lord's Day. The
court held the C.B.C. not bound by the Lord's Day Act, as a servant or agent
of the crown. This decision in no way prejudices the interest groups
mentioned in the introductory part; a contrary decision would, on the other
hand, have affected millions of Canadians by depriving them of broadcasting
services on Sundays. In B.V.D. Co. Ltd. v. The Queen\textsuperscript{218} the crown
sought, as principal, to recover money owed to its agent, a crown
corporation. The decision that the crown could so recover the money did not
adversely affect anyone whose interests are deemed worthy of protection; on
the contrary, it was only appropriate that the taxpayers' money should not
be left to private appropriation. Similarly, in R. v. Achtem\textsuperscript{219} the
holding that the Alberta Housing Corporation was an agent of the crown
sustained the conviction of the appellant for paying a reward to a
government official, namely, the executive director of the corporation. The
court, in effect, but without so saying, held that crown corporations should
not be the object or subject of corrupt practices and this is desirable.

On the other hand, in Marcel Langlois v. Canadian Commercial Corporation\textsuperscript{220}, the court refused to give particular legal incidence to the statutory relationship of agency. The claim in this case was for interest on damages for breach of contract and the Supreme Court of Canada held that such interest was recoverable. So the appellant, a private litigant, was protected against a public authority. In the same spirit, in National Harbours Board v. Langelier and Others,\textsuperscript{221} an interlocutory injunction was granted against the Board to restrain it from carrying out certain works on the St. Lawrence river, which would have injuriously affected the properties of the respondents, notwithstanding that the Board was constituted an agent of the crown\textsuperscript{222} and that the crown is generally immune from restraint.\textsuperscript{223} But as the following discussion of the tortious liability of crown corporations will, in part, show, it is not possible to rationalise all the cases in the fashion that the above five cases have been rationalised.

V. TORTIOUS LIABILITY OF CROWN CORPORATIONS

The two most important prerogatives by exception have, since the feudal period, been that the crown is not liable for tort and is not in general bound by any statute unless named therein.\textsuperscript{224} The rule against tortious liability in practice exempts the state from liability to the subject for the wrongful acts of its officers and servants, while that of exemption from statutes operates, in general, in rather a different way. From the fact that statute law deals in the main with matters of public regulation or administration and with matters of revenue, the rule works out practically to this: that the property of the central government is exempt
from administrative regulation and especially from taxing Acts, and that the functions of central government are exercised independently of and not subject to the fiscal or administrative regulations imposed by statutes or by the several subordinate authorities created and empowered by these statutes. The rule of exemption from statute, therefore, does not affect the subject or individual in any direct sense and this is the reason why it is not discussed in any detail. On the other hand, the fact that the rule against tortious liability of the crown, directly and in a real sense, affects the subject or individual, calls for a detailed examination of the same, in an attempt to analyse how the courts have reacted to the interests of the groups already outlined.

(a) The Position Prior to 1953

(i) Tortious liability of crown corporations denied

The rule in Canada, prior to 1953, was that the crown itself could not be sued in tort and crown assets could not be reached, indirectly, by suing in tort, a department of government or an official of the crown. As to a government department, there was the added barrier that, not being a legal entity, it could not be sued. The courts, both in Canada and England extended the crown's immunity from tort actions to crown corporations vide the relationships of master and servant, and principal and agent. Using the tests already discussed, the courts held in a number of cases, that if a corporation in question was a servant or agent of the crown, then it was not liable to be sued in tort. Thus McTague J.A. in Gooderham and Worts Ltd. v. C.B.C. confidently stated; "It seems pretty definitely established that the crown or an emanation of the crown cannot be successfully sued in tort . . ." The courts, as has already been pointed out, used such expressions as 'emanation or shield of the crown',

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'department of government', 'state instrumentality' or 'hands of the crown' in order to convey the relationships of master-servant and principal-agent. In Quebec Liquor Commission v. Moore, the commission was held not liable in tort for injury caused to Moore by the action of the commission's employee because the commission was an instrumentality of the government. In the Australian case of Marks v. Forests Commission, the Victorian commission was held not liable for injury caused to a member of the general public by the negligence of one of the drivers of the commission partly because it was largely controlled by a Minister and was therefore a government department.

It is clear that in thus denying the tortious liability of crown corporations, the courts paid no regard to the interests of those who were wronged by the actions of these corporations. The individual was thus without any remedy at all. What is not clear is whether the courts ever addressed themselves to these interests or whether they so did but did not consider those interests worthy of legal protection. However, in the United Kingdom the crown's immunity, prior to 1947, was mitigated by the crown, as a matter of grace, 'standing behind' any servant who committed a tort in the course of his employment. If the injured person was successful in suing the servant, who was personally liable, the crown would satisfy the judgment. This practice was the result of a moral and not legal duty for as Viscount Simon pointed out in Adams and Others v. Naylor, where an action in respect of a tort was brought against a servant of the crown, the issues to be tried were those between the parties and the court was not concerned with the fact that the crown, which was not a party, might stand behind the defendant. The practice had also other defects, namely;
(a) the plaintiff might not know the identity of the servant who injured him, in that case he had no one to sue;

(b) the crown might dispute that the tortfeasor was its servant, or that he was acting in the course of his employment; in that case the injured party could not obtain a judicial decision on the question;

(c) more significantly, the crown's practice provided no machinery for recovering damages from the crown in situations where a private employer would be liable directly rather than vicariously. 234

Because the practice rested on a moral but not legal duty, and by virtue of the defects in the practice pointed out above, victims of tortious wrongs largely remained without redress, and in Canada there is no evidence of such practice.

As has been intimated, a servant of the crown who committed a tort was personally liable to the injured victim and this was so even if the tort was committed in the course of his employment.235 The principle was stated as early as 1865 by Cockburn J. in Feather v. The Queen236 in these words;-

"But in our opinion no authority is needed to establish that a servant of the crown is responsible in law for a tortious act done to a fellow subject, though done by the authority of the crown - a position which appears to us to rest on principles which are too well settled to admit of question, and which are alike essential to uphold the dignity of the crown on the one hand, and the rights and liberties of the subject on the other."

According to this principle, only the servant who actually committed a tort was personally liable. A minister, departmental head or other superior servant was not liable for the torts of a subordinate, for the superior is a fellow servant and not the master.237 The liability was thus direct and not vicarious.

Further disregarding the necessity to provide relief to those injured by crown corporations, the courts refused to apply the above principle or
rule to crown corporations. One of the reasons was that since there was no contractual relationship between the crown and the corporations, then the corporations could not, in strict accuracy, be described as servants.238 This argument is self-contradictory for it was the same relationship that was used to identify the corporations with the crown and attribute crown prerogatives to the former. Closer analysis shows that if this argument is taken to its logical conclusion it gives the following result: for purposes of immunity from tort actions, a crown corporation is a servant of the crown, but for purposes of personal liability in tort such a corporation is not a servant of the crown. Secondly, it has been argued that a public corporation has no personal capacity but only a representative one and therefore it could not be sued without necessarily involving the crown.239 It has no private property to satisfy a judgment and in view of the rule that state property is never available to satisfy a judgment against a servant personally, no action in tort could be brought against such a corporation.240 It is submitted that this second argument is legally untenable for a corporation, whether public or private, has its own personality separate from the crown or its shareholders and there is no legal requirement that its property be that of the crown or its shareholders. This argument, if maintained, would make public corporations immune from all actions, whether founded in tort or contract or any other branch of law.241 This cannot be the case.

A third reason for not applying the rule of personal liability to crown corporations was that since a corporation is an abstraction, it could not be held to have actually committed a tort.242 But a case can be made out that if it could be shown that the corporation had actually committed the tort or was directly privy to it, it could be held liable therefor.243
An example would be where the governing body passed a resolution ordering the commission of the tort.244

Also, in the same way as a Minister was not liable for torts of his subordinates, a crown corporation was not liable for the torts of its employees for these employees were not servants of the corporation but servants of the crown, the rule being that a person employed by a crown servant in his official capacity is not a servant of that crown servant but is himself a servant of the crown;245 the superior is a fellow servant and not master.246

If the courts had been serious about providing redress to injured victims, the obstacle posed by the fact that a corporation is an abstraction could have been overcome by utilizing the principle laid down in Lennard's Carrying Co. v. Asiatic Petroleum Co. Ltd.247 In that case a company which owned a ship was seeking to take advantage of the limitation of liability under section 502 of the Merchant Shipping Act 1894. This limitation is available only where injury is caused without the owner's 'actual fault or privy.' The loss resulted from the default of Lennard, its managing director, and in holding the company liable, Viscount Haldane L.C., in delivering the judgment of the House of Lords, said:-

"My Lords, a corporation is an abstraction. It has no mind of its own any more than it has a body of its own; its active and directing will must consequently be sought in the person of somebody who for some purposes may be called an agent, but who is really the directing mind and will of the corporation, the very ego and centre of the personality of the corporation . . . If Mr. Lennard was the directing mind of the company, then his action must, unless a corporation is not to be liable at all, have been an action which was the action of the company itself within the meaning of section 502 . . . It must be upon the true construction of that section in such a case as the present one that the fault or privity is the fault or privity of somebody who is not merely a servant or agent for whom the company is responsible upon the footing respondeat superior, but somebody for whom the company is liable because his action is the very action of the company itself." 248
On the authority of this case it can no longer be contended that a corporation is not capable of personally committing a wrong and it was possible to hold crown corporations personally liable for their torts.

Further, as Fullagar J. in Commonwealth v. Bogle observed, there is no reality in the idea of an incorporated public authority being a fellow servant of the crown with the 'individual servants' employed by it; and as G. Sawyer has suggested, the difficulty disappears if the corporation is thought of as an agent, for an agent may employ servants to carry on the agency, and those servants are not fellow servants of their principal. In such a case a corporation would be liable for the actions of its servants in the course of their employment.

Ultra Vires

It is trite law that no act or omission by the crown or its servants gives rise to liability in tort unless it is committed without legal authority. A governmental act may be authorized either by statute or by prerogative, and if so, then it is not tortious. This does not always mean that a person who is injured by the act will go uncompensated, for the particular statute or prerogative may provide for the payment of compensation; but in such a case the claim for compensation is founded on statute or prerogative as the case may be, and not on the law of torts. Relying on this rule, statutory crown corporations have attempted to resist tortious liability by arguing that since their powers are derived from statute, the exercise of those powers cannot be the subject of an action at the suit of individuals who allege that they have been injured; that a crown corporation in the exercise of statutory
powers is incapable of doing a wrongful act and that any wrongful act must be deemed ultra vires the corporation, for which the corporation is not liable. In the Irish case of Wheeler v. Public Works Commissioners, Palles C.B. is quoted as having said; - "Now if a corporation be constituted for the sole purpose of doing acts for the crown, it is prima facie outside its powers to do anything, except for the crown, and as in law a wrongful act cannot be done for the crown, such a corporation is not capable of doing such a wrongful act in its corporate capacity. In such a case, therefore, the wrongful act cannot be deemed that of the corporation. . ."

In East Suffolk River Catchment Board v. Kent and Another, owing to a very high tide, a breach was made in a sea wall, as a consequence of which the respondents' land was flooded. The appellants in the exercise of their statutory powers undertook to repair the wall, but carried out the work so inefficiently that the flooding continued for 178 days, thereby causing serious damage to the respondents' pastureland. It appeared from the evidence that by the exercise of reasonable skill, the breach in the wall might have been repaired in 14 days. The issue was whether the Board was liable for the damage. The House of Lords held in favour of the appellant board, saying that where a statutory authority is entrusted with a mere power, it cannot be made liable for any damage sustained by a member of the public by reason of a failure to exercise the power. Lord Romer specifically stated that if in the exercise of its discretion the authority embarks upon an execution of that power, the only duty owed to any member of the public is not thereby to add to the damages which that person would have suffered had the authority done nothing. So long as the authority exercises its discretion honestly, it can determine the method by which, and the time
during which, the power shall be exercised, and it cannot be made liable for any damage that would have been avoided if it had exercised its discretion in a more reasonable way. But as will be demonstrated in the following subsection, other courts and judges have rejected reliance on statutory provisions as a ground for escaping tortious liability on the part of public corporations.

(ii) Tortious liability of crown corporations established

The courts, in a number of cases, concerned that members of the public should not be exposed to unreasonable risks - even from public bodies, - have held public corporations liable for their torts or those of their servants or employees. In Managers of the Metropolitan Asylum District v. Hill, the appellants were incorporated by the Metropolitan Poor Act, 1867, for the purpose of providing hospitals for the reception of the sick poor of the Metropolis. The respondents brought an action against the appellants, alleging that the appellants had erected a certain hospital near their properties, for the reception of persons suffering from small pox and other infectious and contagious disorders, which was a nuisance, and had carried on the said hospital so as to be a nuisance. The appellants defended the action on the basis that they were simply carrying out orders of the local government board which had statutory power to establish hospitals in metropolitan areas. "What had been done was done under statutory authority and therefore not the subject of an action at the suit of individuals who alleged that they were injured by it ... [it was the] intention of Parliament that private inconvenience must be submitted to, in consideration of the great public benefit that was to result from it." The court overruled the above objections holding that the appellants
could not set up the statute nor the orders of the local government board under it, as an answer to the action or to prevent an injunction issuing to restrain the Board from continuing the nuisance. Lord Blackburn noted that on those who seek to establish that the legislature intended to take away the private rights of individuals, lies the burden of shewing that such an intention appears by express words; and Lord Selborne observed that the appellants were obliged, in order to succeed, to prove that they had a statutory authority to create a nuisance for the purpose of and as incidental to the maintenance of a small pox hospital. And in Great Central Railway Co. v. Hewlett, Lord Parker considered it a well settled principle of law that where statutory powers are conferred, they must be exercised with reasonable care, so that if those who exercise them could by reasonable precaution have prevented an injury which is occasioned, and was likely to be occasioned, by their exercise, damages for negligence may be recovered.

In Mersey Docks and Harbours Board Trustees v. Gibbs, a case involving the liability of the Board for damage caused to the ship and cargo belonging to the respondents, the Board argued that as public trustees or trustees for public purposes they were not in their corporate capacity liable to make compensation for damage sustained by individuals from the neglect of their servants and agents to perform duties imposed on the corporation, or at all events the duty of the Board was limited to that of exercising due care in the choice of their officers; and that if they had properly selected their officers, any evil which ensued must be the fault of the officers and redress should be sought from such officers. They also relied on the statutory defence. The court rejected these arguments and held the Board liable to the owner of the ship and the owner of the cargo
thereon. Similarly, in *Gilbert v. Trinity House Corporation*,\(^\text{268}\) the facts of which have already been given, the court rejected the contention of the corporation that its employees were not its servants, but servants of the crown, and was therefore not liable for their negligence. The court held that the corporation was not a servant of the crown and was liable for the actions of one Griffiths, which resulted in damage to the plaintiff's ship.

The ultra vires defence was also emphatically rejected by the Supreme Court of Canada in *National Harbours Board v. Langelier & Others*,\(^\text{269}\) which observed that if a corporation commits a wrongful act, it is liable therefor and it cannot escape liability by alleging that it is not responsible for anything done outside its corporate powers and that this is true whether it is purporting to act as a crown agent or not. Martland J. rightly pointed out\(^\text{270}\) that a contrary rule would lead to the conclusion that no subject threatened with an unlawful act by a corporate crown agent would have any recourse to the courts against such a corporation to prevent it and continued;-

"I am not prepared to accept the proposition enunciated in *Wheeler v. Public Works Commissioners* [271] . . . that a corporation constituted for the sole purpose of doing acts for the crown is not capable of doing a wrongful act in its corporate capacity, unless that statement is to be limited in its meaning to say that such a wrongful act is not authorised by its corporate powers. Otherwise the statement subscribes to the theory that a corporation cannot be made liable in tort because its corporate powers do not authorize it to commit a wrong. In my opinion if a corporation, in the purported carrying out of its corporate purposes, commits a wrongful act, it is liable therefore and it cannot escape liability by alleging that it is not responsible for anything done outside its corporate powers." \(^\text{272}\)

The foregoing discussion shows that the cases are equally divided, one set refusing to give redress to those injured by crown corporations and the
other holding crown corporations liable for their tortious actions. This is the state of the law prior to 1953 and the position after 1953 will be considered next.

(b) From 1953 to the Present Day

The Canadian legislature, in 1953, passed the Crown Liability Act\textsuperscript{273} which finally established the liability of the crown for torts of its servants.\textsuperscript{274} Thus the feudal concept that the King can do no wrong, was, as far as tortious liability is concerned, reduced to no more than historical value. The Canadian Act following the United Kingdom Crown Proceedings Act 1947,\textsuperscript{275} which made the crown vicariously liable for torts committed by its servants or agents,\textsuperscript{276} and directly liable for breach of employer's duties,\textsuperscript{277} occupier's duties\textsuperscript{278} and statutory duties.\textsuperscript{279}

Now, for purposes of tortious liability, it matters not whether a crown corporation is or is not a servant of the crown. If it is a servant of the crown, then the crown is vicariously liable for its torts.\textsuperscript{280} The case of \textit{B.V.D. Co. Ltd. v. The Queen}\textsuperscript{281} established that the crown, as principal, could sue in respect of a right accruing to a crown corporation. One is therefore entitled, on ordinary agency principles, to assume that the crown can likewise be sued as principal, for the acts or omissions, of its agent, a crown corporation. If, on the other hand, a crown corporation is not a servant or agent of the crown, it is liable to the same extent as any other corporation.\textsuperscript{282} But one problem arises in those cases where the corporation is not a servant of the crown: If liability is established and the corporation is not, out of its corporate funds, able to pay the damages, should the government be called upon to pay or is the liability of the government, as shareholder, limited to the amount invested in the
corporation?

Under ordinary principles of company law, the shareholders of the company are not as such liable for its debts. In the case of a company limited by shares, each member is liable to contribute, when called upon to do so, the full nominal value of the shares held by him in so far as this has not already been paid by him or any prior holder of those shares; and in the case of a company limited by guarantee, each member is liable to contribute a specified amount to the assets of the company in the event of its being wound up while he is a member. In short, the liability of the members is limited.

There appears to be no good reason why such a rule should be extended to crown corporations for, as the Royal Commission on Government Organization observed, it is inconceivable, in terms of political realities, that the government would ever claim a limited liability and permit the organization to be forced into liquidation. And A.G. Irvine notes that, in practice, the government does not set a limit to the financial liabilities to third parties arising from the operations of its crown corporations and that whenever a corporation could not meet its liabilities from its own resources, the government has always provided the funds required to pay the claims of third parties. This approach is indeed commendable for it ensures that a judgment-creditor is not left with an empty judgment.

One case, decided after 1953, by the Ontario Court of Appeal, appears to be incomprehensible. It is the case of Formea Chemicals Ltd. v. Polymer Corporation Ltd., and involved the interpretation of section 3(6) of the Crown Liability Act which preserves the immunity of the crown from actions in tort with respect to anything done or omitted to be done in the
exercise of any prerogative power and in the exercise of any statutory power or authority conferred on the crown. In that case, the appellant's action was for damages for infringement of a patent by the respondent, a crown corporation and for an injunction restraining the respondent from continuing to infringe the same. The issue was whether the action was maintainable against the respondent which was admitted to be an agent of the crown by virtue of section 3(1) of the Government Companies Operation Act; which provides that "Every company is for all its purposes an agent of Her Majesty and its powers may be exercised only as such an agent of Her Majesty." The court held that since at common law an action for infringement of a patent, being an action in tort, was not maintainable against the crown nor against an agent of the crown acting in a representative capacity, the respondent was not liable, the case falling within the immunity of s. 3(6) of the Crown Liability Act. In the words of McLennan J.A.;-

"If it were not for the exception contained in s. 3(6) an action would lie against the respondent for infringement. As I understand s. 3(6) the immunity of the crown from actions in tort remains with respect to anything done or omitted (1) in the exercise of any prerogative power of the crown and (2) in the exercise of any statutory power or authority conferred on the crown. What is complained of in this case was done, if at all, in the exercise of a power conferred on the crown by the Government Companies Operation Act. Prior to the proclamation declaring the Act applied to the Respondent, the crown did not have power to manufacture and sell synthetic rubber products. The real effect of s. 3(1) of the Government Companies Operation Act is to confer a statutory power on the crown in right of Canada to engage in that business. Therefore, s. 3(6) applies and the remedy conferred by s. 3(1) [of the Crown Liability Act] is not available." 287

It is submitted that this case was wrongly decided for neither does s. 3(1) of the Government Companies Operation Act have the alleged effect nor does it, as the court suggested, confer a statutory power on the corporation to
infringe a patent or commit a wrong for that matter. If the reasoning of the court is maintained, it would mean that all crown corporations carrying on functions not 'traditionally' undertaken by the crown would be free from all liability. Therefore the application of section 3(6) of the Crown Liability Act was misconceived;\textsuperscript{288} and one can only hope that in future this case will be overruled by the Supreme Court of Canada.

The legal position as of the present is that the crown's immunity from tort actions has largely been removed; so crown corporations can no longer hide under the shield of the crown, but crown immunities and advantages, which affect and inconvenience the individual, still remain in the international sphere and in the area of procedures. These have also been claimed by public corporations and will be considered in that order.

VI. INTERNATIONAL LEGAL STATUS OF PUBLIC CORPORATIONS

As in national legal systems, states have, in the international legal order, enjoyed a position of advantage over individuals and other legal entities, as far as substantive legal liability is concerned. This has been the result of the application of the doctrine of sovereign immunity.

(a) The Doctrine of Sovereign Immunity

The doctrine of sovereign immunity, which is based on international law, states that a sovereign state cannot, against its will, be impleaded either directly by being served in personam or indirectly by proceeding against its property, in courts and tribunals of another sovereign state.\textsuperscript{289} In the Porto Alexandre Case,\textsuperscript{290} salvage services were rendered to a ship owned by the Portugese government by three Liverpool tugs. In an action for remuneration for the said services the defendant contended that as the vessel was the property of the Portugese government,
it could not be proceeded against and this contention was upheld by the court. The Canadian case of *Dessaulles v. Republic of Poland*\(^2\) involved a declinatory exception by the respondent state when sued for fees for legal services. The Supreme Court of Canada upheld the exception and restated the doctrine that a sovereign state cannot be sued before foreign courts.\(^2\)

Unlike in national legal systems, where an early distinction was made between contractual and tortious liability of the government, no such distinction was made in the international sphere and the state was not suable in the fields of contract,\(^2\) tort\(^2\) and in respect of other legal wrongs.

(b) The Justification for Sovereign Immunity

The maxim "Par in parem non habet imperium" (each state must respect the dignity, equality and independence of another state) provides the justification for the rule of sovereign immunity. According to this maxim, the assumption of jurisdiction over foreign states is contrary to their dignity and as such inconsistent with international courtesy and the amity of international relations. It is beneath the dignity of a sovereign state to submit to the jurisdiction of an alien court and no state or government should be faced with the alternative of either submitting to such indignity or losing its property in default of appearance.\(^2\) In *French Republic v. Board of Supervisors of Jefferson County*,\(^2\) the Kentucky Court of Appeals said;

"... if one nation enters the territory of another with its consent, for the purpose of mutual intercourse, it does so with the implied understanding that it does not intend to degrade its dignity by placing itself or its sovereign rights within the jurisdiction of the other. . ."  

It is also said that one of the consequences of independence and
equality of states is the duty of municipal courts to abstain from exercising their jurisdiction over foreign states. All states are independent and equally sovereign and therefore no state is amenable to the courts of another. It is further argued, as a basis for sovereign immunity, that impleading a foreign state and consequently levying execution in the case of a successful action might lead to belligerent action on the part of the impleaded state and would produce undesirable consequences for the state of jurisdiction. "The reason is that if the courts here entertained the claim and in consequence gave judgment against the foreign sovereign, they could be called upon to enforce it by execution against its property. Such execution might imperil our relations with that country and lead to repercussions impossible to foresee." (c) The Application of the Doctrine of Sovereign Immunity to Public Corporations

The same process, of identifying public corporations with governments or states, for the purposes of conferring, internally, attributes of the state to these corporations, has been transplanted into the international arena almost wholesale. Thus, in attempting to establish the special relationships necessary to attract sovereign immunity, the courts have described a public corporation as an 'emanation', 'arm', 'alter ego', 'organ' or a 'department', 'mere instrument' or 'part and parcel' of the government or state. The tests used in determining whether or not the requisite relationship is established are the now familiar ones - statutory indication, incorporation, financial dependence, appointment of members, nature of functions and control. One may add that guidance may be sought in views of the government with which the corporation claims to have the desired relationship. It has been held that a certificate of the
ambassador or other appropriate representative of a government saying whether or not a body is a department, arm or alter ego of the state is of much weight.\textsuperscript{301} It is weighty because the ambassador or other representative speaks, so it is assumed, with knowledge of his country and its laws, but inconclusive in the sense that he may apply a test, which the courts of the state of jurisdiction, would not consider decisive or conclusive.

As with internal immunities, the cases dealing with sovereign immunity are equally divided, one set holding that public corporations, as agents, servants and departments of government, are entitled to the benefit of sovereign immunity, and another refusing to apply the doctrine of sovereign immunity to public corporations. The result has been to place those with claims against public corporations in a state of uncertainty since one cannot tell before hand which way a particular decision will go. Some cases will serve to illustrate this undesirable state of the law.

In Baccus S.R.L. v. Servicio Nacional Del Trigo,\textsuperscript{302} the defendant was a public corporation set up by the Spanish government and engaged in the regulation of production and distribution of wheat and similar products. It was under the supervision and control of the Spanish Ministry of Agriculture. The plaintiffs and the defendant entered into two c.i.f. contracts for the sale by the latter to the former of a specified quantity of rye. When disputes arose the plaintiffs issued a writ claiming damages for breach of contract.

Subsequently a summons was issued on behalf of the defendant praying that all further proceedings in the action be stayed on the ground that the defendant was a department of the state of Spain and therefore entitled to sovereign immunity. It was argued on behalf of the defendant that a legal
entity is not necessarily separate from the state and that there can be a
department of state which is incorporated; that it does not thereby cease to
be a department of state and that if it is a department of state which is
incorporated, there must be a right to claim sovereign immunity, if it is
impleaded.303

The Court of Appeal upheld the defendant's arguments and held that the
defendant was a department of the State of Spain notwithstanding that it was
a corporate body and a separate entity, and was therefore entitled to claim
sovereign immunity. In the words of Parker L.J., "There is no ground in
English law for thinking that the mere constitution of a body as a legal
personality with the right to make contracts and sue and be sued is wholly
inconsistent with it being a department of state."304

In Re Investigations of World Arrangements,305 immunity was
granted to the Anglo-Iranian Oil Company (now B.P.) on the ground that it
was indistinguishable from the British government which owned a majority of
its voting stock and that the production and refinement of oil - the reasons
for which the British government had acquired control of it - was an
essentially governmental activity since it was concerned with the needs of
the navy.306

In the United States, the courts have, to a large extent, been relieved
of the burden of trying to identify public corporations with the governments
concerned. Section 1603 of the Foreign Sovereign Immunities Act, 1976
defines a foreign state as including an 'agency' or 'instrumentality' of a
foreign state. An agency or instrumentality is further defined, inter alia,
as an entity "which is a separate legal person, corporate or otherwise and
which is an organ of a foreign state or subdivision thereof or a majority of
whose shares or other ownership interest is owned by a foreign state or
political sub-division thereof." It is not, however, clear what is meant by "and which is an organ of the foreign state." The Act does not offer any guidance. What is clear is that the Legislature adopted the language of the decided cases and as has already been pointed out the expression 'organ of the state' is meant to convey a relationship of master-servant, principal-agent or trustee-beneficiary, depending on the context and nature of the case in issue.

The U.K. State Immunity Act, 1978 defines a state as including the government and any department of government. Excluded from the definition is "any entity (separate entity) which is distinct from the executive organs of the government of the state and capable of suing and being sued." If the Act had stopped there, it would have completely excluded public corporations from the ambit of the doctrine of sovereign immunity. This progressive move is thwarted by the further and vague provision that a separate entity is immune if "the proceedings relate to anything done by it in the exercise of sovereign authority and the circumstances are such that a state would have been immune." Particularly vague is the expression "in the exercise of sovereign authority" and one can only hope that the courts will have the occasion to consider the section with a view to clarifying its meaning.

Canada does not have a State Immunity Act or anything along the lines of the United States Foreign Sovereign Immunities Act and cases dealing with sovereign immunity, as applied to public corporations are rare. It is disputable whether provisions constituting public corporations to be agents of the crown would be taken as an indication that the corporations so constituted are entitled to the benefit of sovereign immunity. At any rate, international law does not grant or refuse immunity according to
the immunities granted internally.\textsuperscript{312}

The issue of sovereign immunity of a Canadian public corporation was considered in the English case of \textit{Mellenger v. New Brunswick Development Corporation}.\textsuperscript{313} This was an action for breach of contract and it was contended on behalf of the defendant corporation that the corporation was an arm of the government of New Brunswick and could not be sued in a foreign country. The court sustained the contention holding that the corporation was an arm or alter ego of the government of New Brunswick and therefore entitled to immunity from suit in British courts. Whether the Canadian courts will, when adjudicating on foreign public corporations, take this approach, is not a matter that can be stated with certainty.

On the other hand, another line of cases\textsuperscript{314} has refused to confer sovereign immunity on public corporations, preferring to treat them as separate and distinct from the state and outside the province of state immunities and advantages. In \textit{Trendtex Trading Corporation v. Central Bank of Nigeria},\textsuperscript{315} the Bank issued a Letter of Credit drawn on Midland Bank in London in favour of the plaintiff, a Swiss company to pay for cement sold by the plaintiff to an English company. The Bank assured the plaintiff that the Letter of Credit was reliable. The plaintiff purchased the cement, sold it to the English company and shipped it to Nigeria. The Bank then refused to pay and the plaintiff brought an action on the Letter. The Bank's defence was that, as an arm or department of the government of Nigeria, it was insulated from suit by sovereign immunity. The court, rejecting the argument, held that the Bank, which had been created as a separate legal entity with no clear expression of intent that it should have governmental status, was not an emanation, arm, alter ego or department of the State of Nigeria and was therefore not entitled to claim immunity from suit.
United States v. Deutsches Kalisyndikat Gesellschaft involved a corporation formed and controlled by the French government for the purpose of exploiting potash in Alasace. It was held that a suit against the corporation was not a suit against a government merely because it had been incorporated by direction of the government and used as a governmental agent and its stock was owned solely by the government. In Ulen & Co. v. Polish National Economic Bank, a bank created by the Republic of Poland as a state institution, but as a separate legal person, whose stock was owned by the state, municipalities, and state and municipal enterprises was held not immune from suit on interest coupons attached to bonds issued by it and guaranteed by the Polish government because it had commercial objectives and "since it is a person quite different from the Polish government." And Singleton L.J. in a dissenting judgment in the Baccus S.R.L. case lamented:-

"I cannot find that it has been almost universally recognised that if a government sets up a legal entity, something which may contract on its own behalf as a limited company does in this country, it can succeed in a claim for sovereign immunity in respect of the activities of that company or entity."  

(d) Restrictive Sovereign Immunity

The doctrine of sovereign immunity as originally evolved did not distinguish between commercial and non-commercial activities of the state. The state was absolutely immune from suit in a foreign court and hence the doctrine has been referred to as the doctrine of absolute sovereign immunity, in contrast to the newer and reformed doctrine of restrictive, relative or limited immunity. The modern doctrine of restrictive immunity, which has, to a large extent, replaced the absolutist doctrine, grants immunity in respect of acts of a governmental nature, jure imperii, but no immunity in respect of acts of a commercial or private nature, jure
gestionis, and has found a place in a great number of cases, a 'Tate Letter', conventions, and Acts of Parliament.

The doctrine of restrictive sovereign immunity is the result of the encroachment, by governments or states, upon many forms of activity not traditionally within their sphere, and corresponds, in point of time, with the emergence of public corporations. The principle of absolute immunity as originally applied by the courts was intended to cover the political activities of the state in the strict sense of the word and has therefore become obsolete and productive of injustice and inconvenience at a time when the operations of the state are increasingly extending into commercial, industrial and similar spheres.

It is not clear whether Canada has joined the ranks of those states that adhere to the restrictive doctrine. In the case of Government of the Democratic Republic of the Congo v. Venne, the majority of whose decision has been criticised as "... somewhat ambiguous as no attempt is made to clarify the law," the Supreme Court of Canada had the opportunity to determine the fate of the restrictive immunity doctrine in the Canadian context, but let go that opportunity on the pretext that such determination was not necessary for determining the issues before the court. In that case the plaintiff sued the Republic of Congo for fees for professional services rendered in preparing plans for the construction of a pavilion at Expo '67. The Quebec Court of Appeal affirmed the dismissal of the defendant's declinatory exception based on the doctrine of absolute immunity. The Supreme Court of Canada, on appeal, reversed that decision holding that since the request for the respondent's services was made not only by the duly accredited diplomatic representative of the appellant, but also by the representative of the Department of Foreign Affairs of the
appellant country, it was plain the transaction involved a public sovereign act of state on behalf of the country and the employment of the respondent was a step in the performance of that sovereign act; and accordingly, even if the doctrine of restrictive immunity prevailed, the appellant, a foreign government, could not be impleaded in the Canadian courts.

However, as can be gathered from the above case, the Quebec courts have taken the lead and have adopted the restrictive view of sovereign immunity. On the federal level, the question is still open.

From the foregoing discussion, it is possible to state the doctrine of sovereign immunity as follows: "The doctrine of sovereign immunity, grants immunity from suit, in a foreign country, to a foreign state or government or its departments or other political subdivisions and to a corporation or other legal entity set up by that government to perform governmental or public functions and which may be regarded as a servant or agent of that government."

It has been noted that the restrictive theory of sovereign immunity seeks to draw a distinction between acts of a state which are done jure imperii and acts done by it jure gestionis and accords the foreign state and its agencies no immunity either in actions personam or in actions in rem in respect of transactions under the second head. But how is one to distinguish governmental, public or sovereign acts from commercial or private acts of a government? It is submitted that the expansion of the scope of governmental activities implies a corresponding widening of the reach of public or governmental purpose, and the attempt, implicit in the restrictive view of sovereign immunity, to apply the test of 'proper' or 'true' governmental functions must be rejected as outmoded and illogical in
modern circumstances.

Lauterpacht refers to the distinction between acts jure imperii and acts jure gestionis as "the distinction which experience has proved to be impracticable and productive of uncertainty."\(^3\)\(^2\)\(^9\) Stephenson L.J. says of the same, ". . . the distinction between the two categories has been found difficult to draw,"\(^3\)\(^3\)\(^0\) and W. Friedman writes;-

"The difficulty is how to find a reasonably precise distinction between acts of the one and the other kind in view of the many diverse ways in which governments may engage in economic and commercial activities. For this reason, neither the functional test (Does the state act in its sovereign capacity?) nor the test of the forms of the transaction is satisfactory. Any government activity may fulfil 'sovereign' purposes."\(^3\)\(^3\)\(^1\)

The impropriety of the distinction which has cost the doctrine of restrictive immunity its respect, is further exposed by the inconsistencies to be found in cases that have sought to make the distinction. Courts of different countries - and occasionally of the same country - have treated the same kind of activity in different ways.\(^3\)\(^3\)\(^2\) For example, the same transaction that was held in Government of the Democratic Republic of the Congo v. Venne,\(^3\)\(^3\)\(^3\) to involve a public sovereign act, was held in Allan Construction Ltd. v. Government of Venezuela\(^3\)\(^3\)\(^4\) to be a private and commercial transaction.

Various criterion have been offered for distinguishing between sovereign and commercial acts, viz; - 'nature of the dispute';\(^3\)\(^3\)\(^5\) 'intrinsic nature of the transaction';\(^3\)\(^3\)\(^6\) 'hard core of an irreducible minimum of government activities';\(^3\)\(^3\)\(^7\) and 'strictly political or public acts about which sovereigns have traditionally been quite sensitive.'\(^3\)\(^3\)\(^8\) All these criteria and tests miss the fundamental problem - the inability to appreciate the process by which an economic, trading or commercial activity of a state ceases to be a public, governmental or sovereign act,
for as the U.S. Supreme Court in Berizzi Brothers v. Steamship Pesaro argued;

"We know of no international usage which regards the maintenance and advancement of economic welfare of the people in time of peace as any less a public purpose than the maintenance of a naval force." 339

The concept of commercial, non-sovereign acts or acts of less essential activity requires value judgments which rest on political assumptions as to the proper sphere of state activity and of priorities in state policies. To the economists an extensive public sector might be viewed as a step forward in developing economies. Thus, in a real sense all acts jure gestionis are acts jure imperii.340

If any distinction must be made, it must be between commercial and non-commercial activities of the state. This would avoid the fallacious criterion of sovereignty, but this too is of cosmetic value only. The person seeking redress from the government or governmental institutions is not interested in the description of the activity from which his claim arises, but in compensation for the loss he has suffered, and no legal principle requires that he be compensated in respect of one kind of activity and not the other.

Despite its imperfections, the doctrine of restrictive immunity is beneficial in the one sense that it opens the door to intending litigants in respect of the so-called private or commercial activities of public corporations in particular and the state in general. It is in this sense that one should appreciate the remarks of the court in the Trendtex case341 that the modern principle of restrictive immunity is consonant with justice, comity and good sense. The modern doctrine is thus a step in the right direction.
(e) **Suggestions**

Although "the jurisprudence has also adopted it as being the domestic law of all civilized nations,"\(^{342}\) the doctrine of sovereign immunity has its roots in international law, which is theoretically premised on the consensus of nations. This must be taken into account in any attempt that seeks to modify or alter the doctrine.

It is suggested that the doctrine of sovereign immunity should altogether be done away with; that a sovereign state and all its organs, arms, instrumentalities, departments and corporations should be made liable in respect of claims arising out of contract, tort or other fields of law irrespective of whether the claim in issue arises out of an act jure imperii or jure gestionis.

The theoretical underpinnings of the doctrine of sovereign immunity are, as has already been intimated, to be found in the dignity, equality and independence of states. It is now contended, as a reason for the abolition of the doctrine, that time and events have eroded and falsified these very foundations of the doctrine and that it is no longer necessary or desirable that state activity in all its forms be hedged about with special exonerations and be fenced off from the process of the law by the attribution of perverse and inappropriate notions of sovereign dignity, equality and independence.\(^{343}\)

The rule of immunity was evolved in the days when no action lay against the sovereign in any circumstances. It was thought to offend the dignity of a sovereign and to impinge upon his independence if subjects were allowed to sue him in his own courts. Likewise, he would be offended if he were sued in the courts of another country. But states have long vacated that position,\(^{344}\) and therefore, the attempt to transpose into the
international domain, the traditional claim of the sovereign state to be above the law and to claim before its own courts a privileged position compared to that enjoyed by the subjects, appears to be very inappropriate. The dignity of foreign states is no more impaired by their being subject to the law of a foreign country than it is by their submission to their own law and courts. A state does not derogate from the dignity of another by subjecting it to the normal operations of the law on a footing of equality with the state within which it concludes a contract, commits a tort or other legal wrong. It is in fact more in keeping with the dignity of a sovereign state to submit itself to the rule of law than to claim to be above it, and

"Insofar as the jurisdictional immunity of foreign states is assumed to be based on their dignity, the time has probably come for abandoning what is now no more than an incantation alien to the conception of the rule of law, national and international, and to the true position of the state in modern society." 346

The equality of states is not impaired if all states are suable in foreign courts; the factors which vitiate such equality - wealth, military prowess, level of scientific and technological attainment, etc., have nothing to do with the issue of states being liable to suit in alien courts, and no state would risk the consequences of war by reason only that its department or corporation has been inconvenienced by suit in a foreign court. Independence of a state, in the sense of the right to exercise, within its territory, and to the exclusion of any other state, the functions of a state, is not negated by subjecting it to suit in a foreign court. Therefore, neither dignity, equality, independence of states nor international comity requires vindication through a doctrine of sovereign immunity.

Another reason for abolishing the doctrine of sovereign immunity is
that a claim to immunity is inconsistent with the notion of a state under the rule of law and is productive of injustice. It has been pointed out that "... the object of international law ... is not to work injustice, nor to prevent the enforcement of a just demand. ...", but it is clear that the doctrine of sovereign immunity is doing just that. A consequence of the doctrine of immunity is that in protecting sovereign bodies from indignities and disadvantages of adverse judicial process, it is operating to deprive the other persons of the benefits and advantages of that process in relation to rights which they possess and which would otherwise be susceptible of enforcement. The cases which have been considered and in which immunity has been upheld attest to this fact. The position has been aptly summed up by Professor Lauterpacht as follows:

"Its (the doctrine's) abandonment is required not only by the expansion of the activities of states and the injustice and inconvenience resulting from the disregard of these developments in relation to claims of individuals. At a period in which, in enlightened communities, the securing of the rights of the individual in all their respects, against the state has become a matter of special and significant effort, there is no longer a disposition to tolerate the injustice which may arise whenever the state - our own or a foreign state - screens itself behind the shield of immunity in order to defeat a legitimate claim. ... a claim to immunity consists in an unwarranted and often petty refusal to satisfy what would otherwise be a good claim. It amounts, in fact, to a denial of justice. ... It is this essential incompatibility of the doctrine of jurisdictional immunity with the principle of the subjection of the sovereign state to the rule of law, which explains the strength - we might say, the vehemence - of the opposition to the maintenance of that doctrine."

No single nation can change rules of international law and as Professor D.M. McRae has correctly pointed out, states, in their selfishness, will obviously resist any attempt to do away with the doctrine of sovereign immunity and to pin liability on them, but it is our duty as legal technocrats to educate politicians on what the law should be and what it
should achieve. At one time it was beyond any imagination that the
sovereign could be sued and now a sovereign state may be sued in a foreign
country in respects of acts jure gestionis. There is no reason why the
state cannot finally be made liable in respect of all its activities. With
respect to rules of international law, the modification of which requires the
consensus of a great number of states, the first step has always to be taken
by some state, otherwise international would be static. In relation to
sovereign immunity, Canada should take the lead in abolishing the doctrine
of sovereign immunity and if other states are sufficiently convinced of the
impropriety of the doctrine, they will follow suit. In the meantime the
courts should strive, as far as possible, to curtail the application of the
rule of immunity to state bodies.
I. **INTRODUCTION**

Although in national legal systems crown immunities and prerogatives, affecting the substantive liability of the crown and its agencies, have largely been removed, there still remain various procedural prerogatives which place the crown as litigant in a highly privileged position vis-a-vis the citizen. The procedural prerogatives apply in respect of all types of actions by and against the crown; no distinction was or is made between contract and tort actions. The courts also attempted to confer procedural prerogatives of the crown upon crown corporations and as with substantive crown prerogatives and immunities, two approaches are discernible, one holding crown corporation as being covered within the shield of the crown and the other holding them completely independent and not affected by crown prerogatives. Some of these procedural prerogatives or advantages in litigation are examined below.

II. **FORUM OR VENUE**

It is a well-recognized privilege of the crown to choose its own court. This means that the crown may, in general, choose its own forum and sue in whatever court it pleases. On the other hand, citizens seeking redress from the crown have, since 1877 when the Exchequer Court of Canada was established, been restricted in their choice of forum. Section 17 of the Exchequer Court Act provides that the court has exclusive original jurisdiction in all cases in which the lands, goods, or money of the subject are in possession of the crown or in which the claim arises out of a contract entered into by or on behalf of the crown. Therefore, prior
to 1950, if a case falling under section 17 of the Exchequer Court Act arose, and acrown corporation was involved, it was necessary to determine whether the corporation was a servant or agent of the crown. The tests used were those already discussed. If the corporation was declared to be an agent or servant of the crown and thus entitled to the legal immunities and advantages of the crown, an aggrieved citizen had to petition the Governor General in order to carry his case before the Exchequer Court.

In Oatway v. Canadian Wheat Board, the Canadian Wheat Board, a crown corporation, was sued by a farmer without a fiat from the crown. The Board contended that it was an instrument of the government of Canada or a department of the government of Canada or an emanation of the crown or servant or agent of the crown and that it was entitled to the benefit of all the rights, privileges and prerogatives of the crown, and therefore the court had no jurisdiction to try the action commenced without a fiat. The Manitoba Court of Appeal upheld the contention holding that the mere fact that an agent of the crown is a corporate body whose statute of incorporation provides that it may sue or be sued did not give the right to bring an action against it in the ordinary way. The Ontario Court of Appeal also held in International Railway Co. v. Niagara Parks Commission, that the Commission, as an emanation of the crown could be proceeded against only by petition of right.

Other cases did not consider crown corporations entitled to the procedural advantages of the crown. In Gooderham & Worts Ltd. v. C.B.C., the C.B.C. was sued for specific performance of a lease and for damages for breach of contract. The C.B.C. contended that as an emanation of the crown it could only be proceeded against in the Exchequer Court by petition of right. The Ontario Court of Appeal held that in view
of the wide powers of contract conferred on the corporation by its creating statute, wherein it was declared to be a body corporate with power to sue and be sued, the corporation was not immune to actions in ordinary courts for breach of contract. Therefore, the court had jurisdiction to hear the action. Riddel J.A. briefly stated his reason thus:-

"My reason, shortly stated, is that a corporation given full power to contract, and contracting, is liable to have its contracts dealt with by the ordinary courts . . ." 13

Yeats & Yeats v. Central Mortgage and Housing Corporation,14 involved an action for breach of contract against the defendant corporation in a provincial court. The trial judge held that the corporation being a servant and agent of the crown, could not be sued in the Supreme Court of Alberta. The Appellate Division affirmed the decision. A further appeal was made to the Supreme Court of Canada. The Central Mortgage and Housing Corporation Act provided as follows;-

s. 5(1) The corporation is for all purposes an agent of His Majesty . . . and its powers may be exercised by it only as such agent;

(2) The corporation may on behalf of His Majesty, enter into contracts in the name of His Majesty or in the name of the corporation;

(3) . . . . . .

(4) Where the corporation has acquired or incurred a right or obligation in the name of the corporation, it may sue or be sued therefor in the name of the corporation.

The Supreme Court of Canada held that the Central Mortgage and Housing Corporation, having entered in the name of the corporation into a contract under s. 5(2) of the Act, was subject to the jurisdiction of the Supreme Court of Alberta in respect of any obligation arising out of that contract by virtue of s. 5(4), and the Exchequer Court Act was not applicable because this was a claim against the corporation only and not against the crown. It
is submitted that however desirable the decision of the court might be, s. 5(4) on which the court relied in no way says that the corporation is not entitled to crown prerogatives; on the contrary, s. 5(1) and (2) is clear that the corporation only acts in a representative capacity and if the establishment of an agency relationship is anything to go by, the corporation should have been entitled to the privilege claimed.

The result of the foregoing cases is confusion and uncertainty. The aggrieved party, in the absence of express statutory provision, had no sure way of deciding whether his case was maintainable only in the Exchequer Court by petition of right or could be heard in provincial courts. And as the Yeats case shows, even where a corporation was expressly declared to be an agent of the crown, this did not necessarily mean that actions against it were to be heard in the Exchequer Court. The uncertainty in the law was, to a large extent, removed in 1950 by the Statute Law Amendment Act, which introduced a uniform provision in the statutes constituting departmental, agency and proprietary corporations and in the Government Companies Operation Act, thus:-

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

(a) brought or taken against the corporation without the Governor General's fiat or

(b) brought or taken by the corporation in the name of the corporation in any court that would have jurisdiction if the corporation were not an agent of Her Majesty."

The effect of this provision is that crown corporations can sue and be sued in provincial courts of competent jurisdiction without a fiat of the Governor General, and has been reproduced in acts creating departmental, agency and proprietary corporations passed after 1950.
The Crown Liability Act\textsuperscript{18} passed in 1953, established the liability of the crown in tort,\textsuperscript{19} and conferred exclusive original jurisdiction on the Exchequer Court in respect of claims arising in tort.\textsuperscript{20} However, section 23 of that Act provides that section 7(1) (which confers exclusive jurisdiction on the Exchequer Court) does not apply to or in respect of a cause of action arising in tort brought or taken in a court other than the Exchequer Court of Canada against an agency of the crown in accordance with any act of Parliament that authorizes such actions, suits or other legal proceedings to be so brought or taken; but that all the remaining provisions of the Act apply to and in respect of such actions, suits or other legal proceedings. The meaning of this section is that if a statute constituting a crown corporation specifically provides that it may sue or be sued in tort, in a provincial court, then section 7(1) of the Crown Liability Act is made inoperative.\textsuperscript{21} The question then becomes one of interpretation. The uniform provision alluded to above provides that "Actions, suits or other legal proceedings in respect of any right or obligation acquired or incurred by the corporation . . ." may be brought or taken by or against the corporation in a provincial court; and the issue has been whether such a provision covers tort actions. In \textit{Formea Chemicals Ltd. v. Polymer Corporation Ltd.}\textsuperscript{22} the Ontario Court of Appeal raised a quaere as to whether an action for infringement of a patent, would fall within the exclusive original jurisdiction of the Exchequer Court. The action was dismissed on other grounds but McLennan J.A. said, obiter;\textsuperscript{23} "If s. 3(3) [24] of the Government Companies Operation Act does not include actions in tort, then this court has no jurisdiction to hear the case and the proper forum is the Exchequer Court. I say it may be an obstacle in the
On the other hand, in Smith v. C.B.C., an action in tort was brought in the Ontario High Court against the C.B.C., which moved that the action be dismissed on the ground that the corporation was suable only in contract and not in tort. The issue was whether the word "obligation" appearing in the statute creating the C.B.C. included tort liability. Judson J. held that the word 'obligation' included not only a duty arising out of contract but also a duty or liability arising from an actionable wrong and therefore the action was maintainable against the C.B.C. In Lougheed v. C.B.C., the issue was whether liability in tort for defamation constituted an "obligation incurred" by the C.B.C. within the meaning of section 40(2) of the Broadcasting Act. The Alberta Supreme Court held that 'any obligation' includes a duty or liability arising from an actionable tort. Unless the Supreme Court of Canada or parliament provides a clear solution, the position will still remain uncertain as far as tort actions against crown corporations are concerned.

III. NOTICE OF CLAIM

A tort claim against a crown corporation may be defeated by the failure to give the statutory notice of claim. Section 10(1) of the Crown Liability Act requires that notice of a tort claim against the crown be served by a claimant, at least 90 days before the commencement of proceedings, on the Deputy Attorney General of Canada together with sufficient details of the claim. This provision is made applicable to crown corporations by section
Section 23 refers to "an agency of the crown", but that phrase is not defined in the Act. It is, therefore, not clear whether the provisions of section 10(1) apply only to those corporations which have been expressly constituted agencies of the crown or whether they apply to other types of crown corporations.

In Baton Broadcasting Ltd. v. C.B.C., in which the plaintiff claimed an injunction to restrain the C.B.C. from making use of a film illegally obtained from the plaintiff, the Ontario High Court observed that the language of section 23 of the Crown Liability Act does not reveal an intention to place all crown corporations or agencies upon the same footing as the crown in right of Canada so as to make applicable to all such agencies the provisions respecting notice that apply to the crown itself. In that case, the C.B.C. had set up the failure on the part of the plaintiff to give the statutory notice as a defence to the action.

While conceding that the plaintiff's claim for damages would be defeated for lack of notice since the C.B.C. was, by statute, constituted an agent of the crown, the court held that since the more important branch of the plaintiff's claim was the equitable relief of an injunction, a motion to stay perpetually or to dismiss the action for failure to comply with section 10(1) of the Crown Liability Act would be dismissed. The court considered the claim for an injunction as outside the scheme of the Crown Liability Act which deals primarily with tort actions, and also relied on section 40(4) of the Broadcasting Act, which provides that:

"Actions, suits or other legal proceedings in respect of any right or obligation acquired or incurred by the corporation . . . may . . . be brought or taken by or against the corporation in any court that would have jurisdiction if the corporation were not an agent of Her Majesty." 34

The case above discussed does not lay down any general principles with
respect to the application of section 10(1) of the Crown Liability Act to
crown corporations. All it decided was that on the facts of the case, that
section was not applicable to the C.B.C. which is by statute constituted an
agent of the crown, respecting an action for an injunction. But that
section was held applicable with respect to the claim for damages.

Depending on what a particular court intends to achieve, it is possible
that section 10(1) of the Crown Liability Act may be held applicable to a
crown corporation, which is not expressly declared to be an agent of the
crown, but which, using the common law tests already discussed, is
adjudicated to be such an agent.

IV. IMMUNITY FROM RESTRAINT

"... Perhaps the most unfortunate aspect of our present law is that
it would seem that no interlocutory relief can be obtained to restrain any
unlawful act done by the crown or its servants acting in that behalf"35
The effect of this is that an individual whose rights are threatened by an
unlawful act of the crown or its servants cannot, by injunction, restrain
such unlawful act.

This rule of immunity from restraint was in Banner Investment Ltd. v.
Saskatchewan Telecommunications,36 applied to a crown corporation.
That case involved an application for an injunction to restrain the
defendant crown corporation from demolishing a building on expropriated
land. The defendant crown corporation was, by statute, designated a crown
agent. By section 17(2) of the Proceedings Against the Crown Act
(Saskatchewan)37 the crown in right of the province is not subject to
being enjoined. Johnson J. held that if the crown as principal is not
subject to being enjoined by an injunction, it follows that an agent of the
crown created by statute acting under its statutory authority is not subject to such enjoinment either.  

The above case is in sharp conflict with the Supreme Court case of National Harbours Board v. Langelier & Others. In that case, by a petition for an interlocutory injunction, the respondents, owners of properties bordering on the St. Lawrence River, asked that the National Harbours Board be restrained from carrying out certain works on the river which, it was claimed, would injuriously affect their respective properties. The Board moved by way of declinatory exception that, being an agent of the crown, it was not subject to injunction. The exception was dismissed at trial and this judgment was affirmed by the Court of Appeal (Quebec). The Board was granted leave to appeal to the Supreme Court. 

The Supreme Court held that if a corporation can be held liable civilly in damages for wrongs which it has committed or ordered, it is obvious that a person threatened with the commission of an unlawful act by a corporate crown agent can seek the assistance of the court to prevent the corporation from doing that which it is not authorized to do as a crown agent. The appellant board could not prevent the court from inquiring into the legal justification for its conduct merely by saying that because it is an agent of the crown it is immune from restraint. 

It is said that immunity from restraint is essential because the crown might in an emergency want to override the law, leaving it to parliament to decide whether to ratify ex post facto, and that it would be prevented from so doing by interlocutory injunction. This ignores the prerogative rights of the crown in an emergency and takes no account of the fact that injunction is a discretionary remedy. The ends of justice would be better served by making injunctions available against the crown and its agents or
servants. To withhold an injunction say, against a crown corporation, even where its act is plainly illegal, if it merely purports to be acting on behalf of the crown, is particularly objectionable.

V. LIMITATION OF ACTIONS

(a) Proceedings by the crown and its Agencies

At common law, the rule is that in proceedings by the crown, the defendant may not plead the statutes of limitation. This is based on the maxim "Nullum tempus occurrit Regi" (no lapse of time prejudices the Crown), but Peter Hogg argues that this exemption from limitation laws is simply an application of the rule that statutes do not bind the crown except by express words or necessary implication. This position of advantage has been extended to public corporations. In Public Works Commissioners v. Pontypridd Masonic Hall Co., the plaintiffs, a public corporation, having rented a hall from the defendant, made an overpayment of rent and sued to recover the same. The defendant pleaded limitation. It was held that, although the plaintiffs were incorporated, they were in fact acting as agents of the crown and nominal plaintiffs in the action suing as representatives of the crown, and that the statute of limitations did not apply.

In Canada there is no general federal legislation governing limitation of actions, but Saskatchewan, New Brunswick and Ontario have Limitation Acts which, subject to certain exceptions, expressly bind the crown to limitation periods which affect natural persons. The result is that on the federal level, the crown in right of Canada and its agencies may be able to bring actions after any period of time unless a specific act of Parliament prescribes a limitation period.
Proceedings Against the Crown and its Agencies

The rule that the crown is not generally bound by a statute except by express words or necessary implication does not prevent the crown from taking advantage of a statute of limitation as a defence to proceedings brought against it, for the rule applies only when a statute might operate to the prejudice of the crown. Thus the crown has considerable leverage over its subjects and enjoys the best of both worlds.

As if that is not sufficient ground for concern, it has further been thought necessary to protect the crown and other public bodies, including crown corporations, by imposing in many jurisdictions a shorter time within which suits may be brought against the crown and its agencies.

The United Kingdom Public Authorities Act, 1893 once provided a limitation period of six months for actions against public authorities and s. 21 of the Limitation Act, 1939 increased the period to one year. However, in 1945 the Law Reform (Limitation of Actions) Act in s. 1 repealed this special period of limitation, along with other provisions providing special periods of limitation or other privileges for public authorities.

The Ontario Public Authorities Protection Act provides that:

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

This provision was applied to a crown corporation in Berardinelli v. Ontario Housing Corporation. The action was for damages arising from an alleged neglect of the corporation to remove ice from the common area surrounding its housing units, of which the plaintiff was a tenant. The
plaintiff slipped and fell on a patch of ice located on the common area. The court held that the corporation was a public authority and was entitled to the protection of the six month limitation period in accordance with the above section for its failure to remove the snow and ice from the common area of its housing developments. This is just one example of the kind of injustice that can be inflicted on an individual by the application of different standards for the crown and crown agencies on the one hand and other entities on the other.

With respect to proceedings against the crown in right of Canada under the Crown Liability Act, the law of the province in which the cause of action accrues governs.

The application of crown limitation advantages to crown corporations is difficult to justify. It is obvious that the crown is a huge organization which has to make and to meet a large number of claims of various kinds, making problems of investigation inevitable. The application of limitation provisions may produce undesirable results with respect to the administration of revenue legislation. It would not be in the public interest if the collection of taxes and duties, and the recovery of penalties and forfeitures were barred after a period of time. But public or crown corporations are no different, in this respect, from private organizations and have no unique characteristics which justify special treatment in the matter of limitation of actions.

VI. DISCOVERY AND INTERROGATORIES

One of the crown's procedural prerogatives that a crown corporation, as an agent of the crown, may claim is immunity from discovery. The crown enjoys the prerogative right to refuse to give discovery or to submit to
oral examination for discovery, and this right is not surrendered by
the voluntary entry of the crown into an action as a party, accompanied by a
submission to the Rules of court of the jurisdiction of the action.
The general principle is that a prerogative of the crown cannot be taken
away except by express words of statute.

In the United Kingdom, discovery and interrogatories are now available
by virtue of specific statutory provision. However, as in Canada,
crown privilege is available to the crown whenever the disclosure of a
document or the answer to an interrogatory would be injurious to the public
interest. But as was pointed out in the Canadian case of Homestake
Mining Co. v. Taxagulf Potash Co., the crown privilege is not
absolute. In that case a public servant was called as a witness in an
action between private litigants. The responsible minister objected,
arguing that the disclosure of the public servant's evidence would be
injurious to public interest. The Saskatchewan Court of Appeal, relying on
the Supreme Court case of R. v. Snider, held that the crown privilege
to exclude evidence is not absolute; the courts must balance public interest
in harm not being done to province or public service with public interest in
seeing the administration of justice not frustrated.

Despite this modification the rule against discovery and
interrogatories is still objectionable for as G. Sawer has correctly
pointed out, it prevents a plaintiff from fully presenting his case to
court. This is especially so in view of the fact that discovery and
interrogatories have always been available to the crown against a
subject.
VII. DEBT PRIORITY

In absence of statutory provision, where the right of the crown and the right of the subject, with respect to the payment of a debt of equal degree come into competition, the crown's right prevails. This rule was affirmatively stated as far back as 1807 in the case of R. v. Wells, by MacDonald C.B., in the following terms;-

"I take it to be an incontrovertible rule of law, that where the King's and the subject's title concur, the King's shall be preferred. The books are full of instances to that effect." 

In the Queen in Right of Prince Edward Islands v. J.A. Hughes, crown priority was claimed in respect of sales tax and the issue was whether the crown's claim took priority over judgment creditors. The court held that even apart from statute, the crown has priority over judgment creditors as creditors of equal degree.

The rule has, however, been qualified. In The Queen v. Workmen's Compensation Board and the City of Edmonton, the Alberta Court of Appeal held that the crown is not entitled to priority of payment by virtue of its prerogative in respect of a debt arising out of ordinary business transactions between the crown and a commercial concern. And in Alberta Government Telephones v. Selk, Crossley D.C.J. said; "Priority over other creditors with respect to strictly commercial debts does not seem to be one of the prerogatives available to an agent of the crown." This qualification of the rule seems to be based on the fact that the crown did not traditionally engage in commercial activities and therefore the rule cannot be applied to new situations which were not contemplated when the rule was evolved.

In accordance with a trend that is easily noticeable in this work, the courts have not been consistent in their approach to claims by public corporations to be entitled to the royal prerogative of priority in payment
of debts. In In Re Oriental Holdings Pty. Ltd.,\textsuperscript{74} it was held that the Victorian Railway Commissioners, a public corporation, were entitled to crown priority in payment of a debt owed to them by a company in liquidation. The debt arose out of a sale of coal by the commissioners to the company, an obviously commercial transaction. On the other hand in Fox \textit{v.} Government of Newfoundland,\textsuperscript{75} the Privy Council denied crown priority to the debts of an education board, one of the reasons being that the board had, within the limits of general educational purposes, an independent discretion as to the application of money paid to it.

In Metropolitan Meat Industry Board \textit{v.} Sheedy,\textsuperscript{76} the appellant Board, which had been formed for certain purposes in connection with the administration of slaughter houses, claimed priority as to a debt due to it by a company in process of liquidation. The claim to immunity was based on the contention that it was a servant of the crown. The Privy Council dismissed the contention holding that the Board was not acting as a servant of the crown and was, therefore, not entitled to the privilege claimed.\textsuperscript{77} The Canadian case of Alberta Government Telephones \textit{v.} Selk,\textsuperscript{78} involved the determination of the issue whether a provincial crown corporation could exercise the crown's prerogative of priority with respect to payment of debts. The Alberta District Court held that although the Alberta Government Telephones was, by statute, constituted an agent of the crown, it did not enjoy any rights of priority over other creditors with respect to debts owing to it and arising out of ordinary mercantile transactions.

\textbf{VIII. ENFORCEMENT OF JUDGMENTS}

At common law "... no execution can issue against the crown. The
petitioner remains dependent upon a combination of good will and the moral pressure he may hope to secure from public opinion." This rule which is based on the notion that interference with public property would hamper the state in the performance of its public duties, has now found expression in statutory enactments. The rule is, in Canada, applicable to crown corporation by virtue of the Crown Liability Act and by virtue of specific statutes creating public corporations.

According to the above rationale for the rule of immunity from execution, it may seem embarrassing for the state if its property or that of its agencies is made liable to execution, but this is the very reason why the state should meet its obligations expeditiously - to avoid embarrassment. Further, it is false to talk of the state as if it is something different from the citizens; the state is made up of individuals and if the state goes on inconveniencing its citizens, it ceases to be acting in public interest. H. Street records precedent in France where an unsatisfied judgment creditor of certain administrative bodies can enforce execution and sale, the property chosen being that the sale of which is least prejudicial to the public interest. Such an approach is at least more meaningful than the blanket cover approach adopted in Canada and should be adopted with respect to crown corporations.

IX. GENERAL COMMENTS

The list of crown prerogatives, immunities and privileges that can conceivably be claimed by public or crown corporations is endless but it is felt that the examples above given are sufficient to illustrate the point that the concept of the public corporate person has been so interwoven with the concept of the crown that the prerogatives and advantages of the crown
have blocked the development of a coherent system of liability, to the prejudice and inconvenience of the ordinary citizen.

As the foregoing discussion has demonstrated, a litigant seeking relief or redress from a public corporation is at every stage put at a disadvantage. If he establishes the right to sue the corporation, his claim may be defeated by the failure to give the statutory notice in time or by limitation provisions. If he goes over that, he may not obtain interlocutory relief and this could be fatal to his claim as the Banner Investment case shows. His case may not be fully presented to court as a result of the application of the prerogative of the crown to refuse to submit to oral examination or make discovery. And enforcement of a judgment against a public corporation may prove a tedious process.

Legal conservatism has visibly taken its toll in the area of procedure. Ancient rules, designed for a totally different type of society and government, remain to bedevil the sound administration of justice in a modern state. The prerogatives referred to above are elaborations of the general medieval rule that, in all cases where the King's right and that of a subject conflicted, the King's was preferred. Developed as part of the King's personal prerogative rights, they are inappropriate to the present public and executive concept of the crown. One can scarcely imagine any idea more antithetical to the basic tenets of democratic government than that which holds that the citizens, at whose pleasure and for whose benefit the government and its agencies exist, cannot enforce their rights against their representatives when they have been wronged by them.

The full realisation of the citizen's rights calls for reform on the general principle that no crown immunities are tolerable unless their retention can be affirmatively proved to be necessary in the public
interest. The cases referred to above show that the courts, which have wavered from one position to another, cannot be relied on in this respect. Therefore what is envisaged is parliamentary intervention. Parliament should proceed on the basis of equality between legal entities whether governmental or not and specify in particular cases the special advantages thought to be essential to a particular public authority.
I. INTRODUCTION

It is neither practicable nor desirable that the general body of taxpayers, the persons who provide the funds that form the life line of public corporations, actively manage the affairs of these corporations. So, for each corporation, a set of men or women, to whom the general term 'directors' may be applied, is appointed and charged with the management and administration of the affairs of the corporation. These men and women are trustees and agents of the corporations; they are trustees of the assets which have come into their hands or which are under their control, and they are agents in the transactions which they enter into on behalf of these corporations. But they are also public trustees, for if one lifts the veil of incorporation, one will ultimately find out that the money, property, and other assets, passing under the description 'corporation assets' are in truth public assets. And these public assets are quite substantial, for in 1977-78, out of total government assets of over $74 billion, the share controlled by crown corporations amounted to $29 billion.

Referring to crown corporations, the Royal Commission on Government Organization said, "... the term that best describes these organizations is one that was once widely employed but has fallen into disuse: the public trusts. For, in essence, they involve the appointment, by the government, of a board of trustees to whom is delegated the management of a public undertaking, within limits of public policy as defined in broad terms by Parliament and the government." The position of these directors is, however, different from that of ordinary trustees whose duty is to preserve the trust property and not to risk it. Directors, in most cases, have to
carry on business and this necessarily involves risks. In this respect they resemble directors managing corporations in the private sector.

If directors of public corporations are perceived as public agents and public trustees, then the taxpayers and other beneficiaries of the activities of public corporations have legitimate expectations that not only will the directors execute their duties with care, skill and diligence but also that in so executing those duties and responsibilities they will act honestly and in good faith with a view to the best interests of Canada and of the corporation. Directors have an obligation to see that things go right, that the funds in their control are not misapplied or mismanaged and that the organizations they manage and administer are not converted into avenues for private enrichment.

Creditors of public corporations expect that the assets of the corporations, to which they must look for repayment of their debts, will be preserved, save only to the extent that such assets have been depleted in the legitimate businesses of the corporations.

II. POLITICAL CONTROL AND PUBLIC ACCOUNTABILITY

The absence of shareholders in public corporations, in the sense we understand them with respect to private sector corporations, renders control of directors by members through general meetings irrelevant. The vacuum thus left is filled by the government and parliament. Since crown corporations are instruments of government policy, the government has a responsibility to ensure that its policies are properly carried out. This entails some control over those entrusted with the management of these corporations. Similarly, there must be, at least in principle, ample facility for the exercise of control over the activities of crown
corporations by Parliament in its capacity as representative of the taxpayers. This necessity for parliamentary control was recognised as early as 1921 by Arthur Meighen, then Prime Minister, when he remarked, in respect of the Canadian National Railways, thus:—

"... I know that it is a fact that the board of directors of the Canadian National Railway are dealing virtually with funds of the people of Canada. I know that parliament alone, is responsible to the people for the disposition of the money raised by taxation; consequently I know that there must be ample facility for the exercise of control that goes with and is inseparable from that responsibility." 7

The above two forms of control are directed towards directors of crown corporations and if effective would go a considerable way towards ensuring that the affairs of crown corporations are properly run.

(a) Government Supervision and Control of Public Corporations

One method of government control over public corporations is through the power to appoint and remove members of the board of directors. This power is normally conferred on the Governor-in-Council.

(i) Appointment of directors

A perusal of the acts constituting crown corporations shows an absence of clear guidelines regarding the appointment of directors. Although the government in the Blue Paper stated that, "It is the government's belief that crown corporations will operate at peak efficiency only when boards of directors operate at peak efficiency," 8 in most cases no standards or qualifications are set as regards the appointment of board members. 9 The trust placed in the boards of directors cannot be maintained unless care is taken in selecting directors and only through the appointment of board members with experience, competence and demonstrated capability can one expect responsive guidance and sound managerial direction. 10 It is useless to talk of efficiency, skill and diligence...
and honesty when in the first place no effort is made to ensure that those appointed as directors are capable of achieving such feats. Since, in most cases, no criteria for appointment are given there is room for the consideration of factors other than demonstrated competence in the appointment of board members.

In fact J.T. Stevens reports that "the criteria for appointment are frequently more for political reasons than for demonstrated managerial ability. Depending on the specifics set down in the statute, cabinet can just easily appoint or dismiss a chief commissioner or president." There is also Ottawa's practice of appointing senior government officials to the boards of crown corporations. It is difficult to see how a senior government official can serve on the board of a crown corporation when he must also serve in his own departmental capacity as advisor on financial and operating decisions that involve the corporation. This conflict of duties may also manifest itself in the fact that the official, in his capacity as director, may be placed in a position where he is compelled to join in an opinion that may be opposed to that of his political chief. As J.E. Hodgetts has pointed out, such administrative ambivalence is neither healthy, necessary, or feasible. This results from the lack of clear guidelines as to the appointment of board members.

(ii) Dismissal of directors

With respect to the exercise of the power of dismissal, two situations are discernible. In the first one, the statutes governing the corporations do not specify any grounds for dismissal; the tenure of office is stated to be 'at pleasure' either of the responsible minister or more usually the Governor-in-Council. In the second, 'permanent incapacity' and 'cause' are specified as conditions precedent
to the exercise of the power of dismissal.

The conferral of unlimited powers of dismissal is liable to be abused by those in whom the powers are reposed and means the complete dependence by the directors on the good will of those repositories of the powers of dismissal. This may have an inhibiting effect on freedom of action on the part of directors.

(iii) Suggestions

If the public is to have any confidence in the management of crown corporations, it is essential that there be no suspicion of nepotism or political jobbery. Crown corporation directorships should not be turned into rewards for political favourites. Also, if directors are to act freely and efficiently, they must have security of tenure. For these reasons, it is suggested that clear standards and qualifications for appointment of directors should be established and services of directors must only be terminated on grounds of disability, insolvency, neglect, misconduct or other sufficient ground or by expiry of the contract term, if any is specified.

(iv) The Power of Direction

In private sector corporations, where the main objective is the maximization of return on investments, the directors have a clear idea of what is expected of them. Public corporations, on the other hand, are not profit making bodies. Although directors of public corporations must execute their duties efficiently, they must also pay regard to broad policy objectives. This makes their role broader and more complex. To provide means whereby government can on a continuous basis, communicate broad policy objectives to the corporations, a power of direction has been conferred on the Governor-in-Council or the appropriate Minister with
respect to some crown corporations. This power is usually in this form: "the corporation shall comply with any direction given to it by the Governor-in-Council or Minister with respect to the exercise of its powers." The Royal Commission on Government Organization and the Blue Paper recommended that the power of direction be extended to all crown corporations.

The directive power, as an instrument for making the corporation conform to the government's definition of national policy may provide an outlet for irresponsible and excessive interference in the affairs of the corporations. To provide a safeguard against such an eventuality, the Lambert Commission and the Blue Paper recommended that directives issued to crown corporations be tabled in Parliament for scrutiny and debate.

(v) Other forms of government control

In addition to the powers of appointment and dismissal of directors, the Governor-in-Council has powers in respect of the following matters:

(a) approval of by-laws passed by the boards.
(b) authorizing all expenditure in excess of a fixed maximum.
(c) approving contracts and expenditures on capital account which involve large outlays.
(d) approving short term loans or advances to the corporations. [27]

The responsible Minister is also given certain powers. In conjunction with the Minister of Finance he is empowered to direct a corporation to pay to the Receiver General so much of the money administered by it as is considered in excess of the amount required for the purposes of the corporation. The Minister is normally entitled to request from the
corporation such detailed accounts, books and papers as he may require, and it is through the Minister that each corporation reports annually to Parliament.

(b) **Parliamentary Control and Public Accountability**

Parliamentary control over crown corporations has been deliberately restricted in pursuit of the earlier ideal of managerial autonomy and freedom from partisan pressure.\(^{29}\) Parliament is in a position to discuss annual reports of crown corporations when they are tabled but in practice these reports receive no examination by parliament at all.\(^{30}\) Parliament may also alter or change the powers given to a crown corporation and has an opportunity to examine the capital budgets of crown corporations which are annually laid before Parliament.\(^{31}\)

(c) **General Observations**

While political control and public accountability of crown corporations are useful instruments of control, they are not very effective in ensuring that the interests of those affected by the activities of crown corporations are adequately protected. The Governor-in-Council may dismiss a director of a crown corporation for misconduct or may direct that directors of public corporations shall carry on their duties in a way that the Governor-in-Council considers desirable and in the national interest. Parliament may also consider the annual reports and capital budgets of public corporations and may even change the objectives and powers of these corporations. But these controls do not touch on the legal duties of directors and the legal sanctions available against the directors for breach of their legal duties. While to the political scientist, political control and public accountability would seem very important aspects of the administration of public corporations, to the lawyer, they are less than adequate.
III. JUDICIAL CONTROLS

(a) Ultra Vires Doctrine

As public authorities, forming part of public administration, public corporations are subject to the supervisory powers which the courts as guardians of the law of the land exercise over administrative bodies. The courts will intervene where a public authority has exceeded the terms of its enabling statute, or has been prompted by motives alien to the administrative purpose for which the power was given. Excess and abuse of power by public corporations can be checked by the courts.

The general principle that a legal person created by statute can execute only those functions that it is expressly or by necessary implication empowered to do by its constituent statute, was the subject of consideration in the Canadian case of Rattenbury v. Land Settlement Board. The facts of the case were that the defendant, a body incorporated by the British Columbia Land Settlement and Development Act, took proceedings under that Act with respect to lands of which the plaintiff was the registered owner and penalty taxes provided for by the Act were imposed. The plaintiff sued the defendant attacking the said legislation as ultra vires, as providing for indirect taxation and claimed damages, an injunction, an account and a decree adjudging the plaintiff and his lands absolutely freed from all past and pending proceedings. Although the plaintiff's claim was unsuccessful the Supreme Court held that the defendant board was liable to be sued in respect of any ultra vires transactions and Newcombe J. observed that "... it is common practice founded upon general principle, that the court will interfere to restrain ultra vires or illegal acts by a statutory body ... To this extent, in my view, the action is properly constituted; indeed, upon this point the authority is
conclusive."

So strict is the ultra vires rule as applied to public authorities that where an act of a public corporation is wholly ultra vires, the court may interfere even though no damage to the public is shown. In the Australian case of Helicopter Utilities Pty. Ltd. v. Australian National Airlines Commission, the defendant commission, a public corporation, successfully tendered for the hire to the commonwealth of helicopters and crew to accompany the Australian National Antarctic Research Expedition on a voyage to the Antarctic. The plaintiff company which had supplied helicopters for use by the commonwealth in respect of a previous Antarctic expedition and on this occasion had placed the only other tender, sought an interlocutory injunction to restrain the commission from carrying out the contract for the hire of the helicopters, on the ground that the commission had no power to make such a contract. Although the relief sought was not given on the ground that the plaintiff company lacked locus standi to maintain the action, the court held that the proposed charter of the helicopters was ultra vires. Jacobs J. observed:-

"... it seems to me that the carrying on by a statutory corporation of a business which it is not empowered by its statute to carry on is itself a public wrong and that the court may in such case interfere, even though in some cases in its discretion it may decline to interfere. ... It seems to me that where the act is wholly ultra vires the Attorney General can always seek an injunction, even though no damage to the public is shown. It is an injury and a mischief to the public that a public corporation should exceed its power and the court is not bound, except in the exercise of a special discretion to go further." 36

Despite the strictness of the ultra vires doctrine, the doctrine is not as effective as it sounds. A major problem in relation to the challenging of actions by public corporations is the question of locus standi. Also the fact that the powers conferred on public corporations are sometimes stated
widely reduces the efficacy of the ultra vires doctrine as a tool for ensuring that the directors of public corporations properly run the affairs of these corporations.

(i) **Locus standi**

As a public corporation has no members or shareholders, those who normally seek to restrain a corporation from acting ultra vires will not be there to do so. In the Australian case of *Logan Downs Pty. v. Federal Commissioner of Taxation*, the High Court of Australia held that a mere taxpayer did not have standing to seek a declaration that certain powers to be exercised by the Wool Board were invalid. This explains the paucity of authorities on this aspect. The few authorities that are available mostly result from suits by business entities that are threatened with competition by the activities of public corporations.

L.C.B. Gower vaguely states that the ultra vires point may be raised by third parties when their interests are sufficiently affected. However, the correct legal position is that; "A claim that a public corporation incorporated by statute for public purposes is exceeding its powers is a claim which ordinarily falls to be made by the Attorney-General either on his own motion or on the relation of a member of the public." This is part of the general rule that an action to restrain an injury to the public must be brought in the name of the Attorney-General. The only two exceptions to this rule are:

1. Where the interference with the public right is such that some private right of the plaintiff is at the same time interfered with, for example, where an obstruction is so placed in a highway that the owner of premises abutting upon the highway is specially affected by reason that the obstruction interferes with his private right to access from and to his premises to and from the highway. As applied to public corporations, a plaintiff would
have to show that the excess of authority by a public corporation interferes with some private right of his.

2. Where no private right is interfered with, but the plaintiff, in his public right, suffers special damage peculiar to himself from the interference with the public right.

In Helicopter Utilities Pty. Ltd. v. Australian National Airlines Commission, a case considered above, the court held that the commercial interests of the plaintiff company were not sufficient to bring the company within any of the above exceptions since the Attorney-General had declined to issue his fiat for an information in his name on the relation of the plaintiff company.

Unless the Attorney-General becomes aware of any excess of power by a public corporation and is willing to act or a case falls within the two exceptions noted above, there appears to be no other way of restraining ultra vires activities. Probably one would revert to ministerial or cabinet control, for as the Royal Commission on Government Organization remarked, "... The concentration of the shareholders' interests in one person - the Minister - means that the managing board must work, so to speak, under the eye of a shareholders' meeting in continuous session." But even this is an overstatement; the responsible Minister does not exercise such continuous surveillance; he has to be informed.

(ii) Width of statutory powers

The mandatory statutory duties of a public corporation and permissive statutory powers incidental thereto (corresponding to the 'objects clause' in the memorandum of association of a registered company) are sometimes so widely drawn as to make the ultra vires doctrine nugatory as a means of exercising judicial control over the activities of the
corporation. When powers are so extravagantly conferred it becomes
difficult to establish an ultra vires act. This is illustrated by Charles
Roberts & Co. Ltd. v. British Railways Board, in which a declaration
that the Railways Board was not empowered to manufacture railway tank
wagons with a view to their sale to an oil company for use on the Board's
railways was refused. The Board was obliged by statute "to provide railway
services in Great Britain and, in connection with the provision of rail
services, to provide such other services and facilities as appear to the
Board to be expedient," and the Board was empowered, subject to the
Act, to "do all other things which in the opinion of the Board are necessary
to facilitate the proper carrying on of their business." The Board
might also "construct, manufacture, produce, purchase, maintain and repair
anything required for the purposes of the business." The court held
that the provision of wagons raised questions of expediency and of what was
incidental to the Board's business and of these questions the Board was the
best judge. It could not be said as a matter of law that the manufacture of
tank wagons for sale could never be required for the purposes of the Board's
business.

The ultra vires doctrine, therefore, provides an unreliable tool in the
hands of someone seeking to restrain certain activities of a public
corporation in the absence of express statutory prohibition. Further, while the corporation can be prevented from acting ultra vires, it
is difficult to ensure by judicial remedies that the corporation will
provide the services that it is required to provide under its enabling
statute. Although the corporations are placed under a duty to perform
certain functions, the duty is usually expressed in very general terms so
that the only appropriate remedy - mandamus - could rarely be used to
enforce the duty.\textsuperscript{53}

As applied to private corporations in memorandum of association jurisdictions, the ultra vires doctrine states that a company, which owes its incorporation to statutory authority, cannot validly engage in any activities outside the powers expressly or implicitly conferred upon it by its statute or memorandum of association. Any purported activity in excess of those powers will be ineffective even if agreed to by all the members, and any action done ultra vires is not generally binding on the company.\textsuperscript{54} The doctrine has been seriously undermined, basically because it is a nuisance insofar as it prevents a company from changing its activities in a direction upon which all are agreed and which is considered beneficial. As a result of efforts by businessmen, assisted by their lawyers, to evade the doctrine, the whole object of the doctrine, namely investor and creditor protection, has been frustrated. The doctrine has now ceased to be a protection to anyone and has become merely a trap for the unwary third party and a nuisance to the company itself.\textsuperscript{55}

"In consequence the doctrine of ultra vires is an illusory protection for the shareholders and yet may be a pitfall for third parties dealing with the company ... We consider that, as now applied to companies, the ultra vires doctrine ... is ... a cause of unnecessary prolixity and vexation."  \textsuperscript{56}

In fact, in British Columbia the doctrine has been abolished and a company has the power and capacity of a natural person of full capacity.\textsuperscript{57}

The issue then arises whether the doctrine of ultra vires as applied to public corporations should be abolished as British Columbia has done with respect to private corporations. Here one must stress the fundamental difference between private corporations and public corporations. The former are motivated by the lust for profit and as long as the corporation does not commit a breach of the law, it is of little significance how those profits
are made. A doctrine of ultra vires may conveniently be dispensed with. The latter are instruments of national or public policy; they perform those functions which are considered socially desirable. A doctrine of ultra vires is therefore appropriate to ensure that public corporations confine themselves to the objectives outlined by parliament in the constituent acts.

What is therefore advocated is not an abolition of the doctrine of ultra vires, but a thorough re-examination of the objectives and powers of public corporations to ensure that they are properly and concisely stated and an active and vigilant role on the part of the office of the Attorney-General with a view to checking any excesses of power by public corporations.

(b) Directors' Duties

While the ultra vires doctrine has a bearing on the directors' duties - in effect it states that directors of public corporations have a duty to exercise the powers conferred on them for the purposes for which they are given, it is, as has been shown above, an ineffective protective tool. Further, the doctrine is too narrow to cover most situations that may be referred to as directors' misconduct. In the first place, the doctrine does not concern itself with the question whether directors actually perform their duties or perform them with due care, skill and diligence. It is not enough that directors do not exceed their powers; they must positively perform their duties exercising care, skill and diligence. Secondly, the ultra vires doctrine does not deal with conflict of interest situations. The directors while, to all outward appearances, within their powers, may turn the corporations they manage into avenues for private profit. Therefore these directors must be governed by all rules of conscientious fairness and honesty of purpose which the law provides as guides for those
who are under fiduciary obligations.

The suggestion here made is that the fiduciary duties and duties of care and skill which the common law imposes on directors of private sector corporations be applied, subject to necessary qualifications, to directors of public corporations.

(i) Fiduciary duties of loyalty and good faith

Under common law, each director, individually owes fiduciary duties to the company of which he is a director. These duties are owed to the company alone and not to individual members as such, and are not restricted to directors properly called, but equally apply to any officials of the company who are authorized to act on its behalf, and in particular those acting in a managerial capacity.

(a) Bona Fides

The general principle is that directors must act "bona fide in what they consider - not what a court may consider - is in the best interests of the company and not for any collateral purpose." If directors act in their own interests or those of third parties without considering whether it is in the best interests of the company, they are in breach of their duty.

There has been considerable controversy as to what is meant by "best interests of the company" since the company is an abstraction. L.C.B. Gower suggests that these include interests of members, present and future, of the company. The case of Hogg v. Cramphorn Ltd. & Others suggests that the interests of employees are not included. On the other hand, the British Columbia Supreme Court case of Teck Corporation Ltd. v. Millar recognizes that the interests of the employees and the interests of the corporation are not necessarily mutually exclusive. In
that case Berger J. stated:

"I appreciate that it would be a breach of their duty for
directors to disregard the interests of a company's shareholders
in order to confer a benefit on its employees... But if they
observe a decent respect for other interests lying beyond those of
the company's shareholders in the strict sense, that will not, in
my view, leave directors open to the charge that they have failed
in their fiduciary duty to the company." 66

The Blue Paper, which also recommended that the common law fiduciary
duties and duties of care and skill, which have been largely
codified,67 be applied to directors of crown corporations68 sought
to solve the "best interests of the company" problem by providing, in the
Draft Legislative Proposals, that each director shall "act honestly and in
good faith with a view to the best interests of Canada and, insofar as it is
not incompatible with the best interests of Canada, the best interests of
the crown corporation."69 However, the Crown Corporations Bill,70
which was first introduced on November 26, 1979 by the short-lived Tory
Government, omitted the 'best interests of Canada' part. In the absence of
express statutory provision, and since there are no shareholders in public
corporations, directors of public corporations should have regard for the
interests of taxpayers, employees and creditors of public corporations as
well as interests of beneficiaries of the activities of these corporations.

(b) **Proper Purpose**

Directors have a duty to exercise their powers bona fide for the
particular purpose for which they are conferred and in a manner contemplated
by those who give it, and not for some extraneous purpose or
consideration.71 Directors will be liable if they exercise their
powers for the purpose of maintaining their control of the corporation, and
this is so even if they honestly believe it to be in the best interests of
the corporation.72
(c) **Unfettered Discretion**

A director is not permitted to fetter his discretion. This means that a director must come to board discussions without commitments one way or the other. He must have an open mind and must not sell himself to a particular interest; he is a director of the corporation. In this connection directors cannot validly contract either with one another or with third parties as to how they shall vote at future board meetings. This is so even though there is no improper motive or purpose and no profit reaped by the directors under the contract.

(d) **Conflict of Duty and Interest**

As fiduciaries, directors must not place themselves in a position in which there is a conflict between their duties to the corporation and their personal interests. Good faith must be exhibited, and the law will not permit a fiduciary to place himself in a situation in which his judgment is likely to be biased.

(i) **Contracts with the corporation**

Under common law, the position of directors may invalidate any contract which the board of directors enters into on behalf of the company with one of their number. The contract, thus entered into, unless accompanied by effective disclosure is voidable at the instance of the company. The rule as to contracts applies not only to those contracts entered into directly with the directors but also to those in which they are in one way or another interested, however indirectly.

(ii) **Secret profits, commissions and bribes**

A director has a duty of not making undisclosed or secret profits in the execution of his office and is liable to account to the corporation
for such profits. The principle applies not only to payments in the nature of bribes made to directors in the hope of influencing their judgment, but also to any benefit which they would not have reaped but for some use of their special position.78

(iii) **Abuse of confidence**

Directors are not permitted, either during or after their service with the corporation, to use for their own purposes anything entrusted to them for use on behalf of the corporation. This requirement is not restricted to property in the strict sense, it also covers trade secrets and confidential information.79

(ii) **Duties of care and skill**

The common law duties of care, diligence and skill, which like the fiduciary duties are owed to the corporation and not to individual members, were reduced by Romer J. after reviewing the then existing authorities, in *Re City Equitable Insurance Co.*, 80 to three propositions, viz;-

(1) A director need not exhibit in the performance of his duties a greater degree of skill than may reasonably be expected from a person of his knowledge and experience. 81

(2) A director is not bound to give his continuous attention to the affairs of his company. His duties are of an intermittent nature to be performed at periodical board meetings, and at meetings of any committee of the board upon which he happens to be placed. He is not bound to attend all such meetings, though he ought to attend whenever in the circumstances he is reasonably able to do so.

This proposition does not apply to managing or service directors, but only to those holding ordinary outside directorships and from whom nothing more is expected than attendance at meetings.

(3) In respect of all duties that, having regard to the exigencies of business and articles of association, may properly be left to some other official, a director is, in the absence of grounds for suspicion, justified in trusting that official to perform such duties honestly. 82
Since directors are not required to possess any particular accomplishments and since the successful running of the business of the corporation requires a measure of skill, ignorant directors must obviously rely on expert officials. These officials are agents and servants of the corporation, and not of the directors, and therefore the directors are not responsible for their misconduct.

(iii) Remedies available for breach of directors' duties

Depending on the nature of the breach, a breach by a director of his duties may lead to an order for one of the following:

(a) **Injunction or declaration**

An injunction or declaration is usually employed where a breach is threatened but has not yet occurred. An injunction may be permanent or temporary, and may also be appropriate where the breach has already occurred but is likely to continue.

(b) **Damages or compensation**

Damages are the appropriate remedy for breach of the duties of care and skill. Compensation is granted to compel restitution for loss suffered by a director's breach of fiduciary duties.

(c) **Restoration of the corporation's property**

Any property of the corporation in the hands of directors, if unlawfully acquired, may be recovered. This is subject to its being traceable.

(d) **Rescission of contracts**

An agreement with the company which breaches the rules relating to contracts in which directors are interested may be avoided, provided that restitutio in integrum is possible.
(e) Accounting for secret profits

This liability may arise out of a contract made between a director and the corporation or as a result of some contract or arrangement between a director and a third party, and in neither does recovery depend on proof of any loss suffered by the company.  

(iv) Application of directors' duties to directors of public corporations

What is given above is a skeleton of the common law fiduciary duties and duties of care and skill together with the remedies available for breach of those duties. The purpose is not to rewrite those duties and remedies but to show that they are appropriate for application to directors of public corporations. If applied to those directors they would ensure that the affairs of public corporations are properly run and that directors are legally accountable for their misconduct. With respect to remedies, since public corporations are public authorities, any measures taken against maladministration by parliament and government are essentially of a political, administrative and disciplinary character. Therefore something more is required. A director may be dismissed, but he must also make good his misfeasance or non-feasance preceding his dismissal.

In relation to crown companies formed under general company legislation, it is logical to assume that the above duties apply to them, but with respect to statutory corporations, no such assumption can readily be made. The only judicial pronouncement on this matter is to be found in Tamlin v. Hannaford. In that case Lord Denning in referring to British Transport Commission, a statutory corporation, said; "It has many of the qualities which belong to corporations of other kinds to which we have been accustomed. . . it is directed by a group of men whose duty it is to see that [its] powers are properly used." There is no further
elaboration. It is possible that Lord Denning was referring to the ultra vires doctrine and not to the directors duties discussed above. In fact the statement that "it has, for instance, defined powers which it cannot exceed", preceding the above quotation bears out the conclusion that Lord Denning was not referring to directors' fiduciary duties and duties of care and skill. The Government Blue Paper seems to have proceeded on the assumption that the above common law duties apply to directors of public corporations. The assumption seems reasonable but is not supported by authorities.

The position, then, is that, save for crown companies falling under the regime of general corporation legislation, there is a gap with respect to the duties of directors of public corporations. That there are virtually no reported cases on this subject is testimony to this assertion. And this is the raison d'être necessitating the application of the common law duties, as now codified, to directors and officers of public corporations. It is rather unfortunate that the Conservative Government, which introduced the Crown Corporations Bill, that incorporates the suggestion here made, did not live to see the Bill passed into law. But one hopes that the Liberal Government, which issued the Blue Paper in 1977, which also recommended that the common law duties be applied to directors of public corporations, will soon take up the matter.

One of the solutions would be to amend the Canada Business Corporations Act so as to make it possible for the relevant provisions to be applied to public corporations. Another solution, which is preferable, would be to introduce a separate bill dealing specifically with crown or public corporations, to deal generally with all those matters which have, in the course of this work, been considered as inarticulate and in respect of which
legislative consideration has been advocated for.

(vii) Locus standi

The Government Blue Paper proposed that the Attorney-General of Canada, in addition to any other right he has as the first legal officer, be given the power or right to enforce directors duties or to restrain directors from acting in breach of their duties.\textsuperscript{91} As in the case of the ultra vires doctrine, the Attorney-General suffers from the constraint of information, but no change is suggested for it is neither reasonable nor desirable that a taxpayer ipso facto be given the right to go to court to enforce directors' duties. A conferment of such a right would only lead to confusion and chaos.

IV. CREDITOR PROTECTION

The urgency of the issue of creditor protection is lost by a number of factors. In the first place, virtually all public corporations rely on the Government of Canada for appropriations or loans to finance capital projects and operations.\textsuperscript{92} In the words of A.G. Irvine, "crown corporations have . . . been neither designed nor used to raise capital from the public."\textsuperscript{93} Therefore, in most cases, the interests of shareholder and creditor are merged indistinguishably in the government.\textsuperscript{94}

In the second place, even in those cases where the constituent acts give authority to crown corporations to obtain financing from capital markets,\textsuperscript{95} there is little cause for concern. For one thing, these borrowing powers have rarely been used\textsuperscript{96} and for another, as these powers are conferred subject to the approval of the Governor-in-Council, in most cases the government will guarantee the borrowing.\textsuperscript{97}

Crown companies incorporated under company legislation have authority
to borrow from private sources and the Government Blue Paper proposed that the borrowing powers of crown corporations be expanded by allowing all agency and propriety corporations access to private capital markets, subject to authorization by the Minister of Finance and approval by the Governor-in-Council. These expanded borrowing powers are considered as necessary to provide increased flexibility to crown corporations in their financing, to expose the commercial activities of crown corporations more to market disciplines and to curtail the cash drain on the Consolidated Revenue Fund that results from corporations borrowing from the government.

In such cases, and noting that the ordinary rules governing the maintenance of capital of private sector corporations are by their nature inapplicable to public corporations, it may seem necessary to provide some kind of protection to creditors. However, directors and officials of public corporations acting in accordance with the duties outlined above, and the application of the ultra vires doctrine, despite its minimized value, provide adequate protection to creditors. Further, government guarantee of borrowing by public corporations and the practice by the government of providing funds required to pay claims of third parties in those instances where a corporation is unable to meet its liabilities from its own resources, provide added insurance. Therefore, beyond these forms of creditor protection, no further protection is immediately necessary. Such further protection would be necessary if a sufficient number of reported cases were available to show that creditors have been substantially prejudiced. As far as the present research has ascertained, no such cases are available. And this tends to confirm the observation by the Royal Commission on Government Organization that, "... it is ... inconceivable in terms of political realities, that the government would ever claim a
limited liability and permit the organization to be forced into liquidation by its creditors."101
PART FIVE

SUMMARY AND CONCLUSIONS

I. PART ONE

In Part One of this essay, taxpayers, creditors and suppliers of crown corporations, and victims of wrongs committed by crown corporations were identified as interest groups most directly affected by the activities and operations of crown corporations. The object of research was stated to be an analysis of the extent to which the courts have given legal recognition and protection to the interests of those groups.

II. PARTS TWO AND THREE

The discussion in Parts Two and Three has shown that the full realization and protection of those interests has been blocked or hindered by the public status of crown corporations. Because crown corporations are public authorities charged with the performance of public functions, they have been able to claim immunities, privileges and other advantages pertaining to the ultimate public authority, the crown, and to escape legal liability or in some way inconvenience the ordinary citizen in the process.

(a) Contractual Liability

With respect to contractual liability, although the case of Thomas v. R,¹ firmly established the crown's liability in contract and therefore crown corporations cannot, as such, claim a privileged position, there remains the problem, arising from the public status of these corporations of whether a policy directive, given by a competent authority, which interferes with a contract made by a crown corporation with third parties can be set up as a defence to an action for breach of that contractual commitment. The case of C. Czarnikow Ltd. v. Centrala Handlu Zagranicznego 'Rolimpex',²
shows that such intervention may provide a good defence. As a measure of protecting the citizenry against an injurious application of the elusive concept of public good, it has been proposed that courts should not excuse a public corporation from contractual liability, unless a private corporation would be excused from such liability under comparable conditions and circumstances.³

(b) Tortious Liability

Prior to the passing of the Crown Liability Act in 1953, the crown in Canada was not liable in tort. This immunity from tortious liability was extended to those crown corporations which were considered as agents or servants of the crown or covered within the shield of the crown. However, the Crown Liability Act removed the crown's immunity from tortious liability.⁴ The only problem with respect to tortious liability has been caused by the judgment in Formea Chemicals Ltd. v. Polymer Corporation Ltd.⁵ That case involved the interpretation of section 3(6) of the Crown Liability Act, which preserves the immunity of the crown from actions in tort with respect to anything done or omitted to be done in the exercise of any prerogative or statutory power conferred on the crown. The Ontario Court of Appeal construed that section as extricating the respondent crown corporation from liability to pay damages for infringement of a patent. As has already been contended,⁶ this case was badly decided and one can only look to the Supreme Court of Canada for remedial action.

(c) International Legal Status

In the international domain, an individual seeking redress from a crown corporation has to contend with the doctrine of sovereign immunity which has been applied to those corporations answering the descriptions of 'emanation' 'arm', 'alter ego', 'organ', 'department', or 'instrumentality' of the
government or state. Some of the rigours of the doctrine have been mitigated in those countries that subscribe to a restrictive view of sovereign immunity. The doctrine of sovereign immunity in its restricted or limited form accords immunity to a state or its corporations in respect of acts of a public or governmental nature and not in respect of acts of a commercial or private nature. That it is difficult to find a reasonably precise distinction between acts of the one and the other kind in view of the many diverse ways in which governments may engage in economic and commercial activities, has already been pointed out.\textsuperscript{7} Even if that distinction were intelligible, the person seeking redress from the government or governmental bodies is not interested in the description of the activity from which his claim arises, but in compensation for the loss he has suffered. No legal principle requires that he be compensated in respect of one type of activity and not the other. It has been suggested that the doctrine of sovereign immunity should altogether be abolished. This flows from the fact that the theoretical foundations of the doctrine - dignity, equality, and independence of states - have been eroded, and from the fact that a claim to immunity is inconsistent with the notion of the state under the rule of law.\textsuperscript{8}

(d) Procedural Aspects

Part Three demonstrated that even with respect to procedural matters, the application of ancient rules designed for a totally different type of society and government, still remains to bedevil the sound administration of justice in a modern state. At every stage in the proceedings a litigant seeking relief or redress from a public corporation is put at a disadvantage. This is because crown corporations coming under the shield of the crown enjoy privileges with respect to such matters as forum, restraint,
limitation of actions, discovery and interrogatories and enforcement of judgments.

(e) Conclusions for Parts Two and Three

Up to this point, it is evident that the concept of the public corporate person has been so interwoven with the concept of the crown that the prerogatives, immunities and advantages of the crown have frustrated the development of a coherent system of liability. Courts have conferred crown advantages upon crown corporations depending on whether or not the corporation in issue is a servant, agent or trustee of the crown, but without ascertaining whether any superior public purpose is served thereby, or whether any public detriment is precipitated by placing a public corporation on an equal footing with private corporations. In short, no concept, with respect to the proper application of principle of crown prerogative and immunity, is discernible. It has been said that crown privileges should not be regarded as unreasonable survivals of despotism but must be interpreted as a recognition of the principle that all private interests are subordinate to public needs.\(^9\) This essay has shown, that in fact, crown privileges are unreasonable survivals of the past and even if they were not, "public need" is too wide a concept to provide a meaningful criterion for the application of the principle of crown prerogative and immunity.

Crown immunities and advantages, both substantive and procedural, originated in a feudal background as prerogatives personal to the King and were reinforced by theories of divine right of Kings and of sovereignty.\(^10\) They are thus inappropriate to the present public and executive concept of the crown. Yet, Canada, heedless of the reasons for the functioning of these immunities, has nevertheless adopted them. This is
unfortunate.

It is more unfortunate if these immunities are conferred on public corporations. One cannot but adopt the words of Lord Denning in Tamlin v. Hannaford. He held that the British Transport Commission, a public corporation, is, "... in the eye of the law ... its own master and is answerable as fully as any other person or corporation. It is not the crown and has none of the immunities or privilege of the crown... It is, of course, a public authority and its purposes, no doubt, are public purposes, but it is not a government department nor do its powers fall within the province of government."12

Therefore, the fact that crown corporations are public authorities does not, in legal theory, necessarily require that they be accorded the attributes of the crown. It may well be that there are public benefits or purposes served by the concept of crown immunity as applied to the crown and crown corporations. For example, it would not, as has been pointed out,13 be in the public interest if the collection of taxes, duties and other charges by the crown were barred by limitation provisions. In this case it may be necessary to relax limitation law in favour of the crown. But if it is desired to vindicate some public purpose by a principle of crown immunity, nothing is simpler than for the legislature to provide so in clear and unambiguous words.

In their general application, crown immunities are one and in all objectionable and should be abolished. The courts should be authorized to act on the assumption of formal equality between legal entities whether government or not, and the legislature should specify, in particular cases, the special advantages thought essential to a particular authority.14

Save for compelling reasons which should be made clear, all public
corporations should be regarded as outside the sphere of governmental immunities and privileges. This is the best approach to the protection of the interests of those affected by the activities of these corporations.

Since, as the decided cases have shown, the courts cannot be relied upon to carry out the above proposal, one must look to parliament. The principle to guide parliament is that of equality before the law of those who engage in comparable transactions or a presumption in favour of subjecting a public corporation to the same law as a private person. The crown corporation should be given exactly what it requires in order to carry out its functions and no more. In the same way as parliament specifies in the corporation's constituting statute the powers which the corporation requires, it should also specify any crown immunities or privileges which the corporation also requires. And if none are required, that should also be stated for the avoidance of doubt. In fact such an approach has taken root in the United Kingdom. Section 28(1) of the Iron and Steel Act provides that:--

"It is hereby declared for the avoidance of doubt that . . . neither the Board nor the Agency are to be regarded as the servant or agent of the crown or as enjoying the status, immunity or privilege of the crown. . . ." 15

III. SUMMARY AND CONCLUSION FOR PART FOUR

Part Four deals with the issues of directors' legal duties and creditor protection. Taxpayers, who provide the bulk of the funds that enable public corporations to perform their functions, are entitled to expect that not only do directors execute their duties with care, skill and diligence, but also that in so doing they act honestly and in good faith with a view to the best interests of Canada and of the corporations. Similarly, creditors
expect that corporate funds are not misapplied or mismanaged.

Neither political accountability nor judicial control through the doctrine of ultra vires is sufficient to ensure that the affairs of crown corporations are properly run and that the interests of taxpayers are sufficiently protected. In the first place, any measures taken by parliament and government against maladministration are of political, administrative and disciplinary character. They do not provide legal sanctions. In the second place, the efficacy of the ultra vires doctrine is reduced by the fact that the powers conferred on public corporations are often so widely drawn as to make the doctrine nugatory as a means of exercising judicial control over the activities of public corporations.

It has, therefore, been proposed that the fiduciary duties and duties of care and skill which the common law imposes on directors of private sector corporations, together with the legal sanctions or remedies available for breach of those duties, be applied, insofar as the circumstances of public corporations admit, to directors of the latter corporations.

IV. GENERAL OBSERVATION

The proposals and suggestions above made call for legislative action. It may well be that it is too much to expect that all the problems alluded to will be solved at once and in one all-embracing Act of Parliament. But it is clear that gone are the Second World War days when crown corporations were perceived as ad hoc and transient institutions designed only for the particular requirements of the time. In the current politico-economic order, it is no longer good enough to respond naively to the proliferation of governmental activities; public corporations are an integral part of the state structure. Therefore, some immediate action along the lines above suggested is called for.
FOOTNOTES - PART ONE


12. 23-24 Eliz II, c. 33, 1974-75.

13. e.g., British Columbia Companies Act.


15. e.g., B.C. Hydro, B.C.R.I.C., Ontario Hydro.


23. See, for example, Hazen, C.J. in Michaud v. C.N.R. Co., [1924] 3 D.L.R. 1 (New Brunswick Supreme Court, Appeal Division) at p. 4 where he said of the C.N.R. Co., a Crown Corporation; "... it seems to me that it was the intention of parliament to create the company a corporation as
FOOTNOTES - PART ONE, continued


25. Friedmann, W., "The Public Corporation in Great Britain", op. cit. at p. 163 says that the term 'public corporation' first appeared in Great Britain in 1926 in a report on broadcasting. The origins of the term in Canada are far from clear but is often used in literature dealing with the subject. See for example Hodgetts, J.E., "The Public Corporation in Canada", op. cit.


29. The Government Blue Paper, pp. 18 & 21. Section 4 of the Draft Legislative Proposals on the Control, Direction and Accountability of Crown Corporations, which appear as Appendix A of the Government Blue Paper, is more specific and provides as follows;-

4. "It is hereby declared that every crown corporation is constituted an instrument for advancing the national interests of Canada and that in order to best advance those national interests it is the duty of the directors of every crown corporation when managing the crown corporation to take into consideration the national interests of Canada . . . and . . to pursue those corporate policies that best advance such national interests."


35. e.g., Atomic Energy of Canada Ltd., Canadian Arsenals Ltd., Canadian Patents and Development Ltd., Defence Construction (1951) Ltd., Uranium Canada Ltd., Eldorado Aviation Ltd., Eldorado Nuclear Ltd., and Polysar Ltd.


37. Ibid, pp. 164-165.

38. As has been already pointed out, public corporations may be incorporated under the Canada Business Corporations Act.

39. See also, s. 66(1) Financial Administration Act, R.S.C., 1970, c. F-10.


41. Ashley & Smails, "Canadian Crown Corporations", op. cit. p. 3.


43. Ashley & Smails, "Canadian Crown Corporations", op. cit. p. 3.

44. The Government Blue Paper, pp. 17 & 37.

45. Ashley & Smails, "Canadian Crown Corporations", op. cit. p. 3.

46. S. 70(1) F.A.A.

47. S. 70(2) F.A.A.

FOOTNOTES - PART ONE, continued


50. S. 2(1) of the Draft Legislative Proposals defines a crown corporation as follows:

"'Crown corporation' means a corporation named in Schedule B, Schedule C or Schedule D to the Financial Administration Act."

51. Public or crown corporations are set up to achieve broad policy objectives; they perform public functions and while profits are legitimate in appropriate cases, they are not the principal object. In the case of proprietary corporations which are ordinarily required to operate without appropriations, this means that the implementation of broad policy objectives is to be carried out, as much as possible within commercial disciplines, but the pursuit of commercial goals is not intended to override the broad social, cultural and economic goals. See also Tamlin v. Hannaford op. cit. p. 23.

52. Price, T.W., "The Public Corporation in South Africa" op. cit. p. 303; comes close to this definition when he writes "... [they are] 'public' because they are subject to a certain limited degree of political or governmental finance and control, and 'corporations' because they are otherwise autonomous bodies. ..."

53. S. 66(1) F.A.A.


55. See Appendix A.

56. S. 66(3)(a) F.A.A.


60. The Government Blue Paper, p. 15.

61. See Appendix B.

62. S. 66(3)(b) F.A.A.


64. S. 70(1) F.A.A.
FOOTNOTES - PART ONE, continued

65. S. 70(2) F.A.A.
66. S. 75 F.A.A.
67. S. 73 F.A.A.
68. The Government Blue Paper, p. 15.
69. See Appendix C.
70. S. 66(3)(c)(i) 7 (ii) F.A.A.
72. S. 70(2) F.A.A.
73. The Government Blue Paper, p. 16.
74. S. 70 F.A.A.
76. For a detailed description of some of these corporations, see Ashley & Smalls, "Canadian Crown Corporations", op. cit. pp. 161-337.
79. S. 6(1) of the Defence Production Act, R.S.C., 1970, c. D-2 provides, in part, "The Minister may, if he considers that the carrying out of the purposes or provisions of this act is likely to be facilitated thereby . . . procure the incorporation of any one or more corporations for the purpose of undertaking or carrying out any acts or things that the Minister is authorised to undertake or carry out under this Act."
FOOTNOTES - PART ONE, continued


85. e.g., Telesat Canada.

86. e.g., Canada Development Corporation.

87. See for example Syncrude Canada, in which the governments of Canada, Alberta and Ontario and private oil companies are shareholders.

88. For a complete list of all corporations in which the federal government has an interest see, Minutes of the Proceeding and Evidence of the Standing Committee on Public Accounts, House of Commons, Issue No. 33, Tuesday, May 17, 1977, Ottawa, Printing and Publishing, Supply and Services Canada, Appendix 'A-220'. See also Schedules I, II & III to the Crown Corporations Bill, 1979, Bill C-27.

89. For an exception, see the Canada Development Corporation.


93. See also Kyle, P.R., "The Government Director and His Conflicting Duties", op. cit. p. 76.


96. For a four-fold categorization of these activities, see Hodgetts, J.E., "The Public Corporation in Canada", op. cit. pp. 56-58.


99. The British Columbia Resources Investment Corporation, a provincial crown corporation, is a unique form of crown corporation, in that British Columbians personally hold shares therein and consequently have share certificates. The Clark government had a similar design for Petro-Canada.


103. As has already been noted, sources of funds are not limited to borrowing but include grants and appropriations.

104. [1950] 1 K.B. 18 at p. 23.


109. Friedmann, W., in "Legal Status of Incorporated Public Authorities", 22 A.L.J. 7 at p. 8, expresses the same idea when he says "I believe it to be an unquestionable principle of legal policy in a modern democratic society in which public and private enterprise operate side by side that if a state directly or indirectly engages in activities which may, through contract, torts or in other ways interfere with the life and security of the private citizen, it should as far as possible be made legally responsible to the same extent as private legal persons." So too does Scott, F.R. in "Administrative Law, 1923-1947", op. cit. p. 282 when he writes, "If the state creates risks of damage it should assume these risks as fully as any private person."
FOOTNOTES - PART TWO

1. (1886), 17 Q.B. 795.


9. Message to Congress, April 10, 1933 recommending the Creation of the Tennesse Valley Authority (T.V.A.), a public corporation which has been described as the most important and successful public enterprise in a non-socialist system - Friedmann, W., "Legal Aspects of Incorporated Public Authorities", 22 A.L.J. 7 at p. 8.
FOOTNOTES - PART TWO, continued


16. For example, six of the proprietary corporations and most of the unclassified crown corporations are audited by private auditors.

17. S. 149(1)(d) Income Tax Act, R.S.C., 1970, c. I-5. But s. 27 of the Income Tax Act removes from that exemption a number of proprietary corporations, e.g., Air Canada, C.N.R. Co., and Cape Breton Development Corporation, which are deemed to be private corporations. The exemption is also removed in respect of their subsidiaries.


28. Australia, Canada, France, Germany, Great Britain, India, Israel, Italy, New Zealand, South Africa, Sweden, U.S.A. and U.S.S.R.


34. (1923), 32 C.L.R. 1.

35. Ibid, pp. 11-12.

FOOTNOTES - PART TWO, continued


42. Clifton's case, Y.B. 22 Ed. III, 12.

43. Y.B. 5 Ed. IV, 37.

44. Staunford, W., "Exposition of the King's Prerogatives", London, 1567, p. 72.


51. Holdsworth 9. A history of English Law, 3rd. edn., 8; Clode, W.B., "The Law and Practice of the Petition of Right Under Petition of Right Act,

52. 23 & 24 Vict. c. 34.


57. (1874), L.R. 10 Q.B. 31.


59. (1865), 6 B. & S. 257.

60. Ibid, p. 294.


FOOTNOTES - PART TWO, continued


69. Street, H., "Governmental Liability. A Comparative Study", op. cit. p. 3.


75. (U.S. 1824), 9 Wheat 904.

76. Ibid, p. 907.

77. It was affirmed by Mr. Justice Sutherland in Ohio v. Helvering, Commissioner of Internal Revenue (1933), 292 U.S. 360 at pp. 368-369. See also Friedmann, W., "Governmental (Public) Enterprise", op. cit. p. 40.

78. (1874), L.R. 10 Q.B. 31.

79. [1901] 2 K.B. 781.
FOOTNOTES - PART TWO, continued

82. Ibid, p. 791.
83. [1915] 1 K.B. 45.
84. Ibid, p. 52.
Railway Co. v. Niagra Parks Commission, [1941] 3 D.L.R. 385; Yeats &
90. Ibid, p. 1052.
91. On closer analysis it appears that Counsel's skilful argument was bound
to fail even if the factual findings had been different. If 'Rolimpex'
was not a separate legal entity or personality but rather part of the
Polish Government, it would not, according to Lord Salmon, have been
able to rely on government intervention as ground for escaping
liability, but then it might have successfully put forward the doctrine
of Sovereign Immunity as a defence to the suit for damages for breach
of contract. The doctrine of Sovereign Immunity is discussed in
Section VI of this part.
92. Friedmann, W., Governmental (Public) Enterprise, op. cit. p. 40.
Gilbert v. Trinity House Corporation (1886), 17 Q.B. 795; Mersey Docks
and Harbours Board Trustees v. Cameron, op. cit; Territorial Auxiliary
Forces Association v. Nichols, [1949] 1 K.B. 35 at p. 45; Sawer, G.,
"Shield of the Crown Revisited", op. cit. p. 137; Moore, W.H.,
"Liability for Acts of Public Servants", op. cit. p. 16; Tennant, N.B.,
94. Marks v. Forests Commission, [1936] V.L.R. 344; State Electricity
Commission of Victoria v. Mayor, Councillors & Citizens of the City of
96. Ibid, p. 20.


99. Although they have frequently been used by the courts, no attempt has been made to define them.

100. [1953] 1 D.L.R. 500.


103. Ibid, p. 393.


FOOTNOTES - PART TWO, continued

110. See, for example, Lord Tucker and Lord Asquith in Bank Voor Handel En Scheepvaart v. Administrator of Hungarian Property, op. cit. pp. 627-29 and 629-32 respectively.


112. Lord Tucker, ibid, p. 627 gives owners or occupiers of property exclusively used for purposes of government as examples of persons in consimili casu with servants or agents of the crown. See also Lord Asquith, pp. 630-31.

113. (1955), 93 C.L.R. 376.

114. S. 5 of the Landlord and Tennant (Amendment) Act provided;- "This Act shall not bind (a The Crown in right of the commonwealth or of the State. . ."


FOOTNOTES - PART TWO, continued


123. (1946) 73 C.L.R. 70.

124. Ibid, p. 76.


132. See, for example, s. 3(3) Canada Deposit Insurance Corporation Act; R.S.C., 1970, c. C-3.

133. [1924] 4 D.L.R. 901.


136. That is, apart from the question of taxation.


139. Supra, p. 45.


FOOTNOTES - PART TWO, continued

143. Ibid, pp. 4-5.

147. Ibid, p. 11.
150. [1861-73] All E.R. 397; (1866), L.R., 1 H.L. 687.


153. (1920), 28 C.L.R. 129 at p. 170; see also Kitto, J., in Wynyard Investment Pty. Ltd. v. Commissioner for Rlys. (N.S.W.), op. cit. p. 397.
154. (1942) 65 C.L.R. 373.
156. (1945), 326 U.S. 572.

FOOTNOTES - PART TWO, continued


161. It is also required to provide radio and television services in both official languages across the nation.

162. See also Air Canada, Farm Credit Corporation.


166. [1898] A.C. 667.


169. "... the question whether a person or corporation is a servant of the crown or not depends upon the degree of control the crown through its ministers can exercise over him in the performance of his duties...." Per Williams, Webb, Taylor, JJ. in Wynyard Investment Pty. Ltd. v. Commissioner for Railways (N.S.W.), op. cit. p. 391. See also Lord Reid in Bank Voor Handel En Scheepvaart v. Administrator of Hungarian Property, op. cit. pp. 616-17; Martland, J. in Fidelity Insurance Co. of Canada v. Workers' Compensation Board, [1980] 102 D.L.R. (3d) 255 at p. 256.
FOOTNOTES - PART TWO, continued


176. Ibid, p. 223.


180. For example, the interests that are sought to be protected.


183. Ibid, p. 347.

184. Statutes of Alberta, 1967, c. 34.


192. (1955), 93 C.L.R. 376.

193. (1951), 84 C.L.R. 140.


196. S. 21(1).


203. Canadian Overseas Telecommunications Corporation (now Teleglobe Canada), Northwest Territories Power Commission, Canadian Commercial
FOOTNOTES - PART TWO, continued


204. See, for example, s. 3(2) Canadian Deposit Insurance Corporation Act, R.S.C., 1970, c. C-3; s. 3(1) Government Companies Operation Act, R.S.C., 1970, c. G-7.

205. The C.N.R. Co. Act, R.S.C., 1970, c. C-10 is an exception.


229. (1924), 4 D.L.R. 901.
FOOTNOTES - PART TWO, continued


249. [1953] Argus, L.R. 229 at p. 243, see also Wells, J.A. in Formea Chemicals Ltd. v. Polymer Corporation Ltd., op. cit. at pp. 484-85.


FOOTNOTES - PART TWO, continued


258. Ibid, p. 102.


261. 30 Vict. c. 6.


268. (1886), 17 Q.B.D. 759.


270. Ibid, p. 64.


272. [1969] S.C.R. 60 at p. 72. See also Atkin, L.J. in *McKenzie-Kennedy v. Air Council*, op. cit at p. 533 where he says, "The further objection that any tort would be ultra vires the corporation is of quite different character, and must depend on the duties of the corporation and the circumstances of the particular act complained of. I do not think that the doctrine of ultra vires would be of universal application to every tort or that it would be to the crown's advantage that it should."
FOOTNOTES - PART TWO, continued

274. S. 3(1).
275. 10 & 11 Geo. VI c. 44.
276. S. 2(1)(a).
277. S. 2(1)(b).
278. S. 2(1)(c).
279. S. 2(2).
287. Ibid, p. 482.
288. See Wells, J.A. (dissenting) at pp. 484-85.
292. Ibid, p. 7. It should be noted that as originally evolved, the doctrine admitted of three exceptions, viz.,
1. cases in which the foreign state waived its immunity

2. cases in which rights in property acquired by succession in the host state were in issue

3. cases involving immovable property situate in the state of jurisdiction.

However, with the passage of time and change in circumstances other exceptions to the doctrine have appeared. For these exceptions see Castel, J.G., "Exemptions from Jurisdiction in Canadian Courts", 9 Canadian Yearbook of International Law 159 at pp. 161-162; Foreign Immunities Act, 1976 (U.S.A.), s. 1605; State Immunity Act, 1978 (U.K.), ss. 3-11 and s. 14; Thai-Europe Tapioca Service Ltd. v. Government of Pakistan, Directorate of Agricultural Supplies, [1975] 1 W.L.R. 1485 at pp. 1490-91.


296. (1923), 20 Ky. 18. See also The Parlement Belge, op. cit. p. 207.

297. All states are deemed equal irrespective of their size, power, wealth or technological attainment.


299. Lord Denning in Thai-Europe Tapioca Service Ltd. v. Government of Pakistan, op. cit. p. 1490. See also Isbrandtsen Tankers Inc. v. President of India, [1971] 446 F. 2d. 1198 at p. 1200 where the Court of Appeals of the Second Circuit in New York summed up the position thus: "A judicial decision against the government of a foreign nation could conceivably cause severe international repercussions, the full consequences of which the courts are in no position to predict."

FOOTNOTES - PART TWO, continued


306. See also Cohen, L.J. in *Krajina v. The Tass Agency*, op. cit. at p. 284 where he said, "... it is clear from our Acts of Parliament that we do not consider the fact that a government department may have a separate legal juristic existence as necessarily incompatible with it being a department of state for which immunity can be claimed."

307. S. 1603(b)(i) and (ii).

308. S. 14(1)(b) and (c).

309. S. 14(1).

310. S. 14(2).


316. (1929), 31 Fed. 2d. 199.


318. (1940), 24 N.Y. 2d. 201.


320. See, for example, *The Schooner Exchange* (1812), 7 Cranch 116; *The
FOOTNOTES - PART TWO, continued


324. (1972), 22 D.L.R. (2d) 669 (Supreme Court, Canada).


326. See also, Allan Construction Ltd. v. Government of Venezuela, [1968] Que P.R. 145; Penthouse Studios Inc. v. Venezuela, op. cit.


328. This is an improvement on Denning, L.J.'s words in the Trendtex case, op. cit. at p. 370.


331. "Governmental (Public) Enterprise", op. cit. p. 79.


337. Friedmann, W., "Governmental (Public) Enterprise", op. cit. p. 80.
338. Victory Transport Inc. v. Comisaria General de Abastecimientos y Transportes (1964), 336 F. 2d. 354. Such acts are limited to the following categories:

1. internal administrative acts, such as expulsion of an alien.
2. legislative acts, such as nationalization.
3. acts concerning the armed forces.
4. acts concerning diplomatic activity.
5. public loans.


347. The Island of Palmas case (1928), R.I.A.A. ii, 829.


351. This transpired in the course of a discussion I had with Professor D.M. McRae on the subject of sovereign immunity of public corporations.
FOOTNOTES - PART THREE


8. Ibid, p. 344.


10. This decision was, however, overruled by the Privy Council in International Railway Co. v. Niagara Parks Commission, [1941] 3 D.L.R. 385.


16. 14 Geo. VI, c. 51.


20. S. 7(1).
23. Ibid, p. 482; see also Stokes v. Leaves (1918), 40 D.L.R. 23.
   "Actions, suits or other legal proceedings in respect of any right or
   obligation acquired or incurred by a company . . . may be brought or
   taken by or against the company in the name of the company in any court
   that would have jurisdiction if the company were not an agent of Her
   Majesty."
29. See also Wells, J.A. in Formea Chemicals Ltd. v. Polymer Corporation
   Ltd., op. cit. p. 493.
   Court) at pp. 225 & 226 and the unreported cases of Walsh v. C.B.C. and
   (U.K.); Attorney-General for Ontario v. Toronto Junction Recreation
   Club (1904), 8 Ont. L.R. 440; Underhill v. Minister of Food, [1950] 1
   All E.R. 591; International General Electric Co. of New York v.
   Commissioners of Customs and Excise, [1962] 2 All E.R. 398; Melbourne


44. Ibid, p. 31.


52. S. 11.


67. (1807), 16 East 278.

68. Ibid, pp. 281-82.


71. (1968), 40 D.L.R. (2d) 243.


73. Ibid, p. 211.
75. [1898] A.C. 667.
76. [1927] A.C. 899.
77. Ibid, p. 905.
82. S. 23.
83. See, for example, S. 40(1) National Harbours Board Act, R.S.C., 1970, c. N-8.
1. See, for example, s. 12 Petro Canada Act, 23-24 Eliz. II c. 61 (1975); s. 12 Canada Deposit Insurance Corporation Act, R.S.C., 1970, c. C-3; s. 33(1) Crown Corporations Bill, 1979, Bill C-27.


8. The Government Blue Paper, op. cit. p. 27.

9. See, for example, s. 8(1) Petro Canada Act; s. 6(1) Teleglobe Canada Act; s. 3 Agricultural Stabilization Act.


11. Two of the few exceptions are provided by s. 6(2) of the Bank of Canada Act which provides that the Governor and Deputy-Governor shall be 'men of proven financial experience', and s. 6(1) of the Canada Deposit Insurance Corporation Act which provides that the chairman of the Board of Directors is to be a 'person of proven financial ability'.


16. See, for example, s. 4(2) Canadian Film Development Corporation Act; Hodgetts, J.E., "The Public Corporation in Canada", op. cit. p. 74.

FOOTNOTES - PART FOUR, continued


20. See, for example, s. 7(2) Petro Canada Act; s. 3(9) Teleglobe Canada Act; s. 4(5) Agricultural Stabilization Act; s. 11(1) Canadian Wheat Board Act.

21. See, for example, s. 3(9) Teleglobe Canada Act.


28. S. 71(4) F.A.A.


31. S. 70 F.A.A.


FOOTNOTES - PART FOUR, continued


35. (1963), 80 W.N. (N.S.W.) 48.

36. Ibid, p. 53. See also The Commonwealth v. Australian Shipping Board
(1926), 39 C.L.R. 1, in which a suit was successfully brought by the
commonwealth Attorney-General on the relation of the Secretary to the
New South Wales Chamber of Manufactures against the Australian
Commonwealth Shipping Board, a statutory public corporation, for a
declaration that the Board had no power to enter into an agreement with
a municipal council to supply, deliver and erect on municipal land
fifteen turbo-alternator sets.

37. See, for example, s. 7 Petro Canada Act.

181.


40. The commonwealth v. Australian Shipping Board, op. cit.; Helicopter

58.

42. Jacobs, J. in Helicopter Utilities v. Australian National Airlines
Commission, op. cit. p. 53; The Commonwealth v. Australian Shipping
Board, op. cit. p. 8.


44. Boyce v. Paddington Borough Council, [1903] 1 Ch. 109; Helicopter

45. (1963), 80 W.N. (N.S.W.) 48.


12; Drake, C.B., "The Public Corporation as an Organ of Government
Policy", in "Government Enterprise: A Comparative Study". Friedmann &
Garner (ed.) 26, at p. 46; Gower, L.C.B., "The Principles of Modern
Company Law", op. cit. p. 239.
FOOTNOTES - PART FOUR, continued


49. Transport Act, 1962, s. 3(1) (U.K.).

50. Ibid, s. 14(1).

51. Ibid, s. 13(1).


58. For example, duties relating to insider Trading have no relevance to public corporations.


64. [1967] 1 Ch. 254; see also Park v. Daily News Ltd., op. cit. at p. 963.


66. Ibid, p. 413.
FOOTNOTES - PART FOUR, continued

67. See, for example, ss. 141, 143, 146 B.C.C.A.; ss. 115 and 117 C.B.C.A.


75. Ibid, p. 526.


77. See, s. 115 C.B.C.A.; ss. 143, 144 C.C.C.A.; s. 43(8) Bill C-27, 1979.


80. [1925] Ch. 407.


84. Regal (Hastings) Ltd. v. Gulliver, op. cit.

86. Friedmann, W., "The Public Corporation in Great Britain", op. cit. p. 181; s. 44(3) Bill C-27.


88. Ibid., pp. 22-23.


91. S. 23 Draft Legislative Proposals on the Control, Direction and Accountability of Crown Corporations, Appendix A to the Government Blue Paper. Of course the corporation can itself sue to enforce directors' duties, but since the corporation ordinarily acts through its directors, it becomes necessary to establish some other means of enforcing those duties.


95. See, for example, s. 13 St. Lawrence Seaway Authority Act; s. 13 Petro Canada Act.


1. (1874), L.R. 10 Q.B. 31.
3. See, supra, p. 43.
6. See, supra, p. 83.
7. See, supra, p. 93.
8. See, supra, pp. 95-98.
13. See, supra, p. 110.
15. See also s. 13(2) National Health Act, 1942 (U.K.).
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APPENDIX A

DEPARTMENTAL CROWN CORPORATIONS (SCHEDULE 'B' F.A. ACT)

Agricultural Stabilization Board
Atomic Energy Control Board
Director of Soldier Settlement
The Director, Veterans' Land Act
Economic Council of Canada
Fisheries Prices Support Board
Medical Research Council
Municipal Development and Loan Board
National Museums of Canada
National Research Council
Science Council of Canada
Unemployment Insurance Commission
APPENDIX B

AGENCY CROWN CORPORATIONS (SCHEDULE 'C' F.A. ACT)

Atomic Energy of Canada Limited
Canadian Arsenals Limited
Canadian Commercial Corporation
Canadian Dairy Commission
Canadian Film Development Corporation
Canadian Livestock Feed Board
Canadian National (West Indies) Steamships Limited
Canadian Patents and Development Limited
Canadian Saltfish Corporation
Centennial Commission
Crown Assets Disposal Corporation
Defence Construction (1951) Limited
Loto Canada Inc.
The National Battlefields Commission
National Capital Commission
National Harbours Board
Northern Canada Power Commission
Royal Canadian Mint
Uranium Canada Limited
APPENDIX C

PROPRIETARY CROWN CORPORATIONS (SCHEDULE 'D' F.A. ACT

Air Canada
Canada Deposit Insurance Corporation
Canadian Broadcasting Corporation
Canadian National Railways
Cape Breton Development Corporation
Central Mortgage and Housing Corporation
Eldorado Aviation Limited
Eldorado Nuclear Limited
Export Development Corporation
Farm Credit Corporation
Federal business Development Bank (formerly Industrial Development Bank)
Federal Mortgage Exchange Corporation
Freshwater Fish Marketing Corporation
Northern Transportation Company Limited
Petro Canada
Pilotage Authorities:
  Atlantic Pilotage Authority
  Laurentian Pilotage Authority
  Great Lakes Pilotage Authority
  Pacific Pilotage Authority
St. Lawrence Seaway Authority
The Seaway International Bridge Corporation Limited
Teleglobe Canada (formerly Canadian Overseas Telecommunications Corporation)
APPENDIX D

UNCLASSIFIED GOVERNMENT CORPORATIONS

Bank of Canada
Canada Council
Canadair Limited
The Canadian Wheat Board
The de Havilland Aircraft of Canada Limited
Dungarvon Forestry Project Inc.
Federal Insolvency Trustee Agency
Harbour Commissions

Belleville Harbour Commission
Fraser River Harbour Commission
Hamilton Harbour Commissioners
Lakehead Harbour Commission
Nanaimo Harbour Commission
North Fraser Harbour Commission
Oshawa Harbour Commission
Port Alberni Harbour Commission
Toronto Harbour Commissioners
Windsor Harbour Commission
Winnipeg and St. Boniface Harbour Commission

Hockey Canada Inc.
National Arts Centre Corporation
National Sports and Recreation Centre Inc.

Opcan

Public Works Land Company Limited

207 Queens Quay West Ltd.
Radio Engineering Products Limited
Sport Participation Canada Inc.
Standards Council of Canada
APPENDIX E

MIXED ENTERPRISE CORPORATIONS

Abenaki Motel Ltd.
Association for the Export of Canadian Books
Blue Water Bridge Authority
Canada Book Design Committee Inc.
Canada Development Corporation
Canadian Arctic Producers Limited
Canadian Colour and Fashion Trend Service
Canarctic Shipping Company Limited
Consolidated Computer Inc.
Crane Cove Oyster Farm Ltd.
Fashion Canada
Footwear and Leather Institute of Canada
La Societe Inter-port du Quebec
La Societe du parc industriel et commercial aeroportuaire de Mirabel
Metropolitan Area Growth Investments Limited
Mohawk St. Regis Lacrosse Ltd.
Nanisivik Mines Limited
New Brunswick Multiplex Corporation Limited
Newfoundland and Labrador Development Corporation Ltd.
POS Pilot Plant Corporation
MIXED ENTERPRISE CORPORATIONS (CONTINUED)

Saint John Harbour Bridge Authority
Shong Way Shi Corporation Limited
Telesat Canada
Thousand Islands Bridge Authority

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