NOVA SCOTIA COURT OF APPEAL

Citation: Whalley v. Royal Canadian Mounted Police Public Complaints Commission, 2009 NSCA 122

Date: 20091202
Docket: CA 312984
Registry: Halifax

Between:

Richard Whalley

Appellant

v.

The Royal Canadian Mounted Police Public Complaints Commission

Respondent

Judges:	Roscoe, Saunders and Hamilton, JJ.A.
Appeal Heard:	November 24, 2009, in Halifax, Nova Scotia
Held:	Appeal is dismissed with costs payable by the appellant to the respondent in the amount of $2,000, including disbursements, per reasons for judgment of Roscoe, J.A.; Saunders and Hamilton JJ.A. concurring
Counsel:	Glenn E. Jones, for the appellant Rebecca Saturley and Melissa Grant, for the respondent

Reasons for judgment:

[1] This is an appeal from a decision of Justice Arthur LeBlanc who granted summary judgment to the respondent Royal Canadian Mounted Police Public Complaints Commission. The decision under appeal, with neutral citation 2009 NSSC 128, is not reported.

[2] The appellant Richard Whalley, a former RCMP officer, sued the Commission claiming negligence, abuse of process, interference with economic relations, misfeasance in public office, abuse of statutory power, malicious prosecution and infliction of economic and emotional damage and mental suffering. The lawsuit arose from the Commission's investigation of a complaint made against the appellant by a person he arrested following a break and enter in 1994.

[3] The appellant submits that the Chambers judge erred in the application of the law relating to summary judgment and in refusing to consider the appellant's request to amend his pleadings. The respondent asks by way of notice of contention that the chambers decision be affirmed on additional grounds, namely, that there is no evidence or allegation of bad faith and that the Commission's actions are immune from suit on the basis of absolute privilege.

Background

[4] The background facts are succinctly set out in the decision under appeal as follows:

> [2] This proceeding action in this case arises out of an arrest made by the plaintiff Richard Whalley, a constable with the RCMP, in November 1994. In response to a break and enter call, the plaintiff attended the scene with his police dog and arrested Mr. Ronald Jones, among other suspects. Later in the same month, Mr. Jones filed a complaint with the RCMP Public Complaints Commission ("the Commission") in which he alleged that the plaintiff used excessive force during the apprehension. The Commission forwarded the complaint to the RCMP pursuant to s. 45.35(3) of the *R.C.M.P. Act*, R.S.C. 1985 c. R-10 ("*RCMP Act*"). After an investigation by the RCMP this complaint was dismissed in July 1995.

3] In September 1995, Mr. Jones asked the Commission to review the RCMP's disposition of his complaint. The Commission conducted a review of the complaint over the next two years. The Commission issued an interim report in September 1997, in which it stated that the plaintiff had used excessive force and oppressive conduct, and recommended that the RCMP take necessary corrective action against him. In February 1998, the Commissioner of the RCMP advised the Commission that he agreed with the findings in the interim report. The plaintiff was notified in March 1998 that he was being transferred out of the canine section of the RCMP. The Commission's final report and recommendations were subsequently released.

[4] The respondent sought judicial review of the Commission's final report in March 1999. The judicial review application was settled out of court and a Consent Dismissal Order was issued by the Federal Court on July 5, 2000, ordering that the Commission's final and interim reports be quashed. As a result of the order, the Commission agreed to undertake a fresh review of Mr. Jones' complaint.

[5] In 2001, the respondent commenced an action against the RCMP, the RCMP Commissioner, two RCMP inspectors and the Commission. With respect to the applicant, the respondent alleged that the Commission was negligent and/or acted in bad faith by failing to notify him of the complaint, failing to provide him with all relevant documentation and by acting as an advocate for the complainant, Mr. Jones. The respondent also alleged that the investigation by the Commission and RCMP was so fundamentally flawed and malicious as to amount to an abuse of process.

[6] On May 8, 2003, the respondent discontinued his action against all the defendants except the Commission. In an amended statement of claim filed in August 2005, the respondent made additional allegations against the applicant. He alleged that the Commission acted unlawfully by failing to follow its statutory mandate and procedures, acted with malice and/or a deliberate intention to cause economic hardship and emotional damage, unlawfully interfered with the contractual and/or economic relations of the respondent with his employer, committed misfeasance in a public office and/or an abuse of its statutory power, intentionally inflicted mental suffering, initiated and/or continued the proceedings unlawfully, and made findings in its final report when it knew that there was no supporting basis for them.

[5] The Commission brought the application for summary judgment pursuant to Rule 13.01, **Civil Procedure Rules** 1972, submitting that it was not a suable entity, that the Commission was released when the appellant settled the lawsuit

against the Crown, that the Commission is immune from action when it acts in good faith, that there was no evidence or allegation of bad faith or breach of statutory mandate, and that the claims brought in the amended statement of claim were beyond the applicable limitation period.

The decision under appeal

[6] The Chambers judge dealt only with the first issue and agreed that the Commission was not liable to be sued in an action for damages. He relied on **Westlake v. Ontario,** [1971] 3 O.R. 533; (1971) 21 D.L.R. (3d) 129, (Ont. H.C.J.) which was upheld by the endorsements of the Ontario Court of Appeal, [(1972) 26 D.L.R. (3d) 273] and the Supreme Court of Canada [[1973] S.C.J. No. 13 (Q.L.)]. In that case the Ontario Securities Commission was held to be a non-corporate body which, by the terms of its incorporating statute or by necessary implication, was not liable to be sued in an action for damages, but was a legal entity, whose actions may be reviewed in proceedings by way of *certiorari*, *mandamus*, and prohibition.

[7] Since the decision of the Chambers judge is not reported, I quote his conclusions at length:

> [19] I am satisfied that Parts VI and VII of the *RCMP Act* do not, by necessary implication, suggest that the Commission is suable.
>
> [20] The Commission is an independent federal agency established in accordance with s. 45.29(1) of the *RCMP Act*, which provides:
>
> > There is hereby established a commission, to be known as the Royal Canadian Mounted Police Public Complaints Commission, consisting of a Chairman, a Vice-Chairman, a member for each contracting province and not more than three other members, to be appointed by order of the Governor in Council.
>
> [21] The Commission was created to perform adjudicatory, not commercial, functions. It is an administrative body intended to provide civilian review of the conduct of RCMP members in order to hold the RCMP publicly accountable. It has the power to receive public complaints with respect to RCMP members' conduct, to conduct a review when a complainant is not satisfied with the RCMP's handling of their complaint, to hold public hearings, to lead investigations, and to report findings containing recommendations. It is empowered to hire its own staff

by s. 43.31; however, I find that this fact in itself is insufficient to render the Commission's work an activity of a commercial nature.

[22] In response to the applicant's argument that the Commission is not a suable entity, the respondent has attempted to show that the Commission is an agent of the Crown. As such, the respondent has focused its argument on the "control test," that is, the nature and degree of control exercised by the Crown over the Commission. With respect, the inquiry as to whether a government entity is suable is unrelated to whether that entity is an agent of the Crown. As the Supreme Court of Canada noted in *Northern Pipeline Agency v. Perehinec*, [1983] 2 S.C.R. 513, the inquiry focuses on the language of the enabling legislation. Estey, J. said, at p. 534, that "in the field of public agency liability the issue remains to be decided according to the terminology employed in the constituting legislation. In the result, it appears to make no difference whether the public body is or is not a Crown agency."

[23] Based on the authorities and (in particular) the enabling statute, I conclude that the RCMP Public Complaints Commission falls squarely within the sixth *Westlake* category and accordingly is not a suable entity. It is a legal entity in the sense that its actions may be subject to judicial review. Indeed, the Commission's decision in this case has already been the subject of judicial review. As a result of a settlement arising out of those proceedings the Commission heard the complaint.

[24] The caselaw has established that certain government entities do not possess the requisite legal personality to be sued. I have found that the RCMP Public Complaints Commission is one of them. The provisions of the enabling statute that establish the Commission neither incorporate the entity nor render it expressly liable to be sued. The Commission is authorized to engage in regulatory or adjudicatory, not commercial, functions. It is not rendered suable by necessary implication. It is, however, a legal entity in the sense that its actions may be subject to judicial review.

[25] The respondent submits that if the Commission has the capacity to initiate a legal proceeding in its own name, it must also have the capacity to defend one, and thus must be a suable entity. The authority offered for this proposition is *Royal Canadian Mounted Police Public Complaints Commission v. Canada (Attorney General)*, 2005 FCA 213; 2005 CarswellNat 1632 (Fed. C.A.), the Commission sought judicial review of a Federal Court (Trial Division) decision refusing to order production of certain information that was held to be subject to police informer privilege. One issue was whether the Commission had the capacity to bring an application for judicial review, pursuant to s. 18.1 of the *Federal Court Act*. Létourneau, J.A. said, at paras. 56-58:

Under subsection 18.1(1) of the F.C.A., "anyone directly affected by the matter in respect of which relief is sought" is authorized to bring an application for judicial review. Moreover, the subsection's wording is broad enough to encompass applicants who are not directly affected when they meet the test for public interest standing...

There is no doubt that the Commission is directly affected by a decision of the Commissioner not to provide material relevant to a complaint. The Commission and the Commission Chairperson are, thereby, impeded in the carrying out of their functions and duties as they are mandated to do by section 45.32 of the Act.

Without a legal means of ensuring compliance with the *Act* by the Commissioner, the Commission becomes, for all practical purposes, hindered to the point of uselessness. I entirely agree with the following comments made by the learned judge when discussing the respondent's argument that the Commission has no power to initiate legal proceedings. At paras.163 and 164 of his decision, he wrote:

> If the Respondent is correct in this regard it would mean that, under ss. 45.41 of the *RCMP Act*, the Complaints Commission has no right to compel the RCMP Commissioner to provide either a copy of the complaint or any material relevant to that complaint. *Just as a right without a remedy is no right at all, so an obligation without the means to compel it is no obligation at all*. It would mean, in effect, that the RCMP Commissioner would have a complete discretion, not only as regards what is and what is not relevant, but also as to whether any material is provided at all under ss. 45.41 even if it is relevant.
>
> In my opinion, this is an extraordinary argument to make for anyone concerned with the integrity and reputation of the RCMP because its ultimate effect is to deprive the Force of a significant means of vindication in the face of Complaints against its members. If the Complaints Commissioner cannot compel the RCMP Commissioner to provide materials related to a Complaint, and it is all a matter of discretion on the part of the RCMP, then the whole concept of civilian supervision is severely undermined and a Complainant and the public will never know whether a Complaint has been truly investigated. It renders the Complaints Commission a token investigative agency. [emphasis in original.]

> [26] The Court also addressed the question of whether the Commission had the capacity and jurisdiction to initiate legal proceedings. Létourneau, J.A. held that the Commission could initiate legal proceedings, particularly "for the limited purpose of securing the materials it needs from the RCMP to perform its statutory duty" (para. 74). Otherwise, the RCMP Commissioner could ignore at will proper inquiries from the Commission. Although the court held that the Commission could institute proceedings for judicial review, it did not go so far as the respondent suggests. The power recognized by the Court was limited to circumstances where the Commission was prevented from performing its statutory duties. I am not convinced that it supports the proposition advanced by the respondent.
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> CONCLUSION
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> [27] Consequently, the test for summary judgment has been met. The applicant has established that there is no genuine issue of material fact for trial. On the second branch of the test, I find that the respondent has not rebutted the argument that the Commission is not a suable entity, and has thus failed to discharge his onus of showing that his claim has a real chance of success.
>
> [28] As a result, I allow the application for summary judgment. Having decided on this ground, I do not believe it is necessary to consider the other grounds advanced by the applicant.

Issues

[8] The appellant argues that the judge erred in determining that the Commission was not a suable entity and in failing to allow the appellant to amend his statement of claim to add the Crown as a defendant. The respondent asks by way of notice of contention that the chambers decision be upheld on the basis that there was no evidence that the Commission acted in bad faith and that the Commission was protected by absolute privilege.

Standard of Review

[9] The standard of review on the first issue is whether there was an error of law resulting in an injustice. See: **Cooper v. Atlantic Provinces Special Education Authority**, 2008 NSCA 94 and the cases cited at ¶ 9 therein. On the second issue, since the appellant did not actually file an application to amend for the Chambers

judge to consider, there is no standard of review. See: **Jeffrey v. Naugler** 2006 NSCA 117, ¶ 8.

1. Is the Commission liable to be sued for damages in tort?

[10] The appellant submits that the chambers judge erred in finding that the respondent Commission fell within the sixth category described in **Westlake.** He argues that the Commission falls within the fifth **Westlake** category, that is, a non-corporate body which is, by necessary implication, liable to be sued in an action for damages. Those categories were described in **Westlake** as follows, at pp. 535 and 538:

> (5) There are non-corporate bodies which are not by the terms of the statute incorporating them expressly liable to suit but which are by necessary implication liable to be sued in an action for damages. The Ontario Securities Commission [*Securities Act*, 1966 (Ont.), c. 142 (now R.S.O. 1970, c. 426)] does not fit into any one of the first four categories, but counsel for the respondents submits that it comes within the fifth category with the result that the action is maintainable against the Commission.
>
> (6) It will be obvious from what has been said that there is a sixth category of statutory bodies and it is in this category that, in my opinion, the Ontario Securities Commission belongs. These are non-corporate bodies which are not by the terms of the statute incorporating them or by necessary implication liable to be sued in an action for damages, but who are legal entities in that their actions may be reviewed in proceedings brought against them by way of the extraordinary remedies of *certiorari*, *mandamus* and prohibition.

[11] The **RCMP Act** by which the Commission is established does not provide that the Commission is a body corporate. The **Act** is silent as to whether the Commission can sue or be sued or whether it can contract, hold property or conduct any business. Its purpose is to conduct inquiries into complaints made by members of the public regarding conduct of RCMP officers, make findings regarding the validity of the complaints, and to make recommendations to the Commissioner of the RCMP and the Minister of Public Safety and Emergency Preparedness. It has the power of a board of inquiry (s. 45.45) and functions as a quasi-judicial tribunal.

[12] The appellant asserts that the Commission although not expressly liable to be sued is, by necessary implication, liable to be sued. He says the necessary implication arises from s. 45.31 of the **Royal Canadian Mounted Police Act**, which states:

> 45.31 (1) The head office of the Commission shall be at such place in Canada as the Governor in Council may, by order, designate.
>
> (2) Such officers and employees as are necessary for the proper conduct of the work of the Commission shall be appointed in accordance with the *Public Service Employment Act*.
>
> (3) The Commission may, with the approval of the Treasury Board,
>
> > (a) engage on a temporary basis the services of persons having technical or specialized knowledge of any matter relating to the work of the Commission to advise and assist the Commission in the exercise or performance of its powers, duties and functions under this Act; and
> >
> > (b) fix and pay the remuneration and expenses of persons engaged pursuant to paragraph (a).

[13] The appellant argues that if an agency created by statute is able to enter a contract of employment, by necessary implication it may be sued in its own right. He relies on **Northern Pipeline Agency v. Perehinec**, [1983] 2 S.C.R. 513 for that assertion. In that case the Supreme Court had held that the Northern Pipeline Agency could be sued for wrongful dismissal. The Court noted at p. 517 that the statute creating the Agency authorized it to hire employees:

> By section 11 of the statute, the Agency is given express authorization to:
>
> > . . . employ such professional, scientific, technical and other officers and employees as it considers necessary for the purposes of this Act, fix their tenure of employment and their duties and, with the approval of the Treasury Board, fix and pay their remuneration.

[14] In reaching the conclusion that the Northern Pipeline Agency fell into the fifth **Westlake** category, the Court stated at p. 539:

> . . . Service for the state takes many forms in today's world, including the employment, on a considerable scale, of individuals by agencies such as the one involved in this appeal. The Agency, as a plain reading of the statute indicates, must be seen as the employer of its staff. It is as much an entity within its own sphere of operations as is a trade union, and, in the latter case, the law already recognizes the reality of the legal entity even though the corporate form has not been expressly provided by the statutes.
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> Where a fair construction of the enabling statute permits an agency to enter into a contract on its own behalf, even if it may be on behalf of the Crown as well, the agency, having entered the contract in its own name, may be sued in its own right in an action for breach of that contract. This would place the agency in question here within the fifth category enunciated by Holden J. in *Westlake, supra*. In my opinion, the appellant, pursuant to s. 11 of the Act, is an entity which can enter a contract of employment on its own behalf, and sue or be sued on that contract in its own name. Consequently, the respondent (plaintiff), in commencing an action on this employment contract, is entitled to claim relief against the Agency itself. . . . [emphasis added]

[15] The statute creating the respondent Commission does not have authorization regarding employees that is equivalent to that of the Northern Pipeline Agency. Rather, the **RCMP Act** expressly provides in s. 45.31 that the Commission's employees are to be appointed pursuant to the **Public Service Employment Act** and temporary appointments require the approval of the Treasury Board. As well, the Northern Pipeline Agency is much more like a corporate business than the Commission. For example, as noted by the Supreme Court of Canada at p. 520:

> 17 In the *Northern Pipeline Act, supra*, the Agency was established to carry out and give effect to an agreement which had been previously entered into by this country and the United States relating to the establishment of gas transmission pipeline facilities in the federal territories and the Province of Alberta. To this end the Agency, pursuant to s. 3, was given a statutory mandate to "facilitate the efficient and expeditious planning and construction of the pipeline", and in doing so "to carry out . . . federal responsibilities in relation to the pipeline", and finally to:
>
> > advance national economic and energy interests and to maximize related industrial benefits by ensuring the highest possible degree of Canadian participation in all aspects of the planning and construction of, and procurement for, the pipeline while ensuring that the procurement of goods and services for the pipeline will be on generally competitive terms.

[16] The Commission is more like the Board in **Hollinger Bus Lines Ltd. v. Ontario Labour Relations Board**, [1952] O.R. 366, which was described by the Supreme Court in the Northern Pipeline case at p. 526:

> The whole scheme and purpose of the Act is to deal with certain phases of the employer-employee relationship. The Board does not carry on any business. Its function is primarily administrative and it has been given power to exercise certain functions of a judicial nature. There is nothing in the Act remotely suggesting that it was intended by the Legislature that the Board should have the capacity either to sue or to be sued. [quoting from the Ontario Court of Appeal]
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> The Labour Relations Board, of course, is not a board with any operative functions. It is rather a regulatory board, operating in a quasi-judicial sense to determine issues assigned to it by a statute manifesting the broad policies of the Legislature in the field of labour relations. The board has more of the attributes of a tribunal than it has of a functioning agency in the executive branch of government.

[17] In any event, being able to enter into contracts whether for employment or other purposes does not, by necessary implication, make the Commission liable to be sued for damages in tort. Surely, the human rights, labour relations and security commissions that have routinely been found not to be suable in tort are able to enter into contracts, for example, to acquire office supplies. See: **Westlake** (pp.536-538), and **Smith v. New Brunswick (Human Rights Commission)**, [1997] N.B.J. No. 29 (NBCA) ¶ 19.

[18] As noted by Justice Houlden in **Westlake**, it is important to examine the powers of the agency in question to determine whether the necessary implication arises (p. 537):

> There is nothing in the *Securities Act*, 1966 or the *Labour Relations Act* which confers upon the Commission or the Board the power to enter into contracts, to acquire and hold property and to dispose of same, or to carry on any commercial activity. If s. 26(a) of the *Interpretation Act* is examined, it will be seen that these are the essential powers conferred upon a body corporate created by statute. If a statute confers powers of this type upon a non-corporate entity which it brings into existence, then as Taylor, J., pointed out in *Bank of Montreal v. Bole*, it flows as a necessary intendment from the enactment that the statutory body is to be amenable to the ordinary processes of the Courts. If such powers are not conferred, on the basis of the *Hollinger* case, the statutory body cannot sue or

> be sued by the ordinary processes of the Court: see also *Retail, Wholesale & Department Store Union, Local 580 v. Baldwin et al*., [1953] 4 D.L.R. 735.

[19] As noted above, although the Commission has the limited authority to engage temporary services, it is not given any other express power to enter into contracts in its own name or to hold or dispose of property or undertake any commercial activity. Its powers are limited to investigating complaints, conducting hearings when it deems advisable, and reporting its findings to the Minister of Public Safety and Emergency Preparedness and the Commissioner of the RCMP.

[20] The appellant also argues that the Commission is liable to be sued in an action for damages, because it has been found to have capacity to intervene in an application in the Federal Court regarding the admissibility of evidence at a Commission inquiry [**Singh v. Canada (Attorney General),** [1999] F.C.J. No. 550 (F.C.C.) (QL)] and to initiate proceedings in the Federal Court to determine the obligation of the RCMP Commissioner to produce information related to complaints it was investigating [**Canada (Royal Canadian Mounted Police (RCMP) Public Complaints Commission) (Re)**, [1990] F.C.J. No. 915 (Q.L.) and **Canada (Royal Canadian Mounted Police Public Complaints Commission) v. Canada (Attorney General**) 2005 FCA 213].

[21] The Chambers judge dealt with these arguments of the appellant by relying on the judgment of Létourneau J.A. in **Canada (Royal Canadian Mounted Police Public Complaints Commission) v. Canada (Attorney General)** as quoted above at ¶ 7. I agree with Létourneau J.A. and the Chambers judge that the Commission has the capacity and jurisdiction to seek the assistance of the Federal Court for the limited purpose of carrying out its obligations pursuant to the **RCMP Act**. The ability of the Commission to seek evidentiary rulings and production and disclosure orders does not make it, by necessary implication, liable to be sued in tort for damages by parties who are dissatisfied with the Commission's handling of a complaint. The only avenue to challenge the Commission's ruling is through an application for judicial review. That has been done in this case and, by consent, the final report of the Commission respecting the complaint by Mr. Jones was quashed.

[22] In my view, the Chambers judge was correct to find that the Commission was not liable to be sued for damages in tort and I would dismiss this ground of appeal.

2. Amendment

[23] The appellant also submits that the Chambers judge erred in refusing to consider his request to amend his pleadings to name the Crown as defendant.

[24] In his pre-application brief the appellant indicated that if the Chambers judge found that the Commission was not suable that he "would seek to amend the pleading . . . to appropriately name the Crown as defendant." In his oral submissions counsel for the appellant stated:

> However, my Lord, more importantly, even if the Commission can't be sued in its own name, our submission is that the Plaintiff should be allowed to correct the error and name the Attorney General, because in this case, it's a technical error and it shouldn't operate to bar the Plaintiff's claim.

[25] After receiving the decision under appeal, counsel for the appellant wrote to Justice LeBlanc, asking that he rule on the plaintiff's request to amend the statement of claim to add the Crown as a defendant. Justice LeBlanc replied that the issue was not before him and he declined to deal with the request.

[26] The appellant submits that the Chambers judge erred in failing to consider the issue of a possible amendment and asks that the appeal court allow the request to amend the statement of claim. The respondent objects, arguing that no application for an amendment has actually been made, that the Crown has not been given notice of any application to amend, and that even if the amendment were to be made, there still is no triable issue because the Crown was released by the minutes of settlement.

[27] The appellant relies on **Jeffrey v. Naugler** 2006 NSCA 117. In that case the appellant filed the text of the proposed amendment with the Court of Appeal. The Court permitted the appellant to amend the statement of claim and allowed the appeal from the summary judgment.

[28] Here the appellant has not yet made a formal application to amend the statement of claim or given notice to the Crown of his intention to name it as defendant. In my view, this ground of appeal could be dismissed on that basis

alone. It cannot be said that the Chambers judge erred in failing to deal with an application that was not filed or presented to him.

[29] Moreover, I agree with the respondent's submission that even if this Court were to allow the appellant to name the Crown as a defendant in the lawsuit, the matter would undoubtedly be summarily dismissed. (See **Orlandello v. AGNS**, 2005 NSCA 98 at ¶ 22 and the cases cited therein.) It makes no sense to permit an amendment to add a party that has been released. Upon the payment of $250,000 to Mr. Whalley and other valuable consideration, the Crown was released. The release states:

> . . . I, **Richard Whalley**, . . . do hereby by remise, release and forever discharge . . . **Her Majesty the Queen in Right of Canada, her servants and agents** . . . from any and all causes of action, complaints, grievances, demands for compensation for loss, injury, debts, expenses, interest and costs, at law or in equity, whether known or unknown, suspected or unsuspected, that he ever had, now has or may have in the future which are identified in or reasonably arise from the facts alleged in the Nova Scotia Supreme Court action . . . S.H. No. 170917.
>
> I further agree not to make a claim or take proceedings against any other person or corporation who might claim contribution or indemnity under the provisions of any statute or otherwise. . . .

[30] The Crown has therefore been relieved of and released from any possible liability for the actions of the Commission, as its agent or servant. It therefore makes no practical sense to amend the pleadings to add the Crown as a defendant at this stage.

[31] I would dismiss this ground of appeal.

Notice of Contention

[32] It is not necessary to deal with the issues raised by the notice of contention.

Conclusion

[33] I would dismiss the appeal with costs payable by the appellant to the respondent in the amount of $2,000, including disbursements.

Roscoe, J.A.

Concurring:

Saunders, J.A.

Hamilton, J.A.