Dowson v. The Queen

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When a Chief Superintendant of the Royal Canadian Mounted Police allegedly makes false and defamatory statements about a private citizen to a provincial Assistant Deputy Attorney-General, is he protected from liability for defamation by the doctrine of absolute privilege? To those familiar with absolute privilege as a defence to libel it will come as no small surprise that a recent unanimous decision of the Federal Court of Appeal answered that question affirmatively. It is arguable that in *Dowson* v. *The Queen*[1] the Court struck a major blow against those concerned with maintaining and extending the public accountability of government employees and police forces. In fact, the continued existence of liability for defamatory statements made by public servants in the course of their duty has been put into question by this decision.

The issue came before the Federal Court of Appeal on a motion from the Crown to dismiss the defamation action of Ross Dowson[2] initiated against the federal Crown as a result of a statement made by R.C.M.P. Chief Superintendent Robert Vaughan to R.M. McLeod, the acting Assistant Deputy Attorney-General for Ontario, on 7 December 1977.[3] The statement complained of was made as a result of questions

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[1](1981) 124 D.L.R. (3d) 260 (F.C.A.) *per* Le Dain J., concurred in by Ryan J. and McKay D.J. Leave to appeal to the Supreme Court of Canada refused 1 October 1981 *per* Laskin C.J.C., Estey and Lamer JJ. For further criticism of this decision see J. Maingot, *Parliamentary Privilege in Canada* (1982), chap. 5.

[2]Statement of Claim filed in the Federal Court of Canada office in Toronto, 15 December 1977. Financial support for the carriage of the case came from the Socialist Rights Defence Fund whose sponsors include Noam Chomsky, Linus Pauling, Jessica Mitford, Pierre Berton, Margaret Atwood and a variety of political organization, *e.g.*, the federal New Democratic Party, The Law Union of Ontario, as well as trade unions and labour councils across Canada.

[3]By Notice of Motion dated 20 December 1978, the defendant moved for an order pursuant to Rule 419 (1) (c) and (f) of the General Rules and Orders of the Federal Court of Canada to dismiss the action on the grounds that it was frivolous or vexatious or

directed by Stephen Lewis, then leader of the New Democratic Party (N.D.P.) on 1 November 1977 in the Ontario Legislature to the Attorney-General, Roy McMurtry, with respect to alleged investigations of the N.D.P. by the R.C.M.P. between 1971 and 1973.[4]

The following day, Roy McMurtry wrote to the Solicitor-General, Francis Fox, asking whether the R.C.M.P. investigation had in fact taken place and if so, what its "origin, scope, method, duration and result" had been.[5] Affidavit evidence, filed and accepted by the Court, established that R.C.M.P. officials were instructed to make the inquiries necessary to reply to this letter.[6]

On 30 November 1977 Francis Fox replied to Roy McMurtry's letter advising him that he had asked Assistant R.C.M.P. Commissioner M.S. Sexsmith to provide any additional information which might be required at a meeting.[7] The meeting between M.S. Sexsmith and R.M.

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otherwise an abuse of the process of the court. In the alternative, an order was sought pursuant to Rule 474 to set down for argument as a question of law before trial the question of whether the statements complained of were absolutely privileged. In the further alternative, the defendant sought an order pursuant to Rule 476 requiring that the issue of absolute privilege be determined prior to discovery of the defendant.

[4]Ontario Legis. Debates, 31st Parl., 1st Sess., 1 November 1977, vol. 2, 1375-6:

ACTIVITIES OF RCMP

Mr Lewis: I'd like to put a question to the Attorney General if I may. Could I ask him, on behalf of the democratic process generally, and on behalf of this party in particular, to seek from the federal government, from the Minister of Justice and the Solicitor General, an understanding of, or particulars about the investigation which was launched by the RCMP, so it is alleged, into the activities of members of the New Democratic Party in the years 1971-73 in the province of Ontario?

Hon. Mr McMurtry: Mr Speaker, yes, I am quite prepared to make such a request to the Minister of Justice and the federal Solicitor General.

Hon. Mr McMurtry: Just as a matter of clarification, Mr Speaker, I assume the leader of the NDP is talking about New Democratic Party members of this legislature?

Mr Lewis: No. Well, it may be, one never knows.

Hon. Mr McMurtry: The New Democratic Party in Ontario?

Mr Lewis: Yes. By way of supplementary, would it be possible, given what we consider and obviously others consider to be extremely disturbing allegations attributed to the RCMP of investigating the activities of various members or factions in well-constituted politial parties in this country, the NDP in Ontario at the time, can I ask the Attorney General to demand the information, to peruse it carefully, to make some kind of report to the Ontario Legislature and then to allow us to see whether it might be taken further, say, to the extent of a request for a commission of inquiry?

Mr Conway: You don't mean the Waffle, do you?

Mr Lewis: I suspect it went further than that.

Hon. Mr McMurtry: My answer, Mr Speaker, is yes.

[5]Affidavit of Murray S. Sexsmith, sworn 14 December 1978, para. 4 (b).

[6]*Ibid.*, paras 4 (c) - (e).

[7]*Ibid.*, para. 4 (c).

McLeod, who attended upon the instructions of the Attorney-General of Ontario, took place on 7 December 1977, at which time the statement forming the basis of Dowson's action was communicated. A summary of R.C.M.P. activity relating to the inquiries was prepared as a result of that meeting and was read in the Ontario Legislature by the Attorney-General on 9 December 1977.[8] The portion of the statement complained of reads as follows:

> The RCMP have always acted in the belief that membership in a political party does not give immunity to anyone who would tend to promote changes brought on by violent and undemocratic means and thereby attract the attention of the RCMP on the interest of national security.
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> Between 1970 and 1973 the RCMP did conduct investigations into the activities of certain members of the Waffle group while it was still a part of the NDP.
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> When the Waffle group came into being, it invited persons outside the NDP to join its ranks. These persons included ex-members of the Communist Party of Canada and members of the Canadian Trotskyists movements. The leaders of the League for Socialist Action (Trotskyists), in fact directed their members to join the Waffle Group.
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> The RCMP investigation of certain members of the Waffle group established that subversive elements penetrated the NDP through the Waffle in order to gain more respectability, credibility and influence. Although the RCMP investigation concentrated on individuals of security interest, inquiries were broadened sufficiently to put the activities of these individuals in proper perspective. The investigation was de-emphasized after the NDP decided to rid itself of the Waffle. The individuals of concern to the RCMP, having lost the legitimacy of membership in the NDP, also lost interest in the Waffle. The RCMP concern with these individuals was not reduced but any concerns that the RCMP had that these subversive elements were using the Waffle as a means of penetrating the NDP and therefore as a means of acquiring credibility and influence was accordingly eliminated.[9]

Between 1961 and 1972 the plaintiff-appellant was the Executive Secretary and thereafter the Chairman of the League for Socialist Action (L.S.A.).[10] At the time the allegedly defamatory statement was made, he was a professional politician and political journalist. The plaintiff alleged that because of his role in the L.S.A., he was identifiable as a person referred to in the statement of 7 December 1977 as "subversive" and as someone "who would tend to promote changes brought on by violent and undemocratic means... thereby attracting the attention of the R.C.M.P. on the interests of national security", to the injury of his reputation. The Statement of Claim concluded with a claim for special damages in the amount of $50,000 and general, punitive and

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[8]Affidavit of Ross Dowson, sworn 4 September 1979, para. 8 (ii).
[9]*Supra*, note 4, 9 December 1977, 2815-6.
[10]*Supra*, note 2, para. 1.

exemplary damages in the amount of $450,000.[11] The defendant alleged in its defence that the words complained of were spoken on an occasion of absolute privilege and, alternatively, that they were spoken on an occasion of qualified privilege.

The effective portion of the plaintiff's claim was dismissed by Grant J. of the Federal Court, Trial Division, on 27 December 1979, on the grounds that the statement complained of was an extension of parliamentary proceedings made by an officer of state in the course of official duty, thereby attracting the defence of absolute privilege.[12]

The broad issue before the Federal Court was whether the statement was protected by absolute privilege. The doctrine of absolute privilege, notwithstanding its nomenclature, is distinct from privileges of an evidentiary character which may have a parallel effect.[13] Absolute privilege exists only within the realm of defamation, an area of the law already fraught with numerous formalities of pleading, and its scope is similar in many respects to the Royal prerogative providing immunity to the monarch from civil and criminal process for several centuries. Absolute privilege has been defined as complete immunity from responsibility for publication of defamatory words regardless of purpose or motivation.[14] In this respect, it differs from qualified privilege which is defeated by proof of malice. Words spoken or published on an occasion of absolute privilege are not actionable even though the defendant spoke or published the words with full knowledge of their falsity with the express intention of injuring an individual.

At present, absolute privilege attaches to statements made with respect to three general classifications: (1) statements made with respect to judicial and quasi-judicial proceedings; (2) statements made in the course of parliamentary proceedings; and (3) statements made by high officers of state to each other in the course of official duty with respect to a matter of state.[15] The law with respect to the scope of the latter two categories has been in a state of flux for much of this century in most Commonwealth countries, with decisions frequently going opposite ways on similar facts. No Canadian jurisprudence has modified the English position on the incidents of official privilege. It is generally recognized

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[11] *Ibid.*, paras 2-14. The statement of claim was filed six days after the making of the statement and for the purpose of subsequent court proceedings, its contents were presumed to be true.

[12] *Dowson* v. *The Queen* (F.C.T.D.), T-4816-77, 27 December 1979 *per* Grant J.

[13] A reliable exposition of the basic principles of absolute privilege may be found in R. McEwan & P. Lewis, *Gatley on Libel and Slander*, 7th ed. (1974), paras 381-428.

[14] *Ibid.*, paras 381-2. See also J. Flood, *A Treatise on the Law of Libel and Slander* (1880), 154-5; *Halsbury's Laws of England*, 4th ed. (1979), vol. 28, paras 95-107.

[15] *Ibid.*

that the doctrine, so far as it provides immunity from litigation to communications relating to state matters made by high state officials to each other, has its modern origin in the case of *Chatterton* v. *Secretary of State of India in Council.*[16] The underlying rationale for the rule was stated by Lord Esher M.R. to be that it would be injurious to the public interest to inquire into the motives of an officer of state with respect to an official communication to another high state official as it would reduce the officer's freedom of action in a matter concerning the public interest.[17] Lord Esher felt that to call upon such an official to deny that he acted maliciously would prejudice the independence necessary for the performance of that person's function as an official of state.[18]

It should be noted that his Lordship intended the doctrine to offer complete immunity from suit rather than a defence. Such statements already attract protection through the defence of qualified privilege which, if pleaded and accepted, would provide an absolute defence unless malice on the part of the person making the statement could be proven.[19] However, Lord Esher clearly felt that the public interest necessitated not merely a defence of which a high official of state could avail himself on the merits, but rather a form of complete protection which would negate any form of liability notwithstanding the merits.

The wide scope of absolute privilege has resulted in judicial decisions which have attempted to ensure that such a broad privilege would not be abused. For example, several American cases have held that in determining whether a statement was made in the course of official duty concerning a matter of state, it is relevant to examine whether the statement was made for any other reason and whether the statement was referable to the duty giving rise to the privileged occasion.[20] American case law has also suggested that absolute privilege should not be extended in instances where defamatory statements are not made confidentially and are intended to be "given to the world".[21]

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[16][1895] 2 Q.B. 189 (C.A.).

[17]*Ibid.*, 191.

[18]*Ibid.*

[19]Qualified privilege attaches to statements made in discharge of a public duty as well as to communications in which a defendant and the person to whom the communication is made has a common interest in making and receiving the communication. Both of these defences would normally be available in cases where absolute privilege is pleaded. In fact, these defences were pleaded in the alternative by the defendant in the instant case. See Fresh Statement of Defence, filed 13 October 1978, para. 3.

[20]*Gregoire* v. *Biddle* 177 F. 2d 579, 581 (2d Cir. 1949) *per* Learned Hand J. See also *Wright* v. *Contrell* (1943) 44 S.R. (N.S.W.) 45, 53 (S.C.) *per* Jordan C.J.

[21]*Stivers* v. *Allen* 15 A.L.R. 245, 247 (Wash. S.C. 1921) *per* Parker C.J.

The *Chatterton* case, which involved an alleged defamatory statement made by the Secretary of State for India to the parliamentary undersecretary for India to enable the latter to answer a question in the House of Commons, established three broad prerequisites for the invocation of the doctrine of absolute privilege: (1) the statement must have been made by one officer of state to another officer of state; (2) it must relate to state matters; and (3) it must be made by an officer of state in the course of his official duty.[22]

In *Dowson*, the Federal Court of Appeal had to determine whether it was sufficiently clear in fact and in law that the impugned statement was made on an occasion of absolute privilege so as to justify striking out the statement of claim and dismissing the action as frivolous and vexatious or otherwise an abuse of the process of the Court. Whereas Grant J. in the Trial Division had found the statement to be protected both by the privilege of an officer of state and parliamentary privilege,[23] the Court of Appeal found that the statement was protected by the privilege of an officer of state and found it unnecessary to decide whether parliamentary privilege attached to the statement. However, Le Dain J. said that the existence of a parliamentary privilege on the facts of the case would appear to raise more difficulty in the light of the existing authorities in view of the fact that the Solicitor-General of Canada was not a member of the Ontario Legislature, although he was replying to a request for information by a member of the Legislature to enable him to answer a question in the Legislature. Whether a statement made in such circumstances should enjoy the absolute privilege which attaches to proceedings in the Legislature is not at all clear on the authorities.[24]

Despite their qualified character, these comments stand in sharp contrast to Grant J.'s endorsement of the argument that parliamentary privilege attached to the words at issue.[25] It was asserted strongly by Grant J. that the statement complained of, though made by a stranger to the House, had the protection of parliamentary privilege. He further held in a portion of his judgment that may have been made *per incuriam* that the absolute privilege afforded statements made by officers of state in the course of their duty was an instance of the extension of parliamentary privilege outside the House.[26] Such a statement tends to blur the distinct and separate natures of parliamentary privilege and the

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[22]See *supra*, note 16, 190 *per* Lord Esher M.R., 192 *per* Kay L.J. and *supra*, note 1, 269 *per* Le Dain J.

[23]*Supra*, note 12.

[24]*Supra*, note 1, 273.

[25]*Supra*, note 12, 11-2.

[26]*Ibid.*

privilege afforded official communications between high officers of state.

Furthermore, Grant J.'s decision went directly against case law going well back into the nineteenth century establishing that statements made to members of Parliament by strangers concerning questions to be put in the House were subject to a qualified privilege and that the soliciting or receipt of information was not a proceeding in Parliament which attracts privilege.[27] Until the Trial Division's decision in *Dowson*, conversations between strangers to the House had never been held to be parliamentary proceedings solely because the contents of such communications were subsequently repeated in the House. Grant J.'s reliance on recent Canadian cases dealing with parliamentary privilege ignored the salient fact that these cases applied only to statements made by members of the House.[28]

Historically, the object of absolute privilege arising out of parliamentary proceedings was to protect members of Parliament and no authority exists for the proposition that statements made outside the House by members attracts such a privilege.[29] The privilege of a member of the House is finite and cannot be stretched indefinitely to cover any person along a chain of communication initiated by the member.[30]

Grant J. had apparently ignored the underlying test in all cases with respect to parliamentary privilege; namely, whether the right to claim the privilege is absolutely necessary for the due execution of the power of Parliament.[31] Under the common law, only such laws are inherent in a legislative assembly as are necessary to its existence and to the proper exercise of its functions.[32] Wider power has always depended upon expreess grant by statute.[33] The application of the principle of absolute privilege of parliamentary proceedings to proceedings which are carried on outside the House is far from being settled in Canadian jurisprudence.[34] In fact, the foremost authorities assert that it is an open

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[27]*Dickson* v. *Earl of Wilton* (1859) 1 F. & F. 418, 429, 175 E.R. 790, 794 (*Nisi Prius*) *per* Lord Campbell C.J.

[28]*Roman Corp.* v. *Hudson's Bay Oil and Gas Co.* [1971] 2 O.R. 418 (H.C.), *aff'd* [1972] 1 O.R. 444 (C.A.), *aff'd* for other reasons [1973] S.C.R. 820.

[29]E. May, *The Law, Privileges, Proceedings and Usage of Parliament,* 18th ed. (1971), 64 *et seq.*

[30]*Re Clark and A.-G. Canada* (1977) 17 O.R. (2d) 593 (H.C.).

[31]*Report of the Select Committee on Official Secrets Acts,* H.C. Paper No. 118 (1946-7), para. 10.

[32]*Landers* v. *Woodworth* (1878) 2 S.C.R. 158.

[33]*Dill* v. *Murphy* (1864) 1 Moore (N.S.) 487, 511-2, 15 E.R. 784, 792-3 (P.C.) *per* Molesworth J.

[34]See *Stopforth* v. *Goyer* (1978) 87 D.L.R. (3d) 373, 381 (Ont. H.C.) *per* Lieff J.

question whether the immunity attached to parliamentary proceedings may be extended to matters arising outside Parliament by virtue of their especially close relation to proceedings in Parliament.[35] Even words spoken in the House are not absolutely privileged unless they are directly related to the business at issue.[36] Within the framework of these established principles of law, Le Dain J.'s comments on the "difficulty" in finding the existence of parliamentary privilege in the instant case appear to be understated, but are clearly consistent with existing authorities. Le Dain J. did not hesitate, however, to engage in highly innovative reasoning in order to find that the statement at issue was protected by the privilege attached to official communications, notwithstanding that the person making the statement was an officer of the security service and that the statement was prepared by individuals below him in the R.C.M.P. hierarchy.

Prior to reaching this conclusion, Le Dain J. conceded that if the statement made by Chief Superintendent Vaughan was to be regarded as made on his own behalf and on his own initiative, it would be arguable whether it should be subject to an absolute privilege.[37] The learned Justice, however, went on as follows:

> But it is clear in my opinion that it can not be so regarded in the light of the facts which must be taken as established. It was a statement that was made for and on behalf of the Solicitor-General of Canada and pursuant to his instructions. The request for information was addressed by the Attorney-General of Ontario to the Solicitor-General. The Solicitor-General replied by letter on November 30, 1977 setting out the substance of his reply to the Attorney-General's question in two sentences and indicating that he had instructed Assistant Commissioner Sexsmith to provide any further information that the Attorney General might require at a meeting to be arranged at his convenience. The statement made by Vaughan under Sexsmith's direction at the meeting with McLeod was thus simply an elaboration of the Solicitor-General's reply to the Attorney-General. Vaughan should therefore be likened to a person who makes a statement as the agent of another, and as such should be regarded as having the benefit of the absolute privilege that would clearly apply, on the authority of the *Chatterton* case, to a statement in relation to a state matter made by the Solicitor-General in the course of his official duty. This principle — that an agent who makes a statement takes the benefit of the privilege that would attach to the statement if made by the person on whose behalf it is made — has been recognized in cases of qualified privilege [see R. McEwan & P. Lewis, *Gatley on Libel and Slander,* 7th ed. (1974), paras 469 and 880 and the cases cited, in particular, *Adam* v. *Ward* [1917] A.C. 309 (H.L.)], and I can see no reason why it should not apply to the occasion of absolute privilege created by the statement of a Minister of the Crown in relation to a matter of state, particularly, in view of the necessary delegation that is involved in the exercise of that office [*cf.* R. Powell, *The Law of Agency,* 2d ed. (1961), 279-80].[38]

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[35]May, *supra,* note 29, 64 *et seq.*
[36]*Ibid.,* 63.
[37]*Supra,* note 1, 271.
[38]*Ibid.,* 271-2.

What is most significant about this reasoning is the way in which the intrinsic restriction of the privilege to high officials of state has been effectively circumvented, notwithstanding the unqualified nature of the privilege. Until the instant case, policemen had never been held to be protected by absolute privilege, whether by delegation or otherwise. As Lord Denning M.R. said on behalf of the English Court of Appeal:

> The authorities do show that a report by a very senior military or naval officer to his superior is absolutely privileged; but nothing else is settled. It is doubtful whether reports by the middle or lower ranks of the army and navy are absolutely privileged. The middle ranks of the police do not appear to be absolutely privileged. It has been held by the High Court of Australia that a report made by an inspector of police to his superior officer is not absolutely privileged... . It is a nice question whether the secret service should be treated like the police force or like the army or navy.[39]

Similarly, in *Gibbons* v. *Duffell* the High Court of Australia held that a report to a superior officer which contained defamatory references to a subordinate officer, made by an inspector of police in the course of his duty was not the subject of absolute privilege.[40] A majority of the Court held that the functions of an inspector of police were not removed

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[39]*Richards* v. *Naum* [1967] 1 Q.B. 620, 625 (C.A.). The Court of Appeal decided to refuse to dismiss this action for libel on the ground of absolute privilege at the stage of a motion to strike raising a preliminary determination of a question of law as it was not clear whether absolute privilege extended to a statement made in the particular circumstances of the case and that there were relevant and necessary facts that could only be determined at trial. A similar argument had been put forward unsuccessfully in the case at hand.

[40]*Gibbons* v. *Duffell* (1932) 47 C.L.R. 520, 533-4 (H.C. Austl.). Evatt J. distinguished the case of police officers from operations of a military character arguing that there had always been marked judicial disapproval of *Dawkins* v. *Lord Paulet* (1869) L.R. 5 Q.B. 94, which established absolute privilege for communications between military and navel officers. See S. Bower, *The Law of Actionable Defamation,* 2d ed. (1927), 87. Evatt J. pointed out at pp. 534-5 that there was no justification "for extending to members of the police force, in respect of their official reports, an absolute privilege against all actions of defamation... . Extension of the privilege by reason of analogies to recognized cases is not justified. Even if it were, there is no analogy between the Police Force preserving the State from 'internal enemies' and the army preserving it from 'external enemies'. Those who break the law — whether it be contained in the Crimes Act or the Liquor Act — are punishable by the King's Courts but they do not thereby become the King's enemies. They remain his subjects." Evatt J. further noted at p. 534 that *Royal Aquarium and Summer and Winter Garden Society Ltd* v. *Parkinson* [1892] 1 Q.B. 431 also held that "the classes of publication to which the common law had attached a complete immunity were ascertained, and any proposed extension of classes was looked upon with disfavour." In this connexion see Williams, *Absolute Privileges for Licensing Justices* (1909) 25 L.Q.R. 188, 200: "Absolute immunity from the consequences of defamation is so serious a derogation from the citizen's right to the State's protection of his good name that its existence at all can only be conceded in those few cases where overwhelmingly strong reasons of public policy of another kind cut across the elementary rights of civic protection; and any extension of the area of immunity must be viewed with the must jealous suspicion, and resisted, unless its necessity is demonstrated."

from the common round of official duty and that his situation was not so elevated to require for the satisfactory execution of his office the same freedom from apprehension of suits as a Cabinet Minister or a General Officer.[41] The Court felt that absolute privilege was not necessary for the discipline of the force; nor did they see the removal of the privilege as subverting the administrative needs of the police. The Court felt that there was no sufficient warrant in the principles of common law for denying the protection of the law from malicious defamation to a person aggrieved by a police officer. Stark J., concurring in the result, asked the pointed question:

> If the police in the execution of their duties use more force than is reasonably necessary to effect the object in respect of which they are entitled to use force, their responsibility in law is clear. What reason is there of public policy which makes it necessary that a police officer should be immune from legal responsibility when he makes statements defamatory of others which he knows to be false, and maliciously for the purpose of injuring or ruining their reputations?[42]

Similarly, in *Merricks* v. *Nott-Bower,* a case involving the applicability of absolute privilege to a police report, Salmon L.J. asserted that while the categories of absolute privilege are not closed, at the moment they have not been held to include a communication from one high ranking police officer to another.[43]

What is equally significant about the *Dowson* decision is the manner in which Le Dain J. used the delegable character of qualified privilege as the basis for extending it to absolute privilege as well. In so doing, he left the impression that the question has never been considered and is open to interpretation. However, one need only peruse one of his own authorities with some care in order to note that the Federal Court of Appeal appears to have seriously misinterpreted the law.

Le Dain J. refers to Powell's *The Law of Agency*[44] as an authority for extending the relevant principle of agency law to absolute privilege. Indeed, Powell does say at the page cited by Le Dain J. that:

> Most privileges, however, can be delegated. Examples of such privileges are — consent to the commission of an act which would otherwise be a tort; statutory authority to do an act which would otherwise be a trespass; defence of person or property; abatement of a nuisance; absolute privilege in defamation.[45]

Immediately following this passage, however, Powell sets out the criteria which have to be satisfied in order to permit an agent to avail himself of the privilege:

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[41]*Ibid.,* 528 *per* Gavan Duffy C.J., Rich and Dixon JJ.
[42]*Ibid.,* 532.
[43]*Merricks* v. *Nott-Bower* [1965] 1 Q.B. 57, 73 (C.A.)
[44]R. Powell, *The Law of Agency,* 2d ed. (1961).
[45]*Ibid.,* 279-80.

> An agent can avail himself of a delegable privilege provided three conditions are satisfied —
>
> (i) The principal must have power to do the act involving the privilege through an agent.
>
> (ii) The agent's act must be within his actual authority. The fact that it may be within his usual authority or within an apparent authority would seem to be irrelevant here.
>
> (iii) The privilege must be exercised for the purpose for which it was given.[46]

Motive and malice are normally irrelevant to determining whether absolute privilege attaches to an occasion. But in those instances where an agent seeks the protection of a principal's *ex officio* and personal claim towards absolute privilege, it is necessary not only for an appropriate principal-agent relationship to subsist but also for the agent to act at the time of making the allegedly defamatory statement, within his actual authority and exercise it for the purpose for which it was given in order to avail himself of the protection of the privilege. Such a line of reasoning is contrary to that exemplied in the instant case, which would appear to make irrelevant the motives of the R.C.M.P. or an investigation into the purposes the R.C.M.P. had in drafting the impugned statement.

If Powell is to be followed, however, effect must be given to allegations contained in the appellant's reply which clearly established that the R.C.M.P. exceeded their actual authority and used the occasion for a purpose other than the one for which it was arranged. In particular, the appellant pleaded that the words complained of were not made in confidence in the course of official duty for the purpose of giving the origin, scope, method, duration and results of the R.C.M.P. investigation into the activities of N.D.P. members in Ontario between 1971 and 1973 but were made in order to avoid revealing that the R.C.M.P. committed illegal acts against members and supporters of the N.D.P., including the plaintiff and his political associates.[47]

There are strongly grounded policy considerations for insisting upon the limitations set out by Powell before permitting an agent to avail himself of the immunity granted by absolute privilege. The right to commit what would otherwise be tortious acts with complete protection from civil liability is fraught with potential for abuse.[48] Judicial

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[46]*Ibid.*, 280.

[47]*Supra*, note 8, para. 6. It should be noted that an attempt by Mr Dowson to lay criminal charges against Assistant R.C.M.P. Commissioner Stanley Chisholm and Superintendent Ronald Yaworski resulted in the entry of a stay of proceedings by the Attorney-General for Ontario. On 5 December 1980, Montgomery J. dismissed an application for *mandamus* on behalf of the informant. An appeal taken from this decision was upheld by the Ontario Court of Appeal on 18 September 1981.

[48]See, *e.g.*, *Barr* v. *Matteo* 360 U.S. 564, 578 (1959)*per* Warren C.J. concurred in by Douglas J. (dissenting).

pronouncements have been made from time to time in favour of limiting the scope of absolute privilege to the existing cases.[49] In fact, governments have functioned for centuries without the protection of this doctrine. While instances of abuse may theoretically be conceivable, few cases support the contention that ministers of state have actually been subject to judicial abuse from plaintiff's wrongfully issuing claims against them for defamation either before or after the emergence of the doctrine of absolute privilege.[50]

Notwithstanding these considerations, the Court of Appeal in *Dowson* appears to have extended the scope of absolute privilege beyond traditional limitations. Adopting the reasoning of this case, it is now an open question whether absolute privilege may attach to any defamatory statement made by any Crown employee acting in the course of his usual or apparent authority. Ignoring the specific context of his decision, Le Dain J. appears to draw no limits upon the chain of delegability of absolute privilege. Indeed, on the facts of *Dowson* it would appear that there was no direct communication between the minister and the individual actually making the impugned statement.[51]

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[49]*Supra,* note 39, 626-7.

[50]The rationale for maintaining immunity from civil litigation through absolute privilege has weakened over the decades. However, a number of remedies are available within the judicial sphere to deal with frivolous and vexatious or otherwise foundationless suits directed against high officials of state including the awarding of costs on punitive scales and requirements for depositing funds as security for costs. In addition, non-judicial remedies are also available; for example, various jurisdictions in Canada routinely provide counsel to defend government officials named as defendants by plaintiffs for acts committed in the course of the performance of their duties. See also *Barr* v. *Matteo, supra,* note 48, 584-5 per Warren C.J. (dissenting): "The public interest in limiting libel suits against officers in order that the public might be adequately informed is paralleled by another interest of equal importance: that of preserving the opportunity to criticize the administration of our government and the action of its officials without being subjected to unfair — and absolutely privileged — retorts. If it is important to permit government officials absolute freedom to say anything they wish in the name of public information, it is at least as important to preserve and foster public discussion concerning our government and its operation" And see 588-9 *per* Brennan J. (dissenting): "[T]he courts should be wary of any argument based on the fear that subjecting government officers to the nuisance of litigation and the uncertainities of its outcome may put an undue burden on the conduct of the public business. Such a burden is hardly one peculiar to public officers; citizens general go through life subject to the risk that they may, though in the right, be subject to litigation and the possibility of a miscarriage of justice.... [T]he way to minimizing the burdens of litigation does not generally lie through the abolition of the right to redress for an admitted wrong. The method has too much of the flavour of throwing out the baby with the bath."

[51]On the Cross-Examination of Murray S. Sexsmith on his affidavit in support of the motion to dismiss the action, sworn on 14 December 1978, Mr Sexsmith stated that he did not understand that he was required to communicate information to Mr McLeod

It may be arguable that in using the phrase "on his own behalf", Le Dain J. was distinguishing between a Crown agent with specific delegation that becomes necessary under certain circumstances and a Crown agent acting without such specific delegation. The distinction between the two is often unclear for a specific delegation may affect large numbers of people in the employ of a Ministry and may have consequences identical to instances of general delegation. In the absence of an explicit and prior adoption of an agent's statement by a Minister, there appears to be little reason to extend immunity to that agent.

Giving the words "on his own behalf" their apparent meaning, it is difficult to envisage a situation where an employee of the Crown would make a statement in connection with the discharge of his duties which could be said to have been made entirely "on his own behalf". It is a long-established principle of parliamentary and legal procedure as well as a political practice, that the Crown is responsible in law for the actions of its agents and servants performed in the course of duty.[52]

Le Dain J. draws a chain of command from the Solicitor-General to Sexsmith to Vaughan. A similar chain of command could be drawn with respect to any hierarchy of individuals involved in other matters of ministerial jurisdiction and authority and in connection with which the Minister provides instructions, no matter how general or remote from his personal review and control. Instead of dealing with the specific issue before him — is a superintendent of the R.C.M.P. a high officer of state? — Le Dain J., by importing agency law *holus bolus* into the territory of absolute privilege, elevates the entire civil service hierarchy beyond the reach of the law of defamation. In like manner, the essence of the argument accepted in the *Dowson* case could apply to all statements made in pursuance of official duties and relating to state affairs.

Where new situations arise for judicial consideration and analysis, giving rise to conflict between different principles and developments in the case law, it would appear prudent for a court to examine carefully the facts and the effect of its decision on similar cases in order to

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regarding the methods of surveillance which were used by the R.C.M.P. in connection with the investigation which was the subject matter of the questions raised in the Ontario Legislature. He further indicated that he did not recall that the duration of the investigation was discussed at the meeting with Mr McLeod either. The letter, however, sent to Mr Fox from Mr McMurtry specifically asked for providing the "origin, scope, method, duration and results of the RCMP investigation". See Cross-examination of Murray S. Sexsmith, taken on 6 February 1979, 6, 7.

[52]See *Chartier* v. *A.-G. Québec* [1979] 2 S.C.R. 474, 498-501 *per* Pigeon J. and *Bosada* v. *The Queen* (F.C.A.), A-254-79, 12 March 1979. See also *The Crown Liability Act*, R.S.O. 1970, c. 38, s. 3.

determine applicable principles of law. Regretably, such a careful consideration of the relevant facts appears to be absent from the present case. It should be noted that the statement complained of was apparently not approved by the Minister, was seen by Assistant Commissioner Sexsmith only in its final form, and was implicitly approved by him without checking its accuracy because of his trust in Chief Superintendent Vaughan.[53] This was not a simple repetition or technical libel by an agent, but the independent conception and production of an allegedly defamatory statement without direct Ministerial approval of its contents and without any steps being taken by the Minister to verify the accuracy of its contents.[54] In fact, prior to its relcase by R.M. McLeod, the statement was submitted to the R.C.M.P. office in Toronto for final amendment and approval.[55]

It is unfortunate that the Court failed to address the plaintiff's argument that the respondent should be held responsible for the repetition of the impugned words. It had been explicitly pleaded that the members of the R.C.M.P. who uttered the relevant words know that they would be published by the press.[56] In affidavit material before the Court, it was contended that the impugned statement was given out as a press release by the Attorney-General for Ontario to the public at large.[57]

Aside from these general considerations concerning the *Dowson* decision arising out of the wholesale importation of agency law into the

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[53]Cross-examination of Sexsmith on his affidavit disclosed that the statement complained of was prepared after Commissioner Sexsmith received instructions to do so from the Director-General of the Security Service, Robin Bourne. Mr Bourne received his instructions from the Assistant Deputy Solicitor General, Michael Dare, or the Solicitor General directly. (See Cross-examination of Murray S. Sexsmith, taken on 8 February 1979, 9, question 48.) Sexsmith, in turn, instructed Chief Superintendent Robert Vaughan who was an officer "in charge of a portion of the security service" and concerned with the surveillance alluded to by Mr Lewis in his question to the Legislature, to cause the necessary enquiries to be made and to report. Commissioner Sexsmith left the details to Superintendent Vaughan. Though Commissioner Sexsmith assumed that Superintendent Vaughan had satisfied himself that the research that had been done was accurate and based on fact, he was not involved in reviewing the files or preparing the report. The report was in fact prepared under Superintendent Vaughan's direction by inferiors of his in the R.C.M.P. hierarchy and thereafter approved by him (without checking the source material). Superintendent Vaughan was present with Commissioner Sexsmith, however, at the meeting when the words were spoken and he made the statement complained of to R.M. McLeod. (See the continuation of the Cross-examination of Murray S. Sexsmith, taken on 9 February 1979).

[54]Cross-examination of Murray S. Sexsmith, taken on 8 February 1979, question 48. See also the continuation of Cross-examination of Murray S. Sexsmith, taken on 9 Febrnary 1979.

[55]*Ibid.*

[56]*Supra,* note 2, para. 9.

[57]*Supra,* note 8, para. 8 (iii).

realm of absolute privilege, the Court came dangerously close to accepting the suggestion that absolute privilege is established by the mere fact that a statement purports to be made in the course of official duty.[58] It is at the very least arguable, in the absence of any Canadian cases on the point, that the statement complained of should be made in the course of official duty as a matter of fact prior to attracting absolute privilege. This is the situation in the United States where a number of cases have suggested that a court has the obligation to enquire whether an allegedly defamatory statement was referrable to a duty giving rise to a privileged occasion before applying the doctrine of absolute immunity.[59] The considerably broader language used by the Federal Court of Appeal leaves the door wide open for the potential abuse of such a pervasive and all-encompassing privilege. The mere fact that administrative and conventional conveniences may clothe an occasion with an official character need not in itself be conclusive of the fact that any statement made on that official occasion concerning matters of state is for purposes of the law of defamation made in pursuance of official duty. The *imprimatur* of the occasion clearly raises a presumption that should give rise to absolute immunity. However, that presumption should be left open to rebuttal when it can be shown that there was a total abuse of the occasion. It is arguable that to do otherwise would raise high officials of state — which in the instant case have been defined to include all agents of such high officials appearing to be performing their official duties — to a quasi-divine status where they can do no wrong and therefore stand above the law.

It was contended on behalf of the appellant in the present case that precisely such an abuse took place. Central to his argument was his claim that the statement complained of was not responsive to the questions asked, was not made in confidence in the course of official duty for the purpose of "giving the origin, scope, method, duration and results of the RCMP investigation into the activities of the members of the New Democratic Party in the Province of Ontario", but was made in order to avoid revealing that the R.C.M.P. committed illegal acts against members and supporters of the N.D.P., including the appellant and his political associates.[60]

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[58]See, *supra,* note 1, 272-3 *per* Le Dain J. with respect to the impugned statement: "[W]hether the statement was an adequate answer to the request for information from the Attorney-General or whether it was intended to serve some other purpose at the same time is, in my opinion, beside the point. It purported to be an answer to that request and it was acted on as such."

[59]*Supra*, notes 20 and 21.

[60]*Supra*, note 8, para. 6 and 7.

In this respect, the reasoning of Waisberg Prov. Ct J. in *R.* v. *Toronto Sun Publishing Ltd*[61] may be noted. In that case, he found that notwithstanding the fact that certain documents were marked "Top Secret", such a designation did not make such documentation secret in fact within the meaning of the *Official Secrets Act.*[62] In rejecting an attempt by the federal Crown to lay charges against the editors and publishers of the Toronto Sun for violating the *Act* by publishing the allegedly "secret" material, Waisberg Prov. Ct J. said: "What is designated 'secret', furthermore cannot be determined to be 'secret' by the mere stamp itself. Secrecy must lie in the very nature of the document itself and in the existing circumstances surrounding and affecting the document."[63]

Similarly, the defence of absolute immunity and the continuation of ministerial activity would appear well able to survive an inquiry into the circumstances surrounding a statement complained of and an examination of the statement itself in order to determine whether it was in fact made in pursuance of official duty. Such a line of reasoning, however, seems to run in direct contradiction to that adopted by the Federal Court of Appeal in *Dowson* v. *The Queen.*

In conclusion, it can be said that the readiness of the Court in extending complete immunity from civil liability without significant qualification in respect of each issue raised by the facts in *Dowson* should give rise to some concern. Aside from the consideration as to "necessary delegation", policy matters, in particular the potential for abuse inherent in a defence which arises irrespective of any consideration of merits in a given situation, seem to have been given little weight. The tenor of the decision, coming at a time of broad public concern about police accountability, offers little hope that the Federal Court of Appeal will play an appropriate judicial role in assuaging public concern about these matters.

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[61](1979) 24 O.R. (2d) 621 (Prov. Ct (Crim. Div.)).
[62]R.S.C. 1970, c. 0-3, s. 4.
[63]*Supra,* note 61, 631.