

*Crown Liability*

Although we have no power here over property and civil rights, I do not think it would be disputed that we do have the power in respect to liability upon the federal crown in the manner which we have done in this legislation. And with great respect to the rather important point which my hon. friend has brought up, I think it is very fully covered in the wording which is now before him.

**Mr. Fleming:** With respect to the view expressed by the minister and the law officers of the crown, who I am sure have advised the minister on this matter, it seems to me that something further is required to make it quite clear that the crown in the right of the dominion, or as it is put here, Her Majesty in right of Canada, is submitting herself to the laws of the provinces. Now you simply have a provision that the crown is liable in respect of a tort committed by a servant of the crown. We have to refer to the provincial law to determine what a tort is.

When you legislate, when you consider what a tort is, Mr. Chairman, are you in a common-law province simply considering the common law, or how do you determine what a tort is, having regard to these expressions used in this section, in the light of the substantial body of statute law in reference to torts that has been enacted in each of the provinces and which is not completely uniform? There is a substantial measure of uniformity in the common-law provinces, but we have not uniform legislation in all the provinces with respect to torts. Would it not meet the point, and is it not necessary that we should clearly stipulate here that we are submitting Her Majesty in right of Canada to the law of the respective provinces in this regard because otherwise there is going to be litigation to determine what we mean by a tort. You have to refer to the provincial law for that.

**Mr. Garson:** Let us take a concrete case. Suppose John Doe in the province of Ontario has a tort committed against him by a servant of the federal crown in that province. Relying upon this section 3, he brings an action against the federal crown either in the exchequer court or perhaps in one of the district courts or county courts in Ontario.

**Mr. Fleming:** County courts.

**Mr. Garson:** In that action surely it would not be difficult on the part of the judge who is hearing the case to read this clear language and come to the conclusion that the crown is, as it states, liable in tort for the damages for which, if it were a private person of full age and capacity, it would be liable in respect of the tort committed by a servant of the crown. All that the judge has to ask himself is whether if this tort that is in question in

this action had been committed by the servant of a private person of full age and capacity, would that private person be liable. That is a simple question. And if the private person would be liable in that province according to the law, either common law or statute law, then the requirement of the section is applicable and the plaintiff has his case against the federal crown. We can put this provision in five or ten times as many words, but I do not think it would be any clearer than it is now. Indeed, I think it would be much less clear and not any more accurate.

**Mr. Fleming:** Perhaps there is no point in prolonging the discussion. I do not think the interpretation of this section is nearly as clear as the Minister of Justice thinks. I think there may be some very real questions raised in some of the courts with respect to the meaning of this clause.

**Mr. Garson:** May I ask my hon. friend this question. What argument would he bring up as a lawyer involved in the case to the effect that the section was not applicable and the crown was not liable? What would be the basis of his argument?

**Mr. Fleming:** It would run to this effect, if I were arguing against liability—that would be the way in which the point would arise.

**Mr. Garson:** That is right.

**Mr. Fleming:** Parliament had not submitted the crown in the right of the dominion or, as it is put in the bill, Her Majesty in the right of Canada, to the full scope of the provincial law unless it were spelled out in plain words in this legislation. When we talk about torts are you going beyond the common law, for instance, in one of the common-law provinces in relation to torts, or are you submitting Her Majesty in right of Canada to provincial legislation with reference to torts? Because provincial legislation has sometimes destroyed common law torts. It has oftentimes varied them drastically and in other instances has expanded and created offences which did not exist under the common law.

If I were trying to prepare an argument against liability in such a case, I think I would urge that the prerogative of the crown is not limited in any legislative enactment except in plain terms, and that when parliament enacted legislation in the terms of this bill it did not go so far as to submit the crown to provincial legislation. I think quite an argument could be made, with the exercise of a little thought and a little ingenuity in trimming down what I understand to be the intent of this measure.