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THE PRESUMPTION OF CROWN IMMUNITY

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ALBERTA LAW REFORM INSTITUTE

The Alberta Law Reform Institute was established on January 1, 1968, by the Government of Alberta, the University of Alberta and the Law Society of Alberta for the purposes, among others, of conducting legal research and recommending reforms in the law. Funding of the Institute's operations is provided by the Government of Alberta, the University of Alberta, and the Alberta Law Foundation.

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ACKNOWLEDGEMENTS

The chief proposal contained in this report is deceptively simple — reverse the presumption in section 14 of the Interpretation Act. However, a simple proposal raises a very complex series of consequences and must be viewed against a background of changing and complicated jurisprudence. The Institute acknowledges with gratitude the skill and expertise of our counsel, Christina Gauk who has guided the Institute through the development of policy questions and the resolution of them.

One of the more difficult areas is the position of Crown agencies if the presumption is to be reversed. We are grateful for the helpful responses we have received from various Crown agencies and from government lawyers who have represented them. In addition, one of our Board members, Mr. Clark Dalton, has been particularly helpful and effective in creating access to the various Crown agencies and coordinating the feedback from them.

Within the Institute, there has been some overlap with the proposals in our recently released final report on Mortgage Remedies relating to the position of Crown lenders. The counsel in charge of that report, Ms. Janice Henderson-Lypkie, has been an effective sounding board for Ms. Gauk as she prepared the overall proposals with respect to Crown immunity.

This is a difficult and complex area, and we hope that we have achieved the balance and sensitivity which we strive for in all our recommendations.

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PART I — SUMMARY

Section 14 of the Interpretation Act[1] declares a presumption that legislation is not binding on the Crown, as follows:

> 14. No enactment is binding on Her Majesty or affects Her Majesty or Her Majesty's rights or prerogatives in any manner, unless the enactment expressly states that it binds Her Majesty.

In this report we consider if this presumption should be reversed. Reversing it would mean that the Crown would be bound by statutes unless a statute expressly excepted it. This would not abolish Crown immunity — only its indiscriminate application. It would be left to the legislature to declare immunity for the Crown from particular statutes where this is justified.

The Institute recommends that the presumption of Crown immunity from statute be reversed in Alberta. The reasons for this conclusion are:

1. Clarification of the law

First, reversal would clarify the law. The law respecting Crown immunity in Alberta is in a confused and unpredictable state. The wording of the statutory presumption in the Alberta Interpretation Act potentially gives it a wider scope than could be borne either by the common-law presumption, or by the statutory presumptions of some other jurisdictions. In spite of this, the Court of Appeal has given the presumption the narrowest possible application. At the same time the court has drawn a novel and very wide exception to the presumption — the "Crown as litigant" exception, under which the Crown in coming to court as litigant is said to waive its immunity from statute. As we will try to show, the precedents upon which the Court of Appeal relied arguably fail to support the full extent of the broad exception it declared.

Further, subsequent judgments of the Supreme Court of Canada have defined the conditions for waiver of the presumption of immunity more

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[1] R.S.A. 1980, c. I-7.

narrowly. The Supreme Court held in 1988 that the Crown is bound by the burdens of a statute or statutory scheme when it takes the benefit thereof — but only when there is a sufficiently close nexus between the benefit and burden that acceptance of the benefit must be taken as conditional upon compliance with the restriction.[2] This definition was reiterated by the Supreme Court in 1989.[3] These statements of the waiver rule by the Supreme Court arguably overrule the declaration by our court that the Crown submits to legislation in coming to court. However, the Supreme Court rulings have not had the impact they might have had on Alberta decisions subsequent to them.

The Alberta courts have since taken a variety of conflicting approaches. In some they have continued to apply the "Crown as litigant" exception to immunity. In one case decided after the first of the Supreme Court rulings,[4] the Court of Queen's Bench relied on the cases that developed the "Crown as litigant" exception to hold the Crown bound to the Guarantees Acknowledgment Act. In another decided after both of them,[5] the Court of Appeal held the Crown bound by the Law of Property Act "for the reasons set forth in *Dunwoody*".[6] In a 1991 decision, a Master refused to give a Rice order to a Crown agency in circumstances in which the order would have issued had the Crown been exempt from the Law of Property Act.[7]

Other judgments have taken a different tack. In a November, 1989 judgment, the Court of Appeal reinterpreted its own earlier decisions as based on the "benefit\burden" exception. It did not acknowledge that the latter exception as stated by the Supreme Court conflicts with the broader

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2 *Sparling v. Quebec (Caisse de dépôt et placement du Québec)*, [1988] 2 S.C.R. 1015.

3 *AGT v. CRTC*, [1989] 2 S.C.R. 225.

4 *Alberta Agric. Dev. Corp. v. Tiny Tym's Poultry Ltd.* (1989), 66 Alta. L.R. (2d) 279 (Q.B.).

5 *FCC v. Enns*, [1990] 4 W.W.R. 598 (C.A.).

6 This refers to *Farm Credit Corp. v. Dunwoody Limited (Trustee) and Holowach*, (1988), 59 Alta. L.R. (2d) 279, a judgment of the full panel of the court that affirmed the "Crown as litigant" exception to the presumption of immunity.

7 *Alberta Agricultural Dev. Corp. v. Nelson* (May 13, 1991) Edmonton No. 910381 D (Master).

"Crown as litigant" exception it had declared earlier.[8] A 1990 decision of the Court of Queen's Bench seemed to accept the "Crown as litigant" exception, but limited its scope.[9]

At the same time our courts have begun to issue some judgments that seem to ignore, or overtly discount, the "Crown as litigant exception" line of cases. In a 1990 decision, the Court of Appeal confirmed a judgment given prior to these cases, in which a Master had held the Crown to be immune from the provisions of the Guarantees Acknowledgment Act, and thus able to enforce a guarantee made without complying with the Act's provisions.[10] The Crown was litigant in the case, and thus the "Crown as litigant" exception to immunity would have applied, but the court seemed to ignore its own recent pronouncements, giving no reasons for its apparent about-face. Most recently, two judgments issued by Masters in Chambers have expressly questioned the continued validity of the broad exception to immunity fashioned by the Court of Appeal.[11] The recent developments

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8 *Bank of Canada v. Canadian Commercial Bank* (1990), 72 Alta. L.R. (2d) 1 (C.A.). The court first set out the "benefit\burden" exception declared by the Supreme Court in the *Sparling* case, and then said: "This concept has also been stated by this Court in several cases", listing the cases in which the "Crown as litigant" exception had been developed and applied.

9 *Montreal Trust Co. v. Tottrup* (1990), 82 Alta. L.R. (2d) 340 (Q.B.). In this case the court referred to the judgment of the Court of Appeal in *Royal Bank v. Black & White Developments and A.M.H.C.* (1988), 60 Alta. L.R. (2d) 31. In the *Royal Bank* case, the Court of Appeal had relied in part on the "Crown as litigant" exception to immunity to hold that in using the common writ of *fieri facias* to enforce its debt rather than the prerogative writ of extent, the Crown had waived its prerogative of prior payment. In the *Montreal Trust Co.* case, the Court of Queen's Bench accepted this ruling, (and by implication, the precedents upon which it was based), but restricted it. It said the Crown submits to execution creditor law by its use of the common writ only while participating in a purely commercial transaction. In the case of a governmental transaction such as tax or duty collection, the prerogative of priority continues to apply.

10 *Alberta (Provincial Treasurer) v. Woycenko & Sons Contracting Ltd.* (1990), 105 A.R. 159 (C.A.).

11 In *Alberta Treasury Branches v. Hruschak* (1992), 83 Alta. L.R. (2d) 30, Master Funduk expressed his view that the line of cases that developed the "Crown as litigant" exception has "been seriously undermined by *CNCP Telecommunications* to the extent that they hold that without more the Crown is bound by legislation just as the ordinary citizen is. *CNCP Telecommunications* rejects that position" (at 39). Likewise, Master Quinn has said that the "Crown as litigant" exception to Crown immunity cannot exist in light of the judgments of the Supreme Court of Canada in *Sparling v. Quebec (Caisse de dépôt et placement du Québec)* and *AGT v. CRTC* (cited *supra*, at notes 2 and 3). See *Federal Business Development Bank v. Caskey* (1992), 1 Alta. L.R. (3d) 58 (Master).

have made the law about Crown immunity in Alberta more unpredictable than ever.

Even if our own court were to narrow the exception to immunity in the manner laid down by the Supreme Court of Canada, the law would remain unclear. The applicability of the narrower exception is also fraught with uncertainty. In the Supreme Court's decision in the *AGT* case,[12] there was a strong dissent as to both the extent of the benefit\burden exception to the presumption, and its applicability to the facts.

The presumption of immunity as a legislative definition of the law has failed. The inventive and complex exceptions to the presumption created by a judiciary that is resistant to it has given rise to ceaseless litigation, and to complexity and unpredictability in the law. The reverse presumption — that statutes apply to the Crown unless a statute specifically exempts it — would resolve the uncertainty.

2. History of the presumption: no sound foundation

A review of the history of the presumption fails to yield any foundation for it in principle. The early presumption of Crown immunity was much narrower than today's. According to Professor Harry Street, one of the first academics to trace this history,

(1) the Crown was bound despite the presumption **either** if it was named, **or** if the statute showed an intention that the Crown be bound by reference to its "language, objects, mischiefs and consequences", and

(2) the presumption applied only to statutes that affected the King's peculiar interest.

The later extension of immunity to all statutes, subject only to a narrowly-defined "necessary implication" exception, was, according to Professor Street, based on a misapplication and misinterpretation of precedent.[13]

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12 *Supra*, note 3.

13 H. Street, "The Effect of Statutes upon the Rights and Liabilities of the Crown" (1948) U. of T.L.L.J. 357. Professor Street traced the development of the rule from

(continued...)

Other academic commentators have echoed Professor Street's conclusions about the inadequate grounding for the modern presumption of Crown immunity. Professor Hogg has pointed not only to the fact that the broadening of Crown immunity was wrong as a matter of law, but also that no consideration was given in the process to whether there is any policy foundation for the broader presumption.

> ... the extension of the rule [to statutes other than those which affect the Crown's prerogative] has proceeded without either proper understanding of the old cases or discussion of the reasons behind them.[14]

3. Immunity by default: no justification

The third main objection to Crown immunity is that the **blanket** presumption results in immunity even where it is not necessary in the public interest. The presumption provides that the Crown is not bound other than by legislation that expressly binds it. This rule presupposes that the question of whether the Crown **should** be bound will be asked by legislators for every statute. If it were common practice for legislative drafters to consider whether a particular statute ought to bind the Crown, the existing rule might be satisfactory. However, as many have observed,[15] the absence of provisions binding the Crown in statutes is far more likely the result of inadvertence than of deliberate omission. The result is that the Crown obtains immunity by default. There are some statutes that clearly should not be applied to the Crown, and others that arguably should not be.

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[13](...continued)
its earliest common law form in the 15th Century through to its modern form in the mid-20th.

[14] P.W. Hogg, *Liability of the Crown* (2d ed.) (Toronto: Carswell, 1989) at 243.

[15] Professor Hogg surveyed Ontario statutes for provisions making the Crown bound. He found that very few contain statements that the Crown is bound even though many statutes are by their terms plainly intended to bind the Crown (for example, the Government Contracts Hours and Wages Act). He concluded that "... silence does not indicate a deliberate decision to exempt the Crown, but only indicates that the point was never considered." (*Ibid.* at 244). In his view, the inadvertence of the legislative drafter is an insufficient reason to make the Crown immune; the better result of such inadvertence would be that the Crown would be bound. Parliament or the legislatures can provide any required special powers or immunities where these are needed for effective government. See also P. P. Craig, *Administrative Law* (London: Sweet & Maxwell, 1989) at 525-26.

However, the result of this sort of legislative inadvertence is that the Crown is also able to claim immunity in cases in which as a matter of principle it should be bound by the same rules, enacted for the public good, as ordinary citizens.

In order to provide information about how the presumption of immunity is actually used, Chapter 5 of this report surveys the cases in the last decade in which the Crown has called upon the presumption in its claim or defence. This survey shows that though many of the immunity claims were supportable under the law, their public interest or policy justification was questionable. The most common category of claim involved the Crown as creditor, claiming immunity from exemptions legislation, execution creditors legislation abolishing priorities for execution creditors, or (in Alberta) the provision creating a statutory bar to suits on the personal covenant for mortgage deficiencies. A possible justification for the Crown's immunity from these aspects of creditor law is that the public interest in Crown debt collection must override the individual interests of the debtor or other creditors. The reply to this point is that the revenue generated when the Crown relies on its special status is hardly necessary to keep the wheels of government turning. It is as strong or stronger an argument that the Crown is better able than individuals to bear a loss in a particular case. Questions about the adequacy of justification can also be asked with respect to many of the other classes of immunity claims — for example, against orders of tribunals to testify or produce documents where no public interest considerations are involved, or against limitation of actions legislation.[16]

Because the Crown's immunity arises regardless of legislative intent, it can have capricious results, in some cases results that are frustrating to the goals of the Crown itself. This is illustrated by a case involving alleged illegal price-fixing by a number of corporations, including two Crown corporations, engaged in the production of uranium.[17] The Crown corporations could not be prosecuted as they were not bound by the

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16 The survey also revealed a number of areas in which the Crown's immunity from statutes does have a sound policy reason. In Chapter 7 we set out those statutes that we identified from which immunity has, or arguably has, a principled justification. Should the presumption be reversed, the government should consider preserving immunity in relation to these and other such statutes.

17 *R. v. Eldorado Nuclear Ltd.*, [1983] 2 S.C.R. 551 (S.C.C.).

Combines Investigation Act, but the private participants in the cartel remained liable to criminal prosecution. However, because a Minister of the Crown had been a "prime mover" in the formation of the cartel, it would have been unfair to prosecute the private but not the Crown corporations. Therefore, the government dropped the charges against all the cartel members. In the result, the prosecution for illegal price-fixing was frustrated. This illustrates that unless Crown corporations play by the same rules as their private counterparts, the public policy goals of the legislation can be defeated.

Whatever justification there might have been for the presumption of Crown immunity from statutes in earlier times, the role of the Crown has recently expanded and changed. In the last century both the scope of governmental activity and the scope of legislative regulation have greatly increased. The Crown is now often in competition with ordinary citizens, or engaged in endeavours that are regulated when undertaken by ordinary citizens. The effect of the presumption of immunity is often to place the Crown in a position of advantage relative to ordinary subjects, or to shield it from laws that are enacted for the protection and governance of society. Because this happens not by legislative purpose, but as the result of the presumption, there is often no sound reason, or indeed no reason, for the Crown's special position.

4. Recent calls for reform

The Supreme Court of Canada has recently added its voice to the call for legislative reversal of the presumption. In *AGT* v. *CRTC*,[18] the majority questioned the validity of the presumption at various points throughout its judgment.[19] In the concluding statement of the majority's reasons, the

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[18] [1989] 2 S.C.R. 225.

[19] The court first quoted from its own earlier decision in *Eldorado Nuclear*:

> It [the doctrine of Crown immunity] seems to conflict with basic notions of equality before the law. The more active the government becomes in activities that had once been considered the preserve of private persons, the less easy it is to understand why the Crown need be, or ought to be, in a position different from the subject. This Court is not entitled, however, to question the basic concept of Crown immunity, for Parliament has unequivocally adopted the premise that the Crown is prima facie immune. The Court must give effect to the statutory direction that the Crown is not bound unless

(continued...)

court reminded Parliament of its power to reverse the presumption, and indeed seemed to be inviting it to follow the lead of the jurisdictions that have already done so. The court said:

> ... it is apparent that Parliament and the provinces have the constitutional competence to reverse the common law and current statutory presumption of immunity in favour of a statutory rule of interpretation binding the Crown to enactments except where otherwise therein provided (see *Interpretation Act*, R.S.B.C. 1979, c. 206, s. 14; and *Interpretation Act*, S.P.E.I., 1981, c. 18, s. 14).

Madame Justice Wilson, in dissent, was even stronger on the point. Adding her voice to the majority in questioning the propriety of the presumption in modern times she said:

> I have serious doubts that the doctrine of Crown immunity, developed at a time when the role of government was perceived as a very narrow one, was ever intended to protect the Crown when it acted, not in its special role qua Crown, but in competition with other commercial entities in the market place.

The Ontario Law Reform Commission has also recently recommended reversal of the presumption.[20]

5. Conclusion

Alberta law in relation to section 14 is in a state of uncertainty. The presumption (in contrast to Crown immunity from statutes in particular instances) has no solid foundation and no policy justification. Academic and

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[19](...continued)

> it is "mentioned or referred to" in the enactment. (At 291.)

A little further in the judgment, the majority said:

> A broad benefit/burden test would be overly legislative in the face of the current formulation of s. 16. Regretfully perhaps, but undeniably, the statutory Crown immunity doctrine does not lend itself to imaginative exceptions to the doctrine, however much such exceptions may conform to our intuitive sense of fairness. (At 291.)

[20] The Commission's report is discussed within at 60.

judicial opinions universally hold that it is outmoded and should be reversed. Reversal of the presumption would increase certainty in the law, eliminate Crown immunity where it is not justified, yet allow for its affirmation where there is a principled justification for it.

We recognize that reversal would oblige the Crown to consider where immunity is required. We believe it is neither possible nor necessary for the Crown to review every provincial statute to determine if the Crown should be bound. Our review of cases in which immunity claims have been made before the courts, and our discussion of the policy considerations for the various types of cases, would help the Crown to identify instances of justified immunity. We believe that Crown agencies and departments that have an interest in preserving immunity in areas which we have not identified could be counted on to bring these matters forward. The experience in British Columbia and Prince Edward Island, where the presumption has been reversed, gave rise to no untoward results.

Accordingly, we propose that the presumption be reversed.

PART II — REPORT

CHAPTER 1
INTRODUCTION

Section 14 of the Interpretation Act[21] declares a presumption that legislation is not binding on the Crown, as follows:

> 14. No enactment is binding on Her Majesty or affects Her Majesty or Her Majesty's rights or prerogatives in any manner, unless the enactment expressly states that it binds Her Majesty.

This report begins (in the following chapter) with a review of the cases that interpret section 14. This review reveals an inconsistency between the case law and the legislative provision that is supposed to govern it. Though the section says the Crown is not bound by statutes unless expressly bound, the Crown has often been held subject to statutes despite the absence of the required words. The Alberta courts achieved this result both by limiting the scope of the presumption and by creating extensive exceptions to it, which it neither mentions nor suggests. In the process of creating these exceptions our courts not only deprived section 14 of its apparent meaning, but also left the law in a confused and unpredictable state, arguably inconsistent with both earlier and subsequent rulings on Crown immunity given by the Supreme Court of Canada. This project began with the question of whether these problems — inconsistency between the legislation and the law, and confusion in the law — should be corrected by a legislative reform that would reword the provision so that it would not appear to reach further than it does in fact by virtue of the restrictive judicial interpretations.

However, the research also revealed the reason for the courts' reluctance to grant the immunity that the provision, on its face, accords to the Crown. The reluctance was based on the perception that a blanket presumption of Crown immunity from statute has no justification — that the presumption is outmoded under modern conditions in which the Crown is increasingly entering into ordinary business transactions, and that it gives rise to injustice or potential injustice. This opinion is not unique to

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[21] R.S.A. 1980, c. I-7.

Alberta courts. Our courts have gone further than those of any other Canadian jurisdiction in limiting the scope of the legislated presumption. But others, including the Supreme Court of Canada, have also sought ways to avoid the effect of the presumption, at the same time questioning its legitimacy in modern times. Numerous academics and reform agencies have added their voices to the call for reform.

The project thus expanded beyond the original problem of inconsistency between the statute and case law, to include the broader question of whether a presumption of immunity is justified in principle, or whether it should be reversed. Chapter 3 of the report reviews the commentary on the presumption of immunity by judges, academics and law reform bodies. This commentary universally calls for reversal.

The presumption of immunity has already been reversed in two jurisdictions — British Columbia and Prince Edward Island. Chapter 4 sets out the revised provisions and comments briefly on the experience with reversal.

The state of the case law in Alberta, the commentary on the validity of the presumption, and the precedent for reversal set in other jurisdictions, seemed to point overwhelmingly toward reform. However, before making a recommendation we thought that we needed more information about how the presumption is used: from what kinds of statutes does the Crown claim the immunity the presumption confers? Chapter 5 of the report surveys the cases over the last decade in which immunity claims have been made. Because not all cases in which immunity is relied upon are litigated, we also asked Crown officials in Alberta to provide us with information about how their Crown agencies and departments rely on the presumption. The survey includes a discussion of the policy arguments, for and against, for every type of immunity claim, drawn from judgments, academic commentaries, law reform agencies, and the Crown itself.

Based on the foregoing, the Institute concluded that the presumption of immunity is wrong in principle: immunity ought to exist only where it is justified. Accordingly, we recommend that the **presumption** of immunity be reversed, leaving it to legislators to provide immunity from particular statutes as needed. However, our review of immunity claims showed that these tend to be made in relation to a fairly small number of statutes, and

that for some of these, there are strong policy arguments against application to the Crown. We thought it useful to identify these. If the presumption is reversed, this section can serve as a guide for the consequential amendments needed to preserve justified instances of immunity. Chapter 7 sets out the statutes for which we think retention of immunity is justifiable, or arguably so.

The remaining chapters deal with several problems relating to the effect of reversal: first, its effect on competitions between the federal and provincial Crowns as creditors; second, its effect on the abrogation of Crown prerogatives; and finally, the problem of the transition between the existing and reversed presumptions.

CHAPTER 2
THE LAW IN ALBERTA: UNCERTAINTY

A. Possible Interpretations of the Presumption

In this chapter we examine the way the Alberta courts have interpreted the statutory presumption of immunity. Section 14 provides:

> No enactment is binding on Her Majesty or affects Her Majesty or Her Majesty's rights or prerogatives in any manner, unless the enactment expressly states that it binds Her Majesty.

The interpretation given this provision by our courts has depended in part on the meanings assigned to some of its key words — in particular, "binding" and "rights". Before turning to the Alberta cases, it is useful to consider the possible meanings that these words can bear, and the interpretation of the presumption associated with each of these meanings.

(1) Possible meanings for "binding"

Section 14 differs in a potentially important way from the common law presumption of immunity. The common law presumption was to the effect that a statute could not affect Crown rights or prerogatives unless the statute named the Crown or said the Crown was bound. The pre-1967 federal Interpretation Act, in relation to which much of the relevant law has been developed, was to like effect.[22]

Section 14 (and the post-1967 version of the federal Act) add the opening phrase "no enactment is binding ...". This difference in wording raises a question. Where the opening words are present, is the Crown to be taken as immune from all statutes, not merely from statutes that affect the Crown's rights or prerogatives? Putting the question another way, are the words following the opening phrase — "or affect Her Majesty's rights or prerogatives in any way" intended to explain what "binding" means, or are

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[22] R.S.C. 1952, c. 158, s. 7 provided that

> No provision or enactment in any Act shall affect in any manner whatsoever, the rights of His Majesty, his heirs or successors unless it is expressly stated therein that His Majesty shall be bound thereby.

the two phrases referring to different things: the latter ensuring that statutes do not affect rights or prerogatives, and the former adding immunity against statutes generally?

(2) Possible meanings for "rights"

In the context of the phrase "no enactment affects Her Majesty's rights or prerogatives", the word "rights" can have any of the following meanings.[23]

First, "Her Majesty's Rights" can be limited to rights peculiar to the Crown, or prerogative rights. One example is the prerogative that time does not run against the Crown. Another is that the Crown is entitled to payment prior to other creditors of equal degree. Under this first meaning of "rights", the Crown's immunity extends only against statutes that would derogate from such prerogative rights, for example, a statute imposing a limitation period, or ratable sharing on creditors.

Second, rights can refer to any rights as against others, enjoyed by the Crown indifferently with others, that are created by the rules governing persons in their dealings with one another. These can exist either at common law, or by statute, or both where statutes modify common law rights. In this case, the Crown is immune from any statute that would limit its enjoyment or enforcement of such rights — that is, that would limit the duties or liabilities of others in relation to the Crown, or affect the outcome of litigation between the Crown and others in a manner adverse to the Crown. Examples drawn from the cases include statutory provisions that apportion liability in a tort claim, or prevent suit on a personal covenant in a mortgage foreclosure, or require loan guarantors to obtain an independent notarial certificate before they are bound by their guarantee.[24]

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[23] The meanings suggested are not necessarily exclusive, though some preclude others.

[24] Early Canadian cases interpreting the presumption of immunity refused to give "rights" this broad a meaning. In a key decision which formed the basic underpinning for the evolution of the Alberta law, *R. v. Murray*, [1967] S.C.R. 262, the Supreme Court of Canada, in the context of a tort claim by the Crown against a subject, denied in strong terms that immunity could have the effect of extending the liability of a subject to the Crown (or conversely, affirming a Crown "right" that would have existed apart from the statutory limitation at issue) beyond the limits declared by the statutory law. The court adopted a proposition of law from an

(continued...)

Third, "rights" can refer to freedom from obligations, procedural rules, or regulations governing undertakings. The creation of a duty can conceivably be thought of as affecting a right. Under this meaning of "rights", the Crown is immune from statutes that impose obligations on it (for example to produce documents at an administrative hearing, or to pay municipal taxes), or from statutes that require compliance with regulations, such as planning laws.[25]

Fourth, some cases have drawn a distinction between the Crown's common law rights, or rights existing at the time of reception of English law, and rights created or supplemented by subsequent statutes. These cases have allowed immunity only against statutes that derogate from the former but not the latter.

Finally, the word in the context of the presumption has on occasion been restricted to "accrued rights". This phrase has been defined as contractual rights existing prior to the passage of legislation, in contrast to

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[24](...continued)
earlier Supreme Court judgment (*Gartland Steamship Co. and LaBlanc v. R.*, [1960] S.C.R. 315, at 345). This proposition, quoted by the court (at 267) was as follows:

> It cannot be said, in my opinion, that the Royal prerogative ever extended to imposing liability upon a subject to a greater extent than that declared by law by legislation lawfully enacted. The fact that liability may not be imposed upon the Crown, except by legislation in which the Sovereign is named, or that any of the other prerogative rights are not to be taken as extinguished unless the intention to do so is made manifest by naming the Crown, does not mean that the extent of the liability of the subject may be extended in a case of a claim by the Crown beyond the limit of the liability effectively declared by law.

Broadly understood, this proposition could be taken to mean that despite the presumption of immunity, any statute applies to the Crown that would have an adverse effect on the Crown's claim against another. More narrowly, the *Murray* principle only allows the application of statutes that directly limit liability of others to the Crown (or even only tort liability, the issue in the case, as opposed to contractual liability). Regardless which of these principles the *Murray* decision is taken to support, it is clear that according to the ruling, the presumption does not protect the Crown against derogation of its "rights" understood in the broad sense suggested in the text paragraph.

[25] Early judgments interpreting the presumption in Canada tended to agree that the Crown's immunity extended against statutes imposing duties on the Crown.

rights which would have existed under future contracts had the legislation not been passed. This last is the most limited of the possible meanings.[26]

B. Alberta Law to 1988

(1) Alberta law to 1986: literal application of section 14

We have noted that the case law interpreting section 14 has developed to the point at which the presumption is left with a limited scope. This is a fairly new development. As recently as 1986, Alberta courts were reading section 14 literally, so that the Crown was routinely being held immune from provincial statutes.[27]

Three Queen's Bench decisions created the first exceptions to the general trend of upholding Crown immunity. These cases were decided on the basis that the Crown submits to a statute of which it takes advantage.[28] They foreshadowed the impending reversal of the trend on the basis of a broader principle. However, the literal approach dominated until the question of immunity came before the Court of Appeal.

(2) The interpretation of section 14 by the Court of Appeal

In a flurry of judgments issued in 1987 and 1988, our Court of Appeal created a novel and extensive exception to the statutory presumption of immunity. To do this the court cited judgments of the Supreme Court of Canada in which that court had created exceptions to the common law immunity presumption and an early version of the federal provision. Our

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[26] This meaning is found in *Dom. Bldg. Corp. v. R.*, [1933] A.C. 533 (Privy Council), referring to "rights" as found in the Ontario Interpretation Act. It was quoted, and seemingly adopted, by the Alberta Court of Appeal in *Farm Credit Corporation v. Dunwoody Limited, Holowach and Holowach*, *supra*, note 6.

[27] See Appendix A. Much earlier, the courts had shown a reluctance to permit the Crown to assert its prerogative of priority as a creditor where it was involved in ordinary business transactions. In *R. v. Workman's Compensation Board* (1963), 42 W.W.R. 226, the Alberta Appeal Division held the Crown immune from statutory provisions giving other creditors priority over its claim, but, by virtue of the commercial nature of the transaction, unable to assert a prerogative to prior payment itself. See Appendix B for a discussion of this case and other cases that have drawn a distinction between the Crown acting in a commercial, in contrast to a governmental, capacity.

[28] See Appendix C.

legislated provision potentially gives the Crown a broader immunity from statutes than the common law and early federal presumptions. In spite of this, our court fashioned an exception to the presumption that went further to deny Crown immunity than the Supreme Court did in interpreting the narrower immunity presumption. In the review of cases below we will question whether the Supreme Court precedents support our court's conclusions about section 14.

Further, subsequent judgments of the Supreme Court of Canada have more precisely defined the relevant exception to the presumption of immunity, and the more recent definition is narrower than that declared by our court. As some of our own courts have since pointed out,[29] these Supreme Court cases have arguably overruled the Court of Appeal's expansive pronouncements. These points argue in favour of reversal of the presumption for the sake of clarity in the law.

(a) The *Ciereszko* case: the "Crown as litigant" exception created

The first of the Crown immunity cases to reach the Court of Appeal was *A.M.H.C. v. Ciereszko, Craik and Craik*.[30] The issue was whether section 44(1)(a) of the Law of Property Act barred the Alberta Mortgage and Housing Corporation from suing on a covenant to pay given in a mortgage. The Crown's claim had been refused by Master Alberstat. The Master had ruled that the Crown having chosen to take a statutory mortgage under the Land Titles Act, and having applied for a statutory remedy for order for sale under section 41(2) of the Law of Property Act, could not selectively choose to take advantage of some provisions of a statute without being bound by others that restricted its remedies.

On appeal to the Court of Appeal, the court came to the same conclusion as the Master had reached, but on a different, and broader,

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29 See, for example, *Federal Business Dev. Bank. v. Caskey* (1992), 1 Alta. L.R. (3d) 58 (Master); *Alberta Opportunity Co. v. Snatic* (1992), 3 Alta. L.R. (3d) 199 (Master); *Province of Alberta Treasury Branches v. Hruschak* (1991), 83 Alta. L.R. (2d) 30 (Master).

30 (1987), 50 Alta. L.R. (2d) 289.

principle. Citing *R. v. Murray*[31] and the authorities referred to therein, the court said that the case stood for the principle that

> When the Crown comes into court, it does so on the same footing as other litigants and is bound by its own general laws, section 14 of the Interpretation Act notwithstanding.[32]

As already noted, there is a question whether the authorities cited by the court fully support this "Crown as litigant" exception. With respect, it is arguable that one of the passages quoted by the court is taken out of context and given a new meaning, and another is referred to as containing this principle though it does not.[33] However, this statement of principle has, albeit inconsistently, been held to govern subsequent cases dealing with this and similar issues.

(b) The *Farm Credit Corporation* case: the "Crown as litigant" exception[34] affirmed

A seven-member panel of the Court of Appeal fully reconsidered the issues raised in the *Ciereszko* case in *Farm Credit Corporation v. Dunwoody Limited, Holowach and Holowach.*[35] The question was again whether section 41 of the Law of Property Act prevented the Crown (in this case the federal Crown) from claiming for the deficiency under a mortgage.[36] Ruling

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31 [1967] S.C.R. 262 (S.C.C.).

32 *Supra*, note 30, at 298.

33 The basis of this contention involves a lengthy discussion of the authorities. It has therefore been placed in an appendix. See Appendix D.

34 In some of the statements of the exception, the Crown waives immunity by suing the subject; in others, the principle operates when the Crown "comes to court". The latter is potentially a wider exception to immunity. In applying the principle subsequently, the Court of Appeal seems to have adopted the wider exception. In *Royal Bank v. Black and White Developments Ltd.* (1988), 60 Alta. L.R. (2d) 31 (C.A.), the Crown was held bound to the Execution Creditors Act, in part by virtue of the "Crown as litigant" exception to immunity, even though it was not a plaintiff creditor suing a debtor, but one of several execution creditors competing against one another.

35 (1988), 59 Alta. L.R. (2d) 279.

36 The court had also given leave for the appellant (the Crown) to argue that the *Ciereszko* case had been wrongly decided, on the basis that in asserting that the

(continued...)

once more that section 41 does operate to preclude the Crown's claim, the court set out the broad principle which it had applied in *Ciereszko*, and the authorities it was relying on, as follows:

> When the "federal Crown chooses to sue someone in relation to a matter that is not governed by any special prerogative rules, it must abide by the laws applicable to such matter in private disputes in the province in question": *R. v. Murray* as summarized by Gibson, "Interjurisdictional Immunity in Canadian Federalism" (1969), 47 Can. Bar Rev. 40, at p. 50. While this principle is stated in *Gartland*, that can be based solely on the reach of the Interpretation Act. *Murray* is, however, not based upon the interpretation provision. *Ciereszko*, similarly, does not depend upon an assessment of the reach of the Interpretation Act but applies *Murray*, which, in turn, builds on the comment of Locke J. in *Gartland* (at p. 400) that the Crown's prerogative does not extend the liability of the subject beyond the limits effectively declared by relevant law.[37]

As with the *Ciereszko* decision, it is observed again that the authorities cited to support this principle — the "Crown as litigant" exception to immunity — arguably fail to do so. The basis of this contention is as follows. First, the principle, ostensibly derived from the *Murray* case, which our Court of Appeal says it applied in *Ciereszko* and went on to apply in the case before it, was not drawn from *Murray* directly, but from a summary of the case by Professor Gibson. However, Professor Gibson based his summary upon a statement of principle by Jackett, P. made when the case was before the Exchequer Court.[38] Although the Supreme Court in *Murray* quoted the reasons for judgment of Jackett, P., it did not adopt

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[36](...continued)
case before it was indistinguishable from the *Gartland* case, the court had overlooked a difference between the federal Interpretation Act applicable in *Gartland*, and section 14 of the Alberta statute. In the result the court agreed that the difference in wording did mean the *Gartland* was distinguishable, but held that this would not give rise to any difference in result. According to the court, this was because the principle applied in *Ciereszko* was the broader principle that the Crown choosing to sue in relation to a matter not governed by special prerogative rules must abide by laws applicable to such matter in private disputes.

[37] At 286.

[38] [1965] 2 Ex. C.R. 663.

them.[39] It regarded a different proposition of law — that declared by Locke, J. in the *Gartland* case — as governing the result. This was that

> The fact that liability may not be imposed upon the Crown, except by legislation in which the Sovereign is named, or that any of the other prerogative rights are not to be taken as extinguished unless the intention to do so is made manifest by naming the Crown, does not mean that the extent of the liability of the subject may be extended in a case of a claim by the Crown beyond the limit of the liability effectively declared by law.[40]

This "proposition of law" was, in fact, an assessment of the reach of the Crown immunity rule: immunity against statutes that would impose liability on the Crown or derogate from its prerogatives does not extend the liability of subjects beyond the limits declared by legislation. The *Murray* case at the Supreme Court level denied immunity only from laws that limit the liability of a subject — and on the facts of the case, only for liability in a tort claim.[41] This ruling does not support the broad assertion that

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39 The passage quoted was as follows:

> ... as long as the Sovereign relies upon Her common law status as a person to take advantage of a cause of action available to persons generally in the province, and not upon some special right conferred on Her by Parliament, She must take her cause of action as she finds it when Her claim arises and, if the legislature of the province has changed the general rules applicable as between common subjects, the Sovereign must accept the cause of action as so changed whether the change favours Her claim or is adverse to it. ([1965] 2 Ex. C.R. 663, at 671, as quoted in the *Murray* decision (*supra*, note 31).)

The summary by Professor Gibson, to which our Court of Appeal referred, does indeed state that the Supreme Court has affirmed the broad principle later stated by our court; (the rule as stated by our court is a direct quotation from the Gibson article). It is nevertheless contended that a close reading of the case reveals that the Supreme Court did not approve the principle as stated by Jackett, P., but rather, after quoting it, substituted its own. (It is notable that in restating the principle in the paragraph following, Jackett, P. limited it to cases in which the Sovereign "relies upon a right in tort against a common person". Thus even relying on this precedent, it may be appropriate to limit it to tort claims.)

40 Quoted in *R. v. Murray*, *supra*, note 31, at 267.

41 It is an open question whether this principle is appropriate to other claims, for example contractual claims such as that in the mortgage cases before the Alberta court. As pointed out in note 39, Jackett, P. limited the principle which our court ultimately applied to cases of claims in tort by the Crown against the subject.

(continued...)

whenever the Crown comes to court or makes a claim against a subject,[42] all statutory laws applicable to a like dispute between private parties apply to it. First, the latter assertion would embrace contractual as well as tort liability, though it is not clear that this was intended by the proposition in *Murray*. Second, the assertion embraces laws that could affect the outcome of litigation involving the Crown and subjects even though they do not, either directly or at all, limit the liability of the subject.[43] The "proposition of law" stated by the Supreme Court of Canada in *Murray* is different, and narrower, than the broad exception to immunity stated in the same case at a lower court level by Jackett, P.. Accordingly, the *Murray* decision cannot provide authority for the same broad exception declared by our Court of Appeal.[44]

(c) A limited reach for section 14

The issue in *Farm Credit Corporation v. Dunwoody Limited, Holowach and Holowach*[45] involved the Crown as litigant. Therefore it was open the court to decide the case by simply applying the "Crown as litigant" exception to immunity. However, the court chose not only to declare a broad

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[41](...continued)

It is noted here, and will be discussed further below, that in the recent Supreme Court of Canada decision in *Sparling v. Quebec (Caisse de dépôt et placement du Québec)*, [1988] 2 S.C.R. 1015, the court put the decision in *Murray* on a different footing — the exception to the immunity rule that in invoking the benefit of legislation, the Crown assumes attendant burdens.

[42] See *supra*, note 34 for a discussion of whether the Crown must be a plaintiff for the principle to apply.

[43] Examples of such laws include the following: a statutory scheme of priority for creditors; a statute that prohibited the unilateral withdrawal of a submission to arbitration; a statute that required registration of an interest. There could be circumstances in which such provisions would affect the outcome of litigation involving the Crown and subject in a manner adverse to the Crown even though they could not be said to limit the liability of subjects to the Crown. A law imposing a limitation period, or imposing formal requirements for the creation of certain types of contracts, could similarly impede the Crown's success as a litigant even though it did not limit the liability of the subject in the same direct manner as the statute limiting the amount of liability in a tort claim in the *Murray* decision.

[44] However, if the principle stated by the Supreme Court in *Murray* — that immunity does not extend the liability of a subject beyond that declared by ordinary law — could be extended to contract claims, it would suffice to reach the result in the Alberta cases.

[45] *Supra*, note 6.

exception to the presumption, but also to define the reach of the presumption. In doing this, in spite of the wide scope potentially attributable to its opening words, the court interpreted it narrowly. The wording is, again:

> No enactment is binding on Her Majesty or affects Her Majesty or Her Majesty's rights or prerogatives in any manner, unless the enactment expressly states that it binds Her Majesty.

Counsel for the appellant Crown had argued that the opening words of the provision give it a wide scope that the common law (and earlier federal version) did not have. The Crown urged that by virtue of section 14, all statutes not naming the Crown should be read as though they contained a provision that the Crown was not bound by them. This argument was in effect that the opening words of the provision should be given their common meaning, and that the two beginning phrases should be read disjunctively. If "no enactment is binding ... unless the enactment expressly states that it binds" the Crown ought to be immune even from statutes that do not derogate from Crown prerogatives or adversely affect Crown rights.[46]

Addressing this argument, the Court of Appeal put the question, and answer, as follows:

> Does the Crown escape from that principle [that immunity only applies against statutes which impose a liability or derogate from existing privileges, etc.] by a general interpretation provision that statutes "do not bind or effect"?
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> ...
>
> To say that the Crown is not bound or affected by a statute immunizes the Crown from duties and obligations, and from interference with accrued

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[46] In a sense, any statute that, when applied, has an effect on the Crown, could be said to affect Crown rights. If "rights" in the context of the common law and earlier federal presumption were understood in this way, the position advanced by the Crown would equally hold for the earlier presumptions, even in the absence of the opening words. The Crown's point must therefore have been that the common law presumption protected the Crown only from the derogation by statute of "rights" understood in a restricted sense (see under "Possible meanings for 'rights'" (Chapter 2, section A(2)) for a discussion of the possible restricted meanings) but the addition of the opening words was intended to protect it against all statutes, and against the derogation of "rights" in its widest sense.

> rights,[47] or the prerogative, but does not otherwise immunize it in dealings with the subject.[48]

The court's answer was thus that the opening words of the provision add nothing to the remainder.[49] The court's reasons for this conclusion were as follow:

First, it seemed to place some reliance on the words of Martland, J. where he said of the situation in the *Murray* case that it was "not a case in which a provincial Legislature has sought to "bind" the federal Crown, in the sense of imposing a liability upon it or of derogating from existing Crown prerogatives, privileges or rights". The court appeared to regard this statement from the *Murray* case as an exhaustive definition of the words "bind the Crown". The word "bind" as it is commonly used captures the effect of any legislation that affects the Crown, especially adversely, whether or not it affects Crown prerogatives or diminishes existing Crown rights. However, the court seemed to rely on the quotation for the view that only legislation derogating from accrued Crown rights or Crown prerogatives would "bind the Crown". The legislation in question (preventing suit on the personal covenant) did not have the prohibited effect. Accordingly, though it affected the Crown in other ways, it did not "bind" it, and could be applied. However, read in context, the quoted statement is not meant to define "bind", limiting the word to the particular effects on the Crown mentioned by the court, but excluding others. Its purpose is simply to suggest that had the provincial statute purported to "bind" the Crown in the ways suggested, it would (by reference to the immunity principle as it then stood) have been ineffective as against the Crown. Clearly Martland J. was not addressing his mind to the issue of what "No enactment is binding" could mean, because the version of the

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[47] The reference to "accrued rights" in this statement seems to be meant to convey the most restricted of the meanings discussed under "Possible meanings for 'rights'" (Chapter 2, section A(2)) — contractual rights existing prior to the passage of the legislation at issue. The court had earlier quoted the Privy Council in the *Dom. Bldg. Corp.* case ([1933] A.C. 533 (Privy Council)), where it gave "rights" as this word is found in the Ontario Interpretation Act this limited meaning.

[48] At 287.

[49] The added words cannot be given the office of immunizing the Crown from obligations, as this immunity had already been attached to the common law and early federal provision.

federal Interpretation Act which subsisted then did not contain these words. It was therefore inappropriate to rely on the *Murray* case to help interpret the opening words of section 14.

The court continued:

> We agree with Dickson J. in the Eldorado Nuclear decision that it has become "less easy ... to understand why the Crown need be, or ought to be, in a position different from the subject". The new Acts [the Alberta Interpretation Act and the post-1967 version of the federal Act] do away with the doctrine of "necessary implication". In our view they need not be given the more extensive office of immunizing the Crown from limitations protecting the subject given by the general law.[50]

The Court of Appeal went on to conclude, as already noted, that:

> To say that the Crown is not bound or affected by a statute immunizes the Crown from duties and obligations, and from interference with accrued rights, or the prerogative, but does not otherwise immunize it in its dealings with the subject.[51]

The court offered two additional reasons for this restrictive view of the scope of section 14: that it is open to the legislature to exclude the Crown by inserting provisions to this effect in individual statutes, and that interpretation provisions giving the Crown immunity are narrowly construed. However, the most important reason for the court's conclusion as to what section 14 means appears to have been that that is what the court thought best.[52]

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50 At 287. The reference to the *Eldorado Nuclear* case is curious because immediately after making the quoted statement, Dickson C.J. went on to say that "This Court is not, however, entitled to question the basic concept of Crown immunity, for Parliament has unequivocally adopted the premise that the Crown is *prima facie* immune" (*supra*, note 17, at 558).

51 At 287.

52 The court included one additional authority to support its view that section 14 does not immunize the Crown in its dealing with subjects other than from statutes which derogate from Crown prerogatives, etc. — *Dom. Bldg. Corp. v. R.*, [1933] A.C. 533 (Privy Council). However, this case deals with an earlier version of section 16

(continued...)

The court's statement of the scope of the presumption in the last of the passages quoted above suggests that quite apart from the "Crown as litigant" exception, the presumption of immunity protects the Crown only against limited categories of statutes. The Crown is not immune from statutes generally, but only from those that create an obligation or derogate from Crown prerogatives and accrued rights. Subsequent cases affirm that the court did regard the reach of section 14 to be limited in this way.[53]

(d) Further applications of the "broad principle"

The broad "Crown as litigant" exception, and the narrow view of section 14, laid down by our Court of Appeal in the *Ciereszko* and *Farm Credit Corp.* cases, were applied in several subsequent decisions. In these cases the Crown was held subject to the Execution Creditors Act, the Land Titles Act and the federal Interest Act, with the result in each case that the Crown's claim was adversely affected.[54] In one case the court applied a provision of the Execution Creditors Act to the Crown — requiring ratable sharing among creditors — even though this abrogated the Crown's prerogative of prior payment.[55]

At this point in the history of the interpretation of section 14, our Court of Appeal had deprived it of much of its apparent meaning. The opening words "no enactment is binding on Her Majesty" had been read so narrowly as to add nothing to the remainder of the provision. Any

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[52](...continued)
of the Interpretation Act and does not, like the existing section 16 and our section 14, contain the words that "no enactment is binding on Her Majesty".

[53] See, for example, *Labour Relations Bd. v. Alberta Manpower et al.* (1988), 60 Alta. L.R. (2d) 261 (C.A.). In this case the issue was whether the Crown could be compelled to testify and produce documents before the tribunal. Though the Crown was not a litigant in the case, the court quoted the conclusion in the *Farm Credit Corp.* case (the last of the passages just quoted) as applicable. The court held that the Crown was not bound by the Labour Relations Act, but not simply on the basis that the statute did not name the Crown, hence it was not bound. Rather, the court's conclusion was on the basis that to hold otherwise would allow the statute to create an obligation without naming the Crown. The case involved one of the limited categories of statutes for which, in the court's view, the presumption conferred an immunity.

[54] See Appendix E.

[55] See *Royal Bank v. Black & White Developments* (1988), 60 Alta L.R. (2d) 31 (C.A.). The court's reasoning to the conclusion that the Crown waives its prerogative in coming to court is discussed at greater length at 79 *et seq.*

legislation that did not derogate from accrued Crown rights[56] or prerogatives, or create obligations, would bind the Crown. In any case in which the Crown came to court or chose to sue,[57] it would be bound by its choice to the general law governing private disputes in the matter, whether or not the legislation derogated from Crown prerogatives. Immunity was operative only where the Crown was not a litigant, against legislation that would have the effect either of derogating from an accrued Crown right or prerogative or of creating an obligation.[58]

C. The *Sparling* Case

Two Supreme Court of Canada cases subsequent to the judgments just discussed cast doubt on their continued validity.

The first, *Sparling v. Quebec (Caisse de dépôt et placement du Québec)*,[59] is very instructive for the present purpose for three reasons: first, it re-interprets the Supreme Court's decision in *R. v. Murray*,[60] upon which our Court of Appeal placed great reliance in the series of decisions just discussed; second, it reveals the Supreme Court's tendency to curtail Crown immunity; and third, it lays down a principle which arguably governs the issues determined in these cases by our Court of Appeal.

(1) A narrow exception

The issue was whether the Caisse, a Quebec provincial Crown agent, was bound by the provisions of the federal Business Corporations Act. If

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56 See *supra*, note 47 for a discussion of the meaning of "accrued rights".

57 See *supra*, note 34 for a discussion of whether or not the Crown must be a plaintiff for the waiver exception as stated by the Court of Appeal to apply.

58 This was the situation in the single exception to the line of cases curtailing Crown immunity. In *Labour Relations Bd. v. Alberta Manpower et al.* (1988), 60 Alta. L.R. (2d) 261, the court held that the Executive Director of Alberta Manpower was not required to produce documents pursuant to an order made by the Board under section 13(1) of the Labour Relations Act. The principles from the other cases upon which immunity was denied were held inapplicable because the Crown was not a litigant and the Board was not a court. The court also said that because if section 13 of the Act were given effect an obligation to produce documents would be imposed upon the Crown, the section could not be held to bind the Crown.

59 [1988] 2 S.C.R. 1015.

60 *Supra*, note 31.

bound, it was required by the Act to submit an insider report to the Director. The Supreme Court held that though the Act did not "mention or refer" to the Crown, the Caisse was bound. The court declared that there is a "benefit/burden" exception to Crown immunity from statute — that the Crown may not accept the benefit of a law without also incurring its burdens. According to the court, it had applied this exception in recent cases, including *R. v. Board of Tpt. Comm.*,[61] and *R. v. Murray*. The court then went on to explain how it had applied the "benefit/burden" exception in the Murray case. According to the court, Martland J. had first held that the Crown's claim in negligence "could only arise because of the master and servant relationship deemed to exist between the Crown and members of the armed services by virtue of section 50 of the Exchequer Court Act". He had gone on to rule that as the Crown was thus seeking the benefit of the law, it was also subject to its restrictions as contained in the statute, The Tortfeasors and Contributory Negligence Act, which limited the Crown's recovery. The Supreme Court in *Sparling* pointed out that it had made no difference that the benefit and restriction arose under different statutes. It also referred to several other authorities in support of the "benefit\burden" exception, including the following summary of the doctrine by Professor Peter Hogg in *Liability of the Crown in Australia, New Zealand and the United Kingdom*:[62]

> The restrictions [on a statutory right] are regarded as restrictions on the right itself, and if the Crown could disregard them it would receive a larger right than the statute actually conferred. In other words all of the statutory provisions affecting a right to which the Crown claims title are interpreted as if they were advantageous to the Crown ... [T]here is no room for the rule requiring express words or necessary implication.[63]

and the following statement of C.H.H. McNairn in *Governmental and Intergovernmental Immunity in Australia and Canada*:[64]

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61 [1968] S.C.R. 118.

62 Australia: Law Book Co., 1971.

63 At 183.

64 Toronto: University of Toronto Press, 1977.

> By taking advantage of legislation the crown will be treated as having assumed the attendant burdens, though the legislation has not been made to bind the crown expressly or by necessary implication. The force of the rule of immunity is avoided by the particular conduct of the crown and the integrity of the relevant statutory provisions, beneficial and prejudicial.[65]

The court then considered whether by purchasing shares, the Caisse had invoked a benefit provided by statute. It quoted once more from McNairn, that:

> It is not essential ... that the benefit and the restriction upon it occur in one and the same statute for the notion of crown submission to operate. Rather, the crucial question is whether the two elements are sufficiently related so the benefit must have been intended to be conditional upon compliance with the restriction.[66]

The court concluded that a share is not an entity independent of the statutory provisions that govern its possession and exchange, make up its constituent elements, and define the rights and liabilities that constitute the share's existence. Thus in purchasing a share, the Caisse invoked the rights conferred by the statute and was bound by the attendant obligations of the statutory regime. It had to take the law as it found it. The court went on to note that the "benefit/burden" exception does not, contrary to some authorities, result in subsuming the Crown under every regulatory scheme that governs a particular state of affairs. Before the Crown is bound there must be a sufficiently close inter-relationship between the rights invoked and the obligations to be imposed.

(2) The implications of the *Sparling* case for Alberta law

The first significant point about the *Sparling* case is that the Supreme Court interpreted its own judgment in the *Murray* decision. The court said that the principle it had applied there was the same "benefit/burden" exception that it went on to apply in *Sparling*. Our Court

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65 At 10.

66 *Ibid.* at 11.

of Appeal relied on the *Murray* case as the source of the "broader principle", that:

> When the "federal Crown chooses to sue someone in relation to a matter that is not governed by any special prerogative rules, it must abide by the laws applicable to such matters in private disputes in the province in question".[67]

In light of the Supreme Court's definition of the *Murray* decision, our Court of Appeal's interpretation is open to question. It is certainly arguable that the two principles do not coincide, and that the Court of Appeal's statement of principle is broader than *Murray*, as interpreted in *Sparling*, warrants. According to the Supreme Court in the latter case, the "benefit/burden" exception arises — the Crown submits to legislation — whenever it invokes the benefit of a statute. According to the Alberta Court of Appeal, the Crown submits to the general law whenever it brings a claim or becomes involved in litigation. Because the narrower principle was cited as authority for the broader, the broader principle may be doubted.

There is, further, a question of whether the broader principle conflicts with the narrow one stated by the Supreme Court. The Supreme Court imposed a requirement that there be a sufficient inter-relationship in a statutory scheme between the benefit derived and the burden imposed before the Crown is taken to have submitted to the entire scheme. This arguably leads to the conclusion that the Court of Appeal's statement of principle is in conflict with *Sparling*. The Court of Appeal asserted an automatic submission to the general law, including statutory law, in every case in which the Crown comes into court. Under this rule it is not necessary to consider whether the statutory burdens the Crown seeks to avoid are sufficiently connected to some benefit of the law the Crown invokes. The application of this rule would in some cases lead to a conclusion that the Crown had submitted in the absence of the nexus the Supreme Court required.

The next question is whether the principle in *Sparling* could be held to govern the issue in the cases decided by our Court of Appeal. The *Sparling* case was resolved on the basis that shares are entities dependent

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[67] See the discussion in Chapter 2, section B(2)(b).

on a statutory regime. Like shares, contractual entities such as mortgages and conditional sales agreements have related statutory provisions, for example, registration schemes, or sets of rules governing remedies. The question in a particular case would be whether the statutory provisions are such that the entity is dependent on the statutory scheme for its definition, the enforcement of the rights attached to it, and so on, or whether it is viable standing alone. Whether in entering into and suing on a mortgage contract the Crown has invoked the benefits of the statutory provisions relating to mortgages, and hence assumed the burdens, depends on whether mortgages are properly regarded as dependent on a statutory scheme.[68]

A final question is whether the decision in *Sparling* sheds light on how the Supreme Court would interpret the opening words of our section 14. Would the Supreme Court adopt the position of our Court of Appeal that the words "No enactment is binding on Her Majesty" add nothing to the remainder, leaving the Crown immune only from statutes that derogate from Crown prerogatives and "rights" understood in a restricted sense? There seems to be nothing in the *Sparling* judgment to suggest how the court would be disposed to this issue, beyond the tendency already mentioned to limit Crown immunity from statutes. However, another Supreme Court decision does suggest an answer. In the *R. in Right of Alberta v. Can. Tpt. Comm.*,[69] the Supreme Court suggested that some significance should be given to the change in wording as between the pre-1967 and post-1967 versions of the federal Interpretation Act. Chief Justice Laskin stated:

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[68] At the first level in the *Ciereszko* case, the issue was resolved on the ground that the Crown had elected to take a statutory mortgage under the Land Titles Act, and had applied for a statutory remedy for order for sale under section 41(2) of the Law of Property Act. It could not selectively choose to take advantage of some provisions of a statute without being bound by others that restricted its remedies. However, the Crown might simply rely on its contractual right under the mortgage rather than resorting to the statute for a remedy. In such a case to avoid suit on the personal covenant the borrower might argue the following: first, that mortgages in Alberta are dependent on statute for their definition (see Land Titles Act sections 105, 106); and second, that in taking the benefits of registration of a mortgage under the Land Titles Act the lender takes on the burdens of all mortgage-related statute law, including the burden of restricted remedies under the Law of Property Act. However, there would be a strong contrary argument that there is an insufficient nexus between the benefit of one statute and the burden of the other.

[69] [1978] 1 S.C.R. 61.

> In my opinion, the present section 16, ..., goes further than the superseded provision to protect the Crown from subjection to legislation in which it is not clearly mentioned. Whereas the section considered in *In re Silver Bros. Ltd.* ... and in *Dominion Building Corporation v. The King*, ... spoke only of affecting the rights of the Crown (a point that was taken in respect of the similar Ontario section in the Dominion Building Corporation case and which appeared to control the decision there arrived at), the present section 16 goes beyond "rights" alone and is express that, in addition, "no enactment is binding on Her Majesty or affects Her Majesty ... except only as therein mentioned or referred to".[70]

The opening words of section 14 parallel those of the revised federal provision. It would follow from the quoted passage that by virtue of their inclusion in our immunity presumption, section 14 "goes further than the [earlier federal] provision to protect the Crown from subjection to legislation in which it is not clearly mentioned".[71]

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[70] At 75.

[71] With regard to the legislative intent behind the 1967 amendment to the federal section 16, a search of the Commons Debates, the Senate Debates, and the proceedings of Committees which were involved at both stages, did not reveal any discussion on this question. It appears, therefore, that this was a change which was made in-house before the Bill was presented to Parliament.

D. *AGT v. CRTC*

The Supreme Court of Canada reiterated the "benefit\burden" exception to Crown immunity in *AGT v. CRTC*.[72] Again, the court stressed the importance of a nexus between statutory benefit and detriment.[73]

E. Cases Subsequent to the Supreme Court Rulings

The pronouncements of the Supreme Court of Canada on the presumption of Crown immunity have not settled the law in Alberta; if anything, it is more unsettled than before. As neither of the Supreme Court judgments involved claims by the Crown against subjects, the status of the "Crown as litigant" exception, in which the Crown in choosing to sue is taken to bind itself to the general law governing private disputes, is uncertain.[74] Since the recent Supreme Court rulings, our courts have sometimes applied the broad principle articulated in the *Ciereszko* line of cases, sometimes not. Some judgments now regard these cases as overruled, declaring, for example, that "the "Crown as litigant" exception to Crown immunity does not exist"[75] or that "to the extent that *Ciereszko* and *Holowach* hold that the Crown is bound to legislation to the same extent as

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72 [1989] 2 S.C.R. 225.

73 The majority held that there was an insufficient connection between the benefits that AGT derived from the Railway Act, and the burden of CRTC regulatory authority over it. Madam Justice Wilson disagreed, drawing a wider benefit/burden exception than that cast by the majority. The majority also rejected the "commercial activities" exception to the presumption of immunity on the ground, among others, that the line between commercial and purely governmental Crown activities is hard to draw. Finally, the court revived an exception to immunity about which its own earlier rulings had created some doubt — the "necessary implication" exception. Under this exception the Crown is bound if the statute would be wholly frustrated if it were not. This exception was reaffirmed by the Supreme Court in *Friends of the Oldman River v. Canada*, [1992] 1 S.C.R. 3.

74 As already noted, the principle that governed the *Murray* case when it was first decided — that Crown immunity does not extend the liability of subjects beyond that declared by the general law — would arguably serve to govern the result whenever the Crown is suing subjects and relying on immunity to exempt itself from statutory limitations on the liability of the subject. However, conceivably the Crown could, as a litigant, seek exception from statutes that did not directly limit the liability of subjects. In such a case, the *Ciereszko* principle might govern, while the *Murray* principle would not. There is also uncertainty about whether the exception applies whenever the Crown is involved as a litigant, or only when it sues a subject.

75 *Federal Business Dev. Bank. v. Caskey* (1992), 1 Alta. L.R. (3d) 58. Master Quinn held that the Crown was bound by section 41 of the Law of Property Act.

an ordinary citizen, that principle has been seriously eroded by *CNCP Telecommunications*".[76] However, others have continued to regard the *Ciereszko* principle as good law.[77] One case seems to accept the broad exception, but limits its scope to situations in which the Crown is engaging in commercial activities.[78]

An opportunity for the Court of Appeal to clarify the law arose in 1990 in *Alberta (Provincial Treasurer) v. Woycenko & Sons Contracting Ltd.*,[79] but the court declined it. The case was an appeal from a Master's decision that had been given prior to the *Ciereszko* line of judgments. Adopting the pre-*Ciereszko* approach to the presumption of immunity, the Master had held the Crown immune from the provisions of the Guarantees Acknowledgment Act and thus able to enforce a guarantee that did not comply with the Act's provisions.[80] The Court of Appeal affirmed the

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76 *Alberta Opportunity Co. v. Snatic* (1992), 3 Alta. L.R. (3d) 199 (Master). The Crown was held not to be subject to the Guarantees Acknowledgement Act. See also *Province of Alberta Treasury Branches v. Hruschak* (1991), 83 Alta. L.R. (2d) 30 (Master), in which the Crown was held immune from the provisions of the Interest Act.

77 In *Alberta Agric. Dev. Corp. v. Tiny Tym's Poultry Ltd.* (1989), 66 Alta. L.R. (2d) 279 (Q.B.), the court, relying on the *Ciereszko* case, held the Crown bound to the Guarantees Acknowledgment Act. In *Alberta Agricultural Dev. Corp. v. Nelson* (May 13, 1991) Edmonton No. 910381 D (Master), Master Breitkreuz refused to grant a Rice order in favour of a Crown agent in circumstances in which such an order could have issued had the Crown been immune from the provision of the Law of Property Act.

78 *Montreal Trust Co. v. Tottrup* (1990), 82 Alta. L.R. (2d) 340 (Q.B.). The court acknowledged the principle in *Ciereszko*, as Belzil J. had applied it in *Royal Bank v. Black & White* ((1988), 60 Alta. L.R. (2d) 31 (C.A.)) to reach the conclusion that in taking execution under the Execution Creditors Act the Crown subjects itself to the provisions for *pro rata* sharing. However, the court did not apply the ruling in *Black & White* to the facts before it (a federal Crown claim for unpaid taxes). It said that the waiver rule applies only where the Crown is participating in a purely commercial transaction (in contrast to a governmental transaction such as tax or duty collection). In the latter case, the prerogative of priority continues to apply. The court's reliance on the distinction between commercial and governmental Crown activities to distinguish the *Black & White* case seems inconsistent with the Supreme Court's clear declaration in *AGT v. CRTC* that it did not accept the "commercial activities" exception to the presumption of Crown immunity. For a discussion of the commercial\governmental distinction, see Appendix B.

79 (1990), 105 A.R. 159 (C.A.).

80 (1987), 73 A.R. 229 (Master). The court also held the Crown immune from the federal Interest Act. Master Funduk said that neither defences based on the federal Interest Act nor on the provincial Guarantees Acknowledgment Act were available

(continued...)

Master's ruling that the Crown was immune. The Crown was litigant in the case, and thus the "Crown as litigant" exception to immunity would have applied. Further, application of the statute would not have infringed any Crown prerogatives. However, the court seemed to ignore its own recent pronouncements. Unfortunately it did not give written reasons for its apparent about-face.

In *Bank of Canada v. Canadian Commercial Bank*,[81] the Court of Appeal applied the "benefit/burden" principle as outlined in the *Sparling* case to the facts before it. However, in doing so, the court asserted that "this concept" had been stated by it in the *Black & White*, *Ciereszko*, and *Farm Credit* cases. As noted in an annotation to the case by E. Mirth, Q.C., this was a curious characterization of the earlier cases, especially as in *Ciereszko*, the court had specifically denied that the case was appropriate for application of the "benefit/burden" rule. Mr. Mirth went on to note that the broad language used in the cases could not be confined to the narrower principle.

The law about Crown immunity in Alberta is as unpredictable as ever.

F. Summary

Some aspects of the operation of the presumption of immunity in Alberta are quite well-defined. Alberta law is consistent with Supreme Court rulings on the point that the Crown is immune where application of a statute would impose an obligation upon it. While immunity against statutes that would derogate from established Crown prerogatives may be questionable on grounds of policy, it now seems clear that the presumption

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[80](...continued)
to the defendant. As to the Interest Act, citing *A.M.H.C. v. Hill Investments* (1985), 36 Alta. L.R. (2d) 204 (Q.B.), in which the Crown was held immune from the federal Interest Act because the statute did not bind the Crown either expressly or by necessary implication, the Master said that the Act does not bind Her Majesty. As to guarantors who give guarantees to the Crown, the Master cited the *Hill Investments* case and *F.B.D.B. v. Willms* (1985) 39 Alta. L.R. (2d) 287. In the latter case, the Guarantees Acknowledgment Act was held not to bind a Crown agent because legislation must expressly state that the Crown is bound. The Master stated that section 14 and the common law position of the Crown preclude this Act being set up against the Crown.

[81] (1990), 72 Alta. L.R. (2d) 1 (C.A.).

does operate to protect the Crown from such statutes. Thus, for example, the Crown continues to be immune from the Limitation of Actions Act,[82] and any change in this position would, as noted in a recent case,[83] lie with the legislature.[84]

The Supreme Court of Canada has issued rulings that clarify certain exceptions to the presumption, and these have been adopted by our courts. In *AGT v. CRTC*[85] the court clearly resurrected the necessary implication doctrine — that the Crown is bound where the purpose of the statute would be wholly frustrated if it were not.[86] The Alberta court has applied this doctrine in recent cases.[87] On the other hand, the Supreme Court has denied the "commercial exception" to the operation of the presumption.[88] In *Alberta Opportunity Co. v. Snatic,*[89] the court adopted this view of the commercial exception.[90]

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82 In *The Queen v. Govert Buys and Whitecourt Transport Ltd.* (1989), 66 Alta. L.R. (2d) 361 (C.A.), the court permitted the Crown to continue an action commenced beyond the applicable limitation period. See also *AGT* v. *Arrow Excavators and Trenchers* (1989), 99 A.R. 25 (C.A.); *A.H.M.C. v. Castleridge Apts. Ltd.* (1992), 119 A.R. 166 (Q.B.).

83 *Alberta Opportunity Co. v. Snatic* (1992), 3 Alta. R. 199, at 207 (Master).

84 The *Royal Bank v. Black & White* case ((1988), 60 Alta. L.R. (2d) 31 (C.A.)), in which application of the statute to the Crown involved abrogation of the Crown prerogative of prior payment, remains problematic. It might be explained as an example of the "benefit\burden" exception to immunity, except that the statute could have been applied to the Crown, as it has been in other jurisdictions, while retaining the prerogative. This case is discussed at greater length at 79 *et seq.*

85 [1989] 2 S.C.R. 225 (S.C.C.).

86 In *R. v. Eldorado Nuclear*, [1983] 2 S.C.R. 551, the Supreme Court had held that the statutory presumption of immunity removed the "necessary implication" exception. In the *AGT* case the court also clarified what was meant by "fully frustrated". It said that a statute is not fully frustrated where immunity would merely create a gap in its coverage.

87 *Baary v. Maertens-Poole* (1992), 4 Alta. L.R. (3d) 330 (Master); *Rutherford v. Swanson* (1993), 9 Alta. L.R. (3d) 328 (Q.B.).

88 See *AGT v. CRTC*, *supra*, note 3.

89 (1992), 3 Alta. L.R. (3d) 199 (Master).

90 However, other Alberta rulings do give the distinction between commercial and governmental activities some credence, as does the Supreme Court itself in a different context (that of challenges to legislation that discriminates between the Crown and private persons by reference to section 15 of the Charter of Rights). See the discussion in Appendix B.

As described at length above, however, the law remains in a most uncertain state as to the relation in this jurisdiction between the presumption of immunity and the "benefit\burden" and "Crown as litigant" exceptions to it. Our courts have stated a wider principle of exception to the presumption than was found in the precedents. In some cases the exception was wider than was called for to bind the Crown to the statute: the principles that were articulated in the precedents might have sufficed to achieve this result.[91] There is equal uncertainty about the significance of the opening words "no enactment is binding" in our immunity provision. The courts have denied these words significance without giving an adequate explanation, and in the face of a statement by the Supreme Court that such words increase the scope of immunity. In contrast, some of the more recent decisions seem to overlook the series of cases that gave rise to these questions, and come to the opposite conclusion.

Clarification of the law is called for. The courts have sought to avoid the effect of the immunity presumption by creative reasoning that gives rise to uncertainty. Reversal of the presumption would eliminate the need for unprecedented exceptions and a questionably narrow construction. It would also bring about a desirable result in terms of policy, as the section that follows will try to show.

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[91] For example, the principle that immunity does not extend the liability of the subject beyond that declared by the ordinary law, if extended to cover contractual as well as tort claims, would protect mortgagors from suit on a personal covenant.

CHAPTER 3
THE POLICY OF THE PRESUMPTION

A. Introduction

There is a tide of current opinion that there is no justification for the presumption of Crown immunity. Those who have commented upon the presumption in recent times are uniformly opposed to its continued existence. Indeed, perhaps excepting the Crown itself, the presumption has no contemporary defenders. This opinion has been voiced as strongly by the judiciary as by academics. Judges have grafted a series of exceptions onto the presumption which leave it relatively little scope. Commentators have lamented that legislative reform is long overdue.

The dominant themes in these discussions are contained in the following.

B. Early Critics of the Presumption

(1) Glanville Williams

As long ago as 1948, the time of enactment of the Crown Proceedings Act in England,[92] the presumption of Crown immunity was already being subjected to basic criticism. In his text *Crown Proceedings*,[93] a comment on the then-new legislation, Professor Glanville Williams wrote:

> Law reform is in the air, and although the rule of construction [that a statute can bind the Crown only by express words or necessary implication] is well settled, a few words of criticism of it may not be out of place.
>
> The rule originated in the Middle Ages, when it perhaps had some justification. Its survival however, is due to little but the *vis inertiae*. The chief objection to the rule is its difficulty of application. ...

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92 This Act simplified proceedings in contract by and against the Crown (by omitting the petition of right) and created wide exceptions to the rule that the Crown was not liable in tort.

93 London: Stevens & Sons, 1948.

> Consider how much clearer the law would be if the rule were that the Crown is bound by every statute in the absence of express words to the contrary. Such a change in the law would make no difference to the decision of the preliminary question of legislative policy whether the Crown should be bound by a statute or not. At the moment, if the draftsman of a bill is instructed that the Crown is not to be bound, he simply says nothing on the subject in the bill. Under the rule here suggested, he would insert an express provision exempting the Crown. The change of rule would not prevent the Crown from being expressly exempted from a statute if its framers so wished. It would, however, make the interpretation of the statute a much simpler affair, for it would get rid of the question of "necessary implication".
>
> A second argument in favour of change is that it would, so to speak, alter the legal presumption. At the moment, if the draftsman receives no clear instructions on the question whether the Crown is to be bound, or if he does not think of it, he says nothing in his draft and the Crown remains free -- unless a necessary implication can be discerned. Under the suggested new rule, the Crown would be bound unless the draftsman had already made up his mind to exempt it. Thus the result of the change of rule would be in practice to extend the number of statutes by which the Crown is bound. It is suggested that under modern conditions this change would be desirable. With the great extension in the activities of the State and the number of servants employed by it, and with the modern idea, expressed in the Crown Proceedings Act, that the state should be accountable in wide measure to the law, the presumption should be that a statute binds the Crown rather than that it does not.[94]

(2) Harry Street

A criticism of the presumption contemporaneous with that of Professor Williams is found in Professor Harry Street's article "Effect of

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[94] At 53-54.

Statutes upon the Rights of the Crown".[95] Professor Street undertook a history of the development of the rule, from its early common law form in the 15th Century, through its development in the Stuart period and by the English courts in the 19th century, to the cases of the mid-20th. He concluded that the presumption in its modern form has no firm foundation in precedent or logic.

Professor Street first observed that up to the 16th century, as demonstrated by the decision in *Willion* v. *Berkley*[96] "no such rule as that the king is never bound by statutes in which he is not named was ever recognized".[97] He went on to examine a number of subsequent decisions, and the way that the textbook writers had interpreted and summarized them, in some cases relying on merely **obiter** comments. The position that had resulted was this: the Crown was not bound by statutes unless named therein, except by statutes enacted for the public good, or alternatively except where bound by necessary implication; "necessary implication" was very narrowly defined to mean that the purpose of the statute would be wholly frustrated or its words meaningless unless the Crown were bound. The result of these developments was a narrowing of the range of occasions in which the Crown would be bound.[98] According to Professor Street, this position did not faithfully represent the early authorities. A more accurate interpretation is that the Crown is not bound by statutes unless named, except where it is bound by reference to the intention of the legislature as revealed in the statute — its language, objects, mischiefs and consequences.

In line with the tendency in the developing law to broaden the scope of the presumption was the defeat of the view that immunity obtains only where the statute effects peculiar or prerogative rights, but not otherwise. Had legislative intention to bind the Crown been the key (as, in Professor Street's view, it should have been), the courts might have found such an intention in relation to many of the statutes that affect general rights

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95 (1948) U. of T.L.J. 357.

96 (1561), 75 E.R. 339 (K.B.).

97 At 361.

98 The "public good" exception was potentially very broad. However, it was not founded on any authority. Thus it was readily rejected by the Privy Council in the leading modern case on the subject, *Province of Bombay* v. *Municipal Corporation of Bombay*, [1947] A.C. 58, on the basis that all statutes are for the public good.

belonging to subjects and the Crown indifferently. (Conversely, such intention would be harder to find in the absence of clear words with respect to statutes that affect prerogative rights.) However, the test that developed — the "necessary implication" doctrine — excluded the notion of legislative intention except of a very particular kind — the "wholly frustrated" test. The result was that the Crown came to be immune not only from statutes affecting the King's peculiar interest, but from all statutes.[99]

Professor Street went on to consider the effect of the legislated presumptions that supplanted the common law rules. As to these, he took note of two classes of cases interpreting the statutory presumptions: those holding that the Crown was bound only by express words and not even by a narrowly defined "necessary implication"; and those holding that the Crown could be bound by necessary implication, but giving this phrase a very narrow meaning. He concluded that at best such clauses result in the Crown being bound by express words or by necessary implication, using the latter phrase in the narrow sense that "otherwise the statute would be unmeaning". Noting attempts by courts to overcome the effect of the statutory provisions by strictly construing the word "rights" to refer only to "accrued rights"[100] or "ancient prerogatives",[101] Professor Street lamented that even such commendable rulings

> ... cannot completely undo the mischief that has been caused by the wording of these clauses. Only amending legislation to the effect that the crown shall be bound when it is the policy of the statute that the crown shall be bound can set right the position. That same legislation could provide that there shall be no presumption that statutes do not bind the crown.[102]

Professor Street concluded that:

> The courts must cast aside the technique of literal interpretation and must return to a consideration

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99 See *Province of Bombay* v. *Municipal Corporation of Bombay*, [1947] A.C. 58.

100 *Dominion Building Corp. Ltd.* v. *R.*, [1933] A.C. 533.

101 *McDougall* v. *A.-G.*, [1925] N.Z.L.R. 104.

102 At 381.

> of the social policy of the statutes. But matters have gone too far to be rectified by judicial process alone. Amending legislation removing these inflexible statutory definitions must be put through in order to give the courts the opportunity of interpreting statutes as human contrivances designed to suit human ends.[103]

In the final section of the chapter on the same subject in his text *Governmental Liability, a Comparative Study*,[104] Professor Street took a similar view:

> [The] substantive limitations [on the liability of the state] discussed in this chapter seem to have some common characteristics. They are elaborations of the general medieval rule that "in all cases where the King's rights and that of a subject conflicted, the King 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. Reform is called for on the general principle that no Crown immunities are tolerable unless their retention can be affirmatively proved to be necessary in the public interest.[105]

Many writers have adopted Professor Street's analysis of the historical development of Crown immunity from statute, and his views on the subject. In his text *Administrative Law*,[106] P.P. Craig summarized Professor Street's research, and continued:

> The present state of the law can hardly be regarded as satisfactory. The shift from a rule sensibly based upon general legislative purpose and intent to the present position has been accomplished partly by accident and partly by misinterpretation of earlier authority. Little thought has been given to the justification, if any,

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103 At 384.

104 Cambridge: University Press, 1953.

105 At 165.

106 London: Sweet & Maxwell, 1989.

> for this position. It might be argued that the present rule gives rise to no great problems because the Crown can easily be expressly included in the statute. This would be oversimplistic. A number of problems do exist.
>
> First, it is unclear when the exception to the present rule will apply. Second, the retention of the present presumption creates problems with the application to the Crown of statutes concerning tortious liability.[107] ... Third, and most important, the argument that the present rule produces no problems is premised upon an ideal whereby legislators will carefully weigh the matter to decide whether to extend an Act to the Crown. The legislative process will often not meet these expectations. Whether the Crown should be bound may receive scant attention or simply be forgotten. A reversal of the present presumption would provide a simple solution: the Crown should be bound unless there is a clear indication to the contrary. This would at least force the government to take the initiative in practical terms if it wished to secure immunity, and also place upon it the onus of arguing why immunity is required.[108]

C. Recent Academic Criticism

(1) Peter Hogg

Another recent detractor of the presumption is Peter Hogg. In his text *Liability of the Crown*,[109] Professor Hogg begins by reviewing the process by which the presumption of immunity was extended. He then goes on to consider the following: the uncertainties in the law that have resulted from judicial efforts to avoid the presumption; the fact that immunity exists by default rather than by design; and the increases in the scope of governmental activity and governmental regulation that have created increased opportunities for immunity to operate and for injustice, or

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[107] The position in relation to the English Crown Proceedings Act is then discussed. Similar problems have arisen in Canada.

[108] At 525-26.

[109] 2d ed., Toronto: Carswell, 1989.

frustration of legislative will, to occur. These factors lead Professor Hogg to champion reversal of the presumption unequivocally.

(a) Narrow scope originally, and unreasoned extension

Professor Hogg begins by describing the position respecting Crown immunity at an earlier stage of history. The common law presumption protected the King only from statutes that would strip him of his prerogative (that is, powers, privileges or immunities peculiar to him). However, "[s]tatutes which affected rights enjoyed by the Crown indifferently with subjects were construed without applying any presumption as to Parliament's intention".[110] In Professor Hogg's view, this rule was justifiable on the ground that general words are usually not construed as affecting special rights. However, he describes as a "melancholy history" the eventual application of the presumption to all statutes, whether or not the prerogative was affected. In his view "[t]here is no good reason why the Crown should be generally free to ignore the rules that have been enacted for the regulation of society".[111] Likewise there is no answer to the contention that "when the King in Parliament ordains a remedy for a mischief, it is not to be presumed that he intended to be at liberty to do the mischief".[112] Professor Hogg also notes that the case that settled the present form of the rule did not really consider whether it was sound in policy. The evolution of the presumption culminated in *Province of Bombay* v. *Municipal Corporation of Bombay*,[113] a case that cast governmental immunity in the widest possible terms. However, the Privy Council neither answered (nor even asked) why such an immunity was needed. Professor Hogg comments that "a rule without a good reason for it is an unstable thing".[114]

In the section of his text that deals specifically with reform of the presumption, Professor Hogg refers to Street's work on the presumption's history. He notes that this history showed that "the extension of the rule [to

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110 At 202.

111 At 202.

112 *Willion* v. *Berkley*, *supra*, note 96.

113 [1947] A.C. 58 (Privy Council).

114 At 205.

statutes other than those which affect the Crown's prerogative] has proceeded without either proper understanding of the old cases or discussion of the reasons behind them".[115]

(b) Uncertainty of the law in light of numerous exceptions to the presumption

Noting again that there is no rationale for the rule in the *Bombay* case, Professor Hogg speculates that the Privy Council may have regarded the existence (or otherwise) of the presumption as merely a matter of form, of little practical consequence. Legislative drafters would simply have to take the presumption into account, responding so as to achieve whatever result was desirable. Clarity was possible either way.

In response to this hypothetical argument, Hogg concedes that the *Bombay* case clarified the law by making it clear that the presumption applied to all kinds of statutes. However, he points out that since the decision, judges wishing to resist the effect of the presumption have engrafted many exceptions onto the immunity rule. These exceptions are uncertain in scope, and therefore often unpredictable in application.

Professor Hogg illustrates this problem of uncertainty by referring to some of the particular exceptions. The benefit/burden exception, for example, is potentially of so broad a scope as to swallow the immunity rule with the exception:

> Whenever the crown acquires property or engages in commercial transactions it is taking advantage of the entire network of laws that contribute to the security and transferability of property and the efficacy of commercial transactions. A liberal definition of Crown advantage leads to the conclusion that the Crown as commercial actor is bound by all the same rules as private actors in the same marketplace. The courts have not so far been willing to take this step, recognizing that it involves a massive shrinkage of the presumption of Crown immunity.[116]

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115 At 243.

116 At 219.

In Hogg's view, the limiting principle that there be a "sufficient nexus" between the benefit and the burden is not capable of removing all doubt. (The truth of Professor Hogg's observation is amply demonstrated by the conflicting views as to the applicability of the doctrine as between the majority and dissenting opinions of the Supreme Court of Canada in *AGT* v. *CRTC*.[117])

A second example given by Hogg of an exception that is difficult to apply, and thus inferior to legislative reform of the presumption, is the "commercial activities" exception. Hogg observes that most government commercial ventures have some regulatory or public policy objective. It is therefore difficult to characterize any government activity as purely commercial. (The Supreme Court's definitive rejection of this exception on the basis of similar reasoning in *AGT* v. *CRTC*[118] reflects the accuracy of this observation.)

A third area of uncertainty Professor Hogg notes is about whether Crown agents, servants, contractors, and others share the Crown's immunity.

Hogg concludes that, in general, the creation of more and broader exceptions is not a satisfactory way to reform the presumption. Statutory reversal of the presumption would make most of the exceptions redundant, and it should be reversed.[119]

(c) Immunity by default

Professor Hogg concedes that reversal would not be required if statutes were routinely made to bind the Crown. He notes though that such provisions are unusual. His own survey of Ontario statutes shows that very few contain statements that the Crown is bound even though many statutes are by their terms plainly intended to bind the Crown (for example, the Government Contracts Hours and Wages Act). In light of this he states:

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117 [1989] 2 S.C.R. 225 (S.C.C.). See the discussion in Chapter 3, section D(2).

118 *Supra*, note 117.

119 See at 222.

> There is good reason to suppose that silence does not indicate a deliberate decision to exempt the Crown, but only indicates that the point was never considered.[120]

Professor Hogg regards the inadvertence of the legislative drafter as an insufficient reason to make the Crown immune. He argues that the better result of such inadvertence would be that the Crown would be bound. Conceding that the Crown does require many special powers and some immunities to govern effectively, he points out that Parliament or the legislatures can provide them expressly as needed:

> When powers and immunities are specifically granted by statute, a powerful tradition insists that their scope be carefully defined. The immunity which is granted by the traditional presumption against the Crown being bound by statute is far broader than is needed by an executive which controls the legislative branch, and because it is not needed it conflicts with the basic constitutional assumption that the Crown should be under the law.[121]

(d) Increase in scope of governmental activity, and scope of legislative regulation

Professor Hogg states:

> In the last century there has been a great increase in both the scope of governmental activity, and in the scope of legislative regulation. In general, where the Crown engages in an activity which is controlled by statute, it should surely be subject to the statutory controls; and where legislation is passed to benefit a class of the community, the benefits should not be denied to some members of that class merely because of their relationship with the Crown. There is no good reason, for example, why the Crown should be exempt from planning laws designed to order out environment, or building codes designed to promote health and

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120 At 244.

121 At 245-46.

> safety, or speed limits designed to reduce accidents.[122]

He goes on to describe a negative result of the operation of the presumption, as it arose in *R. v. Eldorado Nuclear*.[123] This case involved alleged price-fixing by a number of corporations, including two Crown corporations, engaged in the production of uranium. The Crown corporations could not be prosecuted because they were not bound by the Combines Investigation Act. The private participants in the cartel were bound and were thus exposed to criminal liability. However, as a Minister of the Crown had been a "prime mover" in the formation of the cartel, it would have been unfair to prosecute only the private cartel members. The government therefore dropped the charges against all the members. In the result, "an important public policy went unvindicated".[124] This illustrates that the presumption — where it results in different rules for Crown corporations than for their private counterparts — can defeat the public policy goals of legislation.[125]

Professor Hogg concludes:

> The reversal of the presumption is a desirable reform. The general rule ought to be that the Crown is bound by statutes. Exceptions to the rule ought to be specifically enacted. The change is not as radical as might appear, because the numerous exceptions to the rule of immunity have eaten away so much of it. A further important merit of the reformed law is it clarifies and simplifies a body of law that is now intolerably complex. It is to be hoped that other jurisdictions will follow the lead of British Columbia and Prince Edward Island.[126]

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122 At 245.

123 [1983] 2 S.C.R. 551 (S.C.C.).

124 At 245.

125 For a discussion of the law relating to contravention of statutory prohibitions by Crown servants, see D.J.A. Rutherford, H.L. Molot, P. Dubrule, "The Defence of Crown Immunity in Canada" (1989-1990) 3 C.J.A.L.P. 102.

126 At 246.

(2) Colin McNairn

In *Governmental and Intergovernmental Immunity in Australia and Canada*,[127] Colin McNairn mentions reversal of the presumption in British Columbia, and continues:

> This seems to be the more appropriate presumption, given the range of activities in which the crown and its agents are now engaged, the proliferation of regulations by statute and subordinate legislation, and the resultant increase in the opportunities for governmental immunity working to the prejudice of subjects. It leaves open the possibility of the legislature giving special protection to the crown in particular circumstances as the situation might dictate. But the crown will have no privileged position, in the face of legislation, by default as it were. Indeed, we are probably quite justified in assuming that the merit of applying a given statute to the crown frequently receives little or no consideration. If that is so then the failure to mention the crown ought not to be attributed to any conscious decision that the crown should be free of the burdens of a statute.
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> The courts, especially in Canada, seem to have been less than happy with the present rule of governmental immunity. However, they have managed to do justice in many cases by taking a narrow view of the scope of protection which the rule affords. But of course there are limits to the flexibility of the courts in this matter which do not constrain the legislature.[128]

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127 *Supra*, note 64.

128 At 22.

(3) Pierre-André Côté

In a section on Crown immunity in *The Interpretation of Legislation in Canada*,[129] Pierre-André Côté describes immunity as "a state privilege that is little more than a vestige of absolutism".[130]

(4) David Jones & Anne de Villars

A call for reform from a source close to home is found in Jones & de Villars' *Principles of Administrative Law*.[131] Citing the British Columbia Law Reform Commission Report and the authorities quoted therein, the authors write:

> The presumption that the Crown is not affected by statutes has been enshrined in the federal and most provincial Interpretation Acts. The resultant preferred position of the Crown is incapable of justification in our society, and reform is long overdue.[132]

D. Criticism by the Courts

(1) Alberta Court of Appeal

The treatment given to the presumption of Crown immunity from statute by the Alberta Court of Appeal in a series of decisions in 1987-88 is dealt with at length in an earlier section of this report. The policy basis for the court's conclusions derives from a statement by Dickson J. in *R. v. Eldorado Nuclear Ltd.*[133] Our court quoted and adopted Mr. Justice

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129 (2d ed.) Cowansville (Quebec): Yvon Blais, 1991.

130 At 184.

131 Toronto: Carswell, 1985.

132 At 427.

133 *Supra*, note 123.

Dickson's view that it has become "less easy ... to understand why the Crown need be, or ought to be, in a position different from the subject".[134]

In *The Queen v. Govert Buys and Whitecourt Transport Ltd.*,[135] noting the comments of Street and others to like effect, the Court of Appeal expressed regret that the Limitation of Actions Act did not specifically abrogate the Crown's peculiar right. The court said:

> I ... find myself powerless to by-pass s. 14 of the Interpretation Act having concluded that a separate and distinct prerogative exists and would necessarily be affected by finding that the Crown is bound by the Limitation of Actions Act. To do so under these circumstances would devoid s. 14 of the Interpretation Act of any real meaning and of any realistic application. I can say no more than I have said; I too ... must await the intervention of the legislators as is the case in Quebec where, since 1963, the Crown is bound by provincial limitation legislation.[136]

(2) Supreme Court of Canada

AGT v. *CRTC*[137] is a recent decision of the Supreme Court of Canada on the subject of Crown immunity. The Supreme Court allowed the provincial Crown agent Alberta Government Telephones its claim of immunity under section 16 of the federal Interpretation Act in the particular circumstances before it. This decision has been read by some as resurrecting the principle of Crown immunity. However, looking past the result, the reasons reveal that the case is another example of current judicial scepticism about the continuing validity of the presumption. Though

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134 It was noted earlier that the Alberta court did not refer to the remainder of the paragraph from which it quoted, in which Dickson J. reluctantly deferred to the will of the legislature on the matter of Crown immunity. The court chose instead to adopt a line of reasoning by which it could avoid the plain words of the presumption, and reach a conclusion consistent with its view of appropriate policy. As discussed in Chapter 2, section B(2), it is respectfully suggested that this reasoning process was less than satisfactory.

135 *Supra*, note 82.

136 At 375-76.

137 [1989] 2 S.C.R. 225 (S.C.C.).

it did not apply them to the facts of the case, the majority reaffirmed a series of exceptions to the presumption, including one that it had itself earlier denied.[138] Further, at various points throughout its reasons, the majority questioned the legitimacy of the presumption. Though asserting that it was for the legislatures and not the courts to pass judgement upon it, the court did this very thing, indeed in the same breath. The following quotations illustrate the court's views.

The court first quoted from its own earlier decision in *Eldorado Nuclear*:

> It [the doctrine of Crown immunity] seems to conflict with basic notions of equality before the law. The more active the government becomes in activities that had once been considered the preserve of private persons, the less easy it is to understand why the Crown need be, or ought to be, in a position different from the subject. This Court is not entitled, however, to question the basic concept of Crown immunity, for Parliament has unequivocally adopted the premise that the Crown is prima facie immune. The Court must give effect to the statutory direction that the Crown is not bound unless it is "mentioned or referred to" in the enactment.[139]

Further on the same page the majority stated:

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138 The first exception was the one stated in section 16 itself — where the Crown is "mentioned or referred to" in the enactment. As to this exception the court resurrected the doctrine of "necessary implication" — that the Crown may be bound though not expressly mentioned where a clear intention to bind is manifest from the very terms of the statute or where the statute's purpose would be wholly frustrated if the Crown were not bound. (This doctrine had been doubted in some of the Supreme Court's own earlier judgments.) The second exception was the "benefit\burden" or "waiver" doctrine — that the Crown waives immunity from the burdens of a statute where it takes advantage of the statute's benefits. As to this exception the court imposed a requirement that there be a sufficient nexus between the benefit taken and the burden imposed that "the benefit must have been intended to be conditional upon compliance with the restriction". (This test was held not to have been met in the case.) The third exception accepted by the court was the doctrine that the Crown loses its immunity by acting beyond its statutory mandate. The court rejected the last exception put to it, the "commercial activities" exception, on the basis, among others, that it is impossible to draw a line between what is governmental and what is proprietary.

139 At 291.

> ... a fairly tight (sufficient nexus) test for the benefit/burden exception follows from the strict test for finding a legislative intention to bind the Crown. A broad benefit/burden test would be overly legislative in he face of the current formulation of s. 16. Regretfully perhaps, but undeniably, the statutory Crown immunity doctrine does not lend itself to imaginative exceptions to the doctrine, however much such exceptions may conform to our intuitive sense of fairness.

The court dealt specifically with whether there is a "commercial activities" exception to section 16. Though denying this exception (the only one put to it that it did not affirm), the court said:

> Why AGT or other Crown agencies undertaking business ventures in an ordinary commercial capacity ought to be immune from otherwise valid federal legislation is a question which only Parliament can explain.[140]

The court added that "assessment of the desirability of a commercial exception is for Parliament to make, if so inclined, as was the case with the State Immunity Act, 1982".[141] [This act provides that foreign states do not enjoy sovereign immunity in respect of commercial activity.] However, the court also noted the difficulty of trying to separate what is governmental from what is proprietary or purely commercial.

In the concluding statement of the majority judgment, the Supreme Court again reminded Parliament of its power to reverse the presumption. Indeed it seemed to be inviting Parliament to follow the lead of the provincial jurisdictions that have already done so. The court said:

> ... it is apparent that Parliament and the provinces have the constitutional competence to reverse the common law and current statutory presumption of immunity in favour of a statutory rule of interpretation binding the Crown to enactments except where otherwise therein

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140 At 298.

141 At 300.

> provided (see Interpretation Act, R.S.B.C. 1979, c. 206, s. 14; and Interpretation Act, S.P.E.I., 1981, c. 18, s. 14).[142]

Madame Justice Wilson, in dissent, was even stronger on the point. First, she drew the benefit/burden exception to immunity more broadly than had the majority: the Crown submits to legislation where it "has engaged in a deliberate and sustained course of conduct through which it has benefited from a particular provision or provisions of a statute".[143] In her view, this test had been met in the case before the court. Second, as to the "commercial activities" exception to immunity denied by the majority, she said that the rationale for such an exception in the international sphere obtains equally in the domestic sphere. Adding her voice to the majority in questioning the viability of the presumption in modern times, she stated:

> I have serious doubts that the doctrine of Crown immunity, developed at a time when the role of government was perceived as a very narrow one, was ever intended to protect the Crown when it acted, not in its special role qua Crown, but in competition with other commercial entities in the market place.[144]

E. Law Reform Bodies

(1) British Columbia Law Reform Commission

In its 1972 *Report on Civil Rights*,[145] the British Columbia Law Reform Commission based its decision to recommend reversal of the presumption on the following considerations:

> • the unfairness of the rule that the Crown is not bound by statutes to its prejudice, but may have the benefits of a statute[146]

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142 At 301.

143 At 304.

144 At 316.

145 *(Project No. 3), Part I - Legal Position of the Crown* (1972).

146 This was illustrated by the Crown's freedom from limitation legislation.

- the difficulty of determining when the presumption, whether common law or statutory, operates[147]

- the desirability of having a deliberate policy choice about whether the Crown should have immunity

- a number of perceived potential injustices as to particular matters.[148]

The Commission also considered the question of Crown immunity from Limitation of Actions legislation. In the Commission's view there was "no reason why the valid purposes served by limitation statutes should not

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147 This was illustrated as to the common law presumption by two conflicting cases, one an English decision in which the Crown was not presumed bound by the duty imposed upon landlords in the Housing Act, 1936, to keep premises reasonably fit for habitation, the other a B.C. case in which the Crown was held bound by necessary implication by company legislation requiring the return of funds to revived companies. (The latter ruling was based upon an uncommonly broad definition of "necessary implication".) The perceived difficulty with the Interpretation Act provision was that some cases have held that such provisions mean that only express words will bind the Crown, whereas others have viewed them as embracing the doctrine of necessary implication. While both these issues have now been settled by our Supreme Court, other equally troubling issues have arisen in their stead, for example, the scope of the "benefit\burden" exception to the presumption.

148 The potential for injustice was illustrated as follows: the Crown could argue that it was not bound by the Adoption Act or the Legitimacy Act, and that neither adoption, nor the consequence under the Legitimacy Act of the subsequent marriage of parents of a child born out of wedlock (ie., legitimation), could prevent an escheat to the Crown; the Crown could argue that it was not bound by either of these Acts and could therefore levy succession duties against the estate of a deceased who had been adopted or legitimized, on the basis that the beneficiaries were strangers rather than relatives; the Crown could argue that it was not bound by the Land Registry Act and thus could claim priority of payment by reference to priority of execution, rather than priority of registration as provided under the Act; the Crown could decline to observe legislation designed for the protection of the individual, such as the Human Rights Act, the Maternity Protection Act, and possibly the Contributory Negligence Act; the Crown was free to disregard municipal by-laws. The Commission stressed that it was not suggesting that the Crown was in fact routinely disobeying its own statutes or municipal by-laws, but rather that it was pointing out the potential for abuse. (As to the latter, however, the Commission did point to one case of a failed prosecution for breach of a municipal by-law prohibiting certain spraying operations, in which the B.C. Hydro and Power Authority relied on a provision in its constituting statute which exempted it from the effect of any other provincial statute).

apply with equal vigour to the crown".[149] (Limitations is one area in which Alberta courts have preserved Crown immunity, not on the basis of the Interpretation Act, but rather by virtue of the existence of a Crown prerogative — the rule that "time does not run against the King".[150])

(2) Ontario Law Reform Commission

(a) Research Report to the Commission by Mario Bouchard

In his report to the Commission entitled "The Presumption of Non-Applicability of Statutes to the Crown, a Comparative Study", Mario Bouchard reviewed several arguments for abandoning the presumption. Most of these arguments are canvassed in other parts of this report.[151] One argument raised in the Bouchard report that has not been dealt with here is under the title "Constitutional". This argument has two parts: first, Canada's legal system now rests on a constitutional document to which the submission of the Administration and Legislatures is a constitutional necessity; and second, section 15 of the Charter of Rights requires a measure of equality of treatment between the Administration and the individual. As to the Charter argument, the author conceded that this was largely speculative. (Charter litigation at the time the report was written was still in its infancy.)

In support of the Crown-individual equality argument, the author cited a successful challenge to the Crown's claim to rank first among creditors based on Charter section 15. The Ontario District Court held that "The Crown priority claim has an inevitable and drastic discriminatory effect on the applicant's rights and, if it is to be saved, the Crown must

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149 At 63. The Commission put forward its recommendations on this matter in a separate report on limitations law. See the *Report on Limitations, Part 2, General* (1974) at 94-96.

150 The Alberta Law Reform Institute has already dealt with this issue. In its *Report No. 55, Limitations* (December, 1989), the Institute recommended that limitations legislation should apply to the Crown. See the report's Model Limitations Act, section 2(3), at 56, *et seq.*

151 These include the following: that logic and simplicity require reversal; that any presumption ought to favour the party that is at a disadvantage; that exemptions should be the result of deliberate policy choices; that the presumption creates the potential for injustice; and that the judiciary has systematically limited the ambit of the presumption, sometimes at the expense of logic and principle.

justify it under section 1".[152] This case has since been overturned, on the basis that the Crown is not an "individual" under section 15, with whom a comparison can be made to determine a section 15 violation.[153] The author also cited a case holding that the requirement for a separate action in Federal Court to obtain remedies against the Crown contravenes section 15.[154] Again, the decision was overturned, this time by the Supreme Court of Canada. The Supreme Court agreed that in the circumstances of the case, the Crown was not an individual with whom a comparison could be made.[155]

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152 *Wright v. Attorney-General of Canada* (1986), 25 C.R.R. 259 (Ont. D.C.) at 270.

153 *Wright* v. *Canada (A.G.)* (1987), 36 C.R.R. 361 (Ont. Div. Ct.), citing *R.* v. *Stoddart* (1987), 32 C.R.R. 328 (Ont. C.A.). In the latter case Tarnopolsky J.A. also held, in the alternative, that an accused and the Crown were not similarly situated with respect to the purpose of the law). See also *Leighton* v. *Canada*, [1989] 1 F.C. 75 (T.D.). In the *Leighton* case the Charter challenge was to the Federal Court Act provision denying pre-judgment interest against the Crown. The Federal Court held that individuals are not guaranteed equality with the Crown, on the basis that the Crown is not an individual, and also because section 101 of the Constitution Act, 1867, pursuant to which Parliament enacted section 35 of the Federal Court Act (providing that interest shall not be awarded against the Crown) was of equal constitutional status with, and not subject to, section 15 of the Charter. See also *Ominayek* v. *Norcen Energy Resources* (1987), 83 A.R. 363 (Alta. Q.B.).

154 *Zutphen Bros. Construction Ltd.* v. *Dywidag Systems Intl.* (1987), 35 D.L.R. (4th) 433 (N.S.A.D.). This case was disapproved in the judgment of the Federal Court, Trial Division in the *Leighton* case, on the basis that the court in *Zutphen* was wrong in treating the exercise of Parliament's power under section 101 of the Constitution Act, 1867 as subject to section 15 of the Charter, and also wrong in holding that under section 15 an individual is guaranteed equality with, or enjoys legal rights on the same constitutional plane as, the Crown.

155 [1990] 1 S.C.R. 705. The court adopted the reasons on the Charter point that had been expressed by it in *Rudolf Wolff & Co. v. Canada*, [1990] 1 S.C.R. 695. It must be noted, though, that in the latter case the Supreme Court reserved for another occasion the question whether there might be circumstances in which a comparison could be made for the purpose of a section 15 argument between the Crown and private individuals. Cory J. said at 702:

> It is not necessary for the purpose of this case to consider ... [whether] the Crown can never be compared with individuals under s. 15(1) of the *Charter* in the context of any statute governing the relationship between the Crown and the subject in civil proceedings. There could conceivably be instances in which the Crown's activities are indistinguishable from those of any other litigant engaged in a commercial activity. It might be that in those circumstances a s. 15(1) comparison would be just and appropriate, but that is a matter for consideration on another occasion.

(This may be contrasted with the conclusion of the majority of the Supreme Court with respect to the "commercial exception" to the presumption of immunity in *AGT v. CRTC*. In the latter case the court denied this exception, in part on the basis that it would be difficult to draw a line between what Crown activity is

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(b) Report on Liability of the Crown

The Ontario Law Reform Commission released its *Report on the Liability of the Crown* in 1989. The report was based on the background research and discussion of policy arguments presented to it by Peter Hogg, Research Director of the Liability of the Crown Project. This is substantially the same as the material contained in Professor Hogg's recent text *Liability of the Crown*. Relying on these materials, the Commission adopted the position that the presumption of Crown immunity from statute ought to be reversed. It concluded:

> In the Commission's view, the immunity that is granted by the traditional presumption against the crown being bound by statute is far broader than is needed by an executive which controls the legislative branch; as such, this presumption conflicts with the basic constitutional assumption that the Crown should be under the law, and therefore should be reformed.[156]

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[155](...continued)
governmental and what is proprietary.)

The issue in the *Zutphen Bros.* and *Wolff* cases — regarding the choice of forum for suits against the federal Crown — has now been resolved by federal legislation amending the Federal Court Act (S.C. 1990, c. 8). The amendment permits individuals to sue the federal government in their home provinces and territories rather than only in the Federal Court. The amending legislation also resolves the issue concerning the awarding of pre-judgment interest against the Crown — the issue in the *Leighton* case. It provides for such awards.

For a discussion of whether the Crown's prerogative of priority in the collection of debts conflicts with section 15 of the Canadian Charter of Rights and Freedoms, see G. Chipeur, "The Royal Prerogative and Equality Rights: Can Medieval Classism Coexist with Section 15 of the Charter?" (1992) 30 Alta. L. Rev. 625. The author reviews the origins, nature and purpose of the royal prerogative and of the prerogative of priority of payment. He goes on to consider the recent challenges to the Crown prerogative based on the Charter, and the merit of the arguments and judicial pronouncements. He concludes that "The Crown prerogative of priority is not worth saving at the expense of the legal principles and moral values enshrined in the *Charter*." (At 668.)

[156] At 223.

(3) Canada Law Reform Commission — Working Paper No. 40

The Law Reform Commission of Canada's Working Paper 40, *The Legal Status of the Federal Administration*, is a conceptual work, reflecting on the nature of the Crown and its various aspects and functions. The Commission observed that for historical, legal and structural reasons, the Crown's traditional privileges and immunities attach to a large part of what it referred to as the federal Administration. In the Commission's opinion, these traditional privileges "are difficult to reconcile with the ideals of a society concerned about equality and democracy". In a context in which individuals are increasingly claiming rights and safeguards in their dealings with the Administration, many of the privileges seem to be anachronisms. The Commission asked: "Has it become necessary to initiate radical changes in order to dispose of what has become obsolete?"[157]

In the portions of the paper that dealt specifically with the immunity of the Crown from statutes, the Commission observed that immunity can have unfortunate results. To illustrate this the Commission cited two cases involving Eldorado Nuclear, a Crown corporation.[158] In the first of these the Ontario government tried unsuccessfully to make the corporation subject to environmental protection legislation. In the second, a decision considered earlier in this report, it was held that this corporation and Uranium Canada could not be prosecuted for infringing the Combines Investigation Act. The Commission commented that in these cases, "association with the legal status of the Crown has essentially given these public enterprises a distinct position capable of frustrating the will of the ... Government".[159] The Commission regarded the result in the latter case as odd: the Crown's immunity from a statute worked against it, causing it to fail in its attempt to make its own agents subject to the general rule of law.

The Commission noted further that given Canada's federal structure:

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157 At 2.

158 *R.* v. *Eldorado Nuclear Ltd.* (1982), 128 D.L.R. (3d) 82 (Ont. Div. Ct.); *R.* v. *Eldorado Nuclear Ltd. and Uranium Canada Ltd.*, [1983] 2 S.C.R. 551 (S.C.C.).

159 At 15.

> As it is above the law, each Crown, federal or provincial, or each agent of the Crown in right of Canada, in law falls outside the scope of a legislative rule which is supposed to apply to all; this amounts to making each one subject to a different system of law. ... The federal Administration is indeed "above the law," especially in relation to provincial regulation, which even further extends the scope of its extraordinary position.In this sense, certain commentators have been right to argue [TRANSLATION] "that in Canada we live under a system of partial rule of law, since the federal Government is not bound by provincial law" (Brun and Tremblay, 1982: 491).[160]

The Commission continued:

> What is worse, this immunity is directly contrary to the principle of equality under the law, as now established by section 15 of the *Canadian Charter of Rights and Freedoms*. It is therefore obviously necessary to move towards a solution which is more in accordance with the rule of law and the principle of equality, as these are now to be a fundamental part of Canadian public law. Undoubtedly, the problem of the application of provincial enactments to the federal authorities raises difficult questions of adjustment and is really a political one in many respects. However, this is not a sufficient reason to abandon the search for more appropriate solutions. If the federal Government is not subject to laws, whether provincial or federal, it is no exaggeration to say that such a situation is incompatible with the spirit of a liberal regime and the very idea of law. Even in the Continental tradition of administrative law, the Administration is far from having such extraordinary privileges, which suggests that the unacceptable nature of the existing situation should be further examined.[161]

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160 At 16.

161 At 16.

The Commission also raised the problems associated with identifying the bodies or agencies that are to have the privileges and immunities of the Crown:

> ... in some cases, the omissions of the legislator have not even made it possible to identify clearly and precisely the legal status of the organization in question. The courts have accordingly been obliged to fill in the sometimes deliberate omissions, and in so doing, develop a complex range of criteria for identification. ... These criteria have been criticised by academic writers, who argue that they are not consistently applied and so lead to contradictory solutions .... In any case, none of these criteria is sufficiently precise to allow a definite *a priori* classification of the organization in question. These uncertainties suggest that changes are desirable to ensure a minimum of stability and security in relations between the Administration and individuals.[162]

The Commission noted the recent efforts of the judiciary, including the Federal Court and the Supreme Court of Canada, to restrict the privileges and immunities of the Crown. After citing several cases,[163] the Commission commented:

> Although this new line of authority seems promising, it is best to avoid at the outset an overly passive approach that prejudges the direction in which judicial supervision will move. Assuming that matters continue on their present course, there will not be any substantial reassessment of existing privileges until after a long and laborious process. Not only does the time needed for such a process seem at odds with the urgency of reform in this area, but there is also

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162 At 19.

163 *Nova Scotia Government Employees Association* v. *The Civil Service Commission of Nova Scotia* [1981], 1 S.C.R. 211; *Bank of Montreal* v. *A.-G. Quebec*, [1979] 1 S.C.R. 565; *R.* v. *Ouellette*, [1980] 1 S.C.R. 568; *C.B.C.* v. *The Queen*, [1983] 1 S.C.R. 339; *Operation Dismantle* v. *The Queen*, [1983] 1 F.C. 429; [1983] 1 F.C. 745 (C.A.); decisions of courts of the provinces are cited at 58.

> the danger that it will eventually lead to piecemeal solutions instead of overall reform.[164]

The Commission thus concluded that change is required. In its view the direction for change should be toward greater accordance with the rule of law and the principle of equality.

However, the solution as the Commission saw it is not necessarily to subject the Administration to the system of private law. The Administration is an institution that has powers and obligations applicable to it alone. It has assumed functions and responsibilities which at present have no equivalent in the private sector. Accordingly it has special requirements. In the Commission's view, "it is essential for future reforms to take account of its [the Administration's] specific nature".[165]

To illustrate this approach the Commission referred to the issue of the tort liability of the Crown. It suggested that some of the concepts from the private law of tort — the concept of individual liability and that of fault — are inappropriate for providing adequate compensation to the victims of certain damage caused in the course of administrative activities. Under the former concept, damage must be shown to have been caused by the negligence of a particular person (in this context, a servant of the Crown). The Commission thought that this was "largely inappropriate to the complex and anonymous operations of the contemporary Administration".[166] The difficulty of establishing the identity of the employee who had committed the fault led the Commission to suggest that this concept ought to be replaced by the principle of direct liability by the Administration.[167]

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164 At 59.

165 At 61.

166 At 70.

167 The Commission elaborated as follows: "It would ... be advisable to recognize that it may not be possible to separate a fault physically from the activity of a department, unless the officer or officers responsible for the damaging act can be definitely identified. In this sense, fault would be a failure to perform the obligations of the department: delay, failure of performance, misinformation ...; abstention, a deficiency in organization and operations, an error in material operations, the adoption of an illegal decision, illicit actions, the fault of incompetence. It should be weighed objectively with reference to the normal operations of a modern Administration. If it is the department as a whole which has been in error, there is little point in trying to identify the employee responsible by name. .... the personal

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The Commission also noted that many administrative activities, for example public works, are overwhelmingly larger than private undertakings. Citing examples such as oil pipelines, hydro-electric dams, bridges and nuclear reactors, it observed that "there are fortuitous risks inherent in the normal operations of any modern Administration". It might be better to recognize that the state engages in activities that create exceptional risks. More use of the idea of no-fault liability based on the concept of risk might be considered, in place of the present fault-based system.[168]

In light of its view that the requirements of the Administration are different from those of private persons, the Commission may not have favoured abolition or reversal of the presumption of immunity from statutes without more. It might have preferred to put in place laws to replace immunity — more consistent with the principle of equality, but taking into account the Administration's peculiar status and functions. It is clear, however, that the reforms the Commission would have promoted would improve the position of the individual relative to the Administration. It is also clear that the Commission opposed the continued existence of the presumption of immunity:

> It can thus be seen that the status of the Administration must be analyzed in a resolutely modern sense, in which any exception should be supported by reasons, not taken for granted.[169]

F. Recent Developments in Other Jurisdictions

The strong policy arguments against a presumption of immunity have recently led the High Court of Australia to reconsider its approach to

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[167](...continued)
liability of an officer should be limited to cases in which he acts beyond the scope of his duties or, if he has not in fact exceeded the limits of his authority, where he has been clearly and intentionally in breach of the duties of his position." (At 70-71).

[168] The Commission also discussed another area in which subjection of the Crown to private law would be a less than satisfactory resolution of existing inequities — the execution of judgments against the Crown. The Commission suggested that there is a need for some innovative methods for compelling execution. See the discussion at 76.

[169] At 51.

interpretation of the presumption. In a 1990 decision, *Bropho v. State of Western Australia*[170] the court said that it was wrong to rigidly apply the presumption as an inflexible principle rather than as an aid to statutory construction. It allowed a challenge to a claim of immunity to succeed even though the statute in question neither expressly mentioned the Crown, nor could it be said that the Crown was bound by necessary implication (in the sense that an intention to bind it was "manifest from the very terms" of the statute, or that the statute's purpose would otherwise be "wholly frustrated"). The court said that it was sufficient that an intention to bind the Crown "can be discerned from all the relevant circumstances".[171] In coming to its conclusion the court made the following statement about the continuing propriety of the strict rule (that there is a blanket immunity except where the Crown is bound by express statement or necessary implication):

> [T]he historical considerations which give rise to a presumption that the legislature would not have intended that a statute bind the Crown are largely inapplicable to conditions in this country where the activities of the executive government reach into almost all aspects of commercial, industrial and development endeavour and where it is a commonplace for governmental, commercial, industrial and developmental instrumentalities and their servants and agents, which are covered by the shield of the Crown either by reason of their character as such or by reason of specific statutory provision to that effect, to compete and have commercial dealings on the same basis as private enterprise.[172]

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170 (1990), 64 A.L.J.R. 374.

171 At 383.

172 At 379. For a discussion of this development see David Kinley, "Crown Immunity, a Lesson from Australia", [1990] 53 M.L.R. 819, and Susan Kneebone, "The Crown's Presumptive Immunity from Statute: New Light in Australia" [1991] P.L. 361. In contrast, the House of Lords has recently re-affirmed the doctrine in its strict form (overturning an attempt by the First Division in Scotland to limit the application of the rule to cases where pre-existing rights and interests of the Crown might be prejudiced by the application of legislation). See *Lord Advocate v. Dumbarton District Council*, [1989] 3 W.L.R. 1346. For a discussion and criticism of the latter decision see J. Wolffe, "Crown Immunity from Legislative Obligations", [1990] P.L. 14.

G. Summary of Policy Arguments

(1) Arguments for reversal

The various policy arguments put forward in the preceding pages can be summarized as follows:

1) ***No foundation for the rule in precedent.*** The presumption of Crown immunity from all statutes derives from misunderstanding and misapplication of precedent. The early precedents did provide authority for a presumption of immunity, but only from a particular class of statutes — those that would detract from prerogatives or rights peculiar to the Crown. A different rule originally applied for statutes that would affect the Crown and subject indifferently. For these, the general purpose and intent of the statute was to be derived from its language, objects, and consequences. If this showed a legislative intention to bind the Crown, it was to be bound. The existing rule — the application to all statutes of a presumption that there was no legislative intent to bind the Crown — resulted from a distortion of precedent.

2) ***Reasons for the rule not considered.*** The presumption of Crown immunity was extended to all statutes without regard to whether this was necessary or justified. The key cases, in particular the *Bombay* case, contain no discussion of the policy reasons for the rule.

3) ***No reason for the rule.*** In the narrow class of statutes the presumption had some justification. Originally, the rule secured the King's personal prerogatives. Even now the narrower application of the presumption finds some justification by reference to the rule of interpretation that general words in a statute should not affect particular rights, such as prerogative rights.

However, there is no justification for the broader application of the presumption. This point has been expressed in many ways: there is no reason why the Crown should generally be free to ignore the rules that have been enacted for the regulation of society; no reason why the state should not be accountable in wide measure to the law; no reason why the social policy of statutes, designed as they are to suit human ends, should not prevail.

4) ***Role of the Crown has changed.*** The rule arose at a time when the Crown was acting in a much narrower capacity. The role of the Crown has changed so as to increase the opportunity for Crown immunity to work to the prejudice of subjects. The scope of Crown activities in areas which were formerly the preserve of private persons, in particular in commercial ventures, has increased greatly. These matters are generally controlled by statute. There has also been a proliferation of regulations governing such activities. The Crown is thus often in competition with private persons, but with the advantage of statutory immunity. Private persons may also be at a disadvantage by virtue of their relationship with the Crown. Further, many of the modern regulations have a public purpose, for example, planning laws, building codes, speed limits. To the extent the Crown ignores such laws, their public purpose is frustrated.

5) ***Reversal would not eliminate immunity, but only ensure that it is given only when needed.*** At present Crown immunity exists by default. It should be given only when a considered judgment has been made that the Crown needs it to govern effectively.

6) ***Presumption gives rise to needless complexity and uncertainty.*** The courts have developed several doctrines to avoid the effect of the presumption. These result in a complex and inconsistent body of law, of uncertain application. Reversal of the presumption would simplify the law.

7) ***Injustices in particular cases.*** The presumption gives rise to a variety of actual and potential injustices.

8) ***Presumption conflicts with notions of fairness and equality.*** Both the Supreme Court of Canada and the Law Reform Commission of Canada have said that the presumption contravenes basic notions of justice and equality. This point has sometimes been tied to the Charter of Rights. It is not yet clear whether Charter section 15 could be relied on to defeat the presumption before the courts in appropriate circumstances.[173] Either

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[173] In *AGT v. CRTC* (*supra*, note 3) the Supreme Court of Canada said that the presumption of Crown immunity from statute contravenes our basic notions of equality before the law, and our intuitive sense of fairness. However, this statement, though made in the Charter era, was made without referring to the Charter (possibly because section 15 does not apply to corporations). The Supreme

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way, the Charter can still form the basis for arguing for legislative reform. It constitutionally enshrines the principle of equality and places a great emphasis on the individual. It is inconsistent in the Charter era to preserve a presumption that conflicts with these principles. Further, the argument for reform need not rely on the Charter: as the Supreme Court has said, the principles of fairness and equality are fundamental quite apart from the Charter.

(2) Arguments for retention

While there are arguments for Crown immunity from statute in particular situations,[174] there seems to be nothing in favour of preserving the **presumption** of immunity. All that can be said is that whenever the Crown acts, it does so with a public purpose, or for the general good. It does not follow that to pursue these public goals effectively, the Crown as a matter of course needs a special advantage as against subjects pursuing the same goals for private reasons, or that it needs to be free from the constraints or obligations imposed by statute for the general good. Even accepting that the Administration may need to be treated differently by virtue of its special functions (as suggested in the Law Reform Commission of Canada's Working Paper 40), whatever special powers, privileges or immunities are required can be conferred as they are shown to be warranted.

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[173](...continued)
Court has more than once denied section 15 challenges to legislation that discriminates between the Crown and private individuals in a manner adverse to the latter, on the basis that in the particular circumstances, the Crown was not an individual with whom a section 15 comparison could be made. (See *Rudolf Wolff & Co. v. Canada*, [1990] 1 S.C.R. 695 (S.C.C.); *Dywidag Systems International, Canada Ltd. v. Zutphen Brothers Construction Ltd.*, [1990] 1 S.C.R. 705 (S.C.C.).) However, the court has left open the question whether there might be circumstances in which a comparison could be made for the purpose of a section 15 argument between the Crown and private individuals. It cited as a possible example situations in which the Crown and the private persons were engaging in commercial endeavours. (This must be compared to concerns noted by the majority in the *AGT* case that it would be difficult to draw a line between Crown activity of a governmental versus proprietary nature. See Appendix B.)

[174] Some of these are discussed in Chapter 5.

H. Applicability of the Policy Arguments in Alberta

All the policy arguments for reversing the presumption that have been reviewed apply in Alberta, in some cases with greater force than in other jurisdictions.

(1) Types of statutes to which immunity applies

The statutory immunity provisions of some jurisdictions arguably limit the presumption to statutes that would affect or derogate from Crown prerogatives.[175] Our own provision is in broader terms. Like the amended federal section 16, on its face it applies to all statutes:

> No enactment is binding on Her Majesty or affects Her Majesty's rights or prerogatives in any manner, unless the enactment expressly states that it binds Her Majesty.

The criticism of the presumption that its current breadth arose out of an unwarranted extension of a much narrower original rule (that protected the King's prerogatives) therefore applies with greater force to the Alberta provision than to some of the others. The same is true of the point that the breadth of the presumption has no sound policy base. It is true that in Alberta the presumption is not as broad as its words suggest. The Court of Appeal has refused to accord any significance to the opening words of the provision, "No enactment is binding on Her Majesty"; it has insisted that even under this wording only statutes that would create duties or obligations in the Crown, or would interfere with accrued Crown rights, or the prerogative, do not bind the Crown. If the commentators reviewed above

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[175] This was true of the pre-1967 federal Interpretation Act, which stated: "No provision or enactment in any Act affects, in any manner whatsoever, the rights of Her Majesty, Her Heirs or Successors, unless it is expressly stated therein that Her Majesty is bound thereby". This has been interpreted as immunizing the Crown only against statutes which would derogate from accrued rights (see *Dominion Building Corp. Ltd.* v. *R.*, [1933] A.C. 533; *R.* v. *Board of Transport Commissioners*, [1968] S.C.R. 118, at 123), or prerogatives (see *Gartland S.S. Co.* v. *R.*, [1960] S.C.R. 315, per Locke J., who said that "the purpose of s. 16 of the Interpretation Act ... is, in my opinion, to prevent the infringement of prerogative rights of the crown other than by express enactment in which the Sovereign is named" (at 400). See also the Interpretation Acts of Ontario, Saskatchewan, New Brunswick and Quebec. Some commentators have said that an immunity presumption that is limited in this way has some justification. See, for example, Chapter 3, section C(1)(a).

are right, this conclusion is sound from the standpoint of policy. However, as has been argued, it relies on inadequate precedent and conflicts with subsequent rulings of the Supreme Court of Canada. Legislative amendment seems a better route to the same desirable goal of doing away with Crown immunity where there is no justification for it.

(2) Uncertainty in the law

The argument that the exceptions that have been carved out of the presumption have left the law in a confused and uncertain state also applies with greater force here than elsewhere.

It must be observed that leave to appeal from all but one of the 1988 Court of Appeal judgments that dealt with Crown immunity was refused by the Supreme Court of Canada. (The single exception, *Canada (Director of Soldier Settlement) v. Snider Estate*,[176] was decided by the Supreme Court on another ground.) However, the law in Alberta is by no means settled. As discussed at length in an earlier section, the Supreme Court decided the Crown immunity question in the *Sparling* case on the basis of a considerably narrower exception to the presumption, and it approved this reasoning in *AGT* v. *CRTC*. This "benefit\burden" exception as the Supreme Court defined it arguably conflicts with and overrides the broad "Crown as litigant" exception asserted by the Alberta Court of Appeal. It has been argued, correctly it is suggested, that the denial of the leave applications cannot be taken as acceptance by the Supreme Court of the soundness of the reasoning in the Alberta judgments.[177]

Some of the Alberta Court of Appeal judgments decided after *Sparling* and *AGT* cite these decisions. However, they do not overtly acknowledge any inconsistency between the court's own conclusions in the *Ciereszko* line of cases, and the Supreme Court's statement of a much

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176 [1991] 2 S.C.R. 481.

177 See E. Mirth, "Case Comment: Alta. Govt. Tel. v. C.R.T.C.", (1989), 68 Alta. L.R. (2d) 83, at 83. The author argues that by reference to the *AGT* case, the Alberta Court of Appeal's decisions are no longer valid. As to the denial of leave to appeal, he states: "[r]efusal by the Supreme Court to grant leave does not necessarily indicate approval of the specific decisions below, and perceived lack of national importance or the existence of other cases already dealing with issues before the court, inter alia, may be the basis upon which the court declines to hear specific matters".

narrower exception to the presumption of immunity.[178] Conceivably, though, the post-*Sparling* cases might be seen as a retreat by our courts from their earlier outright denial of Crown immunity in the face of the presumption.

The result of these recent developments is that the law in Alberta is in as confused a state as ever, if not more so. If uncertainty is an important reason for reform, reform is clearly called for in this jurisdiction.

(3) Inconsistency between statute and case law

A final argument for reversal of the presumption is that in this jurisdiction, more than in any other, the courts have created exceptions to the statutory rule which leave it little scope. This is so even though our provision is worded so as to potentially have a very broad meaning. Reversal of the presumption would achieve greater conformity between statute and case law.

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[178] See Chapter 2, section E for a discussion of the post-*Sparling* and -*AGT* cases.

CHAPTER 4
REVERSAL OF THE PRESUMPTION IN OTHER JURISDICTIONS

Following a recommendation by the Law Reform Commission of British Columbia in 1972, a provision in the B.C. Interpretation Act parallel to our section 14 was amended in 1974, reversing the presumption as follows:

> 13. Unless an enactment otherwise specifically provides, every Act, and every enactment made thereunder is binding upon Her Majesty.

The provision was subsequently amended to preserve immunity for the Crown in its use and development of land. The provision now reads:

> 14. (1) Unless it specifically provides otherwise, an enactment is binding on Her Majesty.
>
> (2) An enactment that would, except for this section, bind or affect the Crown in the use and development of land, or the planning, construction, alteration, servicing, maintenance, or use of improvements, defined in the *Assessment Act*, does not bind or affect the Crown.

A similar provision, though with the important difference that it was to operate only in respect of future statutes, was enacted in a new Interpretation Act in Prince Edward Island in 1981, as follows:

> 14. (1) Unless an Act otherwise specifically provides, every Act and every regulation made thereunder, is binding on Her Majesty.
>
> (2) This section applies only to Acts enacted after this Act comes into force.

We requested information about the operation of the reversed presumption from the offices of legislative counsel in these two jurisdictions.

In neither case had any current problem been brought to counsels' attention for resolution. Counsel in Prince Edward Island did note that the amendments that have been made to statutes since the presumption was

reversed bind the Crown, while parent statutes do not. At the time of consultation, the courts had not addressed this "limping application" problem.

According to the information provided, neither jurisdiction has a standard procedure in the drafting process for raising the question of whether the Crown should be exempted from new legislation.[179]

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[179] In British Columbia, exemption from the Company Act is commonly included in legislation that creates or continues Crown corporations. This exception is usually accompanied by a provision that allows the Lieutenant Governor in Council to specify that parts of the Company Act do apply. (See, for example, section 36 of the Development Corporation Act, R.S.B.C.) In Alberta, provincial corporations (those whose directors are appointed by legislation or by the Crown, or whose shares are owned by or held in trust for the Crown) are either incorporated under the Business Corporations Act, R.S.A. 1980, c. B-15, or they are established by a statute. The former are subject to the Business Corporations Act. The latter are governed by the statute creating them. In some cases the latter statutes provide that the Business Corporations Act applies, except where there is a conflict between the two acts. (See, for example, the Alberta Government Telephones Reorganization Act, S.A. 1990, c. A-23.5. Section 28 makes the Business Corporations Act apply to the corporation created under the Act, and to the Telephone Company, except to the extent of conflicts between the two statutes.) If the presumption of immunity were reversed, it would be necessary to consider, with respect to those corporations that do not already deal with the application of the Business Corporations Act, whether the provisions of the Act that thereby become applicable, if any, should apply.

CHAPTER 5
SURVEY OF STATUTES FROM WHICH IMMUNITY IS CLAIMED, AND POLICY JUSTIFICATIONS FOR THE CLAIMS

A. Introduction

This section identifies the role that Crown immunity plays in practice. It surveys the provincial statutory provisions from which the Crowns of the various provinces have claimed immunity before the courts, relying on provisions like our section 14, over the last decade. Because the Crown may rely on immunity from a particular legislative provision without the matter ever being litigated, the survey is supplemented by information from the Alberta Crown as to some of the ways in which our own provincial departments and agencies routinely rely on the presumption. By identifying what role Crown immunity plays, the survey will give a more complete understanding of what effect reversal of the presumption would have.

This section also deals with the policy justifications for or against immunity from the particular statutes identified. The views are those of Crown officials, judges and academic commentators. The review should thus help to identify statutory provisions from which it is desirable to preserve Crown immunity.

B. Issues

(1) Crown as creditor: rights and priorities

(a) The law

Cases involving the Crown as creditor have been among the most common of those in which the Crown, both federal and provincial, has claimed immunity from legislation. The statutory provisions from which immunity has been claimed include the following: the provisions of exemptions statutes; the statutory abolition of priorities among execution creditors; provincial legislation that gives certain aspects of the provincial Crown priority for particular debts such as workers' compensation assessments; and in Alberta, from the Law of Property Act provision that bars suits on a covenant to pay given in a mortgage.

(i) Exemptions legislation

Does exemptions legislation preclude the Crown, as much as other creditors, from resorting to statutorily-exempt property to satisfy its debt-related claims?

Three Saskatchewan cases dealt with whether the Crown is bound by the Saskatchewan Exemptions Act. In the first, *Norfolk Trust Co. v. Hardy and Hardy*,[180] the Saskatchewan Court of Queen's Bench held that both the provincial and federal Crowns were bound. As to the provincial Crown, the court applied the doctrine of necessary implication, ruling that the purpose of the Act would be wholly frustrated if the Crown were not bound. The federal Crown was held subject to the provincial statute by virtue of federal legislation: section 56(3) of the Federal Court Act was said to adopt the Exemptions Act. Accordingly, neither Crown, federal nor provincial, was held to be entitled to a forfeited deposit on a foreclosure.[181]

In the two cases following, the Saskatchewan Court of Queen's Bench reversed itself on the question of whether the doctrine of necessary implication subsists. In each case the court observed that the *Norfolk* decision was at variance with an earlier Supreme Court of Canada ruling. In *R. v. Eldorado Nuclear Ltd.*[182] the Supreme Court had held that the statutory presumption removes the necessary implication exception. Applying this ruling, the Saskatchewan court held in both *Wilkinson v. Agricultural Credit Corp. of Sask.*,[183] and *Wanhella and McFall v. Agricultural Credit Corp. of Sask.*[184] that the Crown is not bound by provincial legislation in the absence of an express provision. As the Exemptions Act did not expressly bind the Crown, it did not apply to the Crown corporation. The result in each case was that the corporation was held entitled to the proceeds from property exempt under the Act, in one

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180 [1984] 5 W.W.R. 86 (Q.B.).

181 The deposit was exempt from seizure as part of the proceeds of a forced sale.

182 [1983] 2 S.C.R. 551. The Supreme Court has since reversed itself on this point. In *AGT v. CRTC*, [1989] 2 S.C.R. 225, it restored the "necessary implication" exception to the presumption of immunity.

183 [1987] 4 W.W.R. 713 (Q.B.).

184 (1988), 68 Sask. R. 146 (Q.B.).

case from a sale of hogs, and in the other from the interest in a mobile home and related chattels.

In one 1970 Alberta case dealing with this issue, *Straka* v. *Straka*,[185] the Exemptions Act was held inapplicable to the provincial Crown. The Crown was allowed to satisfy a claim, arising out of a bail forfeiture, from the sale of a house occupied by the debtor that was otherwise exempt under the Act.

The Alberta Department of Health relies on its immunity from the Exemptions Act in seeking orders for removal and sale to enforce debts for unpaid health care premiums.

(ii) The Crown as execution creditor

The Crown as unsecured execution creditor may claim priority of payment on two related grounds: first, that it is immune from statute; and second, that it has a prerogative of prior payment over other creditors of equal degree. Provincial execution creditors' legislation typically provides that creditors of equal degree share ratably in the proceeds of execution. Where the Crown holds a writ of execution, ratable sharing can defeat part of the Crown's claim. In such cases the Crown may rely on the legislated procedures that make the proceeds of execution available for sharing, yet deny that it is to be treated like other creditors holding writs — that it is immune from the order of priority set out in the statute. To put the matter another way, the Crown may claim to be entitled to its prerogative of prior payment in satisfying its debt under the statute.

There are many examples of cases in which the courts have acceded to such claims. In a New Brunswick case, *Provincial Bank of Canada and Golden Eagle Canada Limited v. Daigle*,[186] the court held that the scheme of the provincial Creditor's Relief Act, under which there was no priority among execution creditors, did not affect the Crown's prerogative of prior payment. Both the provincial and federal Crown were given priority over other creditors who had filed writs under the Act. The Ontario Divisional

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185 (1970), 73 W.W.R. 759 (Alta T.D.).

186 (1980), 31 N.B.R. (2d) 236 (Q.B.).

Court has reached a similar result. In *Re Marten*,[187] it held that though the Creditors' Relief Act governed all writs, including that of the Crown, there was nothing in the Act to abrogate or limit Crown prerogative, federal or provincial. The Crown was given priority in its competition with other creditors of equal degree.[188] Saskatchewan courts have come to a similar conclusion on this point. In *Re Ile A La Crosse Native Indust.*,[189] the court held that the Creditors' Relief Act did not interfere with the royal prerogative. Two more recent judgments from Saskatchewan affirm that the Crown (the Agricultural Credit Corporation) retains its priority over other creditors of equal degree while taking execution under a statute that eliminates priorities among creditors: *Farley v. Badley*[190] and *Agric. Credit Corp. v. Kozak*.[191]

The Crown in Alberta has also tried to assert its prerogative to be paid before other execution creditors. However, our courts have been less receptive, finding various ways to deny the claim.

An early device to defeat Crown priority was the "commercial transactions" exception to the prerogative. In *Regina v. Workmen's Compensation Board*,[192] Buchanan C.J.D.C. held that the Crown prerogative did not operate where the Crown debt arose out of an ordinary business transaction. The idea of a "commercial exception" to the immunity

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187 (1981), 34 O.R. (2d) 399 (Ont. Div. Ct.).

188 Another Ontario judgment is of interest because it concerns a challenge to a claim of priority by the federal Crown, based on section 15 of the Charter of Rights. In *Wright v. Canada (A.G.)* (1987), 36 C.R.R. 361, Revenue Canada succeeded in its claim to be paid in priority to other execution creditors under the Ontario Creditors' Relief Act. The Ontario Divisional Court rejected the argument that the Crown's assertion of its prerogative should fail because it offends the section 15 equality rights of the applicant (a spouse of the debtor whose claim was for arrears under a support order). The majority said that the Crown is not an individual with whom a comparison for the purposes of section 15 can be made. However, in a concurring judgment, Smith J. raised the possibility that in other circumstances, such as where the Crown is engaged in ordinary civil litigation, section 15 could conceivably be held applicable.

189 [1983] 6 W.W.R. 565 (Q.B.).

190 [1990] 3 W.W.R. 676 (Q.B.).

191 (1991), 91 Sask. R. 277 (Q.B.).

192 (1963), 39 W.W.R. 291 (Alta. D.C.).

presumption has been revived from time to time. It was rejected recently by the majority of the Supreme Court of Canada in *AGT v. CRTC*.[193]

However, another route to the same result was created by the Alberta Court of Appeal in *Royal Bank v. Black & White Developments Ltd. and A.M.H.C.*[194] In this case, the court concluded that the Crown was to be paid ratably with other execution creditors despite its prerogative of prior payment. One element in this conclusion was the now well-recognized "benefit\burden" exception to Crown immunity. The court said that "by its election to seek its remedy as a common law person under the general law by ordinary action in the courts and to take execution pursuant thereto"[195] the Crown bound itself to the provisions of the Execution Creditors Act. A second element was that the Act had abolished all priorities (except certain legislated ones) among execution creditors. The Crown having bound itself, the Act must be applied to it. For this purpose, the abolition of priorities among execution creditors included the abolition of the Crown's prerogative. Accordingly, the Crown was to be treated like an ordinary creditor. Mr. Justice Belzil said:

> When the Crown elected to be bound by the Execution Creditors Act, it accepted the provision of the Act eliminating all priorities, **including its own** [emphasis added].[196]

This conclusion is contrary to that in the cases just surveyed. In those cases, the Crown had taken execution under parallel legislation, yet

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193 *Supra*, note 3. However, in *Rudolph Wolff & Co. v. Canada*, [1990] 1 S.C.R. 695 the Supreme Court left open the question of whether in appropriate circumstances a challenge to legislation that discriminated between the Crown and subject in a manner adverse to the latter could be based on Charter section 15. The court cited as a possible example of appropriate circumstances those in which the Crown acts in a commercial capacity. The *AGT* case aside, could section 15 be relied on to argue that the presumption must be read down where it has a discriminatory effect as between the Crown acting in a commercial capacity and a subject? (See also the concurring judgment of Smith J. in *Wright v. Canada*, discussed *supra*, at note 188.)

194 (1988), 60 Alta. L.R. (2d) 31 (C.A.).

195 At 35.

196 At 38. Mr. Justice Belzil also suggested that the Crown might have retained its prerogative had it proceeded by way of the prerogative remedy of the writ of extent.

retained its prerogative; though it had submitted to the legislation, the Crown was still treated like the Crown. In some of these cases, the courts specifically rejected the contention that in taking the benefit of the statutory right to share in the proceeds divisible among creditors, the Crown accepted the burdens of ratable distribution.[197] The novel aspect of our court's conclusion was that the Crown's submission to a statute is a waiver of the prerogative, or a waiver of immunity from provisions that derogate from the prerogative. (The opposing view is that even though it takes the benefit of a statute, the Crown waives immunity only from provisions that do not derogate from the prerogative.) With respect, though the conclusion may be attractive as a matter of policy, the authorities the court relied on do not support it.[198]

The *Black & White* decision has been limited in scope by our Court of Queen's Bench. In *Montreal Trust Co. v. Tottrup*,[199] Mr. Justice Cooke acknowledged the ruling in *Black & White* that the Crown waived its prerogative by its choice of remedies, but restricted it to cases involving commercial debts. He held that where the federal Crown seeks to enforce a historically-recognized debt of Crown taxes (in contrast to a commercial debt such as that in the *Black & White* case) it may use the ordinary writ of execution and still retain its prerogative. Only in cases of commercial (rather than governmental) debts need the Crown resort to its special

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197 See, for example, *Re Marten* (1981), 34 O.R. (2d) 399 (Div. Ct.).

198 Mr. Justice Belzil declared at 35 that:

> It was a fundamental and ancient principle of the common law that when the King came into the common law courts as a litigant, he came in his capacity as a common law person and left his prerogative guns at the door; with a few possible exceptions such as those pertaining to estoppel and laches, he was subject to the laws applicable between subject and subject.

A number of older authorities were cited in support of this proposition. These authorities say only that the Crown may chose its own forum, and may waive its prerogative **remedies** and resort to the usual forms of action. They do not support the view that in so coming into the common law courts, the Crown abandons its prerogative **rights**. See the comments of the Saskatchewan Court of Queen's Bench in *Farley v. Badley*, [1990] 3 W.W.R. 676, at 682, where Armstrong J. reviewed these authorities and concluded:

> With respect, I see nothing in the above quotations from Chitty and Halsbury that impinges on the Crown's prerogative of priority that was at issue in the *Royal Bank* case and is the issue in the present case. How the Crown may proceed is one thing. Where the Crown stands in relation to other creditors is another, regardless of procedure.

199 (1990), 82 Alta. L.R. (2d) 340 (Q.B.).

prerogative remedy (the writ of extent) to keep its prerogative.[200] Presumably the same reasoning would apply to debts of the provincial Crown where it was engaged in traditional governmental functions.

(iii) The Crown as secured creditor and competing statutory liens

Some legislation gives priority even over secured claims for debts owed to particular creditors (often Crown creditors). For example a statute may give such priority for unpaid assessments made by the Workers' Compensation Board, or for orders respecting unpaid wages made by the Director of Employment Standards. Where the Crown is a secured creditor, it may claim to be immune from such statutes in order to realize on its security in preference to the statutory priority. In such cases, the contest may be between two aspects of the Crown, sometimes between the federal and provincial Crowns.

In *City of Regina v. Sask. Economic Development Corp.*,[201] the statutory priority was created by the Urban Municipalities Act. This statute gave priority to personal property under seizure to the City of Regina for claims for unpaid business taxes. The issue was whether the act applied to a Crown corporation. The Court of Queen's Bench held that the scheme of priorities under the legislation did not bind the Crown corporation. Accordingly its claim arising out of default of its security agreement had priority over the city's statutory preference.

Contests between a secured claim by the federal Crown and a statutory priority in the provincial Crown might be resolved on the basis of the doctrine of intergovernmental immunity rather than the presumption of Crown immunity. The former doctrine deals with whether and to what extent competent provincial legislation can bind the federal Crown. The Supreme Court of Canada has held that provincial legislation cannot abridge federal Crown privileges, nor can it embrace the federal Crown in

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200 The court did not acknowledge any inconsistency between this ruling and the denial of a commercial exception to the presumption of immunity in *AGT v. CRTC*. See the discussion at *supra*, note 193, and in Appendix B.

201 (1986), 47 Sask. R. 140 (Q.B.).

compulsory regulations.[202] In *Federal Business Development Bank v. Hillcrest Motor Inn*,[203] the B.C. Court of Appeal held that the secured claim of the F.B.D.B. took precedence over the unpaid assessments of the Workers' Compensation Board (which had a statutory priority over all liens and charges), because the Workers' Compensation Act did not apply to the federal Crown. The court cited in support the proposition from *Pac. West. Airlines*[204] that "... a Provincial Legislature cannot in the valid exercise of its legislative power, embrace the Crown in right of Canada in any compulsory regulation".[205]

(iv) The Crown claiming immunity from the statutory bar to claims for mortgage deficiencies

Another issue involving the Crown as creditor that has arisen in Alberta concerns the statutory bar to suits for deficiencies on a mortgage in section 41(1) of the Law of Property Act. Does the act bar the Crown, as it does other mortgage lenders, from suing on a covenant to pay?

The Crown's ability to sue for the deficiency on a mortgage has been dealt with extensively in earlier chapters. The position under the present

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202 See *Gauthier v. The King* (1918), 56 S.C.R. 176; *Re Pac. West. Airlines Ltd.; R. v. Can. Tpt. Comm.*, [1978] 1 S.C.R. 61. However, there are conflicting judgments, and the status of the doctrine continues to be a matter of debate. See, for example, the discussion in Lorden, P.L., *Crown Law* (Toronto: Butterworths, 1991) at 133-36.

203 [1988] 5 W.W.R. 466 (C.A.).

204 *Supra*, note 202.

205 At 72-73. The presumption of immunity would not have applied in this case because the presumption had been reversed in British Columbia. There are cases in which the federal Crown has succeeded in asserting priority for its secured debts, as against statutory preferences in provincial Crown bodies, on the basis that the provincial statutory presumption makes it immune from the statutes creating the latter preferences. These cases include *Re LeBlanc Mollins and Leblanc, Province of New Brunswick, and Federal Business Dev. Bank* (1984), 54 N.B.R. (2d) 329 (N.B.C.A.); *Workers' Compensation Board of Nova Scotia and the Attorney General of Nova Scotia v. Federal Business Development Bank* (1984), 63 N.S.R. (2d) 197 (N.S.A.D.); *Workers' Compensation Board of New Brunswick v. Federal Business Development Bank; Attorney General of New Brunswick* (1985), 15 Admin. L.R. 29 (N.B.C.A.). The first of these cases was also decided on the basis that it was constitutionally impermissible for the province to make federal public property (the proceeds of the sale of a debtor's property which had been sold on default of a mortgage and chattel mortgage held by the Federal Business Development Bank) the subject of a lien for unpaid taxes. The court said that legislative power over federal public property is vested exclusively in Parliament.

law lacks certainty. Some cases hold that the Crown, both federal and provincial, is barred by the Law of Property Act like any other creditor, on the basis that in coming to court, it waives its immunity from statute. However, later cases have put the validity of these rulings in question, and a recent case has held the Crown immune from the Act.[206]

(b) The policy

The Crown's entitlement to priority of payment, whether in the form of the common law prerogative, or embodied in statutory preferences, has, like Crown immunity from statute, been challenged as indefensible in modern times. This topic was thoroughly reviewed by the Law Reform Commission of British Columbia in 1982 in a report entitled: *The Crown as Creditor: Priorities and Privileges*. The Commission first examined the history and scope of the common law prerogative. Then it turned to the statutes, reviewing on the one hand those that derogate from the Crown's common law priority, and on the other those that affirm it and create legal techniques for achieving a position in some cases of even higher priority than allowed by the common law. The Commission then drew distinctions between several classes of Crown claims for payment of debts. For each of these it considered whether the existing common law or statutory Crown priorities were justified.

The factors considered by the Commission and its conclusions were as follows:

(i) General priority of payment

The Commission reviewed the arguments in favour.[207] These were:

(a) The Crown cannot choose its debtors, particularly in regard to taxation.

(b) The Crown must protect its reserves to maintain the financial stability of government.

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206 *Federal Business Development Bank v. Caskey* (*supra*, note 11). See the discussion in Chapter 2, sections C to F.

207 At 35-36.

(c) Crown debts are really debts due to the community, and should take precedence over debts due to an individual.

The Commission rejected each of these arguments. As to the first and second, it adopted the following comments of the Canadian Study Committee on Bankruptcy and Insolvency Legislation:[208]

(a) The argument about choice of debtors may apply to tax claims, but has no relevance in contractual claims; further, there are other creditors (for example, persons claiming damages) who cannot choose their debtors but who have no priority on this account.

(b) The financial stability of government does certainly not depend on priority; the public treasury is in fact in a better position than private creditors to bear losses.

As to the third argument, the Commission noted with approval the comments of other bodies that individuals should not be made to suffer for the general good where the general benefit is small but the individual loss is substantial. It thought that the public would not likely support retention of priority on this ground.

The Commission then reviewed a number of arguments against a general right to priority in the Crown.[209] These were:

(a) The Crown is increasingly involved in business, and there are increases in the types and rates of taxes. There is a corresponding rise in opportunities for the Crown to assert its priority. This may lead to creditor apathy in the administration of bankrupt estates.

(b) Crown priority can result in hardship for individual creditors, for example, employees or small businesspeople. For such creditors even the costs of obtaining judgment, writ of execution, etc., may be onerous.

(c) Creditors of corporations sometimes have claims against corporate officers who have improperly conducted themselves. If the Crown can intervene to assert its preferred position, other creditors may not pursue their claims. Vigilant creditors ensure high standards of commercial morality and observance of law.

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208 Government of Canada Publication (1970).

209 At 36-39.

(d) The Crown may extend a period of grace to a debtor, giving him or her a false appearance of liquidity. Other creditors who extend credit on the basis of this appearance may then suffer a hardship, especially if the Crown then asserts its priority.

(e) The Crown sometimes defers it prior claim to what it regards as "worthy" claims. It is wrong in principle for the Crown to have such a discretion.

(f) Priority is an anachronism based on principles such as the divine right of the monarch. Such principles are no longer relevant to the conduct of government.

The Commission concluded that there was no justification for continuing the general right to priority of payment in the Crown. It said:

> In our view the arguments against a general right in the Crown to priority are overwhelming and that [sic] the prerogative right to prior payment should be abolished. It is simply too rigid a rule for justly defining legal rights and even if used sparingly is objectionable. Occasionally, the assertion of the prerogative is capable of achieving a result that can be justified in terms of social policy but that is more often a matter of accident than design. Its assertion, in the majority of situations in which it might be asserted, would more often produce unfair results.[210]

The Commission reserved one exception to this general recommendation. This was where there is a competition as to priority between the provincial Crown and the federal Crown or another provincial Crown. Though the law is unsettled, there is substantial authority for the view that the federal Crown is immune from provincial legislation, particularly legislation that would derogate from a Crown prerogative.[211] Under this view, reversal of the presumption in provincial Interpretation Acts changes the position only of the provincial Crown, not that of the

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210 At 40. For a discussion of whether the Crown's prerogative of priority conflicts with section 15 of the Canadian Charter of Rights and Freedoms, see G. Chipeur, "The Royal Prerogative and Equality Rights: Can Medieval Classism Coexist with Section 15 of the Charter?" (*supra*, note 155. The author concludes that "The Crown prerogative of priority is not worth saving at the expense of the legal principles and moral values enshrined in the *Charter*." (At 668.)

211 See the discussion in Appendix F.

federal Crown. The Commission concluded that the provincial Crown priority should be preserved in such a manner that where Crown claimants compete, the funds in issue are divided among them ratably.[212]

(ii) Statutory Crown preferences

The Commission next turned to statutory Crown priorities.[213] It considered the justification and validity of particular statutes affirming Crown priority and providing special mechanisms for asserting it. The views of the B.C. Commission on these matters is included because they reveal the extent to which the Commission regarded Crown preferences as unjustified. Thus they are a comment on the validity of Crown preferences generally. The justification for particular statutory Crown liens is also important to help decide which claim ought to prevail as a matter of policy when the Crown is in a competition with itself. Should the Crown as secured creditor be immune from particular statutory liens in favour of the Crown in another aspect?

It is notable that even in relation to the law in the present category — legislation enacted specifically to give the Crown priority over other creditors — the Commission regarded much of the legislation that it reviewed as unjustified. For example, it thought the arguments advanced against a general right in the Crown to prior payment of liens apply equally against liens for unpaid taxes. Thus it recommended repeal of most Crown liens in relation to claims for unpaid taxes,[214] and for taxes collected by others on behalf of the Crown.[215] The Commission recognized that in some

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212 See Chapter 6 for a discussion of how this point could be dealt with in Alberta should the presumption of immunity be reversed.

213 See at 43-66.

214 One exception was liens attaching to land in respect of arrears of real property taxes, or claims that are assimilated to taxes on real property. Such taxes are used to maintain services to the properties, and are the principal source of revenue for municipalities. The Commission recommended that these be retained, as there are other means for protecting purchasers and mortgage lenders. Arrears are readily ascertainable by purchasers, and mortgage lenders commonly protect their interest in the realty by including a term in the mortgage that the borrower will pay an amount equal to the tax levy to the mortgagee, who pays it directly to the taxing authority.

215 British Columbia's Social Service Tax Act, Hotel Room Tax Act, and Tobacco Tax Act create liens in favour of the Crown in respect of the amounts collected on its

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cases abolition of Crown liens could reduce the effectiveness of the collection of Crown debts, and lead to some loss of revenue. Nevertheless the Commission reasserted that this possibility cannot in itself justify the retention of any particular lien.[216]

The Commission did, however, regard certain classes of Crown liens as justified. One such category was for claims for resource rents.[217] Another was for certain claims by the Crown for the benefit of others: liens in favour of the Director of Employment Standards for the payment of wages, under the Employment Standards Act, and in favour of the Workers Compensation Board for employers' contributions to the accident fund, under the Workers Compensation Act.[218] The policy justifications for these liens also apply to the policy question when there is a competition between the Crown as secured creditor and the Crown as lien claimant. They are

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[215](...continued)
behalf. These statutes also provide that taxes collected on behalf of the Crown are to be held or deemed to be held in trust, and in some cases they are also deemed to be held separate and apart from the collector's estate, whether or not they have in fact been kept separate and apart. The Commission saw no reason to recommend abolition of the first type of trust provisions, but objected to the second type on the basis that the Crown should be required to follow the same rules as to tracing as any other beneficiary of a trust.

[216] The Commission noted that abolition could lead to the development of more effective and prompt collection methods, as had happened in Ontario after the introduction of legislation reducing the scope of the lien for corporation tax.

[217] The Commission described such rents as "in effect, the price paid for a supply for raw materials such as timber or coal". (At 55.) The majority of the Commission thought that the preferential treatment of the Crown in relation to such claims could be supported on several grounds. First, the claim relates to the supply of tangible property, for which it is reasonable to take some form of security. Second, the liens are limited, relative to liens for unpaid taxes, in terms of the property to which they may attach (that is, not to real property), and the degree of priority given (that is, they are subordinate to prior registered charges).

[218] The Commission accepted the following arguments in relation to a prior claim for unpaid wages: of all creditors, employees are least able to protect themselves; employees are paid in arrears and are extending credit involuntarily without the benefit of any security device; it is unreasonable to expect most employees to know about their employer's degree of solvency; and employees are least able to bear any loss. As to the Workers Compensation assessments, the Commission thought it was important to maintain the liquidity of the accident fund used for compensating injured workers. The Commission thus recommended retention of these legislated liens. However, it recommended certain modifications to the scheme of priorities that would "reduce the risk and mercantile inconvenience caused to third parties acting in ignorance of the existence of a particular lien." (At 67.)

arguments for holding the Crown in the former aspect to be bound by the statutes creating the lien.

(iii) Application of Exemptions Acts

The purpose of Exemptions Acts is to provide individuals with protection for basic necessities and the means by which to earn them. The arguments from the preceding section as to priorities generally would apply equally in this context. If there is insufficient justification for putting the Crown ahead of other creditors, there is certainly none for permitting it, in contrast to others, to deprive individuals of such minimal protection.

(iv) Application of Law of Property Act in Alberta

Section 41(1) of the Law of Property Act is meant to protect individual borrowers, who mortgage their home or farm, against inordinate loss in the event of downturns in the economy. Where the Crown is acting like a private-sector lender,[219] this legislation should protect borrowers in the same way as it does those who borrow from the private sector, for the same policy reason.

However, the Crown sometimes makes mortgage loans, for social-policy reasons, that carry a higher element of risk than those made by private-sector lenders. It may lend to those who cannot afford the higher down-payments required by the private sector. In such cases, the borrower has less to lose by defaulting on the mortgage. For this type of lending, we recognize that the government may wish to except the Crown from legislation creating deficiency-judgment protection. From a policy standpoint, there are two considerations that oppose one another. Where, as happens in recessionary times, the value of the mortgaged property has fallen below the purchase price, a borrower may find it more economical to default on the mortgage. The threat of suit on the personal covenant may deter persons who would walk away even though they have the ability to pay. On the other hand, it is undesirable to sue a modest-income borrower who could not obtain private-sector financing (and thus deficiency-judgment protection), but who defaults because of an inability to pay. These two

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219 The Alberta Treasury Branches as mortgage lenders, for example, operate much like private-sector lending institutions.

factors must be balanced. We canvass these issues in greater detail in the our report on mortgage remedies.[220]

(2) Crown immunity from construction lien legislation

A second type of immunity claim made by the Crown has been against legislation authorizing the creation of mechanics' or builders' liens. Can property in which the Crown has an interest be made the subject of a construction lien?

(a) The law

Both the federal and provincial Crowns have successfully resisted the application of provincial construction lien legislation.[221] While the federal Crown has been able to argue that application of provincial lien legislation would be *ultra vires*,[222] provincial Crowns have based their resistance to liens on the presumption of Crown immunity.[223]

The question of whether construction liens apply to property of the Crown has not arisen in Alberta since the Court of Appeal asserted the broad "Crown as litigant" exception to immunity from statutes. Would this exception, if still operative, apply where a creditor seeks to subject Crown property to a lien? It is unlikely the Crown would be said to have submitted

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220 Alberta Law Reform Institute, *Report No. 70, Mortgage Remedies in Alberta*, 1994.

221 Private persons have also sought to assert the immunity of the Crown against liens for their own purposes. See Chapter 5, section B(5)(a) at 102 *et seq.*

222 In *Western Concrete Finishers Ltd. v. Rapid Forming, Sun Constructing Company Limited, Travellers Indemnity Company of Canada and Canada* (1985), 39 Sask. R. 264 (Q.B.), the court held that there can be no mechanics' lien on land, the title to which is in Her Majesty in Right of Canada, and that Saskatchewan courts have no power to order the sale of such land. In *Ed Miller Sales & Rentals Ltd. v. R.* (1982), 22 Alta. L.R. (2d) 9, an interest in land owned by the federal Crown was held immune from a lien under the Mechanic's Lien Act, as provincial legislation purporting to affect such an interest is *ultra vires* the province. In *Canadian National Railway Co. v. Corrosion Service Co.* (1991), 46 C.L.R. 252 (N.S.A.D.) the court relied both on the provincial Interpretation Act provision and the doctrine of *ultra vires* to hold federal Crown property immune from lien legislation.

223 In *Ed Miller Sales & Rentals Ltd. v. R.* (1982), 22 Alta. L.R. (2d) 9 (Q.B.), liens filed against property owned by the provincial Crown were held invalid by reference to section 14 of the Interpretation Act.

to lien legislation by the act of coming to court to resist its application.[224] However, conceivably the Crown might do some other act that could be characterized as submission to lien legislation. In a decision of the Prince Edward Island Supreme Court,[225] a Crown corporation had complied with the initial requirements of the Mechanics Lien Act regarding holdbacks and notice, and had made an application under the Act for an order discharging the liens. The court said that the corporation had thereby submitted to the Act, and had led creditors to believe it was doing so. The lien against the holdback funds was held valid.[226] Barring Crown conduct that could constitute submission, Crown property in Alberta is immune from construction liens by virtue of Interpretation Act section 14.[227]

Though creditors of the Crown in Alberta cannot take advantage of provincial lien legislation, tradespeople supplying materials or services to public works have some protection in the Public Works Act.[228] The part of the Act dealing with "Payment of Public Works Creditors" contains the relevant provisions. These permit the Minister responsible for a public work to require contractors to provide security for the payment of labour and materials. The Act also allows the Crown to pay claimants out of the security, or to deduct amounts paid to claimants out of money payable to the contractor. The language of this statute is empowering rather than mandatory.

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224 The Court of Appeal has spoken of the exception as applying both when the Crown sues a subject, and when it comes to court. (See the discussion at note 34.) However, it has also tied the exception to the idea of submission to legislation.

225 *Re Hillsboro Construction Ltd.* (1987), 197 A.P.R. 152 (S.C.).

226 In another P.E.I. decision, the Crown corporation had posted a public notice and provided in its construction contracts that it would hold back funds to meet contract claims. The court held the subcontractors entitled to be paid from the holdback funds on the basis of a constructive trust, as they had supplied labour and materials relying on these representations. (See *P.E.I. Housing Corp. v. Linkletter Welding Ltd.* (1983), 139 A.P.R. 185 (P.E.I.S.C.).)

227 There is also authority for a "public policy" exception to the application of lien legislation in Alberta. This applies where it is contrary to the public interest that the land that would be subject to the lien (regardless by whom it is owned) be sold to satisfy lien claimants. In *Prairie Roadbuilders Ltd. v. County of Stettler* (1983), 2 C.L.R. 164 (Master), the court considered whether lands of a municipality were lienable. The court declared that there was a "public policy" exception to the application of lien legislation, but denied that the test for the exception had been met in the case.

228 R.S.A. 1980, c. P-38.

In Ontario, the Mechanics' Lien Act was amended in 1975 to bind the Crown.[229] However, the Act creates a special type of lien for improvements to property in which the Crown has an interest, that differs from liens in relation to other property. The lienholder who supplied the services or materials to such property cannot transform the lien into a proprietary interest or encumbrance against the lands. The ultimate remedy provided by the Act — forced sale of the owner's interest in the land — is not available. Rather, the lien creates a charge against the holdbacks required under the Act, equivalent in value to a lien against the land, and enforceable by action.[230]

(b) The policy

The Attorney General's Advisory Committee on the Draft Construction Lien Act gave two reasons for the special provision enacted in Ontario.[231] First, "[t]he attachment of a lien to Crown land is theoretically absurd since the Crown is the source of property rights". Second, "... it is unnecessary. Section 26 of the Proceedings Against the Crown Act requires the Crown to pay all final judgments against it".[232]

The legislative solution was a provision for special liens that do not attach to the property, but are enforceable by creating a charge against the holdback fund.

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229 See the Construction Lien Act, R.S.O. 1990, c. C.30.

230 For a case in which the Supreme Court of Canada applied this provision see *Ken Gordon Excavating v. Edstan Construction*, [1984] 2 S.C.R. 280. For a discussion of how this legislation works in practice, see Kirsh, H.J., "Crown Lands and the Construction Lien Act" (1984-85) 7 C.L.R. 109. Construction lien legislation in Saskatchewan, Manitoba and Prince Edward Island also includes the Crown. In the first two of these provinces, the lien does not attach to the Crown's interest in land, but constitutes a charge against the holdbacks required by the Act. See Macklem and Bristow, *Construction Builders' and Mechanics' Liens in Canada* (6th ed.), 1994 at 2-36 to 2-38 for a summary of the Crown-related provisions in these statutes.

231 Report of the Attorney General's Advisory Committee on the Draft Construction Lien Act (Ontario Ministry of the Attorney General, April, 1982).

232 In Alberta, see Proceedings Against the Crown Act, R.S.A. 1980, c. P-18, s. 24.

Another policy ground for Crown immunity from liens is one that has often been given for the Crown's immunity against execution.[233] This is that forced sale of property of the Crown could interrupt a public service and adversely affect the public. Crown property ultimately belongs to the entire community, and the concerns of an individual should not be allowed to prevail over the public interest.

In the event the presumption of immunity is reversed, lien legislation is one area where the Crown may wish to seek specific exemption. Subjection of Crown property to liens that are enforceable by forced sale of the property may in some cases be contrary to the public interest.

However, the interests of the contractors and workmen for whose security lien legislation is enacted also require protection. One solution is to follow Ontario in exempting the Crown from liens attachable to property, but providing a right to a charge against the holdback fund.

A Study Paper issued in 1987 by the Law Reform Commission of Canada, titled *Immunity from Execution*, suggested a different approach. The paper argued that distinctions should be made between different administrative functions. These different functions should receive differential treatment in terms of the availability of execution. The Commission thought that there should be no immunity where the state engages in administrative action of an industrial or commercial nature:

> Where the State acts as a businessman, it should be treated as one. Therefore, a decisive step should be taken by allowing normal execution process with respect to administrative action of an industrial or commercial nature.[234]

Even as to non-commercial administrative action, the Commission did not favour a blanket immunity. Rather, immunity should attach to property only where the administrative authority can show that the property is essential to the organization and operation of the public service. Immunity

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233 The Crown has a statutory immunity in every province against execution and garnishment, and a common law immunity against distress. For a list of the statutes, see Hogg, P., *Liability of the Crown* (2d ed.) at 48, note 6.

234 At 84.

would remain only "for activities of a clearly public and social dimension (service to the community) for which any interruption in the continuity of public services would be unacceptable".[235] A similar system might be instituted with respect to immunity for Crown property from lien legislation.[236]

(3) Orders against the Crown to testify, produce documents, and submit to discovery

(a) The law

(i) Orders by tribunals

At common law, the Crown[237] has never been immune from the court's inherent power to compel testimony or the production of documents.[238]

However, tribunals created by or appointed under statute have no such inherent power; their powers to order testimony or submission of documents must be created by statute. The Crown has sometimes relied on immunity from statute to resist such orders made by tribunals pursuant to their statutory powers. In *Labour Relations Bd. v. Alberta Manpower et*

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235 At 85.

236 As already noted, in *AGT v. CRTC* (*supra*, note 3), the Supreme Court rejected the distinction between the commercial and other activities of the Crown, on the basis, among others, that they are incapable of separation. However, the Canada Law Reform Commission offered some criteria for making the distinction, at 66.

237 This excepts the person and close servants of the Sovereign.

238 The Crown can claim immunity (or "privilege") from having to give evidence where the evidence would be injurious to the public interest. It also has a common law immunity from discovery, but legislation has made it subject to discovery in proceedings against it in all the provinces and in the federal jurisdiction. (See *Re Associated Investors of Canada Ltd; Re First Investors Corp. Ltd; Canada Deposit Insurance Corp. v. Inspector* (1987), 57 Alta. L.R. (2d) 289, for a discussion of the source of the Crown's "immunity for discovery". Kerans, J.A. did not regard this immunity as deriving from any Crown prerogative; in his view, it is simply a function of the presumption of immunity. When discovery was made generally available by statute, the Crown was not specifically included. It remains immune from discovery in any proceedings in which it has not been specifically subjected to it.)

al.,[239] the Alberta Court of Appeal held that the Executive Director of Alberta Manpower was not required to produce documents pursuant to an order made by the Board under section 13(1) of the Labour Relations Act. The court said that if section 13 of the Act were given effect, an obligation to produce documents would be imposed upon the Crown by the statute. This would be contrary to the court's ruling in *Farm Credit Corp. v. Holowach*[240] that section 14 of the Interpretation Act immunizes the Crown from duties and obligations.[241]

(ii) Orders by courts under statute

In another Alberta Court of Appeal decision, provincial legislation empowered a court to order the production of documents to an inspector under the Business Corporations Act. In *Re Associated Investors of Canada Ltd; Re First Investors Corp. Ltd; Canada Deposit Insurance Corp. v. Inspector*,[242] the Court of Queen's Bench agreed that the Crown was not bound by the provision in the provincial statute that empowers the court to order production. Nonetheless the court granted an order for production of documents by way of a *subpoena duces tecum*. It relied on its inherent jurisdiction as a superior court to grant such an order in aid of an inferior tribunal. (The Court of Appeal upheld the court-issued subpoena as a mechanism for enforcing the duty of all citizens, including Crown agents, to give relevant testimony to lawful inquiries.)[243]

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239 (1988), 60 Alta. L.R. (2d) 261.

240 (1988), 59 Alta. L.R. (2d) 279.

241 The Labour Relations Act has since been amended to bind the Crown in Right of Alberta. The provision concerning compulsion of testimony and documents has also changed. See S.A. 1988, c. L-1.2, ss. 4(1),12,13.

242 *Supra*, note 238.

243 (1988), 57 Alta. L.R. (2d) 289 (C.A.). The appeal court varied the form of the order slightly, requiring the attendance of an officer of a corporation with relevant documents, rather than the production and discovery of documents. In the course of its judgment, the court held that a Crown agent cannot be compelled to submit to discovery in the absence of express statutory authority. However, the Crown agent is not immune from a court-ordered obligation to give testimony at a public inquiry unless a real concern can be shown that the testimony might become a discovery. The court saw no such concern in the circumstances. See also *Maksymyk Homes and Bldg. Supplies Ltd. (Trustee of) v. C.M.H.C.*, [1989] 5 W.W.R. 685 (Man. Q.B.), which applied the *Associated Investors* case.

In two more recent cases, the Alberta Court of Queen's Bench has ruled that in proceedings to which the Crown is not a party, Crown immunity from statute includes immunity against the Alberta Rules of Court. In each case the court held that orders for production of documents cannot be made against the Crown under the Rules. Thus in *Rutherford v. Swanson*,[244] the court refused to issue an order under the Rules compelling the R.C.M.P. to produce in a civil suit, documents created or found during its investigations. Similarly, in *Barry v. Maertens-Poole*,[245] the court would not require the Department of Family and Social Services to produce documents in its possession in a case in which it was not a party to the action.

In Nova Scotia a Crown Minister successfully resisted subjection to examination for discovery under the Nova Scotia Civil Procedure Rules. The case involved an application for certiorari to quash a decision that the Minister had made. The court's refusal of the order was based both on the Crown's common law immunity from discovery and on the statutory presumption of immunity.[246]

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244 [1993] 6 W.W.R. 126 (Q.B.).

245 (1992), 4 Alta. L.R. (3d) 330 (Master).

246 See *Waverley (Village) v. Nova Scotia* (1993), 10 Admin. L.R. (2d) 267 (N.S.S.C.). Under the Nova Scotia Proceedings Against the Crown Act, the Civil Procedure Rules apply to proceedings against the Crown. However, the Act had no application in the case because the Crown was not a party to the action.

A Supreme Court of Canada decision, *Smallwood v. Sparling*, [1982] 2 S.C.R.686 (S.C.C.), also dealt with a Crown Minister, in this case a former Crown Minister. A tribunal constituted and granted its compulsory powers under the Canada Corporations Act had ordered Mr. Smallwood to testify and produce documents. The court considered and rejected a number of arguments against the order. The presumption of immunity does not seem to have been raised. The court did deal with a related contention — that federal legislation cannot confer jurisdiction on a commission of inquiry to compel the attendance of provincial Crown witnesses. In reply to this the court said that Mr. Smallwood was now a private citizen and called upon to testify as such. (The adequacy of this answer might be questioned, as Mr. Smallwood had dealt with the matters under investigation only in his capacity as Crown Minister.) However, the conclusion that Mr. Smallwood was no longer "the Crown" would presumably also have answered the argument that as Crown Minister he was immune from the federal legislation by virtue of section 16 of the federal Interpretation Act.

In another recent Nova Scotia decision,[247] the Crown's attempt to resist discovery failed. The Crown argued that it was immune from the Civil Procedure Rules. Though under the Proceedings Against the Crown Act the Rules applied to the Crown "in proceedings against the crown", the Crown claimed the Act did not apply because the claim against it was not within the categories of claims against the Crown enumerated in the Act. The Nova Scotia Family Court rejected this argument. It held that the Act was not intended to be restrictive in this way, and that the provision incorporating the Rules applied to all proceedings against the Crown, whether or not it was among those listed in the statute.[248]

(b) The policy

The Crown may claim privilege whenever admission of testimony or documents would be injurious to the public interest. This rule applies to testimony or production of documents before a tribunal, in the same way as before a court.[249] This rule safeguards the public interest with respect to information in the possession of the Crown. Where it has relevant evidence not harmful to the public interest, there seems to be no reason in principle why the Crown should not provide it to a statutory tribunal as much as to a court. Neither is there any reason for immunity greater than that of the

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247 *R.A.S. v. Nova Scotia (Minister of Social Services)* (1987), 80 N.S.R. (2d) 374.

248 This case, which involved a challenge in Family Court by a person whose name had been placed on a child abuse register, was also decided on the basis of Charter section 7. The court held that the principles of fundamental justice required that the Crown employees who had been involved in placing the name on the Register could not claim privilege and were required to submit to discovery.

249 *Smallwood v. Sparling*, [1982] 2 S.C.R. 686.

ordinary citizen in proceedings in which the Crown is not a party,[250] or from discovery in proceedings in which it is.[251]

(4) Limitation of actions

(a) The law

The Alberta Court of Appeal has recently held in several cases[252] that the Limitations Act does not apply to the Crown. To apply the Act would abrogate the Crown's prerogative (that time does not run against it) without express words, contrary to section 14 of the Interpretation Act. The Manitoba Limitations Act has also been held inapplicable to Crown agency Manitoba Development Corporation.[253]

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250 The Crown has expressed a concern about making documents that are created during regulatory investigations available to private litigants for their own purposes. Those who are required to supply such information might be less forthcoming if the information they give could be used as evidence in private litigation. If the presumption of immunity were reversed, conceivably the Crown could resist orders for production of documents on the basis that production is harmful to the public interest. The Crown could argue that the duty to produce documents would interfere with the regulatory process, and that documents created for a public regulatory purpose should not be available to assist private persons to achieve their own, unrelated, ends. However, to avoid having to make this argument in every case, it might be better to address the issue with legislation. See further in Chapter 7, section G.

251 In *Re First Investors Corp. Ltd; Canada Deposit Insurance Corp. v. Inspector, supra*, note 238, the Alberta Court of Appeal reviewed the origins and policy of the Crown's immunity from discovery. Though it felt itself bound by the precedents that hold the Crown immune from discovery unless expressly subjected to it, the court said that there was much to be said for a rule that the right of discovery be assumed wherever suit against the Crown is permitted.

252 *Alberta Home Mortgage Corp. v. Castleridge Apartments Ltd.* (1991), 80 Alta. L.R. 59; *AGT* v. *Arrow Excavators and Trenchers Ltd.* (1989), 69 Alta. L.R. (2d) 332 (C.A.); *The Queen* v. *Govert Buys and Whitecourt Transport Ltd.* (1989), 66 Alta L.R. 361 (C.A.). See also *Morguard Trust Co. v. Schneider* (1993), 8 Alta. L.R. (3d) 330 (Master).

253 *Manitoba Development Corp. v. Arthur D. Little Inc.* (1984), 27 Man. R. (2d) 182 (Man. Q.B.).

(b) The policy

In the course of its decision in *The Queen* v. *Govert Buys and Whitecourt Transport Ltd.*,[254] the Court of Appeal conceded that there is some policy justification for the Crown's prerogative that time does not run against it.[255] In spite of this, in both this case and *AGT* v. *Arrow Excavators and Trenchers Ltd.*,[256] the court said it was regrettable that the Limitation of Actions Act did not specifically abrogate the Crown's peculiar right, and indicated its support for reform.[257]

The main argument against immunity is that the purposes of the Limitations Act are equally valid where the Crown is a party.

In its report on Limitations, the Institute has already recommended in section 2(3) of its Model Limitations Act that the Crown be bound.[258]

(5) Application of statutory rules

(a) The law

The final class in the survey of Crown immunity claims is of cases where it has sought to avoid the application of variety of provincial statutory rules.[259] Examples include rules regulating business, labour

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254 (1989), 66 Alta. L.R. (2d) 361.

255 This was that "the Crown must first be concerned with the affairs of state and is not always able to concern itself with the protection of its rights" and " public rights ought not to be subject to erosion by negligence or ill intentions of public servants." (At 373.) As noted earlier, the first of these arguments now seems completely outdated.

256 (1989), 99 A.R. 199 (C.A.).

257 This case is quoted in Chapter 3, section D(1).

258 The comments on the proposals indicate the intention that the application of the Act to the Crown would involve abrogation of the prerogative that time does not run against it. See the Report at 59-60.

259 There are numerous cases in the last decade in which both the federal and provincial Crowns have sought to resist the application of **federal** regulatory legislation. Examples include two cases recently decided by the Supreme Court of Canada. In *Sparling v. Quebec (Caisse de dépôt et placement du Québec)* (*supra*, note 2), a Quebec provincial Crown agent unsuccessfully claimed immunity from

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relations, and court procedure. Cases involving resistance to these and miscellaneous other rules include the following:

1) Regulation of business

- The Guarantees Acknowledgment Act provides that an acknowledgement of the obligation, certified by a notary public, is required to make a guarantee effective. In *AADC v. Tiny Tym's Poultry Ltd.*,[260] the Crown, relying on the presumption of immunity, sought to bind a guarantor to his covenant even though the document was not executed in compliance with the Act. The court refused to enforce the guarantee, relying on the reasoning in the *Ciereszko* decision.[261] Two cases decided since the Supreme Court of Canada redefined the benefit\burden exception to the presumption of Crown immunity reach the opposite conclusion.[262] In *Alberta (Provincial Treasurer) v. Woycenko & Sons Contracting Ltd.*[263] and in *Alberta Opportunity Co. v. Snatic*,[264] the Crown was held immune from the Act.

- The Crown has advised that some existing Crown agency loan portfolios do not comply with the Act's requirement for independent notarial certificates for a guarantee. However, reversal of the

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[259](...continued)
the provisions of the federal Business Corporations Act which required it to submit an insider report to the Director under the Act. In *AGT v. CRTC* (*supra*, note 3), AGT claimed, successfully, that it was not subject to regulation by the Canadian Radio-television and Telecommunications Commission under the federal Railway Act. However, though cases such as these are relevant to the question of the desirability of Crown immunity from statute generally, we have not, with a few exceptions, included cases involving Crown claims of immunity against federal legislation. The present review has been primarily confined to cases that shed light on the potential impact of reversal of the presumption of immunity from provincial laws.

[260] (1989), 66 Alta. L.R. (2d) 279.

[261] See *supra*, note 30, and accompanying text. In a case decided before *Ciereszko*, *Federal Business Development Bank v. Willms* (1985), 39 Alta. L.R. (2d) 287 the Crown was held immune from the Act.

[262] See the discussion in Chapter 2, section E.

[263] (1990), 105 A.R. 159 (C.A.).

[264] (1992), 3 Alta. L.R. (3d) 199.

presumption would not have a retrospective effect on existing loan agreements.[265]

- *Yukon Territory v. Robb*[266] dealt with a provision in the Territory Judicature Act providing for awards of pre-judgment interest. The federal Crown relied on section 12 of the Yukon Territory Interpretation Act to argue, successfully, that it was not bound by the Act. However, in *Brophy v. A.G. of Nova Scotia*,[267] a similar argument was rejected. The court said that the Proceedings Against the Crown Act of that jurisdiction, which enabled the court to make any order in proceedings against the Crown that it could make in proceedings between persons, and to give any relief the case requires, enabled it to award prejudgment interest in proceedings against the Crown.[268]

- *Phoenix Transportation v. Saskatchewan*[269] involved a regulation under the Saskatchewan Motor Carriers Act that requires a consignee to make payments for delivery of goods where a shipper defaults. The government (consignee) was able to successfully resist a claim for payment based on this regulation on the ground that it was not bound by the legislation.

- *Director of Soldier Settlement v. Snider*,[270] dealt with a provision in the Alberta Land Titles Act that makes a certificate of title conclusive proof of title to the land and interest specified in the certificate. The federal Crown did not succeed in its contention that it was not subject to the provision, The court said that it had to accept the burdens of provincial land title legislation under which it had

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265 See the discussion about transitional provisions in Chapter 9.

266 (1987), 14 B.C.L.R. (2d) 289 (Y.T.C.A.)

267 (1985), 34 M.V.R. 312 (N.S.S.C.).

268 The court said that since the Judicature Act of the province required it to award prejudgment interest in all proceedings, and the Proceedings Against the Crown Act required that proceedings against the Crown be conducted in accordance with the Judicature Act, it was clear the court was required to award prejudgment interest against the Crown.

269 (1994) 111 Sask. R. 94 (Q.B.).

270 [1988] 6 W.W.R. 360 (C.A.).

chosen to shelter itself. On appeal to the Supreme Court of Canada, the case was decided on other grounds.[271]

• In *Quebec v. Ontario [Securities Commission]*[272] the court applied the benefit\burden exception declared in the *Sparling* case[273] to hold that the Quebec government, in purchasing the controlling interest in a corporation which traded its shares on the Toronto Stock Exchange, was bound by the provisions of the Ontario Securities Act that govern take-over bids.

2) Regulation of labour

• In *Ballycliffe Lodge v. The Queen in Right of Ontario*,[274] an employer applied for a declaration that the Crown and the Applicant were related employers for the purposes of the Labour Relations Act, and that the Crown was bound by a collective agreement entered into between the Applicant and a union. The Crown succeeded in a challenge to the application. The court held that the Crown is not bound by the Labour Relations Act and thus not subject to the jurisdiction of the Board.

3) Procedure

• In *R. v. Moodie*,[275] the Crown applied for an order of certiorari to quash an order for costs. The respondent resisted the application, relying on a provision in the Provincial Offences Act that bars certiorari in any instance where the Act does not provide an appeal. The court nevertheless entertained the order, on the ground that the provision in the Provincial Offences Act does not bind the Crown.[276]

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271 [1991] 2 S.C.R. 481 (S.C.C.).

272 (1993), 97 D.L.R. (4th) 144 (Ont. C.A.).

273 See *supra*, note 2.

274 [1984] Ont. L.R.B.R. 1681.

275 (1984), 13 C.C.C. (3d) 264 (Ont. High Ct.).

276 The court also held that the Provincial Offences Act did not provide for an appeal.

4) Miscellaneous others

• In *Re Queen and Heinrichs*[277] the Crown relied upon its immunity from statute in the prosecution of an individual. The appellant was charged with travelling on a closed public forest road. In closing the road the Crown had not complied with the Road Access Act. The appellant argued this in defence, but the Crown's non-compliance was held not to save him, as the Crown was not bound by the Act.

• In *Quebec v. Expropriation Tribunal*,[278] the Crown asserted the right to discontinue an expropriation unilaterally without the authorization of the Expropriation Tribunal. This was contrary to the requirements of the Expropriation Act, but the Crown argued that it was not bound by the Act. The court rejected the Crown's argument. It court held that as the Act governs all expropriations in Quebec, it applies to Crown by virtue the doctrine of necessary implication.

• In *R. v. Greening and Webb*,[279] Canada Post Corporation employees were charged with violating the Ontario Highway Traffic Act while engaged in their duties as mail couriers. The accused argued in their defence that the Act does not bind the Crown. The court rejected this argument, holding that the Act disclosed an intention to bind all users of the highway to the rules of the road.[280]

Private individuals have also asserted the Crown's immunity from statute for their own purposes.

• In *Re Official Plan of North Kawartha Planning Area*,[281] an argument that Crown lands could not have an Official Plan designation placed upon them was made by a prospective lessee of the

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277 (1985), 53 O.R. (2d) 165 (Ont. C.A.).

278 (1986), 66 N.R. 380 (S.C.C.).

279 [1993] Ont. D. Crim. Conv. 5525-01 (Prov. Div.).

280 The court also rejected an argument against application of the statute based on interjurisdictional immunity. It said that applying the rules of the road to Canada Post does not affect a specifically federal aspect of the postal service.

281 (1981), 12 O.M.B.R. 364 (Ontario Municipal Board).

Crown land, rather than by the Crown itself. The Ontario Municipal Board ruled that the lands could be designated, but the designation could control only future patent holders or successors who were not the Crown in their use of the land. It could not affect the Crown.

• In *S. v. K.; The Queen in Right of Ontario*,[282] the Ministry of Community and Social Services had insisted that a mother exhaust all possible sources of support before applying for benefits. The father resisted the mother's application to the court for support from the father, on the basis that the application violated the Act Respecting Champerty. This act prohibits encouraging another to take legal action to gain financial benefit for oneself. One of the grounds which the court used to allow the application was that the Act does not apply to the Crown.

• In *Engineering and Plumbing Supplies Ltd. v. Seaboard Excavating Ltd.*[283] a private contractor tried to rely on the Crown's immunity under section 14(2) of the British Columbia Interpretation Act to resist a claim by subcontractors to funds received by the contractor on account of the contract price. The work was done on Indian reserve land. The Builder's Lien Act of the province provided that such funds constituted a trust fund in favour of subcontractors and suppliers. The contractor argued that the provincial Builders' Lien Act does not apply with respect to work done on federal Crown land. The court rejected this contention on the ground that section 14(2) provides only that certain legislation does not bind or affect the Crown. It does not follow that legislation is not to be taken to refer to the Crown or to Crown land.

• In *Eastern Home Products Ltd. v. Parsons Construction; Newfoundland and Labrador Housing Corp. (Garnishee)*[284] the court held that the Interpretation Act makes the Mechanics' Lien legislation inapplicable to the Crown. Thus moneys of a judgment debtor held back by the Crown for possible lien claims were not held back pursuant to a statutory obligation. Therefore they were moneys

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282 (1986), 55 O.R. (2d) 111 (Dist. Ct.).

283 (1988), 29 B.C.L.R. (2d) 309 (Co. Ct., S.C.).

284 (1980), 112 D.L.R. (3d) 756 (Nfld. T.D.).

in respect of which the debtor had a present claim, and as such were attachable on a garnishee.[285]

(b) The policy

The examples given here are too diverse to make any general comment on the value of immunity in relation to them all, other than the one that there seems to be no very pressing need for it for it in many of the individual cases.

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285 The court also dealt with an argument that because the Judicature Act does not apply to the Crown, an attachment in respect of moneys due to third parties could not be placed in the hands of the Crown or a Crown agent. It decided that in this case the Act that constituted the Crown corporation itself contained provisions permitting suits in respect of obligations incurred by the corporation as if it were not a Crown agent, and this included garnishee proceedings.

CHAPTER 6
REVERSAL AND COMPETITIONS IN DEBT COLLECTION BETWEEN THE FEDERAL AND PROVINCIAL CROWNS

During our consultations Crown officials and others raised a concern about the effect of reversal of the presumption on the provincial Crown where it is in competition as creditor with the federal Crown. The extent to which provincial legislation can bind the federal Crown is not fully resolved. However, it is tolerably clear that provincial legislation could not bind the federal Crown to legislation that would extinguish its prerogative of prior payment.[286] If the provincial Crown is to be subjected to provincial creditor law whereas the federal Crown is not, the concern is that the provincial Crown will be disadvantaged where the two are in competition.

The concern relates to a situation in which both levels of the Crown are execution creditors. The Execution Creditors Act provides a system for the execution of writs issued in connection with judgments. If the Crown obtains a writ of fieri facias (the common writ of execution) and files it with the sheriff, the provisions of the Act by which moneys realized from seizure and sale of the debtor's property, garnishment, etc., are distributed, apply to it. Proceedings taken by one creditor holding a writ are taken on behalf of all, and distribution by the sheriff is to all writ holders. Assuming a situation in which both the provincial and federal Crowns have filed writs with the sheriff,[287] and the presumption of immunity has been reversed, the provisions for ratable sharing among execution creditors would apply to the provincial Crown by virtue of the reversal.[288] However, they would not

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286 See Appendix F.

287 Depending on the forum, a federal Crown writ may be issued out of the Federal Court. According to the Federal Court Act, R.S.C. 1970, c. 10, writs of execution issued by the Federal Court may be filed with the sheriff in the province, and are to be executed as nearly as possible in the same manner as are similar writs issued out of the provincial courts. This system has been described as separate but parallel to the provincial system (in contrast to incorporating the provincial system by reference). The same is true for seizures based on writs under the Income Tax Act under Rule 1900 of the Federal Court Rules. In British Columbia, it has been held that when it has resort to this system, the federal Crown retains its priority. See *British Columbia (Deputy Sheriff, Victoria) v. Canada*, [1992] 4 W.W.R. 432 (C.A.).

288 This assumes that the reversal of the presumption would have the effect of extinguishing the provincial Crown's prerogative of prior payment. Since it is not certain that it would, it would be better to say this expressly. This is discussed below in Chapter 8.

apply to the federal Crown. Would the federal Crown be entitled to prior payment of its debt, leaving the provincial Crown to share the remainder, if any, with other execution creditors?

In Alberta, the answer for the moment is unclear. In *Royal Bank* v. *Black & White Developments Ltd.*,[289] the Court of Appeal held that the federal Crown as creditor, in seeking to enforce its judgment under the Execution Creditor's Act, accepted the provisions of the Act. Thus it was bound by the provisions as to priorities of creditors. As all priorities between execution creditors (other than legislated priorities) had been abolished, the federal Crown could take only a ratable share of the proceeds.

However, the judgment depended in part on the court's earlier ruling in the *Ciereszko* line of cases, a series of authorities whose continued validity is now in question.[290] Further, in a more recent judgment, *Montreal Trust Co. v. Tottrup*,[291] the Court of Queen's Bench allowed the federal Crown to assert its prerogative of priority for a debt relating to the exercise of a historically governmental function — the collection of a tax debt. It said that the Crown need not resort to its special prerogative writ, the writ of extent, in order to preserve its priority, though it seemed to accept that this could be so where the Crown engages in commercial endeavours.[292] However, the validity of the distinction between commercial and governmental endeavours has been questioned by the

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289 (1988), 60 Alta. L.R. (2d) 31 (C.A.).

290 See the discussion in Chapter 2, sections C to F. A recent judgment of the B.C. Court of Appeal suggests that the only way the federal Crown can accommodate itself to the provisions of the British Columbia Creditor Assistance Act is to "start its proceedings from the beginning in the provincial system". See *British Columbia (Deputy Sheriff, Victoria) v. Canada*, [1992] 4 W.W.R. 432. The B.C. Court of Appeal has also ruled that the federal Crown maintains its immunity from statutes when it acts within the scope of the public purposes it is statutorily empowered to pursue, even in the face of provincial legislation which, by virtue of the reversed presumption in that province, was intended to bind it. See *Federal Business Dev. Bank. v. Hillcrest Motor Inn*, [1988] 5 W.W.R. 466 (C.A.).

291 (1990), 82 Alta. L.R. (2d) 340 (Q.B.).

292 The court distinguished the *Black & White* case on the basis that the earlier case had involved a commercial transaction. A recent Ontario decision holds that the federal Crown (Revenue Canada) is not bound by the Ontario Companies Creditors Arrangement Act and is free to pursue collection of employees' source deductions despite the existence of an order permitting a plan of compromise obtained pursuant to the Act. *Re Gaston H. Poulin Contractor Ltd.* (1992), 91 D.L.R. (4th) 96 (Ont. Gen. Div.).

Supreme Court of Canada in the *AGT v. CRTC* case.[293] Thus the position of the federal Crown as creditor in Alberta remains uncertain.

In the situation posited, though, at least for debts arising out of historical governmental functions, it seems the federal Crown would retain its priority to the detriment of the provincial Crown.[294] The situation of course assumes that the provincial Crown had chosen to obtain a writ of *fieri facias* rather than a writ of extent. There is authority that the latter course is open to the provincial Crown should it wish to assert its prerogative of priority.[295] The unassailable priority for at least some federal Crown debts might cause the provincial Crown, when competing with the federal Crown, to proceed by way of the prerogative writ of extent rather than by way of the writ of fieri facias. However, to protect the provincial Crown for situations in which both Crowns hold common writs, a provision could be included in the Execution Creditors Act that in such cases, the two Crowns share ratably. To preserve the principle that the Crown shares ratably with ordinary creditors, provision could be made for the provincial Crown's share to be added to the pool of available money for a further ratable distribution.

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293 See the discussion in Appendix B.

294 This was precisely the situation in a 1983 British Columbia decision, *Rutherford, Bazett & Co. v. Penticton Pub Ltd.* (1983), 50 B.C.L.R. 21. The B.C. Supreme Court allowed the federal Crown its full claim before the other judgment creditors, including the provincial Crown, were permitted to share in the proceeds.

295 In *Royal Bank* v. *Black & White Developments Ltd.* (1988), 60 Alta. L.R. (2d) 31 (C.A.) Mr. Justice Belzil suggested that had the provincial Crown proceeded by way of writ of extent, it could have preserved its prerogative of priority. In *Montreal Trust Co. v. Tottrup* (1990), 82 Alta. L.R. (2d) 340 (Q.B.) the court suggested that the federal Crown seeking to enforce a judgment arising out of a commercial transaction (in contrast to one arising from the Crown acting in a historical governmental capacity) might also have to resort to the writ of extent to maintain its priority.

CHAPTER 7
SUMMARY OF STATUTES FROM WHICH THE LEGISLATURE MAY WISH TO PRESERVE CROWN IMMUNITY

If the presumption were reversed, it would be necessary to enact consequential enactments to preserve Crown immunity from statutes where it is justified. In the course of our survey of claims of immunity, we discovered that most of the claims were made in relation to a limited number of statutes. The list below includes those of the surveyed claims that we felt were justified or arguably justified in policy. The list is meant to help with the identification of cases for preserving immunity, but is not meant to be exhaustive. Crown agencies and departments that have an interest in preserving immunity from particular statutes that we have not identified should bring their concerns forward.

A. Laws or Regulations (Including By-Laws) Governing the Use of Land

The provincial government departments that we surveyed informed us that the Crown does not regard itself as bound by planning legislation or by-laws. However, normally, the Crown as developer works with a municipality or approving authority to reach a consensus about the construction of Crown improvements on land, etc..

In British Columbia, where the presumption of immunity was reversed, an exception has since been made for enactments that bind or affect the Crown in the use and development of land, or the planning, construction, alteration, servicing, maintenance, or use of improvements (defined in the Assessment Act).[296]

Because of the variation in planning regulations from one municipality to another, this is an area in which the legislature may well desire to keep Crown immunity.

B. Construction Lien Legislation

The legislature might wish to specifically exempt the Crown from construction lien legislation. As noted earlier, subjection of Crown property

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[296] This provision is quoted in Chapter 4.

to liens enforceable by forced sale of the property would in some cases be contrary to the public interest. Alternatively, the Crown could be subjected to the legislation, but with a provision for special liens that do not attach to Crown property, but are enforceable by creating a charge against the holdback fund.[297]

C. Execution Creditor Legislation

For cases in which both levels of Crown are competing execution creditors, the legislature may wish to preserve the provincial Crown's prerogative of priority. This would result in the provincial and federal Crown sharing the proceeds with priority over other creditors. To satisfy the principle that the Crown should share ratably with ordinary creditors, the provincial Crown's share could be put back into the pool of available money for ratable sharing among creditors generally. See Chapter 6 for a fuller discussion.

D. Insurance Legislation

The Crown has advised us that it requires immunity from the Insurance Act in order for the government to operate its own "risk management" insurance scheme.

E. Statutory Liens in Favour of Particular Aspects of the Crown

In its review of laws pertaining to the Crown as creditor, the B.C. Law Reform Commission regarded certain classes of Crown liens as justified. These included liens in relation to claims for resource rents. The Commission also approved of certain claims by the Crown for the benefit of others — liens in favour of the Director of Employment Standards for the payment of wages, under the Employment Standards Act, and in favour of the Workers Compensation Board for employers' contributions to the accident fund, under the Workers Compensation Act. The policy justifications for these liens also apply to the policy question when there is a competition between the Crown as secured creditor and the Crown as lien claimant. They are arguments for holding the Crown in the former aspect to be bound by the statutes creating the liens.

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297 This type of provision is discussed in Chapter 5, section B(2).

F. Legislation Governing Mortgage Remedies

As discussed in greater detail in our report *Mortgage Remedies in Alberta*, the Crown may wish to exempt specific Crown agencies that lend to high-risk borrowers from the application of the legislation that governs mortgage remedies.

G. The Compellability of Documents Created During Regulatory Investigations

Many statutes provide for investigations by Crown officials for regulatory purposes. The Crown has expressed a concern that if documents created during such investigations could be compelled as evidence in private litigation, those called upon for information in the regulatory proceedings might be reticent in supplying it. As already noted,[298] if the presumption were reversed, the Crown could try to claim public interest immunity for such documents on the basis that production impedes the regulatory process and thereby injures the public interest. It could also argue that it is inappropriate to make documents generated for a public regulatory purpose available for private persons to pursue their own ends.

To avoid the Crown having to make such arguments in every case, the issue could be dealt with by legislation. One approach would be to retain immunity for the Crown from the Rules of Court (Rule 209) allowing the court to order production of documents in civil litigation. However, this could be overly broad, and would conflict with the principle that the Crown should be subject to statute except where the need for immunity can be demonstrated.[299] A second alternative would be to enact special provisions in those regulatory statutes for which the successful conduct of regulatory investigations is seen to depend on confidentiality. The provisions would immunize information supplied for regulatory investigations conducted under such statutes from compelled production in private litigation. Such legislation already exists, in the Department of Transportation and Utilities

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298 See Chapter 5, section B(3)(b).

299 The proposed Freedom of Information and Protection of Privacy Act, 1994 Bill 18, contains provisions that allow access to government documents. Assuming for the purpose of the discussion that this or substantially similar legislation will become law, there seems no reason to deny civil litigants access, through the mechanism of Rule 209, to documents that would be available to any person by application under the disclosure provisions of the new legislation.

Act.[300] Section 14 allows the Transportation Safety Branch to require information from insurance companies regarding accidents, and to interview drivers and witnesses to accidents. Section 14(6) provides that "in the interests of obtaining full and true information concerning the accident", documents generated from these investigations are not to be used in court proceedings.

A third approach would be a middle ground between the former two. This would be to enact a statutory provision with two components. The first would provide that a chilling effect on a regulatory investigation is a ground for a public body to refuse to supply information for the purpose of civil litigation. The second would provide for a review of the refusal by a public official (for example, the Privacy Commissioner under the proposed Freedom of Information and Protection of Privacy Act, or by the court). This suggestion is to some degree parallel with a provision in the proposed Act. Section 15(1)(c)(ii) provides that where disclosure of information is harmful to the business interests of a third party, and the information is supplied in confidence, the head of a public body must refuse to disclose information, "the disclosure of which could reasonably be expected to result in similar information no longer being supplied to the public body when it is in the public interest that similar information continue to be supplied". (A refusal can be challenged before the Privacy Commissioner, with the onus on the public body to prove that the applicant has no right of access to the information.)[301]

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300 R.S.A. 1980, c. D-30.

301 It is uncertain whether the existing provisions of the proposed Freedom of Information and Protection of Privacy Act would protect information given to regulatory investigations from direct access by applicants under the Act. In appropriate cases, refusal might be based on section 19, which excepts information the disclosure of which would be harmful to law enforcement, including harm to the effectiveness of investigative techniques and procedures used in law enforcement. (However, by virtue of section 19(4)(a), routine inspections by regulatory agencies would not be covered by the exception). If a provision of the type suggested were considered, it would be necessary to reconcile it with the Freedom of Information and Protection of Privacy Act, to avoid a situation in which a court order under the Rules of Court could be resisted, yet the information sought was accessible through the Act.

CHAPTER 8
THE EFFECT OF REVERSAL OF THE PRESUMPTION ON CROWN PREROGATIVES

In other Institute reports in which we have recommended that the Crown be bound by particular statutes, we have assumed that the Crown would be treated under the statute like an ordinary person, without special prerogatives. For example, if the Limitation of Actions Act were to bind the Crown, this would abolish the prerogative that time does not run against the Crown. Similarly, if the Execution Creditors Act were to bind the Crown, the Crown holding a writ of execution would lose its prerogative of prior payment. The reform we propose in this report is meant to have a like result. Reversing the presumption while leaving the Crown to be treated under some statutes like the Crown, with attendant prerogatives, would deprive the proposal of much of its intent — that the Crown be subject to the general law unless there is a good reason otherwise. It is of course open to the Crown to preserve the content of particular prerogative rules where these are justified, in the same way that it can preserve immunity from particular statutes.

How can this result be achieved? Would reversing the presumption by providing that statutes bind the Crown extinguish Crown prerogatives, so that statutes would apply to the Crown in the same way as to ordinary persons?

In its 1982 Report, *The Crown as Creditor: Priorities and Privileges*, the Law Reform Commission of British Columbia took the view that the application to the Crown of creditors' law abolishes the Crown's prerogative of prior payment. The Commission thought that by virtue of the application to the Crown of the Creditor Assistance Act, which abolishes priority among execution creditors,

> ... where the Provincial Crown seeks to assert its claim through a writ of execution ..., it would seem that it can not rely on the prerogative to assert a right to priority.[302]

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302 At 10.

The British Columbia Supreme Court has affirmed this result in *Rutherford, Bazett & Co. v. Penticton Pub Ltd.*[303] The court said:

> The province of British Columbia, by virtue of section 47 of the Creditor Assistance Act, and section 14 of the Interpretation Act, R.S.B.C. 1979, c. 206, has wiped out any prerogative right to priority which the Queen in the right of the province of British Columbia might have heretofore had.[304]

Relying on this authority, we believe that reversing the presumption in the same manner as was done in British Columbia and Prince Edward Island would negate prerogative rights to the extent this is necessary to make statutes apply to the Crown as to others. For the sake of clarity, however, a provision to this effect should be added to the reversed presumption.

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303 (1983), 50 B.C.L.R. 21.

304 The issue of whether reversal of the presumption and the consequent application of a statute to the Crown impliedly abrogates a prerogative had also been addressed earlier in *Twinriver Timber Ltd. v. R. in Right of B.C.* (1979), 15 B.C.L.R. 38. The court held that the common law presumption of Crown exemption from statutory burdens having been reversed, the Crown debt in the case was subject to a limitation period.

CHAPTER 9
TRANSITIONAL PROVISIONS

If the presumption is to be reversed, a question arises about how reversal will affect rights, obligations, liabilities, etc. as between the Crown and others that arose prior to reversal. For example, what becomes of existing guarantees for loans given to the Crown that do not meet the requirement for an independent notarial certificate set out in the Guarantees Acknowledgment Act?

The Interpretation Act[305] contains provisions that govern the repeal of enactments, and the substitution of new enactments.[306] These provisions could conceivably govern the transitional issues raised. However, the provisions are general, and speak of rights **under** the repealed enactment, **contravention** of the repealed enactment, and so on. They are not precisely apt to the repeal of the presumption - which deals with the application of other enactments. Therefore, for the sake of certainty, we recommend transitional provisions as follows:

> (1) The repeal of the former section 14 and the replacement by the reverse presumption [that statutes bind the Crown unless they provide that the Crown is not bound] does not
>
> > (a) affect the previous operation of the former presumption or anything done or suffered while it was operative,
> >
> > (b) affect any right, obligation, privilege or liability acquired, accrued, accruing or incurred while the former presumption was operative,
> >
> > (c) affect any offence or contravention of any enactment committed, or any penalty forfeiture or punishment incurred, while the former presumption was operative[307]

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305 R.S.A. 1980, c. I-7.

306 See Appendix G.

307 With respect to the Crown itself, it is unlikely that application of statutes to the Crown could have the effect of making an act or omission of the Crown not

(continued...)

(d) affect any investigation, proceeding or remedy in respect of the right, obligation, privilege, liability, penalty, forfeiture or punishment.

(2) Any investigation, proceeding or remedy described in subsection (d) may be instituted, continued or enforced and the penalty, forfeiture or punishment imposed as if section 14 had not been repealed and replaced by the reverse presumption.

(3) No prosecution will be taken in respect of any act or omission that occurred prior to the reversal of the presumption that did not constitute an offence or contravention of an enactment prior to the reversal of the presumption.

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[307](...continued)
unlawful where formerly it was unlawful. However, conceivably, albeit uncommonly, reversal of the presumption could render an act or omission of a private party lawful which was formerly unlawful. An illustration of this is found in the case of *Re the Queen and Heinrichs* (1985), 53 O.R. (2d) 165 (Ont.C.A.) The Crown's immunity from statute was relied upon in the prosecution of an individual. The appellant was charged with travelling on a closed public forest road. The closure of the road had not been in compliance with the Road Access Act. The appellant argued this in defence, but the Crown's non-compliance was held not to save him, on the basis that the Crown was not bound by the Act.

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PART III — RECOMMENDATIONS

RECOMMENDATION 1

Section 14 of the Interpretation Act should be reversed to provide that unless an enactment specifically provides otherwise, it is binding on the Crown. This provision should apply to existing as well as future enactments.

RECOMMENDATION 2

The reversed presumption should specify that Crown prerogatives are abrogated by statutes where this is necessary for the statutes to apply to the Crown in the same way as to ordinary persons.

RECOMMENDATION 3

The legislature should consider preserving immunity in consequent amendments for the types of statutes listed in Chapter 7 above.

APPENDIX A

Alberta cases to 1986

Examples include:

- *Straka v. Straka* (1970), 73 W.W.R. 759 (Alta. T.D.). The Crown was held not to be bound by the provisions of the Exemptions Act, which exempted a house occupied by the debtor from seizure and sale.

- *Kardinal Homes Ltd. v. Alberta Housing Corp.* (1978), 8 Alta. L.R. (2d) 56 (Dist. Ct.). The interest of a provincial Crown agent (the A.H.C.) in land was held immune from builder's liens.

- *Ed Miller Sales v. The Queen in Right of Alberta* (1982), 22 Alta L.R. (2d) 9 (Q.B.). An interest in land owned by the Crown was held immune from a lien under the Mechanic's Lien Act.

- *Alberta Home Mtge. Corp. v. Bailey* (unreported) [1982], A.U.D. 116 (Q.B.). The statutory redemption period under section 42 of the Law of Property Act was held not to apply against the plaintiff Crown agency (A.H.M.C.).

- *Deloitte, Haskins & Sells v. McFaull* (1983), 42 A.R. 324 (Q.B.). Liens under the Builders' Liens Act were held invalid as against the interest of the Crown in Right of Alberta as a tenant in common.

- *Alberta Agric. Dev. Corp. v. Bonney* (1984), 55 A.R. 189 (Q.B.). Section 41 of the Law of Property Act was held ineffective as against the Treasury Branch, provincial Crown agent, to restrict the right of a mortgagee to sue on a covenant to pay.

- *Provincial Treasurer v. Stark* (unreported), [1984] A.U.D. 2205 (Q.B.). The Provincial Treasurer was held immune from the provisions of the Law of Property Act, and thus could bring an action on a promissory note after an order for sale enforcing an equitable mortgage.

- *Alberta Treasury Branches v. McIntosh* (1985), 41 Alta. L.R. (2d) 3 (Q.B.). The Treasury Branch, a Crown agency, was held immune from the provisions of the Law of Property Act, and thus entitled to a deficiency judgment.

- *Royal Bank v. Black & White Developments Ltd* (1986), 43 Alta. L.R. (2d) 322 (Q.B.). The A.M.H.C., a Crown agent, and one of a number of execution creditors, was held not bound by the provisions of the Execution Creditor's Act. As it could not, therefore, take the benefit of ratable distribution under the Act, it was excluded from the distribution of the proceeds of a seizure and sale.

- *Alta. Opp. Co. v. Shortt* (unreported), [1987] Alta. D. 2768-02 (Master). The Alberta Opportunity Company, Crown agent, was held immune from the Law of Property Act, and thus able to bring an action on a promissory note for a mortgage deficiency.

- *Alberta (Provincial Treasurer) v. Woycenko Contracting Ltd.* (1986), 73 A.R. 229 (Q.B.). A guarantor who had given a guarantee to the provincial Crown was not permitted the defence that the document had not been not executed in accordance with the Guarantees Acknowledgment Act.

APPENDIX B

The commercial exception in Alberta

In *Regina v. Workman's Compensation Board*, [1962] 39 W.W.R. 291 (Alta. D.C.), Buchanan C.J.D.C. observed that there was a traditional royal prerogative such that when rights of the Crown and rights of the subject as to the payment of debts of equal degree came into competition, the Crown's rights prevail. However the court noted that we have entered an era "when the crown by its crown corporations and government agencies and subdivisions of government departments has adventured into the world of business in competition with its own citizens". Following an *obiter dictum* in a decision of the English House of Lords, the court held that the Crown prerogative did not operate where the Crown debt arose out of an ordinary business transaction. It concluded that the claim of the provincial treasurer based on chattel mortgages granted as security for a loan made by the treasury branch to the debtor in the course of the financial or banking business carried on by the treasurer "is not of a kind or nature held from the earliest times to be included in or covered by the royal prerogative". The result as determined by Buchanan C.J.D.C. was that statutory provisions giving the other creditors priority were to apply. (The reasoning was presumably that section 13 (now section 14) of the Interpretation Act did not give the Crown immunity from the statutes because there would be no derogation from a Crown prerogative.)

However, on appeal, the Appeal Division, though adopting the trial court's reasoning that the Treasurer was not entitled to succeed by virtue of the royal prerogative, nevertheless held that the statutory provisions giving the other creditors priority did not, by reference to section 13, apply as against the Treasurer. Thus it concluded that none of the claimants had priority, and all of the creditors must share *pro rata* ((1963), 42 W.W.R. 226 Alta A.D.).

The idea that the Crown acting commercially should be treated the same as private individuals has come up again in some recent cases. In *AGT v. CRTC*, [1989] 2 S.C.R. 225, the Supreme Court of Canada rejected the "commercial activities" exception to the presumption of immunity. It doing this, it quoted with approval from an article by Professor Swinton, "Federalism and Provincial Government Immunity" (1989), 29 U. of T.L.J. 1, in which she expressed the view that a reasoned separation of Crown activities that are governmental and those that are commercial is impossible. At the same time, though, the Supreme Court seemed to call for

reform for cases in which the Crown was engaging in commercial activities, but said it was for the legislatures and not the courts to bring about this result. In *Alberta Opportunity Co. v. Snatic* (1992), 3 Alta. L.R. (3d) 199, Master Waller referred to the Supreme Court's rejection of the commercial exception. Accordingly, he denied the exception and held the Crown immune from the Guarantees Acknowledgment Act, agreeing that any reform must be legislative.

However other courts have continued to make and apply the distinction between commercial and governmental Crown activities. In *Montreal Trust Co. v. Tottrup* (1990), 82 Alta. L.R. (2d) 340 (Q.B.), acknowledging dicta to a similar effect in *Royal Bank v. Black & White Developments* (1988), 60 Alta. L.R. (2d) 35, the court suggested that if the Crown wishes to retain its prerogative as creditor in commercial dealings, it must proceed by way of writ of extent, whereas for truly governmental debts such as tax debts it may proceed by way of fieri facias (the common writ of execution) and still maintain priority. See also *Rudolph Wolff & Co. v. Canada*, [1990] 1 S.C.R. 695, in which the court left open the question whether Charter section 15 could support a challenge to legislation governing the Crown and subject in civil proceedings that discriminated against the subject. Cory J. cited as an example situations in which both Crown and subject were engaged in commercial activities. This dictum was taken up in *Alberta Home Mortgage v. Castleridge Apartments Ltd.* (1991), 80 Alta. L.R. (2d) 59 (Q.B.). The Alberta court was dealing with an argument that the Crown prerogative that time does not run against the Crown offends Charter section 15. (The principle was that the Crown acting in a governmental capacity cannot be compared with an individual for Charter purposes.) Conrad, J. seemed to accept the distinction between the two types of Crown activities, but characterized the actions of the Alberta Home Mortgage Corporation as governmental.

In the result, the commercial\governmental distinction is not presently available to create an exception to the presumption of Crown immunity, binding the Crown to statute when it acts in a commercial capacity. However, it seems it can be used to allow the Crown immunity, despite the broad exception to immunity declared by the Alberta courts, when it acts in a governmental capacity.

APPENDIX C

Early applications of the "benefit/burden" principle

In *Dennis v. Yurkowski* (1984), 33 Alta. L.R. (2d) 167 (Q.B.), the Crown was one of the competitors with respect to insufficient insurance proceeds of a motor vehicle policy. The Crown was not a party to the insurance contract. Its right to claim, which but for statute would not have existed by virtue of the privity of contract rule, arose by virtue of a provision of the Alberta Insurance Act. Citing the Supreme Court of Canada decisions in *R. v. Murray*, [1967] S.C.R. 262 and *Toronto Tpt. Comm. v. R.*, [1949] S.C.R. 510, Prowse J. held that if the Crown was to take advantage of the substantive right to sue created by the provision, it must also take the burden of *pro rata* distribution set out therein. Section 14 of the Interpretation Act was held inapplicable because it was said that the statute did not seek to "bind" the Crown in the sense of imposing liability thereon or derogating from existing Crown privileges. The reasoning of Prowse J. was upheld in 1986 by the Court of Appeal ((1986), 46 Alta. L.R. (2d) 59.)

Another example of the application by Alberta courts of the rule that the Crown submits to a statute where it takes advantage of it is found in *A.H.M.C. v. Hilltown Developments* (1986), 45 Alta. L.R. (2d) 162 (Q.B.). One issue in the case was whether A.H.M.C. was bound by the provision in the Law of Property Act, section 44(1)(a), which bars action on a covenant in a mortgage to recover a deficiency, (an issue which was to arise repeatedly in future cases). The court held that because the mortgage document contained a clause stating that the mortgage was made "in pursuance of the Land Titles Act", the plaintiff had "entered into a statutory mortgage". It had thereby committed itself to adhering to the statutory provisions for enforcing the mortgage, which included section 44(1)(a).

Similar reasoning was applied by Master Alberstat in *A.M.H.C. v. Ciereszko* (1986), 42 Alta. L.R. 432, to refuse a claim by A.M.H.C. for a deficiency judgment. The court said that since the plaintiff relied on the power of sale in section 41 of the Law of Property Act, it was bound by all of the section. The result in this and the foregoing case was later upheld by the Court of Appeal, but for different reasons, as will be discussed.

APPENDIX D

The reasoning in *Alta. Mtge. & Housing Corp. v. Ciereszko* (1987), 50 Alta. L.R. (2d) 289

Writing for the court, Belzil J.A. relied primarily upon the decision in *R. v. Murray*, [1967] S.C.R. 262 (S.C.C.), and upon the authorities quoted therein, especially the *Gartland* case, [1960] S.C.R. 315. The first passage from *Murray* quoted by Mr. Justice Belzil was Martland J.'s reference to the judgment of Kerwin J. in *Toronto Tpt. Comm. v. R.*, [1949] S.C.R. 510. In that case the issue was the effect upon a federal Crown claim of a provincial statute which on the one hand allowed the Crown to make a claim which at common law it could not have made (because both parties had been negligent), and on the other hand limited the liability of the defendant to one-half of the damages. Kerwin J. had contrasted the position of the Crown at common law (under which the Crown would have been completely unsuccessful) with the position under statute, and held that the Crown could take advantage of the statute, and thus succeed to the extent that the statute allowed. In context, it is clear that the portion of Kerwin J.'s judgment, quoted by our Court of Appeal at 297, in which he stated that

> The Crown coming into Court could claim only on the basis of the law applicable as between subject and subject unless something different in the general law relating to the matter is made applicable to the Crown.

was intended to explain the position which would have obtained in that particular case but for the statute (that is, the common-law position in which the Crown's claim would have failed altogether — "something different" referring to the statute allowing recovery). The statement was not intended to be a declaration of a rule that applies whenever the Crown comes into court, or that governs to make applicable to the Crown legislation which has an adverse effect upon its claim. (This is, nevertheless, the meaning the Court of Appeal seems to have attributed to the passage.)

Mr. Justice Belzil went on to note that Martland J. next quoted a passage from the decision of Locke J. in the *Gartland* case. This passage was as follows:

> The effect of the sections of the Canada Shipping Act, however, are to declare and limit the extent of the liability of shipowners in accidents occurring

> without their own fault and privity. It cannot be said, in my opinion, that the Royal prerogative ever extended to imposing liability upon a subject to a greater extent than that declared by law by legislation lawfully enacted. The fact that liability may not be imposed upon the Crown, except by legislation in which the Sovereign is named, or that any of the other prerogative rights are not to be taken as extinguished unless the intention to do so is made manifest by naming the Crown, does not mean that the extent of the liability of the subject may be extended in a case of a claim by the Crown beyond the limit of the liability effectively declared by law.

Mr. Justice Belzil then noted that after quoting this passage, Martland J. had gone on to say

> In my opinion, this proposition of law is applicable to the present case, and the fact that, in the *Gartland* case, the statute in question was a federal enactment, while in the present case it is provincial, does not affect the position.

Belzil J.A. next asserted (at 297-98) that

> What the *Murray* case stands for then is that the general principle stated by Locke J. in *Gartland*, that the federal Crown as litigant in the courts is bound by its own federal general laws, is equally applicable to the federal Crown as litigant being bound by provincial intra vires general laws. The same principle governs the position of the provincial Crown in civil litigation. It is, as in *Gartland*, bound by its own general laws to the same extent as the subjects unless there be very specific provisions exempting it ... .

With respect, the problem with this assertion is that the quotation of Locke J. from *Gartland*, identified by Martland J. as containing the principle applicable to the result in the *Murray* case, does not state the rule that the Crown in court is bound by its own general laws. Rather, the quote from *Gartland* does no more than declare that neither the Royal prerogative, nor Crown immunity, impose upon the subject a greater liability than that declared by law by legislation lawfully enacted. (Neither can a statement of this "Crown as litigant" principle be found in any other

part of the judgment in *Gartland*.) The result in *Murray* — that provincial legislation limiting liability for negligence did not derogate from an established Royal prerogative, and thus could operate to limit the liability of a defendant against a Crown claim — was based on the limiting definitions of immunity and of the prerogative, rather than the much broader principle that the Crown as a civil litigant is bound by its own general laws. Mr. Justice Belzil seemed to treat the statement from the *Toronto Tpt. Comm.* case first quoted above, taken out of context, as though it were contained in the quotation from *Gartland*.

(It must be added, however, that insofar as the claim in the *Ciereszko* case was a Crown claim to extend the liability of the subject beyond that allowed by the general law (a claim on a covenant to pay, barred by the Law of Property Act), the principles from the authorities cited were arguably adequate, if extended beyond tort claims to contractual claims, to support the result reached in the *Ciereszko* case, without assertion of the broader principle.)

APPENDIX E

Alberta cases applying *Ciereszko* and *Farm Credit*

• *A.M.H.C. v. Hilltown Developments* (1987), 50 Alta. L.R.(2d) 300 (C.A.). The court held that the Law of Property Act applies to an agent of the provincial Crown.

• *Alta. Opportunity Co. v. Shortt* (unreported), [1987] Alta. D. 3664-01 (Master). Master Quinn issued subsequent reasons reversing his original conclusion that the Law of Property Act did not bind the Crown, stating that in light of *Ciereszko*, "the Crown is bound by its own general laws (such as the Law of Property Act) to the same extent as the subjects of the Crown, unless there is a very specific provision excepting it".

• *Royal Bank v. Black & White Developments and A.M.H.C.* (1988), 60 Alta. L.R.(2d) 31 (C.A.): the court held that the A.M.H.C. having obtained a judgment in the Court of Queen's Bench and having filed a writ of execution, had elected to seek its remedy as a common law person under the general law, and had thereby subjected itself to the provision for ratable distribution under the Act. The court's conclusion that the submission to the Act constituted a waiver of the prerogative of prior payment was supplemented by its view that "when the King came into the common law courts as a litigant, he came in his capacity as a common law person and left his prerogative guns at the door; with a few possible exceptions such as those pertaining to estoppel and laches, he was subject to the laws applicable between subject and subject" (at 35). (This case is discussed at greater length at 79.)

• *Director of Soldier Settlement v. Snider*, [1988] 6 W.W.R. 360 (C.A.). The court held that "similar reasoning" as was applied in the *Farm Credit Corp.* case applied to the question whether the federal Crown is immunized from the operation of the Land Titles Act. By registering its title (which it then transferred to another without reserving minerals (though these were reserved by statute)), the Crown chose "to shelter under the umbrella of a Torrens system" and therefore, no prerogative right having been directly affected, it was "bound by the normal incidents of that legislation." (At 373.) On appeal to the Supreme Court of Canada, the case was decided on other grounds ([1991] 5 W.W.R. 289 (S.C.C.)).

- *A.H.M.C. v. Melchionno and Strauss* (1988), 92 A.R. 264 (Master).

Citing the *Farm Credit Corp.* case, Master Quinn held that the provincial Crown is bound by the provisions of the federal Interest Act limiting interest on a judgment to 5%, on the basis that the Crown is bound by statutes unless the provisions thereof derogate from existing Crown prerogatives, privileges or rights.

APPENDIX F

Can the province enact laws that affect the rights of the federal Crown as creditor?

The question of whether and to what extent provincial legislation can bind the federal Crown has never been resolved satisfactorily. An early Supreme Court of Canada case states a principle that provincial legislation cannot abrogate a privilege of the federal Crown. In *Gauthier v. The King* (1918), 56 S.C.R. 176, the Supreme Court held that the federal Crown was not bound by Ontario's Arbitration Act. Two of the judges based their conclusion that the provincial legislation was inapplicable to the federal Crown in part on a constitutional principle that "Provincial legislation cannot *proprio vigore* take away or abridge any privilege of the Crown in right of the Dominion". (At 194, per Anglin J, Davies J. concurring.) In contrast, a subsequent Privy Council decision rules by implication that there is no constitutional impediment to a provincial statute binding the federal Crown. In *Dominion Building Corporation v. The King* (1933), A.C. 533, the Privy Council determined that the Mercantile Law Amendment Act of Ontario (R.S.O. 1927, c. 161) applied to the federal Crown. By implication, there was no constitutional barrier to the province binding the federal Crown. A more recent Supreme Court of Canada case reasserts an immunity from provincial legislation in the federal Crown, in a slightly different form. in *Re Pac. West. Airlines Ltd.; R. v. Can. Tpt. Comm.*, [1978] 1 S.C.R. 61, Laskin, C.J.C., speaking for the majority, said that "... a Provincial Legislature cannot in the valid exercise of its legislative power, embrace the Crown in right of Canada in any compulsory legislation." (At 72.)

In addition to the principles stated by the Supreme Court (that provincial legislation cannot abrogate federal Crown privileges or bind the federal Crown by compulsory legislation), two other constitutional principles could in appropriate cases preclude provincial legislation from affecting the federal Crown as creditor. One is the division of powers. Under section 91(1) of the Constitution Act, the province cannot legislation in relation to section 91 heads (though of course it can legislate in relation to its own heads, and can incidentally affect section 91 matters). Section 91 includes public debt and property, and thus any Crown property. Any provincial legislation that purported to bind the federal Crown but that could be taken as in relation to federal Crown property would be unconstitutional. Creditor law purporting to bind the federal Crown could conceivably be regarded as law in relation to federal property.

The last principle is the doctrine of interjurisdictional immunity. The doctrine of division of powers holds that in legislating in relation to their own heads of power, the provinces can incidentally affect heads of federal power. The doctrine of interjurisdictional immunity limits the way in which provincial legislation can incidentally affect federal undertakings. Under this doctrine, undertakings that are within the exclusive jurisdiction of Parliament are subject to provincial statutes of general application, **except** where the provincial statute bears essentially upon the management and control of the undertakings to which the provincial statute is directed (*Regina v. Canadian Pacific Limited* (1993), 103 D.L.R. (4th) 255 (C.A.).) A law in relation to the federal Crown as creditor might in an appropriate circumstance be regarded as bearing on an aspect of the management of a federal undertaking.

The weight of authority about whether or to what extent provinces can bind the federal Crown by provincial laws suggests that a province could not impose a regime of ratable sharing on the federal Crown. This is especially so in view of the fact that in doing this it would extinguish a federal Crown prerogative, that of priority of payment. On this view, the federal Crown's priority would continue in spite of legislation making execution creditor law binding on the Crown.

APPENDIX G

Relevant transitional provisions in the Interpretation Act

The relevant portions of the Interpretation Act, R.S.A. 1980, c. I-7 are as follows:

> **31**(1) When an enactment is repealed in whole or in part, the repeal does not
>
> ...
>
> (b) affect the previous operation of the enactment so repealed or anything done or suffered under it,
>
> (c) affect any right, privilege, obligation or liability acquired, accrued, accruing or incurred under the enactment so repealed
>
> (d) affect any offence committed against or a contravention of the enactment so repealed, or any penalty, forfeiture, or punishment incurred in respect of or under the enactment so repealed, or
>
> (e) affect any investigation, proceeding or remedy in respect of the right, privilege, obligation, liability, penalty, forfeiture or punishment.
>
> (2) An investigation, proceeding or remedy described in subsection (1)(e) may be instituted, continued or enforced and the penalty, forfeiture or punishment imposed as if the enactment had not been repealed.
>
> **32**(1) If an enactment is repealed and a new enactment is substituted for it,
>
> (a) every person acting under the repealed enactment shall continue to act as if appointed or elected under the new enactment until he is reappointed or another is appointed or elected in his place;
>
> (b) every proceeding commenced under the repealed enactment shall be continued under and in conformity with the new enactment so far as may be consistent with the new enactment;

(c) the procedure established by the new enactment shall be followed as far as it can be adapted

(i) in the recovery or enforcement of penalties and forfeitures incurred under the repealed enactment,

(ii) in the enforcement of rights existing or accruing under the repealed enactment, and

(iii) in a proceeding in relation to matters that have happened before the repeal;

(d) if any penalty, forfeiture or punishment is reduced or mitigated by the new enactment, the penalty, forfeiture or punishment, if imposed or adjudged after the repeal, shall be reduced or mitigated accordingly;

(e) all regulations made under the repealed enactment remain in force and shall be deemed to have been made under the new enactment, in so far as they are not inconsistent with the new enactment;

(f) any reference in an unrepealed enactment to the repealed enactment shall, with respect to a subsequent transaction, matter or thing, be construed as a reference to the provisions of the new enactment relating to the same subject-matter as the repealed enactment, but if there are no provisions in the new enactment relating to the same subject-matter, the repealed enactment shall be construed as being unrepealed in so far as is necessary to maintain or give effect to the unrepealed enactment.

....