



Law Reform
Commission of
Saskatchewan

Crown Immunity

Final Report

December 2013

The doctrine of Crown immunity provides that a statute does not bind the Crown unless the statute expressly so states or it is otherwise clear from the enactment that the legislature intended the Crown to be bound. The Crown requires unique powers and immunities in order to govern, however, critics have pointed out for over fifty years that the doctrine of Crown immunity is broader than necessary. Academics, judges and law reformers who have considered the doctrine argue that it is outdated and unprincipled, creating uncertainty in the law. In this Final Report, the Commission draws a distinction between legislation currently in force and future enactments. With respect to legislation currently in force, the Commission recommends that immunity be considered whenever substantial changes are made to a statute. The Commission recommends that, for future enactments, each new statute specifically address whether the Crown is bound, and to what extent.

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The Commission is incorporated by an Act of the Saskatchewan Legislature. Commissioners are appointed by Order in Council. The Commission's recommendations are independent, and are submitted to the Minister of Justice and Attorney General of Saskatchewan for consideration.

Projects are initiated by the Commission in response to suggestions from the public and the legal community, or at the request of the Minister of Justice and Attorney General. After preliminary research, the Commission usually issues background or consultation papers to facilitate consultation. Tentative Proposals may be issued if the legal issues involved in a project are complex. Upon completion of a project, the Commission's recommendations are formally submitted to the Minister of Justice and Attorney General as final proposals.

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SUMMARY OF RECOMMENDATIONS

1. Section 14 of *The Interpretation Act, 1995* should be amended to provide that every statute passed after the date of enactment of such amendment must state whether the Crown is bound by or immune from the statute's obligations, in whole or in part.
2. When substantive changes are made to any statute passed before the date of enactment of the amendment of section 14 of *The Interpretation Act, 1995*, the statute being considered should be amended to reflect whether the Crown is bound by or immune from the statute's obligations, in whole or in part.

1. INTRODUCTION

The doctrine of Crown immunity provides that a statute does not bind the Crown unless the statute expressly so states or it is otherwise clear from the enactment that the legislature intended the Crown to be bound.¹ The doctrine has attracted criticism since 1948 from academics, judges, and law reformers who consider it inconsistent with the principles of a modern legal system and difficult to apply, creating uncertainty in the law.² Given the concerns about the operation of Crown immunity, the Law Reform Commission of Saskatchewan initiated an inquiry into whether reform is advisable in this province.

In October 2012, the Commission released the *Presumption of Crown Immunity: Consultation Paper*. The Consultation Paper invited responses to five questions:

1. In your opinion, what are the policy grounds for immunizing the Crown from the effects of a statute?
2. Is there a need for legislative reform given:
 - a. the approach taken by the courts as demonstrated by the "benefit/burden" exception applied by the Supreme Court of Canada; and,
 - b. the approach taken by the Saskatchewan Legislature as reflected in *The Enforcement of Money Judgments Act*, SS 2010, c E-9.22?

In short, is the private citizen/public benefit distinction workable in practice?

¹ *Alberta Government Telephones v Canadian Radio-television and Telecommunications Commission*, [1989] 2 SCR 225 at 281, [1989] SCJ No 84 [AGT].

² Alberta Law Reform Institute, *The Presumption of Crown Immunity*, Report No 71, (Edmonton: Alberta Law Reform Institute, 1994), online: <<http://www.law.ualberta.ca/alri>> at 38 [ALRI].

3. Do you believe uncertainty exists in the law as a result of judicially carved exceptions to the presumption of Crown immunity? If so, is this uncertainty enough to warrant a legislative solution?
4. Do you know of any examples where the Crown has received an unfair advantage due to application of Crown immunity?
5. Are there some situations that absolutely require Crown immunity?

The Commission received a limited response to its Consultation Paper. No objections were raised to the prospect of reform and no arguments in favour of presumptive immunity for the Crown were made. However, Crown counsel raised concerns about the possible practical consequences of complete reversal of the doctrine. In Crown counsel's view, if the Crown was presumed bound by all statutes, including those enacted prior to the reversal, the government would be required to review all existing legislation to determine whether amendments were needed to retain immunity in each provision of each Act. The scope of such a review would require substantial government resources.

This Final Report draws on the responses to the Consultation Paper and the Commission's independent research to recommend reform of Crown immunity. In making its recommendations, the Commission has taken into account the resource challenges an absolute reversal of the doctrine might pose for the government. The Commission's recommendations reflect its desire to propose practical reform while fulfilling its mandate to modernize and simplify the law in Saskatchewan.³ The recommendations represent a realistic plan to reform Crown immunity given the absence of any legal or public policy concerns raised during the consultation process.

2. DEFINING CROWN IMMUNITY

2.1 The doctrine's common law origins

The doctrine of Crown immunity originated in the common law of 17th century England, an era when "relations between king and parliament were still being defined, when crown immunity was axiomatic, and when judges were sub-servient to the crown."⁴ Professor Harry Street has argued, in his definitive exploration of Crown immunity's origins, that the

³ *The Law Reform Commission Act*, RSS 1978, c L-8, s 6.

⁴ Harry Street, "The Effect of Statutes upon the Rights and Liabilities of the Crown" (1948) U of T LJ 357 at 384. *Law Reform Commission of Saskatchewan*

doctrine lacked legal justification even as it emerged in the common law.⁵ According to Professor Street, the doctrine is rooted in “dubious”⁶ sources: misunderstood, non-binding precedents that textbook writers transformed into fully accepted principles of law.⁷

Crown immunity originally only included statutes which, “if applied to the King, would strip him of his prerogative, that is to say, rights (or powers, privileges or immunities)”⁸ peculiar to him as the monarch. Courts began interpreting statutes that touched the Crown in a more general fashion as presumptively non-binding in the early 1600s. Eventually, the doctrine came to be applied to the interpretation of all statutes except those that bound the Crown by express words, “necessary implication,” or were passed “for the public good.”⁹

Professor Street observes that beginning in 1870 there was a steadily decreasing emphasis on how the policy behind a statute should affect Crown immunity.¹⁰ Initially, there was some authority for disallowing Crown immunity if a statute had been passed for the “public good.”¹¹ The doctrine was interpreted in an increasingly strict manner, culminating in the Judicial Committee of the Privy Council’s definition of “necessary implication” in 1946. Though the idea that the Crown could be bound by “necessary implication” began to appear in the jurisprudence beginning in 1820, it was not until the leading case of *Province of Bombay v Municipal Corporation of Bombay* was decided in 1946 that the term was defined.¹²

The Privy Council found that the Crown could be bound by necessary implication only if “at the time when the statute was passed and received the royal sanction, it was apparent from its terms that its beneficent purpose must be wholly frustrated unless the Crown were bound.”¹³ Requiring the purpose of the statute to be wholly frustrated in order to bind the Crown by necessary implication sets a very high threshold to rebut Crown immunity, but the

⁵ *Ibid* at 365.

⁶ *Ibid* at 384. Regardless of Professor Street’s persuasive contention that the modern version of the doctrine of Crown immunity is based on a misunderstanding of precedent, a broad definition of Crown immunity has been ingrained in the common law: *R v Eldorado Nuclear Ltd*, [1983] 2 SCR 551 at 557, [1983] SCJ No 87 [*Eldorado Nuclear*].

⁷ *Ibid*.

⁸ Peter W Hogg, Patrick J Monahan & Wade K Wright, *Liability of the Crown*, 4th ed (Toronto: Thomson Reuters, 2011) at 399 [Hogg].

⁹ *Ibid* at 399 and ALRI, *supra* note 2 at 41. Professor Street, *supra* note 4 at 365, suggests that this evolution of Crown immunity had no legal justification.

¹⁰ Street, *supra* note 4 at 397.

¹¹ *Ibid* at 384. Professor Street found that the “public good” exception had a weak legal basis, *ibid*.

¹² *Ibid* at 367-370; *Province of Bombay v Municipal Corporation of Bombay*, [1947] AC 58 [PC, India][*Bombay*].

¹³ *Bombay*, *ibid* at 63.

Bombay test has been adopted and continually affirmed by the Supreme Court in Canada, the United Kingdom, New Zealand and, until recently, Australia.¹⁴

2.2 Codification

Governments in many common law jurisdictions, including Saskatchewan, have chosen to codify Crown immunity. Saskatchewan first incorporated the doctrine in legislation in 1943.¹⁵ Currently, Crown immunity is found in section 14 of *The Interpretation Act, 1995*:

14. No enactment binds the Crown or affects the Crown or any of the Crown's rights or prerogatives, except as is mentioned in the enactment.¹⁶

Equivalent statutes exist in all but two Canadian jurisdictions: the doctrine has been reversed in British Columbia¹⁷ and Prince Edward Island¹⁸ but remains in effect in all other provinces and territories and at the federal level.¹⁹

The Supreme Court of Canada had interpreted the codification of Crown immunity as putting an end to the doctrine of necessary implication;²⁰ however, other, more recent jurisprudence appears to affirm the *Bombay* test which defined necessary implication.²¹ Part of the confusion on this point may be related to the fact that much of the case law construing Crown immunity is based on the federal *Interpretation Act*,²² the wording of which may be broader than the provisions in some provinces, including Saskatchewan.²³

Although somewhat ambiguous, it seems likely that Saskatchewan's provision includes the necessary implication doctrine. In *Alberta Government Telephones v Canadian Radio and Television Commission* [AGT], the Supreme Court of Canada attempted to clarify the content of Crown immunity found in the federal *Interpretation Act*. Dickson C.J. wrote:

¹⁴ Hogg, *supra* note 8 at 399.

¹⁵ *The Interpretation Act*, SS 1943, c 2, s 7.

¹⁶ SS 1995, c I-11.2, s 14 [Saskatchewan *Interpretation Act*]. Section 28 of the *Act* defines the Crown as "the Sovereign of the United Kingdom, Canada and Her or His other realms and territories, and Head of the Commonwealth."

¹⁷ *Interpretation Act*, RSBC 1996, c 238, s 14.

¹⁸ *Interpretation Act*, RSPEI 1988, c I-8, s 14.

¹⁹ RSC 1985, c 1-21, s 17; RSNWT 1988, c 1-8, s 8; RSA 2000, c 1-8, s 14; RSNS 1989, c 235, s 14; RSNL 1990, c I-19, s 12; RSY 2002, c 125, s 13; SO 2006, c 21, sch F, s 71; CCSM c 180, s 49; SS 1995, c 1- 11.2, s 14; RSNB 1973, c 1-13, s 32; RSQ 1977, c 1-16, s 42.

²⁰ *Eldorado Nuclear*, *supra* note 6 at 558.

²¹ AGT, *supra* note 1 at 281.

²² RSC 1985, c I-21, s 17 reads: "No enactment is binding on Her Majesty or affects Her Majesty or Her Majesty's rights or prerogatives in any manner, except as mentioned or referred to in the enactment."

²³ Hogg, *supra* note 8 at 408, fn 64.

It seems to me that the words "mentioned or referred to" in s. 16 are capable of encompassing (1) expressly binding words ("Her Majesty is bound"), (2) a clear intention to bind which, in *Bombay* terminology, "is manifest from the very terms of the statute", in other words, an intention revealed when provisions are read in the context of other textual provisions, as in *Ouellette, supra*, and, (3) an intention to bind where the purpose of the statute would be "wholly frustrated" if the government were not bound, or, in other words, if an absurdity (as opposed to simply an undesirable result) were produced."²⁴

While the necessary implication label is absent in Dickson C.J.'s framework, the content reflects that of the doctrine as defined in *Bombay*.²⁵ The Court of Appeal for Saskatchewan appears to have adopted this stream of the Supreme Court's jurisprudence as applicable to Saskatchewan's codified Crown immunity.²⁶

3. DEFINING THE CROWN

3.1 The indivisible Crown

When interpreting who is protected by the doctrine of Crown immunity, the bulk of Canadian case law supports the view of an "indivisible Crown."²⁷ Both the statutory and common law Crown immunity have most often been interpreted to include the legislating government and the Crown in right of other Canadian governments. This includes both other provincial governments and the federal Crown but, though the reasoning might suggest otherwise, is unlikely to extend to governments beyond Canada's borders.²⁸

Which governments may claim statutory immunity depends on how the Crown is defined in the relevant *Interpretation Act*. Many Canadian jurisdictions have a broad definition similar or identical to Saskatchewan's: the Crown means "the Sovereign of the United Kingdom, Canada and Her or His other realms and territories, and Head of the Commonwealth."²⁹ British Columbia has avoided any confusion about who is bound by its *Interpretation Act* by

²⁴ *AGT, supra* note 1 at 281.

²⁵ Prior to *AGT* the jurisprudence out of the Supreme Court of Canada construing the 1967 provision appeared to contradict itself on whether necessary implication remained relevant under that legislation. For example, in *Eldorado Nuclear, supra* note 6 at 558, the Court said "Section 16 of the *Interpretation Act* removes even the necessary implication exception." However, in *R v Ouellette*, [1980] 1 SCR 568, 111 DLR (3d) 216, "the Court seems to have applied a form of necessary implication test" and thus, "despite the lack of an express statement binding the Crown, the Court...found that in that particular statutory context, there was mention of or reference to "Her Majesty" (*AGT, supra* note 1 at 277 and 280).

²⁶ *Investors Group Trust Co Ltd v Eckhoff*, 2008 SKCA 18 at 32, [2008] 9 WWR 306.

²⁷ Hogg, *supra* note 8 at 451.

²⁸ *Ibid* at 452.

²⁹ *Supra* note 16, s 28.

binding the “government,”³⁰ defined as the Crown in right of British Columbia.³¹ Because British Columbia has reversed its statutory Crown immunity, other jurisdictions wishing to claim Crown immunity there would need to do so with recourse to the common law.

Although the courts have given Crown immunity a broad interpretation respecting non-legislating governments, the same cannot be said for statutes that bind the Crown, at least not specific statutes that explicitly bind the Crown. In “the absence of indication to the contrary, a provision expressly binding the Crown refers only to the Crown in right of the legislating government.”³² This apparent contradiction can best be explained by the courts’ reluctance to bind the Crown unless the legislature’s intent is clearly to do so.³³ What then would likely happen if Saskatchewan reversed Crown immunity but did not amend the definition of “the Crown”?

Professor Hogg suggests that where Crown immunity has been reversed and where the Crown is defined broadly, as in Saskatchewan, non-legislating governments and the Crown in right of the home jurisdiction should all be bound.³⁴ This would appear to best give effect to the legislative intent of the provision. However, it is open to the courts to follow the precedent where individual statutes were considered and found not to bind the non-legislating Crowns. As there does not appear to be case law decided on this point, a more definitive answer to the question of how reversing the doctrine in Saskatchewan might affect other jurisdictions, whether the federal government or other provinces, is not possible.

The above discussion relates to the doctrine of Crown immunity as a rule of construction. This is a separate inquiry from whether a given provision is constitutionally valid under Canada’s division of powers regime. Constitutional questions “lurk in the background of the interpretation question,”³⁵ and will often be argued in conjunction with Crown immunity. Perhaps the most difficult constitutional question posed by an inquiry into Crown immunity is the extent to which Parliament or a legislature can make laws binding upon other governments in the Canadian federation.

³⁰ *Supra* note 17, s 14.

³¹ *Ibid*, s 29.

³² Hogg, *supra* note 8 at 453.

³³ *Ibid* at 454.

³⁴ *Ibid*.

³⁵ *Ibid* at 451.

3.2 The federal Crown's constitutional immunity from provincial laws

There appears to be no question that the federal government “may adopt by reference the laws of a province and make them applicable to the federal Crown.”³⁶ It is not so clear, however, whether validly enacted provincial laws of their own effect will be found to bind the federal Crown. Case law on this point is contradictory; however, recent jurisprudence seems to support a constitutional immunity from provincial legislation for the federal Crown.³⁷ The Ontario Court of Appeal recently wrote, “A province cannot validly enact legislation affecting the federal Crown in a compulsory manner.”³⁸ Courts seem to find – even if acknowledging an indivisible Crown for the purposes of interpreting which levels of government are captured under the umbrella of “the Crown” – that a provincial law will not apply to the federal Crown.

4. CRITICISMS OF CROWN IMMUNITY

4.1 No valid justification for the policy of Crown immunity remains

For over sixty years, the doctrine of Crown immunity has attracted criticism as an “anachronistic inheritance of the Middle Ages, whose survival” can be accounted for only by “inertia.”³⁹ Some observers find the rationale behind Crown immunity as a general rule of construction – “the law made by the Crown with the assent of the Lords and Commons is enacted *prima facie* for the subject and not for the Sovereign”⁴⁰ – decidedly unsatisfactory.⁴¹ Commentators almost unanimously conclude that no justification exists for the doctrine's retention in contemporary law.⁴² Judges, academics, and law reformers alike have recommended legislative reform, most concluding that the best option would be a complete reversal of Crown immunity.⁴³ Even commentators like New Zealand's Law

³⁶ Peter W Hogg, *Constitutional Law of Canada*, loose leaf (consulted on 10 July 2013), 5th ed (Toronto: Carswell, 2012) at 319 [Hogg, *Constitutional Law of Canada*].

³⁷ *Ibid* at 320.

³⁸ *Lantheus Medical Imaging Inc v Atomic Energy of Canada Ltd*, 2013 ONCA 264 at para 13, 115 O R (3d) 161.

³⁹ Glanville Williams, *Crown Proceedings* (London: Stevens & Sons, 1948) at 53 cited in Law Reform Commission of British Columbia, *Report on Civil Rights: Legal Position of the Crown*, Project No 3, Part I (Vancouver: Law Reform Commission of British Columbia, 1972) at 66 [LRCBC].

⁴⁰ *Bonanza Creek Gold Mining Co v The King*, [1916] 1 AC 566 at 586.

⁴¹ *Eldorado Nuclear*, *supra* note 6 at 558.

⁴² ALRI, *supra* note 2 at 39.

⁴³ Hogg, *supra* note 8 at 459.

Commission who reject reversal as the optimal reform acknowledge that the doctrine requires modernization by the legislature.⁴⁴

That said, even Crown immunity's staunchest critics agree that the state requires special powers and immunities in order to govern effectively.⁴⁵ The legislature is justified in limiting the Crown's liability under particular statutes, or specific provisions therein, depending on how the public policy goals of the enactment intersect with the Crown's role under the statute. The issue is not whether there are circumstances that would justify limiting the liability of government under a particular statute: it is always open to the legislature to so enact. Rather, the question is whether a general presumption that a statute does not bind the Crown unless the statute so provides is acceptable as a principle of a modern legal system. Many observers agree that a rule of construction that presumes immunity for the Crown is broader than necessary to meet the objective of governing effectively.⁴⁶

Particular concern has been raised that the doctrine's continued operation cannot be reconciled with the expanded role of the Crown, specifically when the Crown enters the marketplace and competes with other commercial entities rather than containing its activities to its "special role *qua* Crown."⁴⁷ As Dickson C.J. wrote for the majority of the Supreme Court of Canada in 1983:

[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.⁴⁸

4.2 Uncertainty in the law

Historically, the courts have carved out a number of exceptions in order to limit the scope of what they see as an "unfair"⁴⁹ doctrine. It could be argued that applying the exceptions is sufficient to address any problems that might arise as a result of Crown immunity, or that judicial interpretation of the rule has circumscribed its overbroad operation. However, commentators have noted for decades the "intolerable complexity"⁵⁰ of the exceptions and

⁴⁴ New Zealand Law Commission, *To Bind Their King in Chains* (Wellington: New Zealand Law Commission, 2000) at para 16 [New Zealand Law Commission].

⁴⁵ Hogg, *supra* note 8 at 459.

⁴⁶ New Zealand Law Commission, *supra* note 44 at para 11.

⁴⁷ *AGT*, *supra* note 1 at 316 [Wilson J. in dissent].

⁴⁸ *Eldorado Nuclear*, *supra* note 25 at 555.

⁴⁹ *AGT*, *supra* note 1 at 290-291.

⁵⁰ Hogg, *supra* note 8 at 460.

the unsatisfactory results that occur when trying to reform Crown immunity through the common law.⁵¹

The criticism that the doctrine and its exceptions are unacceptably complicated, though longstanding, may be considered outdated. For example, the Federal Court of Appeal recently asserted “that the principles to be applied in determining whether the Crown is immune from a particular statute on the basis of...the *Interpretation Act* are now well established.”⁵² In the Federal Court of Appeal’s opinion, this has been the case since 1989 when *AGT* was decided. While it may be true that the principles are clearer now than prior to *AGT*, the Supreme Court of Canada remains unconvinced of the clarity of the interpretive principles at issue.

In 2011, Canada’s highest court advised that, because of the numerous difficulties associated with interpreting the doctrine, and because of its archaic nature, courts should, if possible, decide cases on grounds other than Crown immunity.⁵³ In the case before them, the Court chose to prioritize the federal paramountcy analysis. Reasons to avoid the systematic application of the doctrine of Crown immunity⁵⁴ included concern that “most of the techniques used to ensure that statutes apply to the Crown are uncertain in scope and unpredictable in their application” and that the “law in this area is exceedingly complex.”⁵⁵ The Court implied that the doctrine is out of place in a modern legal system,⁵⁶ and noted that it tends to benefit the federal Crown asymmetrically in the same manner as interjurisdictional immunity.⁵⁷ While the Court adopted the view that the law surrounding Crown immunity remains uncertain, it declined to clarify the doctrine.

Courts have often carved out exceptions to the doctrine’s broad sweep.⁵⁸ The Alberta Law Reform Institute has documented the judicial efforts to develop appropriate exceptions and the resulting uncertainty in application of Crown immunity in Alberta prior to the Supreme Court’s decisions in *AGT* and *Sparling*.⁵⁹ In *AGT*, the Supreme Court sent a clear message to

⁵¹ ALRI, *supra* note 2 at 47.

⁵² *Manitoba v Canadian Copyright Licensing Agency (c.o.b. Access Copyright)*, 2013 FCA 91 at para 28, [2013] FCJ No 358.

⁵³ *Quebec (Attorney General) v Canada (Human Resources and Social Development)*, 2011 SCC 60 at para 16, [2011] 3 SCR 635.

⁵⁴ *Ibid* at para 16.

⁵⁵ *Ibid* at para 13.

⁵⁶ *Ibid* at para 12.

⁵⁷ *Ibid* at para 14.

⁵⁸ Hogg, *supra* note 8 at 457.

⁵⁹ ALRI, *supra* note 2 at 18.

lower courts: “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.”⁶⁰ Therefore, most of the exceptions developed by the lower courts pre-*AGT*, like those discussed in the Alberta Law Reform Institute’s report, have been eliminated by the Supreme Court’s articulation of the benefit/burden exception (discussed below) and new exceptions seem unlikely to arise. However, certain exceptions continue to operate in Canadian law. For example,

A statute will bind the Crown if it is incorporated by reference into a contract entered into by the Crown; the incorporation may be implied as well as express. A statute will bind the Crown if it is incorporated by reference into another statute that binds the Crown; the incorporation may be implied as well as express, and may even be ambulatory (incorporating future statutes as well as existing ones). When the Crown is a defendant in civil proceedings, cases of high authority have held that the Crown proceedings statute implicitly subjects the Crown to all statutes, substantive as well as procedural, that would be applicable to a private party. Similar results have been reached in cases when the Crown is a plaintiff in civil proceedings.⁶¹

While the exceptions to the doctrine may be more certain now than pre-*AGT*, those that persist remain complex. What’s more, the benefit/burden exception could arguably create uncertainty in and of itself.

In *AGT*, the Supreme Court clarified the waiver exception to Crown immunity first articulated in *Sparling*. Known as the “benefit/burden exception,” the Court found that the Crown may not accept the benefit of an enactment without also incurring its burdens.⁶² The Court adopted Professor Hogg’s description of the exception, as developed in other Commonwealth jurisdictions and hinted at in earlier Supreme Court of Canada decisions:

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

AGT and *Sparling* suggest that the Court was seeking a principled method to limit the doctrine while at the same time disallowing the further development of *ad hoc* exceptions by the lower courts.

⁶⁰ *AGT*, *supra* note 1 at 291.

⁶¹ Hogg, *supra* note 8 at 457.

⁶² [1988] 2 SCR 1015, [1988] SCJ No 95 at 1021-1028 [*Sparling*] and *AGT*, *supra* note 1 at 284-291.

⁶³ *Sparling*, *supra* note 62 at 1023, citing Peter W Hogg, *Liability of the Crown in Australia, New Zealand and the United Kingdom*, (Australia: Law Book Co of Australasia, 1972) at 183.

The Court was also very clear that the test for the benefit/burden exception was to be tightly constrained so that the “exception does not swallow the rule.”⁶⁴ In the Court’s view, allowing a broad interpretation of the waiver would be inconsistent with the doctrine itself and overly legislative on the part of the Court.⁶⁵ The Court thus developed the “sufficient nexus” test, which “requires a direct connection between the benefit obtained and the burden that is to be imposed before the benefit/burden exception applies.”⁶⁶

Professor Hogg argues that the narrow application of the benefit/burden exception cannot remedy the uncertainty that Crown immunity creates in the law. Consistent application of the exception will lead to the exception overwhelming the doctrine; precisely what the Supreme Court warned must not happen.

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.⁶⁷

He suggests that the courts have not yet been willing to apply the exception broadly in this manner, recognizing that it would involve a massive limitation of the doctrine of Crown immunity.⁶⁸ If Professor Hogg is correct and courts do not apply the exception broadly, in effect abolishing Crown immunity, then application of the benefit/burden exception will continue to be uncertain.

A Saskatchewan example serves to illustrate the confusion that persists when analyzing how Crown immunity operates. In *Medvid v Alberta (Health and Wellness)* both the Court of Appeal⁶⁹ and the Court of Queen’s Bench,⁷⁰ relying on decisions from lower courts in Ontario and British Columbia, refer to the commercial activities exception to Crown immunity. While both courts agree that the exception is irrelevant to the case at bar, and therefore the courts’ comments on this point are obiter, they both refer to it seemingly as an exception to Crown immunity. The Supreme Court of Canada, on the other hand, explicitly rejected the commercial activities exception in *AGT*.⁷¹ In the Supreme Court’s

⁶⁴ *AGT*, *supra* note 1 at 291.

⁶⁵ *Ibid.*

⁶⁶ Hogg, *supra* note 8 at 422.

⁶⁷ *Ibid* at 423.

⁶⁸ *Ibid.*

⁶⁹ 2012 SKCA 49 at para 29, 349 DLR (4th) 72.

⁷⁰ 2010 SKQB 22 at para 23, 4 WWR 643.

⁷¹ *Supra* note 1 at 298.

opinion it was for Parliament, not the courts, to determine whether there were public policy reasons to create such an exception.⁷²

Whether a commercial activities exception now exists in Saskatchewan is somewhat unclear. However, as Professor Hogg warns, if courts create such an exception it “would be exceedingly difficult to apply because of the absence of any principle that would enable an activity to be characterized as ‘commercial’ rather than ‘governmental’.”⁷³ Professor Hogg cautions that because governmental involvement in commercial activities generally stems from a regulatory or public policy motive, rather than from a profit-making motive as for private ventures, it would be difficult to determine the point at which a government’s activities cross the line.⁷⁴ Regardless of the scope or existence of this particular exception, the contradictory messages between the Saskatchewan courts which seem to recognize a commercial activities exception, and the Supreme Court’s instruction that such an exception does not exist in Canadian law, serve to reinforce the criticism that the doctrine of Crown immunity remains complex and uncertain.

4.3 Immunity by default

Some Saskatchewan statutes preempt the doctrine of Crown immunity by including provisions that “the Crown is bound by this Act,” but many do not. In some cases the decision not to include such a provision – and therefore retain the Crown’s immunity from the obligations of the statute – was likely a deliberate policy decision. However, in some cases legislators may simply have failed to turn their minds to whether immunity was appropriate, thus creating what has been called “immunity by default.”⁷⁵ Concern has been expressed that Crown immunity in such circumstances creates the potential for results contrary to legislative intent, an eventuality cited as a reason to reverse the doctrine.⁷⁶

That said, even the staunchest critics of Crown immunity agree that, to a certain extent, the issue is one of drafting technique. Problems could be significantly alleviated if every statute addressed whether or not the Crown was bound.⁷⁷ An example of the kind of attention legislators are encouraged to pay to Crown immunity was embodied in Saskatchewan’s

⁷² *Ibid.*

⁷³ Hogg, *supra* note 8 at 427.

⁷⁴ *Ibid.*

⁷⁵ ALRI, *supra* note 2 at 5.

⁷⁶ *Ibid* at 6.

⁷⁷ Hogg, *supra* note 8 at 458.

recently enacted *Enforcement of Money Judgments Act* [*EMJA*],⁷⁸ which directs specific attention to the extent to which the Crown should be bound by various provisions in the *Act*.

The *EMJA* binds the Crown when it is exercising its rights or remedies as an enforcing judgment creditor, but the Crown is otherwise bound only where the legislation expressly so provides. The rationale is that a distinction should be made between cases in which the Crown takes a benefit from legislation in the same manner as a private citizen, and cases in which the Crown is acting under a statute for the public benefit. Thus, the *EMJA* provides that the seizure of Crown accounts by creditors is permitted only if authorized by regulation. This allows limits to be placed on creditors' rights to seize social benefit payments made by the Crown to debtors. In a comment solicited by the Law Reform Commission of Saskatchewan, the Ministry of Justice observed that:

The policy basis for these provisions is that the Crown is not acting as capricious royal tax collector or a quasi-commercial entity exploiting a commercial advantage. Rather, the Crown is implementing social policy or, at the very least, protecting the interests of taxpayers. This perspective recognizes that the democratic and public interest mandate of a modern government in a parliamentary democracy is to act on behalf of the collective electorate as their representative.

Such principled justification by legislators and nuanced attention to the various roles the Crown might play in a given statutory scheme, and whether immunity is appropriate to each, alleviates concern about immunity by default. Indeed, if the sort of process exemplified by the *EMJA* were systematized it would be similar to New Zealand's approach to Crown immunity, discussed below.⁷⁹

However, limitations to this approach exist. Systematically analyzing whether Crown immunity is appropriate for new enactments may be a practical solution to modernizing the doctrine going forward, but attentive drafting does not remedy the doctrine's operation in relation to existing statutes. Further, it does not address the concern that the blanket Crown immunity is broader than it needs to be. Professor Hogg points out that we live under a system of responsible government where the executive controls the legislature and is rarely denied the legislation it sees fit to pass. He also notes, "When powers and immunities are specifically granted by statute, a powerful tradition insists that their scope

⁷⁸ SS 2010, c E-9.22 [*EMJA*]. The *EMJA* (except for clause 93(1)(k) which is not yet proclaimed) came into effect May 28, 2012. The *EMJA* was drafted to address common law prerogatives and, as a result, also addresses statutory Crown immunity.

⁷⁹ See Part 5.2 of this report, below.

be carefully defined.”⁸⁰ The doctrine of Crown immunity does not accord with this tradition and “conflicts with the constitutional assumption that the Crown should be under the law”⁸¹ as are its subjects.

4.4 Problems in application

The call for reform remains despite few real-life problems being attributed to Crown immunity. In 1972, the Law Reform Commission of British Columbia observed that the government and its agencies generally obey the law: there is little, if any, evidence to suggest that the Crown uses its immunity from statute unscrupulously.⁸² However, while abuse of Crown immunity is not an issue, it remains true that “[t]he Crown is still free to choose which laws it will, or will not, observe or consider binding on it. To that extent, the existing rules regarding statutes and the Crown place the government above the law and are, therefore, unacceptable.”⁸³ Further, results may be unfair when problems do arise and the doctrine of Crown immunity operates.

For example, in *R v Eldorado Nuclear*, the Supreme Court of Canada ruled that Crown immunity precluded two Crown corporations from liability under the *Combines Investigation Act*. Both companies were engaged in the production of uranium and were accused of entering into a cartel that included private producers. The cartel allegedly conspired to fix the price of uranium in contravention of the *Act*. Because the *Act* did not include express words binding the Crown, the Court found that the *Act* did not apply to the Crown.⁸⁴ The Crown, like a corporation, can only act through agents or servants,⁸⁵ who therefore necessarily share the Crown’s immunity when acting on behalf of the Crown.⁸⁶ If the Crown is immune from a statute, it is not that the Crown is immune from prosecution despite an unlawful act under the statute, but that there is no unlawful act because the statute does not apply.⁸⁷ The Court found that the companies were acting for the purposes of the Crown and so had not contravened the *Combines Investigation Act*. As a result, an important public policy initiative of Parliament was not fulfilled.⁸⁸

⁸⁰ Hogg, *supra* note 8 at 459.

⁸¹ *Ibid.*

⁸² LRCBC, *supra* note 39 at 66.

⁸³ *Ibid.*

⁸⁴ *Eldorado Nuclear*, *supra* note 6 at 558-59, 562.

⁸⁵ *Ibid* at 562.

⁸⁶ *Ibid* at 565-66.

⁸⁷ *Ibid* at 564-65.

⁸⁸ Hogg, *supra* note 8 at 458. Disturbed by the Supreme Court of Canada’s decision in *R v Eldorado Nuclear*, Parliament debated the issue of the Crown’s obligations under the *Combines Investigation Act* and amended *Law Reform Commission of Saskatchewan*

5. OPTIONS FOR REFORM

5.1 Reversing the doctrine

Commentators, including the Alberta Law Reform Institute and Professor Hogg, have suggested that to best address the deficiencies created by Crown immunity's long tenure in the law, legislatures should reverse the doctrine completely.⁸⁹ Reversal would involve replacing current provisions immunizing the Crown with provisions that presume the Crown is bound unless an Act employs express words to the contrary. Proponents assert that a complete reversal would provide certainty to the law while also simplifying it. The Crown, proponents suggest, ought to be presumed bound by statute and exceptions should require specific enactment. Professor Hogg notes that, "perhaps above all, a reversal of the presumption would send the message that any proposed departure from the general principle that the same law applies to citizens and governments must be scrutinized and justified."⁹⁰

British Columbia and Prince Edward Island are the only two Canadian jurisdictions that have reversed the doctrine of Crown immunity. The British Columbia Legislature chose to reverse Crown immunity completely.⁹¹ All enactments bind the Crown regardless of whether they were proclaimed before or after the reversal, except where specific statutes expressly state that the Crown is not bound or in certain areas of land use and development.⁹² Prince Edward Island, on the other hand, chose to reverse Crown immunity prospectively, with the reversal applying only to enactments made after the 1981 amendment to that province's *Interpretation Act*.⁹³ The reversal in Prince Edward Island seems slightly more complex: the reversal applies to new amendments to pre-existing statutes with the result that in some cases a new amendment may bind the Crown but older provisions of the same statute will not.⁹⁴ Our research did not reveal any significant issues arising from the doctrine's reversal in either British Columbia or Prince Edward Island.

the anti-competition legislation to bind Crown corporations who engage in commercial activities. See Hogg, *ibid*, at 426. This exemplifies the power the government holds to adapt or pass legislation to address issues that arise as a result of the doctrine of Crown immunity.

⁸⁹ Hogg, *supra* note 8 at 459 and ALRI, *supra* note 2 at 1.

⁹⁰ Hogg, *supra* note 8 at 460, fn 306.

⁹¹ *Interpretation Act*, RSBC 1996, c 238, s 14.

⁹² *Ibid*.

⁹³ *Interpretation Act*, RSPEI 1988, c I-8, s 14.

⁹⁴ Ministry of Justice, *Report required by section 28 of the Interpretation Act 1999* (June 2001), online: <<http://www.justice.govt.nz>> at para 39 [New Zealand Justice].

Initially, British Columbia's *Interpretation Act* was amended to read, "Unless an enactment otherwise specifically provides, every Act, and every enactment made thereunder, is binding on Her Majesty."⁹⁵ Her Majesty was broadly defined to include the "Sovereign of the United Kingdom, Canada and Her other realms and territories, and Head of the Commonwealth."⁹⁶ This definition mirrors what is currently found in Saskatchewan's *Interpretation Act*.⁹⁷ However, subsequent to the initial amendment, British Columbia's *Interpretation Act* was clarified and now includes only "the government"; specifically, "her Majesty in right of British Columbia."⁹⁸

Concurrent with the amendment reversing Crown immunity, a provision was added to the *Laws Declaratory Act* of British Columbia exempting the Crown from enactments that would bind or affect it in relation to "the use or development of land" or the "planning, construction, servicing, maintenance, or use of improvements as defined in the *Assessment Act*."⁹⁹ Subsequently, this became a subsection of the *Interpretation Act*,¹⁰⁰ as it remains. British Columbia's Legislature was alert to public policy concerns regarding the provincial government being bound by statutes related to the Crown's use of land and legislated appropriately. Though this specific exception to Crown liability would not be relevant in Saskatchewan, as the Crown here is bound under *The Planning and Development Act, 2007*,¹⁰¹ it is an example of how legislators can reverse the doctrine of Crown immunity but continue to legislate exceptions as public policy dictates.

The British Columbia Legislature's decision to reverse Crown immunity followed the Law Reform Commission of British Columbia's 1972 recommendation that the province's *Interpretation Act* be amended such that the Crown be bound by "every statute in the absence of express words to the contrary."¹⁰² The recommendation was made in the context of the Commission's multi-volume report on civil rights, specifically the part devoted to the legal position of the Crown. After outlining several possible difficulties that could arise from Crown immunity, the Commission stressed that it had "no evidence that such

⁹⁵ *Interpretation Act*, SBC 1974, ch 42, s 13.

⁹⁶ *Ibid*, s 25(24).

⁹⁷ *Supra* note 16, s 27(1).

⁹⁸ *Supra* note 91, s 29.

⁹⁹ *Laws Declaratory Act*, RSBC 1960, ch 213, s 44.

¹⁰⁰ *Stewart v Kimberley* (1986), 70 BCLR 183 at para 13, 36 ACWS (2d) 399.

¹⁰¹ SS 2007, c P-13.2, s 5. The Crown appears to have been bound under land use planning legislation since *The Planning and Development Act, 1983*, SS 1983-84, c P-13.1, s 213.

¹⁰² LRCBC, *supra* note 39 at 67.

events (were), in fact, occurring.”¹⁰³ Regardless, the Commission reasoned that the fact that the Crown generally obeys its own laws does not justify placing it above the law.¹⁰⁴ There was no indication that the province engaged in a review of all existing legislation in order to facilitate reform.

5.2 New Zealand’s approach

In 1990, New Zealand’s Law Commission recommended that the *Interpretation Act* be changed to read, “Every enactment binds the Crown unless it otherwise provides or the context otherwise requires.”¹⁰⁵ At that time, as now, New Zealand’s statutory Crown immunity was the same as Saskatchewan’s.

The Law Commission’s recommendation was not incorporated into New Zealand’s *Interpretation Bill* tabled in 1997. The explanatory note read: “The reason for this is that it has not been possible at this stage to quantify the precise effects (both fiscal and otherwise) of implementing the recommendation.”¹⁰⁶ The New Zealand government legislated a review period of two years during which the Ministry of Justice was to prepare a report on “(a) whether it is desirable that the law be changed so that all enactments bind the Crown unless provided otherwise; and (b) whether changes in the law may be required to impose criminal liability on the Crown for the breach of any enactment.”¹⁰⁷

During the review period, the Law Commission published a second report that reversed its previous recommendations, instead encouraging a “piecemeal approach.”¹⁰⁸ Specifically, the Law Commission recommended that the Cabinet Office Manual be amended to require every proposed bill to explicitly state whether the Crown was bound, and to what extent, by a proposed statute. Further, Cabinet would need to justify each decision to keep the Crown immune.¹⁰⁹

The Law Commission explained its change in position in part as a philosophical difference:

There exists a philosophy that among the three branches of government the judicial should be strengthened at the expense of the executive. It is a philosophy amply demonstrated by the assumption by the Courts during the concluding decades of the

¹⁰³ *Ibid* at 66.

¹⁰⁴ *Ibid*.

¹⁰⁵ New Zealand Law Commission, *supra* note 44 at para 6.

¹⁰⁶ *Ibid* at para 8.

¹⁰⁷ *Ibid* at para 1.

¹⁰⁸ *Ibid* at para 11.

¹⁰⁹ *Ibid* at para 16.

twentieth century of ever-widening powers to review administrative acts. The Law Commission thought it appropriate despite the austere mechanical function of an interpretation act to seize the occasion of the review to advance this philosophy.¹¹⁰

The Law Commission also took issue with the suggestion that the previous report's recommendation, if adopted, would make the law less uncertain: "in the overwhelming majority of cases, there is no question of a contextual implication rebutting either presumption."¹¹¹ The inclusion of the exception "or the context otherwise requires" in the initially proposed reversal would fail to clarify the law.

The Law Commission stressed the unique role of government and the "self-evident" unreasonableness of applying a reversal to existing legislation as reasons not to enact a complete reversal of Crown immunity.¹¹² The Law Commission argued that while true that, on principle, the Crown should be bound by the general law of the land, it was "equally true that governments must be allowed to govern, and that the nature of government requires the executive to have certain powers and immunities unavailable to the private citizen."¹¹³ Although the Law Commission acknowledged that the "skies did not fall" when British Columbia reversed the doctrine retrospectively, the proposition was found to be "so self-evidently unreasonable" that the possibility was not even discussed.¹¹⁴

The Law Commission's optimal solution was for each new statute to provide whether and to what extent the Crown should be bound and for this be systematized at the Cabinet level.¹¹⁵ Crown immunity would remain unchanged in the *Interpretation Act*. The Ministry of Justice largely adopted the Law Commission's views,¹¹⁶ recommending that:

[A]ll policy papers submitted to Cabinet Committees or Cabinet which will result in government bills must address the issue of whether or not a new statute is to bind the Crown, and to the extent that it does not, the reasons why. This would mean that agencies responsible for promoting legislation will have to focus specifically on the issue early in the policy development stage, and should ensure that a more systematic approach is taken to consideration of whether a particular enactment is to bind the Crown.¹¹⁷

The Ministry acknowledged that this approach would leave existing statutes untouched and Crown immunity on the books, which was justifiable given that "over time as these acts are

¹¹⁰ *Ibid.*

¹¹¹ *Ibid* at para 7.

¹¹² *Ibid.*

¹¹³ *Ibid* at para 10.

¹¹⁴ *Ibid* at para 7.

¹¹⁵ *Ibid* at paras 14-16.

¹¹⁶ Hogg, *supra* note 8 at 460, fn 306.

¹¹⁷ New Zealand Justice, *supra* note 94 at para 44.

consolidated or replaced, the issue will be addressed.”¹¹⁸ Further, the recommendation did not “preclude a global review of existing legislation taking place as resources permit if that is desired.”¹¹⁹

The recommendations in New Zealand appear to have been motivated not only by practicality, but also by concern with the unpredictable repercussions of retrospective change and questions of the Crown’s criminal liability.¹²⁰ The Ministry of Justice wrote, “Reversing the presumption in respect of all legislation (including existing legislation) would create fiscal and other risks to the Crown unless a global assessment of all legislation is undertaken... Assessing the scope and extent of the risks is likely to be difficult and resource intensive.”¹²¹ Even though the Ministry acknowledged that the reversal had caused no identifiable difficulties in practice in jurisdictions that had reversed Crown immunity, and there was no indication that they had undertaken comprehensive reviews of existing legislation, the concern prevailed and New Zealand has not reversed the doctrine.¹²²

6. RECOMMENDATIONS FOR REFORM

The Law Reform Commission of Saskatchewan agrees that the difficulties with the doctrine of Crown immunity could be significantly diminished if every statute dealt specifically with whether the Crown is bound or immune from the statute’s provisions, in whole or in part.¹²³ By ensuring that each new statute explicitly states what the Crown’s relationship will be to the obligations therein, the Commission believes greater certainty will be brought to the law, immunity by default will disappear over time, and the policy reasons for immunizing the Crown in specific situations will be more clearly identifiable.

Commentators like Professor Hogg encourage an absolute reversal as in British Columbia. They argue that the change is “not as radical as it might appear”¹²⁴ since the numerous exceptions have already eroded the breadth of the doctrine. So too, in the case of Saskatchewan, the apparent increase in attention to Crown immunity issues, as exemplified by the *EMJA*, would suggest a complete reversal might have less effect on existing legislation than assumed. However, the consequences of reversal are unknown and unpredictable,

¹¹⁸ *Ibid* at para 45.

¹¹⁹ *Ibid*.

¹²⁰ Hogg, *supra* note 8 at 460, fn 306.

¹²¹ New Zealand Justice, *supra* note 94 at para 35.

¹²² *Ibid* at para 36.

¹²³ Hogg, *supra* note 8 at 458.

¹²⁴ *Ibid* at 460.

particularly given the doctrine's centuries old entrenchment in the law. The Commission does not believe recommending a complete reversal in these circumstances is advisable.

Recommendation

1. Section 14 of *The Interpretation Act, 1995* should be amended to provide that every statute passed after the date of enactment of such amendment must state whether the Crown is bound by or immune from the statute's obligations, in whole or in part.

The Commission recommends modernizing and simplifying the law gradually, with a focus on how to best address the Crown's obligations under statute law moving forward. This approach is the most pragmatic and has the most potential to ensure that laws are clearly drafted to reflect the legislature's intent respecting the Crown's specific obligations in a given statutory scheme. The Commission recognizes that leaving Crown immunity in effect for legislation passed prior to the enactment of the proposed amendment allows for the continued operation of what many feel is an unprincipled element of the law. However, by legislating a requirement for new statutes to make specific reference to Crown immunity, in conjunction with a mandate to consider the Crown's obligations whenever substantial changes are made to a pre-existing statute, the doctrine will, over time, be eliminated from the law.

Recommendation

2. When substantive changes are made to any statute passed before the date of enactment of the amendment of section 14 of *The Interpretation Act, 1995*, the statute being considered should be amended to reflect whether the Crown is bound by or immune from the statute's obligations, in whole or in part.

The Commission's opinion is that Crown immunity from statute should be the exception rather than the rule. The government should adopt a general policy to determine when the Crown should be bound by an enactment and when it should be immune. If the Crown takes a benefit from a statute in the same manner as a private citizen, immunity is not appropriate; immunity may be appropriate if it protects the Crown from liability when acting for the public benefit. Any instance where the Crown is immunized from its laws should meet the public benefit test. Application of the test will depend on an assessment of the practical consequences of immunity on the operation of the statute in question.

As New Zealand's Law Commission pointed out, these recommendations do not preclude a global review of legislation, nor do they preclude the legislature from reversing Crown immunity completely, if it so chooses. The Commission's recommendations simply offer a practical solution to remedying the problems associated with the doctrine of Crown immunity going forward.