



Law Reform
Commission of
Saskatchewan

Presumption of Crown Immunity

Consultation Paper

October 2012

This consultation paper discusses the presumption of Crown immunity and the consequences of reversing it. This paper:

- (a) Discusses how the courts in Canada have interpreted and applied the presumption;
- (b) Reviews the criticisms of the presumption; and
- (c) Considers how reversing the presumption would affect the law in Saskatchewan.

WE WELCOME YOUR COMMENTS AND OPINIONS.

The Law Reform Commission of Saskatchewan was established by *An Act to Establish a Law Reform Commission*, proclaimed in force in November, 1973, and began functioning in February of 1974.

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.

At present, the Commission is funded by grants from the Law Foundation of Saskatchewan and the Ministry of Justice and Attorney General.

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CALL FOR RESPONSES

We are interested in your response to this consultation paper. We welcome your comments and opinions on the topic. Please allow the following questions to guide you in your response:

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 “benefits/burdens” exception applied by the Supreme Court of Canada; and,
 - b. the approach taken by the Legislature as reflected in Saskatchewan’s *Enforcement of Money Judgments Act*, SS 2010, c E-9.22?

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

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?

How to Respond

Responses may be sent to us **no later than March 31, 2013**:

By email - director.research@sasklawreform.com

By fax - (306) 966-5900

By mail - Law Reform Commission of Saskatchewan
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All responses will be treated as public documents, unless you expressly state in the body of your response that it is confidential. Respondents may be identified by name in the final report for the project, unless they expressly advise us to keep their names confidential.

1. INTRODUCTION

At common law, “the king can do no wrong.” In 1905, *Halsbury’s Laws of England*¹ could still state the general rule that “no remedy lies against the Sovereign”² unless an express exception in law exists. It is hardly surprising that this broad notion of Crown immunity has been abridged over the last century. The most important reform was the adoption of the *Crown Proceedings Act, 1947*³ in England. This legislation was quickly copied throughout the Commonwealth. Saskatchewan’s *Proceedings Against the Crown Act*⁴ sets out when an individual may sue the Crown,⁵ the liability of the Crown in tort,⁶ and certain rules and enactments that bind the Crown.⁷ This Act does not, however, eliminate the presumption of Crown immunity, which is the topic of this Consultation Paper.

Simply stated, the presumption of Crown immunity is the presumption that a statute does not “bind the Crown” unless it expressly states that it does. This presumption was first legislated in Saskatchewan in *The Interpretation Act*⁸ in 1943, and is currently found in *The Interpretation Act, 1995*:⁹

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.¹⁰

Some statutes include a provision stating that “the Crown is bound by this Act,” but many do not. In some cases, the decision to immunize the Crown from obligations created by the statute may have been a matter of deliberate policy. In many cases, however, it is possible that legislators simply failed to consider whether immunity is appropriate, and thus created what has been called immunity by default.

¹ Vol 6, 1st ed (London UK: Butterworths).

² *Ibid*, citing *Blackstone’s Commentaries*, 14th ed (Oxford: Clarendon Press, 1803) at 245.

³ (UK) 10 & 11 Geo VI, c 44.

⁴ RSS 1978, c P-27.

⁵ *Ibid*, ss 4, 8.

⁶ *Ibid*, s 5.

⁷ *Ibid*, ss 9, 12-13.

⁸ SS 1943, c 2, s 7.

⁹ SS 1995, c I-11.2 [*Saskatchewan Interpretation Act*].

¹⁰ *Ibid*, s 14.

Little evidence that the presumption of Crown immunity works much active mischief exists. This good fortune may result from the presumption's long history in the law: Some of the presumption's consequences have worked their way into the legal framework. The lack of mischief may also result from the legislature reversing the presumption when immunity is clearly perceived as unfair in a particular case. There are instances where immunizing the Crown from liability may be appropriate, including when legislation establishes a program for the benefit of the public. Despite the lack of active mischief and the appropriate instances of Crown immunity, courts, law reform agencies and commentators have criticized the presumption of Crown immunity.

In 1989, the Supreme Court of Canada in *Alberta Government Telephones v Canadian Radio-television and Telecommunications Commission* [AGT],¹¹ while upholding a claim to immunity, observed that Crown immunity is hard to reconcile with the needs of a modern legal system:

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 unequivocally adopted the premise that the Crown is *prima facie* immune.¹²

Law reform agencies in Alberta,¹³ British Columbia,¹⁴ and Ontario¹⁵ have recommended reversal of the presumption so that a statute would bind the Crown unless the statute expressly provides otherwise. The presumption has in fact been reversed by the

¹¹ [1989] 2 SCR 225, [1989] SCJ No 84 [AGT cited to SCR].

¹² *Ibid* at para 144.

¹³ 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/docs/fr071.pdf> at 1-9.

¹⁴ 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), online: <http://www.bcli.org/sites/default/files/report9.pdf>.

¹⁵ Ontario Law Reform Commission, *Report on the Liability of the Crown* (Toronto: Ontario Law Reform Commission, 1989) at 95-115.

Legislatures of British Columbia¹⁶ and Prince Edward Island.¹⁷ Considerable academic literature criticizing the presumption exists.¹⁸

Reversing the presumption would not prevent the legislature from protecting the Crown from liability when it is deemed appropriate to do so. If the presumption were reversed, it would be easy enough to identify such cases in new legislation. A more difficult problem may be identifying cases in which immunity should be retained. As noted above, the presumption has worked its way into the law. It can be argued that in some cases it now serves policies quite different from the old maxim that “the Crown can do no wrong.” If the presumption were to be reversed, these cases must be identified and considered.

This consultation paper discusses the presumption of Crown immunity and the consequences of reversing it. This paper:

- (a) Discusses how the courts in Canada have interpreted and applied the presumption;
- (b) Reviews the criticisms of the presumption; and
- (c) Considers how reversing the presumption would affect the law in Saskatchewan.

We invite your responses to this consultation paper. Please see page 1 for questions for consideration and contact information.

2. THE PRESUMPTION OF IMMUNITY: THE PRESENT LAW

2.1 Origin of the presumption

The origin of the presumption of Crown immunity dates back to two closely related, but distinct, common law rules of the 17th century.¹⁹ What appears to be the older rule

¹⁶ *Interpretation Act*, RSBC 1996, c 238, s 14. This legislation was based on recommendations of the Law Reform Commission of British Columbia, *supra* note 14.

¹⁷ *Interpretation Act*, RSPEI 1988, c I-8, s 14.

¹⁸ See Part 3.1, below, for more on this topic.

applies to the Crown's prerogatives. Crown prerogatives are "the powers and privileges accorded by the common law to the Crown."²⁰ At common law, "existing prerogatives cannot be affected or parted with by the Crown except by express statutory authority."²¹ A statute may, however, affect the Crown without abridging a prerogative. In such cases, the common law rule was not quite as strict as that pertaining to Crown prerogatives: "The Crown is not bound by statute unless expressly named, or bound by necessary implication."²²

Both common law rules require that the intention to affect the Crown must be clear in the statute. The difference between the rules probably reflected the assumption that prerogatives were more jealously guarded, thus less apt to be surrendered. According to Professor Harry Street, the distinction became blurred over time.²³ The circumstances in which a statute could be found to bind the Crown by "necessary implication" were progressively narrowed to the point of near extinction. In the leading modern authority on the common law principle, *Province of Bombay v Municipal Corporation of Bombay* [*Province of Bombay*],²⁴ "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 was bound.²⁵ Professor Peter Hogg argues that this development was based on a mistaken belief that the common law rule applicable to prerogative rights applied to all statutes.²⁶

¹⁹ On the history of the rules, see Harry Street, "Effect of Statutes upon the Rights of the Crown," (1948) 7 UTLJ 357. Street argues that the rule that a statute does not ordinarily bind the Crown was unknown earlier than the 17th century.

²⁰ Peter W. Hogg, *Constitutional Law of Canada*, looseleaf ed. (Scarborough, Ontario: Thomson Carswell, 1997) at 1.9 cited in *Black v Chretien et al.*, (2001) 54 OR (3d) 215 (CA) at 224. This definition was also accepted by a majority of the Supreme Court of Canada in *Ross River Dena Council Band v Canada* (2002), 213 DLR (4th) 193 at 217. The minority differed on another point and did not offer a definition for Crown prerogative.

²¹ *Halsbury's Laws of England*, *supra* note 1 at 372.

²² *Ibid* at 409, citing *Magdalen College Case* (1615), 11 Co Rep 66, and *Sheffield (Lord) v Ratcliffe* (1615), Hob 334.

²³ Street, *supra* note 19 at 360.

²⁴ [1947] AC 58, [1946] UKPC41 (JCPC) [*Province of Bombay* cited to AC].

²⁵ *Ibid* at 61-63.

²⁶ Peter W Hogg, *Liability of the Crown*, 2d ed (Toronto: Carswell, 1989) at 74.

2.2 Codification of the presumption

The presumption of Crown immunity is now codified in Canada in federal and provincial *Interpretation Acts*. Much of the case law construing these provisions is based on readings of the Federal *Interpretation Act*.²⁷ Prior to 1967, the Federal *Interpretation Act* provided that:

7. 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.²⁸

This formula appears to make no distinction between prerogative rights and other rights, and fails to explicitly state a general presumption that statutes do not bind the Crown. Some judicial decisions construing this provision attempted to limit its scope by restricting “rights” to prerogative rights or similar rights unique to the Crown. This would have had the effect of removing the presumption in many cases.²⁹ Since the formula did not extend the presumption beyond cases in which “rights” (narrowly construed) are affected, it also kept alive the doctrine of “necessary implication,” even though the provision states that the presumption is not defeated “unless it is expressly stated therein that His Majesty shall be bound.”³⁰

In 1967, the Federal *Interpretation Act*³¹ was amended. It now provides that:

17. 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.³²

This formula was adopted in legislation by several provinces, including Alberta and Saskatchewan.³³ It was almost certainly adopted to correct the uncertainty in the pre-

²⁷ RSC 1952, c 158.

²⁸ *Ibid*, s 7.

²⁹ Street, *supra* note 19 at 362. See also *R v Murray*, [1967] SCR 262, [1967] SCJ No 16.

³⁰ *Interpretation Act*, *supra* note 27, s 7. See commentary on this point throughout *AGT*, *supra* note 11.

³¹ RSC 1985, c I-21.

³² *Ibid*, s 17.

1967 provision,³⁴ but it did so by reinvigorating the presumption of Crown immunity. It appears to necessitate giving a broad scope to the presumption. In *R v Eldorado Nuclear Ltd*,³⁵ the Supreme Court of Canada held that the provision excludes the “necessary implication” doctrine.³⁶

Further nuance to the codification of the presumption of Crown immunity is added by *Investors Group Trust Co Ltd v Eckhoff*.³⁷ In *Investors*, the Court of Appeal for Saskatchewan held that if a statute binds the Crown and if that statute incorporates by reference (adopts) another statute, the incorporated (or adopted) statute also binds the Crown.³⁸ It is not necessary that the incorporated statute include express words or a necessary implication that the Crown is bound.

2.3 Development of exceptions to the presumption

The Alberta Law Reform Institute suggests that Canadian courts were initially inclined to give the presumption a strict interpretation, but that a counter trend emerged by the 1980s, possibly earlier.³⁹ The result was renewed uncertainty in the law. The Supreme Court of Canada may have been motivated by a desire to clarify the law by rejecting *ad hoc* exceptions when it apparently tightened the presumption in decisions such as *Eldorado Nuclear*. However, the Supreme Court was also concerned about the broader policy implications of the presumption. *Eldorado Nuclear* was the first case to criticize the presumption. When this case was decided in 1983, the Court appears to have

³³ The Alberta and Saskatchewan provisions are not identical to the federal provision, but the differences are probably not significant. Saskatchewan: see text accompanying *supra* note 10. Alberta: *Interpretation Act*, RSA 2000, c I-8, s 14.

³⁴ Alberta Law Reform Institute, *supra* note 13, argues that the meaning of both “binding” and “rights” is uncertain, and suggests several interpretations. However, the problems the new wording intended to remedy makes the intended meaning reasonably clear.

³⁵ [1983] 2 SCR 551, [1983] SCJ No 87 [*Eldorado Nuclear*].

³⁶ In Saskatchewan, the “necessary implication” doctrine was applied in *Norfold Trust Co v Hardy*, [1983] 9 DLR (4th) 473 (QB) to defeat the presumption. However, in *Wilkinson v Agricultural Credit Corp of Saskatchewan*, [1987] 4 WWR 713 (QB) and *Wanhella and McFall v Agricultural Credit Corp of Saskatchewan*, (1988) 68 Sask R 146 (QB) the court reversed its position and applied *Eldorado Nuclear*, *supra* note 35, to the same statute.

³⁷ 2008 SKCA 18.

³⁸ *Ibid* at para 32, quoting Peter W Hogg & Patrick J Monahan, *Liability of the Crown*, 3rd ed (Toronto: Carswell, 2000) at 303.

³⁹ Alberta Law Reform Institute, *supra* note 13 at 15.

believed that little could be done in the face of the clear language of federal and provincial *Interpretation Acts* to soften the presumption. However, in 1988 and 1989, the Court developed an exception potentially broader than the necessary implication doctrine it had only recently disavowed.

In *Sparling v Quebec (Caisse de depot et placement du Quebec)* [*Sparling*]⁴⁰ and *AGT*, the court elaborated a “benefit/burden” exception to Crown immunity: the Crown may not accept the benefit of a law without also incurring its burdens.⁴¹ The Court adopted Professor Hogg’s description of the exception, as developed in other Commonwealth jurisdictions, and at least 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.⁴²

These decisions suggest that the Court desired to limit the scope of the presumption, but without allowing the *ad hoc* exceptions that had been revived by the lower courts since the 1967 amendment to the federal *Interpretation Act*. The “benefit/burden” exception makes most other exceptions developed by the courts unnecessary. As Peter Hogg observes, it encompasses and supercedes the necessary implication doctrine. It also supercedes the “commercial exception” that had occasionally been entertained by lower courts. Under this exception, Crown immunity did not operate where a Crown debt arose out of an ordinary business transaction.⁴³ In *AGT*, the Court specifically rejected the commercial exception.⁴⁴

On the whole, the Supreme Court of Canada’s decisions in *Sparling* and *AGT* have succeeded in giving as much clarity as may be possible to a difficult legal issue. The law

⁴⁰ [1988] 2 SCR 1015, [1988] SCJ No 95 [*Sparling* cited to SCR].

⁴¹ *Ibid* at paras 12-29; *AGT*, *supra* note 11 at paras 134-45.

⁴² *Sparling*, *supra* note 40 at para 18, 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.

⁴³ Hogg, *Liability of the Crown*, *supra* note 26 at 243.

⁴⁴ *AGT*, *supra* note 11 at paras 160-165.

in Saskatchewan governing the presumption of Crown immunity remains difficult to apply in practice, and some anomalous cases may remain unresolved,⁴⁵ but the general principles now seem reasonably clear.⁴⁶

3. SHOULD THE PRESUMPTION BE REVERSED?

3.1 Criticisms of the presumption

In *AGT*, the Supreme Court of Canada expressed doubt that the presumption could be justified, but observed, “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.”⁴⁷ The courts may have gone as far as they can to soften the presumption.

The Alberta Law Reform Institute observed that:

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.⁴⁸

⁴⁵ One such case was recently resolved in *Medvid v Alberta (Health and Wellness)*, 2012 SKCA 49. In this case, the Court of Appeal held that a resident of Saskatchewan cannot sue the Alberta government in Saskatchewan because the Alberta government is protected by Crown immunity, immunity that exists unless it falls within any exceptions to immunity or is removed by legislation enacted by the Alberta Crown.

⁴⁶ The same cannot be said of Alberta, where, prior to 1988-89, the courts had developed a broad exception to the presumption on different principles than those adopted by the Supreme Court of Canada. The extent to which the Supreme Court of Canada has overruled the Alberta approach is unclear. In the result, the Alberta Law Reform Institute, *supra* note 13 at 71, concluded that the law in Alberta remains “as confused a state as ever.”

⁴⁷ *AGT*, *supra* note 11 at para 144.

⁴⁸ Alberta Law Reform Institute, *supra* note 13 at 39.

Academic commentators appear to be uniformly critical. The Alberta Law Reform Institute, the Law Reform Commission of British Columbia, and the Ontario Law Reform Commission have recommended reversal of the presumption, and the Law Reform Commission of Canada⁴⁹ has criticized it. The presumption has been reversed by statute in British Columbia⁵⁰ and Prince Edward Island.⁵¹

The arguments advanced against the presumption can be summarized under several heads:

3.1.1 A valid justification for the policy of the presumption no longer exists

The issue is not, of course, whether there are ever circumstances that would justify limitation of 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. Glanville Williams, writing shortly after the first *Proceedings Against the Crown Act* was adopted in England, thought the presumption of Crown immunity should follow immunity in tort into oblivion. He wrote, “The rule originated in the Middle Ages, when it perhaps had some justification. Its survival, however, is due to little but [inertia].”⁵² He suggested that the presumption is now not only archaic, but also inappropriate:

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 a wide measure to the law, the presumption should be that a statute binds the Crown rather than that it does not.⁵³

⁴⁹ Law Reform Commission of Canada, *The Legal Status of the Federal Administration*, Working Paper No 40, (Ottawa: Law Reform Commission of Canada, 1985), online: <http://www.lareau-legal.ca/LRCWP40.pdf>.

⁵⁰ BC *Interpretation Act*, *supra* note 16, s 14.

⁵¹ PEI *Interpretation Act*, *supra* note 17, s 14.

⁵² Glanville Williams, *Crown Proceedings* (London: Stevens & Sons, 1948) at 54.

⁵³ *Ibid.*

Both Professors Street and Hogg doubt that the rule was ever justified. Following Street's historical analysis, Hogg refers to the "melancholy history" that led to the extension of a rule, originally applied only to abridgement of the royal prerogatives, to all statutes. According to Hogg, the rule that emerges has no coherent policy justification:

There is no good reason why the Crown should be generally free to ignore the rules that have been enacted for the regulation of society.... 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.⁵⁴

He notes that, in *Province of Bombay*, the Privy Council did not even ask the question of whether the rule is needed.⁵⁵

In *AGT*, the Supreme Court of Canada observed that the doctrine of Crown immunity "seems to conflict with basic notions of equality before the law."⁵⁶ Although it has been held that the presumption does not conflict with the *Charter of Rights and Freedoms*,⁵⁷ it is hard to reconcile with modern constitutional theory. The Ontario Law Reform Commission concluded that:

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.⁵⁸

⁵⁴ Hogg, *Liability of the Crown*, *supra* note 26 at 202.

⁵⁵ *Ibid* at 205.

⁵⁶ *AGT*, *supra* note 11 at para 144.

⁵⁷ Enacted as Schedule B to the *Canada Act 1982*, (UK) 1982, c 11, which came into force on April 17, 1982; see *Wright v Canada (Attorney General)* (1987), 36 CRR 361, 46 DLR (4th) 182 (Ont Div Ct).

⁵⁸ Ontario Law Reform Commission, *supra* note 15 at 109.

3.1.2 The rule creates uncertainty

The Law Reform Commission of British Columbia identified “the great difficulties” of determining “when the presumption operates” as a major reason for reform.⁵⁹ It was suggested above that the Supreme Court of Canada has made application of the presumption as clear and certain as it likely can be, so long as exceptions are required to make the rule acceptable. However, uncertainty still exists, and the potential for creation of greater uncertainty as exceptions develop is very real. The Alberta Law Reform Institute has documented the uncertainty that infected application of the presumption in Alberta in the 1980s as a result of judicial efforts to develop appropriate exceptions.⁶⁰

Development of the “benefit/burden” exception by the Supreme Court of Canada was, at least in part, an effort to replace the disparate and confusing exceptions found in earlier authorities with a single, less uncertain exception. However, Professor Hogg argues that this effort cannot succeed. In his view, consistent application of the exception would lead to the exception swallowing the presumption:

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.⁶¹

He suggests that the courts have not so far been willing to apply the exception in this manner, recognizing that it involves a massive limitation of the presumption of Crown immunity.⁶²

If Professor Hogg is correct, and courts do not follow the logic of the exception and in effect abolish the presumption, then application of the “benefit/burden” exception will

⁵⁹ Law Reform Commission of British Columbia, *supra* note 14 at 75.

⁶⁰ Alberta Law Reform Institute, *supra* note 13 at 18.

⁶¹ Hogg, *Liability of the Crown*, *supra* note 26 at 219.

⁶² *Ibid* at 222.

necessarily be inconsistent and uncertain. The issue for reformers is perhaps whether this uncertainty is significant enough to require a legislated solution.

3.1.3 Unfairness

The presumption of Crown immunity can produce unfair results. The Law Reform Commission of Canada argues that when the Crown or its agents undertake commercial activities or other activities normally subject to legal regulation, Crown immunity is potentially unfair, and can have unintended consequences.⁶³ As an example, the Law Reform Commission of Canada discussed two cases involving Eldorado Nuclear, a Crown corporation. These cases held that Crown immunity applied to the corporation, preventing prosecution under Ontario environmental protection legislation in one case,⁶⁴ and Federal competition legislation in the other.⁶⁵ This evidences unequal treatment of private enterprises and a Crown agency, even though all are engaged in the same industry. In addition, as the Law Reform Commission of Canada notes, “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.”⁶⁶ Immunity in these cases produced the distinctly odd result that immunity frustrated the Crown itself.⁶⁷ However, these cases referenced by the Law Reform Commission of Canada occurred prior to the decisions in *Sparling* and *AGT*. It is possible that the “benefit/burden” exception enunciated in these latter decisions would serve to mitigate any unfairness associated with the doctrine of Crown immunity.

3.1.4 Immunity by default

There would perhaps be little reason to criticize the presumption if legislators carefully considered whether immunity is appropriate when legislation is adopted. However, as Professor Hogg has noted, “there is good reason to suppose that silence does not indicate a deliberate decision to exempt the Crown, but only indicates that the point

⁶³ Law Reform Commission of Canada, *supra* note 49 at 14.

⁶⁴ *R v Eldorado Nuclear* (1982), 128 DLR (3d) 82, 34 OR (2d) 243 (Ont Div Ct).

⁶⁵ *Eldorado Nuclear*, *supra* note 35.

⁶⁶ Law Reform Commission of Canada, *supra* note 49 at 15.

⁶⁷ *Ibid* at 15-16.

was never considered.”⁶⁸ His survey of Ontario legislation found very few statutes that contain an express statement negating the presumption of Crown immunity. Many of those without such express statement, nevertheless, appear by their own terms plainly intended to bind the Crown. He gives the example of the *Government Contracts Hours and Wages Act*,⁶⁹ which fails to state that it binds the Crown.

A brief examination of Saskatchewan legislation indicates that the situation is little different in this province. Few statutes bind the Crown, and little evidence of a clear or consistent policy in regard to immunity can be found. In recent years, however, the situation has improved, and Saskatchewan legislators now appear to more consistently insert provisions binding the Crown than in the past. Nevertheless, there are literally hundreds of older statutes that do not expressly bind the Crown.

Glanville Williams suggested that immunity by default is a major source of uncertainty in application of the presumption because it has driven the courts to frame exceptions. He wrote:

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.... 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.⁷⁰

3.2 The modern utility of the presumption

Despite the criticisms outlined above, the presumption retains some practical utility. While it may be possible to preserve the valid policy purposes that the presumption

⁶⁸ Hogg, *Liability of the Crown*, *supra* note 26 at 244.

⁶⁹ RSO 1990, c G.8. This Act was repealed on September 4, 2001: see 2000, c 41, ss 144(3), 145.

⁷⁰ Williams, *supra* note 52 at 53-54.

serves if the presumption is reversed, doing so may be difficult in practice. The issue is not whether the Crown should be immunized, but whether the presumption, in the absence of an explicit statement of legislative intent, should be in favour of immunity. Against the objection to the presumption in principle, reformers must weigh the fact that it has long been part of the legal system without doing serious mischief, and may now serve some perhaps unexpected purposes.

The presumption does not do much harm in practice. The inequality complained of by the critics is more theoretical than practical. It may be true that legislators have often created “immunity by default” by failing to give much attention to the issue. But legislators are increasingly aware of the problem, and if Crown immunity under a statute is demonstrated to be unfair, it can be amended to bind the Crown. The presumption can create unfairness, but it might be argued that the cases in which it has done so are few, and may involve special circumstances. The mischief in the Eldorado Nuclear cases, for example, was as much a product of a clash between federal and provincial jurisdictions as of the presumption of immunity.

There are no doubt some cases in which Crown immunity should be retained if the presumption is reversed. An attempt will be made in the next section of this paper to identify possible candidates for retention. The discussion suggests that immunity is appropriate in only a very few cases. Nevertheless, as the Alberta Law Reform Institute observed, the consequences of reversing the presumption are not entirely straightforward. The Institute concluded that the presumption should be reversed, but an argument can be made that doing so might create as many problems as it solves. Part of the difficulty is simply that, because the presumption is presently the default rule, an effort must be made to sort out the cases in which immunity is appropriate. Experience in other jurisdictions is of considerable assistance in this effort, but there remains a fundamental issue: What are the policy grounds for immunizing the Crown from the effects of a statute? Merely reversing the presumption does not answer this question, even if it is an improvement over immunity by default.

Consider, for example, Saskatchewan's recently enacted *Enforcement of Money Judgments Act* [EMJA]⁷¹ that repealed *The Creditors' Relief Act*.⁷² The drafters of the EMJA directed attention to the extent to which the Crown should be bound by the legislation. The EMJA binds the Crown when it is exercising its rights or remedies as an enforcing judgment creditor, but the Crown will otherwise be 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 and Attorney General 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.

Although judicially created exceptions to the presumption have been characterized as an effort to reduce the general scope of a questionable statutory rule, it may be more accurate to describe the courts' response to the presumption as an attempt to find principled distinctions between statutes that ought to attract the presumption, and those that should not. Thus the "benefit/burden" exception denies immunity where the Crown can rely on a statute in the same manner as a private citizen, but would recognize the immunity when the statute is intended to benefit the public rather than

⁷¹ 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.

⁷² RSS 1978, c C-46 (repealed).

the Crown as a party.⁷³ This is similar to the distinction made by the drafters of the *EMJA*. Moreover, the “commercial exception,” which was rejected by the Supreme Court of Canada in *AGT*, prevented the Crown from relying on immunity to avoid a debt arising from an ordinary business transaction, but would respect the presumption when it protected the Crown from liability when the Crown was acting for the public benefit.

Ideally, a rule governing Crown immunity should incorporate the kind of distinctions discussed above, and to some extent, this is what the Supreme Court of Canada has sought to do by grafting the “benefit/burden” exception onto the presumption of immunity. Critics argue that, even with the “benefit/burden” exception, the presumption remains unfair: the distinction recognized by the exception should be applied by the legislature, not by the courts to ameliorate effects of a rule that is questionable in itself. In any event, the distinction is a valid policy consideration that should be applied at some stage when immunity under a statute is under consideration. A rule that explicitly states the presumption may be more satisfactory than a general presumption either in favour of or against immunity.

4. CONSEQUENCES OF REVERSING THE PRESUMPTION

The presumption of Crown immunity has been applied to a wide range of statutes. As noted above, if the presumption is abolished, some specific exceptions will almost certainly be necessary. In the previous section of this report, a general policy in regard to statutory immunity was suggested: if the Crown takes a benefit from a statute in the same manner as a private citizen, immunity is not appropriate, but immunity may be appropriate if it protects the Crown from liability when it is acting for the public benefit. In the final analysis, if the presumption is reversed, any exceptions should meet this test.

Application of the test depends on an assessment of the practical consequences of immunity on the operation of the statute in question. Experience in other jurisdictions

⁷³ In *Medvid v Alberta*, *supra* note 45, the Court of Appeal for Saskatchewan recognized the public function of providing health services as a reason why a Saskatchewan resident could not sue the Alberta Crown in Saskatchewan courts.

can provide assistance. Some of the candidates for exception can be identified from judicial decisions that have attempted to define the limits of the presumption. The consequences of reversal of the presumption in British Columbia can usefully be considered. The Alberta Law Reform Institute has discussed possible exceptions.

These sources suggest that there are few essential exceptions. The Alberta Law Reform Institute considered a wide range of possible exceptions, but concluded that only a small number of them have merit. British Columbia reversed the presumption without enacting any exceptions. One exception was adopted shortly after reversal of the presumption. No others exceptions have since been adopted. However, it should be noted that immunities recognized in some jurisdictions are not thought to be necessary in others. Differences of opinion about the appropriateness of immunity can exist.

The problem of identifying appropriate exceptions is compounded by the fact that, in the past, the legislature did not have a consistent policy toward binding the Crown. As noted above, Saskatchewan appears to be more consistent, as recent legislation has more routinely bound the Crown than in the past. For example, limitations of actions legislation in Canada traditionally did not bind the Crown. Immunity from limitation periods has been upheld by courts,⁷⁴ but has often been criticized.⁷⁵ Saskatchewan's *Limitations Act*⁷⁶ binds the Crown.⁷⁷

There remain a few other cases in which immunity has long been accepted as part of the law, making it unwise to abolish the immunity without considering the consequences of doing so.

4.1 The Crown as creditor

The Crown has traditionally claimed a prerogative of prior payment over other creditors of equal degree. A series of Saskatchewan decisions have confirmed the rule that the

⁷⁴ See *Morguard Trust Co v Schneider* (1993), 8 Alta LR (3d) 330, [1993] AJ No 67; *Manitoba Development Corp v Arthur D. Little Inc* (1984), 27 Man R (2d) 182, [1984] MJ No 358.

⁷⁵ See Law Reform Commission of Saskatchewan, *Proposals for a New Limitation of Actions Act* (April 1989).

⁷⁶ SS 2004, c L-16.1.

⁷⁷ *Ibid.*, s 4.

Crown takes priority over execution creditors of equal degree.⁷⁸ The Crown may also take priority over creditors in some other cases.⁷⁹ This state of affairs has been criticized. In a fairly recent report,⁸⁰ Professors Tamara M. Buckwold and Ronald C.C. Cuming recommended that the Crown should be bound by legislation for enforcement of judgments:

The Royal Prerogatives that now give the Crown priority to enforcement and payment are anachronistic and unnecessary. When it is required, Crown claims can be, as they currently are in several instances, given priority through statutory conferral of a deemed security interest in property of the judgment debtor.⁸¹

However, the new *EMJA* adopts this recommendation only in part.⁸² Section 118 provides that the Crown is bound by the *EMJA* in exercising its rights or remedies as an enforcing judgment creditor but otherwise is only bound where expressly stated. Section 118(3) specifically addresses retention of the Crown prerogative to enforce alternative remedies outside the *EMJA* and certain issues of privacy and disclosure. Section 61 provides authority to identify by regulation those Crown accounts that will be subject to seizure under the Act. This is intended to permit distinctions to be made between social benefit payments by the Crown and payments in the nature of commercial activities. Section 64 presumes Crown employment remuneration will be subject to seizure but allows for separate regulation of that process in the Crown context. Thus, under the *EMJA* the Crown's traditional enforcement rights have been preserved: to the extent that the Crown is going to use the enforcement remedies in the *EMJA* they are bound by the *EMJA*, but the *EMJA* does not prevent them from using other enforcement remedies. Just because the Crown is brought into an Act, that Act

⁷⁸ See *Re Ile A La Crosse Native Industries*, [1983] 6 WWR 565, 28 Sask R 182 (QB); *Farley v Badley*, [1990] 3 WWR 676, 82 Sask R 247 (QB), aff'd, [1992] 1 WWR 638, 97 Sask R 21 (CA); *Agriculture Credit Corporation v Kozak*, [1991] 4 WWR 231, 91 Sask R 277 (QB).

⁷⁹ See *City of Regina v Saskatchewan Economic Development Corporation* (1986), 47 Sask R 140, [1986] SJ No 157 (QB).

⁸⁰ Professor Tamara M Buckwold and Professor Ronald CC Cuming, *Modernization of Saskatchewan Money Judgment Enforcement Law* (Saskatoon: Law Foundation of Saskatchewan, 2005), online: http://www.qp.gov.sk.ca/orphan/JE_Final_Report.pdf.

⁸¹ *Ibid* at 196 [footnotes omitted].

⁸² Note that the *EMJA* repealed *The Creditors' Relief Act*, *supra* note 72, which did not bind the Crown.

may not restrict the Crown for other remedies.⁸³ The approach adopted in the *EMJA* is consistent with the general policy in regard to immunity suggested in this paper.

4.2 The Crown as witness

The Crown has no prerogative to refuse to give testimony or produce documents in court. However, it has frequently been held in Canada that the presumption of immunity may permit the Crown to refuse to give evidence before a tribunal or similar investigative body created by statute.⁸⁴ Saskatchewan statutes establishing tribunals often do not bind the Crown.⁸⁵ The Alberta Law Reform Institute suggests that little justification exists for a general immunity from giving evidence before tribunals.⁸⁶ In *Smallwood v Sparling*,⁸⁷ the Supreme Court of Canada held that public officials may exercise a privilege to avoid giving evidence in court, if giving evidence would be “injurious to the public interest.”⁸⁸ This is arguably as much protection as the Crown can reasonably require or expect.

4.3 Builders’ liens

It appears to be settled law in Canada that, in the absence of an express provision to the contrary, the Crown is exempt from builders’ lien legislation.⁸⁹ It has been argued that application of builders’ lien legislation to the Crown would be contrary to public policy

⁸³ This mirrors the decision in *Agricultural Credit Corp of Saskatchewan v Kozak*, *supra* note 78. Baynton J. stated that the Crown is not immune from the (since repealed) *Creditors’ Relief Act* per se, but only from the provisions in the Act that abrogate Crown prerogatives. The Crown may not lose its common law prerogative to priority by electing to pursue one remedy instead of another, but nor can it obtain a broader prerogative to priority than is enjoyed under common law. In order to rely on this common law prerogative to priority it must accept the inherent equal degree qualification imposed by the common law.

⁸⁴ For example, *Labour Relations Board v Alberta Manpower et al* (1988), 60 Alta LR (2d) 261, [1988] 5 WWR 540; *RAS v Nova Scotia (Minister of Social Services)* (1987), 20 NSR (2d) 374, [1987] NSJ No 550.

⁸⁵ See e.g., *The Trade Union Act*, RSS 1978, c T-17, which establishes that the Labour Relations Board does not bind the Crown.

⁸⁶ Alberta Law Reform Institute, *supra* note 13 at 96.

⁸⁷ [1982] 2 SCR 686, [1982] SCJ No 93 [cited to SCR].

⁸⁸ *Ibid* at 701.

⁸⁹ See *Ed Miller Sales & Rentals Ltd v R* (1982), 22 Alta LR (2d) 9, [1982] AJ No 585 (QB).

to the extent that liens could be enforced by forced sale of Crown property.⁹⁰ However, this does not appear to be an issue in Saskatchewan. The Saskatchewan *Builders' Lien Act*⁹¹ provides that:

- 5.(1) Except as otherwise provided, the Crown is bound by this Act.
- (2) This Act does not apply where services or material are provided:
 - (a) in connection with a contract entered into under or pursuant to *The Highways and Transportation Act*; or
 - (b) in connection with the construction or improvement of a street or highway owned by the Crown.
- (3) Notwithstanding subsection (2), this Act applies where services or material are provided in connection with the construction or improvement of a bridge owned by the Crown other than a bridge constructed or improved under or pursuant to *The Highways and Transportation Act*.⁹²

4.4 Planning legislation and bylaws

After the presumption was reversed in British Columbia, an exception was adopted to exempt the Crown from application of land use planning legislation:

- 14. (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.⁹³

The provincial government did not regard itself as bound by such legislation prior to reversal of the presumption, and this appears to be the assumption in some other

⁹⁰ Alberta Law Reform Institute, *supra* note 13 at 91-92.

⁹¹ SS 1984-85-86, c B-7.1.

⁹² *Ibid*, s 5(1)-(3).

⁹³ BC *Interpretation Act*, *supra* note 16, s 14(2).

provinces.⁹⁴ However, the Crown is bound in Saskatchewan under *The Planning and Development Act, 2007*.⁹⁵

Review of reported decisions and commentary from Saskatchewan and other common law jurisdictions suggests that there are few statutes under which immunity continues to serve a significant public policy. In some cases, such as limitation of actions and builders' liens, traditional immunities once thought to be important have already been abolished.

If the presumption of Crown immunity is abolished, a danger would no doubt remain that some less obvious but important consequences of abolition will have been overlooked. However, the consequences of abolition may be overstated. In at least two cases—limitations and builders' liens—policy arguments once made in favour of immunity seem to have simply expired, and no harm appeared to follow abolition of these immunities. In any event, mistakes can be corrected, as demonstrated in British Columbia where exemption of the Crown from land-use legislation was re-enacted after abolition of the presumption.

5. CONCLUSION

The presumption that a statute does not “bind the Crown” unless it expressly so states is a remnant of the past. It cannot easily be defended in principle. As the discussion in this paper shows, the courts, law reformers, and academics have criticized it. It has been reversed in two provinces. A strong case for abolition of the presumption can be made.

However, the presumption has long been part of the law. Like many other common law principles, its edges have been worn smooth in practice. Little evidence exists that the unfairness that now seems inherent in the rule is as significant in practice as in theory. The rule may serve legitimate policy goals in at least a few cases. Whether these

⁹⁴ Alberta Law Reform Institute, *supra* note 13 at 109.

⁹⁵ 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.

considerations are sufficient to justify retention of a rule that, as the Supreme Court of Canada put it, is in “conflict with basic notions of equality before the law,”⁹⁶ is the first question law reformers need to ask about the presumption.

If the presumption is abolished, it will be necessary to ensure that any legitimate instances of Crown immunity that abolition would otherwise negate are preserved. The evidence presented in this paper suggests that there are few, if any, such cases. However, this is a topic that should be given careful consideration.

6. INVITATION TO RESPOND

Given the above, what changes, if any, do you think need to be made to the presumption of Crown immunity? Please refer to our Call for Responses on page 1 for suggestions to guide your thinking and information on how to submit your response.

⁹⁶ *AGT, supra* note 11 at para 144.