

# INTERPROVINCIAL SOVEREIGN IMMUNITY REVISITED<sup>©</sup>

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The conventional wisdom has been that the Canadian provincial Crowns are immune from the jurisdiction of the courts of other Canadian provinces just as they are immune from the jurisdiction of foreign courts. This reflects the old views that the provinces are like foreign countries for the purposes of the conflict of laws and that court jurisdiction over the Crown is purely a creature of statute. Recent recognition of the constitutional bases for court jurisdiction and the need to reassess conflict of laws rules in light of the principles of Canadian federalism invites us to revisit interprovincial sovereign immunity, especially as it could arise in multi-province class actions against the Crowns in right of the provinces.

La philosophie traditionnelle est à l'effet que l'immunité des Couronnes provinciales s'étend aux tribunaux des autres provinces canadiennes. Cela reflète les anciens principes selon lesquels les provinces peuvent être assimilées à des pays étrangers pour les fins de conflit des lois et que la juridiction du tribunal sur la Couronne est tout simplement une fiction de la loi. La reconnaissance du fondement constitutionnel de la juridiction des tribunaux ainsi que la nécessité de réexaminer les règles de conflits des lois face aux principes du fédéralisme canadien, nous invitent à réévaluer l'immunité de la souveraineté provinciale puisqu'il existe toujours la possibilité d'un recours collectif multi-provincial contre les Couronnes provinciales.

I. INTRODUCTION .....	380
II. THE NOTION OF INTERPROVINCIAL SOVEREIGN IMMUNITY .....	381
III. JURISDICTION OVER CROWN PROCEEDINGS AT COMMON LAW AND PURSUANT TO STATUTE .....	384
IV. JURISDICTION OVER CROWN PROCEEDINGS PURSUANT TO THE CONSTITUTION .....	389
V. REAL AND SUBSTANTIAL CONNECTION .....	392
VI. CONCLUSION .....	395

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## I. INTRODUCTION

In 1993, the Supreme Court of Canada boldly proclaimed in *Hunt v. T&N PLC* that “the traditional conflicts rules, which were designed for an anarchic world that emphasized forum independence, must be assessed in light of the principles of our constitutional law.”<sup>1</sup> The Court in *Hunt* developed the principle enunciated in its 1990 decision in *Morguard Investments Ltd. v. De Savoye*<sup>2</sup> that the relationship between the superior courts of the provinces should reflect and foster Canadian federalism. In part, this required that the provincial superior courts recognize that they are obliged in various contexts to cooperate even more closely with one another than with the courts of other countries.

Still, when the decision in *Hunt* was released, it was difficult to anticipate the extent of the reform that might follow or its likely direction or progress. Since then, academics have speculated on the implications of the decision for such diverse matters as proof of foreign law and constitutional review of regulations governing court jurisdiction<sup>3</sup> but, as yet, the legacy of *Hunt* has sounded in few specific doctrinal or legislative developments.

In the coming years, however, it appears likely that the decision in *Hunt* will form the basis for reconsidering, among other things, the view that the provincial governments are immune from the jurisdiction of the superior courts of the other provinces. While the question of interprovincial Crown immunity has largely eluded judicial scrutiny, the emerging phenomenon of multi-province class proceedings is likely to necessitate its authoritative resolution. Should it happen that, for example, in the area of fisheries management or health care delivery, the provincial governments had been involved jointly or similarly in regulating resources improperly, or in providing the public with goods or services that proved injurious, it would be necessary to resolve whether their liability could be determined in a single proceeding or whether they would have to be sued in separate proceedings in the courts of each province.

Apart from the practical impetus to resolve the question, a determination of the provincial Crowns’ amenability to suit in the

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<sup>1</sup> [1993] 4 S.C.R. 289 at 321 [hereinafter *Hunt*].

<sup>2</sup> [1990] 3 S.C.R. 1077 [hereinafter *Morguard*].

<sup>3</sup> See, for example, E. Edinger, “The Constitutionalization of the Conflict of Laws” (1995) 25 Can. Bus. L.J. 38.

courts of other provinces would clarify whether this traditional aspect of “sovereignty” forms part of the relationship between the Canadian provinces. Some might regard provincial sovereignty as obviously antithetical to federalism, but this would seem to be a peculiarly Canadian view. American federalism, for example, clearly contemplates the accommodation of some state sovereignty, including the immunity of state governments from the jurisdiction of federal courts.<sup>4</sup> Accordingly, a consideration of interprovincial Crown immunity could shed light on a subtle but important feature of the Canadian constitutional structure.

## II. THE NOTION OF INTERPROVINCIAL SOVEREIGN IMMUNITY

While the prevailing academic view was once that the provinces are separate sovereigns for the purposes of court jurisdiction, the jurisprudence has been divided. In its 1967 decision in *Weir v. Lohr*,<sup>5</sup> the Manitoba Court of Queen’s Bench held that the private international law rule against enforcing foreign revenue laws did not preclude a claim for a hospital account for which the plaintiff had been reimbursed by the Saskatchewan government because “[i]n Manitoba the Province of Saskatchewan is not to be regarded as a foreign state. Her Majesty in right of the province of Saskatchewan is not a foreign sovereign in Her Majesty’s Court of Queen’s Bench for Manitoba.”<sup>6</sup> The issue before the court was one of the application of another province’s laws and not of local court jurisdiction over other provincial governments. Still, *Weir* provides an early articulation of the distinction in court jurisdiction between foreign sovereigns and other provincial Crowns and suggests that interprovincial Crown liability should be governed by the same principles as domestic Crown liability.<sup>7</sup>

This approach was later endorsed by the Quebec Court of Appeal when it recognized that the law of interprovincial Crown liability should be based on principles of Crown liability and not on those of sovereign immunity in *Quebec (Commission Hydroélectrique) v. Churchill*

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<sup>4</sup> See U.S. Const. amend. XI; and L. Tribe, *American Constitutional Law* 2d ed. (New York: Foundation Press, 1988) at 173-89.

<sup>5</sup> (1967), 62 W.W.R. 99 (Man. Q.B.) [hereinafter *Weir*].

<sup>6</sup> *Ibid.* at 106.

<sup>7</sup> The comparable distinction on the international plane is that between the doctrines of the exclusion of foreign law and sovereign immunity.

*Falls (Labrador) Corp*<sup>8</sup> The Crown in right of Newfoundland objected to being impleaded in the courts of Quebec but Monet J.A. held:

[J]e suis d'avis qu'il ne faut pas confondre les règles de droit international en matière d'immunité—que la jurisprudence de nos Tribunaux reconnaît—et le principe de la souveraineté des provinces canadiennes dans le champ de compétence qui est le leur—que la jurisprudence de nos Tribunaux a consacré depuis longtemps. Sans ignorer que la chose effectivement jugée était tout autre dans l'affaire *Weirc. Lohr*, je n'hésiterais pas à transposer ici l'opinion de monsieur le juge en chef Tritschler.<sup>9</sup>

This was not, however, the approach taken in early academic consideration of the subject. Professor Dale Gibson criticized the decision in *Weir*. He offered the following analysis, suggesting that the provinces are separate sovereigns for the purposes of court jurisdiction:

Suppose an employee of the British Columbia government drives to Alberta in the course of his duties, and negligently injures someone in a collision while in Alberta. If the injured person sues the British Columbia Crown in British Columbia, he will probably not succeed, since by British Columbia law the Crown is not liable in tort. If he sues in Alberta, where the Crown is liable in tort, he will probably meet a similar fate under existing law, because of the principle that the courts will not entertain an action against a 'foreign' sovereign.<sup>10</sup>

In the footnote to the above passage, Gibson observed:

It is arguable that the Crown in the right of another province is not a foreign sovereign, but I suspect that it would be so treated for this purpose. It is true, however, that one province has been held not to be a foreign state in the courts of another for the purpose of the rule that the courts of one state will not enforce the tax laws of another: *Weir v. Lohr*. ... In any event, the provincial legislation imposing tort liability is usually so phrased as to apply to the Crown of that province only.<sup>11</sup>

It was on this basis that the British Columbia Supreme Court in *Western Surety Co. v. Elk Valley Logging Ltd.* held that "Alberta is a sovereign state vis-à-vis the Province of British Columbia"<sup>12</sup> and, therefore, was entitled to immunity from the process of the British

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<sup>8</sup> [1980] C.A. 203.

<sup>9</sup> *Ibid.* at 209. On appeal to the Supreme Court of Canada, the Court explicitly refrained from addressing this question and decided the case on other grounds: [1982] 2 S.C.R. 79 at 91. The Quebec Court of Appeal later reiterated with approval the observation of Monet J.A. in *Sparling v. Caisse de Dépôt* [1985] C.A. 164, aff'd [1988] 2 S.C.R. 1015, but, as in *Weir*; *supra* note 5, the issue in *Sparling* was that of Crown immunity from the application of another province's statute and not immunity from the process of its court.

<sup>10</sup> D. Gibson, "Interjurisdictional Immunity in Canadian Federalism" (1969) 47 Can. Bar Rev. 40 at 59 [emphasis added].

<sup>11</sup> *Ibid.* n. 69.

<sup>12</sup> (1985), 23 D.L.R. (4th) 464 at 468 (B.C.S.C.) [hereinafter *Western Surety*].

Columbia courts. The court regarded the comments in *Weir* to be *obiter dicta* as the case concerned Crown immunity from another province's legislation and not the jurisdiction of its courts. Instead, the court relied on the analysis of the English Court of Appeal in *Mellenger v. New Brunswick Development Corp*<sup>13</sup>

Although *Mellenger* is one of very few decisions to address the sovereign immunity of a province, reliance on it, in the context of interprovincial Crown immunity, seems misplaced. In *Mellenger*, a claim of sovereign immunity from the English courts by a provincial Crown corporation had been challenged on the basis that a provincial Crown was not a foreign sovereign. The issue might have arisen because the entitlement to immunity of sub-federal governments like the Canadian provincial governments might not have been obvious to the English courts: in a unitary state such as the United Kingdom, the second tier of government would be local or municipal in nature and not entitled to be treated as a sovereign. Having considered the nature and structure of the provincial government, the Court of Appeal held that "[e]ach provincial government, within its own sphere, retained its independence and autonomy, directly under the Crown. ... It follows that the Province of New Brunswick is a sovereign state in its own right, and entitled, if it so wishes, to claim sovereign immunity."<sup>14</sup> The operative question here, however, is whether the Province of New Brunswick is sovereign in the sense that the governments of Canada are sovereign vis-à-vis foreign governments and courts or whether the provincial government is sovereign in the sense that it is a separate sovereignty vis-à-vis other Canadian provinces and superior courts. By adopting this reasoning in *Western Surety* the British Columbia Supreme Court appeared to assimilate the question of sovereign immunity that was addressed in *Mellenger* (i.e., whether New Brunswick, as one of the Canadian governments, was entitled to immunity from foreign courts) to the question of Crown liability (i.e., whether the Crown in right of New Brunswick was amenable to suit in the Canadian superior courts).

Since then, *Western Surety* has been followed by other courts<sup>15</sup>

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<sup>13</sup> [1971] 2 All E.R. 593 [hereinafter *Mellenger*].

<sup>14</sup> *Ibid.* at 595-96.

<sup>15</sup> *Bouchard v. J.L. Le Saux* (1984), 45 O.R. (2d) 792 at 797-99 (S.C.), rev'd on other grounds (1984), 48 O.R. (2d) 799 (H.C.J.), rev'd on other grounds (1986), 58 O.R. (2d) 124 (C.A.). The "historic principle of sovereign immunity" was cited by Wilson J. as an additional reason for declining jurisdiction in *Godin v. New Brunswick Electric Power Commission* (1993), 16 C.P.C. (3d) 388 (Ont. Ct. (Gen. Div.)) [hereinafter *Godin*]. See also *Dableh v. Ontario Hydro* (1993), 33 C.P.R. (3d) 544 (F.C.T.D.). However, in *Dableh*, it was noted, at 549, that the court in question, the Federal Court, was a statutory court and that there could be a different result for a court of inherent

and the academic commentary has continued to note it as a precedent in the area;<sup>16</sup> and in the most recent edition of *Liability of the Crown* Professor Peter Hogg, relying in part on *Western Surety* and the Gibson article,<sup>17</sup> answered the jurisdictional question in the negative: “[c]an the Crown in right of Ontario be sued in the courts of British Columbia? ... Although there is not much direct authority on the point, in principle the answer must be no.”<sup>18</sup>

### III. JURISDICTION OVER CROWN PROCEEDINGS AT COMMON LAW AND PURSUANT TO STATUTE

While Professor Hogg reached the same conclusion as the court in *Western Surety* it appears that he did so not on the basis of interprovincial sovereignty, but rather on the basis that jurisdiction over the Crown is entirely a creature of statute and only a statute explicitly granting jurisdiction to the courts of other provinces could render a provincial Crown amenable to suit in other provinces.<sup>19</sup> The development of Crown liability law until recent years supports the view that the right to commence proceedings against the Crown is provided for exhaustively in provincial statutes. Many of those statutes nominate only the province’s own superior courts (and, where they still exist, the district or county courts) as the courts of competent jurisdiction.

Until some fifty years ago, there was no common law right to sue the Crown without its consent.<sup>20</sup> As Professor Hogg notes, although “[t]he general rule is that the Crown cannot be sued in any court ..., [t]he common law can be changed by statute, so that the Crown can be sued in

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jurisdiction.

<sup>16</sup> See, for example, H. Kindred *et al.*, eds., *International Law Chiefly as Interpreted and Applied in Canada*, 5th ed. (Toronto: Emond Montgomery, 1993).

<sup>17</sup> *Supra* note 10.

<sup>18</sup> P.W. Hogg, *Liability of the Crown* 2d ed. (Toronto: Carswell, 1989) at 267.

<sup>19</sup> Similar views were expressed in Legal Education Society of Alberta, *Proceedings Involving Governments* (Edmonton: Legal Education Society of Alberta, 1989) at 89: “a province cannot be sued anywhere but in the Courts of the province in question;” and see Continuing Legal Education Society of British Columbia, *Taking the Government to Court* (Vancouver: Continuing Legal Education Society of British Columbia, 1990) at 4.2.03: “[g]enerally, it is not possible to sue the Crown in right of one province in the courts of another.”

<sup>20</sup> *Supra* note 10 at 3-9; Ontario Law Reform Commission, *Report on the Liability of the Crown* (Toronto: Carswell, 1989) at 8-10; E.C.S. Wade & A.W. Bradley, *Constitutional and Administrative Law*, 11th ed. (London: Longman, 1993) at 733-36; and S.W.A. de Smith & R. Brazier, *Constitutional and Administrative Law* 6th ed. (London: Penguin, 1990) at 133-34, 626ff., esp. at 630.

a court that has been granted jurisdiction over the Crown by statute.”<sup>21</sup> In 1950, following post-war legislative reform in the United Kingdom, the Canadian Conference of Commissioners on Uniformity of Legislation prepared a “Uniform Model Act” for Crown proceedings.<sup>22</sup> Provincial legislation, based on the *Model Act* was passed in all the provinces in the period between 1951 and 1974<sup>23</sup> with the exception of Quebec, where legislative provisions granting a right of action against the government were already in place.<sup>24</sup>

Crown liability legislation in the Canadian provinces is fairly uniform. However, in interpreting the provisions of the various acts, it should be noted that, owing to the territorial restrictions on provincial legislation, the relevant statute is that of the defendant province and not of the forum province.<sup>25</sup> Thus, it would appear that a right of action in the Ontario Court (General Division) against, say, the Crown in right of Alberta could be authorized only by a provision in the Alberta statute

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<sup>21</sup> *Supra* note 18 at 266 (footnotes omitted). However, the common law tradition of immunity, based on the feudal principle that “a lord could not be sued in his own court,” *ibid.* at 3-4, had long been recognized to be at odds with the principle of the rule of law and had been restricted by mechanisms for obtaining the Crown’s consent to be sued, such as the petition of right.

<sup>22</sup> *Conference of Commissioners on Uniformity of Legislation in Canada, Proceedings of 1950* (Ottawa, Queen’s Printer, 1950) at 76 [hereinafter *Model Act*].

<sup>23</sup> See Alberta: *Proceedings Against the Crown Act* R.S.A. 1980, c. P-18 [hereinafter *Alberta Act*]; British Columbia: *Crown Proceeding Act* R.S.B.C. 1996, c. 89 [hereinafter *British Columbia Act*]; Manitoba: *Proceedings Against the Crown Act* R.S.M. 1987, c. P140 [hereinafter *Manitoba Act*]; New Brunswick: *Proceedings Against the Crown Act* R.S.N.B. 1973, c. P-18 [hereinafter *New Brunswick Act*]; Newfoundland: *Proceedings Against the Crown Act* R.S.N. 1990, c. P-26 [hereinafter *Newfoundland Act*]; Nova Scotia: *Proceedings Against the Crown Act* R.S.N.S. 1989, c. 360 [hereinafter *Nova Scotia Act*]; Ontario: *Proceedings Against the Crown Act* R.S.O. 1990, c. P.27 [hereinafter *Ontario Act*]; Prince Edward Island: *Crown Proceeding Act* R.S.P.E.I. 1988, c. C-32 [hereinafter *PEI Act*]; and Saskatchewan: *The Proceedings Against the Crown Act* R.S.S. 1978, c. P-27 [hereinafter *Saskatchewan Act*].

<sup>24</sup> R.S.Q. c. C-5, ss. 94-94.10 [hereinafter *Quebec Act*].

<sup>25</sup> A grant of jurisdiction over another provincial Crown would appear to exceed the “within the province” territorial restriction on legislation that the provinces are authorized to enact pursuant to section 92 of the *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3 [hereinafter *Constitution Act, 1867*]. See Hogg, *supra* note 18 at 267; and Phillips (*Guardian ad litem of*) v. Beary (1994), 29 C.P.C. (3d) 258 (B.C.S.C.); but see Gibson, *supra* note 10 at 59, who, asks “[c]ould the Alberta legislature constitutionally pass a statute stating that the Crown in right of other provinces may be sued in Alberta courts with respect to acts done in Alberta, and held legally liable to the same extent as the Alberta Crown?” and answers, at 60-61:

It is probable, then, although the question seems never to have been litigated, that provincial Crowns have no constitutional immunity against the statutes of sister provinces in which they may be operating. If Manitoba chooses to pass a statute enabling the Crowns of other provinces to be sued for tort with respect to activities carried on in Manitoba, it may constitutionally do so. And this, I submit, is as it should be.

that permitted proceedings in the Alberta Court of Queen's Bench and in other provincial superior courts. The Ontario court could not rely on an Ontario statute for jurisdiction over the Crown in right of Alberta. It is important, then, to consider the drafting of each provincial statute to determine whether it subjects that province's Crown to the jurisdiction of another province's courts.

Although eight of the provincial statutes provide explicitly for jurisdiction, the *Ontario Act* and *Quebec Act* do not have provisions for jurisdiction *per se*. In those *Acts*, broadly worded provisions for procedure appear to apply also to jurisdiction and to render the Crown in right of Ontario and the Government of Quebec, respectively, subject to the general law governing court jurisdiction.<sup>26</sup> The Alberta legislation contains a provision for jurisdiction<sup>27</sup> that does not appear to restrict the jurisdiction of any court that would, under the general law, be competent to entertain a proceeding against the Crown. It would appear, then, that the Crown proceedings statutes in Ontario, Quebec, and Alberta contain no impediment to suit in another province against their respective Crowns.

The legislation of the other seven provinces, however, contains jurisdiction provisions adopted from the *Model Act* that permit proceedings in local superior courts (and, in some cases, the district or county courts) pursuant to the relevant legislation (and, in some cases, the relevant regulations). By permitting or requiring proceedings to be brought in these courts, the *Acts* could be regarded as implicitly excluding proceedings in other courts. This follows from the *expressio unius* principle of statutory interpretation by which the designation of certain courts would impliedly exclude other courts,<sup>28</sup> and from the

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<sup>26</sup> Section 13 of the *Ontario Act*, *supra* note 23, provides: "[e]xcept as otherwise provided in this Act, in a proceeding against the Crown the rights of the parties are as nearly as possible the same as in a suit between persons ..."; and article 94 of the *Quebec Act*, *supra* note 24, provides: "[a]ny person having a recourse to exercise against the government may exercise it in the same manner as if it were a recourse against a person of full age and capacity, subject only to the provisions of this chapter."

<sup>27</sup> Section 8 of the *Alberta Act* *supra* note 23 provides: "[e]xcept as otherwise provided in this Act, all proceedings against the Crown in any court shall be instituted and proceeded with in accordance with the relevant law governing the practice in that court." [emphasis added] The section was drafted to replace two previous sections (similar to those found in the *Saskatchewan Act* *supra* note 23) as a result of the consolidation of the former "Supreme" and "District" courts into the Alberta Court of Queen's Bench. See *Proceedings Against the Crown Act* R.S.A. 1970, c. 285, ss. 7, 8; and *Court of Queen's Bench Act* S.A. 1978, c. 51.

<sup>28</sup> See F.A.R. Bennion, *Statutory Interpretation: A Codified* ed. (London: Butterworths, 1992) at 874-75.



absence of common law jurisdiction over the Crown.<sup>29</sup> Provisions abolishing previous means of proceeding against the Crown, in the statutes of Saskatchewan,<sup>30</sup> New Brunswick,<sup>31</sup> and Newfoundland<sup>32</sup> appear to support this. In a 1993 decision, the Ontario Court (General Division) declined to hear an action against the New Brunswick Electric Power Commission on the basis that the jurisdiction provision of the *New Brunswick Act* had to be read in conjunction with section 21 of the *Act* which provided “[n]o proceeding may be brought against the Crown except as provided by this Act.”<sup>33</sup> While the jurisdiction provisions could have the effect of establishing exclusive jurisdiction in the province’s own courts, the territorial limitations on the grant of legislative authority of the provinces under section 92 of the *Constitution Act, 1867*<sup>34</sup> would appear to prevent this from being a matter of legislative intent. Just as it would be *ultra vires* for a provincial statute to purport to establish jurisdiction for its courts over another provincial Crown, so too would it be *ultra vires* for a provincial statute to purport to limit the authority of another province’s courts. Accordingly, to the extent that proceedings against the Crown continue to be purely a creature of statute, the absence of a clear grant of jurisdiction might have the effect of precluding jurisdiction, even though such a legislative intent would be *ultra vires*.

Did legislators intend to exclude the jurisdiction of other provincial superior courts? The provisions of the seven provinces that appear to have the potential for restricting jurisdiction to local superior courts were drawn from the *Model Act* which, in turn, was drawn from the United Kingdom legislation.<sup>35</sup> In a unitary state such as the United

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<sup>29</sup> The *British Columbia, Saskatchewan, New Brunswick, and Nova Scotia Acts* *supra* note 23, nominate generically “the Supreme Court” or “the Court of Queen’s Bench.” The *Manitoba, Newfoundland, and Prince Edward Island Acts* *supra* note 23, nominate specifically the superior court of the province (*i.e.*, the Court of Queen’s Bench of Manitoba, etc.). Whether the court of competent jurisdiction is named or not probably does not change the effect of the provision in that the provisions specifying “the court” arguably refer to the local superior court.

<sup>30</sup> *Saskatchewan Act*, *supra* note 23, s. 23.

<sup>31</sup> *New Brunswick Act* *supra* note 23, s. 21.

<sup>32</sup> *Newfoundland Act* *supra* note 23, s. 27.

<sup>33</sup> *Godin*, *supra* note 15.

<sup>34</sup> *Supra* note 25.

<sup>35</sup> Section 7 of the *Model Act*, *supra* note 22, cites the United Kingdom Crown Proceedings legislation as its source: “Subject to this Act, all proceedings against the Crown in (His Majesty’s Court of King’s Bench for Manitoba) shall be instituted and proceeded with in accordance with the *King’s Bench Act* (U.K.), 10 & 11 Geo. VI, c. 44, s. 13.

Kingdom, the “other courts” whose jurisdiction would be excluded by such a provision would be inferior courts or foreign courts—not courts of coordinate jurisdiction, like the superior courts of other provinces, that would exist in a federation. Indeed, Canadian provincial legislators might have intended only to exclude the jurisdiction of inferior courts in adopting this provision. In provinces such as Saskatchewan, New Brunswick, and Nova Scotia, where the district or county court system still operated at the time this legislation was adopted, provisions were added to ensure that those courts would also have jurisdiction to entertain proceedings against the Crown.<sup>36</sup> The *New Brunswick Act* and *Nova Scotia Act* go on to clarify that the statute does not create jurisdiction in other tribunals beyond these courts.<sup>37</sup>

The Ontario Court (General Division) in *Belay v. Saskatchewan Government Insurance*<sup>38</sup> was of the view that a similar jurisdiction provision of the Saskatchewan *Automobile Accident Insurance Act*<sup>39</sup> was intended only to exclude the jurisdiction of inferior courts. According to the Court:

the historical purpose of this section has been to designate which court in *Saskatchewan* has been given jurisdiction to adjudicate Part III claims. .... The section does not purport to address the issue of the jurisdiction of any court outside Saskatchewan, nor does it say that any action to enforce Part III rights may *only* be brought in Saskatchewan, that is, to oust what could, in certain circumstances, otherwise be the jurisdiction of any other provincial superior court. Not only would clear and explicit language be required to convey any such legislative intent, but any such language would of course have to withstand constitutional scrutiny, as provincial Legislatures are presumed to intend to legislate intra-territorially: *Moran v. Pyle National (Canada)*.<sup>40</sup>

It is possible that the jurisdiction provisions in the Crown Proceedings Acts were intended to exclude the jurisdiction of foreign courts in order to clarify that the legislation was not intended to undermine any sovereign immunity that the Crown might wish to claim in a foreign court; and it is possible that the potential effect of

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<sup>36</sup> Section 10 of the *Saskatchewan Act*, *supra* note 23, provides: “[s]ubject to this Act and to any enactment limiting the jurisdiction of the District Court, any proceedings against the Crown may be instituted in the District Court and proceeded with in accordance with *The District Court Act*,” and see the former provisions of the Alberta legislation, *supra* note 27.

<sup>37</sup> Section 9 of the *New Brunswick Act* *supra* note 23, provides: “[n]othing in this Act authorizes proceedings against the Crown in an inferior court;” and section 10 of the *Nova Scotia Act*, *supra* note 23, provides: “[n]othing in this Act authorizes proceedings against the Crown except in the Supreme Court or a county court.”

<sup>38</sup> (1992), 10 O.R. (3d) 371.

<sup>39</sup> R.S.S. 1978, c. A-35.

<sup>40</sup> *Supra* note 38 at 374-76 [emphasis in original].

precluding suit in the superior courts of another province was simply not considered by provincial legislators. Nevertheless, it appears that for at least seven of the ten provinces there is neither a common law nor a statutory basis for jurisdiction of other provincial superior courts over their Crowns. Following the Supreme Court of Canada decisions in *Morguard*<sup>41</sup> and *Hunt*,<sup>42</sup> however, it is now recognized that the Constitution may itself provide a source of court jurisdiction by prohibiting the ouster of the jurisdiction of the superior courts of a province with a real and substantial connection to the matter.

#### IV. JURISDICTION OVER CROWN PROCEEDINGS PURSUANT TO THE CONSTITUTION

The law regarding the jurisdictional relationships between the Canadian provincial superior courts has undergone significant development following the 1990 Supreme Court of Canada decision in *Morguard*. In that case a provincial superior court was held to have jurisdiction to issue an enforceable default judgment against a defendant served in another province because there was a “real and substantial connection” between the matter and the province in which the judgment was issued. Although the question of jurisdiction had arisen in the context of the enforcement of extra-provincial judgments, La Forest J., speaking for the Court, held that “the taking of jurisdiction by a court in one province and its recognition in another must be viewed as correlatives.”<sup>43</sup> In describing the special relationship that exists between the Canadian superior courts as a result of Canada’s particular constitutional structure, La Forest J. emphasized that it gave rise to special requirements for rules of court jurisdiction. In his words:

[T]here is really no comparison between the interprovincial relationships of today and those obtaining between foreign countries in the 19th century ... and the courts made a serious error in transposing the rules developed for the enforcement of foreign judgments to the enforcement of judgments from sister-provinces. ... The considerations underlying the rules of comity apply with much greater force between the units of a federal state. ... It seems anarchic and unfair that a person should be able to avoid legal obligations arising in one province simply by moving to another province. Why should a plaintiff be compelled to begin an action in the province where the defendant now resides, whatever

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<sup>41</sup> *Supra* note 2 at 1095.

<sup>42</sup> *Supra* note 1.

<sup>43</sup> *Supra* note 2 at 1103, and see 1094.

the inconvenience and costs this may bring, and whatever the degree of connection the relevant transaction may have with another province?<sup>44</sup>

In formulating the appropriate rule for jurisdiction among the Canadian provincial superior courts, he said:

to what extent may a court of a province properly exercise jurisdiction over a defendant in another province? A case in this Court, *Moran v. Pyle National (Canada) Ltd.*, [1975] 1 SCR 393 ... is instructive as to the manner in which a court may properly exercise jurisdiction ... Dickson J. ... rejected any rigid or mechanical theory for determining the situs of the tort. Rather, he adopted “a more flexible, qualitative and quantitative test,” posing the question, as had some English cases there cited, in terms of whether it was “inherently reasonable” for the action to be brought in a particular jurisdiction ... the approach of permitting suit where there is a real and substantial connection with the action provides a reasonable balance between the rights of the parties.<sup>45</sup>

In *Hunt*, the Court reviewed the constitutionality of provincial legislation that affected the exercise of jurisdiction by other provincial superior courts. Orders had been issued by a Quebec court pursuant to the Quebec *Business Concerns Records Act* to prohibit the Quebec defendant from forwarding productions from Quebec to British Columbia for the purposes of proceedings commenced in British Columbia. The plaintiffs argued that the Quebec legislation, enacted to protect Canadian defendants from the excesses of American antitrust litigation, was constitutionally inapplicable to proceedings in another Canadian province. The Supreme Court of Canada agreed, in part, because a plaintiff should not be compelled to begin actions in the province where the defendant resides regardless of the connection the action may have to another province.

While the Court had considered the inappropriateness of unduly restricting superior court jurisdiction to the courts of one province both in *Moran v. Pyle National (Canada) Ltd.*<sup>47</sup> and in *Morguard*, this was the first time the Court had reviewed the constitutionality of legislation having this effect. The Court held that although *Morguard* was not argued in constitutional terms, its principles were constitutional principles—they could not be overridden by provincial legislation. While provinces were not “debarred from enacting legislation that may have some effect on litigation in other provinces,” this legislation “must

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<sup>44</sup> *Ibid.* at 1098, 1102-03.

<sup>45</sup> *Ibid.* at 1104-08.

<sup>46</sup> R.S.Q. c. D-12.

<sup>47</sup> [1975] 1 S.C.R. 393.

respect minimum standards of order and fairness.”<sup>48</sup> The failure of provincial legislation to respect these minimum standards could render it subject to constitutional review in any provincial superior court.

What was constitutionally infirm about the ruling under the Quebec *Business Concerns Records Act*? By thwarting the discovery process in the courts of other provinces, the *Act* effectively required the plaintiff to commence litigation in a Quebec court. The *Act* operated to arrogate to the Quebec courts exclusive jurisdiction over matters that might appropriately be tried in the courts of other provinces by reason of the real and substantial connections that the matters had to those provinces. By ousting the jurisdiction of a Canadian court in another province with a real and substantial connection to the matter, orders made under the *Act* offended the principles of order and fairness enunciated by the Supreme Court in *Morguard*. As La Forest J. explained:

The essential effect, then, and indeed the barely shielded intent, [of blocking statutes, such as the *Business Concerns Records Act*] is to impede the substantive rights of litigants elsewhere. It would force parties to conduct litigation in multiple fora and compel more plaintiffs to choose to litigate in the courts of Ontario and Quebec. Other provinces could, of course, follow suit. It is inconceivable that in devising a scheme of union comprising a common market stretching from sea to sea, the Fathers of Confederation would have contemplated a situation where citizens would be effectively deprived of access to the ordinary courts in their jurisdiction in respect of transactions flowing from the existence of that market.<sup>49</sup>

Applying this reasoning to the question of the jurisdiction a provincial superior court has over the Crown in right of other provinces, it could be said that having made their Crown subject to proceedings in the local superior courts, it would be *ultra vires* the authority of the provincial legislatures to confine proceedings against their Crowns to the courts of their province. Legislation having this effect would preclude suit in the superior court of another province to which the matter had a real and substantial connection.<sup>50</sup> In *Hunt* this resulted in a ruling that the impugned legislation was constitutionally inapplicable to litigation in

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<sup>48</sup> *Hunt*, *supra* note 1 at 324.

<sup>49</sup> *Ibid.* at 330.

<sup>50</sup> On one ancillary logistical point, the objection that a suit against another province's Crown would entail the inconvenience of the attorney general of that province travelling to appear in the litigation seems to have been answered by the rejection in *Hunt* of this as a ground for precluding court jurisdiction to review the constitutionality of another province's legislation.

Canada.<sup>51</sup> In the same way, then, it would appear that the jurisdictional provisions of the provincial legislation for proceedings against the Crown must be read to include the superior courts of any province with a real and substantial connection to the matter.

## V. REAL AND SUBSTANTIAL CONNECTION

Although legislation for proceedings against the Crown may not oust the jurisdiction of the superior court of another province with a real and substantial connection to the matter, the jurisdiction of that court would still depend on the existence of a real and substantial connection to the matter. In a case in which the provincial Crowns had acted jointly to incur liability in every province there would appear to be a real and substantial connection between the matter and the courts of any of the provinces. However, in a case in which the same liability was incurred independently by each government in each province it would remain to be determined whether the matter could be said to have a real and substantial connection to a single province.

The precise nature of the requisite “real and substantial” connection necessary to satisfy the jurisdictional test established in *Morguard* and *Hunt* has not been authoritatively defined. Whether it is a connection between the province of the forum and the cause of action, or the litigants, or the practical requirements of the litigation (for example, the accessibility of witnesses and evidence) and the province has not been fixed. Indeed, La Forest J. noted in *Hunt* that “[t]he exact limits of what constitutes a reasonable assumption of jurisdiction were not defined, and I add that no test can perhaps ever be rigidly applied.”<sup>52</sup> It appears, however, that even in a case involving liability incurred in a province by the Crown in right of that province, the practical requirements of the litigation might provide a real and substantial connection to another province.

Early recognition of the possibility that the appropriate forum might be determined by the practical requirements of the litigation may be found in the House of Lords decision in *Spiliada Maritime Corp. v. Cansulex Ltd.*<sup>53</sup> In that case, the Court endorsed the trial judge’s

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<sup>51</sup> The Court held that it was not necessary to consider whether it could properly be “read down” to permit its application to jurisdictions outside the country, presumably, because the application to foreign litigation was not in issue.

<sup>52</sup> *Hunt*, *supra* note 1 at 324.

<sup>53</sup> [1987] A.C. 460.

finding that, notwithstanding the strong connection to British Columbia, the matter should be tried in the English court because another difficult and complex case with very similar factual and legal issues had just been tried in that court. This was described as “the Cambridgeshire factor” following the name of the ship in the previous case. According to the court at first instance:

The plaintiff's solicitors have made all the dispositions and incurred all the expense for the trial of one action in England; they have engaged English counsel and educated them in the various topics upon which expert evidence will be called; they have engaged English expert witnesses; and they have assembled vast numbers of documents. They have also, no doubt, educated themselves upon the issues in the action. All that has been done on behalf of Cansulex as well, save that one of their expert witnesses is Canadian. If they now wish to start the process again in Canada, that is their choice. But it seems to me that the additional inconvenience and expense which would be thrust upon the plaintiffs if this action were tried in Canada far outweighs the burden which would fall upon Cansulex if they had to bring their witnesses and senior executives here a second time. Overall it would be wasteful in the extreme of talent, effort and money if the parties to this case were to have to start again in Canada.<sup>54</sup>

Having reviewed the various arguments for and against a stay based on the doctrine of *forum non conveniens* Lord Goff returned to the Cambridgeshire factor and concluded:

I believe that anyone who has been involved, as counsel, in very heavy litigation of this kind, with a number of experts on both sides and difficult scientific questions involved, knows only too well what the learning curve is like; how much information and knowledge has to be, and is, absorbed, not only by the lawyers but really by the whole team, including both lawyers and experts, as they learn about the interrelation of law, fact and scientific knowledge, having regard to the contentions advanced by both sides in the case, and identify in their minds the crucial matters on which attention has to be focused, why these are the crucial matters, and how they are to be assessed. The judge in the present case has considerable experience of litigation of this kind, and is well aware of what is involved. He was, in my judgment, entitled to take the view (as he did) that this matter was not merely of advantage to the shipowners, but also constituted an advantage which was not balanced by a countervailing equal disadvantage to Cansulex; and (more pertinently) further to take the view that having experienced teams of lawyers and experts available on both sides of the litigation, who had prepared for and fought a substantial part of the *Cambridgeshire* action for Cansulex (among others) on one side and the relevant owners on the other, would contribute to efficiency, expedition and economy—and he could have added, in my opinion, both to assisting the court to reach a just resolution, and to promoting a possibility of settlement, in the present case. This is not simply a matter, as Oliver L.J. suggested, of financial advantage to the shipowners; it is a matter which can, and should, properly be taken into account, in a case of this kind, in the objective interests of justice.<sup>55</sup>

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<sup>54</sup> *Ibid.* at 470-71.

<sup>55</sup> *Ibid.* at 485-86.

Thus, litigation convenience and judicial economy may be significant factors in establishing a real and substantial connection to the forum. In a matter involving common factual and legal issues arising from liability incurred by each of the provincial Crowns in their own provinces, the convenience and economy of litigating in a single forum could render it the appropriate forum for the resolution of the claims against several of the provincial Crowns.

In addition, the benefits of consolidating matters to avoid the potential for multiplicity of actions and inconsistent results is coming to be recognized as a factor supporting jurisdiction in a single court where a claim might otherwise need to be tried in the courts of several provinces. The courts of Ontario and British Columbia have acknowledged the importance of consolidating claims by certifying class proceedings that span provincial borders. For example, in *Nantais v. Telectronics Proprietary (Canada) Ltd.*<sup>56</sup> the Ontario Court (General Division) certified a nationwide plaintiff class in an action for damages from allegedly defective pacemakers. In doing so, the court observed that it seemed “eminently sensible, for all the reasons given by La Forest J. in *Morguard* and the policy reasons given for passage of the [*Class Proceedings Act*], to have the questions of liability of these defendants determined as far as possible once and for all, for all Canadians.”<sup>57</sup>

The British Columbia Supreme Court took a similar approach in certifying a multi-province class action for injuries associated with breast implants in *Harrington v. Dow Corning Corporation*.<sup>58</sup> The court reviewed the practical considerations affecting the product liability claim before it which potentially involved plaintiffs and defendants from several provinces. Referring to comments in the Supreme Court of Canada decision in *Amchem Products Inc. v. British Columbia (Workers' Compensation Board)*<sup>59</sup> regarding the difficulty of identifying a single appropriate forum in cases involving large plaintiff classes and multiple defendants, the court said:

I think those comments are pertinent here, and they go to the jurisdictional issue and not just to *forum conveniens*. The demands of multi-claimant manufacturer's liability litigation require recognition of concurrent jurisdiction of courts within Canada. In such cases there is no utility in having the same factual issues litigated in several jurisdictions if the claims can be consolidated. .... [In] claims inside and outside the province which raise

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<sup>56</sup> (1995), 25 O.R. (3d) 331.

<sup>57</sup> *Ibid.* at 347.

<sup>58</sup> (1997), 29 B.C.L.R. (3d) 88 [hereinafter *Harrington*].

<sup>59</sup> [1993] 1 S.C.R. 897.



the same common issue, [i]t is that common issue which establishes the real and substantial connection necessary for jurisdiction.”<sup>60</sup>

On this basis, even if the liability of each provincial Crown is incurred in its own province, a claim involving the same factual and legal issues would, by virtue of those common factual and legal issues, have a real and substantial connection to any of the provinces involved, thereby establishing jurisdiction in that province’s superior courts.

It is possible that the court would have to apply different laws to claims arising in the various provinces if the law differed from province to province and if liability had been incurred by each Crown in its province.<sup>61</sup> The court in *Harrington*<sup>62</sup> recognized that, in taking jurisdiction over claims arising in other provinces, it might be required to apply the limitations and other substantive law of those provinces.<sup>63</sup> Still, it was “not persuaded that the differences between British Columbia and other jurisdictions in the context of this litigation are sufficiently problematic that the general view expressed in *Nantais* should be rejected on practical grounds.”<sup>64</sup> Accordingly, whether the need to apply the laws of different provinces to various sub-classes should prevent a single court from assuming jurisdiction to try the matter would likely depend on whether the application of different laws would defeat the litigation convenience and judicial economy achieved by consolidating the claims into one proceeding.

## VI. CONCLUSION

In proceedings against several provincial Crowns for liability jointly incurred there could be a real and substantial connection to any of those provinces supporting the jurisdiction of their courts. Further, proceedings against various provincial Crowns for several liability that involve common factual and legal issues, could afford litigation convenience and judicial economy that would support the exercise of jurisdiction by one court over the various Crowns impleaded; and the common factual or legal issues could supply the real and substantial connection necessary for the proper assumption of jurisdiction. The

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<sup>60</sup> *Supra* note 58 at 95.

<sup>61</sup> *Tolofson v. Jensen*, [1994] 3 S.C.R. 1022.

<sup>62</sup> *Supra* note 58.

<sup>63</sup> *Ibid.* at 91.

<sup>64</sup> *Ibid.* at 94.

interest in avoiding inconsistent results could provide further support for the consolidation of the claims in a single forum.

Should this result be secured through federal legislation? In both *Morguard* and *Hunt*, the Court hinted at the permissibility of federal legislation pursuant to the Peace, Order, and Good Government clause<sup>65</sup> which “gives the federal Parliament powers to deal with interprovincial activities.”<sup>66</sup> The question of interprovincial Crown immunity would appear to be one of national importance beyond the competence of provincial legislation and, thereby, permissibly regulated under the national concerns doctrine interpreting the Peace, Order, and Good Government clause. However, it is not clear that such legislation would be needed. As with the issues in *Morguard* and *Hunt*, the amenability of the provincial Crowns to the jurisdiction of other provincial superior courts is a relatively discrete and straightforward issue that could be clarified by an authoritative judicial pronouncement regarding the proper interpretation of Crown proceedings legislation. It would not appear to require legislation in the way that a complex regulatory scheme might require a statutory framework to set out the relationship between various provisions. Moreover, because the current provincial legislation has largely been adopted from a model act, there is little need for federal legislation to establish common rules. Rather, general principles of civil litigation and the conflict of laws would probably suffice to resolve issues arising as to the scope or applicability of the basic principle that the Crown of one province was subject to the jurisdiction of the superior court of another province.

The notion that the Canadian provinces are “sovereign” vis-à-vis one another as this relates to court jurisdiction appears, then, to have been a passing view, applied with little critical consideration of the differences between interprovincial and foreign relations, and now overtaken by recent developments in the law of interprovincial comity in court jurisdiction. The increasing demands for litigation convenience and judicial economy, especially as witnessed in the advent of multi-province class proceedings, promise to provide a strong practical impetus to overcome the barriers to consolidating claims arising in the distribution of products and services throughout Canada. As was observed in *Hunt*:

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<sup>65</sup> *Constitution Act, 1867* *supra* note 25, s. 91.

<sup>66</sup> *Hunt*, *supra* note 1 at 322, citing *Interprovincial Co-Operatives Ltdv. The Queen*, [1976] 1 S.C.R. 477; *R. v. Crown Zellerbach Canada Ltd*, [1988] 1 S.C.R. 401, La Forest J. (dissenting but not on this point); and *Multiple Accessv. McCutcheon*, [1982] 2 S.C.R. 161.

It is inconceivable that in devising a scheme of union comprising a common market stretching from sea to sea, the Fathers of Confederation would have contemplated a situation where citizens would be effectively deprived of access to the ordinary courts in their jurisdiction in respect of transactions flowing from the existence of that common market.<sup>67</sup>

Indeed, this accords with the widely held intuition that the relationship between the legal systems in Canada should reflect “the essentially unitary structure of our judicial system”<sup>68</sup>—a distinctive characteristic of the Canadian federation. Thus, coupled with the admonitions of the Supreme Court of Canada to reassess traditional conflicts rules in light of the principles of our constitutional law, the need to revisit the doctrine of interprovincial sovereign immunity is likely to be among the ongoing opportunities for re-examining the nature of our federation through the operation of the Canadian court system.

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<sup>67</sup> *Supra* note 1 at 322.

<sup>68</sup> *Ibid.* at 330.