INTERJURISDICTIONAL IMMUNITY IN CANADIAN FEDERALISM

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Introduction

There are eleven different governments in Canada exercising a measure of constitutional sovereignty: ten provincial and one federal. Each has a distinct legal system. Each sometimes engages in activities which in one way or another have ramifications within the boundaries of the others. In such situations it is important to know the extent to which the laws of one government are legally binding on the other. A closely related problem, which arises even more frequently than that of directly controlling government conduct, is the extent to which government “instrumentalities” (corporations created by a government, or enterprises involving activities under its legislative jurisdiction) are bound to obey the laws of other governments.

Surprisingly, the solutions to these problems remain obscure after a century’s experience with the Canadian constitution.¹ This article will examine the often inconsistent decisions that have been made on the subject in the past, and attempt to suggest an approach for the future.

It would, perhaps, be wise to say a word at the outset about my use of the word “Crown”.² I use it as a convenient abbreviation for “Her Majesty the Queen in the Right of Canada (or of a particular province)”, which is, in turn, merely a useful ex-

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¹ Considerable controversy also surrounds the problem in Australia and the United States: Sawer, State Statutes and the Commonwealth (1961), 1 Tasmanian U. L. Rev. 580. Since that article was written, the Australian High Court has clarified matters somewhat by recognizing in Commonwealth v. Cigamatic Pty. Ltd. (1962), 108 C.L.R. 372, a substantial measure of federal Crown immunity from state law (see comments in (1964), 4 Sydney L. Rev. 435 and (1963), 4 Melbourne L. Rev. 127) but many unanswered questions remain.

² See Mundell, Legal Nature of Federal and Provincial Executive Governments (1960), 2 Osgoode Hall L.J. 56.
pression to describe the corporate legal entity to which the law ascribes the legal rights and obligations of the various semi-sovereign units of government created by the British North America Act. I am not troubled by the metaphysical argument that since the Queen is "one and indivisible" there cannot be separate Crowns for each unit. Whether one regards the Queen as a trustee, acting on behalf of a different group of beneficiaries in each jurisdiction, or simply holds that the British North America Act impliedly invested each unit with legal personality, there can be little doubt now that the federal and provincial Crowns are distinct entities at law.\(^3\)

On June 30th, 1867, British North America consisted of a number of mutually independent colonies. Within each colony was a semi-autonomous system of government, based on the British model, and a body of laws (two bodies in the case of the Province of Canada). Queen Victoria exercised the functions of the Crown in the right of each individual colony, and was in that capacity, at least, subject to the laws of each colony.\(^5\) By those laws, however, the Crown enjoyed certain rights and immunities in excess of those enjoyed by private citizens.\(^6\) For example, in most colonies the Crown was immune from tort liability, and, although subject to

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\(^3\) See, for example, Baty, Sovereign Colonies (1921), 34 Harv. L. Rev. 837.

\(^4\) See Moore, Suits Between States Within the British Empire (1925), 7 J. of Comp. Legis. 155, and The Federations and Suits Between Governments (1935), 17 J. of Comp. Legis. 163.

\(^5\) Henderson v. Westover (1852), 1 U.C. Error & App. R. 465, per Robinson C.J., at p. 466. Could the colonial legislature bind the Crown with respect to acts done other than in the right of the colony? Even after Confederation the Privy Council felt that the federal Parliament's jurisdiction over criminal law did not give it the power to end prerogative appeals to that body: "... however widely these powers are construed they are confined to action to be taken in the Dominion; and they do not appear to their Lordships to authorize the Dominion Parliament to annul the prerogative right of the King in Council to grant special leave to appeal." Nadan v. The King, [1926] A.C. 482, at p. 492. Nevertheless, it is at least arguable that contracts entered into in a colony by the Crown in the Right of Great Britain (say for supplies for British troops stationed in the colonies, or purchase of lumber for construction of British naval vessels) would be governed by the law of that colony.

\(^6\) Although the details of private law may have differed somewhat from colony to colony, it is probable that at least those with common law inheritances had very similar rules of prerogative immunity. In the case of Canada East, it has been held that the governing principles were to be found in French law: Exchange Bank v. The Queen (1886), 11 A.C. 157 (P.C.). There is a strange dictum of Sir Barnes Peacock in Farnell v. Bowman (1887), 12 A.C. 648, at p. 649, to the effect that colonial governments may not be in the same position as the British Crown respecting prerogative rights, but that statement must be read in the light of the particular case, which involved an interpretation of a colonial statute restricting Crown immunity.
liability in contract and property transactions, it could not be sued without its consent. No statute could affect the Crown unless it expressly stated or necessarily implied so. It was also a part of the law of each colony that no foreign sovereign or state could be impleaded in a colonial court against its will; although it was not clear whether the Crown in the right of Great Britain or of another colony fell into the category of a “foreign sovereign”.

When the British North America Act came into force the following day, and before any new legislation was passed, the situation did not change within the individual provinces. Executive power at the provincial level was still in the hands of the Crown in the right of each particular province, and the law relating to Crown immunity in each province continued to be based on the pre-Confederation rules.

However, Confederation did give rise to several new Crown immunity problems. A new manifestation of the Crown—Her Majesty in the Right of the Dominion of Canada—was created to represent the new federal level of government. This raised the questions: to what extent is the federal Crown bound by provincial laws, and to what extent is the provincial Crown bound by federal laws? In addition, the British North America Act federally united the formerly mutually independent colonies, which put in a new context the problem of whether the provincial Crowns are bound by the laws of the other provinces. The only section of the Act which seems relevant to these questions is section 125, which states that “no lands or property belonging to Canada or any province shall be liable to taxation”. This could be read as carrying the implication that laws other than those relating to taxation would apply to all manifestations of the Crown, but such an interpretation provides a rather fragile basis for solving an important constitutional problem. These three questions: federal-provincial immunity, provincial-federal immunity, and inter-provincial immunity, will be examined separately.


There can be no doubt that the federal Parliament could, if it chose, pass legislation defining the right and immunities of the federal Crown. It has, in fact, exercised this power to some ex-
tent, but there are many matters concerning which there is not yet any relevant federal legislation. To what extent is provincial law on these matters binding on the federal Crown? The British North America Act is silent on the subject.

Because it is constitutionally possible for provincial common law to operate in a broader sphere than provincial statute law, it will be necessary to examine separately the effect on the federal Crown of provincial common law and provincial statute law.


By creating a new Crown manifestation, authorized to function in each provincial jurisdiction, without stating what its rights and immunities are to be, the British North America Act undoubtedly empowers the courts to decide, as a kind of “constitutional common law”, what those rights and immunities are to be until legislation governing the question is passed. In doing so, two different approaches would be open to the court: it could create its own law on the subject, or it could simply choose to apply the law of a particular province which it regarded as most appropriate to the dispute before it. In other words, if a court had to determine a dispute over federal prerogative rights in the absence of legislation, it would have the choice of either creating a substantive common law on the subject or simply creating a conflict of laws rule for selecting the law of one or other province.

For this universally recognized principle “is not clear”, but suggests that it is based either on Parliament’s power under sections 91(1A) and 106 to control the public debt and property and the Consolidated Revenue Fund of Canada, or on Parliament’s residual power under the opening words of section 91 to make laws “for the peace, order and good government of Canada” in relation to matters not specifically provided for. Since 1949, an additional basis for the principle would be section 91(1), which allows Parliament to amend the “Constitution of Canada”, at least in its purely federal aspects.

The Petition of Right Act (R.S.C., 1952, c. 210), first passed in 1875 (S.C., 1875, 38 Vict., c. 12, repealed the following year by S.C., 1876, 39 Vict., c. 27, s. 20 of which preserved proceedings commenced under the 1875 Act), sets out the procedures to be followed in actions against the federal Crown, and the Exchequer Court Act (R.S.C., 1952, c. 98) and the Crown Liability Act (S.C., 1952-53, c. 30) have expanded the Crown’s liability considerably, and have given exclusive jurisdiction over most claims against the Crown to the Exchequer Court.

Supra, footnote 8. Section 9 states that “The executive government and authority of and over Canada is hereby declared to continue and to be vested in the Queen”. Section 12 states that the Governor General retains all the powers exercised by the Governors of the individual colonies, subject to alteration by the Parliament of Canada.

For example, although “divorce” is a matter within the exclusive legislative jurisdiction of the federal Parliament, until Parliament passed comprehensive legislation on the subject, divorce rights in each province were based on the law inherited by each province at Confederation.
The former approach was taken by a Master of the Ontario Supreme Court in *Re Mendelsohn*\(^\text{14}\) in 1959. He held that the federal Crown's prerogative priority in claims against the estate of a deceased debtor was based on the rules of English law in 1867, and, therefore, was not affected by legislation passed either before or after Confederation in Ontario, where the debtor resided. This decision was reversed (by consent of the Crown) on appeal, however,\(^\text{15}\) and it is submitted that the opposite approach is compelled by the case of *Exchange Bank v. The Queen*.\(^\text{16}\) In the latter case, the Privy Council held that in the absence of federal legislation it is the law of the province in which the transaction occurred which determines the priority of the federal Crown over debtors' estates. The province in question in that case was Quebec, and the Privy Council held that since Quebec's inherited French law granted no Crown priority in the circumstances, the federal Crown must rank equally with other claimants.\(^\text{17}\)

In the absence of legislation, therefore, it seems clear that the rights and immunities of the Crown, whether in the provincial or the federal right, are to be determined by the law of the province indicated by the conflict of laws rules of the forum. In the early years there were no federal courts, so actions against the federal Crown were necessarily tried in provincial courts.\(^\text{18}\) When federal courts were created and given jurisdiction in these matters, the situation did not change, except to the extent that the federal courts may have adopted conflict of laws rules different than those of the other forums.

There is no reason why the provincial law applicable to federal Crown rights should be frozen at 1867. In England the applicable laws are those in force at the time of the action, and this principle

\(^{14}\) (1959), 22 D.L.R. (2d) 748. The reasons for judgment contain a useful collection of previous judicial views on the subject.

\(^{15}\) (1960), 25 D.L.R. (2d) 778.

\(^{16}\) Supra, footnote 6.

\(^{17}\) Laskin, Canadian Constitutional Law (3rd ed., 1966) pp. 554-555, states that this decision is "wrong in principle", because both federal prerogative rights and federal Crown property are matters within the exclusive legislative jurisdiction of the federal Parliament, and may not, therefore, be affected by provincial law. This argument fails to distinguish between the questions: (a) Which legislature may pass statutes on the subject?, and (b) What laws apply in the absence of legislation?

In *Re Mendelsohn*, supra, footnote 14, at p. 753, the Master distinguished the *Exchange Bank* case on the ground that "the law of France was granted to Lower Canada by treaty and by such treaty the Royal prerogative has been limited", and that the principle applied in that case is "peculiar to the Province of Quebec". It is submitted, with respect, that the existence of the treaty is irrelevant; treaties have no direct effect on internal law.

seems appropriate to Canada as well. It is true that section 129, which introduces colonial laws into the provinces as of the date of entering Confederation, refers only to future changes being made by legislation, but the courts have long recognized their power to keep the common law up-to-date by the various methods of change sanctioned by the principles of precedent. This judicial amendment may be reconciled with section 129 by either the fiction that the common law never changes, and that apparent changes are simply corrections of earlier erroneous decisions, or the more realistic recognition that the law which was introduced to the provinces by Section 129 had, as one of its features, a capacity for change through judicial action. Whatever rationale is chosen, it seems clear that the federal Crown is, in the absence of legislation, subject to the most recent provincial judicial pronouncements concerning civil liability.

2. Statute Law.

This brings us to the question that has given the courts most difficulty in this area: to what extent is the federal Crown subject to provincial statutes passed after 1867? Because the provinces are under greater constitutional restrictions concerning their statutes than concerning their judge-made law, the federal Crown enjoys a somewhat greater immunity from provincial legislation than from provincial common law. There has never been agreement about the precise extent of that immunity, however.

A recent decision of the Supreme Court of Canada, *The Queen v. Breton*, contains the startling assertion that this immunity is absolute: "The Crown in the Right of Canada cannot be bound by a provincial statute." This *dictum* is much more sweeping than was necessary to decide the case at hand, however, and it disregards Sir W. Harrison Moore's admonition: "The power of

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20 *Supra,* footnote 13.
21 (1968), 65 D.L.R. (2d) 76, at p. 79, per Fauteux J., concurred in by Taschereau C.J.C., and Abbott, Martland and Ritchie JJ.
22 The suppliant was injured in a fall on a sidewalk adjacent to a building in Quebec City owned by the federal Crown and occupied by the Royal Canadian Mounted Police. The suppliant claimed that her injury was the result of the unsafe condition of the sidewalk, and that the federal Crown was liable to pay damages because of a City by-law imposing legal liability on property owners for failure to repair adjacent sidewalks. The statement quoted was made to support the proposition (which was admitted by all parties) that only federal legislation could wipe out the old common law immunity of the Crown for tortious liability. The *ratio decidendi* of the case consisted of two alternative grounds, neither one of which depended on the quoted statement.

First, it was held, the federal Crown Liability Act, which imposes tort liability on the Crown "in respect of a breach of duty attaching to the
one legislature to impose duties, obligations or liabilities upon the other government, or to detract from its rights . . . is a constitutional matter of the greatest intricacy, upon which generalization is dangerous."

I hope to show that the federal Crown is subject to some, but not all, provincial legislation, and to examine the principles upon which the distinction rests.

Establishing the first part of this thesis is a simple matter, since there have been many judicial decisions requiring the Crown in the Right of Canada to obey provincial statutes. The second part presents a much more difficult task, however, because there has been no uniformity in the reasons assigned for reaching these decisions. There appear, in fact, to be three different explanations for subjecting the federal Crown to provincial legislation. The first two are accepted by most authorities, but the third is a matter of controversy.

A. Incorporation by reference.

All of the authorities are agreed that the federal Crown is subject to any provincial legislation incorporated by reference in ownership, occupation, possession or control of property" was inapplicable, since the Act refers only to "the clearly identified and well-known duty established by the general law, and common in all territorial jurisdictions to persons owning, occupying, possessing or controlling property", not to "all those duties which, by specific enactment by way of exception to the general law, any provincial Legislature may now or in the future seek to impose, in certain localities, upon a particular category of building or landowner with respect to certain other property—in this case a sidewalk—the ownership, occupation, possession or control of which the property owner does not have . . .". The basis of this argument is not clear. If it means that the Crown Liability Act applies only to property duties which are common to the law of every province, it is entirely out of step with the jurisprudence, which consistently looks to the law of a particular province. If it means that the federal Crown is only bound to abide by property duties which are uniform throughout a particular province, the merit of the principle is difficult to understand. If it simply means that the particular duty involved in this case was not a "duty attaching to the ownership, occupation, possession or control of property", it is much less startling (though, with respect, hardly more defensible).

The second reason for the Supreme Court's decision was that because the by-law allowed the City to make the repairs on default by the landowner, and collect the cost from him "as a tax, and in the same manner, and with the same privileges as all other taxes", application of the by-law to the Crown would offend the prohibition in section 125 of the British North America Act against taxation of Crown property. It must be acknowledged that this is a more imaginative approach than is customarily to be found in Supreme Court opinions.

On the whole, however, the decision falls considerably short of satisfactory. It could probably have been disposed of on the simple ground that the by-law in question did not impose civil liability for damages, and there was certainly no need for all of the questionable dicta that the opinion contains on the subject of interjurisdictional immunity.

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a federal statute imposing liability on the federal Crown. As Chief Justice Fitzpatrick said, in *Gauthier v. The King*:

24 "The principle is . . . that liability is such as existed under the laws in force in the province at the time when the Crown became liable." For example, in *Bank of Nova Scotia v. The Queen*,

25 the federal Crown was held to be bound by an 1875 Manitoba statute concerning assignment of choses in action, because it was in force, and, therefore, incorporated by reference, when the federal Petition of Right Act established the procedure for suing the federal Crown in 1876. And in *The King v. Murphy*

26 it was held that the federal Crown was subject to Ontario contributory negligence legislation of 1937 because Crown liability for the conduct in question was first created in 1938 by a federal statute which impliedly incorporated provincial law as of that date.

There are serious problems involved in this approach, however, especially if it is treated, as it seems to have been treated by many authorities, as virtually the only method by which the federal Crown can be subjected to provincial legislation.

Why is the provincial legislation that is incorporated by reference restricted to statutes in existence when the incorporating act was passed? It is well established that a statute may validly incorporate the laws in force from time to time in another jurisdiction. If federal legislation establishing Crown liability can be interpreted as impliedly adopting provincial law as of the date of the federal legislation, there is no reason why the implication could not be stretched to include incorporation of future provincial laws as well. The original federal Petition of Right Act recited a desire to "assimilate" Crown proceedings, "as nearly as may be to the course of practice and procedure now in force in actions and suits between subject and subject". If this purpose still underlies the Act, it seems wrong to interpret it as freezing the law relating to Crown proceedings (unlike that relating to private litigation) at some moment in the past. Such an interpretation has, however, been very fashionable over the years.

24 (1918), 56 S.C.R. 176, at p. 179.
25 (1961), 27 D.L.R. (2d) 120, per Thorson P. See footnote 32, infra, about the apparent confusion of dates in this case.
28 *Supra*, footnote 11, preamble.
29 Rand J. stated in *The King v. Lapierre*, [1946] S.C.R. 415, at p. 447: "... I see nothing whatever anomalous in the view that what Parliament intended in creating liability of the Crown was to adopt the law then existing in each province except as it might thereafter be amended or changed by Parliament ...; but in any event the interpretation placed on
Determining the date at which provincial law was incorporated has proved a difficult task for the court in certain types of situation. The relevant date is supposed to be "the time when the Crown became liable". What would that date be for contract or property claims? In the *Bank of Nova Scotia* case mentioned earlier, President Thorson of the Exchequer Court treated this as being the date when the federal Petition of Right Act was first passed. But it is difficult to understand why this should be so, since that act was procedural, and did not purport to extend the liability of the Crown in any way. By reason of Canada's common law inheritance, the federal Crown was subject to liability in contract and property claims even before this legislation was passed, and probably such claims could be made by petition of right (although this procedure was very cumbersome, and had apparently fallen into disuse in the Colonial and early Confederation years). In fact, there is no federal legislation imposing this section since its enactment has established a jurisprudence which I think it is now too late to modify."

30 *Gauthier v. The King*, supra, footnote 24.
32 The learned President seems to have erred about the dates. The 1876 statute was actually the second Petition of Right Act passed by the Canadian Parliament. The first one was given Royal Assent on April 8th, 1875, supra, footnote 11, over a month before the Manitoba legislation in question was assented to.
33 Section 8 of the 1875 Act, and section 19(3) of the 1876 Act, *ibid.*, emphasized the procedural nature of the legislation by stating that it was not intended to "give the subject any remedy against the Crown, in any case in which he would not have been entitled to such remedy . . ." at common law.
34 The implication that the common-law petition of right procedures applied in British North America before the first Petition of Right Acts is conveyed by section 21(3) of the 1875 Act, and section 19(2) of the 1876 Act, *ibid.*, which state that "nothing in this Act contained shall . . . prevent any suppliant from proceeding as before the passing of this Act". McLaurin, commenting in *The Crown as Litigant* (1936), 14 Can. Bar Rev. 606, at p. 611, on the lack of petition of right legislation in Prince Edward Island, New Brunswick and Nova Scotia at the time, said: "... petition of right seems an entire stranger to the practitioner in those provinces, even in cases where mere contractual obligations of the Crown are involved. . . . As the remedy of petitioning the Sovereign is a very ancient one, the Committee would assume that the subject even in those provinces might have some remedy at common law, but it must be noted that prior to the statute of 1860, the practice in England was uncertain and cumbersome, and even there legislation was necessary to make the remedy more generally available." The extent of the procedural problems in suing the Crown in Ontario in the early years was discussed in *Canada Central Railway Company v. The Queen* (1873), 20 Grant's Chancery Cases 273, at p. 290, by Strong V.C., who described them as "insuperable". Of course, this would not have been the case for the provinces whose dates of reception of English law are subsequent to the enactment of simplified petition of right procedures in England in 1860. And, in any event, whatever the procedural difficulties to suing the Crown might have been, there was no doubt that
liability on the federal Crown in contract and property matters, so the "incorporation by reference" theory would seem to be wholly inapplicable in those fields.

Even in the areas, such as tort, where federal legislation has imposed on the Crown a liability that did not exist at common law, there are problems in determining the appropriate date. Tort liability of the federal Crown began with a section in the 1887 Exchequer Court Act relating to negligence of Crown servants in connexion with public works in Canada, and was gradually expanded by a series of amendments over the years until the Crown Liability Act of 1952-53 was passed, making the Crown responsible for all the torts of its servants to the same extent as any other employer. To decide the date at which provincial legislation was "incorporated by reference" in a tort claim against the federal Crown, it is necessary for the court to ascertain, through a careful study of the legislative history, the first moment at which the precise type of tort claim would have been actionable against the Crown, which does not seem to me to be a justifiable expenditure of judicial energies.

And why is it the moment when the Crown first became liable that counts? Does it not seem more reasonable that Parliament should have intended to incorporate provincial law as at the date of its most recent acknowledgment of Crown liability (at least the most recent enactment of a substantial change in that liability)?

The whole "incorporation by reference" theory has an Alice in Wonderland quality about it.

B. Submission or waiver.

The Crown has always had the right to rely on any legislation it chooses. If the federal Crown exercises this right and invokes a particular provincial statute, it becomes subject to all of the provisions of that statute, beneficial or detrimental. For example, in A.-G. Canada v. Tombs, an Ontario County Court judge held that by suing under the provincial Highway Traffic Act, the federal Crown must accept the one-year limitation period included in the Act: "Having requested the Court to decide the action upon the provisions of the Highway Traffic Act it is not open to the

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55 The history of these amendments is concisely traced in 10 Canadian Encyclopaedic Digest (Ontario) (2nd ed., 1954), pp. 467-468.
56 Although doubt has occasionally been expressed about this principle: see Maxwell, Interpretation of Statutes (11th ed., 1962), pp. 136-137.
Crown to contend that the provisions of that Act are not binding upon it. It cannot approbate and reprobate..."37

Indeed, the Supreme Court of Canada has recently approved the even broader principle that whenever the federal Crown chooses to sue someone in relation to a matter that is not governed by any special prerogative rules, it must abide by the laws applicable to such a matter in private disputes in the province in question. In The Queen v. Murray,38 the federal Crown sued a man whose negligent driving had contributed to the injury of a servant of the Crown, and claimed immunity from provincial guest passenger and negligence apportionment statutes which would have limited the defendant’s liability to twenty-five per cent. The Supreme Court upheld an Exchequer Court holding that the federal Crown was subject to the provincial legislation. As the President of the Exchequer Court put it:

...as long as the Sovereign relies on her common law status as a person to take advantage of a cause of action available to persons generally in the province, and not upon some special right conferred upon Her by Parliament, She must take the cause of action as She finds it when Her claim arises and, if the legislature of the province has changed the general rules applicable as between common subjects, the Sovereign must accept the cause of action as so changed whether the change favours Her claim or is adverse to it.39

Occasionally, an even more radical suggestion has been made: that whenever the Crown engages in ordinary commercial enterprises, it abandons its prerogative rights with respect to such activities.40 This principle has been followed in many civil law jurisdictions,41 but the only authority for applying it in the common law provinces consists of a few isolated obiter dicta, which were probably never intended to apply outside the special context in which they were made.42

37 [1946] 4 D.L.R. 516. The Ontario Court of Appeal reversed the trial judge, but for reasons which did not require a consideration of this point.
39 Ibid., at p. 671.
40 This argument was advanced in The King v. Zornes, [1922] S.C.R. 257, but the Supreme Court of Canada found it unnecessary to express an opinion about it: per Anglin J., at p. 266.
42 In The Queen v. McLeod (1883), 8 S.C.R. 1, at p. 26, Ritchie C.J.C., said: “There is . . . nothing unreasonable in limiting the liability of the Crown and freeing it from liability for negligence and laches of its servants; none of the great public works having been undertaken with a view to mercantile gain, but for the general public good.” A similar dictum is to be found in Farnell v. Bowman, supra, footnote 6.
On the question of whether the federal Crown is bound by any provincial legislation apart from incorporation by reference or submission, the cases are in conflict. The two leading decisions seem impossible to reconcile.\(^43\)

In *Gauthier v. The King*,\(^44\) the question was whether the federal Crown was bound by an Ontario statute altering the common law rule that an agreement to arbitrate is revocable. The Crown, which had agreed to arbitrate a contractual dispute with the suppliant, changed its mind, and took the position that since the provincial statute was not binding on it, it could rely on the common law right to revoke its submission to arbitration. The Supreme Court of Canada agreed with the Crown, stating:

Provincial legislation cannot *proprio vigore* take away or abridge any privilege of the Crown in the right of the Dominion.\(^45\)

... the provinces have ... neither executive, legislative nor judicial power to bind the Dominion Government. Provincial statutes which were in existence at the time when the Dominion accepted a liability form part of the law of the province by reference to which the Dominion has consented that such liability shall be ascertained and regulated, but any statutory modification of such law can only be enacted by Parliament in order to bind the Dominion Government. That this may occasionally be productive of inconvenient results is one of the inevitable consequences of a divided authority inherent in every federal system such as provided by the constitution of this country.\(^46\)

The Privy Council reached a different conclusion a few years later, however, in *Dominion Building Corporation v. The King*.\(^47\) In that case, which also involved the application of an Ontario statute to the federal Crown, the suppliant sued the Crown for refusing to complete a contract to sell certain land to the suppliant. The Crown’s defence was that the suppliant was guilty of delay in payment to the extent that the Crown was entitled to terminate the contract. The question for the Privy Council to determine was whether “time was of the essence” of this contract. At one time the rule that “time was of the essence” for such contracts operated at common law, but not in equity. However, Ontario passed a statute in 1881 applying the equity rule to all contractual proceedings. The Crown claimed to be immune from this provincial statute, but the Privy Council held that it was bound by it, and

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\(^{43}\) Mundell, *op. cit.*, footnote 7, at p. 155, agrees.

\(^{44}\) *Supra*, footnote 24.

\(^{45}\) Per Anglin J., at p. 194, *ibid*.

\(^{46}\) Per Sir Charles Fitzpatrick C.J.C., at p. 182, *ibid*.

\(^{47}\) [1933] A.C. 533.
that the Crown’s defence to the claim failed. Unfortunately, the opinion contains no reference to the Gauthier case, and, for that matter, no other evidence that their Lordships addressed their attention to the problem of interjurisdictional immunity. The question of whether “the Crown” could be affected by the statute was discussed, but the fact that the federal Crown was involved was given no special consideration.

The meaning of the Gauthier and Dominion Building decisions was discussed at length by Thorson P., in the Bank of Nova Scotia case.48 His conclusion was that if the Gauthier decision means the federal Crown is not bound by provincial legislation passed after the date the Crown first became liable (and it is difficult to see how else it could be read), it has been overruled by the Privy Council in the Dominion Building case. The Murray case also contains a helpful discussion of the problem by Jackett P., and the comment by the Supreme Court of Canada that “some question is raised” about the Gauthier case by the Dominion Building decision.50 The majority of lower court decisions on the subject have, however, ignored this conflict, and have followed the Gauthier case in holding that the federal Crown is immune from provincial legislation in the absence of incorporation by reference or submission.51 A conclusive decision is sorely needed.

When we turn to the law concerning the effect of provincial legislation on federal “instrumentalities”, such as federally incorporated companies, employees of the federal Crown, and enterprises within federal legislative jurisdiction, the picture is almost as confused.

Until recently, the position of such federal instrumentalities seemed to be that they were subject to the general statutes of the provinces in which they operated, unless:

a) the statute related, in pith and substance, to a matter outside the province’s legislative jurisdiction, or

b) the statute related to a matter having both federal and provincial aspects, and the federal Parliament had passed legislation inconsistent with the provincial act, or

c) the effect of applying the statute to the federal instrumentality would be to impair its status or essential capacities.52

48 Supra, footnote 25, at pp. 149-154.
49 Supra, footnote 38, at pp. 675-678, and 683-684 (Ex. C.R.).
50 Ibid., at p. 654 (D.L.R.), per Martland J.
51 For a survey of the cases see Laskin, op. cit., footnote 17, p. 554, et seq.
52 See Gibson, The B.C. Power Case: New Restrictions on Provincial
If the same approach were taken to the position of the federal Crown itself, it would clearly be subject to many provincial statutes.

A recent Supreme Court decision, however, *Commission du Scolaire v. Bell Telephone Co. of Canada*,\(^5^3\) indicates that at least some types of federal instrumentality enjoy even greater immunity from provincial legislation than provided by these three principles. The question before the court in that case was whether provincial minimum wage legislation applied to the employees of a company operating a communications system which, because of its interprovincial connexions, was subject to federal legislative jurisdiction. The court’s unanimous decision, written by Martland J., was that since labour relations was an “essential part” of the company’s operation, provincial legislation of that type did not apply to the company’s employees:

> In my opinion, regulation of the field of employer and employee relationships in an undertaking such as that of the respondent’s, as in the case of the regulation of the rates which they charge to their customers, is a “matter” coming within the class of subject defined in s. 92(10)(a) and, that being so, is within the exclusive legislative jurisdiction of the Parliament of Canada. Consequently, any provincial legislation in that field, while valid in respect of employers not within exclusive federal legislative jurisdiction, cannot apply to employers who are within that exclusive control.\(^5^4\)

The court appears to have created a new principle of immunity: that a provincial statute will not be allowed to affect any “essential part” of an enterprise under the exclusive legislative jurisdiction of the federal Parliament. In determining whether an “essential part” of a federal enterprise has been affected, the court would, of course, have a wide discretion. For example, in this case Martland J. distinguished cases applying provincial workmen’s compensation acts to federal enterprises, on the ground that they did not affect an essential part of the operation, while minimum wage legislation did—a fine distinction, to say the least.

If my interpretation of the meaning of the *Bell Telephone* decision is correct, it is submitted that it is neither wise constitutional policy nor sound constitutional law.

The principle that the Crown is not above the law has been a valued part of the British constitutional heritage since the days of Coke. The utility of the principle is obvious: the ordinary

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\(^{53}\) Ibid., at p. 153.

\(^{54}\) Ibid., at p. 153.
individual is always at a disadvantage when dealing with the Crown because of the extent of the latter's resources, and if the Crown were also freed from legal responsibility, the disadvantage would become intolerably great. It would, therefore, be unfortunate if, in attempting to transfer the British constitutional heritage to federal setting, the drafters of the British North America Act had seriously undermined the principle of Crown responsibility. Some degree of interjurisdictional Crown immunity is, of course, an inevitable feature of any federal system. Provincial statutes dealing in essence with federal matters would not be operative against the federal Crown (or anyone else for that matter) simply because they would be unconstitutional; and even statutes within provincial jurisdiction cannot be allowed to prevent the existence or frustrate the operations of the federal Crown and other federal enterprises whose existence and operations are impliedly guaranteed by the constitution. To hold, however, that no otherwise valid provincial statute may even affect an essential part of a federal enterprise, as the Supreme Court seems to have held in the Bell Telephone case, is to create much greater immunity than is required. It would be bad enough if this protection applied only to the Crown itself, but to extend it as well to mere federal instrumentalities is most unfair to the ordinary citizen dealing with these organizations. It is true, of course, that to exempt these enterprises from provincial statutes does not place them entirely above the law—they remain subject to federal statutes and provincial common law—but it does give them a privileged and confusing legal status for no good reason.

It is even more difficult to discover a satisfactory legal rationale for this new form of immunity (if such it is) than to justify it on policy grounds. Mr. Justice Martland based his decision on the fact that the British North America Act gives the federal Parliament “exclusive” jurisdiction to make laws in relation to federal enterprises. This he apparently interpreted to mean that no provincial statute could apply to the essential part of a federal enterprise. It is a long established principle of Canadian constitutional law, however, that no law is regarded as being in relation to a particular head of jurisdiction simply because it affects that area; the constitutional validity of a statute is judged instead on

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55 Sawer, op. cit., footnote 1, discusses the various policy considerations involved, and contends, persuasively, that whatever may be the situation in the United States, there is no sound reason for sweeping interjurisdictional Crown immunity in Australia. His arguments also hold good for Canada.
the basis of its dominant character—its "pith and substance". If this approach had been taken in the Bell Telephone case, the outcome would have been different, since the law did not concern interprovincial communications in pith and substance; in essence it concerned minimum wages, and had only an incidental effect on federal operations.

Remarkably, the same judge who wrote the Supreme Court's opinion in the Bell Telephone case, Mr. Justice Martland, did employ the "pith and substance" approach to resist a claim of immunity by a federal enterprise in a recent case with similar facts. In that case, Carnation Co. Ltd. v. Quebec Agricultural Marketing Board,56 the question was whether a company which bought milk within the Province of Quebec and processed it there into evaporated milk for sale largely outside the province was subject to provincial legislation controlling the price which the company must pay for raw milk. The statute unquestionably affected an "essential part" of an interprovincial business enterprise which was within federal jurisdiction by reason of Parliament's power over "Trade and Commerce". Yet, the Supreme Court of Canada, again speaking through Martland J., held that the company was subject to the provincial statute, stating:

It is not the possibility that these orders might "affect" the appellant's interprovincial trade which should determine their validity, but, rather, whether they were made "in relation to" the regulation of trade and commerce.57

Martland J., did not mention his earlier decision in the Bell Telephone case, and the only indication that he was aware of the inconsistency of the two cases is his remark that:

... there would seem to be little doubt as to the power of a Province to regulate wage rates payable within a Province, save as to an undertaking falling within the exceptions listed in s. 92(10) of the B.N.A. Act.58

He seems, then, to be saying that the new principle of interjurisdictional immunity which he announced in the Bell Telephone case only applies to the transportation and communication enterprises within federal jurisdiction by virtue of section 92 (10). There are at least two reasons why this explanation is unsatisfactory. First, Martland J., seems to have forgotten that one of the cases which he used to support his holding in the Bell Telephone case was an earlier Supreme Court decision59 to the effect

that provincial minimum wage legislation did not apply to federal postal employees, whose activities do not fall within the ambit of section 92(10). Second, there seems no reason (and Martland J., advanced none) to treat federal jurisdiction under section 92(10) differently from other heads of federal jurisdiction. Parliament's powers with respect to "trade and commerce", and the other matters included in section 91 are every bit as "exclusive" as those based on section 92(10).

The law relating to the immunity of federal instrumentalities seems, then, to be as confused as that relating to the immunity of the Crown itself. The Bell Telephone and Carnation cases are as difficult to reconcile as the Gauthier and Dominion Building decisions. It is to be hoped that the Supreme Court of Canada will soon be given an opportunity to clarify the situation.

What would the result be if the Bell Telephone and Gauthier approaches were preferred in such a conclusive decision? In that event the law would appear to be that:

1. The federal Crown itself would be immune from all provincial legislation in the absence of either (a) submission, or (b) incorporation by reference, while
2. All federal instrumentalities would be exempt from provincial statutes (a) relating in essence to federal matters, (b) inconsistent with competent federal legislation, or (c) impairing their status or essential capacities, and
3. Federal instrumentalities covered by section 92(10) (generally speaking, those in the realm of transportation and communication) would also be exempt from provincial acts affecting their "essential parts".

If, however, the Carnation and Dominion Building decisions were upheld, the law would be much simpler, both the federal Crown and its instrumentalities being subject to all provincial statutes except those described in 2 above. Since I have submitted that this approach would also be more consistent with constitutional law and less destructive of the principle of Crown responsibility, I hope that the Supreme Court of Canada can be persuaded to adopt it.

Before leaving this section, there is one further problem that should be explored. It arises from the rule of interpretation that no statute can affect the rights of the Crown unless it says so, either expressly or by necessary implication. The precise ambit of this rule is somewhat uncertain, but it has often been used to exempt  

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60 Maxwell, op. cit., footnote 36, p. 129, says: "It has been said that the
the federal Crown from provincial legislation by "interpretation". Could a provincial legislature validly wipe out this exemption by stipulating in its statutes that they are intended to affect the federal Crown? The answer probably depends on which of the above approaches ultimately wins out in the courts. If the Bell Telephone-Gauthier line of cases prevails, it is probable that such a provision will be held ultra vires. If, however, the Carnation-Dominion Building approach is upheld, I believe that this kind of legislation will be permitted. It is true that even in the latter event a court might reject such a provision on the ground that it concerns a matter within federal legislative jurisdiction—prerogatives of the federal Crown—but I submit that such a decision would be wrong. The Crown's prerogative right in this regard is simply to be immune from legislation which does not specifically name it. A statute which does name the Crown does not thereby encroach on this prerogative right; on the contrary, it honours it. This does not mean, of course, that a provincial legislature could impose every one of its statutes on the federal Crown. It could only do so to the extent of its constitutional power to affect the federal Crown. The point that is being made here is merely that to name the federal Crown in provincial legislation would not be per se, unconstitutional, because to do so would not in itself derogate from prerogative rights.


In principle, there is no reason why the immunity from federal legislation of the Crown in the right of the various provinces

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61 The recent Supreme Court of Canada decision in *The Queen v. Breton*, supra, footnote 21, can be explained in this way.
should differ from the immunity of the federal Crown (except
that in cases of overlapping jurisdiction federal legislation takes
priority over incompatible provincial legislation). Each pro-
vincial legislature has, like the federal Parliament, exclusive juris-
diction over its own revenues, and has had the power to amend its
own constitution even longer than has Parliament; so it is clear
that just as legislative jurisdiction over the federal Crown resides
primarily in Parliament, jurisdiction over the provincial Crowns
resides in the provincial legislatures. And, of course, just as the
federal Crown is subject to some provincial statutes, so the pro-
vincial Crown is subject to certain federal legislation.

Mr. Justice Laskin claims, however, that although it may
seem illogical, the positions of the federal and provincial Crowns
are constitutionally different. It cannot be denied that the
majority of the cases have shown a greater readiness to grant
immunity to the federal Crown than to the provincial Crown,
but Mr. Justice Laskin's explanation that "... nothing in the
provincial catalogue of powers justifies any claim to bind the
Crown in the Right of Canada..." is not satisfying; in most of
the cases there was a relevant head of provincial jurisdiction.
Some of these cases can be explained by the "paramountcy
doctrine", which gives priority to federal legislation in the case of

63 Reference Re Troops in Cape Breton, [1930] S.C.R. 554, at p. 562,
per Duff J.: "The Solicitor-General ... did not contend that the duty to
pay these expenses could be imposed by the Dominion on the province in
invitum, and that, of course, would be a plain violation of the fundamental
principle of the British North America Act. The revenues of the province
are vested in His Majesty as the supreme head of the province, and the
right of appropriation of all such revenues belongs to the legislature of
the province exclusively." It is debatable, however, whether this principle
was really applicable to the matter in dispute in that case, which was the
right of the Parliament of Canada to require the provinces to pay the cost
of providing military assistance to cope with provincial riots. A federal
statute imposing a duty on a province to pay a certain sum is not "ap-
propriating" provincial revenue any more than a statute requiring me to pay
taxes "appropriates" the money in my bank account. In both cases the legis-
lation creates a liability, but the act of appropriation—the decision to meet
the obligation—is left to the individual, or province, concerned. In any
event, the passage quoted was obiter dictum since the case was decided on
an interpretation of the federal Act.
64 S. 92(1) of the British North America Act, supra, footnote 8.
65 In The Queen v. Board of transport Commissioners, supra, footnote 60,
the Supreme Court of Canada held that the Crown in the Right of
Ontario was bound by federal railway legislation when operating a com-
muter rail service. A similar American decision is U.S. v. California (1936),
297 U.S. 175.
67 Ibid., p. 554 et seq.
The remainder are inexplicable by any constitutional principle of which I am aware.

III. Interprovincial Immunity.

To what extent may one province bind the Crown of another province by its laws? 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. Could the Alberta legislature constitutionally pass a statute stating that the Crown in the 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?

The argument in support of the validity of such legislation would be based primarily on the fact that, unlike the federal government, the legislative and executive authority of the provincial governments has strict geographic limits. The provinces have no constitutional powers outside their own boundaries. Since every head of provincial legislative jurisdiction is restricted to matters “in the province”, no provincial legislature can give to its Crown rights or immunities outside the province; and since legislative and executive powers under the British North America Act are co-extensive, the provincial Crown cannot on its own

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68 This would account, for example, for the dictum of the majority in Re Silver Brothers, [1932] A.C. 514 (P.C.), to the effect that Parliament could, by bankruptcy legislation, give priority in claims against bankrupt estates to the federal over the provincial Crowns. Duff J., disagreed on that point, expressing the view that section 125 of the British North America Act would protect the provincial Crown from such legislation.

69 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 (1968), 65 D.L.R. (2d), 717 (Man. Q.B.), per Tritschler C.J., at p. 723: “In Manitoba the Province of Saskatchewan is not to be regarded as a foreign State. Her Majesty in the Right of the Province of Saskatchewan is not a foreign Sovereign in Her Majesty's Court of Queen's Bench for Manitoba.”

In any event, the provincial legislation imposing tort liability is usually so phrased as to apply to the Crown of that province only. See s. 2(b) of the Manitoba Proceedings Against the Crown Act, R.S.M., 1954, c. 207.

70 See Bonanza Creek Gold Mining Co. Ltd. v. The King, [1916] 1 A.C. 566, at p. 580.
take rights or immunities which its legislature cannot bestow on it. This is not to say that the provincial Crown may not validly operate outside the province. Just as a provincially incorporated company may be given the capacity (but not the right) to operate outside the province, 71 so the provincial Crown has the capacity (but not the right) to function within the territory of another province (or anywhere else, for that matter). But when a provincial Crown chooses to engage in activities in another province, it must abide by the laws of that other province. And the various restrictions that apply to provincial jurisdiction over the federal Crown are not appropriate to provincial Crowns, because these restrictions are all based on the continuing legislative control of Parliament over its own Crown while operating in the provinces. Legislation that is otherwise within the competence of a provincial legislature will bind other provincial Crowns functioning within the province, even though it deprives them of prerogative rights, interferes with a vital Crown function, or conflicts with legislation of the other provinces.

It requires considerably more imagination to construct arguments supporting interprovincial Crown immunity. It could be contended that provincial Crowns are shielded from legislation of the other provinces by the prohibition against "taxation" of their property in section 125, or their exclusive control over their own revenues, but only a desperate court would be likely to base any more than very limited protection on these propositions. Another approach would be to regard the international law principle that one sovereign state may not be sued in the courts of another without permission 72 as evidence of a similar rule of "constitutional common law" within our federal system. However, even at international law this principle does not invalidate legislation imposing liability on a foreign Crown; it simply renders the country that passed it liable at international law. To use the principle as a basis for declaring unconstitutional a provincial statute affecting the rights of another provincial Crown would be to employ it much differently than it is used in the international context.

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

71 Ibid.
72 Even at international law there are wide discrepancies in the way in which the principle is applied by various states, and there have been suggestions that it is no longer useful: Lauterpacht, The Problem of Jurisdictional Immunities of Foreign States (1951), 27 Br. Y. B. Int. L. 200.
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. The federal Crown must, by its nature, act within the provinces, so there is some justification for according it a measure of protection from provincial laws; but it is not imperative for provincial Crowns to engage in activities outside their boundaries, so it is fair to treat them like everyone else within the area when they choose to do so.

**Conclusion**

The marked resurgence of provincial power on the Canadian political scene in recent years has generally been accompanied by a similar trend in judicial decisions. In the field of interjurisdictional immunity, however, the recent cases show a contrary tendency—a pronounced bias toward the federal Crown and its instrumentalities. One might feel less uncomfortable about this trend if the justification for it were explored and explained by the courts, but most of the decisions appear to have been reached in isolation and without a full consideration of either the legal issues or policy ramifications involved. One reason for this may be the fact that interjurisdictional immunity has received very little academic attention in the past. Let us hope that this oversight will be remedied before the Supreme Court of Canada renders such study entirely academic with a terminal decision.