Athabasca Chipewyan First Nation v. British Columbia, 2001 ABCA 112

Date: 20010508
Docket: 9903-0469-AC

IN THE COURT OF APPEAL OF ALBERTA

THE COURT:

THE HONOURABLE MADAM JUSTICE McFADYEN
THE HONOURABLE MADAM JUSTICE PICARD
THE HONOURABLE MADAM JUSTICE HUNT

BETWEEN:

THE ATHABASCA CHIPEWYAN FIRST NATION and CHIEF ARCHIE CYPRIEN,
acting on his own behalf and on behalf of all members of the
ATHABASCA CHIPEWYAN FIRST NATION

Respondents (Plaintiffs)

- and -

HER MAJESTY THE QUEEN IN RIGHT OF BRITISH COLUMBIA,
and BRITISH COLUMBIA HYDRO AND POWER AUTHORITY

Appellants (Defendants)

- and -

HER MAJESTY THE QUEEN IN RIGHT OF CANADA, as represented by
THE MINISTER OF INDIAN AFFAIRS AND NORTHERN DEVELOPMENT and
PUBLIC WORKS AND GOVERNMENT SERVICES CANADA and
NATURAL RESOURCES CANADA

Respondents (Defendants)

APPEAL FROM THE ORDER OF
THE HONOURABLE MR. JUSTICE LEE
Dated September 3, 1999
Filed October 22, 1999

REASONS FOR JUDGMENT RESERVED

REASONS FOR JUDGMENT OF THE HONOURABLE MADAM JUSTICE HUNT
CONCURRED IN BY THE HONOURABLE MADAM JUSTICE McFADYEN
AND CONCURRED IN BY THE HONOURABLE MADAM JUSTICE PICARD

COUNSEL:

P. D. Feldberg
K. J. Bomhof
For British Columbia Hydro and Power Authority

T. Leadem
P. Yearwood
For the B.C. Ministry of Attorney General

R. C. Secord
J. T. Kondro
For the Athabasca Chipewyan First Nation and Chief Cyprien

P. G. Hodgkinson
For Her Majesty the Queen in right of Canada

REASONS FOR JUDGMENT OF
THE HONOURABLE MADAM JUSTICE HUNT

[1] In the late 1960s, British Columbia Hydro, a corporation established by the government of British Columbia, completed the construction of the Bennett Dam on the Peace River in the province of British Columbia. The Peace River eventually flows into northern Alberta's Peace Athabasca Delta, where the Athabasca Chipewyan have exercised treaty rights for about a hundred years. Claiming that the dam's construction has altered the natural flow of the Peace River and deleteriously affected the ecosystem of the Delta, the Athabasca Chipewyan sought a declaration, an injunction and damages against, among others, Her Majesty the Queen in right of the Province of British Columbia and British Columbia Hydro.

[2] The issue on this appeal is whether these defendants can be sued in the Alberta Court of Queen's Bench. I conclude that while British Columbia Hydro is amenable to this suit, The Queen in right of British Columbia is not. The appeal must be allowed in part.

BRIEF BACKGROUND

[3] The factual background is set out in the decision under appeal: (1999), 72 Alta. L.R. (3d) 247.

[4] Briefly, a lawsuit commenced in Alberta in 1997 by the Respondents Athabasca Chipewyan First Nation ("the Band") claims that the Appellants British Columbia Hydro and Power Authority ("Hydro") and Her Majesty the Queen in right of British Columbia ("British Columbia") have interfered with their riparian rights, created a nuisance, and breached various licences and federal and provincial statutes. Her Majesty the Queen in right of Canada ("Canada"), a respondent on the appeal but a defendant in the lawsuit, is alleged to have been negligent in several ways, including a failure to conduct an environmental assessment and comply with statutory duties under federal laws. The Band also claims that all defendants have breached their fiduciary duties.

[5] A lawsuit involving many of the same parties and allegations, commenced in British Columbia in 1970, was adjourned *sine die* by consent in March 1973. The record does not reveal why.

THE MASTER'S DECISION: [1998] A.J. No. 673

[6] The Band obtained an *ex parte* order under Rule 30 authorizing service of its statement of claim *ex juris* on Hydro and British Columbia. Hydro and British Columbia then applied under Rule 27 to have service set aside, asserting that the Alberta Court of Queen's Bench has no jurisdiction to entertain an action against them due to Crown and sovereign immunity.

[7] The Master granted an order setting aside service, observing at para. 7 that an agent of the Crown such as Hydro is entitled to sovereign and other Crown immunities in the same manner as the Crown. He concluded that both Hydro and British Columbia are entitled to rely on sovereign immunity and have not, through statute, waived that right as regards the courts in other provinces.

THE DECISION IN THE COURT OF QUEEN'S BENCH, *supra*

[8] An appeal against the Master's order by the Band and Canada was allowed in the Court of Queen's Bench. The chambers judge concluded at para. 40 that Hydro's acts in constructing the dam were "designed to effect Crown purposes". Thus, if British Columbia was entitled to rely on sovereign immunity to resist a suit in Alberta, so too was Hydro.

[9] He held at para. 58 that "the traditional common law rules of sovereign immunity should not apply interprovincially", reaching this conclusion largely in reliance on principles developed by the Supreme Court of Canada in ***Morguard Investments Ltd.* v. *De Savoye***, [1990] 3 S.C.R. 1077 and ***Hunt* v. *T&N plc***, [1993] 4 S.C.R. 289. In his opinion, "the common law rules of sovereign immunity within the Canadian context ... should be based on a conception of this country's constitutional structure which recognizes provincial independence, but not at a cost to fairness." He added at para. 70 that "Alberta has a real and substantial connection with the subject-matter of the suit", as required by the analysis in ***Hunt*** and ***Morguard***.

[10] He concluded at para. 83 that s. 4(1) of the B.C. *Crown Proceeding Act*, cited below, was "constitutionally inapplicable" against the Alberta Court of Queen's Bench in the circumstances of this case, because to uphold it would be to deny the Band the right to sue in its home province of Alberta. Alternatively, if that section were read as applying only to actions brought against British Columbia in British Columbia, it would not oust the jurisdiction of the Alberta courts (para. 87).

STATUTORY PROVISIONS

B.C. *CROWN PROCEEDING ACT*, R.S.B.C. 1996, c. 89 ("the B.C. *Act*")
ss. 1, 2(c), 3(2)(d), 4(1), 5, 6, 11(1)

Definitions

1. In this Act:

. . .

"Crown" means Her Majesty the Queen in right of British Columbia

Liability of government

2. Subject to this Act,

. . .

(c) the government is subject to all the liabilities to which it would be liable if it were a person ...

Limitations on proceedings and liabilities

3(2) Nothing in section 2 does any of the following:

. . .

(d) authorizes proceedings against the government for a cause of action that is enforceable against a corporation or other agency owned or controlled by the government

Institution of claim

4(1) Subject to this Act, all proceedings against the government in the Supreme Court must be instituted and proceeded with under the *Supreme Court Act* and, if applicable, under the *Class Proceedings Act*.

Prohibition

5. Nothing in this Act authorizes a proceeding against the government under the *Small Claims Act*.

Appeals and stays of proceedings

6. Subject to this Act, all enactments and rules of court for appeals and stays of proceedings apply to proceedings against the government and proceedings in which the government is a party.

Rights of parties and authority of the court

11(1) In proceedings against the government and proceedings in which the government is a party, the rights of the parties must, subject to this Act, be as nearly as possible the same as in a proceeding between persons, and the court may

(a) make an order, including an order as to costs, that it may make in proceedings between persons, and

(b) otherwise give the appropriate relief that the case may require.

[Emphasis added.]

B.C. *INTERPRETATION ACT*, R.S.B.C. 1996, c. 238 ("the *Interpretation Act*")

ss. 1, 2(1), 8, 14(1), 29

Definitions

1. In this Act, or in an enactment:

"Act" means an Act of the Legislature, whether referred to as a statute, code or by any other name, and, when referring to past legislation, includes an ordinance or proclamation made before 1871, and having the force of law;

. . .

"enactment" means an Act or a regulation or a portion of an Act or regulation

Application

2(1) Every provision of this Act extends and applies to every enactment, whether enacted before or after the commencement of this Act, unless a contrary intention appears in this Act or in the enactment.

Enactment remedial

8. Every enactment must be construed as being remedial, and must be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

Government bound by enactments; exception

14(1) Unless it specifically provides otherwise, an enactment is binding on the government.

Expressions defined

29. In an enactment:

. . .

"Her Majesty" ... means the Sovereign of the United Kingdom, Canada, and Her other realms and territories, and Head of the Commonwealth;

. . .

"Legislative Assembly" means the Legislative Assembly of British Columbia constituted under the *Constitution Act*;

"Legislature" means the Lieutenant Governor acting by and with the advice and consent of the Legislative Assembly

ALBERTA *INTERPRETATION ACT*, R.S.A. 1980, c. I-7 ("the Alberta *Interpretation Act*") ss. 2, 3(1), 14, 25(1)(a),(e),(i),(k)

Application to all enactments

2. This Act applies to every enactment whether enacted before or after the commencement of this Act.

Extent of application

3(1) This Act applies to the interpretation of every enactment except to the extent that a contrary intention appears in this Act or the enactment.

Crown not bound

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

General definitions

25(1) In an enactment,

(a) "Act" means an Act of the Legislature and includes an Ordinance of the North-West Territories in force in Alberta;

. . .

(e) "enactment" means an Act or a regulation or any portion of an Act or regulation;

. . .

(i) “Her Majesty” ... means the Sovereign of the United Kingdom, Canada and Her other realms and territories, and Head of the Commonwealth;

. . .

(k) “Legislative Assembly” or “Assembly” means the Legislative Assembly of Alberta

ALBERTA *PROCEEDINGS AGAINST THE CROWN ACT*, R.S.A. 1980, c. P-18 (“the Alberta *Act*”) ss. 1(b) and 8

Definitions

1. In this Act,

. . .

(b) “Crown” means Her Majesty the Queen in right of Alberta

Proceedings against Crown

8. Except 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.

B.C. *HYDRO AND POWER AUTHORITY ACT*, R.S.B.C. 1996, c. 212 (“the *Hydro Act*”) ss. 3(1), 12(1)(d), 30(1) and (2), 32(1) and (7)(z)

Agent of government

3(1) The authority is for all its purposes an agent of the government and its powers may be exercised only as an agent of the government.

Powers

12(1) Subject to the approval of the Lieutenant Governor in Council, which may be given by order of the Lieutenant Governor in Council, the authority has the power to do the following:

. . .

(d) flood and overflow land, purchase, otherwise acquire, accumulate and store water, raise or lower the level of rivers, lakes, streams and other bodies of water, and purchase and otherwise acquire water records and water privileges

Liability of authority

30(1) The authority may sue and be sued in its own corporate name for any right or obligation acquired or incurred by it on behalf of the government as if the right or obligation had been acquired or incurred on its own behalf and also in respect of any liabilities in tort to which it is made subject by this Act.

(2) The authority is liable in tort for the damages for which if it were a private person of full age and capacity it would be subject

(a) for torts committed by its servants or agents, and

(b) for a breach of duty that attaches to the ownership, occupation, possession or control of property.

Application of other statutes

32(1) Despite any specific provision in any Act to the contrary, except as otherwise provided by or under this Act, the authority is not bound by any statute or statutory provision of British Columbia.

. . .

(7) The following Acts and provisions apply to the authority:

. . .

(z) sections 1 to 26, 29, 31 to 42, 44, 45, 46, except subsection (2)(c), and 47 to 49 of the *Water Act.*

FEDERAL *CROWN LIABILITY AND PROCEEDINGS ACT*, R.S.C. 1985, c. C-50, s. 21(1)

Concurrent jurisdiction of provincial court

21(1) In all cases where a claim is made against the Crown, except where the Federal Court has exclusive jurisdiction with respect thereto,

(a) the county or district court of the province in which the claim arises that would have jurisdiction under the laws of that province if the claim were against a private person of full age and capacity, or

(b) if there is no such county or district court or the county or district court does not have that jurisdiction, the superior court of the province

has concurrent jurisdiction with respect to the subject-matter of the claim.

ISSUES

[11] My view of this case makes it unnecessary to discuss the many arguments raised by the parties. The following questions must be addressed:

1. Is British Columbia immune from this suit because of the doctrine of Crown immunity, as altered by the B.C. *Act*?

2. Does the Court of Queen's Bench of Alberta lack jurisdiction to order service *ex juris* against British Columbia because the Alberta *Rules of Court* do not apply to British Columbia?

3. Is s. 4(1) of the B.C. *Act* constitutionally inapplicable in Alberta?

4. Can Hydro rely on the doctrine of sovereign immunity to resist the jurisdiction of the Alberta courts?

5. If the *Rules of Court* do not apply to British Columbia, are they also inapplicable to Hydro as an agent of British Columbia?

1. Is British Columbia immune from this suit because of the doctrine of Crown immunity, as altered by the B.C. *Act*?

[12] Apart from questions of constitutionality discussed later, British Columbia's exposure to this litigation turns primarily on the interpretation of its *Act* in light of common law rules about Crown immunity. The similar Alberta *Act* cannot govern this dispute since it applies only to the Crown in right of Alberta (s. 1(b)). As Hogg and Monahan point out, the notion of an indivisible Crown must sometimes be resisted:

> Each government is a separate legal entity. In asking whether the Crown in right of Ontario, for example, is liable under a contract, we are asking a question about the legal duties of a legal person, the government of Ontario. If the answer to the question is yes, then the liability will have to be satisfied out of the treasury of the province of Ontario. No other government represented by the Crown has any legal interest in the question.
>
> P.W. Hogg & P.J. Monahan, *Liability of the Crown*, 3d ed. (Toronto: Carswell, 2000) at 13.

[13] According to Hogg and Monahan, at common law the King could not be sued in the royal courts because of the feudal principle that a lord could not be sued in his own court. Hogg and Monahan, *supra* at 4-5. Under the petition of right in use by the fourteenth century, claims against the King were referred to commissioners for investigation and, if appropriate, handed

over to a court for trial. *Ibid*. In the nineteenth century, the courts determined that a petition of right could not be used for a tort claim, based on the maxim "the King can do no wrong". Hogg and Monahan suggest that the courts were mistaken in relying on this maxim, but in the result there was no Crown liability in tort until various jurisdictions in Canada enacted statutes authorizing proceedings against the Crown.

[14] Section 2(c) of the B.C. *Act* makes the B.C. government subject to all the liabilities to which it would be liable "if it were a person", but this exposure is "[s]ubject to this Act". This provision constitutes a significant waiver of the Crown's substantive immunity. Section 11(1) provides that, subject to the Act, in proceedings involving the government the rights of the parties must "be as nearly as possible the same as in a proceeding between persons". Assuming that Alberta is a *forum conveniens*, a "person" would be subject to this suit in Alberta. Since these general sections are "subject" to the *Act*, is there anything else in the B.C. *Act* to suggest that the government is not amenable to this suit? I think there is.

[15] In my view, s. 4(1) requires suits against British Columbia to be instituted in the B.C. Supreme Court. The language of the subsection is not as clear as one would like. It can be read as setting out the procedure to be followed only if a suit is commenced in the B.C. Supreme Court. The corresponding s. 21(1) of the federal *Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50 is much clearer, making it apparent that, generally, the federal Crown can be sued either in the Federal Court or in the appropriate provincial court.

[16] One commentator suggests that the *expressio unius* principle of statutory interpretation may lead to the conclusion that s. 4(1), found in like legislation in several provinces, implicitly excludes proceedings in courts other than the one mentioned. J. Walker, "Interprovincial Sovereign Immunity Revisited" (1997) 35 Osgoode Hall L.J. 379 at 386. Walker notes that the section is drawn from a "Uniform Model Act" prepared in 1950 by the Canadian Conference of Commissioners on Uniformity of Legislation: *Conference of Commissioners on Uniformity of Legislation in Canada, Proceedings of 1950* (Ottawa: Queen's Printer, 1950) at 76. The provision in the *Model Act* was adopted from legislation in the United Kingdom, which is not a federal state. As she observes at 388, in a non-federal context such a provision likely would be intended to exclude the jurisdiction of inferior or foreign courts. She therefore questions at 389 whether provincial legislators who enacted this provision considered its potential effect of precluding suits in the superior courts of another province.

[17] Notwithstanding this possible explanation for its infelicitous language, there are two reasons why I think s. 4(1) must be interpreted as requiring that suits against British Columbia be brought in the B.C. Supreme Court.

[18] First, s. 5 of the B.C. *Act* states that nothing therein authorizes proceedings against the government under the *Small Claims Act*. This suggests that s. 4(1) was directed at courts other than courts of inferior jurisdiction within the province.

[19] Second, there is a presumption that "the legislature does not intend to make any change in the existing law beyond that which is expressly stated in, or follows by necessary implication from, the language of the statute". P. St. J. Langan, *Maxwell on the Interpretation of Statutes*, 12th ed. (London: Sweet & Maxwell, 1969) at 116. At common law, the general rule is that the Crown cannot be sued. ***Young* v. *S.S. "Scotia"***, [1903] A.C. 501 at 505 (P.C., Can.); ***Can. Javelin* v. *The Queen Nfld.***, [1978] 1 F.C. 408 at 409 (F.C.A.). The Crown can be sued, of course, in a court that has been granted jurisdiction over it by statute. The B.C. *Act* does not expressly give jurisdiction over the B.C. government to the Alberta Court of Queen's Bench. While it does not give express jurisdiction over the government to the B.C. Supreme Court either, it does so by implication of s. 4(1). Absent more explicit language (such as that found in the similar federal legislation), the above principle suggests that s. 4(1) should not be interpreted as granting jurisdiction to any court other than the B.C. Supreme Court. In the result, while British Columbia has largely waived its substantive immunity through s. 2(c), it has only partly waived its procedural immunity through s. 4(1).

[20] The conclusion that s. 4(1) requires suits against British Columbia to be filed in the B.C. Supreme Court necessitates a consideration of whether, as found by the chambers judge at para. 83, such a provision is "constitutionally inapplicable" in Alberta. This issue is discussed *infra* beginning at para. 29.

[21] Apart from s. 4(1), it is also arguable that s. 3(2)(d) of the B.C. *Act* prevents this suit from proceeding against British Columbia. It provides that nothing in s. 2 authorizes proceedings against the government for a cause of action enforceable against a corporation owned or controlled by the government. Hogg and Monahan, *supra* at 345, explain that although "the purpose and scope of this provision is not entirely clear, it does seem to preclude an action against the Crown that is premised on vicarious liability for the tort of a corporate Crown agent." No one contests the fact that Hydro is owned in its entirety by British Columbia. Since I conclude below that Hydro can be sued in Alberta, the requirements of s. 3(2)(d) may be met. In these circumstances, s. 3(2)(d) appears to protect British Columbia from this suit. ***Vanmackelberg v. Insurance Corp. of British Columbia***, [1995] B.C.J. No. 802 (S.C. Master's), aff'd on other grounds [1995] B.C.J. No. 1277.

[22] Section 3(2)(d) was not argued by the parties except in supplementary material filed at the request of the panel after oral argument. Given the divergent views expressed in the supplementary material (including the time and circumstances under which s. 3(2)(d) ought to come into play), and the fact that there has been no oral argument on this issue, I prefer to base my decision on s. 4(1) and leave for another day a thorough assessment of the effect of s. 3(2)(d).

2. Does the Court of Queen's Bench of Alberta lack jurisdiction to order service *ex juris* against British Columbia because the Alberta *Rules of Court* do not apply to British Columbia?

[23] At common law, it was presumed that the Crown was not bound by a statute except by express words or necessary implication. Hogg and Monahan, *supra* at 275. British Columbia relies on this presumption to assert that the Alberta Court of Queen's Bench has no jurisdiction to order service *ex juris* against it pursuant to Rule 30 of the Alberta *Rules of Court*, Alta. Reg. 390/68 as amended.

[24] The power of the Court of Queen's Bench to order service *ex juris* is statutory and must flow from Rule 30. ***A.B.S. Investments Ltd.* v. *Flick***, [1985] A.J. No. 432 (Q.B.). The *Rules of Court* are made applicable to the Crown in right of Alberta by s. 8 of the Alberta *Act*. But that provision does not bind British Columbia because, as mentioned earlier, the Alberta *Act* only applies to the Crown in right of Alberta.

[25] British Columbia maintains that it is entitled to the benefit of s. 14 of the Alberta *Interpretation Act*, which says that no "enactment" is binding on "Her Majesty" unless the enactment expressly so states. This is a codification of the common law rule mentioned above.

[26] The term "enactment" includes "regulations": Alberta *Interpretation Act*, s. 25(1)(e). Having been made by regulation, the *Rules of Court* are included in the term "enactment": *Court of Queen's Bench Act*, R.S.A. 1980, c. C-29, s. 18.

[27] Does the definition of "Her Majesty" found in s. 25(1)(i) of the Alberta *Interpretation Act* include the Crown in right of British Columbia? Its broad language suggests it does. Similar language in the federal *Interpretation Act* has been held to embrace both the provincial and federal Crowns. ***Alberta Government Telephones* v. *Canada (Canadian Radio-Television and Telecommunications Commission)***, [1989] 2 S.C.R. 225 at 274. The weight of authority, moreover, suggests that both statutory and common law immunities benefit an indivisible Crown. Hogg and Monahan, *supra* at 322. Even if the term "Her Majesty" in the Alberta *Interpretation Act* does not include British Columbia, British Columbia could employ its common law immunity to argue that the Alberta *Rules of Court* have no application because they have not been expressly so made applicable.

[28] This is an additional reason why, subject to the issue of the constitutionality of s. 4(1), British Columbia is not amenable to this suit.

3. Is s. 4(1) of the B.C. *Act* constitutionally inapplicable in Alberta?

[29] According to the Band, my interpretation of s. 4(1) constitutes a "reading in" of a provision of questionable constitutional validity. This argument is related to the chamber judge's conclusion that s. 4(1) is constitutionally inapplicable to the Alberta Court of Queen's Bench because of the principles in ***Hunt***, *supra* and ***Morguard***, *supra*. He reasoned that even if s. 4(1) requires suits against British Columbia to be filed in the B.C. Supreme Court, British Columbia lacks the constitutional authority to prohibit proceedings against it in another Canadian jurisdiction.

[30] I have concluded above that s. 4(1) leaves the Alberta courts without jurisdiction over British Columbia. An examination of ***Morguard*** and ***Hunt*** is therefore necessary to explain why, unlike the chambers judge, I am not persuaded that s. 4(1) is constitutionally inapplicable in Alberta.

[31] ***Morguard*** concerned "the recognition to be given by the courts in one province to a judgment of the courts in another province in a personal action brought in the latter province at a time when the defendant did not live there" (at 1082). The issue arose in the context of deficiency judgments granted in Alberta in relation to the foreclosure of mortgaged property. It was clear that the Alberta courts had jurisdiction to entertain the actions and that the Appellant had been properly served in British Columbia according to the Alberta *Rules of Court*.

[32] At 1102, the Supreme Court held that "the courts in one province should give full faith and credit ... to the judgments given by a court in another province or territory, so long as that court has properly, or appropriately, exercised jurisdiction ...". It emphasized at 1096 that in modern times there is a need "to facilitate the flow of wealth, skills and people across state lines in a fair and orderly manner." This is especially so in a federal state such as Canada, where there is interprovincial mobility and an interprovincial common market (at 1099).

[33] The Court noted at 1103 an underlying concern about determining whether a court has exercised its jurisdiction appropriately for the purposes of recognition by a court in another jurisdiction. It underscored at 1106 the importance of there being a real and substantial connection with the jurisdiction granting the judgment. The Court observed at 1110 that other discretionary techniques, such as the doctrine of *forum non conveniens* and the power of a court to prevent an abuse of its process, permit courts to refuse jurisdiction when a plaintiff's contact with the jurisdiction is tenuous or when entertaining the proceedings would create an injustice.

[34] Although La Forest J. stated at 1109-10 of ***Morguard*** that the case was not argued on constitutional grounds, the opportunity to constitutionalize its principles soon arose. ***Hunt*** concerned the constitutional applicability to a judicial proceeding in British Columbia of a Quebec statute prohibiting the removal from Quebec of business documents required in British Columbia during the discovery process. At 310, the Supreme Court held that the British Columbia courts were not precluded from determining the constitutionality of the Quebec legislation. An assessment of the constitutionality of another province's laws should be undertaken, however, only if, in the province of the litigation, there is a real interest affected (at 315).

[35] The Court concluded at 332 that "the Act should be read as not applying to the provinces since such application would be *ultra vires* under the constitutional principle set forth in the *Morguard* case." Specifically, the principles of fairness and order described in ***Morguard*** were offended because the legislation impeded litigation in another province.

[36] It is apparent that, as required by ***Hunt***, this litigation has a real and substantial connection with Alberta. The Band members reside here and the alleged damage has been suffered here. Although the offending dam was constructed in B.C., the cross-boundary nature of the waterways makes it inevitable that activities in one jurisdiction may have impacts in another.

[37] If I have correctly interpreted s. 4(1) as requiring suits against British Columbia to be filed in that province, is this contrary to the principles of fairness and order in a federal state described in ***Morguard***? Despite the fact that a different view has been taken in Hogg and Monahan, *supra* at 356, I do not think so.

[38] Both ***Morguard***, but especially ***Hunt***, were cases where the court of one province properly had assumed jurisdiction over the litigation. Here, in contrast, jurisdiction is the central issue. On that basis alone these cases are distinguishable. But there are more fundamental reasons why the principles in ***Morguard*** and ***Hunt*** should not govern here.

[39] Our constitutional regime "recognizes the diversity of the component parts of Confederation, and the autonomy of provincial governments to develop their societies within their respective spheres of jurisdiction." ***Reference re Secession of Quebec***, [1998] 2 S.C.R. 217 at 251. The law regarding the Crown as litigant in relation to the Crown in right of a province is provincial law. ***Quebec North Shore Paper* v. *C.P. Ltd.***, [1977] 2 S.C.R. 1054 at 1063. It is contrary to our basic notion of federalism that the decision of one provincial Crown about the extent to and the manner in which it waives its immunity could be declared constitutionally inapplicable by courts established by the Crown in another province.

[40] In an admittedly different context, the Supreme Court perceived dangers in the possibility of courts altering rules about Crown immunity: ***Mitchell* v. *Peguis Indian Band***, [1990] 2 S.C.R. 85 at 120-21. Such matters "concern fundamental questions about the relationship between the courts and government" and the courts are ill-equipped to rewrite these laws since "attempts on the part of the judiciary to reformulate the law on Crown immunity ... raise delicate constitutional issues". *Ibid*. at 121.

[41] The logic of my conclusion on this point is supported by imagining that no Crown proceedings legislation had been passed in British Columbia. In such a case, British Columbia would not have waived its Crown immunity in any manner. There would be no legislative provision whose validity could be tested against the ***Morguard*** and ***Hunt*** principles. In such a situation, surely a court in one province could not conclude that the Crown in right of another was amenable to suit before it. Such a holding would fly in the face of provincial autonomy and the right of each provincial Crown to determine the extent of its immunity. I do not think the opposite outcome can be achieved merely because a provincial Crown partially has waived its procedural immunity.

[42] In my opinion, the principles of ***Morguard*** and ***Hunt*** have no application to Crown immunity questions, which are completely different than the procedural issues raised in those

cases. The result in this case is not unjust. No one seems ever to have contested that the litigation could have been brought in British Columbia. Indeed, it was. No explanation has been offered as to why the British Columbia suit did not proceed and there is no evidence to suggest that unfairness results from having to litigate in British Columbia.

[43] Thus, the plaintiffs are not without a remedy. The fact that their remedy lies in the courts of another jurisdiction because of decisions by a provincial Crown concerning the extent to which it will waive its traditional immunity does not breach the principles upon which our Constitution is based. On the contrary, it is fundamental to them.

4. Can Hydro rely on the doctrine of sovereign immunity to resist the jurisdiction of the Alberta courts?

[44] Hydro does not seek the protection of the B.C. *Act*. Indeed, it cannot because s. 32(1) of the *Hydro Act* provides that Hydro generally is not bound by any British Columbia statutes. The list of statutes made applicable to Hydro by s. 32(7) does not include the B.C. *Act*. Hydro asserts, however, that it is protected by sovereign immunity, sometimes referred to as state immunity. I reject this argument because I do not think sovereign immunity applies between Canadian provinces.

[45] Sovereign or state immunity is a concept distinct from Crown immunity. According to S.A. Williams & A.L.C. de Mestral, *An Introduction to International Law*, 2nd ed. (Toronto: Butterworths, 1987) at 137, it "prevents a foreign state or its head from being impleaded in the domestic courts of another state without its consent." A foreign state may submit to the jurisdiction of a court but compulsion cannot be used to achieve this result. The rationale for sovereign immunity is that, since states are equal, one cannot exercise jurisdiction over another. It will be immediately apparent that, while sovereign and Crown immunity are distinct concepts, there is a strong resemblance between them.

[46] A review of the application of sovereign immunity in Canada in ***Jaffe* v. *Miller*** (1993), 103 D.L.R. (4th) 315 (Ont. C.A.) reveals that many states have replaced the approach described above ("absolute immunity") with "restricted immunity". The latter recognizes that when states enter into commercial or other private transactions with individuals, those individuals must be permitted to bring their disputes before the courts.

[47] There has never been an authoritative decision about whether absolute or restricted immunity applies in this country. The *State Immunity Act*, R.S.C. 1985, c. S-18, considered to be a codification of the principles of restricted immunity, has minimized the importance of that question.

[48] The *State Immunity Act* applies to "foreign states", a term clearly directed at governments outside Canada. The international law concept, unamended by statute, requires consideration

here because of Hydro's reliance on decisions that have applied it between provinces within Canada.

[49] The idea that a province could rely on sovereign immunity to resist the jurisdiction of another province's courts originated in ***Mellenger* v. *New Brunswick Corpn.***, [1971] 2 All E.R. 593 (C.A.). Canadian citizens applied in England for service *ex juris* against the New Brunswick Development Corporation, claiming entitlement to a commission for introducing a commercial enterprise into New Brunswick. The Corporation objected to service on the ground that it was an arm of the government of New Brunswick and entitled to sovereign immunity in England.

[50] Lord Denning M.R. agreed, observing at 595-96 that the Canadian constitution recognizes the independence and autonomy of each provincial government under the Crown. He stated that "the Crown is sovereign in New Brunswick for provincial powers, just as it is sovereign in Canada for dominion powers ... . 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."

[51] Although this may be uncontentious when a province claims sovereign immunity outside Canada, the application of the principle within Canada is surprising. Relying on ***Mellenger***, a series of cases concluded that a province may utilize sovereign immunity to resist the jurisdiction of the courts of another. ***Western Surety Co.* v. *Elk Valley Logging*** (1985), 23 D.L.R. (4th) 464 (B.C. S.C.); ***Phillips (Guardian ad litem of)* v. *Beary*** (1994), 29 C.P.C. (3d) 258 (B.C. S.C.); ***Kaman* v. *British Columbia*** (1999), 242 A.R. 336 (Q.B.); ***Bouchard* v. *J. L. Le Saux Ltée*** (1984), 45 O.R. (2d) 792 (S.C. Master's). These cases contain little, if any, analysis about why the ***Mellenger*** principle ought to apply interprovincially. Some cases even seem to overlook the distinction between Crown and sovereign immunity. ***Godin* v. *New Brunswick Electric Power Commission*** (1993), 16 C.P.C. (3d) 388 (Ont. Ct. Just. Gen. Div.).

[52] There are decisions to the opposite effect. ***Weir* v. *Lohr*** (1967), 65 D.L.R. (2d) 717, [1968] 62 W.W.R. 99 (Man. Q.B.) involved the possible application of the principle that "no country ever takes notice of the revenue laws of another". At 719, citing Lord Mansfield C.J. in ***Holman et al.* v. *Johnson, alias Newland*** (1775), 1 Cowp. 341, 98 E.R. 1120, Tritschler C.J.Q.B. rejected this principle on the ground that one provincial Crown is "not a foreign Sovereign" in the courts of another province (at 723).

[53] A similar issue arose in the Quebec Court of Appeal in ***Commission Hydroélectrique de Quebec* v. *Churchill Falls (Labrador) Corp.***, [1980] C.A. 203, a case where the province of Newfoundland objected to being impleaded in the courts of Quebec. In rejecting this argument, Monet J.A. said at 209:

> ... je 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 *Weir c. Lohr*, je n'hésiterais pas à transposer ici l'opinion de monsieur le juge en chef Tritschler ...

[54] The fashion in which the Supreme Court analysed the ***Hydroélectrique*** case did not require its comment on this point: [1982] 2 S.C.R. 79. In a later case, however, Lamer C.J. drew an analogy between Crown and sovereign immunity: ***Alberta Government Telephones***, *supra* at 299. While suggesting that the analogy was not necessarily direct, he noted that "[t]he same considerations which call for mutual respect of activities of both levels of government within the confines of a single federal state ... do not necessarily arise in the international sphere."

[55] In my view, the use of the ***Mellenger*** principle in an interprovincial context is misplaced. To the extent that the rationale underlying sovereign immunity has any importance in a federal state, that function is already fulfilled by Crown immunity. The fact that some Canadian courts confuse the two concepts further suggests that they play the same role.

[56] Permitting Hydro to avoid this litigation because of sovereign immunity would be particularly offensive. As mentioned, the *Hydro Act* makes it apparent that the B.C. government never intended Hydro's liability to be determined by principles found in the B.C. *Act*. Hydro concedes that if its argument on this point is accepted, its immunity would be greater than any immunity under the B.C. *Act*. It would be strange indeed if the government's own legislative intention were thwarted by reliance on a principle of international law that, in my view, serves no useful function within Canada.

5. If the *Rules of Court* do not apply to British Columbia, are they also inapplicable to Hydro as an agent of British Columbia?

[57] Although Hydro cannot benefit from the B.C. *Act*, it relies on British Columbia's argument (discussed above) that the Alberta *Rules of Court* do not apply to British Columbia because of the rule that a statute does not bind the Crown unless it expressly so states. Hydro can succeed on this point only if, for purposes of this lawsuit, it is protected by the same common law principles that benefit the Crown.

[58] Although a number of cases have considered the extent to which Crown immunity from statutes protects Crown agencies, the relevant principles are not always clear or easy to apply. If a Crown agent is acting within its statutory purposes, it is entitled to the same immunity as the Crown. When an agent steps outside the ambit of its agency (i.e., acts outside its statutory purposes), it loses whatever immunity was associated with the agency. ***Canadian Broadcasting Corporation* v. *The Queen***, [1983] 1 S.C.R. 339; ***R.* v. *Eldorado Nuclear Limited***, [1983] 2 S.C.R. 551; ***Alberta Government Telephones***, *supra*.

[59] In ***Canadian Broadcasting Corporation***, *supra*, the Canadian Broadcasting Corporation ("CBC") was charged under the *Criminal Code* for broadcasting an admittedly obscene program.

The CBC's enabling legislation made it "an agent of Her Majesty" for all its purposes. Since the *Criminal Code* provision may not have bound the Crown, the question arose as to whether it bound the CBC, its agent.

[60] At 351, the Supreme Court stated:

> Borrowing the words of Martland J. in *Conseil des Ports Nationaux, supra*: "It is only when the [Corporation] is lawfully executing the powers entrusted to it by the Act that it is deemed to be the Crown agent" (p. 72). When so acting and thereby enjoying the status of Crown agent the immunities of the Crown flow through to the agent for its benefit. Where, however, the Corporation is not acting "for all purposes of this Act" or with reference to "its powers under this Act" the status and the benefits of Crown agency disappear.

[61] As well as being contrary to the *Criminal Code*, the broadcast of obscene programs was prohibited by a regulation passed pursuant to the CBC's constituent legislation. Thus, the CBC was not acting for purposes entrusted to it under its legislation and had exercised its powers in a manner inconsistent with the purposes of that legislation. The CBC therefore lost its agency status and was disentitled to Crown immunity.

[62] The Supreme Court again considered whether a Crown agent was immune from a statute in ***R.* v. *Eldorado***, *supra*, which concerned two Crown corporations' liability to prosecution under federal combines legislation. Each corporation was expressly designated an "agent of Her Majesty" in its constituting statute.

[63] The majority of the Supreme Court held that the corporations were entitled to immunity because their conduct was within the scope of the purposes for which they had been incorporated. For the majority, Dickson J. emphasized at 568 that it is important to:

> ... draw a distinction between (i) acts committed in the course of fulfilling Crown purposes but in no way undertaken in order to effect Crown purposes; and (ii) those acts committed which are designed to effect Crown purposes. Whereas the latter situation does invoke Crown immunity, the former does not.

[64] In ***Alberta Government Telephones***, the Supreme Court applied the principles from ***Canadian Broadcasting Corporation*** and ***Eldorado*** to the issue of whether a provincial Crown agent was bound by federal legislation regulating telecommunications traffic. After concluding that the legislation did not bind either the federal or provincial Crowns, the Court considered whether the agent had exceeded its statutory purposes. If it had, its claim to Crown immunity would be lost.

[65] Noting that ***Canadian Broadcasting Corporation*** and ***Eldorado*** involved federal Crown agents seeking immunity from federal legislation, Dickson C.J., for the majority, held that the

same principles applied when the Crown in right of one jurisdiction seeks immunity from legislation enacted by the Crown in right of a second jurisdiction. He stated at 295:

> The distinction drawn in *Eldorado* between an agent acting for Crown purposes and acting personally is applicable in the current context. It follows that if AGT is acting "within the scope of the public purposes it is statutorily empowered to pursue [...], it is entitled to Crown immunity from the operation of statutes, because it is acting on behalf of the Crown" (*Eldorado, supra*, at pp. 565-66).

[66] Dickson C.J. concluded that the agent was "...lawfully executing its powers consistently with the purposes of the AGT Act and [was] fulfilling its Crown purposes thereby" (at 297). As it did not exceed its statutory mandate or Crown purposes, it did not lose Crown immunity.

[67] Applying these principles here, the issue is whether, in acting as alleged by the Respondents, Hydro has exceeded its statutory mandate so as to lose immunity from the application of the Alberta *Rules of Court*. Among the relevant allegations are that Hydro has interfered with the Band's riparian rights, created a nuisance and breached various licenses and federal and provincial statutes.

[68] A specific allegation is that Hydro has breached the B.C. *Water Act*, R.S.B.C. 1996, c. 483. Section 32(7)(z) of the *Hydro Act* requires Hydro to comply with the B.C. *Water Act*. If it does not (as is alleged here), Hydro has acted outside its statutory authority.

[69] As for the other allegations, section 12(1) of its *Act* grants Hydro broad powers to carry out its mandate in the province of British Columbia. Under s. 12(1)(d), Hydro may "flood and overflow land" and "raise or lower the level of rivers, lakes, streams and other bodies of water". But the *Act* does not purport to authorize Hydro to carry out such activities so as to affect lands or property outside the province of British Columbia. Such legislation would be of questionable constitutional validity in any event: ***Interprovincial Co-Operatives* v. *Dryden Chemicals***, [1976] 1 S.C.R. 477 at 512-13 and 521.

[70] Similarly, Hydro's mandate does not authorize the commission of a tort or other wrongful act in another province or the breach of federal or provincial laws. Although a province can authorize its Crown corporation to engage in interprovincial activities (***Alberta Government Telephones***, *supra* at 292), there is no authority for the proposition that a province can authorize such a corporation to commit a tort or breach laws in another province.

[71] Although both ***Eldorado*** and ***Canadian Broadcasting Corporation* v. *Ontario (Attorney-General)***, [1959] S.C.R. 188, might be seen as authority for the proposition that the breach of a statute by an agent does not necessarily result in the loss of immunity, both those cases involved breaches of federal law by a federal agent. That is not the situation here.

[72] Moreover, the Supreme Court has approved of the common law principle that the Crown cannot authorize its agents or servants to commit wrongful or tortious acts. In ***Eldorado***, *supra*, Dickson J. at 563 adopted the following statement from an earlier English case:

> ... from the maxim that the King cannot do wrong it follows, as a necessary consequence, that the King cannot authorize wrong. For to authorize a wrong to be done is to do a wrong; inasmuch as the wrongful act, when done, becomes, in law, the act of him who directed or authorized it to be done.

In my view, s. 30(2) of the *Hydro Act* (which makes Hydro expressly liable in tort for "a breach of duty that attaches to the ownership, occupation, possession or control of property") clearly suggests that Hydro is not authorized to commit torts.

[73] Since its incorporating legislation does not authorize it to carry out the acts complained of in this case, in acting as alleged by the Respondents Hydro has exceeded its statutory mandate or Crown purposes. Consequently, Hydro cannot claim Crown immunity and cannot benefit from my conclusion that Alberta's *Rules of Court* do not apply to British Columbia.

[74] This conclusion is supported by other provisions of the *Hydro Act* which suggest that Hydro is meant generally to be amenable to suit (subject to exceptions such as s. 31 that make it liable for nuisance or under the rule in ***Rylands* v. *Fletcher*** only in the event of its own negligence).

[75] Although s. 3(1) of the Act states that Hydro is "for all its purposes an agent of the government and its powers may be exercised only as an agent of the government", s. 30(1) states that it may be sued in its own corporate name for any obligation acquired or incurred by it on behalf of the government "as if the right or obligation had been acquired or incurred on its own behalf and also in respect of any liabilities in tort to which it is made subject by this Act." Subsection 2 makes it liable in tort "for the damages for which if it were a private person of full age and capacity it would be subject (a) for torts committed by its servant or agents, and (b) for a breach of duty that attaches to the ownership, occupation, possession or control of property."

[76] Given these provisions, the argument that Hydro is protected from this litigation because it is an agent of British Columbia seems counter-intuitive. In ***Langlois* v. *Canadian Commercial Corp.***, [1956] S.C.R. 954, enabling legislation with provisions similar to ss. 3(1) and 30(1) did not shield a Crown agent from having to pay interest on a judgment wherein it had been found liable in contract.

[77] For the majority, Kerwin C.J. held, at 956, that the words "as if the right or obligation had been acquired or incurred on its own behalf" meant that the defendant was in the same position as if it were not an agent for the Crown. Kellock J., writing for himself and Taschereau J. said at 957 that it was the express intention of the statute "that the corporation shall stand in the same position before the Court as any private corporation." All the judges therefore agreed that the defendant could not rely on Crown immunity to escape liability for interest.

[78] In the leading case concerning a Crown agent's liability in tort, the Supreme Court held that Crown corporations are liable in their own right for torts committed in the service of the Crown. ***Canada (Conseil des Ports Nationaux)* v. *Langelier et al.***, [1969] S.C.R. 60. For the Court at 70, Martland J. stated as follows:

> What is in issue here is the responsibility of a person, whether individual or corporate, who, though a Crown agent, and purporting to act as such, commits an act which is unlawful. My understanding of the law is that a personal liability will result. The liability arises, not because he is an agent of the Crown, but because, though he is an agent of the Crown, the plea of Crown authority will not avail in any event.

Thus, although a Crown agent is generally entitled to share the immunities of the Crown, "[w]henever the law deems the Crown agent to be liable in its own right, the Crown agent loses the protection of the Crown's immunities." Hogg and Monahan, *supra* at 347.

CONCLUSION

[79] While the Band cannot sue British Columbia in Alberta, there is no impediment to its suit against Hydro. Therefore, I would allow the appeal in part.

APPEAL HEARD on OCTOBER 26 and 27, 2000

REASONS FILED at EDMONTON, Alberta,
this 8th day of MAY, 2001

_____
HUNT J.A.

I concur: _____
McFADYEN J.A.

I concur: _____
PICARD J.A.