Litigating Cross-Border Aboriginal Title Claims in Canada: The Possibility (and Necessity) of a Federal Legislative Response to *Newfoundland and Labrador (Attorney General) v. Uashaunnuat (Innu of Uashat and of Mani-Utenam)*

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There are many Indigenous peoples in Canada who have occupied, and continue to occupy today, traditional territories that straddle provincial borders. The decision of the Supreme Court of Canada in *Newfoundland and Labrador (Attorney General) v. Uashaunnuat (Innu of Uashat and of Mani-Utenam)* illustrates the practical difficulties faced by the Indigenous peoples in Canada who seek to claim Aboriginal rights in a single traditional territory that straddles provincial borders. Because of provincial Crown immunity, Indigenous peoples who wish to obtain a declaration of Aboriginal title that is binding on all the provincial Crowns concerned over a single traditional territory that straddles provincial borders have no choice but to bring proceedings in the courts of all the provinces concerned. This seems particularly unfair, especially since provincial borders were imposed on Indigenous peoples without regard for their pre-existing social organization. Forcing Indigenous peoples to bring multiple claims in multiple jurisdictions is also a threat to access to justice. In this article, I suggest amendments to the *Federal Courts Act* that would provide the Indigenous peoples in Canada who wish to litigate cross-border Aboriginal title claims with a forum in which all the parties necessary to resolve the issues fairly, including all the provincial Crowns concerned, could be summoned as defendants, and in which a declaration of Aboriginal title, binding on all such defendants, could be sought.

De nombreux peuples autochtones du Canada ont occupé, et continuent aujourd'hui d'occuper, des territoires traditionnels qui chevauchent les frontières entre différentes provinces. L'arrêt de la Cour suprême du Canada dans *Terre-Neuve-et-Labrador (Procureur général) c. Uashaunnuat (Innus de Uashat et de Mani-Utenam)* illustre les difficultés pratiques auxquelles sont confrontés les peuples autochtones du Canada qui souhaitent revendiquer des droits ancestraux sur un seul et même territoire traditionnel qui chevauche les frontières entre différentes provinces. En raison de l'immunité de la Couronne provinciale, les peuples autochtones qui souhaitent obtenir une déclaration de titre ancestral liant toutes les couronnes provinciales concernées à l'égard d'un seul et même territoire traditionnel qui chevauche les frontières entre différentes provinces n'ont d'autre choix que d'engager des procédures judiciaires devant les tribunaux de toutes ces provinces. Cette situation semble particulièrement injuste, notamment parce que les frontières provinciales ont été imposées aux peuples autochtones sans égard pour l'organisation antérieure de leurs sociétés. Forcer les peuples autochtones à présenter de multiples réclamations dans de multiples ressorts constitue également une menace à l'accès à la justice. La présente étude suggère d'amender la *Loi sur les Cours fédérales* afin de mettre à la disposition des peuples autochtones du Canada, s'ils souhaitent revendiquer des titres ancestraux sur un seul et même territoire qui chevauche les frontières entre différentes provinces, un forum où toutes les parties nécessaires à la résolution équitable de ce type de différends, y compris toutes les couronnes provinciales concernées, pourraient être citées à comparaître en tant que parties défenderesses, et où une déclaration de titre ancestral liant toutes ces parties défenderesses pourrait être sollicitée.

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Introduction

Before the presence of Europeans in Canada, Indigenous peoples had long been possessing North America in structured societies with legal, political, and social institutions of their own.[1] This occupation and use of land by Indigenous peoples obviously predates the establishment of borders in the modern era.[2] It is thus only natural that many of the Indigenous peoples in Canada have come to occupy and use traditional territories that, today, sometimes straddle provincial borders.[3] Traditional territory of the Blackfoot Confederacy, for instance, includes parts of Alberta and Saskatchewan (as well as Montana).[4] Traditional Denesuline (also known as Chipewyan) territory covers portions of Alberta, Saskatchewan, Manitoba, the Northwest Territories, and Nunavut.[5] Traditional Algonquin territory centres on the Ottawa River and tributaries, including parts of western Quebec and Ontario.[6] And so on.

The decision of the Supreme Court of Canada in *Newfoundland and Labrador (Attorney General) v. Uashaunnuat (Innu of Uashat and of Mani-Utenam)* ("*Uashaunnuat*") illustrates "the practical difficulties faced by the Indigenous peoples of Canada who seek to claim Aboriginal rights in a single traditional territory that straddles provincial borders."[7] In *Uashaunnuat*, the Innu of Uashat and of Mani-Utenam and the Innu of Matimekush-Lac John (collectively the "Innu") claimed to hold Aboriginal title and other Aboriginal or treaty rights in all of "Nitassinan," a traditional territory they have occupied for centuries.[8] This traditional territory spans over the border between the provinces of Quebec and Newfoundland and Labrador.[9] Even though they had not yet obtained a judicial dec-

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1 See *Mitchell v MNR*, 2001 SCC 33 at para 9 [*Mitchell*].

2 See *ibid* at paras 24, 161.

3 See Olive Patricia Dickason, *Canada's First Nations: A History of Founding Peoples from Earliest Times* (Toronto: McClelland & Stewart, 1992) at 65 (displaying a map of tribal distributions in and near Canada at the time of contact).

4 See Hugh A Dempsey, "Blackfoot Confederacy" (last modified 27 October 2021), online: *The Canadian Encyclopedia* <thecanadianencyclopedia.ca> [perma.cc/2WRW-ME5Y].

5 See Patricia A McCormack & James G e Smith, "Denesuline (Chipewyan)" (last modified 16 March 2022), online: *The Canadian Encyclopedia* <thecanadianencyclopedia.ca> [perma.cc/6P52-6H5U].

6 See Meredith Jean Black, "Algonquin" (last modified 25 October 2021), online: *The Canadian Encyclopedia* <thecanadianencyclopedia.ca> [perma.cc/BC86-L9QZ].

7 2020 SCC 4 at para 77, Brown and Rowe JJ, dissenting [*Uashaunnuat*].

8 *Ibid* at para 2, Wagner CJC and Abella and Karakatsanis JJ. See also *ibid* at para 83, Brown and Rowe JJ, dissenting.

9 See *ibid* at para 2.

laration of their title or rights against the Crown,[10] the Innu filed suit in the Superior Court of Quebec against two mining companies, Iron Ore Company of Canada ("IOC") and Quebec North Shore and Labrador Railway Company Inc. ("QNS&L"), alleging that the infringement by IOC and QNS&L of their Aboriginal title and other Aboriginal or treaty rights in Nitassinan constituted a fault within the meaning of article 1457 of the *Civil Code of Québec* ("CCQ").[11] By way of remedy, the Innu sought (1) a declaration of Aboriginal title[12] and associated injunctive relief,[13] and (2) an award of damages.[14]

The two defendants, IOC and QNS&L, moved to have allegations struck from the Innu's pleadings.[15] They argued "that Aboriginal title is a real right and that, pursuant to art. 3152 of the *Civil Code of Québec*, ... the Innu's action was beyond the jurisdiction of Quebec courts insofar as it concerned property located in Newfoundland and Labrador."[16] The Attorney General of Newfoundland and Labrador ("AGNL") eventually filed a motion to intervene as well as its own motion to have allegations struck from the Innu's pleadings, essentially supporting the arguments of the two defendants, IOC and QNS&L, but also raising the issue of Crown immunity.[17] The Innu argued in response that their action was a personal or a mixed action, and that the Quebec courts had jurisdiction by virtue of their authority to grant an injunction and damages against private par-

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10 The Superior Court of Quebec had previously held that judicial recognition of Aboriginal rights is not a prerequisite to the liability of the mining companies. See *Uashaunnuat (Innus de Uashat et de Mani-Utenam) c Compagnie minière IOC inc (Iron Ore Company of Canada)*, 2014 QCCS 4403, leave to appeal to QCCA refused, 2015 QCCA 2, leave to appeal to SCC refused, 36332 (15 October 2015) [*Uashaunnuat* (Motion to Dismiss)]. See also *Saik'uz First Nation and Stellat'en First Nation v Rio Tinto Alcan Inc*, 2015 BCCA 154 at paras 73, 75, 79 [*Rio Tinto*], rev'g in part *Thomas v Rio Tinto Alcan Inc,* 2013 BCSC 2303, leave to appeal to SCC refused, 36480 (15 October 2015) (the British Columbia Court of Appeal followed the reasoning of the Superior Court of Quebec and held that there was a reasonable cause of action for civil claims even though Aboriginal title or other rights had not been proven); Kerry Wilkins, *Essentials of Canadian Aboriginal Law* (Toronto: Thomson Reuters, 2018) at § 291.

11 See *Uashaunnuat*, *supra* note 7 at para 83.

12 The Innu also sought a declaration of other Aboriginal rights and treaty rights (see *ibid* at paras 83–84, 184–85), but this article focuses more particularly on Aboriginal title.

13 See *ibid* at paras 84, 192–94, Brown and Rowe JJ, dissenting.

14 See *ibid* at paras 83–84, 195–99, Brown and Rowe JJ, dissenting.

15 See *ibid* at para 9.

16 *Ibid* at para 10.

17 See *ibid* at paras 9–10.

ties domiciled in Quebec, pursuant to articles 3134 and 3148, para 1(1) of the CCQ.[18]

The Superior Court of Quebec dismissed the motions to strike.[19] The AGNL appealed from this judgment, but the Court of Appeal of Quebec affirmed the judgment of the Superior Court,[20] and a majority of the Supreme Court of Canada affirmed the judgment of the Court of Appeal. For the majority, the Innu's action fell "into the 'mixed' category, insofar as the Innu [sought] the recognition of a *sui generis* right (a declaration of Aboriginal title [and associated injunctive relief]) and the performance of various [personal] obligations related to failures to respect that right [namely, an award of damages]."[21] In the case of a mixed action, a Quebec court must "have jurisdiction over *both* the personal and the *sui generis* aspects of the claim."[22] The majority concluded that the Quebec courts did have jurisdiction over both aspects of the Innu's action. As regards the personal aspects of their claim, article 3148, para 1(1) of the CCQ grants jurisdiction to the Quebec courts "where the defendant is domiciled in Quebec."[23] Moreover, with respect to the *sui generis* aspects of the Innu's claim, the CCQ does not contain "any special provision to establish the jurisdiction of Quebec authorities in such circumstances"; consequently, the majority applied the general subsidiary rule of article 3134 of the CCQ, according to which the Quebec courts are competent "when the defendant is domiciled in Quebec."[24]

However, the majority did not dispute the Innu's admission that a declaration of Aboriginal title by a Quebec court would not be binding on the Crown in right of Newfoundland and Labrador.[25] This is potentially problematic for the Indigenous peoples in Canada: "Aboriginal title is a burden on the Crown's underlying title," and an "incident of this underlying title is a fiduciary duty owed [*by the Crown*] to Indigenous peoples when dealing with the lands and a right to encroach on the title if the justification test under s. 35(1) [of the *Constitution Act, 1982*[26]] is satisfied."[27]

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18 See *ibid* at para 10.

19 See *Uashaunnuat (Innus de Uashat et de Mani-Utenam) c Compagnie minière IOC inc (Iron Ore Company of Canada)*, 2016 QCCS 5133 [*Uashaunnuat* CS 2016].

20 See *Procureur général de Terre-Neuve-et-Labrador c Uashaunnuat (Innus de Uashat et de Mani-Utenam)*, 2017 QCCA 1791.

21 *Uashaunnuat*, *supra* note 7 at para 56.

22 *Ibid* at para 57 [emphasis added].

23 *Ibid* at para 58.

24 *Ibid* at para 59.

25 See *ibid* at para 72.

26 Being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11 [*Constitution Act, 1982*].

In the absence of a declaration of Aboriginal title *that is binding on the Crown*, Indigenous peoples cannot benefit from the full development of "the fiduciary-like relationship" that judicial recognition of Aboriginal title normally entails.[28] The Innu further recognized that, if they wished to obtain a declaration of Aboriginal title that would be binding on the Crown in right of Newfoundland and Labrador, they would need to file a second suit against the Crown in right of Newfoundland and Labrador, in the courts of that province, and in the context of a "comprehensive land claim."[29]

The necessity of multiple proceedings in cases of cross-border Aboriginal title claims results from the fact that, under existing law, the Crown in right of one province can only be sued in the courts of that province.[30] As a result, Indigenous peoples who wish to obtain a declaration of Aboriginal title that is binding on all the provincial Crowns concerned over a single traditional territory that straddles provincial borders have no choice but to bring proceedings in the courts of all the provinces concerned. This seems particularly unfair, especially since "[p]rovincial boundaries were imposed on Indigenous peoples without regard for their pre-existing social organization."[31] As noted by the intervener Tsawout First Nation, forcing Indigenous peoples who wish to litigate cross-border Aboriginal title claims in Canada to bring multiple claims in multiple jurisdictions is a threat to access to justice.[32] And access to justice is "a precondition to the rule of law"; as such, it is "fundamental to our constitutional arrangements."[33]

In this article, I argue that Parliament *has* the constitutional authority to provide the Indigenous peoples in Canada who wish to litigate cross-border Aboriginal title claims with a forum in which all the parties necessary to resolve the issues fairly, including all the provincial Crowns concerned, could be summoned as defendants, and in which a declaration of

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27 *Uashaunnuat*, *supra* note 7 at para 251, Brown and Rowe JJ, dissenting. See also *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 at para 71 [*Tsilhqot'in Nation*].

28 *Uashaunnuat*, *supra* note 7 at para 252, Brown and Rowe JJ, dissenting.

29 *Ibid* at paras 72, Wagner CJC and Abella and Karakatsanis JJ, and 191, Brown and Rowe JJ, dissenting.

30 See section III.B, *below*.

31 *Uashaunnuat*, *supra* note 7 at para 246, Brown and Rowe JJ, dissenting.

32 See *ibid* (Factum of the Intervener Tsawout First Nation at para 31).

33 *Uashaunnuat*, *supra* note 7 at para 214, Brown and Rowe JJ, dissenting; *Trial Lawyers Association of British Columbia v British Columbia (Attorney General)*, 2014 SCC 59 at para 41. See also *BCGEU v British Columbia (Attorney General)*, [1988] 2 SCR 214 at 230, 53 DLR (4th) 1.

Aboriginal title, binding on all such defendants, could be sought.[34] In my view, Parliament *should*[35] exercise its constitutional authority by amending the *Federal Courts Act* ("*FCA*")[36] in the way I suggest. Pursuant to my recommendations, the jurisdiction of the Federal Court of Canada over Aboriginal title claims *in general* would be *concurrent* with the jurisdiction of the local courts of the provinces. However, in cases of *cross-border* Aboriginal title claims, the Federal Court would *de facto* become *the sole*

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[34] From a comparative perspective, I note that, in Australia, the federal Parliament gave the Federal Court jurisdiction over what is known there as "native title" claims (see *Native Title Act 1993* (Cth), 1993/110 [*NTA*]). See generally Maureen Tehan, "A Hope Disillusioned, an Opportunity Lost? Reflections on Common Law Native Title and Ten Years of the *Native Title Act*" (2003) 27:2 Melbourne UL Rev 523; Geoff Clark, "Mediation under the *Native Title Act 1993* (CTH): Some Structural Considerations" (2002-2003) 9 James Cook UL Rev 74; Sarah Burnside, "Outcomes for All? Overlapping Claims and Intra-Indigenous Conflict under the *Native Title Act*" (2012) 16:1 Australian Indigenous L Rev 2. The *NTA* establishes a mechanism for adjudicating claims of native title in which applications and determinations are made in the Federal Court (see *NTA*, *supra* note 34, ss 61, 62, 86F, 87, 94A, 225). Section 5 of the *NTA* explicitly states that "[t]his Act binds the Crown in right of the Commonwealth, of each of the States, of the Australian Capital Territory and of the Northern Territory" (*NTA*, *supra* note 34, s 5). Consequently, Commonwealth and State governments, as well as many other parties, commonly act in opposition to a claim (see *NTA*, *supra* note 34, ss 66(2), 84(4)). In this respect, Western Australia sought a declaration that the *NTA* was beyond the legislative power of the Commonwealth, but the High Court upheld the *NTA* (see *Western Australia v Commonwealth*, [1995] HCA 47). For the Court, the *NTA* constitutes "a valid exercise of Commonwealth power that constrain[s] the states and … impact[s] upon their land and resource management practices" (Tehan, *supra* note 34 at 545). Furthermore, I note that "[t]he political systems of Australia and Canada have a number of important features in common," as they are both "federal jurisdictions with constitutions originally given force ... by imperial legislation" (Colin HH McNairn, *Governmental and Intergovernmental Immunity in Australia and Canada* (Toronto: University of Toronto Press, 1977) [McNairn, "Intergovernmental Immunity"] (adding that "in their federal elements the two constitutions have many close but little explored parallels" at xii)).

[35] Access to justice for Indigenous peoples is guaranteed by the *United Nations Declaration on the Rights of Indigenous Peoples* (GA Res, UNGAOR, 61st Sess, Supp No 49, UN Doc A/RES/61/295 (2007), arts 28, 32, 40 [*Declaration*]). Furthermore, the Preamble of the *United Nations Declaration on the Rights of Indigenous Peoples Act* states that "the rights and principles affirmed in the Declaration constitute the minimum standards for the survival, dignity and well-being of Indigenous peoples of the world, and must be implemented in Canada" and that "the Government of Canada is committed to taking effective measures – including legislative, policy and administrative measures – at the national and international level, in consultation and cooperation with Indigenous peoples, to achieve the objectives of the Declaration" (SC 2021, c 14 [*UNDRIP Act*]). Finally, section 5 of the *UNDRIP Act* states that "[t]he Government of Canada must, in consultation and cooperation with Indigenous peoples, take all measures necessary to ensure that the laws of Canada are consistent with the Declaration" (*ibid*, s 5).

[36] RSC 1985, c F-7 [*FCA*].

forum in which two or more provincial Crowns could be summoned as defendants.[37]

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[37] There are two points I wish to stress further. First, my suggestion to provide the Indigenous peoples in Canada with a forum in which two or more provincial Crowns could be summoned as defendants would have practical utility. As stated by Peter Hogg, "[m]uch land in Canada is subject to claims of [A]boriginal title that have not yet been proved" (Peter W Hogg, *Constitutional Law of Canada*, 5th ed supp (Toronto: Thomson Reuters, 2021) (loose-leaf, release 1, 7/2021) at 28-41 [Hogg, *Constitutional Law*]). In this respect, we should not presume that the situation faced by the Innu in *Uashaunnuat* (*supra* note 7) is unique. As emphasized by Justices Brown and Rowe, "[t]he historical Indigenous presence in and occupation of North America *predate* the colonial and later constitutional imposition of provincial boundaries in Canada" and, as a result, "Indigenous peoples will occasionally assert Aboriginal rights – including Aboriginal title – over a traditional territory that extends across provincial boundaries" (*ibid* at para 209 [emphasis in original]). Secondly, my suggestion is to confer upon the Federal Court *concurrent* jurisdiction over Aboriginal title claims. Consequently, it is *less likely* to result in an impermissible *removal* of a part of the provincial superior courts' core or inherent jurisdiction. See *MacMillan Bloedel Ltd v Simpson*, [1995] 4 SCR 725 at paras 27–28, 37, 130 DLR (4th) 385; *R v Ahmad*, 2011 SCC 6 at para 61 [*Ahmad*]; *Reference re Code of Civil Procedure* (Que), art 35, 2021 SCC 27 at paras 63–69, 80, 82–86, 88, 101–04, 133, 137. However, I do not mean to imply that to confer upon the Federal Court *exclusive* jurisdiction over Aboriginal title claims would necessarily be *more likely* to result, or would necessarily result, in an *impermissible* removal of a part of the provincial superior courts' core or inherent jurisdiction. See *Ontario (Attorney General) v Pembina Exploration Canada Ltd*, [1989] 1 SCR 206, 57 DLR (4th) 710 [*Pembina Exploration*] (emphasizing "the federal government's power to expressly grant *exclusive* jurisdiction to a court established by it under s. 101" at 228 [emphasis added]); Nicole Vallières & Denis Lemieux, "Le fondement constitutionnel du pouvoir de contrôle judiciaire exercé par la Cour fédérale du Canada" (1975) 2:2 Dal LJ 268 ("*dans la mesure où le Parlement a la compétence législative, il peut créer une cour et lui donner juridiction dans ce domaine. De plus, l'article 101 est assez large pour permettre au Parlement fédéral en créant une telle cour d'exclure la juridiction traditionnelle des cours provinciales*" at 290–91); Peter H Russell, *The Judiciary in Canada: The Third Branch of Government* (Toronto: McGraw-Hill Ryerson, 1987) at 321–22 (arguing that Vallières and Lemieux convincingly demonstrate the constitutional power of Parliament to give the Federal Court *exclusive* jurisdiction to administer the common law writs against the federal government in spite of the inherent jurisdiction of the provincial superior courts to administer such traditional remedies). As stated by the Supreme Court, "[i]t is true, of course, that ... the *Constitution Act, 1867* [((UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5)] create[s] substantive constitutional limitations [on the ability of both Parliament and the provincial legislatures] to confer powers on courts or tribunals other than those established under s. 96" (*Ahmad*, *supra* note 37 at para 57). See also *Reference re Residential Tenancies Act, 1979*, [1981] 1 SCR 714, 123 DLR (3d) 554; *Massey-Ferguson Industries Ltd v Saskatchewan*, [1981] 2 SCR 413, 127 DLR (3d) 513; *McEvoy v Attorney General for New Brunswick*, [1983] 1 SCR 704, 148 DLR (3d) 25; *Attorney General of Quebec v Grondin*, [1983] 2 SCR 364, 4 DLR (4th) 605; *Sobeys Stores Ltd v Yeomans and Labour Standards Tribunal (NS)*, [1989] 1 SCR 238, 57 DLR (4th) 1; *Reference re Young Offenders Act (PEI)*, [1991] 1 SCR 252 at 264–74, 77 DLR (4th) 492; *Reference re Amendments to the Residential Tenancies Act (Nova Scotia)*, [1996] 1 SCR 186, 131 DLR (4th) 609. However, there is a strong basis for suggesting that those limitations do not apply to federal courts established by Parliament

This article addresses two issues. First, as a matter of constitutional law, can Parliament confer upon the Federal Court the jurisdiction to try a private suit of the type commenced by the Innu against IOC and QNS&L in *Uashaunnuat*? Secondly, as a matter of constitutional law, can Parliament compel submission of the provincial Crowns to the jurisdiction of the Federal Court for the purpose of allowing litigation of Aboriginal title claims? I address the first issue in Part II of my analysis, in which I examine the subject matter jurisdiction of the Federal Court. I address the second issue in Part III, in which I examine the *in personam* jurisdiction of the Federal Court. I start this article with a brief overview of the current jurisdiction of the Federal Court in Part I.

I. The Federal Court

Parliament created the Federal Court[38] in 1971.[39] This Court absorbed[40] the Exchequer Court of Canada established in 1875.[41] If, originally, the Exchequer Court enjoyed only "a very limited jurisdiction over cases involving the revenue and the Crown in right of Canada,"[42] its jurisdic-

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under section 101. See e.g. *Felipa v Canada (Citizenship and Immigration)*, 2011 FCA 272 at paras 142–64; *Bilodeau-Massé v Canada (AG)*, 2017 FC 604 at para 82; Hogg, *Constitutional Law*, *supra* note 37 at 7-36; Neil Finkelstein, *Laskin's Canadian Constitutional Law*, 5th ed, vol 1 (Toronto: Carswell, 1986) at 112. But see Henri Brun, Guy Tremblay & Eugénie Brouillet, *Droit constitutionnel*, 5th ed (Cowansville: Yvon Blais, 2008) ("*le législateur provincial ne peut de lui-même transférer la juridiction traditionnelle de la Cour supérieure à d'autres tribunaux provinciaux ... et, en toute logique, il doit en être de même pour le législateur fédéral par rapport tant aux tribunaux fédéraux qu'aux tribunaux provinciaux inférieurs*" at 799). The Supreme Court has yet to rule on the interaction between sections 96 and 101 (see *Ahmad*, *supra* note 37 at para 57).

38 Before 2003, the Federal Court of Canada had two divisions: (1) the Federal Court – Trial Division and (2) the Federal Court – Appeal Division. In 2003, the two divisions were continued into two separate courts: (1) the Federal Court and (2) the Federal Court of Appeal. See *FCA*, *supra* note 36, ss 3–4, as re-enacted by the *Courts Administration Service Act*, SC 2002, c 8, s 16. See also Hogg, *Constitutional Law*, *supra* note 37 at 7-32, n 5; Peter W Hogg, Patrick J Monahan & Wade K Wright, *Liability of the Crown*, 4th ed (Toronto: Carswell, 2011) at 489, n 30.

39 See *Federal Court Act*, RSC 1970 (2nd Supp), c 10. See also *Windsor (City) v Canadian Transit Co*, 2016 SCC 54 at para 15 [*Windsor*]; Hogg, *Constitutional Law*, *supra* note 37 at 7-32, n 4; Ian Bushnell, *The Federal Court of Canada: A History, 1875–1992* (Toronto: University of Toronto Press, 1997).

40 See Russell, *supra* note 37 at 311.

41 See *The Supreme and Exchequer Court Act*, SC 1875, c 11. See also *Windsor*, *supra* note 39 at para 31; Hogg, *Constitutional Law*, *supra* note 37 at 7-32; Russell, *supra* note 37 at 312; James Fyfe, "*Canada v Peigan*: Has the Federal Court Given in to Temptation" (2018) 96:2 Can Bar Rev 324 at 325.

42 Hogg, *Constitutional Law*, *supra* note 37 at 7-32. See also Russell, *supra* note 37 at 312.

tion was progressively expanded[43] so as to include admiralty, intellectual property, tax, citizenship, and "several very technical fields of federal law."[44] In addition to inheriting this jurisdiction, the Federal Court received some new powers, such as "the power to review the decisions of federal agencies and officials" and "the power to entertain claims for relief in respect of aeronautics, interprovincial undertakings and certain kinds of commercial paper."[45]

The *FCA* states that the Federal Court is a "superior court,"[46] but this statement is interpreted as meaning "that its jurisdiction is 'supervisory.'"[47] For the Supreme Court, "[t]he Federal Court is not a superior court in the true sense of possessing inherent jurisdiction."[48] On this view, the Federal Court is not a "true" superior court due to the nature of the statutory and constitutional constraints on its jurisdiction.[49] First, the Federal Court "is a statutory court": The only jurisdiction it has is the jurisdiction that statute has conferred upon it.[50] Secondly, as a matter of constitutional law, federal law must govern the cause of action.[51] Indeed, section 101 of the *Constitution Act, 1867*[52] limits Parliament's power to grant jurisdiction to a federal court: The creation of federal courts is authorized for a specific purpose, namely "the better Administration of the Laws of Canada."[53] The Supreme Court interpreted the phrase "Laws of Canada" to mean federal laws only, and not to include laws in force in Canada

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43 See Hogg, *Constitutional Law*, *supra* note 37 at 7-32.

44 Russell, *supra* note 37 at 312. See also Hon Bora Laskin, *The British Tradition in Canadian Law* (London, UK: Stevens & Sons, 1969) at 113, citing *Exchequer Court Act*, RSC 1952, c 98.

45 Hogg, *Constitutional Law*, *supra* note 37 at 7-32.

46 *FCA*, *supra* note 36, ss 3, 4.

47 *Windsor*, *supra* note 39 at para 33, n 2, citing *Puerto Rico v Hernandez*, [1975] 1 SCR 228 at 233, 41 DLR (3d) 549.

48 *Ibid*. See also Hogg, *Constitutional Law*, *supra* note 37 at 7-32; Hogg, Monahan & Wright, *supra* note 38 at 489; Russell, *supra* note 37 at 321–22. *Contra* Nicolas Lambert, "The Nature of Federal Court Jurisdiction: Statutory or Inherent?" (2010) 23:2 Can J Admin L & Prac 145.

49 See Hogg, Monahan & Wright, *supra* note 38 at 489.

50 *Windsor*, *supra* note 39 at para 33. See also *Roberts v Canada*, [1989] 1 SCR 322 at 331, 57 DLR (4th) 197 [*Roberts*]; Hogg, *Constitutional Law*, *supra* note 37 at 7-32; Hogg, Monahan & Wright, *supra* note 38 at 489.

51 See Hogg, Monahan & Wright, *supra* note 38 at 493, 489; Hogg, *Constitutional Law*, *supra* note 37 at 7-32.

52 *Constitution Act, 1867*, *supra* note 37.

53 See Hogg, Monahan & Wright, *supra* note 38 at 489. See also *Windsor*, *supra* note 39 at para 34; Russell, *supra* note 37 at 63.

through provincial enactments.[54] Finally, in addition to jurisdiction over the cause of action, or subject matter jurisdiction, the Federal Court must as well possess jurisdiction over the parties, or jurisdiction *in personam*, for a suit to proceed before it.[55]

II. Subject Matter Jurisdiction

In *ITO—International Terminal Operators Ltd v. Miida Electronics Inc* ("*ITO*"),[56] the Supreme Court, drawing upon its prior judgments in *Quebec North Shore Paper v. CP Ltd* ("*Quebec North Shore*")[57] and *McNamara Construction (Western) Ltd v. The Queen* ("*McNamara Construction*"),[58] identified three required elements to make a finding of jurisdiction in the Federal Court:

1. There must be a statutory grant of jurisdiction by Parliament.
2. There must be an existing body of federal law which is essential to the disposition of the case and which nourishes the statutory grant of jurisdiction.
3. The law on which the case is based must be "a law of Canada" as the phrase is used in section 101 of the *Constitution Act, 1867*.[59]

According to the Supreme Court, the first required element of the test concerns the statutory constraints on the Federal Court's jurisdiction.[60] This first required element is satisfied if a federal statute confers upon

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54 See *Windsor*, *supra* note 39 at paras 31, 34, 65; *R v Thomas Fuller Construction Co (1958) Ltd* (1979), [1980] 1 SCR 695 at 707, 106 DLR (3d) 193 [*Fuller*]; *Quebec North Shore Paper v Canadian Pacific Ltd*, [1977] 2 SCR 1054 at 1065–66, 71 DLR (3d) 111 [*Quebec North Shore*]; *Consolidated Distilleries Ltd v The King*, [1933] 3 DLR 1 at 9–11, 60 CCC 206 (here, the Judicial Committee of the Privy Council offered a similar interpretation). See also Laskin, *supra* note 44 at 112–13; Hogg, *Constitutional Law*, *supra* note 37 at 7-32 to 7-33; Hogg, Monahan & Wright, *supra* note 38 at 489.

55 See *Canada (Attorney General) v TeleZone Inc*, 2010 SCC 62 at para 44; *Canada v Peigan*, 2016 FCA 133 at para 47, leave to appeal to SCC refused, 37084 (22 December 2016) [*Peigan*]; *Canada v Toney*, 2013 FCA 217 at para 10 [*Toney*]; *Kusugak v Northern Transportation Co*, 2004 FC 1696 at para 42; *Greeley v Ship Tami Joan* (1996), 113 FTR 66 at paras 20–21, 7 FCJ No 739 [*Greeley*]; *Blood Band v Canada*, 2001 FCT 1067 at para 21 [*Blood Band*]. See also Fyfe, *supra* note 41 at 330.

56 [1986] 1 SCR 752, 28 DLR (4th) 641 [*ITO*].

57 *Quebec North Shore*, *supra* note 54.

58 [1977] 2 SCR 654, 75 DLR (3d) 273 [*McNamara Construction*].

59 *ITO*, *supra* note 56 at 766. See also *Windsor*, *supra* note 39 at para 34; *Roberts*, *supra* note 50 at 330; *Peigan*, *supra* note 55 at para 67; Hogg, *Constitutional Law*, *supra* note 37 at 7-40.

60 See *Windsor*, *supra* note 39 at para 35.

the Federal Court jurisdiction "over the subject matter of the litigation."[61] The second and third required elements of the test concern the constitutional constraints on the Federal Court's jurisdiction.[62] Both of these required elements "are directed toward determining whether federal law plays a sufficiently important role in the case for it to fall within the jurisdiction of the Federal Court."[63] Consequently, it is inevitable that the second and third required elements of the test present "a certain degree of overlap."[64] The second required element is satisfied if "a general body of federal law cover[s] the area of the dispute," while the third required element is satisfied if "the specific law which will be resolutive of the dispute [is] 'a law of Canada' within the meaning of s. 101."[65] In other words, the third required element of the test is satisfied if the federal law in question is "constitutionally valid," which means that it must be capable of being assigned to one or more heads of federal legislative power.[66] In the following parts of this article, I apply the three-part *ITO* test to the claims of the Innu in *Uashaunnuat* for the purpose of assessing the jurisdiction, or potential jurisdiction, of the Federal Court over such claims.

A. Statutory Grant of Jurisdiction

The first issue addressed in this article is whether Parliament can, as a matter of constitutional law, confer upon the Federal Court jurisdiction to try a private suit of the type commenced by the Innu against IOC and QNS&L in *Uashaunnuat*. The *FCA* currently does not grant such a jurisdiction to the Federal Court. First, the Federal Court has (concurrent)[67] original jurisdiction in all cases where relief is claimed *against the federal Crown* (sections 2(1) and 17(1) of the *FCA*); consequently, section 17(1) of the *FCA* does not authorize a claim *against a private party*,[68] unless such

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61 *Peigan*, *supra* note 55 at para 68.

62 See *Windsor*, *supra* note 39 at para 35. See also Fyfe, *supra* note 41 at 326.

63 *Peigan*, *supra* note 55 at para 68.

64 *Windsor*, *supra* note 39 at para 35. See also *Roberts*, *supra* note 50 at 330.

65 *Roberts*, *supra* note 50 at 330–31.

66 *ITO*, *supra* note 56 at 777.

67 Before 1990, the *FCA* "conferred [upon] the Federal Court *exclusive* jurisdiction over proceedings against the federal Crown" (Hogg, *Constitutional Law*, *supra* note 37 at 7-39). In 1990, the *FCA* "was amended to make the jurisdiction over proceedings against the [federal] Crown concurrent rather than exclusive" (*ibid*). See also *An Act to amend the Federal Court Act, the Crown Liability Act, the Supreme Court Act and other Acts in consequence thereof*, SC 1990, c 8, amending *FCA*, *supra* note 36, s 17.

68 See *Cie National de Courtage 2885-SD Location & Flotte Ltée v Canada (MNR)* (1991), 52 FTR 198 (TD), [1991] FCJ No 700 at paras 4–8 (the Federal Court has no jurisdiction over a claim against a commercial company); *Varnam v Canada (Minister of Na-*

a claim is in respect of an obligation of the federal Crown (section 17(4) of the *FCA*).[69]

Secondly, the subject matter provisions of the *FCA* (sections 20, 22, and 23) do grant jurisdiction to the Federal Court to try private suits in some areas of federal legislative competence. But, such a jurisdiction is unrelated to the claims of the Innu against IOC and QNS&L in *Uashaunnuat*: intellectual property (section 20), "Canadian maritime law," as defined in the *FCA* (section 2(1)),[70] "navigation and shipping" (section 22), and bills of exchange, promissory notes, aeronautics, and interprovincial works and undertakings (section 23).[71]

B. Existing Body of Federal Law

Even if Parliament were to grant, by statute, jurisdiction to the Federal Court to try a private suit of the type commenced by the Innu against IOC and QNS&L in *Uashaunnuat*, such a statutory grant of jurisdiction would be "constitutionally ineffective" in the absence of an existing body of federal law that governs the cause of action.[72] As explained by the Supreme Court in *Windsor (City) v. Canadian Transit Co* ("*Windsor*"), "a statutory grant of jurisdiction is necessary, but not alone sufficient, for the Federal Court to have jurisdiction in a given case."[73] In addition, "[t]he second part of the *ITO* test requires that federal law be 'essential to the disposition of the case' such that it 'nourishes the statutory grant of jurisdiction.'"[74]

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tional Health & Welfare), [1988] FCJ No 126, 2 FC 454 (CA) [*Varnam*] (rejecting a doctrine of intertwined jurisdiction). But see *Marshall v R*, [1986] 1 FC 437 (TD), 1985 CarswellNat 63 (the Federal Court has jurisdiction to hear claims against the federal Crown and a private party if such claims are sufficiently "intertwined" at 447); *Roberts v Canada*, [1987] 1 FC 155, [1986] FCJ No 472 (TD); *Roberts*, *supra* note 50 at 333. See also Hogg, *Constitutional Law*, *supra* note 37 at 7-39; Fyfe, *supra* note 41 at 336–37, n 43.

69 See e.g. *Roberts*, *supra* note 50 at 335–36 (a claim by an Indian Band against another Indian Band is in respect of the federal Crown's obligation to hold the land for its exclusive use and occupation as the federal Crown holds the underlying title to the land).

70 See *Desgagnés Transport Inc v Wärtsilä Canada Inc*, 2019 SCC 58 [*Desgagnés*]; *Ordon Estate v Grail*, [1998] 3 SCR 437 at para 71, 166 DLR (4th) 193; *QNS Paper Co v Chartwell Shipping Ltd*, [1989] 2 SCR 683, 62 DLR (4th) 36; *ITO*, *supra* note 56 at 776–77, 779.

71 See Russell, *supra* note 37 at 315.

72 Hogg, Monahan & Wright, *supra* note 38 at 490.

73 *Windsor*, *supra* note 39 at para 34.

74 *Ibid* at para 67, citing *ITO*, *supra* note 56 at 766. See also *Roberts*, *supra* note 50 at 336.

In *Uashaunnuat*, the claims of the Innu against IOC and QNS&L were based upon the law of Aboriginal title, insofar as the Innu sought a declaration of Aboriginal title and associated injunctive relief (section II.B.1).[75] These claims were also based upon Quebec's law of delict, insofar as the Innu sought an award of damages on the basis that the infringement by IOC and QNS&L of their Aboriginal title constituted a fault within the meaning of article 1457 of the CCQ (section II.B.2).[76] I examine in turn these two aspects of the Innu's action against IOC and QNS&L.

1. The Law of Aboriginal Title

It is well established that "Aboriginal title is ... a sub-category of Aboriginal rights."[77] Aboriginal rights are constitutionally "recognized and affirmed" by section 35(1) of the *Constitution Act, 1982*.[78] It is important to note at the outset that the doctrine of Aboriginal rights is not a creation of section 35(1): it is a common law doctrine that predates the *Constitution Act, 1982*.[79] However, at common law, Parliament could extinguish Aboriginal rights at will.[80] In 1982, the amendment of Canada's Constitution changed this situation.[81] Nowadays, Parliament cannot *extinguish* Aboriginal rights, and it, or the provincial legislatures, can only *regulate*, or *infringe*, Aboriginal rights to the extent that the justificatory test of *R v. Sparrow* is satisfied.[82]

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75 See *Uashaunnuat*, *supra* note 7 at paras 84, 192–94, Brown and Rowe JJ, dissenting.

76 See *ibid* at paras 83–84, 195–99, Brown and Rowe JJ, dissenting.

77 *Ibid* at para 27. See also *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 at para 137, 153 DLR (4th) 193 [*Delgamuukw*]; *R v Van der Peet*, [1996] 2 SCR 507 at para 74, 137 DLR (4th) 289 [*Van der Peet*]; *R v Adams*, [1996] 3 SCR 101 at para 30, 138 DLR (4th) 657; Thomas Isaac, *Aboriginal Law*, 5th ed (Toronto: Thomson Reuters, 2016) at 65.

78 *Delgamuukw*, *supra* note 77 at para 138; *Constitution Act, 1982*, *supra* note 26.

79 See *Van der Peet*, *supra* note 77 at para 28. See also *Delgamuukw*, *supra* note 77 at paras 133–34; *Calder v British Columbia (Attorney General)*, [1973] SCR 313 at 376, 34 DLR (3d) 145 [*Calder*]; Wilkins, *supra* note 10 at § 290.

80 See *Van der Peet*, *supra* note 77 at para 28. See also *Kruger v The Queen*, [1978] 1 SCR 104 at 112, 75 DLR (3d) 434; *R v Derriksan*, [1976] SCJ No 3, 71 DLR (3d) 159; *Mitchell*, *supra* note 1 at para 11; Hogg, *Constitutional Law*, *supra* note 37 at 28-35; Wilkins, *supra* note 10 at § 629.

81 See *Mitchell*, *supra* note 1 (adding "it is important to note [that] the protection offered by s. 35(1) also extends beyond the [A]boriginal rights recognized at common law" at para 11). See also *Van der Peet*, *supra* note 77 at para 28; Wilkins, *supra* note 10 at § 630.

82 See *Van der Peet*, *supra* note 77 at para 28, citing *R v Sparrow*, [1990] 1 SCR 1075 at 1112, 70 DLR (4th) 385 [*Sparrow*]. See also *Mitchell*, *supra* note 1 at para 11; *R v*

Aboriginal title "is the highest form of Aboriginal right."[83] It is defined as a right of exclusive use of land; as a result, it confers upon the Indigenous owners a freedom to use the land in a variety of ways.[84] Aboriginal title is held by Indigenous communities who can prove exclusive use of specific land at the time at which the Crown asserted sovereignty over the land.[85] However, Aboriginal title "is not the same as, or equivalent to, a fee simple interest in land."[86] Nonetheless, it is a right of ownership "similar to [a] fee simple."[87]

The *Royal Proclamation of 1763* ("*Proclamation*")[88] "recognized the right of Indians to unceded lands in their possession, protected the Indians' interest in those lands, and provided that [their] rights in the land [could] be ceded only to the Crown."[89] Importantly, the *Proclamation* is not

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Gladstone, [1996] 2 SCR 723, 137 DLR (4th) 648; *Delgamuukw*, *supra* note 77; Hogg, *Constitutional Law*, *supra* note 37 at 28-42 to 28-43; Wilkins, *supra* note 10 at § 36.

83 Isaac, *supra* note 77 at 65, citing *R v Marshall; R v Bernard*, 2005 SCC 43 at para 77.

84 See *Uashaunnuat*, *supra* note 7 at para 141, Brown and Rowe JJ, dissenting, citing *Delgamuukw*, *supra* note 77 at para 117. See also Hogg, *Constitutional Law*, *supra* note 37 at 28-35; Wilkins, *supra* note 10 at § 612; Brian Slattery, "The Metamorphosis of Aboriginal Title" (2006) 85:2 Can Bar Rev 255.

85 See Wilkins, *supra* note 10 at § 292. See also *Tsilhqot'in Nation*, *supra* note 27 at paras 47, 50; *Delgamuukw*, *supra* note 77 at para 142; Hogg, *Constitutional Law*, *supra* note 37 at 28-39 to 28-41.

86 Wilkins, *supra* note 10 at § 321. See also *Delgamuukw*, *supra* note 77 ("Aboriginal title has been described as *sui generis* in order to distinguish it from 'normal' proprietary interests, such as fee simple" at para 112); Douglas Sanderson (*Amo Binashii*) & Amitpal C Singh, "Why Is Aboriginal Title Property if It Looks Like Sovereignty?" (2021) 34:2 Can JL & Jur 417 ("Aboriginal title is unlike common law fee simple in three respects. First, Aboriginal title cannot be alienated ... Second, Aboriginal title traces its genealogy to Indigenous systems of law ... Finally, and perhaps most significantly, Aboriginal title is held communally, and inter-generationally, by an Indigenous community rather than by individual Aboriginal persons ... [T]he key implication of this communal and intergenerational structure is the presence of an inherent limit on how Aboriginal title lands can be used ... [T]he uses to which Aboriginal title lands are put cannot alter the land so as to destroy the special relationship which founded the right of title itself" at 423–24).

87 *Uashaunnuat*, *supra* note 7 at para 148, Brown and Rowe JJ, dissenting, citing *Tsilhqot'in Nation*, *supra* note 27 at para 73. See also *ibid* ("[a]nalogies to other forms of property ownership – for example, fee simple – may help us to understand aspects of Aboriginal title" at para 72); Wilkins, *supra* note 10 at § 32; Larissa Katz, "Exclusion and Exclusivity in Property Law" (2008) 58:3 UTLJ 275 (describing Aboriginal title as "a form of ownership right" at 286).

88 George R, Proclamation, 7 October 1763 (3 Geo III), Reprinted in RSC 1985, Appendix II, No 1 [*Proclamation*].

89 Isaac, *supra* note 77 at 67. See also *R v Sioui*, [1990] 1 SCR 1025 at 1064, 70 DLR (4th) 427; *Calder*, *supra* note 79 at 394–95, Hall J (the *Proclamation* is "an Executive Order having the force and effect of an Act of Parliament" at 394).

the source of Aboriginal title: it merely confirms its existence.[90] As explained by Thomas Isaac, "Aboriginal title exists independently of the *Proclamation* and arises ... from the historical use and occupation of Canada by Aboriginal peoples."[91] The *Proclamation* is simply evidence of the respect that the British tended to show in their policies toward the rights of Indigenous peoples to occupy and use their traditional territories.[92]

The 1888 decision in *St Catherine's Milling and Lumber Company v. The Queen (Ontario)* ("*St Catherine's Milling*")[93] is "[t]he starting point of the Canadian jurisprudence on [A]boriginal title."[94] In this decision, the Privy Council recognized that Aboriginal title exists at Canadian law. It described Aboriginal title as a burden on the Crown's underlying title to the land[95] and as a "personal and usufructuary right."[96] However, "[t]he Privy Council did not address common law recognition of Aboriginal rights and instead focused its decision on Aboriginal title flowing exclusively from the *Proclamation*."[97]

In its 1973 decision in *Calder v. British Columbia (Attorney General)* ("*Calder*"),[98] the Supreme Court rejected this idea that the source of Aboriginal title is the *Proclamation*.[99] Justices Judson and Hall held that Aboriginal title exists at common law independently of the *Proclamation*.[100] The *Calder* decision thus "recognized [A]boriginal title as a legal right derived from the Indians' historic occupation and possession of their tribal lands,"[101] and as "not solely dependent upon legislative enactments, executive orders, or treaties for their existence."[102] The Supreme Court reiterat-

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90 See Isaac, *supra* note 77 at 67. See also *Delgamuukw*, *supra* note 77 at para 114; *Guerin v R*, [1984] 2 SCR 335 at 377, 13 DLR (4th) 321 [*Guerin*].

91 Isaac, *supra* note 77 at 67. See also *R v Sappier; R v Gray*, 2006 SCC 54 at para 45.

92 See Isaac, *supra* note 77 at 67, citing *Sparrow*, *supra* note 82 at 1103.

93 [1888] UKPC 70, (1889) LR 14 App Cas 46 [*St Catherine's Milling*].

94 *Delgamuukw*, *supra* note 77 at para 112. See also *Uashaunnuat*, *supra* note 7 at para 144, Brown and Rowe JJ, dissenting; *Osoyoos Indian Band v Oliver (Town)*, 2001 SCC 85 at para 41 [*Osoyoos*].

95 See Isaac, *supra* note 77 at 70.

96 *St Catherine's Milling*, *supra* note 93 at para 7. See also *Smith v The Queen*, [1983] 1 SCR 554 at 568–69, 147 DLR (3d) 237 [*Smith*]; *Uashaunnuat*, *supra* note 7 at para 144, Brown and Rowe JJ, dissenting.

97 Isaac, *supra* note 77 at 70.

98 *Calder*, *supra* note 79.

99 See Isaac, *supra* note 77 at 71.

100 See *ibid*. See also *Calder*, *supra* note 79 at 322–23, 328, Judson J, and at 390, Hall J; *Guerin*, *supra* note 90 at 377.

101 *Guerin*, *supra* note 90 at 376. See also *Roberts*, *supra* note 50 at 340.

102 Isaac, *supra* note 77 at 71.

ed its position that Aboriginal title exists at common law independently of the *Proclamation* [103] in its 1984 decision in *Guerin v. The Queen* ("*Guerin*"),[104] and in its 1997 decision in *Delgamuukw v. British Columbia*.[105]

The common law doctrine of Aboriginal rights results from the rules of British imperial constitutional law and "the doctrine of continuity, which governed the absorption of [A]boriginal laws and customs into the new legal regime upon the assertion of Crown sovereignty over the region."[106] As explained by the Supreme Court in *Mitchell v. MNR*, "English law ... accepted that the [A]boriginal peoples possessed pre-existing laws and interests, and recognized their continuance in the absence of extinguishment, by cession, conquest, or legislation."[107] In this respect, the Supreme Court endorses the view that the doctrine of discovery and *terra nullius* has never been a part of Canadian law.[108]

However, the Supreme Court endorses at the same time the view that, by asserting "sovereignty over the land," the Crown acquired "its underlying title."[109] The rights of Indigenous peoples to occupy and use their traditional territories are said to have "continued as a 'burden on the radical or final title of the Sovereign.'"[110] The reason for this is "[t]he principle

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[103] See Isaac, *supra* note 77 at 72.

[104] *Guerin*, *supra* note 90 at 379, Dickson J.

[105] *Delgamuukw*, *supra* note 77 at para 114.

[106] *Mitchell*, *supra* note 1 at para 62. See also Russell Lawrence Barsh & James Youngblood Henderson, "The Supreme Court's *Van der Peet* Trilogy: Naive Imperialism and Ropes of Sand" (1997) 42:4 McGill LJ 993.

[107] *Mitchell*, *supra* note 1 at para 9.

[108] See *Tsilhqot'in Nation*, *supra* note 27 at para 69. But see John Borrows, "The Durability of *Terra Nullius*: *Tsilhqot'in Nation v British Columbia*" (2015) 48:3 UBC L Rev 701; John Borrows, *Law's Indigenous Ethics* (Toronto: University of Toronto Press, 2019) at 88–113; Joshua Ben David Nichols, *A Reconciliation without Recollection?: An Investigation of the Foundations of Aboriginal Law in Canada* (Toronto: University of Toronto Press, 2020) at 278.

[109] *Mitchell*, *supra* note 1 at para 9. See also *Tsilhqot'in Nation*, *supra* note 27 at para 69; *Sparrow*, *supra* note 82 at 1103. But see Douglas Sanderson (*Amo Binashii*), "The Residue of *Imperium*: Property and Sovereignty on Indigenous Lands" (2018) 68:3 UTLJ 319; Sanderson (*Amo Binashii*) & Singh, *supra* note 86 (describing underlying Crown title as a "myth ... which in turn is substantiated by the doctrine of discovery and *terra nullius*" at 458, n 223 and arguing that the idea "of the Crown's underlying title is an especially confusing part of the jurisprudence [which is] normatively indefensible" at 423, n 19).

[110] *Roberts*, *supra* note 50 at 340, citing *Amodu Tijani v Southern Nigeria (Secretary)*, [1921] 2 AC 399 at 403, [1921] UKPC 80. See also *Mabo v Queensland (No 2)*, [1992] 175 CLR 1 at 8, 107 ALR 1 [*Mabo No 2*]; *Guerin*, *supra* note 90 at 377–78; *Mitchell*, *su-*

that a change in sovereignty over a particular territory does not in general affect the presumptive title of the inhabitants."[111] The doctrine of continuity confirms the Supreme Court's position that Aboriginal title exists at common law independently of the *Proclamation*.[112] There is accordingly a presumption that Aboriginal rights "survive[d] the assertion of sovereignty, and were absorbed into the common law ... unless (1) they were [unconscionable or] incompatible with the Crown's assertion of sovereignty, (2) they were surrendered voluntarily via the treaty process, or (3) the government extinguished them."[113]

In sum, the common law doctrine of Aboriginal rights "arose from the very process whereby the Crown assumed sovereignty over Canada."[114] It is "a necessary incident of British sovereignty,"[115] a doctrine of colonial law.[116] Being a "part of a body of fundamental constitutional law,"[117] the common law doctrine of Aboriginal rights "took force uniformly throughout the various colonial territories that now make up Canada."[118] As explained by John Evans and Brian Slattery, "[u]pon Confederation, this body of common law passed into the federal sphere of authority by virtue of section 91(24) of the *Constitution Act, 1867*,"[119] which vests in the federal order of government the power to make laws in relation to "Indians, and Lands reserved for the Indians."[120] As a result, "the common law of [A]boriginal title ... became federal common law," namely "a body of basic *public* law operating uniformly across the country within the federal

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pra note 1 at para 67, Binnie J, concurring; *Tsilhqot'in Nation*, *supra* note 27 at paras 10, 12; Hogg, *Constitutional Law*, *supra* note 37 at 28-23, 28-25.

111 *Guerin*, *supra* note 90 at 378.

112 See *ibid*.

113 *Mitchell*, *supra* note 1 at paras 10, 62. See also *Calder*, *supra* note 79; *Mabo No 2*, *supra* note 110 at 57, 61, Brennan J, 81–82, Deane and Gaudron JJ, 182–83, Toohey J; *Inasa v Oshodi*, [1934] 99 AC 9, [1933] UKPC 75; *Delgamuukw v British Columbia*, [1993] 104 DLR (4th) 470 at 728–29, 5 WWR 97, Lambert JA, dissenting; Brian Slattery, "Understanding Aboriginal Rights" (1987) 66:4 Can Bar Rev 727 [Slattery, "Understanding Aboriginal Rights"].

114 JM Evans & Brian Slattery, "Federal Jurisdiction—Pendent Parties—Aboriginal Title and Federal Common Law—Charter Challenges—Reform Proposals: *Roberts* v. *Canada*" (1989) 68:4 Can Bar Rev 817 at 832 [Evans & Slattery, "Federal Jurisdiction"].

115 *R v Côté*, [1996] 3 SCR 139 at para 49, 138 DLR (4th) 385.

116 See Slattery, "Understanding Aboriginal Rights", *supra* note 113 at 737. See also *Mitchell*, *supra* note 1 at para 114, Binnie J, concurring.

117 Slattery, "Understanding Aboriginal Rights", *supra* note 113 at 737.

118 Evans & Slattery, "Federal Jurisdiction", *supra* note 114 at 832.

119 *Ibid*.

120 *Constitution Act, 1867*, *supra* note 37, s 91(24).

sphere of competence."[121] In *Roberts v. Canada* ("*Roberts*"),[122] the Supreme Court affirmed that the common law doctrine of Aboriginal title "is part of the federal common law."[123] The aspect of the Innu's action that sought a declaration of Aboriginal title and associated injunctive relief was thus governed by an existing body of federal law. The second part of the *ITO* test is therefore satisfied.

2. Quebec's Law of Delict

As mentioned earlier, the Supreme Court interpreted the phrase "Laws of Canada" in section 101 of the *Constitution Act, 1867* to mean federal laws only.[124] Thus, as a principle, the Federal Court cannot determine "questions of provincial law."[125] The Supreme Court established this "restrictive rule"[126] in its 1976 decision in *Quebec North Shore*.[127] Furthermore, this case also established that, even in areas of unexercised federal legislative competence, the common law or the civil law in Quebec is not, for this purpose, federal law.[128] Consequently, as a matter of constitutional law, "applicable *and existing* federal law" must govern the cause of action for the Federal Court to have jurisdiction.[129] The Supreme Court reiterated this requirement in its 1977 decision in *McNamara Construction*.[130]

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121 Evans & Slattery, "Federal Jurisdiction", *supra* note 114 at 832 [emphasis in original]. See also *Uashaunnuat*, *supra* note 7 at para 118, Brown and Rowe JJ, dissenting; Brian Slattery, "The Constitutional Dimensions of Aboriginal Title" (2015) 71 SCLR 45 at 47.

122 *Roberts*, *supra* note 50 at 340.

123 Isaac, *supra* note 77 at 72; *Uashaunnuat*, *supra* note 7 at para 135; *Van der Peet*, *supra* note 77 at para 28; *Calder*, *supra* note 79. See also Robert Mainville, *An Overview of Aboriginal and Treaty Rights and Compensation for Their Breach* (Saskatoon: Purich Publishing, 2001) at 62–64.

124 See Hogg, Monahan & Wright, *supra* note 38 at 499.

125 *Ibid* at 489.

126 *Ibid* at 489, n 32.

127 *Quebec North Shore*, *supra* note 54.

128 See Hogg, Monahan & Wright, *supra* note 38 at 489, n 32. See also *Roberts*, *supra* note 50 at 338–39; Finkelstein, *supra* note 37 at 169.

129 Hogg, *Constitutional Law*, *supra* note 37 at 7-33 to 7-34, citing *Quebec North Shore*, *supra* note 54 at 1065–66 [emphasis added]; Russell, *supra* note 37 at 322–23.

130 *McNamara Construction*, *supra* note 58. The decisions in *Quebec North Shore* and *McNamara Construction* are subject "to serious criticism" (Hogg, *Constitutional Law*, *supra* note 37 at 7-34, n 13 and accompanying references). See also Hogg, Monahan & Wright, *supra* note 38 at 499; Stephen A Scott, "Canadian Federal Courts and the Constitutional Limits of Their Jurisdiction" (1982) 27:2 McGill LJ 137 at 191.

However, the jurisprudence of the Supreme Court does not forthrightly deny the possibility that "a federal common law" might exist.[131] In fact, "some parts of the common law" were actually held to "qualify as federal law."[132] Furthermore, the principle that the Federal Court cannot determine questions of provincial law is also not absolute.[133] In at least two cases,[134] the Supreme Court recognized the jurisdiction of the Federal Court over "a single cause of action" that was "governed partly by federal law and partly by common law."[135] As stated by the Supreme Court in *ITO*, "[w]here a case is in 'pith and substance' within the court's statutory jurisdiction, the Federal Court may apply provincial law incidentally necessary to resolve the issues presented by the parties."[136] In this passage, the Supreme Court seemed to adopt the United States "doctrine of pendent jurisdiction," under which a federal court—if properly seized of a particular case—can "determine all of the issues that are derived from the 'common nucleus of operative fact', including 'state' issues."[137] However, in *Roberts*,[138] the Supreme Court later rejected the doctrine of pendent jurisdiction.[139] It results from these somewhat conflicting decisions "that there is no clear rule to deal with a cause of action governed by both federal and provincial law."[140]

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131 Hogg, Monahan & Wright, *supra* note 38 at 500.

132 *Ibid*. See e.g. *Roberts*, *supra* note 50 (using the phrase "common law of [A]boriginal title" at 340); *Fuller*, *supra* note 54 (using the phrase "common law rules respecting [federal] crown liability in contract" at 702–03). *Cf Bisaillon v Keable*, [1983] 2 SCR 60, 2 DLR (4th) 193 (where the court held that the common law rule against judicial disclosure of police informant identity was part of Quebec law). See also *Quebec North Shore*, *supra* note 54 at 1063, 1065–66; *McNamara Construction*, *supra* note 58 at 662–63; *Rhine v The Queen*, [1980] 2 SCR 442, 116 DLR (3d) 385 [*Rhine*] (stating "that 'contract' or other legal institutions, such as 'tort' cannot be invariably attributed to sole provincial legislative regulation or be deemed to be, as common law, solely matters of provincial law" at 447); *Northern Telecom v Communication Workers*, [1983] 1 SCR 733 at 740, 147 DLR (3d) 1; Laskin, *supra* note 44 at 112–13; Hogg, *Constitutional Law*, *supra* note 37 at 7-35.

133 See *ITO*, *supra* note 56 at 781.

134 See *ibid*; *Rhine*, *supra* note 132 at 447.

135 Hogg, *Constitutional Law*, *supra* note 37 at 7-36. See also Finkelstein, *supra* note 37 at 169.

136 *ITO*, *supra* note 56 at 781, citing *Kellogg Co v Kellogg*, [1941] SCR 242, 2 DLR 545 and *McNamara Construction*, *supra* note 58.

137 Hogg, *Constitutional Law*, *supra* note 37 at 7-36, n 28.

138 *Roberts*, *supra* note 50.

139 See Hogg, *Constitutional Law*, *supra* note 37 at 7-36; *Roberts*, *supra* note 50 at 334. See also Russell, *supra* note 37 at 69.

140 Hogg, *Constitutional Law*, *supra* note 37 at 7-36.

The Innu's claim for damages against IOC and QNS&L was such a cause of action. Quebec's law of delict, upon which the Innu's claim for damages was based is, of course, provincial law. But the Innu's claim for damages could succeed "*only if*" they obtained judicial recognition *of their Aboriginal title*.[141] Indeed, the Innu alleged that the infringement by IOC and QNS&L *of their Aboriginal title* constituted a fault within the meaning of article 1457 of the CCQ.[142] The law of Aboriginal title, which is federal common law,[143] was thus a necessary component of the Innu's claim for damages against IOC and QNS&L. Whether this is sufficient to satisfy the second part of the *ITO* test is unclear: In *Roberts*, the Supreme Court "disapproved of a dictum that it is sufficient 'if the rights and obligations of the parties are to be determined to some material extent by federal law.'"[144]

In *Windsor*, the Supreme Court similarly disapproved of a number of the Federal Court of Appeal's articulations of the second part of the *ITO* test. For the Supreme Court, the second part of the *ITO* test is not satisfied by the mere fact that there is "sufficient federal law,"[145] or by the mere fact that federal law "has an important part to play"[146] in determining the outcome:

> These articulations of the test should not be understood to lower in any way the high threshold articulated in *ITO* itself. The fact that the Federal Court may have to consider federal law as a necessary component is not alone sufficient; federal law must be "essential to the disposition of the case". It must "nourish" the grant of jurisdiction.[147]

To ensure the constitutional effectiveness of a statutory grant of jurisdiction to the Federal Court to try a private suit of the type commenced by the Innu against IOC and QNS&L in *Uashaunnuat*, Parliament could simply incorporate into federal law any provincial law applicable to a claim for damages for the infringement of Aboriginal title, for example by

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141 *Uashaunnuat*, *supra* note 7 at para 197, Brown and Rowe JJ, dissenting [emphasis in original].

142 See *ibid* at paras 83, 195, Brown and Rowe JJ, dissenting.

143 See *Calder*, *supra* note 79; *Roberts*, *supra* note 50 at 340; *Van der Peet*, *supra* note 77 at para 28; *Uashaunnuat*, *supra* note 7 at para 135, Brown and Rowe JJ, dissenting.

144 Hogg, *Constitutional Law*, *supra* note 37 at 7-36, citing *Roberts*, *supra* note 50 at 333, citing *Bensol Customs Brokers v Air Canada*, [1979] 99 DLR (3d) 623, 1979 CanLII 2500 (FCA) at para 17.

145 *Canadian Transit Company v Windsor (Corporation of the City)*, 2015 FCA 88 at para 32.

146 *The Queen v Montreal Urban Community Transit Commission*, [1980] 112 DLR (3d) 266 at 269, 2 FC 151.

147 *Windsor*, *supra* note 39 at 69 [emphasis added].

directing the application of the law of the province where the cause of action arose.[148] According to Colin McNairn, it is at least arguable that such "a federal choice of law rule" is sufficient to satisfy section 101 of the *Constitution Act, 1867*.[149] I agree. Liability in torts of the federal Crown, for instance, is governed by a similar federal choice of law rule, which directs the application of the law of the province where the cause of action arose, and there is no doubt that liability in torts of the federal Crown is federal law.[150] In my view, it would be within Parliament's legislative competence to incorporate into federal law any provincial law applicable[151] to a claim for damages for the infringement of Aboriginal title. This is the point I shall now explore in more detail.

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148 See Hogg, *Constitutional Law*, *supra* note 37 at 7-34. In fact, the Supreme Court protects the admiralty jurisdiction of the Federal Court precisely by interpreting the *FCA* as incorporating by reference the applicable substantive law so as to convert it into a "law of Canada" (see e.g. *Tropwood v Sivaco*, [1979] 2 SCR 157 at 166–67, 99 DLR (3d) 235; *Antares Shipping v The Capricorn*, [1980] 1 SCR 553 at 566–67, 111 DLR (3d) 289; *Aris Steamship v Associated Metals & Minerals*, [1980] 2 SCR 322 at 324, 110 DLR (3d) 1; *Wire Rope v BC Marine*, [1981] 1 SCR 363 at 379, 121 DLR 3(d) 517; *Triglav v Terrasses Jewellers Inc*, [1983] 1 SCR 283 at 302, 54 NR 321; *ITO*, *supra* note 56 at 774, 782; *Pembina Exploration*, *supra* note 37 at 212; *Monk Corp v Island Fertilizers Ltd*, [1991] 1 SCR 779 at 795–96, 80 DLR (4th) 58; *Desgagnés*, *supra* note 70 at para 17).

149 McNairn, "Intergovernmental Immunity", *supra* note 34 at 50.

150 See Hogg, Monahan & Wright, *supra* note 38 at 435–36. See also Dale Gibson, "Interjurisdictional Immunity in Canadian Federalism" (1969) 47:1 Can Bar Rev 40 at 46–49; McNairn, "Intergovernmental Immunity", *supra* note 34 at 54–69.

151 There is no doubt that, "subject to the s. 35 infringement and justification framework," provincial laws of general application, such as the laws regulating civil liability, apply to the use of Aboriginal title lands (*Tsilhqot'in Nation*, *supra* note 27 at para 150). See also Ghislain Otis, "Les droits ancestraux des peuples autochtones au carrefour du droit public et du droit privé: le cas de l'industrie extractive" (2019) 60:2 C de D 451 ("*le droit provincial relatif à la responsabilité civile s'appliquera, sous réserve de l'article 35, aux relations entre les particuliers et un peuple autochtone relativement à un conflit mettant en cause la jouissance et l'exercice des droits ancestraux*" at 472); *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 at para 56 [*Haida Nation*]; *Rio Tinto*, *supra* note 10 at para 77; *Ominayak v Penn West Petroleum Ltd*, 2015 ABQB 342 at paras 1, 37–38; *Uashaunnuat* (Motion to Dismiss), *supra* note 10; *Uashaunnuat*, *supra* note 7 at para 28. Indeed, as a general matter, the regulation of land use and of civil liability within the province falls under its power over "Property and Civil Rights" pursuant to section 92(13) of the *Constitution Act, 1867* (*supra* note 37). However, the regulation of the use *of Aboriginal title lands* and of civil liability *for the infringement of Aboriginal title* possesses, for constitutional purposes, a double aspect: Both the provincial legislatures and Parliament enjoy a concurrent jurisdiction. For Parliament's power to regulate non-Indian use of Aboriginal title lands and civil liability for the infringement of Aboriginal title, see section II.C, *below*.

C. Constitutional Validity of Federal Law

Section 91(24) of the *Constitution Act, 1867* confers exclusive legislative authority upon Parliament in relation to "Indians, and Lands reserved for the Indians."[152] This section "assigns jurisdiction to Parliament over two distinct subject matters, Indians *and* Lands reserved for the Indians, not Indians *on* Lands reserved for the Indians."[153] Parliament's exclusive legislative authority in relation to "Indians" is thus "the same whether Indians are on a reserve or off a reserve."[154] It is reasonable to conclude that "[b]y parity of reasoning, federal legislative authority over lands reserved for the Indians is the same regardless of whether Indians are the ones located there."[155] Accordingly, Parliament's legislative authority over "Lands reserved for the Indians" includes "the power to regulate non-Indian use of such lands,"[156] as well as, in my view, the power to regulate civil liability for the infringement of Aboriginal title. There is indeed no doubt that the words "Lands reserved for the Indians" include, "in addition to lands that qualify as 'reserves' under the *Indian Act*[157] and 'First Nation land' as defined under the *First Nations Land Management Act*,[158] lands reserved or set aside pursuant to the Royal Proclamation of 1763 and lands held by Indians pursuant to [A]boriginal title."[159]

Federal legislative power over "Lands reserved for the Indians" does not, however, entail that the property of these lands is vested in the federal order of government.[160] In *St Catherine's Milling*,[161] the Privy Council specifically held that the *Constitution Act, 1867* does not transfer to the

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152 *R v Morris*, 2006 SCC 59 at para 41; *Delgamuukw*, *supra* note 77 at para 173; *Derrickson v Derrickson*, [1986] 1 SCR 285, 26 DLR (4th) 175 at 293 [*Derrickson*]; Isaac, *supra* note 77 at 202.

153 *Four B Manufacturing Ltd v United Garment Workers of America*, [1980] 1 SCR 1031 at 1049–50, 102 DLR (3d) 385 [*Four B*] [emphasis in original]. See also *Derrickson*, *supra* note 152 at 298; Hogg, *Constitutional Law*, *supra* note 37 at 28-3.

154 *Four B*, *supra* note 153 at 1050.

155 Wilkins, *supra* note 10 at § 8.

156 *Ibid* at § 18 and accompanying references. See also Hogg, *Constitutional Law*, *supra* note 37 at 28-3.

157 RSC 1985, c I-5, s 2(1) "reserve".

158 SC 1999, c 24, s 2(1) "First Nation land".

159 Wilkins, *supra* note 10 at § 15. See also *Delgamuukw*, *supra* note 77 at para 174; *Calder*, *supra* note 79; *St Catherine's Milling*, *supra* note 93 at paras 6–7; Hogg, *Constitutional Law*, *supra* note 37 at 28-7 to 28-8; Isaac, *supra* note 77 at 205–06.

160 See Wilkins, *supra* note 10 at § 19. See also Hogg, *Constitutional Law*, *supra* note 37 at 28-7 to 28-8, 29-6; Isaac, *supra* note 77 at 205.

161 *St Catherine's Milling*, *supra* note 93.

federal order of government the property of the "Lands reserved for the Indians," and that the underlying title to the lands that are subject to the rights of Indigenous peoples to occupy and use their traditional territories remains in the provincial Crowns.[162] As explained by Kerry Wilkins, it is not inconsistent to assign legislative power over "Lands reserved for the Indians" to the federal order of government, and the underlying title to these lands to the provincial Crowns.[163] This underlying title belongs to the provincial Crowns by virtue of the fact that, first, the Crown acquired it when "it asserted sovereignty over the land."[164] Secondly, at the time of Confederation, section 109 of the *Constitution Act, 1867* "vest[ed] this underlying title in the provincial Crowns[165] and qualifie[d] provincial own-

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[162] See Hogg, *Constitutional Law*, *supra* note 37 at 28-8. See also Isaac, *supra* note 76 at 206.

[163] See Wilkins, *supra* note 10 at § 19. See also *St Catherine's Milling*, *supra* note 93; Hogg, *Constitutional Law*, *supra* note 37 at 29-6.

[164] *Delgamuukw*, *supra* note 77 at para 145. See also *Uashaunnuat*, *supra* note 7 at paras 123, 251, Brown and Rowe JJ, dissenting.

[165] At the time of Confederation, the *Constitution Act, 1867* (*supra* note 37) distributed Crown property "among the federal order [of government] and the four originating provinces [of Ontario, Quebec, Nova Scotia, and New Brunswick]" (Wilkins, *supra* note 10 at § 21). As explained by Wilkins:

> With the exception of "[t]he Public Works and Property of each Province, enumerated in the Third Schedule to the Act" [(section 108)], and subject to "the Right of Canada to assume any Lands or Public Property required for Fortifications or for the Defence of the Country" [(section 117)], all lands, mines, minerals, and royalties belonging to the pre-Confederation provinces were to belong, respectively, to the four originating provinces, subject to "any Interest other than that of the Province in the same" [(section 109)] (*ibid* and accompanying references).

Wilkins adds that "[t]he same was true of British Columbia when it joined Confederation in 1871" (*ibid* at § 23; *British Columbia Terms of Union* (UK), 1871, Schedule, s 10, reprinted in RSC 1985, Appendix II, No 10). Likewise, Prince Edward Island, in 1873, and Newfoundland (now Newfoundland and Labrador), in 1949, were granted the underlying proprietary interest in all public lands within their respective provincial borders upon joining Confederation (see *Prince Edward Island Terms of Union* (UK), 1873, reprinted in RSC 1985, Appendix II, No 12; *Newfoundland Act* (UK), 12 & 13 Geo VI, c 22, Schedule, ss 3, 37, reprinted in RSC 1985, Appendix II, No 32). Before 1930, by contrast, "administration and control of Crown property in the three prairie provinces vested in the federal order of government" (Wilkins, *supra* note 10 at § 23; *Manitoba Act, 1870* (Can), 33 Vict, c 3, s 30, reprinted in RSC 1985, Appendix II, No 8; *Alberta Act* (Can), 4 & 5 Edw VII, c 3, s 21, reprinted in RSC 1985, Appendix II, No 20; *Saskatchewan Act* (Can), 4 & 5 Edw VII, c 42, s 21, reprinted in RSC 1985, Appendix II, No 21). In 1930, this situation changed "when Parliament and the legislatures of the three prairie provinces passed legislation giving effect to [*Natural Resources Transfer Agreements*] the government of Canada had made with the governments of Manitoba, Saskatchewan and Alberta" to give them ownership of natural resources and Crown lands (Wilkins, *supra* note 10 at § 31; *The Manitoba Natural Resources Act*, SC 1930, c 29, Schedule, s 1; *The Manitoba Natural Resources Transfer Act*, RSM 1987, c N30, CCSM, Schedule, s 1; *The Saskatchewan Natural Resources Act*, SC 1930, c 41, Schedule, s 1;

ership by making it subject to 'any Interest other than that of the Province.'"[166] There is no doubt that "Aboriginal title is one such interest."[167] The underlying title of the provincial Crowns is "what is left when Aboriginal title is subtracted from it."[168] It consists of "a fiduciary duty owed by the Crown to Aboriginal people when dealing with Aboriginal lands, and the right to encroach on Aboriginal title if the government can justify this in the broader public interest under s. 35 of the *Constitution Act, 1982*."[169]

As a result, the province takes absolute title to the land on surrender of Aboriginal title, even if "jurisdiction to accept surrenders lies with the federal government."[170] In other words, "ownership of lands held pursuant

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An Act to ratify a certain Agreement between the Government of the Dominion of Canada, represented therein by the Honourable Ernest Lapointe, Minister of Justice, and the Honourable Charles Stewart, Minister of the Interior, of the first part, and the Government of the Province of Saskatchewan represented therein by the Honourable James Thomas Milton Anderson, Premier and Minister of Education of the Province, and the Honourable Murdoch Alexander MacPherson, Attorney General, of the second part, SS 1930, c 87, Schedule, s 1; *Alberta Natural Resources Act*, SC 1930, c 3, Schedule, s 1; *An Act respecting the Transfer of the Natural Resources of Alberta*, SA 1930, c 21, Schedule, s 1). These agreements were "confirmed" and "g[iven] ... the force of constitutional law" by Imperial legislation (Wilkins, *supra* note 10 at § 31; *Constitution Act, 1930* (UK), 20 & 21 Geo V, c 26, s 1, reprinted in RSC 1985, Appendix II, No 26). See generally *Peigan*, *supra* note 55 at paras 10–12; Hogg, *Constitutional Law*, *supra* note 37 at 29-1 to 29-2; Isaac, *supra* note 77 at 321.

166 *Uashaunnuat*, *supra* note 7 at para 123, Brown and Rowe JJ, dissenting.

167 *Ibid*. See also *Haida Nation*, *supra* note 151 at para 59; *Delgamuukw*, *supra* note 77 at paras 174–75; *Guerin*, *supra* note 90 at 380; *St Catherine's Milling*, *supra* note 93; Wilkins, *supra* note 10 at § 22.

168 *Uashaunnuat*, *supra* note 7 at para 123, Brown and Rowe JJ, dissenting, citing *Tsilhqot'in Nation*, *supra* note 27 at para 70.

169 *Uashaunnuat*, *supra* note 7 at para 123, Brown and Rowe JJ, dissenting, citing *Tsilhqot'in Nation*, *supra* note 27 at para 71. The honour of the Crown gives rise to a fiduciary duty where the Crown has assumed discretionary control over an independent and specific or cognizable legal interest belonging to an Indigenous community (see *Williams Lake Indian Band v Canada (Aboriginal Affairs and Northern Development)*, 2018 SCC 4 at paras 80–81 [*Williams Lake*]; *Manitoba Metis Federation Inc v Canada (Attorney General)*, 2013 SCC 14 at para 51 [*Manitoba Metis*]; *Haida Nation*, *supra* note 151 at para 18; *Wewaykum Indian Band v Canada*, 2002 SCC 79 at para 79 [*Wewaykum*]; *Guerin*, *supra* note 90 at 384). Aboriginal title in land is such an interest (see *Tsilhqot'in Nation*, *supra* note 27 at paras 69, 71, 80, 90; *Osoyoos*, *supra* note 94 at paras 41–42, 52; *Guerin*, *supra* note 90 at 382). The provinces are subject to the Crown's fiduciary duty (see *Grassy Narrows First Nation v Ontario (Natural Resources)*, 2014 SCC 48 at paras 35, 50, 53 [*Grassy Narrows*]; *Tsilhqot'in Nation*, *supra* note 27 at paras 128–52).

170 *Delgamuukw*, *supra* note 77 (adding "[t]he same can be said of extinguishment – although on extinguishment of [A]boriginal title, the province would take complete title to the land, the jurisdiction to extinguish lies with the federal government" at para 175). See also *St Catherine's Milling*, *supra* note 93; *Ontario Mining Co v Seybold* (1902), [1903] AC 73, [1902] JCJ No 2 (PC) [*Seybold*]; *Dominion of Canada v Province of On-*

to [A]boriginal title" is separate "from jurisdiction over those lands."[171] And where, "by virtue of a cession or absolute surrender of the Indigenous interest [in land]," such land is freed from the overlying Aboriginal title, it "come[s] under full provincial administration and control" pursuant to sections 109, 92(5), 92(13), and 92A of the *Constitution Act, 1867*.[172] The federal order of government is thereby deprived of all constitutional authority "to appropriate such lan[d] unilaterally for Indian purposes" or to otherwise "dispose of the land."[173] As explained by the Privy Council in its 1903 decision in *Ontario Mining Co v. Seybold*, section 91(24) of the *Constitution Act, 1867* does not vest in the federal order of government "any power by legislation to appropriate ... the free public lands of the province ... in infringement of the proprietary rights of the province."[174]

For the purposes of this article, this raises an additional constitutional question: If Parliament granted jurisdiction to the Federal Court to issue a declaration of Aboriginal title and associated injunctive relief with respect to lands that would otherwise qualify as "the free public lands of [a] province," could one argue that such a grant of jurisdiction is tantamount to a unilateral appropriation by Parliament of "the free public lands of the province" in infringement of the proprietary rights of the province?[175] Is it not true, after all, that "the onus of proving Aboriginal title is on the [Indigenous] claimants" and that, "[a]s a result, lands that are subject to unproven Aboriginal title claims are presumed to be [provincial] Crown

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tario, [1910] AC 637, [1910] JCJ No 1 [*Canada v Ontario*]; *Attorney-General for the Province of Quebec v Attorney-General for the Dominion of Canada* (1920), [1921] 1 AC 401, [1920] JCJ No 3 [*Quebec v Canada*]; *Smith*, *supra* note 96 at 578; *Wewaykum*, *supra* note 169 at para 15; Hogg, *Constitutional Law*, *supra* note 37 at 28-8; Wilkins, *supra* note 10 at § 24.

171 *Delgamuukw*, *supra* note 77 at para 175. As established in the first fisheries case (see *Attorney-General for Canada v Attorney-General for Ontario*, [1898] AC 700, [1898] UKPC 29 [*AG for Canada v AG for Ontario*]), there is a "broad distinction between proprietary rights and legislative jurisdiction" (*Seybold*, *supra* note 170 at 82). See also Hogg, *Constitutional Law*, *supra* note 37 at 29-6. It is, however, recognized that the exercise of legislative power may have "incidental effects on proprietary rights" (*ibid* at 29-7). See also *Sparrow*, *supra* note 82 at 1097–98; *AG for Canada v AG for Ontario*, *supra* note 171 at 712–13.

172 Wilkins, *supra* note 10 at § 25; *Constitution Act, 1867*, *supra* note 37. See also *Grassy Narrows*, *supra* note 169 at paras 31, 50; Hogg, *Constitutional Law*, *supra* note 37 at 29-3.

173 Wilkins, *supra* note 10 at § 25. See also *St Catherine's Milling*, *supra* note 93; *Seybold*, *supra* note 170; *Canada v Ontario*, *supra* note 170; *Quebec v Canada*, *supra* note 170; *Smith*, *supra* note 96 at 571–72; *Wewaykum*, *supra* note 169 at para 15; *Grassy Narrows*, *supra* note 169 at para 33; *Williams Lake*, *supra* note 169.

174 *Seybold*, *supra* note 170 at 82; *Constitution Act, 1867*, *supra* note 37, s 91(24).

175 *Seybold*, *supra* note 170 at 82.

lands" (i.e., "the free public lands of the province"[176])?[177] Is it not also true that "Parliament cannot do indirectly through the Federal Court what it cannot do directly under the constitutional division of powers"?[178] Nonetheless, Aboriginal title "is a pre-existing legal right not created by Royal Proclamation ... or by any other executive or legislative provision";[179] it "is an independent legal interest."[180] Consequently, a declaration of Aboriginal title by the Federal Court, or any other court, is clearly distinct from an appropriation, by executive or legislative authority, of "the free public lands of the province."[181] The provinces took their interest in land subject to "any Interest other than that of the Province in the same" (section 109 of the *Constitution Act, 1867*);[182] Aboriginal title is one such interest. By *declaring* the existence of Aboriginal title, the Federal Court, or Parliament through a grant of jurisdiction to the Federal Court, is thus not *depriving* a province of powers it would otherwise enjoy.[183]

D. Conclusion on Subject Matter Jurisdiction

The current *FCA* does not grant to the Federal Court the jurisdiction to try a private suit of the type commenced by the Innu against IOC and QNS&L in *Uashaunnuat*. However, as a matter of constitutional law, Parliament could confer such a jurisdiction upon the Federal Court. First, the aspect of the Innu's action that sought a declaration of Aboriginal title and associated injunctive relief was governed by an existing body of federal law, namely the common law doctrine of Aboriginal title, which is part of the federal common law. Secondly, the Innu's claim for damages for the infringement of their Aboriginal title would undoubtedly have

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176 *Ibid.*

177 Kent McNeil, "Aboriginal Title and the Provinces after *Tsilhqot'in Nation*" (2015) 71:1 SCLR 67 at 69 [McNeil, "Provinces"]. See also *Delgamuukw*, *supra* note 77 at paras 143–44; *Tsilhqot'in Nation*, *supra* note 27 at paras 25–26, 50; *Haida Nation*, *supra* note 151. For a critique of this rule of evidence, see John Borrows, "Sovereignty's Alchemy: An Analysis of *Delgamuukw v. British Columbia*" (1999) 37:3 Osgoode Hall LJ 537 at 573–74; Kent McNeil, "The Onus of Proof of Aboriginal Title" (1999) 37:4 Osgoode Hall LJ 775 at 800–01.

178 Fyfe, *supra* note 41 at 326. See also *Reference Re The Board of Commerce Act, 1919 and The Combines and Fair Prices Act, 1919*, [1921] 1 AC 191, [1921] JCJ No 4.

179 *Williams Lake*, *supra* note 169 at para 53, citing *Manitoba Metis*, *supra* note 169 at para 58 [emphasis omitted]. See also *Guerin*, *supra* note 90 at 379.

180 *Tsilhqot'in Nation*, *supra* note 27 at para 69.

181 *Seybold*, *supra* note 170 at 82.

182 *Constitution Act, 1867*, *supra* note 37, s 109.

183 By analogy, see *Haida Nation*, *supra* note 151 at para 59. See also McNeil, "Provinces", *supra* note 177 at 72; Burnside, *supra* note 34 at 10; Sanderson & Singh, *supra* note 86 at 422.

been governed by federal law if Parliament had simply incorporated into federal law, by a federal choice of law rule, any provincial law applicable to such a claim. Thirdly, the law of Aboriginal title and the regulation of civil liability for the infringement of Aboriginal title come within the federal sphere of authority by virtue of section 91(24) of the *Constitution Act, 1867*. In this section, the words "Lands reserved for the Indians" include lands held pursuant to Aboriginal title, and Parliament's authority over "Lands reserved for the Indians" includes the power to regulate non-Indian use of such lands.[184]

Having established that Parliament has the constitutional authority to confer upon the Federal Court subject matter jurisdiction over Aboriginal title claims, I must now demonstrate that Parliament has the constitutional authority to confer upon the Federal Court *in personam* jurisdiction over all the parties necessary to resolve such claims fairly.

III. *In Personam* Jurisdiction

Parliament's constitutional authority to confer upon the Federal Court *in personam* jurisdiction over private parties is not seriously in doubt. In fact, the *FCA* does grant jurisdiction to the Federal Court to try a private suit in some matters.[185] What I must explore in more detail is thus the constitutional authority of Parliament to confer upon the Federal Court *in personam* jurisdiction over the provinces.

In a series of cases, courts have held that the provincial Crown is a necessary party to any claim of Aboriginal title,[186] since "Aboriginal title is a burden on the [provincial] Crown's underlying title."[187] In *Uashaunnuat*, the Innu were seeking no direct relief against the Crown in right of Newfoundland and Labrador.[188] However, they *were* seeking a declaration of Aboriginal title. The majority of the Supreme Court nonetheless held, perhaps surprisingly, that the Crown in right of Newfoundland and Lab-

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184 *Constitution Act, 1867*, *supra* note 37, s 91(24).

185 See section II.A, *above*.

186 See *Uashaunnuat*, *supra* note 7 at paras 252, 256, Brown and Rowe JJ, dissenting; *Thomas v Rio Tinto Alcan Inc*, 2016 BCSC 1474 at paras 21–25; *Chief Joe Hall v Canada Lands Company Limited*, 2011 BCSC 1031 at paras 4, 38. See also *Uashaunnuat (Innus de Uashat et de Mani-Utenam) c Compagnie minière IOC inc (Iron Ore Company of Canada)*, 2016 QCCS 1958 at para 59; *Les Innus de Uashat Mak Mani-Utenam c Canada*, 2016 FCA 156 [*Innu of Uashat Mak Mani-Utenam* FCA]; *Uashaunnuat* CS 2016, *supra* note 19 at para 5; *Vollant v Canada*, 2009 FCA 185 at para 3 [*Vollant*]; *Joe v Canada*, [1984] 1 CNLR 96, 1983 CarswellNat 486, aff'd [1986] 2 SCR 145 [*Joe*].

187 *Uashaunnuat*, *supra* note 7 at para 251, Brown and Rowe JJ, dissenting. See also *Tsilhqot'in Nation*, *supra* note 27 at para 71.

188 *Uashaunnuat*, *supra* note 7 at para 72.

rador was *not* a necessary party to the proceedings and, as a result, that there was no need for the Court to resolve "at this stage of the proceedings" the issue of the jurisdiction of the *Quebec* courts to grant a remedy against the Crown in right *of Newfoundland and Labrador*.[189] In particular, the majority did not dispute the Innu's admission that a declaration of Aboriginal title by a Quebec court would not be binding on the Crown in right of Newfoundland and Labrador.[190] The Innu further recognized that, if they wished to obtain a declaration of Aboriginal title that would be binding on the Crown in right of Newfoundland and Labrador, they would need to file a second suit against the Crown in right of Newfoundland and Labrador, in the courts of that province, and in the context of a "comprehensive land claim."[191] In this respect, the dissent stressed "that the strategy chosen by the Innu"[192] was seemingly at odds with the principle of the proportionality of the proceedings:

> The fact is that they [the Innu] are seeking authorization to engage, in Quebec, in long and costly proceedings that would, by their own admission, result in declarations that would have *no value* against the Crown in right of Newfoundland and Labrador. If they wished to embark on a "comprehensive land claim", they would then, by their own logic, have to recommence the same proceedings before the competent authorities in Newfoundland and Labrador.[193]

In my view, the approach supposedly *chosen* by the Innu was actually *compelled* by the simple fact that, under existing law, there is, in Canada, no forum whatsoever in which two or more provincial Crowns can be sued by a private party in the course of a single proceeding. The principle of "interprovincial jurisdictional immunity" prevents the Crown in right of one province from being sued in the courts of another province,[194] and the Federal Court lacks jurisdiction under the current *FCA* to grant a remedy against a province.[195] This situation may present difficulties for the Indig-

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189 *Ibid* at para 71.

190 See *ibid* at para 72.

191 *Ibid* at paras 72, Wagner CJC and Abella and Karakatsanis JJ, and 191, Brown and Rowe JJ, dissenting.

192 *Uashaunnuat*, *supra* note 7 at para 191.

193 *Ibid*, Brown and Rowe JJ, dissenting [emphasis in original]. For its part, the majority refused to "second-guess a litigant's strategic choice" and, therefore, refused to comment on "the suggestion that the approach chosen by the Innu [was] problematic and [did] not facilitate access to justice" (*ibid* at para 45).

194 See *ibid* at paras 71–72, Wagner CJC and Abella and Karakatsanis JJ and 274–80, Brown and Rowe JJ, dissenting.

195 See *Joe*, *supra* note 186; *Innu of Uashat Mak Mani-Utenam* FCA, *supra* note 186 at para 9; *Peigan*, *supra* note 55 at para 50; *Vollant*, *supra* note 186 at para 5; *Blood Band*, *supra* note 55 at paras 15–21, 26; *Greeley*, *supra* note 55; *Kahgee v Canada*, [1992] 3 FC 576 at 581, 592, 1992 CarswellNat 131 (TD) [*Kahgee*]; *Varnam*, *supra* note

enous peoples in Canada who wish to litigate cross-border Aboriginal title claims. In such claims, two or more provincial Crowns may have to be summoned as defendants.

This is why the second issue addressed in this article is whether Parliament can, as a matter of constitutional law, compel submission of the provincial Crowns to the jurisdiction of the Federal Court for the purpose of allowing litigation of Aboriginal title claims. The focus of this article is on Parliament's power under section 101 of the *Constitution Act, 1867* to establish "any additional Courts for the better Administration of the Laws of Canada" because there is a strong basis for suggesting that, as a matter of constitutional law, "[n]o Province can compel another to submit to a particular forum."[196] By contrast, the issue of whether Parliament can, as a matter of constitutional law, "make a Province answerable in a court as a defendant without its consent" is not "altogether clear."[197] To elucidate this issue, I examine the common law of Crown immunity in section III.A and the federal issues that arise as a matter of statutory interpretation and as a matter of constitutional law in, respectively, section III.B and section III.C.

A. Crown Immunity

In our system of government, the Crown enjoys certain "exemptions from the general law of the land."[198] While "[s]ome of these [immunities and privileges] are necessary to the effective exercise of state powers," "[o]thers are the product of traditional notions of sovereignty."[199] Crown

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68; *Lubicon Lake Band v The Queen*, [1981] 117 DLR (3d) 247 at 251–52, 2 FC 317 [*Lubicon*]; *Union Oil Co v The Queen*, [1974] 52 DLR (3d) 388 at 394, 2 FC 452 [*Union Oil* FC], aff'd [1976] 1 FC 74, 72 DLR (3d) 81 (CA) [*Union Oil* FCA].

196 Laskin, *supra* note 44 at 115–16. See also Hogg, Monahan & Wright, *supra* note 38 at 486; Janet Walker, "Interprovincial Sovereign Immunity Revisited" (1997) 35:2 Osgoode Hall LJ 379 at 385, n 25 [Walker, "Interprovincial Immunity"]; *Phillips (Guardian ad litem of) v Beary*, 1994 CarswellBC 737, 29 CPC (3d) 258 (BCSC) [*Beary*]. But see Gibson, *supra* note 150 at 59–61.

197 Laskin, *supra* note 44 at 115–16; *Constitution Act, 1867*, *supra* note 37, ss 64, 65, 129. By contrast, "American federalism ... clearly contemplates ... the immunity of state governments from the jurisdiction of federal courts," unless the state government has waived its immunity or consented to suit (Walker, "Interprovincial Immunity", *supra* note 196 at 381). See also US Const amend XI; John E Nowak & Ronald D Rotunda, *Constitutional Law*, 7th ed (St Paul, MN: Thomson West, 2000) at 48ff; Richard H Fallon et al, *Hart and Wechsler's The Federal Courts and the Federal System*, 7th ed (New York: Foundation Press, 2015) at 877ff; Katherine Swinton, "Federalism and Provincial Government Immunity" (1979) 29:1 UTLJ 1 (emphasizing "the absence of an equivalent to the Eleventh Amendment" in Canada at 18, n 74).

198 Hogg, *Constitutional Law*, *supra* note 37 at 10-2.

199 *Ibid*.

immunity originated in the common law and is "deeply entrenched in our law."[200] It "came to the colonies as received or imposed English law," and it was "absorbed into the Canadian federation" through sections 64, 65, and 129 of the *Constitution Act, 1867*.[201]

In the colonies, the Crown was *not* subject to liability in torts and, even though it *was* subject to liability in contracts and in proprietary claims, it could be sued only with its permission (a procedure known as "the petition of right," under which the Crown in right of each colony "enjoyed the privilege of granting or denying the 'royal fiat' when faced with a lawsuit").[202] In addition, "[n]o statute could affect the Crown unless it expressly stated or necessarily implied so."[203] Finally, "no 'foreign sovereign' or 'state' could be impleaded in a colonial court against its will"; however, "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.'"[204]

To understand Crown immunity, Mundell distinguishes, on the one hand, "the substantive law on liabilities of Her Majesty" from, on the other hand, "the law relating to remedies."[205] In my view, this is a useful distinction, and I shall thus expose, very briefly, "the substantive law on liabilities" of the Crown in section III.A.1, and "the law relating to remedies" against the Crown in section III.A.2.

1. The Law Relating to the Substantive Liabilities of the Crown

The Crown is, at common law, subject to liability in contracts and in proprietary claims, but is immune from tort liability.[206] The Crown is also, at common law, immune from statutes and, consequently, from the imposition by statute of substantive liabilities. "The immunity of the Crown from statutes" means "that general language in a statute, such as 'person'

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200 *Uashaunnuat*, *supra* note 7 at para 274, Brown and Rowe JJ, dissenting, citing *Canada (Attorney General) v Thouin*, 2017 SCC 46 at para 1 [*Thouin*].

201 Laskin, *supra* note 44 at 120; *Constitution Act, 1867*, *supra* note 37. See also *Quebec North Shore*, *supra* note 54 at 1063; Gibson, *supra* note 150 at 42, n 9; Hogg, Monahan & Wright, *supra* note 38 at 8.

202 Gibson, *supra* note 150 at 41–42; Hogg, Monahan & Wright, *supra* note 38 at 8. See also *Thouin*, *supra* note 200 at para 16; *Calder*, *supra* note 79 at 424–27, Pigeon J and 417–19, Hall J, dissenting; DW Mundell, "Remedies against the Crown" in The Law Society of Upper Canada, ed, *Special Lectures – Remedies* (Toronto: Richard De Boo, 1961) 149 at 152–53 [Mundell, "Remedies"].

203 Gibson, *supra* note 150 at 42.

204 *Ibid*.

205 Mundell, "Remedies", *supra* note 202 at 150.

206 See *Thouin*, *supra* note 200 at para 16; Gibson, *supra* note 150 at 41–42. See also Hogg, Monahan & Wright, *supra* note 38 at 6–7; Mundell, "Remedies", *supra* note 202 at 150.

or 'owner' or 'landlord', [is] interpreted as not including the Crown."[207] Of course, the common law, including the Crown's common law immunity from statutes, can itself be changed by statute.[208] However, there is a presumption that the common law remains unchanged "beyond that which is expressly stated in, or follows by necessary implication from, the language of the statute."[209] Because of this presumption, the Crown's common law immunity from statutes, which is a prerogative of the Crown,[210] is often expressed as a common law rule of statutory interpretation according to which there is "a 'presumption' that the Crown is not bound by statute—a presumption that is rebuttable by express words or necessary implication."[211] If a "statute expressly states that it applies to the Crown (express words), or [if] the context of the statute makes it clear beyond doubt that the Crown must be bound (necessary implication)," then the legislature is understood as having lifted the Crown's common law immunity from statutes.[212] In this manner, liability in torts was eventually imposed on the Crown by statute in the United Kingdom and in all Canadian jurisdictions.[213] The rule that the Crown is not bound by statute except by express words or necessary implication is confirmed by the *Interpretation*

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207 Hogg, *Constitutional Law*, *supra* note 37 at 10-16.

208 See Hogg, Monahan & Wright, *supra* note 38 at 485.

209 *Athabasca Chipewyan First Nation v British Columbia*, 2001 ABCA 112 at para 19 [*Athabasca*], citing P St J Langan, *Maxwell on the Interpretation of Statutes*, 12th ed (London, UK: Sweet & Maxwell, 1969) at 116. See also *Thouin*, *supra* note 200 at para 19; *Lizotte v Aviva Insurance Company of Canada*, 2016 SCC 52 at para 56; *Parry Sound (District) Social Services Administration Board v OPSEU, Local 324*, 2003 SCC 42 at para 39; *Slaight Communications Inc v Davidson*, [1989] 1 SCR 1038 at 1077, 59 DLR (4th) 416; *Toney*, *supra* note 55 at para 31; Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed (Markham: LexisNexis, 2014) at 504–05.

210 See Hogg, *Constitutional Law*, *supra* note 37 at 10-16; Hogg, Monahan & Wright, *supra* note 38 at 398; McNairn, "Intergovernmental Immunity", *supra* note 34 at 35.

211 Hogg, *Constitutional Law*, *supra* note 37 at 10-16. See also Hogg, Monahan & Wright, *supra* note 38 at 397–98; *Bonanza Creek Gold Mining Company Ltd v The King* (1916), 26 DLR 273 at 286, [1916] 1 AC 566 (PC); *Province of Bombay v Municipal Corporation of Bombay* (1946), [1947] AC 58 at 61, [1946] UKPC 41 (PC); *Friends of the Oldman River Society v Canada (Minister of Transport)*, [1992] 1 SCR 3 at 50–53, 88 DLR (4th) 1 [*Oldman River*]; *Alberta Government Telephones v Canada (Canadian Radio-Television and Telecommunications Commission)*, [1992] 2 SCR 225 at 271–73, 61 DLR (4th) 193 [*Alberta Government Telephones*].

212 Hogg, *Constitutional Law*, *supra* note 37 at 10-16. See also *Thouin*, *supra* note 200 at para 21.

213 See Hogg, Monahan & Wright, *supra* note 38 at 7–8.

Act of Canada[214] and of all Canadian provinces (except British Columbia and Prince Edward Island).[215]

2. The Law Relating to the Remedies against the Crown

The most important of the Crown's immunities and privileges, for the purposes of this article, is the common law rule according to which "the Crown cannot be sued in any court."[216] Historically, the Crown's common law immunity from suits was overcome in contracts and in proprietary claims by the procedure of the petition of right. The reason for this is that the petition of right proceeded "only with the consent of the Crown (the royal fiat)."[217] In the United Kingdom, the petition of right as the procedure to sue the Crown and the requirement of the fiat were abolished by the *Crown Proceedings Act, 1947*,[218] which, essentially, "permitted the Crown to be sued in the same fashion as a private person."[219] That same Act also abolished the Crown's common law immunity from tort liability.[220]

In Canada, the petition of right as the procedure to sue the Crown and the requirement of the fiat were gradually replaced by procedures that are, generally, the same as those employed against private defendants.[221] Drawing on the United Kingdom's *Crown Proceedings Act, 1947*, Parlia-

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214 RSC 1985, c I-21, s 17.

215 See *Interpretation Act*, RSA 2000, c I-8, s 14; *Interpretation Act*, RSNS 1989, c 235, s 14; *Interpretation Act*, RSNL 1990, c I-19, s 12; *Legislation Act*, 2006, SO 2006, c 21, Sch F, s 71; *The Interpretation Act*, CCSM, c 180, s 49; *The Legislation Act*, SS 2019, c L-10.2, s 2-20 [*Saskatchewan Interpretation Act*]; *Interpretation Act*, RSNB 1973, c I-13, s 32; *Interpretation Act*, CQLR, c I-16, s 42 [*Quebec Interpretation Act*]. British Columbia abolished the common law rule of immunity in its *Interpretation Act* (RSBC 1996, c 238, s 14 [*British Columbia Interpretation Act*]), which was copied by Prince Edward Island in its own *Interpretation Act* (RSPEI 1988, c I-8, s 20 [*PEI Interpretation Act*]). See also Hogg, *Constitutional Law*, *supra* note 37 at 10-16 to 10-17; Hogg, Monahan & Wright, *supra* note 38 at 409–10.

216 Hogg, Monahan & Wright, *supra* note 38 at 485. See *Young v SS "Scotia"*, [1903] AC 505 at 504–05, 13 CRAC 168; *Canadian Javelin Ltd v The Queen (Newfoundland)*, [1978] 1 FC 408 at 409, 77 DLR (3d) 317 (FCA) [*Javelin*]; *Peigan*, *supra* note 55 at para 48; *Athabasca*, *supra* note 209 at para 19. See also *Uashaunnuat*, *supra* note 7 at para 274, Brown and Rowe JJ, dissenting.

217 Hogg, Monahan & Wright, *supra* note 38 at 485.

218 (UK), 10 & 11 Geo VI, c 44.

219 Hogg, *Constitutional Law*, *supra* note 37 at 10-7 to 10-8; Hogg, Monahan & Wright, *supra* note 38 at 9.

220 See Hogg, Monahan & Wright, *supra* note 38 at 9.

221 See *ibid* at 8–10.

ment abolished the requirement of the fiat in 1951[222] and, in 1953, imposed wider liability in torts on the federal Crown.[223] However, Parliament retained the petition of right as the procedure to sue the federal Crown until 1971 when, finally, it was abolished, too.[224] The current state of the law in Canada is governed by the various Crown proceedings statutes enacted by Parliament and the provincial legislatures.[225]

Despite these statutes, the Crown's common law immunity from suits "retains its relevance," in a federation such as Canada, "as a bar to proceedings against the Crown in *a court* other than the one stipulated in the applicable Crown proceedings statute."[226] I add that the Crown's common law immunity from suits also retains its relevance as a bar to proceedings in a court against *a Crown* other than the one stipulated in the applicable Crown proceedings statute. The reason for this is that "the federal government (the Crown in right of Canada) is a separate legal entity from each of the provinces (the Crown in right of the province), and each of the provinces is a separate legal entity from the other provinces."[227] As a result, the federal Crown and the provincial Crowns all enjoy the powers, privileges, and immunities of the Crown.[228] This situation inevitably rais-

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222 See *An Act to Amend the Petition of Right Act* (UK), 1951, 15 Geo VI, c 33. See also *Thouin*, *supra* note 200 at para 23; Hogg, Monahan & Wright, *supra* note 38 at 9.

223 See *Crown Liability Act* (UK), 1953, 1 & 2 Eli II, c 30, s 3. See also *Thouin*, *supra* note 200 at para 23; Hogg, Monahan & Wright, *supra* note 38 at 9.

224 See Hogg, Monahan & Wright, *supra* note 38 at 9. See *FCA*, *supra* note 36, s 48. See also Hogg, *Constitutional Law*, *supra* note 37 at 10-8.

225 See *Crown Liability and Proceedings Act*, RSC 1985, c C-50 [*CLPA*]; *Crown Proceeding Act*, RSBC 1996, c 89 [*British Columbia Act*]; *Proceedings Against the Crown Act*, RSA 2000, c P-25 [*Alberta Act*]; *The Proceedings Against the Crown Act*, SS 2019, c P-27.01 [*Saskatchewan Act*]; *The Proceedings Against the Crown Act*, RSM 1987, CCSM, c P140 [*Manitoba Act*]; *Crown Liability and Proceedings Act*, SO 2019, c 7, sch 17 [*Ontario Act*]; *Code of Civil Procedure*, CQLR, c C-25.01 [*Quebec Code*]; *Proceedings Against the Crown Act*, RSNB 1973, c P-18 [*New Brunswick Act*]; *Proceedings Against the Crown Act*, RSNS 1989, c 360 [*Nova Scotia Act*]; *Crown Proceedings Act*, RSPEI 1988, c C-32 [*Prince Edward Island Act*]; *Proceedings Against the Crown Act*, RSNL 1990, c P-26 [*Newfoundland and Labrador Act*].

226 Hogg, Monahan & Wright, *supra* note 38 at 485.

227 *Ibid* at 483. See also *Liquidators of the Maritime Bank of Canada v Receiver-General of New Brunswick*, [1892] AC 437 at 442, 10 CRAC 180 (PC) (recognizing the divisibility of the Crown within Canada's federal system); *R v Secretary of State for Foreign and Commonwealth Affairs, ex parte Indian Association of Alberta*, [1982] QB 892, 2 All ER 118 at 906 (CA) (recognizing the divisibility of the Crown in right of Canada from the Crown in right of the United Kingdom); Hogg, *Constitutional Law*, *supra* note 37 at 10-3; Hogg, Monahan & Wright, *supra* note 38 at 14; Gibson, *supra* note 150 at 41; Kent McNeil, "The Obsolete Theory of Crown Unity in Canada and Its Relevance to Indigenous Claims" (2015) 20:1 Rev Const Stud 1.

228 See Hogg, *Constitutional Law*, *supra* note 37 at 10-3.

es the issue of which courts have jurisdiction over suits against the various Crowns. Can the Crown in right of one province be sued in the courts of another province? Can the Crown in right of a province be sued in the Federal Court? These are the questions that I shall now examine as a matter of statutory interpretation in section III.B, and as a matter of constitutional law in section III.C.

B. Federal Issues: Statutory Interpretation

1. Can the Crown in Right of One Province Be Sued in the Courts of Another Province?

The Crown's common law immunity from suits "survives" if the Crown in right of one province is sued in the courts of another province.[229] The reason for this is that the legislation of all provinces, except Ontario, Quebec, and Alberta, authorizes proceedings against the Crown *in the local courts of the enacting province only*.[230] The legislations, by authorizing proceedings against the Crown in *these* courts, implicitly reject proceedings in the courts of other provinces.[231] This results "from the *expressio unius* principle of statutory interpretation" and from the Crown's common law immunity from suits.[232]

It is true that the Ontario *Crown Liability and Proceedings Act* and the Quebec *Code of Civil Procedure* contain only general provisions for procedure, which seem "to render the Crown in right of Ontario and the Government of Quebec, respectively, subject to the general law governing

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[229] Hogg, Monahan & Wright, *supra* note 38 at 486. See also Gibson, *supra* note 150 at 59.

[230] See Walker, "Interprovincial Immunity", *supra* note 196 at 386. The *British Columbia Act* (*supra* note 225, s 4(1)), the *Saskatchewan Act* (*supra* note 225, s 9), the *Nova Scotia Act* (*supra* note 225, s 7), and the *Prince Edward Island Act* (*supra* note 225, s 6) "nominate generically 'the Supreme Court' or 'the Court of Queen's Bench'" (Walker, "Interprovincial Immunity", *supra* note 196 at 387, n 29). The *Manitoba Act* (*supra* note 225, s 7(1)), the *Newfoundland and Labrador Act* (*supra* note 225, s 7), and the *New Brunswick Act* (*supra* note 225, s 6) "nominate specifically the superior court of the province (i.e., the Court of Queen's Bench of Manitoba, etc.)" (Walker, "Interprovincial Immunity", *supra* note 196 at 387, n 29). Walker rightly argues that "whether the court of competent jurisdiction is named or not probably does not change the effect of the provision in that the provisions specifying 'the court' arguably refer to the local superior court" (*ibid*). See also *Uashaunnuat*, *supra* note 7, Brown and Rowe JJ, dissenting ("[a]ll provincial legislatures have introduced legislation allowing the Crown to be sued, but only in their own courts" at para 274).

[231] See Walker, "Interprovincial Immunity", *supra* note 196 at 386.

[232] *Ibid* at 386–87. See also *Athabasca*, *supra* note 209 at paras 15–19; Hogg, Monahan & Wright, *supra* note 38 at 485–86.

court jurisdiction."[233] Similarly, the Alberta *Proceedings Against the Crown Act* generally provides for proceedings against the Crown in right of Alberta in "any court."[234] Because of the Crown's common law immunity from suits, which can be changed only by express words or necessary implication, the Ontario *Crown Liability and Proceedings Act*, the Quebec *Code of Civil Procedure* and the Alberta *Proceedings Against the Crown Act* are nonetheless interpreted as granting jurisdiction only to the local courts of the enacting province. As explained by Janet Walker, "jurisdiction over the Crown is entirely a creature of statute and only a statute explicitly granting jurisdiction to the courts of other provinces could render a provincial Crown amenable to suit in other provinces."[235] In short, "the Crown in right of one province cannot be sued in the courts of another province."[236]

Walker claims that the restriction of proceedings against the Crown in right of one province to the courts of only that province, in the Crown proceedings statute of each province, is unconstitutional. The Constitution, she argues, implicitly insists that proceedings against a province be amenable to the superior court of any province that has a real and substantial connection to the cause of action. In her view, a province lacks the constitutional authority to prohibit proceedings against it in another province that has a real and substantial connection to the cause of action.[237] It is

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[233] Walker, "Interprovincial Immunity", *supra* note 196 at 386. See *Ontario Act*, *supra* note 225, s 16(1); *Quebec Code*, *supra* note 225, art 96(1).

[234] Walker, "Interprovincial Immunity", *supra* note 196 at 386. See *Alberta Act*, *supra* note 225, s 8.

[235] Walker, "Interprovincial Immunity", *supra* note 196 at 384. See also Legal Education Society of Alberta, ed, *Proceedings Involving Governments* (Edmonton: Legal Education Society of Alberta, 1989) at 89; E Robert A Edwards & Harvey Groberman, "Actions by and against the Crown: Practice and Procedure" in Continuing Legal Education Society of British Columbia, ed, *Taking the Government to Court: Advanced Issues in Public Law* (Vancouver: Continuing Legal Society of British Columbia, 1990) at 4.2.03.

[236] Hogg, Monahan & Wright, *supra* note 38 at 485. See also *Uashaunnuat*, *supra* note 7 at para 275, Brown and Rowe JJ, dissenting; *Athabasca*, *supra* note 209; *Sauve v Quebec (Attorney General)*, 2011 ONCA 369; *Medvid v Saskatchewan (Minister of Health and Wellness)*, 2012 SKCA 49 [*Medvid*]; *Fitter International Inc v British Columbia*, 2021 ABCA 54 [*Fitter*]; *Manson v Canetic Resources Ltd*, 2014 ONSC 261 at paras 23–28 [*Manson*]; *Constructions Beauce-Atlas inc c Pomerleau*, 2013 QCCS 4077 at paras 16–32 [*Pomerleau*]; *Liability Solutions Inc v New Brunswick* (2007), 287 DLR (4th) 672, 88 OR (3d) 101 (Ont Sup Ct); *Western Surety Co v Elk Valley Logging* (1985), 23 DLR (4th) 464, 31 BLR 193 (Alta SC); Brun, Tremblay & Brouillet, *supra* note 37 at 85.

[237] See Walker, "Interprovincial Immunity", *supra* note 196 ("having made their Crown subject to proceedings in the local superior courts, it would be *ultra vires* the authority of the provincial legislatures to confine proceedings against their Crowns to the courts of their province. Legislation having this effect would preclude suit in the superior court of another province to which the matter had a real and substantial connection. In

important to note that current law does *not* endorse Walker's claim. In *Athabasca Chipewyan First Nation v. British Columbia*, for instance, the Alberta Court of Appeal unequivocally *rejected* Walker's reasoning.[238] According to Justice Hunt, the fact that "a provincial Crown partially has waived its procedural immunity" in its own province does not expose the Crown in right of that province to suit in the courts of another province.[239] Moreover, the extent to and the manner in which the Crown in right of a province can be sued is an element of provincial autonomy that can only be determined by the legislature of that province: "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."[240] Justice Hunt also stressed the "dangers in the possibility of courts altering rules about Crown immunity."[241] As explained by Peter Hogg, Patrick Monahan, and Wade Wright, "Canadian courts have drawn back from the radical reformation of Crown proceedings law."[242] The reason for this is that any reformulation of Crown immunity by the judiciary raises "delicate constitutional issues" regarding "the relationship between the courts and government."[243]

In addition, "the Crown proceedings statute of [each] province [does not] purport to confer jurisdiction on the province's courts over the Crown in right of any province other than the enacting province."[244] In a federation such as Canada, it is arguable that "an intention to bind the Crown

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Hunt this resulted in a ruling that the impugned legislation was constitutionally inapplicable to litigation in Canada. In the same way, then, it would appear that the jurisdictional provisions of the provincial legislation for proceedings against the Crown must be read to include the superior courts of any province with a real and substantial connection to the matter" at 391–92). See also Hogg, Monahan & Wright, *supra* note 38 at 488.

238 *Athabasca*, *supra* note 209 at paras 29–43. See also *Medvid*, *supra* note 236 at paras 13–21; *Fitter*, *supra* note 236 at paras 29–41.

239 *Athabasca*, *supra* note 209 at para 41.

240 *Ibid* at para 39. See also *Uashaunnuat*, *supra* note 7 at para 280, Brown and Rowe JJ, dissenting.

241 *Athabasca*, *supra* note 209 at para 40.

242 Hogg, Monahan & Wright, *supra* note 38 at 11. See also *Rudolf Wolff & Co v Canada*, [1990] 1 SCR 695, 69 DLR (4th) 392 [*Rudolf*]. But see *Quebec (Attorney General) v Canada (Human Resources and Social Development)*, 2011 SCC 60 at paras 10–16.

243 *Mitchell v Peguis Indian Band*, [1990] 2 SCR 85 at 121, 71 DLR (4th) 193. See also *R v Eldorado Nuclear Ltd; R v Uranium Canada Ltd*, [1983] 2 SCR 551 at 558, 4 DLR (4th) 193; Hogg, *Constitutional Law*, *supra* note 37 at 10-18.

244 Hogg, Monahan & Wright, *supra* note 38 at 486.

in right of another jurisdiction should be clearly indicated."[245] No such intention is indicated in the Crown proceedings statute of each province. To the contrary, the Crown proceedings statute of each province allows proceedings against "the Crown," and expressly defines "the Crown" as meaning the Crown in right of the enacting province.[246] Similarly, the general rules of private international law that govern the ways in which the courts of each province may assume jurisdiction[247] over out-of-province defendants cannot justify an assumption of jurisdiction over the Crown in right of another jurisdiction. In the province of Quebec, those rules are found in Book Ten of the CCQ[248] and, in the common law provinces, "in the procedural rules for service *ex juris*, in the real and substantial connection test,[249] ... and in the statutes of those provinces."[250] I engage brief-

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245 *Ibid* at 453. See also *Alberta Government Telephones*, *supra* note 211 at 273; *Gauthier v The King*, [1918] 56 SCR 176, 40 DLR 353 [*Gauthier*]; *Montreal Trust Co v The King*, [1924] 1 DLR 1030, 1 WWR 657 [*Montreal Trust Co*]; *Federal Business Development Bank v Workers' Compensation Board (NS)*, [1984] 11 DLR (4th) 395, 63 NSR (2nd) 197 (NSSC) [*Federal Business Development Bank*]; Colin HH McNairn, "Crown Immunity from Statute – Provincial Governments and Federal Legislation" (1978) 56:1 Can Bar Rev 145 at 150; McNairn, "Intergovernmental Immunity", *supra* note 34 at 30.

246 See *British Columbia Act*, *supra* note 225, ss 1, 7; *Saskatchewan Act*, *supra* note 225, s 2; *New Brunswick Act*, ss 1, 11; *Nova Scotia Act*, *supra* note 225, ss 2(b), 12; *Manitoba Act*, *supra* note 225, s 1; *Newfoundland and Labrador Act*, *supra* note 225, s 10; *Prince Edward Island Act*, *supra* note 225, s 1(b); *Ontario Act*, *supra* note 225, s 1(1); *Interpretation Act*, CQLR, c I-16, s 61(12) [*Quebec Interpretation Act*]; *Alberta Act*, *supra* note 225, s 1(b).

247 To be clear, the Crown's common law immunity from suits confers immunity from the courts' *jurisdiction*. See e.g. *Medvid*, *supra* note 236 (describing the Crown's common law immunity from suits as a "jurisdictional principle" and concluding that the Saskatchewan Court of Queen's Bench does not have jurisdiction over Alberta in a proposed class action, the intent of which was to have jointly liable provincial Crowns, Alberta and Saskatchewan, dealt with in one proceeding at paras 1–3); *Manson*, *supra* note 236 (concluding that the Ontario Superior Court of Justice does not have subject matter jurisdiction since "the allegations are against Her Majesty in Right of Alberta which is protected by inter-provincial Crown immunity" at para 28); *Pomerleau*, *supra* note 236 (describing the Crown's common law immunity from suits as "*une immunité de juridiction*" at para 16). See also Janet Walker, *Castel & Walker: Canadian Conflict of Laws*, vol 1, 6th ed (Toronto: LexisNexis Canada, 2005) (loose-leaf updated 2021, issue 90) at § 10.2 [Walker, *Canadian Conflict of Laws*].

248 There is no specific indication that Book Ten of the CCQ is binding on the Crown (*cf* art 1376 CCQ), much less binding on the Crown in right of another jurisdiction (see *Quebec Interpretation Act*, *supra* note 246, s 42).

249 See *Morguard Investments Ltd v De Savoye*, [1990] 3 SCR 1077, 76 DLR (4th) 256 [*Morguard*]. See generally *Club Resorts Ltd v Van Breda*, 2012 SCC 17 [*Van Breda*].

250 *Uashaunnuat*, *supra* note 7 at para 102, Brown and Rowe JJ, dissenting. See also Geneviève Saumier, "Statutory Jurisdiction: An Analysis of the Court Jurisdiction and Proceedings Transfer Act" (2013) 9:2 J Priv Intl L 349 at 350.

ly with all three sources of private international law rules in the next paragraph.

First, the procedural rules for service *ex juris*[251] were, initially, "more than just procedural rules": They were jurisdictional rules, in the sense that "the court assumed jurisdiction in any dispute in which the defendant could be validly served under the rules."[252] However, this is not true anymore.[253] Nowadays, those procedural rules do not determine the issue of jurisdiction.[254] In any event, it is far from clear that, as a matter of statutory interpretation, those rules confer on the courts of the enacting province the jurisdiction to order service *ex juris* against the Crown in right of another jurisdiction.[255] Secondly, as a common law principle,[256] the real and substantial connection test does not displace the Crown's common law immunity from suits.[257] As a prerogative of the Crown,[258] this immunity is also a part of the common law,[259] and its purpose is precisely to "mak[e] a small part of the common law different for the Crown than it

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[251] See e.g. *Rules of Civil Procedure*, RRO 1990, Reg 194, s 17; *Supreme Court Civil Rules*, BC Reg 168/2009, ss 4–5; *Alberta Rules of Court*, Alta Reg 124/2010, ss 11.25–11.26.

[252] Stephen GA Pitel & Nicholas S Rafferty, *Conflict of Laws*, 2nd ed (Toronto: Irwin Law, 2016) at 54–55.

[253] See *ibid* at 55.

[254] See *ibid* at 71. See also Walker, *Canadian Conflict of Laws*, *supra* note 247 at § 2.1.a; Saumier, *supra* note 250 at 352.

[255] See e.g. *Athabasca*, *supra* note 209 at paras 23–28 (concluding that the Alberta Court of Queen's Bench does not have jurisdiction to order service *ex juris* against British Columbia pursuant to the Alberta *Rules of Court* (Alta Reg 390/68)).

[256] Of course, in *Hunt v T&N plc* ([1993] 4 SCR 289 at 324, 109 DLR (4th) 16 [*Hunt*]), the Supreme Court of Canada "transformed the *Morguard* principle from a common law proposition into a constitutional one" (Pitel & Rafferty, *supra* note 252 at 72). See also *Van Breda*, *supra* note 249 at paras 25–29. However, current law rejects Walker's claim that the Constitution implicitly insists that proceedings against a province be amenable to the superior court of any province that has a real and substantial connection to the cause of action (see *Athabasca*, *supra* note 209 at paras 29–43). See also *Fitter*, *supra* note 236 ("[t]his Court in *Athabasca* ... considered the principle of interprovincial Crown immunity broadly, and found no inconsistency with the Constitution" at para 37); *Medvid*, *supra* note 236 at paras 13–21.

[257] See *Athabasca*, *supra* note 209 ("the principles of *Morguard* and *Hunt* have no application to Crown immunity questions" at para 42); *Medvid*, *supra* note 236 ("[t]he proposition that real and substantial connection trumps Crown immunity was rejected by the Alberta Court of Appeal in ... *Athabasca*" at para 32); *Fitter*, *supra* note 236 at para 35.

[258] See Hogg, Monahan & Wright, *supra* note 38 at 398, n 9.

[259] See *ibid* at 19, citing DW Mundell, "Legal Nature of Federal and Provincial Governments: Some Comments on Transactions between Them" (1960) 2:1 Osgoode Hall LJ 56 [Mundell, "Legal Nature"].

is for a subject."[260] Accordingly, "Canadian courts have consistently recognized and confirmed the principle of provincial Crown immunity to conclude that 'provincial Crowns can only be sued in the courts of the Crown's own province.'"[261] Thirdly, the model *Court Jurisdiction and Proceedings Transfer Act* ("model *CJPTA*")[262] does not expressly state that it is binding on the Crown.[263] Nevertheless, Vaughan Black, Stephen Pitel, and Michael Sobkin conclude that "it seems likely," particularly in light of the model *CJPTA*'s definitions of "person" and "state,"[264] that "the [model *CJPTA*] is binding on the Crown."[265] But even assuming that the model *CJPTA* is binding on "the Crown," there remains the issue of whether, as a matter of statutory interpretation, it is binding on the Crown *in right of*

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260 Hogg, Monahan & Wright, *supra* note 38 at 396, n 1. See also Mundell, "Legal Nature", *supra* note 259 ("[t]he prerogative is a body of common law rules that vary or add to the general common law rules insofar as they apply to Her Majesty" at 59).

261 *Manson*, *supra* note 236 at para 25, citing *Medvid v Saskatchewan (Minister of Health)*, 2010 SKQB 22 at para 27, aff'd *Medvid*, *supra* note 236. See also *Fitter*, *supra* note 236 ("[t]he Crown's procedural immunity against extra provincial claims remains part of Canadian jurisprudence" at para 37).

262 Uniform Law Conference of Canada, *Proceedings of the 1994 Annual Meeting* at 48, Appendix C [model *CJPTA*]. The model *CJPTA* has been adopted by five legislatures in Canada but is in force in only four jurisdictions (see *The Court Jurisdiction and Proceedings Transfer Act*, SS 1997, c C-41.1 [*Saskatchewan CJPTA*]; *Court Jurisdiction and Proceedings Transfer Act*, SPEI 1997, c 61 (not yet in force); *Court Jurisdiction and Proceedings Transfer Act*, SY 2000, c 7; *Court Jurisdiction and Proceedings Transfer Act*, SBC 2003, c 28 [*British Columbia CJPTA*]; *Court Jurisdiction and Proceedings Transfer Act*, SNS 2003 (2nd Sess), c 2).

263 See Vaughan Black, Stephen GA Pitel & Michael Sobkin, *Statutory Jurisdiction: An Analysis of the Court Jurisdiction and Proceedings Transfer Act* (Toronto: Carswell, 2012) at 59. As explained by Black, Pitel, and Sobkin, "this makes no difference" in British Columbia, since section 14 of the *British Columbia Interpretation Act* (*supra* note 215) "provides that statutes bind the Crown unless they specifically provide otherwise"; as a result, it seems clear that the *British Columbia CJPTA* (*supra* note 262) is binding on the Crown (Black, Pitel & Sobkin, *supra* note 263 at 59–60 (adding "[t]he same will be true in Prince Edward Island if that province ever brings its [*CJPTA*] into force" at 60, n 62); *PEI Interpretation Act*, *supra* note 215, s 20).

264 The definition of "person" includes a "state," and both Canada and the provinces are included in the definition of "state" (model *CJPTA*, *supra* note 262, s 1). However, there is no definition of "person" in section 2 of the *Saskatchewan CJPTA* (*supra* note 262) and thus "a proceeding that is brought against a person" in section 4 of that statute should not be interpreted as including a proceeding that is brought against the Crown (*Saskatchewan Interpretation Act*, *supra* note 215, s 2-20). See also Black, Pitel & Sobkin, *supra* note 263 ("Saskatchewan enacted only five of the seven definitions in s. 2" at 35).

265 Black, Pitel & Sobkin, *supra* note 263 ("the [model] CJPTA's definition of 'state' includes both Canada and the provinces, and were the matter ever to be put in issue – as to date it has not – that might be held to amount to an express legislative intention to bind the Crown" at 60).

another province.[266] A further issue is also whether, as a matter of constitutional law, it is permissible for one province to grant jurisdiction to the courts of that province over the Crown in right of another province. There is indeed a strong basis for suggesting that, as a matter of constitutional law, a grant of jurisdiction by one province to the courts of that province

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[266] Black, Pitel and Sobkin conclude that, as a matter of statutory interpretation, the *CJPTA* of a forum province is "likely" binding on both the federal Crown and the Crown in right of another province (*ibid* at 60). This situation leaves open the possibility of a "conflict" between the *CJPTA* of a forum province and the Crown proceedings statute of the defendant province, which restricts proceedings against the Crown in right of the defendant province to the courts of only that province. As pointed out by Black, Pitel, and Sobkin, section 12 of the *CJPTA* of the forum province would not come into play to resolve such a conflict (see *ibid* ("[s]ection 12 does not deal with conflicts between the enacting jurisdiction's [*CJPTA*] and statutes of ... other provinces" at 53, n 30)). That section provides that, if there is a conflict between the *CJPTA* of the forum province and some other statute *of the forum province* or *of Canada* that expressly (or, in the case of Saskatchewan, "expressly *or implicitly*" (*Saskatchewan CJPTA*, *supra* note 262, s 11 [emphasis added])) confers or denies jurisdiction, then that other legislation prevails (see Black, Pitel & Sobkin, *supra* note 263 (adding "[i]nterestingly, although s 12 seems to operate to give precedence to statutes dealing with actions against both foreign sovereigns and the government of Canada [both types of actions being governed by federal statutes: the *State Immunity Act* (RSC 1985, c S-18) and the *CLPA* (*supra* note 225)], it would have no applicability in actions against the Crown in right of other provinces" at 55, n 41)). In my view, any attempt by a forum province to compel submission of the defendant province to the courts of the forum province would be unconstitutional. The weight of authority supports the latter proposition (see note 267 and accompanying references, *below*). As a result, the relevant legislation, when the Crown in right of one province is sued in the courts of another province, "is that of the defendant province and not of the forum province" (Walker, "Interprovincial Immunity", *supra* note 196 at 385). See also Walker, *Canadian Conflict of Laws*, *supra* note 247 ("[j]urisdiction over claims against a provincial Crown is based on the crown proceedings legislation in that province, which generally authorizes only in the courts of the province" at § 11.6.d). See e.g. *Conor Pacific Group Inc v Canada (Attorney General)*, 2011 BCCA 403 (the Court of Appeal for British Columbia concluded that the *British Columbia CJPTA* (*supra* note 262) "does not apply to claims against the federal Crown" because "only Parliament can enact statutes that legislate as to which court can hear an action against the Crown in the right of Canada" at para 40). See also *Rudolf*, *supra* note 242 ("[i]t is beyond question that only the Parliament of Canada could enact statutes to provide that actions could be brought against the Crown in right of Canada. It is only that body which can legislate as to the court in which those claims can be brought" at 700); *Blood Tribe v Canada*, 2005 SKQB 105 at paras 7–9. For similar constitutional reasons, the *CJPTA* of a forum province could not apply to claims against the Crown in right of another province (see e.g. Laskin, *supra* note 44 ("*[n]o Province can compel another to submit to a particular forum*, and certainly a Province cannot compel submission of the federal Crown to judicial process" at 115–16) [emphasis added]).

over the Crown in right of another province would, in any event, be unconstitutional.[267]

2. Can the Crown in Right of a Province Be Sued in the Federal Court?

Because the Crown proceedings statute of each province implicitly excludes the jurisdiction of—or at least does not expressly grant jurisdiction to—courts other than the local courts of the enacting province, the Crown's common law immunity from suits retains its relevance where a suit is brought in the Federal Court against a provincial Crown. In addition, the *FCA* does not purport to confer jurisdiction upon the Federal Court over a provincial Crown.[268] In order to bind the Crown in right of a province, Parliament's intention to do so "should be clearly indicated,"[269] and no such intention is indicated in the current *FCA*. Subsections 17(1) and (2) of the *FCA* provide for suits against the "Crown" in the Federal Court, but section 2 of the *FCA* defines the "Crown" as meaning "Her Majesty in right of Canada."[270] In light of this, it was held, in a series of cases, that, due to the Crown's common law immunity from suits, the Crown in right of a province cannot be sued in the Federal Court.[271]

Historically, the Federal Court similarly "refused to exercise jurisdiction over the provinces under the subject matter provisions of the *FCA*" (sections 20, 22, and 23).[272] For instance, the Federal Court of Appeal decided in *Canada v. Toney* that section 22 of the *FCA*, which provides for jurisdiction over disputes "between subject and subject as well as other-

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[267] See Laskin, *supra* note 44 at 115–16. See also Hogg, Monahan & Wright, *supra* note 38 at 486; Walker, "Interprovincial Immunity", *supra* note 196 at 385, n 25; *Beary*, *supra* note 196. But see Gibson, *supra* note 150 at 59–61.

[268] See *Peigan*, *supra* note 55 at para 49.

[269] Hogg, Monahan & Wright, *supra* note 38 at 453. See also *Alberta Government Telephones*, *supra* note 211 at 273; *Gauthier*, *supra* note 245; *Montreal Trust Co*, *supra* note 245; *Federal Business Development Bank*, *supra* note 245; McNairn, "Intergovernmental Immunity", *supra* note 34 at 30; *Toney*, *supra* note 55 at para 7.

[270] Fyfe, *supra* note 41 at 330–31.

[271] See *Peigan*, *supra* note 55 at para 50. See also *Joe*, *supra* note 186; *Innu of Uashat Mak Mani-Utenam* FCA, *supra* note 186 at para 9; *Vollant*, *supra* note 186 at para 5; *Blood Band*, *supra* note 55 at paras 15–21, 26; *Greeley*, *supra* note 55; *Kahgee*, *supra* note 195 at 581, 592; *Varnam*, *supra* note 68; *Lubicon*, *supra* note 195 at 251–52; *Union Oil* FC, *supra* note 195; *Union Oil* FCA, *supra* note 195; *Kelly Lake Cree Nation v Canada*, 2017 FC 791 at para 41. But see *Peigan*, *supra* note 55 at para 52; Fyfe, *supra* note 41 (describing *Peigan* as "a landmark departure from the Federal Court's longstanding jurisprudence in relation to its limited authority over the provinces" at 325).

[272] See Fyfe, *supra* note 41 at 331, n 28. See generally *Javelin*, *supra* note 216; *Avant Inc v Ontario*, [1986] 25 DLR (4th) 156, [1986] FCJ No 1018 [*Avant Inc*]; *Trainor Surveys (1974) Ltd v New Brunswick*, [1990] 2 FC 168, 29 CPR (3d) 505 (TD) [*Trainor Surveys*]; *Dableh v Ontario Hydro* [1990], FCJ No 913, 33 CPR (3d) 544.

wise" in relation to navigation and shipping, does not confer jurisdiction upon the Federal Court over the provinces. In particular, the phrase "as well as otherwise" does not, according to the Federal Court of Appeal, indicate a clear intention to bind the provinces.[273] The Court recognized "that the phrase ... 'between subject and subject as well as otherwise' ... is broad enough to refer to an action against a public authority."[274] However, the Court stressed that the definition of the "Crown" as meaning "Her Majesty in right of Canada" in section 2 of the *FCA* was "contraindicative of a clear intention to bind the provinces."[275] In the end, the words "as well as otherwise" are not "sufficiently express to convey Parliament's clear intention to bind the provinces."[276]

C. Federal Issues: Constitutional Law

The *Constitution Act, 1867* does not contain any provision for jurisdiction over controversies between the federal Crown and a province or as between provinces.[277] This "conspicuous gap in the definition of judicial power under the Canadian Constitution" is all the more surprising given that "this is covered in the earlier American Constitution and in the later Australian one."[278] Section 19 of the *FCA* provides for consensual jurisdiction, meaning that, for this purpose, a complementary provincial statute must supplement section 19 of the *FCA*.[279] Section 19 of the *FCA* reads as follows:

> If the legislature of a province has passed an Act agreeing that the Federal Court, the Federal Court of Canada or the Exchequer Court of Canada has jurisdiction in cases of controversies between Canada and that province, or between that province and any other province or provinces that have passed a like Act, the Federal Court has jurisdiction to determine the controversies.[280]

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[273] The Federal Court had previously confirmed that a provincial Crown cannot be considered as a "subject" of the federal Crown (*Lubicon*, *supra* note 195 at 252).

[274] *Toney*, *supra* note 55 at para 57. See also *National Association of Broadcast Employees and Technicians v Canada* [1979], 107 DLR (3d) 186 at 190, [1980] 1 FC 820.

[275] *Toney*, *supra* note 55 at para 15.

[276] *Ibid*. See also *Greeley*, *supra* note 55.

[277] See Laskin, *supra* note 44 at 115–16.

[278] *Ibid*.

[279] See *ibid*. See also *Toney*, *supra* note 55 at para 19; Fyfe, *supra* note 41 at 327.

[280] *FCA*, *supra* note 36, s 19.

The successive versions of the statutes governing the jurisdiction of the Exchequer Court, which is the predecessor of the Federal Court, have included this unique provision, or a similar one, since 1875.[281]

Section 19 of the *FCA* "is an example of cooperative federalism."[282] As noted by Hogg, Monahan, and Wright, "[n]ine of the ten provinces have passed the Act contemplated by s. 19 (or its predecessor in the Exchequer Court Act), granting jurisdiction to the Federal Court to determine controversies between Canada and that province or between that province and the other agreeing provinces."[283] However, "[n]either s. 19 nor the provincial Acts authorize a private person to bring proceedings against a provincial Crown in the Federal Court."[284] In this respect, the jurisprudence is unanimous: Section 19 of the *FCA* can only be relied upon by the federal Crown or by a province and it cannot be relied upon by a private party.[285] In other words, under the current *FCA*, the jurisdiction of the Federal Court over a province is *consensual*,[286] and it cannot be relied upon *by a private party*. This raises the issue of whether Parliament has the constitutional authority to implead a provincial Crown in the Federal Court *without its consent* and *to the advantage of a private party*. In my view, it does or, at least, it does in some circumstances.

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281 See *Alberta v Canada*, 2018 FCA 83 at para 27; *An Act to establish a Supreme Court, and a Court of Exchequer, for the Dominion of Canada*, SC 1875, c 11, s 54. See also *British Columbia (Attorney General) v Alberta (Attorney General)*, 2019 FC 1195 at paras 32–49; Fyfe, *supra* note 41 at 332, n 32.

282 *Alberta v Canada*, *supra* note 281 at para 30.

283 Hogg, Monahan & Wright, *supra* note 38 at 495. See *Federal Courts Jurisdiction Act*, RSBC 1996, c 135, s 1; *Judicature Act*, RSA 2000, c J-2, s 27; *The Federal Courts Act*, RSS 1978, c F-12, s 2; *The Federal Courts Jurisdiction Act*, RSM 1987, c C270, s 1; *Courts of Justice Act*, RSO 1990, c C.43, s 148; *An Act respecting the Supreme Court of Canada and the Exchequer Court of Canada*, SQ 1906, c 6, s 1; *Federal Courts Jurisdiction Act*, RSNB 2011, c 157, s 1; *Of the Supreme and Exchequer Courts of Canada*, RSNS 1900, c 154, s 1; *Federal Courts Jurisdiction Act*, RSNL 1990, c F-7, s 2. The missing province is Prince Edward Island (see *Supreme Court Act*, SPEI 1987, c 66, s 69, repealing *Judicature Act*, RSPEI 1974, c J-3). See also Fyfe, *supra* note 41 at 327.

284 Hogg, Monahan & Wright, *supra* note 38 at 495. See also Fyfe, *supra* note 41 at 327, n 11.

285 See *Alberta v Canada*, *supra* note 281 at para 24. See also *Union Oil* FC, *supra* note 195; *Union Oil* FCA, *supra* note 195; *Toney*, *supra* note 55 at paras 19–25; *Peigan*, *supra* note 55 at para 51; *Blood Band*, *supra* note 55 at paras 29–32; *Fairford Band v Canada (Attorney General)*, [1995] 3 FC 165, [1995] FCJ No 819, aff'd [1996] FCJ No 1242 (FCA), 205 NR 280 [*Fairford* FCA] (the federal Crown, sued by a private party, may invoke section 19 of the *FCA* to commence a third party proceeding against a provincial Crown).

286 See *Alberta v Canada*, *supra* note 281, Gauthier JA ("in addition to the precursors of [section 19 of the *FCA*], other types of [consensual] mechanisms have been used to deal with intergovernmental disputes" at para 31).

To begin with, the fact that existing legislation provides for consensual jurisdiction does not mean that the consent of a province to the jurisdiction of a court established by Parliament for the better administration of the laws of Canada under section 101 of the *Constitution Act, 1867* is a constitutional imperative. Consensual jurisdiction is possibly provided for under section 19 of the *FCA*—not to overcome Parliament's lack of constitutional authority to compel submission of a province to the jurisdiction of the Federal Court—but to overcome the "laws-of-Canada" restriction on the jurisdiction of the Federal Court under section 101, and to allow the Federal Court to exercise jurisdiction over a controversy between the federal Crown and a province, or as between provinces, even if such a controversy is not governed by federal law. As explained by the Federal Court of Appeal in *Alberta v. Canada*, section 19 of the *FCA* is not solely grounded on Parliament's power to establish a court for the better administration of the laws of Canada under section 101: "It is also nourished by the power of provincial legislatures ... to confer to a statutory court jurisdiction over controversies ... in respect of subject matters that could fall within section 92 of the *Constitution*."[287] In such circumstances, the constitutional constraints on the Federal Court's jurisdiction are overcome as their purpose is merely "to ensure that the federal Parliament does not use its power provided in section 101 to expand unilaterally the Federal Court's jurisdiction."[288] In other words, when section 19 of the *FCA* is supplemented by a complementary provincial statute conferring jurisdiction upon the Federal Court, "the Court's restriction to federal law is overcome."[289] Because of their unique character, section 19 of the *FCA* and any complementary provincial statute "satisfy the issue of jurisdiction completely"[290] and there is no "need for a substratum of federal law to nourish the Federal Court's grant of jurisdiction."[291] Conversely, when there *is* "a substratum of federal law to nourish the Federal Court's grant of jurisdiction,"[292] there is possibly no need for a complementary provincial statute conferring jurisdiction upon the Federal Court.

However, it is, of course, true that "the Crown's position as a litigant ... is federal law in relation to the Crown in right of Canada, just as it is provincial law in relation to the Crown in right of a Province, and is subject to modification in each case by the competent Parliament or Legisla-

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287 *Ibid* at para 34.

288 *Ibid* at para 35.

289 Hogg, Monahan & Wright, *supra* note 38 at 496.

290 *Southwind v Canada*, 2011 FC 351 at para 33, citing *Fairford* FCA, *supra* note 285.

291 *Alberta v Canada*, *supra* note 281 at para 34.

292 *Ibid*.

ture."[293] Parliament has exclusive authority to define the rights, liabilities, immunities and privileges of the federal Crown by virtue of sections 91(1A) ("The Public Debt and Property") and 91(8) ("The fixing of and providing for the Salaries and Allowances of Civil and other Officers of the Government of Canada") of the *Constitution Act, 1867*, or by virtue of Parliament's residual power under the opening words of section 91 of the *Constitution Act, 1867* to make laws "for the Peace, Order, and good Government of Canada" in relation to matters not specifically provided for.[294] Similarly, the legislature of a province has[295] exclusive authority to define the rights, liabilities, immunities, and privileges of the Crown in right of the province by virtue of sections 92(4) ("The Establishment and Tenure of Provincial Offices and the Appointment and Payment of Provincial Officers") and 92(5) ("The Management and Sale of the Public Lands belonging to the Province and of the Timber and Wood thereon") of the *Constitution Act, 1867*, or by virtue of sections 92(13) ("Property and Civil Rights in the Province"), 92(14) ("The Administration of Justice in the Province, including ... Procedure in Civil Matters"), and 92(16) ("Generally all Matters of a merely local or private Nature in the Province").[296] Even if legislation on the rights, liabilities, immunities, and privileges of the provincial Crowns is—in "pith and substance"—legislation in relation to one or more heads of legislative power allocated to the provinces under the *Constitution Act, 1867*, the validity of a federal measure lifting a provincial Crown's common law immunity from suits for the purpose of allowing Aboriginal title claims in the Federal Court could be saved by the ancillary powers doctrine.[297]

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293 *Quebec North Shore*, *supra* note 54 at 1063.

294 See Gibson, *supra* note 150 at 42, citing Mundell, "Remedies", *supra* note 202 at 154; Hogg, *Constitutional Law*, *supra* note 37 at 10-15, n 1.

295 But see Walker, "Interprovincial Immunity", *supra* note 196 at 396 (arguing that "[t]he question of *interprovincial* Crown immunity would appear to be one of national importance beyond the competence of provincial legislation and, thereby, permissibly regulated under the national concerns doctrine interpreting the Peace, Order, and Good Government clause" which "'gives the federal Parliament powers to deal with interprovincial activities'" at 396 [emphasis added]), citing *Hunt*, *supra* note 256 at 322, *Interprovincial Co-Operatives Ltd v The Queen*, [1976] 1 SCR 477, 53 DLR (3d) 321, *R v Crown Zellerbach Canada Ltd*, [1988] 1 SCR 401, 49 DLR (4th) 161, and *Multiple Access Ltd v McCutcheon*, [1982] 2 SCR 161, 138 DLR (3d) 1.

296 See note 294 and accompanying references, *above*.

297 For the purposes of this article, it is unnecessary to decide if it is, on the one hand, that the validity of a federal measure lifting a provincial Crown's common law immunity from suits for the purpose of allowing litigation of Aboriginal title claims in the Federal Court is *saved* by the ancillary powers doctrine or rather if it is, on the other hand, that Parliament *has* the power to lift a provincial Crown's common law immunity from suits for the purpose of allowing litigation of Aboriginal title claims in the Federal Court by virtue of sections 91(24) or 101 of the *Constitution Act, 1867* (*supra* note 37). If the lat-

In short, "the ancillary powers doctrine concerns legislation that, in pith and substance, falls outside the jurisdiction of its enacting body," and "accepts the validity of" such legislation if it "constitute[s] an integral part of a legislative scheme that comes within [the jurisdiction of the enacting body]."[298] There is, in my view, no doubt that a legislative scheme conferring jurisdiction upon the Federal Court over claims of Aboriginal title comes within the jurisdiction of Parliament. Parliament has jurisdiction over "Indians, and Lands reserved for the Indians" (section 91(24) of the *Constitution Act, 1867*). This includes jurisdiction over lands held pursuant to Aboriginal title and jurisdiction over non-Indian use of such lands. The law of Aboriginal title is part of the federal common law, and any law applicable to a claim for damages for the infringement of Aboriginal title, especially if incorporated into federal law by a federal choice of law rule,

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ter is true, then the power to lift a provincial Crown's common law immunity from suits for the purpose of allowing litigation of Aboriginal title claims in the Federal Court "comes squarely under" federal legislative competence "notwithstanding the fact that it may incidentally affect" one or more heads of provincial legislative competence (*Nykorak v Attorney General of Canada*, [1962] 1 SCR 331 at 335, 33 DLR (2d) 373). See generally Hogg, *Constitutional Law*, *supra* note 37 at 15-51 to 15-56. *Cf Attorney General of Quebec v Nipissing Central Railway*, [1926] 3 DLR 545, [1926] AC 715 [*Nipissing*] ("while the proprietary right of each Province in its own Crown lands is beyond dispute, that right is subject to be affected by legislation passed by the Parliament of Canada within the limits of the authority conferred on that Parliament ... [I]t may be added that where (as in this case) the legislative power cannot be effectually exercised without affecting the proprietary rights both of individuals in a province and of the provincial Government, *the power so to affect those rights is necessarily involved in the legislative power*" at 550 [emphasis added]). To the extent that a provincial Crown's common law immunity from suits is a matter in relation to "procedure," see, insofar as section 91(24) is concerned, *Attorney General of Alberta v Atlas Lumber Co*, [1941] SCR 87, 1 DLR 625 (the power to regulate proceedings with respect to matters coming within the powers conferred upon Parliament by section 91 is "necessarily incidental" to such powers at 94). To the extent, again, that a provincial Crown's common law immunity from suits is a matter in relation to "procedure," see, insofar as section 101 is concerned, Brun, Tremblay & Brouillet, *supra* note 37 ("*c'est le fédéral qui peut établir la procédure 'civile' ... applicable devant les tribunaux fédéraux*" at 502). In this respect, I note that Parliament's jurisdiction to establish "any additional Courts for the better Administration of" federal law operates "notwithstanding anything in" the *Constitution Act, 1867* (see *Attorney General of Ontario v Attorney General of Canada*, [1947] 1 DLR 801 at 804, 805, 1 WWR 305). Consequently, it is arguable that such a jurisdiction may include the power to lift a provincial Crown's common law immunity from suits for the purpose of allowing litigation of Aboriginal title claims in the Federal Court "notwithstanding" the provincial legislatures' exclusive power to define the rights, liabilities, immunities, and privileges of the provincial Crowns.

298 *Quebec (Attorney General) v Lacombe*, 2010 SCC 38 at paras 32, 38 [*Lacombe*]. See also *General Motors of Canada Ltd v City National Leasing*, [1989] 1 SCR 641 at 668–70, 58 DLR (4th) 255; *Reference re Goods and Services Tax*, [1992] 2 SCR 445, 94 DLR (4th) 51 [*Re GST*]; *Global Securities Corp v British Columbia (Securities Commission)*, 2000 SCC 21; *Kitkatla Band v British Columbia (Minister of Small Business, Tourism and Culture)*, 2002 SCC 31; *Kirkbi AG v Ritvik Holdings Inc*, 2005 SCC 65.

is federal law. Parliament also has jurisdiction to establish "any additional Courts for the better Administration of [federal law]" (section 101 of the *Constitution Act, 1867*). In my view, there is no more doubt that a federal measure lifting a provincial Crown's common law immunity from suits for the purpose of allowing litigation of Aboriginal title claims in the Federal Court would constitute "an integral part" of a legislative scheme conferring jurisdiction upon the Federal Court over claims of Aboriginal title. I am of the view that such a federal measure would, in fact, satisfy even a strict necessity test.[299] As mentioned earlier, it was held, in a series of cases, that the provincial Crown is a *necessary* party to any claim of Aboriginal title. It is true that the majority judgment in *Uashaunnuat* casts doubt upon the validity of the latter proposition. But it does not dispute the proposition that the provincial Crown is a necessary party to a claim of Aboriginal title *if the Indigenous claimants wish to obtain a declaration of Aboriginal title that is binding on the provincial Crown.*

There remains the issue of whether a federal measure lifting a provincial Crown's common law immunity from suits for the purpose of allowing litigation of Aboriginal title claims in the Federal Court "trenches on the protected 'core' of a [provincial] competence"[300] and, in the affirmative, the further issue of whether such a federal measure significantly "trammels" or "impairs" the manner in which the provincial power can be exercised so as to justify the application of the doctrine of interjurisdictional immunity.[301] In my view, it does not.[302] The doctrine of interjurisdictional immuni-

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299 On the precise nature of the connection required to validate a provision under the ancillary powers doctrine, see *Lacombe*, *supra* note 298 at paras 39ff (discussing the application of the ancillary powers doctrine in the context of amending legislation). For a formulation of a strict necessity test, see *Attorney-General of Canada v Attorney-General of Quebec*, [1947] AC 33 at 86, 1 DLR 81; *Fuller*, *supra* note 54 at 713; *Fowler v The Queen*, [1980] 2 SCR 213 at 226, 113 DLR (3d) 513; *Regional Municipality of Peel v MacKenzie*, [1982] 2 SCR 9 at 18, 139 DLR (3d) 14 [*Peel*].

300 *Quebec (Attorney General) v Canadian Owners and Pilots Association*, 2010 SCC 39 at para 27 [*COPA*]. See also *Desgagnés*, *supra* note 70 at para 90.

301 *COPA, supra* note 300 at paras 43, 45. See also *Rogers Communications Inc v Châteauguay (City)*, 2016 SCC 23 at para 59 [*Châteauguay*].

302 I note that it is likely that the doctrine of interjurisdictional immunity does not exist to protect provincial legislative authority (see Kerry Wilkins, "Exclusively Yours: Reconsidering Interjurisdictional Immunity" (2019) 52:2 UBC L Rev 697 at 714–23 (arguing that "[d]espite recent suggestions to the contrary, the better current view remains that [interjurisdictional immunity] protects exclusive federal, but not exclusive provincial legislative authority" at 723)). See also *Oldman River*, *supra* note 211 at 68–69. But see *Canadian Western Bank v Alberta*, 2007 SCC 22 at paras 34, 35, 67 [*Canadian Western Bank*]; *Canada (Attorney General) v PHS Community Services Society*, 2011 SCC 44 at para 65 [*PHS*]; *Tsilhqot'in Nation*, *supra* note 27 at paras 131, 148; *Carter v Canada (Attorney General)*, 2015 SCC 5 at paras 49–53.

ty is subject today to a "restrained approach"[303] and is generally "reserved for situations already covered by precedent."[304] There is no precedent establishing that a provincial Crown's common law immunity from suits, as opposed to a provincial Crown's common law immunity from the imposition by statute of substantive liabilities,[305] lies at the protected core of exclusive provincial authority. To the contrary, the jurisprudence of the Federal Court and of the Federal Court of Appeal seems to assume, or "accept,"[306] that Parliament could implead a provincial Crown in the Federal Court without its consent if such a parliamentary intention was

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303 *References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11 at para 124. See also *Reference re Genetic Non-Discrimination Act*, 2020 SCC 17 ("[i]n keeping with the movement of constitutional law towards a more flexible view of federalism that reflects the political and cultural realities of Canadian society, the fixed 'watertight compartments' approach has long since been overtaken and the doctrine of interjurisdictional immunity has been limited" at para 22).

304 *Canadian Western Bank*, *supra* note 302 at para 77. See also *COPA*, *supra* note 300 at paras 26, 36 ("the doctrine remains part of Canadian law but in a form constrained by principle and precedent" at para 58); *PHS*, *supra* note 302 at paras 60–65; *Marine Services International Ltd v Ryan Estate*, 2013 SCC 44 at paras 49–50 [*Marine Services*]; *Tsilhqot'in Nation*, *supra* note 27 at paras 144–49; *Bank of Montreal v Marcotte*, 2014 SCC 55 at paras 63–64; *Châteauguay*, *supra* note 301 at paras 60–61.

305 The direct imposition by Parliament of substantive liabilities on a provincial Crown is unconstitutional to the extent that it constitutes an appropriation of provincial funds. See Mundell, "Remedies", *supra* note 202 at 155 (suggesting that the legislature of a province has exclusive authority to vary or add to the substantive liabilities of the Crown in right of the province by virtue of section 126 of the *Constitution Act, 1867* (*supra* note 37)). See also *Reference re Troops in Cape Breton*, [1930] SCR 554 at 562, [1930] 4 DLR 82 [*Cape Breton*] (concluding that Parliament cannot impose a duty to pay expenses on a province without its consent); *Peel*, *supra* note 299 (relying upon *Cape Breton* to conclude that Parliament "cannot, without the interposition of the province, impose [a duty to pay expenses] upon municipal institutions in the province" at 22, but reasoning that, in the circumstances of the case, such an imposition "was not truly necessary for the effective exercise of Parliament's legislative authority" at 9); Swinton, *supra* note 197 ("[j]ust as there is an area of provincial immunity to protect crown land, there is extensive immunity for the provinces in the appropriation of their assets" at 46). But see *Re GST*, *supra* note 298 (distinguishing the imposition of "an obligation to pay out a sum of money to the federal government from the provincial consolidated revenue fund," as in *Cape Breton* and *Peel*, which is impermissible, from the imposition of "certain administrative burdens ... that are necessarily incidental to a valid federal scheme" at 483, which is permissible). Furthermore, Gibson (*supra* note 150 at 58) and Hogg (*Constitutional Law*, *supra* note 37 at 10-15, n 2), both referring to Mundell ("Remedies", *supra* note 202 at 155), suggest that the legislature of a province has exclusive authority to vary or add to the substantive liabilities of the Crown in right of the province by virtue of the legislature's exclusive power to amend the "constitution of the province" (*Constitution Act, 1982*, *supra* note 26, s 45).

306 *Union Oil* FCA, *supra* note 195 at 81. See also *Sylvain v Canada (Attorney General)*, 2004 FC 1474 at para 19.

clearly indicated.[307] Insofar as a provincial Crown's common law immunity from statutes is concerned, the Supreme Court has rejected a theory of "constitutional inter-governmental immunity."[308] In this respect, "the weight of authority is against" the recognition of a form of "constitutional inter-governmental immunity" from federal laws even for what might be thought of as "the essential functions of" a provincial Crown.[309] It is indeed well established that "where Parliament has the authority to legislate in an area, a provincial Crown [is] bound if Parliament so chooses."[310] Where it chooses to bind a provincial Crown by statute, Parliament effectively lifts the provincial Crown's common law immunity *from statutes*. I see no reason why Parliament could not similarly lift a provincial Crown's common law immunity *from suits*. In any event, there is strong support for the proposition that "federal legislation, competently enacted of course, may embrace the Crown in right of a Province ... *and may also*

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307 See e.g. *Avant Inc*, *supra* note 272 at 160; *Trainor Surveys*, *supra* note 272 at 176; *Toney*, *supra* note 55 at paras 9–10, 17.

308 But see Laskin, *supra* note 44 ("[c]orrelative competence of provincial legislation to embrace the federal Crown has not, however, been recognised" at 124); Hogg, *Constitutional Law*, *supra* note 37 at 10-21 to 10-22; Hogg, Monahan & Wright, *supra* note 38 at 453, n 274; McNairn, "Intergovernmental Immunity", *supra* note 34 at 35. See also *Quebec (Attorney General) v Canada (Attorney General)*, [1979] 1 SCR 218 at 244–45, 90 DLR (3d) 161; *Her Majesty in Right of the Province of Alberta v Canadian Transport Commission*, [1978] 1 SCR 61, 75 DLR (3d) 257 [*Canadian Transport Commission*] ("a Provincial Legislature cannot in the valid exercise of its legislative power, embrace the Crown in right of Canada in any compulsory regulation" at 72); *La Reine c Breton*, [1967] SCR 503 at 506–07, 65 DLR (2d) 76; *Gauthier*, *supra* note 245 at 182, Fitzpatrick CJ, 194, Anglin J. *Contra*: *Dominion Building Corp Ltd v The King*, [1933] AC 533, [1933] 3 DLR 577.

309 Hogg, *Constitutional Law*, *supra* note 37 at 10-24 to 10-25. See also *Reference Re Anti-Inflation Act*, [1976] 2 SCR 373 at 430, 68 DLR (3d) 452; *Alberta Government Telephones*, *supra* note 211 at 275; Swinton, *supra* note 197 ("[t]he Canadian Supreme Court and its predecessor, the Privy Council, have refused to [elaborate a doctrine of intergovernmental immunity], mainly as a consequence of their preference for textual exegesis as a method of reasoning" at 7).

310 *Toney*, *supra* note 55 at para 8. See also *Alberta Government Telephones*, *supra* note 211 at 275; *Canadian Transport Commission*, *supra* note 308 ("[i]t is, of course, open to the federal Parliament to embrace the provincial Crown in its competent legislation if it chooses to do so" at 72); *Attorney-General for British Columbia v Canadian Pacific Railway Company*, [1906] AC 204, 1906 CarswellBC 109; *Attorney-General of British Columbia v Attorney-General of Canada*, [1923] 4 DLR 669, [1924] AC 222; *Nipissing*, *supra* note 297; *The Queen in right of Ontario v Board of Transport Commissioners*, [1968] 1 SCR 118, 65 DLR (2d) 425; Laskin, *supra* note 44 at 123–24; Hogg, *Constitutional Law*, *supra* note 37 at 10-23; Hogg, Monahan & Wright, *supra* note 38 at 453, n 274; Mundell, "Remedies", *supra* note 202 ("[i]t is clear that federal legislation may to some extent bind the Crown in right of the province but this authority does not extend to directly imposing liability" at 155–56).

deal with its privileges and immunities in so far as they may relate to matters that fall within federal legislative power."[311]

Lastly, it is, of course, also true that the Crown proceedings statute of each province implicitly excludes the jurisdiction of—or at least does not expressly grant jurisdiction to—courts other than the local courts of the enacting province. But a valid federal measure lifting a provincial Crown's common law immunity from suits for the purpose of allowing litigation of Aboriginal title claims in the Federal Court would necessarily prevail over conflicting provincial legislation by virtue of the doctrine of federal paramountcy.[312]

D. Conclusion on In Personam *Jurisdiction*

Because of the Crown's common law immunity from suits, a provincial Crown cannot be sued in the Federal Court under the current *FCA*. However, as a matter of constitutional law, Parliament could compel submission of the provincial Crowns to the jurisdiction of the Federal Court for the purpose of allowing litigation of Aboriginal title claims. In my view, Parliament can compel submission of a provincial Crown to the jurisdiction of the Federal Court, at least if the following conditions are satisfied: The Federal Court's subject matter jurisdiction is grounded on a substratum of valid federal law, and the presence of the provincial Crown is necessary if the claimant is to obtain an effective remedy. These conditions are satisfied in cases of Aboriginal title claims where the Indigenous claimants seek a declaration of Aboriginal title that is binding on the provincial Crown. However, Parliament's intention to compel submission of the provincial Crown would have to be clearly indicated, in which case such a parliamentary intention would then prevail over conflicting provincial legislation by virtue of the doctrine of federal paramountcy.

The result of my analysis in Parts II and III is that Parliament has the constitutional authority to provide the Indigenous peoples in Canada who wish to litigate cross-border Aboriginal title claims with a forum in which all the parties necessary to resolve the issues fairly, including all the provincial Crowns concerned, could be summoned as defendants, and

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[311] Laskin, *supra* note 44 at 123–24 [emphasis added]. See also McNairn, "Intergovernmental Immunity", *supra* note 34 at 42.

[312] See *Desgagnés*, *supra* note 70 at para 99; *Canadian Western Bank*, *supra* note 302 ("[t]he doctrine [of federal paramountcy] applies ... also to situations in which the provincial legislature acts within its primary powers, and Parliament pursuant to its ancillary powers" at para 69); *Alberta (Attorney General) v Moloney*, 2015 SCC 51 at para 16; *Saskatchewan (Attorney General) v Lemare Lake Logging Ltd*, 2015 SCC 53 at para 15, citing *Rothmans, Benson & Hedges Inc v Saskatchewan*, 2005 SCC 13. See also *Marine Services*, *supra* note 304 at para 65.

in which a declaration of Aboriginal title, binding on all such defendants, could be sought.

Conclusion

I would summarize my recommendations as follows.

First, Parliament could, and should,[313] exercise its constitutional authority to confer upon the Federal Court the jurisdiction to try a private suit of the type commenced by the Innu against IOC and QNS&L in *Uashaunnuat*. It could do so simply by adding to the existing subject matter provisions of the *FCA* (sections 20, 22, and 23), stating that "the Federal Court has concurrent original jurisdiction, between subject and subject as well as otherwise, in all cases in which a claim for relief is made or a remedy is sought under or by virtue of the law of Aboriginal title." The word "relief" is already defined by section 2 of the *FCA* as including "every species of relief, whether by way of damages, payment of money, injunction, declaration, restitution of an incorporeal right, return of land or chattels or otherwise."[314] Consequently, "a claim for relief ... made or a remedy ... sought under or by virtue of the law of Aboriginal title" would include a declaration of Aboriginal title and associated injunctive relief. It would probably also include a claim for damages for the infringement of Aboriginal title. Nevertheless, for greater certainty, I would suggest that Parliament adopt a federal choice of law rule stating that a claim for damages for the infringement of Aboriginal title is governed by the law of torts of the province in which the cause of action arose.

Secondly, Parliament could, and should, exercise its constitutional authority to compel submission of the provincial Crowns to the jurisdiction of the Federal Court for the purpose of allowing litigation of Aboriginal title claims. Parliament's intention to bind a provincial Crown must be clearly indicated. Parliament could do so simply by stating that the phrase "between subject and subject as well as otherwise" includes, for the purposes of this provision, "Her Majesty in right of a province."

Quite simple.

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[313] See note 35 and accompanying references, *above*.

[314] *FCA*, *supra* note 36, s 2 "relief".