SUPREME COURT SCEPTICAL ABOUT PRESUMPTION OF CROWN IMMUNITY

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The presumption of Crown immunity - that the Crown is not bound by statutes other than those which provide that the Crown is bound - exists both in the common law, and in statutory form in eight of the ten provinces and in the federal jurisdiction. Two provinces, British Columbia and Prince Edward Island, have reversed the presumption so that the Crown is bound by all statutes other than those which exempt it.

The Supreme Court's ruling in AGT v. CNCP is the most recent example of current judicial scepticism about the continuing validity of the presumption. The Court allowed the provincial Crown agent Alberta Government Telephones (AGT) its claim of immunity under s. 16 of the federal Interpretation Act in the particular circumstances before it. However, though it did not apply them to the facts of the case, the majority reaffirmed a series of exceptions to the operation of the presumption. The judgment may even be taken as a suggestion to Parliament that unless it can find an explanation for the continued existence of the presumption, it ought to follow the lead of the two legislatures which have reversed it.

The case arose on the application by CNCP to the Canadian RadioTelevision and Telecommunications Commission (CRTC) for orders requiring AGT to provide facilities for the interchange of telecommunications traffic between the system operated by CNCP and the system operated by AGT. The orders sought were to be made pursuant to regulatory authority given the CRTC over telecommunications carriers by the Railway Act.

AGT resisted the application on the basis that it was not subject to the CRTC's regulatory authority. AGT argued, first, that it was not a work or undertaking under federal legislative authority within the meaning of s. 92(10)(a) of the Constitution Act, 1867. Second, it argued that as a provincial Crown agent it was entitled to claim the immunity from federal statutes given to the Crown by s. 16 of the federal Interpretation Act.

AGT's application for a writ of prohibition to the Federal Court, Trial Division was granted. Reed J. held that AGT was a federal work or undertaking and therefore fell within federal legislative authority, but that the CRTC could not grant the orders because AGT as provincial Crown agent was entitled to claim immunity from the provisions of the Railway Act.

Pratte J. of the Federal Court of Appeal agreed with Reed J.'s conclusion that AGT was a federal undertaking, but held that in operating an interprovincial undertaking, AGT had exceeded the mandate given it by the provincial AGT Act, and in so doing had lost its right to claim Crown immunity. The order of prohibition was accordingly set aside.

The Supreme Court readily came to the same conclusion as the earlier level of courts with respect to whether AGT operated a federal or a provincial undertaking. Writing for the majority, Dickson C.J. said that the type of service which AGT normally provided was more significant than the fact that its physical facilities and its customers were all within the province. A service involving the transmission and reception of electronic signals at the borders of Alberta, connecting Alberta with the rest of Canada, the U.S. and other parts of the world, clearly extended beyond the Province. Beyond the mere physical interconnection, AGT's various bilateral and multilateral commercial arrangements, particularly its membership in Telecom Canada, the organization through which the various telecommunication company members coordinate their network of services, enabled it to play a crucial role in the national telecommunications system. These factors characterized AGT as an interprovincial undertaking.

The second and more difficult constitutional issue was whether AGT was immune as Crown agent from the regulatory authority of the CRTC exercising its powers under the Railway Act, by virtue of s. 16 of the federal Interpretation Act. Section 16 provides that "[n]o enactment is binding on Her Majesty, or affects Her Majesty or Her Majesty's rights or prerogatives in any manner, except only as therein mentioned or referred to." AGT's claim of the s. 16 immunity depended first on whether the reference to "Her Majesty" in s. 16 embraces the Crown in right of a province as well as the Crown in right of Canada. The Court held that the presumption of immunity does operate in favour of the provincial Crown, adding, however, that there is no impediment to Parliament's embracing the provincial Crown in its competent legislation if it chooses to do so.

The next question was whether the Railway Act "mentioned or referred to" the provincial Crown so as to bind it within the terms of the express exception to immunity contained in s. 16 itself. On this question the Court was prepared to hold, contrary to some pronouncements in its own earlier judgments, that the phrase "mentioned or referred to" could be met not only by express words but also by necessary implication. A strict requirement for express words would involve an "overbroad extension of state immunity". Accordingly, the Court reasserted the doctrine of necessary

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implication, though confining the doctrine to "a clear intention to bind which ... is manifest from the very terms of the statute" or "where the purpose of the statute would be wholly frustrated if the government were not bound". However, the Court found no such intention to bind with respect to AGT in the Railway Act.

The Court next turned to consider whether AGT had triggered any exceptions to the presumption of Crown immunity by its conduct. Though the majority ultimately concluded that AGT had not done this, it undertook a review of the various doctrines, and indicated a willingness to entertain two of the three suggested exceptions in appropriate circumstances under the present law. At the same time the Court seemed to invite legislative reform which would eliminate the presumption altogether.

The first of the possible exceptions was the "benefit\burden" exception or "waiver doctrine" - that immunity from the burdens of a statute is waived by the Crown where it takes advantage of the statute's benefits. The majority affirmed the existence of the doctrine as it had recently been laid down in Sparling v. Quebec [1988] 2 S.C.R. 1015. However, adopting the requirement set out in Sparling that the nexus between the benefit taken and the burden imposed be "sufficiently related so that the benefit must have been intended to be conditional upon compliance with the restriction", the majority held that the advantages obtained by AGT as a party to some agreements which are subject to CRTC approval under the Railway Act, were insufficient to link it to CRTC jurisdiction. The benefits derived by AGT under the Railway Act were of a general nature. It was not a case of AGT's having relied on the Act for advantages while seeking to avoid attached restrictions. AGT had not itself sought CRTC approval of the agreements. Neither had there been, as had been in the Sparling case, "an implied general submission to the entire statutory scheme of benefits and burdens". However, while denying that AGT had waived immunity according to this test, the majority acknowledged a conflict between the conclusion to which it was constrained under the existing law, and "basic notions of equality before the law" and "our intuitive sense of fairness". Dickson C.J. cited his own earlier pronouncement in R. v. Eldorado Nuclear: "The more active the government becomes in activities that had once been considered the preserve of private persons, the less easy it is to understand why the Crown need be, or ought to be, in a position different from the subject."

The next exception to be considered was that of the Crown exceeding its statutory mandate or purpose. Again, the majority accepted the doctrine - that the Crown acting beyond its statutory mandate could thereby lose its immunity (though the fact that a provincial Crown undertakes an interprovincial work does not of itself trigger the doctrine) - but disagreed that AGT had exceeded its statutory purpose. It interpreted the AGT Act as empowering AGT to enter into interconnection agreements in order to fulfil its statutory purpose of providing an integrated interprovincial telecommunications service for its customers.

The final exception put to the Court was the "commercial activities" exception - that immunity is not available to the Crown operating a commercial entity. The majority rejected this exception, refusing to draw an analogy to public international law which accords immunity for governmental, but not for commercial activity. It pointed out that "[i]n trying to draw a line between what is governmental and what is proprietary, one fast becomes fixed in a quagmire of political and economic distinctions with no hope of reasoned separation." Nevertheless the judgment again hinted that the involvement of government in the commercial arena may justify legislated reversal of the presumption: "Why AGT or other Crown agencies undertaking business ventures in an ordinary commercial capacity ought to be immune from otherwise valid federal legislation is a question which only Parliament can explain."

Wilson, J. in dissent agreed with much of the judgment of the majority, but disagreed as to the applicability of the waiver doctrine. In her view the "benefit/burden" exception as laid down in Sparling was too narrowly expressed by the majority. The doctrine as she saw it does not require that "the burdens must constitute specific limitations on a specific benefit". Rather, it is enough to waive immunity that "the Crown agent has engaged in a deliberate and sustained course of conduct through which it has benefited from a particular provision or provisions of a statute". In her view this description suited AGT's having "endeavoured to take advantage of the benefits of interconnection agreements which under the legislation required the approval of the CRTC". Thus Wilson J. did not regard the case as one which required deferral to the legislative will on the matter of Crown immunity. Nonetheless, she lent her voice to that of the majority in questioning the desirability of the continued existence of the presumption in modern times, stating: "I have serious doubts that the doctrine of Crown immunity, developed at a time when the role of government was perceived as a very narrow one, was ever intended to protect the Crown when it acted, not in its special role qua Crown, but in competition with other commercial entities in the market place."

With the exception of Madame Justice Wilson, the Supreme Court declined to allow the exceptions to the presumption of immunity to "swallow the rule", on the ground that this would be "overly legislative" on its part. The concluding sentence in the majority judgment reminds Parliament and the provincial legislatures that they do have the power to legislate the same result.

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