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COMMENTS

CHRONIQUE DE JURISPRUDENCE

Jurisdiction Over Telecommunications: *Alberta Government Telephones v. CRTC*

Peter W. Hogg*

In *Alberta Government Telephones v. Canadian Radio-television and Telecommunications Commission*, the Supreme Court of Canada held that AGT was a federal undertaking, but that as an agent of the provincial Crown, it was not bound by regulations of the CRTC, made under the authority of the federal *Railway Act*. AGT is therefore presently unregulated.

The author proposes that AGT was characterized as a federal undertaking on the basis of its membership within Telecom Canada and its border connections with neighbouring telephone companies, which allow it to provide interprovincial and international service. The AGT decision leaves open, however, the issue of the constitutional status of regional and municipal telephone companies which also provide interprovincial and international service, through cooperative arrangements with larger interprovincial companies.

The author considers that the AGT decision is likely to bring about important changes in the telecommunications industry. Following the decision, the federal government introduced a bill declaring that the *Railway Act* is binding on agents of the provincial Crown, thus abolishing AGT's immunity as a provincial Crown agent and subjecting AGT to CRTC regulation. The author predicts that the bill, if passed, will lead to competition in the provision of long-distance telephone services.

Dans *Alberta Government Telephones c. Conseil canadien de la radiodiffusion et des télécommunications canadiennes*, la Cour suprême établit qu'AGT est une entreprise fédérale. Toutefois, en tant qu'agent de la Couronne provinciale, AGT n'est pas soumis aux règlements du CRTC établis sous la juridiction de la *Loi sur les chemins de fer* (fédérale). À l'heure actuelle, AGT n'est donc soumis à aucune réglementation.

AGT est membre de Télécom Canada et ses connections avec des compagnies de téléphone situées dans des juridictions voisines lui permettent d'offrir un service de portée interprovinciale et internationale. L'auteur soumet que ces données ont amené la Cour à considérer AGT comme entreprise fédérale. Toutefois, cette décision ne résoud pas la question du statut constitutionnel des compagnies régionales et municipales qui, de pair avec des compagnies interprovinciales, offrent aussi un service international et interprovincial.

L'auteur croit que cette décision apportera d'importants changements à l'industrie des télécommunications au Canada. Suite à la décision de la Cour suprême, le gouvernement fédéral proposa un projet de loi visant à abolir l'immunité d'AGT en tant qu'agent provincial et à soumettre AGT aux règlements du CRTC. L'auteur prévoit que cette loi augmentera la concurrence dans le domaine des services téléphoniques interurbains.

*Q.C., of the Osgoode Hall Law School of York University. I disclose that I was one of the counsel representing AGT in the case that is the subject of this note. An earlier version of this comment was delivered at The Canadian Institute conference on "Canadian Telecommunications into the 1990s and Beyond" in Toronto on October 19, 1989.

The Decision

In *Alberta Government Telephones v. Canadian Radio-television and Telecommunications Commission*,¹ the Supreme Court of Canada held that the existing pattern of provincial regulation of most telephone systems is unconstitutional. The case concerned jurisdiction over Alberta Government Telephones (AGT), which is an Alberta Crown corporation that operates a telephone system within the province of Alberta. AGT has until now been regulated by the Public Utilities Board of Alberta, exercising powers conferred by provincial law. The Court, in a judgment delivered by Dickson C.J.,² held unanimously that AGT was a federal undertaking, subject to the exclusive legislative power of the federal Parliament. However, the Court held by a majority that the federal *Railway Act*, which is the source of the regulatory power over telecommunications of the Canadian Radio-television and Telecommunications Commission (CRTC), did not bind AGT, because AGT was an agent of the provincial Crown. Therefore, AGT was not subject to any form of regulation. In a companion case,³ the Court held that the same "regulatory vacuum" prevailed with respect to labour relations: AGT as a federal undertaking was outside provincial labour relations jurisdiction, but as an agent of the provincial Crown was not covered by the *Canada Labour Code*.

The Proceedings

The proceedings were essentially a battle over competition in the telecommunications industry. Generally speaking, one could say that provincial regulators are likely to be protective of a local, provincially-regulated monopoly, while federal regulators are more likely to favour competition by national firms. Certainly, a premise of this kind seemed to underlie the positions taken by the parties in this case.

The case started when CNCP Telecommunications (CNCP) applied to the CRTC for an order compelling AGT to provide a connection with CNCP's system, so that CNCP's telecommunications traffic could be carried on the AGT system. AGT, which had always been regulated by the province, did not acknowledge the regulatory authority of the CRTC, a federal agency, and applied to the Federal Court, Trial Division, for an order of prohibition to stop

¹[1989] 2 S.C.R. 225 [hereinafter *AGT*].

²Dickson C.J.'s opinion was agreed to by McIntyre, Lamer, La Forest and L'Heureux-Dubé JJ. Wilson J. wrote a dissenting opinion, in which she agreed with Dickson C.J. on the constitutional issue, but disagreed with Dickson C.J. on the Crown immunity issue, which caused her to dissent. Only six judges participated in the decision, three judges having retired during the 21-month interval between oral argument (on November 12 and 13, 1987) and judgment (on August 14, 1989).

³*IBEW v. Alberta Government Telephones* [1989] 2 S.C.R. 318 [hereinafter *IBEW*].

the CRTC application. In the Federal Court, Trial Division,⁴ Reed J. accepted CNCP's argument that AGT was within federal jurisdiction; however, she granted the order of prohibition on the ground that AGT as an agent of the provincial Crown was immune from the federal *Railway Act* and therefore outside the authority of the CRTC. In the Federal Court of Appeal,⁵ Reed J.'s decision was reversed; the Court agreed with Reed J. on the constitutional issue, but reversed her ruling on the Crown immunity issue.

The Supreme Court of Canada restored Reed J.'s order of prohibition, and essentially agreed with her reasons. As noted above, on the constitutional issue, the Court held unanimously that AGT was within federal jurisdiction. On the Crown immunity issue, the Court held by a majority of five to one that AGT was immune from the federal *Railway Act*.

The Constitutional Background

Legislative authority over telecommunications depends upon s. 92(10) of the *Constitution Act, 1867* (U.K.).⁶ Section 92(10) confers authority on the provincial Legislatures to make laws in relation to:

- Local Works and Undertakings other than such as are of the following Classes: —
- (a) Lines of Steam or other Ships, Railways, Canals, Telegraphs, and other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province;
 - (b) Lines of Steam Ships between the Province and any British or Foreign Country;
 - (c) Such Works as, although wholly situate within the Province, are before or after their Execution declared by the Parliament of Canada to be for the general Advantage of Canada or for the Advantage of Two or more of the Provinces.

The three classes of undertaking excepted by paragraphs (a), (b) and (c) come within the legislative authority of the federal Parliament by virtue of s. 91(29) of the *Constitution Act, 1867* (U.K.).⁷

The basic scheme of distribution of power established by s. 92(10) is this. Communications undertakings that remain within the boundaries of a single province are "local", and therefore within provincial authority under the opening words of s. 92(10). Communications undertakings that connect the province with other provinces or extend beyond the limits of the province are within federal authority under paragraph (a) of s. 92(10). An exception to this dichotomy is created by paragraph (c) of s. 92(10), which brings into federal jurisdiction

⁴[1985] 2 F.C. 472, 17 Admin. L.R. 149, 15 D.L.R. (4th) 515 (T.D.).

⁵[1986] 2 F.C. 179, 24 D.L.R. (4th) 608, 63 N.R. 374 (C.A.).

⁶30 & 31 Vict., c. 3.

⁷*Ibid.*

local works that have been declared by the Parliament of Canada to be "for the general advantage of Canada".

Where a single telephone company provides service in more than one province, it comes within federal jurisdiction under s. 92(10)(a). In *Toronto (City of) v. Bell Telephone Co. of Canada*,⁸ the Privy Council held that the Bell Telephone Company was within federal jurisdiction on this ground. At that time, Bell was operating only in Ontario, but it was planning to extend its system into Quebec, and their lordships took the wish for the deed.

In the *Bell Telephone* case, it was argued that jurisdiction over the company's undertaking could be divided between the two levels of government: the province would have regulatory power over the company's local (intraprovincial) business, and the federal Parliament would have regulatory power over the company's long-distance (interprovincial) business. The Privy Council refused to divide jurisdiction in this way. This established an important rule, which has been consistently applied to other kinds of communications and transportation undertakings as well,⁹ that an undertaking is subject to the regulation of only one level of government. Once an undertaking is characterized as interprovincial, all of its activity, intraprovincial as well as interprovincial, is subject to federal regulation. And, by the same token, once an undertaking is classified as local, all of its business, including any casual or irregular interprovincial business,¹⁰ is subject to provincial regulation. In this way, the courts have avoided the complications of divided jurisdiction over a single undertaking. On the other hand, the one-undertaking-one-regulator rule loads enormous freight on the initial question of characterization: everything turns on whether the undertaking is interprovincial or local. As Dickson C.J. commented in the *AGT* case, the question of jurisdiction is "an all or nothing affair".¹¹

The Regulatory Background

The *Bell Telephone* case settled the regulatory jurisdiction over the Bell Telephone Company. Bell did in fact extend its service into Quebec as well as Ontario, and later added service in the eastern Northwest Territories. Bell is accordingly regulated by the CRTC, acting under powers conferred by the federal *Railway Act*.

Also within federal jurisdiction is the British Columbia Telephone Company, which provides service in British Columbia. It has been brought within federal jurisdiction by a declaration under s. 92(10)(c) that it is a work

⁸[1905] A.C. 52 (P.C.).

⁹See P.W. Hogg, *Constitutional Law of Canada*, 2d ed. (Toronto: Carswell, 1985) at 486-89.

¹⁰If the interprovincial business was continuous and regular, the undertaking would be classified as federal, *ibid.* at 488.

¹¹*Supra*, note 1 at 257.

for the general advantage of Canada. B.C. Telephone is therefore also regulated by the CRTC.

Also within federal jurisdiction is Telesat Canada, a company which provides satellite facilities to the other telephone companies as well as to some other businesses.

At the time of the *AGT* case, Bell, B.C. Telephone and Telesat Canada were the only telephone companies that were federally regulated. In each of the three prairie provinces, there is a provincially-owned telephone company that was provincially regulated: AGT in Alberta, Saskatchewan Telecommunications in Saskatchewan, and Manitoba Telephone System in Manitoba. In each of the four Atlantic provinces, there is a privately-owned telephone company that was provincially regulated: the New Brunswick Telephone Company in New Brunswick, Maritime Telegraph and Telephone Company in Nova Scotia, Island Telephone Company in Prince Edward Island and Newfoundland Telephone Company in Newfoundland.

In addition to the nine major terrestrial carriers, there are about fifty "independent" telephone companies, most of which are very small. There are thirty in Ontario and sixteen in Quebec, for example, existing alongside Bell's federally-regulated presence. These independent companies are mostly privately owned, although a few are municipally owned, including two of the largest — Edmonton Tel and Thunder Bay Tel. They are all provincially regulated.

The Facts

AGT is a provincial Crown corporation that operates a telephone undertaking within the province of Alberta. AGT's physical works and its customers are all located within the province of Alberta.¹² AGT is, however, organized to offer interprovincial and international service to its customers. The AGT system connects at the borders with the telephone companies of British Columbia, Saskatchewan, the Northwest Territories and Montana, partly by cable, but mainly by microwave signals that are transmitted between towers located on each side of each border. As well, the AGT system has access to satellites through cable links to earth stations in Alberta operated by Telesat Canada. These physical connections are operated under the terms of agreements entered into between AGT and the neighbouring carriers.

¹²There is one exception to this proposition, and that is the case of Lloydminster, a small town straddling the Alberta-Saskatchewan border. AGT supplied service to all the residents of Lloydminster, including those on the Saskatchewan side of the border. The Supreme Court of Canada agreed with the courts below that "the situation in Lloydminster is not constitutionally significant", *supra*, note 1 at 258.

In addition to the bilateral agreements with neighbouring carriers, AGT is a member of Telecom Canada, which is an unincorporated organization, originally created in 1931 under the name Trans-Canada Telephone System (TCTS), which is made up of the nine major telephone companies and Telesat Canada. Telecom Canada is managed by committees of representatives of the member companies, under multilateral agreements entered into by the members. Telecom Canada is the vehicle by which the various telephone companies cooperate to create a national telecommunications network; it also makes arrangements for connections to carriers in the United States; and it also collects and shares the revenues from long-distance calls that extend beyond the neighbouring provinces that have bilateral connecting agreements.

Interprovincial Undertaking

Dickson C.J. (for the entire Court on the constitutional issue) held that AGT's connections with telephone systems outside Alberta were sufficient to constitute AGT an interprovincial undertaking. "AGT's telecommunications system, taken as a whole, connects Alberta with the rest of Canada and with the United States, and other parts of the world. It undoubtedly extends beyond the province of Alberta".¹³ While a mere physical connection would not convert a local undertaking into an interprovincial one, in this case "the facts demonstrate much more than mere physical interconnection of AGT's system at provincial borders".¹⁴ AGT, through various bilateral and multilateral agreements, is "organized in a manner which enables it to play a crucial role in the national telecommunications system".¹⁵ AGT "is the mechanism through which the residents of Alberta send and receive interprovincial and international telecommunications services".¹⁶ These statements, which are rather abstract and conclusory, do not make clear exactly what were the elements that located AGT in the federal jurisdiction.

There are two alternative grounds upon which a communications or transportation undertaking will be classified as federal (interprovincial or international). One is if the undertaking itself is interprovincial, meaning that it connects the province with another province or extends beyond the limits of the province. The other is if the undertaking is an integral part of another undertaking that is interprovincial.

It is clear that the Court's decision in the *AGT* case was not based on the second ground: the Court was not saying that AGT was an integral part of another interprovincial undertaking. The Court did not identify a larger under-

¹³*Ibid.* at 260.

¹⁴*Ibid.* at 262.

¹⁵*Ibid.* at 262.

¹⁶*Ibid.* at 264.

taking of which AGT was a part. Telecom Canada could perhaps have been characterized in that way, despite its unincorporated form, but the Court said that "the Court is not here called upon to assess the constitutional character of Telecom Canada".¹⁷ The Court said that "AGT's role and relationship with Telecom Canada is relevant to the decision on AGT's *own* constitutional character".¹⁸ The Court did emphasize the cooperative arrangements that AGT had made with the telephone companies of neighbouring jurisdictions, and, through Telecom Canada, with telephone companies elsewhere in Canada. But no case has ever decided that cooperative arrangements between two, separately managed, local undertakings could convert the local undertakings into a single interprovincial undertaking. Indeed, even when one of the enterprises is interprovincial, the railway cases hold that a physical connection, even combined with cooperation to facilitate through traffic, does not sweep a local undertaking into federal jurisdiction.¹⁹

It seems clear therefore that it was the nature of the service provided by AGT itself, and not its relationship to a larger entity, that led to its classification as an interprovincial undertaking. The relationships with other telephone companies were relevant only to cast light on the nature of AGT's own business. Thus, the Court referred to "the involvement of AGT in the transmission and reception of electronic signals at the border",²⁰ to the fact that AGT was "organized in a manner which enables it to play a crucial role in the national telecommunications system",²¹ and to the fact that "AGT is the mechanism through which the residents of Alberta send and receive interprovincial and international telecommunications services".²² And yet, these statements do not explain why Dickson C.J. said that there was "no merit in the argument that AGT's involvement in the interprovincial flow of signals begins and ends at Alberta's borders".²³ It is literally true that AGT carried telephone messages only within the province of Alberta, and its participation in interprovincial traffic was confined to delivering outgoing messages and receiving incoming messages at the border. On the other hand, the company's ability to provide interprovincial and international service did depend upon the company's participation in a host of bilateral and multilateral arrangements. It seems to be the scope and complexity of these

¹⁷*Ibid.* at 263.

¹⁸*Ibid.* at 264 (emphasis added).

¹⁹*Montreal (City of) v. Montreal St. Rwy.*, [1912] A.C. 333, 1 D.L.R. 681 (P.C.); *B.C. Elec. Rwy Co. Ltd v. C.N.R.*, [1932] S.C.R. 161, 2 D.L.R. 728. In *Luscar Collieries, Ltd v. A.G. Can. and Que.*, [1927] A.C. 925, 3 W.W.R. 454, the branch line was held to be within federal jurisdiction, but it was managed by Canadian National, the operator of the federal line. See also note 22, *infra*.

²⁰*Supra*, note 1 at 260.

²¹*Ibid.* at 262.

²²*Ibid.* at 264.

²³*Ibid.* at 267.

bilateral and multilateral arrangements that led the Court to characterize AGT as an interprovincial undertaking.

The *AGT* case determines the constitutional jurisdiction of those telephone companies that possess the same basic interconnections as AGT, that is: (1) border connections with the telephone companies of neighbouring jurisdictions, and (2) membership of Telecom Canada. Such companies are now within federal jurisdiction. This means that the three publicly-owned companies in the prairie provinces, and the four privately-owned companies in the Atlantic provinces, have been swept into federal jurisdiction. Like AGT, these companies are parties to various bilateral cross-border interconnection agreements, and they are all members of Telecom Canada. This is also true of the British Columbia Telephone Company and Bell Canada, but, as explained above, these two carriers are already federally regulated.

While the *AGT* case settles the constitutional status of Canada's nine major telephone companies, it does not settle the constitutional status of the "independent" regional, local and municipal telephone companies. These lack cross-border connections, and they are not members of Telecom Canada. Each company is, however, able to provide to its customers full long-distance service to and from anywhere in Canada, the United States and overseas. The company is able to provide this service by cooperative arrangements with the major telephone company (the Telecom member) within the same province. Lacking any direct interprovincial connections, the independent company is probably still local, and therefore within provincial jurisdiction. It should not be overlooked, however, that a close operational relationship with a larger company that is interprovincial could lead to the small company being classified as an integral part of the interprovincial enterprise.²⁴

Crown Immunity

The Court's ruling on the constitutional status of AGT as a federal undertaking established that the company's telecommunications business was within the exclusive regulatory power of the federal Parliament. However, the question whether the CRTC could order AGT to interconnect with CNCP (or exercise other regulatory power) depended upon whether the federal *Railway Act*, which was the source of the CRTC's regulatory power over telecommunications, was

²⁴Such a result would probably require common management of the two companies: *supra*, note 17 and accompanying text. But lesser degrees of integration have occasionally sufficed: *Reference Re Validity of Industrial Relations and Disputes Investigation Act*, [1955] S.C.R. 529, 3 D.L.R. 721 (independently managed stevedoring company an integral part of shipping); *R. v. Bd of Transport Commrs*, [1968] S.C.R. 118, 65 D.L.R. (2d) 425 (commuter rail service using part of interprovincial line an integral part of the interprovincial system); *Kootenay and Elk Rwy v. C.P.R. Co.* (1972), [1974] S.C.R. 955 at 980, 982, 28 D.L.R. (3d) 385 (*obiter dicta* implying that something less than common management would suffice).

binding on AGT. There was no doubt that the *Railway Act* applied to a private individual or corporation operating an interprovincial telecommunications undertaking. But AGT was a provincially-owned corporation that was expressly designated by provincial statute to be "an agent of the Crown in right of Alberta". As an agent of the Crown, AGT argued that it was immune from the *Railway Act*. As explained earlier, this argument was accepted by a majority of the Court. This aspect of the case is also interesting, and attracted a long and elaborate discussion by Dickson C.J., and a dissent by Wilson J., who would have held that the *Railway Act* was binding on AGT. However, this part of the Court's reasoning is outside the scope of this note.

The result of the case is that AGT is unregulated. The provincial regime of regulation, administered by the Public Utilities Board of Alberta, cannot constitutionally apply to AGT, because AGT's telecommunications business comes within exclusive federal jurisdiction. The federal regime of regulation administered by the CRTC does not apply to AGT because AGT is a provincial Crown agent. The same regulatory vacuum exists with respect to labour relations. Provincial labour law cannot apply to AGT's labour relations, because AGT is an undertaking within federal jurisdiction.²⁵ But, in a companion case decided at the same time as the *AGT* case, the Court held that the *Canada Labour Code* did not apply to AGT, because the Code did not extend to a provincial Crown agent.²⁶ This regulatory vacuum undoubtedly applies not only to AGT, but also to the two Crown-owned telephone companies of Saskatchewan and Manitoba, which must be in the same position as AGT. Like AGT, they have a constitutional immunity from provincial laws respecting telecommunications and labour relations, and they have a statutory immunity from the federal laws.

The Court was at pains to point out that the doctrine of Crown immunity, which exempted AGT from the *Railway Act* and the *Canada Labour Code*, was not a constitutional doctrine. The immunity, originally a matter of common law, now flowed from s. 17 of the federal *Interpretation Act*,²⁷ which provides that no Act is binding on the Crown "except only as therein mentioned or referred to". This immunity could be abolished in general or for particular statutes, such as the *Railway Act* or the *Canada Labour Code*.²⁸ There is no doubt, therefore, that the regulatory vacuum can, in principle, be filled.

²⁵*Commission du Salaire Minimum v. Bell Telephone Co. of Can.*, [1966] S.C.R. 767, 59 D.L.R. (2d) 145.

²⁶*I.B.E.W.*, *supra*, note 3.

²⁷R.S.C. 1985, c. I-21. Section 17 was s. 16 in the previous consolidation, R.S.C. 1970, c. I-23, which was the provision in force when the facts of the *AGT* case arose.

²⁸*Supra*, note 1 at 301.

Sequel to Decision

The reasoning in the *AGT* case left no doubt that the four Atlantic telephone companies and the three prairie telephone companies were within exclusive federal jurisdiction. The four Atlantic companies are privately owned and can claim no Crown immunity from the regulatory provisions of the federal *Railway Act*, which are administered by the CRTC. These four companies must now join B.C. Telephone and Bell Canada in the regulatory stable of the CRTC.

The three prairie companies remain outside the jurisdiction of the CRTC only because of their Crown immunity from the *Railway Act*. This situation is unlikely to continue for long. On October 19, 1989, the federal government introduced into Parliament a brief amendment to the *Railway Act*, declaring that the provisions of the Act respecting telephone systems are binding on the Crown in right of a province.²⁹ This bill, if enacted, will fill the regulatory vacuum by subjecting the three prairie telephone companies to the jurisdiction of the CRTC.

When the *Railway Act* amendment is enacted, the CRTC will regulate all the major carriers and most of the telephones in Canada. (The fifty or so independent telephone companies service only three per cent of the nation's telephones.) It seems inevitable that the regulatory policies of the CRTC will diverge from those of the former provincial regulators. The introduction of competition in the provision of long-distance services is one likely outcome. Closely related to the issue of competition, is the issue of long-distance and local rates: in some provinces high long-distance rates subsidize low local rates. Such a cross-subsidy would be difficult to maintain if long-distance services could be supplied by carriers that had no obligation to supply the local services. It seems obvious therefore that the *AGT* case may be the beginning of important changes in the telecommunications industry, which is one of the few industries with a direct impact on virtually everyone.

²⁹Bill C-41, *An Act to Amend the Railway Act (Telecommunications)*, 2d Sess., 34th Parl., 1989 (1st reading, October 19 1989). No similar amendment to the *Canada Labour Code* was introduced.