## MUNICIPALITY OF ST. JOHN v. FRASER-BRACE OVERSEAS CORPORATION ET AL.

The problem of immunity of a foreign sovereign and his property is, in one form or another, as old as international law itself. In its embryonic form, in fact, it antecedes nation-states and international law as we know it today.

The vast majority of international law writers credit the principles of sovereign immunity to the feudal rule which decreed that no lord was to be subject to the laws of another lord on the ground that all lords were equal: *par in parem non habet imperium*. When nation states emerged, this rule was logically extended to heads of state and their property as well as to state property.[1]

The extent to which a foreign sovereign and his property are exempt from jurisdiction of local municipal law has been the subject of voluminous international litigation, and has given rise to numerous pertinent problems. Does not such immunity derogate from the sovereignty of the "host" state? If immunity is admitted, should it be absolute or should it apply only to the person of the sovereign himself and to his diplomatic agents acting in their capacity as public officials? Should a distinction, then, be made between private acts and public acts of a foreign state for the purpose of determining where immunity lies? Should only property employed for the public use of a foreign state be exempt from local jurisdiction, or should immunity apply to all property owned abroad by a foreign sovereign? These are some of the main questions generated by the concept of sovereign immunity.

The answers to most of these problems, even today, have not yet been fully settled as both doctrine and jurisprudence often hold contradictory views regarding the problems of immunity. The modern trend, however, has been to recognize partial immunity of a foreign sovereign. Where a state or its agents act in a limited, private capacity (*jure gestionis*) they can claim no immunity; but where their acts are of public nature and for the benefit of the state as a whole (*jure imperii*), immunity from local jurisdiction may be invoked. This view has been adopted by the courts of continental Europe, especially France, Italy, and Belgium.[2] The Anglo-American view has tended to be more rigid, and until recently has leaned towards absolute immunity.[3]

Criticism has been levelled lately at the principle of immunity on the ground that it belongs to a past era. "The principle of sovereign immunity is an archaic hangover not consonant with modern morality, and it should

[1]Lyons, A.B., *The Avoidance of Hardships Resulting from the Doctrine of Sovereign Immunity*, 42 The Grotius Society 61: Briggs, H.W., *The Law of Nations*, second edition, 1952, p. 442; Lauterpacht, H., The Prohlems of Jurisdictional Immunities of Foreign States, 28 B.Y.B.I.L. 220 at 221.

[2]For cases cited on the point, see 34 The Grotius Society 111, at 112.

[3]Ibid at 117; Briggs, op. cit., p. 447.

therefore be limited whenever possible."[4] Professor Lauterpacht in particular has been adamant in his criticism of sovereign immunity. He claims "it is productive of inconvenience, injustice, and resentment which may be more inimical to friendly international intercourse than the assumption of jurisdiction."[5] Moreover, he submits that the notions of dignity and equality which are the basis of sovereign immunity are "archaic", and there is no reason why a foreign state should not be subject to the same laws which bind the "host" state. Any jurisdictional problems that do arise could be resolved through international agreement.[6]

Whatever may be the view regarding the principles and theory behind sovereignty, it is quite clear that in its practical aspect the problem is of great importance. The world has shrunk considerably since the 19th century, and with the tremendous upsurge of the welfare state, inter-governmental transactions and property ownership by one state in the territory of another are common, every-day occurrences. It is quite obvious, therefore that 19th century principles and concepts regarding immunity are no longer satisfactory today. Moreover, the distinction between private and public acts of a state has become virtually impossible to apply.

Uncertainty exists as to whether a foreign state can be sued for breach of a commercial contract in a municipal court, or whether property owned by a foreign state is subject to local law. The problem of jurisdiction of municipal courts over foreign states is unsettled, and it is a moot question to what extent domestic statutes apply to foreign states.

The close relationship between Canada and the United States has led to considerable controversy lately regarding questions of jurisdiction. Recently the important question of the ability of one state to tax the property of another has arisen between these two neighbours, with the issue coming to a head in the Canadian Supreme Court case of *Municipality of St. John v. Fraser-Brace Overseas Corporation.*[7] The case is of unusual practical importance since it concerned defense installations erected in Canada by the United States and designed to serve both countries as a joint warning system against air attacks.

By special agreement the Canadian federal government granted the United States government, without charge, the right of access, use, and occupation necessary for the building of these radar installations. In 1952 an American company, the Fraser-Brace Co., was given the task of constructing the system. Towards this purpose, the Corporation proceeded to lease some property from the Municipality of St. John in New Brunswick, and also bought moveable property necessary for the construction of the installations. Some of the moveable property was directly owned by the United States government while the

[4] *Larson v. Domestic & Foreign Corporation,* Sup. Ct. 337 U.S. 682, at 703.
[5] Lauterpacht, *op. cit.,* at 226.
[6] *Ibid,* at 231, at 237.
[7] [1958] S.C.R. 263.

rest was bought in Canada by Fraser-Brace with the understanding, mentioned in the purchase orders, that the United States government would reimburse the Corporations for these purchases. Finally, the contract between the United States government and Fraser-Brace stated that title to all the property at the installations, moveable and immoveable, would pass to the United States government either upon reimbursement to the Corporations, or upon the use of the installations by government personnel, whichever came first. In fact, however, the leases were never transfered to the government, but instead were transferred to Drake-Merrit Co., a co-contractor, who took over the work on the installations in 1954.

From the beginning, Fraser-Brace claimed tax exemptions both on the moveable and immoveable property alleging that the property was owned by the United States government, and as such could not be taxed. A clause on their purchase orders read as follows: these goods are "to become and remain the property of the Government of the United States, and are not for Resale, Personal or Private use, and are exempt from Sales Tax, Excise Tax, and Duty by virtue of an Order in Council of the Dominion Government." Although the Municipality was undoubtedly aware of this exemption claim, nevertheless it assessed and collected taxes from Fraser-Brace in 1953 amounting to $17,823.97. Fraser-Brace paid these taxes under protest. In 1955, the Municipality further assessed the Drake-Merrit Co. for the years 1954 and 1955. Consequently in June of 1955, both companies took a joint action against the Municipality to recover the taxes already paid, and to obtain an injunction preventing the Municipality from levying the taxes assessed for 1954 and 1955.

The main issue in the case is relatively clear: is the exemption claimed by the companies justified? In other words, can a sovereign — here the United States government — claim immunity from taxation upon its property situated in a foreign country? Before this question can be answered however, the issue of whether or not the United States government actually owned the property in question had to be settled. Another subsidiary issue is the constitutionality of the tax from the point of view of Provincial-Dominion relations.

The trial judge[8] dismissed the action stating that the property was not "destined for its [the United States] public use;" nor was it "devoted to public use in the traditional sense." On the question of ownership, he held that legal title both to the moveable and to the immoveable property was vested in the companies, but held in trust for the United States government.

The majority of the judges of the New Brunswick Court of Appeal[9] reversed the judgment in part, holding that only the leases were liable to taxation but that the rest of the property was immune. Bridges J., however, agreed fully with the trial judgment. All three judges concurred that legal ownership of the pro-

[8](1956), 39 M.P.R. 33.
[9](1957), 9 D.L.R. (2d), 391.

perty was vested in the Government. Thereupon the Municipality appealed to the Supreme Court to reverse the Appeal decision on the property declared to be immune, while the companies launched a cross-appeal praying that in addition to the moveable property, the leases as well be exempt from taxation.

The Supreme Court, by a unanimous decision dismissed the appeal of the Municipality and maintained the cross-appeal of the companies, thus holding the entire property at the installation immune from taxes. The Court devoted little time to the question of the legal title of the property. Whether or not the United States government was the legal owner was not really an important consideration. The companies were undoubtedly the trustees or agents of the United States government and, as Justice Rand pointed out, there is no authority "which holds a trustee taxable in respect of the interest of a beneficiary exempt."[10] The contractors were merely passive agents charged with no responsibility beyond that arising out of the construction contract.[11]

In their judgments both Justices, Rand and Locke, traced a short history of the development of the notion of immunity of a foreign sovereign. They cited various authorities but seemed to rely principally on the two leading decisions of the *Schooner Exchange v. M'fadden,* and the *Parlement Belge.*[12] Both these cases concerned the question of immunity of war ships during peace time. In both cases it was held that the ship, being a public vessel, was exempt from local jurisdiction. In referring to these cases, the learned justices approved the principles of dignity and international comity:

> Our King owes no kind of subjection to any other potentate on earth. Hence it is that no suit or action can be brought against the King, even in civil matters, because no court can have jurisdiction over him. For all the jurisdiction implies superiority of power; authority to try would be vain and idle without authority to redress, and the sentence of the court would be contemptible unless the court had power to command the executive of it, but who shall command the King?[13]

From these comments, one wonders to what extent support is given to the principle of absolute immunity. Although the modern trend, certainly on the part of the executive in most countries, leads away from the notion of absolute immunity, Justice Rand in his remarks seems to echo 19th century principles when he says: "In general the immunity of a sovereign, his ambassadors, ministers, and their staff, together with his or their property, extends to all processes of the courts, to all invasions or interferences with their person or property, and to all application of coercive public law brought to bear affirmatively, including taxation."[14] Yet neither Rand J., nor Locke J. rely entirely on the principles of dignity and non-submission. Both emphasize that behind sovereign immunity there lies the consent of the host state to such

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[10][1958] S.C.R. 263, at 270.

[11]For a similar view on the question of state ownership see *The Rahimtoola Case* [1957] 3 A.E.R. 441, at 462.; *U.S. v. Dolfus* [1952] A.C. 582, at 586.

[12](1812) 11 U.S. (7 Cranch) 116; [1880] L.R. 5 P.D. 197.

[13][1880] L.R. 5 P.D. 197, at 206; Quoted at 279.

[14][1958] S.C.R. 263, at 268.

immunity, a consent which in the present case is implied from the Dominion government invitation extended to the United States to construct the installations.

For authoritative precedent in regard to the taxation issue, the court relies heavily on the *Foreign Legations* case.[15] This was a reference case in which the question was put before the Supreme Court whether or not it was within the power of the City of Ottawa to levy rates on property owned and occupied as legations by foreign governments, viz., France, United States, and Brazil. The majority of the Court (Justices Rinfret, Taschereau and Duff), answered the question unqualifiedly in the negative. Judges Kerwin and Hudson held that the city was entirely within its rights in assessing and levying these taxes, but that no judicial recourse could be exercised against the legations if they refused to pay voluntarily.

Mr. Justice Locke, in the present case, was of the opinion that the *Foreign Legations* case had settled the question of immunity in respect to taxation even though the latter case "related to property of different nature."[16] Mr. Justice Rand is not quite as certain about the applicability of the *Foreign Legations* case, and although he does cite it as authority, he seems to rely more on common sense and practicality as the real basis of his judgment. One must always find the rule which "reason and good sense . . . would prescribe."[17] Each issue must be determined on the merit of its facts and implications "in the international sphere". Rand J. goes on to cite the *Armed Forces* case,[18] in which the United States was held to have exclusive jurisdiction in criminal matters over its soldiers stationed in Canada, as authority for the proposition that a state must be allowed to excercise the "powers of high sovereign character" in the unique circumstances of national defence. "Public works of this sort are not ordinarily considered subjects of taxation. Their object is to preserve the agencies that produce national wealth, the source of taxation."[19]

Although on its surface the decision would appear to engender little controversy, and to conform to settled principle of law, nevertheless it does raise some interesting points and important implications. It could well be argued — certainly on the basis of Justice Rand's judgment — that the case was decided upon the expediency and the practicality of defense needs rather than on the basis of international law principles of sovereign immunity — a kind of *ex aequo et bono* ground. If so, one wonders what would be the attitude of Canadian courts if tax-exemptions would be claimed by American state-owned companies dealing in non-defense matters. If again, the *ratio* of the case is immunity because of the special character of defense works, it

[15][1943] S.C.R. 208.
[16][1958] S.C.R. 263, at 278.
[17]*Ibid,* at 269.
[18][1943] S.C.R. 483.
[19][1958] S.C.R. 263, at 270.

would be interesting to speculate just how far this immunity would extend. For example, could the federal government control — by virtue of section 91(7) of the British North America Act and by virtue of the principles laid down in this case — the prices of defense materials sold, in a province under provincial law, to foreign sovereigns? In other words, does the immunity granted in this case extend the powers of the Dominion government vis-à-vis the Provinces?

This question raises a fine constitutional issue. Little mention is made of it by any of the judges in the case. Only Justice Rand mentions, *en passant*, the existence of the federal Order-in-Council inviting the United States government to proceed with the construction of the installations, and permitting its agent full immunity from any local jurisdiction. *Prima facie* this would appear to be an encroachment on provincial rights, but quite obviously none of the judges think so. Locke points out that the federal government was legislating under its defense powers (s. 91(7) of the British North America Act) when it issued the Order-in-Council. Here again is evidence of reasoning based on the peculiar defense circumstances of the case.

Mr. Justice Rand, however, implies that it is by virtue of international law principles that the government was justified in granting the exemptions. If so, it must be presumed that international law is incorporated into the domestic law of the province. This would seem to be the basis of the judgment in respect to the provincial-federal question. It still leaves open, however, the question of the constitutionality of the Order-in-Council. But this was not the issue in the case and the court did not rule on it.

As all the judges rely quite heavily on the *Foreign Legations* case, it is interesting to note what was said there regarding the issue of extension of federal powers into the provincial field. Taschereau J., in commenting on this question in that case, said to prohibit a municipality from assessing taxes for its purpose "would in no way clothe the Dominion with any enlarged competence . . . [nor] would it extend the field of federal legislative power."[20] The other judges who touched on this question agreed. The Privy Council, moreover, is further authority for this proposition: "No further legislative competence is obtained by the Dominion from its accession to international status and the consequent increase in the scope of the executive function."[21]

If one accepts that international law is part of provincial law the solution to the question of federal encroachment is quite simple. In fact, it may be disregarded altogether. One need only look at the New Brunswick statute relevant to the taxation in question. Since this statute deals with taxation only in general terms, one can readily apply the presumption of statute interpretation that international law rules must be adhered to unless specifically excluded

[20][1943] S.C.R. 208, at 249.

[21]*AG of Canada v. AG of Ontario et al.* [1937] A.C. 326, at 352.

with the result that immunity of foreign sovereigns from taxation applies vis-à-vis the provinces as much as it applies vis-à-vis the Dominion.

As a final question one must ask what theory of immunity this case represents. The answer to this question is important as it may have far reaching consequences upon American-Canadian commercial and defense relations. As mentioned above, it could well be argued that the judgment was rendered on the basis of the defense character of the installations in question. Yet, undoubtedly, there emerges from the judgments of Justices Rand and Locke a fairly consistent and conservative doctrine of immunity, not unlike that of the past century. While in defense matters such doctrine is undoubtedly necessary, it could, nevertheless, seriously hamper commercial relations between Canada and foreign, state-owned companies. Although the executive is bent on reducing the concept of immunity in commercial transactions of this type, the courts, as evidenced by the present case, have not followed suit. It is imperative that this situation be remedied — preferably through international agreements.

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