

1960  
\*Dec. 5

CANADIAN NATIONAL RAILWAY }  
COMPANY (*Plaintiff*) ..... }

APPELLANT;

1961  
Jan. 24

AND

NORTH-WEST TELEPHONE COM- }  
PANY (*Defendant*) ..... }

RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

*Crown—Telephone and telegraph system—Breach of contract—Motion for interlocutory injunctions—Jurisdiction of Exchequer Court—Exchequer Court Act, R.S.C. 1962, c. 98, s. 17.*

The Crown owned a portion of a certain telephone and telegraph system running between Edmonton, Alberta and Fairbanks, Alaska. The management and operation of this section was acquired by the appellant company. Certain other telephone facilities in northern British Columbia and in the Yukon, also owned by the Crown, were purchased by the respondent company. The latter agreed to route all traffic over the facilities of the appellant and also agreed not to interconnect, without consent, with any other facilities, which would result in bypassing the appellant's system.

Appellant alleged that the respondent breached the agreement, resulting in damage to the appellant, and immediately after delivering a statement of claim launched a motion for interlocutory injunctions. The Exchequer Court dismissed the motion on the ground that it lacked jurisdiction to entertain the action. On behalf of the appellant it was argued that this was a case in which "the claim arises out of a contract entered into by or on behalf of the Crown" within the meaning of s. 17 of the *Exchequer Court Act*.

*Held:* The appeal and the action should be dismissed.

From a reading of s. 18 of the old *Exchequer Court Act* before it was replaced by the precursor of the present s. 17, the conclusion was inescapable that there was no intention to confer exclusive jurisdiction on the Exchequer Court to adjudicate upon claims by the Crown arising out of contract,—thereby excluding the jurisdiction of provincial courts, or to restrict the well-recognized privilege of the Crown to choose its own Court. Section 17 must be restricted to claims against the Crown in the same way that old s. 18 was restricted. Any different construction would have the effect of compelling the Crown to sue in contract in the Exchequer Court.

Section 29(d) does not give jurisdiction to the Exchequer Court unless "the Crown is plaintiff or petitioner" *eo nomine*. Those words do not include an action in which the plaintiff or petitioner is not the Crown, but is an entity such as the appellant, even if the rights sought to be enforced may have been derived from the Crown.

The provisions of s. 44(1) and (3) of the *Canadian National Railway Act* did not assist the appellant because, while such a suit as that brought by the appellant may be brought and be heard in any court of competent jurisdiction, the question would still remain as to what is such a court,—and that was already answered.

\*PRESENT: Kerwin C.J. and Taschereau, Cartwright, Fauteux, Abbott, Martland and Ritchie JJ.

APPEAL from an order of Cameron J. in the Exchequer Court of Canada, dismissing a motion for interlocutory injunctions. Appeal and action dismissed.

*C. C. Locke*, for the plaintiff, appellant.

*K. E. Eaton*, for the defendant, respondent.

*D. S. Maxwell*, for the Attorney General of Canada, intervenant.

1961  
CANADIAN  
NATIONAL  
RAILWAY  
Co.  
v.  
NORTH-  
WEST  
TELEPHONE  
Co.  
—

The judgment of the Court was delivered by

THE CHIEF JUSTICE:—By leave of a member of this Court Canadian National Railway Company appeals from an order of Cameron J. dismissing a motion for interlocutory injunctions in an action in the Exchequer Court of Canada in which the appellant is plaintiff and the respondent, North-West Telephone Company, is defendant. The motion was launched immediately after the delivery of the statement of claim, whereupon the respondent served notice that a preliminary objection would be taken that the Exchequer Court had no jurisdiction to entertain the action. When the motion came on for argument, counsel for the Crown in the right of Canada, with the consent of both parties, appeared as *amicus curiae*. He supported the respondent's preliminary objection which Cameron J. sustained. Leave was granted the Attorney General of Canada to intervene in the appeal; a factum was filed on his behalf and he was represented by counsel on the argument. Notice of the appeal was served upon the Attorneys General of the Provinces but none asked to intervene and none was represented before us.

For the purposes of this appeal the allegations in the statement of claim are taken as true and the relevant ones are set forth substantially in the language used by the draftsman.

The respondent is incorporated by a private Act of the Legislature of British Columbia. The appellant is a company duly incorporated and constituted according to the laws of Canada by special acts of the Parliament of Canada as more particularly set out in s. 3 of c. 29 of the Statutes of Canada 1955, which section reads:

The company incorporated under the name of Canadian National Railways Company by chapter 13 of the statutes of 1919, the company formed by the amalgamation of Canadian National Railways Company and the Grand Trunk Railway Company of Canada, and the Canadian National

1961  
CANADIAN  
NATIONAL  
RAILWAY  
Co.  
v.  
NORTH-  
WEST  
TELEPHONE  
Co.  
Kerwin C.J.

Railway Company referred to in chapter 33 of the statutes of 1932-33, are hereby declared to be and to have been one and the same company, and the said company is hereby continued under the name of Canadian National Railway Company.

In 1945 the Government of Canada had acquired title to a portion of a certain telephone and telegraph system running between Edmonton, Alberta and Fairbanks, Alaska, known as the Alaska Highway Telephone System. By Order in Council P.C. 4251, dated October 24, 1947, the management and operation of that portion of the system was turned over to the Canadian National Telegraph Company, a subsidiary of the appellant and the said portion was named the North-West Communications System. By Order in Council P.C. 1979, of April 26, 1949, the management and operation of that system by the Canadian National Telegraph Company was continued. On March 18, 1958, Order in Council P.C. 420 recited that it was proposed that the said system be placed on an entrustment basis similar to that of government railways entrusted to the Canadian National Railway Company in respect of management and operation, that is, title to remain in the Government of Canada, but the Canadian National Railway Company to assume direct responsibility for future capital requirements for any annual operating deficits out of its general revenues and retaining any profits that might develop. Order in Council P.C. 420 of March 18, 1958, revoked Orders in Council P.C. 4251 of October 24, 1947, and P.C. 1959 of April 26, 1949, and under the authority of s. 19 of the *Canadian National Railways Act* entrusted the North-West Communications System, as from and after April 1, 1958, in respect of management and operation thereof, to the appellant upon the terms specified in the last mentioned Act.

For some years prior to July 4, 1956, the Government of Canada owned certain telephone facilities in the northern part of British Columbia and in the Yukon, which were operated by an agency of the Crown known as "Government Telephone and Telegraph Service", including certain telephone facilities in Dawson Creek, Pouce Coupe and Fort St. John, all in British Columbia.

On July 4, 1956, an agreement was entered into between Her Majesty the Queen in the right of Canada, represented by the Minister of Transport, and the present respondent, whereby Her Majesty sold and the respondent purchased those telephone facilities. By clauses 6 and 7 of this agreement the respondent agreed to route after July 1, 1956, by way of the facilities of the system between Dawson Creek and Edmonton all long distance telephone traffic and private wire leases which, in accordance with accepted routing and leasing practices, would normally be so routed; and by which the respondent undertook and agreed not to interconnect, without the previous consent in writing of the Minister, any telecommunication facilities extending from the Dawson Creek-Fort St. John area with any telecommunication facilities of the Alberta Government Telephone or others, which would result in by-passing the facilities of the North-West Communications System between Dawson Creek and Edmonton.

Grande Prairie, Alberta, lies on the direct communication route between Dawson Creek and Edmonton and on or about December 20, 1959, the respondent set up telephone toll circuits between Dawson Creek, British Columbia, and Grande Prairie, Alberta, by connecting with the Alberta Government Telephones at a point on or near the British Columbia-Alberta border. From December 21, 1959, no long distance telephone traffic or private wire traffic has passed over the facilities of the plaintiff company.

Since on or about December 21, 1959, the respondent has routed all telephone messages between the Fort St. John, Pouce Coupe and Dawson Creek areas and the Grande Prairie Telephone Exchange area over its own toll circuits or those of the Alberta Government Telephones by means of the connection referred to in the preceding paragraph and has by-passed the facilities of the North-West Communications System. This connection was made without the previous consent in writing of the Minister. By so doing the respondent is said to have breached clauses 6 and 7 of the agreement of July 4, 1956, and, after alleging damage as a result of these continuing breaches, the appellant claims restraining and mandatory injunctions.

1961  
CANADIAN  
NATIONAL  
RAILWAY  
Co.  
v.  
NORTH-  
WEST  
TELEPHONE  
Co.  
Kerwin C.J.

1961  
CANADIAN  
NATIONAL  
RAILWAY  
Co.  
v.  
NORTH-  
WEST  
TELEPHONE  
Co.  
Kerwin C.J.

On behalf of the appellant it is argued that the present case is one in which “the claim arises out of a contract entered into by or on behalf of the Crown”, within the meaning of the last clause of s. 17 of the *Exchequer Court Act*, R.S.C. 1952, c. 98, which section reads as follows:

The Exchequer Court has exclusive original jurisdiction in all cases in which the land, goods or money of the subject are in the possession of the Crown, or in which the claim arises out of a contract entered into by or on behalf of the Crown.

As was pointed out in the Court below, the forerunner of this section was s. 18 of the *Exchequer Court Act*, R.S.C. 1927, c. 34, as enacted by s. 1 of c. 5 of the Statutes of 1949 (2nd session). This last mentioned section repealed s. 18 of R.S.C. 1927, c. 34, which had provided:

The Exchequer Court shall have exclusive original jurisdiction in all cases in which demand is made or relief sought in respect of any matter which might, in England, be subject of a suit or action against the Crown, and for greater certainty, but not so as to restrict the generality of the foregoing terms, it shall have exclusive original jurisdiction in all cases in which the land, goods or money of the subject are in the possession of the Crown, or in which the claim arises out of a contract entered into by or on behalf of the Crown.

When one looks at s. 18 of the old *Exchequer Court Act* before it was replaced by the precursor of s. 17 in 1949, the conclusion is inescapable that there was no intention to confer exclusive jurisdiction on the Exchequer Court to adjudicate upon claims by the Crown arising out of contract,—thereby excluding the jurisdiction of provincial courts, or to restrict the well-recognized privilege of the Crown to choose its own Court. I agree with Cameron J. that s. 17 must be restricted to claims against the Crown in the same way that old s. 18 was restricted. Any different construction would have the effect of compelling the Crown to sue in contract in the Exchequer Court.

This is sufficient to dispose of the appeal and, therefore, nothing need be said as to whether the appellant’s claim arises out of a contract entered into by or on behalf of the Crown.

Many of the appellant’s contentions based upon s. 29(d) of the *Exchequer Court Act*:

The Exchequer Court has and possesses concurrent original jurisdiction in Canada

- .....  
(d) in all other actions and suits of a civil nature at common law or equity in which the Crown is plaintiff or petitioner.

were abandoned on the argument of the appeal, but counsel did submit that, even if the appellant were not a Crown agent, there was a Crown vesting or statutory assignment of a right entitling the appellant to exercise the Crown's prerogative of choosing its forum and to sue for the enforcement of that right in its own name or in the name of the Crown. Even if that proposition is correct, as to which it is not necessary to express an opinion, s. 29(d) does not give jurisdiction to the Exchequer Court to deal with the matter unless "the Crown is plaintiff or petitioner" *eo nomine*. Those words do not include an action in which the plaintiff or petitioner is not the Crown, but is an entity such as the appellant, even if the rights sought to be enforced may have been derived from the Crown.

1961  
CANADIAN  
NATIONAL  
RAILWAY  
Co.  
v.  
NORTH-  
WEST  
TELEPHONE  
Co.  
Kerwin C.J.

Reference was made by counsel for the appellant to s. 44 of the *Canadian National Railways Act*, c. 29 of the Statutes of 1955, subss. (1) and (3) of which read as follows:

44. (1) Actions, suits or other proceedings by or against the National Company in respect of its undertakings or in respect of the operation or management of Canadian Government Railways, may, in the name of the National Company, be brought in and may be heard by any judge or judges of any court of competent jurisdiction in Canada, with the same right of appeal as may be had from a judge sitting in court under the rules of court applicable thereto.

.....

(3) Any court having under the statutes or laws relating thereto jurisdiction to deal with any cause of action, suit or other proceeding, when arising between private parties shall, with respect to any similar cause of action, suit or other proceeding by or against the National Company, be a court of competent jurisdiction under the provisions of this section.

These provisions do not assist the appellant, firstly, because it is clear, in view of the definition of "Canadian Government Railways" in s. 2(b) of the *Canadian National Railways Act*, that that term includes the management and operation of the property, works or interests and the powers, rights or privileges, the management and operation of which are entrusted to the National Company,—and which definition is certainly wide enough to include the management and operation alleged in the statement of claim,—and, therefore, an action such as this might be brought in the name of the appellant; secondly, because, while any such suit by the

1961  
CANADIAN  
NATIONAL  
RAILWAY  
Co.  
v.  
NORTH-  
WEST  
TELEPHONE  
Co.  
Kerwin C.J.

appellant may be brought and be heard in any court of competent jurisdiction, the question would still remain as to what is such a court,—and that has already been answered.

The appeal and the action should be dismissed with costs, except that there should be no costs to or against the Attorney General of Canada.

*Appeal and action dismissed with costs.*

*Solicitors for the plaintiff, appellant: Ladner, Downs, Ladner, Locke, Clarke & Lenox, Vancouver.*

*Solicitors for the defendant, respondent: Gowling, MacTavish, Osborne & Henderson, Ottawa.*

---