

CANADA / JUDGMENT

McNamara Construction et al. v. The Queen

[1977] 2 SCR 654

COURT

Supreme Court of Canada

DECIDED

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McNamara Construction et al. v. The Queen Collection Supreme Court Judgments Date 1977-01-25 Report

[1977] 2 SCR 654 Judges Laskin, Bora; Martland, Ronald; Judson, Wilfred; Ritchie, Roland Almon; Spence, Wishart Flett; Pigeon, Louis-Philippe; Dickson, Robert George Brian; Beetz, Jean; de Grandpré, Louis-Philippe On appeal from Federal Court of Appeal Subjects Courts Decision Content SUPREME COURT OF CANADA McNamara Construction et al. v. The Queen, [1977] 2 S.C.R. 654 Date: 1977-01-25 McNamara Construction (Western) Limited and Fidelity Insurance Company of Canada (Defendants) Appellants; and Her Majesty The Queen (Plaintiff) Respondent; and J. Stevenson & Associates and Stevenson, Raines, Barrett, Hutton, Seaton & Partners (Defendants) Respondents; and Lockerbie & Hole Western Limited (Third Party) Respondent; and J. Stevenson & Associates and Stevenson, Raines, Barrett, Hutton, Seaton & Partners (Defendants) Appellants; and Her Majesty The Queen (Plaintiff) Respondent. 1976: November 16; 1977: January 25. Present: Laskin C.J. and Martland, Judson, Ritchie, Spence, Pigeon, Dickson, Beetz and de Grandpré JJ. ON APPEAL FROM THE FEDERAL COURT OF APPEAL Courts — Federal Court jurisdiction — Proceedings to be based on existing and applicable federal law — Jurisdiction in contracts of the Crown in right of Canada — Federal Court Act, R.S.C. 1970, 2nd Supp., c. 10, s. 17 — B.N.A. Act, 1867, s. 101 — Public Works Act, R.S.C. 1970, c. P-38, s. 16(1). The Crown in right of Canada entered into a construction contract with appellant McNamara, an Alberta company. Appellant Fidelity Insurance Company provided the surety bond. This contract was preceded by a consulting contract between the Crown and appellant J. Stevenson & Associates, an Alberta firm of architects and engineers which prepared the plans, specification and tender documents on which the construction contract was based. The Crown, alleging a breach of the respective contracts brought action against McNamara and Stevenson and against Fidelity, under its surety contract, in the Federal Court. McNamara and Fidelity gave notice of a claim-over against their co-defendant Stevenson for negligence in the preparation of the plans, served a third party notice on a sub-contractor and made a separate motion to have the statement of claim struck out for want of

jurisdiction. The applications were dismissed by the trial judge who in other proceedings set aside the notice of claim over and the third party notice on the ground that the Federal Court had no jurisdiction to entertain the claims embodied in them. The Federal Court of Appeal agreed. In the Supreme Court appellants gave notice of a constitutional question and the main issue was whether the Federal Court has jurisdiction over a subject at the suit of the Crown in right of Canada which seeks to enforce in that Court a claim for damages for breach of contract. Held: The appeal should be allowed. It is a prerequisite under s. 101 of the B.N.A. Act to the exercise of jurisdiction by the Federal Court that there be existing and applicable federal law which can be invoked to support the proceedings before it. The common law rule that the Crown may sue in any Court having jurisdiction in the particular matter developed in unitary England, has no unlimited application to federal Canada where legislative and executive powers are divided between central and provincial levels of legislature and government and where there is a constitutional limitation on the power of Parliament to establish Courts. As there was neither a statutory nor a common law basis for the Crown's suit the Federal Court did not have jurisdiction in respect of the contract claims asserted by the Crown. It was not the Crown's liability that was involved but that of the other party to a bilateral contract. *Quebec North Shore Paper Company v. Canadian Pacific Limited*, [1977] 2 S.C.R. *infra* followed; *Farwell v. The Queen* (1893), 22 S.C.R. 553 not followed; *R. v. Farwell* (1887), 14 S.C.R. 392; *Consolidated Distilleries Limited v. Consolidated Exporters Corporation Limited*, [1930] S.C.R. 531; *Consolidated Distilleries Limited v. The King*, [1933] A.C. 508 referred to. APPEALS from judgments of the Federal Court of Canada[1] sustaining rulings of Collier J. refusing motions to strike out a statement of claim for want of jurisdiction in the Federal Court of Canada in actions on contract taken by the Crown in right of Canada. Appeals allowed. Appeal No. 1: J. J. Robinette, Q.C., and D. A. Brown, for the appellants. G. W. Ainslie, Q.C., and I. G. Whitehall, for the respondent Attorney General of Canada. D. O'Brien and W. D. Rice, for the respondent J. Stevenson & Associates. J. H. Waite, Q.C., for the respondent, Lockerbie & Hole Western Limited. W. Mundell, Q.C., and T. H. Wickett, for the intervenant Province of Ontario. M. H. Smith, for the intervenant Province of British Columbia. W. Henkel, Q.C., for the intervenant Province of Alberta. Appeal No. 2: C. D. O'Brien and W. D. Rice, for the appellants. G. W. Ainslie, Q.C., and I. G. Whitehall, for the respondent. The judgment of the Court was delivered by THE CHIEF JUSTICE—These two appeals, which are here by leave of this Court, and which were argued together, raise an important question of Federal Court jurisdiction under s. 17(4)(a) of the Federal Court Act, 1970-71-72 (Can.), c. 1. The importance of the question is attested by the fact that the appellants gave notice of a constitutional issue which was formulated as follows: Is s. 17(4) of the Federal Court Act 1970-71-72 (CAN), c. I *intra vires* in so far as it purports to vest jurisdiction in the Federal Court of Canada to entertain a claim for relief by the Crown in Right of Canada in proceedings of a civil nature regardless of the nature of such proceedings and, in particular, (1) does s. 17(4) validly confer jurisdiction upon the Federal Court to entertain a claim for damages by the Crown in Right of Canada against a construction company under a contract to build a young offenders institution and, if so, (2) may this jurisdiction extend

to a claim over by one defendant against a co-defendant and also to claims for indemnity against third parties and if so, does it in fact so extend? The facts giving rise to this issue may be shortly stated. The Crown in right of Canada entered into a contract with the defendant appellant McNamara Construction (Western) Limited, an Alberta company, for the construction of a Young Offenders Institution in Drumheller, Alberta. Fidelity Insurance Company of Canada provided a surety bond to the Crown in respect of McNamara's obligations under the construction contract. This contract was preceded by a consulting contract entered into between the Crown and J. Stevenson & Associates, an Alberta firm of architects and engineers which prepared the plans, specifications and tender documents upon which the construction contract was based. Alleging a breach of their respective contracts by Stevenson and by McNamara, the Crown brought action against them in the Federal Court claiming against each, in the alternative, damages for the breach and claiming against Fidelity under its surety bond. In the same action, McNamara and Fidelity gave notice, pursuant to Federal Court Rule 1730, of a claim over against their co-defendant Stevenson, alleging negligence on Stevenson's part in the preparation of the plans. McNamara and Fidelity also served a third party notice, pursuant to Federal Court Rule 1726, on Lockerbie & Hole Western Limited, a subcontractor, claiming relief over by reason of alleged negligence or breach of contract by the third party. The appellants McNamara and Stevenson made separate motions to the Trial Division of the Federal Court to have the statement of claim struck out because of a want of jurisdiction to entertain the action against them. Collier J. dismissed these applications but, in other proceedings, he set aside the notice served pursuant to Federal Court Rule 1730, and also the third party notice served pursuant to Federal Court Rule 1726 on the ground that the Federal Court had no jurisdiction to entertain the claim over by McNamara and Fidelity against their co-defendants Stevenson or the third party claim by McNamara and Fidelity against Lockerbie & Hole Western Limited. These rulings were sustained by the Federal Court of Appeal in reasons delivered by Thurlow J. and in concurring reasons by Ryan J. and by Smith D.J. Shortly put, the main issue in these appeals is whether the Federal Court of Canada may be invested with jurisdiction over a subject at the suit of the Crown in right of Canada which seeks to enforce in that Court a claim for damages for breach of contract. The basis for the conferring of any such jurisdiction must be found in s. 101 of the British North America Act which, inter alia, confers upon Parliament legislative power to establish courts "for the better administration of the laws of Canada". In *Quebec North Shore Paper Company v. Canadian Pacific Limited*[2], (a decision which came after the judgments of the Federal Court of Appeal in the present appeals), this Court held that the quoted provisions of s. 101, make it a prerequisite to the exercise of jurisdiction by the Federal Court that there be existing and applicable federal law which can be invoked to support any proceedings before it. It is not enough that the Parliament of Canada have legislative jurisdiction in respect of some matter which is the subject of litigation in the Federal Court. As this Court indicated in the *Quebec North Shore Paper Company* case, judicial jurisdiction contemplated by s. 101 is not co-extensive with federal legislative jurisdiction. It follows that the mere fact that

Parliament has exclusive legislative authority in relation to "the public debt and property" under s. 91(1A) of the British North America Act and in relation to "the establishment, maintenance and management of penitentiaries" under s. 91(28), and that the subject matter of the construction contract may fall within either or both of these grants of power, is not enough to support a grant of jurisdiction to the Federal Court to entertain the claim for damages made in these cases. Section 17(4) of the Federal Court Act is the foundation for the assertion of jurisdiction herein at the suit of the Crown. Section 17(1) and (2) invest the Trial Division of the Federal Court with jurisdiction in actions against the Crown, and no issue arises here as to the validity of those provisions. Nor are we concerned here with the validity of s. 17(3) which provides for jurisdiction through agreement in certain situations between the Crown and a subject, and also in proceedings to resolve conflicting claims in respect of an alleged obligation of the Crown. Section 17(4) reads as follows:

(4) The Trial Division has concurrent original jurisdiction

(a) in proceedings of a civil nature in which the Crown or the Attorney General of Canada claims relief; and

- (b) in proceedings in which relief is sought against any person for anything done or omitted to be done in the performance of his duties as an officer or servant of the Crown. A comparable predecessor provision was s. 29(d) of the Exchequer Court Act, R.S.C. 1952, c. 98 which gave jurisdiction to the Exchequer Court in all other actions and suits of a civil nature at common law or equity in which the Crown is plaintiff or petitioner. In the Quebec North Shore Paper Company case, this Court observed, referring to this provision, that the Crown in right of Canada in seeking to bring persons into the Exchequer Court as defendants must have founded its action on some existing federal law, whether statute or regulation or common law. What must be decided in the present appeals, therefore, is not whether the Crown's action is in respect of matters that are within federal legislative jurisdiction but whether it is founded on existing federal law. I do not think that s. 17(4), read literally, is valid federal legislation under s. 101 of the British North America Act in purporting to give jurisdiction to the Federal Court to entertain any type of civil action simply because the Crown in right of Canada asserts a claim as plaintiff. The common law rule that the Crown may sue in any Court having jurisdiction in the particular matter, developed in unitary England, has no unlimited application to federal Canada where legislative and executive powers are distributed between the central and provincial levels of legislature and government and where, moreover, there is a constitutional limitation on the power of Parliament to establish Courts. *Farwell v. The Queen*[3] appears to take a different view, one that would support the respondent's position on a literal and unqualified application of s. 17(4). That case was the second appeal to this Court, the first being in *The Queen v. Farwell*[4], in respect of an issue of title to land in the railway belt in British Columbia. The appellant claimed title under a provincial Crown grant and failed in that claim. Nonetheless, he registered his grant and sought to obtain an indefeasible certificate of title so as to defeat grantees from the Crown in right of Canada. Thereupon the Attorney-General of Canada

exhibited an information in the Exchequer Court for an order directing the appellant to execute a surrender or conveyance of the land. It was so ordered by the Exchequer Court. Although it was arguable that the Exchequer Court, invested with jurisdiction in the terms of s. 29 (d) of the Exchequer Court Act quoted above, could properly entertain the Crown's action because it related to federal Crown Land, King J. who spoke in this Court for the majority proceeded on a wider basis. I quote his reasons at pp. 561-2 of 22 S.C.R., as follows: The remaining objection is that the Parliament of Canada had no power to give to the Exchequer Court original jurisdiction "in all actions and suits of a civil nature at common law or equity in which the crown is plaintiff or petitioner." It is contended that the power of Parliament, in the establishment of courts, is limited by the British North America Act to the establishing of a court of appeal or other courts for the better administration of the laws of Canada. But "the King has the undoubted privilege of suing in any court he pleases." Chitty on Prerogatives (p. 244). And where the matter in suit in another court concerns the revenue, or touches the profit of the King, he has the right to remove the suit into the Exchequer. See the illustrations given of this in *Cawthorne v. Campbell* (1 Anstruther, p. 205 in note). This privilege is said to be "without the least mixture of prerogative process; or whether it is a proper subject for prerogative process only to act upon or not, that is not an ingredient" (p. 218). It follows, in my mind, that the crown, by and with the advice and consent of the Houses of Parliament, must have the right (a right which it would need clear words to take away) to enact that all actions and suits of a civil nature at common law or equity, in which the crown in right of the Dominion is plaintiff or petitioner, may be brought in the Exchequer Court—the right to establish which with its other branches of jurisdiction is undisputed and indisputable. I must, with respect, disagree with that reasoning, which adapts to federal Canada a unitary conception, and makes the jurisdiction [sic] of a federal trial Court over a subject of the Crown depend solely on the Crown asserting a claim as plaintiff. In my opinion, *Farwell v. The Queen* can no longer be regarded as an authority on the interpretation of what was s. 29 (d) of the Exchequer Court Act and, similarly, no longer governs as to the comparable terms of s. 17(4) of the Federal Court Act. I observe, moreover, that it appears to have become a forgotten case, not having been considered either in *Consolidated Distilleries Limited v. Consolidated Exporters Corporation Ltd.*[5], or in *Consolidated Distilleries Limited v. The King*[6], cases in which it could reasonably have been expected that the *Farwell* case would be taken into account, certainly in the second of these cases if not in the first. The two cases were considered in the *Quebec North Shore Paper Company* case and, save for an observation about the second case later in these reasons, I need not say anything further about them here. What remains for consideration here on the question of jurisdiction is whether there is applicable federal law involved in the cases in appeal to support the competence of the Federal Court to entertain the Crown's action, both with respect to the claim for damages and the claim on the surety bond. In the *Quebec North Shore Paper Company* case, this Court referred to what I may for convenience call Crown law as follows: ... It should be recalled that the law respecting the Crown came into Canada as part of the public or constitutional law of Great Britain, and there can be no pretence that that law is provincial law. In so far as there is a common law associated with

the Crown's position as a litigant it 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 Legislature. Crown law does not enter into the present case. This passage cannot be taken as saying that it is enough that the Crown is a party to a contract, on which it is suing as a plaintiff, to satisfy the requirement of applicable federal law. The situation is different if Crown liability is involved because in that respect there were existing common law rules respecting Crown liability in contract and immunity in tort, rules which have been considerably modified by legislation. Where it is not the Crown's liability that is involved but that of the other party to a bilateral contract, a different situation prevails as to the right of the Crown to compel that person to answer process issued out of the Federal Court. It was the contention of the Attorney-General of Canada on behalf of the Crown that the construction contract, being in relation to a public work or property, involved on that account federal law. What federal law was not indicated. Certainly there is no statutory basis for the Crown's suit, nor is there any invocation by the Crown of some principle of law peculiar to it by which its claims against the appellants would be assessed or determined. Counsel for the Attorney-General was candid enough to say that his position had to be that jurisdiction existed in the Federal Court in respect of any contract claim asserted by the Crown. I have already indicated that this is untenable and, clearly, s. 17(4) would be ultra vires if that was its reach. It can be valid only in so far as its terms are limited in accordance with what s. 101 of the British North America Act prescribes. I take the same view of the Crown's claim on the bond as I do of its claim against McNamara for damages. It was urged that a difference existed because (1) s. 16(1) of the Public Works Act, now R.S.C. 1970, c. P-38 obliges the responsible Minister to obtain sufficient security for the due performance of a contract for a public work and (2) *Consolidated Distilleries v. The King*, supra, stands as an authority in support of the Crown's right to invoke the jurisdiction of the Federal Court where it sues on a bond. Neither of these contentions improves the Crown's position. Section 16(1) of the Public Works Act stipulates an executive or administrative requirement that a bond be taken but prescribes nothing as to the law governing the enforcement of the bond. The Consolidated Distilleries case involved an action on a bond given pursuant to the federal Inland Revenue Act and, as the Privy Council noted "the subject matter of the actions directly arose from legislation of Parliament in respect of excise": see [1933] A.C. 508 at p. 521. I conclude, therefore, that the appellants' challenge to the jurisdiction of the Federal Court must succeed and that their appeals must, accordingly, be allowed with costs throughout. The judgments of the Courts below should be set aside and the statements of claim served on the appellants should be struck out. In view of this conclusion, the consequential proceedings between the co-defendants and the third party proceedings must likewise fall, and it is unnecessary to deal with the issues raised as to their validity or propriety. I would, however, observe that if there had been jurisdiction in the Federal Court there could be some likelihood of proceedings for contribution or indemnity being similarly competent, at least between the parties, in so far as the supporting federal law embraced the issues arising therein. I do not think that this is a case for costs as between the co-defendants nor in respect of the third

party proceedings. There will also be no order as to costs to or against any of the intervenors. Appeal allowed with costs. Solicitors for the appellants: Davies, Ward & Beck, Toronto. Solicitor for the respondent, Her Majesty The Queen: D. S. Thorson, Ottawa. Solicitors for J. Stevenson & Associates and Stevenson, Raines, Barrett, Hutton, Seaton & Partners: Jones, Black and Company, Calgary. Solicitors for the respondent, Lockerbie & Hole Western Limited: Harradence & Company, Calgary. Solicitor for the Attorney General for Alberta, intervenant: William Henkel, Edmonton. Solicitor for the Attorney General for British Columbia, intervenant: David H. Vickers, Victoria.

- [1] [1976] 2 F.C. 292.
- [2] [1977] 2 S.C.R. *infra*.
- [3] (1893), 22 S.C.R. 553.
- [4] (1887), 14 S.C.R. 392.
- [5] [1930] S.C.R. 531.
- [6] [1932] S.C.R. 419 *revd.* [1933] A.C. 508.

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