WEWAYAKUM INDIAN BAND v. CANADA

Federal Court of Appeal, Hugessen, Urie and MacGuigan JJ., March 2, 1987

John D. McAlpine, Q.C. and David R. Paterson, for the defendants (appellants)
Irwin G. Nathanson, Q.C. and Anna K. Fung, for the plaintiffs (respondents)
No one appearing for Her Majesty the Queen

The plaintiff Indian band brought an action against the federal Crown for a declaration that its lands had been unlawfully granted to another band (second defendants). The plaintiffs joined this action with a claim against the defendant band for an injunction restraining them from trespassing on the lands in question. The land in dispute was an Indian reserve, title to which was vested in the federal Crown. The defendant band moved that the action against it be dismissed for want of jurisdiction. That motion was denied by Joyal J. in the Trial Division. The band appealed.

Held: Appeal dismissed.

Per HUGESSEN J. (URIE J. concurring; MACGUIGAN J. concurring in part):

1. The essential requirements to support a finding of jurisdiction in the Federal Court were (1) that there be a statutory grant of jurisdiction by the federal Parliament; (2) an existing body of federal law which was essential to the disposition of the case; (3) the law on which the case was based must be "a law of Canada" as that phrase was used in s.101 of the Constitution Act, 1867. These requirements were met: jurisdiction was given by s.17(3)(c) of the Federal Court Act, R.S.C. 1970, (2nd Supp.), c.10 which covered cases where there were competing claims to an obligation owed by the federal Crown; the Indian Act and the law of aboriginal title were federal laws essential to the disposition of the case; the Indian Act and the law of aboriginal title were "laws of Canada" as that phrase was used in s.101 of the Constitution Act, 1867.

2. It was clear that the action constituted a proceeding, that there was a dispute and that the Crown was under an obligation in the dispute, that obligation being to hold reserve lands for the use and benefit of the band for which it was originally set apart. There were conflicting claims in respect of the Crown's obligation.

Per MACGUIGAN J.:

The statutory grant of jurisdiction to the Federal Court arose not only from s.17(3)(c), but also from s.17(1). When a claim against the Crown is made, s.17(1) is broad enough to allow a co-defendant to be sued along with the Crown.

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HUGESSEN J.: This appeal raises yet again the question of the limits of this court's jurisdiction.

The plaintiffs sue as representing the Campbell River Indian Band. They allege that, beginning in the year 1888 and ever since, the federal Crown has wrongfully denied to the Campbell River Band the use and occupation of a piece of land known as Reserve No. 12. Instead, they say, the Crown wrongfully gave Reserve No. 12 to the second defendants, who are sued as representing another band, known as Cape Mudge Indian Band. The land in dispute is an Indian reserve title to which vests in the federal Crown but the use and benefit of which should be with the plaintiff band rather than the defendant band. As against the Crown, the action seeks a declaration, an accounting and damages; as against the defendant band, it seeks a declaration and an injunction. The defendant band has moved that the action be dismissed as against it for want of jurisdiction. That motion was denied by Joyal J. in the Trial Division, whence the present appeal.

Notwithstanding the quantities of judicial ink that have been expended on the question of this court's jurisdiction, I am relieved of a detailed study of all the jurisprudence by the most recent decision of the Supreme Court on the matter in ITO-International Terminal Operations Ltd. v. Milda Electronics Inc., [1986] 1 S.C.R. 752. In that case, McIntyre J., speaking for the majority, gave what, I may say with respect, was a clear and helpful synthesis of the state of the law. He said:

> The general extent of the jurisdiction of the Federal Court has been the subject of much judicial consideration in recent years. In Quebec North Shore Paper Co. v. Canadian Pacific Ltd., [1977] 2 S.C.R. 1054, and in McNamara Construction (Western) Ltd. v. The Queen,

> [1977] 2 S.C.R. 654, the essential requirements to support a finding of jurisdiction in the Federal Court were established. They are:
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> 1. There must be a statutory grant of jurisdiction by the federal Parliament.
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> 2. There must be an existing body of federal law which is essential to the disposition of the case and which nourishes the statutory grant of jurisdiction.
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> 3. The law on which the case is based must be a law of Canada as the phrase is used in s.101 of the Constitution Act, 1867. (at page 766)

What I find particularly useful about this approach to the problem is that it separates questions relating to the statutory grant upon which any claim of jurisdiction of this court must rest from questions relating to the law which the court is called upon to apply and questions of constitutional competence. Such separation, in its turn, permits a clearer and more rational analysis of the issues in each case.

In the present appeal, there would not appear to me to be any great problem raised by the second and third of McIntyre J.'s requirements. The case relates to the possession of Indian reserve lands. As was stated by Chouinard J., speaking for the court in Derrickson v. Derrickson, [1986] 1 S.C.R. 285, [1986] 2 C.N.L.R. 45:

> The right to possession of lands on an Indian reserve is manifestly of the very essence of the federal exclusive legislative power under s.91(24) of the Constitution Act, 1867. It follows that provincial legislation cannot apply to the right of possession of Indian reserve lands. (at p.296; p.55 C.N.L.R.)

Not only is federal law essential to the disposition of the present case; it is difficult to think of any other law that might be applicable.

The federal law essential to the disposition of the present case has two sources.

In the first place, there is of course, the Indian Act, R.S.C. 1970, c.I-6. While the right to possession of reserve lands is not created by that Act, it is provided for and dealt with therein and there can be no doubt that the provisions of the Act and its predecessors will be essential elements of the ultimate decision on the merits.

The second source of applicable federal law is the underlying aboriginal title which, on the pleadings, must vest in either the plaintiff band or the defendant and in the case of Guerin v. R., [1984] 2 S.C.R. 335, [1985] 1 C.N.L.R. 120, that tile was variously described as a “unique” or "sui generis" interest (per Dickson J., at page 383 [pp.315-36 C.N.L.R.) and as "historic reality" (per Wilson J., at page 349 [p.152 C.N.L.R.]). As further stated by Dickson J. at page, [p.133 C.N.L.R.], the Indians' interest in their lands

> ...is a pre-existing legal right not created by Royal Proclamation, by s.18(1) of the Indian Act, or by any other executive order or legislative provision.

In the light of s.91(24) of the Constitution Act, and of the Derrickson decision, supra, it cannot be seriously argued that the law of aboriginal title is today anything other than existing federal law.

With respect to the third criterion, it would equally seem to me to be beyond question that both the Indian Act and the law of aboriginal title are "Laws of Canada" as that phrase is used in s.101 of the Constitution Act.

The real problem raised by the present appeal has to do with McIntyre J.'s first requirement namely, that there be a statutory grant of jurisdiction to the Federal Court. It is, of course, trite that this court, as a creature of statute, can have no jurisdiction beyond what statute specifically confers.

Joyal J., in the Trial found the necessary statutory jurisdiction in the words of s-s7(1) of the Federal Court Act, R.S.C. 1970 (2nd Supp.), c.10 the applicable part of which reads as follows:

> 17.(1) The Trial Division has original jurisdiction in all cases where relief is claimed against the Crown …

In this respect he followed two earlier decisions of Reed J., in Marshall v. R. and The Public Service Alliance of Canada (Court file T-1085-85, Judgment of November 19, 1985) [reported [1986] 1 F. C. 437] and Roy Little Chief et al. v. R. and Leo Pretty Youngman et al. (Court file T-2102-85, Judgment of June 11, 1986) [indexed as Blackfoot Indian Band, No.146 (Members) v. Canada and Blackfoot Indian Band, No.146 (Chief and Councillors) reported supra at p.63]. He found that the claims of the plaintiff band against the defendant band were so "intertwined" with one another as to make it appropriate for jurisdiction over the defendant band to follow jurisdiction over the Crown

I confess that this approach gives me some difficulty. It is, of course, perfectly true that that on a literal reading the words of s-s.17(1) lend themselves to the interpretation that, once relief is claimed against the Crown, the whole case falls within the jurisdiction of the Federal Court even though it may include claims for the same or other relief against one or more other defendants which would not otherwise be cognisable in this court. That, however, is not an interpretation which has hitherto found favour. (See Sunday et al. v. The St. Lawrence Seaway Authority et al., [1977] 2 F.C. 3 (F.C.T.D.); The Lubicon Lake Band et al. v. R. et al., [1981] 2 F.C. 317, [1981] 3 C.N.L.R. 7 2 (F.C.T.D.), affirmed by [1981] 13 D.L.R. (4th) 159 (F.C.A.).)

While I concede that the decision here under appeal and the two prior decisions of Reed J. mentioned above, by their requirement that the claim against the non-Crown defendant should be "intertwined" with the claim against the Crown, assert a rather more subtle position than the one I have just stated, it remains that s-s.17(1) purports to grant exclusive jurisdiction; I have difficulty accepting a proposition that would make so fundamental a question, which must be determined at the time of the institution of suit, dependent upon so uncertain a base.

Since I have, in any event, concluded that there is another statutory grant appropriate to sustain the court's jurisdiction in this case, I would prefer to save the question of s-s.17(1) to another day and to say no more on the matter.

The provision which appears to me to give jurisdiction to this court in the particular circumstances of the present case is para. 17(3)(c) of the Federal Court Act, which grants exclusive jurisdiction over

> ...proceedings to determine disputes where the Crown is or may be under an obligation, in respect of which, there are or may be conflicting claims.

This paragraph of the Federal Court Act is new legislation. It has no clear textual predecessor in the Exchequer Court Act, R.S.C. 1970, c.E-11. It clearly intended to cover, and does cover, the same area as the previous jurisdiction in interpleader granted by s.24 of the Exchequer Court Act:

> 24. The Court has jurisdiction, upon application of the Attorney General of Canada, to entertain suits for relief by way of interpleader in all cases where the Crown or any officer or servant of the Crown as such is under liability for any debt, money, goods or chattels for or in respect of which the Attorney General expects that the Crown or its officer or servant will be sued or proceeded against by two or more persons making adverse claims thereto, where Her Majesty's High Court of Justice in England could, on the 30th day of September 1891, grant such relief to any person therefor in like circumstances.

The grant contained in para. 17(3)(c), however, is far broader than that of the former jurisdiction in interpleader. Interpleader as a proceeding was limited to the case of the stakeholder or other person in possession of or liable for property in which he had no interest but to which others asserted competing claims. It was fundamental that the person seeking interpleader not be a party to the dispute or have colluded or sided with either claimant. Proceedings in interpleader were, of course, as the wording of s.24 of the Exchequer Court Act makes clear, instituted at the instance of the stakeholder. Clearly the present proceedings are not interpleader proceedings since:

1. The Crown is far more than a mere stakeholder. It has, and whatever the outcome will retain, legal title to the reserve lands in dispute.

2. The Crown has taken sides in the dispute and is not neutral. By its original action in 1881 and by its statement of defence filed in the present case, it has asserted and reiterated that beneficial interest in Reserve No. 12 properly vests in the defendant band.

3. The proceedings have not been taken at the instance of the Crown but of the plaintiff band; the Crown appears only as a defendant.

As I have indicated, however, it is my view that para.17(3)(c) is not limited to matters of interpleader. If it were it would have been a simple matter to have said so. Instead, Parliament chose to adopt a text which, while no doubt broad enough to cover interpleader, covers other cases where there are competing claims to an obligation owed by the federal Crown. While it may be doubtful that such other cases will be very numerous, especially since they must meet the second, and third requirements enumerated by McIntyre J. above, it is my view that the present action is one of them.

Paragraph 17(3)(c) requires:

1. A proceeding

2. to determine a dispute

3. where the Crown is under an obligation

4. in respect of which there are conflicting claims.

There can be no doubt that the present action constitutes a proceeding.

There can equally be no doubt: that there is a dispute. The plaintiff band claims possession of, and aboriginal title to, Reserve No. 12 which the Crown has, given to the defendant band.

The Crown is under an obligation in the dispute. That obligation, arising from the law of aboriginal, title and recognized in s.18 of the Indian Act is to hold Reserve No. 12 for the use and benefit of the band for which it was originally set apart.

Finally, there are conflicting claims in respect of the Crown's obligation. That there may be such conflicting claims was clear enough at the time of the filing of the original statement of claim. Since then the defendant band has filed its statement of defence which asserts unequivocally that Reserve No. 12

> ... is and has been since its creation set aside for the exclusive use and benefit of the Defendant Band.

I conclude accordingly that the present action is properly within the jurisdiction of this court. I may say that, like the Trial Judge, I find some comfort in this conclusion. Clearly the action as framed is primarily directed against the Crown, whose wrongdoing, it is alleged, lies at the very foundation of the plaintiff band's claim. That action must be taken in this court. Equally clearly, however, the defendant band has a vital interest in the outcome. If the plaintiff band is successful, the defendant band will find themselves in the position of squatters upon land to which they have neither legal nor beneficial title. While the Crown, by its statement of defence, has made it clear that it proposes to support the defendant band, the latter is surely the most competent and most appropriate body to defend itself.

I would dismiss the appeal with costs.

URIE J.: I have had the advantage of reading the Reasons for Judgment of both of my brother; Hugessen and MacGuigan JJ. I am entirely in agreement with both that the Federal Court jurisdiction in this case arises clearly from para. 17(3)(c) of the Federal Court Act. I would prefer to base my concurrence solely on that view so that I propose to concur only with the reasons of Hugessen J. and leave for another day the resolution of the apparent differences of opinion in the Trial Division as to the applicability of s-s.17(1) of the Act in circumstances such as prevail in this case. This is not to say that I agree or disagree with MacGuigan J.'s view as to a probable source of jurisdiction being s-s.17(1). On the facts of this case, as I see them, it is unnecessary to decide that difficult issue so that the preferable course, it seems to me, is to leave the matter open to be decided in a case where the issue is confronted directly or where there may not be any other jurisdictional foundation.

I agree, too, with the disposition of the appeal proposed by Hugessen J.

MACGUIGAN J.: I agree entirely with the view of my colleague, Mr. Justice Hugessen, that the provisions of para.17(3)(c) of the Federal Court Act constitute a statutory grant appropriate to sustain the court's jurisdiction In this case.

However, I do not share his doubts as to the appropriateness of s-s.17(1) of the Act for the same purpose, and I would, in fact, adopt the following analysis of that subsection by Reed J. in Marshall v. The Queen et al., [1986] 1 F.C. 437, 447-9:

> The question, then, is whether subsection 17(1) confers jurisdiction on the Federal Court so as to allow a plaintiff to sue both the Crown and a subject in that Court when the cause of action against both of them is one that is as intertwined as is the case here leg: with respect to the alleged collusion). On a plain reading of the section, such jurisdiction would appear to have been intended since the grant given is over "cases where relief is claimed against the Crown". The jurisdiction is not merely over "claims against the Crown", as a narrower interpretation would seem to require.
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> That Parliament intended the broader scope not only would seem to follow from the literal wording of the section but it is also a reasonable inference from the fact that certain claims against the federal Crown are to be brought exclusively in the Federal Court. It seems unlikely that Parliament would have intended to disadvantage persons, in the position of the plaintiff, by requiring them to split a unified cause of action and bring part of it in the Federal Court and part in the superior courts of the provinces. The effect of such an intention would be to subject a plaintiff, in a position similar to the plaintiff in this case, to different and possibly contradictory findings in different courts, and to place jurisdictional and cost impediments in the path of such persons if they sue the federal Crown. I do not think that such was the intention of Parliament. While there is no doubt that the jurisdiction of statutory courts are strictly interpreted in that they are not courts of inherent jurisdiction, it is well to remember that section 11 of the Interpretation Act, R.S.C. 1970, c.I-23 requires that all federal statutes be interpreted with such a construction as best to ensure the attainment of their purpose. This would seem to require that subsection 17(1) be interpreted as conferring on the Federal Court jurisdiction over the whole case, in a situation such as the present, where the plaintiff' s claim is against both the employer (the Crown), and the Union (the P.S.A.).
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> Also, I would note that the scope which in my view subsection 17(1) bears would not accord the Federal Court any jurisdiction over cases between subject and subject, solely on the ground that a federal claim might potentially be present but is not being pursued. Without a claim being made directly against the Crown there would be no foundation for Federal Court jurisdiction, exclusive or concurrent, pursuant to subsection 17(1). But when such a claim against the federal Crown is made, in my view, subsection 17(1) is broadly enough drafted to allow a co-defendant, in a case such as the present, to be sued along with the Crown.... In the present case the claim against the Crown (employer) and the Public Service Alliance (Union) are so intertwined that findings of fact with respect to one defendant are intimately bound up with those that would have to be mane with respect to the other.

In this case, for the reasons set forth by Mr. Justice Hugessen in his analysis of the facts in relation to para.17(3)(c), the competing claims of the two bands to Reserve No. 12 are intertwined not only with respect to each other, but also in each case with respect to the Crown.

I would therefore rest the requisite statutory grant for jurisdiction upon s-s.17(1) as well as upon para.17(3)(c).

In all other respects I concur with the reasons of Mr. Justice Hugessen and, of course, with his disposition of the appeal.