Ralph Dick, Daniel Billy, Elmer Dick, Stephen Assu and James D. Wilson sued on their own behalf and on behalf of all other members of the Wewayakai Indian Band, also known as the Cape Mudge Indian Band (Defendants) Appellants)

v.

Her Majesty the Queen (Defendant) Respondent and **Roy Anthony Roberts, C. Aubrey Roberts, and John Henderson, suing on their own behalf and on behalf of all other members of the Wewayakum Indian Band, also known as the Campbell River Indian Band** (Plaintiffs) Respondents

indexed as: **Roberts v. Canada**]

File No.: 20377
1988: June 13; 1989: March 9.
Present: Dickson C.J. and Beetz, Lamer, Wilson and Le Dain [1] JJ.

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Courts -- Federal Court -- Jurisdiction -- Dispute between Indian bands relating to use and occupation of a reserve -- Plaintiff band seeking declaration against Crown that it had the right to use and occupy the reserve and seeking a permanent injunction against defendant band restraining its members from trespassing on the reserve -- Whether Federal Court has jurisdiction to hear the claim -- ITO test applied -- Federal Court Act, R.S.C. 1970 (2nd Supp.), c. 10, s. 17(3)(c).

Constitutional law -- Laws of Canada -- Law of aboriginal title --Whether law of aboriginal title a "law of Canada" within the meaning of s. 101 of the Constitution Act, 1867.

Indians -- Law of aboriginal title -- Whether law of aboriginal title is federal common law.

This appeal is to determine whether the Federal Court has jurisdiction to hear the trespass action brought by the plaintiff Band against the defendant Band. The dispute revolves around the determination of which Band has the right to the use and occupation of the Quinsam Indian Reserve. In its statement of claim filed in the Federal Court, Trial Division, the plaintiff Band alleged that the Crown breached its fiduciary duty to protect and preserve the Band's interest in that Reserve and that the Reserve is and always has been set aside for its exclusive use and benefit. It further alleged that the Crown was also in breach of the statutory duties owed to it under the various provisions of the Indian Act. It asserted that the defendant Band had no lawful right to use or occupy that Reserve and sought a permanent injunction to restrain it from doing so. The defendant Band brought a motion for an order pursuant to the Rules of the Federal Court to have the action against it dismissed for want of jurisdiction in the Federal Court to grant the relief sought. The trial judge denied the motion and his order was upheld on appeal.

Held: The appeal should be dismissed.

The Federal Court has jurisdiction to hear the present claim. Jurisdiction in the Federal Court depends on there being: (1) a statutory grant of jurisdiction by Parliament; (2) an existing body of federal law, essential to the disposition of the case, which nourishes the statutory grant of jurisdiction; and (3) "a law of Canada" within the meaning of s. 101 of the Constitution Act, 1867 on which the case is based. The second and third elements of the test overlap. The second element requires a general body of federal law covering the area of the dispute -- here, the law relating to Indians and Indian interests in reserve lands. The third element requires that the specific law, which will be resolutive of the dispute, be "a law of Canada" within the meaning of s. 101 of the Constitution Act, 1867. Federal legislative competence over a subject matter is not enough to satisfy the third branch of the test. There must be an existing federal law, whether statute, regulation or common law.

In this case, these requirements were met. Section 17(3)(c) of the Federal Court Act conferred the necessary jurisdiction. This section requires (a) a proceeding, (b) to determine a dispute, (c) where the Crown is or may be under an obligation, (d) in respect of which there are or may be conflicting claims. A proceeding is certainly involved to determine the dispute between the two Bands and there are conflicting claims to an obligation owed by the federal Crown. Each Band claims that the Crown, which holds the underlying title to the land, owes to it alone the obligation to hold the land comprising the Quinsam Indian Reserve for its exclusive use and occupancy.

"Laws of Canada" are exclusively required for the disposition of this appeal, namely the relevant provisions of the Indian Act which codify the pre-existing duties of the Crown toward the Indians,

the act of the federal executive pursuant to the Indian Act in setting aside the reserve in issue for the use and occupancy of one or other of the two claimant Bands, and the common law of aboriginal title which underlies the fiduciary obligations of the Crown to both Bands. The remaining two elements of the test are accordingly satisfied.

Cases Cited

Applied: ITO--International Terminal Operators Ltd. v. Miida Electronics Inc., [1986] 1 S.C.R. 752; Quebec North Shore Paper Co. v. Canadian Pacific Ltd., [1977] 2 S.C.R. 1054; McNamara Construction (Western) Ltd. v. The Queen, [1977] 2 S.C.R. 654; **referred to**: Calder v. Attorney-General of British Columbia, [1973] S.C.R. 313; Derrickson v. Derrickson, [1986] 1 S.C.R. 285; Rhine v. The Queen; Prytula v. The Queen, [1980] 2 S.C.R. 442; Bensol Customs Brokers Ltd. v. Air Canada, [1979] 2 F.C. 575; Marshall v. The Queen, [1986] 1 F.C. 437; The Queen v. Thomas Fuller Construction Co. (1958) Ltd., [1980] 1 S.C.R. 695; Canadian Pacific Ltd. v. Paul, [1988] 2 S.C.R. 654; Guerin v. The Queen, [1984] 2 S.C.R. 335; Dywidag Systems International Canada Ltd. v. Zutphen Brothers Construction Ltd. (1987), 76 N.S.R. (2d) 398; Amodu Tijani v. Southern Nigeria (Secretary), [1921] 2 A.C. 399.

Statutes and Regulations Cited

Constitution Act, 1867, ss. 91(24), 101.
Exchequer Court Act, R.S.C. 1970, c. E-11, s. 24.
Federal Court Act, R.S.C. 1970 (2nd Supp.), c. 10, ss. 17(1), (3)(c).
Indian Act, R.S.C. 1970, c. I-6, s. 18(1).

Authors Cited

Evans, J. M. "Federal Jurisdiction -- A Lamentable Situation" (1981), 59 Can. Bar Rev. 124.

Hogg, Peter W. "Constitutional Law -- Limits of Federal Court Jurisdiction --Is There a Federal Common Law?" (1977), 55 Can. Bar Rev. 550.

Laskin, John B. and Robert J. Sharpe. "Constricting Federal Court Jurisdiction: A Comment on Fuller Construction" (1980), 30 U. of T.L.J. 283.

APPEAL from a judgment of the Federal Court of Appeal, [1987] 2 F.C. 535, 73 N.R. 234, [1987] 2 C.N.L.R. 145, affirming a judgment of the Trial Division, [1987] 1 F.C. 155, 5 F.T.R. 13. Appeal dismissed.

John McAlpine, Q.C., and David Paterson, for the appellants.
M. R. V. Storrow, Q.C., and Lewis Harvey, for the respondents Dick et al.
H. J. Wruck, for the respondent Her Majesty the Queen.

The judgment of the Court was delivered by

WILSON J. -- The issue in this appeal is whether the Federal Court of Canada has jurisdiction to hear the trespass action brought by the respondent Indian Band against the appellant Indian Band. Her Majesty the Queen ("the Crown") was impleaded in the dispute the purpose of which is to determine which of the two Bands is entitled to the exclusive use and occupation of the Indian Reserve known as the Quinsam Indian Reserve.

The appeal is by leave of this Court from the judgment of the Federal Court of Appeal (Hugessen, Urie JJ., concurring reasons by MacGuigan J.) delivered on March 2, 1987, [1987] 2 F.C. 535, 73 N.R. 234, [1987] 2 C.N.L.R. 145, dismissing an appeal from the judgment of Joyal J. in the Federal Court, Trial Division, delivered on July 21, 1986, [1987] 1 F.C. 155, 5 F.T.R. 13. Joyal J. found that the Federal Court did have jurisdiction to hear the claim. The Court of Appeal agreed but the majority found the jurisdiction in a different section of the Federal Court Act, R.S.C. 1970 (2nd Supp.), c. 10, from the trial judge.

1. The Facts

The plaintiffs are members of the Wewayakum Indian Band, also known as the Campbell River Indian Band (the "Plaintiff Band"), suing on behalf of all past, present and future members of the Band, which principally resides on Campbell River Indian Reserve Number 11 ("Reserve No. 11")

located at Campbell River, British Columbia. The defendants are members of the Wewayakai Indian Band, also known as the Cape Mudge Indian Band (the "Defendant Band"), acting on behalf of all past, present and future members of the Band, which partially resides on Cape Mudge Indian Reserve Number 10 ("Reserve No. 10") located on Quadra Island, British Columbia and partially on the Reserve which is the subject of the dispute, the Quinsam Indian Reserve ("Reserve No. 12"). The Plaintiff Band alleges that the Defendant Band is trespassing on Reserve No. 12 and wants a permanent injunction to put an end to such trespassing. It also seeks a declaration that Reserve No. 12 is and always has been, since its establishment as a reserve, set aside for its exclusive use and benefit.

The confusion concerning the rightful use and occupation of Reserve No. 12 dates back to the nineteenth century. By Order in Council dated April 6, 1888 the Lieutenant-Governor of British Columbia approved the recommendation of the Executive Council that "the Dominion Government be requested to sanction the appointment of Ashdown H. Green Esq. C.E., to proceed without delay to Campbell River with authority to determine the extent and boundaries of the Indian Reserve at that place". The federal government subsequently approved that recommendation. Ashdown Green proceeded without delay to Campbell River, consulted with some members of the Defendant Band, and surveyed two reserves. His surveys were completed on May 4, 1888 and were reported to the Superintendent of Indian Affairs on May 28, 1888. They included the settling of the boundaries of Reserve No. 11 and Reserve No. 12. According to the facts set out by both the Crown and the Defendant Band, the report of Ashdown Green confirmed that the lands comprising the surveyed reserves had been set aside for the use and benefit of the Defendant Band.

On September 24, 1912 the Governments of Canada and British Columbia entered into an agreement appointing a commission known as the McKenna-McBride Commission to settle all differences between the two governments respecting Indian lands and Indian affairs generally in the Province of British Columbia. The Commission ordered on August 14, 1914 that "the Indian Reserves of the . . . Wewayakum Band numbered 11 and 12 . . . BE CONFIRMED as now fixed and determined . . ." This decision was included in the McKenna-McBride Report of 1916, which Report was confirmed by Orders in Council of the governments of both British Columbia and Canada. According to the Crown, this reference to the Wewayakum Band, insofar as it refers to Reserve No. 12, was made by error or inadvertence. The Defendant Band claims that Mr. Green in fact set aside the reserves for it alone.

The dispute in the case thus revolves around the determination of which Band has the right to the use and occupation of Reserve No. 12. The Plaintiff Band alleges that the Crown has breached its fiduciary duty to protect and preserve the interest of the Plaintiff Band in Reserve No. 12 and to ensure that the Reserve is not utilized for any use or purpose incompatible with its interest. The Plaintiff Band further alleges that the Crown is also in breach of the statutory duties owed to it under various provisions of the Indian Act, R.S.C. 1970, c. I-6. It asserts that the Defendant Band has no lawful right to use or occupy Reserve No. 12 and seeks a permanent injunction to restrain it from doing so.

There has thus far been no decision on the merits of the case. The Plaintiff Band filed a statement of claim in the Federal Court, Trial Division on December 2, 1985 naming Her Majesty the Queen and the Cape Mudge Indian Band as defendants. On March 11, 1986 the Defendant Band brought a motion for an Order pursuant to the Rules of the Federal Court to have the action against it dismissed for want of jurisdiction in the Federal Court to grant the relief sought. Joyal J. denied the motion and his order was upheld on appeal. The Defendant Band appeals the issue of jurisdiction to this Court.

2. The Courts Below

Federal Court, Trial Division

Joyal J., citing such landmark cases as Quebec North Shore Paper Co. v. Canadian Pacific Ltd., [1977] 2 S.C.R. 1054, McNamara Construction (Western) Ltd. v. The Queen, [1977] 2 S.C.R. 654, and Rhine v. The Queen; Prytula v. The Queen, [1980] 2 S.C.R. 442, stated that the question whether the Federal Court has jurisdiction depends on the application of a three-fold test: (1) does the Federal Court Act give the Court jurisdiction? (2) is the claim in relation to existing federal law? and (3) is the federal law within the legislative competence of Parliament?

Joyal J., adopting the approach suggested by Le Dain J. in Bensol Customs Brokers Ltd. v. Air Canada, [1979] 2 F.C. 575 (C.A.), and by Reed J. in Marshall v. The Queen, [1986] 1 F.C. 437 (T.D.), found that, in the context of the Plaintiff's case against the Crown, there was no doubt as to

the jurisdiction of the Federal Court to deal with the Reserve lands. The action against the Crown was properly before the Federal Court. Since the claim against the Crown and that against the Defendant Band were closely "intertwined" (Marshall), and the rights and obligations of the parties were to be determined to some material extent by federal law (Bensol), the Federal Court had jurisdiction to hear all parts of the claim. Because the litigant must seek redress against the federal Crown in the Federal Court, "such redress should include all matters which are essential to its final determination". Joyal J. found that the Indian Act was the federal law which had to be applied in order to determine to a material extent the rights and obligations of the parties. He held that s. 17(1) of the Federal Court Act was the source of the Federal Court's jurisdiction. Section 17(1) reads as follows:

> **17.** (1) The Trial Division has original jurisdiction in all cases where relief is claimed against the Crown and, except where otherwise provided, the Trial Division has exclusive original jurisdiction in all such cases.

Federal Court of Appeal

The Federal Court of Appeal upheld the trial judge's decision. Hugessen J., with whom Urie J. concurred, preferred not to pronounce on the correctness of Joyal J.'s finding that s. 17(1) was the source of the Federal Court's jurisdiction. Instead, he found that s. 17(3)(c) conferred the necessary jurisdiction on the Court. In so doing he neither accepted nor rejected the reasoning in Marshall that s. 17(1) of the Act confers exclusive jurisdiction on the Federal Court where a claim against a private party is "intertwined" with a separate claim against the Crown. While expressing reservations that this was the law, he did not explicitly rule out the possibility.

Section 17(3)(c) of the Federal Court Act provides:

> **17.** . . .
>
> (3) The Trial Division has exclusive original jurisdiction to hear and determine the following matters:
>
> . . .
>
> (c) 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.

According to Hugessen J., s. 17(3)(c) is not confined to interpleader but covers all cases where there are conflicting claims to an obligation owed by the federal Crown and in which the four requirements of s. 17(3)(c) are met. He found that they were met in this case. The four requirements are (1) a proceeding, (2) to determine a dispute, (3) where the Crown is or may be under an obligation, (4) in respect of which there are or may be conflicting claims. Hugessen J. found that the existing body of federal law necessary for the proper exercise of Federal Court jurisdiction consisted of statutory law in the form of the Indian Act and, as well, the law of aboriginal title which, on the authority of this Court's recent judgment in Derrickson v. Derrickson, [1986] 1 S.C.R. 285, he found to be federal law. The Federal Court thus had jurisdiction.

MacGuigan J. held that Federal Court jurisdiction in this case could be found in either s. 17(1) or s. 17(3)(c). He agreed with the majority that the other two elements of the three-fold jurisdictional test were met.

3. The Issue

The essential requirements to support a finding of jurisdiction in the Federal Court have been set out and expanded upon by this Court on a number of occasions. In ITO--International Terminal Operators Ltd. v. Miida Electronics Inc., [1986] 1 S.C.R. 752, McIntyre J., speaking for the majority and drawing primarily upon this Court's judgments in Quebec North Shore Paper Co. v. Canadian Pacific Ltd., supra, and in McNamara Construction (Western) Ltd. v. The Queen, supra, summarized the test to be applied in assessing whether the Federal Court is properly seized of a matter at p. 766:

> 1. There must be a statutory grant of jurisdiction by the federal Parliament.
>
> 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.
>
> 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.

This test is well established as the one to be applied in every case where the jurisdiction of the Federal Court is in issue.

While there is clearly an overlap between the second and third elements of the test for Federal Court jurisdiction, the second element, as I understand it, requires a general body of federal law covering the area of the dispute, i.e., in this case the law relating to Indians and Indian interests in reserve lands, and the third element requires that the specific law which will be resolutive of the dispute be "a law of Canada" within the meaning of s. 101 of the Constitution Act, 1867. No difficulty arises in meeting the third element of the test if the dispute is to be determined on the basis of an existing federal statute. As will be seen, problems can, however, arise if the law of Canada which is relied on is not federal legislation but so-called "federal common law" or if federal law is not exclusively applicable to the issue in dispute.

In the courts below it was the first element of the test which was seen as involving the greatest degree of uncertainty. The statutory grant of jurisdiction by Parliament to the Federal Court is contained in the Federal Court Act. Because the Federal Court is without any inherent jurisdiction such as that existing in provincial superior courts, the language of the Act is completely determinative of the scope of the Court's jurisdiction. In the present case s. 17(1) and s. 17(3)(c) were advanced as capable of supporting the necessary jurisdiction. For convenience I reproduce them together:

> **17.** (1) The Trial Division has original jurisdiction in all cases where relief is claimed against the Crown and, except where otherwise provided, the Trial Division has exclusive original jurisdiction in all such cases.
>
> . . .
>
> (3) The Trial Division has exclusive original jurisdiction to hear and determine the following matters:
>
> . . .
>
> (c) 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.

Joyal J. found that s. 17(1) conferred the necessary jurisdiction. Hugessen and Urie JJ. found such jurisdiction in s. 17(3)(c) and MacGuigan J. found that either section would support it.

In finding jurisdiction in s. 17(1) Joyal J. accepted the "intertwining" basis of jurisdiction set out by Reed J. in Marshall, supra.

In Marshall, Marshall sued the Crown and the public service union alleging that she had been illegally laid off and that both defendants had colluded to achieve this. The following passage at pp. 447-48 captures the gist of Reed J.'s reasons:

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 (eg: 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.

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.

Reed J. concluded at p. 449:

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 made with respect to the other.

There is clearly a substantial policy component involved in the resolution of this jurisdictional problem. Practical considerations enter in and concern over the undue extension of federal court jurisdiction where the federal Crown is not the sole defendant has to be balanced against the need for the expeditious resolution of litigation at reasonable cost. Marshall seems to strike an appropriate balance by requiring the claim or claims against the private litigant to be inextricably linked with those against the Crown. In addition, where such link exists serious problems of res judicata which could arise in subsequent litigation in the provincial courts are avoided.

Le Dain J. focussed on another jurisdictional problem in Bensol. He was concerned about cases in which, although the claim was solely against the Crown, federal law was not exclusively applicable. To deal with this problem he introduced another modification to the strict rules governing federal court jurisdiction, stating at p. 583:

There will inevitably be claims in which the rights and obligations of the parties will be determined partly by federal law and partly by provincial law. It should be sufficient in my opinion if the rights and obligations of the parties are to be determined to some material extent by federal law. It should not be necessary that the cause of action be one that is created by federal law so long as it is one affected by it. [Emphasis added.]

The approaches taken by Reed J. in Marshall and Le Dain J. in Bensol had found favour with several academic commentators anxious to avoid problems of fragmented jurisdiction and, in some cases, the lack of a forum in which claim and counterclaim can both be heard: see, for example, Hogg, "Constitutional Law -- Limits of Federal Court Jurisdiction -- Is There a Federal Common Law?" (1977), 55 Can. Bar Rev. 550; Laskin and Sharpe, "Constricting Federal Court Jurisdiction: A Comment on Fuller Construction" (1980), 30 U. of T.L.J. 283; Evans, "Federal Jurisdiction -- A Lamentable Situation" (1981), 59 Can. Bar Rev. 124. The concerns expressed by advocates of this more liberal approach to Federal Court jurisdiction were addressed in the United States federal courts through the development of the concept of "pendent and ancillary jurisdiction". Under this concept, if a plaintiff's claims are such that he would ordinarily be expected to try them all in one judicial proceeding, then, assuming that the federal issues are substantial, there is power in the federal courts to hear all of the issues. In some ways this is an attractive concept. However, it does not appear to find support in the existing jurisprudence of this Court nor indeed in the wording of s. 101 of the Constitution Act, 1867 which requires the jurisdiction of any court set up pursuant to that section (excepting, of course, the General Court of Appeal for Canada) to be "for the better Administration of the Laws of Canada". The fact that a claim resting on provincial law is "intertwined" with or affected by another claim determinable according to the "Laws of Canada" has been held not to bring the first claim within the jurisdiction of the Federal Court: see The Queen v. Thomas Fuller Construction Co. (1958) Ltd., [1980] 1 S.C.R. 695, per Pigeon J., at p. 713. Whether the Federal Court could, in this case, entertain the claim of the Plaintiff Band pursuant to s. 17(1) without at least implicitly adopting a pendent and ancillary jurisdiction approach is a question which need not be answered in this case. I say that because s. 17(3)(c), in my view, is an independent source of jurisdiction enabling the Federal Court to hear the claim.

Section 17(3)(c) has no direct predecessor in the Exchequer Court Act, R.S.C. 1970, c. E-11. The closest provision in that Act was s. 24, which provided, inter alia, that:

> **24.** The Court has jurisdiction . . . to entertain suits for relief by way of interpleader in all cases . . . in respect of which the Attorney General expects that the Crown . . . will be sued or proceeded against by two or more persons making adverse claims thereto . . . .

Hugessen J. in his judgment in the Federal Court of Appeal gives a description of the interpleader proceeding and notes, correctly in my view, that the instant case cannot be one of interpleader because the Crown, as title-holder to the land in issue, is far more than a mere stakeholder. Further, an interpleaded party should be a neutral one whereas in the case at bar the Crown has clearly sided with the Defendant Band. Nor were the proceedings instituted by the Crown which would be the case in interpleader situations. However, Hugessen J. went on to say, again correctly in my opinion, that the scope of s. 17(3)(c) is broader than the interpleader provision in the Exchequer Court Act. There is no explicit mention of interpleader in s. 17(3)(c). The description of the proceedings covered by the provision would clearly include interpleader but are not limited to that.

In my view, Hugessen J. took the right approach in analyzing s. 17(3)(c) itself in order to determine the scope of the jurisdiction conferred. As he pointed out, the section requires: a) a proceeding, b) to determine a dispute, c) where the Crown is or may be under an obligation, d) in respect of which there are or may be conflicting claims. Interpleader by the Crown would fit this description. Indeed, at first blush it is hard to envisage situations other than interpleader in which the requirements of s. 17(3)(c) will all be met. I believe, however, that the present case is one such situation. A proceeding is certainly involved to determine the dispute between the Plaintiff and Defendant

Bands. The obligation owed by the Crown in this case results from the very nature of aboriginal title. This Court's most recent affirmation that the nature of the Indian interest in aboriginal lands is sui generis is found in Canadian Pacific Ltd. v. Paul, [1988] 2 S.C.R. 654. As noted in Guerin v. The Queen, [1984] 2 S.C.R. 335, the obligation owed by the Crown in respect of lands held for the Indians is recognized in, although not created by, s. 18(1) of the Indian Act. The Crown must hold the land comprising Reserve No. 12 for the use and benefit of one of the Bands. The question is: which one? Finally, the case at bar falls within the wording of s. 17(3)(c) because the conflicting claims are undoubtedly in respect of the Crown's obligation. Each Band claims that the Crown, which holds the underlying title to the land, owes to it alone the obligation to hold the land for its exclusive use and occupancy.

My conclusion that s. 17(3)(c) of the Federal Court Act confers jurisdiction on the Federal Court to deal with the issues in this case is, of course, premised on the constitutionality of the section. In Dywidag Systems International Canada Ltd. v. Zutphen Brothers Construction Ltd. (1987), 76 N.S.R. (2d) 398, the Nova Scotia Court of Appeal held that the exclusive jurisdiction of the Federal Court with respect to claims against the federal Crown, as a result of which the federal Crown can sue the subject in the provincial superior courts but the subject cannot sue the Crown in these courts, infringes the guarantee of equality before the law contained in s. 15 of the Canadian Charter of Rights and Freedoms. Leave to appeal that decision to this Court was granted on July 29, 1987, [1987] 2 S.C.R. ix. No constitutional challenge was, however, raised in this case.

Having found that the first element in the ITO test is satisfied, i.e., that there is a statutory grant of jurisdiction to the Federal Court, I turn now to the two remaining elements. The second element is that there be an existing body of federal law essential to the disposition of the case which nourishes the statutory grant of jurisdiction. The Federal Court of Appeal found that body of federal law in a combination of the law concerning aboriginal title and the provisions of the Indian Act. Hugessen J. concluded that the aboriginal title must be in either the Plaintiff or Defendant Band and is essential to the disposition of the appeal. He noted that while the Indian Act did not create the right to possession of reserve lands, the provisions of that Act which deal with that right would be essential elements in the disposition of the case on the merits. He further found that it was beyond question that both the Indian Act and the law of aboriginal title are "Laws of Canada" within the meaning of s. 101 of the Constitution Act, 1867, thus satisfying the third and final component of the ITO test.

In this Court the Plaintiff Band conceded that its claim was not based upon aboriginal title, but contended that such title would be relevant to the determination of the right to occupation of the reserve. While I do not disagree with Hugessen J.'s conclusion that both the law of aboriginal title and the provisions of the Indian Act are relevant in the present case, I do not believe that this is adequate to satisfy the third requirement of the test for Federal Court jurisdiction, namely that the claim itself be "based" upon "a law of Canada" within the meaning of s. 101 of the Constitution Act, 1867.

The right to the use and occupancy of reserve lands flows from the sui generis nature of Indian title. However, where the issue in the case is which of two claimant Bands has the right to use and occupy a particular reserve, we have to go to other sources for an answer. One of these sources is the executive act which originally established the Indian reserve and allotted it either through the Ashdown Green report or the McKenna-McBride Commission Report to one or other of the claimant Bands. Other sources we must look at are the provisions of the Indian Act which, while not constitutive of the obligations owed to the Indians by the Crown, codify the pre-existing duties of the Crown toward the Indians. Still another source is the common law relating to aboriginal title which underlies the fiduciary nature of the Crown's obligations. It is interesting to note that Hugessen J. relied on s. 91(24) of the Constitution Act, 1867 and on Derrickson for his statement that "it cannot be seriously argued that the law of aboriginal title is today anything other than existing federal law" (p. 540). The reference is to the conclusion of Chouinard J., writing for the Court in Derrickson on the question whether provincial family law legislation dealing with family assets could apply to lands on an Indian reserve. Chouinard J. stated at p. 296:

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.

While I do not question the soundness of Chouinard J.'s conclusion that provincial legislation cannot apply to Indian lands because of the exclusive federal legislative power in relation to "Indians, and Lands reserved for Indians" under s. 91(24) of the Constitution Act, 1867, it does not, in my view, address the issue before us which is: is the law of aboriginal title a "law of Canada" within the meaning of s. 101? I turn to Laskin C.J. in McNamara Construction and Quebec North Shore for guidance.

In these two cases Laskin C.J. made it abundantly clear that federal legislative competence over a subject matter is not enough to satisfy the third branch of the test for Federal Court jurisdiction. He stated at pp. 658-59 of McNamara Construction:

In Quebec North Shore Paper Company v. Canadian Pacific Limited, (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.

He further stated at p. 659:

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 in 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. [Emphasis added.]

Commenting on Quebec North Shore and McNamara Construction, Professor Evans observes, loc. cit., at p. 125:

The thrust of Quebec North Shore and McNamara Construction was to deny, in general terms, the existence of a body of federal common law that was co-extensive with the unexercised constitutional legislative competence of Parliament over matters assigned to it. Thus a law will normally only be a law of Canada for the purpose of section 101 of the British North America Act if it is enacted by or under federal legislation. [Emphasis added.]

If Professor Evans is saying in the above-quoted paragraph that only federal legislation can meet the description of a "law of Canada" within the meaning of s. 101, I think he must be wrong since Laskin C.J. clearly includes "common law" as existing federal law inasmuch as he says that the cause of action must be founded "on some existing federal law, whether statute or regulation or common law". Professor Evans may be right that Quebec North Shore and McNamara Construction deny the existence of a federal body of common law co-extensive with the federal legislature's unexercised legislative jurisdiction over the subject matters assigned to it. However, I think that the existence of "federal common law" in some areas is expressly recognized by Laskin C.J. and the question for us, therefore, is whether the law of aboriginal title is federal common law.

I believe that it is. In Calder v. Attorney-General of British Columbia, [1973] S.C.R. 313, this Court recognized aboriginal title as a legal right derived from the Indians' historic occupation and possession of their tribal lands. As Dickson J. (as he then was) pointed out in Guerin, supra, aboriginal title pre-dated colonization by the British and survived British claims of sovereignty. The Indians' right of occupation and possession continued as a "burden on the radical or final title of the Sovereign": per Viscount Haldane in Amodu Tijani v. Southern Nigeria (Secretary), [1921] 2 A.C. 399 (P.C.), at p. 403. While, as was made clear in Guerin, s. 18(1) of the Indian Act did not create the unique relationship between the Crown and the Indians, it certainly incorporated it into federal law by affirming that "reserves are held by Her Majesty for the use and benefit of the respective bands for which they were set apart".

I would conclude therefore that "laws of Canada" are exclusively required for the disposition of this appeal, namely the relevant provisions of the Indian Act, the act of the federal executive pursuant to the Indian Act in setting aside the reserve in issue for the use and occupancy of one or other of the two claimant Bands, and the common law of aboriginal title which underlies the fiduciary obligations of the Crown to both Bands. The remaining two elements of the test set out in ITO, supra, are accordingly satisfied.

For the foregoing reasons I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellants: McAlpine & Hordo, Vancouver. Solicitors for the respondents Roberts et al.: Davis & Company, Vancouver. Solicitor for the respondent Her Majesty the Queen: F. Iacobucci, Ottawa.