NOTE

A New Development in the Jurisdiction of the Federal Court

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The *Federal Court Act* stipulates that when relief is sought for acts or omissions of Crown servants the proper forum for the action is the Federal Court. Until recently it appeared to have been clearly established that a private co-defendent could be joined in the action only if the subject matter of the suit against him, considered in isolation from the action against the Crown, would also be within the jurisdiction of the Federal Court. This "stand alone" rule, which can have the effect of requiring the duplication of proceedings, has been justified as necessary to maintain the integrity of Canada's dual court system. The judgment of the Federal Court in the recent case of *Marshall* v. *R.* questions this rationale, suggesting that judicial policy should seek to eliminate duplicate proceedings in order to reduce the burden on the plaintiff and to avoid contradictory judgements. In this note the author canvasses the authorities prior to *Marshall* to clarify the doctrinal basis for the stand alone rule. He then examines the *Marshall* decision, and a number of other recent Federal Court decisions. The author argues that although the policy considerations in *Marshall* have merit, the policy underlying the "stand alone" rule is even more persuasive, and moreover is supported by authority.

La *Loi sur la Cour fédérale* stipule que la Cour fédérale est le tribunal approprié pour obtenir réparation pour des dommages causés par le fait d'employés de la Couronne. Jusqu'à tout récemment, il semblait clair qu'un codéfendeur privé ne pouvait être mis en cause dans une telle action que si la matière de la poursuite contre lui relevait aussi de la juridiction de la Cour fédérale, et cela indépendamment du recours contre la Couronne. Ce critère dit « *stand alone test* », qui peut entraîner la duplication des procédures, trouvait sa justification dans la nécessité de maintenir la dualité du système judiciaire canadien. La récente décision de la Cour fédérale dans l'affaire *Marshall* c. *R.* remet en doute cette justification et suggère que la Cour devrait éliminer la duplication des procédures afin de faciliter la tâche au demandeur et d'éviter des jugements contradictoires. L'auteur considère les autorités qui ont précédé *Marshall* dans le but de clarifier la base doctrinale du « *stand alone test* ». Il analyse ensuite la décision *Marshall* de même que d'autres décisions rendues récemment par la Cour fédérale. L'auteur soutient que, même si les motifs de la Cour dans *Marshall* sont valables, les motifs invoqués pour le maintien du « *stand alone test* » sont plus convaincants et, qui plus est, jouissent de l'appui des autorités sur la question.

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In *International Terminal Operators* v. *Miida Electronics*[1] McIntyre J., surveying a considerable body of recent jurisprudence, held that there are three essential requirements to support a finding of jurisdiction in the Federal Court. First, there must be a statutory grant of jurisdiction by the federal Parliament. Secondly, 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. Thirdly, the law on which the case is based must be "a law of Canada" as the phrase is used in section 101 of the *Constitution Act, 1867*. The purpose of this note is to point out and analyse recent developments concerning the first of these requirements,[2] particularly as it relates to suits between subject and subject as opposed to suits involving the Crown.

It is axiomatic that the Federal Court may exercise only the jurisdiction that is conferred on it by the *Federal Court Act*,[3] and for present purposes it is enough to contrast section 17 on the one hand, with sections 20, 22, 23 and 25 on the other. The latter sections specifically confer jurisdiction "as well between subject and subject as otherwise" in a variety of specific areas including industrial property, navigation and shipping, bills of exchange and promissory notes, aeronautics and interprovincial works. Section 17, by contrast, conspicuously omits any reference to suits between subject and subject. It provides in part as follows:

> (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.
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> (2) Without restricting the generality of subsection (1), the Trial Division has exclusive jurisdiction except where otherwise provided, in all cases in which the land, goods or money of any person 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, and in all cases in which there is a claim against the Crown for injurious affection.
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> ....
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> (4) The Trial Division has concurrent original jurisdiction

[1] *International Terminal Operators* v. *Miida Electronics* [1986] 1 S.C.R. 752 at 766, 28 D.L.R. (4th) 641 at 650 [hereinafter *I.T.O.* cited to S.C.R.].

[2] Discussion of this topic is conventionally overshadowed by concern about the mystifying nature of the second and third requirements, upon which there have been numerous commentaries. See P.W. Hogg, Comment (1977) 55 Can. Bar Rev. 550; P.W. Hogg, "Federalism and the Jurisdiction of Canadian Courts" (1981), 30 U.N.B.L.J. 9; J.B. Laskin & R.J. Sharpe, "Constricting Federal Court Jurisdiction" (1980) 30 U.T.L.J. 283; J.M. Evans, Comment (1981) 59 Can. Bar Rev. 124; S.A. Scott, "Canadian Federal Courts and the Constitutional Limits of Their Jurisdiction" (1982) 27 McGill L.J. 137.

[3] S.C. 1970-71-72 c. 1.

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

The question has frequently arisen whether, when an action is begun under section 17 against the Crown or its servants, a private defendant may also be made a party to the action. Until recently it appeared to have been clearly established that the private defendant could be joined only if the *subject matter* of the action against him, considered in isolation from the action against the Crown, would be within the jurisdiction of the Federal Court. Two decisions of Madam Justice Reed of the Federal Court Trial Division have brought this principle into question. In *Marshall* v. *R.*[4] and *Roy Little Chief* v. *R. and Youngman*,[5] she held that if the action against a private individual is factually "intertwined" with the action against the Crown the two actions should be joined and duplication of proceedings thus avoided.

The *Marshall* decision has raised fundamental questions about the policy underlying the allocation of judicial jurisdiction in Canada's federal system. The older authorities hold that duplication of proceedings is an unavoidable hazard in a dual court system; *Marshall* advocates minimizing the duplication of proceedings even if it means that the Federal Court's jurisdiction will be broadened. In the first part of this note, the jurisprudence which preceded *Marshall* is presented. The *Marshall* and *Little Chief* decisions are then examined, and the principles which emerge are contrasted with those of the earlier cases. In the last part of this note, the reaction of the Federal Court to *Marshall* is canvassed and criticized. Throughout, it is argued that while the jurisdictional reforms advocated in *Marshall* have some merit, the decision remains inconsistent with the authorities, and fails to take full account of other equally persuasive policy considerations.

The Authorities Prior to *Marshall*

Very soon after the Federal Court was established, Collier J. decided *Anglophoto Ltd* v. *The Ikaros*,[6] in which the plaintiff consignee began an action against a ship, its owners and a stevedoring company. The action, brought both in contract and in tort, arose out of a carriage of goods by sea, and short delivery was alleged. The stevedoring company moved to dismiss the action against it for want of jurisdiction, and succeeded. After

[4](1985), [1986] 1 F.C. 437 (T.D.) [hereinafter *Marshall*].
[5](11 June 1986) Vancouver T-2102-85 (F.C.T.D.) [hereinafter *Little Chief*].
[6][1973] F.C. 483, 39 D.L.R. (3d) 446 (T.D.) [hereinafter *Anglophoto* cited to F.C.].

examining section 22 of the *Federal Court Act* at some length, Collier J. concluded that there was no statutory authorization for the Court to hear the action, and he propounded the following test:

> I suggest a proper test to apply in approaching the question of jurisdiction is to see whether this Court would have jurisdiction if the claim advanced against one particular defendant stood alone and were not joined in an action against other defendants over whom there properly was jurisdiction.[7]

When the federal Crown is among several defendants, the actions against the other defendants are to be notionally separated from the action against the Crown, and examined as if the Crown were not involved. The Federal Court has jurisdiction over these separate actions only if the *subject matter* is within its competence. It is worth noting that in formulating this test Collier J. fully recognized the possibility that the test would lead to the duplication of proceedings, but accepted that possibility as "a fact of life in a federal system such as we have in Canada."[8]

The *Anglophoto* test was applied in a variety of subsequent cases[9] and the point reinforced that the mere presence of the federal Crown as a defendant in an action was not sufficient "to give the Court jurisdiction, regardless of the identity or character of the other defendants."[10] The issue was faced directly in *Lubicon Lake Band* v. *R.*[11] in which the plaintiffs were asserting various Aboriginal land claims, and brought an action in the Federal Court against the federal Crown and, *inter alia*, several oil companies. Addy J., upon hearing a successful motion by the oil companies to strike out the action against them, took the view that subsection 17(1) of the *Federal Court Act* did not, on its face, authorize claims between subject and subject, and held that it "merely refers to the party, namely, the Crown against whom a claim may be made and remains silent as to the nature of the claims which may be made."[12] This ruling was reinforced by a reference to the principle that where a court is created by statute its jurisdiction ought to be strictly interpreted. Because the words "between subject and subject", which appear in other jurisdictional sections of the Act, are omitted from section 17, the section should be interpreted as affirmatively excluding such actions.[13] At the same time Addy J. addressed the question of the duplication

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[7]*Ibid.* at 498.

[8]*Ibid.* at 497.

[9]*E.g.*, *Desbiens* v. *R.* [1974] 2 F.C. 20 (T.D.); *Sunday* v. *St-Lawrence Seaway Authority* (1976), [1977] 2 F.C. 3, 72 D.L.R. (3d) 104 (T.D.) [hereinafter *Sunday* cited to F.C.].

[10]*Sunday, ibid., per* Marceau J. at 9.

[11](1980), [1981] 2 F.C. 317, 117 D.L.R. (3d) 247 (T.D.); aff'd (1981), 13 D.L.R. (4th) 159 [hereinafter *Lubicon Lake Band* cited to F.C.].

[12]*Ibid.* at 321-22.

[13]*Federal Court Act, supra*, note 3, ss 20, 22, 23 and 25.

of proceedings and held as had Collier J., that it is an inevitable phenomenon in Canada's federal system.

Marshall v. *R.*

In view of the previous authorities, the decision of Reed J. in *Marshall* v. *R.*[14] was surprising. The plaintiff had brought an action in the Federal Court against the federal Crown and a federal public service union for wrongful dismissal. The union, in reliance upon the earlier cases, applied to have the action against it struck out for lack of jurisdiction. The application was declined.

Madame Justice Reed first interpreted subsection 17(1) on the basis of its plain meaning. She deduced that the section, because it referred to "cases where relief is claimed against the Crown" rather than "claims against the Crown", must authorize actions against private defendants as long as the Crown is being actively pursued as a co-defendant and the actions 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."[15] She based this principle on the belief that Parliament could not have intended to encourage duplication of proceedings.

Reed J. then turned to the authorities. She ruled that they could all be distinguished on the basis that in none of them had the causes of action against the Crown and the private defendant been sufficiently "intertwined". Equally, she was of the opinion that in none of the earlier cases had the meaning of subsection 17(1) been addressed in sufficient detail to be persuasive. This was as true of the *Lubicon* case as of any other.

Reed J. relied primarily on two cases. The first of these was *The Ship "Sparrows Point"* v. *Greater Vancouver Water District*,[16] in which an action was brought in the Exchequer Court by the Water District against a ship and the National Harbours Board, claiming for damage to some of its water mains. The question was whether the Exchequer Court, in exercising its admiralty jurisdiction over "damage by any ship", could properly hear the case against the Harbours Board. The Supreme Court of Canada held that it could because of the responsibility borne by the Board for the ship's navigation. The issue was very different from that at stake in *Marshall*, as Reed J. acknowledged; nevertheless Kellock J. (for the majority), did state that one of the reasons for giving the Exchequer Court Act a broad reading

[14] *Supra*, note 4.
[15] *Supra*, note 4 at 449.
[16] [1951] S.C.R. 396.

was "to avoid the scandal of possible different results if more than one action were tried separately."[17]

The other decision mentioned by Reed J. in support of her position was *Davie Shipbuilding Ltd.* v. *R. and Morse.*[18] In this case there was a claim and counterclaim between Davie and the federal Crown, and Davie sought to have a third party issue heard in the same proceedings in the Federal Court. Gibson J., citing, *inter alia*, the *Sparrows Point* decision, held that the Court's admiralty jurisdiction was probably wide enough to support the third party proceedings, but then went on to justify his decision further by reference to "the ancillary jurisdiction concept."[19]

At this point it is appropriate to mention the other, later, decision of Reed J., namely, *Roy Little Chief* v. *R. and Youngman.*[20] Here, members of an Indian Band were alleging misappropriation of funds paid by the Crown to a Band Council, and brought an action in the Federal Court against the Crown and against members of the Council. The individual Council members moved to strike out the claim on the basis of lack of jurisdiction, but Reed J. applied the *Marshall* doctrine, asserting briefly that the facts in issue were sufficiently "intertwined" and "closer to [those] in the *Marshall* case than ... in *Lubicon.*"[21] The *Little Chief* case, does not, therefore, appear to add to the weight of the *Marshall* case, and demonstrates the highly subjective nature of the "intertwined" test.

Criticisms of *Marshall*

There seems little doubt that the decision in *Marshall*, although reasoned at length, was the result of considerations of policy rather than of precedent. While it might be difficult, taking the facts of *Marshall* in isolation, to justify obliging the plaintiff to bring two sets of proceedings in two sets of courts, the theme of duplication of proceedings is a recurrent one in the cases, even at the level of the Supreme Court of Canada. In *Bank of Montreal* v. *Royal Bank of Canada*[22] the Bank of Montreal, having been sued by the Crown in the Exchequer Court, sought an indemnity from the Royal Bank by issuing a third party notice. The Bank of Montreal alleged that the Exchequer Court could hear the third party proceedings by virtue of section 30(d) of the *Exchequer Court Act*, which provided at the time

[17] *Ibid.* at 404.

[18] (1978), [1979] 2 F.C. 235, 90 D.L.R. (3d) 661 (T.D.) [hereinafter *Davie Shipbuilding* cited to F.C.].

[19] *Ibid.* at 243.

[20] *Supra*, note 5.

[21] *Ibid.*

[22] [1933] S.C.R. 311.

that the Court had jurisdiction "in all other actions and suits of a civil nature at common law or equity in which the Crown is plaintiff or petitioner." It was held that this statutory provision ought to be construed narrowly, and that because third party proceedings could be brought in a provincial superior court, they should be brought there rather than in the Exchequer Court.

The more recent decision of the Supreme Court of Canada in *R.* v. *Thomas Fuller Construction Co.* confirmed this view.[23] The case did not involve statutory construction of the *Federal Court Act*; rather, the issue was whether there was federal law to support a third party notice issued by the Crown in Federal Court proceedings. The notice had been issued after an action had been commenced against the Crown for breach of contract and negligence. It had been argued that reason and convenience required the Court to embrace a doctrine of "ancillary power" in order to avoid duplication of proceedings, but Pigeon J., for the majority, dismissed the argument:

> It must be considered that the basic principle governing the Canadian system of judicature is the jurisdiction of the superior courts of the provinces in all matters federal and provincial ... . Consequently I fail to see any basis for the application of the ancillary power doctrine which is limited to what is truly *necessary* for the effective exercise of Parliament's legislative authority.[24]

It is submitted that, on the issue of principle, these two cases are more compelling in their combined effect than those cited by Reed J. in *Marshall.* Thus it is argued that, whatever the merits of *Marshall* taken in isolation, the issue of policy has been addressed again and again, often at the highest levels, and has almost always resulted in a finding that duplication of proceedings is an established, if not welcome, feature of a federal judicial landscape with two court systems.

A variety of other criticisms of varying degrees of technicality may be levelled at the *Marshall* decision. First, an argument may be advanced that, if the reasoning in the case is correct, there would follow the unusual consequence that a number of private defendants could be sued *only* in the Federal Court. Subsection 17(1) of the *Federal Court Act* stipulates that, except where otherwise provided, the Trial Division has original and *exclusive* jurisdiction where relief is claimed against the Crown. The broad view of this subsection taken by Reed J. would seem to require that a plaintiff who has a cause of action against the Crown would not be permitted to bring an action against a private defendant, arising out of the same facts,

[23](1979), [1980] 1 S.C.R. 695, 106 D.L.R. (3d) 193 [hereinafter *Thomas Fuller Construction* cited to F.C.].

[24]*Ibid.* at 713.

in a provincial superior court. This surprising result would certainly be contrary to a long line of authorities which have spoken of limiting, rather than extending, the jurisdiction of both the Exchequer Court and the Federal Court.

Secondly, although Reed J. distinguished some of the earlier decisions, it is submitted that it is not self-evident that the facts in those cases were intrinsically less "intertwined" than they were in *Marshall.* In any event, the "stand alone" test formulated in *Anglophoto*[25] is clearly incompatible with the "intertwined" test. In a case in which the only justification for suing a private defendant in the Federal Court is that (i) the Crown is also a party, and (ii) the claim against the private defendant is intimately "intertwined" with the case against the Crown, it is a logical impossibility for the case against the private defendant to pass the *Anglophoto* test that the Court would have jurisdiction only "if the claim against [the private defendant] stood alone and were not joined in an action against [the Crown] over whom there is properly jurisdiction."[26]

The third basis upon which Reed J. distinguished the earlier cases was that her interpretation of subsection 17(1) had not been directly considered — and therefore had not been rejected — in any of them. This, it is submitted, is not wholly supportable. The heart of the *Marshall* decision lies in a broad construction of section 17, and this principle of construction has been decisively rejected in a number of cases. This is particularly true of *Bank of Montreal* v. *Royal Bank of Canada,*[27] *Sunday* v. *St. Lawrence Seaway Authority*[28] and *Lubicon Lake Band* v. *R.*[29] In the latter case it is especially significant that Addy J. addressed himself directly to the meaning of subsection 17(1) and that an appeal from his decision was dismissed.[30]

Finally, in neither *Marshall* nor *Little Chief*[31] did Reed J. mention the decision of the Federal Court of Appeal in *Stephens' Estate* v. *Minister of National Revenue.*[32] In *Stephens* the plaintiff began an action in the Federal Court for damages for wrongful seizure and trespass said to have followed an allegedly invalid notice of assessment issued by Revenue Canada. In

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[25]*Supra,* note 6.

[26]*Supra* note 7.

[27]*Supra,* note 22.

[28]*Supra,* note 8.

[29]*Supra,* note 11.

[30]*Ibid.* It is fair to point out, however, that the appeal was dismissed without reasons and, as Reed J. pointed out in *Marshall,* there may not have been detailed argument on the construction to be placed on s. 17(1).

[31]*Supra,* note 5.

[32](1982), 40 N.R. 620, (*sub nom. Stephens* v. *R.*) 26 C.P.C. 1 (F.C. A.D.) [hereinafter *Stephens* cited to N.R.].

addition to the Crown one of the defendants was a sheriff's officer in Ontario. He moved to strike out the action against him on the basis that he was not an officer or servant of the Crown.[33] LeDain J., for the Court, said:

> The cause of action against the defendants other than the Crown, to the extent that there is one, is in tort ... .
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> The *only* head of Federal Court jurisdiction on which the claims against the defendants other than the Crown *can conceivably rest is para. 17(4)(b)* of the *Federal Court Act* ... .
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> It was contended [on behalf of the sheriff's officer] that he was not a servant of the Crown in the right of Canada. I agree with that contention.[34] [Emphasis added]

The claim against the sheriff's officer was struck out.

LeDain J. did not refer directly to subsection 17(1), nor of course, did he refer to the "intertwining" doctrine. He, however, was of the opinion that the case against the sheriff's officer could be brought only pursuant to paragraph 17(4)(b). In the light of the novel nature of the *Marshall* decision it is regrettable that the *Stephens* case was not considered there.

Federal Court Decisious Following *Marshall*

The *Marshall* case, predictably, has not gone unnoticed and, although it was decided recently, the point at issue has already been raised on a number of subsequent occasions.[35]

In *Roberts* v. *R.*[36] one Indian band sued the Crown and another band in the Federal Court over possession of land. The defendant band moved to have the proceedings against it dismissed for want of jurisdiction, but Joyal J., upon hearing the motion, declined to dismiss on the basis of *Marshall, Little Chief* and the "intertwining doctrine". On appeal, Hugessen J. (Urie J. concurring) found that jurisdiction over the band could be taken on other grounds, namely, by reference to paragraph 17(3)(c) of the *Federal Court Act.* He was, however, carefully skeptical about the "intertwining" doctrine. Having said that the *Marshall* approach gave him "some difficulty", and that it was "not an interpretation which [had] hitherto found favour", he said:

> [It] remains that subsection 17(1) purports to grant exclusive jurisdiction; I have difficulty accepting a proposition that would make so fundamental a

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[33]See *Federal Court Act*, s. 17(4)(b).

[34]*Supra*, note 32 at 626-27.

[35]See, *e.g.*, *Little Chief, supra*, note 5.

[36][1987] 2 F.C. 535, 36 D.L.R. (4th) 552 (A.D.) [hereinafter *Roberts* cited to F.C.].

> question, which must be determined at the time of the institution of the suit, dependent upon so uncertain a base ... .
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> I would prefer to leave the question of subsection 17(1) to another day and to say no more on the matter.

Only MacGuigan J. adopted the *Marshall* interpretation, taking the view that the cases against the Crown and the band were sufficiently intertwined.

Another recent case in which this issue arose in the Federal Court of Appeal is *Oag* v. *R.*[37] Here a tort claim was made against the Crown and a variety of persons associated with the National Parole Board. It is significant that a unanimous court (Thurlow C.J., Stone and Heald JJ.) disposed of the question of statutory jurisdiction without any reference to the "intertwining" doctrine, taking the view that the issue stood or fell with exclusive reference to whether the defendants in question were "officers or servants of the Crown" under paragraph 17(4)(b). For technical reasons it was held that they were, and that jurisdiction was properly taken over them.

Most recently the issue has arisen in *Wilder* v. *R.*[38] In this case the plaintiff alleged that there had been impropriety in the communication of confidential tax information to American federal officials by Canadian officials. In the course of an action against the Crown and the Canadian officials for breach of statutory duty and the tort of civil conspiracy, the plaintiff sought leave, *ex parte* under Rule 307 of the *Federal Court Rules*, to serve the American defendants *ex juris*. The claim against them amounted to an allegation of participation in the civil conspiracy. Muldoon J. granted leave and, despite the *ex parte* nature of the case, wrote a lengthy judgement applying the criteria laid down in *I.T.O.*[39] The significance of the judgment for present purposes lies in the fact that Muldoon J. relied heavily on *Marshall* and *Little Chief*. He held that because jurisdiction properly lay against the Crown under subsection 17(1) of the *Federal Court Act*, and against Crown officials under paragraph 17(4)(b), it was appropriate to assert jurisdiction over the American officials. In other words, satisfying one or both of those provisions was a condition precedent to jurisdiction over the private defendants, provided that the case against them was sufficiently "intertwined" with the case against the Canadian defendants.

Despite the fact that *Wilder* v. *R.* was decided *ex parte* it has been thought appropriate to refer to it at some length to indicate how attractive the *Marshall* doctrine may be in some quarters, despite the authorities against it. It need hardly be pointed out that the facts in *Wilder* could not have justified the service *ex juris* from the Federal Court had the

[37][1987] 2 F.C. 511 (A.D.) [hereinafter *Oag*].
[38][1987] 3 F.C. 45, 9 F.T.R. 140 (T.D.) [hereinafter *Wilder* cited to F.C.].
[39]*Supra*, note 1.

Anglophoto[40] test laid down by Collier J. been applied. There is nothing in section 17, or indeed in any other section of the *Federal Court Act*, which would support Federal Court jurisdiction if the claim against the American officials "stood alone and were not joined in an action against other defendants ovcr whom there properly is jurisdiction."[41]

The treatment by Muldoon J. of the earlier authorities was curious. He recognised that the *Stephens*[42] case is inconsistent with the *Marshall* view, but in referring to *Roberts*[43] he emphasised its dissimilarity on the facts from *Wilder*, although acknowledging the overruled view of Joyal J. at trial, and the minority view of MacGuigan J. on the appeal. The carefully expressed doubts of Urie and Hugessen JJ. about the *Marshall* case were not referred to. In analysing the *Oag*[44] decision, Muldoon J. appeared to hold that the ruling was not inconsistent with asserting jurisdiction over persons who were not "officers or servants of the Crown."

Conclusion

If the avoidance of duplication of proceedings were the only issue in *Marshall*, *Little Chief* and *Wilder*, it would be hard to adduce arguments in principle against those decisions. Speaking of the obscure line dividing the jurisdiction of the Federal Court and the provincial superior courts drawn by the Supreme Court of Canada in *Quebec North Shore Paper Co.* v. *Canadian Pacific Ltd.*,[45] a leading Canadian constitutional authority commented that "the burden of inadequate rules will be borne not by governments but by individual litigants who have no means of escape from the uncertainties, expenses, delays, inconsistencies and injustices which are inherent in multiple lawsuits."[46]

It is submitted, however, that the problem of duplication of proceedings is too complex for judicial intervention on a case by case basis. Recognition that this is so, it is argued, underlies all of the earlier decisions in which the courts have narrowly construed the *Federal Court Act* in spite of the

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[40]*Supra*, note 7.

[41]*Ibid.*

[42]*Supra*, note 32.

[43]*Supra*, note 36.

[44]*Supra*, note 37.

[45](1976), [1977] 2 S.C.R. 1054.

[46]P.W. Hogg, *Constitutional Law of Canada*, 2d ed. (Toronto: Carswell, 1985) at 148. Professor Hogg's criticism, however, is subject to his overriding view that Canada does not need a federal court system at all. See Hogg, "Federalism and the Jurisdiction of Canadian Courts", *supra*, note 2.

undesirability of multiple proceedings.[47] These decisions may also amount to an acknowledgment that, even in the most carefully designed dual court system, there will be some instances in which duplication is unavoidable, simply because the two systems exist.

Two particular criticisms of the *Marshall* solution should be re-iterated. The first is, as Hugessen J. pointed out in *Roberts*,[48] that the test of "intertwining" is a very uncertain criterion upon which to base jurisdiction. More often than not neither plaintiff nor defendant would, on this test, be able to predict whether a cause of action against a private defendant properly belongs in the Federal Court under section 17 of the *Federal Court Act* or in a provincial superior court. Secondly, subsection 17(1)[49] provides for exclusive original jurisdiction for the Trial Division. Thus, on the *Marshall* reasoning, a plaintiff with a cause of action against the Crown may be forced to litigate a related issue against a private defendant in the Federal Court, even though preferring in reality to pursue the matter in a provincial superior court.[50]

These anomalies are, perhaps, the natural result of an attempt to bring about substantial jurisdictional reform by judicial means, and it is suggested that if the jurisdictional rules of the Federal Court are to be changed in the interest of avoiding duplication of proceedings, the change should come about by legislation. The relationship between the Federal Court and the provincial superior courts is obviously a complex one, involving a consideration of constitutional and political issues, as well as of less contentious procedural matters like duplication of proceedings. A legislative approach would permit all questions to be addressed comprehensively in a way not available to the judiciary. It is suggested, therefore, that the *Marshall* case,

[47]*E.g. Bank of Montreal* v. *Royal Bank of Canada, supra*, note 15; *Lubicon Lake Band, supra*, note 10; *Sunday, supra*, note 8; *Anglophoto, supra*, note 5.

[48]*Supra*, note 36.

[49]This is not the case with s. 17(4)(b).

[50]The force of this criticism may be modified by *Zutphen Bros. Construction* v. *Dywidag Systems International* (1987), 76 N.S.R. (2d) 398, 189 A.P.R. 398, 35 D.L.R. (4th) 433 (N.S.S.C.A.D.). Here the plaintiff had brought an action against the defendant in the Nova Scotia Supreme Court. The defendant applied to add the federal Crown as a third party, but was met with the objection by the Crown that s. 17 obliged the defendant to bring an action against the Crown only in the Federal Court. The defendant challenged this position, submitting that the application of s. 17 to this situation resulted in an infringement of the defendant's rights under, *inter alia*, s. 15(1) of the Canadian Charter of Rights and Freedoms. The Appeal Division held that the exclusive nature of s. 17 did indeed infringe the defendant's rights. Crown privilege was an outdated concept and private plaintiffs should be placed in the same position as the Crown, namely, able to choose whether to bring an action in either the Federal Court or in the provincial superior courts. If the *Zutphen* view is maintained, the difficulty occasioned by *Marshall* may diminish, as fewer plaintiffs may choose to bring their actions in the Federal Court.

inconsistent as it appears to be with earlier authorities, should for the time being be treated as anomalous.

Author's Note

Just before this article went to press, the Federal Court of Appeal gave judgment in College of Physicians and Surgeons of British Columbia *v.* Varnam and Minister of National Health.[51] *In that decision, Hugessen J. (Desjardins and Mahoney JJ. concurring) held that the "intertwining" doctrine was "too vague and elastic a standard upon which to found exclusive jurisdiction in the Federal Court." It was also held that Reed J. was mistaken in her reading of subsection 17(1) of the* Federal Court Act. *In reaching this conclusion Hugessen J. placed particular reliance on the references to jurisdiction as between subject and subject appearing in sections 20, 22, 23 and 25 of the* Act. *The decisions which precede* Marshall *cited in this article were approved and said to represent "sound judicial policy."*

[51](22 February 1988) Ottawa A-245-87.