Jurisdiction for First Nation Labour Relations

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Introduction

Agenda

- *Toronto Electric Commissioners v. Snider*, [1925] AC 396 & provincial presumption over labour relations
- *NIL/TU,O Child & Family Services Society v. B.C.G.E.U.,* [2010] 2 SCR 696 & functional test
- Application of functional test post-*NIL/TU,O*
- Discussion: Client management when facing uncertain jurisdiction for labour relations – Plaintiff considerations and Respondent considerations.
- Discussion: Challenges with First Nation organizations & cultural homophily

Provincial Presumption

- *Toronto Electric Commissioners v. Snider*, [1925] AC 396:
    - A dispute had arisen between the Toronto Electric Commission – a body operating the light, heat and power system of Toronto – and its employees, at whose request a federal Conciliation Board was set up under the Industrial Disputes Investigation Act.
        - The Judicial Committee of the Privy Council held that the Act was beyond the powers of the Federal Parliament.

Provincial Presumption

- ***Labour relations are presumptively a provincial matter, and that the federal government has jurisdiction over labour relations only by way of exception.***

1. The work constitutes a federal undertaking *(Snider; Reference re Industrial Relations and Disputes Investigation Act,* [1955] S.C.R. 529);

2. The work is a "functionally discrete" unit of employees, doing federal work within an otherwise provincial operation (*Northern Telecom; Four B; Bell Canada v. Quebec (Commission de la santé et de la sécurité du travail),* [1988] 1 S.C.R. 74)

Functional Integration Test

NIL/TU,O Child & Family Services Society v. B.C.G.E.U., [2010] 2 SCR 696

FACTS

- NIL/TU,O Child and Family Services Society provided child welfare services to the children and families of several first nations in British Columbia. Unique institutional structure combining provincial accountability, federal funding, and a measuring of operational independence.

- In 2005 the Union applied to the B.C. Labour Relations Board to be certified as bargaining agent for NIL/TU,O employees, but NIL/TU,O objected, arguing that its labour relations fell within federal jurisdiction over 'Indians' under s.91(24) of the *Constitution Act* 1867.

Functional Integration Test

FACTS

- Board dismissed NIL/TU,O's objection. On judicial review, Supreme Court of British Columbia overturned Board's decision: although NIL's operation served provincial ends, they did so by uniquely indigenous means.

- British Columbia Court of Appeal allowed the Union's appeal, concluding that NIL/TU,O operations fell under provincial jurisdiction:

  > [9] … nothing in the Child, Family and Community Service Act, the design of NIL/TU,O's operations or the nature of NIL/TU,O's services took NIL/TU,O outside provincial jurisdiction. Primary provincial jurisdiction over labour relations was not "ousted" simply because NIL/TU,O's operations "engage[d] the interests of [indigenous] groups" or because NIL/TU,O provided services in a "culturally sensitive" manner

Functional Integration Test

NIL/TU,O Child & Family Services Society v. B.C.G.E.U., [2010] 2 SCR 696

ISSUE

- Whether NIL/TU,O's labour relations fall within federal jurisdiction over 'Indians' under s.91(24) because its services are designed for First Nation children and families.

DECISION

- Appeal dismissed – NIL/TU,O fell under provincial jurisdiction for labour relations.

Functional Integration Test

Analysis

- To displace the presumption of provincial jurisdiction, a court must conduct an inquiry having two distinct steps, the first being the "functional test" , which examines the nature, operations and habitual activities of the entity to determine whether it constitutes a federal undertaking. ***Only when this first Test is inconclusive, should a court proceed to the second step, which is to ask whether the provincial regulation of that entity's Labour relations would impair the core of the federal head of power at issue***

Functional Integration Test

REASONS FOR JUDGEMENT

- The essential nature of NIL's operation is to provide child and family services, a matter within the provincial sphere. ***It is regulated exclusively by the province and its employees exercise exclusively provincial delegated authority. The identity of the beneficiaries may affect how those services are delivered, but they do not change the fact that the delivery of child welfare services – a provincial undertaking, is what NIL essentially does.*** The presumption in favour of provincial jurisdiction over labour relations remains operative in this case.

Functional Integration Test

REASONS FOR JUDGEMENT

- British Columbia's Child, Family and Community Service Act, by expressly recognizing, affirming and giving practical meaning to the unique rights and status of Aboriginal people in the child welfare context, and by expressly respecting Aboriginal culture and heritage, represents a commendable, ***constitutionally mandated exercise of legislative power.*** The very fact that the delivery of child welfare services is delegated to First Nations agencies marks, significantly and positively, public recognition of the particular needs of Aboriginal children and families. It seems to me that this is a development to be encouraged in the provincial sphere, not obstructed.

‘Core of Indianness’

- This so-called ‘core of Indianness’ is a contested concept referring to federal jurisdiction over ‘Indians and lands reserved for the Indians’ under section 91(24) of Canada’s Constitution Act, 1867. Since the late 1970s, the ‘core’ has emerged in case law around land rights, hunting, fishing and harvesting rights, and labour relations to determine what counts as Indigenous activity and labour and, following from that definition, what falls within (or outside) federal jurisdiction.

- The Supreme Court of Canada reasoned that the labours involved in providing child and family welfare services at an Indigenous social service agency were not a matter of federal jurisdiction because these labours fall outside of the ‘core of Indianness’.

Test for FN Jurisdiction

- A provincial law of general application will extend to Indian undertakings, business or enterprises, whether on or off a reserve, ***except*** where the law impairs those functions of the enterprise which are intimately bound with the status and rights of Indians ('core of Indianness')

    - ***Rights so closely connected with Indian status that they should be regarded as necessary incidents of status*** such as registrability, membership in a band, the right to participate in the election of Chief and Council, reserve privileges, etc.

    - ***Focus of analysis rests squarely on whether the nature of the operation and its normal activities***, as distinguished from the people who are involved in running it or the cultural identity of those who may be affected by it, relate to what makes Indians federal persons as defined by what they do and what they are.

Post-*NIL/TU,O*: *Charlie v. Sts'ailes Indian Band*

Charlie v. Sts'ailes Indian Band, 2019 CanLII 104254 (CA LA)

Facts

- Unjust dismissal complaint at the Labour Program of Employment and Social Development Canada (ESDC) pursuant to section 240(1) of the *Canada Labour Code*.
- As the complaint was referred to adjudication, the Band raised a constitutional issue with respect to the Board's jurisdiction, alleging that the Complainant's employment relationship was not regulated by the *Canada Labour Code*.

Post-*NIL/TU,O*: *Charlie v. Sts'ailes Indian Band*

Charlie v. Sts'ailes Indian Band, 2019 CanLII 104254 (CA LA)

Facts

- Complainant was employed employed by Sts'ailes Indian Band as an Early Childhood Educator (pre-kindergarten teacher). The Centre employs indigenous and non-indigenous adults to deliver child care services to indigenous and non-indigenous children living on and off reserve lands. On-reserve community families do not have priority over registered off-reserve community families. The Early Education Centre was not a separate incorporated entity, and operated within the Sts'ailes Education Department, where the Director of Education reported to the Chief and Council. There were no federal laws governing the Centre's operation, and it relied on a provincial license and provincial standards under the Community Care and Assisted Living Act to operate.

Decision

- Provincial jurisdiction found. Complaint dismissed.

Post-*NIL/TU,O*: *Charlie v. Sts'ailes Indian Band*

Charlie v. Sts'ailes Indian Band, 2019 CanLII 104254 (CA LA)

Analysis

- [68] Neither ownership of the Sts'ailes Early Education Centre nor its location on reserve land rebuts the provincial presumption. The source of funding and identity of the beneficiaries of the services do not rebut the provincial presumption. ***"... it does not matter who receives the services, who funds the services, who provides the services, or where the services are located; the sole consideration is the nature of the habitual activities undertaken by the entity."***
- [70] The reach of First Nation governance activity is elastic. ... The direction of the Supreme Court of Canada is not to lapse into analysis that places core "Indianness" ahead of the nature, habitual activities and operations of the disputed employment relationship.

Post-*NIL/TU,O*: *Charlie v. Sts'ailes Indian Band*

Charlie v. Sts'ailes Indian Band, 2019 CanLII 104254 (CA LA)

Analysis

- [72-75] The Sts'ailes Early Education Centre's nature, habitual activities and daily operations is as a provincially regulated child care facility delivering care to any children who register in its a multi-service program established within a provincially regulated scheme of early childhood care and education... The Centre exists because of provincial regulation... The Centre's activities are not conducted pursuant to federal delegated authority and do not affect core aspects of the status and rights of Indians... The Director of the Early Childhood Educator Registry and the regional health authority have crucial roles and authority over employment relationships in the Centre's activity and services that can supersede Band Council authority.

Post-*NIL/TU,O*: *Quebec (Attorney General) v. Picard*

Quebec (Attorney General) v. Picard, 2020 FCA 74

Facts

- Dispute arising from pension entitlements of police officers who were members of Indigenous police forces, employed directly by band councils in Quebec. Judicial review of decision made by the Office of the Superintendent of Financial Institutions of Canada decreeing that the police officers who were members of Indigenous police forces were not employed in a federal undertaking such that their pension plan can be registered under the *Pension Benefits Standards Act, 1985*, RSC 1985 c. 32.

Post-*NIL/TU,O*: *Quebec (Attorney General) v. Picard*

Quebec (Attorney General) v. Picard, 2020 FCA 74

Facts

- Federal Court allowed initial application for judicial review, finding federal jurisdiction for the police officers and special constables hired and remunerated by band councils under a tripartite agreement that also involved the federal and Quebec governments.
- Attorney General of Quebec appealed the decision.

Decision

Appeal dismissed.

Post-*NIL/TU,O*: *Quebec (Attorney General) v. Picard*

Quebec (Attorney General) v. Picard, 2020 FCA 74

Analysis

- [54] There is no longer any doubt that the functional test must be applied in the same way in Indigenous matters as in any other matter … As the Supreme Court reiterated in NIL/TU,O, it is the nature, operations and habitual activities of the entity that must be examined to determine whether it is a federal undertaking…
- Band council was responsible for:
  - Policies and procedures for police service
  - Hiring, discipline, and terminations;
  - Providing the required facility, and ensuring the facility complies with the applicable fire safety and occupational health and safety standards; and
  - Supplying material and equipment needed for the provision of policing services

Post-*NIL/TU,O*: *Quebec (Attorney General) v. Picard*

Quebec (Attorney General) v. Picard, 2020 FCA 74

Analysis

- [61] … this case differs from the facts in *NIL/TU,O, Nishnawbe-Aski* and *Northern Inter-Tribal*. ***In those cases, the employer was not the band council but an entity independent of the councils.*** It is precisely on the basis of that distinction that this Court found in *Lac John* that an application for certification of a bargaining unit composed of the teaching staff of a school located on the territory of an Indigenous reserve falls within the jurisdiction of the Canada Industrial Relations Board … In that case, as in the present case, the employer was the band council.
- [63] It does not follow from the foregoing that any activity or duty whose performance is under band council authority will fall under federal jurisdiction… This activity or duty must be truly assimilated to or associated with the governance of a First Nation.

Post-*NIL/TU,O*: *Miriam Windsor v Haisla Nation Council*

Miriam Windsor v Haisla Nation Council, 2021 CIRB 958

Facts

- Unjust dismissal complaint at the Labour Program of Employment and Social Development Canada (ESDC) pursuant to section 240(1) of the *Canada Labour Code*. As the complaint was referred to adjudication, the Parties agreed that the Board should first deal with the issue of whether the employment relationship is subject to provincial or federal jurisdiction.

- The Complainant was dismissed for cause from her position as a Haisla expressive arts contract worker with the Haisla Nation Council at the Haisla Health Centre.

Post-*NIL/TU,O*: *Miriam Windsor v Haisla Nation Council*

Miriam Windsor v Haisla Nation Council, 2021 CIRB 958

Facts

- Health Centre was operated as a part of the Nation's Health Department, rather than as a separate corporate entity. As part of its programs, the Haisla Nation had a health centre, situated on the reserve lands, that delivered services in a way that was culturally appropriate to Indigenous persons.
- The health centre was housed in a separate building close to, but apart from, the administration building. The health centre offered a wide range of health and welfare services to the members of the Haisla Nation. The Health Manager reports directly to the Chief Executive Officer of the Haisla Nation. The budget for the health centre is mainly funded through the First Nations Health Authority (FNHA) via a funding agreement directly between the Nation and FNHA.

Post-*NIL/TU,O*: *Miriam Windsor v Haisla Nation Council*

Miriam Windsor v Haisla Nation Council, 2021 CIRB 958

Decision

- Federal jurisdiction found. Complaint proceeded to have a Hearing on its merits.

Analysis

- [52] In *NIL/TU,O,* supra, the SCC reiterated the presumption that labour relations are governed by provincial legislation. However, the presumption can be rebutted. In analyzing this issue, the Board must first apply a functional test, which examines the normal and habitual activities of the entity without regard for exceptional or casual factors, to determine whether the entity constitutes a federal undertaking. If the functional test is inconclusive, the Board must determine whether the "core" of the federal head of power at issue would be impaired by the provincial regulation of the entity's labour relations.

Post-*NIL/TU,O*: *Miriam Windsor v Haisla Nation Council*

Miriam Windsor v Haisla Nation Council, 2021 CIRB 958

Analysis

- [88] In this case, the Haisla Nation has a mandate to provide health services to its members and, through its health centre, delivers the services directly to its members. ***The health centre's day-to-day activities and operations are controlled by the Haisla Nation and are part of the local government services it provides to its members.*** As the Federal Court found in Berens River First Nation, supra, these activities are a normal part of the local government activity of a First Nation.
- [89] The Board finds that the delivery of health care services directly by the Haisla Nation is assimilated to the exercise of a governance function. It is not a commercial, for-profit enterprise but part of the local governmental services that the First Nation delivers to its members. Consequently, the Board concludes that the labour and employment relations of the health centre fall under federal jurisdiction.

Post-*NIL/TU,O*: *Gerald Schlesiger v Tsleil-Waututh Nation*

Gerald Schlesiger v Tsleil-Waututh Nation, 2023 CIRB 1058

Facts

- Unjust dismissal complaint at the Labour Program of Employment and Social Development Canada (ESDC) pursuant to section 240(1) of the *Canada Labour Code*.
- As the complaint was referred to adjudication, the Band raised a constitutional issue with respect to the Board's jurisdiction, alleging that its Lands Office was not a federal work, undertaking or business.
- Complainant was employed as the lands manager with the Department of Public Works of Tsleil-Waututh Nation. He worked out of the TWN Administration Building in North Vancouver, and his immediate supervisor was the Director of Public Works. He was hired (and terminated) by Band Council Resolution, and his Record of Employment indicated TWN as the employer.

Post-*NIL/TU,O*: *Gerald Schlesiger v Tsleil-Waututh Nation*

Gerald Schlesiger v Tsleil-Waututh Nation, 2023 CIRB 1058

Decision

- Provincial jurisdiction found. Complaint dismissed.

Analysis

- [80-82] ...The Board has applied the approach in NIL/TU,O, supra, and considered the nature of the activities without focussing on the elements of the service that are "Indigenous" in nature, such as the population served, the cultural sensitivity of the services or the source of funding... The Board has focussed on the nature of the activity, assessing whether it is within the rare exception of governance activity... When an Indian band or First Nation is alleged to be the undertaking... it is important to consider whether the normal and habitual activities are ones that are assimilated to band governance.

Post-*NIL/TU,O*: *Gerald Schlesiger v Tsleil-Waututh Nation*

Gerald Schlesiger v Tsleil-Waututh Nation, 2023 CIRB 1058

Analysis

- [103] On balance, however, the Board finds that the work was carried out at the Lands Office, under the authority of the Land Code, and that the nature of the work required independence from the day-to-day administration of the TWN. The Board notes that an employer can have some aspects that are subject to provincial regulation while also having others that are subject to federal regulation.
- [111,113] In the Board's view, there is nothing particularly federal about the registration of interests in land or land administration… this is no different than the activities of a provincial land titles office in British Columbia, which deals with the Torrens system.

Post-*NIL/TU,O*: *Gerald Schlesiger v Tsleil-Waututh Nation*

Gerald Schlesiger v Tsleil-Waututh Nation, 2023 CIRB 1058

Analysis

- [115] In the Board's view, "land management," land use planning, registration of land interests, and collection and disbursement of rents are activities of a local nature. They affect those in the community and those that have or seek to have land dealings in the TWN community. The Board notes that the framework agreement, the FNLMA and the Land Code are all instruments or tools that give authority to the TWN to deal with the rights of its members and persons who deal with TWN land. The intent of the FNLMA was to ensure local Indigenous control over lands without requiring federal government involvement and without the need to resort to the Indian Act in land use decision-making.

QUESTIONS?

Client management when facing uncertain jurisdiction for labour relations

Challenges with First Nation organizations & cultural homophily

Thank you