Case Name:

NIL/TU,O Child and Family Services Society v. British Columbia Government and Service Employees' Union

Between
NIL/TU,O Child and Family Services Society,
Petitioner, and
B.C. Government and Service Employees' Union,
Respondent

[2007] B.C.J. No. 1609

2007 BCSC 1080

284 D.L.R. (4th) 42

[2007] CLLC para. 220-044

159 A.C.W.S. (3d) 370

[2008] 4 W.W.R. 287

2007 CarswellBC 1671

76 B.C.L.R. (4th) 322

147 C.L.R.B.R. (2d) 289

Vancouver Registry No. S067214

British Columbia Supreme Court
Vancouver, British Columbia

Cullen J.

Heard: April 16 - 17, 2007.
Judgment: July 19, 2007.

(82 paras.)

Aboriginal law -- Aboriginal rights -- Effect of legislation -- Federal -- The application for judicial review was granted, and the B.C. Labour Relations Board's decision to certify the respondent trade union was quashed -- The board lacked jurisdiction, as the operation and normal activities of the petitioning children's aid society, which addressed unique First Nations concerns and issues, were matters falling within s. 91(24) of the Constitution Act -- Constitution Act, 1867, s. 91(24).

Administrative law -- Judicial review and statutory appeal -- When available -- Error of law -- The application for judicial review was granted, and the B.C. Labour Relations Board's decision to certify the respondent trade union was quashed -- The board lacked jurisdiction, as the operation and normal activities of the petitioning children's aid society, which addressed unique First Nations concerns and issues, were matters falling within s. 91(24) of the Constitution Act -- Constitution Act, 1867, s. 91(24).

Constitutional law -- Division of powers -- Federal jurisdiction -- Section 91, Constitution Act, 1867 -- Aboriginals and reserves -- The application for judicial review was granted, and the B.C. Labour Relations Board's decision to certify the respondent trade union was quashed -- The board lacked jurisdiction, as the operation and normal activities of the petitioning children's aid society, which addressed unique First Nations concerns and issues, were matters falling within s. 91(24) of the Constitution Act -- Constitution Act, 1867, s. 91(24).

Family law -- Child protection -- Children's Aid Societies -- The application for judicial review was granted, and the B.C. Labour Relations Board's decision to certify the respondent trade union was quashed -- The board lacked jurisdiction, as the operation and normal activities of the petitioning children's aid society, which addressed unique First Nations concerns and issues, were matters falling within s. 91(24) of the Constitution Act -- Constitution Act, 1867, s. 91(24).

Labour law -- Collective bargaining rights -- Certification -- The application for judicial review was granted, and the B.C. Labour Relations Board's decision to certify the respondent trade union was quashed -- The board lacked jurisdiction, as the operation and normal activities of the petitioning children's aid society, which addressed unique First Nations concerns and issues, were matters falling within s. 91(24) of the Constitution Act -- Constitution Act, 1867, s. 91(24).

The petitioning child and family services society sought judicial review, seeking (a) a declaration that the B.C. Labour Relations Board lacked constitutional jurisdiction with regard to its labour relations, and (b) an order that the certification granted by the board to the respondent trade union for a bargaining unit composed of employees at the society save the executive director and those excluded by the code be set aside -- The petitioner argued that if the core function of the society related to "Indianness", meaning that the society's labour relations were an integral part of primary federal jurisdiction over Indians or land reserved for Indians, then the board did not have jurisdiction -- The society had been established in 1997 by seven different First Nations to create, develop, implement and maintain a child welfare and family service agency for respective First Nations -- The petitioner contended that if the board had properly applied the appropriate functional

test, it would have been led to the conclusion that the enterprise engaged in by the society formed an integral part of the primary federal jurisdiction over Indians or land reserved for Indians and would have declined to certify the respondent -- HELD: The application was allowed, and the board's decision to certify the respondent was quashed -- Under the functional test, the operation and normal activities of the society were matters falling within s. 91(24) of the Constitution Act, and accordingly, labour relations which pertained to it formed an integral part of primary federal jurisdiction over that operation -- Although the operations and normal activities of the society unarguably served the ends of the Child, Family and Community Services Act, they did so by means which addressed unique First Nations' concerns and issues -- Where the operations and normal activities of an undertaking mirrored matters such as medical and health services and education which fall within s. 91(24) and were shaped to deal with issues arising out of the discrete First Nations experience, it followed, under the functional test, that the service assumed a federal dimension despite its genesis in provincial jurisdiction and legislation.

Statutes, Regulations and Rules Cited:

Child, Family and Community Services Act

Constitution Act, 1867, 30 & 31 Victoria, C. 3 (U.K.), s. 92(13), s. 92(16)

Society Act, R.S.B.C. 1996, c. 433

Counsel:

Counsel for the petitioner: W.G. Rilkoff, N. Skuggedal.

Counsel for the respondent: K. Curry.

Counsel for the B.C. Labour Relations Board: E. Miller.

CULLEN J.:--

INTRODUCTION AND BACKGROUND

1 This is an application for judicial review seeking the following relief:

(a) a declaration that the British Columbia Labour Relations Board ("the Board") is without constitutional jurisdiction with regard to the labour relations of the petitioner, NIL/TU,O Child and Family Services Society ("NIL/TU,O");

(b) an order that the certification granted by the Board to the respondent, B.C. Government and Service Employees' Union ("BCGEU") for a bargaining unit composed of employees at and from NIL/TU,O except the executive director and those excluded by the code dated March 23, 2006 ("the Original Decision") be set aside.

As the issue before the Court is a constitutional question, the standard of review is one of correctness.

2 NIL/TU,O is a society incorporated under the ***Society Act***, R.S.B.C. 1996, c. 433, and BCGEU is a trade union. NIL/TU,O was established in November, 1997 by the Pacheedaht, Pauquachin, Songhees, Sooke, Tseycum, Tsartlip, and Tsawout First Nations to create, develop, implement and maintain a child welfare and family service agency for the respective First Nations. Since 1997 the membership in NIL/TU,O has changed somewhat and as of winter of 2005 it consisted of Beecher Bay, Pacheedaht, Pauquachin, Songhees, Sooke, Tsartlip and Tsawout.

3 Since 1999, NIL/TU,O has provided basic services to the First Nations comprising its membership as set out in the ***Child, Family and Community Services Act***, R.S.B.C. 1996, c. 46 [CFSC Act] pursuant to a Delegation Agreement entered into in accordance with Federal Directive 20-1. The Delegation Agreement is tripartite among NIL/TU,O, Her Majesty the Queen ("HMTQ") in Right of B.C. and HMTQ in right of Canada. Under an earlier Memorandum of Understanding between Canada and British Columbia, Canada agreed that British Columbia would administer the ***CFCS Act*** for the benefit of Indian persons under 19 and Canada would reimburse the cost of child protection services for certain eligible children.

4 Federal Directive 20-1 is a policy statement of the Department of Indian Affairs and Northern Development respecting the administration of the Federal government's First Nations Child and Family Services Program. Paragraph 6 of the directive sets out the principles of the Program as follows:

> The department is committed to the expansion of First Nations Child and Family Services on reserve to a level comparable to the services provided off reserve in similar circumstances. This commitment is independent of and without prejudice to any related right which may or may not exist under treaties.
>
> The department will support the creation of Indian designed, controlled and managed services.
>
> The department will support the development of Indian standards for those services, and will work with Indian organizations to encourage their adoption by provinces/territory.

> This expansion of First Nations Child and Family Services (FNCFS) will be gradual as funds become available and First Nations are prepared to negotiate the establishment of new services or the takeover of existing services.
>
> Provincial child and family services legislation is applicable on reserves and will form the basis for this expansion. It is the intention of the department to include the provinces in the process and as party to agreements.

5 The first Tripartite Delegation Agreement which was entered into on March 5, 1999 was replaced by a second Tripartite Delegation Agreement reached on April 1, 2004 which delegated to the collective First Nations the authority over their children and family services. NIL/TU,O receives about 75% of its funding from the Federal Government, and 25% from the Provincial Government. The money paid by the Federal Government to NIL/TU,O was formerly paid to the Provincial Government for family and child services for First Nations. The nature and extent of the services provided by NIL/TU,O was described in an affidavit sworn by Mavis Henry on November 6, 2006 in paragraphs 23 - 26 inclusive as follows:

> All of the children serviced by NIL/TU,O are of First Nations and are Indians within the meaning of the Indian Act. "Eligible child" is defined in the Delegation Confirmation Agreements as "any person under the age of 19, registered as an Indian under the Indian Act ... whom has at least one parent on a reserve of one of the Collective Nations."
>
> During September 2005, 90% of the services provided by NIL/TU,O were provided on reserve lands to eligible children. During October 2005, 86% of the services provided by NIL/TU,O were on reserve lands to eligible children.
>
> Among the services provided by NIL/TU,O include numerous services of a uniquely aboriginal nature or which involve significant aboriginal elements. For example:
>
> (i) After school programs are aimed at increasing children's appreciation of First Nations culture, activity such as traditional arts and music, First Nations language lessons and excursions to traditional sacred sites;
> (ii) A special residential camp designed to rebuild traditions and cultural practices;
> (iii) Youth justice initiative, repairing troubled youth with mentors and in some

cases elders who counsel on traditional disciplinary methods and adolescent upbringing. In addition to mentoring, the justice initiative keeps the youth occupied through involvement in First Nations with community with cultural activities and services such as providing care to elders;

(iv) School support for children with difficulties fitting into non-First Nations society. The program involves providing children with mentors to assist and encounter racism and discrimination in building pride in their First Nations heritage; and

(v) NIL/TU,O employees often provide cross cultural education to public school educators and non First Nations children in order to assist First Nations youth in addressing discrimination.

NIL/TU,O provides services in accordance with the terms of the Second Delegation Agreement to members of the Collective First Nations.

6 In a second affidavit sworn April 5, 2007, Ms. Henry expanded on the nature and extent of NIL/TU,O's operations in paragraphs 2, 4, 5 and 6.

NIL/TU,O currently has 24 employees. Of these 24 employees there are six social workers and seven family support workers. The other employees are in supervisory and administrative positions.

...

The Ministry is only involved in NIL/TU,O files when there are child protection issues. At any given time approximately 20 - 30% of NIL/TU,O files involved child protection issues.

The following are examples of the types of duties performed by family support workers:

(a) providing one on one support to children in need. In addition to general support, NIL/TU,O family support workers have training on issues particular to First Nations children such as lack of cultural identity, discrimination, the impact of residential schools on families, fetal alcohol syndrome, teenage pregnancy, and lack of male role models.

(b) coordinating NIL/TU,O's cultural awareness activities and programs, including: activities in drum-making, spear fishing, singing, collecting

food and medicinal plants, and traditional art activities.

(c) working with the public school system and other community organizations to promote awareness of Aboriginal issues.

(d) providing parenting support and advice to parents living in the First Nations communities that NIL/TU,O services.

In response to paragraph 11 of Ms. Chartrand's affidavit, I say:

(a) NIL/TU,O offers a variety of after school and weekend programs designed to increase pride in Aboriginal heritage. Examples of current programs include:

(i) Honour Your Health Challenge. This program involves a male family support worker hosting dinners for children and youth in the First Nations communities that NIL/TU,O services. The discussion during dinner focuses on concerns of family health, addiction and violence with a focus on issues facing our First Nations communities.

(ii) Boys and Girls Club. NIL/TU,O family support workers are currently working with Boys and Girls Club to provide First Nations content to Boys and Girls Club programs. This includes organizing art activities, games and field trips with a focus on Aboriginal customs and traditions.

(b) NIL/TU,O has coordinated the following camps focusing on first nations traditions and cultural practices:

(i) Pachedaht Rediscovery Camp;

(ii) Beecher Bay Cultural Camp; and

(iii) Power to be Outdoor Challenge Camp which explores the First Nations traditions in the Salish Traditional Territory.

(c) NIL/TU,O is currently working with Parks Canada to develop a cultural camp at Sidney Spit. This is a camp designed for children in need, particularly Aboriginal children. NIL/TU,O employees are responsible for providing the First Nations content including coordinating Elders to attend at the camp talk about the historical significance of the site and to teach

children traditional Aboriginal stories and songs.

(d) NIL/TU,O's social workers and family support workers assist youth who are facing challenges in the legal system through counselling and mentoring. This often engages traditional methods of conflict resolution and restorative justice. NIL/TU,O workers are trained to respond to the unique challenges faced by First Nations youth such as fetal alcohol syndrome, lack of male role models and discrimination. NIL/TU,O often coordinates elders to act as mentors for troubled youth.

(e) The school support provided by NIL/TU,O has a significant Aboriginal component in that it addresses issues of racism and discrimination particular to First Nations children by instilling a sense of pride in the children's First Nations heritage.

(f) NIL/TU,O employees are actively involved in providing cross cultural education to public school educators. Examples include NIL/TU,O family support workers:

(i) attending at local schools to teach Aboriginal and non-aboriginal children the traditional cultural practices of the Coast Salish people;

(ii) presenting to public school educators on professional development days. These presentations focus on Aboriginal awareness and cultural history; and

(iii) participating in the Local Education Agreement discussions on designing the curriculum for local schools. NIL/TU,O employees are involved in providing the First Nations content to the public school curriculum.

7 The Province of British Columbia has legislative authority in respect of the welfare of children pursuant to s. 92(13) and 92(16) of the ***Constitution Act, 1867***, 30 & 31 Victoria, c. 3 (U.K.) [***Constitution Act, 1867***]. The duties to be carried out under the ***CFCS Act***are delegated by the Director designated under that statue. At present, although the highest level of delegation from the Director is Level 15, which allows an employee to apprehend a child under the legislative scheme of the ***CFCS Act***, employees of NIL/TU,O are limited to either Level 12 or 13, which does not authorize them to apprehend a child. In Recital D to the 2004 Tripartite Delegation Confirmation Agreement, the parties acknowledge:

> The Province of British Columbia has legislative authority in respect to the welfare of children pursuant to section 92(13) and 92(16) of the *Constitution Act, 1867*; and the Director is responsible for the administration of the *Child, Family, and Community Service Act*.

8 The Agreement also contains the following provisions:

"Services" is defined as any function, power, duty or service provided for in the *Child, Family and Community Services Act*.

...

4.2 The Parties agree that NIL/TU,O will deliver Services in accordance with the *Act*.

4.3 The Director has the right to intervene in any case in a manner that he deems necessary to comply with applicable provincial legislation. The Director will make every effort to inform the Executive Director before intervening in a NIL/TU,O case unless exceptional circumstances exist that cause the Director to conclude it would put a child or other person at risk of physical or emotional harm, neglect or abuse to do so.

...

5.2 For greater certainty, Delegated Staff are accountable to:

(a) the Executive Director and the NIL/TU,O Board of Directors; and
(b) the Director who has responsibility to provide for the safety, best interest and well being of the children under the Act and as such the Delegated Staff will be subject to the direction of the Director with regard to their specific Delegated Authority consistent with the Aboriginal Operational and Practice Standards and Indicators.

...

6.2 The Director and NIL/TU,O agree that NIL/TU,O staff will, subject to receiving Delegated Authority as set out in Article 4 and subsection 6.3 of this Agreement, provide Services to the children and families in accordance with their level of Delegated Authority.

...

9.1 NIL/TU,O may formulate and implement policies related to the delivery of Services, which

are consistent with the Aboriginal Operational and Practices Standards and Indicators, with the exception of the Ministry's policies regarding Reportable Circumstances.

9.2 Until NIL/TU,O develops policies pursuant to sub-section 9.1 as above, Ministry standards and policies will apply.

...

10.1 The Parties agree that all information obtained under the authority of the *Act* is information in the custody or control of the Director within the meaning of section 73 of the *Act* and is subject to access and periodic review by the Director.

...

10.3 The Director and NIL/TU,O agree that they must adhere to and ensure adherence to Part 5 of the *Act*, and the storage and future retrieval of files as anticipated by the Province's *Freedom of Information and Protection of Privacy Act ("FOIPPA")* and the *Document Disposal Act*, R.S.B.C. 1996, c. 99, as may be replaced or amended from time to time, and any other applicable law affecting the release, transfer, storage, movement, disclosure, access to, or retention of information collected under the authority of the *Act*.

...

10.5 NIL/TU,O agrees to maintain case records in a manner sufficiently compatible with Ministry case records practices to enable files to be incorporated into a central electronic file registry and to allow for case continuity in the file transfer process. Further, NIL/TU,O and the Director agree to support the development of an interface that would enable information related to Delegated Services to be shared electronically between NIL/TU,O and the Ministry.

...

10.7 NIL/TU,O agrees to transfer closed files to the Ministry Records Management unit Branch or Provincial Records Storage Facilities for storage and disposal.

10.8 NIL/TU,O will utilize the services of the Ministry Information and Privacy Division to process applications that are made to NIL/TU,O under the FOIPPA or the Act for access to in-

formation on NIL/TU,O files.

...

10.12

The Director shall be provided with incident reports regarding Reportable Circumstances.

...

11.2

The Director and NIL/TU,O agree that Audits of Services provided by NIL/TU,O pursuant to this Agreement and related programs will take place:

(a) as required by the Director;
(b) at intervals as agreed upon by the Director and NIL/TU,O;
(c) pursuant to applicable provincial legislation.

...

12.1

The Director and NIL/TU,O acknowledge that in a specified case, the Director, pursuant to the Aboriginal Operational and Practice Standards and Indicators, may conduct a Case Review.

...

14.2

NIL/TU,O and the Director agree that, where there is a conflict between NIL/TU,O and Director on the safety and/or placement or Services to a child and/or family, the Director, after consultation with NIL/TU,O, will have the final decision.

...

18.5

Notwithstanding subsection 18.3 above, the Director, by written notification in accordance

> with Article 21 of this Agreement, may terminate the Delegation Confirmation Agreement immediately.

9 So far as the composition of NIL/TU,O is concerned, the Board of Directors is made up of two representatives from each of the constituent First Nations appointed by the Chief and Band Council and there are "at large" positions which involve elders and youth of the constituent First Nations.

10 The services provided by NIL/TU,O are those set out in the ***CFCS Act***, administered in accordance with "Aboriginal Operational and Practice Standards and Indicators" which were originally created in 1997 by the executive Directors of the Aboriginal Child and Family Service Agency, the Federal Department of Indian Affairs and Northern Development (Canada) and the British Columbia Ministry for Children and Families and revised in 2003 by the Caring for First Nations Children Society. The mission statement of that society is:

> To provide professional development, research and liaison services for First Nations who protect and promote the well being of First Nations children and families by respecting and reaffirming traditional values and beliefs, encouraging innovative and quality child and family service delivery and empowering the voices of First Nations peoples.

11 It is evident that NIL/TU,O provides its services in a way that addresses distinct issues facing First Nations children and families in order to emphasize and promote First Nations history, tradition and culture.

THE BOARD'S DECISIONS

(i) The Original Decision

12 It is against that backdrop that the question of the constitutional jurisdiction of the Board to certify the BCGEU as the Society's bargaining unit arises. In its original decision issued on March 23, 2006, the Board, speaking through its Vice-Chair, noted on the basis of Reference ***re: Industrial Relations and Disputes Investigation Act (Canada)***, [1955] S.C.R. 529 that labour relations, *prima facie*, falls within provincial jurisdiction. At para. 31 the Board cited ***Four B Manufacturing Ltd. v. United Garment Workers of America***, [1980] 1 S.C.R. 1031 [***Four B***] as providing a summary of "the principles to be applied when determining if a labour relations matter is within federal jurisdiction".

13 The Vice-Chair, at para. 32 noted that under s. 91(24) of the ***Constitution Act, 1867*** the Federal Government has responsibility for Indians and land reserved for Indians. She then noted that "when a labour relations matter involves Indians consideration must be given to the primary focus of the normal and habitual activities of the operation in question (in) respect to the status of Indians referred to in the jurisprudence as "Indianness" and to the question whether the provincial law impairs the status or capacity of Indians."

14 The Vice-Chair summarized the positions of the parties before her in paragraphs 35 and 36 of her decision as follows:

> The parties take different approaches to the test to be applied in this case. The Employer submits that if I find that the core function of the Society relates to "Indianness" then the Board does not have jurisdiction. In the Employer's view a finding of "Indianness" means that the Society's labour relations are an Integral part of primary federal jurisdiction over Indians or lands reserved for the Indians. The Employer relies on *Nisga'a* and other cases cited within that decision.
>
> The Union submits that the test proposed by the Employer confuses two concepts. The Union notes that following *Four B*, the Supreme Court of Canada elaborated on the notion of "Indianness" in *Dick v. Regina*, [1986] 1 W.W.R. ("*Dick*"). In *Dick*, Beetz J. concluded that "a distinction should be drawn between two categories of provincial laws. There are, on the one hand, provincial laws which can be applied to Indians without touching their Indianness, like traffic legislation; there are, on the other hand, provincial laws which cannot apply to Indians without regulating them *qua* Indians" (p. 16). The Union submits that while "Indianness" has its analogy in the immunity from provincial laws that affect a vital part of a federal undertaking they are distinct concepts which should not be mixed together.

15 She considered two cases representing the respective opposing positions of each party; ***Tobique Band Council v. Sappier*** (1988), 87 N.R.1 (F.C.A.) [***Tobique***], relied on by the petitioner, and ***Native Child and Family Services of Toronto***, [1995] O.L.R.D. No. 4298 [***Native Child***] relied on by the respondent. After considering a number of other decisions, the Vice-Chair concluded that the approach taken by the Ontario Labour Relations Board in ***Native Child***"is more comprehensive". She concluded as follows in paragraphs 47 - 50 of her decision:

> The case before me involves a social service agency operated by a Society created by eight Indian Bands. The Society primarily operates on reserve land and employs First Nations employees who deliver the service exclusively to First Nations children. On the basis of these facts, I find that Society is clearly an "Indian" organization. However, "Indian" content without some kind of connection to the exercise of federal legislative power does not necessarily attract federal jurisdiction over labour relations. Here, the Society does not derive its authority to deliver child welfare services to the Collective First Nations from the *Indian Act*. There is nothing in the *Indian Act* related to child welfare or cultural organizations. Rather the Society is established as a result of an agreement with the Province of British Columbia and the Government of Canada pursuant to provincial legislation, the *CFSC Act*.

> Child welfare is a provincial responsibility under the *Constitution Act*, 1867. The Society carries out its mandate in accordance with provincial legislation, the *CFCS Act.* Under the *CFCS Act*, a director is appointed who has the authority to intervene in the Society and its actions. As a result, the Society's employees have a dual accountability to the Director and to the Employer. The Society's employees are unable to carry out child apprehension duties without being accompanied by an employee from the provincial Ministry. The federal government's role is limited to providing funds for the Society's activities and, as noted in *Four B,* federal funding is not enough to warrant federal control over labour relations.
>
> Further, there is no evidence that there is any conflict between the provincial regulation of labour relations of the Society and its function as a First Nations organization providing social services to First Nations children on reserve. As noted in *Four B*, the association of First Nations persons with one another and others for labour relations purposes does not affect "Indian" status. In my view, the Code touches the First Nations persons involved with the Society as ordinary employees and employers in a way that does not intrude on their First Nations' character, identity or relationships. When provincial legislation only affects Indian organizations and the Indian persons associated with the organization in this way, the labour relations of the organization remains within provincial jurisdiction: *Four B, Dick* and *Natural Parents*, [1976] 2 S.C.R. 751.
>
> Accordingly, I dismiss the Employer's objection based on its division of powers argument. I conclude that the Employer's labour relations matters fall within provincial jurisdiction.

(ii) The Reconsideration Decision

16 In a subsequent application for reconsideration brought by the petitioner, the Board, consisting of the Chair and two Vice-Chairs, dismissed the application employing the following analysis in paragraphs 4 - 7 of its reasons:

> We have reviewed the Original Decision, the application for leave and reconsideration, the Union's response and the Employer's final reply. We are satisfied that the Original Decision dos not err in dismissing the Employer's arguments that the application for certification either fell within federal jurisdiction or is barred by a claimed right to aboriginal self-government.

With respect to the first argument, we do not accept that the Original Decision erred in requiring something more than a finding of "Indianness" in order to determine that the labour relations of an organization falls within federal rather than provincial jurisdiction. We find the leading Supreme Court of Canada decision on this issue, *Four B Manufacturing Ltd. v. United Garment Workers of America*, [1980] 1 S.C.R. 1031 ("*Four B*"), is clear on this point.

In *Four B*, Laskin C.J. in his dissenting reasons found that the organization at issue in that case fell within federal jurisdiction due to its "Indian" nature and its connection to federal powers. However, this view did not carry the day. Beetz J. for the majority in *Four B* stated that none of the facts relating to "Indianness" and the entity's connection to federal powers, "taken separately or together, can have any effect on the operational nature of the business" (p. 1047). The entity did not fall within federal jurisdiction because neither Indian status is at stake nor rights so closely connected with Indian status that they should be regarded as necessary incidents of status such for instance as registrability, membership in a band, the right to participate in the election of Chiefs and Band Councils, reserve privileges, etc." (p. 1049).

In the present case, there is no basis for finding that the test set out by the majority in *Four B* for federal jurisdiction over the labour relations of an "Indian" entity is met. Certifying the employees of the Society under the Code does not affect Indian status or rights closely associated with it such as membership in a Band, the right to participate in Band elections, or reserve privileges.

(iii) The Decision in*Four B*

17 In ***Four B***, the court was confronted with the issue whether the provincial ***Labour Relations Act***, R.S.O. 1970, c. 232 applied to the activities of Four B Manufacturing Ltd., which was a company which produced leather shoe uppers for the Bata Shoe Company.

18 The company was owned by four brothers, all members of an Indian band, and carried on its business on the band's reserve, established under the ***Indian Act***, R.S.C. 1970, c. I-6 (the "***Indian Act***"). The company was not controlled by the band council, but occupied premises on the reserve on a three year renewable permit. The company received $284,000 from the Government of Canada, of which $31,000 was a grant, and the remainder a loan.

19 The company employed 48 band members, 10 former band members and 10 non-Indians.

20 In his dissent, Laskin C.J.C. concluded that the enterprise fell within the purview of the ***Canada Labour Code***, R.S.C. 1970, c. L-1 because it fell squarely within s. 2 of the ***Code*** as being "an undertaking or business that is within the legislative authority of the parliament of Canada".

21 It was Chief Justice Laskin's conclusion that a combination of circumstances brought the matter within federal jurisdiction. He held at pp. 1042 - 1043 as follows:

> There is the fact that the factory is operated by Indians and for Indians; it is operated on a reserve in a building leased from the Band Council; it is operated under a revocable licence issued by the responsible federal Minister, with the approval of the Band Council and under terms set out in the licence or permit; it is financed by federal funds provided under the special Indian Economic Development Fund pursuant to four agreements ... for the stated purpose "of employing members of the band in all positions possible and ... for the benefit of the band as a whole to improve their economic position and provide continuing employment for Band members"; and it is operated under the detailed provisions in the *Indian Act* and under the approvals therein prescribed.

22 It is apparent Laskin C.J.C. viewed as the critical factor in determining whether the undertaking fell within the legislative authority of the Parliament of Canada under s. 91(24), not the inherent nature or function of the business, but rather its connection to Indians and the benefits it brought to them. In other words, Laskin C.J.C. looked beyond the function of the undertaking - making leather shoe uppers - and considered its impact upon or connection with a particular class of subjects assigned to the exclusive legislative authority of the Parliament of Canada - Indians, and Lands reserved for the Indians.

23 In the majority judgment, however, another tack was taken. Beetz J. for the majority, in upholding the provincial certification, considered the function of the undertaking, noting as follows at 1045:

> With respect to labour relations, exclusive provincial legislative competence is the rule, exclusive federal competence is the exception. The exception comprises, in the main, labour relations in undertakings, services and businesses which, having regard to the functional test of the nature of their operations and their normal activities, can be characterized as federal undertakings, services or businesses ...

24 Beetz J. explained the ambit of the functional test for determining legislative competence, describing it as follows at 1047:

> The functional test is a particular method of applying a more general rule, namely, that exclusive federal jurisdiction over labour relations arises only if it can be shown that such jurisdiction forms an integral part of primary federal

> jurisdiction over some other federal object ...

25 Justice Beetz offered that characterization of the functional test in the course of rejecting an argument that it was inappropriate and ought to be disregarded when legislative competence is conferred over persons or groups of persons rather than over physical objects, things or systems.

26 In applying the general rule on the basis of a hypothetical conclusion that the functional test was not conclusive for the purposes of that case, Beetz J. posed two questions. The first question was "whether the power to regulate the labour relations in issue forms an integral part of primary federal jurisdiction over Indians and lands reserved for Indians": ***Four B*** at 1947. The second question was whether Parliament has occupied the field by the provision of the ***Canada Labour Code***. The majority answered both questions in the negative. The critical question in the case at bar is the first: whether the power to regulate the labour relations in issue formed an integral part of primary federal jurisdiction over Indians and lands reserved for Indians. In answer to that, Beetz J. said, in part, as follows at 1047-1048:

> I think it is an oversimplification to say that the matter which falls to be regulated in the case at bar is the civil rights of Indians. The matter is broader and more complex: it involves the rights of Indians and non-Indians to associate with one another for labour relations purposes, purposes which are not related to "Indianness"; it involves their relationship with the United Garment Workers of America or some other trade union about which there is nothing inherently Indian; it finally involves their collective bargaining with an employer who happens to be an Ontario corporation, privately owned by Indians, but about which there is nothing specifically Indian either, the operation of which the Bank has expressly refused to assume and from which it has elected to withdraw its name.
>
> But even if the situation is considered from the sole point of view of Indian employees and as if the employer were an Indian, neither Indian Status is at stake nor rights so closely connected with Indian status that they should be regarded as necessary incidents of status such for instance as registrability, membership in a band, and the right to participate in the election of Chiefs and Band Councils, reserve privileges, etc. For this reason, I come to the conclusion that the power to regulate the labour relations in issue does not form an integral part of primary federal jurisdiction over Indians or Lands reserved for the Indians.
>
> ...
>
> The conferring upon parliament of exclusive legislative competence to make

> laws relating to certain classes of persons does not mean that the totality of those persons' rights and duties comes under federal competence to the exclusion of provincial laws of general application.

27 After referring to an example of provincial legislation which purported to proscribe "boys under 12, girls and women of any age, and all Chinese people" from working in mines underground, which the court held to be *ultra vires* insofar as it related to naturalization and aliens - classes of subjects falling under the federal power - Beetz J. pointed out that the *intra vires* proscription relating to boys under 12 and women and girls of all ages would not exclude Chinese people falling into that category. He went on to say at 1068:

> A similar reasoning must prevail with respect to the application of provincial laws to Indians, as long as such laws do not single out Indians nor purport to regulate them *qua* Indians ...

THE POSITIONS OF THE PARTIES

28 The fundamental assertion by the petitioner before me is that in the Original Decision, and in the Reconsideration Decision, the Board erred by conflating the functional test set out in ***Four B*** with the second test proposed in the hypothetical circumstance that the functional test was "not conclusive for the purposes of this case" (***Four B*** at 1047). According to the petitioner, the Board thereby added a requirement to the functional test which was not required by the majority in ***Four B*** and led the Board astray in its analysis of whether the power to regulate the Labour Relations in issue forms an integral part of primary federal jurisdiction over Indians or land reserved for Indians. The petitioner takes the position that the second test is not applicable in the circumstances of this case.

29 The petitioner further contends that if the Board properly applied the functional test propounded in ***Four B***, it would have been led to the conclusion that the enterprise engaged in by NIL/TU,O forms an integral part of the primary federal jurisdiction over Indians or land reserved for Indians and would have declined to certify the respondent, BCGEU as the bargaining agent for the Society for want of jurisdiction.

30 The position of the respondent, BCGEU, is that the various decisions relied on by the plaintiff in asserting that the Board's decision was in error, and the plaintiff's position itself, rests on a misunderstanding of the Supreme Court of Canada's reasoning in ***Four B*** and in subsequent decisions touching on the scope of s. 91(24), and on a misunderstanding of what characteristics or qualities of an enterprise or undertaking bring it within that head.

DECISIONS OF THE SUPREME COURT OF CANADA RELATING TO 91(24)

31 In ***Dick v. A.G. (Canada) and A.G. (Nova Scotia)***, [1985] 2 S.C.R. 309 at issue was the scope and effect of s. 88 of the ***Indian Act*** which then read as follows:

> Subject to the terms of any treaty and any other Act of the Parliament of Canada, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province, except to the extent that such laws are inconsistent with this Act or any order, rule, regulation or by-law made thereunder, and except to the extent that such laws make provision for any matter for which provision is made by or under this Act.
>
> The current wording of s. 88 of the *Indian Act*, R.S.C. 1985, c. I-5 is slightly different from the above wording, but the differences are not relevant to this discussion.

32 The appellant in Dick was charged under the ***Wildlife Act***, R.S.B.C. 1979, c. 433 (ss. 3(1) and 8(1)) with killing deer out of season and with possession of wildlife that was dead. The Supreme Court assumed without deciding that the practice of year round foraging for food is so central to the Indian way of life of the Alkali Lake Band, that it cannot be restricted by ss. 3(1) and 8(1) of the ***Wildlife Act*** without impairment of their status and capacity as Indians and without invasion of the federal field under s. 91(24) of the ***Constitution Act, 1867***.

33 The court held at 321 as follows:

> On the basis of this assumption and subject to the question of referential incorporation which will be dealt with in the next chapter, it follows that the *Wildlife Act* could not apply to the appellant *ex proprio vigore* and, in order to preserve its constitutionality, it would be necessary to read it down to prevent its applying to the appellant in the circumstances of this case.

34 In analyzing whether s. 88 referentially incorporated the ***Wildlife Act***, Beetz J. for the court, drew a distinction between two categories of provincial laws at 326-327:

> I believe that a distinction should be drawn between two categories of provincial laws. There are, on the one hand, provincial laws which can be applied to Indians without touching their Indianness, like traffic legislation; there are, on the other hand, provincial laws which cannot apply to Indians without regulating them qua Indians.
>
> Laws of the first category, in my opinion, continue to apply to Indians *ex proprio vigore* (of their own force) as they always did before the enactment of s. 88 in 1951 ... and quite apart from s. 88 ...

35 I have come to the view that it is to the laws of the second category that s. 88 refers.

36 Beetz J. concluded that because it was not shown that the intent of the ***Wildlife Act*** was to regulate Indians *qua* Indians, even though it did so, the ***Wildlife Act*** remained a law of general application, which, through the effect of s. 88, applied, through referential incorporation, to Indians.

37 In ***Delgamuukw v. British Columbia***, [1997] 3 S.C.R. 1010 [***Delgamuukw***] the Supreme Court explored the nature of what is set beyond the reach of provincial laws of general application by s. 91(24). The exploration was done in the context of determining whether provincial laws of general application could extinguish aboriginal rights.

38 In para. 177 Lamer C.J.C. in giving the majority judgment noted:

> The extent of federal jurisdiction over Indians has not been definitively addressed by this court. We have not needed to do so because the *vires* of federal legislation with respect to Indians, under the division of powers, has never been at issue. The cases which have come before the Court under s. 91(24) have implicated the question of jurisdiction over Indians from the other direction - whether provincial laws which on their face apply to Indians, intrude on Federal jurisdiction and are inapplicable to Indians to the extent of that intrusion. As I explain below, the Court has held that s. 91(24) protects a "core" of Indianness from provincial intrusion, through the doctrine of interjurisdictional immunity.

39 As to what lies at the core of Indianness, Lamer C.J.C. explained in para. 178:

> That core, for reasons I will develop, encompasses aboriginal rights, including the rights that are recognized and affirmed by s. 35(1). Laws which purport to extinguish those rights therefore touch the core of Indianness which lies at the heart of s. 91(24), and are beyond the legislative competence of the provinces to enact. The core of Indianness encompasses the whole range of aboriginal rights that are protected by s. 35(1). Those rights include rights in relation to land; that part of the core derives from s. 91(24)'s reference to "Lands reserved for the Indians". But those rights also encompass practices, customs and traditions which are not tied to land as well; that part of the core can be traced to federal jurisdiction over "Indians". Provincial governments are prevented when legislating in relation to both types of aboriginal rights.

40 As to the effect of s. 91(24) on provincial laws of general application, after noting at para. 179 that "provincial laws which single out Indians for special treatment are *ultra vires* ...", Lamer C.J.C. affirmed the principle in ***Four B*** that:

> ... provincial laws of general application apply *proprio vigore* to Indians and Indian lands. Thus this court has held that provincial labour relations (*Four B*) and motor vehicle laws (*R. v. Francis*, [1988] 1 S.C.R. 1025), which purport to apply to all persons in the province also apply to Indians living on reserves.

(***Delgamuukw*** at para. 179)

41 In dealing with the issue of whether provincial laws of general application can extinguish aboriginal rights however, Lamer C.J.C. concluded they could not and cited as the second of two reasons why not, the doctrine of interjurisdictional immunity. He explained that concept in para. 181 as follows:

> Second, as I mentioned earlier, s. 91(24) protects a core of federal jurisdiction even from provincial laws of general application through the operation of the doctrine of interjurisdictional immunity. That core has been described as matters touching on "Indianness" or the core of Indianness (*Dick, supra*, at pp. 326 and 315; see also *Four B* at p. 1047 and *Francis, supra*, at pp. 1028 - 1029). The core of Indianness at the heart of s. 91(24) has been defined in both positive and negative terms. Negatively, it has been held not to include labour relations (*Four B*) and the driving of motor vehicles (*Francis*). The only positive formulation of Indianness was offered in *Dick*. Speaking for the Court, Beetz J. assumed, but did not decide, that a provincial hunting law did not apply *proprio vigore* to the members of an Indian band to hunt because those activities were "at the centre of what they do and who they are" (*supra* at p. 320).

THE ISSUE TO BE DETERMINED

42 The general rule in ***Four B*** is that exclusive federal jurisdiction over labour relations arises only if it can be shown that it forms an integral part of primary federal jurisdiction over some other federal object. The traditional and functional method of applying the rule is to consider whether the operations and normal activities of the undertaking can be characterized as federal in nature. This method of applying the rule was held in ***Four B*** to be apt even where federal legislative competence is conferred in relation to persons or groups of persons such as Indians or aliens, as opposed to physical objects, things or systems.

43 In cases where the functional and traditional test is not "conclusive", (***Four B*** at 1047) the applicability of the general rule can be determined by considering whether the purposes of "the matter which falls to be regulated" - labour relations associations - relates to "Indianness" so as to "form an integral part of primary federal jurisdiction over Indians ..." (***Four B*** at 1047).

44 Although both the functional test, on one hand, and the secondary test, on the other, relate to the application of the same general rule referred to in ***Four B*** each has a distinct focus. The focus of the functional test is upon the nature of the operations and normal activities at issue (in this case NIL/TU,O's exercise of delegated duties and powers under the provincial ***CFCS Act***) and whether it falls within a federal class of subject or a provincial class of subject.

45 The focus of the secondary test, on the other hand, is on the class of subject enumerated in s. 91(24) and whether, in circumstances in which the operation or activity at issue is not conclusively federal in nature, its affect upon Indian status or rights closely connected with Indian status ("Indianness") brings it within that class of subject.

46 The petitioner asserts that the nature of the operations and normal activities of NIL/TU,O bring it within the class of subject enumerated in s. 91(24). The petitioner relies on a line of authority that suggests that the "Indianness" of the operations and normal activities of an organization is relevant when applying the functional test to determine whether the operation is a federal undertaking. The Board rejected that line of authority in the present case.

47 It is that proposition that divides the parties and is at the centre of this petition. The respondent contends that by infusing the traditional and functional test with the notion of "Indianness", the petitioner and the authorities it relies on, conflate the two different methods of establishing the exception to the rule that in respect of labour relations, exclusive legislative competence is provincial not federal.

THE AUTHORITIES RELIED ON

48 The line of authority relied on by the petitioner in support of its contention begins with the decision of the federal court in ***Qu'appelle Indian Residential School Council v. Canada***, [1988] 2 F.C. 226, 14 F.T.R. 31 [***Qu'appelle***].

49 ***Qu'appelle*** involved a school which provided education and residential care to Indian children of a district designated by the federal Minister of Indian and Northern Affairs. The school was administered by a council composed of band chiefs from the designated districts. The council objected to the jurisdiction of the federal Human Rights Commission to entertain a complaint against them.

50 In the course of giving reasons for upholding the jurisdiction of the federal Human Rights Commission, Pinard J., after quoting from Beetz J.'s description of the functional test in ***Four B***, observed at para. 13 as follows:

> From this statement of law it can be concluded that in deciding the jurisdiction of labour relations in a particular case, the focus should not be on who the employer is, who the employees are, where the activity is taking place, or who is funding the activity. Instead, at issue is the character or nature of the activity concerned. In the *Four B* case, the majority of the Supreme Court of Canada decided that the nature of the activity had nothing whatsoever to do with Indian status or privileges and that the sewing of uppers onto sports shoes could be characterized as merely an ordinary industrial activity. Thus, the labour relations, in the circumstances, would be dealt with under provincial law.

51 In distinguishing ***Four B*** from the case at bar in ***Qu'appelle***, Pinard J. quoted with approval a passage from the decision of the Human Rights Tribunal below in para. 22:

> The fact that the School is designed and operated for Indians, governed solely by Indians, that its enrolment is limited to Indians, that the stated objects are to promote Indian traditions and the curriculum includes Indian language and culture all served to identify the very "Indianness" of the operation and link it to Indian rights, status and privileges.

52 Pinard J. concluded at paras. 24 and 25 of his judgment as follows:

> In my opinion, as in the *Francis* case (supra) and the *Whitebear* case (supra), the Council's employees here are so directly involved in activities relating to Indian status, rights and privileges that their labour relations with the Council should be characterized as forming an integral part of the primary federal jurisdiction over Indians and Indian lands, under subsection 91(24) of the *Constitution Act, 1867*.
>
> By the traditional and functional test, therefore, the facts in this case indicating that the nature of the operations of the Qu'Appelle Residential Indian School is primarily federal, that School is subject to federal legislation regarding labour relations and consequently the Canada Human Rights Tribunal has jurisdiction to hear the complaint against the plaintiff.

53 In a subsequent case, Tobique, *supra,* at issue was whether an adjudicator appointed by the Minister of Labour pursuant to s. 61.5 of the ***Canada Labour Code*** had jurisdiction to hear the complaint of an employee of the Child Welfare Agency of the Tobique Indian Band. In the course of her majority reasons, Dejardins J. described the agency thus at para. 9-12:

> The Agency in question is a creature of the combined results of two tripartite agreements, the Canada - New Brunswick - Indian Child and Family Services Agreement together with a subsidiary agreement applicable to the Tobique Reservation entitled the Canada - New Brunswick - Tobique Indian Band Child and Family Services Subsidiary Agreement. The first, signed between Her Majesty the Queen in Right of Canada, Her Majesty the Queen in Right of the Province of New Brunswick and the Chiefs of Four Indian Bands of New Brunswick, dated May 24, 1983, makes it clear that the Agreement and Subsidiary Agreements apply only in respect of Bands and - Indian authorities encompassed by a Subsidiary Agreement. The Subsidiary Agreement related to the Tobique Band was signed by representatives of the two governments and the Tobique Indian Band Council on March 13, 1986.

The purposes of the Agreement, set in section 4, is revealing of the fact that the services are destined to Indian children and famiies on the reserve with an emphasis on the delivery of those services by Indians themselves:

> 4. The purposes of this Agreement and Subsidiary Agreements are to:
>
> (i) Provide the mechanism and guiding principles and related financial arrangements for the provision of Indian child and family services to Indians resident on reserves through the negotiation of Subsidiary Agreements; and to
> (ii) Facilitate increased Indian Band participation and responsibility over Indian child and family related services.

In the manner described herein.

Section 5 of the Agreement entitled "Principles for Provision of the Programs" makes it clear that the social services contemplated must take into consideration the special needs and culture of the Indian community it is meant to serve:

> 5(a) It is the intention of the parties hereto to plan through this Agreement and implement through Subsidiary Agreements a complete and comprehensive Indian child and family services program in accordance with the following principles:
>
> (i) Indians have a special status as defined through the provisions of the Indian Act and Constitution Act, 1867;
> (ii) the family is the first resource for the nurture and protection of children, but families do need support for their parenting role and children, for a variety of reasons, may need substitute care;
> (iii) all children need care, nurture and protection;
> (iv) as a result of culture, geography and past experience, Indian people have special needs;
> (v) preservation of Indian cultural identity is of importance in terms of both language and customs, within the framework of tribes, bands, extended families and individuals;
> (vi) the provision of services must involve Indian people,

> recognize their priority needs and the current variety of service modes.

> Section 6 sets the roles and responsibilities of the parties to the Agreement. New Brunswick undertakes to extend, to the extent negotiated through Subsidiary Agreements, New Brunswick child and family services programs to Indian residents on a reserve in the province, with emphasis on programs or services which recognize, encourage and support the desire of Indian people to ensure their children retain their Indian identity (subparagraph 6(a)(i)). The Government of Canada undertakes to provide the fiscal resources to meet the needs of Indians for the program in the manner set in Subsidiary Agreements (subparagraph 6(b)(ii)). The Councils of the Indian Bands accept responsibility for planning, designing and controlling those service requirements appropriate to traditional customs, culture and way of life (subparagraph 6 (c)(i)). Under the Subsidiary Agreement, the Tobique Band Council undertakes to establish the Tobique Agency with the responsibility of delivering the services contemplated. It is stated that one of the objectives sought is to deliver these services through "the recruitment, development and training of Indian staff, as the primary professional resources for delivery of service" (section II of the Subsidiary Agreement).

54 In concluding that the federally appointed adjudicator had jurisdiction to decide the matter, Dejardins J. held as follows at para. 14:

> The gist of the matter consists however in determining the true character of the activities involving the grievor and her employer. At page 1048 of his reasons in the *Four B* case, referred to above, Mr. Justice Beetz gives illustrations of the kind of rights that should be regarded as necessary incidents to the Indian status. He mentions "registrability, membership in a band, the right to participate in the election of Chiefs and Band Councils, Reserve privileges, etc." The *Indian Act* specifically provides for services to the Indians akin to social services, namely medical and health services (subsection 18(2) and paragraphs 73(1)(g) and 81(1)(a)). Section 114 of the Act provides for agreements with the provinces "for the education in accordance with this Act of Indian children" (my emphasis). The same technique of federal provincial agreements can of course be extended to social services for Indian children and families, provided funds are made available by Parliament. The social services delivered by the Agency relate to the welfare of Indians of the Tobique Band in the same way as medical services or education. They deal with Indians qua Indians. They are related to "Indianness" (per Beetz J. in Four B, supra, at 1047). The Agency is concerned not only with the welfare of the children but more specifically with the welfare of the Indian children: see section 5 of the Agreement. Both the physical and cultural integrity

> of the youngsters are taken into consideration. For that reason, the social services form an integrated part of the primary federal jurisdiction over Indians (subsection 91(24) of the *Constitution Act, 1867*). The labour relations of the Agency follow the same course since the Agency is a creature under the authority of the Band Council devoted exclusively to Indians and Indian welfare on the reserve. This notwithstanding the fact that the Agency may, by delegation, carry out all or some responsibilities of the Minister of Social Services under the *Child and Family Services and Family Relations Act* (*P.E.I. Potato Marketing Board v. Willis*, [1952] 2 S.C.R. 392; *Coughlin v. The Ontario Highway Transport Board*, [1968] S.C.R. 569; *The Queen v. Smith*, [1972] S.C.R. 359).

55 In ***Sagkeeng Alcohol Rehabilitation Centre Inc. v. Abraham***, [1995] 1 C.N. L.R. 184 (F.C.T.D.) at issue was whether an adjudicator appointed under the ***Canada Labour Code*** had jurisdiction to hear an unjust dismissal complaint against the alcohol rehabilitation centre located on the Fort Alexander Indian Reserve.

56 In upholding the jurisdiction of the arbitrator appointed under the ***Canada Labour Code***, Rothstein J. (as he then was) held that the function of the applicant rehabilitation centre fell within s. 91(24) of the ***Constitution Act, 1867*** and accordingly the power to regulate its labour relations formed an integral part of primary federal jurisdiction over Indians.

57 In coming to his conclusion, Rothstein J. distinguished the case before him from ***Four B*** as follows at 190-191:

> The evidence before me indicates that the features of the applicant distinguish it from the facts in *Four B (supra)*. We are not here concerned with an ordinary manufacturing business carried on on an Indian reserve. Rather, the rehabilitation centre in question is engaged in the provision of a form of health care service designed and operated to meet the needs of its Indian beneficiaries.
>
> The fact that the rehabilitation centre is organized and operated primarily for Indians, governed solely by Indians, that its facilities and services are intended primarily for Indians, that its staff are specially trained under the NNADAP and receive First Nations training, and that its rehabilitation program, curriculum and materials are designed for Indians, all serve to identify the inherent "Indianness" of the centre and link it to Indians.
>
> To say; that the focus of the applicant is on the treatment of alcoholism is to gloss over the way in which the applicant operates its program. The applicant's program of alcohol rehabilitation involves a 33 percent component, i.e. one out of three weeks, other than the review week, devoted to Indian cultural awareness,

> values and survival as Native people. The focus of the applicant is on alcohol rehabilitation of Indians and that is the function its program is designed to perform.
>
> That the cultural week may not be compulsory or that a small number of persons who are admitted to the applicant's centre are not Indians, does not detract from the integrally Indian operation of the applicant. Its normal activity is to provide alcohol rehabilitation services for Indians. As I understand the decta of Beetz J. (p. 1045 [p. 23 C.N.L.R.] of *Four B*), it is the nature of the operations of a service and its normal activities that determine whether or not it is characterized as a federal or provincial service. The fact that a small number of non-Indians are treated at the centre or that the cultural week may not be compulsory, does not detract from the centre's normal activities and functions.

58 In ***Sagkeeng***, the argument that the alcohol rehabilitation centre was not a federal undertaking focussed on the articles of incorporation restricting the applicant to managing and operating an alcohol rehabilitation centre. The applicant in that case submitted there was nothing integral to Indians or lands reserved for Indians about the operation of an alcohol abuse rehabilitation centre.

59 In ***Shubenacadie Indian Band v. Canada (Canadian Human Rights Commission)*** (2000), 187 D.L.R. (4th) 741 (F.C.A), leave to appeal to S.C.C. refused, [2000] S.C.C.A. No. 398, 28078 (August 18, 2000), the Federal Court of Appeal upheld the dismissal of an application for judicial review of the decision of the Canadian Human Rights Tribunal, finding the appellant band council had discriminated against the respondents by refusing to pay social assistance to them under the welfare program which it administered and which was funded by the federal government.

60 One of the issues before the Federal Court of Appeal was whether the tribunal had jurisdiction to make the order which it did. The court summarized the appellant's argument at paras. 51 and 52 as follows:

> This is how the argument goes. Social assistance is a matter falling within provincial legislative authority under sections 92(13) and 92(16) of the *Constitution Act, 1867*; consequently, the legislative authority of Parliament cannot extend to embrace it. It follows then that section 2 of the CHRA has no application to the facts of the case and therefore the Commission had no authority to entertain the complaint and the Tribunal no constitutional jurisdiction to make an order directing the payment of social assistance to non-Indians.
>
> The appellant contends further that the want of jurisdiction in the Tribunal arises for the following reasons: first, since the persons to whom social assistance was

> denied are all non-Indians, the legislative authority of Parliament does not extend to them; and, second, since social assistance to non-Indian residents on reserve is a legislative subject matter falling within provincial authority, Parliament has no constitutional authority to use its "so called" spending power to provide social assistance to non-Indians living on the Reserve.

61 In rejecting the applicant's contention that the provision of social assistance in that case fell within provincial legislative authority, the Federal Court of Appeal concluded on the evidence before it that the funding of the social assistance program was pursuant to the authority given to parliament in s. 91(24). In coming to its conclusion the court relied on a document entitled "Background of the Development of the Social Assistance Program" which made it clear that the federal government's funding of social assistance to Indians on reserve was pursuant to its "general responsibility to Indians as a result of s. 91 of the British North America Act which gives Canada legislative jurisdiction over Indians and land reserved for Indians" (***Shubenacadie*** at para. 9). The court was also influenced in its view by the fact that "the program was designed to enhance the status of the Indian people and their families ..." (***Shubenacadie*** at para. 56) and concluded at para. 60:

> It follows in my judgment, that a program designed to promote Indianness and limited territorially to the reserve is one that is constitutionally supportable under s. 91(24) of the *Constitution Act 1867* as being a program relating to Indians and lands reserved for Indians.

62 In ***Westbank First Nation v. British Columbia (Labour Relations Board)*** (1997), 39 C.L.R.B.R. (2d) 227 (B.C.S.C.), Tysoe J. (as he then was) dismissed an application for judicial review of a finding of jurisdiction by the B.C.L.R.B. granting union certification for a care facility located on the Westbank First Nation Reserve. In the course of his judgment, Tysoe J. set forth the basic principles in relation to labour relations as stated by the Supreme Court of Canada in ***Northern Telecom Ltd. v. Communication Workers of Canada***, [1980] 1 S.C.R. 115 as follows in para. 43 of his reasons:

> (1) Parliament has no authority over labour relations as such ... exclusive provincial competence is the rule.
> (2) By way of exception, however, Parliament may assert exclusive jurisdiction over these matters if it is shown that such jurisdiction is an integral part of its primary competence over some other single federal subject.
> (3) Primary federal competence over a given subject can prevent the application of provincial law relating to labour relations and the conditions of employment but only if it is demonstrated that federal authority over these matters is an integral element of such federal competence.
> (4) Thus, ... the regulation of its labour relations, being related to an integral

> part of the operation of the undertaking, service or business, are removed from provincial jurisdiction and immune from the effect of provincial law if the undertaking, service or business is a federal one.
>
> (5) The question whether an undertaking, service or business is a federal one depends on the nature of its operation.
>
> (6) In order to determine the nature of the operation, one must look at the normal or habitual activities of the business as those of "a going concern", without regard for exceptional or casual factors.

63 Justice Tysoe summarized the petitioner's contention that the care facility was a federal undertaking at para. 44 of his reasons as follows:

> The federal subject that the Petitioners say brings the labour relations of Pine Acres Home under federal jurisdiction is found in s. 91(24) of the *British North America Act*, 1867, which gives Parliament exclusive legislative authority over "Indians and Lands reserve for the Indians". Section 81 of the *Indian Act*[14] empowers band councils to make by-laws to provide for the health of residents on its reserves. In the present case, the Council of Westbank First Nation has not passed any such by-laws but I do not believe that anything turns on their absence.

64 In the course of his reasons, Tysoe J. considered ***Four B***, ***White Bear Band Council v. Carpenter's Council of Saskatchewan***, [1982] 3 W.W.R. 554 (Sask. C.A.), in which the Saskatchewan Court of Appeal held that the construction of houses on a reserve by members of the band employed by band council was a federal operation; ***Paul Band v. R.***, [1984] 2 W.W.R. 540 (Alta. C.A.), where it was held that employees of a band council acting as special constables within the reserve were engaged in a federal undertaking; and, ***Sagkeeng***, *supra*.

65 Tysoe J. followed the directions in ***Four B*** that "the fundamental issue is whether the business, having regard to the functional test of the operations, can be characterized as a federal business in light of the normal or habitual activities, not its exceptional or casual aspects."

66 In concluding that the enterprise before him was not a federal business, Tysoe J. distinguished ***White Bear***, ***Paul Band*** and ***Sagkeeng*** on their facts. He noted at para. 52 that in ***Sagkeeng*** "the rehabilitation centre was truly designed for Indians. Its function was specifically to assist Indians to overcome their addiction to alcohol and only a negligible portion of the residents of the centre were non-Indians."

67 On the evidence before him, Tysoe J. found at para. 55 the function of the care facility was to provide "intermediate care to a much wider group (than) First Nations people" and said:

> There is a distinction to be made between the "means" and the "end". While it may be argued that the "end" only relates to First Nations people, the "means" to accomplish the "end" is much broader and relates to a majority of non-First

> Nations patients. In the ***Four B*** case, the purpose of the business was to benefit the Band as a whole to improve their economic position but the means to accomplish this purpose was held not to constitute a federal business. It is the "means" not the "end", which is the relevant consideration under the functional test of the nature of the business.

68 In upholding Tysoe J.'s judgment the Court of Appeal (2000 BCCA 163, 138 B.C.A.C. 163) said at para. 3:

> Notwithstanding Mr. Favell's forceful submission, I have not been persuaded that any error has been demonstrated in the conclusion of Tysoe J. or in the underlying determination of the Board. I agree with Mr. Favell that the issue is not simply a matter of determining whether there are fewer First Nations' residents than others in the Home at any particular time. Here, however, Pine Acres Home is a for-profit enterprise intended primarily to serve the South Okanagan area generally. A substantial majority of the residents now and in the foreseeable future are likely to be non-aboriginal. Accordingly, the facility appears to me to be a legitimate subject of provincial labour relations jurisdiction under the principles stated by the Supreme Court of Canada.

ANALYSIS AND CONCLUSION

69 This case highlights the difficulty of reconciling the concept of "Indianness" as it is used in ***Four B*** as a test for jurisdiction over labour relations with how it is used in subsequent cases. In ***Four B***, the court appears to confine a consideration of Indianness to circumstances in which Indian status or rights so closely connected to Indian status that they should be regarded as necessary incidents of such status are at stake, and only where the functional test is inconclusive.

70 In subsequent cases, such as ***Qu'appelle***, ***Sagkeeng***, ***Shubenacadie***, ***Tobique*** and ***Westbank*** the concept of "Indianness" appears to be used in a broader sense, for example, to determine whether the nature of an operation at issue has "inherent Indianness" (***Sagkeeng***) or to "promote Indianness" or enhance the status of Indian people and their families (***Shubenacadie***). In ***Tobique***, which significantly parallels the present case, the court held that "the gist of the matter consists ... in determining the true character of the activities ..." and found in the analogy of child welfare services to services provided for in the ***Indian Act*** (medical, health and education) the necessary element of Indianness to engage federal jurisdiction over labour relations. In ***Qu'appelle***, in applying the traditional and functional test, the court looked at the "Indianness of the operation and its link to Indian rights, status and privileges."

71 In ***Westbank***, Tysoe J. looked at "the functional test of the operations" and distinguished them from the alcohol rehabilitation centre in ***Sagkeeng*** which "was truly designed for Indians ... to assist Indians to overcome their addiction to alcohol and only a negligible portion of the residents of the centre were non Indians."

72 In the present case, clearly the operations and normal activities at issue, insofar as they relate only to child welfare would, under the functional test, not qualify as a federal object. The question is whether, under the functional test, the operations and normal activities of NIL/TU,O which affect only Indians and are designed to assist First Nations in addressing unique systemic problems and in maintaining their culture, assumes a federal dimension.

73 On the one hand, it is clear under the April 1st, 2004 Tripartite Agreement that the province retained substantial control over the services which NIL/TU,O dispenses and which form the legal substance of its operations and normal activities. Under that agreement, the parties (NIL/TU,O, Her Majesty the Queen in Right of B.C. as represented by a Director responsible for Aboriginal Child and Family Services Agencies and designated as such by the Minister for Children and Families pursuant to s. 91 of the ***CFCS Act***, and Her Majesty the Queen in Right of Canada as represented by the Minister of Indian Affairs and Northern Development) expressly acknowledged, under Recital D, that the province has legislative authority in respect of welfare of children under s. 92(13) and 92(16) of the ***Constitution Act, 1867***. There is nothing in the agreement that derogates from provincial responsibility for the functions performed under the agreement: the Director appointed by the provincial minister is responsible for the administration of the ***CFCS Act*** under which NIL/TU,O provides its services (Recital D, para. 4.2); the Director has the authority to intervene in any case to ensure compliance with the ***CFCS Act*** (para. 4.3); NIL/TU,O employees are subject to the Director's direction with regard to their delegated authority (para. 5.2); all information obtained under authority of the ***CFCS Act*** is in the custody or control of the Director (para. 10.1); the Director has the authority to make a final decision in the event of a dispute over the safety and/or placement of or services to, a child and/or a family (para. 14.2); the Director has the authority to conduct a case review (para. 12.1); and the Director has the authority to terminate the Delegation Confirmation Agreement immediately, without case (para. 18.5).

74 On the other hand, the whole purpose of NIL/TU,O is to mould child welfare services delegated by the province into a shape which serve Indians *qua* Indians rather than to maintain it as part of a homogenous service applicable to Indian and non-Indian alike.

75 In ***Four B*** and ***Westbank***, the activities at issue were held not to be federal objects because, apart from the involvement of Indians in the operations, they had nothing to do with s. 91(24) and did not qualify as matters falling within any other class of subject enumerated in s. 91. In other words, as a function, the operations did not relate to Indians or lands reserved for Indians.

76 It is clear that the functional test is not engaged merely by the involvement of Indians in a business, undertaking or service. That is at the heart of the majority's holding in ***Four B*** that the functional test applies even when legislative competence is conferred in terms relating to persons or groups of persons as opposed to physical objects, things or systems.

77 In my view, that is also at the core of Tysoe J.'s judgment in ***Westbank***, distinguishing between the means and the end of an undertaking. Although he observed that it may be argued that

the end of the undertaking at issue in that case related only to First Nations people, he was unable to find a federal object because the means to the end (the operations and normal activities) were broader and related to "a majority of non First Nations patients." He analogized the ***Westbank*** case to ***Four B*** where the purpose of the activity was "to benefit the band as a whole to improve their economic position" but the means "was held not to constitute a federal business."

78 Thus, in both ***Four B*** and ***Westbank***, the nature of the function was assessed without reference to its purpose.

79 As I see it, if that analysis is performed in the present case, the opposite result ensues. The operations and normal activities of NIL/TU,O, although unarguably serving the ends of the ***CFCS Act***, are doing so by means which address unique First Nations' concerns and issues. The second test in ***Four B*** does not imply that there is no "Indianness" component to the functional test. It merely addressed the (hypothetical) situation where the functional test for jurisdiction over a business undertaking or service is inconclusive, positing, in those circumstances, that labour relations relating to such operations would be provincial unless Indian status or closely connected rights are "at stake".

80 In that way, the second test in ***Four B*** has its analogy in the "core of Indianness" protected by s. 91(24) and the concept of interjurisdictional immunity referred to in ***Dick*** and ***Delgamuukw***, concepts that play no role in the application of the functional test.

81 Where, however, as in the present case, the operations and normal activities of an undertaking mirror matters such as medical and health services and education which fall within s. 91(24), (see ***Tobique***, *supra*) and are shaped to deal with issues arising out of the discrete First Nations experience, it follows, under the functional test, that the service assumes a federal dimension despite its genesis in provincial jurisdiction and legislation.

82 I conclude, therefore, that under the functional test, the operation and normal activities of NIL/TU,O are matters falling within s. 91(24) and accordingly, labour relations which pertain to it form an integral part of primary federal jurisdiction over that operation. I accordingly conclude that the board erred in its Original Decision and Reconsideration Decision and I quash the certification of the respondent, BCGEU as the bargaining agent for the employees of NIL/TU,O.

CULLEN J.

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