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, Respondent (Petitioner), and
B.C. Government and Service Employees' Union, Appellant (Respondent)

[2008] B.C.J. No. 1611

2008 BCCA 333

[2008] 10 W.W.R. 388

81 B.C.L.R. (4th) 318

296 D.L.R. (4th) 364

258 B.C.A.C. 244

80 Admin. L.R. (4th) 282

2008 CarswellBC 1773

168 A.C.W.S. (3d) 771

[2008] 4 C.N.L.R. 57

155 C.L.R.B.R. (2d) 1

[2009] CLLC para. 220-011

Docket: CA035328

British Columbia Court of Appeal
Vancouver, British Columbia

L.S.G. Finch C.J.B.C., S.D. Frankel and

H. Groberman JJ.A.

Heard: June 2 and 3, 2008.
Judgment: August 27, 2008.

(67 paras.)

Aboriginal law -- Aboriginal status and rights -- Constitutional issues -- Federal v. provincial jurisdiction -- Jurisdiction -- British Columbia -- Appeal by the Union from a judgment which quashed the certification of the appellant as the bargaining agent for the respondent's employees -- All of the respondent's services were provided to children who were registered Indians -- The sole issue on the appeal was whether the labour relations of the Society and its employees were governed by provincial or by federal labour legislation -- Appeal allowed -- Nothing in the Child, Family and Community Service Act or in the manner in which delegated services were provided by the respondent took those services outside of provincial jurisdiction.

Constitutional law -- Division of powers -- Federal jurisdiction -- Section 91, Constitution Act, 1867 -- Provincial jurisdiction -- Section 92, Constitution Act, 1867 -- Appeal by the Union from a judgment which quashed the certification of the appellant as the bargaining agent for the respondent's employees -- All of the respondent's services were provided to children who were registered Indians -- The sole issue on the appeal was whether the labour relations of the Society and its employees were governed by provincial or by federal labour legislation -- Appeal allowed -- Nothing in the Child, Family and Community Service Act or in the manner in which delegated services were provided by the respondent took those services outside of provincial jurisdiction.

Constitutional law -- Canadian constitution -- Aboriginal rights -- Constitution Act, 1867 -- Appeal by the Union from a judgment which quashed the certification of the appellant as the bargaining agent for the respondent's employees -- All of the respondent's services were provided to children who were registered Indians -- The sole issue on the appeal was whether the labour relations of the Society and its employees were governed by provincial or by federal labour legislation -- Appeal allowed -- Nothing in the Child, Family and Community Service Act or in the manner in which delegated services were provided by the respondent took those services outside of provincial jurisdiction.

Appeal by the B.C. Government and Service Employees' Union from a judgment of the Supreme Court which quashed the certification of the Union as the bargaining agent for the respondent Society's employees. The sole issue on the appeal was whether the labour relations of the Society and its employees were governed by provincial or by federal labour legislation. If the Labour Relations Code applied to the parties, then the B.C. Labour Relations Board had jurisdiction to grant the certification and its decision should be reinstated. If not, then exclusive jurisdiction lay with the Canada Industrial Relations Board under the Canada Labour Code. The Society argued that its operations were so integrally connected to the culture and special needs of its First Nations

members as to place its labour relations under section 91(24) of the Constitution Act, 1867, as matters in relation to Indians. The Union argued that the labour relations fell within section 92(13) of the Constitution Act, 1867, as matters in relation to civil rights in the province. All of the Society's services were provided to children who were registered Indians, and the vast majority of its services were provided on reserve lands.

HELD: Appeal allowed, and the order of the Labour Board was reinstated. Provincial jurisdiction over a matter was not lost whenever a province attempted to enact or apply its laws in a manner sensitive to the interests of First Nations. Nothing in the Child, Family and Community Service Act or in the manner in which delegated services were provided by the Society took those services outside of provincial jurisdiction. Accordingly, the Labour Relations Board had jurisdiction to certify the Union as bargaining agent for the employees of the Society.

Statutes, Regulations and Rules Cited:

Child, Family and Community Service Act, RSBC 1996, CHAPTER 46, s. 2, s. 3, s. 4(1), s. 71

Constitution Act, 1867, R.S.C. 1985, App. II, No. 5, s. 91(24), s. 92(13)

Heritage Conservation Act, RSBC 1996, CHAPTER 187, s. 13(4)

Counsel:

Kenneth Curry: Counsel for the Appellant.

Walter G. Rilkoff and N. Skuggedal: Counsel for the Respondent.

E.F. Miller: Counsel for the B.C.L.R.B.

Reasons for Judgment

The judgment of the Court was delivered by

1 H. GROBERMAN J.A.:-- This is an appeal from a judgment of the Supreme Court (2007 BCSC 1080) quashing the certification of the appellant (the "Union") as the bargaining agent for the respondent's employees. The sole issue on this appeal is whether the labour relations of the respondent (the "Society") and its employees are governed by provincial or by federal labour legislation. If the ***Labour Relations Code***, R.S.B.C. 1996, c. 244, applies to the parties, then the B.C. Labour Relations Board had jurisdiction to grant the certification, and its decision should be reinstated. If not, then exclusive jurisdiction lay with the Canada Industrial Relations Board under

the ***Canada Labour Code***, R.S.C. 1985, c. L-2, and the judgment of the Supreme Court should be affirmed.

2 The Society argues that its operations are so integrally connected to the culture and special needs of its First Nations members as to place its labour relations under section 91(24) of the ***Constitution Act, 1867***, as being matters in relation to Indians. The Union argues that the labour relations fall within section 92(13) of the ***Constitution Act, 1867***, being matters in relation to Civil Rights in the Province.

Factual Background

3 The Society was incorporated pursuant to the ***Society Act***, R.S.B.C. 1996, c. 433, by a number of First Nations on Southern Vancouver Island. Currently, its members are seven First Nations (Beecher Bay, Pacheedaht, Pauquachin, Songhees, T'Sou-ke, Tsartlip, and Tsawout) and individuals who are members of those First Nations. Only members of those First Nations are eligible to be directors of the Society. The Society has its offices on Tsawout reserve lands.

4 Sections 2 to 4 of the Society's constitution set out its purposes and goals:

> 2. NIL/TU,O's Mission Statement is:
>
> > NIL/TU,O's goals are to ensure the safety, protection and well being of our children in today's society; working together to maintain the traditional values of the extended family.
> >
> > This means that each individual child's physical, spiritual, emotional, and psychological needs are met.
> >
> > While adults we are showing mutual: respect, love, patience, and nurturing for our children through involvement of the entire community.
>
> 3. NIL/TU,O's Mandate is stated as:
>
> > The Collective First Nations declares its responsibilities to safeguard the right of children to live safely and with dignity and shall:
> >
> > Recognize the authority of the Child, Family and Community Service Act to deliver statutory services to families and children until such time as

there is a First Nations Self Government Child and Family Services legislation or Government of Canada First Nations Child and Family Services legislation.

Recognize the authority of NIL/TU,O Child and Family Services to deliver non-statutory services to families and children.

4. The purposes of the Society are:

a) To create, develop, implement and maintain a child welfare and family service agency (hereinafter referred to as "the agency") for the First Nations/Bands (hereafter referred to as the "Collective Tribes") listed in Appendix 1, Member Nations/Bands;
b) To enter into and maintain an agreement with the Collective Tribes, respecting the conditions under which the society will operate the agency on behalf of the Collective Tribes through individual Band Council Resolution Agreements and with individual protocol agreements which define the working relations and guidelines;
c) To negotiate and maintain formal agreements with the Department of Indian Affairs Canada and the provincial Ministry for Child and Family Development with respect to funding and delegation of authority under the Child, Family and Community Services Act (CFCSA) and operation of the agency;
d) To govern and provide services in keeping with the culture, traditions and teachings of the Collective Tribes;
e) To assess child and family services needs in the community and within the scope of the legislative mandate and existing resources, to develop services to meet those needs;
f) To develop and implement policies with respect to the operation of the agency;
g) To advise band councils and to receive information from them with regard to child and family services needs and issues in the communities;
h) To advocate on behalf of children, youth and families in the communities; including to be a part of the plans of care'; reunification of children in care, and continuing care as per CFCSA;
i) To increase community awareness of child and family services issues through educational programs, building and focusing on community strengths, and other means;
j) To ensure that First Nations qualified practitioners deliver services for the

agency, including building that capacity through training of First Nations practitioners;

k) To ensure the legal obligation with respect to services, accountability and reporting, for the agency programs and services, are being met;

l) To approve the agency operational finances based on. allocated funding;

m) To buy, lease, hold, operate, develop or improve any real personal property for the purpose of carrying out the "purposes" of the society;

n) To raise money from government and private sources for carrying out the "purposes" of the society;

o) To co-manage cases with the Ministry for Child and Family Development until such time as full delegation of authority is obtained by the agency.

5 In British Columbia, child welfare, including child protection, is governed primarily by the ***Child, Family and Community Service Act***, R.S.B.C. 1996, c. 46. Under that statute, the "director" has various powers and responsibilities for child welfare. The statute provides the director with authority to delegate those powers and responsibilities. In furtherance of its purposes and goals, the Society entered into an agreement in March 1999 with the governments of Canada and of British Columbia, under which the director delegated powers and responsibilities to the Society.

6 The original agreement was replaced by a second tripartite agreement in 2004, known as the "Delegation Confirmation Agreement". The agreement delegates to the Society the authority and responsibility to provide certain services to children who are registered as Indians under the ***Indian Act***, R.S.C. 1985, c. I-5, and who have at least one parent who resides on reserve lands of one of the member First Nations. The actual powers that are delegated are set out in an appendix to the agreement entitled "Aboriginal Delegation Matrix". While most of the director's powers and responsibilities are delegated to the Society, some, particularly those involving apprehension of children, have not been delegated. The director also retains jurisdiction to provide services directly. Where services are undertaken by the director, they are typically performed by government social workers working alongside and in consultation with social workers employed by the Society.

7 All of the Society's services are provided to children who are registered Indians, and the vast majority of its services are provided on reserve lands.

8 The standards to be followed by the Society in carrying out its delegated powers and responsibilities are set out in an appendix to the Delegation Confirmation Agreement known as the "Aboriginal Operational and Practice Standards and Indicators". This document, like the Aboriginal Delegation Matrix, was promulgated by the director under the ***Child, Family and Community Service Act***. The policies were developed in consultation with First Nation groups.

9 The exercise of delegated authority under the ***Child, Family and Community Service Act*** is the major function with which the Society is engaged. While the "Mandate" set out in section 3 of the Society's constitution recognizes that it may deliver "non-statutory services", it does not appear that

such services currently constitute a significant part of its activities.

10 The Society is dedicated to training First Nations people in the delivery of services, and to employing them to provide the services. While there is no requirement that its employees be members of First Nations, all but one of its 21 employees (including its Executive Director) were members of First Nations at the time of the certification.

11 The Aboriginal Operational and Practice Standards and Indicators include provisions that specifically recognize the unique circumstances of aboriginal children. Of particular note are Standard 4 and Standard 7 of the Voluntary Services Standards. These deal with "Involving the Aboriginal Community in the Provision of Services" and "Preserving the Identity of the Child in Care and Providing Culturally Appropriate Services" respectively. Other standards (including certain of the Child Protection Standards) contain provisions dealing with matters that are unique to aboriginal children, such as the need to consult with Indian Bands in making arrangements. For the most part, however, the standards are of a nature that would be applicable to the provision of services to any children. The provisions that specifically recognize specialized needs of First Nations are limited - for example, the two specific standards I have mentioned make up only about two pages of the 100 pages of standards.

12 The Society emphasized, in the affidavit material that it filed, the specifically aboriginal nature of some of its services. Mavis Henry, the Executive Director of the Society, states as follows:

> 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 [and] 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.

It should be noted, however, that the responsive affidavit of Audrey Chartrand, a social worker employed by the Society, suggests that these programs, to the extent that they exist, represent a minor aspect of the Society's functions.

13 Neither the Labour Relations Board nor the chambers judge made specific findings of fact as to the degree to which these specialized programs represent core functions of the Society. Given, however, that it is common ground that the bulk of the Society's work is concerned with statutory duties and powers under the ***Child, Family and Community Service Act***, these specific aboriginal programs would not appear to be the main undertakings of the Society.

Original Decision of the Labour Relations Board

14 When the Union applied for certification, the Society objected on the ground that its functions fall within federal jurisdiction being matters in relation to "Indians, and Lands Reserved for the Indians" pursuant to section 91(24) of the ***Constitution Act, 1867***. The Union argued that the labour relations fall within section 92(13) of the ***Constitution Act, 1867***, being matters in relation to "Civil Rights in the Province."

15 The original decision by a one-member panel of the Labour Relations Board was issued on March 23, 2006, as BCLRB No. B72/2006. The Board commenced its legal analysis with a consideration of the seminal decision of the Supreme Court of Canada in ***Four B Manufacturing Ltd. v. United Garment Workers of America***, [1980] 1 S.C.R. 1031, a case which I will discuss in further detail below. It then noted that different lines of authority exist with respect to jurisdiction over the labour relations of "'Indian' organizations". It considered the decision of the Ontario Labour Relations Board in ***Native Child and Family Services of Toronto***, [1995] O.L.R.D. No. 4298, to be particularly persuasive.

16 The panel considered the fact that the Society's functions are delegated under provincial legislation to be of importance. It stated that " Indian' content without some kind of connection to the exercise of federal legislative power does not necessarily attract federal jurisdiction over labour relations." (para. 47.) It found no evidence of "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", and concluded at paragraph 49:

> ... In my view, the [Labour Relations] 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 [citations omitted].

17 One week after the decision, after the counting of the vote, the Board certified the Union as the bargaining agent for the Society's employees.

Reconsideration Application

18 The Society applied to the Board under section 141 of the ***Labour Relations Code*** for reconsideration of the Board's decision. In a decision issued September 8, 2006, as BCLRB No. B209/2006, a three-member panel of the Board denied leave for reconsideration.

19 The panel stated at paragraphs 5 and 7:

> ... [W]e do not accept that the Original Decision errs 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.
>
> ...
>
> 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.

20 The reconsideration panel considered that a straightforward application of the decision of the Supreme Court of Canada in ***Four B*** was determinative of provincial jurisdiction over labour relations in this case.

Decision on Judicial Review

21 Following the denial of leave for reconsideration, the Society brought judicial review proceedings before the Supreme Court. The learned chambers judge undertook an extensive review of the authorities. He noted that the test of jurisdiction as enunciated in ***Four B*** had been modified by subsequent jurisprudence. At paragraphs 69 and 70 of his judgment, he summarized:

> 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 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.
>
> In subsequent cases, such as *Qu'appelle* [*Indian Residential School Council v. Canada*, [1988] 2 F.C. 226 (T.D.)], *Sagkeeng* [*Alcohol Rehabilitation Centre Inc. v. Abraham*, [1995] 1 C.N.L.R. 184 (F.C. T.D.)], *Shubenacadie* [*Indian Band v. Canada (Canadian Human Rights Commission)* (2000), 187 D.L.R. (4th) 741

> (F.C.A.)], *Tobique* [*Band Council v. Sappier* (1988), 87 N.R. 1 (F.C.A.)] and *Westbank* [*First Nation v. British Columbia (Labour Relations Board)* (1997), 39 C.L.R.B.R. (2d) 227 (BCSC)] 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."

22 The court found that, using this broader conception of "Indianness", the operations of the Society in the case at bar were sufficiently related to matters under section 91(24) of the ***Constitution Act, 1867*** that its labour relations fall under federal jurisdiction (at paragraphs 72, 74, 79 and 81):

> 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.
>
> ...
>
> ... [T]he 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.
>
> ...
>
> ... 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. ...

...

> Where ... , 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*) 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.

23 In the result, the learned chambers judge quashed the decision of the Labour Relations Board.

General Framework of Constitutional Jurisdiction over Labour Relations

24 The starting point for analysis in this case is the general law concerning the division of legislative authority over labour relations between the provincial and federal governments. It is long-established that labour relations are *prima facie* within the legislative jurisdiction of provincial governments, being matters of Civil Rights in the Province, under section 92(13) of the ***Constitution Act, 1867***.

25 There are, however, circumstances where labour relations are within federal jurisdiction. In ***Reference re Industrial Relations and Disputes Investigation Act***, [1955] S.C.R. 529 (often referred to as the ***Eastern Canada Stevedoring*** case), Estey J. set out the four circumstances in which federal jurisdiction may arise at 564:

> [T]here is a jurisdiction in the Parliament of Canada to legislate with respect to labour and labour relations, even though these relations are classified under Property and Civil Rights within the meaning of s. 92(13) of the *B.N.A. Act* [now cited as the *Constitution Act, 1867*] and, therefore, subject to provincial legislation. This jurisdiction of Parliament to so legislate includes those situations in which labour and labour relations are (a) an integral part of or necessarily incidental to the headings enumerated under s. 91; (b) in respect to Dominion Government employees; (c) in respect to works and undertakings under ss. 91(29) and 92(10); (d) in respect of works, undertakings or businesses in Canada but outside of any province.

26 In ***Northern Telecom Ltd. v. Communications Workers of Canada***, [1980] 1 S.C.R. 115, Dickson J. (as he then was) for the court summarized the constitutional principles applicable to labour relations as follows at 131-132:

> The best and most succinct statement of the legal principles in this area of labour relations is found in Laskin's *Canadian Constitutional Law* (4th ed., 1975) at p. 363:

> In the field of employer-employee and labour-management relations, the division of authority between Parliament and provincial legislatures is based on an initial conclusion that in so far as such relations have an independent constitutional value they are within provincial competence; and, secondly, in so far as they are merely a facet of particular industries or enterprises their regulation is within the legislative authority of that body which has power to regulate the particular industry or enterprise ...

In an elaboration of the foregoing, Mr. Justice Beetz in *Construction Montcalm Inc. v. Minimum Wage Commission* [[1979] 1 S.C.R. 754] set out certain principles which I venture to summarize:

(1) Parliament has no authority over labour relations as such nor over the terms of a contract of employment; 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 wages to be paid by an undertaking, service or business, and 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 these of "a going concern", without regard for exceptional or casual factors; otherwise, the Constitution could not be applied with any degree of continuity and regularity.

27 These considerations have come to be described as the "functional test". Under this test, the court is required to examine the normal and habitual activities of an undertaking in order to determine whether federal authority over labour relations is integral to a matter of federal competence.

The Supreme Court of Canada's Decision in *Four B*

28 When the federal government has jurisdiction over commercial activities or particular undertakings (e.g., shipping, banking, interprovincial railroads), it is often a relatively simple matter to determine whether labour relations are integral to the federal power. It has proven more difficult to postulate a theory of when labour relations are integral to federal competence over "Indians and Lands Reserved for the Indians".

29 The Supreme Court of Canada has dealt with the issue of labour relations and section 91(24) of the ***Constitution Act, 1867*** only in ***Four B***. In that case, the employer was a company engaged in the commercial manufacture of leather shoe uppers. It was wholly owned by status Indians, and the manufacturing facility was situated on a reserve, with the approval of the Band Council. Most of the employees were members of the First Nation on whose reserve the facility was located. The employer received financial assistance from the federal government, under the Indian Economic Development Fund for the purpose of improving the economic position of the Band.

30 While two judges would have held the connections between the company and Indians to be sufficient to bring its labour relations within the federal sphere, Beetz J., speaking for the majority, rejected that view. At 1046-1047, he stated:

> There is nothing about the business or operation of *Four B* which might allow it to be considered as a federal business: the sewing of uppers on sport shoes is an ordinary industrial activity which clearly comes under provincial legislative authority for the purposes of labour relations. Neither the ownership of the business by Indian shareholders, nor the employment by that business of a majority of Indian employees, nor the carrying on of that business on an Indian reserve under a federal permit, nor the federal loan and subsidies, taken separately or together, can have any effect on the operational nature of that business. By the traditional and functional test, therefore, *The Labour Relations Act* applies to the facts of this case, and the *Board* has jurisdiction.
>
> ... It is argued that the functional test is inappropriate and ought to be disregarded where legislative competence is conferred not in terms relating to physical objects, things or systems, but to persons or groups of persons such as Indians or aliens.
>
> I cannot agree with these submissions.
>
> 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: the *Stevedoring* case.
>
> Given this general rule, and assuming for the sake of argument that the functional test is not conclusive for the purposes of this case, the first question which must be answered in order to deal with appellant's submissions is whether the power to regulate the labour relations in issue forms an integral part of primary federal jurisdiction over Indians and Lands reserved for the Indians ...

31 The majority goes on to describe what it means by an "integral part of primary federal jurisdiction of Indians and Lands reserved for the Indians" in a number of ways. It speaks of "Indianness", and things that are "inherently Indian", and of regulating Indians "*qua* Indians". At 1047-48, it emphasizes its point:

> ... [N]either 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. 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.

32 The majority in ***Four B*** considered that unless the regulation of labour relations went to the core of federal competence over Indians, then provincial labour laws validly applied to Indians and on reserves.

Federal Court Labour Cases after *Four B*

33 The regulation of labour relations involving First Nations persons and organizations has come before the courts on numerous occasions since ***Four B***. Two separate lines of authority have emerged. One line of authority, consisting almost entirely of cases emanating from the Federal Court and Federal Court of Appeal, holds that where an enterprise is important to a First Nation or its members, or operates in a manner influenced by First Nations culture, labour relations will be regulated by the ***Canada Labour Code***. The Society places particular reliance on four cases in this line of authority: ***Qu'appelle Indian Residential School Council v. Canada***, [1988] 2 F.C. 226 (T.D.); ***Tobique Band Council v. Sappier*** (1988), 87 N.R. 1 (F.C.A.); ***Sagkeeng Alcohol Rehabilitation Centre Inc. v. Abraham***, [1994] 3 F.C. 449 (T.D.); and ***Shubenacadie Indian Band v. Canada (Canadian Human Rights Commission)*** (2000), 187 D.L.R. (4th) 741 (F.C.A.).

34 In ***Qu'Appelle Indian Residential School Council v. Canada***, the Federal Court Trial Division found that the Canadian Human Rights Tribunal had jurisdiction to hear a human rights complaint against the body administering Indian Residential Schools. The school's objects were to

promote Indian traditions, and an important aspect of its functions was the teaching of Indian language and culture. In these circumstances, it seems to me unremarkable that the school's administration came within federal jurisdiction; its operations clearly dealt with matters integral to the s. 91(24) powers of the federal government.

35 ***Tobique Band Council v. Sappier*** dealt with the jurisdiction of an adjudicator under the ***Canada Labour Code*** over a dispute between the Band's Child Welfare Agency and an employee. The Federal Court of Appeal held that the adjudicator had jurisdiction. Madam Justice Desjardins, speaking for the court on this point, said at paragraph 14:

> The gist of the matter consists ... in determining the true character of the activities involving the grievor and her employer. At page 1048 S.C.R. of his reasons in the *Four B* case ... 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" ([Desjardin J.'s] 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* at 1047 S.C.R.). 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. Ontario Highway Transport Board*, [1968] S.C.R. 569; *The Queen v. Smith*, [1972] S.C.R. 359).

36 In essence, then, the court accepted two different bases for federal jurisdiction. First, it noted that the federal government had jurisdiction to enact legislation concerning the provision of health services and education to First Nations. By extension, the court reasoned that the federal

government must also have jurisdiction to enact legislation concerning the provision of social services to First Nations. The court concluded that the jurisdiction to enact such legislation was sufficient to establish federal jurisdiction over the labour relations of the child welfare agency. Second, the court noted that the agency was concerned specifically with Indian children, and that it "took into account" both their "physical and cultural integrity".

37 The learned chambers judge in the case at bar appears to have accepted similar rationales for finding that the labour relations of the Society and its employees fall within federal jurisdiction. For reasons that I will come to, I consider that he erred in doing so.

38 In ***Sagkeeng Alcohol Rehabilitation Centre Inc. v. Abraham***, Rothstein J. (then of the Federal Court, Trial Division) found that the ***Canada Labour Code*** applied to an alcohol rehabilitation centre on a reserve. He found that the focus of the rehabilitation centre on a First Nations clientele was a sufficient link to "Indianness" to bring it under federal jurisdiction at 459-60:

> 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 [a federally sponsored program directed at First Nations] 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.

39 ***Shubenacadie Indian Band v. Canada (Canadian Human Rights Commission)*** involved a welfare program operated by an Indian Band. It was alleged that the program operated in a discriminatory fashion by denying band members benefits in respect of non-Indian spouses, and a complaint was made to the Canadian Human Rights Commission. Ultimately, the Commission appointed a tribunal, which upheld the complaint. The Band sought to quash the decision, arguing that the matter was outside the jurisdiction of the Commission. At first instance, the Federal Court held that the matter was an exercise of the federal spending power, and therefore properly a matter to be investigated by the Canadian Human Rights Commission. The Federal Court of Appeal preferred to characterize the program as one relating to Indians. At paragraphs 56-60, Isaac J.A. for

the court stated:

> It is clear from the document entitled *Background of the Development of the Social Assistance Program*, which I have earlier reproduced, that the Government of Canada through the Treasury Board Ministers, decided in 1964 to provide social assistance to Indians living on reserve and to their families. That this was done in discharge of the constitutional responsibilities is expressed in that document. That the programme was designed to enhance the status of the Indian people and their families is also beyond question.
>
> The evidence demonstrates that, on the authority of the relevant Treasury Board Minute, DIAND entered into Master Funding Agreements and prepared the Agreements which govern the distribution of the social assistance benefits which is funded wholly by the Government of Canada.
>
> Moreover, in this appeal, each of the applicants for social assistance is a status Indian and a member of the Band. They received benefits for themselves and their children; but, were refused for their non-Indian spouses who resided with them on the Reserve. In my respectful view, the refusal to pay benefits to Indian applicants in respect of non-Indian spouses cannot transform what is in fact a programme designed to enhance the status of Indian peoples (a matter within the constitutional competence of Parliament) into a matter within provincial competence, simply because non-Indian spouses are involved.
>
> It bears emphasizing that the programme is designed for the benefit of Indians. Only Indians who are members of the Band and are normally resident on the Reserve are entitled to apply for benefits for themselves and their dependents who must also normally reside on the Reserve.
>
> It follows, in my judgment, that a programme designed to promote Indianness and limited territorially to the Reserve is one that is constitutionally supportable under section 91(24) of the *Constitution Act, 1867*, as being a program relating to Indians and lands reserved for Indians.

40 This case is distinguishable from the case at bar, in that it concerned constitutional jurisdiction over the administration of a program developed and funded exclusively by the federal government. To the extent, however, that the case suggests that a program that is designed to assist members of Indian bands is *ipso facto* a matter promoting "Indianness", it is relevant to the case at bar. I will consider the soundness of this proposition after discussing a second line of authority emanating

from provincial superior courts.

Cases from Provincial Superior Courts

41 The second line of authority, consisting of most cases on this issue decided by provincial superior courts, takes a more restrictive view of federal jurisdiction over labour relations under s. 91(24).

42 In ***Whitebear Band Council v. Carpenters Provincial Council Saskatchewan*** (1982), 135 D.L.R. (3d) 128, the Saskatchewan Court of Appeal held that labour relations between the Band Council and carpenters engaged in building housing on a reserve was a matter of federal jurisdiction.

43 In ***Saskatchewan Indian Gaming Authority v. National Automobile, Aerospace, Transportation and General Workers Union of Canada***, 2000 SKQB 176, Smith J., as she then was, explained the ***Whitebear*** decision as being based on the statutory functions of the Band Council under the ***Indian Act***, and the fact that its housing construction functions could not, on the facts of the case, be divided from its other functions. She found that the First Nations organization that ran casinos, on the other hand, was subject to provincial jurisdiction. The Court of Appeal of Saskatchewan, in a decision given by Cameron J.A., who had authored the ***Whitebear*** decision, adopted her reasons: 2000 SKCA 138.

44 Smith J. considered the decisions of the Supreme Court of Canada in ***Northern Telecom***, ***Four B***, and in ***Delgamuukw v. British Columbia***, [1997] 3 S.C.R. 1010, and concluded that enterprises are subject to federal labour jurisdiction as a result of federal jurisdiction over Indians only in narrow circumstances - when regulation of the enterprise's operations would affect core aspects of "Indianness" as that concept was analysed in ***Delgamuukw***: see ***Saskatchewan Indian Gaming Authority*** (Q.B.) at paragraphs 39-40 and 67.

45 In ***Southeast Resource Development Council v. United Food and Commercial Workers Union, Local No. 832***, 2004 MBQB 35, the issue before the court was jurisdiction over the labour relations of an enterprise that provided transportation, accommodation, and interpretation services to status Indians from outside Winnipeg when they needed to access medical treatment in Winnipeg. The enterprise was controlled by nine Indian Band Councils. The court found that the matter was under provincial jurisdiction. It approved the reasons of the Labour Board, which it summarized as follows, at paragraph 38:

> (1) The fact that funding comes from the federal government is of no consequence (*Four B*);
> (2) The control of Southeast by nine band councils is irrelevant to the constitutional issue. Southeast is not a band council, but instead a provincially incorporated corporation (*SIGA* [*Saskatchewan Indian Gaming Authority*]);

(3) The powers of band councils are concerned with and restricted to the administration of band affairs on their reserves;

(4) The focus of concern should not be on the employer or employees, but on the activities of the operation. Consequently "... jurisdiction over labour matters depends on legislative authority over the operation, not the person of the employer or the employees" (page 49, Board's Reasons for Decision);

(5) The Board considered the characteristics that go the core of s. 91(24) or constitute "Indianness";

(6) The core content of s. 91(24) relates to those things that distinguish Indians from non-Indians culturally, historically and legally. Those would include issues such as hunting rights and aboriginal rights to land;

(7) Labour relations involving Indian employees or Indian employers do not go to the core of "Indianness" (*Four B*);

(8) There is no case law considering whether the health of Indians, or the transportation or accommodation of Indians are at the core of "Indianness". The Board held that those types of matters are not the kind that courts have found to be at the core of "Indianness": *Kitkatla Band v. British Columbia*, [2002 SCC 31, [2002] 2 S.C.R. 146] and *SIGA* [*Saskatchewan Indian Gaming Authority*];

(9) The normal activities of the business included transportation, travel and accommodation arrangements. The Board held that such activities are not demonstrative of the characteristics required to place it at the core of federal jurisdiction over Indians;

(10) The Board considered that the drivers and dispatchers were recommended to be able to converse in a native language. However, there was nothing in the Statement of Work under the federal contract which made that a requirement. The evidence was that there were drivers and dispatchers without an ability to speak a native language. Additionally, it could not be guaranteed that even if a driver did speak a native language, that it would be the one required in the circumstances of the particular client;

(11) The Board held that the employees in the bargaining unit drove or dispatched vehicles. That activity was not found to be a traditional Indian activity that would go to the core of "Indianness";

(12) While it is correct the *Indian Act* facilitates that the Governor in Council may make regulations to provide health services for Indians and the authority for band councils to make by-laws to provide for the health of reserve residents, a grant of such power is ... "not synonymous with the imposition of an obligation, nor does it determine the constitutional question. Even assuming the provision of health care to reserve Indians is an obligation of the federal government, such an obligation does not create

> exclusive legislative authority over the subject ..." (Reasons, page 56). That finding does not make health solely within the power of the federal government as it relates to Indians. However, the Board found that what Southeast did was effectively not a health service as in [*Nisga'a Valley Health Board v. BCGEU*, [1995] B.C.L.R.B.D. No. 285 (QL)]. It was one of transportation.

46 The Ontario Labour Relations Board decision in ***Native Child and Family Services of Toronto***, [1995] O.L.R.D. No. 4298, which the Labour Board found particularly persuasive in the case at bar, similarly took a restrictive view of the core of "Indianness", and found provincial jurisdiction to be applicable.

47 This Court dealt with the issue of labour relations and s. 91(24) of the ***Constitution Act, 1867*** in ***Westbank First Nation v. British Columbia (Labour Relations Board)***, 2000 BCCA 163. In that case, Mackenzie J.A. for the court held that the operation of an Intermediate Care Facility located on a reserve was subject to provincial labour laws. Although one of the First Nation's goals was to provide health services in a "culturally appropriate way", and to benefit the band, the court found that there was an insufficient connection to s. 91(24) to oust provincial jurisdiction. The court affirmed the reasoning of Tysoe J. (as he then was) in the court below (see 39 C.L.R.B.R. (2d) 227, [1997] B.C.J. No. 2410 (S.C.)). At paragraph 55, Tysoe J. said:

> Although the ultimate goal may be to benefit members of the Westbank First Nation and other First Nations groups, the actual function of the Home is to provide intermediate care to a much wider group, the majority of which are not First Nations people. 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.

The Relevance of Federal Ancillary Jurisdiction

48 As I have indicated, in ***Tobique***, the Federal Court of Appeal placed considerable reliance on provisions of the ***Indian Act*** which allowed the federal government to enter into agreements for the provision of health services and education on reserves. It reasoned that the federal government also, therefore, had jurisdiction to enact legislation concerning social services on reserves, and therefore found the provision of social services on reserves to be a matter falling within s. 91(24) of the ***Constitution Act, 1867***. Having so found, it concluded that labour relations in respect of social service agencies on reserve should be governed by federal labour laws. In the case at bar, the

learned chambers judge appears to have adopted that reasoning at paragraph 81 of his reasons.

49 With respect, this analysis fails to distinguish between the core federal competence under section 91(24) and the jurisdiction to enact legislation ancillary to the purposes of section 91(24). In ***Four B***, at pp. 1047-48, the Supreme Court of Canada made it clear that the mere fact that the federal government could enact legislation in the exercise of its ancillary powers would not oust the application of provincial labour laws:

> ... [N]either 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. 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. Whether Parliament could regulate them in the exercise of its ancillary powers is a question we do not have to resolve any more than it is desirable to determine in the abstract the ultimate reach of potential federal paramountcy.

[Emphasis added.]

50 A power is characterized as "ancillary" for the very reason that it is not exercised for purposes integral to primary federal competence over a subject matter. Under the analysis in ***Northern Telecom***, therefore, the mere fact that the federal government might be competent to enact ancillary provisions that regulate an area will not affect labour relations. In ***Four B***, the court did not consider it necessary to determine whether ancillary powers could be used to govern labour relations, as no such powers had been exercised.

51 The situation is the same in the case at bar. It might be theoretically possible for Parliament to enact child welfare legislation ancillary to provisions of the ***Indian Act***. It might even be possible to enact specific statutory provisions dealing with labour relations in the field of child welfare under ancillary powers. Parliament has not, however, done so, and therefore no issue of *vires* or paramountcy of ancillary federal legislation arises in this case. Even if the learned chambers judge was correct in finding that the federal government is competent to enact child welfare provisions as part of the ***Indian Act*** (an issue on which I express no opinion), that finding would be irrelevant to the issues in the case at bar.

Primary Federal Competence over Indians - the Concept of "Indianness"

52 The Society argues that there are two separate tests that apply to a determination of jurisdiction over labour relations when there is an argument that jurisdiction is federal pursuant to s.

91(24). It says that the primary test is a "functional" one, and that a secondary test dealing with "Indianness" is applied where the primary test is not conclusive. The learned chambers judge appears to have accepted this proposition, though he emphasized that the concept of "Indianness" was also important to the primary test.

53 The issue of whether there is a secondary test is not critical to the matter before the court, as both parties agree that the matter can be determined using the primary "functional" approach laid out in ***Northern Telecom***. In my view, however, the proposition that there is a second test is not well-founded, and can only lead to confusion. As I read ***Four B***, the Supreme Court of Canada rejected the notion that the functional approach was deficient.

54 The issue in this case must be resolved using the functional test. The court must determine whether the operations of the Society are concerned with matters integral to primary federal competence under section 91(24) of the ***Constitution Act, 1867***.

55 The courts have often described this primary federal competence as consisting of matters going to "Indianness" (I leave aside, for the present, the second primary federal competence under section 91(24), which consists of matters related to "Lands reserved for the Indians"). Matters integral to the primary federal competence under s. 91(24) have been described as going to the "core of Indianness". While that expression seems a bit awkward today, it has some legal pedigree. There has been considerable judicial discussion of the scope of federal jurisdiction over First Nations in recent years, and the phrase "the core of Indianness" has come to have a fairly well-defined meaning (see, for example, ***Delgamuukw v. British Columbia*** and ***Kitkatla Band v. British Columbia***, 2002 SCC 31, [2002] 2 S.C.R. 146).

56 Lamer C.J.C., for the majority, discussed the scope of federal jurisdiction over Indians and the "core of Indianness" at some length in ***Delgamuukw*** at paragraphs 177-79 and 181:

> 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.
>
> It follows, at the very least, that this core falls within the scope of federal jurisdiction over Indians. 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 from legislating in relation to both types of aboriginal rights.

...

The vesting of exclusive jurisdiction with the federal government over Indians and Indian lands under s. 91(24), operates to preclude provincial laws in relation to those matters. Thus, provincial laws which single out Indians for special treatment are *ultra vires*, because they are in relation to Indians and therefore invade federal jurisdiction: see *R. v. Sutherland*, [1980] 2 S.C.R. 451. However, it is a well-established principle that (*Four B Manufacturing Ltd.* at p. 1048):

> The conferring upon Parliament of exclusive legislative competence to make laws relating to certain classes of persons does not mean that the totality of these persons' rights and duties comes under primary federal competence to the exclusion of provincial laws of general application.

In other words, notwithstanding s. 91(24), provincial laws of general application apply *proprio vigore* to Indians and Indian lands. Thus, this Court has held that provincial labour relations legislation (*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.

...

... [Section] 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* [*v. The Queen*, [1985] 2 S.C.R. 309], at pp. 326 and 315; also see *Four B* at p. 1047 and *Francis* at pp. 1028-29).

> The core of Indianness at the heart of s. 91(24) has been defined in both negative and positive terms. Negatively, it has been held to not 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 and because those activities were "at the centre of what they do and what they are" (at p. 320). But in [*R. v.*] *Van der Peet* [[1996] 2 S.C.R. 507], I described and defined the aboriginal rights that are recognized and affirmed by s. 35(1) in a similar fashion, as protecting the occupation of land and the activities which are integral to the distinctive aboriginal culture of the group claiming the right. It follows that aboriginal rights are part of the core of Indianness at the heart of s. 91(24). Prior to 1982, as a result, they could not be extinguished by provincial laws of general application.

Application of the Principles to this Case

57 The question, then, is whether the operations of the Society touch upon the "core of Indianness" - a core made up of matters integral to aboriginal or treaty rights, aboriginal culture, or Indian status.

58 Neither of the parties has suggested that the ***Child, Family and Community Service Act*** is unconstitutional in its application to First Nations; indeed, the Delegation Confirmation Agreement accepts that it is applicable legislation. It can, pursuant to the reasoning in ***Delgamuukw***, be valid only in one of two ways - as provincial legislation that applies of its own force, because it does not touch upon the "core of Indianness" or as provincial legislation of general application that applies by virtue of section 88 of the ***Indian Act***. The provincial laws of general application to which s. 88 refers are those laws that could not apply to Indians without regulating them *qua* Indians.

59 The Society did not argue that the legislation applies only by virtue of s. 88 of the ***Indian Act***. In my view, it is correct in not pursuing that argument. There is no matter that is integral to aboriginal or treaty rights, aboriginal culture or Indian status that is impaired or affected by the statute or by the way in which the Society exercises its delegated authority under the ***Child, Family and Community Service Act***. There is, in short, no law at issue that regulates "Indians *qua* Indians".

60 Certain passages in some of the decisions of the federal courts, the Canada Industrial Relations Board, and of the B.C. and Canadian Human Rights Tribunals suggest that matters go to "Indianness" whenever they are of importance to members of First Nations. Other passages suggest that whenever services are provided in a culturally appropriate manner, they trench upon "Indianness". In my view, this expansive view of the core of s. 91(24) is not justified by the jurisprudence of the Supreme Court of Canada, or by the logic of the division of powers in the ***Constitution Act, 1867***.

61 Social services must, in order to be effective, be geared to the target clientele. Neither the

importance of a service to an individual, the fact that a First Nation derives a benefit from a service, nor the fact that the service is provided in a manner conforming to cultural norms mean that the service goes to "the core of Indianness".

62 Cases such as ***Southeast Resource Development Council v. United Food and Commercial Workers Union, Local No. 832*** and ***Saskatchewan Indian Gaming Authority v. National Automobile, Aerospace, Transportation and General Workers Union of Canada*** are correct in holding that primary provincial jurisdiction over labour relations is not ousted simply because enterprises engage the interests of aboriginal groups, or provide services in a manner that is culturally sensitive.

63 There are provisions in the Aboriginal Operational and Practice Standards and Indicators that are specifically geared to ensuring the appropriate application of the ***Child, Family and Community Service Act*** within First Nations communities. Similarly, certain sections of the ***Child, Family and Community Service Act*** itself apply special considerations to aboriginal children. The following provisions are included in the ***Act***:

> 2 This Act must be interpreted and administered so that the safety and well-being of children are the paramount considerations and in accordance with the following principles:
>
> ...
>
> (f) the cultural identity of aboriginal children should be preserved;
>
> ...
>
> 3 The following principles apply to the provision of services under this Act:
>
> ...
>
> (b) aboriginal people should be involved in the planning and delivery of services to aboriginal families and their children;
>
> ...

> 4(1) Where there is a reference in this Act to the best interests of a child, all relevant factors must be considered in determining the child's best interests, including for example:
>
> ...
>
> (e) the child's cultural, racial, linguistic and religious heritage;
>
> ...
>
> (2) If the child is an aboriginal child, the importance of preserving the child's cultural identity must be considered in determining the child's best interests.
>
> ...
>
> 71(1) When deciding where to place a child, the director must consider the child's best interests.
>
> ...
>
> (3) If the child is an aboriginal child, the director must give priority to placing the child as follows:
>
> (a) with the child's extended family or within the child's aboriginal cultural community;
> (b) with another aboriginal family, if the child cannot be safely placed under paragraph (a);
> (c) in accordance with subsection 2 [which applies to non-aboriginal children], if the child cannot be safely placed under paragraph (a) or (b) of this subsection.

64 None of these provisions makes the ***Child, Family and Community Service Act*** legislation in respect of Indians, nor do they bring the activities of the Society within the legislative scope of s. 91(24) of the ***Constitution Act, 1867***. In this regard, they are similar to s. 13(4) of the ***Heritage***

Conservation Act, R.S.B.C. 1996, c. 187, considered by the Supreme Court of Canada in ***Kitkatla***:

> 13(4) The minister may, after providing an opportunity for consultation with the first nation whose heritage site or object would be affected,
>
> (a) define the extent of a site protected under subsection (2), or
> (b) exempt a site or object from subsection (2) on any terms and conditions the minister considers appropriate if the minister considers that the site or object lacks sufficient heritage value to justify its conservation.

65 The Constitution of Canada should be interpreted as encouraging, not prohibiting, cultural sensitivity in the administration of provincial statutes, including cultural sensitivity to First Nations. While not directly applicable to the ***Constitution Act, 1867***, section 27 of the ***Canadian Charter of Rights and Freedoms*** represents a constitutional acknowledgement of the value accorded multiculturalism in Canada:

> 27. This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.

66 Provincial jurisdiction over a matter is not lost whenever a province attempts to enact or apply its laws in a manner sensitive to the interests of First Nations. Nothing in the ***Child, Family and Community Service Act***, the Delegation Confirmation Agreement, or in the manner in which delegated services are provided by the Society takes those services outside of provincial jurisdiction.

Conclusion

67 In my view, the B.C. Labour Relations Board was correct in holding that it had jurisdiction to certify the Union as bargaining agent for the employees of the Society. I would allow the appeal, and reinstate the order of the Labour Board certifying the Union.

H. GROBERMAN J.A.
L.S.G. FINCH C.J.B.C.:-- I agree.
S.D. FRANKEL J.A.:-- I agree.

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