Federal Court  Cour fédérale

Date: 20150508

Docket: T-1933-14

Citation: 2015 FC 614

Toronto, Ontario, May 8, 2015

PRESENT: The Honourable Madam Justice Strickland

BETWEEN:

BERENS RIVER FIRST NATION

Applicant

and

TERESA GIBSON-PERON

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review, pursuant to sections 18 and 18.1 of the *Federal Courts Act*, RSC 1985, c F-7, of the decision of Adjudicator James E. McLandress (Adjudicator), dated August 11, 2014, which awarded damages to the Respondent, Ms. Teresa Gibson-Peron, as a result of her claim for unjust dismissal pursuant to the *Canada Labour Code*, RSC 1985, c L-2 (*Code*) as against the Applicant, Berens River First Nation (BRFN or Band). The Applicant in this matter alleges that the Adjudicator did not have jurisdiction to hear the complaint and that it should have been dealt with under provincial jurisdiction.

[2] For the reasons set out below, the application for judicial review is dismissed.

Background

[3] The following facts are taken from the Agreed Statement of Facts which was filed before the Adjudicator at the complaint for unjust dismissal and which forms part of the record before me. Additional relevant facts as found by the Adjudicator in his decision are summarized below in the "Decision Under Review" section of these reasons. The parties agree that the facts are not in dispute.

[4] BRFN is a First Nation located in Manitoba. BRFN operates its own Nursing Station on the First Nation. The Nursing Station operates under the supervision of a Health Director who is responsible to the Chief and Council of BRFN. The Nursing Station has a mandate to provide healthcare services to residents of the surrounding area. It receives funding through the First Nation Inuit Health Branch (FNIHB), which is a federal organization. It follows Health Canada Guidelines and is affiliated with the Interlake-Eastern Regional Health Authority of Manitoba. The nursing staff working at the Nursing Station are provincially licensed by the College of Registered Nurses of Manitoba.

[5] The Respondent was employed by BRFN as a clinic nurse at the Nursing Station. Her first day of employment was on or about July 5, 2009. She entered into her first contract of employment on or about December 16, 2009. Over the following years, until March 2013, the Respondent's contract was renewed on multiple occasions, and she worked under substantially the same terms and conditions. The exception to this was a period of time from July 1, 2011

until September 12, 2012, when she continued her employment at BRFN without a contract of employment. On or about March 27, 2013, the Respondent was told not to attend to work relief shifts for which she had been scheduled on March 29, 30 and 31, 2013. On or about March 28, 2013, the Health Director at that time and now Band Chief, Ms. Jackie Everett, told the Respondent that her contract, which would expire on March 31, 2013, would not be renewed nor would she be offered a new contract.

[6] On or about April 29, 2013, the Respondent filed a complaint with the Human Resources and Skills Development Canada (HRSDC) Labour Program under the *Code* alleging she had been unjustly dismissed from her position with BRFN. The Health Director wrote a letter dated June 20, 2013 to the HRSDC Labour Program alleging that the Respondent had previously worked from June 2012 to March 2013 without an employment contract. She also alleged that the Respondent was part of the treatment plan of a patient who had died and that this had prompted the decision by Chief and Council of BRFN not to renew her contract. BRFN has never investigated the incident surrounding this patient's death on March 17, 2013, nor has the Respondent been interviewed by BRFN regarding the patient's death. The Respondent's record of employment, dated April 8, 2013, states that the reason for its issuance is Code "A", meaning "lay off/shortage of work".

[7] The Adjudicator heard the unjust dismissal claim filed by the Respondent on June 3 and 4, 2014 and issued his decision to award her compensation on August 11, 2014.

Issues

[8] I agree with the parties that this matter raises the following issues:

1. What is the applicable standard of review?
2. Did the Adjudicator have the jurisdiction to hear and decide the Respondent's complaint?

Decision Under Review

[9] The Adjudicator's decision is 70 pages in length and addresses a significant body of jurisprudence, not all of which is recited in this summary. The Adjudicator set out the issues which the parties had agreed were to be determined. The first of these is relevant to this application, being whether the employment relationship between BRFN and the Respondent was subject to federal or provincial regulation in order to determine if the Adjudicator had jurisdiction over the matter. More specifically, if the relationship was subject to federal regulation, then the *Code* would apply and he would have jurisdiction. It if were provincially regulated, then he would not have jurisdiction to hear the complaint.

[10] The Adjudicator set out the relevant facts concerning the jurisdictional issue. He was satisfied that, as a remote First Nation with an elected Chief and Council, BRFN is responsible for providing a wide range of governmental services to its members, including healthcare. Chief Jackie Everett, a witness at the hearing and Health Director at the time period at issue, agreed that nursing is an essential service at BRFN. The Nursing Station is not separately incorporated, is not established as a stand-alone entity, and does not have its own board of directors. Rather, it

operates under the ultimate direction of BRFN's Chief and Council. Healthcare is the responsibility of the Chief and Council. The Health Director reports to the councillor with the Health portfolio and the Health Director's duties are to oversee all health-related programs, which includes nursing. The Health Director manages day-to-day affairs of the nurses, but the Band retains the power to hire and fire them.

[11] All funding for healthcare at BRFN comes from FNIHB, an arm of Health Canada and a federal entity. The Nursing Station operates under FNIHB's and Health Canada's directions, guidelines and policies. BRFN is a "band-transferred" First Nation, which means FNIHB has given the authority for the recruitment and retention of nurses to the Band. While FNIHB provides overall funding, the Band is responsible for managing those funds for the purposes of delivering its healthcare mandate, including with respect to nursing staff. The chain of command at the Nursing Station is such that: all clinical, nursing-related matters go to FNIHB and all HR-related matters go to Chief and Council; the staff nurses report to the Nurse-in-Charge; the Nurse-in-Charge reports to the Health Director on HR-related matters, who then reports to the Health portfolio councillor and Chief and Council; the Nurse-in-Charge, and sometimes the nurses themselves, deal directly with FNIHB on nursing-related matters.

[12] The Adjudicator found that the only evidence of provincial involvement was that the nurses are subject to provincial regulation for their practicing licenses, and, the Nursing Station is affiliated with the Interlake-Eastern Regional Health Authority of Manitoba. There was no evidence as to the nature of this "affiliation". In that regard, the Adjudicator stated, had there been any meaningful day-to-day impact on the Nursing Station, that he would have expected at

least one of the witnesses to have referred to it, but they had not done so. The Adjudicator found that the day-to-day activities of the Nursing Station were under the joint control of FNIHB for clinical matters, and the Band for HR matters without any relevant operational involvement by any provincial entity. The Nursing Station did not operate as an independent unit of the Band. Rather, it was closely integrated with an important part of the Band's operations for discharging its obligation to deliver healthcare services to its residents. Additionally, a choice of law clause in the employment contracts, which selected the laws of Canada, had been included on the advice of the Band's counsel.

[13] The Adjudicator analysed whether the Respondent's employment at BRFN was subject to federal or provincial jurisdiction. After setting out the reasons why jurisdiction is relevant to this inquiry under the *Constitution Act, 1867* (UK), 30 & 31, Vict, c 3, reprinted in RSC 1985, App II, No 5 [*Constitution Act, 1867*] and Canadian labour law, the Adjudicator noted that the law in the area of jurisdiction for labour disputes is not clear, particularly since the 2010 ruling of the Supreme Court of Canada in *NIL/TU,O Child & Family Services Society v BVGEU*, 2010 SCC 45 [*NIL/TU,O*].

[14] The Adjudicator set out what he understood to be the key elements from the jurisprudence relating to jurisdiction in labour relations matters as well as the relevant factors, as identified by the jurisprudence, to be considered when analyzing whether an entity falls under federal jurisdiction. The Adjudicator found that the Supreme Court's ruling in *NIL/TU,O* did not effectively reshape the world of employment law when it comes to employees of First Nations.

He found that the effect of *NIL/TU,O* is relatively narrow, and puts the regulation of labour and employment matters in respect of First Nations on the same footing as every other entity.

[15] Before the Adjudicator, the Respondent had argued that the Band was the proper entity to be assessed as to the nature of its operations, while the Band argued it was the Nursing Station. The Adjudicator stated that, if he had to decide which entity should be tested, then the proper approach was to ask whether the activity or operation under consideration was independent enough to be considered its own entity. If so, the functional test can be applied to it, and if not, the functional test is applied to the larger entity. However, in his view, the question of which entity should be subjected to the functional test did not really enter the picture in the jurisprudence. He addressed it because both parties made submissions on this point.

[16] The Adjudicator also found that it was not determinative that nursing is a provincially regulated activity given that Parliament can have jurisdiction in the field of healthcare. The Adjudicator could not accept the Respondent's submission that *NIL/TU,O* would be meaningless if the functional test is applied to the Band as a whole since many entities are engaged in a wide variety of activities. He found that nothing in *NIL/TU,O* undermined the analysis of the essential nature of an Indian band for the purposes of determining jurisdiction, as previously found in *Paul Band Indian Reserve No 133 v R*, [1984] 2 WWR 540 [*Paul*], *Francis v Canada (Labour Relations Board)*, [1981] 1 FC 225 [*Francis*] and *Whitebear Band Council v Carpenters Provincial Council of Saskatchewan*, [1982] 3 WWR 554 [*Whitebear*]. Rather, those cases supported the proposition that Indian bands themselves are subject to the *Code*. The Adjudicator found that the provision of healthcare services to its members was a normal part of the Band's

local government activities, that BRFN was the employer and that the Nursing Station was, therefore, not a distinct entity. This was fundamentally different than the fact situation in *NIL/TU,O*.

[17] The Adjudicator went on to note that it was significant that the Nursing Station was not separately incorporated, although it would be possible to have a distinct entity without being separately incorporated. He also assessed the federal government's involvement in the day-to-day activities of the Nursing Station, and found that all of the evidence pointed to the conclusion that it was not sufficiently independent from the Band to be considered a distinct entity for the purposes of determining jurisdiction. Therefore, the relevant entity was the Band.

[18] The Adjudicator addressed the cases referred to by the Band supporting the proposition that the nurses at BRFN are subject to provincial jurisdiction. He found that a first category of cases were factually distinguishable in that they did not deal with Indian bands themselves as the employer, but with operationally distinct entities, which were related to an Indian band (therefore the same fact scenario as *NIL/TU,O*), which was not the case before him. In the Adjudicator's view, the remaining cases, *MNU, Local 139 v Norway House Cree Nation*, [2011] MLBD No 26 [*Norway House*] and *Munsee-Delaware Nation and Flewelling (Unjust Dismissal), Re*, 2013 CarswellNat 1359, 7 CCEL (4th) 278, were wrongly decided in terms of jurisdiction.

[19] Finally, the Adjudicator applied the traditional approach to determine the applicable jurisdiction. He dealt first with the question of direct jurisdiction. He asked the question: is the Nursing Station a part of the Band's operations in respect of Indians and Lands reserved for

Indians, or is it a separate undertaking? The Adjudicator considered the evidence and found that, taken in totality, there was nothing about the Nursing Station that says it operates as a separate, distinct or autonomous unit; rather it is a key element in the Band carrying out its local government activities. In terms of derivative jurisdiction, the Adjudicator found that the Nursing Station is so tightly interwoven with the Band's operations that it ought to properly be subject to federal regulation for the purposes of its labour and employment relations.

[20] The Adjudicator also addressed the choice of law clause noting that the very reason why lawyers utilize such clauses is to eliminate any debate about which laws will govern. Therefore, it was significant that the parties chose to specify that the laws of Canada apply. And, as this was an employment contract, it could only be referring to the federal employment standards legislation, including the *Code*.

[21] Once he had found that he had jurisdiction to hear the Respondent's claim, the Adjudicator assessed the merits of the claim.

Relevant Legislation

Canada Labour Code, RSC 1985, c L-2, s 2.

2. In this Act,	2. Les définitions qui suivent s'appliquent à la présente loi.
"federal work, undertaking or business"	**« entreprises fédérales »**
"federal work, undertaking or business" means any work, undertaking or business that is	« entreprises fédérales » Les installations, ouvrages, entreprises ou secteurs

within the legislative authority of Parliament, including, without restricting the generality of the foregoing

d'activité qui relèvent de la compétence législative du Parlement, notamment :

(a) a work, undertaking or business operated or carried on for or in connection with navigation and shipping, whether inland or maritime, including the operation of ships and transportation by ship anywhere in Canada,

a) ceux qui se rapportent à la navigation et aux transports par eau, entre autres à ce qui touche l'exploitation de navires et le transport par navire partout au Canada;

(b) a railway, canal, telegraph or other work or undertaking connecting any province with any other province, or extending beyond the limits of a province,

b) les installations ou ouvrages, entre autres, chemins de fer, canaux ou liaisons télégraphiques, reliant une province à une ou plusieurs autres, ou débordant les limites d'une province, et les entreprises correspondantes;

(c) a line of ships connecting a province with any other province, or extending beyond the limits of a province,

c) les lignes de transport par bateaux à vapeur ou autres navires, reliant une province à une ou plusieurs autres, ou débordant les limites d'une province;

(d) a ferry between any province and any other province or between any province and any country other than Canada,

d) les passages par eaux entre deux provinces ou entre une province et un pays étranger;

(e) aerodromes, aircraft or a line of air transportation,

e) les aéroports, aéronefs ou lignes de transport aérien;

(f) a radio broadcasting station,

f) les stations de radiodiffusion;

(g) a bank or an authorized foreign bank within the meaning of section 2 of the Bank Act,

g) les banques et les banques étrangères autorisées, au sens de l'article 2 de la Loi sur les banques;

(h) a work or undertaking that,

h) les ouvrages ou entreprises

although wholly situated within a province, is before or after its execution declared by Parliament to be for the general advantage of Canada or for the advantage of two or more of the provinces,	qui, bien qu'entièrement situés dans une province, sont, avant ou après leur réalisation, déclarés par le Parlement être à l'avantage général du Canada ou de plusieurs provinces;
(i) a work, undertaking or business outside the exclusive legislative authority of the legislatures of the provinces, and	i) les installations, ouvrages, entreprises ou secteurs d'activité ne ressortissant pas au pouvoir législatif exclusif des législatures provinciales;
(j) a work, undertaking or activity in respect of which federal laws within the meaning of section 2 of the Oceans Act apply pursuant to section 20 of that Act and any regulations made pursuant to paragraph 26(1)(k) of that Act;	j) les entreprises auxquelles les lois fédérales, au sens de l'article 2 de la Loi sur les océans, s'appliquent en vertu de l'article 20 de cette loi et des règlements d'application de l'alinéa 26(1)k) de la même loi.

Constitution Act, 1867 (UK), 30 & 31 Victoria, c 3, reprinted in RSC 1985, App II, No 5.

Legislative Authority of Parliament of Canada	**Autorité législative du parlement du Canada**
91. It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive	91. Il sera loisible à la Reine, de l'avis et du consentement du Sénat et de la Chambre des Communes, de faire des lois pour la paix, l'ordre et le bon gouvernement du Canada, relativement à toutes les matières ne tombant pas dans les catégories de sujets par la présente loi exclusivement assignés aux législatures des provinces; mais, pour plus de garantie, sans toutefois restreindre la généralité des termes ci-haut employés dans le présent article, il est par la présente déclaré que

Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,	(nonobstant toute disposition contraire énoncée dans la présente loi) l'autorité législative exclusive du parlement du Canada s'étend à toutes les matières tombant dans les catégories de sujets ci-dessous énumérés, savoir :
[…]	[…]
24. Indians, and Lands reserved for the Indians.	24. Les Indiens et les terres réservées pour les Indiens.

Indian Act, RSC, 1985, c I-5.

Powers of the Council	**Pouvoirs du conseil**
By-laws	**Règlements administratifs**
81. (1) The council of a band may make by-laws not inconsistent with this Act or with any regulation made by the Governor in Council or the Minister, for any or all of the following purposes, namely,	81. (1) Le conseil d'une bande peut prendre des règlements administratifs, non incompatibles avec la présente loi ou avec un règlement pris par le gouverneur en conseil ou par le ministre, pour l'une ou l'ensemble des fins suivantes :
(a) to provide for the health of residents on the reserve and to prevent the spreading of contagious and infectious diseases;	a) l'adoption de mesures relatives à la santé des habitants de la réserve et les précautions à prendre contre la propagation des maladies contagieuses et infectieuses;
(b) the regulation of traffic;	b) la réglementation de la circulation;
(c) the observance of law and order;	c) l'observation de la loi et le maintien de l'ordre;
(d) the prevention of disorderly conduct and nuisances;	d) la répression de l'inconduite et des incommodités;

(e) the protection against and prevention of trespass by cattle and other domestic animals, the establishment of pounds, the appointment of pound-keepers, the regulation of their duties and the provision for fees and charges for their services;

e) la protection et les précautions à prendre contre les empiétements des bestiaux et autres animaux domestiques, l'établissement de fourrières, la nomination de gardes-fourrières, la réglementation de leurs fonctions et la constitution de droits et redevances pour leurs services;

(f) the construction and maintenance of watercourses, roads, bridges, ditches, fences and other local works;

f) l'établissement et l'entretien de cours d'eau, routes, ponts, fossés, clôtures et autres ouvrages locaux;

(g) the dividing of the reserve or a portion thereof into zones and the prohibition of the construction or maintenance of any class of buildings or the carrying on of any class of business, trade or calling in any zone;

g) la division de la réserve ou d'une de ses parties en zones, et l'interdiction de construire ou d'entretenir une catégorie de bâtiments ou d'exercer une catégorie d'entreprises, de métiers ou de professions dans une telle zone;

(h) the regulation of the construction, repair and use of buildings, whether owned by the band or by individual members of the band;

h) la réglementation de la construction, de la réparation et de l'usage des bâtiments, qu'ils appartiennent à la bande ou à des membres de la bande pris individuellement;

(i) the survey and allotment of reserve lands among the members of the band and the establishment of a register of Certificates of Possession and Certificates of Occupation relating to allotments and the setting apart of reserve lands for common use, if authority therefor has been granted under section 60;

i) l'arpentage des terres de la réserve et leur répartition entre les membres de la bande, et l'établissement d'un registre de certificats de possession et de certificats d'occupation concernant les attributions, et la mise à part de terres de la réserve pour usage commun, si l'autorisation à cet égard a été accordée aux termes de l'article 60;

(j) the destruction and control

j) la destruction et le contrôle

of noxious weeds;

des herbes nuisibles;

(k) the regulation of bee-keeping and poultry raising;

k) la réglementation de l'apiculture et de l'aviculture;

(l) the construction and regulation of the use of public wells, cisterns, reservoirs and other water supplies;

l) l'établissement de puits, citernes et réservoirs publics et autres services d'eau du même genre, ainsi que la réglementation de leur usage;

(m) the control or prohibition of public games, sports, races, athletic contests and other amusements;

m) la réglementation ou l'interdiction de jeux, sports, courses et concours athlétiques d'ordre public et autres amusements du même genre;

(n) the regulation of the conduct and activities of hawkers, peddlers or others who enter the reserve to buy, sell or otherwise deal in wares or merchandise;

n) la réglementation de la conduite et des opérations des marchands ambulants, colporteurs ou autres personnes qui pénètrent dans la réserve pour acheter ou vendre des produits ou marchandises, ou en faire un autre commerce;

(o) the preservation, protection and management of fur-bearing animals, fish and other game on the reserve;

o) la conservation, la protection et la régie des animaux à fourrure, du poisson et du gibier de toute sorte dans la réserve;

(p) the removal and punishment of persons trespassing on the reserve or frequenting the reserve for prohibited purposes;

p) l'expulsion et la punition des personnes qui pénètrent sans droit ni autorisation dans la réserve ou la fréquentent pour des fins interdites;

(p.1) the residence of band members and other persons on the reserve;

p.1) la résidence des membres de la bande ou des autres personnes sur la réserve;

(p.2) to provide for the rights of spouses or common-law partners and children who reside with members of the band on the reserve with respect to any matter in

p.2) l'adoption de mesures relatives aux droits des époux ou conjoints de fait ou des enfants qui résident avec des membres de la bande dans une réserve pour toute matière au

relation to which the council may make by-laws in respect of members of the band;

sujet de laquelle le conseil peut établir des règlements administratifs à l'égard des membres de la bande;

(p.3) to authorize the Minister to make payments out of capital or revenue moneys to persons whose names were deleted from the Band List of the band;

p.3) l'autorisation du ministre à effectuer des paiements sur des sommes d'argent au compte de capital ou des sommes d'argent de revenu aux personnes dont les noms ont été retranchés de la liste de la bande;

(p.4) to bring subsection 10(3) or 64.1(2) into effect in respect of the band;

p.4) la mise en vigueur des paragraphes 10(3) ou 64.1(2) à l'égard de la bande;

(q) with respect to any matter arising out of or ancillary to the exercise of powers under this section; and

q) toute question qui découle de l'exercice des pouvoirs prévus par le présent article, ou qui y est accessoire;

(r) the imposition on summary conviction of a fine not exceeding one thousand dollars or imprisonment for a term not exceeding thirty days, or both, for violation of a by-law made under this section.

r) l'imposition, sur déclaration de culpabilité par procédure sommaire, d'une amende maximale de mille dollars et d'un emprisonnement maximal de trente jours, ou de l'une de ces peines, pour violation d'un règlement administratif pris aux termes du présent article.

[…]

[…]

Submissions of the Parties

Applicant's Submissions

[22] The Applicant submits that the Adjudicator only has jurisdiction pursuant to the *Code* to hear and decide complaints brought by employees who are subject to federal jurisdiction. Given that the Respondent was employed as a nurse at BRFN and that the provision of healthcare services is within provincial jurisdiction, her employment was within provincial jurisdiction.

[23] The functional test used to determine whether federal or provincial jurisdiction for labour relations applies to a particular undertaking was stated in *NIL/TU,O* and requires "an inquiry into the nature, habitual activities and daily operations of the entity in question to determine whether it constitutes a federal undertaking" (*NIL/TU,O* at para 3). The Adjudicator found that *Norway House* was wrongly decided because the panel in that matter looked at the operations of the employees instead of the activities of the First Nation more generally. The Applicant submits that the Adjudicator erred in reaching this conclusion because the panel did turn its mind to and considered the reality that the health clinic was part of the First Nation (*Norway House* at para 27b). The Applicant agrees with the Adjudicator that jurisdiction is founded on legislative authority over the operation, not over the employer, and that an entity could be a department within a larger body.

[24] The Applicant notes that the Adjudicator focussed on what the "entity" was for the purpose of determining jurisdiction and determined that it was the First Nation, primarily relying on *Paul*, *Francis* and *Whitebear*. The Applicant submits that the case of *Paul* should be

distinguished as inapplicable on factual grounds given that the Band constables in that case were not operating in the context of a police station or considered anything other than directly associated with the band itself and its core governmental functions. In the present case, the Nursing Station was a separate branch of the Band. Notwithstanding that the Band was the employer, the entity to be regulated was the Nursing Station. In *Francis*, the employees in question were performing work related to the 'administration of the band', which is plainly distinguishable from this case. In *Whitebear*, the Saskatchewan Court of Appeal found that the function of an Indian band council is federal on the basis of the performance by a band council of "their local government function". The Applicant concedes that a band would be subject to federal jurisdiction in labour relations when dealing with those units or departments of a band which function to give effect to the "government nature" of the band as described in *Francis*.

[25] The Applicant submits that the Adjudicator erred in his choice of factors to determine that the Nursing Station is to be considered a part of the Band for the purpose of labour relations jurisdiction. The Supreme Court in *Tessier Ltée c Quebec (Commission de la santé et de la sécurité du travail)*, 2012 SCC 23 at para 49 [*Tessier*], found that federal undertakings can be made up of functionally discrete units which can be constitutionally characterized separately from the rest of the related operation. Further, an entity can be federally regulated in part while another part is provincially regulated (*NIL/TU,O* at para 22).

[26] In the alternative, the Applicant submits that the Band is not an indivisible undertaking, as per *Tessier* at paras 50-51, 55. The Adjudicator, in finding that the Nursing Station was not divisible from the Band, took an overly formulaic and rigid approach. The facts in this case were

very different than in *Tessier*, given that the nurses working at the Nursing Station are nurses only and do not spend time working in the other operations of the Band. They provide a discrete service within the confines of a discrete operation within the Band structure. The Adjudicator erred by giving significant weight to considerations such as who held responsibility for human resources management, who regulated medical standards and who funded the operation, which are not relevant to the determination of whether the Nursing Station was a functionality distinct operation (*Tessier* at para 41). Artificial divisions for the purpose of constitutional classification should not be created, but neither should artificial unities.

[27] The Applicant also argues that the Adjudicator erred by applying a structural rather than a functional test to the question of the appropriate entity to be dealt with. Therefore, he did not properly consider the question of his jurisdiction.

[28] The Applicant next submits that the factors identified by the Adjudicator as determinative on the questions of whether the Nursing Station would be subject to direct or derivative federal jurisdiction are not determinative and are a return to the structural inquiry which the Adjudicator employed over the functional test. In the alternative, if it is the Band that is the relevant entity, the Nursing Station branch is subject to provincial jurisdiction.

[29] The Applicant also submits that choice of law clauses are not intended to supplant the constitutional division of power, and this could set an unwise precedent. This Court should find that the choice of law clause did not provide the Adjudicator with *jurisdiction simpliciter*, nor did it make the adjudication *forum conveniens*. In the alternative, if the Court finds that the clause

did grant jurisdiction, then it should exercise its discretion to refuse jurisdiction on policy grounds. In disputes relating to the correct jurisdiction for a proceeding, it is not a simple matter of observing the existence of a choice of law or forum selection clause (*2249659 Ontario Ltd v Siegen*, 2013 ONCA 354 [*Siegen*]). Factors that are important to determine where jurisdiction *simpliciter* lies are that: BRFN carries on business in Manitoba, the alleged wrongful termination took place in Manitoba, and, the employment contract was made in Manitoba. Any one of these will give rise to a presumption of jurisdiction (*Siegen* at paras 22 and 31). The Applicant does concede that if the Court finds that the choice of law clause has force, then it would normally be enforced. However, in exceptional circumstances, such as these, the Court has discretion to not enforce the clause (*Northern Sales Co v Saskatchewan Wheat Pool*, (1992) 78 Man R (2d) 200 at para 4 [*Northern Sales*]).

[30] The Applicant seeks an order quashing the decision of the Adjudicator and an order declaring that the Respondent's employment was subject to provincial labour relations jurisdiction.

Respondent's Submissions

[31] The Respondent submits that the federal government has jurisdiction to regulate employment in two circumstances: first, when the employment relates to a work, undertaking, or business within the legislative authority of Parliament (direct jurisdiction); and, second, when it is an integral part of a federally regulated undertaking (derivative jurisdiction) (*Tessier* at para 17). The Respondent submits that the Nursing Station falls under federal jurisdiction either directly or derivatively.

[32] Direct jurisdiction requires an assessment of whether the work, business or undertaking's essential operational nature brings it within a federal head of power (*Tessier* at para 18). The question is whether the Nursing Station and BRFN are separate from one another, or are they both part of one, single federal undertaking (*Westcoast Energy Inc v Canada (National Energy Board)*, [1998] 1 SCR 322 at para 45 [*Westcoast*]; *Tessier* at para 44). In order to be considered one undertaking, the operations have to be functionally integrated and subject to a common management, control and direction. This is the primary determining factor. Non-determinative factors include common ownership and whether goods and services provided by one operation are for the sole benefit of the other operation or its customers. This is a fact-based test (*Westcoast* at paras 49 and 65).

[33] Parliament has exclusive legislative jurisdiction over Indians and Lands reserved for Indians. This is the federal head of power relevant to the direct jurisdictional analysis in this case. When an Indian band council is doing that which Parliament is exclusively empowered to do pursuant to section 92(24) of the *Constitution Act, 1867*, but which, through the *Indian Act*, RSC, 1985, c I-5 [*Indian Act*] has been delegated to band councils, the activity in question falls directly under federal jurisdiction (*Paul* at para 21; *Whitebear* at para 30; *Francis* at para 27). The Respondent submits that, on an analysis similar to *Paul*, where an Indian band council is empowered by the *Indian Act* and undertakes to provide for the health of its residents on reserve, such an undertaking falls directly under federal jurisdiction (*Paul* at paras 16 and 23).

[34] In this case, the Nursing Station is operated by BRFN, whose mandate it is to provide healthcare services to residents. The crucial question is whether the Nursing Station is part of

BRFN such that it forms a part of a single federal undertaking. It must be determined whether the Nursing Station and BRFN are functionally integrated and subject to common management, control and direction (*Westcoast* at p 3). The Respondent submits that it is, given the agreed fact that "BRFN operates its own nursing station on the First Nation". The Nursing Station exists in furtherance of the Band's obligation to provide health services to its members. Additionally, the Nursing Station operates under the supervision of a Health Director who is responsible to the Chief and Council of BRFN. The chain of command also emphasizes the functional integration. The Nursing Station is not separately incorporated, does not have its own board of directors, and is not otherwise established as a stand-alone entity. Furthermore, BRFN has management, control and direction over the Nursing Station and its employees. Therefore, the Nursing Station is part of BRFN and is functionally integrated and connected with BRFN's Chief and Council in order to exercise a power delegated to it under the *Indian Act*.

[35] The Respondent also submits that the choice of law clause in the Respondent's employment contract that expressly provided for federal laws further reinforces the view that the Nursing Station is functionally integrated into BRFN. Additionally, BRFN failed to raise any jurisdictional objection in an unjust dismissal adjudication conducted just a few months before the adjudication at issue in this matter (*Ellis v Berens River First Nation*, [2014] CLAD No 101).

[36] Through its Nursing Station, BRFN is executing its mandate to provide healthcare services and is thereby exercising a power delegated to it by Parliament pursuant to the *Indian Act* to provide for the health of its residents. The federal nature of this delegated power is supported by the fact that BRFN is a fully transferred First Nation with authority to operate its

own health services. This authority also comes from FNIHB, a federal entity that is an arm of Health Canada which delegated the human resources aspects of nursing to BRFN. The Nursing Station is part of BRFN and operates pursuant to a federally delegated power. Therefore, its operations fall directly within federal jurisdiction, as the Adjudicator found.

[37] In the alternative, the Respondent submits that the Nursing Station falls under federal jurisdiction derivatively. This determination requires an assessment of whether the essential operational nature of the work, business or undertaking renders it integral to a federal undertaking (*Tessier* at para 18). The focus of the analysis is on the relationship between the activity, the particular employees under scrutiny, and the federal operation that is said to benefit from the work of those employees (*Tessier* at para 38). The Court must look at the relationship from the perspective of both the federal undertaking and the work which is said to be integrally related, assessing the extent to which the effective performance of BRFN's federally regulated undertakings are dependent on the services provided by the Nursing Station and how important the services are to the Nursing Station itself (*Tessier* at para 46). Derivative federal jurisdiction is established when the related operation is functionally connected to the federal undertaking in such an integral way that the related operation has lost its distinct provincial character and moved in the federal sphere (*Tessier* at para 45; *Westcoast* at para 111). This is a flexible test (*Tessier* at para 45; *Westcoast* at paras 125, 128).

[38] In this case, it must be determined whether the essential operational nature of the Nursing Station renders it integral to BRFN's federally regulated undertakings, namely, providing for the health of its residents. The essential operational nature of the Nursing Station is the provision of

healthcare services. The Nursing Station exists in furtherance of the Band's obligation to provide health services to its members and it is one, if not the most important, way in which BRFN delivers this mandate. Furthermore, the Nursing Station is so functionally integrated into BRFN that it has lost its distinct provincial character and moved into the federal sphere. The Nursing Station, therefore, falls under federal jurisdiction derivatively.

[39] In reply to the Applicant's submissions, the Respondent submits that while the functional test might be the relevant test in certain cases involving only a direct jurisdiction analysis, it is otherwise one test that forms part of the jurisdictional analysis in certain direct jurisdiction cases and all derivative jurisdiction cases. In the case of direct jurisdiction analysis where there is more than one operation, at least one of which is federally regulated, determining whether the operations are a single federal undertaking requires more than simply applying the functional test to the operation under scrutiny. There must also be some assessment as to the functional integration between the operations. Similarly, in the case of derivative jurisdiction, the degree to which the undertaking's operation is integral to some other federally related undertaking must be assessed.

[40] The Respondent submits that the Adjudicator found that the panel in *Norway House* erred by focusing only on the activities of the healthcare clinic, while it should have also considered the First Nation's overall operations, in order to determine whether the clinic was integrated into the First Nation's operations to such a degree that it could be considered a single federal undertaking (direct jurisdiction) or integral to a federal undertaking of the First Nation

(derivative jurisdiction). The Adjudicator's disagreement with the panel is therefore based on law.

[41] The Respondent also submits that the Adjudicator relied on *Paul*, *Francis*, and *Whitebear* for the proposition that Indian bands themselves have been held to be federal works, undertakings or businesses for the purposes of determining jurisdiction over their labour and employment matters. Therefore, the factual distinctions made by the Applicant in distinguishing those cases are irrelevant. In any event, in *Francis* the work was characterized as coming under the jurisdiction of the *Indian Act* and the work there was related to the administration of the band as it is in this case. The ratio of *Whitebear* is that the function of an Indian band is federal if it is doing that which it has been delegated to do by Parliament. Finally, the Respondent submits that the 'distinct functional inquiry' to which the Applicant refers was used in the context of the derivative jurisdiction analysis. The proper test for determining whether a number of operations form a single operation undertaking is set out in *Westcoast*. The Adjudicator considered the correct factors in his analysis.

[42] The Respondent seeks an order dismissing this application and an order for costs.

Issue 1: What is the applicable standard of review?

[43] The Applicant submits that the Supreme Court has held that questions of jurisdiction should be subject to the correctness standard (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 50 [*Dunsmuir*]). This case is primarily concerned with the question of whether the Adjudicator had jurisdiction to hear the Respondent's complaint, and this is a true question of jurisdiction

where the Court must determine whether the Adjudicator's decision that he could hear the particular matter was correct (*Dunsmuir* at para 59).

[44] The Respondent submits that the correctness standard of review applies to constitutional questions and issues regarding the division of power between Parliament and the provinces (*Dunsmuir* at para 58). The Respondent also submits that the Adjudicator's determinations of fact are to be reviewed on a standard of reasonableness (*Dunsmuir* at para 53).

[45] I agree with the Applicant that this is a true question of jurisdiction to be reviewed on the standard of correctness (*Dunsmuir* at paras 50, 59; *Commissionaires (Great Lakes) v Dawson*, 2011 FC 717 at para 24 [*Dawson*]). The issue can also be characterized as a constitutional question relating to the division of powers, which is again reviewable on the standard of correctness (*Dunsmuir* at para 58; *Canada (Attorney General) v Munsee-Delaware Nation*, 2015 FC 366 at para 16 [*Munsee-Delaware*]; *Anderson and Fox Lake Cree Nation, Re*, 2013 FC 1276 at para 23). While findings of fact of an adjudicator are to be determined on the standard of reasonableness (*Munsee-Delaware* at para 16; *Dawson* at para 24), in this case the findings of fact of the Adjudicator are not contested.

Issue 2: Did the Adjudicator have the jurisdiction to hear and decide the Respondent's complaint?

[46] In my view, the Adjudicator's decision that the Respondent's complaint fell under federal jurisdiction, and that he therefore had jurisdiction to assess the complaint on its merits, was correct.

[47] The *Code* applies in respect of employees who are employed on or in connection with the operation of any federal work, undertaking or business, and in respect of the employers of all such employees in their relations with those employees (*Code*, s 4). "Federal work, undertaking or business" is defined as any work, undertaking or business that is within the legislative authority of Parliament. This includes, without restricting the generality of that statement, enumerated works, undertaking or business (*Code*, s 2).

[48] Jurisdiction over labour relations is not delegated to either the provincial or federal governments under section 91 or section 92 of the *Constitution Act, 1867*. However, it is well established that "Canadian courts have recognized that labour relations are presumptively a provincial matter, and that the federal government has jurisdiction over labour relations only by way of exception" (*NIL/TU,O* at para 11; *Tessier* at para 11; *Northern Telecom Ltd v Communication Workers of Canada*, [1980] 1 SCR 115 at para 31 [*Northern Telecom*]; *Four B Manufacturing v UGW*, [1980] 1 SCR 1031 at para 28 [*Four B*]; *Society of Ontario Hydro Professional & Administrative Employees v Ontario Hydro*, [1993] 3 SCR 327 at para 39).

[49] Pursuant to section 91(24) of the *Constitutions Act, 1867*, Parliament has exclusive jurisdiction over Indians and Lands reserved for the Indians. This has led to the question, as in this case, of in what circumstances will works, undertakings or business concluded by or in connection with Indian bands be considered federal in nature and, therefore, subject to the *Code*.

[50] On a more general level, the jurisprudence has established the proper analysis to be utilized in determining whether the particular labour relation at issue falls under federal or provincial jurisdiction. In *Northern Telecom*, the Court stated at para 32:

> [32] A recent decision of the British Columbia Labour Relations Board, *Arrow Transfer Co. Ltd. 4* , provides a useful statement of the method adopted by the courts in determining constitutional jurisdiction in labour matters. First, one must begin with the operation which is at the core of the federal undertaking. Then the courts look at the particular subsidiary operation engaged in by the employees in question. The court must then arrive at a judgment as to the relationship of that operation to the core federal undertaking, the necessary relationship being variously characterized as "vital", "essential" or "integral".

[51] The Supreme Court of Canada restated this in *Tessier*, citing *Reference re Industrial Relations and Disputes Investigation Act*, [1955] SCR 529 [*Stevedores Reference*]:

> [14] This Court, in nine separate sets of reasons, answered the first question by unanimously upholding the federal statute, and concluding that notwithstanding *Snider*, Parliament was entitled to regulate labour relations when jurisdiction over the undertakings were an integral part of Parliament's competence under a federal head of power. As Abbott J. wrote:
>
> > . . . the determination of such matters as hours of work, rates of wages, working conditions and the like, is in my opinion a vital part of the management and operation of any commercial or industrial undertaking. This being so, the power to regulate such matters, in the case of undertakings which fall within the legislative authority of Parliament lies with Parliament and not with the Provincial Legislatures. [Emphasis added; p. 592.]

[52] This is based on the reasoning that a level of government cannot have exclusive authority to manage a work or undertaking without having the analogous power to regulate its labour relations (*Tessier* at para 15).

[53] In *Tessier*, the Supreme Court also set out the test for determining whether labour relations come under federal or provincial jurisdiction:

> [17] In the *Stevedores Reference*, this Court therefore established that the federal government has jurisdiction to regulate employment in two circumstances: when the employment relates to a work, undertaking, or business within the legislative authority of Parliament; or when it is an integral part of a federally regulated undertaking, sometimes referred to as derivative jurisdiction. Dickson C.J. described these two forms of federal jurisdiction over labour relations as distinct but related in *Central Western Railway Corp. v. U.T.U.*, [1990] 3 S.C.R. 1112 (S.C.C.), at pp. 1124-25.
>
> [18] In the case of direct federal labour jurisdiction, we assess whether the work, business or undertaking's essential operational nature brings it within a federal head of power. In the case of derivative jurisdiction, we assess whether that essential operational nature renders the work integral to a federal undertaking. In either case, we determine which level of government has labour relations authority by assessing the work's essential operational nature.
>
> [19] In this functional inquiry, the court analyzes the enterprise as a going concern and considers only its ongoing character: *Québec (Commission du salaire minimum) c. Bell Telephone Co. of Canada Ltd.*. The exceptional aspects of an enterprise do not determine its essential operational nature. A small number of exceptional extra-provincial voyages which are not part of the local transportation company's regular operations, for example, do not determine the nature of a maritime transportation operation (*Canada (Conseil des relations ouvrières) v. Agence maritime inc.*, [1969] S.C.R. 851 (S.C.C.)), nor does one contract determine the nature of a construction undertaking (*Construction Montcalm Inc. v. Quebec (Minimum Wage Commission)* (1978), [1979] 1 S.C.R. 754 (S.C.C.)). Nor will a small amount of local activity overwhelm the nature of an undertaking that is otherwise an integral part of the postal service (*L.C.U.C. v. C.U.P.W.* (1973), [1975] 1 S.C.R. 178 (S.C.C.)). [emphasis added]

[54] This was revisited by the Supreme Court of Canada in *NIL/TU,O*, which also referred to *Four B*, a decision concerning a manufacturing operation with ties to an Aboriginal band. The Court stated at paragraphs 12-16:

[12] …Because the regulation of labour relations falls presumptively within the jurisdiction of the provinces, the narrow question when dealing with cases raising the jurisdiction of labour relations is whether a particular entity is a "federal work, undertaking or business" for purposes of triggering the jurisdiction of the *Canada Labour Code*.

[13] The principles underpinning this Court's well-established approach to labour relations jurisdiction are set out by Dickson J., writing for a unanimous Court, in *Northern Telecom*. The case dealt with the jurisdiction of the labour relations of a subsidiary of a telecommunications company which was itself unquestionably a federal "work, undertaking or business" under s. 92(10)(a) of the *Constitution Act, 1867*. Adopting Beetz J.'s majority judgment in *Construction Montcalm*, Dickson J. described the relationship between the division of powers and labour relations as follows:

> (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. [p. 132]

[14] He then set out a "functional test" for determining whether an entity is "federal" for purposes of triggering federal labour relations jurisdiction. Significantly, the "core" of the

telecommunications head of power was not used to determine, as part of the functional analysis, the nature of the subsidiary's operations:

> (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; otherwise, the Constitution could not be applied with any degree of continuity and regularity. [Emphasis added; p. 132.]

[15] *Four B*, decided the same year as *Northern Telecom*, also adopted the principles from *Construction Montcalm*, and again found the functional test, which examined the "normal or habitual activities" of the entity, to be determinative. The issue in *Four B* was whether provincial labour legislation applied to a provincially incorporated manufacturing operation that was owned by four Aboriginal band members, employed mostly band members, and operated on reserve land pursuant to a federal permit. Beetz J., for the majority, set out the governing principles and concluded that the "operational nature" of the business was provincial:

> In my view the established principles relevant to this issue can be summarized very briefly. 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…
>
> 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. [Emphasis added; pp. 1045-46.]

Beetz J. was satisfied that the functional test was conclusive and that Four B was a provincial undertaking.

[16] At no point, in discussing the functional test, does Beetz J. mention the "core" of s. 91(24) or its content. In fact, he makes it clear that only if the functional test is inconclusive as to whether a particular undertaking is "federal", should a court consider whether provincial regulation of labour relations would impair the "core" of whatever federal regulation governed the entity.

[55] The Applicant submits that *NIL/TU,O*, and the subsequent arbitrator's decision in *Norway House* should have been followed by the Adjudicator to find that the Nursing Station in this case came under provincial jurisdiction.

[56] While the Applicant did not refer to *NIL/TU,O* in depth, it does require a closer look. That case concerned a child welfare agency, the *NIL/TU,O* Child and Family Services Society. The British Columbia Government and Service Employees' Union had applied to the British Columbia Labour Relations Board to be certified as the bargaining agent for *NIL/TU,O*'s employees. *NIL/TU,O* objected arguing that its labour relations fell under federal jurisdiction over "Indians" under section 91(24) of the *Constitution Act, 1867* because its services were designed for First Nations children and families. Ultimately, the Supreme Court of Canada concluded, based on the facts of that case, that *NIL/TU,O* was a provincial undertaking and that provincial jurisdiction over labour relations applied.

[57] Justice Abella, writing for the majority, stated that in determining whether an entity's labour relations will be federally regulated, thereby displacing the operative presumption of provincial jurisdiction, *Four B* requires that a court first apply the functional test, that is, examine the nature, operation and habitual activities of the entity to see if it is a federal undertaking. If so, its labour relations will be federally regulated.

[58] She also noted that, notwithstanding the Supreme Court of Canada's long standing approach, a different line of authority had uniquely emerged when courts are dealing with section 91(24) of the *Constitution Act, 1867*. That "divergent analysis" was not endorsed by the Court:

> [20] There is no reason why, as a matter of principle, the jurisdiction of an entity's labour relations should be approached differently when s. 91(24) is at issue. The fundamental nature of the inquiry is - and should be - the same as for any other head of power. It is an inquiry with two distinct steps, the first being the functional test. A court should proceed to the second step only when this first test is inconclusive. If it is, the question is not whether the entity's *operations* lie at the "core" of the federal head of power; it is whether the provincial regulation of that entity's *labour relations* would impair the "core" of that head of power…

[59] Justice Abella then applied the *Four B* test to the circumstances of that case, as gleaned from the facts as to the nature of *NIL/TU,O*'s operations, concluding:

> [45] The essential nature of NIL/TU,O's operation is to provide child and family services, a matter within the provincial sphere. Neither the presence of federal funding, nor the fact that NIL/TU,O's services are provided in a culturally sensitive manner, in my respectful view, displaces the overridingly provincial nature of this entity. The community for whom NIL/TU,O operates as a child welfare agency does not change *what* it does, namely, deliver child welfare services. The designated beneficiaries may and undoubtedly should affect how those services are delivered, but

> they do not change the fact that the delivery of child welfare services, a provincial undertaking, is what it essentially does.
>
> [46] And neither the nature of NIL/TU,O's operation nor the jurisprudence calls for an inquiry into the "core of Indianness" in this appeal. The *Northern Telecom/Four B* principles clearly and conclusively confirm that NIL/TU,O is a provincial undertaking. The past 85 years of labour jurisprudence confirms that no further or alternate analysis is required. The presumption in favour of provincial jurisdiction over labour relations, therefore, remains operative in this case.
>
> [Emphasis in original]

[60] Accordingly, in my view the Adjudicator in the present case did not err when she found that *NIL/TU,O* did not reshape the world of employment law when it comes to employees of First Nations (paras 137-138).

[61] In that regard, in *Munsee-Delaware*, Justice LeBlanc also similarly found that nothing in *NIL/TU,O* changed the existing law pertaining to the determination of whether federal or provincial law applies to labour relations. And, more specifically, that employment relations concerning First Nations do not attract a different test. As stated by Justice LeBlanc:

> [36] *Four B* is the predecessor of *NIL/TU,O* when establishing whether labour relations in a First Nation employment context are to be governed by provincial or federal laws. In this regard, nothing in *NIL/TU,O* points to the *Four B*'s principles being discarded, disregarded or discredited. To the contrary, the majority in *NIL/TU,O* often refers to the test of *Four B* as the one that should be followed and applied (*NIL/TU,O*, at para 3, 15, 18, 23 and 40). It also refers to *Four B* as being the case, together with *Northern Telecom*, above, which sets out "most comprehensively" the legal test for determining the jurisdiction of labour relations on federalism grounds (*NIL/TU,O*, at para 3).
>
> [37] *NIL/TU,O* reiterated that this legal test had to be used regardless of the specific head of federal power engaged in a particular case, including, as stated in *Four B*, the power over

> "Indians and Lands reserved for Indians" (*NIL/TU,O*, at para 3). Applying the *Four B* test to the circumstances of that case (*NIL/TU,O*, at para 23) – a certification case like *Francis* - the Supreme Court found that the labour relations of the group of employees at issue fell under provincial jurisdiction.

[62] The Adjudicator did not err in his understanding of the analysis to be applied, rather he found that *NIL/TU,O* was factually distinct from the matter before him. *NIL/TU,O* was a child welfare agency incorporated under provincial legislation. That agency was an entity related to, but independent from the First Nations to which it provided services. More specifically, the employer in *NIL/TU,O* was a distinct legal entity and was not the First Nation itself. Further, the circumstance in that case was one of derivative jurisdiction. The Adjudicator, in his decision, carefully listed the facts describing the operation of the Nursing Station which grounded his conclusion that, under either the direct or derivative analysis, it fell within federal jurisdiction as regards to labour relations and that he could not reach the same conclusion as the Court had in *NIL/TU,O*.

[63] In this regard it is of note that *Munsee-Delaware*, decided earlier this year, concerned a similar fact situation to that which was before the Adjudicator. There the applicant, Ms. Flewelling, claimed that her employment had been unjustly terminated by the Munsee-Delaware First Nation and filed a complaint for unjust dismissal pursuant to the *Code*. The adjudicator in that case, based on *NIL/TU,O*, ruled that he had no jurisdiction to consider the applicant's complaint on the ground that her employment was provincially regulated. Justice LeBlanc found that the *Code* applied and quashed the adjudicator's decision.

[64] Justice LeBlanc stated that the issue in that case turned on whether *Francis* was still good law in light of *NIL/TU,O*. If so, it was binding on both the adjudicator and the Court. *Francis* concerned the certification, under the *Code*, of the Public Service Alliance of Canada as the bargaining agent for a group of employees of the St. Regis Indian Band engaged, for the most part, in "education administration, the administration of Indian Lands and estate, the administration of welfare, the administration of housing, school administration, public works, the administration of old age homes, maintenance of roads, maintenance of school, maintenance of water and sanitation services, and garbage collection" (*Francis* at para 17).

[65] As noted above, Justice LeBlanc concluded that *NIL/TU,O* and *Four B*, its predecessor, did not alter the existing legal test for establishing whether labour relations are governed by provincial or federal law. Although *NIL/TU,O* concluded that provincial law applied in that case, Justice LeBlanc distinguished it from *Francis* and the matter before him based on its facts:

> [38] However, these circumstances were somewhat different to those in *Francis*. From the outset, Madam Justice Abella, writing for the majority, underlined the "unique institutional structure" of the employer (*NIL/TU,O*, at para 1). This employer was a society - the NIL/TU,O Child and Family Services Society (the Society) – incorporated under British Columbia's *Society Act* by a number of First Nations located in that province, to establish a child welfare agency that would provide "culturally sensitive" services to the children and families of those communities. The Society was regulated exclusively by the province and its employees exercised exclusively provincial delegated authority under British Columbia's *Child, Family and Community Service Act* (*NIL/TU,O*, at para 36). It was funded by both the province and the federal government. This funding was the federal government's sole involvement in the Society's activities (*NIL/TU,O*, at para 34 and 40).
>
> [39] Madam Justice Abella found that the Society's distinctiveness as a child welfare organization for Aboriginal communities did not take away "from its essential character as a child welfare agency that is in all respects regulated by the

> province" and concluded that its function was "unquestionably a provincial one" (*NIL/TU,O*, at para 39).
>
> [40] To borrow the terms used by Madam Justice Abella in *NIL/TU,O*, I do not think it can be said, in the present case, that the employer is an agency "that is in all respects regulated by the province", that its function is "unquestionably a provincial one" and that Ms Flewelling exercised "exclusively provincial delegated authority" under a provincial legislation. Here, the employer is a Band Council to which the *Indian Act* applies and Ms Flewelling was engaged in the general administration of the band's affairs, including on-reserve housing and matters concerning Indian reserve lands. Her work activities were described by the Adjudicator as follows:
>
> > The Complainant worked in the Employer's finance department in the Nation's office. She was the only employee in that department and so she did all the usual accounting duties. She maintained the Employer's financial records, including accounts payable, accounts receivable, payroll, bank deposits and bank reconciliation.
>
> (Emphasis added)
>
> [41] The evidence before the Court shows that Ms Flewelling's salary was paid out of federal monies received by the Nation; monies which consisted of the main share of the Nation's funding.

[66] Justice LeBlanc noted that, according to *Francis*, the business or operation of a band council is that of a local government deriving its authority from the *Indian Act* and the applicable regulations. It has a "comprehensive responsibility of a local government nature" and carried out governance through the employment of administrative employees (*Munsee-Delaware* at para 42; *Francis* at para 27). Justice LeBlanc found that Ms. Flewelling was such an employee.

[67] Accordingly, Justice LeBlanc stated the following:

> [43] I agree with the Attorney General that the Adjudicator's analysis is devoid of any consideration of the core functions of

> Indian bands and Band Councils that formed part of the analysis in *Francis*. His sole reliance on *NIL/TU,O*, which was concerned with the labour relations of a separately incorporated and provincially regulated child welfare service and which had nothing to do with the day-to-day administrative functions integral to running - the affairs of an Indian Band, is a reviewable error.

[68] Justice LeBlanc found that the fundamental nature of the "business" or operations of a band and a band council, to which the *Indian Act* applies, as depicted by the Federal Court of Appeal in *Francis*, was completely lost in the analysis of the Adjudicator:

> [45] I am not prepared to say that *Francis* was overruled by *NIL/TU,O*. The absence of any consideration of this crucial factor, is, in my view, fatal to the Adjudicator's ruling. In other words, based on Francis, the functional test is conclusive that the administration of the Nation's Band is a federal undertaking within the meaning of the *Code*.

[69] This is significant because the Applicant submits that the Adjudicator should have looked at the operations or the Nursing Station in isolation. However, if the Adjudicator in this case had applied *NIL/TU,O* blindly, without looking at the functions of the BRFN Band Council, this would have been a reviewable error (*Munsee-Delaware* at paras 43 and 45; *Paul* at para 17). He did not make that error and the fact that *NIL/TU,O* reached a conclusion different than the Adjudicator is explained by his factual findings which are described below. Further, unlike *NIL/TU,O*, the Nursing Station was not provincially incorporated, its operations were not regulated exclusively by the province and its employees did not exercise exclusively provincially delegated authority. The Nursing Station was not funded by both the federal and provincial governments, nor was the federal government's role limited to funding.

[70] The Applicant asserts that the functional test can be applied to the Nursing Station as an "entity" entirely in isolation of the *Indian Act* and questions of federal undertakings. For the reasons above, I do not agree. Nor am I of the view that this would be the appropriate application of the functional test when applying the direct jurisdictional analysis in these circumstances. As recognized by the Adjudicator, the question before him was whether the Nursing Station was a part of the Band's operations in respect of Indians and the Lands reserved for Indians, or whether it was a separate undertaking. It is in the derivative jurisdictional analysis that the essential operational nature of the related entity, in this case the Nursing Station, was to be assessed as being integral to a federal entity, being BRFN. This was correctly recognized and applied by the Adjudicator (paras 195-203). As part of that analysis the Adjudicator listed the factors that he considered when assessing the essential operational nature of the Nursing Station (para 198) and I am not persuaded that he was distracted by the "structure" of the employment relationship as submitted by the Applicant.

[71] The Applicant also submits that the Adjudicator erred in concluding that *Norway House* was wrongly decided, rather, he should have followed that decision. *Norway House* involved applications for union certification. The Adjudicator was of the view that the panel in that case had focused on the activities of the healthcare clinic without also looking at how it was integrated with the First Nation. In effect, the panel looked at what the employees of the healthcare clinic did, rather than at the First Nation's overall operations.

[72] The panel in *Norway House* set out its reasons in paragraph 28 of its decision. They are very much in summary form and, while the Applicant is correct that they do state that Norway

House Cree Nation "operates a community health clinic which provides community health services", I am not sure, in the absence of anything more, that this supports the Applicant's position that the panel "turned their minds to and considered the fact that the health clinic was part of the First Nations". While the reasons do also state that the operations of the health clinic by the First Nations, and other factors, do not have any effect on the "operational nature of the business", there is simply no analysis of the First Nations' overall operations.

[73] As seen from *Munsee-Deleware*, something more was required of the panel in *Norway House* in this regard. For the same reason, I also cannot accept the Applicant's premise that the Adjudicator's disagreement with the panel's assessment of the importance of the relationship between the health clinic and the First Nation is not based on law.

[74] Further, in my view, nothing in the panel's decision supports the Applicant's submission that *Norway House* makes it clear that to consider all of the activities of a First Nation as one monolithic entity would be artificial and would fail to recognize that, operating as a government, a First Nation has different parts which may be more or less autonomous and self-organizing but which are in any event unique and perform important functions. The panel simply does not address this issue. The Adjudicator, however, acknowledged in his decision that in a derivative analysis it may be that a band is involved in multiple undertakings. Therefore, it did not follow that all the undertakings would be automatically federally regulated (*Employees of the Canadian Pacific Railway in Empress Hotel, Victoria (City), Re*, [1950] 1 WWR 220 at para 13 [*Empress Hotel*]). Thus, it was all the more important to assess the relationship between the undertaking and the entity.

[75] I also agree with the Adjudicator that the cases of *Paul*, *Francis*, and *Whitebear* are still good law and have not been displaced by *NIL/TU,O* (*Munsee-Delaware* at para 45). Those cases stand for their analysis of the essential nature of an Indian band for determining jurisdiction based on *Four B* and the functional test (see *Paul* at paras 16, 21, 23; *Francis* at para 20; *Whitebear* at paras 13-20, 30). More specifically, those cases stand for the proposition that Indian bands who are themselves conducting the duties delegated to them by Parliament, as distinct from entities that are related to Indians bands, such as in *NIL/TU,O*, may be subject to the *Code*. In *NIL/TU,O*, the facts were simply different as seen in the paragraphs above (Decision at paras 164-171).

[76] The Applicant also submits that the Adjudicator relied primarily on these three cases in finding that the Nursing Station is part of the First Nation. However, a review of the Adjudicator's decision shows that this was not the case. The Adjudicator relied on these cases for the proposition that "Indian bands themselves (as distinct from entities related to Indian bands) are subject to the *Code*" (Decision at para 169). Although the Adjudicator summarizes the facts and findings of the cases, he does not rely on them based on their factual scenarios, but rather for the overarching principle. The Applicant's factual distinctions, therefore, do not displace the Adjudicator's reliance on the principles arising from these cases. The Adjudicator applied the functional test to the facts of the matter before him.

[77] In any event, I would note that *Paul* factually also supports the Respondent's position. There the issue was whether the *Alberta Labour Act* applied to the labour relations of the band and its special constables. The band council was treated as the employer. *Four B* and the

functional test were set out and the Alberta Court of Appeal stated that employees were to be classed for jurisdictional purposes not by reference to their particular activities in their employment, but by reference to the character or nature of the operation of the employer by whom they were employed, and to the legislative authority over that operation. The ultimate test was stated as "legislative authority over the operation" (*Paul* at para 9).

[78] The Court distinguished the situation before it from those where the employer was a private corporation separate from the band council (*Four B*), or, where a particular operation of an employer does not form an integral part of the main operation of that employer (*Empress Hotel*). It found that in enforcing provincial laws on the reserve, the band council was carrying out one of a number of powers entrusted to it by section 81 of the *Indian Act*, the regulating of traffic and the observance of law and order, which was an integral part of the normal operations assigned to the band:

> [20] The only operations or activities that a band council is empowered to carry on are those authorized by Parliament under the *Indian Act*, and in particular by s. 81:
>
> > 81. The council of a band may make by-laws not inconsistent with this Act or with any regulation made by the Governor in Council or the Minister, for any or all of the following purposes, namely:
> >
> > (a) to provide for the health of residents on the reserve and to prevent the spreading of contagious and infectious diseases;
> >
> > (b) the regulation of traffic;
> >
> > (c) the observance of law and order;
> >
> > […]

[79] Similarly in this case, the exercise of the Band Council's powers was concerned with the administration of Band affairs by way of the *Indian Act*. Specifically, the power to provide for the health of residents on the reserve. The Nursing Station was operated by BRFN to deliver healthcare services as part of the Band's administrative duties.

[80] Additionally, BRFN is a "band-transferred" First Nation. The Adjudicator found that FNIHB, an arm of Health Canada, provides overall healthcare funding but that the Band is responsible for managing those funds for the purpose of delivering its healthcare mandate, including recruiting, retaining, and training nursing staff. Thus, in my view, BRFN was also acting as an administrative arm of the federal government in effecting its administrative role of Band governance.

[81] Just as the band's relations in *Paul,* where the special constables fell within band governance, so too does the labour relationship as between BRFN and its nursing staff. I do not think that the fact that the nurses work primarily out of a station, which was not a separately incorporated entity and which BRFN acknowledged that it operated as its own, while the special constables in *Paul* do not appear to have done so, is a relevant distinguishing feature.

[82] In *Whitebear,* the band council undertook to manage programs for the benefit of band members by way of a consolidated contributor agreement with the federal department of Indian Affairs and Northern Development. Having conducted the jurisdictional analysis applying *Four B* and the functional test, the Saskatchewan Court of Appeal concluded that the band council was the employer and was directly involved in and responsible for the work of its employees, thus

critically distinguishing it from *Four B*, and that federal jurisdiction applied. The Court went on to state that:

> [32] In my opinion, the particular activity in which Whitebear Band Council and its carpenters were engaged — the construction of houses on the reserve pursuant to the "single contribution" agreement — cannot be separated from the activity of the band council as a whole, isolated and assigned a different character than that of which it forms part — the general function of the band council. To do that would be to run counter to the principles of determination referred to in *Montcalm*, supra, and to have regard for exceptions or casual factors, rather than looking to the normal or habitual activities of the work of the employer as those of a going concern to avoid the fractured application of the constitution spoken of by Beetz J. in *Montcalm*. Accordingly, I am satisfied that the construction of houses on the reserve, in the circumstances, is part and parcel of the general operation as a whole of the band council, and cannot properly be removed from that whole and viewed as an ordinary industrial activity in the province and falling under provincial jurisdiction; this, I think, is the error made by the Labour Relations Board.

[83] While in this case the Adjudicator was dealing with services provided by nurses, the analysis and conclusion as regards to carpenters in *Whitebear* is equally applicable.

[84] The Applicant concedes that BRFN would be subject to federal jurisdiction in labour relations when dealing with those units or departments of the Band which function to give effect to the governmental nature of the Band as described in *Francis*. In my view, that is the circumstance in this case.

[85] The Applicant also relies heavily on the Supreme Court of Canada's decision in *Tessier*. There, at paragraph 55, the Court found that:

> [55] In short, if there is an indivisible, integrated operation, it should not be artificially divided for purposes of constitutional

> classification. Only if its dominant character is integral to a federal undertaking will a local work or undertaking be federally regulated; otherwise, jurisdiction remains with the province…

[86] It should first be noted that *Tessier* concerned section 92(10) of the *Constitution Act, 1867*, the authority over shipping and navigation, and the analytical framework for assessing whether a related undertaking was integral to a federal undertaking, that is, the derivative jurisdictional analysis. The Court found that *Tessier*'s essential operational nature was local and that its stevedoring activities, which were integrated with its overall operations, formed a relatively minor part of its overall operation. Not to retain provincial hegemony over those employees would subject them to federal regulation based on intermittent stevedoring, notwithstanding that the major part of *Tessier*'s work consists of provincially regulated activities.

[87] In the present case, the Adjudicator acknowledged the finding in *Tessier* (Decision at para 130), which was agreed with in *NIL/TU,O* at para 22, that "… it is possible for an entity to be federally regulated in part and provincially regulated in part". Additionally, the Adjudicator did not disagree with the Court in *Tessier*, that the functional test can be applied to determine whether a part of an operation could be considered a "discrete unit" (*Tessier* at para 49). The Adjudicator simply found that, applying the test to the facts of this case, the Nursing Station was an integral part of BRFN and that federal jurisdiction applied.

[88] The Adjudicator correctly identified and considered the factors pointing to the independence, or lack thereof, of the Nursing Station and found that the Band was the relevant entity to consider for the functional test (which he referred to as the traditional approach). In support of this he noted that the day-to-day activities of the Nursing Station were under the joint

control of FNIHB, for clinical matters, and the Band, for HR matters, without any relevant involvement by a provincial entity. The operations and the chain of command tied it directly to the Band. The Band itself was the employer. The Nursing Station was one of, if not the most important, way in which the Band delivered on its healthcare mandate. One factor of significance, although not determinative, was that the Nursing Station was not separately incorporated. The only provincial involvement was that the nurses were provincially regulated. Therefore, as in the cases of *Paul*, *Francis*, and *Whitebear*, the Band was the entity to be analyzed and it provided a wide range of governmental services to its members, including healthcare. Like the Adjudicator, it is my view that this analysis of the identity of the entity to be considered was unnecessary as it is already captured in the direct and derivative jurisdictional analysis.

[89] As the Adjudicator found, the Nursing Station comes under federal jurisdiction either directly or derivatively (*Tessier* at para 17).

[90] He correctly found that, in the case of direct federal labour jurisdiction, the question to be assessed is whether the entity's essential operational nature brings it within a federal head of power (*Tessier* at para 18; Decision at para 130(j)). The question, therefore, was whether the Nursing Station was a part of the Band's operations in relation to Indians and Lands reserved for Indians, or whether it was a separate undertaking (Decision at para 197). The analysis being whether the Nursing Station and BRFN are functionally integrated, which is a fact-based analysis.

[91] The application of the functional analysis test to the facts in this case pointed to a finding that the Nursing Station was part of or integrally connected to the Band and, therefore, subject to federal jurisdiction. When an Indian band is providing governmental services delegated by Parliament through the *Indian Act*, the activities fall under federal jurisdiction (*Paul*; *Francis*; *Whitebear; Munsee-Deleware*). The Nursing Station was the way in which BRFN executed its mandate to provide healthcare services to its residents and it was, therefore, exercising a power delegated to it by Parliament pursuant to the *Indian Act*. This falls directly under federal jurisdiction. The Adjudicator correctly found:

> [199] Taken in totality there is nothing about the Nursing Station that says it operates as a separate, distinct or autonomous unit. Rather it is a key element in the Band carrying out its local government activities. It is, quite simply, part of the Band. To separate it for jurisdictional reasons would be artificial in the extreme.

[92] If the Nursing Station is considered a separate undertaking from the Band, the question is whether it is an integral part of a federally regulated undertaking, business, or undertaking, and whether it falls under derivative federal jurisdiction (*Tessier* at para 18). That is, whether the related undertaking is functionally connected to the federal undertaking in such an integral way that the related operation has lost its distinct provincial character and moved under federal jurisdiction. The test is flexible, different decisions have emphasized different factors, and there is no simple litmus test (*Tessier* at para 45). In this case, as the Adjudicator found based on the facts, the Nursing Station is integral to the Band's operations:

> [203] Again, even if we start from the premise the Nursing Station is provincially regulated, it's so tightly interwoven with the Band's operations that it ought properly be subject to federal regulation for the purposes of its labour and employment relations.

[93] I cannot find that the Adjudicator erred in this regard.

[94] The Applicant point to the fact that the nurses working at the Nursing Station were performing a discrete service. However, even if this were so, it does not preclude a finding that the Nursing Station's operations were functionally integrated into BRFN's operations, or were integral to BRFN's federally regulated undertaking of providing healthcare services to its residents, as seen above.

[95] The Applicant also submits that in this case, no by-law was effected to enable healthcare delivery by the Band. However, the reality is that the Band had established the Nursing Station, hired nurses and put in place a chain of command, the apex of which was with Band Council. Accordingly, with or without a by-law, BRFN was undertaking that duty. As to the Applicant's suggestion that the authority under section 81 of the *Indian Act* to make by-laws is illustrative of policy making rather than governance, no authority was provided in support of this position. Nor do I agree with it. By-laws are defined in *Black's Law Dictionary*, 10th edition, *sub verbo* "by-laws", as "a rule or administration provision adopted by an organization for its internal governance and its external dealings. Although the by-laws may be an organization's most authoritative governing document, they are subordinate to a charter or articles of incorporation or a constitution" (emphasis added). In this case, if they existed, the by-laws would have been effected pursuant to explicit authority to do so in federal legislation, section 81 of the *Indian Act* and section 91(24) of the *Constitution Act, 1867*, and would not constitute mere policy statements, as the Applicant suggests, but would be for the internal governance of the Band.

[96] Finally, while not clearly stated in its written submissions, the Applicant asserts that the BRFN Band Council does not owe its existence to the *Indian Act*. It is a *sui generis*, or unique or particular entity, operating simultaneously as a municipal, provincial and federal government. As such, it is self governing in its own right. Not all activities of Indians are federal undertakings and it must be recognized that the BRFN had inherent self governing rights. These are not recognized by the functional test, but should be considered by the Court.

[97] This would appear to be similar in nature to the submissions made before Justice LeBlanc in *Munsee-Deleware*. There, Justice LeBlanc concluded that, although First Nations do not owe their existence to the *Indian Act* or any other statute and an Indian Band is more than a creature of stature, they nevertheless constitute entities that, as bands and councils, are regulated by the *Indian Act* and exercise powers in accordance with that Act. Further, there as here, the Aboriginal right to self-government was neither established nor asserted before the Adjudicator. And, in this case, no constitutional basis for the submission was put forward. Thus, BRFN's submission that its governmental authority is not delegated from Parliament, but rather stems from its right to self-govern, cannot succeed. Although it is true that some of BRFN's activities could be considered to fall under provincial jurisdiction based on the functional analysis, healthcare is an express power delegated to BRFN by Parliament and the Nursing Station therefore falls under federal jurisdiction.

[98] With respect to the inclusion of the choice of law clause in the employment contract, the Adjudicator found that this was significant. Although not determinative in this case, given the findings above that the Nursing Station fell under direct or derivative federal jurisdiction, the

Adjudicator was correct in finding that it was a conscious choice by the parties that the laws of Canada, and not of Manitoba, would apply. Parties to a contract are free to specify which system of law is to govern the contract (*Vita Food Products Inc v Unus Shipping Co*, [1939] UKPC 7 at para 12; *Nike Informatic Systems Ltd v Avac Systems Ltd*, [1980] 1 WWR 528 at paras 10, 13).

[99] The Applicant refers to the cases of *Van Breda v Village Resorts Ltd*, 2012 SCC 17 [*Van Breda*] and *Siegen* for the proposition that the determination of the correct jurisdiction for a proceeding is not a simple matter of observing the existence of a choice of law or forum selection clause. Rather, what is determinative is jurisdiction *simpliciter* and the factors as set out in *Van Breda*. These factors are: whether the defendant carries on business in the province; whether the tort was committed in the province; and, whether a contract connected with the dispute was made in the province (*Van Breda* at para 90).

[100] Those cases, however, can be distinguished from the present case. First, those cases dealt with court actions whereas the present case deals with a labour matter. Second, the disputes in those cases concerned which of two separate possible jurisdictions would prevail. In the present case, the only two options are whether the laws of Manitoba or of Canada apply, and thus whether Manitoba or Canada has jurisdiction to adjudicate a labour dispute. The jurisdiction *simpliciter* factors are not very useful in this context because all actions that take place inside Manitoba also simultaneously take place inside Canada, which distinguishes this case from the above forum selection cases. Additionally, although healthcare is usually regulated by provinces, the Nursing Station fulfills the healthcare mandate of BRFN, a First Nation, which is a federally regulated entity. We are thus left with a conflict because the jurisdiction *simpliciter*

factors stated in *Van Breda* could lead to a finding that jurisdiction belongs either to Manitoba, because it is a healthcare employment matter which is usually within provincial jurisdiction, or to Canada, because it is an entity that is integral to a First Nation community which is usually within federal jurisdiction. Given that the jurisdiction *simpliciter* factors do not lead to a finding of which jurisdiction would apply, the choice of law clause included in the employment contract comes into play to clarify which of the two possible systems of law and jurisdictions should prevail. Given that the clause in the Respondent's employment contract clearly indicates that the laws of Canada apply, the *Code* applies.

[101] It is clear from this clause what the parties intended and given that there are no exceptional circumstances , the Court should not exercise its discretion not to enforce the clause (*Northern Sales* at para 4).

Conclusions

[102] The Adjudicator was correct in finding that he had jurisdiction to hear this matter given that the Nursing Station at BRFN falls under federal jurisdiction using the functional test established in the jurisprudence. *NIL/TU,O* did not displace the established analysis to be conducted in order to determine whether federal or provincial jurisdiction applies to a labour or employment matter. Rather, the Court in *NIL/TU,O* came to a different conclusion based on the specific facts before it, which differed from those before the Arbitrator. In the present case, the Nursing Station is one of the ways, if not the most important way, in which BRFN, a federally regulated entity, fulfills its mandate to provide healthcare to its residents. The only provincial involvement is that the nurses are provincially licensed and the provincial government has no

operational involvement with the Nursing Station. Therefore, the Nursing Station is part of BRFN, because it does not operate a separate, distinct or autonomous unit, and it falls directly under federal jurisdiction. Alternatively, the Nursing Station is an integral part of the core federal undertaking that is BRFN, and falls derivatively under federal jurisdiction. Further, the choice of law clause included by the parties in the employment contract confirms that federal jurisdiction applies.

[103] For the reasons set out above, the application for judicial review is dismissed.

[104] The Court requested that the parties submit, regardless of the outcome of this proceeding, a jointly agreed all inclusive lump sum costs figure. The figure agreed was $5,000.00. Accordingly, the Respondent shall have her costs in that amount.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application for judicial review is dismissed.

2. The Respondent shall have its costs in the amount of $5,000.00.

"Cecily Y. Strickland"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

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