Federal Court  Cour fédérale

Date: 20180718

Docket: T-1362-16

Citation: 2018 FC 747

[ENGLISH TRANSLATION]

Ottawa, Ontario, July 18, 2018

PRESENT: The Honourable Justice Martineau

BETWEEN:

SYLVAIN PICARD AND
RBA FINANCIAL GROUP

Applicants

And

ATTORNEY GENERAL OF CANADA

Respondent

And

ATTORNEY GENERAL OF QUEBEC

Intervener

JUDGMENT AND REASONS

I. Introduction

[1] This case raises important issues of statutory interpretation and constitutional applicability arising from co-operative federalism with respect to policing in Indigenous communities in Quebec. “[A] certain degree of predictability with regard to the division of powers between Parliament and the provincial legislatures is essential” (*Canadian Western Bank v. Alberta*, 2007 SCC 22 at paragraph 23 [*Canadian Western Bank*]). When the Royal Canadian Mounted Police [RCMP], the Sûreté du Québec or a municipal police force provides police services to First Nations, the federal or provincial nature of labour regulations applicable to police officers is not a problem. But what happens when a band council provides these services?

[2] In this case, for many decades, all interested parties – including federal and provincial governments – agreed that federal regulations apply to employees hired by a band council to perform the duties of a special constable or a police officer on a reserve. Except that, on July 21, 2016, the Office of the Superintendent of Financial Institutions of Canada [Office] revised its position by decreeing that (1) the employees in question are not employed in a federal undertaking, (2) their pension plan “is therefore not registered” under the *Pension Benefits Standards Act, 1985*, RSC 1985, c. 32 (2nd Supp.) [PBSA], and (3) it will be transferred to the appropriate provincial authority [impugned decision], hence this application for judicial review.

II. This application for judicial review

[3] The applicants are now seeking to have the impugned decision set aside, as well as a declaration that the members of the First Nations Public Security Pension Plan [Plan] are

employed in a work, a business or an activity under federal jurisdiction, and that the PBSA applies to the Plan. The Attorney General of Canada (the respondent) maintains that the impugned decision is legal and that provincial regulations apply to the Plan.

[4] A Notice of Constitutional Question was duly served on all attorneys general pursuant to section 57 of the *Federal Courts Act*, RSC, 1985, c. F-7. The intervener, the Attorney General of Quebec, simply adopted the respondent's position, without making any representations in this case.

[5] The Constitution of Canada views the division of powers between the central authority and the provinces from a dualistic perspective, within the traditional framework of the "federal-provincial" dichotomy, which must respond to the reality of various forms of Indigenous governance. In short, there are two opposing arguments in the case at bar. For purely logical purposes, I believe it is preferable to first present the respondent's position (which was also adopted by the intervener).

[6] The respondent does not dispute the fact that Parliament has the legislative authority to enact laws regarding Indigenous policing, but that is not the issue. It clearly can pursuant to its authority over Indians (*NIL/TU,O Child and Family Services Society v. BC Government and Service Employees' Union*, 2010 SCC 45 at paragraph 2 [*NIL/TU,O*]). However, currently, Parliament has not exercised this jurisdiction, and the Indigenous police forces at issue here therefore derive their existence and powers from the *Police Act*, RSQ, c. P-13.1, which constitutes a material element of qualification. In this case, the status of "peace officer" under the

Police Act clearly shows that employees participating in the Plan perform a provincial activity according to the functional test, and the Federal Court of Appeal ruled the same way in 2015 in *Nishnawbe-Aski Police Service Board v. Public Service Alliance of Canada*, 2015 FCA 211 [*Police Service Board*].

[7] The applicants see things very differently. The fact that certain aspects of Indigenous police forces – such as training and professional conduct – are regulated by the province does not preclude the application of federal labour and pension legislation when a band council is the direct employer. It is not because an Indigenous police officer is authorized to act as "peace officer" under the *Police Act* that his employer is subject to provincial labour laws. On the contrary, the functional test is whether the police service operated by a band council on reserve land and lands reserved for Indians is a vital "governance" activity that is essential to the exercise of its powers as a federal institution. The answer is affirmative when one considers the federal nature of the powers under the *Indian Act*, RSC 1985, c. 1-5, which are implemented in the provinces pursuant to the *First Nations Policing Policy* (Solicitor General of Canada, *First Nations Policing Policy*, Ottawa, Minister of Supply and Services Canada, 1992 and 1996 [*First Nations Policing Policy*]). Finally, *NIL/TU,O* and *Police Service Board* dealt with provincial entities independent of band councils.

[8] For the reasons that follow, the application for judicial review is allowed.

III. Superintendent's limited jurisdiction

[9] It should be noted that the PBSA came into force on January 1, 1987, and replaces the *Pension Benefits Standards Act*, RSC 1985, c P-7, and pension plans registered under the original Act are deemed to have been registered under the PBSA (sections 42 and 46 of the PBSA), which is the case with the Plan (registered since 1981). However, the Superintendent must be given the authority to determine *ex post facto* whether a pension plan that is already registered continues to be subject to federal regulations. The doctrine of jurisdiction by necessary implication provides that an administrative decision-maker implicitly has all the powers necessary to accomplish the mandate entrusted to him by the legislature, including the power to make a decision as to whether a matter falls within its jurisdiction (see *ATCO Gas & Pipelines Ltd v. Alberta (Energy & Utilities Board)*, 2006 SCC 4 at paragraph 51; *Bell Canada v. Canada (Canadian Radio-Television and Telecommunications Commission)*, [1989] 1 SCR 1722 at p. 1056, 60 DLR (4th) 682; *Canada v. Professional Institute of the Public Service of Canada*, 1980 CanLII 2467 at paragraph 4 (FCA) 113 DLR (3d) 262; also see subsection 31(2) of the *Interpretation Act*, RSC, 1985, c.I-21).

[10] Now, under subsection 4(2) of the PBSA, a pension plan can only be registered by the Superintendent if the participants have included employment, i.e. employment "on or in connection with the operation of any work, undertaking or business that is within the legislative authority of the Parliament of Canada"[federal undertaking] (see the definition of "included employment" in subsection 4(4)) [Emphasis added]. Paragraphs (a) through (i) include a list of works, undertakings and businesses that fall within federal jurisdiction (see also sections 2 and 4, and subsections 123(1) and 167(1) of the *Canada Labour Code*, R.S.C., 1985, c. L-2). Of course,

the statutory list is not exhaustive and includes "a work, undertaking or business outside the exclusive legislative authority of the legislatures of the provinces" [Emphasis added].

[11] Parliament also provides an important clarification. "Employment" means "the performance by an employee of work for remuneration for an employer under an express or implied contract of service or apprenticeship" (subsection 2(1) of the PBSA) [Emphasis added]. The "employer, in relation to an employee, means the person or organization, whether incorporated or unincorporated, in respect of employment with which the employee receives his remuneration, and includes the successors or assigns of that person or organization" (subsection 2(1) of the PSBS) [Emphasis added]. In employment law, the employer is the entity that hires, establishes working conditions and has the power to discipline and dismiss employees in his employ.

[12] Consequently, the identification of the employer and the federal business that it operates, as well as the existence of an employment relationship between the employee and the employer in question, are essential prerequisites under subsection 4(4) of the PBSA that must be satisfied for federal regulations to apply to a pension plan. In this case, although employees performing police duties are employed by federal entities, i.e. band councils that are members of the Plan as employers, the Office was of the view that the employees fell within provincial jurisdiction.

IV. First Nations Public Security Pension Plan

[13] Formerly known as the "Régime de rentes pour les employés de la Police amérindienne" [Amerindian Police Employee Pension Plan], the Plan is a multi-employer pension plan whose

employer-members are exclusively band councils within the meaning of the *Indian Act*. The Plan came into force on November 1, 1979, as specified in the February 25, 1981, application for registration [the Plan's jurisdiction of registration] – the Plan being a pension plan registered by the Superintendent, as shown by certificate of registry number 55864 issued on September 18, 1981.

[14] The purpose of the Plan is to provide retirement benefits for police officers, firefighters and special constables [collectively the employees] working in Indigenous communities and who work exclusively for any of the employer-members. It is a defined benefit plan that foresees the accumulation of a guaranteed pension calculated on the basis of years of participation of each employee member of the Plan. The Plan is currently composed of the police departments of 14 band councils serving Indigenous communities that are members of First Nations in the province of Quebec: Conseil de la Première Nation Abitibiwinni; Pessamit Band Council; Kebaowek First Nation; Micmacs of Gesgapegiag Band Council; Conseil de la Nation Anishinabe du Lac Simon; Kitigan Zibi Anishinabeg Nation; Conseil des Atikamekw de Manawan; Conseil des Atikamekw d'Opitciwan; Conseil des Abénakis d'Odanak; Conseil des Innus de Pakua Shipi; Pekuakamiulnuatsh Takuhikan; Innu Takuaikan Uashat Mak Mani Utenam; Timiskaming First Nation and Conseil des Atikamekw de Wemotaci. With respect to its coverage of employees employed by employer-members, the Plan currently covers some 220 active members.

[15] Before going any further, it should also be noted that when the Superintendent registers a pension plan, it is an act of public authority that helps build public confidence in the Canadian financial system and creates legitimate expectations. Once a pension plan has been registered,

the Office is responsible for ensuring compliance with the minimum funding requirements and other requirements in the PBSA and its regulations, *Pension Benefits Standards Regulations, 1985,* SOR/87-19 [regulations] (see paragraph 4(2.1)(a) of the *Office of the Superintendent of Financial Institutions Act*, RSC, 1985, c. 18 (3rd Supp.)). For its part, the plan administrator administers the pension plan and pension fund as a trustee for the employer, the members of the pension plan, former members, and any other persons entitled to pension benefits under the plan in accordance with the requirements of the PBSA and its regulations (subsection 8(3) of the PBSA).

[16] The Plan is administered in accordance with the Plan Regulations, the most recent version of which (effective July 1, 2011) has been filed in the Court record. In fact, the Plan pension committee has a written investment policy in accordance with the PBSA, its regulations, the *Income Tax Act*, RSC 1985, c. 1 (5th Supp.), and the Canada Revenue Agency's administrative rules [collectively, federal regulations]. Currently, the co-applicant, RBA Financial Group, is responsible for administering the Plan in accordance with the Plan Regulations and federal regulations.

V. Canadian constitutional environment

[17] We cannot really understand the sequence of events and appreciate the arguments raised by the parties in this case without first reviewing the Canadian constitutional environment. In this highly nuanced exercise, we must start with the constitutional and statutory texts. We will then examine the use of the functional test in determining ancillary jurisdiction over labour relations. Finally, we will see that the statutory regulations governing policing powers delegated

to persons acting as “peace officers” are the result of an exercise of shared constitutional jurisdiction.

A. Constitutional and statutory texts

[18] There is a distinction to be made between constitutional jurisdiction over Indians and criminal law, which is a federal responsibility, and the administration of justice, which is a provincial responsibility. This has led to the statutory creation of provincial and federal police forces. Finally, we must consider the impact of subsection 35(1) of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982*, (UK), 1982, c 11.

i. Indians and criminal law

[19] Parliament has exclusive jurisdiction to regulate Indians and lands reserved for Indians, as well as criminal law, including criminal procedure (see subsections 91(24) and (27) of the *Constitution Act, 1867*, 30 & 31 Victoria, c. 3 (U.K.), reprinted in RSC 1985, Appendix II, No. 5 [*Constitution Act, 1867*]. Legislative expression of these concurrent powers can be found in the *Indian Act* and the *Criminal Code*, RSC, 1985, c. C-46.

[20] Pursuant to its jurisdiction over Indians, Parliament provides for the constitution and legislative recognition of band councils and delegates certain governmental powers to band councils, including the power to legislate on the observance of law and order on reserves and lands reserved for Indians (paragraph 81(1)(c) of the *Indian Act*). We will discuss this essential aspect of band council governance in more detail later.

[21] Moreover, so long as they remain such, reserve lands are administered by the Federal Government (*Derrickson v. Derrickson*, [1986] 1 SCR 285, 26 DLR (4th) 175 at paragraph 26). Also, nothing prevents Parliament from (1) setting aside other "reserved lands" – which do not constitute a "reserve" within the meaning of the *Indian Act* – for the benefit and use of the members of a First Nation and (2) delegating to an Indian band the power to legislate in all matters that fall within its jurisdiction, including the observance of law and order and the prevention of disorderly conduct and nuisances (see for example the *Kanesatake Interim Land Base Governance Act*, SC 2001, c. 8).

[22] No one is questioning the fact that a band council already exercises delegated governance powers under sections 81 and 83 of the *Indian Act*, which are similar to those of a local government or municipality (see for example *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203 at paragraph 77, 173 DLR (4th) 1, L'Heureux-Dubé J., concurring opinion). Take for instance the regulation of traffic, the observance of law and order, the prevention of disorderly conduct and nuisances, 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, the removal and punishment of persons trespassing on the reserve or frequenting the reserve for prohibited purposes, or the imposition on summary conviction of a fine or imprisonment, or both, for violation of a by-law. In this case, the band council could not effectively perform its governance activities if it did not have the power to hire special constables and police officers to maintain law and order on the reserve (paragraph 81(1)(c) of the *Indian Act*).

ii. Administration of justice

[23] Provincial legislatures have exclusive jurisdiction to regulate municipal institutions, property and civil rights, the administration of justice, (provincial) criminal law and generally all matters of a merely local or private nature (see subsections 92(8), (13), (14), (15) and (16) of the *Constitution Act, 1867*).

[24] Logically, the creation and oversight of provincial and municipal police forces – whose members have the status of "peace officers" for the purposes of the *Criminal Code* and the enforcement of provincial laws and regulations – partially fall under the administration of justice (see Dickson J.'s comments in *Di Iorio v. Warden of the Montreal Jail* (1976), [1978] 1 SCR 152 at p. 200, 73 DLR (3d) 491 [*Di Iorio* cited to SCR]).

iii. Provincial and federal police forces

[25] In Quebec, there is a framework act that deals with the organization of professional training for police personnel, the organization of police forces, the regulation of professional qualifications for police officers, standards of conduct and external supervision of police activity in Quebec. Of course, we are referring to the *Police Act*. We will revisit the Act later in these reasons (see Section VI – H. The Quebec perspective). Similar legislation has been enacted in Nova Scotia, Ontario, Manitoba, Saskatchewan and British Columbia (see Section VI – F. First Nations police forces: today's reality and Section VI – G. The Ontario perspective).

[26] From the federal standpoint, Parliament also has the power to create police forces and to appoint peace officers or special constables to administer and enforce any federal statute (Michel Deschênes, “Les pouvoirs d’urgence et le partage des compétences au Canada”, *Les Cahiers de droit* (1992) 33:4 C from D 1181 to pp. 1200-1201 [Deschênes]). As Mr. Deschênes explained at p. 1201:

> […] [TRANSLATION] following a constitutional amendment in 1871, Parliament was granted certain additional powers, including the power to legislate for the administration of non-provincial territories. Pursuant to these powers, Parliament instituted the North-West Mounted Police in 1873, known in French as the “Police à cheval du Nord-Ouest” [...] (Since then) the Royal Canadian Mounted Police has been given authority to enforce all federal laws across the country, except the *Criminal Code* in the provinces, because enforcement of the Code falls within provincial jurisdiction.
>
> (See also the *Constitution Act, 1871*, reprinted in RSC 1985, Appendix II, No. 11, section 4; Peter Hogg, *Constitutional Law of Canada*, 5th ed supplemented, Toronto, Thomson Reuters, 2007 (loose-leaf series updated in 2017), at pp. 19-13–19-14; *Di Iorio* at p. 197).

[27] Now, under subsection 11.1(1) of the *Royal Canadian Mounted Police Act*, RSC 1985, c. R-10, every Royal Canadian Mounted Police officer is a peace officers in every part of Canada and has all the powers, authority, protection and privileges that a peace officer has by law until the officer ceases to be an officer.

[28] Everything appears to be in order. The case is straightforward. Here is where things start to get a little complicated.

iv. Subsection 35(1) of the *Constitution Act, 1982*

[29] In 1867, the Fathers of Confederation had not imagined that First Nations could one day soon have governments in the new federation. Failing that, pursuant to its jurisdiction over Indians and lands reserved for Indians, Parliament provided for the creation of band councils whose powers are statutorily governed by the *Indian Acts*. Today, under subsection 35(1) of the *Constitution Act, 1982*, the existing aboriginal and treaty rights of the aboriginal peoples of Canada are recognized and affirmed. A liberal interpretation of this provision has led to official recognition by governments of Indigenous peoples' right to self-governance.

[30] However, self-governance of First Nations will remain wishful thinking by political actors due to lack of funding. This economic contingency opens the door to various forms of "co-operative federalism" – for lack of a better term – with the provinces or territories. This is particularly true in the policing sector, if we are to substantially strengthen First Nations' ability to ensure social order, public security, and personal safety in First Nations and Inuit communities, including the safety of women, children and other vulnerable groups.

[31] The *British North America Act* of 1867, 30 & 31 Victoria, c. 3 (U.K.) (which in 1982 became the *Constitution Act, 1867*), establishing the Confederation, has long remained an unfinished work of the British Parliament. Initially, it considered the desire of the provinces of Canada, Nova Scotia and New Brunswick "to be federally united into One Dominion under the Crown of the United Kingdom of Great Britain and Ireland, with a Constitution similar in Principle to that of the United Kingdom". However, over time, Canadian political actors have had to adapt to historical conjectures that led to the division of powers in 1867 and the evolution

of the Canadian federation which, between 1870 and 1949, expanded with the addition of the western provinces and Newfoundland.

[32] We should therefore refer to Canada's Constitution as a "living tree", to use Lord Sankey's famous metaphor (*Edwards v. Canada (Attorney General)*, [1930] 1 DLR 98 at pp. 106-107, 1929 CanLII 438 (UK JCPC)). Regarding this point, "[t]he federalism principle requires a court interpreting constitutional texts to consider how different interpretations impact the balance between federal and provincial interests" (*R. V. Comeau*, 2018 SCC 15 at paragraph 78). The same concern has led, for example, to the development of doctrines like the necessarily incidental doctrine and the ancillary powers doctrine, which brings us to this case concerning the registration of the Plan which, until the date of the impugned decision, was registered by the Superintendent.

B. Ancillary jurisdiction over labour relations: the functional test

[33] Today, the issue is the constitutional jurisdiction over labour relations between police officers who are members of Indigenous police forces and the band councils that employ them. However, this depends on how the work, undertaking or activity of the employer in question is characterized.

[34] In principle, under subsection 92(13), labour relations come under provincial jurisdiction (see *Toronto Electric Commissioners v. Snider*, [1925] 2 DLR 5, 1925 CanLII 331 (UK JCPC); *Letter Carrier's Union of Canada v. Canadian Union of Postal Workers et al*., [1975] 1 SCR 178, 40 DLR (3d) 105). However, Parliament may regulate labour relations – including

pension plans – where a worker is employed in a federal undertaking [direct jurisdiction], or the worker's employment involves an activity that is an integral part of a federal undertaking [derivative jurisdiction](see *Validity and Applicability of the Industrial Relations and Disputes Investigation Act*, [1955] SCR 529, 1955 CanLII 1 [*Stevedores Reference* cited to SCR]; *Construction Montcalm Inc. v. Min. Wage Com.* (1978), [1979] 1 SCR 754 at p. 768, 93 DLR (3d) 641 [*Construction Montcalm* cited to SCR]; *Northern Telecom v. Communications Workers* (1979), [1980] 1 SCR 115, 98 DLR (3d) 1 [*Northern Telecom* cited to SCR]; *United Transportation Union v. Central Western Railway Corp.*, [1990] 3 SCR 1112 at pp. 1124-1125, 76 DLR (4th) 1; *Tessier Ltée v. Quebec (Commission de la santé et de la sécurité du travail)*, 2012 SCC 23 at paragraphs 11-18 [*Tessier*].

[35] In order to determine whether labour relations fall within federal jurisdiction, we must first assess whether the work, business or undertaking's essential operational nature brings it within the head of power mentioned in section 91 of the *Constitution Act, 1867*, whereas in the case of "derivative jurisdiction", we assess whether the nature of the work renders the work integral to a federal undertaking (as for example in *Stevedores Reference*). In either case, we determine which level of government has labour relations authority by assessing the work's "essential operational nature" (*Tessier* at paragraph 18).

[36] In short, the functional test involves analyzing the enterprise as a going concern, considering only its ongoing character, which calls for a fairly complete set of factual findings (*Northern Telecom* at pp. 139-140; *Commission du salaire minimum v. Bell Telephone Company of Canada*, [1966] SCR 767, 59 DLR (2nd) 145; see also *Tessier*, at paragraph 19). Only if the

"functional test" is found to be inconclusive are further steps taken to consider whether provincial regulation of that entity's labour relations would impair the "core" of the federal head of power (*NIL/TU,O* at paragraph 3).

[37] Both *Stevedores Reference* and *Northern Telecom* – which was followed by *Northern Telecom v. Communication Workers*, [1983] 1 SCR 733, 147 DLR (3d) 1 – are cases of derivative federal jurisdiction involving separate entities that provided integrated and essential services for the active operation of other separate entities whose federal character was not in dispute (shipping company and telecommunications company). In this case, there are no entities separate and independent from band councils that are members of the Plan. Indigenous police forces do not have a separate existence, and band councils are solely responsible for them.

[38] In *Four B Manufacturing v. United Garment Workers* (1979), [1980] 1 SCR 1031, 102 DLR (3d) 385 [*Four B*], which was subsequently was considered by the Supreme Court in *NIL/TU,O*, the case involved a shoe manufacturing company owned by four members of an Indian band, which mainly employed band members and operated on an Indian reserve. Obviously, under the functional test, the provincial company's business activities had nothing to do with the band's affairs or the services provided to the population by the band council. Moreover, the production of leather shoe uppers as a subcontractor for a non-Indian business enterprise was unrelated to Indianness.

[39] First, subsection 91(24) of the *Constitution Act, 1867* grants the Government of Canada a power of governance over Indians and lands reserved for Indians. The idea that an Indian band

can “legislate” through its council is the very purpose of the provisions of the *Indian Act* and the recognition and delegation system put in place by Parliament from the earliest days of the Confederation. Cutting to the chase: the regulation of band councils – which owes its existence to subsection 2(1) and section 74 of the *Indian Act* – is under the exclusive jurisdiction of the federal government. The same applies to the regulation of labour relations when, in performing a governance activity, the band council employs staff.

C. Statutory regulation of powers of peace officers: a delegation exercise shared between the federal and provincial governments

[40] While it is true that the enumerations of sections 91 and 92 of the *Constitution Act, 1867* contain a number of powers that are precise and not really open to discussion, it is clear that some matters are impossible to categorize under a single head of power: they may have both provincial and federal aspects (see *Canadian Western Bank* at paragraphs 29 and 43 and the case law cited).

[41] We should bear in mind that section 2 of the *Criminal Code* has a very broad definition of “peace officer”. It includes not only persons who may act under federal law, but also “a mayor, warden, reeve, sheriff, deputy sheriff, sheriff’s officer and justice of the peace”, as well as “a police officer, police constable, bailiff, constable, or other person employed for the preservation and maintenance of the public peace or for the service or execution of civil process”. The *Criminal Code* also stipulates the conditions of detention and release from custody of a person who has been arrested with a warrant by a peace officer (see, for example, sections 498 and 503 of the *Criminal Code*).

[42] Like other regional and municipal police officers, members of an Indigenous police force – including those exclusively employed by a band council – are appointed to serve their own community in the absence of specific agreements to the contrary. But they are not confined in the discharge of their duties to the territorial limits of that community. Their "territorial jurisdiction" is determined instead by relevant statutes and regulations, by agreements to which they are subject and by the terms of their appointment or engagement. For example, in Quebec, it is useful to refer to sections 49 and 93 of the *Police Act*.

[43] In such a case, as "peace officers" within the meaning of section 2 of the *Criminal Code*, Indigenous police officers are, where appropriate, empowered under subsection 254 (3) of the *Criminal Code* to demand that a breath sample be provided and to arrest the accused for failing to comply with that demand (see also *R. v. Decorte*, 2005 SCC 9 at paragraphs 20-22 [*Decorte*]). That said, the fact that a person has the status of "peace officer" under the *Criminal Code* or the *Police Act* does not change the nature of the relationship with his employer and does not affect the federal or provincial character of his employer's police activities. Further below, we will see that this was a fatal error made by the Office in the impugned decision.

[44] It is also clear that federal and provincial laws that merely duplicate one another but do not conflict can exist side by side (*R v. Francis*, [1988] 1 SCR 1025 at paragraph 9, 51 DLR (4th) 418 [*R v. Francis* cited to SCR]; *Multiple Access Ltd v. McCutcheon*, [1982] 2 SCR 161, 138 DLR (3d) 1 [*Multiple Access*]). Take for instance the enforcement of traffic regulations on the Indian reserves.

[45] Under paragraph 73(1)(c) of the *Indian Act*, the Governor in Council may make regulations for the control of the speed, operation and parking of vehicles on roads within reserves. The band council is entitled to do the same under the powers vested in it by paragraph 81(1)(b) of the *Indian Act*. On the other hand, the province also has jurisdiction to regulate traffic on the roads of the province, which Quebec did by adopting the *Highway Safety Code*, CQLR, chapter C-24.2.

[46] In *R v. Francis*, the Supreme Court wondered "why the federal government would engage in the idle exercise of simply enjoining people to comply with provincial laws" since federal traffic regulations referred to "all laws and regulations relating to motor vehicles", which constituted the incorporation by reference of a provincial law as a federal law (*R v. Francis* at paragraph 7). Given "the then prevalent wider view of federal paramountcy" (before *Multiple Access*), the Supreme Court provided the following pragmatic answer: "[i]t is also possible that the federal government wanted to have the option of having traffic rules on Indian reserves enforced by either federal or provincial officials" (*R v. Francis* at paragraph 7) [Emphasis added].

[47] On the other hand, according to the "double aspect" doctrine, nothing prevents a Sûreté du Québec police officer from arresting an individual on an Indian reserve who is reasonably believed to have committed a criminal act within the meaning of the *Criminal Code.* The latter power is conferred by a law of general application, the *Police Act*, throughout the province (section 50 of the *Police Act*). However, while the Sûreté du Québec does not have jurisdiction to enforce a band council by-law on a reserve, it does have jurisdiction to enforce applicable

municipal by-laws in the territories of the municipalities in which it provides police services (section 50 of the *Police Act*).

[48] Furthermore, the Royal Canadian Mounted Police does not enforce provincial laws or municipal laws, nor does it enforce the *Criminal Code*, within a province, unless authorized by the province or a municipality to act as a provincial or municipal police force. That is because those aspects of police work are within the exclusive legislative authority of the provinces (*Public Service Alliance of Canada v. Canada*, 2005 FCA 5 at paragraph 11 [*Public Service Alliance*]). From an operational standpoint, two separate legislative or regulatory empowerments are therefore required: a federal one and a provincial one (*Public Service Alliance* at paragraphs 11, 12 and 25; *Société des Acadiens et Acadiennes du Nouveau-Brunswick Inc. v. Canada*, 2008 SCC 15 at paragraph 13 [*Société des Acadiens*]).

[49] Conversely, when a provincial government enters into a service agreement with the Government of Canada to have the Royal Canadian Mounted Police ensure peace, order and security in a territory, the Royal Canadian Mounted Police retains its status as a "federal institution" (*Société des Acadiens* at paragraph 14; *Doucet v. Canada*, 2004 FC 1444 at paragraph 35). In short, all matters of discipline, organization and management of Royal Canadian Mounted Police, even in relation to its activities as a provincial police force, are within the sole legislative authority of Parliament (*Public Service Alliance* at paragraph 26; *O'Hara v. British Columbia*, [1987] 2 SCR 591 at paragraphs 16 and 17, 45 DLR (4th) 527; *Attorney General of Alberta et al. v. Putnam et al.*, [1981] 2 SCR 267 at pp. 277-278, 123 DLR (3d) 257).

[50] This has been clearly demonstrated. Constitutional jurisdiction over police forces is not an exercise in pure rhetoric. It cannot be based on some constitutional fallacy. It calls for pragmatism. And that is where the necessary cooperation between the federal and provincial authorities comes into play. It will help put in place these statutory glia that ensure the cohesion and support of all the neurons of the Canadian system of justice and enforcement of federal and provincial administrative, criminal and penal laws.

VI. First Nations police services: a historical and contemporary overview

[51] We come to the heart of the issue that concerns us today, constitutional and statutory jurisdiction over First Nations police services and, in particular, those provided on reserves by band councils and other legal entities. Our analytical framework must consider historical and contemporary contexts. From simple subjects of federal jurisdiction, Indians have themselves become indispensable actors in Indigenous governance. This has led to a gradual reassessment of the federal and provincial policy and regulatory framework governing federal, provincial and Indigenous police forces.

A. General analytical framework: importance of the statutory facts

[52] Decisions regarding constitutional matters must not be made in a factual vacuum (*Northern Telecom* at pp. 139-140; *Mackay v. Manitoba*, [1989] 2 SCR 357 at pp. 361-62, 61 DLR (4th) 385). That said, it is necessary to start by drawing a distinction between adjudicative facts and legislative facts (*Danson v. Ontario (Attorney General)*, [1990] 2 SCR 1086 at page 1099, 73 DLR (4th) 686 [*Danson* cited to SCR]). Adjudicative facts are

those that concern the immediate parties. They are specific and must be proved by admissible evidence. Legislative facts are those that establish the purpose and background of legislation, including its social, economic and cultural context. Such facts are of a more general nature, and are subject to less stringent admissibility requirements (*Danson* at p. 1099).

[53] Therefore, the purpose of this case is not for the parties to try one another under the guise of reviewing the "legislative facts". Rather, we must try to understand where the "racial" or "ethnic" concept of "Indigenous police force" originated. It has been explicitly sanctioned in Quebec since 1995 under the *Police Act*. Moreover, it can be said that [TRANSLATION]"[t]he term governance – a very polysemous concept [...] – applied to Indigenous communities is related to the term self-governance and thus to the process of decolonization and establishment of new relationships between Indigenous communities and the State [...] (Laura Aubert and Mylène Jaccoud, "Politique sur la police des Premières Nations : une avancée en matière de gouvernance" (2012) 54 Can J Corr 265 at p. 267 [Aubert]).

[54] This general analytical framework has led the Court to assess the representations of the parties in the light of the various relevant laws and policies. The Court's assessment will include the social, economic or cultural reasons for which Indigenous police forces exist today and will of course consider the content of the tripartite agreements that were filed in the record and will be more fully discussed when applying the functional test.

B. A word on the pre-confederation period

[55] Prior to contact with Europeans, there were already policing mechanisms in Indigenous communities. Also, the task of maintaining order, which would now be considered police work, was more or less formal and varied between Indigenous nations (see Nicholas A. Jones et al., *First Nations Policing: A Review of the Literature*, Regina (SK), Collaborative Centre for Justice and Safety, 2014 at p. 21 [Jones]). Although Indigenous communities did not have law enforcement systems – in the European sense of the word – the fact remains that social order was regulated by customary standards and disputes were resolved in an alternative manner (see René Dussault and Georges Erasmus, *Bridging the cultural divide: a report on Aboriginal people and criminal justice in Canada*, Ottawa, Minister of Supply and Services Canada, 1996 at pp. 13-19 [Dussault-Erasmus report]; Jones at pp. 22-24). Justice took an undeniably collective form: for example, officers were appointed by the community to make decisions and impose sanctions (Dussault-Erasmus report at p. 14).

C. Indigenous people: subjects of confederative colonialism

[56] As the Royal Commission on Aboriginal Peoples' 1996 report on the recognition and establishment of Aboriginal justice systems noted "[i]t has been through the law and the administration of justice that Aboriginal people have experienced the most repressive aspects of colonialism" (Dussault-Erasmus report at p. 57). In the 1970s, the *Indian Act* still contained a statutory system of offences (see sections 94 to 100 of the *Indian Act* since repealed), which can only be explained by the exclusive jurisdiction of Parliament over Indians (read Pigeon J.'s dissent in *The Queen v. Drybones* (1969), [1970] SCR 282 at pp. 303-304, 9 DLR (3d) 473; see

also *Attorney General of Canada v. Lavell* (1973), [1974] SCR 1349, at pp. 1358-59, 1361-62 and 1367-70, 38 DLR (3d) 481; *Attorney General of Canada et al. v. Canard* (1975), [1976] 1 SCR 170 at pp. 187-88, 191-93 and 206-07, 52 DLR (3d) 548 [*Canard* cited to SCR]).

[57] A century earlier, according to the colonialist and paternalistic view of Confederation-era relations, the Superintendent General of Indian Affairs – assisted by his agents – assumed the management of the reserves and the lands reserved for them (see *Indian Act*, RSC 1886, c. 43). His jurisdiction included respect for peace, order, and public safety. However, chiefs and band councils had very few formal legal powers in this regard. In terms of enforcing the Act, section 104 of the *Indian Act* stipulated that "[a]ny constable may, without process of law, arrest any Indian or non-treaty Indian whom he finds in a state of intoxication, and convey him to any common gaol, house of correction, lock-up or other place of confinement, there to be kept until he is sober." Section 117 stipulated that "[e]very Indian agent shall be *ex officio* a justice of the peace […], and shall have the power and authority of two justices of the peace", which meant the Indian agent had full discretion under section 104 or section 105 to try and impose imprisonment and payment of fines on an Indian or non-treaty Indian found guilty of intoxication or refusing to say where he had obtained the intoxicant.

[58] It is worthwhile providing a history of the North West Mounted Police – now the Royal Canadian Mounted Police – if only to point out that it was called upon to enforce order on reserve, although the bands themselves could have done the policing. The force also had to enforce infamous measures such as compulsory school attendance for Indian children and the placement of Indian children in residential schools, the prohibition of traditional spiritual

practices, which became offences under the *Indian Act* (see former section 114), and the pass system under which residents of reserves had to obtain written permission to leave the reserve (see Jones at pp. 30-34; see also generally Marcel-Eugène Lebeuf, *The Role of the Royal Canadian Mounted Police During the Indian Residential School System*, Ottawa, Royal Canadian Mounted Police, 2011, online: http://publications.gc.ca/collections/collection_2011/grc-rcmp/PS64-71-2009-eng.pdf [Lebeuf]). "The RCMP exercised social control over many activities pertaining to Aboriginal peoples, especially in Northern and Western Canada", even beyond the residential schools program (Lebeuf at p. 3).

[59] With the exception of the areas served by the Sûreté du Québec and the Ontario Provincial Police, the Royal Canadian Mounted Police continues to provide on-reserve and off-reserve policing services in most provinces under government agreements, whereas, with the exception of Quebec and Ontario, there are still very few Indigenous police forces. There appears to be only one Indigenous police force in British Columbia (the Stl'atl'imx (Stat-la-mic) Tribal Police Service); three in Alberta (the Blood Tribe Police Service, the Lakeshore Regional Police Service, and the Tsuu T'ina Nation Police Service); only one in Saskatchewan (the File Hills First Nations Police Service); and only one in Manitoba (the Manitoba First Nations Police) (see John Kiedrowski, Michael Petrunik and Rick Ruddell, *Illustrative Case Studies of First Nations Policing Program Models,* Ottawa, Public Safety Canada – Research Division, 2016 at p. 13 [Kiedrowski]; *First Nations Policing*, Government of British Columbia, online: https://www2.gov.bc.ca/gov/content/justice/criminal-justice/policing-in-bc/the-structure-of-police-services-in-bc/first-nations [Government of British Columbia]; *First Nations Policing*,

(2018), Alberta Solicitor General, online: https://www.solgps.alberta.ca/programs_and_services/public_security/law_enforcement_oversight/Pages/first_nations_policing.aspx [Alberta Solicitor General]; *About us*, (2018), File Hills First Nations Police Service online: http://www.filehillspolice.ca/about.html [File Hills]; *Dakota Ojibway Police Service* (2013), Manitoba First Nations Police online: http://www.dops.org/Overview.html [Manitoba First Nations Police]). Other communities served by the RCMP. In 2016, the RCMP provided police service to more than 600 Indigenous communities in Canada ("*Serving Canada's Indigenous People*" (February 1, 2016), Royal Canadian Mounted Police (web page), online: http://www.rcmp-grc.gc.ca/aboriginal-autochtone/index-eng.htm).

D. Growth of Indigenous policing: introduction of special constables and modernization of the *Indian Act*

[60] As the Royal Commission on Aboriginal Peoples pointed out, "[o]ne approach to making the current justice system more accommodating of Aboriginal people is to have Aboriginal faces present throughout the court process in roles other than that of accused persons" (Dussault-Erasmus at p. 103). It is obvious that, while limited, the federal statutory framework already has law enforcement mechanisms on reserves that fall under the exclusive jurisdiction of the federal government and band councils. Nothing prevents the federal government from appointing Indigenous justices of the peace and peace officers to exercise the powers described in the provisions of the *Indian Act*. Regardless of whether the jurisdiction stipulated under the *Indian Act* is exercised by the government does not change the nature of the powers granted to Parliament pursuant to subsection 91(24) of the *Constitution Act, 1867*.

[61] In the current version of section 107 of the *Indian Act*, the Governor in Council may appoint persons to be, for the purposes of this Act, justices of the peace and those persons have the powers and authority of two justices of the peace with regard to any offence under the Act, and any offence under the *Criminal Code* relating to cruelty to animals, common assault, breaking and entering and vagrancy, where the offence is committed by an Indian or relates to the person or property of an Indian. Under section 103 of the *Indian Act*, whenever a peace officer, a superintendent or a person authorized by the Minister believes on reasonable grounds that a by-law made under subsection 81(1) or 85.1(1) has been contravened or an offence against section 90 or 93 has been committed, he may seize all goods and chattels by means of or in relation to which he believes on reasonable grounds the by-law was contravened or the offence was committed.

[62] While the *Indian Act* does not explicitly provide for the creation of Indigenous police forces, the fact remains that in 1971, the federal government decided to allow band councils to hire "special constables". However, they were not to replace federal and provincial police officers. Furthermore, these special constables had very little training, and they did not enjoy all the powers of true "peace officers". They could not carry weapons, and their powers to arrest an offender were not all that different from those of ordinary citizens under the *Criminal Code* (see Rick Linden, "Policing First Nations and Métis People: Progress and Prospects" (2005) 68 Sask L Rev 303 at pp. 303-304 [Linden] citing Rick Linden, Donald Clairmont and Chris Murphy, *Aboriginal Policing in Manitoba: a Report to the Aboriginal Justice Implementation Commission*, Winnipeg, Aboriginal Justice Implementation Commission at p. 19, online: http://www.ajic.mb.ca/policing.pdf; Don Clairmont, *Aboriginal policing in Canada: an overview*

of developments in First Nations, Halifax, Atlantic Institute of Criminology, Dalhousie University, September 2006 at p. 16, online: https://dalspace.library.dal.ca/bitstream/handle/10222/64600/Aboriginal_Policing_in_Canada_Overview_2006.pdf?sequence=1&isAllowed=y [Clairmont]).

E. First Nations Policing Policy

[63] In June 1991, the federal government announced the adoption of a new First Nations Policing Policy on reserves and lands reserved for Indians that are not Indian reserves within the meaning of the *Indian Act*, as well as lands inhabited by Inuit communities: *First Nations Policing Policy.* Its purpose is to improve the administration of justice and the maintenance of social order, public safety and personal safety in the communities in question (see Aubert; Linden; Jones; Jim Harding, "Policing and Aboriginal Justice", (1991) 33 Canadian J Crim 363; Nicholas A. Jones et al., *First Nations Policing: A Review of the Literature*, Regina (SK), Collaborative Centre for Justice and Safety, 2014; *Conseil mohawk de Kanesatake/Mohawk Council of Kanesatake v. Isaac*, 2011 QCCA 977 at paragraph 23 [*Isaac*]).

[64] The respondent does not dispute that the *First Nations Policing Policy* is a valid exercise of federal jurisdiction over Indians under subsection 91(24) of the *Constitution Act, 1867* (see *Isaac* at paragraph 23; *Pitawanakwat v. Wikwemikong Tribal Police Service*, 2010 FC 917 at paragraph 25 [*Pitawanakwat*]; *Decorte* at paragraphs 12-13]. The *First Nations Policing Policy* is the result of extensive consultations with a broad range of First Nations communities, a large number of First Nations police services and all provincial and territorial governments. In particular, the Policy is a means to support federal policy on the implementation of Indigenous

peoples' inherent right and the negotiation of self-government (see *First Nations Policing Policy* at pp. 1-2; see also Aubert, at p. 266). The policy is applied consistently across Canada through tripartite agreements negotiated between the federal government, the provinces or territories and First Nations. These are therefore not bilateral agreements between Canada and a province.

[65] In the case of a reserve, the band council – a federal body – may be a signatory to such an agreement, precisely because of the delegation of the power to maintain law and order and peace under the *Indian Act*. However, when ancestral lands and other treaty lands (or areas subject to land claims) are involved, the scope needs to be broadened. We may be dealing with already independent Indigenous governments acting not as representatives of an Indian band recognized under of the *Indian Act*, but on behalf of an Indigenous people recognized as a First Nation (see, for example, Pamela D. Palmater, *Beyond Blood: Rethinking Indigenous Identity*, Saskatoon, Purich Publishing Limited, 2011 at pp. 30, 67, 129-130, etc. The distinction between the right of Indigenous peoples to self-determination and their organization in bands is at the heart of this essay, Shin Imai, "Indigenous Self-Determination and the State" in Benjamin J Richardson, Shin Imai and Kent McNeil's collection of essays, *Indigenous Peoples and the Law*, Oxford, Hart Publishings, 2009, 285 at pp. 294-296).

F. First Nations police forces: today's reality

[66] In practice, today's First Nations police services involve a variety of approaches and entities, both in terms of their operation and regulation. These police services may be provided by Indigenous police forces under the direct authority of band councils (this case); small separate entities (e.g. File Hills First Nations Police Service); independent interregional police

commissions managing a large provincial area (e.g. Nishnawbe-Aski Police Service Board; the Cree Nation Police Department); provincial bodies (e.g. Sûreté du Québec and the Ontario Provincial Police), municipalities (e.g. Aboriginal Peacekeeping Unit in Toronto and Diversity and Aboriginal Policing Section in Vancouver); and in most provinces and territories, Royal Canadian Mounted Police officers.

[67] Aside from Quebec and Ontario, whose specific schemes will be examined in detail below, only Nova Scotia and Manitoba have specific legislation governing Indigenous police. In Nova Scotia, the *Police Act*, RSNS 1989, Chapter 348 was amended in 1992 to add section 42D which provides that the "Solicitor General" may appoint Aboriginal police officers assigned to a particular territory (subsection 42D(1)). The Act stipulates that Aboriginal police officers have all the powers of peace officers (subsection 42D(2)). If the officer's duties relate to a reserve, the appointment requires the approval of the band council (subsection 42D(3)). The termination of a police officer assigned to a reserve also requires band council approval (subsection 42D(4)). This scheme is described in section 87 of the new *Police Act*, SNS 2004, Chapter 31, in force since 2004.

[68] In Manitoba, it was only in 2009 that the new *Police Services Act*, CCSM c. P94.5 was adopted, wherein subsection 45(1) authorizes the provincial government, the Government of Canada and one or more First Nations, or an entity representing a group of First Nations, to enter into an agreement to establish a police service to provide policing services to a First Nation community or a group of First Nations communities (subsection 45(1) – enacted in 2012). However, the jurisdiction of the police service is limited to the areas specified in the agreement

(section 46). The Act defines a First Nation as a band within the meaning of the *Indian Act* (subsection 1(1)).

[69] In British Columbia, Alberta and Saskatchewan, police services are generally provided to the public under provisions giving the Minister or Lieutenant Governor broad discretionary powers to create a police service in a designated area (see, for example, section 5 of the *Police Act*, RSA 2000 c P-17 or subsection 4.1 of the *Police Act*, RSBC 1996 c 367.

[70] In 2016, there were 21 self-governing Indigenous police forces in Quebec, 11 in Ontario, one in Manitoba, one in Saskatchewan, three in Alberta and one in British Columbia (see Kiedrowski at p. 13).

G. Ontario perspective

[71] Because the issue in *Police Service Board* was jurisdiction over police officers employed by an interregional police commission recognized under Ontario law, it appears necessary to discuss this scheme.

[72] In 1989, the first Ontario First Nations Policing Agreement was entered into between the Government of Ontario, the Government of Canada and five First Nations (*Ontario First Nations Policing Agreement*, March 2, 1989; see also Clairmont, at p. 7). This agreement provided that a band council could by resolution inform the Commissioner of the Ontario Provincial Police of its desire to enter into an Aboriginal policing agreement (section 2). The Commissioner could then appoint First Nations officers with the consent of band councils or a new police authority created

under the agreement (sections 3 and 4). The agreement also provided that First Nations officers so appointed would have the powers of special constables under the Ontario police act in force at the time (subsection 1(c)).

[73] With the enactment of the new *Police Services Act* in 1990, the Ontario government enshrined in the Act the nascent First Nations officers scheme that was initiated with the 1989 agreement. Indigenous officers now have full powers as police officers, not just special constables. Under subsection 54(1), the Commissioner of the Ontario Provincial Police may appoint First Nations Constables to perform specified duties. The appointment of a First Nations Constable confers on him or her the powers of a police officer for the purpose of carrying out his or her specified duties (subsection 54(3)). The Constable may or may not be assigned to a reserve (subsection 54(2)). If the Constable's specified duties relate to a reserve, the appointment requires the approval of the reserve's police governing authority or band council (subsection 54(2)). Similarly, while the Act confers upon the Commissioner and the Commission the power to suspend or terminate the appointment of the Constable (subsections 54(5) and (6)), the reserve's police governing authority or band council must be consulted if the Constable's duties are related to a reserve (subsection 54(4)). These provisions are still in effect today.

[74] In 1992, the Ontario government signed a new First Nations Policing Agreement with the federal government and other First Nations (see *Police Service Board* at paragraph 14; also Clairmont at p. 8). Among other things, it broadens the various options for the delivery of police services: First Nations can enter into an agreement with municipal or regional police services or the Ontario Provincial Police for police services, establish their own police services, or create a

regional police service controlled by a First Nation police governing authority operating in a group of First Nation territories (see *Police Service Board* at paragraph 14; Clairmont at p. 8).

H. Quebec perspective

[75] In Quebec, the *Police Act* enacted in 1968 first gave a judge the authority to appoint special constables for a designated period. Their role is to maintain peace, order and security in a designated area, to prevent crime and apprehend offenders (see sections 64 and those following of the 1968 Act). These special constables may only exercise the powers of peace officers subject to the restrictions outlined in their deed of appointment. This scheme has remained essentially the same since then, with the exception that today special constables are appointed by and report to the Minister of Public Security, rather than the Attorney General and a judge (see sections 105 and 111 of the current *Police Act*). The first Indigenous special constables in Quebec were appointed under this Act.

[76] In 1979, Quebec amended the *Police Act* to implement the James Bay and Northeastern Quebec Agreements to allow Cree Village municipalities and the Naskapi Village municipality to create and establish their own police forces for territories over which they have jurisdiction (see section 52 of the *Police Act* as amended in 1979). However, these police forces had to be made up of special constables (see subsection 63(a)). Municipalities could, through by-laws subject to the approval of the Attorney General, set the qualifications for becoming a member of their police force (see subsection 63(b)). Under subsection 63(b), municipalities were authorized to enter into police agreements, either with the Attorney General for the Sûreté du Québec to provide all or part of the police services, or with the Cree Regional Authority, the Kativik

Regional Government or a band within the meaning of *The Cree Villages and The Naskapi Village Act.* With regard to the employment relationship, section 62 (adopted in 1968) also states that municipal police officers are deemed to be employees of the Attorney General when they act as peace officers other than in the performance of their duties on behalf of the municipality that employs them – which seems to indicate that each municipality is the police officers' "employer".

[77] We note parenthetically that in the new *Police Act* adopted in 2000, police officers in the Cree Villages and the Naskapi Village were given full status as "police officers" for the purposes of the Act (see section 94), with powers of peace officers, rather than the restricted status of special constables. Also, in 2008, the *Police Act* was amended to ensure the establishment and maintenance of a regional police force to serve the Cree communities (subsection 102.1). If it decides to exercise this power, the Cree Regional Authority is considered a municipality for the purposes of the Act (subsection 102.1). The existing police forces of the Cree villages are then amalgamated with this regional police force (subsection 102.2). The Cree Regional Authority then has the power to appoint and discipline members of its police force (subsection 102.3), but hiring requirements are determined by agreement with the provincial government (subsection 102.4). The subsection also provides for cooperation between the regional police force and the Sûreté du Québec (subsections 102.7, 102.9). With these amendments, the legislator aims to give effect to the "Paix des Braves", an agreement between the Government of Quebec and the Cree Nation reflecting a desire to work together on a "nation to nation" basis (see Québec, Assemblée nationale, Journal des débats, 38^{e} lég, 1re session, vol 40 n^{o} 55 (June 3, 2008) (Benoît Pelletier)). Beginning in 2013, the term Cree Nation Government was used

following the adoption of the *Act establishing the Eeyou Istchee James Bay Regional Government and introducing certain legislative amendments concerning the Cree Nation Government*, whose objective was once again to [TRANSLATION] "harmonize relations between the government, Jamesians and the Cree regarding the governance of the municipality of James Bay" (see Québec, Assemblée nationale, Journal des débats, 40e lég, 1re session, vol 43 no 57 (May 28, 2013) (Gaétan Lelièvre)).

[78] I return now to the legislative recognition of Indigenous police forces that are created pursuant to agreements with band councils or First Nations representatives.

[79] In 1985, the National Assembly of Quebec had already adopted a resolution on the recognition of Indigenous rights (Québec, National Assembly of Quebec, *March 20, 1985 Resolution of the Quebec National Assembly on the Recognition of Indigenous Rights* (March 20, 1985) (René Lévesque), online: https://www.sqrc.gouv.qc.ca/relations-canadiennes/positions-historiques/motions/1985-05-30.pdf [1985 Resolution]; see also the preamble to the *Act Respecting the Exercise of the Fundamental Rights and Prerogatives of the Québec People and the Québec State*, CQLR chapter E-20.2, which reiterates this recognition). The National Assembly recognized that First Nations have the right, under Quebec laws, to govern themselves on lands allocated to them. Under agreements with the government, First Nations are entitled to have and control institutions that meet their cultural, language, health, social services and economic development needs. This led the Quebec government to negotiate and enter into several agreements with First Nations involving various areas of activity, including public safety and more specifically police services (see generally the 1985 Resolution, but also the 15

principles that form the basis of government action regarding Indigenous people, adopted by the Quebec cabinet on February 9, 1983: Québec, Secrétariat aux affaires autochtones [Aboriginal Affairs Secretariat], "Mission and orientations of the Secrétariat" online: http://www.autochtones.gouv.qc.ca/secretariat/mission_secretariat_en.htm).

[80] In 1990, the Oka crisis involving a dispute between the Mohawks of the Kanesatake and Kahnawake Reserves and the provincial and federal governments highlighted the breakdown of the relationship between Indigenous people, non-Indigenous people and governments at a time of constitutional instability. Beginning with local land claims in response to the municipality of Oka's plan to expand a golf course and build condominiums on Mohawk ancestral lands, the conflict soon became violent. There were protests and blockades. This led to a response by the Sûreté du Québec, which was called in by the mayor of Oka to intervene, and then the Canadian army became involved in the standoff (see John Borrows, *Freedom and Indigenous Constitutionalism*, Toronto, University of Toronto Press, 2016 at pp. 75-77 [Borrows]; Pierre Trudel, "La crise d'Oka de 1990 : Retour sur les évènements du 11 juillet" (2009) 39 :1-2 *Recherches Amérindiennes au Québec* 129). Culminating in the death of Corporal Lemay of the Sûreté du Québec, the conflict led to the mobilization of Indigenous communities across the country, in support of the idea that they were once again being deprived of lands they considered their own (see generally Borrows). Despite the negotiations that followed, many aspects of the conflict have never really been resolved (see Borrows at p. 77). However, the Oka crisis opened up a Canada-wide debate about the relationship between governments and First Nations. It was instrumental in establishing the Royal Commission on Aboriginal Peoples in August 1991 (see Royal Commission on Aboriginal Peoples, *People to people, nation to nation: highlights from*

the report of the Royal Commission on Aboriginal Peoples, Ottawa, Minister of Supply and Services Canada, 1996; see also Borrows, at p. 77). At the same time, the federal government announced the adoption of the *First Nations Policing Policy*, which provides for the establishment of Indigenous police forces pursuant to the signing of tripartite agreements.

[81] In 1995, Quebec amended the *Police Act*, to add a new section stipulating that the Government of Quebec may enter into an agreement with an Indigenous community to establish or maintain a police force in a territory specified in the agreement. It was the wish of the Quebec government that [TRANSLATION] "the amendments to the *Police Act* will facilitate the enforcement of negotiated agreements by providing Indigenous police officers with all the tools they need to enforce applicable laws and regulations in their territory" (Québec, Assemblée nationale, Journal des débats (Hansard),35^{e} lég, 1re session, n^{o} 19 (January 27, 1995) at pp. 1252-1257 (Serge Ménard) [Hansard, January 27, 1995]).

[82] As Serge Ménard, the Minister of Justice at the time, noted [TRANSLATION], "Every agreement made under this Act will be a step in the right direction to put an end to the confusion surrounding the status of police officers acting as special constables. This term often has a pejorative connotation in the minds of both Indigenous and non-Indigenous people dealing with these constables. Indigenous police officers will have the status of peace officers equivalent to any other police officer working in Quebec." [Hansard, January 27, 1995].

[83] The relevant provisions of the Act read as follows:

> **90**. The Government may enter into an agreement with one or more Native communities, each represented by its band council, to establish or maintain a police force in a territory determined under the agreement.
>
> A police force thus established or maintained shall, for the duration of the agreement, be a police force for the purposes of this Act.
>
> **91**. The agreement must include provisions relating to the employment status and swearing-in of police officers, the independence of the administration of the police force, civil liability, internal discipline and accountability.
>
> The agreement may also include, in particular, provisions relating to
>
> (1) standards governing the hiring of police officers;
>
> (2) the appointment of members to the Comité de déontologie policière charged with hearing an application for review or a citation concerning the conduct of a police officer pursuant to this Act.
>
> The provisions relating to the standards governing the hiring of police officers may vary from the standards prescribed by this Act or the regulations under it and shall, in case of incompatibility, take precedence over the latter.
>
> The provisions of the agreement relating to the appointment of members to the Comité de déontologie policière are binding on the Comité.
>
> **92**. The Minister shall table the agreement before the National Assembly within 15 days of the day on which it is signed if the Assembly is in session or, if it is not sitting, within 15 days of resumption.
>
> **93**. A Native police force and its members are responsible for maintaining peace, order and public safety in the territory for which it is established, preventing and repressing crime and offences under the laws and regulations applicable in that territory and seeking out offenders.
>
> [Emphasis added]

[84] It should be noted that one of the objectives of the *First Nations Policing Policy* is to ensure that, at the national level, members of an Indigenous police force have received adequate training and meet the requirements in the province or territory covered by a tripartite agreement. Since Parliament does not have jurisdiction over education, the *Police Act* addresses the problem of training and qualifying members of an Indigenous police force. A candidate wishing to be

hired as an Indigenous police officer in Quebec must (1) be a Canadian citizen, (2) be of good moral character, (3) not have been found guilty of a criminal offence and (4) hold a diploma awarded by the École nationale de police du Québec or meet equivalency standards (section 115 of the *Police Act*).

[85] Provisions of the agreement relating to the standards governing the hiring of police officers who are members of an Indigenous police force may vary from the standards prescribed in the *Police Act* (or Government of Quebec regulations under the Act) and, in case of incompatibility, take precedence over the latter (section 91 of the *Police Act*). We should also bear in mind that although section 90 of the *Police Act* authorizes the Government of Quebec and a band council representing the Indigenous community to enter into an agreement, this case clearly deals with trilateral agreements also involving the Government of Canada. Negotiated agreements are not limited to the topics mentioned in section 91 of the *Police Act*. That said, according to the tripartite agreements in the Court record, the funding formula for annual contributions from Canada and Quebec is 52% for Canada and 48% for the province, which is consistent with the general formula set out in the *First Nations Policing Policy*.

VII. Origins of this dispute

[86] To better understand this dispute, which is essentially the result of an administrative disagreement over the legal scope of the 2015 Federal Court of Appeal decision in *Police Service Board*, we now turn to the Office's past conduct. There are three pivotal periods, or better yet, three acts of a play whose ending is not yet written.

Act One: The Plan is federal

[87] In 1981, the Superintendent did not find any grounds to decline jurisdiction and refuse to register the Plan. This outcome is in line with consistent case law throughout the country that employees – including special constables and police officers – employed by a band council are governed by federal labour regulations (see *Public Service Alliance of Canada v. Francis et al.*, [1982] 2 SCR 72, 139 DLR (3d) 9 [*Francis SCC*], overturning *Francis v. Canada (Labour Relations Board)* (1980), [1981] 1 FC 225, 1980 CarswellNat 96F (FCA) [*Francis FCA* cited to Carswell], but only on the issue of the employer – the reasoning on jurisdiction still stands; *Whitebear Band Council v. Carpenters Provincial Council of Saskatchewan*, 132 DLR (3d) 128, [1982] 3 WWR 554 (CA Sask) [*Whitebear*]; *R. v. Paul Band*, 1983 ABCA 308 [*Paul Band*]; *Mohawks of the (Bay of Quinte) Tyendinaga Mohawk Territory*, [2001] 1 CNLR 176, 2000 CCRI 64 (CanLII); *Pitawanakwat*). Moreover, this has been the law between the parties for about 40 years.

Act Two: The Plan is still federal

[88] In 2011, the Office informed the First Nations sponsors of a pension plan registered under the PBSA that it would conduct an administrative review of the applicability of federal regulations as a result of the two Supreme Court of Canada decisions rendered concurrently in *NIL/TU,O* and *Communications, Energy and Paperworkers Union of Canada v. Native Child and Family Services of Toronto*, 2010 SCC 46 [*Native Child*].

[89] A few months earlier, after having applied the functional test to the facts under review, the highest court had ruled that the two entities involved, as well as their employees, were governed by provincial labour laws rather than by the *Canada Labour Code*. Although the mission of a provincially regulated child welfare agency is to provide Indigenous clients and communities with effective and culturally appropriate services, this does not change the fact that the essential function of this separate entity is, by nature, a provincial activity.

[90] To ensure administrative consistency, following the *NIL/TU,O* and *Native Child* decisions, the Office did in fact review 665 First Nations pension plans, based on the definition of "included employment" in the PBSA. About 25% of these plans will be transferred to various provincial jurisdictions; most of the plans involved employment in education, health and child-family services. As of October 2017, the OSFI still oversaw approximately 520 First Nations pension plans.

[91] However, pension plans established by band councils that directly provide services to Indigenous communities will not be transferred. The explanation is simple: the two entities formed to provide services in *NIL/TU,O* and *Native Child* were separate employers. This fundamental structural difference was well noted by the Office, whose July 11, 2011 media release was reassuring:

> […] [TRANSLATION] [the Supreme Court] has held that the jurisdiction of an entity established to provide services to First Nations depends on the nature of its activities […]
>
> As such, an employer whose activities are limited to areas such as health care and education will be subject to provincial labour relations and pension plan administration laws. However, an employer who is involved in exclusively federal activities, such as the administration of a First Nations band councils, will be subject

> to [federal] [sic] labour relations legislation and pension plan administration laws.
>
> [Emphasis added.]

[92] Two years later, on February 25, 2013, the Office notified the applicant that the Plan's registration would not be changed, unless the applicant provided, before April 30, 2013, additional information that could be required to amend assessment. On March 19, 2013, the applicant confirmed the Office's assessment. Let the people be the judge, but this administrative assessment can rely not only on the previous jurisprudence (1980-2010), but also on the jurisprudence following *NIL/TU,O* and *Native Child*: *Canada (Attorney General) v. Munsee-Delaware Nation*, 2015 FC 366 [*Munsee-Delaware Nation*]; *Berens River First Nation v. Gibson-Peron*, 2015 FC 614 [*Berens River*]; *Cahoose v. Ulkatcho Indian Band and another*, 2016 BCHRT 114; *United Food and Commercial Workers Canada Union, Local 864 v. All employees of Waycobah First Nation working as shore based fishers and deck hands, Captains and Mates on fishing vessels, excluding office staff and managers.*, 2015 CIRB 792; *Association of employees of Northern Quebec v. Matimekush-Lac John Innu Nation Band Council*, 2016 CIRB 843 affirmed by the Federal Court of Appeal ruling in *Conseil de la Nation Innu Matimekush-Lac John c Association des employés du nord québécois (CSQ)*, 2017 CAF 212 [*Lac John*].

Act Three: The Plan is <u>no longer</u> federal

[93] On April 25, 2016, the Office changed course: it advised the applicant that it believed the Plan could be subject to provincial legislation because, on October 2, 2015, the Federal Court of Appeal rendered its *Police Service Board* ruling, overturning the Supreme Court's decision in

NIL/TU,O and *Native Child. Police Service Board* became final on April 7, 2016. The Office therefore asked the applicant, Mr. Picard, to provide it with information contrary to this new administrative assessment, otherwise the Plan would be transferred to Retraite Québec.

[94] In May 2016, the applicant, Mr. Picard, provided the Office with a legal opinion from the prosecutors in this case that labour relations regarding police officers hired and remunerated directly by band councils fell within federal jurisdiction. Essentially, the police services in question were inseparable from governance activities of band councils and were the band councils' responsibility under the *Indian Act* to ensure peace, order and public safety on Indian reserves. Reference was also made to the essential differences between Indigenous police forces in Quebec and the Nishnawbe-Aski Police Service Board. The Board is a separate, independent legal entity serving several Indian bands, as well as large off-reserve areas where police services are provided to Indigenous and non-Indigenous populations in Ontario.

[95] In June 2016, the applicant also provided the Office with three standard Indigenous policing agreements between the Government of Quebec, the Government of Canada and the communities of Wendake, Masteuiatsh and Opitciwan. However, unlike the Nishnawbe-Aski Nation, which made the decision to have police services managed by a Police Service Board, band councils that are parties to these tripartite agreements are the employers of the police and are responsible for the administrative management, organization, hiring and selection of police officers.

[96] On July 21, 2016, the Office rendered the impugned decision. Purporting to rely on the "functional test" applied by the Supreme Court of Canada in *NIL/TU,O*, and the Federal Court of Appeal in *Police Service Board*, the Office used the following reasoning to find that the Plan was now subject to provincial regulations and not federal labour regulations:

> [TRANSLATION]
>
> As you know [...], the Federal Court applied the functional test [...]; the test is used to examine the nature, operation and usual activities of the entity and identify the labour code that governs its use. Although the organizational structure of the entity should not be overlooked, the examination must focus on the type of activities it carries out.
>
> As a rule, band councils are governed by the *Canada Labour Code* because of the administrative nature of their duties. However, in certain circumstances, some groups of band council employees may be subject to a provincial labour code when the work they perform is under provincial jurisdiction.
>
> The information you have given us clearly indicates that band councils are the employers of the police forces that serve their respective territories. However, as stated on page 6 of the legal opinion you submitted to us, "*when an employer is a band council, the activities in question must be reviewed to see whether these activities are an inherent part of the band's responsibilities as an entity that provides programs and services to its members*." In the case of the Plan, it is important to examine the operation and nature of the activities of the police forces participating in the Plan separately from typical band council activities. Although the administrative activities of band councils are governed by the *Canada Labour Code*, the essential nature and function of police operations is an area of provincial jurisdiction.
>
> The power given to police officers in the performance of their duties and the power conferred on band councils for the administration of police services derive from the provincial *Police Act*. Activities delegated to band councils are detailed in the agreements. These agreements also stipulate that these activities must be governed and interpreted in accordance with the laws and regulations in force in Quebec. In addition, if these agreements did not exist, police services in these territories would be provided by the Sûreté du Québec, which, under section 50 of the *Police Act*, has jurisdiction to enforce law throughout the province.

> In the case of the Plan, it is all the more obvious to us that police force activities are separate from band council activities because the agreements stipulate that police forces must act independently of band councils […]
>
> [Emphasis added.]

[97] This has therefore become the new reality: the Plan can no longer be registered under the PBSA. As a result, the Plan will be transferred to Retraite Québec "in the coming weeks," hence this application for judicial review.

VIII. Applicants' legal interest and practical reasons for a declaration

[98] In this case, Sylvain Picard is acting as the Plan administrator, while RBA Financial Group sees to its day-to-day management. The legal interest of the applicants, who defend the band councils' interests, as members-employers of the Plan, is not disputed.

[99] On September 15, 2016, concurrent with the institution of these judicial review proceedings, the applicant, Mr. Picard, served a notice of objection on the Superintendent, under section 32 of the PBSA. It should be noted that this provision refers to subsection 10(4) and section 11.1 of the PBSA, under which the Superintendent may send the plan administrator a notice of non-compliance or revoke the registration and cancel the certificate of registration in respect of a pension plan if the administrator has not complied with the notice of non-compliance.

[100] On October 5, 2016, the Office provided the applicant, Mr. Picard, with confirmation that [TRANSLATION] "our letter dated July 21 informing you of the transfer of the Plan does not

involve either subsection 10(4) or section 11.1 of the PBSA", so the Superintendent will follow up on the applicant's notice of objection. The Plan therefore complies with federal regulations. The problem is that federal regulations would no longer apply to the Plan because of the new reality described in the impugned decision. That said, the Office is prepared to continue to monitor the Plan until a final ruling is obtained from the Court.

[101] Admittedly, a transfer to Retraite Québec will not invalidate the Plan – it is simply a contract – and will not automatically result in its liquidation. However, the fact remains that the Plan will then be subject to provincial regulation and different rules that could possibly affect fundamental features of the Plan, including the funding framework, the right to authorize reduction measures, the appointment of the administrator, etc. (see Natalie Bussière, "Les régimes de retraite : où en sommes-nous et qu'est-ce l'avenir nous réserve?" in *Développements en droit du travail 2004*, volume 205, Cowansville, Yvon Blais, 2004 at p. 83).

[102] As a result, the applicants and interested band councils fear the worst, which is why they want the Court to declare that the PBSA applies the to Plan, rather than simply quashing the impugned decision. Incidentally, according to information provided by the respondent, five other similar pension plans are currently registered under the PBSA (one in Saskatchewan, three in Ontario, and one in British Columbia). However, the parties do not know whether the plans will be transferred to provincial authorities. This fact can only increase the uncertainty regarding the legal status of Indigenous police pension plans in Canada.

IX. Federal Court's standard of review and declaratory power

[103] The impugned decision is reviewable under sections 18 and 18.1 of the *Federal Courts Act*. Since the Office has ruled on a constitutional question, the standard of correctness applies (*Dunsmuir v. New Brunswick*, 2008 SCC 9 at paragraphs 58-59; *Police Service Board* at paragraph 6).

[104] Moreover, the Federal Court has jurisdiction, as a superior statutory court created under section 101 of the *Constitution Act, 1867*, to rule on the constitutional question and render a declaratory judgment (*Bilodeau-Massé v. Canada (Attorney General)*, 2017 FC 604 at paragraph 38). A clarification of the Court law that applies – to Indigenous police forces whose members are band council employees – is desirable in this case (see *Osborne v. Canada (Treasury Board)* [1991] 2 SCR 69; *Schachter v. Canada* [1992] 2 SCR 679; *Corbiere v. Canada* [1999] 2 SCR 20; *Canada (Attorney General) v. Law Society of British Columbia*, [1982] 2 SCR 307.

[105] There is a basis for intervening in this case.

X. Review of the constitutional and statutory arguments of the parties

[106] At this point, the constitutional and statutory arguments of the parties must be reviewed before we state the grounds on which the impugned decision must be quashed and declare that federal regulations apply to the Plan.

A. Position of the applicants

[107] In short, the applicants argued that the employees participating in the Plan were employed in a federal undertaking. The shared desire of the federal and provincial governments and band councils to enter into tripartite agreements pursuant to the *First Nations Policing Policy* allows band councils to exercise the governance powers conferred upon them under section 81 of the *Indian Act*, including the power to enforce law and order on reserve land.

[108] In this case, the Office erred with respect to the scope of *NIL/TU,O* and *Police Service Board*: Indigenous police forces are created by the will of the three parties – the Band Council, the Government of Canada and the Government of Quebec – not exclusively pursuant to the *Police Act*. Also, although section 90 of the *Police Act* empowers the Government of Quebec to enter into such agreements, the applicants argued that the members of the Plan are in fact employees of each band council. The fact that employees have "peace officer" powers under the *Police Act* does not change the true nature of their employer's federal activities.

[109] Since providing [services] for Indigenous communities living on reserves and lands reserved for Indians is a governance activity of each band council, we are not dealing with any

business activities or other activities that may fall under provincial jurisdiction pursuant to the functional test. Labour relations between the employer and the employees fall exclusively under the *Canada Labour Code*. The PBSA therefore applies to the Plan. It is not necessary to move on to the second step of the functional test, which is to review the effects of provincial labour legislation on Indianness.

B. Position of the respondent

[110] While recognizing that employees employed by a band council are normally governed by the *Canada Labour Code*, the respondent argued that Plan members nevertheless provide a service that is separate and divisible from other band council activities. They must therefore be subject to provincial regulation based on the functional test.

[111] The respondent was of the view that Indigenous governance is limited to the administration of band affairs, whereas section 81 of the *Indian Act* does not allow a band council to enforce the *Criminal Code* and provincial laws on reserve land. The province has sole jurisdiction over the administration of justice. Here, the "peace officer" power of members of an Indigenous police force derives from sections 49 and 93 of the Quebec *Police Act*. Furthermore, Indigenous police officers enjoy professional independence when they are peace officers, even though the band council hires and remunerates them, decides on their working conditions (salary, hours of work, vacation, etc.) and can terminate their employment.

[112] The respondent therefore argued that the Office did not make any reviewable errors based on the finding in *Police Service Board*. Although the Nishnawbe-Aski Police Service Board was

an interregional entity independent of band councils and had off-reserve territorial jurisdiction, the fact remains that provinces have sole jurisdiction over the regulation of municipal and provincial police forces.

[113] In terms of Indianness, police officers who are members of Indigenous police forces work on a daily basis, the same as other provincial police officers do. The fact that tripartite agreements are covered by the *First Nations Policing Policy* is not material. As one of the parties to the tripartite agreements filed in the record, the federal government is simply using its spending power to encourage the creation of local or regional police services culturally adapted to Indigenous people.

C. Position of the intervener

[114] The intervener, the Attorney General of Quebec, relies on the respondent's arguments.

XI. Specific grounds for intervention

[115] It is not necessary to repeat the entire constitutional reasoning set out in Section V, Canadian constitutional environment, which is the basis of the Court's general conclusion: the recognition of an Indigenous police force in a provincial statute does not provide a constitutionally material basis for finding that labour relations for special constables and police officers directly employed by a band council fall within provincial or federal jurisdiction. It is now necessary, given the facts of the case, to identify the reviewable errors committed by the

Office in this matter. In doing so, we will also examine some relevant aspects that the Office has avoided, as well as the relevant case law in this matter.

A. Reviewable errors of the Office

[116] Beyond the changes that provincial legislatures have made to their police laws (see Section VI – First Nations police services: a historical and contemporary overview), from a pragmatic standpoint, it is clear that according to settled case law and leading case law, the rules governing the labour relations for special constables and police officers have always been determined by the federal or provincial or even municipal character of the employer's activities. They have not been determined by the description of the police officers, or the fact that they could act as peace officers under a provincial statute, which includes special constables and police officers employed by band councils (see Section VII – Origins of this dispute).

[117] It is also true that the 2015 *Police Service Board* decision of the Federal Court of Appeal seems, at least on the face of it, to depart from this line of case law. But on closer examination, the Federal Court of Appeal had before it an independent legal entity operating at arms length from any band council, which explains the similar outcome to the ruling in *NIL/TU,O* regarding services provided to Indigenous communities by a provincial entity. It should also be pointed out that in *Lac John*, which followed *Police Service Board*, the Federal Court of Appeal itself reiterated this important distinction. We will discuss these rulings further below (Section XI – C. Limited application of the ruling in *Police Service Board*).

[118] In the impugned decision, the Office incorrectly assumed that policing activities on a reserve are and remain under provincial jurisdiction because of the nature of a police officer's work. However, it must be remembered, jurisdiction over labour relations is an ancillary jurisdiction. The enterprise must be examined, not the work. No one would think that because an individual is an engineer, surveyor, notary or lawyer recognized by provincial law, the inevitable conclusion is that the labour relations with his employer will be regulated by provincial law. The issue is whether that person is actually employed in a provincial or federal undertaking. This is the case here, since the employers of the employees participating the Plan are the band councils themselves, not an independent and autonomous provincial entity. The prerequisites for federal regulations to apply are all satisfied pursuant to subsection 4(2) of the PBSA and the analytical framework dictated by law and jurisprudence.

[119] We will not revisit the Superintendent's limited jurisdiction (see Section III). In this case, a proper analysis of all relevant facts based on the functional test reveals that, in their essential nature, police services provided by special constables or police officers who are members of an Indigenous police force and are directly employed by band councils that are members of the Plan are closely connected and indivisible from the governance activities of each band council party to the tripartite agreements in the Court record. Given subsection 91(24) of the *Constitution Act, 1867*, the maintenance of order and public safety on Indian reserves could be seen by the drafters of the Constitution as a "necessary incident" to legislative jurisdiction over Indians and Indian lands (*Four B*).

[120] Under the agreements, the band council must at all times meet its obligations and responsibilities to provide the community with a quality police force. The Office erred in considering that police services provided to communities on reserves and other lands reserved for Indians were divisible from the other band council governance activities. In this case, the fact that each band council controls the hiring and working conditions of employees participating in the Plan is a determining factor in the exercise of the jurisdiction conferred on the band council by law and under the agreements. At the risk of repeating myself, the fact that a member of an Indigenous police force has the status of "peace officer" under the *Police Act* does not affect his employee-employer relationship with the band council and does not change the federal character of band council governance activities.

B. Reliance on the double aspect theory: beyond the Office's simplifications

[121] As we have seen above, First Nations policing issues are not all black and white (see Section VI – First Nations police services: a historical and contemporary overview). The situation is much more constitutionally complex than the Office seemed to suggest in the impugned decision (see in particular Section V – C. Statutory regulation of powers of peace officers: a delegation exercise shared between the federal and provincial governments). It is fair to say that "police" powers do not derive from a single head of power. It all depends on the context and the nature of the powers vested in each level of government concerned. The Office erred in unequivocally stating that [TRANSLATION] "the essential nature and function of police operations is an area of provincial jurisdiction."

[122] "[I]t is well settled that jurisdiction over labour matters depends on legislative authority over the operation, not over the person of the employer" (*Canada Labour Relations Board et al. v. Yellowknife*, [1977] 2 SCR 729 at p. 736, 76 DLR (3d) 85). Nevertheless, where the employer is the federal Crown, the Crown cannot be subject to provincial labour relations legislation, regardless of the nature of the work performed by the employees.(see *Reference in re Legislative Jurisdiction over Hours of Labour*, [1925] SCR 505 at pp. 510 and 512, [1925] 3 DLR 1114; *Stevedores Reference* at pp. 542, 545, 555, 564, 574-575 and 592; *Commission du salaire minimum* at p. 772; *Attorney General of Canada v. St. Hubert Base Teachers' Association*, [1983] 1 SCR 498 at pp. 504-507, 1 DLR (4th) 105).

[123] Here, the *Police Act* authorizes the Quebec government to enter into an agreement with a band council to create an Indigenous police force. For the purposes of the *Police Act*, once an Indigenous police force is created, it can be considered another provincial or municipal police force in the province. However, the *Police Act* is not a labour law, nor is it a statute that regulates band council governance. Without delving into the subject of interjurisdictional immunity, the quasi-governmental nature of the local police service provided by the band council should be sufficient to rule out the application of provincial labour and pension legislation, given the fact that by entering into a funding agreement with the governments of Canada and a province, the band council does not lose its status as a federal body exercising a power of governance delegated by Parliament.

[124] Sections 81 and 83 of the *Indian Act* already give band councils broad regulatory powers, which include, as we have seen, the observance of law and order (paragraph 81(1)(c)). Under

section 88 of the *Indian Act*, Parliament has ensured that provincial laws of general application will be applicable to Indians, except to the extent that such laws are inconsistent with this Act or the *First Nations Fiscal Management Act*, SC 2005, c. 9 or any order, rule, regulation or by-law of a band council made thereunder, and except to the extent that such provincial laws make provision for any matter for which provision is made by or under the *Indian Act* or the *First Nations Fiscal Management Act*. In particular, provincial laws of general application apply on reserves and lands reserved for Indians as long as they fall within a jurisdictional area provided for in section 92 of the *Constitution Act, 1867*. In this sense, there are no "enclaves" (*Cardinal v. Attorney General of Alberta* (1973), [1974] SCR 695, 40 DLR (3d) 553).

[125] Thus, the Office erred in finding that [TRANSLATION] "if [the] [tripartite] agreements did not exist, police services in those territories would be provided by the Sûreté du Québec, which, in accordance with section 50 of the *Police Act*, has jurisdiction to enforce law throughout the province of Quebec." At this point, we will not revisit the analysis provided in Section V – C. Statutory regulation of powers of peace officers: a delegation exercise shared between the federal and provincial governments.

C. Scope of the ruling in *Police Service Board*

[126] The Office erred with respect to the legal scope that it conferred in the case of the registration of the Plan to the 2015 judgment rendered in *Police Service Board*. The Federal Court of Appeal did not in any way "overturn" the *NIL/TU,O* decision rendered a few years earlier by the Supreme Court of Canada. The functional test was simply applied to a factual situation that was unique in this case and specific to Ontario.

[127] We need to bear in mind that Indian bands are the ones that choose an appropriate provincial social services delivery model that can respond to the specific needs of their communities (see Maggie Wente, "*Case comment: NIL/TU,O Child and Family Services Society v. BC Government and Service Employees' Union and Communication Energy and Paperworkers of Canada v. Native Child and Family Services of Toronto*" (2011) 10 Indigenous LJ 133 at p. 135 [Wente]; see also Sebastien Grammond, "Federal Legislation on Indigenous Child Welfare in Canada" (2018) 28 J L & Soc Pol'y 132 [Grammond 2018]). Thus, some communities choose to provide services through incorporated companies and others directly through band councils (see Grammond 2018 at pp. 142-144). These structural differences effectively limit the scope of the Supreme Court decision in *NIL/TU,O* where services were directly provided by a band council (see Wente at p. 135).

[128] Moreover, in *Police Service Board*, the Provincial Commission recruited employees independently of the Indigenous communities. The Nishnawbe-Aski Nation, a political organization representing members of many First Nations, is directly involved in a number of treaties covering northern Ontario and the James Bay region. The area served by the Provincial Commission covered about two-thirds of the province of Ontario, largely exceeding reserve lands or lands reserved for Indians. The Provincial Commission found itself taking over from the Ontario Provincial Police, many of whose employees were transferred to the Commission.

[129] The Federal Court of Appeal distinguished *Police Service Board* in *Lac John* and noted in paragraphs 37-39:

> [TRANSLATION]

> [37] In *Nishnawbe-Aski Police Service Board v. Public Service Alliance of Canada*, 2015 FCA 211, [2016] 2 F.C.R. 351, leave to appeal to the SCC dismissed, 36742 (April 7, 2016), [*Nishnawbe-Aski*], this Court overturned the Board's decision that it had jurisdiction to hear Nishnawbe-Aski's employees' application for certification.
>
> [38] In that case, this Court determined that the Nishnawbe-Aski Police Service did not assume any policing functions from a federal agency or a federal police service (at paragraph 17). Candidates were recruited independently of the Nishnawbe-Aski First Nations (*ibid* at paragraph 23). As employees of these police services, First Nations officers served both First Nations and non-First Nations citizens in areas covered by an operational agreement between them and the Ontario Provincial Police (OPP) (*ibid* at paragraph 26). Police services were a separate entity. Finally, officers of the Nishnawbe-Aski Police Service were ultimately responsible to the Commissioner of the OPP and the Ontario Civilian Police Commission, both of whom have the power to suspend or terminate them under subsections 54(5) and 54(6) of the *Police Services Act*, R.S.O. 1990, c. P.15 (*ibid* at paragraph 27).
>
> [39] In our case, the applicant is the teachers' employer, and it has the power to hire and terminate them.

[130] In short, the Office erred in fact and in law in deciding that Plan members worked for a provincial enterprise and that the Plan would be transferred to Retraite Québec.

D. Functional analysis: an exercise that the Office misunderstood or did not complete

[131] Labour relations jurisdiction is ancillary to one or more heads of power under sections 91 and 92 of the *Constitution Act, 1867*. We have already addressed the issue and use of the functional test in Section V – B of these reasons. A police service provided to a community on a reserve or lands reserved for Indians is a public government service. Furthermore, when an Indian band provides a public service to the on-reserve community, it is a governance activity

under federal jurisdiction (*Francis FCA*; *Paul Band*; *Whitebear*; *Munsee-Delaware Nation*; *Berens River*; *Lac John*).

[132] In this case, because the employers of the employees participating in the Plan are federal entities – band councils – this is referred to as "direct jurisdiction" (as in *Francis FCA and SCC*). This service cannot be artificially separated from the other public services provided by a band council. That is what the Office did in this case. Now, under the tripartite agreements, employees of the police force thus maintained and constituted are not employees of the Government of Quebec and the Government of Canada. They act exclusively under the direction of each band council, which is legally responsible for the actions or omissions of members of the Indigenous police force. Nor is it necessary to narrowly construe section 81 of the *Indian Act* as the respondent suggests.

[133] There is no comparison between the situations described by the Supreme Court in *Northern Telecom*, *Four B* and *NIL/TU,O* and this case. Indigenous police forces are not entities that are legally or functionally distinct from band councils. However, the stevedoring companies that loaded and unloaded goods from ships on behalf of shipping companies could be considered legally or functionally distinct entities, as could Northern Telecom, some of whose employees installed telecommunications equipment to help Bell Canada commission its telecommunications system, or Four B Manufacturing, which was a business that operated independently from the reserve band council.

[134] According to uncontradicted evidence, each band council that is a member of the Plan is solely responsible for administrating and managing the police force established under the agreement and provides for its organization in terms of police staff, support staff, police facilities, material and equipment. In practical terms, the band council looks after selecting and hiring police officers, including the chief of police. The band council also manages police force budgets and purchasing. It may establish internal policies and procedures specific to the administrative management of its police service. However, to ensure the independence of the police force, it is important that the band council not be allowed to interfere in a police investigation undertaken by employees in its service. Although the band council may not dictate to a police officer the professional conduct that he must adopt in a particular case, the fact remains that the police officer is subordinate to the band council. Consequently, as an employee, the police officer must perform his work in accordance with the administrative rules established by the employer (hours, hours of work, vacation, etc.). Also, as an employer, each band council has the power to discipline or even terminate the employment of the police chief and discipline an insubordinate police officer who does not report for work, commits a wrongdoing, etc. These are material facts in this case.

[135] When the band council decides to become involved in creating an Indigenous police service for which it will assume the day-to-day management, as a public authority, its situation is no different from that of any municipality that has established a similar public service. Providing the police force with everything that is normally required to ensure the police service’s administrative efficiency falls exclusively within the purview of band council operations and governance. Any omission in this respect may constitute negligence and result in extra-

contractual liability (see *Laurentide Motels Ltd. v. Beauport (City)*, [1989] 1 SCR 705, 94 NR 1). As an employer, the band council is also liable for any fault committed by one of its officers in the performance of his duties, which includes any member of an Indigenous police force. The fact that the member is acting as a peace officer under the *Police Act* does not render the Government of Quebec liable. Regarding this point, the tripartite agreements expressly provide that the band council must purchase liability insurance.

[136] Ultimately, the decision to sign an agreement with the appropriate governments to establish an Indigenous police force on the reserve rests exclusively with the band council (see *Pitawanakwat* at paragraph 30). Although section 50 of the *Police Act* authorizes the Minister of Public Security of Quebec to sign such an agreement, it does not oblige the Government of Canada, the band council or a First Nation to create or maintain an Indigenous police force. A band council may very well allow the Sûreté du Québec or a municipal police force to enforce the law within its territory.

[137] In addition, according to case law, any decision by a band council to terminate or dismiss a member of an Indigenous police force – the council then acting as a federal board – is reviewable by the Federal Court (*Pitawanakwat* at paragraphs 24-33; *Ross v. Mohawk Council of Kanesatake*, 2003 CFPI 531 at paragraphs 66-69; *Coalition To Save Northern Flood v. Canada*, 102 Man R (2d) 223, [1995] 9 WWR 457 (CA Man); *Gabriel v. Canatonquin*, [1980] 2 FC 792, [1981] 4 CNLR 61 (FCA)). A complaint of unjust dismissal under the *Canada Labour Code* may also be made against the band council (see for example *Delisle v. Mohawk council of*

Kanesatake, 2007 FC 35), while an action in damages may also be instituted against the band council in a provincial court (*Isaac*).

[138] In summary, if the functional analysis remained a misunderstood or incomplete exercise in this case, it is because the Office failed to consider the vital and essential nature of a band council's governance activities. By nature, the word "police" means "l'ensemble des mesures ayant pour but de garantir l'ordre public" [all measures aimed at guaranteeing public order]. It comes from the Latin *politeia* meaning *administration d'une ville* [city administration] ("police" Larousse, online: http://larousse.fr/dictionnaires/francais/police/62149?q=police#61449). Thus, "police powers" are intrinsically linked to governance: any governing body necessarily has the power to ensure peace, order and public safety within its territory. It also follows that any level of sovereign and autonomous government has the power to establish a "police" entity responsible for the administration or enforcement of any law or regulation falling within its legislative or regulatory jurisdiction (where the police entity exercises jurisdiction delegated by Parliament or the legislature of a province).

E. *Francis* and the case law applying *Francis* are instrumental in ruling on the issue of constitutional applicability.

[139] In 1982, the Supreme Court ruled in *Francis SCC* that the *Canada Labour Code* applied to the St. Regis Band Council – which was to be considered an "employer" – and to its employees. The Federal Court of Appeal had previously found in the same case that the labour relations in question fell within federal legislative jurisdiction (*Francis FCA*).

[140] On the issue of constitutional applicability, Heald J. noted in paragraphs 17-20, after citing Beetz J. in *Four B*:

> [TRANSLATION]
> [17] Beetz J.'s reasons indicated that with respect to labour relations "exclusive federal competence" was, in the main, over "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...". It is therefore necessary, in my view, for the purpose of applying the functional test adopted by Beetz J., to determine the nature of the work performed by the unit of employees in question. Appendix C of the reasons for the respondent Board's decision mentioned above appears to be an organizational chart that is instructive as to the nature of the work performed by the unit of employees in question. Appendix D, a list of employees, appears to confirm the information found in Appendix C. Based on this evidence, it is clear that the employees were involved in the administration of education, Indian lands and estates, welfare, housing, schools, public works, and a senior's residence, as well as maintenance of roads, schools, water and sewage, garbage collection, etc. Thus, bus drivers, garbage collectors, teachers, carpenters, stenographers, housing clerks, janitors and road crews comprised, inter alia, the unit of employees in question. I believe that the functions of this unit, in general terms, can be defined as being almost exclusively related to the administration of the St. Regis band of Indians and that all these functions can be said to be of a governmental nature and to come under the *Indian Act*. It is also instructive to review the various provisions of the *Indian Act* to determine the extent to which an Indian band and its council participate in the affairs of an Indian band to which, as in this case, the *Indian Act* applies. […]
>
> [18] Sections 81 to 86 inclusively set out the powers of the band council. Section 81 authorizes the band council to make by-laws in a large number of areas: to provide for the health of residents on the reserve; the regulation of traffic; the observance of law and order; the establishment of pounds; the construction and maintenance of watercourses, roads, bridges, ditches, fences and other local works; the regulation of classes of businesses allowed; the regulation of construction; the allotment of reserve lands among the members of the band; the destruction and control of noxious weeds; the establishment and regulation of water utilities; the regulation and control of sports, races, athletic contests and other amusements; the regulation of hawkers and peddlers, etc.

> [19] The review of the by-laws of the St. Regis Band filed as evidence shows that this band did in fact make a number of by-laws under section 81, *supra*. […]
>
> [20] According to the powers conferred on the band and its council under the *Indian Act*, as we have just seen, and based on the evidence that the band and its council exercised these powers, I am persuaded that the unit of employees in question is directly involved in activities closely related to Indian status. At page 1048 of his reasons in *Four B, supra*, Beetz J. gave examples of the categories of rights that should be regarded as necessary incidents of Indian status. He provided examples such as registrability, membership in a band, the right to participate in the election of Chiefs and Band Councils, and reserve privileges. In my view, these examples are directly related to band administration, given the powers conferred on the band and council under the Act and, in my view, are in the same category as the powers exercised by this band and its council, as we saw above. However, *Four B* (*supra*) is in fact completely different from this case. In *Four B*, four Indians from the reserve operated a business on an Indian reserve. The unit of employees' status and rights as Indians and members of the band were not affected in any way. In this case, it is impossible to separate the employees of the unit from the right to elect councillors and chiefs, the right to own land on reserves, the right of Indians on the reserve to have their children educated in schools on the reserve, the right to welfare when circumstances warrant, the right to live in a seniors' residence, provided admission requirements are met, etc. Overall, band administration is continually related to the status and rights and privileges of band Indians. I am therefore firmly convinced that labour relations in this case form "an integral part of the primary federal jurisdiction over Indians or lands reserved for Indians" [This quotation is taken from page 1048 of Beetz J.'s reasons in *Four B* (*supra*)], thereby establishing federal legislative jurisdiction pursuant to subsection 91(24) of the *British North America Act, 1867*, 30-31 Vict., c. 3 (U.K.) [SCR 1970, Appendix II, No. 5.]
>
> [Emphasis added.]

[141] The Federal Court of Appeal's constitutional reasoning and finding on this point have not been seriously challenged in the Supreme Court. However, according to the Federal Court of Appeal, the band council did not have the status of "employer" within the meaning of the

Canada Labour Code (Le Dain J. dissenting on this point). It remained to be decided whether for the purpose of the *Canada Labour Code*, the Canada Labour Relations Board [CLRB] could find that the band council was an "employer". The Supreme Court responded in the affirmative and, for this reason, quashed the Federal Court of Appeal's decision.

[142] Well aware of the functional test and *Construction Montcalm*, *Four B* and *Francis FCA*, both the Court of Appeal for Saskatchewan and the Court of Appeal of Alberta confirmed that, under the constitution, federal regulations applied to employees of a band council (*Whitebear* and *Paul Band*). Although the special constables in *Paul Band* were authorized, under section 38 of the *Police Act*, 1973, Statutes of Alberta c.44, to enforce certain provincial statutes (e.g. the *Motor Vehicle Administration Act*; *Highway Traffic Act*; *Liquor Control Act*; *Motor Transport Act*; *Off-highway Vehicle Act*; *Litter Act*), in addition to maintaining peace and order on the reserve, this did not change the fundamental and indivisible nature of band council governance activities under section 81 of the *Indian Act*: these remained federal.

[143] *Francis FCA* is still valid law and was not overturned by *NIL/TU,O* or *Police Service Board* precisely because these cases did not involve employees directly employed by a band council (see *Munsee Nation* at paragraph 45). In *Munsee Nation*, the Court determined that accounting functions were intimately tied to band administration and therefore fell within federal jurisdiction over Indians. The Court pointed out in paragraph 42 that the Band Council "carries out governance functions through the employment of administrative employees" (see also *Berens River*, at paragraph 66).

[144] Similarly, in *Berens River*, the fact that the band did not rely on a by-law was not determinative (see *Berens River* at paragraph 95). In this case, this Court had to review the decision of an adjudicator appointed under the *Canada Labour Code* who refused to exercise jurisdiction over a complaint of unjust dismissal of a nurse, claiming that her labour relations were governed by the province. The employee worked as a nurse at the Berens River First Nation nursing station. She was employed by the band council. The Court refused to consider the nursing station a separate entity. Instead, it said the issue was whether the nursing station was part of the Indian band's operations in respect of the lands reserved for Indians (at paragraph 70). According to the Court, operating a nursing station was closely linked to the administration of Band affairs, because this was within the exercise of its power to provide for the health of residents on the reserve under the *Indian Act* (at paragraph 79). For these reasons, the Court found that the adjudicator had jurisdiction to hear the complaint.

[145] The rulings in *Berens River* and *Munsee-Delaware Nation* were recently upheld by the Federal Court of Appeal in *Lac John* (see paragraphs 43-45). The Federal Court of Appeal held that the Canada Industrial Relations Board [CIRB] had the constitutional jurisdiction to certify the Association des employés du nord québécois (AENQ) (affiliated with Centrale des syndicats du Québec (QSC) as the bargaining agent for a bargaining unit composed of a school located on an Indigenous reserve, the Nation Innu Matimekush-Lac John reserve. The Nation Innu Matimekush-Lac John band council was the employer of the teachers who applied for certification (paragraphs 23 and 39). The band council had the power to hire and terminate employees (paragraphs 23 and 39). In upholding the CIRB's finding, the Federal Court of Appeal agreed that [TRANSLATION] "the educational services provided by the employer on

reserve land and the duties performed by the employer in this area, including its decision-making power over this activity, constitute a governance activity, and this activity is under federal jurisdiction" (*Lac John* at paragraph 11). The establishment of a school on a reserve therefore comes under federal jurisdiction over Indians (paragraph 49).

[146] The Office therefore made two mischaracterizations. First, instead of identifying the essential nature of a band council's activities, which are governance activities similar to those of a local government, the Office treated the Indigenous police service as if it were functionally divisible from other public services provided by the band council. Second, contrary to the requirements of the functional test, the Office failed to correctly identify the federal undertaking at issue, and, in the impugned decision, it incorrectly confused "the authority given to police officers in the exercise of their duties" with "[the power] conferred on band councils for the administration of police services", which led it to erroneously conclude that "[both powers in question] derive from the *Police Act*, which is a provincial statute."

XII. Subsidiary remarks on Indianness

[147] Subsidiarily, if we need to extend the analysis beyond the functional test, the Court's answer remains the same. Consider the governance of an Indigenous police force from the standpoint of the First Nations right of self-government – particularly in the area of the administration of justice – or from the standpoint of a statutory or contractual delegation of power to band councils, the result is the same. Indianness, or if one prefers the core of Indianness, is involved. From a constitutional perspective, due to subsection 91(24) of the

Constitution Act, 1867 and federal paramountcy, the federal labour and pension plan regulations must therefore continue to apply to the Plan.

[148] To date, the doctrine of interjurisdictional immunity has been applied by the courts to protect "vital" or "essential" parts of federal undertakings, which may lead to frustrating the application of provincial occupational health and safety laws (*Canadian Western Bank* at paragraphs 40 and 51; *Bell Canada v. Quebec (Commission de la santé et de la sécurité du travail)*, [1988] 1 SCR 749, 51 DLR (4th) 161). However, the "core" of "Indianness" has never been exhaustively defined by the courts (see *Dick v. La Reine*, [1985] 2 SCR 309 at pp. 320-321, 23 DLR (4th) 33; *Delgamuukw v. British Columbia*, [1997] 3 SCR 1010 at paragraph 181, 153 DLR (4th) 193; *Paul v. British Columbia (Forest Appeals Commission)*, 2003 SCC 55 at paragraph 15). Each situation is a specific case. Here, the *Police Act* provides for the recognition of a particular category of police force based on the individual's racial identity.

[149] In *Canard* at p. 207, Beetz J. noted that by using the word "Indians" in subsection 91(24), "the *Constitution Act, 1867* [formerly known as the *British North America Act, 1867*] creates a racial classification and refers to a racial group for whom it contemplates the possibility of a special treatment" [My emphasis]. The very premise of the tripartite agreements under the *First Nations Policing Policy* is to provide First Nations communities with culturally specific police services that respond to their needs. It should therefore come as no surprise that police services that are self-administered by band councils (this case) are primarily made up of Indigenous police officers.

[150] In fact, the term “native police force” has been enshrined in the Quebec *Police Act* since 1995 (DIVISION IV – NATIVE POLICE FORCES, sections 90 to 93). Whether “race” or “ethnicity” are involved (read the article by Sebastien Grammond, “Disentangling “Race” and Indigenous Status: the Role of Ethnicity” (2008) 33 Queen’s LJ 487), the fact of the matter is that the “Indigenous” nature of the Indigenous police force is what distinguishes it from other municipal, provincial or federal police forces. The establishment of hiring criteria or minimum thresholds based on Indigenous ethnicity by each band council responsible for an Indigenous police force is certainly a vital element of self-governance and touches upon Indianness. Since the band council is solely responsible for selecting candidates and hiring members of the Indigenous police force, it is open to question whether the band council’s ability to give preference to Indigenous candidates can be limited by a provincial law of general application. Not to mention all the other stewardship issues that the application of provincial labour laws could cause for the band council. We must keep in mind that under the agreements, the band council provides the premises and the equipment for the Indigenous police service. As an employer, the band council cannot be subject to both the occupational health and safety rules of the *Canada Labour Code* for part of its administrative staff and Quebec regulations for police officers and special constables who are also employed by the band council. That makes no sense.

[151] Insofar as a provincial law of general application purports to regulate or limit the band council’s stewardship powers as an employer under the *Indian Act* – whether in terms of employment conditions and selection of candidates, collective labour relations, minimum working conditions for band council employees, their occupational health and safety, or the regulation and oversight of their pension plan – an interpretation that is constitutionally

compatible with the exclusive federal jurisdiction provided for in subsection 91(24) of the *Constitution Act, 1867* requires that this provincial law not apply to band councils and employees participating in the Plan. In the view of this Court, any contrary interpretation "would, in effect, nullify any exercise of the constitutional power" (*Gosselin (Tutor of) v. Quebec (Attorney General)*, 2005 SCC 15 at paragraph 14). In this case, the practical solution is therefore to recognize that federal regulations apply to the Plan, which does not preclude sections 90 to 93 of the *Police Act* from also applying.

XIII. Conclusion

[152] For the reasons stated above, the Court allows this application. The impugned decision is set aside. The applicants are entitled to a declaration by the Court that police officers and special constables hired and remunerated by band councils that are members of the Plan are employed in a work, a business or an activity under federal jurisdiction, and that the PBSA and its regulations apply to the Plan, since the employees are employed in "included employment" as defined in the PBSA. Given the outcome, the applicants are entitled to their costs against the respondent.

JUDGMENT in T-1362-16

THE COURT FINDS AND DECLARES:

1. This application for judicial review is allowed;

2. The July 21, 2016 decision rendered by the Office of the Superintendent of Financial Institutions of Canada is set aside;

3. Police officers and special constables hired and remunerated by band councils that are members of the First Nations Public Security Pension Plan [Plan] are employed in a work, undertaking or activity under federal jurisdiction, and the *Pension Benefits Standards Act, 1985*, RSC 1985, c. 32 (2nd Supp.) [PBSA] and its regulations apply to the Plan, since the employees are employed in "included employment" as defined in the PBSA; and

4. The applicants are entitled to their costs against the respondent.

"Luc Martineau"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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STYLE OF CAUSE:	SYLVAIN PICARD v. ATTORNEY GENERAL OF CANADA AND ATTORNEY GENERAL OF QUEBEC
PLACE OF HEARING:	QUÉBEC, QUEBEC
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APPEARANCES:

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