Federal Court Cour fédérale

Date: 20211105

Docket: T-1405-20

Citation: 2021 FC 1173

Ottawa, Ontario, November 5, 2021

PRESENT: Mr. Justice Diner

BETWEEN:

ANISHINAABEG OF KABAPIKOTAWANGAG RESOURCE COUNCIL INC.

Applicant

and

KATHY MACLEOD

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is a judicial review, pursuant to s 18.1 of the *Federal Courts Act*, RSC 1985, c F-7, of a decision by a federal Adjudicator who determined that he had jurisdiction to hear an unjust dismissal complaint, lodged pursuant to s 240 of the *Canada Labour Code*, RSC, 1985 c L-2 [the *Code*].

[2] For the reasons that follow, I find that the Adjudicator erred when he determined that the labour relations of the entity in question, the Anishinaabeg of Kabapikotawangag Resource Council Inc. (AKRC or the Applicant), falls under exclusive federal jurisdiction. As a result, I will grant the application.

[3] Only the Applicant made written and oral submissions to the Court. The Respondent declined to provide submissions or appear at the hearing. The Attorney General of Canada advised the Court early on in the proceedings that it would not intervene in the judicial review.

II. Facts

[4] AKRC is a non-profit tribal council, which provides advice and technical support to five member First Nations (the Members), all located in Northwestern Ontario. The Chiefs of each of the Members sit on the Applicant's Board of Directors.

[5] AKRC provides support services in five main areas – (i) education, (ii) health care, (iii) technical support, (iv) financial management, and (v) advisory services – areas in which the Applicant assists the Members by delivering administration, research, training, negotiation, and advocacy assistance.

[6] Specifically, the Applicant provides assistance tailored for the Members, including funding requests, information on policy and legal developments, financial management advisory services, training on caring for children with Fetal Alcohol Syndrome, and advocacy. It also provides technical advisory services related to government reporting requirements as well as

housing needs, including for insurance compliance and building codes. All of the Applicant's services are provided upon request by the Members. As such, AKRC is limited in terms of the extent of its services.

[7] For instance, some of AKRC's limitations include the fact that it: (i) cannot require any Member to accept or continue with any of its services, (ii) lacks delegate or decision-making authority over any Member, meaning it cannot direct a Member to adopt a policy, nor can it bind a Member to a contract, (iii) does not own or manage land, and (iv) does not own any of the projects it advises on or supports. Rather, AKRC's purpose is to provide advice and support to Members when requested, being fully independent of the First Nations it serves. It has offices on two of its Members' reserve lands and sends its employees to each of the five Members to provide its services. These employees include wellness workers, educational support workers, and financial consultants. It acts akin to an independent consultancy.

[8] The matter under review arose before the Adjudicator due to an unjust dismissal claim filed by the Respondent, Ms. Macleod, who was employed by the Applicant in the position of Director of Operations from April 18, 2017, through January 31, 2019.

[9] On February 13, 2019, the Respondent filed an unjust dismissal complaint (the Complaint) with Employment and Social Development Canada's (ESDC) Labour Program in respect of the dismissal, pursuant to s 240 of the *Code*. An Adjudicator was subsequently appointed.

[10] In March and August of 2020, the Adjudicator held hearings with respect to two preliminary issues raised by the Applicant, namely that (a) the Adjudicator had no jurisdiction to hear the Complaint because the Applicant's labour relations fell within provincial jurisdiction, and (b) the Respondent was a manager, meaning her claim fell outside the jurisdiction of the *Code* pursuant to s 167(3).

III. Decision Under Review

[11] In a decision dated October 23, 2020 (the Decision), the Adjudicator determined the two preliminary issues by finding that (a) the Applicant's labour relations fell within federal jurisdiction, and (b) since the Respondent was employed as a manager, he lacked jurisdiction to consider the Complaint on its merits. As a result, the Complaint was dismissed. The Applicant now seeks judicial review only of jurisdictional issue (a).

[12] The Adjudicator, after reviewing the evidence of the Applicant's activities, including the testimony of the Chief of one of the Members, stated that he was "unable to find any factors pointing towards provincial jurisdiction", and that "there is no presumption of provincial jurisdiction and insufficient evidence to establish it" (at para 14 of the Decision). Furthermore, he noted that "AKRC's existence, purpose and objects reads like an amplification and explanation of Section 91(24)" of the *Constitution Act, 1867* (UK), 30 & 31 Victoria, c 3 [*Constitution Act*].

[13] The Adjudicator found that AKRC's purpose appears to touch on the "core of Indianness". He wrote at paragraphs 19-20:

> AKRC's purpose appears to touch on the "core of Indianness" and fall within Federal jurisdiction, touch on the core aspects of the "people" conducted by Federal delegated authority. There was a paucity of evidence to establish any undertakings or functions contradicting this, or, to establish that ordinary activities of the Agency did not touch on issues, Indian status/rights as expressed in the objectives above.
>
> There is insufficient evidence to establish the nature of AKRC's operation is anything but Federal or to displace the Federal competence over Indians in Section 91(24) of the Constitution Act. In the establishment of the entity AKRC, indications are an organization established by a number of Indian Bands, for Indian Bands, presumably to assist them and the lands reserved to them under legislation and by their Treaties, presumably using funds received from the Federal Government to assist those Indians.

IV. Analysis

[14] On judicial review, the Court must examine the Adjudicator's decision with respect to the appropriate head of power (federal or provincial) on a standard of correctness (*Attorney General v Northern Inter-Tribal Health Authority Inc*, 2020 FCA 63 [*Northern Inter-Tribal Health*] at paras 12-13, citing *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 53-55, 129-132; see also *Southeast Collegiate Inc v Larocque*, 2020 FC 820 [*Southeast Collegiate*] at paras 22-24). The correctness standard requires the Court to undertake its own reasoning to arrive at the correct result.

[15] The leading Supreme Court of Canada (SCC) authority in this area, *NIL/TU,O Child and Family Services Society v BC Government and Service Employees' Union*, 2010 SCC 45 [*NIL/TU,O*], starts with the presumption that labour relations fall within the provincial domain. However, that presumption can be overcome by a narrow exception if the entity falls within the

ambit of the *Code* as a "federal work, undertaking, or business" (*NIL/TU,O* at paras 11-12; legislative definition at s 2 of the *Code* in Annex A).

[16] In order to fit into this narrow exception, a two-part test must be satisfied. First, one must apply the "functional test", to determine whether the normal or habitual activities of the entity are federal (*NIL/TU,O* at para 14). Only where the first part of the test proves inconclusive does the second part of the test apply, which consists of determining whether provincial regulation of the entity's labour relations would impair the core of a federal power (*NIL/TU,O* at paras 20-22; see also *Quebec (Attorney General) v Picard*, 2020 FCA 74 [*Picard*] at para 26; *Fox Lake Cree Nation v Anderson*, 2013 FC 1276 [*Fox Lake*] at para 27; *Southeast Collegiate* at para 49).

[17] Here, the first (functional) element of the test is determinative – the organization's role in delivering advisory services in education, health, technical services, economic development, and financial management to its Members are not activities that bring the undertaking within the federal ambit. The Applicant's Aboriginal character, its receipt of federal funding, or the fact that it serves exclusively First Nation communities, do not necessarily bring the organization within the "federal undertaking" exemption.

[18] In *NIL/TU,O*, the undertaking in question was a child welfare organization serving Aboriginal communities. The SCC wrote (at para 39) that:

> the fact that it serves these communities cannot take away from its essential character as a child welfare agency that is in all respects regulated by the province. Neither the cultural identity of NIL/TU,O's clients and employees, nor its mandate to provide culturally appropriate services to Aboriginal clients, displaces the operating presumption that labour relations are provincially

> regulated… This attempt to provide meaningful services to a particular community, however, cannot oust primary provincial jurisdiction over the service providers' labour relations. NIL/TU,O's function is unquestionably a provincial one.

(See also *Picard* at paras 31, 37-39; *Northern Inter-Tribal Health* at paras 23-24; *Nishnawbe-Aski Police Service Board v Public Service Alliance of Canada*, 2015 FCA 211 [*Nishnawbe-Aski*] at paras 38-39, 70-71).

[19] Similarly, here, the Applicant's functions are clearly provincial in scope, particularly when considered in light of various analogous decisions. I refer in particular to similar advisory services provided by the Applicant in *Treaty 8 Tribal Assn v Barley*, 2016 FC 1090 [*Treaty 8*] at para 24, and the case that it relied on, *Fox Lake*.

[20] The Adjudicator made much of the fact that the Applicant receives federal funding. First, I note the submissions of counsel that the Applicant only received part of its funding from the federal government (through the testimony it received, at page 8 of the Decision).

[21] Second, and more importantly, *NIL/TU,O* made it clear that an entity's receipt of federal funding is only relevant to the functional test if it rises to a level of federal involvement in the applicant's operations (at para 40). Here, there is no evidence or suggestion in the record that the federal funding agreements with the Applicant involve or require any federal operational involvement.

[22] This functional test should have been sufficient to find that the Applicant fell within provincial labour law. Had the Adjudicator properly applied the facts to the law, the analysis would have ended there. Instead, the Adjudicator turned immediately, at paragraphs 19 and 20, to addressing Indian-ness and the core of the s 91(24) power. Again, I find that he erred in his unnecessary and incorrect application of the second part of the *NIL/TU,O* test.

[23] In *Treaty 8*, Justice Danièle Tremblay-Lamer relied on the earlier decision this Court made in *Fox Lake* to point out that “Subsection 91(24) of the Constitution Act is concerned with the ‘core of Indian-ness’” (para 21). She reproduced paragraph 43 of *Fox Lake*, where Justice Russel Zinn summarized what the jurisprudence considered part of the core of Indian-ness, and thus rights which cannot be impaired by provincial jurisdiction over labour relations:

> Relationships within Indian families and reserve communities; rights that are necessarily incidental to Indian status such as registrability, membership in a band, the right to participate in elections of Chiefs and Band Councils, and reserve privileges; the right to possession of lands on a reserve and the division of family property on reserve lands; sustenance hunting pursuant to Aboriginal and treaty rights; the right to advance a claim for the existence or extent of Aboriginal rights or title in respect of a contested resource or lands; and the operation of constitutional and federal rules respecting Aboriginal rights.

[24] As the concurring decision of Chief Justice McLachlin and Justice Fish clarified in *NIL/TU,O*, it is not enough for the undertaking to touch on these core powers of s 91(24). Rather, only if the “normal and habitual activities relate directly to what makes Indians federal persons by virtue of their status or rights can provincial labour legislation be ousted, provided the impact of the provincial legislation would be to impair this essentially federal undertaking” (at para 74). As Justice Zinn put it, whether the undertaking impairs those core rights is not the proper

analysis: "the relevant question is whether provincial labour legislation would impair the exercise of the treaty rights" (*Fox Lake* at para 45; emphasis in original).

[25] Here, there was never any suggestion or consideration of how provincial labour legislation applicable to AKRC could impair the exercise of the core powers of s 91(24).

[26] Indeed, *Fox Lake* and *Treaty 8* both concerned undertakings that provide similar services to those provided by the Applicant, and in both cases, the Court quashed adjudicator's findings of federal jurisdiction.

[27] In *Treaty 8*, as with the services offered by the Applicant in the present case, the organization's services related to economic development, education, and culture of the Member First Nations, including in administrative, technical, research, and advocacy assistance. These activities were found to fall within the provincial ambit. Moreover, as with the current case, the community organization in *Treaty 8* was not directly involved in policy development or the implementation of policies at the community level. There was no indication that the member First Nations delegated any such powers.

[28] The same was true of *Fox Lake*, in which the Fox Lake Cree Nation set up a negotiations office to negotiate with the hydro authorities, including matters relating to business opportunities; training and employment; project development; environment and resources; adverse effects; and commercial terms. Once again, like *Treaty 8*, the Court reversed the Adjudicator's finding that the negotiations office was a federal entity.

[29] What was common to both *Fox Lake* and *Treaty 8*, just as in this case, is that the First Nations remained responsible for developing their own policy and maintained full autonomy and decision-making powers (*Treaty 8* at para 22). Justice Tremblay-Lamer found that, had "the adjudicator proceeded to do the functional analysis, she would have conclusively concluded that the applicant's activities did not fall under subsection 91(24) and declined jurisdiction".

[30] Similar to *Fox Lake*, and *Treaty 8*¸ here too the Adjudicator abdicated his requirement to apply the law as established by the SCC in *NIL/TU,O*. Not only did the Adjudicator fail to apply, or even recognize, the presumption of provincial jurisdiction over labour relations, he also declined to apply the two-part test, which begins with the functional element of examining the nature, operations, and habitual activities of the Applicant.

[31] The Adjudicator thus erred by failing to apply the legal test, and instead presuming that activities involving First Nations communities fell automatically to federal jurisdiction. In doing so, the Adjudicator effectively reversed the law, first by overlooking the provincial presumption, then by failing to apply the functional test, and finally by finding that the core services infringed on s 91(24), instead of considering whether provincial labour legislation would impair the exercise of those rights. The Adjudicator began his analysis at paragraphs 26-29 of his Decision, providing his erroneous conception of the law, as follows:

> The overall intent of Section 91(24) seems to be an all encompassing directive to supervise Indians not just supervising them doing certain specific activities.
>
> There has been an attempt, in many Decisions, by organizations to designate that Indians doing this, or that, particular activity, are not Indians anymore.

> Their activity strips them of their Indianness because they behave or carry on a specific activity they are no longer Indians.
>
> To make an extreme analogy, an Indian playing across would presumably still be considered an Indian whereas, an Indian playing hockey would not be.

[32] The Adjudicator went on to observe that, "Section 91(24) is still in effect and to have any meaning it must mean 'some Indians' are covered by it. Unless the organization removes itself by the use of tests such as the 'functional test' or other devices, the Bands concerns are all covered by Section 91(24)", and that, presumably, that provision "was enacted to apply to and for the benefit of, all Canadian Indians" (Decision at paras 32-33).

[33] Indeed, the Adjudicator placed undue emphasis on the Applicant's Indigenous character when he determined the Applicant's "policies and objectives fall with the Federal head of power under Section 91(24) of the Constitution" (Decision at para 13). Clearly, he was primarily concerned with who benefitted from the funds, rather than the habitual activities and operations of the entity concerned.

[34] The Adjudicator also provided some editorial comments on what he deemed to be the inappropriateness of "imposing legislatively constructed rules, regulations and definitions to decide 'the core of Indian fess [*sic*]'", which he qualified as "insulting and a denial of their aboriginal origins and existence" (Decision at para 50).

[35] Having himself skipped to the second part of the analysis without addressing the functional test, the Adjudicator employed the approach adopted by the minority in *NIL/TU,O* at

paragraphs 56-61, whereby the central and only question would have been whether the operation falls within the "protected core of Indianness" under s 91(24).

[36] Indeed, the Adjudicator appears to have his own views on the appropriate means of determining jurisdiction over Aboriginal labour matters. He would not be the first, for example, to comment on the special approach that applies to jurisdictional questions in labour law as compared to other areas (see *Nishnawbe-Aski* at paras 47-48, referencing *Canadian Western Bank v Alberta*, 2007 SCC 22), or on the potential for this approach to create jurisdictional confusion in aboriginal labour matters (see Maggie Wente "NIL/TU,O Child and Family Services Society v. B.C. Government and Service Employees' Union and Communication Energy and Paperworkers of Canada v. Native Child and Family Services of Toronto" (2011) 10 Indigenous LJ 142-144). The area has also been the subject of recent academic commentary on the absence of space the current approach leaves for consideration of Aboriginal regulation of labour (see, for instance, Robert Hamilton, "The *United Nations Declaration on the Rights of Indigenous Peoples* and the Division of Powers: Considering Federal and Provincial Authority in Implementation" (2021) 53 UBC L Rev 1114-1120; Craig Mazerolle, "Crafting an Aboriginal Labour Law" (2016) 74 UT Fac L Rev 19).

[37] Be that as it may, the Adjudicator is unquestionably bound, as am I, by clear and consistent prevailing jurisprudence, to resolve this matter by applying the test set out by the majority in *NIL/TU,O* and many times since by the Federal Court and the Federal Court of Appeal, in the cases referenced above (*Fox Lake* and *Treaty 8*; see also *Nishnawbe-Aski*, *Northern Inter-Tribal Health*, *Picard*), as well as more recently in *Southeast Collegiate*. There,

Justice Susan Elliott set aside similar flawed rationale from the same Adjudicator who decided this case. She wrote at paragraphs 49 and 50:

> The Adjudicator erroneously found, contrary to *NIL/TU,O*, that the functional test was not required because jurisdiction was predetermined by section 91(24) of the [*Constitution Act*]. In doing so he then found that no presumption was required given the provisions in section 91(24) and section 2 of the *CLC*. In the process the Adjudicator failed to address paragraph 20 of *NIL/TU,O* which directly contradicts his finding.
>
>> [20] There is no reason why, as a matter of principle, the jurisdiction of an entity's labour relations should be approached differently when s. 91(24) is at issue. The fundamental nature of the inquiry is — and should be — the same as for any other head of power. It is an inquiry with two distinct steps, the first being the functional test. A court should proceed to the second step only when this first test is inconclusive. If it is, the question is not whether the entity's operations lie at the "core" of the federal head of power; it is whether the provincial regulation of that entity's labour relations would impair the "core" of that head of power. Collapsing the two steps into a single inquiry, as the trial judge and the Court of Appeal did, and as the Chief Justice and Fish J. do in their concurring reasons, transforms the traditional labour relations test into a different test: the one used for determining whether a statute is "inapplicable" under the traditional interjurisdictional immunity doctrine. The two-step inquiry preserves the integrity of the unique labour relations test; the single-step approach extinguishes it.
>
> Failing to apply the functional test set out in *NIL/TU,O* is an error in law. It has been found to be sufficient, on its own, to determine in favour of an Applicant a judicial review such as this: *Treaty 8* at paragraph 23

[38] The same comments apply once again here, and the Adjudicator's conception of federal jurisdiction cannot stand. Indeed, as the Applicant pointed out to the Court, numerous fellow

federal Adjudicators have found that provincial jurisdiction applies to similarly situated organizations (see, for instance: *Goulais and Assembly of First Nations (Adjudicator's Jurisdiction Over AFN), Re*, 2019 CarswellNat 4791; *Gallagher and Native Women's Assn of Canada, Re*, 2017 CarswellNat 4091, [2017] CLAD No 178; *Ross and Amos Okemow Memorial Education Authority Inc, Re*, 2019 CarswellNat 1020).

[39] Finally, at the close of the hearing, the Court pointed out two cases in which federal jurisdiction over labour relations was found to apply to aboriginal organizations, and invited submissions on those authorities. I agree with the Applicant that both involved distinguishable contexts.

[40] First, in *Conseil de la Nation Innu Matimekush-Lac John v Association of Employees of Northern Quebec (CSQ)*, 2017 FCA 212, the facts involved the certification of the bargaining unit of teaching staff of a school owned and operated by a First Nation. The school was established pursuant to provisions of the *Indian Act*, RSC 1985, c I-5, governing the creation and operation of schools on reserve. Other than a voluntary agreement to follow the provincial curriculum, the activities all related to a Federal power. As a result, the Federal Court of Appeal found that the Canada Industrial Relations board had the required federal jurisdiction to decide the certification application.

[41] Second, in *Canada (Attorney General) v Munsee-Delaware Nation*, 2015 FC 366, the Band itself was the employer, and the employee worked in their administration offices. This situation is again distinguishable from the separate third party entity in the present matter (and in

NIL/TU,O, *Nishnawbe-Aski*, *Fox Lake*, *Treaty 8*, and *Southeast Collegiate*). In all these cases, just as in the present case, the habitual activities and services provided were clearly provincial, not federal in scope.

V. Style of Cause

[42] As was the case in *Northern Inter-Tribal Health*, at paragraphs 36 to 38, there is some reason to question whether, pursuant to Rule 303 of the *Federal Courts Rules*, SOR/98-106 [the *Rules*], Kathy Macleod was the proper respondent in this matter. Given that her claim was dismissed for lack of jurisdiction, it is questionable whether the outcome of this review would have any direct impact on her, and whether the proper Respondent was actually the Attorney General of Canada.

[43] The Applicant did raise to my attention that the parties have ongoing litigation in the Ontario Superior Court, in which, I note, certain provisions of the *Code* have been invoked.

[44] Having not heard any arguments from the Respondent, the Attorney General of Canada, or from the Applicant on this specific issue, and in case this decision affects the parallel litigation in some way, I will leave the style of cause unchanged.

VI. Costs

[45] In light of all the circumstances, including the fact that Respondent did not oppose and thus reduced the length of these proceedings, and taking into consideration other relevant factors

pursuant to Rule 400(3) of the *Rules*, and noting the fact that the Respondent is now pursuing her claim for unjust dismissal in the Ontario Superior Court, no Costs will issue in this judicial review.

VII. Conclusion

[46] The Adjudicator acted contrary to law in the jurisdictional component of his Decision. The Court will therefore issue an order for certiorari quashing his Decision as it relates to federal jurisdiction. The Applicant's labour relations fall within provincial jurisdiction. For these and all other reasons outlined above, the judicial review is granted.

JUDGMENT in T-1405-20

THIS COURT'S JUDGMENT is that:

1. The application is allowed; the Adjudicator's Decision is set aside.

2. The employment relationship of the Applicant and the Respondent was not governed by the *Canada Labour Code*, but rather falls to the provincial domain.

3. No costs will issue.

"Alan S. Diner"

Judge

ANNEX A

Canada Labour Code, RSC 1985, c L-2 excerpt:

Definitions	**Définitions**
2 In this Act,	**2** Les définitions qui suivent s’appliquent à la présente loi.
…	[…]
federal work, undertaking or business means any work, undertaking or business that is within the legislative authority of Parliament, including, without restricting the generality of the foregoing,	entreprises fédérales Les installations, ouvrages, entreprises ou secteurs d’activité qui relèvent de la compétence législative du Parlement, notamment :
(a) a work, undertaking or business operated or carried on for or in connection with navigation and shipping, whether inland or maritime, including the operation of ships and transportation by ship anywhere in Canada,	**a)** ceux qui se rapportent à la navigation et aux transports par eau, entre autres à ce qui touche l’exploitation de navires et le transport par navire partout au Canada;
(b) a railway, canal, telegraph or other work or undertaking connecting any province with any other province, or extending beyond the limits of a province,	**b)** les installations ou ouvrages, entre autres, chemins de fer, canaux ou liaisons télégraphiques, reliant une province à une ou plusieurs autres, ou débordant les limites d’une province, et les entreprises correspondantes;
(c) a line of ships connecting a province with any other province, or extending beyond the limits of a province,	**c)** les lignes de transport par bateaux à vapeur ou autres navires, reliant une province à une ou plusieurs autres, ou débordant les limites d’une province;
(d) a ferry between any province and any other province or between any	**d)** les passages par eaux entre deux provinces ou

province and any country other than Canada,	entre une province et un pays étranger;
(e) aerodromes, aircraft or a line of air transportation,	**e)** les aéroports, aéronefs ou lignes de transport aérien;
(f) a radio broadcasting station,	**f)** les stations de radiodiffusion;
(g) a bank or an authorized foreign bank within the meaning of section 2 of the Bank Act,	**g)** les banques et les banques étrangères autorisées, au sens de l'article 2 de la Loi sur les banques;
(h) a work or undertaking that, although wholly situated within a province, is before or after its execution declared by Parliament to be for the general advantage of Canada or for the advantage of two or more of the provinces,	**h)** les ouvrages ou entreprises qui, bien qu'entièrement situés dans une province, sont, avant ou après leur réalisation, déclarés par le Parlement être à l'avantage général du Canada ou de plusieurs provinces;
(i) a work, undertaking or business outside the exclusive legislative authority of the legislatures of the provinces, and	**i)** les installations, ouvrages, entreprises ou secteurs d'activité ne ressortissant pas au pouvoir législatif exclusif des législatures provinciales;
(j) a work, undertaking or activity in respect of which federal laws within the meaning of section 2 of the Oceans Act apply pursuant to section 20 of that Act and any regulations made pursuant to paragraph 26(1)(k) of that Act; (*entreprises fédérales*)	**j)** les entreprises auxquelles les lois fédérales, au sens de l'article 2 de la Loi sur les océans, s'appliquent en vertu de l'article 20 de cette loi et des règlements d'application de l'alinéa 26(1)k) de la même loi. (*federal work, undertaking or business*)

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

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