

Federal Court



Cour fédérale

Date: 20241206

Docket: T-1869-23

Citation: 2024 FC 1981

Ottawa, Ontario, December 6, 2024

PRESENT: The Honourable Madam Justice Turley

BETWEEN:

CONFEDERATION COLLEGE

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The issue for determination is whether the Applicant, Confederation College's Aviation Centre for Excellence [ACE], is subject to federal labour jurisdiction under the *Canada Labour Code*, RSC 1985, c L-2 [Code]. In a Jurisdiction Determination dated May 11, 2023, a Health and Safety Officer [Officer] from Employment and Social Development Canada concluded that, although the Applicant is an educational institution subject to provincial labour jurisdiction, the

ACE is a divisible entity from Confederation College. The Officer found that the ACE is engaged in the operation of aircraft and aircraft maintenance and, as such, falls under federal labour jurisdiction pursuant to paragraph 2(e) of the *Code*.

[2] I am allowing the application. In my view, the Officer erred in assessing whether the ACE is a federal work, business or undertaking for labour relations purposes. More particularly, the Officer failed to apply the well-established functional test to determine the normal and habitual activities of the ACE as an ongoing concern. The presumption of provincial jurisdiction is only displaced where the essential operational nature of the entity qualifies it as a federal work, business or undertaking. Considering the relevant factors, I find that the essential nature of the ACE is that of an educational program within Confederation College. The fact that it provides education related to flying and aircraft maintenance does not change its essential character for labour relations purposes.

II. Background

A. *The ACE*

[3] Confederation College of Applied Arts and Technology is a college established pursuant to the *Ontario Colleges of Applied Arts and Technology Act*, 2002, SO 2002, c 8, Schedule F [Act]. In accordance with subsection 2(2) of the *Act*, it offers “career-oriented, post-secondary education and training to assist individuals in finding and keeping employment, to meet the needs of employers and the changing work environment and to support the economic and social development of their local and diverse communities.” Confederation College has campuses across

northwestern Ontario, with its main campus in Thunder Bay, registering several thousand students each year.

[4] Confederation College's School of Engineering Technology, Trades and Aviation offers two full-time diploma programs through the ACE: (i) the Aviation Flight Management program; and (ii) the Aviation Technician – Aircraft Maintenance program. These two programs operate out of the ACE's campus located at the Thunder Bay airport. The ACE campus includes two hangars, an apron and taxiway to the airport's runway, shops, classrooms, and labs.

[5] The ACE has no separate legal or corporate identity from that of Confederation College. The Associate Dean – Aviation reports to the Dean of the School of Engineering Technology, Trades and Aviation, who reports to Confederation College's President and ultimately, its Board of Directors. The ACE's budget and departments (for example payroll, human resources) are shared with other Confederation College campuses.

[6] Of Confederation College's approximately 600 employees, 30 are based out of the ACE. All employees form the same union bargaining unit. Of the ACE employees, nine are engaged in aircraft operation more than five percent of the time, while three are engaged in aircraft maintenance more than five percent of the time. Some Confederation College employees teach courses unrelated to aviation at the ACE, while ACE employees rarely work on other campuses.

[7] The ACE has 18 aircraft, two flight simulators, as well as several non-flying aircraft used for the Aircraft Maintenance Program. The ACE does not engage in any form of transportation.

Students must complete approximately 180 flight hours, roughly half of which with ACE instructors onboard. The ACE holds three certifications through Transport Canada: Approved Maintenance Organization, Flight Training Unit, and an Approved Training Organization.

B. *The Officer's Jurisdiction Determination*

[8] The Officer's investigation was not initiated due to a complaint or an occurrence, but rather was conducted proactively. There was no prior labour jurisdiction investigation on record for the Applicant Confederation College.

[9] The Officer determined that the essential nature of Confederation College is education, which clearly falls under provincial labour jurisdiction. However, he found that the ACE is a very small part of Confederation College's overall operation. The Officer determined that, moreover, aircraft are subject to federal jurisdiction pursuant to paragraph 2(e) of the *Code*. The Officer concluded that the ACE performs two distinct activities: education and the operation of aircraft. However, he held that "the aircraft are essential to the core of ACE, as without aircraft there would be no flight school": Case Summary Report – Jurisdiction dated March 24, 2023 at 4 [Officer's Report].

[10] The Officer focused his inquiry on whether the ACE is a "discrete unit that can be characterized separate from the rest of the college's operations": Officer's Report at 5. After examining various factors relevant to the ACE's daily operations, the Officer concluded that the ACE "appears to be a separate division": Officer's Report at 5.

[11] Ultimately, while finding that the division between the ACE’s provincial and federal work is “not crystal-clear,” the Officer determined that “the ACE is divisible from the provincial entity for the purposes of labour legislation”: Officer’s Report at 6. As such, he found that the ACE is subject to federal jurisdiction and governed by paragraph 2(e) of the *Code*.

III. Issue and Standard of Review

[12] The sole question for determination is whether the ACE is subject to federal or provincial labour legislation.

[13] The presumptive standard of review for administrative decisions is that of reasonableness: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 16 [*Vavilov*]. However, that presumption is rebutted for certain types of questions, including constitutional questions, where the rule of law requires courts to apply the standard of correctness: *Vavilov* at paras 53, 55.

[14] The Federal Court of Appeal has held that the question of whether an entity is regulated by provincial or federal labour law “falls into the category of ‘constitutional questions’”: *Canada (Attorney General) v Northern Inter-Tribal Health Authority Inc*, 2020 FCA 63 at para 13; see also: *Quebec (Attorney General) v Picard*, 2020 FCA 74 at paras 20–21 [*Picard*]; *Anishinaabeg of Kabapikotawangag Resource Council Inc v Macleod*, 2021 FC 1173 at para 14 [*Anishinaabeg of Kabapikotawangag*]; *Southeast Collegiate Inc v Laroque*, 2020 FC 820 at paras 23–24. In performing correctness review, “the reviewing court is ultimately empowered to come to its own conclusions on the question”: *Vavilov* at para 54.

IV. Analysis

A. *Determining jurisdiction over labour relations*

[15] The starting point is the presumption that labour relations is provincially regulated. While labour relations is not expressly mentioned in sections 91 or 92 of the *Constitution Act, 1867*, it is accepted that labour law falls primarily under subsections 92(13) “Property and Civil Rights in the Province” and 92(16) “Generally all Matters of a merely local or private Nature in the Province”: *Picard* at para 23.

[16] However, the presumption of provincial regulation can, exceptionally, be rebutted in narrow cases where the entity in question qualifies as a federal work, undertaking or business: *Tessier Ltée v Quebec (Commission de la santé et de la sécurité du travail)*, 2012 SCC 23 at paras 11–12 [*Tessier*]; *NIL/TU, O Child and Family Services Society v BC Government and Service Employees’ Union*, 2010 SCC 45 at para 11 [*NIL/TU, O*]; *Consolidated Fastfrate Inc v Western Canada Council of Teamsters*, 2009 SCC 53 at paras 27–28; *Northern Telecom Ltd v Communications Workers of Canada*, 1979 CanLII 3 (SCC), [1980] 1 SCR 115 at 132.

[17] To determine whether this narrow exception applies, courts apply a two-part inquiry. The first part of this inquiry is the “functional test”. This requires examining the entity’s “nature, habitual activities and daily operations” to assess whether it constitutes a federal undertaking: *NIL/TU, O* at para 3. Under the functional test, federal labour jurisdiction can be established in two ways: (i) direct jurisdiction; or (ii) derivative jurisdiction. Direct jurisdiction is established where the entity is itself within the legislative authority of Parliament. Derivative jurisdiction is

established where the entity is integral to another federally regulated undertaking. Under either prong of the test, the focus is on the undertaking's essential operational nature: *Tessier* at paras 17–18; *United Transportation Union v Central Western Railway Corp*, 1990 CanLII 30 (SCC), [1990] 3 SCR 1112, at 1124–25; *Tokmakjian Inc v Achorn*, 2017 FC 1057 at paras 51–54 [*Tokmakjian*].

[18] If the functional test is inconclusive, then courts move to the second part of the inquiry. At this stage, courts must determine whether provincial regulation of the entity's labour relations would impair the “core” of the federal head of power: *NIL/TU,O* at para 18; *Picard* at para 26; *Anishinaabeg of Kabapikotawangag* at para 16; *Tokmakjian* at para 50.

B. *The Officer erred in law in failing to apply the functional test*

[19] At issue is whether the ACE is subject to provincial jurisdiction because education falls under section 93 of the *Constitution Act, 1867*, or whether it is subject to federal jurisdiction pursuant to the peace, order, and good government clause of section 91 of the *Constitution Act, 1867*: *Johannesson v Municipality of West St Paul*, 1951 CanLII 55 (SCC), [1952] 1 SCR 292. Furthermore, paragraph 2(e) of the *Code* provides that a federal work, undertaking or business includes “aerodromes, aircraft or a line of air transportation”.

[20] Applying the two-part analysis cited above, the only consideration is whether the ACE is directly subject to federal jurisdiction under the functional test. The parties agree that derivative jurisdiction is not applicable in this case. In addition, if the Court finds that the functional test is inconclusive, the Respondent concedes that provincial regulation of the ACE's labour relations

would not impair the core of the federal head of power. Consequently, if the functional test is inconclusive in this case, the presumption of provincial jurisdiction applies.

[21] The Officer did not address, or even acknowledge the functional test for assessing whether an entity is subject to federal or provincial labour jurisdiction. Applying the functional test, I find that the ACE is a provincial undertaking for the purposes of labour relations for two main reasons. First, the essential nature of the ACE is to provide post-secondary education. Second, the ACE's daily operations are fully integrated with that of Confederation College, which is under provincial jurisdiction.

(1) Education is the essential nature of the ACE's activities and operations

[22] Under the functional test, it is necessary to determine the "essential nature" of an entity's operation or "what it essentially does": *NIL/TU, O* at para 45. Here, the Officer determined that the essential nature of Confederation College is education. However, with respect to the ACE, he concluded that it engages in "two distinguishable activities: education and the operation of aircraft": Officer's Report at 5. In my view, this is an error. These are not two distinct activities. Rather, the aircraft are only operated for educational purposes. The ACE teaches without using aircraft, but it does not use aircraft without teaching. As the Officer recognized, the ACE's aircraft are not used for charter flights nor any other form of transportation.

[23] I agree with the Officer's statement that "the aircraft are essential to the core of ACE, as without the aircraft there would be no flight school": Officer's Report at 4. Indeed, education is the core of the ACE's operations and activities. However, the Officer's analysis fails to appreciate

that the aircraft are simply among the teaching tools the ACE uses in its two post-secondary diploma programs, as part of Confederation College's mandate as a public college in Ontario. The tools the ACE uses to train its students do not change the essential nature of the ACE's operations: education.

[24] The Applicant argues that activities performed by the ACE that could be considered "federal" in nature do not occur regularly and habitually: Applicant's Memorandum of Fact and Law at para 52. The Applicant relies on statistics about the "insignificant" amount of time the ACE's employees engage in aircraft flight or maintenance activities. They cite *Tessier* for the principle that work representing an insignificant part of employees' time will not render federal an undertaking that is otherwise provincial. I agree with the Respondent that the Applicant's reliance on this particular statement in *Tessier* is misplaced. The statement was made in the context of the functional test's derivative jurisdiction prong. However, while not determinative, information about the amount of time spent on an activity may be a relevant factor in determining an entity's essential nature, especially where the entity may be engaged in different activities.

[25] For these reasons, I find that the essential nature of the ACE's activities and operations is education, a provincially regulated activity.

(2) The ACE is functionally integrated with Confederation College

[26] In assessing whether an entity is itself a federal undertaking under the functional test's direct jurisdiction prong, courts have examined whether the entity is "functionally integrated" and subject to "common management, control and direction" with a federal undertaking: *Westcoast*

Energy Inc v Canada (National Energy Board), 1998 CanLII 813 (SCC), [1998] 1 SCR 322 at para 65 [*Westcoast*]; *Tokmakjian* at paras 78, 121. In the circumstances of this case, the Officer undertook the exercise in reverse given that Confederation College is provincially regulated. He examined whether the ACE is a discrete unit that could be characterized separately from Confederation College, a provincial undertaking: Officer's Report at 5.

[27] Functional integration is a relevant factor in the overall inquiry about the nature, habitual activities and daily operations of the entity in question. It is not, however, determinative in and of itself, nor is it a threshold issue. It is simply another indication of whether the entity is federal or provincial. Indeed, an entity need not be considered separate in order to be subject to different labour jurisdictions. One employer may have employees who are subject to provincial jurisdiction, and others who are subject to federal jurisdiction: *NIL/TU,O* at para 22; *Tessier* at para 49; *Fox Lake Cree Nation v Anderson*, 2013 FC 1276 at para 25.

[28] In this case, however, the Officer's substantive reasoning is largely devoted to assessing whether the ACE is "divisible from the provincial entity": Officer's Report at 5. After examining various factors, the Officer concluded that the ACE "appears to be a separate division":

The ACE facility is separate from the other campuses and it is strictly dedicated to aviation related programs. In addition, this facility is operated by a manager and employees, all of which are strictly engaged in programs related to aviation. The fact that the Dean, President, and Board is responsible for other aspects of the college, or that finances, policies, and procedures are shared amongst the ACE and college, does not hold as much weight. Although there is some correlation amongst divisions, the ACE appears to be a separate division.

Officer's Report at p 5.

[29] I do not agree with the Officer's analysis. The following are strong indicia that the ACE is functionally integrated with Confederation College:

- The ACE does not have a separate legal name nor corporate registry from Confederation College;
- The ACE is one of Confederation College's campuses/buildings;
- While generally the employees at the ACE do not perform work at the other campuses, there is overlap as some employees from Confederation College teach non-core courses at the ACE;
- The ACE employees are represented by the same union as Confederation College's other employees, pursuant to provincial legislation;
- Apart from one Associate Dean located full-time at the ACE, the ACE is managed by Confederation College's leadership team;
- The ACE's aircraft are owned by and registered to Confederation College and only used for education;
- The ACE falls under a single budget along with all programs at Confederation College; and
- The same payroll, human resources, and safety policies and procedures apply to all Confederation College programs.

[30] The jurisprudence is clear that an entity's "commercial costume" does not determine whether it falls under provincial or federal jurisdiction for labour relations purposes: *Westcoast* at para 48; *Sawyer v Transcanada Pipeline Limited*, 2017 FCA 159 at para 68 [*Sawyer*]; *Tokmakjian*

at para 100. Rather, the inquiry is concerned with the actual character of the entity as an ongoing undertaking: *Sawyer* at para 69. In that vein, the above-noted indicia are not merely “legal niceties” but rather clear evidence of the management and control of the ACE by Confederation College.

[31] The Officer erred in placing undue emphasis on the fact that the ACE operates out of a separate campus, with a separate front line manager and employees. He found that these factors “outweigh” the indicia of functional integration: shared assets, finances, policies and procedures, and senior management: Officer’s Report at 5. This conclusion fails to appreciate the context of the case. The ACE is an educational program within the larger institution. Confederation College’s different programs are subject to common direction and management. Given that the two aviation programs offered at the ACE are highly specialized and technical, it makes sense that they require a specialized campus, employees, and tools. This does not detract from the fact that the ACE, like Confederation College’s other programs, is engaged in the common purpose of providing post-secondary education.

[32] Based on the foregoing, I find that the ACE is an integral part of Confederation College’s mandate as a post-secondary educational institution.

(3) The presumption of provincial regulation of labour relations is not rebutted

[33] The above-noted errors suffice to set aside the Officer’s decision and find that the ACE is subject to provincial labour jurisdiction. However, another element of the Officer’s Jurisdiction Determination merits commentary for future cases: the Officer’s equivocal conclusions about the essential nature of the ACE’s operations and its functional integration with Confederation College

are incompatible with the presumption that labour relations is provincially regulated. As the jurisprudence makes clear, the exception of federal regulation is narrow.

[34] The Officer's reasoning demonstrates he was not certain about the essential nature of the ACE's operations, nor about its integration with Confederation College. Concerning the ACE's operations, he found that "it appears we have at least two distinguishable activities: education and the operation of aircraft" [emphasis added]: Officer's Report at 5.

[35] With respect to the ACE's functional integration with Confederation College, the Officer's language was similarly tentative, finding that:

- "Although there is some correlation amongst divisions, the ACE appears to be a separate division" [emphasis added]: Officer's Report at 5; and
- "Although the division between the provincial and federal work is not crystal-clear, it appears the ACE is a separate campus, with separate employees, and a front line manager that is directly responsible for the ACE" [emphasis added]: Officer's Report at 5.

[36] When the answer is not "crystal-clear", as the Officer found here, there is no justification for "imposing exceptional federal jurisdiction for purposes of labour relations": *Tessier* at para 47. The Officer's equivocal conclusions are insufficient to rebut the presumption that the ACE is subject to provincial jurisdiction.

V. Conclusion

[37] In my view, the Officer erred in law in determining that the ACE is subject to federal labour jurisdiction. Applying the functional test, I find that the nature, habitual activities, and daily operations of the ACE are clearly education. The fact that it uses aircraft to train its students does not alter its essential nature as an educational program. The aircraft in this context are simply educational tools. Further, the ACE is integrated within the larger operations of Confederation College, in both a functional and business sense.

[38] At the hearing, counsel advised me that they had agreed that each party would bear their own costs. Consequently, there is no order of costs.

JUDGMENT in T-1869-23

THIS COURT’S JUDGMENT is that:

1. The application for judicial review is granted.
2. The decision of the Officer dated May 11, 2023, is set aside.
3. The Aviation Centre for Excellence of the Confederation College is not a federal work, business or undertaking as governed by the *Canada Labour Code*, RSC 1985, c L-2.
4. There is no order of costs.

“Anne M. Turley”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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