Date: 20090917

Docket: T-462-09

Citation: 2009 FC 930

Ottawa, Ontario, September 17, 2009

PRESENT: The Honourable Mr. Justice Simon Noël

BETWEEN:

NUU-CHAH-NULTH TRIBAL COUNCIL

Applicant

and

ERIC SAYERS

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The Applicant, a society registered in British Columbia, is applying for judicial review in respect of the preliminary decision on jurisdiction dated February 27, 2009 ("the decision"), of Bruce Greyell, Q.C., Adjudicator, in the Matter of an Adjudication Under Division XIV-Part III of the *Canada Labour Cod*e (R.S., 1985, c. L-2) (the "Code"). The Applicant is asking this Court to quash the decision on the grounds that the Adjudicator had no jurisdiction. The Applicant argues that the present matter is governed by provincial laws, not the *Code*. The Applicant also argues that the Respondent had not been dismissed but rather that his employment contracts came to an end.

I. The Facts

[2] The Applicant, Nuu-Chah-Nulth Tribal Council ("NTC"), is a society registered in British Columbia. Its membership is made up of 14 First Nation Indian Bands. The NTC's mandate is to develop programs and services as well as administer federal government funding to its membership. Nuu-Chah-Nulth Community and Human Services Program ("CHSP") is one such program developed by the NTC.

[3] The Respondent, Eric Sayers, contracted with the NTC for two separate fixed short-term contracts to deliver two CHSP services: TB Crisis Support Counselling ("TB Counselling") and Clinical Counselling Services ("Clinical Counselling"). Both services were funded by the Federal Government. He operated these services on First Nations Band Member Reserves to status Indians who were members of those Bands.

[4] The contract for Clinical Counselling covered a period from April 1 to September 31 [sic], 2007 but dated April 26, 2007. From October 25, 1999 to March 31, 2007, Mr. Sayers had also been contracted to provide this service.

[5] The TB Counselling contract was in effect from June 8, 2007 to September 31[sic], 2007; contemporaneous with the Clinical Counselling contract. It was also dated some weeks after the services commenced: June 19, 2007. This was Mr. Sayers' first and only contract for TB Counselling.

[6] By letter dated September 25, 2007, the NTC notified Mr. Sayers that neither contract would be renewed.

[7] After receipt of that letter, Mr. Sayers filed a complaint of unjust dismissal under section 240(1) of the *Code*. Adjudicator Bruce Greyell, Q.C. was appointed pursuant to Division XIV – Part III of the *Code* to resolve the complaint. The NTC challenged the jurisdiction over the matter. In his preliminary decision of February 27, 2009, the Adjudicator concluded that he had jurisdiction.

II. Points in issue

[8] The Applicant is raising the following question:

a. Did the Adjudicator appointed under the *Code* have jurisdiction to hold a hearing?

b. Was the complainant dismissed or did the contracts only come to an end?

III. Analysis

[9] Constitutional law dictates that labour relations are within the jurisdictional powers of the legislatures. They fall under "Property and Civil Rights", section 92(13) of the *British North American Act* (the "*BNA Act*") a provincial power. See the *Constitution Act*, 1867 (U.K.), 30 & 31 Victoria, c.3 and *Four B Manufacturing Ltd. V. United Garment Workers of America*, [1980] 1 S.C.R. 1031 at 1045 ("*Four B*"). However, Parliament has the power to regulate labour relations

when they are an integral part of, or are necessarily incidental to, an area of federal jurisdiction. See *Validity and Applicability of the Industrial Relations and Disputes Investigation Act*, [1955] S.C.R. 529 at 564.

[10] The Federal Government has exclusive legislative competence over Indians. In particular, section 91(24) of the *BNA Act* states that:

91. (…) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,	**91.** (…) l'autorité législative exclusive du parlement du Canada s'étend à toutes les matières tombant dans les catégories de sujets ci-dessous énumérés, savoir:
(…)	(…)
24. Indians, and Lands reserved for the Indians	24. Les Indiens et les terres réservées pour les Indiens.

Section 91, above, must be applied to the present facts to determine if labour relations are exceptionally a matter of federal jurisdiction.

[11] As evidence of the exclusive legislative jurisdiction over Indians, Parliament has enacted the *Indian Act* (R.S., 1985, c. I-5), the *First Nations Goods and Services Tax Act* (S.C. 2003, c.15, s. 67) and the *First Nations Commercial and Industrial Development Act* (S.C. 2005, c. 53), to name a few.

Functional Test

[12] To assess whether or not the labour relations described in these facts are an integral part of a jurisdiction over Indians, the functional test must be applied. See *Four B,* above, at 1047.

[13] The functional test requires an assessment of the nature of the operations of the NTC. Specifically, we need to look at the normal or usual activities of the organization as a whole, careful not to emphasize exceptional activities. See *Construction Montcalm Inc. v. Minimum Wage Commission* [1979] 1 S.C.R. 754 at 769, 775 and 776 ("*Construction Montcalm"*).

[14] In *Construction Montcalm,* the case involved a jurisdictional challenge over wages. The Appellant was constructing roads on provincial territory as well as on federal lands. In that case, the application of the functional test revealed that the nature of the goods and services was of provincial jurisdiction. The construction of roads on federal lands was found to be an exceptional activity and could not be seen as habitual.

[15] The present case needs to be distinguished from *Construction Montcalm.* The NTC is a provincially incorporated Indian organization which delivers social, health and administrative programs to 14 Indian Bands for the benefit of these communities. The services provided by CHSP are for the benefit and well-being of Indian communities. These communities have specific needs in accordance with their history and specific community objectives.

[16] Labour relations of the CHSP are not necessarily defined within the competency of the Federal jurisdiction. However, to determine if the CHSP labour relations are provincial or federal, the factual approach must be applied, as set out in *Four B*.

[17] The factual approach is a two stage analysis. The first stage is to determine whether or not the facts suggest a "core federal undertaking", and if so, the extent to which it affects the services rendered. The second stage requires an analysis of the relationship between the specific service, the mental health services in this particular case, and the core federal undertaking. See *Northern Telecom Ltd. v. Communications Workers of Canada* [1980] 1 S.C.R. 115 at par. 33 and *Four B*, above, at 1047.

[18] This exercise calls for a thorough analysis of the services at play considering the purpose of the organization as a whole. If the services relate to the concept of "Indianness" which lies at the heart of section 91(24), the services are properly placed within the core of the federal undertaking. In *Delgamuukw v. British Columbia* [1997] 3 S.C.R. 1010, Lamer C.J.C. develops the concept of "Indianness" at para. 171:

> [t]hat core, for reasons I will develop, encompasses aboriginal rights, including the rights that are recognized and affirmed by s. 35(1) [of the *Constitution Act*]. Laws which purport to extinguish those rights therefore touch the core of Indianness which lies at the heart of s. 91(24), and are beyond the legislative competence of the provinces to enact. The core of Indianness encompasses the whole range of aboriginal rights that are protected by s. 35(1). Those rights include rights in relation to land; that part of the core derives from s. 91(24)'s reference to "Lands reserved for the Indians". But those rights also encompass practices, customs and traditions which are not tied to land as well; that part of the core can be traced to federal jurisdiction over "Indians". Provincial governments are prevented from legislating in relation to both types of aboriginal rights.

See also, *Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture),* [2002] SCC 31; [2002] 2 S.C.R. 146 at para. 56. For the purpose of the functional test, we must first determine whether or not the NTC is such that it is "a core federal undertaking". The second part of the test will require us to determine whether the Critical Counselling and the TB Services services can be categorized as part of the concept of "Indianness" or not. If so, they are within the "core federal undertaking".

Is the NTC as an organization a "core federal undertaking?"

[19] The Adjudicator concluded that the NTC, in establishing the mental health services programs, assumed a role that was: "directly related "to Indianness" and hence to section 91(24) of the *Constitutional Act*." See *Preliminary Decision* by the Adjudicator at page 24.

[20] In both written and oral submissions, the Applicant conceded that the function of the NTC in developing programs and administrating funding for its member bands may be within federal jurisdiction. But, the Applicant disagrees with the Adjudicator's finding that the labour relations associated to the mental health service program are under federal jurisdiction. The Applicant submits that once the NTC has allocated the funding to its various programs, it is not performing a function which is integral to the concept of "Indianness". It is hiring contract employees for the purpose of the operation of the different programs.

[21] On this question of law, I agree with the Adjudicator's conclusion that the NTC is assuming a service which is linked to the concept of "Indianness". The evidence establishes the NTC's essential components, its objectives and mission, with respect to the historical context, assumes a core federal undertaking.

[22] In 1958, the Indian Nations or Tribes located along 300 kilometers of the Pacific Coast of Vancouver Island formed the West Coast Allied Tribes. On August 14, 1973, it was incorporated provincially as a non-profit society under "The West Coast District Society of Indian Chiefs". On April 2, 1979, the name was changed to the Nuu-Chah-Nulth Tribal Council (NTC). The members of the NTC are Chiefs and Councils of the 14 Indian Bands. The NTC is managed by directors who are Chief Councilors representing each Band.

[23] The NTC performs many functions typically associated with the government. It provides many of the services in the community that were previously provided by the federal government. The NTC is mandated to directly develop programs to provide and administer funds for a wide range of government services. The services include education, community development, community infrastructure, health care services, fisheries, child welfare, economic development, membership, treaty negotiation and assistance to residential school students. The services are provided to approximately 8,000 registered members, as well as to 2,000 people who live off the reserve.

[24] The vision of the NTC is a self government that promotes strong and healthy communities, guided by the creator and the hereditary Chiefs. To this end, the NTC provides equitable social, economic, political and technical support to its Indian Band members.

[25] Its mission is the achievement of full spiritual, mental, emotional and physical potential for its member, so that families can once again exercise full responsibility for the nurturing of all members and communities, in order to be healthy and to self govern themselves. Their self-governance mission is indicative of a will to reach full containment of its jurisdiction and powers for the benefit of all.

[26] Section 91(24) of the *Constitution Act* gives jurisdiction to the Federal Government over Indians and lands reserved for Indians. Because it has assumed responsibilities and services for the benefit of Indians, the NTC clearly is within the federal jurisdiction. Despite it being a registered provincial society, the provincial government is not implicated insofar as the management structure of the NTC is concerned.

[27] Its vision and mission suggest it is sufficiently related to Indians and thus, its actions illustrate it is assuming a core federal undertaking.

Are the mental health services related to the core federal undertaking?

[28] Having come to the conclusion that the NTC is assuming a core federal undertaking, we must move on to the second stage: are the mental health programs addressing an essential

component of “Indianness”. If so, are they sufficiently related to the NTC core federal undertaking to fall under the competency of the federal government’s jurisdiction.

[29] The mental health programs are designed to support the communities of the 14 Indian Bands members. The clinical counselling and the TB support counselling programs are components of the mental health services.

[30] The mental health counselling programs were developed by the NTC through funding agreements with Health Canada, from 1999 to 2007. The TB support counselling program also received federal government finding but operated only from June 2007 to the end of September 2007.

[31] The Respondent, a member of one of the 14 Indian Band members, was contracted to deliver counselling services with respect to both programs. The services were provided on the reserves to members of the Indian Bands.

[32] From September 1997 to June 1999, the NTC funded a clinical counselling diploma program at Malaspina College. The Respondent was one of 13 students registered in this program. His first clinical counselling contract for the NTC began on October 25, 1999.

[33] A number of cases were studied to support a finding of provincial competence on the basis of location of the operations. These cases involved a shoe factory on a reserve, the building of a landing strip at an airport, a construction company operating on a reserve and a railway operator who happens to divert its operations into the hotel business. See *Four B, Construction Montcalm* and *Re Canadian Pacific Railway* [1948] S.C.R. 373. On another hand, in *Sagkeeng Alcohol Rehab Centre Inc. v. Abraham*, [1994] 3 F.C. 449, Rothstein J. states at para. 14 that:

> The fact that the rehabilitation centre is organized and operated primarily for Indians, governed solely by Indians, that its facilities and services are intended primarily for Indians, that its staff are specially trained under the NNADAP and receive First Nations training, and that its rehabilitation program, curriculum and materials are designed for Indians, all serve to identify the inherent "Indianness" of the centre and link it to Indians.

This decision is most relevant as many criteria are similar to the case at bar.

[34] NTC's programs are distinguishable from *NIL/TU,O Child and Family Services Society v. British Columbia Government and Service Employees' Union* [2008] B.C.J. No. 1611 ("*NIL/TU,O*") and *Native Child and Family Services of Toronto v. Communication, Energy, and Paperworkers Union of Canada* [2008] F.C.J. No. 1497("*Native Child"*). I note that both decisions on appeal at the Supreme Court of Canada.

[35] In *NIL/TU,O*, the Appellant's services were provided to children of registered Indians on reserves. This decision cannot be applied to the case at hand. As pointed out by the Adjudicator in the present Preliminary Decision, the mission and mandate of *NIL/TU,O* were directed to children pursuant to the provincial legislation *Child, Family and Community Service Act*, R.S.B.C. 1996, c.46. The NTC does not provide services, through the mental health program or otherwise, related

to any specific group, but to any person of a specific category of Indians in need of such service in the different communities. In *NIL/TU,O,* it applies the specific legislation made it balance a great deal towards the provincial legislature. This is not the case with the mental health program in the present matter.

[36] In its companion case *Native Child,* the Appellant was serving First Nations clientele in Toronto, as opposed to inside their respective reserves. As in *NIL/TU,O,* above, *Native child* was governed by a provincial statute, the *Child and Family Services Act,* R.S.O. 1990, c.11. As opposed to the case at bar, the federal government had never been involved with the program and there was no formal band involvement in the governance of the agency.

[37] The identity of the membership and the decision makers of the NTC, the NTC's history, vision, mission and objectives are together factors that bring the mental health services towards the concept of "Indianness". The mental health programs are programs chosen, approved, promoted and served by the NTC. They are offered to members of the Indian Communities, on their land, for their specific health betterment and well being. They are part of other programs which the NTC identified as necessary. Mental health programs deliver services which were originally provided by the Federal Government. The Federal Government remains a consistent fund giver in part to insure that such services remain in existence. Although the provenance of the funding is not conclusive, it is a pertinent factor to consider.

[38] The TB Counselling program has not been in place nearly as long as the Clinical counselling. Nevertheless, the same considerations of target benefit group, combined with the nature of the NTC convinced me it is also a service going to the core of "Indianness". I find that both health counselling programs are within the parameters of the concept of "Indianness" and are such that they are essential to the vision and mission of the NTC. They are closely related to the core federal undertaking as stipulated in section 91(24) of the *Constitution Act.*

[39] Labour relations are, in theory, a matter of provincial jurisdiction (section 92(13) of the *Constitution Act*), but can be exceptionally of federal jurisdiction. I find that labour relations for the purpose of conceptualizing, choosing, promoting and delivering these programs are of federal jurisdiction. As a consequence, the *Canada Labour Code* applies to this matter. As an aside, it also is interesting to note that, in its own Human Resources Policy, the NTC considers itself to be under the jurisdiction of the *Canada Labour Code* "(…) and the other applicable government regulations".

Was the Respondent dismissed or did the contract only come to an end?

[40] The second matter affecting jurisdiction is whether or not the Respondent was dismissed. The Applicant argues that the employment agreement simply expired. The *Code* provides in Part III, Division XIV, as follows:

240. (1) Subject to subsections (2) and 242(3.1), any person (*a*) who has completed twelve consecutive months of continuous employment by an employer, and (*b*) who is not a member of a group of employees subject to a collective agreement, may make a complaint in writing to an inspector if the employee has been dismissed and considers the dismissal to be unjust.	**240.** (1) Sous réserve des paragraphes (2) et 242(3.1), toute personne qui se croit injustement congédiée peut déposer une plainte écrite auprès d'un inspecteur si : *a*) d'une part, elle travaille sans interruption depuis au moins douze mois pour le même employeur; *b*) d'autre part, elle ne fait pas partie d'un groupe d'employés régis par une convention collective.

The Applicant argues that the employment agreement simply expired. If so, there is no labour relations matter for the Adjudicator and the *Canada Labour Code* does not apply to the present case.

[41] As mentioned earlier, the Respondent was employed by the NTC under two letters of agreement (the clinical counselling and the TB crisis support letter of agreement) ("the agreements"). Both agreements terminated on September 31[sic], 2007. The clinical counselling agreement was the last of a series of agreements which began in the fall of 1999. These agreements were renewed 16 times throughout the years. The TB crisis support agreement however covered the period between June 8, 2007 and September 31, 2007.

[42] By letter dated September 25, 2007, the NTC notified the Respondent that neither of the agreements would be renewed.

[43] The Applicant strongly suggests that the Court recognize the final date of the contracts (September 31[sic], 2007) as conclusive proof that the Respondent was not dismissed.

[44] The reasons of the Adjudicator are as follows:

- over the course of the 16 consecutive agreements for the clinical counselling program, covering a period of 9 years (except for two agreements when written extensions were signed), all of the new agreements were signed by the parties on a subsequent date, after the end of the previous term. From this, the Respondent was paid pursuant to the terms of the old agreement and no extension of time was provided for;
- the NTC has continued to employ the Respondent without interruption over 9 years, notwithstanding the language of the agreements, and it "… would now be unfair and unjust to permit the NTC to rely on the termination clause contained in the agreements." Therefore, the Respondent was found to be a continuing employee, and the termination of his employment was subject to notice.

[45] The typical content of the contracts included the following:

- defined terms and conditions of the services to be delivered;
- defined the services and the beneficiaries of such services;
- defined, in clear language, the duration of the services and that they can be extended only with a prior approval in writing and that each party can terminate the contract with a 30 days notice;
- provided administrative directions, such as supervision, insurance coverage, the amounts to be paid, the rates of pay, the method of payments, etc…;
- directed how information is to be shared with the NTC.

[46] The Adjudicator noted that most of the 16 agreements were signed by the parties after the date on which they became effective. He infers from this that the parties were giving a retroactive effect to each agreement: The Adjudicator saw in this indication an extension of the precedent agreement. I differ. In order to be able to extend the agreements, the parties had to sign a prior approval in writing. They did not. Therefore, the parties relied on the new agreement to justify payments for the period between the effective date and the date of signatures. I do not see that it would bring a different situation than what the contracts provided for.

[47] It appears from the evidence that, throughout the years, each agreement included a specific termination date. The parties clearly expressed an intent that the employment period was to be for a fixed term. I do not see that, although most of the agreements were signed after their effective date of employment, as an indicator that the parties intended the termination date to not have legal effect. The fact that they signed some of their agreements after the effective date shows that their intent was to ensure the legality of employment for the full duration of the contract.

[48] The expiration of a bilateral fixed-term contract cannot be interpreted as a dismissal. As stated in *Eskasoni School Board v. MacIsaac*, [1986] F.C.J. No. 263;

> The words "dismiss" and "dismissal" have, in the employer-employee relationship, a meaning so well understood that resort need not be had to dictionaries, or case law to substantiate that meaning. In my view, that well known meaning connotes the unilateral termination of the employment of an employee by the employer for whatever reason. There cannot be, in my view, the slightest connotation that their meaning embraces the bilateral agreement of an employer and the employee to terminate the employment relationship whether by the effluxion of time of a term contract of employment, or otherwise.

[49] To interpret the occurrence of the end of the employment by the expiry of time as a dismissal because of the fact that some of the agreements were signed after the contract's effective date is, with all due respect to the Adjudicator, incorrect in law. The parties have clearly expressed on 16 occasions over a period of 9 years through non ambiguous language that the period of employment was for a fixed term.

[50] What happened in the case at hand is that the NTC terminated the clinical counselling program on October 1, 2007 and that the Respondent was informed by letter on September 25, 2007 that his two agreements would not be renewed. Such was the intent of the parties.

Costs

[51] I have noted that the NTC did not ask for costs in its notice of application and in its written or oral submissions. The Respondent does in his written submission. In view of the findings made for the purpose of this application, the costs would normally be granted to the Applicant. Considering the above, each party will assume its own costs.

JUDGMENT

THIS COURT ORDERS THAT:

- The two agreements of employment came to an end by the expiration of time. Therefore, the Adjudicator has no jurisdiction to decide the matter under the *Canada Labour Code*.
- Accordingly, his decision of February 27, 2009, in relation to the terms of employment at issue is declared not to be in accordance with the law applicable to such matters and therefore is not valid.
- Each party will pay their own costs.

"Simon Noël"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-462-09
STYLE OF CAUSE:	Nuu-Chan-Nulth Tribal Council v. Eric Sayers
PLACE OF HEARING:	Vancouver, BC
DATE OF HEARING:	August 26, 2009
REASONS FOR JUDGMENT:	NOËL S. J.
DATED:	September 17, 2009

APPEARANCES:

Mr. Paul S. Rosenberg	FOR THE APPLICANT
Mrs. Judith F. Sayers	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Rosenberg, Rosenberg Vancouver, BC	FOR THE APPLICANT
Mrs. Judith F. Sayers (inactive member of the bar)	FOR THE RESPONDENT