Federal Court Cour fédérale

Date: 20131220

Docket: T-2141-12

Citation: 2013 FC 1276

Ottawa, Ontario, December 20, 2013

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

FOX LAKE CREE NATION

Applicant

and

DENIS ANDERSON

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The Fox Lake Cree Nation [FLCN] challenges a decision of A. Blair Graham, Q.C., who was appointed by the Minister of Labour as an adjudicator and referee pursuant to the *Canada Labour Code*, RSC 1985, c L-2 [*Code*] to determine claims made by Denis Anderson, for unjust dismissal and recovery for unpaid overtime and vacation pay. The FLCN challenges Mr. Graham's decision that he had jurisdiction over the claims because the employment relationship between the FLCN and Mr. Anderson was federally and not provincially regulated.

Background

[2] The FLCN is an Indian Band as defined by the *Indian Act*, RSC 1985, c I-5 [*Indian Act*]. It consists of approximately 1,000 members, 500 of whom reside in or around Gillam or Bird, Manitoba, while the others reside in various communities inside and outside Manitoba.

[3] In or around 2000, the FLCN established an office near Winnipeg, Manitoba, to negotiate contracts on behalf of the FLCN with Manitoba Hydro [Hydro] with respect to significant hydro-electric projects on the Churchill, Nelson, Rat, and Burntwood river systems, and the development of the Lake Winnipeg Regulation System north of the 53rd parallel. The office was referred to as the Keeyask Project Negotiations Office [Negotiations Office] and at the time of its creation, was considered an "internal" consulting office. It was not incorporated as a separate legal entity. Prior to setting up the Negotiations Office, the FLCN had used an outside consulting firm to negotiate with Hydro on its behalf.

[4] There were six categories of issues being negotiated with Hydro: Business opportunities; training and employment; project development; environment and resources; adverse effects; and commercial terms.

[5] The initial responsibility of the Negotiations Office was to negotiate an Impact Settlement Agreement with Hydro to address the adverse effects of past hydro-electric development on the FLCN community. This agreement was concluded in May 2004.

[6] Since 2004, the Negotiations Office has conducted extensive negotiations regarding the Keeyask Project (a hydro-electric project around the Gull Rapids) including the following: Interests in a Limited Partnership, anticipated adverse effects of the Keeyask Project on the FLCN, and the impact of the Keeyask Project on the exercise of Aboriginal and treaty rights by the FLCN and its citizens arising from the development and operation of the Keeyask Project. These agreements were entered into in May 2009.

[7] The Negotiations Office also has an ongoing mandate from the FLCN to oversee all matters affecting negotiations with Hydro respecting the Keeyask Project and the Conawapa project (a separate hydro-electric project).

[8] The Negotiations Office eventually became profitable by passing on operation costs to Hydro at a mark up of the actual cost of operation. Eventually, the Negotiations Office also opened a second negotiations office in Gillam, Manitoba.

[9] Mr. Anderson was employed as a member of the Negotiations Office. He has been a member of the FLCN all of his life. His employment was terminated by the Chief and Council of the FLCN. On October 10, 2010, Mr. Anderson filed his complaints under the *Code*.

[10] On May 13, 2011, the Minister of Labour of Canada appointed Mr. Graham as an adjudicator to hear and determine the unjust dismissal complaint. On May 24, 2011, an Inspector issued an order pursuant to the *Code*, ordering the FLCN to pay $25,328.70 representing overtime pay, general holiday pay, and termination pay [the Wage Order]. On June

3, 2011, the FLCN appealed the Wage Order. On July 20, 2011, the Minister appointed Mr. Graham as a referee to hear and determine the Wage Order appeal.

[11] On November 2, 2011, Mr. Graham was served with a Notice of Constitutional Question pursuant to section 57 of the *Federal Courts Act*, RSC 1985, c F-7, challenging his jurisdiction as an adjudicator and a referee appointed under the *Code* to hear and determine the unjust dismissal complaint and the unpaid wages complaint respectively. The basis for the challenge was that the subject matter of the complaint and the appeal are within provincial and not federal jurisdiction. The FLCN took the position that Mr. Anderson was not an employee of the FLCN generally, but of the Negotiations Office located in Winnipeg, which office was provincially regulated. The Attorney General of Manitoba intervened as of right.

[12] Mr. Graham determined that he had jurisdiction to hear both the unjust dismissal claim and the appeal of the Wage Order. Mr. Graham applied the functional test mandated by the Supreme Court of Canada in *NIL/TU,O Child and Family Services Society v BC Government and Service Employees' Union*, 2010 SCC 45, [2010] 2 SCR 696 [*NIL/TU,O*], and determined that a functional analysis of the Negotiations Office's primary activities led to the conclusive result that it was engaged in a federal work, undertaking, or business as defined by section 2 of the *Code*. Mr. Graham found that the Negotiations Office was engaged in negotiations with Hydro:

> for and on behalf of the FLCN itself, for the benefit of the community at large, and the individual members of the FLCN. Conducting negotiations with respect to agreements which are ultimately entered into by an Indian Band for the benefit of that Indian Band and its members, who are Indians, is <u>not</u> an activity within the exclusive legislative authority of the provinces. (emphasis original).

[13] He found that the presumption that labour relations fell within provincial jurisdiction was ousted because an entity such as the Negotiations Office, "which is either part of an Indian Band, or is subject to its direction, and whose operations and habitual activities are directed towards negotiating agreements for the benefit of that Indian Band and its members, is engaged in a federal work, undertaking or business."

[14] Mr. Graham acknowledged but rejected the FLCN's argument that the Negotiations Office more closely resembles a private consulting firm and is external to the FLCN. Mr. Graham noted that while the Negotiations Office did earn profit, it did so by charging a mark-up to Hydro instead of a consulting fee to the FLCN (its client). Furthermore, the profits earned by the Negotiations Office were provided to the FLCN to finance some of its other activities. Additionally, the Chief and Council of the FLCN always maintained some degree of control over the Negotiations Office. The Negotiations Office was therefore a part of the FLCN, despite being autonomous and independent in other respects.

[15] Mr. Graham also found that if he was wrong about the result of the functional analysis and that it in fact yielded inconclusive results, the second step of the *NIL/TU'O* analysis still led to the conclusion that the Negotiations Office was a federal work, undertaking, or business because Provincial regulation of the Negotiations Office's labour relations would impair the core of the federal power with respect to Indians pursuant to subsection 91(24) of the *Constitution Act*, 1867 (UK), 30 & 31 Victoria, c 3 [the *Constitution*].

[16] Mr. Graham based his conclusion on the fact that the Hydro agreements contained important and extensive compensatory, restitutionary, and mitigating provisions to address the adverse effects of the hydro projects on the FLCN. There are references in the agreements to the impact of the hydro projects on the collective rights and interests of, and the impact upon the exercise of aboriginal and treaty rights, by the FLCN and its citizens. Therefore, the activities of the Negotiations Office were found to be integrally related to the federal responsibility for Indians and lands reserved for Indians, and are involved in matters that go to the status and rights of Indians; issues specifically reserved for Parliament.

Issue and Standard of Review

[17] The only issue in this application is whether Mr. Graham has jurisdiction to hear the appeal of the Wage Order and the unjust dismissal complaint.

[18] The appropriate standard of review, as the parties submit, is correctness. The Supreme Court of Canada in *Dunsmuir v New Brunswick*, 2009 SCC 9 at para 58, explicitly held that constitutional questions relating to the division of powers are "necessarily subject to the correctness review because of the unique role of s. 96 courts as interpreters of the Constitution."

Analysis

[19] Jurisdiction over labour relations has not been explicitly delegated to either the provinces or Parliament; however, Canadian courts have recognized that labour relations presumptively fall within the exclusive jurisdiction of the provincial legislatures and that Parliament has jurisdiction only by way of exception: *NIL/TU,O* at para 11. The exceptions are those that fall within the

meaning of section 2 of the *Code*, i.e. labour relations of a "federal work, undertaking or business that is within the legislative authority of Parliament."

[20] Accordingly, whether Mr. Anderson's employment falls under federal or provincial jurisdiction rests on whether the operations of the Negotiations Office is properly characterized as being a federal work, undertaking, or business within the meaning of s. 2 of the *Code*. If it is, then the presumption that the province has exclusive jurisdiction over its labour relations has been ousted.

[21] Whether a particular entity can be classified as a "federal work, undertaking or business" within the meaning of the *Code* is a narrow question, to be determined according to the framework set out by the Supreme Court of Canada in *Northern Telecom Ltd v Communications Workers of Canada*, [1980] 1 SCR 115 [*Northern Telecom*] and re-affirmed in *NIL/TU,O.*

[22] There was a dispute before Mr. Graham, and this Court, as to whether it is the FLCN or the Negotiations Office that is the employer of Mr. Anderson. The FLCN says that the employer is the Negotiations Office. Mr. Anderson and the Attorney General submit that the employer is the FLCN and that "jurisdiction over [its] labour relations is clearly federal."

[23] Mr. Graham found that the FLCN was the employer and that finding of mixed fact and law was one within his expertise; accordingly, it is a finding that is entitled to considerable deference. Based on the record, that is a reasonable finding that will not be reversed.

[24] Notwithstanding that finding, Mr. Graham observed that it was not determinative of the issue of jurisdiction because a number of cases had been cited to him where, notwithstanding that the employer was either a First Nation or an unincorporated entity that reported directly to a First Nation, the regulation of the labour relations had been found to be within provincial jurisdiction: See *Re: Oneida of the Thames Emergency Medical Service and CAW Canada*, 2011 CIRB 564, [2011] CIRBD No 1 [*Re: Oneida*]; and *Re: Sansparíel*, [2010] CLAD No 404 [*Re: Sansparíel*].

[25] Contrary to the submission of the Attorney General, the proper procedure is not to examine the operations of the FLCN as a whole when considering jurisdiction; rather, as was stated by Mr. Graham, it is to "consider the operations and habitual activities of the FLCN Band's operations which are the subject of the jurisdictional challenge, namely the operations and habitual activities of the Negotiations Office." This is because a single employer may have both federally and provincially regulated employees: *NIL/TU,O* at para 22; *Tessier Ltée v Quebec (Commission de la santé et de la sécurité du travail)*, 2012 SCC 23, [2012] 2 SCR 3 at para 49 [*Tessier*].

[26] Consider as an example, a company that operates a taxi service in British Columbia. The car service that it operates within the city will be subject to provincial regulation. The ferry service that it operates in the waters surrounding the city will be subject to federal regulation. I also note that in *Northern Telecom*, the Supreme Court stated that "… it is necessary to look at the <u>particular subsidiary operation</u>, i.e., the installation department of Telecom, to look at the "normal or habitual activities" <u>of that department</u> as 'a going concern'..." (emphasis added).

Therefore, the correct approach is to examine the habitual activities of the Negotiations Office specifically, not the FLCN as a whole.

Functional Analysis

[27] The Supreme Court of Canada in *NIL/TU,O* confirmed that the analysis for determining whether an entity is a federal work is a two step test. The first step is to conduct a "functional analysis" by examining "the nature, operations and habitual activities of the entity to see if it is a federal undertaking." If this analysis yields conclusive results as to whether the entity is a federal work, the analysis ends. Only if the result of the functional analysis is inconclusive, does one proceed to the second step of the test which examines whether "provincial regulation of the entity's *labour relations* would impair the core of the federal head of power" at issue (NIL/TU,O at para 18, emphasis original).

[28] Mr. Graham concluded that the nature of the activities of the Negotiations Office was conducting negotiations specifically for the purpose of finalizing agreements which are ultimately entered into by the FLCN, for the benefit of the FLCN community at large, which agreements touched on the exercise of Aboriginal and treaty rights, and that this specific type of negotiation is not an activity within the exclusive legislative authority of the province.

[29] He noted that previous jurisprudence demonstrates that even entities which are part of an Indian Band, which report directly to an Indian Band, or which provide services to members of an Indian Band, will nonetheless have their labour relations regulated by the province, if their operations and habitual activities are within provincial jurisdiction. However, he distinguished

this case stating that the nature of the services being provided in those previous cases (ambulance services and early childhood education programs) fell within the jurisdiction of the provinces.

[30] By contrast, he saw the activities of the Negotiations Office as being centred on "negotiating agreements for the benefit of [the] Indian Band and its members," subject to the direction or control of the Indian Band on behalf of whom the negotiations were being conducted.

[31] I agree with the FLCN's submission that Mr. Graham erred in his characterization of the normal and habitual activities of the Negotiations Office. The central purpose of the Negotiations Office was the negotiation of sophisticated commercial arrangements with other parties. Mr. Graham erred in focusing on the fact that the beneficiaries of the activities of the Negotiations Office are members of an Indian Band. The Supreme Court of Canada has held that even where services are being delivered to Aboriginal clients, the essential function of the entity in question does not change: See *Communications, Energy and Paperworkers Union of Canada v Native Child and Family Services of Toronto,* 2010 SCC 46, [2010] 2 SCR 737 at para 11 [*Native Child*]; and *NIL/TU,O* at para 45. I agree with the FLCN that these cases show that it does not matter who receives the services, who funds the services, who provides the services, or where the services are located; the sole consideration is the nature of the habitual activities undertaken by the entity.

[32] When properly considered, the habitual activities of the Negotiations Office are to negotiate with Hydro, a provincial crown corporation established and regulated by provincial

statute, with respect to the development of new hydro-electric projects generally, which projects are wholly situated in the province. Apart from the fact that the FLCN is an Indian Band and that some of the negotiated provisions acknowledge the adverse effects that these projects will have on the members of the Band, there is nothing federal about the Negotiations Office's work. Furthermore, the Supreme Court of Canada in *NIL/TU,O* at para 45 made clear that the "community for whom [the entity] operates… does not change *what* it does" and that the fact that "[the entity's] services are provided in a culturally sensitive manner" does not on its own displace the provincial nature of the entity.

[33] The Attorney General of Manitoba argues that where the employer is an Indian Band, unless there is an activity that the employee is engaging in that is so distinct and separate from the Band, that employee should be federally regulated. This submission ignores express guidance from the Supreme Court of Canada in *NIL/TU,O* that the functional test looks specifically at the habitual activities of the entity in question, not who is providing the services and not who is benefiting from the services. Additionally, the analysis does not change simply because subsection 91(24) is engaged. The Supreme Court stated at para 20 of *NIL/TU,O* that: "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." The fact that the employer in this case is an Indian Band is not relevant to the functional test. This submission also ignores the presumption that labour relations falls within provincial jurisdiction.

[34] The Attorney General of Manitoba also submits that the Negotiations Office is exercising delegated authority from the FLCN Band Council, which in turn, is exercising authority delegated to it from Parliament under the *Indian Act*. Specifically, it is the role of the FLCN Band Council and, by extension, the Negotiations Office, to represent the interests of the community. However, if this submission is accepted, it would mean that anytime any extension of an Indian Band undertook activities which engaged any interest of that First Nations community, the labour relations of those employees would be federally regulated. In my view, this position is undermined by the numerous cases (including those cited by the Adjudicator in this case) where, despite the Indian Band being the employer, and despite there being significant interests of the First Nations community at stake, the employees' labour relations were nevertheless provincially regulated: See for example, *NIL/TU,O* and *Native Child* (interests in child welfare services); *Re: Oneida* (ambulance and medical services); and *Re: Sanspariel* (early childhood education programs).

[35] Additionally, the Attorney General of Manitoba is of the view that the Negotiations Office was integrally related to the FLCN Band Council and therefore according to *Tessier*, Parliament has derivative jurisdiction. The Supreme Court in *Tessier* instructs that Parliament may have derivative jurisdiction in three instances:

1. The services provided to the federal undertaking form the exclusive or principal part of the related work's activities (para 48);
2. When the services provided to the federal undertaking are performed by employees who form a functionally discrete unit that can be constitutionally characterized separately from the rest of the related operation (para 49); and

3. Where there is an indivisible, integrated operation, if the dominant character of its operations is integral to a federal undertaking (para 55).

[36] The Negotiations Office does not fall into any of these categories and accordingly, derivative federal jurisdiction is not justified. In my view, despite the fact that the FLCN is Mr. Anderson's employer, the Negotiations Office operates as a discrete unit, and it cannot be said that the negotiations of Indian rights and status form the "exclusive or principal part" of the Negotiations Office's activities. As the agreements themselves reveal, Indian rights are only engaged by a small portion of the extensive, otherwise commercial, contractual provisions of the agreements it negotiates.

[37] The second category does not apply here because this is not a case where a distinct unit performs a federal work for an otherwise provincial entity.

[38] In any event, if I am wrong, and the Negotiations Office forms an "indivisible, integrated operation" with the FLCN, the dominant character of its operations is not integral to a federal undertaking. The FLCN can exist even without the Negotiations Office. The effective operation of the FLCN is not dependent on the activities performed by the Negotiations office (*Tessier* at para 46). While the negotiations represent progress for the economic interests of the FLCN, I do not accept that simply because it is negotiating on behalf of the FLCN the Negotiations Office thereby "lose[s] its distinct character" as a provincial entity (*Westcoast Energy Inc v Canada (National Energy Board)*, [1998] 1 SCR 322 at para 124). Simply put, the work of the

Negotiations Office is important, but not vital or integral to the FLCN's operations as an Indian Band.

[39] In summary, since the Negotiations Office habitually conducted negotiations related to the development of hydro electric projects, the functional test leads to the conclusion that it is not a federal work. Although some of the contractual provisions that were negotiated by the Negotiations Office contain references to Aboriginal and treaty rights, these were incidental to the overall purpose of the contracts which was to negotiate the development of the hydro-electric projects, and this is not sufficient to oust the presumption that labour relations are within provincial jurisdiction.

Impairment of the Core of Subsection 91(24)

[40] If I am wrong that the functional test is conclusive that the habitual activity of the Negotiations Office is not a federal work, and that at best, the functional test is inclusive, I turn to the second stage of the analysis which focuses on whether provincial regulation of the entity's labour relations would impair the core of the federal head of power under subsection 91(24) of the *Constitution*.

[41] The concurring judges in *NIL/TU,O* conducted this analysis and drawing from prior jurisprudence in *Four B Manufacturing Ltd v United Garment Workers of America*, [1980] 1 SCR 1031, and *Delgamuukw v British Columbia*, [1997] 3 SCR 1010, determined that "the activity or operation must go to the status and rights of Indians. It must be 'at the centre of what they do and what they are.'" The Court noted at para 71 that Provincial law will extend to

business or enterprises, on or off reserve, "*except* when the law impairs those functions of the enterprise which are intimately bound up with the status and rights of Indians."

[42] I agree with the FLCN that it is not sufficient that regulation by the province merely touches on rights related to Indian status; it must impair the core of the federal head of power: *NIL/TU,O* at paras 19-20. The Respondents say that in this case, provincial regulation of the labour relations of the Negotiations Office would impair the core of the federal power, but provide no arguments as to why, beyond simply asserting that the subject matter is beyond the exclusive jurisdiction of the provinces. I fail to see how provincial regulation of the employees engaged in the Negotiations Office would impair the core of the federal power over "Indians and Land Reserved for the Indians." It does not impact Indian status, or any rights so closely connected to it that it could be regarded as a necessary incident of such status.

[43] The concurring judges in *NIL/TU,O* listed the types of rights that go to the core of Indian status. It is these rights which cannot be impaired: 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.

[44] Some of the provisions in the negotiated agreements explicitly acknowledge adverse effects on the exercise of Aboriginal and treaty rights: See, for example, Article F of the Fox Lake Cree Nation Adverse Effects Agreement, which states that: "The Project (as defined in this Agreement) caused adverse effects upon the natural environment in the Traditional Territory and upon the members of Fox Lake". Initially, it might seem as though the exercise of Aboriginal and treaty rights is being impaired by this agreement; however, as the Adjudicator himself notes, "nothing in any of the [negotiated] agreements diminished, abrogated, or infringed upon the aboriginal treaty rights of the FLCN or its citizens." Therefore, the agreements themselves do not impair the core of the federal power.

[45] Even if the Agreements impaired those rights, that is not the proper analysis; the relevant question is whether provincial labour legislation would impair the exercise of the treaty rights: See *NIL/TU,O* at para 74. I conclude that it would not, for four reasons.

[46] First, despite the fact that the Negotiations Office deals directly with Aboriginal and treaty rights, provincial labour legislation has no impact on the way in which the Negotiations Office deals with those rights, nor any impact on the rights themselves. Neither Mr. Graham nor any of the parties pointed to any provision in Manitoba labour legislation that would impair these rights.

[47] By contrast, provincial labour legislation might impair the core of a federal head of power, for example, where subsections 91(8) or 91(28) of the *Constitution* are engaged. Those sections read:

91. (8) The fixing of and providing for the Salaries and Allowances of Civil and other Officers of the Government of Canada.	91. (8) La fixation et le paiement des salaires et honoraires des officiers civils et autres du gouvernement du Canada.
91. (28) The Establishment, Maintenance, and Management of Penitentiaries.	91. (28) L'établissement, le maintien, et l'administration des pénitenciers.

It is conceivable that provincial labour legislation could impair these federal cores of power.

[48] Second, as the concurring judges in *NIL/TU,O* noted, "one looks not to the purpose or effect of the enterprise, but to the activity it carries out." The Negotiations Office conducts commercial negotiations related to the development of hydro-electric projects. Of the two agreements negotiated by the Negotiations Office that are in the record, one sets out a detailed commercial arrangement for ownership in a Limited Partnership set up for the development and design of a hydro-electric project. Nothing in this agreement addresses anything incidental to Aboriginal status. The second agreement deals explicitly with adverse effects on the FLCN, but only select provisions address Aboriginal and treaty rights. Therefore, even if it can be said that the purpose and effect of the negotiations is to deal with Aboriginal and treaty rights, it does not change the nature of the activity which is to negotiate terms of hydro project development more generally.

[49] Third, the labour relations in question are those of employees of the FLCN in the Negotiations Office, a body that simply negotiates the terms of the agreements on behalf of the FLCN. By Mr. Anderson's own admission, the Chief and Council of the FLCN were the ultimate signing authorities and made all major decisions concerning contracts that were

negotiated. Only they could bind the FLCN. Therefore, the role of the Chief and Council must be compartmentalized from the role of the employees working in the Negotiations Office. When that is done, it is clear that nothing about the habitual activities of the Negotiations Office impaired the exercise of Aboriginal and treaty rights because they could not bind the FLCN to the terms of the final agreement. If there was to be any impairment of Aboriginal and treaty rights, it would come at the hands of the Chief and Council of the FLCN, whose labour relations are not in issue in this application.

[50] Fourth, there is nothing in the *Indian Act* concerning negotiations, particularly with provincial entities, or concerning development of hydro-electric projects. There are specific provisions dealing with lands on reserve, but none of them would be impaired by provincial regulation of labour relations.

[51] Moreover, sections 35(1) and 88 of the *Indian Act* acknowledge that there will inevitably be some overlap between the exercise of federal and provincial competencies, but that such overlap does not impair the jurisdiction of the other body:

35. (1) Where by an Act of Parliament or a provincial legislature Her Majesty in right of a province, a municipal or local authority or a corporation is empowered to take or to use lands or any interest therein without the consent of the owner, the power may, with the consent of the Governor in Council and subject to any terms that may be prescribed by the Governor in Council, be exercised in relation to lands in	35. (1) Lorsque, par une loi fédérale ou provinciale, Sa Majesté du chef d'une province, une autorité municipale ou locale, ou une personne morale, a le pouvoir de prendre ou d'utiliser des terres ou tout droit sur celles-ci sans le consentement du propriétaire, ce pouvoir peut, avec le consentement du gouverneur en conseil et aux conditions qu'il peut prescrire, être exercé relativement aux terres dans une

a reserve or any interest therein.	réserve ou à tout droit sur celles-ci.
88. Subject to the terms of any treaty and any other Act of Parliament, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province, except to the extent that those laws are inconsistent with this Act or the *First Nations Fiscal Management Act*, or with any order, rule, regulation or law of a band made under those Acts, and except to the extent that those provincial laws make provision for any matter for which provision is made by or under those Acts.	88. Sous réserve des dispositions de quelque traité et de quelque autre loi fédérale, toutes les lois d'application générale et en vigueur dans une province sont applicables aux Indiens qui s'y trouvent et à leur égard, sauf dans la mesure où ces lois sont incompatibles avec la présente loi ou la *Loi sur la gestion financière des premières nations* ou quelque arrêté, ordonnance, règle, règlement ou texte législatif d'une bande pris sous leur régime, et sauf dans la mesure où ces lois provinciales contiennent des dispositions sur toute question prévue par la présente loi ou la *Loi sur la gestion financière des premières nations* ou sous leur régime.

[52] These provisions are consistent with today's constitutional landscape, which, in the words of Justice Abella in *NIL/TU,O*, "is painted with the brush of co-operative federalism."

[53] Given this view of modern federalism, there is nothing to prevent provinces from passing legislation on subjects within their exclusive jurisdiction, even where the legislation affects Aboriginal peoples, provided that legislation does not directly contradict or materially impact anything in the *Indian Act* or other federal statutes dealing with Aboriginal peoples. There is nothing to suggest that regulation of labour relations of persons who negotiate on behalf of an Indian Band, but cannot bind it, would impair the core of the federal power over "Indians and Lands Reserved for Indians" and no submission was advanced on how provincial regulation of

labour relations over the staff of the Negotiations Office impairs the core of this federal head of power beyond simply asserting that it does.

[54] The application is allowed, and the decision of Mr. Graham finding that the employment of Mr. Anderson by the FLCN falls under the jurisdiction of Parliament is set aside.

[55] The parties indicated that they would prefer to make submissions on costs after a determination on the merits was made. Following the hearing, it was also brought to my attention that the Applicant made an offer to the Respondent regarding costs, which was rejected. Therefore, in light of the fact that the Application is allowed, the parties are to provide submissions as to costs to the Court, as follows:

1. The Applicant's written submissions, not exceeding ten pages in length, are due ten (10) days after the date this judgment is issued;
2. The Respondent's written reply submissions are due 10 days after the Applicant's submissions.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. The application is allowed;

2. The decision of A. Blair Graham Q.C. dated October 30, 2012, is set aside because the employment relationship of Dennis Anderson and the Fox Lake Cree Nation is not governed by the *Canada Labour Code*, RSC 1985, c L-2; and

3. The Fox Lake Cree Nation is entitled to its costs, as against Dennis Anderson, the quantum of which is reserved, pending receipt of the parties' submissions.

"Russel W. Zinn"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-2141-12
STYLE OF CAUSE:	FOX LAKE CREE NATION v DENIS ANDERSON
PLACE OF HEARING:	Winnipeg, Manitoba
DATE OF HEARING:	November 6, 2013
REASONS FOR JUDGMENT AND JUDGMENT BY:	ZINN, J.
DATED:	December 20, 2013

APPEARANCES:

Robert A. Watchman / Todd C. Andres	FOR THE APPLICANT
Lyle M. Smordin	FOR THE RESPONDENT
Michael Bodner	FOR THE INTERVENER THE ATTORNEY GENERAL OF MANITOBA

SOLICITORS OF RECORD:

PITBLADO LLP Barristers and Solicitors Winnipeg, Manitoba	FOR THE APPLICANT
SMORDIN, PAULS & ASSOCIATES Barristers & Solicitors Winnipeg, Manitoba	FOR THE RESPONDENT
THE HONOURABLE ANDREW SWAN Attorney General of Manitoba Winnipeg, Manitoba	FOR THE INTERVENER