Federal Court of Appeal Cour d'appel fédérale

Date: 20200415

Docket: A-293-18

Citation: 2020 FCA 74

[ENGLISH TRANSLATION]

CORAM: **NADON J.A.**
DE MONTIGNY J.A.
LOCKE J.A.

BETWEEN:

ATTORNEY GENERAL OF QUEBEC

Appellant

and

SYLVAIN PICARD
and
RBA FINANCIAL GROUP

Respondents

and

ATTORNEY GENERAL OF CANADA; ASSEMBLY OF FIRST NATIONS; and ASSEMBLY OF FIRST NATIONS QUEBEC-LABRADOR

Interveners

Heard at Quebec City, Quebec, on October 2, 2019.

Judgment delivered at Ottawa, Ontario, on April 15, 2020.

REASONS FOR JUDGMENT BY: DE MONTIGNY J.A.

CONCURRED IN BY: NADON J.A.
LOCKE J.A.

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REASONS FOR JUDGMENT

DE MONTIGNY J.A.

[1] This appeal raises an important constitutional question and centres upon whether the labour relations (and, more specifically, the regulation and supervision of the pension plan) of the Indigenous police officers employed by various band councils fall under federal jurisdiction or under provincial jurisdiction. The appellant, the Attorney General of Quebec, and the intervener, the Attorney General of Canada, are challenging the decision of the Federal Court (per Justice Martineau), which found that the police officers and special constables hired and remunerated by band councils under a tripartite agreement that also involves the federal and Quebec governments are employed in a federal work, undertaking or business. Consequently, the Court expressed the view that their pension plan was a plan registered under the *Pension Benefits Standards Act, 1985*, R.S.C. 1985, c. 32 (2nd Supp.) (PBSA) and that the Office of the Superintendent of Financial Institutions of Canada should continue to administer the plan.

[2] For the reasons that follow, I conclude that the appeal should be dismissed.

I. Facts

[3] The First Nations Public Security Pension Plan (the Plan) was first registered by the Office of the Superintendent of Financial Institutions (OSFI) in 1981 (Appeal Book at page 1062) (A.B.), under the authority of the *Pension Benefits Standards Act*, R.S.C. 1970, c. P-8 (now the PBSA). The purpose of this Plan is to provide retirement benefits to the police officers and special constables of a number of police forces of First Nations member communities serving Indigenous communities (see section 1.1.1 of the First Nations Public Security Pension

Plan Regulations, A.B., vol. 4, tab 11, at page 1069). The Plan currently covers the police forces under the responsibility of 14 band councils in Quebec.

[4] The police services of the band councils that are members of the Plan are all subject to policing services agreements reached between each of these band councils, Her Majesty the Queen in Right of Canada, as represented by the Minister of Public Safety and Emergency Preparedness, and the Government of Quebec, as represented by the Minister of Public Security. These agreements are made under the *First Nations Policing Program* (the *Program*), which is an update to the *First Nations Policing Policy* adopted in 1991 (see Solicitor General of Canada, *First Nations Policing Policy*, Ottawa, Minister of Supply and Services Canada, 1992, updated in 1996 with ISBN: 0-662-62631-1 (*First Nations Policing Policy*)). Two options are available to Indigenous communities under the *Program*: to establish self-administered police services or to sign community tripartite agreements between the communities, the federal government and the provincial government. In both cases, the federal government covers 52% of the costs, and the provincial government covers 48%. Tripartite agreements of the type at issue in this case are apparently preferred by the vast majority of the communities.

[5] The tripartite agreements are all to the same effect: they generally set out the mission and obligations of the police force and specify the terms of funding, cost sharing and the duration of the agreement. More specifically, the agreements adopted by the various band councils that are members of the Plan as employers state the following, among other things:

- The band council is the employer of the members of the police service and is responsible for hiring them;

- The band council is responsible for the administration of the police service;
- The band council may establish internal policies and procedures specific to the administration of its police service;
- The mission of the police service is to maintain peace, order and public safety in accordance with section 93 of the *Police Act* (C.Q.L.R., c. P-13.1) (*Police Act*);
- The police service exercises its powers in the territory under the responsibility of the band council;
- The band council may not interfere with police activities; the chief of the police service and the police officers may not receive instructions, either directly or indirectly, from the council;
- The police service occasionally cooperates with federal, provincial and municipal police authorities;
- Only candidates who meet the required qualifications and conditions set out in section 115 of the *Police Act* may be selected to serve as police officers;
- The police officers are subject to the *Code of Ethics of Québec Police Officers* (C.Q.L.R., c. P-13.1, r. 1) (Code of Ethics); the council shall also adopt a policy on internal discipline for the members of the police service. Schedule G of the various agreements provides in this regard for a model for the regulation on internal discipline, and paragraph 62 of it stipulates that the procedure applicable to the review and arbitration process in the event of dismissal shall be the one set out in the *Canada Labour Code*, R.S.C. 1985, c. L-2 (*Canada Labour Code*);

- The chief of the police service adopts operational directives that comply with the Guide to police practices provided by the Minister of Public Security pursuant to section 304 of the *Police Act* and may adapt them to the cultural and local realities of the community;
- The band council must provide the police service with the required facility;
- The band council manages the budgets and purchases of its police service;
- The government contributions are paid to the band council;
- It is agreed that personnel employed under any of these agreements are persons providing services to the council and that none of the provisions shall have the effect of conferring upon the council, its members or its employees the status of employee, servant or agent of Canada or Quebec.

[6] It is appropriate to cite sections 90 to 93 of the *Police Act*, under which the Government of Quebec is authorized to enter into such agreements with the federal government and band councils:

chapter P-13.1	chapitre P-13.1
POLICE ACT	**LOI SUR LA POLICE**
TITLE I	**TITRE I**
TRAINING	FORMATION
DIVISION IV	**SECTION IV**
NATIVE POLICE FORCES	CORPS DE POLICE AUTOCHTONES
90. The Government may enter into an agreement with one or more Native communities, each represented by its band council, to establish or maintain a police force in a territory determined under the	**90.** Le gouvernement peut conclure, avec une ou plusieurs communautés autochtones, chacune étant représentée par son conseil de bande respectif, une entente visant à établir ou à maintenir un corps de police

agreement.

dans un territoire déterminé dans l'entente.

A police force thus established or maintained shall, for the duration of the agreement, be a police force for the purposes of this Act.

Le corps de police ainsi établi ou maintenu est, pendant la durée de l'entente, un corps de police aux fins de la présente loi.

91. The agreement must include provisions relating to the employment status and swearing-in of police officers, the independence of the administration of the police force, civil liability, internal discipline and accountability.

91. L'entente doit prévoir des dispositions relatives au lien d'emploi et à la prestation de serments des policiers, à l'indépendance de la direction du corps de police, à la responsabilité civile, à la discipline interne et à la reddition de comptes.

The agreement may also include, in particular, provisions relating to

Elle peut aussi prévoir des dispositions relatives, notamment, aux matières suivantes:

(1) standards governing the hiring of police officers;

1° les normes d'embauche des policiers;

(2) the appointment of members to the Comité de déontologie policière charged with hearing an application for review or a citation concerning the conduct of a police officer pursuant to this Act.

2° la désignation des membres du Comité de déontologie policière chargé d'entendre une demande de révision ou une citation relative à la conduite d'un policier suivant la présente loi.

The provisions relating to the standards governing the hiring of police officers may vary from the standards prescribed by this Act or the regulations under it and shall, in case of incompatibility, take precedence over the latter. The provisions of the agreement relating to the appointment of members to the Comité de déontologie policière are binding on the Comité.

Les dispositions relatives aux normes d'embauche des policiers peuvent être différentes des normes prévues par la présente loi ou par les règlements du gouvernement pris pour son application et prévalent sur celles-ci en cas de conflit. Le Comité de déontologie policière est lié par les dispositions de l'entente relatives à la désignation des membres du Comité.

92. The Minister shall table the agreement before the National Assembly within 15 days of the day on which it is signed if the Assembly

92. Le ministre dépose toute entente à l'Assemblée nationale dans les 15 jours de la date de sa signature si elle est en session, sinon, dans les 15

is in session or, if it is not sitting, within 15 days of resumption.	jours de la reprise des travaux.
93. A Native police force and its members are responsible for maintaining peace, order and public safety in the territory for which it is established, preventing and repressing crime and offences under the laws and regulations applicable in that territory and seeking out offenders.	**93.** Un corps de police autochtone et chacun de ses membres sont chargés de maintenir la paix, l'ordre et la sécurité publique dans le territoire pour lequel il est établi, de prévenir et réprimer le crime ainsi que les infractions aux lois et aux règlements applicables sur ce territoire et d'en rechercher les auteurs.

[7] Lastly, it is important to note that the OSFI is responsible for regulating and supervising private federal pension plans registered under the PBSA in order to contribute to public confidence in the Canadian financial system (*Office of the Superintendent of Financial Institutions Act*, R.S.C. 1985, c. 18 (3rd Supp.), Part I, section 4). To be registered under the PBSA, a pension plan must primarily relate to employment in connection with the operation of any work, undertaking or business that is within federal legislative authority (PBSA, subsections 4(2) and (4)). When this is not the case, the supervision of the plan is the responsibility of the provincial authorities, in this case, Retraite Québec (*Act respecting Retraite Québec*, C.Q.L.R. c. R-26.3).

[8] As noted above, the Plan has been registered and supervised by the OSFI since its inception in 1981. It is true that the OSFI reassessed the situation in 2011 following the decisions rendered by the Supreme Court in *NIL/TU,O Child and Family Services Society v. B.C. Government and Service Employees' Union*, 2010 SCC 45, [2010] 2 S.C.R. 696 [*NIL/TU,O*] and *Communications, Energy and Paperworkers Union of Canada v. Native Child and Family Services of Toronto*, 2010 SCC 46, [2010] 2 S.C.R. 737. In both of those cases, the highest court

found that the employees of a provincially regulated (albeit federally funded) child welfare agency providing services to Indigenous communities were governed by provincial labour laws. Nevertheless, the OSFI concluded that it was unnecessary to transfer the supervision of the Plan to the provincial authorities. I will return later to the scope of these Supreme Court decisions.

[9] Further to the decision rendered by this Court in *Nishnawbe-Aski Police Service Board v. Public Service Alliance of Canada*, 2015 FCA 211, [2016] 2 F.C.R. 351 [*Nishnawbe-Aski*], the OSFI again felt it necessary to reassess the situation. In that case, the Court found that the Nishnawbe-Aski Police Service's labour relations fall under provincial jurisdiction to the extent that the essential nature and function of First Nations police forces is to provide services in the same way as other provincial and municipal police forces. In a letter dated April 25, 2016, addressed to Mr. Sylvain Picard, the Plan Administrator, the OSFI expressed the view that the *Nishnawbe-Aski* decision had [TRANSLATION] "overturned" the Supreme Court's decision in *NIL/TU,O* and therefore requested that Mr. Picard provide any information on the structure of the participating employers or the activities they perform [TRANSLATION] "demonstrating that the labour relations of the employers participating in the Plan instead fall under federal jurisdiction" (A.B. at page 184).

[10] One month later (on May 20, 2016), Mr. Picard provided the OSFI with a legal opinion concluding that the policing activities carried out by the band councils that are members of the Plan fall under federal jurisdiction to the extent that these activities are an intrinsic part of the activities of those band councils (A.B. at page 188). According to the authors of that opinion, the situation was different from that analyzed in *Nishnawbe-Aski* because of the fact that the

Nishnawbe-Aski Band Council had assigned the management of policing services to an entity separate from the band council (the Police Services Board) rather than assuming that responsibility itself.

[11] After considering that opinion, the OSFI confirmed its original position. While recognizing that band councils are governed by federal labour law, the OSFI added that certain groups of employees under the responsibility of a band council may be subject to a provincial labour code when the work they perform is under provincial jurisdiction. The OSFI also stated that this is true of policing operations:

> [TRANSLATION]
>
> The power given to police officers in the performance of their duties and the power conferred on band councils for the administration of police services derive from the provincial *Police Act*. Activities delegated to band councils are detailed in the agreements. These agreements also stipulate that these activities must be governed and interpreted in accordance with the laws and regulations in force in Quebec. In addition, if these agreements did not exist, police services in these territories would be provided by the Sûreté du Québec, which, under section 50 of the *Police Act*, has jurisdiction to enforce law throughout the province.
>
> In the case of the Plan, it is all the more obvious to us that police force activities are separate from band council activities because the agreements stipulate that police forces must act independently of band councils (sections 7.3 of the Wendake and Mashteuiatsh agreements and section 2.2.3 of the Opitciwan agreement).
>
> Thus, the application of the functional test demonstrates that the work performed by Plan members does not constitute employment in a work, undertaking or business under federal legislative authority. The Plan is therefore not registered under the PBSA. Since the OSFI has no authority over the Plan, it must be transferred.
>
> A.B. at page 200.

[12] The OSFI therefore concluded that the Plan is not registered under the PBSA and that it should be transferred to Retraite Québec because the Plan members are not employed in a work, undertaking or business under federal legislative authority. It is of that decision that the applicants, Mr. Picard and RBA Financial Group, sought judicial review; not only did they seek to have the decision set aside by the Federal Court, but they also sought a declaratory judgment that the Plan members are employed in employment under federal jurisdiction and are therefore subject to the PBSA.

II. Impugned decision

[13] In a detailed and comprehensive decision, the Federal Court allowed the application for judicial review and found that the police officers and special constables hired and remunerated by band councils that are members of the Plan are employed in a federal work, undertaking or business such that the Plan was therefore subject to the PBSA. Applying the standard of correctness, the Federal Court agreed with the applicants' arguments that the normal and habitual activities of Indigenous police forces are closely connected to the governance activities of band councils and are therefore within Parliament's jurisdiction.

[14] After providing an overview of the division of powers with respect to "Indians", criminal law, the administration of justice and labour law, with particular emphasis on the regulation of policing powers, the trial judge reviewed the history of First Nations police services at the federal level, as well as in Ontario and Quebec. After presenting the origins of this dispute and summarizing the positions of the parties, the judge concluded that the OSFI had erred in focusing on the nature of a police officer's work rather than on the undertaking that employs the police

officer. In the judge's view, "the rules governing the labour relations for special constables and police officers have always been determined by the federal or provincial or even municipal character of the employer's activities. They have not been determined by the description of the police officers' duties, or the fact that they could act as peace officers under a provincial statute, which includes special constables and police officers employed by band councils" (*Picard v. Canada (Attorney General)*, 2018 FC 747 at paragraph 116; see also paragraph 118 (Reasons)).

[15] Given that the normal and habitual activities of Indigenous police forces are closely connected to the governance activities of band councils and that the labour relations of band councils are governed by the *Canada Labour Code* (see *Francis v. Canada Labour Relations Board*, [1981] 1 F.C. 225 (C.A.), [1980] F.C.J. No. 151 (QL) [*Francis*], reversed on another point *P.S.A. (Can.) v. Francis*, [1982] 2 S.C.R. 72, [1982] S.C.J. No. 62 (QL)), the police services that are members of the Plan must be considered to be "included employment" within the meaning of subsection 4(4) of the PBSA. The crux of the Federal Court's reasoning on this point is set out in the following two paragraphs:

> [119] . . . In this case, a proper analysis of all relevant facts based on the functional test reveals that, <u>in their essential nature</u>, police services provided by special constables or police officers who are members of an Indigenous police force and are directly employed by band councils that are members of the Plan <u>are closely connected and indivisible</u> from the governance activities of each band council party to the tripartite agreements in the Court record. Given subsection 91(24) of the *Constitution Act, 1867*, the maintenance of order and public safety on Indian reserves could be seen by the drafters of the Constitution as a "necessary incident" to legislative jurisdiction over Indians and Indian lands (*Four B*).
>
> [120] Under the agreements, the band council must at all times meet its obligations and responsibilities to provide the community with a quality police force. The Office erred in considering that police services provided to communities on reserves and other lands reserved for Indians were divisible from the other band council governance activities. In this case, the fact that each band council controls the hiring and working conditions of employees participating in

> the Plan is a determining factor in the exercise of the jurisdiction conferred on the band council by law and under the agreements. At the risk of repeating myself, the fact that a member of an Indigenous police force has the status of "peace officer" under the *Police Act* does not affect his employee-employer relationship with the band council and does not change the federal character of band council governance activities.

[16] The Federal Court also found that the OSFI erred in considering that this Court had overturned *NIL/TU,O* in *Nishnawbe-Aski*. On the contrary, this Court simply applied the functional test to a unique factual situation specific to Ontario. In that case, it was not the band councils themselves that provided the policing services, but rather a provincial board that recruited the employees independently of the Indigenous communities. That is why the outcome was similar to that of *NIL/TU,O*, which involved children's services provided to Indigenous communities by a provincial entity.

[17] Lastly, the Federal Court appeared to address the second step of the functional analysis in its "Subsidiary remarks on Indianness" (Reasons, at paragraphs 147–151). The Court concluded that, in light of the doctrine of interjurisdictional immunity, the labour relations of Indigenous police forces could not fall under provincial jurisdiction because of the effect on Indianness, which is at the heart of federal authority over Indians. The Federal Court stated the following in this regard:

> [151] Insofar as a provincial law of general application purports to regulate or limit the band council's stewardship powers as an employer under the *Indian Act* – whether in terms of employment conditions and selection of candidates, collective labour relations, minimum working conditions for band council employees, their occupational health and safety, or the regulation and oversight of their pension plan – an interpretation that is constitutionally compatible with the exclusive federal jurisdiction provided for in subsection 91(24) of the *Constitution Act, 1867* requires that this provincial law not apply to band councils and employees participating in the Plan. In the view of this Court, any contrary interpretation "would, in effect, nullify any exercise of the constitutional power"

> (*Gosselin (Tutor of) v. Quebec (Attorney General)*, 2005 SCC 15 at paragraph 14). In this case, the practical solution is therefore to recognize that federal regulations apply to the Plan, which does not preclude sections 90 to 93 of the *Police Act* from also applying.

[18] The Attorney General of Quebec, the intervener in the trialstage, appealed that decision on September 27, 2018, and the Assembly of First Nations and the Assembly of First Nations Quebec-Labrador were granted leave to intervene in support of the position argued by the respondents.

III. Issues

[19] The Attorney General of Quebec submitted four issues in this dispute, which the respondents have taken up in their arguments. However, I agree with the Attorney General of Canada, an intervener, that the only issue to be resolved in this case can be stated as follows:

> Did the Federal Court err in law in finding that the police officers participating in the Plan are employed in connection with the operation of a federal work, undertaking or business within the meaning of the PBSA?

IV. Analysis

A. *Standard of review*

[20] All of the parties agree that the applicable standard of review for deciding this dispute is correctness. That is because the fundamental question to be decided by this Court (and the Federal Court at the trial stage) is constitutional in nature. It is true that, in a formal sense, it is the interpretation of section 4 of the PBSA and, more specifically, of the expression “included employment” that is at issue. However, this exercise is dependent on the division of legislative

powers provided for in sections 91 and 92 of the *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, reproduced in R.S.C. 1985, Appendix II, No. 5 [the C.A., 1867], to which the definition of "included employment" implicitly refers and from which it cannot be dissociated. Parliament can legislate only within the framework of the powers vested in it by the constitutional text.

[21] It is true that this case was heard prior to the Supreme Court's decision in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 [*Vavilov*]. However, that recent decision did not change what is stated in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 at paragraph 58 and confirms the earlier case law according to which constitutional questions can have only one answer:

> The Constitution — both written and unwritten — dictates the limits of all state action. Legislatures and administrative decision makers are bound by the Constitution and must comply with it. A legislature cannot alter the scope of its own constitutional powers through statute. Nor can it alter the constitutional limits of executive power by delegating authority to an administrative body. In other words, although a legislature may choose what powers it delegates to an administrative body, it cannot delegate powers that it does not constitutionally have. The constitutional authority to act must have determinate, defined and consistent limits, which necessitates the application of the correctness standard.
>
> *Vavilov* at paragraph 56.

[22] That is the standard the Federal Court applied. This Court's role is therefore to determine whether the Federal Court properly applied that standard; in other words, the Court's role is to step into the shoes of the trial judge and focus on the administrative decision-maker's decision: see *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559, at paragraphs 45–47.

B. *The division of powers in labour relations*

[23] The power to legislate in matters of labour relations was not explicitly provided for in the C.A., 1867. Nevertheless, it has been accepted for nearly a century now that labour law falls primarily under subsections 92(13) ("Property and Civil Rights in the Province") and 92(16) ("Matters of a merely local or private Nature in the Province"). It is only by way of exception, where Parliament exercises exclusive jurisdiction in a particular area, that labour relations will fall within its jurisdiction as an integral part of its primary competence: see, in particular, *Toronto Electric Commissioners v. Snider*, [1925] A.C. 396, [1925] 2 D.L.R. 5; *Reference re Industrial Relations and Disputes Investigation Act*, [1955] S.C.R. 529; *Reference Re Minimum Wage Act of Saskatchewan*, [1948] S.C.R. 248, [1948] 3 D.L.R. 801; *Commission du Salaire Minimum v. Bell Telephone Company of Canada*, [1966] S.C.R. 767; *Agence Maritime Inc. v. Conseil Canadien des Relations Ouvrières et al.*, [1969] S.C.R. 851; *Letter Carrier's Union of Canada v. Canadian Union of Postal Workers et al.*, [1975] 1 S.C.R. 178; *Canada Labour Relations Board et al. v. Yellowknife*, [1977] 2 S.C.R 729 [*Yellowknife*]; *Construction Montcalm Inc. v. Min. Wage Com.*, [1979] 1 S.C.R 754; *Northern Telecom v. Communications Workers*, [1980] 1 S.C.R 115 [*Northern Telecom*]; *Four B Manufacturing v. United Garment Workers*, [1980] 1 S.C.R 1031 [*Four B*]; *Bell Canada v. Quebec (Commission de la Santé et de la Sécurité du Travail)*, [1988] 1 S.C.R 749, 15 C.A.Q. 217; *Ontario Hydro v. Ontario (Labour Relations Board)*, [1993] 3 S.C.R 327; *Consolidated Fastfrate Inc. v. Western Canada Council of Teamsters*, 2009 SCC 53, [2009] 3 S.C.R 407; *NIL/TU,O*; *Tessier Ltée v. Quebec (Commission de la santé et de la sécurité du travail)*, 2012 SCC 23, [2012] 2 S.C.R 3.

[24] The applicable principles were helpfully summarized by Justice Dickson (on behalf of a unanimous Court) at page 132 of *Northern Telecom* and are still relevant today:

> (1) Parliament has no authority over labour relations as such nor over the terms of a contract of employment; exclusive provincial competence is the rule.
>
> (2) By way of exception, however, Parliament may assert exclusive jurisdiction over these matters if it is shown that such jurisdiction is an integral part of its primary competence over some other single federal subject.
>
> (3) Primary federal competence over a given subject can prevent the application of provincial law relating to labour relations and the conditions of employment but only if it is demonstrated that federal authority over these matters is an integral element of such federal competence.
>
> (4) Thus, the regulation of wages to be paid by an undertaking, service or business, and the regulation of its labour relations, being related to an integral part of the operation of the undertaking, service or business, are removed from provincial jurisdiction and immune from the effect of provincial law if the undertaking, service or business is a federal one.
>
> (5) The question whether an undertaking, service or business is a federal one depends on the nature of its operation.
>
> (6) In order to determine the nature of the operation, one must look at the normal or habitual activities of the business as these of "a going concern", without regard for exceptional or casual factors; otherwise, the Constitution could not be applied with any degree of continuity and regularity.

[25] More recently, the Supreme Court clarified at paragraph 3 of *NIL/TU,O* the approach to be followed in determining whether the regulation of labour relations is within federal jurisdiction. The first step is to apply the functional test and thus to examine the nature, operations and activities of the entity to determine whether the entity constitutes a federal undertaking. In such a case, the labour relations will be governed by Parliament. If this first step is inconclusive, it will then be necessary to determine whether the provincial regulation of that entity's labour relations would infringe the federal power at issue.

[26] This approach differs from that which is generally taken to determine whether a law goes beyond the powers of the government that enacted it. Because the regulation of labour relations must be presumed to fall under provincial authority, the question will not be whether an activity lies at the core of a federal head of power, but rather whether a particular entity is a "federal undertaking" such that it is outside provincial jurisdiction over labour relations. As the majority in *NIL/TU,O* indicates, these two approaches are fundamentally different:

> [22] The difference between these two approaches is significant. The "core" of a federal head of power might not capture the scope or potential reach of federal legislative jurisdiction, as the Court held in *Canadian Western Bank*. Additionally, it is possible for an entity to be federally regulated in part and provincially regulated in part. To the extent that the functional test is inconclusive as to jurisdiction over the labour relations of an entity, the presumption of provincial jurisdiction will apply in such a case *unless* the core of the federal head of power would be impaired by provincial regulation of the entity's labour relations. It is only in this circumstance of an inconclusive finding about the application of the functional test that this narrow analysis of the "core" of the federal power will be engaged. (Emphasis in original.)

[27] The Supreme Court also specified, at paragraph 80 of *NIL/TU,O*, that there is no reason why the jurisdiction of an entity's labour relations should be approached differently because the entity is controlled or operated by Indigenous peoples or because it operates on the territory of a reserve. After duly noting the existence of a line of authority according to which courts have disregarded the functional test in this area in order to move directly to the question of whether there is impairment of the core of a federal head of power, Justice Abella (for the majority) reiterated the approach previously taken by the Supreme Court in *Four B*.

[28] It should be noted that in that case the highest court had ruled that the labour relations in a band-owned shoe manufacturing business operating on a reserve were governed by provincial labour laws. Applying the functional test, the Court expressed the view that the manufacture of

footwear is an "ordinary industrial activity" that falls under provincial jurisdiction in respect of its labour relations and that "[n]either the ownership of the business by Indian shareholders, nor the employment by that business of a majority of Indian employees, nor the carrying on of that business on an Indian reserve under a federal permit, nor the federal loan and subsidies, taken separately or together", can have any effect on the operational nature of that business (*Four B* at page 1046).

[29] Taking that analysis into account, Justice Abella disagreed with the position taken by her two dissenting colleagues to combine the two steps into a single examination of whether the activities in question fall within the "core of Indianness" protected by subsection 91(24) of the C.A., 1867 (*NIL/TU,O* at paragraph 46). She insisted that, even in cases involving Indigenous peoples, the functional test must be applied first. Only if that step is inconclusive should one move on to the second step, namely, to determine whether the provincial regulation of that entity's labour relations will impair the core of the federal power in relation to Indigenous peoples.

[30] Applying the functional test, Justice Abella considered the activities of NIL/TU,O Child and Family Services (NIL/TU,O), which represented the Collective First Nations. Under a tripartite agreement with the federal government and the Government of British Columbia, NIL/TU,O was mandated to provide child welfare services to First Nations children and families covered by the agreement. Under that agreement, the provincial government delegated some of its authority to provide child welfare services to NIL/TU,O, while the federal government funded the delivery of some (65%) of those services. The agreement also provided that NIL/TU,O's

employees were always accountable to the directors appointed under provincial legislation when providing services under that legislation and were required to comply with a number of principles and obligations set out in that legislation. The agreement also set out the nature and scope of the authorities delegated to the various employees of NIL/TU,O. The agreement also provided that a director designated under the provincial legislation could intervene to ensure compliance with the legislation.

[31] NIL/TU,O had argued that the distinctively Aboriginal component of its service delivery meant that it constituted an undertaking, service or business within federal jurisdiction for labour relations purposes. The majority dismissed that argument in unambiguous terms. After pointing out that NIL/TU,O's activities are entirely regulated by provincial law, Justice Abella wrote the following:

> [39] None of this detracts from NIL/TU,O's distinct character as a child welfare organization for Aboriginal communities. But 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. As the Court of Appeal pointed out, social services must, in order to be effective, be geared to the target clientele. 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.

[32] And, in case she had not been clear enough, she concluded as follows:

> [45] The essential nature of NIL/TU,O's operation is to provide child and family services, a matter within the provincial sphere. Neither the presence of federal funding, nor the fact that NIL/TU,O's services are provided in a culturally sensitive manner, in my respectful view, displaces the overridingly provincial nature of this entity. The community for whom NIL/TU,O operates as a child welfare agency does not change *what* it does, namely, deliver child welfare

> services. The designated beneficiaries may and undoubtedly should affect how those services are delivered, but they do not change the fact that the delivery of child welfare services, a provincial undertaking, is what it essentially does. (Emphasis in original.)

[33] This Court has had a few opportunities to examine labour relations in an Indigenous context since *NIL/TU,O*. The first of those decisions, which led the OSFI to conclude that the Plan could not be registered under the PBSA and which all of the parties referred us to given the factual context that is very similar in many respects to that of this case, is *Nishnawbe-Aski*. That case concerned the jurisdiction of the Canada Industrial Relations Board over police officers employed by the Nishnawbe-Aski Police Services Board.

[34] In accordance with the *First Nations Policing Policy* and the *Program*, the federal government, Ontario and the First Nations signed an agreement giving rise to three options for the provision of policing services in the province. The First Nations could enter into an agreement with existing police forces (municipal, regional or the Ontario Provincial Police), establish their own police services, or create a regional police service controlled by a First Nations police governing authority. The Nishnawbe-Aski Nation opted for the third option for its 49 communities.

[35] That agreement provides that all policing responsibilities for the Nishnawbe-Aski Nation communities assumed by the Ontario Provincial Police (OPP) are transferred to the Nishnawbe-Aski Police Services Board. All of the officers of that new police force were thus transferred from the OPP and performed essentially the same duties they performed when they were employed by the OPP. This means that the Nishnawbe-Aski Police Service is responsible

for enforcing First Nations laws, the *Criminal Code*, provincial laws and federal laws in the territory. Recruitment is carried out independently of the First Nations and, once selected, recruits must complete their training at the Ontario Police College like all other recruits in the province. Once appointed by the Commissioner of the OPP in accordance with section 54 of the *Police Services Act*, R.S.O. 1990, c. P.15 [*Police Services Act*], the First Nations officers have all the powers of a police officer under that Act and may enforce the law anywhere in Ontario. Nishnawbe-Aski officers are ultimately responsible to the OPP Commissioner and the Ontario Civilian Police Commission, both of whom can suspend or dismiss their appointment. Lastly, 48% of the core funding is provided by Ontario and 52% by the federal government.

[36] After reiterating the applicable principles and case law, this Court (per Justice Stratas) listed the factors that led it to conclude that the labour relations of the Nishnawbe-Aski Police Service fall under provincial jurisdiction (*Nishnawbe-Aski* at paragraph 65). Among the most relevant to this case are the following:

- The provinces have the legislative authority to establish provincial and municipal police services under subsections 92(8) and 92(16) of the C.A., 1867;
- The statutory source for the appointment of First Nations officers is the provincial *Police Services Act*, and the status of being a First Nations officer flows from that Act, not from federal legislation;
- That provincial legislation vests the First Nations officers with the powers of a police officer for the purposes of carrying out their duties, which include the power to detain, arrest and, where necessary, to use force;

- That Act regulates some aspects of the labour relations of police officers and allows the OPP Commissioner to suspend or terminate a First Nations officer;
- First Nations officers are subject to the same regulatory bodies as are officers in other police services in Ontario;
- The essential nature of the police service is to provide policing services to all persons, Indigenous or non-Indigenous, who are in the Nishnawbe-Aski area. The First Nations officers are required to enforce the law against all persons. These services can be provided anywhere in Ontario.
- The powers of Indigenous police services are not limited to policing on reserves;
- The Nishnawbe-Aski Police Service is functionally integrated in many ways with other police services in Ontario, such as the OPP;
- The Nishnawbe-Aski Police Service is independent and autonomous from the Nishnawbe-Aski Nation and its band members.

[37] After reiterating that the focus should be on the entity’s activities rather than on the identity of the community benefiting from those activities, the Court cited *NIL/TU,O* (at paragraph 39, reproduced at paragraph 31 of these reasons) and indicated that it applied equally to the Nishnawbe-Aski Police Service. This Court stated the following: “[t]he fact that the Nishnawbe-Aski Police Service has a distinct character as a police service for Aboriginal communities does not take away from its essential character as a police service that is in all respects regulated by the province” (*Nishnawbe-Aski* at paragraph 70). This Court then went on to state the following:

> [71] It is true that Nishnawbe-Aski police officers enforce, among other things, bylaws passed by Bands, though this constitutes only a small part of the officers’

> task: *Nishnawbe-Aski Police Services Board Annual Report 2011-2012* (only 0.6% of total incidents in the operational year). It is true that the enforcement of Band bylaws might assist the Nishnawbe-Aski Nation in its governance of Nishnawbe-Aski areas. It is true that an important objective of the Nishnawbe-Aski Police Service is to further and assist Aboriginal self-governance. But these things have nothing to do with the factual character of what the Nishnawbe-Aski Police Service actually does. Like the child welfare agencies in issue in *NIL/TU,O* and *Native Child*, the functions and activities of the Nishnawbe-Aski Police Service can only be characterized on this record as provincial in nature, tailored to serve its particular community, nothing more.

[38] More recently, this Court took a similar approach in *Canada (Attorney General) v. Northern Inter-Tribal Health Authority Inc.*, 2020 FCA 63 [*Northern Inter-Tribal*]. At issue in that case was the OSFI's decision that the pension plan for the employees of the two respondent companies was not under its authority and was instead the responsibility of the province. Those two companies, which are non-profit organizations, were incorporated to provide health services to First Nations and operate under an agreement between the companies, the federal government and the First Nations involved. They are funded by the federal government, while adhering to provincial guidelines and regulations to ensure compliance with the appropriate health standards.

[39] Once again applying the functional test and analytical framework developed in *NIL/TU,O* and applied in *Nishnawbe-Aski*, the Court rejected the respondents' argument that the distinctly Aboriginal component of their service delivery methodology altered the nature of their operations and activities. Taking the view that this was precisely the position rejected by the Supreme Court in *NIL/TU,O*, Justice Stratas (for a unanimous Court) wrote the following:

> [24] This Court's decision in *Nishnawbe-Aski*, like *NIL/TU,O*, is strong authority for the proposition that an undertaking, usually provincially regulated, does not become federally regulated just because it is tailored sensitively to serve the needs of a local Indigenous population. The undertaking in *Nishnawbe-Aski*, a police services board, was very much comprised of Indigenous people, took some direction from the local Indigenous community and played a very significant role

> in it, yet functionally it remained a police services undertaking regulated by the province.

[40] The question in this case is whether the fact that the police officers whose pension plan is at issue here are employed by band councils is determinative and sufficient to distinguish this case from *NIL/TU,O* and *Nishnawbe-Aski*. In all other respects, the legal framework within which the police services that contribute to the Plan operate is not substantially different from that which applies in Ontario and which was in issue in *Nishnawbe-Aski*.

[41] In both cases, the establishment of Indigenous police services stems from a tripartite agreement involving the provincial and federal governments. Contrary to what the Federal Court appears to have stated, these police forces derive their existence and powers from provincial legislation, not federal legislation. It is in fact under the authority of the *Police Act* that the Indigenous police forces are established and exercise their jurisdiction in Quebec and that agreements are reached with the Indigenous communities.

[42] It has long been recognized that the establishment of a police force is the responsibility of the provinces under their authority over the administration of justice set out in subsection 92(14) of the C.A., 1867: see *Attorney General of Alberta et al. v. Putnam et al.*, [1981] 2 S.C.R. 267 at page 279; *O'Hara v. British Columbia*, [1987] 2 S.C.R. 591 at page 606. The administration of both civil and criminal justice is a provincial responsibility (*Di Iorio v. Warden of the Montreal Jail*, [1978] 1 S.C.R. 152 at page 192), and provincial police forces are responsible for enforcing both provincial laws and the *Criminal Code*. Federal jurisdiction over the administration of justice is limited to prosecution and the enforcement of laws enacted by Parliament other than

the *Criminal Code*: *A.G. (Can.) v. Can. Nat. Transportation, Ltd.*, [1983] 2 S.C.R. 206; *R. v. Wetmore*, [1983] 2 S.C.R. 284. See also, more generally, Peter W. Hogg, *Constitutional Law of Canada*, 5th ed. (United States: Thomson Reuters, 2019) chapter 19.5.

[43] I therefore find that the trial judge erred in suggesting that paragraph 81(1)(*c*) of the *Indian Act*, R.S.C. 1985, c. I-5 [*Indian Act*], which gives band councils the power to make by-laws concerning "the observance of law and order", thus authorizes them to establish their own police forces. Similarly, I consider it erroneous to state that, in the absence of an agreement, the Sûreté du Québec could not ensure safety and security in the territories covered by the agreements. There is no doubt that, in the absence of agreements, provincial authorities would be responsible for maintaining order within the territories delimited in those agreements. That is also the conclusion reached by the Court of Appeal of Quebec in another context:

> [TRANSLATION]
>
> The respondents could apply for the position of police officer because of an agreement entered into on August 19, 1999, between the Kanesatake Mohawk Council, the Government of Quebec, and the Government of Canada. Pursuant to the powers conferred upon it by the *Indian Act* and the *Kanesatake Interim Land Base Governance Act*, the Band Council, acting alone, does not have jurisdiction to establish a police force in Kanesatake. As for the federal government, assuming that its jurisdiction over Indians and lands reserved for the Indians allows it to delegate this power to the Band Council, it has not done so.
>
> *Conseil mohawk de Kanesatake/Mohawk Council of Kanesatake v. Isaac*, 2011 QCCA 977 at paragraph 48.

[44] This Court arrived at the same conclusion in *Nishnawbe-Aski* at paragraph 65:

> The CIRB held that the statutory authority for the Nishnawbe-Aski Police Service is paragraph 81(1)(*c*) of the *Indian Act*, which provides that a band council may pass a bylaw for the purpose of the "observance of law and order." I disagree. Paragraph 81(1)(*c*) gives a band council the power to make by-laws maintaining law and order, nothing more. One of the duties of the Nishnawbe-Aski Police

> Service is to enforce bylaws enacted under paragraph 81(1)(*c*) of the *Indian Act* but its overall function is to provide police services that are authorized by the *Police Services Act*. As both the Supreme Court and the Court of Appeal for Ontario have found, the status of being a First Nations Constable flows directly from the *Police Services Act*, not any federal law.

[45] In this appeal, it is not necessary to determine whether Parliament has the power to legislate to establish Indigenous police forces on its own or to authorize band councils to do so. In the Attorney General of Canada's opinion, Parliament has not legislated to that effect, and it is clear to me that paragraph 81(1)(*c*) is not explicit enough to be interpreted in this way.

[46] Coming back to the other similarities between this case and the facts in *Nishnawbe-Aski*, I note that funding for the Indigenous police forces in both cases is provided by the federal government and the affected provincial government, in equal proportions (52% and 48%, respectively). In both cases, the federal government's involvement is not required to establish these police services and results solely from the exercise of its spending authority.

[47] I also note that, in both cases, the Indigenous police officers derive their powers from provincial law and must act independently and without any form of interference in their investigations and operations. Therefore, they may not in any way receive instructions, either directly or indirectly, from the council, its employees or band members. They are also subject to the selection and training criteria applicable to all police officers in the province and are subject to the same code of ethics. Lastly, the agreements being examined here, like the one examined in *Nishnawbe-Aski*, provide for the possibility for Indigenous police forces to collaborate at the operational level with the various police authorities that exercise their powers within Quebec.

[48] It is true that under the agreements at issue in this case, the territory over which the Indigenous police services exercise jurisdiction is the reserve. That was not the case for the Nishnawbe-Aski Police Service, whose officers provide policing services on the First Nations territories they serve, but also outside of the reserve.

[49] In short, apart from the fact that the police services established by the tripartite agreements at the heart of this dispute all fall under the responsibility of the band councils involved rather than that of a board that is independent of those councils, there is essentially nothing to distinguish the factual context of this case from that of *Nishnawbe-Aski*. Is it then necessary to apply the reasoning developed in that decision and conclude that the labour relations and, consequently, the pension plan, of the police officers covered by the Plan are subject to the jurisdiction of Quebec and not of the federal authorities? That is what the Attorney General of Quebec and the Attorney General of Canada are arguing.

[50] According to the Attorney General of Quebec, the fact that the band council is the employer of the police officers of each of the police forces in question is not determinative because federal jurisdiction over labour relations does not apply to all band council employees, but only to those assigned to band administration. The Attorney General of Quebec submits that the role of the police force is to provide policing services in the community covered by the agreement in accordance with the powers provided for in the *Police Act*, a role that [TRANSLATION] "has nothing to do with the mission of the band council as set out in the *Indian Act*" (Attorney General of Quebec's memorandum at paragraph 56). The Attorney General of Quebec adds that it is the Sûreté du Québec that would assume these functions in the absence of

an agreement since that provincial police force has jurisdiction over the entire territory of Quebec.

[51] The Attorney General of Quebec also submits that the Federal Court erred in its application of the functional test by applying a different analytical framework as a result of the Indigenous context, contrary to the pronouncements of the Supreme Court in *NIL/TU,O*. Relying in particular on *Yellowknife* and *Francis*, the Attorney General of Quebec argues that the Federal Court should not have focused on the person of the employer, but rather on the nature of the activity. This argument is most clearly expressed at paragraph 61 of the Attorney General of Quebec's memorandum:

> [TRANSLATION]
>
> In concluding that the police forces' activities are integral to the governance activities of the band councils in this case, it is clear that the Federal Court applied the functional test differently because of the federal authority over Indians and lands reserved for the Indians. In fact, the normal and habitual activity of Indigenous police forces should logically be characterized as "the delivery of policing services", as with municipal or provincial police forces.

[52] The Attorney General of Canada takes a similar position. He also argues that not all band council employees are necessarily governed by federal labour laws and that it is the nature of the duties performed by the employees involved in the case that is determinative. In this case, it is the activities of the police forces that must be considered; these activities are severable from other governance activities and do not stem from the *Indian Act*, but rather from Quebec's *Police Act*. According to the Attorney General of Canada, it is necessary to consider not only the nature of the duties performed by the employees involved, but also the statutory source of the powers they exercise. If Indigenous police officers were appointed under the *Indian Act* or another

federal statute, as is the case for RCMP officers, their labour relations would be under federal jurisdiction.

[53] In my opinion, this argument cannot be accepted. I am mindful of the fact that the courts must be careful and exercise a degree of caution when both levels of government agree on the exercise of their respective authorities: *Siemens v. Manitoba (Attorney General)*, 2003 SCC 3, [2003] 1 S.C.R. 6 at paragraph 34; *Goodwin v. British Columbia (Superintendent of Motor Vehicles)*, 2015 SCC 46, [2015] 3 S.C.R. 250 at paragraph 33; *Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture)*, 2002 SCC 31, [2002] 2 S.C.R. 146 at paragraph 73; *Ontario (Attorney General) v. OPSEU*, [1987] 2 S.C.R. 2 at pages 19–20. Nevertheless, the courts have the ultimate responsibility for ensuring compliance with the Constitution. One of the “whereas clauses” of these agreements is to the effect that the financial contribution provided by Canada and Quebec for the expenses incurred by band councils to establish and maintain policing services is done [TRANSLATION] “while respecting their own jurisdictions”.

[54] There is no longer any doubt that the functional test must be applied in the same way in Indigenous matters as in any other matter. The proposition that the functional test must be disregarded “where legislative competence is conferred not in terms relating to physical objects, things or systems, but to persons or groups of persons such as Indians or aliens” was definitively set aside in *Four B* (at pages 1046–1047). As the Supreme Court reiterated in *NIL/TU,O*, it is the nature, operations and habitual activities of the entity that must be examined to determine whether it is a federal undertaking (at paragraph 18).

[55] In this case, I agree with the Federal Court that the entity to be considered is the band council, not the police services. Indigenous police forces do not exist separately from band councils. Contrary to the situation in *NIL/TU,O* and *Nishnawbe-Aski*, their employer is not an independent body, but the band council itself. Paragraphs 2.1.3 and 5.4.2 of the agreements with the participating First Nations could not be more clear in this regard:

> 2.1.3 The Council shall be responsible for the establishment and administration of the Police Service. It shall be the employer of the members of the Police Service, including the Chief and support staff, and shall also be responsible for their appointment. The Council shall draw up their employment contracts, including paragraph 5.4.2 of this Agreement.
>
> 5.4.2 It is agreed that personnel employed as a result of this Agreement are and shall remain persons providing services to the Council, and nothing in this Agreement is to be read or construed as conferring upon the Council or its members, officers, employees, agents or contractors the status of officer, employee, servant or agent of Canada or Quebec or the status of a person acting in a partnership or a joint venture with Canada or Quebec.
>
> *Agreement on the Provision of Policing Services in the Community of Timiskaming*, submitted as an example, A.B. at pages 270, 292.

[56] It is also the band council that establishes the internal policies and procedures for the administration of the police service (paragraph 2.1.4), that hires the members of the police service (paragraph 2.3.1), that selects the candidate for the position of chief of police (paragraph 2.3.2) and that may dismiss the chief of police or reduce his or her pay (paragraph 2.10). The council is also responsible for providing the police service with the required facility (paragraph 3.1.1), is solely responsible for ensuring that the facility complies with the applicable fire safety and occupational health and safety standards (paragraph 3.1.4), and is responsible for supplying material and equipment needed for the provision of policing services (paragraph 3.2.1).

[57] The band council is clearly an "undertaking" under federal jurisdiction for labour relations purposes, as this Court recognized in *Francis*. The issue in that case was whether the *Canada Labour Code*, the scope of which is defined in terms similar to those used in the PBSA, governed the certification of a group of employees of an Indian band. Those employees were engaged in "education administration, the administration of Indian lands and estates, the administration of welfare, the administration of housing, school administration, public works, the administration of an old age home, maintenance of roads, maintenance of schools, maintenance of water and sanitation services, garbage collection, etc." (*Francis* at paragraph 17).

[58] Taking the view that the activities of those employees were carried out pursuant to the *Indian Act* and were related to Indian status, Justice Heald concluded that the labour relations of those employees were an integral part of the federal jurisdiction pursuant to subsection 91(24) of the C.A., 1867. In his view, the administration of the band was a "work, undertaking or business" under federal jurisdiction. In a dissenting opinion (but not on this point), Justice Le Dain was even clearer:

> . . . the activity in which the employees in question are engaged is activity which falls within federal legislative jurisdiction with respect to "Indians and Lands reserved for the Indians" under subsection 91(24) of *The British North America Act, 1867* and constitutes a federal work, undertaking or business within the meaning of sections 2 and 108 of the *Canada Labour Code*. The activity consists of certain functions or services performed by or under the supervision of the Band Council, and viewed as a whole it may be characterized as the administration of the Reserve and the affairs of the Band. It is concerned with the organization and maintenance of communal life on the Reserve. The Band Council derives its authority for the provision of these functions or services from the terms of the *Indian Act* and applicable Regulations, as well as from administrative approvals by the Department of Indian Affairs and Northern Development, which establishes programs for the reserves and provides the necessary financial resources for their implementation. The Band Council is carrying out some of the administration that inheres in federal jurisdiction with respect to the reserves. Such administration, viewed as a comprehensive responsibility of a local

> government nature, is a work, undertaking or business within the meaning of the *Canada Labour Code* on the broad view that is to be taken of those terms in the light of the decision of the Supreme Court of Canada in the *City of Yellowknife* case (*supra*).
>
> *Francis* at paragraph 27.

[59] If the activities of the employees involved in that case could be viewed as a "comprehensive responsibility of a local government nature," in the words of Justice Le Dain, *a fortiori* the same must be true for the employees of a police force. If there is one duty that is clearly under the governance and responsibility of a local government, it is that of maintaining peace and enforcing the law. I note in this regard that paragraph 81(1)(*c*) gives band councils the power to make by-laws for the purpose of the observance of law and order. Although, as I mentioned earlier, I do not find this provision to be sufficiently explicit to authorize the council to establish a police force, it at least recognizes the council's responsibility to enforce the law (regardless of the method chosen). When employees perform such duties within the boundaries of community territory and are hired by the band council, I do not see how they could be separated from the undertaking that is the band council. The *First Nations Policing Policy* was a means to support federal policy on the implementation of Indigenous peoples' inherent right to self-government and was intended to assist First Nations in acquiring the tools to become self-sufficient and self-governing through the establishment of structures for the management, administration and accountability of the police services provided in their communities (*First Nations Policing Policy*, pages 2–3).

[60] In my view, the fact that police forces under the authority of band councils exercise powers delegated by the province and are subject to certain general provincial standards,

including those regarding training, is not determinative of which level of government has jurisdiction over their labour relations. Federal government employees are similarly subject to a variety of provincial requirements for occupational certification. It would not occur to anyone to conclude that the labour relations of federally employed engineers or physicians are not governed by Parliament simply because the practice of their profession is regulated by provincial professional bodies. Under the functional test, it is the normal and habitual activities of the undertaking for which a person works that are important. This is all the more true at the governmental level since its activities cannot be divided and compartmentalized like those of a corporation (private or public). To find otherwise would result in a vast number of difficulties in implementation, as the Supreme Court recognized in *Attorney General of Canada v. St. Hubert Base Teachers' Association*, [1983] 1 S.C.R. 498 at page 508. What is true for the federal government and the provincial governments is equally true for band councils, which similarly exercise a power of public authority (albeit through statutory delegation).

[61] I therefore find, for the reasons stated above, that this case differs from the facts in *NIL/TU,O*, *Nishnawbe-Aski* and *Northern Inter-Tribal*. In those cases, the employer was not the band council but an entity independent of the councils. It is precisely on the basis of that distinction that this Court found in *Lac John* that an application for certification of a bargaining unit composed of the teaching staff of a school located on the territory of an Indigenous reserve falls within the jurisdiction of the Canada Industrial Relations Board (*Conseil de la Nation Innu Matimekush-Lac John v. Association of Employees of Northern Quebec (CSQ)*, 2017 FCA 212, [2017] F.C.J. No. 997 (QL) [*Lac John*]). In that case, as in the present case, the employer was the band council. Justice Trudel (for a unanimous Court) stated the following in this regard:

> [38] In that decision [*Nishnawbe-Aski*], this Court determined that the Nishnawbe-Aski Police Service did not assume any policing functions from a federal agency or a federal police service (at paragraph 17). The candidates were recruited independently of Nishnawbe-Aski First Nations (*ibidem* at paragraph 23). As employees of this police service, the First Nations constables served both First Nations and non-First Nations citizens in the areas covered by an operational agreement signed between the police service and the Ontario Provincial Police (OPP) (*ibidem* at paragraph 26). The police service was a distinct entity. Finally, the constables of the Nishnawbe-Aski Police Service were ultimately responsible to the OPP Commissioner and to the Ontario Civilian Policing Commission—both having the power to suspend or terminate their appointment under subsections 54(5) and 54(6) of the *Police Services Act*, R.S.O. 1990, c. P.15 (*ibidem* at paragraph 27).
>
> [39] In the case before us, the applicant is the employer of the teachers and has the power to hire and terminate them.

[62] The same is true here, and thus I agree with the Court's remarks in *Lac John*. I also note that the Saskatchewan Court of Appeal applied the same reasoning in *Whitebear Band Council v. Carpenters Provincial Council of Saskatchewan and Saskatchewan Labour Relations Board*, 135 D.L.R. (3d) 128 (Sask CA), [1982] 3 C.N.L.R. 181. The Federal Court also applied the same rationale in at least two cases in which band council employees were performing duties related to the general administration of the band's affairs: see *Canada (Attorney General) v. Munsee-Delaware Nation*, 2015 FC 366, [2015] F.C.J. No. 331 (QL); *Berens River First Nation v. Gibson-Peron*, 2015 FC 614, [2015] F.C.J. No. 1535 (QL).

[63] It does not follow from the foregoing that any activity or duty whose performance is under band council authority will fall under federal jurisdiction, as the Attorney General of Quebec fears. This activity or duty must be truly assimilated to or associated with the governance of a First Nation. Therefore, the conclusion reached in *Fox Lake Cree Nation v. Anderson*, 2013 FC 1276, [2013] F.C.J. No. 1382 (QL), was that the employees of a negotiations office

established by an Indian band to negotiate complex commercial agreements with other parties, and which was operated separately and distinctly from the general administration of the band, were not governed by the *Canada Labour Code*. Similarly, Indigenous fishers employed by a band council whose commercial activities were carried out primarily outside the community's territory were considered to fall under provincial jurisdiction, provided that the activity in question had no connection with the band council's governance activities: *Re Waycobah First Nation and UFCW Local 864*, 2015 CIRB 792, [2015] C.I.R.B.D. No. 41 (QL).

[64] Moreover, the fact that the labour relations of Indigenous police forces fall under federal jurisdiction does not call into question the due process of validly enacted Quebec laws on the administration of civil and criminal justice. Thus, the minimum training and hiring standards set out in the applicable provincial policing legislation, namely the *Police Act*, apply to the Indigenous police services, as set out in paragraph 2.3.1 of the tripartite agreements. The same is true of the Code of Ethics, in accordance with paragraph 2.7.1 of the tripartite agreements.

V. Conclusion

[65] For all of the foregoing reasons, I am therefore of the view that the Federal Court did not err in allowing the application for judicial review and in declaring that the police officers and special constables hired and remunerated by band councils that are members of the Plan are employed in a work, undertaking or business within federal jurisdiction. Consequently, the PBSA and its Regulations apply to the Plan because the participating employees are employed in "included employment" within the meaning of the PBSA.

[66] In light of this conclusion, I do not consider it necessary to deal with the existence of an ancestral right related to governance or police services. Neither the notice of application for judicial review nor the evidence adduced at trial allowed for a debate on this issue, and the trial judge thus erred in basing an argument in support of his decision on that issue.

[67] In any event, the Supreme Court refused to rule on the existence of a general right to self-government in *R. v. Pamajewon*, [1996] 2 S.C.R. 821, [1996] S.C.J. No. 20 (QL). Even assuming that section 35 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, could provide a basis for such a right, it would still be necessary to be able to delineate the exact activity that is subject to an ancestral right and to demonstrate that this activity was a defining characteristic of the culture in question prior to European contact: *R. v. Van der Peet*, [1996] 2 S.C.R. 507, [1996] S.C.J. No. 77 (QL). However, no such evidence has been adduced in the case at bar. Finally, while the establishment of Indigenous police forces may contribute to the self-government of First Nations, I do not find that this aspect of the issue has any bearing on the division of legislative powers over labour relations.

[68] I would therefore dismiss the appeal, with costs in favour of the respondents.

"Yves de Montigny"
J.A.

"I agree.
M. Nadon J.A."

"I agree.
George R. Locke J.A."

FEDERAL COURT OF APPEAL

SOLICITORS OF RECORD

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