

IN THE MATTER OF A COMPLAINT OF UNJUST
DISMISSAL PURSUANT TO DIVISION XIV - PART III,
SECTION 240 OF THE *CANADA LABOUR CODE*;

AND IN THE MATTER OF AN ADJUDICATION OF THE
SAID COMPLAINT

BETWEEN:

ISABELLE (IRA) HORSE,

COMPLAINANT,

- and -

BTC HUMAN SERVICES CORP.,

RESPONDENT.

ADJUDICATOR'S PRELIMINARY DECISION
February 19, 2013

T. F. (TED) KOSKIE, B.Sc., J.D.

Date of Hearing: September 27, 2012

Place of Hearing: Saskatoon, SK

Representatives: Complainant, Isabelle (Ira) Horse, Self Represented

Robert Frost-Hinz, for the Respondent, B.T.C. Human Services Corp.

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I. INTRODUCTION

[1] Isabelle (Ira) Horse (“Horse”) lodged a complaint (the “Complaint”) dated March 25, 2012, pursuant to section 240 of the *Canada Labour Code*,¹ Part III (the “Code”), alleging that BTC Human Services Corp. (“BTC”) unjustly dismissed her from her employment on March 15, 2011.²

[2] BTC says it had just cause to dismiss Horse.

[3] The Minister of Labour (Canada) appointed me to hear and determine the Complaint.

II. PRELIMINARY MATTER

[4] BTC served notice (the “Notice”) that it intended to “question the constitutional jurisdiction of the . . . Code . . . and an Adjudicator appointed pursuant to . . . s. 242 of the . . . Code over the labour relations of a child welfare and family services provider operated by . . . [BTC].”

[5] Within the Notice, BTC said:

The following are the material facts giving rise to the constitutional question:

- (a) [BTC] . . . operates a child welfare and family service provider to members of its member First Nations;
- (b) [BTC] . . . is subject to provincial regulation pursuant to *The Child and Family Service Act*, S.S. 1989-90, c. C-7.2, and operates pursuant to operating agreements with the Province of Saskatchewan and its member First Nations;
- (c) [BTC] . . . receives funding from both provincial and federal sources; and
- (d) [Horse] . . . has commenced a claim for unjust dismissal pursuant to the . . . Code.

¹RSC 1985, c L-2, ss 124, 125(1)

²Exhibit H-1, Horse Complaint

[6] Within the Notice, BTC said:

The following is the legal basis for the constitutional question:

- (a) the Supreme Court of Canada has recently clarified that labour relations of First Nation undertakings are subject to provincial regulation where the undertaking is, functionally, properly subject to provincial jurisdiction;
- (b) section 4 of the . . . *Code* provides that the labour relations of employees who are employed on or in connection with the operation of any federal work, undertaking or business fall within exclusive federal jurisdiction;
- (c) [BTC] . . . operates a child welfare and family services provider to members of its member First Nations, and therefore is not, functionally, a federal work, undertaking or business so as to displace the presumption of provincial jurisdiction over its labour relations;
- (d) the labour relations of the employees working at . . . [BTC's] place of business, including . . . [Horse], are therefore properly subject to provincial, not federal, labour regulation; and
- (e) therefore, the . . . *Code* and an Adjudicator appointed pursuant thereto have no jurisdiction in relation to the labour relations of . . . [BTC].

[7] BTC filed an Affidavit³ satisfying me that it served the Attorneys General of Canada and all provinces in Canada with notice as required by section 57 of the *Federal Courts Act*.⁴ None of the Attorneys General intervened in this matter.

[8] Counsel for BTC articulated the issue herein as simply “whether BTC is properly subject to federal jurisdiction over its labour and employment relations.” I am of the view same is reasonably framed.

[9] Horse presented no evidence and took no position with respect to the issue presented by the Notice.

³Affidavit of Service dated September 12, 2012

⁴R.S.C. 1985, c. F-7

III. FACTS

A. RESPONDENT'S EVIDENCE

1. Janet Blanch Okemow

[10] BTC called Janet Blanch Okemow (“Okemow”) as its sole witness. Okemow testified:

- (a) she is employed by BTC as its Executive Director;
- (b) she is generally responsible for all aspects of the operation of BTC and reports to a Board of Directors comprising the Chiefs of the Lucky Man, Poundmaker, Little Pine and Mosquito First Nations (the “Member First Nations”);
- (c) BTC was incorporated as a nonprofit corporation on May 31, 1993, with its offices at North Battleford, Saskatchewan;⁵
- (d) BTC employs twenty-one (21) individuals—most of whom are First Nations and a few of whom are Métis Nations—comprised of a manager, supervisor and family services workers, all of whom have a degree in social work;
- (e) BTC’s Profile Report states its activities as the “provision of child and family services to member first nations”;⁶
- (f) BTC delivers its services through, *inter alia*, a:
 - (i) Protection Unit for children that provides intake, protection and financial

⁵Exhibit C-1, Corporate Registry Profile Report dated July 25, 2012

⁶*Ibid.*

assistance services; and

- (ii) Prevention Unit with staff that liaises with Member First Nations and work with individuals mostly residing on-reserve (but some living in an urban environment);
- (g) BTC's goal is to:
- (i) maintain and strengthen families;
 - (ii) prevent children from being placed in foster care; and
 - (iii) when children have been placed in foster care, to develop a plan for reuniting them with their natural families;
- and, in so doing, is mindful of cultural heritage;
- (h) BTC has negotiated the following agreements for the transfer of authority over, and responsibility for, the delivery of these services:
- (i) a Comprehensive Funding Agreement ("CFA") with the Canadian Government Department of Indian Affairs and Northern Development ("Canada") dated September 15, 1993;⁷
 - (ii) an ICFS Agreement with Canada dated September 15, 1993;⁸
 - (iii) a Tripartite Agreement ("TA") with the Saskatchewan Government

⁷Exhibit C-2, Comprehensive Funding Agreement dated September 15, 1993

⁸Exhibit C-3, ICFS Agreement dated September 15, 1993

Department of Social Services (“Sask”) dated 2008;⁹ and

(iv) a Family Finders Agreement with Sask dated May 20, 2011;¹⁰

(i) paragraph 3.2 of the CFA¹¹ provides:

Under this agreement, . . . Canada shall . . . provide to . . . [BTC], applicable departmental authorities, regulations and guidelines relevant to the administration of all programs by . . . [BTC], including such programs as may be devolved to . . . [BTC]

and said:

(i) Canada has not supplied BTC with any authorities, regulations and guidelines;
and

(ii) BTC must use authorities, regulations and guidelines supplied by Sask;

(j) BTC operates “pursuant” to the TA, an agreement that draws its authority from *The Child and Family Services Act*¹²;

(k) no Federal legislation is incorporated into the TA;

(l) the TA sets forth the responsibilities of and services to be provided by BTC;¹³ and

(m) paragraph 5.01 of the TA provides:

⁹Exhibit C-4, Tripartite Agreement dated 2008

¹⁰Exhibit C-6, Family Finders Agreement dated May 20, 2011

¹¹*Supra*, footnote 7

¹²S.S. 1989-90, c. C-7.2, as amended

¹³*Supra*, footnote 9, para. 3

[BTC] . . . will use provincial standards as outlined in the Family Centered Case Management Policy Manual, Children's Service Manual and updates to these manuals, unless . . . [BTC] has developed standards which are equivalent to Saskatchewan standards.

and said:

- (i) BTC uses such standards;¹⁴ and
- (ii) Canada does not have any such standards and, hence, there are none to be used by BTC.

IV. DECISION

A. CONSTITUTION

[11] The relevant provisions of the *Constitution Act, 1867*¹⁵ are:

Legislative Authority of Parliament of Canada

91. It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,

...

24. Indians, and Lands reserved for the Indians.

And any Matter coming within any of the Classes of Subjects enumerated in this Section shall not be deemed to come within the Class of Matters of a local or private Nature comprised in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.

Subjects of exclusive Provincial Legislation

92. In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,

¹⁴Exhibit C-5, Manuals

¹⁵30 & 31 Victoria, c. 3 (U.K.)

...

13. Property and Civil Rights in the Province.

B. *INDIAN ACT*

- [12] The relevant provisions of the *Indian Act*¹⁶ are:

General provincial laws applicable to Indians

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 and Statistical 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.

C. *CODE*

- [13] The relevant provisions of the *Code* are:

Definitions

2. In this Act, “federal work, undertaking or business” means any work, undertaking or business that is within the legislative authority of Parliament, including, without restricting the generality of the foregoing,

...

- (h) a work or undertaking that, although wholly situated within a province, is before or after its execution declared by Parliament to be for the general advantage of Canada or for the advantage of two or more of the provinces,
- (i) a work, undertaking or business outside the exclusive legislative authority of the legislatures of the provinces,

...

Application of Part

167(1) This Part applies

- (a) to employment in or in connection with the operation of any federal work, undertaking or business other than a work, undertaking or business of a local or private nature in Yukon, the Northwest Territories or Nunavut;

¹⁶R.S.C. 1985, c. I-6

- (b) to and in respect of employees who are employed in or in connection with any federal work, undertaking or business described in paragraph (a);
- (c) to and in respect of any employers of the employees described in paragraph (b);
- ...

Complaint to inspector for unjust dismissal

240(1) Subject to subsections (2) and 242(3.1), any person

- (a) who has completed twelve consecutive months of continuous employment by an employer, and
- (b) who is not a member of a group of employees subject to a collective agreement,

may make a complaint in writing to an inspector if the employee has been dismissed and considers the dismissal to be unjust.

Time for making complaint

(2) Subject to subsection (3), a complaint under subsection (1) shall be made within ninety days from the date on which the person making the complaint was dismissed.

Extension of time

(3) The Minister may extend the period of time referred to in subsection (2) where the Minister is satisfied that a complaint was made in that period to a government official who had no authority to deal with the complaint but that the person making the complaint believed the official had that authority.

...

Reference to adjudicator

242(1) The Minister may, on receipt of a report pursuant to subsection 241(3), appoint any person that the Minister considers appropriate as an adjudicator to hear and adjudicate on the complaint in respect of which the report was made, and refer the complaint to the adjudicator along with any statement provided pursuant to subsection 241(1).

Powers of adjudicator

- (2) An adjudicator to whom a complaint has been referred under subsection (1)
 - (a) shall consider the complaint within such time as the Governor in Council may by regulation prescribe;
 - (b) shall determine the procedure to be followed, but shall give full opportunity to the parties to the complaint to present evidence and make submissions to the adjudicator and shall consider the information relating to the complaint; and
 - (c) has, in relation to any complaint before the adjudicator, the powers conferred on the Canada Industrial Relations Board, in relation to any proceeding before the Board, under paragraphs 16(a), (b) and (c).

Decision of adjudicator

(3) Subject to subsection (3.1), an adjudicator to whom a complaint has been referred under subsection (1) shall

- (a) consider whether the dismissal of the person who made the complaint was unjust and render a decision thereon; and
- (b) send a copy of the decision with the reasons therefor to each party to the complaint and to the Minister.

Limitation on complaints

(3.1) No complaint shall be considered by an adjudicator under subsection (3) in respect of a person where

- (a) that person has been laid off because of lack of work or because of the discontinuance of a function; or
- (b) a procedure for redress has been provided elsewhere in or under this or any other Act of Parliament.

Where unjust dismissal

(4) Where an adjudicator decides pursuant to subsection (3) that a person has been unjustly dismissed, the adjudicator may, by order, require the employer who dismissed the person to

- (a) pay the person compensation not exceeding the amount of money that is equivalent to the remuneration that would, but for the dismissal, have been paid by the employer to the person;
- (b) reinstate the person in his employ; and
- (c) do any other like thing that it is equitable to require the employer to do in order to remedy or counteract any consequence of the dismissal.

D. *CHILD AND FAMILY SERVICES ACT*

[14] The relevant provisions of the *Child and Family Services Act* are:

Interpretation

2(1) In this Act:

(a.1) “band” means a band as defined in the *Indian Act* (Canada) and includes the council of a band;

...

(s) “status Indian” means a person who is:

- (i) registered as an Indian; or
- (ii) entitled to be registered as an Indian;

pursuant to the *Indian Act* (Canada).

...

Purpose

3 The purpose of this Act is to promote the well-being of children in need of protection by offering, wherever appropriate, services that are designed to maintain, support and preserve the family in the least disruptive manner.

...

Indian child welfare agreements

61(1) The minister may, having regard to the aspirations of people of Indian ancestry to provide services to their communities, enter into agreements with a band or any other legal entity in accordance with the regulations:

- (a) for the provision of services or the administration of all or any part of this *Act* by the band or legal entity as an agency; or
 - (b) for the exercise by the agency of those powers of the minister pursuant to this *Act* that are specified in the agreement
- (2) An agency that enters into an agreement pursuant to subsection (1) is responsible for the exercise of the powers of the minister to the extent to which those powers are specified in the agreement.

E. ANALYSIS

[15] In *NIL/TU, O Child and Family Services Society v. B.C. Government and Service Employees' Union*,¹⁷ the Supreme Court of Canada examined whether the labour relations of an entity similar to that before me.

[16] In *NIL/TU, O*, the Court had before it a provincially incorporated nonprofit corporation established to provide welfare services to First Nations children and families. It described same as “a unique institutional structure, combining provincial accountability, federal funding, and a measure of operational independence.”¹⁸ I am of the view BTC fits that description as well.

[17] In *NIL/TU, O*, the Court began its consideration by stating:

¹⁷[2010] 2 S.C.R. 696; see also *Communications, Energy and Paperworkers Union of Canada v. Native Child and Family Services of Toronto*, [2010] 2 S.C.R. 737

¹⁸*Ibid.*, at para. 1

None of the parties dispute that child welfare is a matter within provincial legislative competence under the Constitution Act, 1867. *NIL/TU,O* . . . does not challenge the constitutional validity of the Child, Family and Community Service Act . . . as it applies to Aboriginal people. Nor is the issue whether the federal government can enact labour relations legislation dealing with “Indians.” It clearly can. The issue in this appeal is whether *NIL/TU,O*’s labour relations nonetheless fall within federal jurisdiction over Indians under s. 91(24) because its services are designed for First Nations children and families.¹⁹

That is also the case with the matter here, but we are dealing with the *Child and Family Services Act*.

[18] The Court went on to hold:

12 The approach to determining whether an entity’s labour relations are federally or provincially regulated is a distinct one and, notably, entails a completely different analysis from that used to determine whether a particular statute is *intra* or *ultra vires* the constitutional authority of the enabling government. Because the regulation of labour relations falls presumptively within the jurisdiction of the provinces, the narrow question when dealing with cases raising the jurisdiction of labour relations is whether a particular entity is a “federal work, undertaking or business” for purposes of triggering the jurisdiction of the *Canada Labour Code*.

...

18 In other words, in determining whether an entity’s labour relations will be federally regulated, thereby displacing the operative presumption of provincial jurisdiction, Four B requires that a court first apply the functional test, that is, examine the nature, operations and habitual activities of the entity to see if it is a federal undertaking. If so, its labour relations will be federally regulated. Only if this inquiry is inconclusive should a court proceed to an examination of whether provincial regulation of the entity’s labour relations would impair the core of the federal head of power at issue.

...

20 There is no reason why, as a matter of principle, the jurisdiction of an entity’s labour relations should be approached differently when s. 91(24) is at issue. The fundamental nature of the inquiry is - and should be - the same as for any other head of power. It is an inquiry with two distinct steps, the first being the functional test. A court should proceed to the second step only when this first test is inconclusive. If it is, the question is not whether the entity’s operations lie at the “core” of the federal head of power; it is whether the provincial regulation of that entity’s labour relations would impair the “core” of that head of power. Collapsing the two steps into a single inquiry, as the trial judge and the Court of Appeal did, and as the Chief Justice and Fish J. do in their concurring reasons, transforms the traditional labour relations test into a different test: the one used for determining whether a statute is “inapplicable” under the traditional interjurisdictional immunity doctrine. The two-step inquiry preserves the integrity of the unique labour relations test; the single-step approach extinguishes it.

¹⁹*Ibid.*, at para. 2

[19] Relying on *NIL/TU, O*, Counsel for BTC submits:

The first phase of the test is therefore the “functional” test—does the entity function as a federal undertaking? Only where this initial test is inconclusive should the decision-maker move to the second head of inquiry: would provincial labour regulation impair the “core” of the relevant federal head of power?

I agree.

[20] Counsel for BTC summarizes the Court’s application of this test to its facts as follows:

They held that, essentially, the undertaking was properly characterized as a provider of child welfare services. They went on to hold that it was this essential characterization which determined the jurisdiction with control over the undertaking’s labour relations. Specifically, the majority found that:

- The operation was funded jointly by the Federal and Provincial governments;
- The operation was subject solely to provincial regulation, namely British Columbia’s Child, Family and Community Service Act;
- The operation was regulated exclusively by the province and its employees were delegated their authority exclusively by the province;
- The operation was fully integrated into the provincial regulatory regime and was supervised by provincial officials;
- The fact that the operation had a distinct character as an aboriginal organization for aboriginal communities did not detract from its essential character as a child welfare agency;
- The cultural identity of the operation’s employees and clients did not displace the presumption of provincial labour regulation; and
- An attempt to provide meaningful service to a particular community did not oust provincial jurisdiction.

To conclude, the majority stated:

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.

Therefore, the majority concluded that the operation was a child welfare agency which was subject to provincial labour regulation. This conclusion was supported by the minority in the decision who

disagreed with the two-part test set out by the majority.

I am satisfied this is a fair and accurate summary.

[21] Following this approach, I find:

- (a) BTC's undertaking is properly characterized as a provider of child welfare services;
- (b) it is this essential characterization that determines the jurisdiction that controls BTC's labour relations;
- (c) BTC's operation is funded jointly by the Federal and Provincial governments;
- (d) BTC's operation is subject solely to provincial regulation, namely Saskatchewan's *Child and Family Services Act*;
- (e) BTC's operation is regulated exclusively by the province and its employees are delegated their authority exclusively by the province;
- (f) BTC's operation is fully integrated into the provincial regulatory regime and is supervised by provincial officials;
- (g) the fact that BTC's operation has a distinct character as an aboriginal organization for aboriginal communities does not detract from its essential character as a child welfare agency;
- (h) the cultural identity of BTC's employees and clients do not displace the presumption of provincial labour regulation; and
- (i) an attempt to provide meaningful service to a particular community does not oust

provincial jurisdiction.

[22] I therefore conclude that BTC's operation is a child welfare agency that is subject to provincial labour regulation.

[23] Counsel for BTC referred me to *United Nurses of Alberta (Re)*.²⁰ In that decision, the Alberta Labour Relations Board held:

25 In our opinion, the Supreme Court of Canada ("SCC") clarifies the law in the area considerably with its recent decisions in *NIL/TU, O* and *Native Child*. Whereas it was previously debatable before as to whether health care delivery on Reserve fell under federal or provincial jurisdiction, that question now has been definitively answered with the confirmation and clarification of a narrowing of federal power over aboriginal labour relations. The result in our case is that the provision of health care services on Reserve is clearly within provincial constitutional competence.

...

29 ... [T]he manner in which the services are delivered does not change the fact the services are a provincial undertaking. Neither the presence of federal funding nor fact the services are provided in a culturally sensitive manner overrides the presumption of provincial jurisdiction.

[24] Counsel for BTC submits:

With respect to the second branch of the Supreme Court's two-stage test, the Alberta Board held that there was no evidence before it as to how provincial regulation of labour relations would "or possibly could" impair the core of federal power over Indians and their lands. It stated that:

Regulating the labour relations of nurses on Reserves would not affect, let alone impair, anything regarding Indian status. Indian rights, or the relationship within Indian families and Reserve communities.

I agree.

[25] I find there is no evidence before me as to how provincial jurisdiction over BTC's labour relations would or possibly could impair the core of federal power over Indians and their lands.

²⁰[2011] A.L.R.B.D. 26; see also *Norway House Cree Nation*, [2011] M.L.B.D. 26; *Duke v. Dakota Oyate Lodge Inc.*, [2012] C.L.A.D. 53 (K. L. Gibson); *McDames v. Gitksan Child and Family Services Society*, [2011] C.L.A.D. 402 (M. T. L. Blaxland); *Athabasca Health Authority Inc. (Re)*, [2007] S.L.R.B.D. 26

of BTC could possibly affect, yet alone infringe upon, anything regarding Indian status or rights. Therefore, even though I find it is not necessary to move to the second phase of the functional analysis, I find the presumption of provincial jurisdiction over labour standards has not been displaced in the circumstances of this case.

[26] As a footnote, Counsel for BTC referred me to *Tla'amin Community Health Board Society v. Bassett*²¹ and submits same stands for the proposition that the reasoning of *NIL/TU, O* should not be limited solely to unionized labour relations, as opposed to employment standards. Counsel quotes the following passages from that decision to support his position:

16 [I] read the references to "labour relations" Four B, Northern Telecom, and NIL/TU, O as reflecting the facts of those cases rather than a limiting of the logic to labour relations as opposed to employment in general. I reject the Complainant's contention, at least as it concerns the functional test, that there is a manifest difference between labour law where union representation is involved, and employment law where the employee is on their own subject to employment standards regulation and common law. The judgement in Northern Telecom sweeps it all into the same package with the sentence "the terms of a contract of employment". I also reject the Complainant's arguments that the incorporation of sections of the Canada Labour Code into the Society's employment policies has any bearing on the question of constitutional jurisdiction. Those terms may be relevant in determining employment obligations in a contractual sense, but not in determining jurisdiction

17 In the result, I take it to be settled that, (1) exclusive provincial competence over labour relations is the rule; (2) the same applies to employment law; (3) a service designed for, and delivered to, First Nations people does not automatically fall into the class of subject "Indians and Lands re-served for Indians" and thereby does not automatically fall under federal jurisdiction. Where employment is concerned, there is a rebuttable presumption to the contrary, through a two step test: the functional test followed, if necessary, by what I will call for convenience, the "impairment" test, given the use of the term "impair" in *NIL/TU, O* para. 18.

I find this reasoning logical and reasonable and adopt it.

V. CONCLUSION

[27] Because of the above, I find:

- (a) the labour relations of BTC are properly subject to provincial jurisdiction;

²¹[2012] C.L.A.D. 142 (R. Coleman)

- (b) I lack jurisdiction over BTC and its operations; and
- (c) I am unable to hear and determine the Complaint.

[28] Under the circumstances, I do not believe this is an appropriate case to award costs and I decline to do so. I note BTC did not ask or argue for costs.

Dated at Saskatoon, Saskatchewan, on February 19, 2013.



T. F. (TED)KOSKIE, B.Sc., J.D.,
ADJUDICATOR