SORTING OUT JURISDICTION OVER EMPLOYMENT RELATIONS FOR ABORIGINAL EMPLOYERS

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SORTING OUT JURISDICTION OVER EMPLOYMENT RELATIONS FOR ABORIGINAL EMPLOYERS

I. Federal or provincial jurisdiction

A. General

The general rule in employment relations is that they are under provincial jurisdiction as part of jurisdiction over "property and civil rights" under s.92(13) of the *Constitution Act, 1867*.[1]

Nevertheless, the Constitution has placed certain undertakings under exclusive federal jurisdiction. Some examples include banking, interprovincial railways, interprovincial shipping, and of course "Indians, and Lands reserved for the Indians": *Constitution Act, 1867*, ss.91, 92(10).

The federal government has a corresponding jurisdiction over labour relations in undertakings which are under federal jurisdiction.[2] Exceptionally, employers in federally-regulated areas of activity are subject to federal and not to provincial rules on employment standards and labour relations.

B. Why does it matter?

1. Introduction

For many First Nations, federal jurisdiction is a matter of principle: since Indians and their lands are a federal matter, they object to any provincial interference. In practice, however, legislation on labour relations and employment is similar though not identical in the fourteen provincial, territorial and federal jurisdictions in Canada.

2. Knowing the rules

Many of the differences between the federal *Canada Labour Code* and provincial and territorial employment standards statutes are slight. For instance, overtime begins after 40 hours under federal law, but after 44 or 48 hours in five provinces; Remembrance Day is a statutory holiday under federal law, but not in four provinces.

Jurisdiction is most important, then, simply in order to apply the correct rules. In addition, seemingly small differences in employment standards can become important when problems arise.

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[1] *Toronto Electric Commissioners v. Snider*, [1925] A.C. 396 (P.C.); *A.G. Canada v. A.G. Ontario (Labour Conventions)*, [1937] A.C. 326 (P.C.).

[2] *Re Industrial Relations and Disputes Investigation Act (Stevedores Reference)*, [1955] S.C.R. 529.

For instance, terminating employees requires calculating amounts such as their severance pay and accumulated vacation time. When an employer is trying to resolve a dismissal quickly and correctly, it will be important to know that under the *Canada Labour Code*, an employee is entitled to 4% vacation pay only if he or she has less than six years' service and 6% vacation pay thereafter (whereas vacation pay increases from 4% to 6% as of five years' service in British Columbia, Alberta, Manitoba and Québec, but not before eight years in New Brunswick and Nova Scotia).

As well, since jurisdiction determines which rules apply in a unionized setting, deciding whether the employer is federally- or provincially-regulated will affect strategic decisions when dealing with unions. Significant differences between federal and provincial legislation concern both certification of trade unions and their bargaining rights.

For instance, a trade union card signed during the previous six months and a five-dollar contribution by a majority of employees is sufficient to show support for a union drive under the *Canada Labour Code*, but many provinces limit the sign-up period to three months and several require a separate representation vote. Once a union is certified, Québec and British Columbia legislation has "anti-scab" provisions which prohibit hiring replacement workers during a strike, but the *Canada Labour Code* does not.

3. Deciding who decides

a. Introduction

Jurisdiction also determines who decides when a dispute arises. In the workplace, a number of bodies other than the courts have decision-making powers over employment disputes, depending on what issue is at stake.

Employment standards officers and adjudicators have powers over wages and dismissals, provincial and federal bodies regulate and inspect health and safety in the workplace, and human rights tribunals have a wide range of powers where discrimination is alleged. In addition, collective agreements allow unions or employers to refer disputes to arbitration.

b. Employment standards adjudicators

The *Canada Labour Code* has an inspection mechanism for non-unionized employees to recover their wages and an adjudication mechanism for those with more than 12 months of service and who allege they have been wrongfully dismissed: s.251.1(1). The powers of an adjudicator hearing a complaint of wrongful dismissal include not just an award of monetary damages but allow him to order reinstatement: s.242(2).

While many provincial statutes also offer an adjudication mechanism, not all of them allow the adjudicator or tribunal to order reinstatement, except in a unionized context. An employer may

therefore be exposed to completely different risk depending upon which jurisdiction names the hearing officer.

c. Workplace health and safety

Health and safety in the workplace is regulated by the Labour Canada branch of Human Resources and Skills Development Canada for federally-regulated employers.

Under the *Canada Labour Code*, an employee has the right to refuse dangerous work and a federally-appointed health and safety officer has the power to investigate and make a decision on whether the employee's refusal is justified or should cease: ss.128, 129. It is illegal for an employer to discipline or dismiss an employee for exercising his right to refuse dangerous work: s.147.

In the provinces, health and safety falls under the responsibility of the Ministry of Labour or the workers' compensation commissions, which apply similar but not identical rules.

d. Human rights tribunals

Finally, the provincial, territorial and federal jurisdictions all have human rights codes – the *Canadian Human Rights Act* in the federal context – which can be invoked by employees who feel that their complaints against their employers are based on discrimination (including sexual harassment).

The Canadian Human Rights Tribunal has a wide range of powers to remedy discrimination, including ordering reinstatement of an employee, compensation, or the adoption by an employer of a special program to make up for discriminatory practices: *Canadian Human Rights Act*, s.53(2).

The provinces have similar procedures but in British Columbia, the Human Rights Commission was recently abolished and all complaints now proceed to a hearing before a tribunal (Ontario has proposed a similar change). In most other jurisdictions, including federally, the human rights commission will usually investigate a complaint first and decide whether it should be sent to the tribunal for a hearing.

e. Privacy issues

Several provinces have adopted legislation to protect the right to privacy in records held by business and other non-governmental institutions.[3]

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[3]In British Columbia, the *Personal Information Protection Act*, S.B.C. 2003, c.63; in Alberta, the *Personal Information Protection Act*, S.A. 2003, c. P-6.5; in Quebec, the *Act Respecting the Protection of Personal Information in the Private Sector*, R.S.Q., c.P-39.1.

At least so far as this provincial legislation affects employment relations, it cannot apply to undertakings which are under federal jurisdiction.[4] The federal *Personal Information Protection and Electronic Documents Act*[5] specifically applies to federal undertakings and regulates their employees' right to privacy.

C. What makes an employer in the Aboriginal context fall under federal or provincial jurisdiction?

1. Clear cases

Certain undertakings are federally-regulated no matter who owns them. The clearest examples are airlines and airports, broadcasters, banks (but not credit unions), all transportation by ship, and any railways which are interprovincial. All of these employers are explicitly named as federal undertakings in s.2 of the *Canada Labour Code*.

As a result, Aboriginal-owned airlines such as Air Inuit or Air Creebec would be federally-regulated employers even if they were not owned by the Inuit or the Cree in Quebec. Similarly, a radio station is federally-regulated whether owned by the Band council and situated on reserve or owned by a private corporation and situated in a city.

The more difficult question is determining which undertakings will fall under federal jurisdiction because they are concerned with Indians.

2. General principles

Since the general rule is that the provinces have jurisdiction over labour relations (as part of property and civil rights), federal jurisdiction over an Aboriginal workplace cannot be assumed. In particular, the mere fact that work takes place on reserve will never be enough to make it federally-regulated.

Over 25 years ago, the Supreme Court of Canada applied provincial law to the certification of a union at a shoe factory on an Indian reserve, operated by a company owned by Indians and employing both Indians and non-Indians. According to the court, nothing about the company's operations was integral to federal jurisdiction over Indians and lands reserved for the Indians.[6]

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[4] *Air Canada v. Constant*, [2003] J.Q. No. 11619 (QL), [2003] C.A.I. 710 (Que. S.C.); see also British Columbia's *Personal Information Protection Act*, s.3(2)(c).

[5] S.C. 2000, c. 5.

[6] *Four B Manufacturing v. United Garment Workers*, [1980] 1 S.C.R. 1031.

In addition, when the federal government hired a privately-owned construction company to build a school on reserve, the company's employees were held to fall under provincial jurisdiction.[7]

On the other hand, works and undertakings which deal with "Indianness" is under exclusive federal jurisdiction by virtue of s.91(24) of the *Constitution Act, 1867*.

The Federal Court therefore ruled that institutions which provide education, health care and social services which "relate to the welfare of Indians" and which take into consideration "both the physical and cultural integrity" of Indians fall under federal jurisdiction,[8] even though schools, hospitals and social services are usually under provincial jurisdiction.

In British Columbia, both the labour relations board and the human rights tribunal have decided that health and social services which are provided primarily to Indians form an integral part of federal jurisdiction over Indians. Collective bargaining at an Aboriginal health board therefore fell under the Canadian Industrial Relations Board's jurisdiction and a human rights complaint against an Aboriginal child welfare agency was referred to the Canadian Human Rights Commission.[9]

This approach has not been followed in all provinces. In Ontario and Manitoba, the tribunals held that health services provided exclusively to Aboriginals by Aboriginal organizations remained provincially-regulated health services.[10]

However these decisions are inconsistent with the case law of the Supreme Court of Canada. The exclusive federal jurisdiction over Indians in general – what has been described as "Indianness" or the "status and rights of Indians" – can exclude the application of provincial legislation which applies to others.[11]

Therefore, the fact that health care is usually provincially-regulated will not be enough to make an Aboriginal health-care provider a provincially-regulated employer. A health service falls

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[7] *R. v. Baert Construction Limited* (1974), 51 D.L.R. (3d) 265 (Man. C.A.) at 268.

[8] *Sappier v. Tobique Indian Band Council* (1988), 22 C.C.E.L.170 at 177 (F.C.A.); *Qu'Appelle Indian Residential School Council v. Canada (Canadian Human Rights Tribunal)* (1987), [1988] 2 F.C. 226 (T.D.).

[9] *Nisga'a Valley Health Board and B.C.G.E.U.* (1995), 27 C.L.R.B.R.(2d) 301 (B.C.L.R.B.); *Fielden v. Gitxsan Child and Family Services Society*, [2004] B.C.H.R.T.D. No. 314.

[10] *Southeast Resource Development Council Corp. (c.o.b. Southeast Medical Referral Services) v. United Food and Commercial Workers Union, Local No. 832*, [2004] 8 W.W.R. 633 (Man. Q.B.); *Native Child and Family Services of Toronto*, [1995] O.L.R.D. No. 4298.

[11] *C.T.C.U.Q. v. Canada (National Battlefields Commission)*, [1990] 2 S.C.R. 838 at 852-853; see also *Attorney General of Canada v. Canard*, [1976] 1 S.C.R. 170.

under exclusive federal jurisdiction if it is "designed and operated to meet the needs of its Indian beneficiaries" and is "integrally bound up with Indian status".[12]

More particularly, the Federal Court, Trial Division, held that an alcohol and drug treatment centre managed by and for Indians with federal funding is regulated by the *Canada Labour Code*:

> [...] We are not here concerned with an ordinary manufacturing business carried on on an Indian reserve. Rather, the rehabilitation centre in question is engaged in the provision of a form of health care service designed and operated to meet the needs of its Indian beneficiaries.
>
> The fact that the rehabilitation centre is organized and operated primarily for Indians, governed solely by Indians, that its facilities and services are intended primarily for Indians, that its staff are specially trained under the NNADAP [National Native Alcohol and Drug Abuse Program] and receive First Nations training, and that its rehabilitation program, curriculum and materials are designed for Indians, all serve to identify the inherent "Indianness" of the centre and link it to Indians.[13]

Since that judgement, adjudicators named under s.242 of the *Canada Labour Code* have continued to exercise jurisdiction over native alcohol and drug treatment centres.[14] The Quebec Human Rights Commission has followed the Federal Court and declined to investigate a complaint against a treatment centre, though the Ontario Labour Relations Board has rejected the Federal Court's approach and considered an application to certify a union at treatment centre.[15]

3. **Bands and Band councils**

The courts have held that a Band Council's power to enter into employment contracts is an implied power which is necessary to carry out its responsibilities under the *Indian Act*.[16]

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[12] *Sagkeeng Alcohol Rehab Centre Inc. v. Abraham*, [1994] 3 F.C. 449 (T.D.) at 459-61.

[13] *Ibid.*

[14] *Weendahmagen Alcohol and Drug Abuse Treatment Centre and Nadjiwan*, [1997] C.L.A.D. No. 204 (QL); *Day v. Sagashtawao Healing Lodge Inc.*, [2000] C.L.A.D. No. 499 (QL).

[15] *L.B. c. Centre de réadaptation Wapan*, Commision des droits de la personne et des droits de la jeunesse, Résolution CP-388.38, 3 May 2002; *Migisi Alcohol & Drug Treatment Centre v. Hardy*, 2004 CanLII 22684 (ON L.R.B.).

[16] *Public Service Alliance of Canada v. Francis*, [1982] 2 S.C.R. 72; *Telecom Leasing v. Enoch Indian Band*, [1994] 1 C.N.L.R. 206 at 209 (Alta. Q.B.).

Since every Band or Band Council is "within the legislative authority of Parliament", all of its workplaces should therefore be presumed to be federally-regulated pursuant to s.2 of the *Canada Labour Code*.[17]

The courts have usually agreed that an undertaking operated directly by a Band and not separately incorporated will usually be federal jurisdiction.[18] For instance, a Band's fishing operation which took place off-reserve but pursuant to treaty rights was held to be a federal undertaking.[19]

However some courts and tribunals have set a narrower test, making federal jurisdiction dependant on whether the undertaking is "operated by a band council or band councils exercising powers delegated from the federal government or engaged in activities contemplated by the *Indian Act*."[20]

According to some, therefore, provincial jurisdiction could apply to a workplace even where the Band itself is the employer, provided that authority to operate the business "is derived through agreements [with] the provincial government" or it is "not integral to federal jurisdiction over Indians and lands reserved for Indians."[21]

This approach is inconsistent with the Supreme Court of Canada's case law. Where "a core federal undertaking" such as a Band council operates a particular "subsidiary operation"– which standing alone would be provincially-regulated – the subsidiary will fall within federal labour relations jurisdiction provided it is"sufficiently integrated" into normal operations of the core federal undertaking.[22]

Most of a Band Council's activities are "sufficiently integrated" into its normal operations as the government of an Aboriginal people so that its activities will usually form part of the core federal undertaking for the purposes of jurisdiction over its employment relations.

4. **Band-controlled entities**

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[17] *Francis v. Canada Labour Relations Board*, [1981] 1 F.C. 225 at 241 (F.C.A.).

[18] *Whitebear Band Council v. Carpenters Provincial Council of Saskatchewan*, [1982] 3 C.N.L.R. 181 (Sask. C.A.); *Paul Band v. R.*, [1984] 1 C.N.L.R. 87 at 92, 95 (Alta C.A.).

[19] *Richard c. Bande indienne des Malécites de Viger*, [2005] D.C.R.T.Q. No. 263.

[20] *Saskatchewan Indian Gaming Authority (SIGA), v. National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada)*, [2000] 3 C.N.L.R. 349 (Sask. Q.B.) at para. 55, aff'd. [2001] 5 W.W.R. 639 (Sask. C.A.).

[21] *Saskatchewan Indian Gaming Authority, ibid.* at para. 68; see also *Wikwemikong Unceded Indian Reserve #26 (c.o.b. Wikwemikong Ambulance Service No. 008)*, [2002] O.L.R.D. No. 2279 at para. 10.

[22] *Northern Telecom Canada Ltd. v. Communication Workers of Canada*, [1983] 1 S.C.R. 733.

For organizations other than Band Councils, it is more difficult to predict whether they will fall under federal or provincial jurisdiction and the result will depend upon their structure and operations.

We believe that federal jurisdiction will apply to most Band-empowered entities, that is, corporations or other organizations which are owned or controlled by a Band or group of Bands, such as a tribal council.[23] But where a business is separately incorporated, the mere fact that a Band is the owner is not enough to make it a federally-regulated undertaking.

Jurisdiction over separately-incorporated entities will usually depend on the business they operate, not their owners: neither a shipyard or a casino owned by a Band and operated on reserve was found to fall under federal jurisdiction.[24] Similarly, a long-term care facility on reserve which was owned and controlled by the Band was held to fall under provincial jurisdiction because its function was to provide care to residents from diverse backgrounds and in fact it depended on non-Aboriginal residents for financial reasons.[25]

5. Metis and non-status Indians

Federal jurisdiction over "Indians" under s.91(24) of the *Constitution Act, 1867* extends beyond those with status under the *Indian Act*. For instance, the Supreme Court of Canada held long ago that Inuit are "Indians" within the meaning of the Constitution, even if they are not subject to the *Indian Act*.[26]

The courts have not reached a clear decision on how to characterize Metis and non-status Indians for constitutional purposes and the result has been varying decisions on labour relations jurisdiction.

In an older decision, the Ontario Labour Relations Board held that it had jurisdiction to hear an application for certification of a union to represent employees of the Ontario Metis and

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[23] *Qu'Appelle Indian Residential School Council v. Canada (Canadian Human Rights Tribunal)* (1987), [1988] 2 F.C. 226 (T.D.).

[24] *Celtic Shipyards (1988) Ltd. v. Marine Workers' and Boilermakers' Industrial Union, Local 1* (1994), [1995] 3 C.N.L.R. 41 (B.C.L.R.B.); *Sports Interaction v. Jacobs*, [2005] F.C.J. No. 15, 268 F.T.R. 218, rev'd. on other grounds [2006] F.C.J. No. 490 (C.A.).

[25] *Westbank First Nation v. British Columbia (Labour Relations Board)*, [1997] B.C.J. No. 2410, aff'd. [2000] B.C.J. No. 501 (C.A.).

[26] *Re Eskimos*, *supra*.

Non-Status Indian Association.[27] The Board took note of "the definition of Indian in the *Indian Act* and the long-standing historical distinction between Indians and Metis or persons of mixed blood," to rule that the association's Metis and non-status members were not Indians within the meaning of section 91(24) of the *Constitution Act, 1867*.

However the Ontario Labour Relations Board's decision was rendered before s.35 of the *Constitution Act, 1982* was adopted and specifically provided that "'aboriginal peoples of Canada' includes the Indian, Inuit and Métis peoples of Canada."

More recently, with respect to non-status Indians, the Federal Court upheld a decision by an adjudicator appointed pursuant to the *Canada Labour Code* that the New Brunswick Aboriginal Peoples Council was a federally-regulated workplace. The court was influenced by the fact that the organization's main goal was to defend the rights of those of Aboriginal ancestry but deprived of status under the *Indian Act* and that most of its funding came from the federal government. In Justice Pinard's words, the organization's "activities clearly relate to the 'Indianness' of its members, even though many of those members are not status Indians."[28]

With respect to the Metis, a prominent labour arbitrator ruled on a case where both the employee and the employer agreed that Metis are Indians for purposes of s.91(24) of the *Constitution Act, 1867*. However the Metis Nation of Ontario argued that when it implemented a strategy to address family violence and poor health among Metis as part of a provincially-funded program and in a joint initiative with the province, the undertaking was not federally-regulated. The adjudicator disagreed: since "the particular operation was administered by the MNO whose sole focus was the promotion of the well-being of the Metis people," it "was closely linked to the 'Metisness' of the clients it was solely designed to serve." To the extent that Metis were Indians for constitutional purposes, he ruled, the undertaking was federal.[29]

The Supreme Court of Canada has recognized the Aboriginal rights of Metis under s.35 of the *Constitution Act, 1982*,[30] but it has refused so far to rule on whether Metis are Indians for the purposes of s.91(24) of the *Constitution Act*.[31] Until a definitive judgment is rendered on the broader issue, the narrower question of labour relations jurisdiction will remain unclear.

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[27] *Ontario Public Service Employees Union and Ontario Metis and Non-Status Indian Association et al.* (1980), [1982] 1 C.N.L.R. 83 (O.L.R.B.).

[28] *New Brunswick Aboriginal Peoples Council v. Brown* (2003), [2004] 1 C.N.L.R. 193 at para. 9 (F.C.T.D.).

[29] *Przybyszewski v. Metis Nation of Ontario* (2002), [2003] 2 C.N.L.R. 232 at para. 21 (Dissanayake Lab. Adj.).

[30] *R. v. Powley*,[2003] 2 S.C.R. 207.

[31] *R. v. Blais*, [2003] 2 S.C.R. 236 at para. 36.

6. Institutions provided for in land claims agreements

a. Federally-regulated

Even when an Aboriginal government is no longer subject to the *Indian Act*, it remains a federal undertaking because it is primarily concerned with the "status and rights of Indians".[32]

Where a Band or Nation is no longer governed by the *Indian Act*, but by a land claims agreement or its enabling legislation, it will usually remain a federally-regulated employer. For instance, employees of Cree Bands within the meaning of the *Cree-Naskapi (of Quebec) Act* as well as those of the Nisga'a Nation have been held to fall under federal jurisdiction.[33] The same result would presumably be reached under legislation such as the *Westbank First Nation Self-Government Act*.[34]

Similarly, the Nunatsiavut Government which is the "government for Inuit and Labrador Inuit Lands" under the *Labrador Inuit Land Claims Agreement* is clearly "subject to federal Laws respecting labour relations and working conditions" by virtue of ss.17.3.3.(a) and 17.23.1 of the agreement.

b. Provincially-regulated

Some land claims agreements have also provided for public institutions to be created in predominantly Aboriginal regions, but under provincial law. For instance, in addition to the institutions serving the Inuit discussed below, the *James Bay and Northern Quebec Agreement* provides for a separate health and social services board and a separate school board in Cree territory.[35]

The Quebec Labour Court decided that for the purposes of the division of powers, the Cree School Board is under provincial jurisdiction, among other reasons because it was created by a

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[32] *C.T.C.U.Q. v. Canada (National Battlefields Commission)*, *supra* at 852-853.

[33] *Cree Nation of Chisasibi et al. v. CSST et al.*, [1994] C.A.L.P. 1492 at 1508; *Pageot c. Cree Nation of Wemindji*, Commission des normes du travail, 13 February 1995; *Azak v. Nisga'a Nation*, [2004] 2 C.N.L.R. 6 (B.C.H.R.T.).

[34] S.C. 2004, c.17.

[35] *Act respecting Health Services and Social Services for Cree Native Persons*, R.S.Q., c.S-5; *Education Act for Cree, Inuit and Naskapi Native Persons*, R.S.Q., c. I-14.

provincial statute.[36] Since that decision, Québec has also extensively regulated the working conditions of employees of the Cree Board of Health and Social Services of James Bay.[37]

In both these cases, the institutions serve a primarily Aboriginal clientèle but according to both the land claims agreement themselves and the provincial statutes which incorporated them, the institutions are officially based on the region they serve, not on the Aboriginal identity of their clients. This would appear to be a sufficient basis to place them under provincial rather than federal jurisdiction.

7. Inuit employers

a. General

For the purposes of the division of powers, Inuit also fall within exclusive federal jurisdiction. The Supreme Court of Canada held that even if they are not subject to the *Indian Act*, Inuit and their lands are "Indians and lands reserved for the Indians" within the meaning of s.91(24) of the *Constitution Act, 1867*.[38]

Constitutional jurisdiction over predominantly Inuit workplaces has rarely been litigated, but in two provinces, Inuit have arrived at very different ways of organizing their institutions.

b. Labrador

In Labrador (part of the province of Newfoundland), the Nunatsiavut Government is the "government for Inuit and Labrador Inuit Lands," pursuant to the *Labrador Inuit Land Claims Agreement*.[39] The agreement specifically provides that the Nunatsiavut Government and each of the five Inuit Community Governments are "subject to federal Laws respecting labour relations and working conditions"[40] and this provision takes precedence over any provincial law.[41]

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[36] *Commission scolaire crie and Association des enseignants du Nouveau-Québec*, [1980] 2 Can. L.B.R. 374 at 378. The Labour Court itself suggested that certain provisions of the James Bay and Northern Quebec Agreement constituted an agreement with the province for the education of Indian children allowed for under s.114(1) of the *Indian Act* but this would not by itself be enough to remove the employer from federal jurisdiction: *Re Mohawks of the Bay of Quinte (Tyendinaga) Mohawk Territory* (2000), [2001] 1 C.N.L.R. 176 (C.I.R.B.).

[37] *Regulation respecting certain conditions of employment of officers of regional councils and public and private institutions referred to in the Act respecting health services and social services for Cree Native persons*, R.R.Q. c. S-5, r.1.002.

[38] *Re Eskimos*, [1939] S.C.R. 104.

[39] *Labrador Inuit Land Claims Agreement*, s.17.3.3.(a).

[40] *Labrador Inuit Land Claims Agreement*, s.17.23.1.

[41] *Labrador Inuit Land Claims Agreement Act*, S.C. 2005, c.27, s.6

c. Quebec

In Quebec, the largest Inuit employers were created by the *James Bay and Northern Quebec Agreement* but they are public institutions governed by provincial statutes: the Kativik School Board, the Kativik Regional Government and its northern villages, as well as the Nunavik Regional Board of Health and Social Services.[42]

All of these institutions are designated as regional rather than specifically Inuit institutions and as a result, provincial labour legislation has been applied to them as a matter of routine except in unusual circumstances, such as for instance, when the Kativik Regional Government operates a federally-regulated airport.[43]

d. Nunavut and the Northwest Territories

Finally, as discussed in more detail below, employers in the predominantly Inuit or Inuvialuit regions of Nunavut and the Northwest Territories are a special case. All employers in the territories (other than the territorial governments) are regulated by the *Canada Labour Code* with respect to collective bargaining, but are subject to territorial legislation in all other matters unless they are employers which would also be federally-regulated if situated in a province: s.123(1)(a), 167(1)(a).

No litigation has arisen over the status of organizations such as Nunavut Tunngavik Incorporated (NTI), which exercises all its powers "on behalf of and for the benefit of Inuit" pursuant to s.39.1.10 of the *Nunavut Land Claims Agreement*. However, NTI would probably be subject to the *Canada Labour Code* rather than territorial law, since it is an organization primarily concerned with Inuit, who are within legislative authority of Parliament as part of federal responsibility for Indians.

D. The special case of labour relations jurisdiction in the territories

Parliament has delegated to the three territories jurisdiction over "property and civil rights" which gives them a similar power to regulate employment relations as enjoyed by the provinces.[44]

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[42] *Education Act for Cree, Inuit and Naskapi Native Persons*, R.S.Q., c.I-14, Part XI; *Act respecting Northern villages and the Kativik Regional Government*, R.S.Q. c.V-6.1, Part II; *Act Respecting Health Services and Social Services*, R.S.Q., c. S-4.2, Part IV.1.

[43] *Re Kativik Regional Government and Kativik Regional Government Employees' Union (Keelan)* (2006), 84 C.L.A.S. 251, 2006 CanLII 205 (Arb.), application for stay dismissed [2006] J.Q. No. 3959 (Que. C.S.).

[44] *Northwest Territories Act*, R.S.C.1985, c. N-27, s.16(h); *Yukon Act*, S.C. 2002, c. 7, s.18(1)(j); *Nunavut Act*, S.C. 1993, c.28, s.23(1)(l).

The territories regulate employment standards, occupational health and safety and human rights in workplaces other than those which would also be federally-regulated if situated in a province. However the *Canada Labour Code* regulates collective bargaining by unions with all employers in the territories other than the territorial governments: ss.5, 123(1)(a), 167(1)(a).

In practice therefore, outside the unionized setting, the same arguments about jurisdiction will apply to employers in the territory in order to determine whether federal or territorial law applies. (Nevertheless, as a matter of constitutional law, statutes adopted by the territorial governments in the Yukon, Nunavut or the Northwest Territories are federal and not provincial legislation, since they are not provinces.)

II. The application of provincial law to federally-regulated employers

A. Introduction

The fact that an undertaking is federally-regulated does not exclude the application of all rules of provincial law. On the contrary, federal works and undertakings are subject to provincial statutes of "general application," so long as that provincial legislation does not affect them "in what makes them specifically of federal jurisdiction."[45]

To use a simple example, when a former employee brings a wrongful dismissal action before the ordinary courts (as opposed to a federal adjudicator), the parties are still subject to the normal rules of court set by the province.

In addition, for an Aboriginal employer, provincial laws of general application will apply,[46] though only so long as they do not conflict with a specific federal statute or a law or by-law adopted by a Band Council. (Of course, provincial statutes may also not conflict with Aboriginal and treaty rights protected under s.35 of the *Constitution Act, 1982*.)

B. Worker's compensation

The Supreme Court of Canada has ruled that provincial legislation on workplace health and safety does not apply to a federally-regulated employer. On the other hand, provincial worker's compensation plans are general insurance schemes, which replace damages actions before the courts and do not regulate working conditions, so that they do apply to federally-regulated employers.[47]

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[45] *Bell Canada v. Quebec (Commission de la santé et de la sécurité du travail)*, [1988] 1 S.C.R. 749 at 762-63.

[46] *Indian Act*, R.S.C.1985, c.I-5, s.88; *Cree-Naskapi (of Quebec) Act*, R.S.C.1984, c.18, s.4; *Westbank First Nation Self-Government Agreement*, s.34(a).

[47] *Bell Canada v. Quebec (Commission de la santé et de la sécurité du travail)*, *supra*.

Moreover, since worker's compensation plans usually apply to all workers and employers in a province, they will apply on- as well as off-reserve.[48] In addition, since the premiums charged to employers for worker's compensation relate to insurance, they are not a tax and do not contradict the exemption under the *Indian Act*.[49]

C. **Regulation of trades and professions**

The regulation of trades and professionals clearly falls within provincial jurisdiction under the *Constitution Act, 1867*. Certain land claims and self-government agreements give First Nations the power to regulate traditional healers or educators in traditional culture and Aboriginal languages, but not to replace provincial laws concerning the accreditation and certification of teachers or medical professionals.[50]

Even if Aboriginal governments and institutions fall under federal labour relations jurisdiction, the professionals they employ must respect provincial law in order to keep their licenses.[51] To the extent that Aboriginal employers seek out licensed employees, therefore, they will be affected by provincial law.

III. **Aboriginal jurisdiction**

A. **Delegated jurisdiction**

Under the *Indian Act*, a Band Council may adopt by-laws (with the approval of the Minister) concerning the appointment of officials to conduct the business of the Council: s.83(1)(c). This is the only provision specifically dealing with labour relations.

Under its self-government statute, the Sechelt Band Council has the specific power to adopt laws appointing officers or hiring employees necessary to carry on the good government of the Band, including setting their powers and responsibilities and the terms of their employment.[52]

More generally, the courts have held that a Band Council's power to enter into employment contracts is an implied power which is necessary to carry out its responsibilities under the *Indian*

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[48] *Isaac v. Workers' Compensation Board*, [1995] 1 C.N.L.R. 26 at 32-40 (B.C. C.A.).

[49] *Cree Nation of Chisasibi v. CALP*, [2000] 1 C.N.L.R. 91 (Que. S.C.).

[50] *Tlicho Land Claims and Self-Government Agreement*, ss.7.4.4(c) and (j), 7.5.10(a); *Westbank First Nation Self-Government Agreement*, s.289.

[51] *Krieger v. Law Society of Alberta*, [2002] 3 S.C.R. 372.

[52] *Sechelt Indian Band Self-Government Act*, S.C. 1986, c. 27, ss.4, 5; *Sechelt Band Constitution*, Can. Gaz. Pt. I, 12 September 1987, p.3248 (adopted pursuant to the *Order declaring the Constitution of the Sechelt Indian Band in force*, SOR/86-1018, as amended SOR/93-126), Part II, Division (3), ss. 4 to 8, Part II, Division (4), s.8.

Act.[53] Similarly, s.5 of the *Sechelt Indian Band Self-Government Act*, provides that rather than adopting a law, the Sechelt Band Council may set the terms of employment for its officials and employees by a collective or other agreement.

However, a Band Council's power to set its employees' terms of employment is subject to certain limits. Since Council by-laws are "delegated legislation" (made possible by an Act of Parliament), the Canadian Industrial Relations Board has ruled that they may not contradict the statutory provisions of the *Canada Labour Code*.[54]

Moreover, when any government sets certain terms and conditions of a particular contract of employment by statute or regulations, all other labour legislation which governs employment continues to apply,[55] so that a by-law supplements but does not exclude other rules.

The *Westbank First Nation Self-Government Agreement* recognizes the First Nation's right "to give preference to its Members in hiring employees and contractors for Westbank First Nation operations, where justifiable": s.291(3). However, it also provides that the agreement does not limit "the operation of the *Canadian Human Rights Act* (CHRA) in respect of the Westbank First Nation and Westbank Lands and Members": s.291.

Therefore the Westbank First Nation's powers supplement but do not exclude application of the CHRA to its employment practices.

B. **Treaty jurisdiction**

A number of land claims agreements have resulted in express or implicit powers for Aboriginal governments to set working conditions for their employees. For instance, most Yukon First Nation self-government agreements include a power to enact laws in relation to First Nation affairs and internal management,[56] as does the *Tlicho Land Claims and Self-Government Agreement* in the Northwest Territories (s.7.4.1).

With their power to make by-laws for the good government of their Category IA lands and their inhabitants, Cree and Naskapi Bands in Quebec have the specific power to adopt by-laws respecting the administration of their affairs and internal management under the *Cree-Naskapi*

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[53] *Public Service Alliance of Canada v. Francis*, *supra*.

[54] *Re Red Bank First Nation*, [1999] C.I.R.B. No. 5 at para. 30, 33 (QL).

[55] *Wells v. Newfoundland*, [1999] 3 S.C.R. 199 at para. 29-31, 33.

[56] *Champagne and Aishihik First Nations Self-Government Agreement*, s.13.1; *Kluane First Nation Self-Government Agreement*, s.13.1; *Little Salmon/Carmacks First Nation Self-Government Agreement*, s.13.1; *First Nation of Nacho Nyak Dun Self-Government Agreement*, s.13.1; *Selkirk First Nation Self-Government Agreement*, s.13.1; *Ta'an Kwach'an Council Self-Government Agreement*, s.13.1; *Tr'ondëk Hwëch'in Self-Government Agreement*, s.13.1; *Vuntut Gwitchin First Nation Self-Government Agreement*, s.13.1.

(of Quebec) Act,[57] ss.21(1)(a) and 45(1)(a). In particular, they have the power to appoint "employees or agents as are necessary for the proper conduct of the affairs of the band" and to set their duties and salaries, including by contract: s.41(1)(a) and (c), 41(3).

Similarly, under the *Nisga'a Final Agreement*, the Nisga'a Lisims Government may make by-laws in respect of the administration, management and operation of Nisga'a government, including the powers, duties, responsibilities, remuneration and indemnification of members, officials, employees and appointees of Nisga'a Institutions: Chapter 11, s. 34.

These treaty powers to regulate employment relations are limited, however. For instance, the courts have ruled that the Cree and Naskapi Bands do not have the power to adopt a group insurance plan to replace the provincial worker's compensation legislation (and which applies to their employees by virtue of s.4 of the *Cree-Naskapi (of Quebec) Act*).[58]

In addition, the courts would probably rule that as with *Indian Act* by-laws, Cree, Naskapi or Nisga'a Lisims by-laws may not contradict the statutory provisions of the *Canada Labour Code* or other relevant legislation such as the *Canadian Human Rights Act*.[59] This limitation is specifically set out in the *Labrador Inuit Land Claims Agreement*, which provides that the Nunatsiavut Government is "subject to federal Laws respecting labour relations and working conditions": s.17.23.1.

C. **Inherent jurisdiction**

The Supreme Court of Canada has declined to rule on whether an Aboriginal right to self-government exists at large. Instead, it has emphasized that a constitutionally-protected Aboriginal right must be a practice, custom or tradition integral to the distinctive culture of the group claiming the right.

The right to self-government would be the right to regulate particular activities and does not apply to every activity engaged in by an Aboriginal people.[60] Similarly, the right to self-government could be exercised through a community's decisions about the land it held by virtue of its Aboriginal title.[61]

When the British Columbia Supreme Court upheld the validity of the Nisga'a Treaty, it ruled that "the aboriginal peoples of Canada, including the Nisga'a, had legal systems prior to the

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[57]S.C. 1984, c. 18.

[58]*Cree Nation of Chisasibi v. C.A.L.P.*, *supra* at para. 213.

[59]*Re Red Bank First Nation*, *supra*; see also *Wells v. Newfoundland*, , *supra*.

[60]*R. v. Pamajewon*, [1996] 2 S.C.R. 821.

[61]*Delgamuukw v. B.C.*, [1997] 3 S.C.R. 1010 at 1082-1083.

arrival of Europeans on this continent and that these legal systems, although diminished, continued after contact." However, the court did not have to decide more than that the Nisga'a right to self-government included the power to negotiate the treaty which in fact gave a clearer definition to their rights.[62]

It is therefore not surprising that the courts and administrative tribunals have usually rejected simple claims to an inherent Aboriginal jurisdiction over labour relations which excluded their jurisdiction. The Ontario Labour Relations Board held that if "there is no ancestral practice of regulating labour relations, there can be no practice or custom which was integral to and distinctive of the pre-contact society and there can be no continuity between the pre-contact practice and the contemporary claim" to self-government.[63]

In several other cases, the parties have announced their intention to lead evidence supporting the argument that an inherent Aboriginal right to self-government makes federal legislation inapplicable has been advanced in several cases,[64] but these cases have not proceeded to a full trial. In fact, supporting such an argument would require extensive evidence at an early stage in the proceedings.[65]

In the absence of a proven Aboriginal or treaty right, the courts have ruled that it is an error to take into account a First Nation's customs: whether a dismissal is just or unjust must be decided according to ordinary labour law principles.[66] However, a decision-maker must still take into account the specific circumstances of an Aboriginal community, provided this is done in a way which respects the rules set out in statutes such as the *Canada Labour Code*.[67]

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[62]*Campbell v. Attorney-General of British Columbia*, [2000] 4 C.N.L.R. 1 at para. 85, 169-71 (B.C.S.C.).

[63]*National Automobile, Aerospace, Transportation and General Workers Union of Canada Local 444 v. Great Blue Heron Gaming Co.*, [2005] 1 C.N.L.R. 147 at para. 82 (Ont. L.R.B.).

[64]*Ermineskin Cree Nation v. Canada* (1999), 38 C.P.C. (4th) 333 (Alta. Q.B.) and (2004) 46 C.P.C. (5th) 223; *Lightning v. Muskwachees Fire & Ambulance Authority Ltd.*, [2001] C.L.A.D. No. 168 (QL).

[65]*Gitxsan Treaty Society v. Hospital Employees' Union* (1999), [2000] 1 F.C. 135 (C.A.).

[66]*Norway House Indian Band v. Canada*, [1994] 3 F.C. 377 at 417 (T.D.).

[67]*Roseau River Tribal Council v. James and Nelson*, [1989] 4 C.N.L.R. 149 at 159-160 (Adj.); *Re Listuguj Mi'gmaq First Nation Council*, [2000] C.I.R.B. No. 20 at para. 34 (QL).