"overlap of fed & prov. competencies" & then where do you go?

Department of Justice Canada

Atlantic Regional Office
Suite 1400, Duke Tower
5251 Duke Street
Halifax, Nova Scotia B3J 1P3

Ministère de la Justice Canada

Bureau régional de l'Atlantique
Pièce 1400, Tour Duke
5251, rue Duke
Halifax (Nouvelle-Écosse) B3J 1P3

Telephone: (902) 426-5959
Facsimile: (902) 426-8796
E-Mail: jonathan.tarlton@justice.gc.ca

Our File: AR-17-82297
Notre dossier:

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By E-Mail

December 9, 2010

- Never argued lab. relations are fed. Obviously, case has always a chronic & conceded this.

Maryse Choquette
Registry Officer
Canadian Human Rights Tribunal
11th Floor, 160 Elgin Street
Ottawa, Ontario K1A 1J4

Dear Ms. Choquette:

Re: *FNCFCS et al v Attorney General of Canada*
Tribunal File No.: T1340/7008

Further to the Chair's direction dated December 1, 2010, below are the Attorney General of Canada's ("Canada") submissions regarding the Supreme Court of Canada judgments in *NIL/TU,O Child and Family Services Society v B.C. Government* and *Service Employees' Union*[1] and *Communications, Energy and Paperworkers Union of Canada v Native Child and Family Services of Toronto*.[2]

In both judgments, the Supreme Court confirmed that child welfare is a matter within provincial legislative authority under the *Constitution Act, 1867*. In addition, the majority's reasons reject the argument that federal funding extends federal labour jurisdiction over an organization exercising delegated provincial authority and providing services to First Nations in a provincially regulated activity. The majority reasons also endorse the cooperative arrangements between federal, provincial and aboriginal governments as positive examples of flexible and co-operative federalism at work. All of these findings support Canada's earlier submissions on its motion to dismiss the complaint.

Background

In *NIL/TU,O*, Canada, the Province of British Columbia and several First Nations entered into a Tripartite Agreement governing the provision of child and family services on reserves in British Columbia. The parties agreed that NIL/TU,O would be regulated under the B.C. provincial child welfare statute, the federal government would provide significant funding, and NIL/TU,O's would exercise delegated statutory authority in providing its services.

1 2010 SCC 45 (hereafter "*NIL/TU,O*").
2 2010 SCC 46 (hereafter "*Native Child*").

In the related proceeding, Native Child and Family Services is a children's aid society providing services to Aboriginal families in downtown Toronto under the relevant Ontario legislation. According to the record, both organizations exercise their delegated authority in a culturally sensitive manner.

The issue in the two appeals was whether the labour relations of these organizations are provincial or federal labour relations legislation. Both appellate courts in these appeals found they were governed by provincial labour relations.

In both cases, the Supreme Court unanimously determined that labour relations fell within provincial jurisdiction, but the Court disagreed on the appropriate test to determine that issue.

Madam Justice Abella, for the majority, found that the functional test should continue as the first step to determine jurisdiction over labour relations, and be augmented in cases where that test cannot readily characterize an undertaking as provincial or federal. In such instances, a second step examines the core of the federal head of power at issue.

Under the second step, the inquiry is whether provincial regulation of an entity's labour relations would impair the core of the federal head of power at issue.[3] It focuses on whether provincial regulation of that entity's labour relations would impair a federal head of power and not consider whether its operations lie at the "core" of that head of power.[4]

Applying her analysis to *NIL/TU,O* and *Native Child*, Abella J. found that both entities in question were exclusively subject to provincial regulation and fulfilled statutory functions and exercised statutory powers under that legislation. The entities were clearly provincial undertakings and there was no need to proceed to the second step to examine whether the core of federal jurisdiction under s. 91(24) would be impaired.[5]

The Chief Justice and Justice Fish wrote a concurring opinion in which they disagreed with the above approach and stated that the functional test should ask whether the operations of the entity at issue fall within the protected core of a federal head of power.[6] If provincial labour jurisdiction impairs that core, then it is ousted in favour of federal jurisdiction.[7]

The minority in *NIL/TU,O* observed that the core of section 91(24) jurisdiction over Indians is narrow and includes those things that go to the status and rights of Indians, listing eight matters from previous cases that might comprise part of this core - none of which arise in the present complaint.[8]

Moreover, the minority went on to characterize the child and family services of the two appellants as being matters of clear provincial jurisdiction that did not impair any exclusive

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3 *NIL/TU,O*, paras. 11-18; *Native Child*, para. 3.
4 *NIL/TU,O*, para. 20.
5 *NIL/TU,O*, para. 45; *Native Child*, para. 10.
6 *NIL/TU,O*, para. 56.
7 *NIL/TU,O*, paras. 57- 61; *Native Child*, para. 13.
8 *NIL/TU,O*, paras. 64-66, 69-72.

federal jurisdiction. Specifically in the *NIL/TU,O* judgment, the minority wrote that these services did not "touch" on issues of Indian status or rights.[9]

Analysis and Application to the Complaint

While the Supreme Court did not directly address the issue of whether "funding" constitutes a "service" under section 5 of the *Canadian Human Rights Act* ("*Act*") in the two judgments, Canada still considers their reasons to be helpful in determining whether to grant Canada's motion to dismiss the complaint.

To date, the complainants and the interested parties have vacillated between characterizing the impugned service as either being the federal government's funding (and only funding) or, alternatively, arguing that funding somehow equals control over the operations of the organization mandated to deliver child welfare services in a given province or the Yukon.[10] Given the outcome in these judgments, neither proposition can withstand serious scrutiny.

As noted above, the Supreme Court unanimously found the labour relations of both child and family services organizations are within provincial jurisdiction even though some of the funding they receive and use to hire and maintain their workforce is provided by the federal government.

In *NIL/TU,O*, Abella J. noted that the federal government reimbursed the province for the cost of providing certain services to Indian children and the province paid for those services that were ineligible for federal funding. NIL/TU,O operated within a fully integrated provincial child welfare scheme and exercised provincial stautory powers. Consequently, NIL/TU,O was directly subject to provincial oversight and provincial officials exercised ultimate decision-making control over its operations.[11]

The above findings also apply to this proceeding. Canada's funding is in furtherance of a provincial/territorial child welfare regulatory scheme. The receipients exercise provincial statutory powers and are directly subject to that province or territory's ultimate decision-making power. Accordingly, the funding of child welfare services to Indians on reserve is a matter that is integrally tied to the provincial scheme and cannot form the basis of a human rights complaint brought before a federal administrative tribunal.

Canada has previously argued that if the impugned service concerns funding, then such characterization does not meet the definition of a "service" under section 5.[12] Moreover, such funding does not discriminate against any "individual".[13]

Furthermore, if the complainants still intend to rely on the second characterization of the impugned service, then it falls outside the section 5 definition of a "service" and beyond the jurisdiction of the Tribunal given the Court's confirmation that child welfare is a matter within provincial legislative authority under the *Constitution Act, 1867*.

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9 *NIL/TU,O*, paras. 74-76.

10 *Written Submissions of the Attorney General("Submissions")*, paras. 88-114; Transcript of Preliminary Motion, June 3, 2010, at pp. 285-345.

11 *NIL/TU,O*, paras. 34, 38.

12 *Submissions*, paras. 54-74.

13 *Submissions*, para. 55.

As a result, the complainants are asking the Tribunal to define section 5 in a manner that ignores the purpose of the *Act* as set out in section 2. That purpose is to extend the laws in Canada to give effect, within the purview of matters coming within the legislative authority of Parliament, to the principle that all individuals should have an equal opportunity to have their needs accommodated without being prevented from doing so by discriminatory practices.[14]

The ultimate benefit/service that a child receives from a provincially mandated and regulated child welfare organization is not a matter coming within the legislative authority of Parliament. To decide otherwise would be inconsistent with interpreting sections 2 and 5 in their entire context and harmoniously with the scheme and object of the *Act*, as well as the intention of Parliament. It would also be inconsistent with the majority's reasons in *NIL/TU,O* and *Native Child*.

Provincial legislative authority was not disputed in *NIL/TU,O* and the majority recognized the provincial government as "the keeper of constitutional authority over child welfare."[15] The majority noted that NIL/TU,O is regulated solely by the Province of British Columbia and its employees exercise exclusively provincial delegated authority. NIL/TU,O, being a fully integrated part of the provincial regulatory regime, is directly subject to the province's oversight and its employees are directly accountable to the provincial directors to ensure statutory compliance.[16] Similar findings regarding the complaint can be made from a review of the evidentiary record on Canada's motion to dismiss, including the testimony of Odette Johnston, Cindy Blackstock, Elsie Flette, Tom Goff and the applicable provincial and Yukon child welfare legislation.[17]

Accordingly, it is beyond dispute that the essence of the complaint falls outside the jurisdiction of the Tribunal.

In addition, the majority's reasons reject the argument that federal funding transforms an entity into a federal undertaking.[18] Justice Abella observed that NIL/TU,O receives 65% of its funding from the federal government pursuant to Directive 20-1 and emphasized that, according to that directive:

> "Provincial child and family services legislation is applicable on reserves and will form the basis for this expansion. It is the intention of the department to include the provinces in the process and as party to agreements."[19]

As noted by the Court in both cases, the specific terms of a provincially regulated child welfare agency's mandate to deliver to Aboriginal clients (e.g. – "effective" and "culturally appropriate") does not alter the fact that the essential function of the agency's operation is to deliver child

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14 *Canadian Human Rights Act*, R.S.C. 1985, c. H-6, s.2.

15 *NIL/TU,O*, paras. 2, 24; *Submissions*, paras. 10, 74; *Reply of the Attorney General of Canada)*, dated May 21, 2010*("Reply")*, para. 11.

16 *NIL/TU,O*, paras. 36-38.

17 *Submissions*, para. 36 and references contained therein.

18 *NIL/TU,O*, para. 40.

19 *NIL/TU,O*, para. 35.

welfare services under provincial legislation. While the identity of such organizations' clients undoubtedly has, and should have, an impact on the way the agency delivers services, it does not alter the essential nature of what it does.[20]
Once again, Canada's uncontroverted evidence on the motion is the same as what was before the Supreme Court. Provincial legislative authority is not being challenged here. One of the complainants tendered evidence of provincial delegation, oversight and accountability for child welfare - i.e., Ms. Flette, who confirmed the same situation applies in respect of child welfare organizations in Province of Manitoba as it does for NIL/TU,O in British Columbia.

The function of these organizations is to provide child welfare services under the umbrella of the province-wide statutory scheme of agencies providing similar services. The fact that such services may impact on the Aboriginal family relationship does not make their operations a federal matter. The ordinary activities of these organizations do not touch on issues of Indian status or rights.

The majority found that neither the presence of federal funding, nor the fact that NIL/TU,O's services are provided in a culturally sensitive manner displaces its "overridingly provincial nature". The community for whom NIL/TU,O operates as a child welfare agency does not change *what* it does, namely, deliver child welfare services.[21]

Even the minority (whose reasons Canada does not rely upon) concluded that child welfare and family services do not touch upon issues of Indian status or rights and recognized that Indians are members of the broader population - in their day-to-day activities, they are subject to provincial laws of general application.[22]

Given that both the majority and minority came to the same conclusion (albeit using different tests), the argument that Canada's funding of those providing such services makes them federal undertakings also lacks merit.

Finally, the majority reasons also approve of the cooperative arrangements between the federal, provincial and aboriginal governments that are reflected in the Tripartite Agreement relating to NIL/TU,O. Provincial oversight of the delivery of child welfare services to Aboriginal children is neither an abdication of regulatory responsibility by the federal government nor an inappropriate usurpation by the provincial one – instead, it is "an example of flexible and co-operative federalism at work and at its best."[23]

The majority noted that co-operative federalism "accepts the inevitability of overlap between the exercise of federal and provincial competencies."[24] Specifically, NIL/TU,O's operational features are influenced by such overlap and it exists because of sophisticated and collaborative effort by the applicable First Nations and the federal and provincial governments to respond to the particular needs of the First Nations' children and families.[25] The Court recognized that the

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20 *NIL/TU,O*, para. 45; *Native Child*, para. 11.
21 *NIL/TU,O*, para. 45.
22 *NIL/TU,O*, paras. 73, 81.
23 *NIL/TU,O*, para. 44.
24 *NIL/TU,O*, para. 42.
25 *NIL/TU,O*, para. 43.

statutory delegation of the delivery of child welfare services to First Nations' agencies is a development to be "encouraged", and not obstructed, in the provincial sphere.[26]

The majority's above analysis supports Canada's earlier submissions that a finding of discrimination must be rooted in the comparison of the impugned treatment in the social and political setting in which the issue arises.[27] The complaint does not respect the overlap of federal and provincial competencies and asks this Tribunal to do the same and ignore its jurisdictional limits prescribed by sections 2 and 5 of the *Act*.

Conclusion

The principles of the two Supreme Court judgments, when extracted and applied to the present complaint, support Canada's position on its motion to dismiss the complaint.

The Court has confirmed that child welfare is a matter within provincial legislative authority under the *Constitution Act, 1867*. The entities that Canada funds are providing child welfare services (like NIL/TU,O) as part of a regulatory regime in which provinces and the Yukon retain ultimate decision-making control over their operations. Being directly subject to provincial oversight and accountability makes them provincial - as opposed to federal - undertakings for the purposes of labour relations jurisdiction. In that context, neither the presence of federal funding, nor the fact that a First Nations child welfare agency's services are provided in a culturally sensitive manner displaces its "overridingly provincial nature". The same principles apply here and the Tribunal has no jurisdiction to hear this complaint.

Accordingly and for the above reasons, we ask that Canada's motion to dismiss the complaint be granted.

Respectfully submitted,

Jonathan D.N. Tarlton
Senior Counsel
Civil Litigation and Advisory Services

JT/snc

Enclosure

c.c. David Nahwegahbow
Paul Champ
Michael Sherry
Owen Rees/Patti Latimer/Vanessa Gruben
Daniel Poulin/Samar Musallam

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26 *NIL/TU,O*, para.41.
27 See: *Reply* at para. 4.