Federal Court  Cour fédérale

Date: 20200807

Docket: T-1615-19

Citation: 2020 FC 820

Ottawa, Ontario, August 7, 2020

PRESENT: The Honourable Madam Justice Elliott

BETWEEN:

SOUTHEAST COLLEGIATE INC.

Applicant

And

RHONDA LAROQUE

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Southeast Collegiate Inc., seeks judicial review pursuant to section 18.1 of the *Federal Courts Act*, RSC 1985, c F-7 [*FC Act*] of a decision made by Canada Labour Adjudicator Derek A. Booth [the Adjudicator] on September 10, 2019 [Decision]. The Decision dealt with a wrongful dismissal complaint made by the Respondent employee against the Applicant employer.

[2] The Adjudicator determined that the Applicant was a federal undertaking to which the *Canada Labour Code*, RSC 1985, c L-2 [*CLC*] applies. The Adjudicator also found that the Respondent did not make out her complaint of wrongful dismissal.

[3] The Applicant seeks judicial review because it maintains that, in light of the relevant jurisprudence, it is not a federal undertaking for the purpose of employment.

[4] The Respondent did not respond to, nor participate in, the application for judicial review.

[5] For the reasons that follow I have determined the Adjudicator committed an error of law by failing to apply the correct legal test. The Decision will be set aside. A declaration will issue that the *CLC* does not apply to the Respondent's complaint of unjust dismissal.

II. **Background Facts**

A. *Incorporation and Undertaking*

[6] The Applicant is a non-share capital corporation [Corporation]. It was incorporated on November 10, 1995 under the laws of the Province of Manitoba. The Applicant was formed by The Southeast Tribal Council which is an organization of nine first nations communities in Manitoba.

[7] The undertaking of the Corporation is restricted by the Articles of Incorporation to:

> The advancement of education and the provision of educational services, including spiritual, religious and cultural instruction.

[8] Further to the corporate undertaking, the Applicant established and operates a high school for indigenous students with classes for grades 10, 11 and 12. The school draws students from sixteen indigenous communities across Manitoba. It serves all of Manitoba but is targeted to those communities that do not have their own local high school.

[9] The school is located in the City of Winnipeg. Students are required to live in campus dormitories during the school year except during holiday periods. At the time of the CLC adjudication, 156 students were expected for the September 2019 school year.

B. *Composition and Duties of the Board of Directors*

[10] At the time of incorporation each of the first directors of the Applicant and each first nation of The Southeast Tribal Council were required to be members of the Corporation. Currently, the Board of Directors of the Applicant is comprised of eight people who are representatives from the member first nations of The Southeast Tribal Council. They are either elected or appointed by their respective first nation.

[11] The Board of Directors is not involved in the day to day operation of the Applicant and the students. The role of the Board is to provide broad oversight and guidance to the Principal and on matters pertaining to policy development, budget development and strategic planning.

[12] The day to day operations of the Applicant are managed by the Director of Operations and the Principal, each of whom testified at the hearing conducted by the Adjudicator.

[13] The Director of Operations oversees the maintenance of the school campus, the kitchen, the youth care leaders, the finance department and human resources. She reports to the Principal.

[14] The Principal manages all the affairs of the Applicant and reports to the Board of Directors. The Principal develops and presents an annual budget to the Board of Directors who must approve it before it is implemented.

C. *Federal Government Involvement*

[15] The Southeast Tribal Council and the Federal Government of Canada are parties to an annual contribution agreement to fund the operation of the school. The agreement runs from April 1 to March 31 of the following year. It provides funding for the operation of the Applicant and pays the tuition and boarding fees for each indigenous student.

[16] Under the contribution agreement The Southeast Tribal Council is allowed to invoice the Federal Government for $3,300 per student, for each month the student is enrolled with the applicant. According to the notes to the audited 2018 Financial Statements, the money is paid by the Federal Government to the Southeast Resource Development Council Corp. (SERDC) which is related to the Applicant through common control. The money is then transferred to the Applicant to manage.

[17] While the Federal Government funding is the primary source of money received by the Applicant, non-indigenous students are allowed to attend the school if they pay the annual tuition.

D. *The School Operations*

[18] The Mission Statement of the Applicant is:

> To provide sound academic standards and a holistic balance of quality education that includes traditional, cultural and academic teachings.

[19] Although the school is not governed by *The Public Schools Act*, C.C.S.M. c. P250 of Manitoba, the Applicant's teachers are required to hold a Provincial Teaching Certificate. The compulsory provincial high school courses are offered by the Applicant. The annual contribution agreement requires that the Applicant follow the Manitoba Ministry of Education Curriculum in order to receive the funding. Course curricula are accredited and provided by the province of Manitoba. As a result, graduating students receive a high school diploma that is recognized by the Manitoba Board of Education and by post-secondary institutions.

[20] The Applicant's School Curricula document requires that the Principal "ensure the curriculum is in accordance with Manitoba Education" and provide education within "the scope of Provincial regulations". The evidence of the Director of Operations was that the philosophy of the school, its courses and testing procedures are conducted according to the provincial regulations and requirements of the Manitoba Ministry of Education. Marks in English and math are reported to the Manitoba Board of Education, as are those of all other Manitoba high schools.

III. **Issue and Standard of Review**

[21] There is a single issue for determination: did the Adjudicator err in finding that he had jurisdiction to determine whether the Respondent was wrongfully dismissed by the Applicant?

[22] Although the presumptive standard of review of a decision by an administrative tribunal is reasonableness, there are limited exceptions to the presumption. One such exception is the category of constitutional questions: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at paragraph 17.

[23] The facts in this matter raise the constitutional issue of whether the dismissal of the Respondent is subject to federal or provincial legislation: *Telecon Inc v International Brotherhood of Electrical Workers (Local Union 213)*, 2019 FCA 244, at paragraph 16; leave to appeal dismissed by Supreme Court of Canada, with costs, file number 38934, May 7, 2020.

[24] The standard of review of the Decision is therefore correctness: *Vavilov* at paragraphs 53 and 55; *Canada (Attorney General) v. Northern Inter-Tribal Health Authority Inc.*, 2020 FCA 63 at paragraph 13 [*Northern Inter-Tribal*].

[25] It has been acknowledged that strictly speaking, this issue is not a genuine constitutional one as it is not concerned with whether a particular statute is *intra* or *ultra vires* the constitutional authority of the enabling government. However, there is a rebuttable presumption that labour relations are a matter of provincial jurisdiction: *NIL/TU,O Child and Family Services Society v. B.C. Government and Service Employees' Union*, 2010 SCC 45 [*NIL/TU,O*] at paragraph 12; *Treaty 8 Tribal Association v Barley*, 2016 FC 1090 at paragraph 7.

[26] The Respondent complained under the *CLC* that she was wrongfully dismissed. She therefore bore the onus to adduce evidence to rebut the presumption of provincial authority.

Although the Respondent did not participate in this judicial review, she did testify at the hearing before the Adjudicator and made submissions, albeit apparently not on the issue of jurisdiction.

[27] The Applicant has not challenged any of the fact-finding in the Decision. Had they done so, those facts would have been reviewed on a standard of reasonableness: *Conseil de la Nation Innu Matimekush-Lac John v Association of Employees of Northern Quebec (CSQ*), 2017 FCA 212 at paragraph 18 [*Lac John*].

IV. **The Decision**

[28] The Adjudicator addressed the two issues put forward by counsel for the Applicant: jurisdiction and the dismissal of the Respondent.

[29] The Adjudicator determined that where there was any conflict between the evidence of the Respondent and the two witnesses for the Applicant, he preferred the evidence of the Applicant's witnesses. Ultimately he found that the facts set out in the termination letter were proven and that the dismissal of the Respondent was justified.

[30] The Adjudicator determined that he had jurisdiction to deal with the dismissal of the Respondent because he found that the Applicant was a federal work, undertaking or business within section 2 of the *CLC*.

[31] In arriving at that finding the Adjudicator outlined several facts he had taken into consideration. He began by outlining eight facts from a 2013 decision by another Canada Labour

Adjudicator in a matter involving the Applicant and a different employee. That decision is referred to hereafter as the *Smordin* decision.

[32] The Adjudicator in this matter then turned to the legislation. He noted that section 114 of the *Indian Act*, RSC 1985, c 1-5 [*Indian Act*] provides that the federal government may enter into agreements with the government of a province or a public or separate school board for education of Indian children in accordance with the Act.

[33] Next, the Adjudicator noted that section 114(2) of the *Indian Act* provides that the federal government may establish, operate and maintain schools for Indian children.

[34] The Adjudicator reviewed various corporate documents concerning the purpose and operation of the school. These included the Mission Statement which states that while provincial regulations should be remembered, "our cultural knowledge will always supersede any foreign regulation" and a school policy that states the school is not formally recognized by the Manitoba Ministry of Education, and it is considered a First Nation school.

[35] The Adjudicator noted the Roles and Responsibilities of Board Members "says nothing about being responsible to the provincial government of (*sic*) Education".

[36] The Principal of the School, when questioned, was noted by the Adjudicator to have said that the school is "intent on preserving Indian culture, and that it overrides the provincial curriculum . . . so that there is no exclusion of Indians' contribution to our teaching of history."

[37] The Adjudicator referred as well to the Respondent's Employment Agreement that states payment is "subject to statutory withholdings, inclusive of notice and severance pay required under the Canada Labour Code".

[38] From those observations, the Adjudicator found that the Applicant "appears to be a federal undertaking within the legislative authority of the federal parliament" and it "appears to exclude provincial legislative authority with regards to education, and only somewhat follows the provincial education curriculum in order to receive federal funding."

[39] The Adjudicator reasoned that the direction in the Mission Statement that cultural knowledge will always supersede any foreign regulation "clearly appears to touch on the vague notion at the "core of indianness, (*sic*)" evidently made up of matters integral to aboriginal and treaty rights, original culture, or Indian status." He concluded that "[t]his goes beyond being culturally sensitive, and makes such matters paramount."

[40] After additional references to the *Smordin* decision and a prior Manitoba Human Rights Commission matter involving the same Applicant, and in each case another employee, the Adjudicator found that the Applicant's "position on jurisdiction in the past appears to have been ambiguous."

[41] I pause to note that the *Smordin* decision said, in obiter, that it would have found the Applicant to be federally regulated but it was not necessary to do so as she had abandoned her position. The Manitoba Human Rights Commission determined that the Applicant fell under

provincial jurisdiction because "the essential function of the [Applicant] is to provide education to First Nations students in a culturally sensitive way. This falls squarely within provincial jurisdiction over education."

[42] Before moving to his own analysis, the Adjudicator noted that in the *Smordin* decision the Attorney General of Manitoba intervened emphasizing the federal government control, and their assertion that "the federal government deals with Indian children, and the provincial government deals with non-Indian children."

[43] The Adjudicator then briefly discussed *NIL/TU,O,* as reviewed below.

V. **Analysis**

A. *The Adjudicator's section 91(24) reasoning*

[44] The Adjudicator found that it was not necessary to consider the tests set out in *NIL/TU,O*.

[45] His reasoning is best encapsulated at paragraphs 70 and 71 of the Decision:

> 70. The decision of Chief Justice Dickson (*sic*) on the *Construction Montcalm* case, 1979 1 SCR 754, and the decision of Beetz, J. on the *Nil/Tu* (*sic*) case concerned jurisdiction over labour relations, which were only "presumptively" deemed to be a provincial matter. To resolve that, the functional and impairment tests have been employed. That is not necessary in the instant case, as there is no presumption required, as jurisdiction has been predetermined by section 91(24) of the *Constitution Act*, and the last 4 lines of section 91 (which has been oft ignored), stating that "any matter enumerated could <u>not</u> be deemed to be provincial.
>
> (Emphasis in original)
>
> 71. Section 2 of the *Canada Labour Code* endorses this, when it states a federal work, undertaking or business means any work

> undertaking or business that is within the legislative authority of parliament. Section 2(i) specifically includes "a work undertaking or business outside the exclusive legislative authority of the legislatures of the province."
>
> (Emphasis in original)

[46] In what can only be described as a somewhat peculiar statement about *NIL/TU,O* and several other similar cases relied upon by the Applicant, the Adjudicator expressed his view that "they have been taking for granted, the question of jurisdiction over Indians is in dispute, and requires presumptions and tests to be exercised to determine jurisdiction."

[47] The Adjudicator elaborates with respect to the existing caselaw, including *NIL/TU,O*, by saying it has been "engaging in tautology" and that "jurisdictional arguments should only arise where the matter at issue has not already been dealt with, as was the case in *Northern Telecom* case, the *Construction Montcalm* case, in the question of labour relations".

[48] The end result of the Adjudicator's assessment of the existing caselaw was his conclusion that in this case "jurisdiction has been predetermined by the sections in the *Constitution Act* and the *Canada Labour Code*" to which he had already referred.

[49] The Adjudicator erroneously found, contrary to *NIL/TU,O*, that the functional test was not required because jurisdiction was predetermined by section 91(24) of *The Constitution Act, 1867* (UK), 30 & 31 Victoria, c 3 [*Constitution Act*]. In doing so he then found that no presumption was required given the provisions in section 91(24) and section 2 of the*CLC*. In the

process the Adjudicator failed to address paragraph 20 of *NIL/TU,O* which directly contradicts his finding.

> [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.

[50] Failing to apply the functional test set out in *NIL/TU,O* is an error in law. It has been found to be sufficient, on its own, to determine in favour of an Applicant a judicial review such as this: *Treaty 8* at paragraph 23.

B. *The Adjudicator's Indian Act section 114 analysis*

[51] The Adjudicator found that jurisdiction is "self-evident" as otherwise section 114 of the *Indian Act* "would be meaningless, and precludes analysis and analogies and tests employed in the past."

[52] To illustrate the interpretive problem as he sees it, the Adjudicator goes on to posit a hypothetical question involving aliens and a consideration of section 91(25) of the *Constitution*

Act. He finds that to have the Courts presume and analyze "normal and habitual activities of being an alien," begs the question. The Adjudicator says the question should be "who is an alien" and, in this case, it would be "who is an Indian". He states that if not already self-evident, the answer clearly would be "the federal government has jurisdiction by several statutory directions. The resort to quiddity is unnecessary."

[53] This analysis fails for the same reason as did the section 91(24) analysis. It does not address the presumption of provincial jurisdiction other than to say that it does not apply because of federal legislation and the reference to the school serving Indian children. It does not even attempt to perform a functional analysis.

[54] It is not clear what the Adjudicator found to be "self-evident" about his jurisdiction. Section 114(1) of the *Indian Act* provides that the federal government may enter into an agreement with the government of a province or a public or separate school board for the education of Indian children.

[55] There is no such agreement with the province or a school board in evidence in this matter. The Adjudicator did not identity any such agreement. The Contribution Agreement deals with funding the Applicant. It is a provincial non-share, private corporation.

[56] With respect to section 114(2) of the *Indian Act*, which provides that the Minister of Indigenous Affairs may establish, operate and maintain schools for Indian children, the

Adjudicator did not indicate how the Contribution Agreement, the only agreement between the Applicant and the Federal Government, falls within or triggers any part of section 114(2).

[57] Overall, the section 114 *Indian Act* statements made by the Adjudicator, are unsupported by any consideration of, or reference to, the evidence. The only possible apparent support is the Adjudicator's reference to the submission of the Attorney General of Manitoba, as set out in the *Smordin* decision, that the federal government controlled the school because "the federal government deals with Indian children, and the provincial government deals with non-Indian children."

[58] If that was the reasoning employed by the Adjudicator, it is wrong in law. Control is but one possible component of the determination of jurisdiction.

C. *Conclusion*

[59] In *NIL/TU,O*, the Supreme Court indicated that the functional test "calls for an inquiry into the nature, habitual activities and daily operations of the entity in question to determine whether it constitutes a federal undertaking": *NIL/TU,O* at paragraph 3.

[60] The Adjudicator had before him the Mission Statement of the Applicant that states the mission of the Applicant is "to provide sound academic standards and a holistic balance of quality education that includes traditional, cultural and academic teachings."

[61] The statement by the Adjudicator that the Applicant "only somewhat follows the provincial education curriculum in order to receive federal funding" is problematic. It amounts to a finding that the Applicant did not follow the provincial curriculum requirements. The Adjudicator's statement is incorrect on the evidence. The Contribution Agreement requires that the provincial curriculum be followed in order to receive funding. The Financial Statements show that the funding was received. The only correct conclusion is that the provincial curriculum was followed by the Applicant.

[62] The Adjudicator also noted the philosophy of the Applicant, which is "to always remember this basic foundation of knowledge with the scope of Provincial regulations, and that our cultural knowledge will always supersede any foreign regulation.". He then expressed the opinion that it "goes beyond being culturally sensitive, and makes such matters paramount."

[63] The answer to the Adjudicator's statement on sensitivity is found in a recent observation by the Federal Court of Appeal made in *Northern Inter-Tribal* when it discussed *NIL/TU,O*. Mr. Justice Stratas, writing for the Court, stated that an undertaking that is usually provincially regulated does not become federally regulated just because it is tailored sensitively to serve the needs of a local Indigenous population: *Northern Inter-Tribal* at paragraph 24.

[64] Correctness review is not deferential to the reasoning process of the decision-maker.

[65] A reviewing court when applying the correctness standard may choose either to uphold an administrative decision maker's determination, or substitute its own view. In doing so, the

court may come to its own conclusion if it finds the administrative decision-maker's reasoning is unpersuasive: *Vavilov* at paragraph 54.

[66] I do not hesitate to find the Adjudicator's reasoning process was unpersuasive and that the Decision is incorrect.

[67] The Adjudicator was required to consider the functional test established by the Supreme Court of Canada in *NIL/TU,O* and, in doing so, he had to correctly apply it.

[68] The Adjudicator did neither.

[69] Because the Adjudicator found that it did not arise, there is no indication in the Decision that the presumption of provincial authority over this Applicant's labour relations with the Respondent was rebutted. Unless the presumption is rebutted, the Province of Manitoba had jurisdiction over the relationship between the Applicant and the Respondent.

[70] Instead of applying the functional test, the Adjudicator substituted his own view that the presumption did not arise. In that respect, the Decision is based on an error of law. It must be set aside as contemplated in section 18.1 of the *FC Act*.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application is allowed and the Decision of Adjudicator Booth is set aside.

2. The employment relationship of the Applicant and the Respondent was not governed by the *Canada Labour Code*.

3. There are no costs awarded.

"E. Susan Elliott"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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