Federal Court of Appeal | Cour d'appel fédérale

Date: 20171025

Docket: A-333-16

Citation: 2017 FCA 212

[ENGLISH TRANSLATION]

CORAM: **PELLETIER J.A.**
GAUTHIER J.A.
TRUDEL J.A.

BETWEEN:

CONSEIL DE LA NATION INNU MATIMEKUSH-LAC JOHN

Applicant

and

ASSOCIATION OF EMPLOYEES OF NORTHERN QUEBEC (CSQ)

Respondent

Heard at Montréal, Quebec, on September 26, 2017.

Judgment delivered at Ottawa, Ontario, on October 25, 2017.

REASONS FOR JUDGMENT BY: TRUDEL J.A.

CONCURRED IN BY: GAUTHIER J.A.
CONCURRING REASONS BY: PELLETIER J.A.

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REASONS FOR JUDGMENT

TRUDEL J.A.

I. Introduction

[1] Does the Canada Industrial Relations Board (the Board) have the required jurisdiction to decide the application for certification submitted by the Association of Employees of Northern

Quebec (CSQ) (the respondent)? That is the issue before this Court. I propose to answer it in the affirmative.

[2] In this case, this Court is dealing with an application for judicial review of the Board's summary decision dated August 22, 2016 (*Matimekush-Lac John Innu Nation Band Council*, 2016 CCRI LD 3685).

[3] In that decision, the reasons for which, dated November 25, 2016, are reported under neutral citation 2016 CIRB 843, the Board determined that it had the jurisdiction to decide the application for certification of the bargaining unit of teaching staff of a school located on the territory of an Indigenous reserve, namely the Nation Innu Matimekush-Lac John territory.

[4] The applicant, the Conseil de la Nation Innu Matimekush-Lac John, is the employer of the teachers for whom certification is sought. It reminds this Court of the law, according to which there is a presumption that labour relations fall within provincial jurisdiction. According to the applicant, the respondent did not discharge its burden of proof and did not rebut that presumption. The Board therefore erred in finding as it did. Although it correctly identified the applicable test, the Board did not comply with it (Applicant's Memorandum of Fact and Law at paragraph 29).

[5] For its part, the respondent argues that the education of Indigenous children on reserves falls under a federal head of power based on, *inter alia*, the *Indian Act*, R.S.C., 1985, c. I-5, which [TRANSLATION] "governs almost all aspects of the lives of First Nations peoples and their

lands, including education" (Respondent's Memorandum of Fact and Law at paragraph 34—citations in footnotes omitted - and at paragraph 100). The Board therefore did not err in finding as it did.

II. Applicable law

[6] Since the parties concede that the Board correctly cited the applicable law, I will focus on this first. Once I have identified the proper approach for determining whether the labour relations of an entity are governed by federal or provincial law, it will be easier for me to examine the Board's findings of fact and the parties' arguments regarding the activities and the organizational structure of the Indigenous school at issue.

[7] Beginning at paragraph 46 of its reasons, the Board discusses the law under the heading "Applicable Constitutional Principles of Law".

[8] To start off, it cites a leading case on this issue, namely *NIL/TU,O Child and Family Services Society v. B.C. Government and Service Employees' Union*, 2010 SCC 45, [2010] 2 S.C.R. 696 [*NIL/TU,O*], in which the Supreme Court of Canada had to decide, just as in this case, an issue of certification in labour relations.

[9] In *NIL/TU,O* the Supreme Court of Canada said that it was not making new law. It was simply applying well-established principles in our law to a particular set of facts. These principles are the following:

- Labour relations are presumed to fall under a provincial head of power. Jurisdiction of the federal government is an exception in this regard that must be narrowly interpreted (*NIL/TU,O* at paragraph 11);

- To determine whether, exceptionally, labour relations fall under federal government jurisdiction, a two-step inquiry is required, regardless of the head of power in question;

- This approach necessarily focuses on a first test: the functional test;

- The presumption will be rebutted if the application of the functional test to the facts of the case supports the finding that the entity is a federal undertaking;

- If the analysis under this test is inconclusive, that is, if it is not possible to determine whether the entity is a federal undertaking, the decision maker then turns to the core test: Does the provincial regulation of that entity's labour relations impair the core of the federal head of power? (*ibidem* at paragraph 3).

[10] In practice, there are only a few decisions that have considered the core test, in the alternative, where there was an error in the first test (see *Fox Lake Cree Nation v. Anderson*, 2013 FC 1276, [2014] 2 C.N.L.R. 150 at paragraph 40) [*Fox Lake*]; *U.N.A. v. Aakam-Kiyii (Peigan/Piikani) Health Services* (2011), 198 C.L.R.B.R. (2nd) 30 at paragraphs 46-48, [2011] Alta. L.R.B.R. 208.

III. The Board's decision

[11] After reviewing the parties' evidence in light of the functional test set out in *NIL/TU,O*, the Board determined "that the education services provided by the employer on reserve and the functions carried out by the employer in this field, including its decision-making authority concerning this activity, constitute a governance activity, and such activity falls under federal jurisdiction" (Reasons for Decision at paragraph 72).

[12] The applicant challenges in particular the Board's use of the notion of governance to determine whether it has jurisdiction to decide the application for certification.

[13] I reach the same conclusion as the Board by proceeding in accordance with the method set out by the Supreme Court in *NIL/TU,O*.

IV. Analysis

A. *The standard of review*

[14] Both parties argue that the correctness standard applies in this case because the issue is one that [TRANSLATION] "involves the division of powers" (Applicant's Memorandum of Fact and Law at paragraph 16). I agree that the standard that applies to constitutional issues is that of correctness.

[15] However, this case does not involve a genuine constitutional issue. The issue is not whether "a particular statute is *intra* or *ultra vires* the constitutional authority of the enabling government" (*NIL/TU,O* at paragraph 12).

[16] We are dealing here with a rebuttable presumption against which one of the parties—in this case, the respondent—must adduce evidence if it wishes to rebut it. The specific issue to decide is whether the Indigenous school in question is a federal undertaking that falls under the *Canada Labour Code*, R.S.C., 1985, c. L-2 (*ibidem*).

[17] The Board's constitutional analysis is based on its findings of fact, which are severable from the constitutional issue bearing on its jurisdiction.

[18] Accordingly, deference must be given to these initial findings of fact regarding the operations and organizational structure of the Indigenous school at issue (*Consolidated Fastfrate Inc. v. Western Canada Council of Teamsters*, 2009 SCC 53, [2009] 3 S.C.R. 407 at paragraph 26; *CHC Global Operations (2008) Inc. v. Global Helicopter Pilots Association*, 2010 FCA 89, 4 Admin. L.R. (5th) 251).

B. *Analysis under the functional test*

[19] In *NIL/TU,O*, the Supreme Court of Canada reminds us 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" (at paragraph 3).

[20] Of course, no one here is questioning the exclusive federal jurisdiction over "Indians and lands reserved for the Indians". Similarly, sections 114 through 117 of the *Indian Act*, which relate to schools, cannot be disregarded.

[21] A review of the factual framework is necessarily initiated by this background because, in this case, the Conseil de la Nation Innu Matimekush-Lac John established a school on its territory by occupying the area left open by the Minister of Indian Affairs and Northern Development (now divided under the Minister of Indigenous Services and the Minister of Crown–Indigenous Relations and Northern Affairs), who has jurisdiction under subsection 114(2) of the *Indian Act* to "establish, operate and maintain schools for Indian children".

[22] The applicant therefore established École Kanatamat Tshitipenitamunu on its reserve, a school strictly intended for Indigenous students at the preschool, kindergarten, primary, and secondary levels.

[23] As the Board noted, the applicant is the teachers' employer. It signs employment contracts with them directly and can terminate those contracts. It manages the teachers' day-to-day schedules through a school principal, among others, whom it hires and who reports to it.

[24] With respect to the school curriculum, the applicant chose to adopt the curriculum of Quebec's department of education, the Ministère de l' Éducation et de l'Enseignement supérieur (MEES), while adding an Indigenous component to preserve the historical and cultural heritage of Indigenous students attending the school. In doing so, it made it possible for students to obtain a permanent code from the MEES, which facilitates their passage between the First Nations and Quebec educational systems.

[25] This willingness to support the academic success of Indigenous students is reflected in an agreement signed in May 2012 between the First Nations Education Council (of which the applicant is a member), the Government of Quebec, and the Government of Canada (*Agreement to Support the Success of First Nations Students*, signed on May 4, 2012). The First Nations Education Council describes itself as an "association devoted to defending the shared vision of member communities, in order to provide a quality education to all First Nations children" (at paragraph 8 of the recitals).

[26] This agreement states, *inter alia*,

- that the joint action plan that is the subject of the agreement "intends to complement . . . the *First Nations Student Success Program* of Aboriginal Affairs and Northern Development Canada" (at article 3); and

- that the agreement "does not aim to affect [sic] a transfer of responsibilities between the Parties" (at paragraph 16 C).

[27] It therefore cannot be concluded that there has been a delegation of federal jurisdiction with regard to education under the *Indian Act* in favour of the Government of Quebec. Further, it cannot be concluded that the provincial power in relation to education has been transferred to the applicant.

[28] Before moving on from the agreement, it seems fitting to take note of the third paragraph of the recitals, in which the members of First Nations assert their right to self-determination—including the right to full autonomy in the area of education—if only to say that the parties did

not present their respective positions on this point in their written submissions. Furthermore, they did not accept the Court's invitation to do so at the hearing.

[29] That said, I will now turn to the case law argued by the parties.

[30] In their respective memoranda and at the hearing, the parties cited many previous decisions in order to invite the Court to follow the *ratio decidendi*.

[31] As I said earlier, the functional test is primarily a fact-based exercise that requires the analysis, on a case-by-case basis, of the activities and the organizational structure of École Kanatamat Tshitipenitamunu.

[32] I will therefore review the relevant case law discussed by the parties to defend their respective positions, to look for common indicia that enable a useful comparison with this case. I begin with *NIL/TU,O*.

C. *The relevant decisions discussed at the hearing*

[33] *NIL/TU,O* was a child welfare agency established by seven First Nations under the *Society Act*, R.S.B.C. 1996, c. 433, repealed by the *Societies Act*, S.B.C. 2015, c. 18, section 252, as stated at paragraph 23 of that case:

> The delivery of child welfare services in British Columbia is governed by the *Child, Family and Community Service Act*. The Act sets out a detailed child protection regime for the province that is administered by "directors" appointed by the Minister for Child and Family Development.

[34] Moreover, the evidence established that there was a tripartite agreement between the two levels of government and *NIL/TU,O* that clearly set out provincial jurisdiction over child welfare, as well the obligation of the agency's employees to provide services as required by provincial law.

[35] The factual background is substantially the same in the related decision, *Communications, Energy and Paperworkers Union of Canada v. Native Child and Family Services of Toronto*, 2010 SCC 46, [2010] 2 S.C.R. 737 [*Native Child*].

[36] In the case before us, the École Kanatamat Tshitipenitamunu was established under the *Indian Act* and not under a provincial statute.

[37] In *Nishnawbe-Aski Police Service Board v. Public Service Alliance of Canada*, 2015 FCA 211, [2016] 2 F.C.R. 351, leave to appeal to the S.C.C. refused, 36742 (April 7, 2016), [*Nishnawbe-Aski*], this Court reversed the decision of the Board, which found that it had jurisdiction to hear the applications for certification of employees of the Nishnawbe-Aski Police Service.

[38] In that decision, this Court determined that the Nishnawbe-Aski Police Service did not assume any policing functions from a federal agency or a federal police service (at paragraph 17). The candidates were recruited independently of Nishnawbe-Aski First Nations (*ibidem* at paragraph 23). As employees of this police service, the First Nations constables served both First Nations and non-First Nations citizens in the areas covered by an operational

agreement signed between the police service and the Ontario Provincial Police (OPP) (*ibidem* at paragraph 26). The police service was a distinct entity. Finally, the constables of the Nishnawbe-Aski Police Service were ultimately responsible to the OPP Commissioner and to the Ontario Civilian Policing Commission—both having the power to suspend or terminate their appointment under subsections 54(5) and 54(6) of the *Police Services Act*, R.S.O. 1990, c. P.15 (*ibidem* at paragraph 27).

[39] In the case before us, the applicant is the employer of the teachers and has the power to hire and terminate them.

[40] In *United Food and Commercial Workers Canada Union, Local 864 v. Waycobah First Nation*, 2015 CIRB 792, 280 C.L.R.B.R. (2nd) 69, the Board declined jurisdiction over labour relations connected to the fishing activities of Waycobah First Nation because, among other reasons, "the Fishery's habitual activities are to fish commercially off the reserve, in essentially the same way that any commercial fishing business would operate" (at paragraph 119). No link could be found between these activities and the governance functions of Waycobah First Nation.

[41] The Federal Court made the same finding in *Fox Lake*, where it was decided that a federal adjudicator did not have the jurisdiction to hear an unjust dismissal complaint filed by an employee of a Negotiations Office that had the central purpose of negotiating commercial arrangements (at paragraphs 31 and 38). The dominant character of the Negotiation Office was not a federal undertaking even though the services provided were intended for an Indigenous

clientele and were intended to respond to specific cultural needs (*ibidem* at paragraph 32, citing *NIL/TU,O*).

[42] The facts of both of these cases, as well as those of *NIL/TU,O*, *Native Child*, *Nishnawkbe-Aski*, *Fox Lake*, and *Waycobah*, are difficult to reconcile with the case at hand.

[43] In *Canada (Attorney General) v. Munsee-Delaware Nation*, 2015 FC 366, [2015] 2 C.N.L.R. 131 [*Munsee-Delaware*], the Federal Court determined that a federal adjudicator had the jurisdiction to consider the unjust dismissal complaint of a member of the Munsee-Delaware Nation hired to work at the administration offices of the Nation.

[44] In so finding, the judge relied in large part on *Public Service Alliance of Canada v. Francis et al.*, [1982] 2 S.C.R. 72, 139 D.L.R. (3rd) 9 [*Francis*]. He wrote:

> According to *St Regis*, the business or operation of a Band Council is that of a local government deriving its authority from the *Indian Act* and the applicable regulations. It has a "comprehensive responsibility of a local government nature" (*St Regis*, Justice Le Dain, at para 27). It carries out governance functions through the employment of administrative employees. Ms. Flewelling was one of those employees (*Munsee-Delaware* at paragraph 42).

[45] In *Berens River First Nation v. Gibson-Peron*, 2015 FC 614, [2015] F.C.J. No. 1535 (QL) [*Berens*], which was not raised by the parties at the hearing, the Federal Court did basically the same exercise, this time with regard to a nurse working at a nursing station established and managed by the First Nation. Although the nurse was subject to provincial regulation for her practising licence, she was, in every other respect, under federal jurisdiction. The nursing station at which she worked was not a distinct entity. Rather, it was under the supervision of the Chief

and Council of the Berens First Nation. The Band retained the power to hire and fire the nursing personnel, who had to follow the guidelines and policies of the First Nation Inuit Health Branch, a federal organization headed by Health Canada.

[46] Finally, in *Attorney General of Canada v. St. Hubert Base Teachers' Association*, [1983] 1 S.C.R. 498, 1 D.L.R. (4th) 105 [*St. Hubert*], it was decided that Quebec's *Labour Code* did not apply to the teachers of a secondary school located on a military base, primarily because Parliament has exclusive jurisdiction over all employees of the federal government. Moreover, the factual background established the following:

- a federal order authorizing the establishment of the school on the military base;
- the school was not subject to all the provincial statutes, nor was it subject to a school committee or board in the true sense of the term in Quebec educational law;
- The only connection with Quebec was that the school committee responsible for the school's administration had to administer the school "in accordance with the provincial Act respecting schools" (at page 500).

D. *École Kanatamat Tshitipenitamunu*

[47] The preceding review of the case law confirms, once again, the importance of applying the functional test to this case.

[48] Primary federal competence over a given subject can prevent the application of provincial law relating to labour relations and the conditions of employment but only if it is demonstrated

that federal authority over these matters is an integral element of such federal competence (*Syndicat des agents de sécurité Garda, Section CPI-CSN v. Garda Canada Security Corporation*, 2011 FCA 302, [2011] 430 N.R. 84 at paragraph 35, citing *Northern Telecom v. Communications Workers*, [1980] 1 S.C.R. 115 at pages 132-133, 98 D.L.R. (3rd) 1).

[49] The authority to establish a school on reserve derives from federal jurisdiction over Indians.

[50] In this case, the choice of school curriculum is the principal element that justifies the intervention of the Government of Quebec in the tripartite agreement. From this choice, certain requirements regarding the professional qualifications of the teachers arise. In *St. Hubert*, the Supreme Court of Canada stated that it was insufficient that the school be administered "in accordance with the provincial Act respecting schools" to justify the application of Quebec's *Labour Code* (at page 510). Similarly, it is also insufficient for the applicant to argue that the choice of Quebec's school curriculum for Indigenous students is a basis for provincial jurisdiction.

[51] As the respondent pointed out, the applicant is voluntarily submitting to the provisions of the *Education Act*, R.S.Q. c. I-13.3 (the EA). Moreover, according to section 39 of the EA, it is up to the school board to establish schools. However, École Kanatamat Tshitipenitamunu is not connected to any school board. It was established by the applicant under the *Indian Act*. This school is also not a private school governed by *An Act respecting private education*, R.S.Q. c. E-9.1.

[52] This shows that the provisions of the *Indian Act* also govern the school attendance obligations of Indigenous students living on reserves.

[53] These facts, added to the factual background described in paragraphs [21] to [28] of these reasons, lead me to a finding that is similar to *Munsee-Delaware*, *Berens*, and *St. Hubert*.

[54] Given this factual context, I find that École Kanatamat Tshitipenitamunu falls under the category of federal undertakings and is thus subject to the *Canada Labour Code*. I therefore agree with the Board's finding.

[55] The application can be disposed of through the analysis under the functional test, therefore it is not necessary to proceed to the core test or to ask whether Quebec labour relations legislation impairs the core of the federal head of power.

V. Conclusion

[56] Accordingly, I would dismiss the application for judicial review with costs fixed, with the consent of the parties, at $3,500, including taxes and disbursements.

"Johanne Trudel"

J.A.

"I agree.
Johanne Gauthier J.A."

PELLETIER J.A. (concurring reasons)

[57] I concur with the reasons of my colleague, except on the following point.

[58] To the extent that the jurisdiction of Canada with regard to the education of Indians is an issue in this case, I do not believe that it is clear that the education of Indian children is an integral part of federal jurisdiction over "Indians and lands reserved for the Indians". It is apparent that the federal government has, at the very least, ancillary power that enables it to "establish, operate and maintain schools for Indian children" and to take other measures to ensure the proper functioning of these schools: see sections 114-117 of the *Indian Act, R.S.C.*, 1985, c. I-5. I observe in passing that section 114 merely confers discretion to Canada regarding the establishment and operation of these schools. Moreover, it is also not clear whether this ancillary power, in the form of a discretionary power, is sufficient to establish that anything that involves the education of Indians must go through the federal government.

[59] Indeed, in the recitals of the agreement between the First Nations Education Council (the Council), the Government of Quebec, and Her Majesty the Queen in Right of Canada (Canada), an agreement that governs the establishment and operation of schools on the territory of First Nations Education Council members, the Council asserts that First Nations and their peoples "have the right to self-determination, which includes the right to full autonomy in the area of education, a right that they have never relinquished". The Council's intention to not give up any First Nations education rights is found in paragraph 16(C) of the agreement, which states, "This Agreement is not intended to effect a transfer of responsibilities between the Parties".

[60] These provisions do not establish the existence of the rights that they refer to, but they demonstrate that jurisdiction over the education of Indian children is not necessarily governed by the distribution of legislative powers set out in the *Constitution Act, 1867*, 30 & 31 Victoria, c. 3 (U.K.).

[61] All that to say that I am not satisfied that the functional analysis of the activities of the Conseil de la Nation Innu Matimekush-Lac John's school can be based on the proposition that the education of Indian children is an integral part of federal jurisdiction in respect of Indians and over lands reserved for the Indians.

[62] In all other respects, I agree with the reasons of my colleague.

"J.D. Denis Pelletier"

J.A.

FEDERAL COURT OF APPEAL

SOLICITORS OF RECORD

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